



29 November 2023

**FEDERAL CHAMBER  
OF AUTOMOTIVE  
INDUSTRIES**

ABN 53 008 550 347

Director  
Consumer Policy and Product Safety Unit  
Market Conduct and Digital Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

LEVEL 1  
59 WENTWORTH AVENUE  
KINGSTON ACT 2604  
AUSTRALIA  
PHONE: 02 6247 3811  
FAX: 02 6248 7673

via email: [consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au)

Dear Sir/Madam,

### **Protecting Consumers from Unfair Trading Practices. Consultation Regulation Impact Statement**

The Federal Chamber of Automotive Industries (FCAI) is pleased to respond to the request for submissions in relation to the paper, *Protecting Consumers from Unfair Trading Practices. Consultation Regulation Impact Statement* (Statement).

The FCAI is the peak industry body for the Australian importers and distributors of passenger motor vehicles, sports utility vehicles (SUVs), light commercial vehicles, motorcycles and Off Highway Vehicles. FCAI members supply about 99% of new vehicles to the Australian market each year. Members are listed at <https://www.fcai.com.au/about/members>.

### **Introduction**

This FCAI submission does not seek to broadly respond to the general propositions and questions set out in the Statement except to note that there has been very little time to assess the effectiveness of current regulatory framework. The recent extensions to the prohibitions on unfair contract terms are very new, and the significant penalties that apply to the insertion of unfair contract terms in standard form small business contracts only took effect from earlier this month. The Franchising Code of Conduct discussed in more detail below is currently under independent review, with the report to Government due in December 2023. It seems to be sensible to assess the impact of these reforms and review before moving to introduce any new regulation.

This response is directed solely at the relationship between Original Equipment Manufacturers (OEMs) and their dealerships. It is the FCAI's contention that automotive dealerships are inappropriately captured by the broad definition of small business set out in the Statement. Automotive dealerships are not subject to the unfair practices outlined in the Statement, nor experience the harms of such practices. For the reasons set out below, the FCAI contends that the reach of any new regulation contemplated by the Statement should not extend to the comprehensively regulated commercial relationship between OEMs and their dealerships.

The preferred position of the FCAI in terms of policy options is Option 1 – Status quo (no change) insofar as the automotive sector is concerned. If other options are preferred the FCAI's position is that the automotive sector should be excluded or exempted from compliance with any new legislative requirements. The FCAI's reasoning is set out below.

### **Reasoning**

The FCAI understands that the discussion regarding unfair trading practices aims to ensure consumers/small businesses are protected from unfair practices that can cause significant consumer harm. Examples of such unfair practices are listed and include:

- inducing consumer consent or agreement to data collection through concealed data practices;
- exploiting bargaining power imbalances;
- omitting or obfuscating material information;
- non disclosure of contract terms including financial obligations;
- providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter into contracts.<sup>1</sup>

Further, the harms such practices are said to cause include:

- targeting of vulnerable people or groups;
- dark patterns and digital engagement practices;
- predatory or aggressive business conduct;
- misleading omissions and hidden information;
- difficulty opting out or cancelling goods or services;
- limited mechanisms for redress.<sup>2</sup>

The FCAI is not in a position to verify the accuracy of many of the observations made in the Statement in relation to the broader consumer/small business sector. However, the FCAI believes that the assumptions and adverse impacts in the Statement are not accurate or relevant in the context of the automotive sector.

The FCAI notes that the identified examples of alleged unfair business practices come from the technology sector, which is largely unregulated. The automotive sector on the other hand is already comprehensively regulated, via the current prohibitions on misleading or deceptive conduct, unconscionable conduct and unfair contract terms in the Australian Consumer Law and the comprehensive disclosure and conduct obligations in the Franchising Code of Conduct. Not only does the Franchising Code of Conduct apply to automotive dealership and agency arrangements, but there are specific additional provisions that apply solely to the automotive sector and to new car dealership arrangements.

The Franchising Code contains a comprehensive pre-contractual disclosure process that mitigates against the identified concerns in the discussion paper. For example the Code ensures:

- there is full information transparency and full disclosure of contract terms and financial obligations;
- there are specific documents that highlight key information, such as the Information Statement and Key Facts Sheet as well as the information required by the Franchise Disclosure Register;
- there is ample time for considered decision making and obtaining advice due to the 14 day waiting period prior to signing and the 14 day cooling off period after signing;
- prospective franchisees are directed to obtain legal and business advice, with time frames allowed for this process and a certification process to encourage advice; and
- there are specific mechanisms for redress including the highly successful mediation based dispute resolution framework and arbitration framework, oversight by the ACCC and ASBFEO and ready access to enforceable remedies via the court system. The Code contains significant financial penalties for breaches of every material provision in the Code, and the ACC has extensive regulatory and enforcement powers which it regularly exercises.

There is no "concealed data practices", "exploitative bargaining power imbalances", "distortion of expectations", "opaque data-driven targeting", "all or nothing click-wrap consents" or any other conduct identified as examples of potentially unfair trading practices. Indeed the Franchising Code and the current Australian Consumer Law provisions already provide significant protection to the parties to an automotive franchise agreement.

In addition, and importantly, the Franchising Code also contains an express good faith obligation that applies to the parties to a franchise agreement, and carries a penalty of 600 penalty units for breach. No such specific obligation and sanction currently applies to the parties to a contract outside the franchise and automotive sector.

<sup>1</sup> *Protecting Consumers from Unfair Trading Practices. Consultation Regulation Impact Statement*, page 9.

<sup>2</sup> *Protecting Consumers from Unfair Trading Practices. Consultation Regulation Impact Statement*, page 9.

The FCAI considers that there is no need for any new form of regulation outside the Franchising Code of Conduct. The FCAI further notes that the Code is currently under independent review, which is a further reason why no action should be taken to introduce further regulation at this time.

### **Definition of Small Business will include Automotive Franchises**

The Statement defines a small business as a business that employs fewer than 100 persons or has a turnover for the last income year of less than \$10 million. Notwithstanding the ongoing consolidation of automotive dealerships, the corporate structures under which many dealerships operate, means that it is likely that the expansive definition would capture many dealerships. The FCAI does not believe that this reflects the policy intent of the Statement.

### **Specific Characteristics of Automotive Dealerships**

It is important to note important features of automotive dealerships (franchises) that effectively ensure that the harms (namely, targeting of vulnerable people, hidden information, misleading omissions, limited mechanism for redress) to be addressed through additional unfair trading practice regulation are not relevant to, and do not occur in, the automotive sector.

The vast majority of automotive dealers are significant businesses. Independent data clearly demonstrates automotive dealership ownership is becoming more concentrated and is increasingly dominated by sophisticated investors – whether they be family owned conglomerates, listed companies, or foreign owned entities.<sup>3</sup> FCAI research has shown that the average turnover of an urban dealer is over \$97 million per annum. A large number of dealers are multi-brand dealers. The nature of the corporate structure of dealerships however means that many would be small businesses as defined in the Statement.

Clearly automotive dealer franchisees are not without significant market power. Many are large, sophisticated businesses with ready access to professional legal and financial advice – either through an inhouse capacity or via external legal, financial and accounting advisory firms. They have active industry bodies that represent their interests and regularly combine with other dealers to review agreements and obtain advice. Many Original Equipment Manufacturers consult with dealer councils in regard to draft dealer agreements. Automotive franchisees are well positioned to ensure they are fully informed of the rights and obligations attaching to franchise agreements prior to entering into the arrangements. They are not entering into contracts where they do not understand the risk nor are they poorly placed to manage and understand any risks. They are not subject to bargaining power imbalances, predatory business conduct or limited mechanisms for redress.

Further, automotive franchisees benefit from extensive protections relating to provision of information, information disclosure and dispute resolution. The nature of this information is prescribed in Part 5 of the Code and includes:

- pre-contractual disclosure of capital expenditure;
- a requirement for more information to be provided to prospective franchisees at least 14 days before entering into an agreement;
- the development and provision of a Key Facts Sheet (in addition to the Disclosure Document) to be provided to the prospective, renewing or transferring franchisee at least 14 days prior to any agreement;
- additional information to be provided in the disclosure document including whether the agreement provides for arbitration of disputes and also the franchisee's rights to any goodwill they have generated;
- significantly greater degree of discussion and disclosure of any capital expenditure requirements;
- the inclusion of any earnings information with, or attached to, the disclosure document;
- extension of the cooling off period to 14 days;
- addition of a cooling off period for transfer of agreements.

Significant financial penalties apply to breaches of these provisions.

---

<sup>3</sup> *Economics of Automotive Franchising in Australia* prepared for the FCAI by Evaluate, 9 September 202 (updated October 2023).

## **Summary**

As noted above, the automotive industry does not experience the unfair practices or the harms identified as the target areas of concern in the Statement. Option 1 (status quo) is therefore clearly the policy option preferred by the FCAI in relation to the automotive sector.

In the event that other options are preferred by Government, the FCAI would urge that new vehicle franchise arrangements be excluded on the basis that they are already comprehensively regulated in relation to commercial practices under a range of mechanisms including the Franchising Code of Conduct and the Australian Consumer Law.

I hope the above submission is of assistance to you.

Yours sincerely,

Tony Weber  
Chief Executive Officer