

## Article Information

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## Motor vehicle dealerships - changes to Franchising Code take effect

**Taking effect on and from 1 June 2020, changes to the Franchising Code of Conduct affect how new motor vehicle dealerships will be entered into by manufacturers and dealers. Motor vehicle manufacturers should carefully review and plan their approach towards end of term arrangements, capital expenditure requirements and dispute resolution mechanisms.**

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With effect on and from 1 June 2020, the Franchising Code of Conduct (**Code**) has been amended in respect of “new motor vehicle dealership agreements”. The amendments apply to the entry and exit of new vehicle dealership agreements, capital expenditure requirements in relation to new vehicle dealership agreements and dispute resolution procedures. A dealership agreement will constitute a “new vehicle dealership agreement” if it relates to a motor vehicle dealership that predominantly deals in “new passenger vehicles or new light goods vehicles (or both)”.

### When the new obligations apply to existing dealership agreements

The changes made to the Code apply to all dealership agreements entered into on or after 1 June 2020. This includes renewals or extensions that take effect on or after 1 June 2020 of dealership agreements entered into before 1 June 2020. Further, they apply to transfers of dealership agreements where the transfer involves the termination of the existing dealership agreement and the manufacturer and new dealer entering into a replacement dealership agreement on or after 1 June 2020.

### Notification obligations

For all dealership agreements entered into on or after 1 June 2020, the manufacturer must notify the dealer of the manufacturer’s intention to either extend the existing agreement, enter into a new agreement or do neither with at least 12 months’ notice (if the term of the agreement exceeds 12 months) or at least six months’ notice (if the term of the agreement is less than 12 months). If the manufacturer gives notice that it intends to neither extend the agreement nor enter into a new agreement, the manufacturer’s notice must set out the manufacturer’s reasons. The manufacturer’s decision with respect to the renewal, extension or expiration of the dealership agreement must be made in good faith (by virtue of clause 6 of the Code). If the manufacturer gives notice that it intends to enter into a new dealership agreement, the notice must include a statement that the dealer is entitled to request a disclosure document from the manufacturer.

Dealers have an equivalent notification obligation within the equivalent notice period. However, unlike manufacturers (which are exposed to civil penalties of \$63,000 for failing to provide the relevant notice and for failing to include the necessary statements in the notice), dealers will not be penalised for failing to notify manufacturer of their intentions with respect to an existing dealership agreement.

These notification obligations supersede the existing notification obligations set out in clause 18 of the Code.

### Managing the winding down of a motor vehicle dealership agreement

For dealership agreements entered into on or after 1 June 2020, where either the manufacturer or dealer has given notice that the relevant party intends to neither extend the agreement nor enter into a new agreement, the Code requires the parties to (as soon as practicable) agree to a written plan for managing the winding down of the dealership. The plan must

include milestones and must set out a plan for managing the franchisee's stock (including new vehicles, spare parts and service and repair equipment). The Code requires the parties cooperate to reduce the dealer's stock of new vehicles and spare parts over the remaining term of the dealership agreement.

Again, by virtue of clause 6 of the Code, the parties must act in good faith in relation to the management of the winding down of the dealership agreement. However, there may be practical difficulties in managing the wind down of a dealership agreement where the parties are in dispute over the parties' respective obligations under the dealership agreement. The lengthy notice periods for notification of intentions by manufacturer and dealer are clearly intended to mitigate the more pronounced difficulties arising from the sudden and unexpected winding down of dealership agreements.

### **Capital expenditure**

For dealership agreements entered into on or after 1 June 2020, the Code now stipulates that a manufacturer is not to require a dealer to undertake "significant capital expenditure" in relation to the dealership during the term of the dealership agreement. The existing clause 30 of the Code (which deals with significant capital expenditures under franchise agreements) now expressly does not apply to "new vehicle dealership agreements" entered into on or after 1 June 2020 (but continues to apply to new vehicle dealership agreements that were in effect as of 1 June 2020 up until the point those agreements are renewed or extended on or after 1 June 2020).

As amended, the Code provides that a 'significant capital expenditure' does not include:

- expenditure disclosed to the dealer in the disclosure document that is given to the dealer before entering into or renewing the agreement, or extending the term or scope of the agreement;
- if expenditure is to be incurred by all or a majority of the dealers and such expenditure is approved by a majority of those dealers;
- expenditure incurred by the dealer to comply with legislative obligations; and
- expenditure agreed to by the dealer.

The Code (as amended) provides that if the capital expenditure is disclosed in the disclosure document, then the manufacturer must include in the disclosure document as much information as practicable about the expenditure, including (a) the rationale for the expenditure; (b) the amount, timing and nature of the expenditure; (c) the anticipated outcomes and benefits of the expenditure; and (d) the expected risks associated with the expenditure. The Amending Regulations give an example that the information could include the type of any upgrades to facilities or premises, any planned changes to the corporate identity of the manufacturer's brand and indicative costs for any building materials.

Importantly, the Code (as amended) requires the manufacturer and dealer (or prospective dealer) to "discuss the expenditure" before entering into, renewing or extending the term or scope of the dealer agreement. The discussion must include a discussion of the circumstances under which the dealer considers that the dealer is likely to recoup the expenditure, having regard to the geographical area of operations of the dealership.

Accordingly, if the manufacturer discloses its expectation that the dealer must undertake a significant capital expenditure in the disclosure document, the manufacturer must ensure that it has a defensible basis for the "anticipated outcomes and benefits of the expenditure". This is because the representations set out in the disclosure document could constitute misleading and deceptive conduct if there were no reasonable basis for the statement given to the prospective dealer about the anticipated outcomes and benefits of the expenditure.

### **Dispute Resolution**

The Code (as amended) provides that, if the manufacturer has entered into dealership agreements with multiple dealers (on or after 1 June 2020), and multiple dealers each have a dispute "of the same nature" with the manufacturer, then two or more of the dealers may request that the manufacturer deals with the dealers together about the dispute. Having regard to clause 6 of the Code, the manufacturer would be required to consider and to respond to the request in good faith.

This is clearly intended to allow the dealers to pool their resources and to improve their bargaining power relative to the manufacturer in the resolution of the dispute. However, dealers would still need to be careful to protect their individual interests in the dispute, and will need to be careful to manage potential conflicts of interest which arise between dealers as well as a risk of confidentiality being breached.

### **Conclusion**

The amendments to the Code will require manufacturers and franchisors of dealer agreements to review and update their procedures in relation to the renewal and extension of existing dealer agreements, particularly given that a failure to comply with the notification obligations would expose the manufacturer to a civil penalty of \$63,000 per breach.

Further, if the manufacturer expects the dealer to complete a significant capital expenditure during the course of the dealer agreement and discloses the manufacturer's expectation as part of the disclosure document, then the manufacturer must be prepared to justify the rationale for the significant capital expenditure, as well as the anticipated outcomes and benefits and expected risks, both in the disclosure document and in the discussions with the dealer.

Complicating the situation for manufacturers is the fact that the amendments to the Franchising Code apply to all new dealership agreements entered into on or after 1 June 2020. Therefore, the manufacturer must deal with two parallel regulatory regimes in relation to dealership agreements. There are further considerations to be taken into account for the manufacturer when an existing dealer requests a transfer of a dealership to a prospective dealer. Given that a transfer may involve the termination of an existing dealership agreement and a new dealership agreement to be entered into with the new dealer, the manufacturer will be subject to the new regulatory regime in respect of the new dealership agreement (by virtue of it being entered into on or after 1 June 2020). Whilst some manufacturers may prefer to give effect to transfers by terminating the existing dealership agreement and entering into a new dealership agreement, the manufacturer may want to consider whether it would be better served by transfers which do not involve the termination of an existing dealership agreement.

### **Key Takeaways**

- For all new vehicle dealership agreements entered into on and from 1 June 2020, manufacturers must give at least 12 months notice of their intention regarding the renewal or extension of a new vehicle dealership agreement, or if they do not intend to renew or extend the agreement
- For all new vehicle dealership agreements entered into on and from 1 June 2020, manufacturers cannot require franchisees to undertake "significant capital expenditure" unless the expenditure is disclosed in the disclosure document and the manufacturer has discussed the expenditure with the dealer, or another exception applies (including that the dealer agrees to the expenditure)
- For all new vehicle dealership agreements entered into on and from 1 June 2020, manufacturers must consider in good faith a request from multiple dealers to have a dispute "of the same nature" dealt with together.
- These changes to the Franchising Code apply to dealership agreements that are extended or renewed on or after 1 June 2020 and to transferred dealership agreement where the transfer involves the termination of the existing dealership agreements and a new dealership agreement entered into with the transferee.