



# Australian Automotive Dealer Association Ltd.

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Unfair Contract Terms and Small Business Consultation Paper

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## EXTENDING UNFAIR CONTRACT TERM PROTECTIONS (UCT) TO SMALL BUSINESSES - TREASURY CONSULTATION PAPER MAY 2014

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AADA supports the Government's consideration of extension of UCT protections that apply to consumers to small businesses (SMEs) and lodges this submission in response to the Treasury Consultation Paper dated May 2014. In particular, we note the policy objective is to help provide a level playing field for SMEs when interacting with other businesses through standard form contracts and in this regard AADA has already touched on some of these issues in its formal submissions to Government on the proposed amendments to the *Franchising Code of Conduct* (Code), appointment of Small Business Ombudsman and Competition Policy Review.

We note that there is very little reference in the consultation paper to franchisees as SMEs and draw your attention to the 73,000 odd franchising units in Australia and the general reluctance of a franchisee to address unfair contract terms and unjust conduct for fear of reprisal, non-renewal of contract and access to justice being too slow, too expensive and too adversarial.

AADA was registered under the *Corporations Act 2001* (Corporations Act) in Queensland on 17 January 2014 to represent franchised new car dealers in Australia. There are over 1500 new car dealers in Australia that operate something in the order of 2600 new vehicle outlets. Dealerships range from family-owned small businesses in the regions to larger businesses and public companies operating in the regions, capital cities and across the States and Territories.

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## **CONSIDERATION**

We note that the policy objective is to provide a level playing field for small businesses when interacting with other businesses through standard form contracts and a number of options have been identified. Option 3 – Legislative amendment to extend existing UCT provisions to small business contracts is the Government’s preferred option and feedback is being sought on the design of such an extension, particularly how small business contracts would be defined and whether the provisions should apply to both the acquisition and supply of goods and services.

AADA’s submission is focused on this policy objective and the commercial and contractual relationship that exists between a franchised new car dealer resident in Australia and a global non-resident motor vehicle manufacturer (OEM) operating through multiple subsidiary companies or other entities in this country. AADA members are operating in a highly competitive industry that is undergoing significant structural change and rationalisation as a result of the impending cessation of motor vehicle manufacturing in Australia.

For the purposes of this consultation our submission provides an overview of the retail environment in which dealers operate, and concerns raised by members on key design aspects of Option 3 including:

- Standard Form Contracts and the Code;
- Definition of SME;
- Scope of UCT Provisions; and
- Unfair Terms.

### **Overview of Retail Environment**

Australia’s retail new car market is highly contestable and sub-optimal by global standards with sales on new vehicles just over 1.1 million units in 2013 or 1.4 per cent of 82 million passenger and commercial vehicles globally. Currently, 90 per cent of all new vehicles in Australia are imported. There are 66 brands in Australia competing for market share compared to 51 million in the United States which has a market of around 13 million units annually. The Australian market is characterised by low margins which average in the order of 1.5 per cent.

The industry generates revenue of \$72 billion and consists of 4100 odd franchised businesses including two public companies – Automotive Holdings Group Limited and AP Eagers Limited. A characteristic of the industry is the high number of smaller businesses and IBIS World estimates that the largest cost for the industry is purchases around 81.5 per cent the most significant being the actual motor vehicles.

### **Standard Form Contracts and the Code**

The Code applies to a motor vehicle dealership agreement between an OEM and a motor vehicle dealer and proposed amendments to the Code were announced by the Hon Bruce Billson MP, Minister for Small Business in April this year. The amendments include a statutory obligation for both parties to act in good faith. A party to a franchise agreement can act in good faith if it is acting in its legitimate commercial interests. “Legitimate commercial interests” is not defined for the purposes of the Code and it leaves

scope for UCTs as defined in section 24 of the *Australian Consumer Law (ACL)* to be included under the guise of acting in legitimate commercial interests.

A motor vehicle dealership agreement has all the characteristics of, and for all intents and purposes, is a standard form contract by reference to section 27 of the ACL. That is, a motor vehicle dealer is a “consumer” under a standard form contract in respect of the acquisition of goods and services being predominately new motor vehicles and service and repair technical information.

The Wein review of the Code in 2013 identified approximately 73,000 franchising units in Australia and around 2,045,375 SMEs. To exclude a franchisee from extension of UCT protections either on the basis that a franchise agreement is not a standard form contract or a franchisee is not a “consumer” would not be fair and equitable.

### **Definition of Small Business**

In AADA’s submission dated 23 May 2014 to the Treasury concerning the appointment of a Small Business and Family Enterprise Ombudsman we stated that we did not believe any useful policy purpose would be served by restricting the a key responsibility of the Ombudsman as a Commonwealth-wide advocate for small businesses and family enterprises to a “definition” of small business and family enterprise. We noted the myriad definitions of SMEs based on thresholds and concessions found in income tax law and other legislation both in Australia and overseas. The inconsistency and complexity of definitions arising from past policy decisions should not limit UCT protections to a franchisee being a motor vehicle dealer. By its very nature a motor vehicle dealership agreement is a standard form contract implying a significance imbalance of market and bargaining power.

AADA submits that the key concept should be relative size of the parties evidenced by the use of a standard form contract and therefore extension of UCT protections should apply to all franchisees. A retail motor vehicle dealer in Australia is small in comparison to a global vehicle manufacturer.

AADA strongly recommends the adoption of Option A.1: Apply to all business-to-business standard form contracts with an exception a publicly listed company as defined in the ACL cannot rely on the provisions.

### ***Motor Vehicle Dealers and Repairers Act 2013 (NSW) (MVDR Act)***

On 27 November 2013 the NSW Parliament passed the MVDR Act which introduced new provisions regulating the relationships between NSW motor vehicle dealers and motor vehicle manufacturers. Part 6 of the Act – Unfair contracts and unjust conduct affecting motor dealers, created new rights for dealers in respect of unfair contracts and unjust conduct of a manufacturer.

A motor vehicle dealer means a person who carries on the business in dealing in motor vehicles as a retailer or on a wholesale basis. The NSW Government recognised and understood the need to extend UCT protections under the Act to a motor vehicle dealer irrespective of size. Motor vehicle dealers in NSW welcomed the passing of this legislation and AADA sees it as a first step towards the adoption of similar legislation in other States and Territories and ultimately at a national level.

A key aspect of this legislation is the ability for an approved industry body to represent a motor vehicle dealer in dealing with a dispute with a manufacturer concerning unfair contracts and unjust conduct.

AADA submits that the Treasury carefully consider the legislative framework of MVDR Act as a very good example of UCT protections.

### **Scope of UCT Provisions**

AADA would support the adoption of Option B.1 to extend the UCT provisions to provide protection for franchisees and other SMEs when they both acquire and supply goods and services.

The extension of the UCT provisions to capture small business to small business contracts (b2b) will be dependent on the definition of small business ultimately adopted. We strongly support extension of the UCT provisions to contracts between a franchisor and franchisee. That is, a franchise agreement being a motor vehicle dealership agreement is standard form contract and a motor vehicle dealer should be accorded the same degree of protection as extended to other SMEs.

### **Unfair Terms**

The consultation paper asks for examples of terms businesses are encountering that might be considered unfair. AADA members have identified a number of operational concerns including:

- Dealers are required to take damaged or late delivered stock with no right of appeal;
- Objectives set with no consultation and are often unachievable;
- Cost shifting to dealer when substantial unforeseen warranty recalls/costs arise;
- OEM invoicing stock to dealers where the dealer has either not ordered stock or agreed to delivery;
- Dealer agreements that link dealer bonuses/incentives to finance arrangements with specified third party or manufacturer financiers; and
- Margins adjusted based on consumer satisfaction scores with no right of appeal.

AADA would welcome the opportunity to contribute further to this consultation and if you require additional information or clarification of any matter please do not hesitate to contact me on 03 9576 9944.

Yours faithfully



Patrick Tessier  
Chief Executive Officer