

JLR National Dealer and Representative Council Limited - 2023 Franchising Code Review Submission

1. The JLR National Dealer and Representative Council Limited (**JLR Dealer Council**) represents the franchised Jaguar Land Rover motor vehicle dealers in Australia (**JLR Dealers**).
2. This submission by the JLR Dealer Council is in response to the 2023 review of the Franchising Code being undertaken by Dr Michael Schaper, the Independent Reviewer, appointed by the Federal Government.
3. JLR Dealers in Australia are authorised to sell, service and sell parts for Jaguar and Land Rover motor vehicles pursuant to the terms set out in their motor vehicle dealer agreements.
4. The term of each Jaguar Land Rover dealer agreements for each JLR Dealer varies between each dealer from 2, 3 to 5 years. The terms of all the dealer agreements are due to conclude between December 2023 to January 2024.
5. Where the JLR Dealers have acquired their Jaguar Land Rover dealerships from other dealers, they have paid significant sums in goodwill based on a multiple of earnings of the dealership. The prices paid for goodwill by the JLR Dealers is based on the assumption and understanding that if the dealer's performance was satisfactory, the dealer would be offered a new dealer agreement at the expiration of the term. The JLR Dealers have also made significant ongoing investments in goodwill and capital whilst operating their dealerships.
6. On 2 November 2022, Jaguar Land Rover Australia Pty Ltd (**JLRA**) gave notice to the JLR Dealers that it will implement a new business model in Australia called 'Future Go to Market'. As part of the implementation of that business model, JLRA informed the JLR Dealers that at the expiry of their dealer agreements, they will be offered new agreements in lieu of their current dealer agreement, namely:
 - (a) a Jaguar:
 - (i) Retailer Agreement with a term of 1 year, expiring on 31 December 2024. This agreement established an 'agency' arrangement between JLRA and the JLR Dealers;
 - (ii) Repairer Agreement with a term of 5 years from 1 January 2024 to 31 December 2028; and
 - (b) a Land Rover Retailer and Repairer Agreement for a further term of 2 years, expiring on 31 December 2025.
7. To date, JLRA has not given the JLR Dealers a copy of the proposed new dealer, agency and repairer agreements. Accordingly, the JLR Dealers do not know, among other things, the:
 - (a) rate of return on sales or commission they will earn for the sale of Jaguar vehicles under an agency relationship; and
 - (b) affect that splitting their current dealer agreement into 3 (one of which being an agency agreement) will have on the value of the established goodwill the JLR Dealers have invested in their dealerships.



8. One of the key issues recently canvassed by the Federal Court of Australia in *AHG WA (2015) Pty Ltd T/A Mercedes-Benz Perth & Westpoint Star Mercedes-Benz & Ors v Mercedes-Benz Australia/Pacific Pty Ltd* [2023] FCA 1022 was 'franchisor opportunism' in circumstances where Mercedes-Benz Australia sought to convert its dealers in Australia to agents and the affect that had on their goodwill.
9. During the trial, on the topic of 'franchisor opportunism', Mercedes-Benz dealers led evidence from Sydney University economics Professor, Mr Nick De Roos, who stated in his affidavit of 22 May 2022:


'The term franchisor opportunism refers to actions taken by a franchisor to their benefit, and to the possible detriment of the franchisee after the franchisee has made investment specific to the franchise relationship. Such actions could be considered opportunistic because of a fundamental transformation of the relationship after relationship-specific investments have been made. To understand the nature of this transformation, consider the perspective of two parties (A and B) to a relationship before and after a relationship specific investment made by B. Before the investment, the frame of reference for any explicit or implicit division of surplus will be the surplus generated by the relationship net of investment costs. After the investment, the investment costs have already been incurred by B, and the negotiating position between the parties has shifted. The surplus to be divided now ignores the investment cost incurred by B. A is now in a position to behave opportunistically by renegotiating the terms of the relationship, exploiting the fact that B has already incurred the investment costs.'
10. The theory of franchisor opportunism was discussed by Professors Blair and La Fontaine in their 2005 book, *The Economics of Franchising*, at [10.3], where they identified that 'established franchisors' in a mature market are more likely to act opportunistically, than a chain which is dependent on having a good reputation with its franchisees to build future growth.
11. The JLR Dealers are particularly concerned about their investment in goodwill in their dealerships given that:
 - (a) the new proposed agreements for the sale of vehicles have very short terms (1 & 2 years respectively);
 - (b) one of the proposed agreements is an 'agency' agreement;
 - (c) in the case concerning the Mercedes-Benz dealers, the:
 - (i) Court dismissed the claims made by the dealers;
 - (ii) Court found that franchisees are not entitled to be compensated for goodwill on the non-renewal of a franchise agreement; and
 - (iii) presiding Juge, Justice Beach, said that the Franchising Code needs to be reformed given the findings of the case.
12. The JLR Dealers are also concerned that with respect to the sale of Jaguar vehicles:
 - (a) the proposed agreement to repair vehicles is a 'stand-alone agreement';



- (b) it is not clear whether a 'stand-alone' repair agreement falls within the definition of *motor vehicle dealership agreement* in clause 4 of the Franchising Code; and
 - (c) whether they will be afforded the protections under the Franchising Code for the proposed 'stand-alone' repair agreement by reason of what is set out in subparagraph (b) above.
13. The JLR Dealer Council calls for reforms of the Franchising Code so that:
- (a) the Franchising Code recognises the right of dealers to be compensated for their established goodwill;
 - (b) dealers are entitled to be compensated for their established goodwill where a dealer is offered an agency agreement in lieu of a new dealer agreement or renewal of a dealer agreement;
 - (c) dealers are afforded tenure of at least 5 years for their agreements; and
 - (d) stand alone service or repair agreements are clearly captured by the definition of *motor vehicle dealership agreement* in clause 4 of the Franchising Code
14. To this end, the JLR Dealer Council supports and adopts the submissions made to the 2023 review of the Franchising Code by the Australian Automotive Dealer Association (AADA) and the Motor Trades Association of Australia (MTAA).

The JLR Dealer Council wishes to thank Dr Michael Schaper for considering this submission

Date: 28 September 2023


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For and on behalf of
JLR National Dealer and Representative Council Limited