



AUSTRALIAN  
AUTOMOTIVE  
DEALER  
ASSOCIATION

# RESPONSE TO TREASURY DISCUSSION PAPER ON UNFAIR CONTRACT TERMS

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## FOREWORD

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**We believe that the protections afforded by the Unfair Contract Terms provisions of the ACL and ASIC Act need to be expanded to protect franchised new car Dealers with respect to their Franchisor.**

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The Australian Automotive Dealer Association (AADA) is pleased to lodge this submission to the Treasury on its discussion paper on “Unfair Contract Terms” (UCT).

The AADA supports the Treasury review of the extension of the UCT provisions for small business but notes that the limits placed on the provisions effectively exclude new car Dealers as franchisees from their protection when dealing with overseas-based car manufacturers acting as their franchisors.

The AADA looks forward to providing further input after Treasury incorporates any recommendations arising from the Parliamentary Inquiry into the Franchising Code of Conduct.



**David Blackhall**  
Chief Executive Officer



# BACKGROUND

The AADA is the peak industry advocacy body exclusively representing franchised new car Dealers in Australia. Our members total around 1,500 franchised new car Dealers that operate some 3,500 new vehicle outlets.

The automotive retail sector in Australia is one of the most competitive in the world. Around 72 brands offer more than 400 models for sale in a relatively small market of about 1.2 million units annually (less than 1.5 per cent of global demand). The competition means there is significant pressure on the Australian subsidiaries of the global automotive manufacturers and by extension their franchised new car Dealer networks to achieve sales targets. In short, success in this highly competitive industry is by no means assured and franchised new car Dealers often run on razor thin profit margins.

New car Dealers in Australia are franchised to the global automotive manufacturer brands or Original Equipment Manufacturers (OEMs). Dealers who enter into a contract (Dealer Agreement) with an OEM are given the exclusive right to market and sell new vehicles and associated services within a specific geographic location or marketing area. In return, Dealers are bound by these Dealer Agreements, the terms of which are very much skewed in favour of the OEM.

At this point it is worth noting that most franchisees covered by the Franchising Code of Conduct also enjoy protections from the Australian Consumer Law (ACL) Unfair Contract Terms provisions on new, renewed and terminated franchise

agreements since 12 November 2016. Unfortunately, franchised new car Dealers, have not benefited at all due to the “small business” threshold requirements of the legislation. Small business is defined in the ACL unfair contract terms legislation as a business employing fewer than 20 employees and the overwhelming majority of franchised new car Dealerships in Australia exceed this number. The AADA contends that a strict limit on definition of a small business for the purpose of UCT protection does not adequately address the circumstances where the power differences between a franchisor and its franchisee is so large as to make it impossible for contracts to be negotiated on a level playing field.

The lack of capacity and bargaining power of Dealers, combined with long term commercial relationships and significant sunk investment, results in franchised new car Dealers choosing to enter into contractual agreements which contain oppressive contractual clauses, or which permit manufacturers to engage in opportunistic and/or exploitative conduct. Specifically, Dealer Agreements most often include reference to Policies and Standards that are set by the OEM and that can be changed unilaterally by the OEM. The real-life effect for our members is that they may have signed a five-year Dealer Agreement in good faith that is predicated on sole access to a particular marketing area, and on a specific set of targets and incentives. The OEM can reduce the marketing area, increase targets, and decrease incentives unilaterally, thus making the contract onerous and unprofitable, without the Dealer having any recourse.

## ISSUES FOR DISCUSSION - TRESHOLDS

The AADA does not agree that the current thresholds (20 employees and contracts being for less than \$300,000 or \$1,000,000 if over twelve months) form a sufficient basis for determining protection under the UCT provisions. While new car Dealers will breach both the staffing and the contract size provision, their relative power position with respect to their franchisors is one of extreme power imbalance. For example, in 2017 Volkswagen had revenue greater than the Gross State Product of more than half of Australia's States. In comparison, a new car Dealership with 30-50 employees, is a minnow very much deserving of statutory protection. Western Australia.

We contend that the requirement for collective bargaining stems, not from the objective size of the businesses involved, but from the relative power/size relationship between the franchisee and the franchisor.

### **Discussion Question 1**

In the experience of new car Dealers, the headcount approach does not serve to define a small business for Unfair Contract Provisions. An alternative approach that weighed the relative sizes of franchisee and franchisor would be more effective for new car Dealers.

We note that limiting coverage to UCT protections through a hard limit on contract sizes places new car Dealers on a difficult position as their Franchise Contracts, that are usually on a 'take-it-or-leave it' format, are for periods of up to five years and in the order of several multiples of the maximum threshold currently articulated in the legislation. This places intolerable stresses on the franchisee because the terms of the contract may be very unfair, but they have no opportunity to negotiate them. At the same time, Dealers likely have their whole net worth (and that of their family) tied up in that Dealership, and have long-serving staff that they are responsible for.

### **Discussion Question 2**

The AADA believes that the current threshold effectively excludes multi-year contracts such as those that underpin Dealership agreements. Should contract-size thresholds remain, then they should effectively account for multi-year contracts.

## ISSUES FOR DISCUSSION - COVERAGE

### Discussion Question 4

The experience of our members is that, in the broad, Dealership Agreements fall within the definition of standard form contracts. However, those Dealership Agreements also include references to subsidiary documents (Policies and Standards) that can considerably change the context and provisions of the contract, and these documents can, and often are, changed unilaterally by the franchisor. These subsidiary documents include matters ranging from the allowed marketing area to the levels of commission or types of incentives. All these materially affect the balance of the contract, yet they can only be changed by one party to the contract.

The AADA would be happy to meet with Treasury officials to discuss our belief that UCT protections should be extended to bigger businesses and larger contracts than are currently covered.



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