

AUTOMOTIVE CODE OF CONDUCT SIX PRINCIPLES

1 **ACCESS TO SERVICE AND REPAIR INFORMATION.**

2 **MANUFACTURER WARRANTY AND POLICY DOCUMENTATION TO UPHOLD ACL RIGHTS WITHOUT EXCEPTION.**

3 **UNFAIR CONDUCT TO BE PROHIBITED.**

4 **UNFAIR CONTRACT TERMS LEGISLATION TO BE EXTENDED TO FRANCHISED NEW CAR DEALERS.**

5 **SPECIFIC INDUSTRY ISSUES TO BE ADDRESSED IN CODE.**

6 **FRANCHISING CODE OF CONDUCT PROVISIONS TO BE ADOPTED AS RELEVANT.**

INTRODUCTION

An Automotive Code of Conduct (Automotive Code) would close the regulatory gap in the existing Franchising Code of Conduct (Code) in respect of unfair contract terms, unfair conduct and address specific industry issues identified in previous reviews of the Code. In addition, the Automotive Code would be a regulatory response to the ACCC recommendation concerning access to technical information by independent repairers.

Development of a framework for an Automotive Code could be guided by reference to a number of principles.

1. ACCESS TO SERVICE AND REPAIR INFORMATION

An Automotive Code would be an appropriate regulatory response to the ACCC recommendation that 'A mandatory scheme should be introduced for car Manufacturers to share technical information with independent repairers, on commercially fair and reasonable terms. The mandatory scheme should provide independent repairers with access to the same technical information which car Manufacturers make available to their authorised Dealers and preferred repairer networks, including environmental, safety and security-related information (if it is made available to Dealers).

Protocols would need to be established for the secure release of, and access to sensitive environmental, safety and security-related information. There should also be a process for vetting end users accessing this sensitive information and for tracing the use of that information.

2. MANUFACTURER WARRANTY AND POLICY DOCUMENTATION TO UPHOLD ACL RIGHTS WITHOUT EXCEPTION

- There continues to be great debate at State and National levels about the effectiveness of consumer rights and whether the current consumer guarantees are sufficient for consumers of all products including motor vehicles. Lemons laws remain a point of debate.
- There must be regulation to insist that the warranty policy of Manufacturer's in relation to its dealings with their Dealer network is consistent with Australian laws.
- Australian Dealers must be compensated for carrying out all warranty work in conformity with the Manufacturer warranty and the ACL laws;
- Australian Dealers must act honestly, provide a proper explanation of the warranty work required to be undertaken or undertaken, provide reasonable records of the warranty work and submit claims within a reasonable timeframe; and
- Manufacturers and importers must act honestly, carry out audits within a reasonable period and ensure that payment is made to Dealers for all legitimate warranty claims whether under a Manufacturer's warranty or the ACL within a reasonable timeframe.

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- There should be an absolute prohibition on Manufacturers using limited sampling to unreasonably extrapolate non-compliant warranty claims rates.

3. UNFAIR CONDUCT TO BE PROHIBITED

Due to the power imbalance and risk of termination or non-renewal, Dealers are unable to enforce statutory or common law rights that may be available. The conduct of importers must therefore be regulated to ensure that opportunistic conduct does not occur.

- Seek expansion and clarification in the Motor Dealers and Repairers Act 2013 NSW by setting out specific examples of conduct that can be considered to be 'black listed' items. For example:
 - withholding information and data in relation to process of target setting or performance review. If target setting is to remain in the control of importers then at the very least there should be disclosure obligations in relation to any research carried out that affects the Dealer.
 - recommended retail price (RRP) must not fall below wholesale price unless wholesale invoice is appropriately amended and credited to Dealers. Sometimes, importers sell motor vehicles to Dealers at a particular wholesale price, then reduce the RRP drive away price to a figure below the original wholesale price. During the period between the payment of the wholesale price and sale of the motor vehicle at the drive away price the importers have the benefit of additional cash flow at the expense of the Dealer who financed the wholesale value.
 - existing factory stores must not receive unfair trading advantages compared to independent dealerships and must be subject to audit certificate from an auditor with automotive experience. Audit certificate to be disclosed as part of disclosure requirements under the Code and/or Automotive Code.

4. UNFAIR CONTRACT TERMS LEGISLATION TO BE EXTENDED TO FRANCHISED NEW CAR DEALERS

Unfair Contract Terms (UCT) legislation has been extended from initially only applying to a consumer to now including a small business. However, a small business is narrowly defined and the Automotive Code should provide for the existing UCT protections to apply to all franchised new car Dealers.

The UCT legislation can list a number of "blacklisted" clauses specific to the automotive industry as well as the common blacklisted clauses currently listed in the Competition and Consumer Act 2010. The specific "blacklisted" clauses should include:

- prohibition on clauses that permit unilateral variation of the terms of a Dealer Agreement, including the operations manual and bulletins.
- prohibition on clauses that permit an importer to claw back or recover valid and legitimate warranty payments made to Dealers in relation to legitimate warranty work carried out to a consumer's vehicle.

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- prohibition on clauses that permit changes to a Dealer's territory or the prime marketing area (PMA) without the Dealer's consent.
 - prohibition on performance targets that are not realistic or arbitrary. Work towards an industry standard, model or formula in relation to performance standards that are fair.
 - prohibition on an importer selling a motor vehicle to a customer for less than the published recommended retail price.

5. SPECIFIC INDUSTRY ISSUES TO BE ADDRESSED IN CODE

Due to the power imbalance, the level of investment already committed by most franchises, Dealers (no matter what size) are unable to negotiate terms with distributors. Dealers require reallocation of risk including:

- minimum contractual term of 5 + 5 years.
- automatic renewal of one term of 5 years at option of Dealer if not in default of the terms of the Dealer Agreement. Similar protection to that contained in State Retail Lease legislation.
- minimum 12 months' notice of non-renewal given capital investment, value of stock holdings, number of employees, impact on local community.
- all capital expenditure requirements over \$100,000 or \$250,000 in aggregate terms in relation to a facility must be discussed in the final 2 years of a 5+5 term, supported by a written business case demonstrating how the Dealer can make a return on the investment requested by the importer and linked to a renewed term of 5+5.
- corporate Identity updates or similar changes must not be undertaken more than once every 5 years, or without reasonable notice.
- compensation for loss of goodwill for forced name changes. Long standing family dealership names have a goodwill value on the company balance sheet but importers force changes to generic names (allowing them to terminate/not renew and then establish a new dealership with another Dealer more easily in the future if required) and pay no regard whatsoever to the effect on the balance sheet of the dealership business.
- target setting must be fair and transparent, and agreed with Dealer where incentive is linked to achievement. Usually targets are based on the importer's prediction of sales/market share in the coming year. If the importer fails to achieve its predicted target, there is no review of the Dealer's target, so the Dealer may fail to achieve target through no fault of the Dealer e.g. importer expects to sell 100,000 units, Dealer's share is 5%, so Dealer's target is 5,000 units. At the end of the financial year or reporting year, the importer achieves sales of 90,000 units, Dealer achieves 4,700 units, so fails to achieve target and fails to earn the bonus, even though the Dealer has exceeded 5% of the franchisor's sales.
- just and equitable compensation as per Swanson and Ripoll recommendations for Dealers whose agreements are terminated or not renewed at the end of term. Noting that just and equitable compensation may range from zero to several millions of dollars depending on the circumstances.
- prohibition on fully or partially owned company dealerships (factory stores) or agency arrangements where a Dealer network has been established.

6. *FRANCHISING CODE OF CONDUCT PROVISIONS TO BE ADOPTED AS RELEVANT*

Relevant provisions of the Code would continue to apply and be adopted in the new Automotive Code.