



18 December 2024

Director
Consumer Policy Unit
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

via email: consumerlaw@treasury.gov.au

Dear Director,

Unfair Trading Practices, Consultation on the design of proposed general and specific prohibitions

The Federal Chamber of Automotive Industries (FCAI) is pleased to respond to the consultation on the paper, *Unfair trading practices, Consultation on the design of proposed general and specific prohibitions* (consultation paper).

The FCAI is the peak industry body for the Australian importers and distributors of passenger motor vehicles, sports utility vehicles, light commercial vehicles, motorcycles and off highway vehicles. FCAI members supply about 98% of the 1.2 million new vehicles sold into the Australian market each year.

FCAI members are listed at <https://www.fcai.com.au/about/members>.

INTRODUCTION

The FCAI was pleased to participate in Treasury's 2023 consultation in relation to the paper, *Protecting Consumers from Unfair Trading Practices: Consultation Regulation Impact Statement*. In its submission, the FCAI maintained that the automotive industry does not experience the unfair practices identified as areas of concern in the Regulation Impact Statement and identified option 1 (status quo) as its preferred policy option. The FCAI's position was based in part on the (then) recent extensions to the prohibitions on unfair contract terms and ongoing review of and amendment to the Franchising Code of Conduct. The FCAI argued that it would be prudent to assess the impact of those amendments before moving to introduce further new regulation.

The FCAI notes that this current consultation is seeking views on how to best address specific unfair trading practices, as follows:

- subscription-related practices;
- drip pricing practices and hidden fees;
- dynamic pricing;
- online account requirements;
- barriers to accessing customer support; and
- dark patterns.

The FCAI submits that many of the above practices have limited application in the context of Original Equipment Manufacturers (OEMs) and new vehicle consumers. The discussion below provides the FCAI's comments directed only at those elements of the consultation paper relevant to OEMs and the automotive industry.



FCAI COMMENTARY – BUSINESS TO BUSINESS DEALINGS

The FCAI refers to focus question 35, as follows:

Do you have any views regarding the staged approach for the introduction of a general prohibition on unfair trading practices applying initially to business-to-consumer dealings? At what point do you think the application of a general prohibition should be considered for business-to-business dealings?

In the automotive context, business to business dealings would encompass the interactions between OEMs and new vehicle automotive dealers. The FCAI does not support the extension to this relationship of the unfair trading protections nominated in the consultation paper.

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 dealer groups (where multiple dealers are ultimately owned by a single, very large and well-resourced entity) and/or sophisticated investors – whether they be listed companies, family-owned conglomerates, or foreign owned entities. 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.

Automotive dealers are therefore not without significant market power. They 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 are well positioned to ensure they are fully informed of their rights and obligations.

The FCAI notes that in the discussion of the potential application of the nominated unfair trading practices to business-to-business dealings, the consultation paper lists a number of cautionary preliminary considerations, as follows:

- the potential distortion of the freedom to contract in commercial dealings between businesses;
- the addition of yet another layer of regulation on businesses that already operate under comprehensive regulatory regimes (such as industry codes);
- the various protections available under the Australian Consumer Law (ACL) including provisions relating to unconscionable conduct; and
- the introduction of unfair contract terms protections.

The FCAI supports the analysis set out in the consultation paper in respect of the business-to-business dealings and opposes the extension of further regulation (such as unfair trading practice prohibitions) to business-to-business dealings. The FCAI submits that the sophisticated nature of the business and commercial transactions between OEMs and new vehicle automotive dealers are such that the existing protections available to the parties under the ACL, the Franchising Code of Conduct and other relevant legislative regimes are entirely adequate. The FCAI believes that in these circumstances a further layer of regulation is unnecessary.

COMMENTARY – BUSINESS TO CONSUMER DEALINGS

The FCAI's comments in relation to each of the specific unfair trading practices of relevance to the automotive industry are set out below.

Subscription related practices

The FCAI understands that the issues related to subscription practices set out in the consultation paper include a lack of information about the service being provided to consumers, practices that make it difficult for consumers to cancel a subscription, and services that automatically renew (into a paid subscription).



The FCAI acknowledges that many new vehicles now have subscription services available that may be activated at the time of purchase or by the consumer post purchase. The subscription services are however a minor component of the overall new vehicle purchase. OEMs are well aware of the unfair contract terms legislation that addresses issues such as automatic renewal of terms, as well as the ACL prohibitions in relation to unconscionable conduct. The FCAI believes that such protections effectively cover new vehicle consumers in relation to subscription services.

Further, the purchase of a new vehicle is a substantial and considered purchase that is generally preceded by the consumer researching the product and the purchase price. The purchase of a new motor vehicle is not an impulse buy. The consumer is supplied with and has available to them a great deal of information about the product, and has the ability and time to make enquiries and ask questions in regard to the product. Most purchases are made through face-to-face transactions with dealers and there are continuing interactions after the vehicle purchase through after sales support, vehicle servicing and the fulfilment of warranty provisions.

While the FCAI understands that many vehicles are now purchased with some form of subscription service, a new vehicle purchase is accompanied by pre-purchase discussions with the consumer, ongoing interactions with vehicle dealership personnel, contact with OEMs in relation to vehicle recalls (if applicable) and general availability for consumer enquiries. New vehicle consumers are routinely provided with comprehensive documentation, as would be expected in the case of a purchase of a complex product. The FCAI suggests there is ample opportunity and multiple fora for consumers to clarify their understanding of or to make adjustment to a subscription service related to a new vehicle purchase.

Drip pricing practices and hidden fees

The FCAI understands that the issues related to drip pricing and hidden fees set out in the consultation paper include the gradual addition of hidden fees to a product purchase price. The consultation paper indicates that concerns in relation to drip pricing practices often relate to accommodation bookings, and airline and event ticketing.

While the FCAI agrees that such practices may be problematic, the identified problem behaviours are not relevant to the automotive industry.

The FCAI refers to the widespread use by OEMs of Drive Away Calculators (DACs) on their websites which allow consumers to configure and price a new motor vehicle. The DAC was developed on behalf of the FCAI and its members following interactions with the ACCC some years ago. The new vehicle pricing produced through the DAC provides consumers with pricing inclusive of the various State and Territory based statutory charges, delivery fees and any other applicable charges. The DAC costings provided to a new vehicle consumers ensure consumers are presented with clear, accurate and complete price representations.

The effect of the DAC is that a consumer who configures a particular new motor vehicle on the website of an OEM will be presented with a drive away price for the specific vehicle, inclusive of all additional or add-on charges such as relevant State / Territory charges and delivery fees. New vehicle consumers can therefore access the total new vehicle price and be assured there are no other hidden or undeclared costs associated with the vehicle.

Barriers to access customer support

The FCAI understands that the issues related to barriers to accessing customer support set out in the consultation paper include practices that make it difficult for a customer to access customer service and/or long delays in providing customer service.

While the FCAI agrees that such practices may be problematic, the identified problem behaviours are not relevant to the automotive industry.



Motor vehicles are extremely advanced, long held consumer goods made from thousands of component parts. The complexity of motor vehicles, coupled with the wide range of conditions they experience during use, means they require routine inspection, regular servicing, and the periodic repair and replacement of component parts. As a result, new motor vehicles are generally supplied with express warranties in addition to those contained within the ACL, regular servicing is essential, and safety recalls and corrective actions are issued by OEMs from time to time as appropriate.

The FCAI notes therefore that there is regular and ongoing customer service-related interactions between OEMs, dealer networks and new vehicle consumers. As noted above, a new vehicle purchase is accompanied by ongoing interactions with vehicle dealership personnel, contact with OEMs in relation to vehicle recalls (if applicable) and general availability for consumer enquiries. The FCAI suggests there is ample opportunity and multiple fora for consumers to access customer support.

COMMENTARY - GENERAL PROHIBITIONS

The FCAI does not support amendment to the ACL to address the specified unfair trading practices through the introduction of a principles-based general prohibition.

The FCAI is concerned that a principles-based general prohibition in the context of the listed unfair trading practices would be necessarily broad, uncertain in its terms and application, and difficult to implement. The result of such a prohibition would see the addition of a further layer of regulation to existing and comprehensive ACL and industry code requirements and would be likely to result in increased compliance costs.

The FCAI remains concerned that further regulation inappropriately applied to an already heavily regulated sector will have a chilling effect on continued innovation in product development and commercial interactions and add further costs to the supply of new vehicles into the Australian market.

SUMMARY

The FCAI notes that the unfair trading practices set out in the consultation paper are most relevant to commercial transactions which appear to be web-based or reliant on online interactions. This scenario is simply not the norm when purchasing a new motor vehicle, which is generally a considered and well-researched purchasing decision. OEMs are very cognisant of the existing consumer protections and prohibitions in the ACL, codes of conduct and other regulatory instruments. The FCAI is concerned that OEMs may be inadvertently captured in yet a further round of broad-brush regulation that is intended to address the practices of other sectors.

The FCAI would be pleased to provide further information in relation to this submission if that would be of assistance.

Yours sincerely,

Tony Weber
Chief Executive