



AUSTRALIAN
AUTOMOTIVE
DEALER
ASSOCIATION

RESPONSE TO THE EXPOSURE DRAFT TO STRENGTHEN PROTECTIONS AGAINST UNFAIR CONTRACT TERMS

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CONTENT

Section 1: Foreword	3
Section 2: Reasons for Applying the UCT Principles to all Franchisees	4
Section 3: Comments on the New Laws as they Apply to Franchised New Car Dealers	5
Section 4: Conclusion	8

FOREWORD

The Australian Automotive Dealer Association (AADA) is the peak industry advocacy body exclusively representing franchised new car Dealers. The AADA is the only Dealer advocacy body which represents Dealers in every state and territory of Australia. We appreciate the opportunity to provide comments on the Exposure Draft Legislation to strengthen protections against Unfair Contract Terms.

There are around 1,500 new car Dealers in Australia that operate more than 3,000 Dealerships. The new vehicle retailing sector employs more than 55,000 people including almost 4,500 apprentices. It contributes over 14 million in community donations nationally, has total turnover / sales of more than \$55 billion and generates more than \$2 billion in tax revenue. About 85 per cent of franchised new car Dealers are either independent operators or belong to family groups and private companies.

The AADA welcomes the draft bill to strengthen the unfair contract terms provisions of the Australian Consumer Law (ACL) and ASIC Acts. Recent reforms of the Franchising Code have led to improved protections for Dealers, but the fact remains that franchise agreements in the new car retailing sector are characterised by contracts between very large offshore Manufacturers and local Australian car Dealers. The size difference between franchisee and franchisor creates a significant power imbalance between Dealers and Manufacturers and even the largest Dealer group in Australia is but a fraction of the size of those Manufacturers it is franchised to.

The use of standard form contracts in Dealer Agreements is common and these contracts are almost always offered to Dealers on a take it or leave it basis. At the direction of Manufacturers, Dealers make significant investments in facilities, tools, parts, equipment and human resources and these commitments place them under great

pressure to sign the agreements when they are issued. The power imbalance looms large in pre-agreement discussions and Dealers are regularly informed that negotiations are limited to only those matters the Manufacturer is willing to consider. While there may be an assumption that larger Dealers or Dealer groups wield greater negotiating power, in practice the fact that they also have commensurately greater sums invested, effectively equalises their bargaining power to that of a smaller Dealer.

Franchise Agreements offered to Dealers also regularly include additional documentation in the form of operations manuals, or similar contract addenda. The most egregious terms of new car franchise agreements are often contained in these manuals which contain the detail of the obligations that a franchisee is required to comply with. As these manuals are referenced by, but sit separate to the franchise agreement, the terms contained in them are liable to be varied unilaterally by the franchisor on an ad hoc basis at the franchisor's discretion. The AADA believes that addenda to a standard form contract should be considered part of the "Master" Agreement and subject to the Unfair Contract Terms (UCT) legislation that applies to standard form contracts.

James Voortman
Chief Executive Officer



REASONS FOR APPLYING THE UCT PRINCIPLES TO ALL FRANCHISEES

The 2016 extension of the UCT legislation to small businesses was an important step in providing franchisees with greater protection in their relationships with much larger franchisors, however, the eligibility thresholds rendered the overwhelming majority Dealers ineligible.

We note that the draft bill improves on these protections and amends the eligibility criteria to include small businesses that employ fewer than 100 employees and have a turnover of less than \$10 million in the last year. This is a welcome improvement, however it will still yield no benefit for many franchised Dealers.

Manufacturers can include clauses in contracts which allow them to reduce the prime market area of Dealer, increase sales targets, make warranty processes unworkable and decrease incentives unilaterally. For Dealers this makes the contract onerous and unprofitable and provides no recourse on an agreement signed in good faith.

In March 2019, the Parliamentary Joint Committee for Corporations and Financial Services released its Fairness in Franchising report¹. This report contained the following recommendation which we fully support and would urge the Treasury to consider:

Recommendation 9.5

9.68 The committee recommends that the Franchising Taskforce examine how to amend section 23 of Schedule 2 of the Australian Consumer Law to provide that unfair contract terms provisions apply to all franchise agreements notwithstanding any other term in the franchise agreement or other agreements.

The size of franchisees businesses varies widely, however in the new car sector one constant remains; Australian Dealers are all small businesses relative to the size of their franchisors. This difference in size and market power will always result in Dealers having less bargaining power when considering an agreement offered to them. By way of example the largest Dealer Group in Australia, Eagers Automotive Limited, reported \$8.7 billion in sales revenue for 2020. For comparison Mercedes-Benz, ranked only number 10 for car sales in Australia in 2020, had a turnover from sales of more than AU\$158 billion in its international car and van division.²

The underlying principles of the UCT legislation offers protections from clauses which:

- cause a significant imbalance in the parties' rights and obligations;
- are not reasonably necessary to protect the legitimate interests of the party who would be advantaged by such terms, and;
- would cause detriment (financial or otherwise) to a party if the term were to be applied or relied on.

Given the consistency of circumstances described above we believe it is entirely appropriate that UCT protections should apply to all Dealer franchisees across the board, not just to those under the thresholds of 100 employees and \$10 million turnover.

¹https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising/Report

²<https://www.daimler.com/investors/reports-news/annual-reports/2020/>

COMMENTS ON THE NEW LAWS AS THEY APPLY TO FRANCHISED NEW CAR DEALERS

- 1. The unfair contract term protections will apply to a small business contract if one party to the contract is a business that employs fewer than 100 employees or has a turnover for the last income year of less than \$10,000,000. Casual employees are excluded unless they are employed on a regular and systematic basis. Part time employees are to be counted as an appropriate fraction of a full-time equivalent.**

As per our comments above, the UCT protections should apply to all franchisees, with no eligibility criteria.

- 2. A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term.**

The AADA supports pecuniary penalties, but they must be sufficiently large to deter large multinational corporations from including unfair terms in their standard form contracts.

- 3. In addition to the current law, if a court has declared a term of a contract to be unfair, the court can make orders it considers appropriate to prevent or reduce loss or damage that has or may be caused by the unfair term. These orders can be made on application of a person or by the regulator on behalf of and with consent of a person.**

The AADA supports this amendment but would extend it further to not only prevent or reduce loss or damage, but also provide for compensation to victims of unfair contract terms.

- 4. In addition to the current law, if a court has declared a term of a contract to be an unfair contract term, the court can make orders it thinks appropriate to prevent or reduce loss or damage that has or may be caused by the declared term. These orders can be made in relation to any existing standard form contract that contains a similar term to the term that has been declared as unfair. These orders can be made on application of the regulator only.**

The AADA fully supports this amendment but again, compensation for loss or damage should also be considered.

Section 3

- 5. In addition to the current injunction powers, the court can make orders injunctioning a person from entering into any future contract that contains a term that is the same or similar in effect to a term that has been declared an unfair contract term.**

The court can issue an injunction to prevent a person from applying or relying on a term in any existing contract that is the same or similar in effect (to a term that has been declared unfair) whether or not that contract is before the court.

The AADA fully supports this amendment.

- 6. A contract term will be presumed to be unfair in a proceeding unless another party proves otherwise if that term is the same or similar in effect as a term that has been found to be unfair in another proceeding. The presumption only applies where the contract term subject to the proceeding is being proposed by the same person who proposed the term that was found to be unfair or the contract is in the same industry as the contract that contained the unfair term.**

The AADA fully supports this amendment.

- 7. In addition to the current matters that must be taken into account when determining whether a contract is a standard form contract, a court must also take into account whether one of the parties has used the same or similar contract before.**

The AADA fully supports this amendment.

- 8. When determining whether one party was required to reject or accept the terms of a contract in the form in which they were presented, and whether another party was given an effective opportunity to negotiate the terms of the contract, the court must not consider:**

- whether a party had an opportunity to negotiate minor or insubstantial changes to terms of the contract;**
- whether a party had an opportunity to select a term from a range of options determined by another party; or**
- the extent to which a party to another contract or proposed contract was given an effective opportunity to negotiate terms of the other contract or proposed contract.**

As described above, franchised Dealers are typically offered contracts on a take it or leave it basis. The sunk investment made by Dealers and the imbalance of power in the relationship often results in Dealers accepting the important terms without sufficient opportunity to negotiate the substantial clauses. The AADA supports any amendment that enables franchisees to properly negotiate terms.

Section 3

- 9. In addition to the current exemptions to the unfair contract term provisions, contractual provisions that are taken to be included in a contract by operation of a law are also excluded. Additionally, a clause of a contract that results in other contract terms being included in a contract because of the operation of another law, is exempt from the unfair contract term provisions.**

The AADA supports this amendment.

- 10. The law refers to non-party to clarify the law applies to both consumers and small businesses.**

The AADA supports this amendment.

CONCLUSION

We thank you for the opportunity to provide feedback on the draft bill and would welcome the opportunity to discuss this in more detail if called upon.

If you have any questions, please contact me on:

James Voortman
Chief Executive Officer



CANBERRA OFFICE

Level 3, 10 National Circuit, Barton ACT 2600
PO Box 4409 Kingston ACT 2604

E Info@aada.asn.au

aada.asn.au