



AUSTRALIAN
AUTOMOTIVE
DEALER
ASSOCIATION

RESPONSE TO 'PROTECTING CONSUMERS FROM UNFAIR TRADING PRACTICES' CONSULTATION REGULATION IMPACT STATEMENT

DECEMBER 2023



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FOREWORD

The AADA welcomes the opportunity to make a submission in response to the *'Protecting consumers from unfair trading practices'* Consultation Regulation Impact Statement (the RIS).

The AADA is the peak automotive industry body representing Australia's franchised new car Dealers. There are more than 3,100 new vehicle dealerships in Australia employing more than 56,000 people directly and generating \$68 billion in turnover and sales with a total economic contribution of over \$17 billion.

Franchised new car Dealers are in relationships with international manufacturers which is characterised by a power imbalance. In jurisdictions such as the US, automotive franchising laws provide Dealers with a level of protection. Australia has taken steps in the right direction in recent years with the adoption of automotive specific franchise laws, but serious gaps remain and the ability for manufacturers to exploit Dealers has been evident in recent years.

The high bar required to demonstrate unconscionable conduct has at times benefitted manufacturers in disputes with their Dealer networks. The AADA strongly believes there is a need to prohibit unfair trading practices in combination with amending statutory unconscionable conduct to better capture exploitative behaviour.

The AADA is open to working with Treasury on the mechanics of the various option, but we are of the firm view that all business relationships should be covered by the reforms.

The AADA is encouraged by and welcomes proposed reforms to address Unfair Trading Practices (UTP) in the Australian Consumer Law (ACL). The AADA considers that these reforms will go some way towards addressing the use of harmful business practices not currently captured by existing protections in the ACL. While the AADA acknowledges that policy reform to deal with 'unfairness' presents many challenges due to the subjective nature of what is considered 'unfair', these reforms will help bring Australia's competition regulations in line with community expectations and other OECD countries.

The AADA strongly advocates that these protections be expanded to ALL businesses regardless of size, as many businesses that would not be covered by the proposed threshold in the RIS, are subject to unfair practices at the hands of very large and well-resourced companies in their supply chain relationships.

The AADA is broadly supportive of options 2 & 4 canvassed in the regulation impact statement (RIS). Regarding option 2, the extension of current prohibitions in the ACL on unconscionable conduct to include conduct that is unfair would provide increased protection to consumers and businesses against harmful conduct and provide the government and the regulators with more tools to address harmful conduct not currently captured by existing unconscionable conduct laws.

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Regarding option 4, this would be the most comprehensive approach, through a combination of a general principles-based prohibition, with the addition of a specific list of prohibited practices. Both of these options have merit, and the AADA would encourage the adoption of a combination of these options.

These issues are examined in further detail below.

James Voortman
Chief Executive Officer



AADA RECOMMENDATIONS

1. A reform option to address unfair trading practices be introduced.
2. Pursue option 4 as the most comprehensive option to address unfair trading practices.
3. Pursue option 2 as a combined approach with option 4.
4. Pursue option 3 as a workable solution to address unfair trading practices, as opposed to retaining status quo.
5. Expand the coverage of new reforms to capture all businesses.

Australia

3,176 Dealerships



Economic Contribution



56,829

Dealer Employees



\$6.80 billion

Dealer Wages



\$3.59 billion

Tax Contribution



\$17.30 billion

Total Economic Contribution

GENERAL COMMENTS

AUSTRALIAN AUTOMOTIVE RETAILING INDUSTRY CONTEXT

The Australian automotive new car retailing industry can be broadly defined into two categories. Vehicle manufacturers or OEMs, which are largely multinational businesses that supply vehicles into the Australian market. Car Dealers, which are generally Australian privately owned or family businesses who enter franchise agreements to purchase vehicles from these manufacturers to retail to Australian consumers. This system is known as the franchising model and has underpinned the way in which Australians are able to buy new cars for more than a century.

NEED FOR EXPANSION OF COVERAGE TO ALL BUSINESSES

The AADA agrees with the findings in the RIS which highlight that a growing number of commercial practices fall into the category of 'unfair business practices' or 'unfair trading practices' which cause considerable harm to consumers and businesses, and thus warrant reform in this area. However, under thresholds that would define what a small business is provided on page 5, many Dealers would not qualify.

A key feature of the automotive industry in Australia that highlights the need for stronger protections against unfair trading practices is the immense power imbalance between Dealers and manufacturers whom they are in franchising relationships with. This is largely due to the disparity in size and power between these global automakers and Australian Dealers.

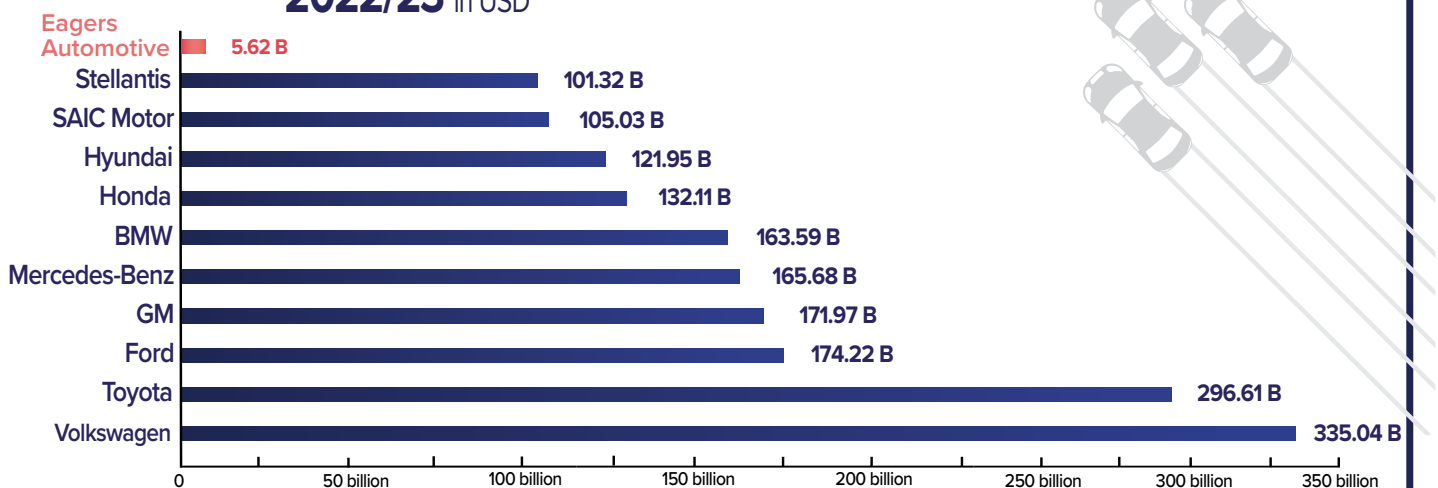
Car companies are ranked as some of the largest and long-standing businesses operating in one of the world's most significant manufacturing industries. For example:

- Volkswagen AG is the 15th largest company in the world ranked by revenue.
- Toyota Motor Corp is the 19th largest company in the world ranked by revenue.
- Fortune Global 500 ranks 30 automotive companies in the top Global 500 companies.

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By way of comparison, Eagers Automotive (APE on the ASX), is far and away the largest Dealer group in Australia, and it turned over \$8.54 billion last year. (including approximately 10% of all Australian new cars sold). However, the chart below demonstrates that even at Eagers Automotives' size, it pales in comparison to the manufacturers that Dealers are in a franchise relationship with.

Eagers Automotive & Automakers Revenue 2022/23 in USD



Source: <https://companiesmarketcap.com/automakers/largest-automakers-by-revenue/>

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DEALER/MANUFACTURER DEPENDENCY

Dealers make significant investments in their businesses, often resulting in a dependency on the ongoing right to run the franchise. With this dependency, the Dealer loses their bargaining power, and the more sunk investment the Dealer commits, the more vulnerable they are. They are vulnerable because manufacturers have extensive powers to bring franchise agreements to an abrupt end using non-renewal and termination powers. Ironically, significant portions of the investments Dealers make are a result of non-negotiable requirements prescribed by the manufacturer.

Manufacturers can exploit this vulnerability and as a result, Dealers are often subject to unfair trading practices, and on occasions that Dealers have pursued a claim through the courts, they have been on the receiving end of the very high bar required to prove unconscionable conduct or failure to act in good faith.

The AADA considers that policy options 2 & 4 presented in the RIS would go some way towards protecting Dealers from being subject to these unfair trading practices and as such, strongly recommends that these protections be extended to all businesses.

Indeed, the ACCC found that many challenges faced by dealers are a consequence of the misuse of power by car manufacturers. To this point, the consumer watchdog alleged unfair treatment towards franchisees in critical areas, such as non-renewal of franchise agreements, capital expenditure, and dispute resolution, all which undermines not only the dealers' businesses, but also the Australian consumers' best interests.....¹

'An Evaluation of the Franchise Model in the Australian Automotive Industry'

KEY FOCUS QUESTIONS

1. DO YOU AGREE OR DISAGREE WITH THE REPRESENTATION AND SCOPE OF UNFAIR TRADING PRACTICES IDENTIFIED IN THIS PAPER?

The AADA agrees with the scope of unfair trading practices identified in the consultation paper encompassing, oppressive, exploitative, or otherwise unfair business behaviour.

2. HOW DO YOU THINK UNFAIR SHOULD BE DEFINED IN THE CONTEXT OF AN UNFAIR TRADING PROHIBITION? WHAT, IF ANY, AUSTRALIAN OR OVERSEAS PRECEDENT SHOULD BE CONSIDERED WHEN DEVELOPING THE DEFINITION? ARE THERE THINGS WHICH YOU THINK SHOULD BE INCLUDED, OR EXCLUDED, FROM THE DEFINITION?

Defining 'unfair' in the context of unfair trading practices is challenging due to the subjective nature of the term. The perception of fairness varies significantly from individual to individual and is generally context driven. The AADA considers, that while there isn't a standard definition of 'unfair', there are generally accepted principles which help to determine if an action or behaviour is unfair, for example, the principles of good faith and fair dealing.²

In attempting to define 'unfair' a number of Australian regulatory instruments already include the concept of unfairness.

In New South Wales, the power imbalance between franchised new car Dealers and larger more powerful manufacturers resulted in the development of Part 6 of

the *Motor Dealers and Repairers Act 2013*. Under Part 6, Dealers are offered protections against Unjust Conduct. Conduct of a manufacturer is **unjust conduct** for the purposes of Part 6 if it is conduct:

- (a) that occurs in connection with a supply contract and is conduct that is dishonest or unfair, or
- (b) that is authorised by an unfair term of a supply contract .

(2) In determining whether to make a declaration that a term of a supply contract is an unfair term or that conduct is unjust, the Tribunal may take into account such matters as it thinks fit and is to have regard to all the circumstances of the case, including the contract as a whole.

(3) Without limiting subsection (2), the Tribunal may consider the following (if relevant) -

- (a) the extent to which the supply contract is expressed in reasonably plain language and is presented clearly,
- (b) whether or not there was any material inequality in bargaining power between the parties to the supply contract,
- (c) whether or not at or before the time the supply contract was made its provisions were the subject of negotiation,
- (d) whether or not it was reasonably practicable for a motor dealer to negotiate for the alteration of or to reject the term of the supply contract or any matter related to the contract,

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(e) whether a term of a supply contract imposes conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the supply contract,

(f) whether or not and when independent legal or other expert advice was obtained by the motor dealer,

(g) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the motor dealer -

(i) by any other party to the supply contract, or

(ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the supply contract, or

(iii) by any person to the knowledge (at the time the supply contract was made) of any other party to the supply contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the supply contract,

(h) the conduct of the parties in relation to similar contracts or courses of dealing to which any of them has been a party.

Another example to consider is Unfair Contract Terms (UCT) in the *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010*. In which, deciding whether a term in a standard form consumer contract is unfair, the court or tribunal will apply the three-limbed test for unfairness.

A number of international jurisdictions have already sought to or have defined what is unfair in a business practice context, for example:

- The European Commission has defined Unfair Trading Practices as *practices*

*that deviate grossly from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another.*³

- In the United States, the Federal Trade Commission Act (FTC Act) contains a general prohibition against 'unfair or deceptive acts or practices in or affecting commerce'. The FTC Act defines an act or practice to be unfair when it; causes or is likely to cause substantial injury to consumers, cannot be reasonably avoided by consumers or is not outweighed by countervailing benefits to consumers or to competition.

3. DO YOU HAVE ANY SPECIFIC INFORMATION, ANALYSIS OR DATA THAT WILL HELP MEASURE THE IMPACT OF THE PROBLEMS IDENTIFIED?

The automotive retailing industry in Australia contains many examples, where manufacturers exploit the power imbalance that characterises their franchise relationship with Dealers. The language and provisions contained in franchising agreements are often skewed to favour the manufacturer and due to the David and Goliath style match-up between these parties, Dealers are often at the receiving end of unfair practices. There are a number of areas where the practices employed by manufacturers could amount to unfair trading practices. Among these include:

- Terminating Dealer agreements and pressuring Dealers to accept inadequate compensation within very tight deadlines.
- Offering short term Dealer Agreements with no prospect of recovering investment.

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- Linking major investment to the renewal of a franchise agreement.
- Pressuring dealers to take on additional stock and register vehicles as sold to improve market share of the manufacturer.
- Refusing to indemnify Dealers (a legal obligation) for work done to honour an OEM's warranty and Australian Consumer Law obligations.
- Conducting random warranty audits, clawing back large sums of money by extrapolating the results from a small sample over an extended period of time.
- Setting unrealistic sales and performance targets and using failure to achieve targets to penalise dealers financially.
- Making unilateral significant changes to the business model with little to no negotiation with Dealers.

This is also demonstrated in the numerous disputes and court actions between Dealers and manufacturers in recent years.

- General Motors (GM) termination of the Holden brand and 200 Dealers in Australia. The way in which GM treated its Dealers led to a Senate Inquiry that extraordinarily censured GM. It also prompted the ACCC to issue a rebuke of Holden calling it 'a lesson to all franchisors of what not to do in managing their relationships with franchisees and treating them fairly and with respect'.
- The recent case before the Federal Court in which Mercedes-Benz Dealers unsuccessfully sought compensation from Mercedes-Benz Australia for converting their dealerships to an agency model. (See Appendix A). It should be noted that Justice Beach made the extraordinary comment that

the Dealers "were successful on many issues of fact but lost on the law." He went on to suggest that the legal framework governing franchise relations may need to be reviewed.

- The conduct by Honda as part of its move to an agency model. Specifically, the ACCC has instituted Federal Court proceedings against Honda Australia Pty Ltd for making false or misleading representations to consumers about two of the Dealers which were terminated as part of the move to an agency model, stating that these businesses were closed when in fact they were still trading.

Most examples of unfair behaviour from manufacturers are not aired publicly such as the examples above. The fear of speaking up on these issues has only escalated following the behaviour exhibited by some manufacturers in recent years. Unfair conduct has significant financial consequences for franchised new car Dealers, who are increasingly being pressured to invest or sacrifice margins to fulfill a Manufacturers demands. The result can be a stressful arrangement which effects Dealers psychologically and filters down into the staff of the business.

4. DO YOU AGREE WITH THE CONSULTATION OBJECTIVES AS OUTLINED? IF NOT, WHY NOT?

The AADA agrees with the consultation objectives outlined in the RIS.

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5. ARE THERE ANY OTHER CONSULTATION OBJECTIVES THAT SHOULD BE CONSIDERED IN ADDRESSING UNFAIR TRADING PRACTICES IN AUSTRALIA?

The AADA has no comment.

6. AS A CONSUMER OR SMALL BUSINESS, HAVE YOU SUFFERED DETRIMENT FROM UNFAIR TRADING PRACTICES? PLEASE DESCRIBE YOUR EXPERIENCE AND QUANTIFY THE IMPACT IN MONETARY TERMS, IF POSSIBLE.

As noted above, there are numerous examples of unfair behaviour from manufacturers, but they are not always highlighted in the public domain. Dealers often have a natural fear of speaking up on these issues, making it difficult to quantify the impact that unfair trading practices have, as such, the AADA would encourage the opportunity to discuss these matters confidentially as part of the consultation process.

7. HAVE YOU EXPERIENCED ANY DIFFICULTIES WITH CHALLENGING OR DISPUTING A POTENTIALLY UNFAIR TRADING PRACTICE? PLEASE PROVIDE ANY RELEVANT DETAILS.

For Dealers disputing an unfair trading practice with a manufacturer, success varies according to the nature of the relationship. There are relationships within the automotive retail industry which are respectful and mutually beneficial. We have heard examples of Dealers in these relationships being able to successfully address a certain practice and negotiate with a franchisor to achieve a mutually satisfactory outcome.

However, there are many relationships where practices perceived to be unfair by Dealers are not up for negotiation. In fact, Dealers who are prepared to raise unfair behaviour with their franchisor are often labelled a troublemaker and liable to be punished or marginalised because of their willingness to speak up.

8. WHAT IS YOUR PREFERRED REFORM OPTION, OR COMBINATION OF OPTIONS? WHAT ARE YOUR REASONS?

The AADA considers that a combination of options 2 & 4 canvassed in the RIS offers the most comprehensive solution to address unfair trading practices. Our reasoning is detailed below.

9. ARE THERE ANY ALTERNATIVE OR ADDITIONAL REFORM OPTIONS TO THOSE PRESENTED YOU THINK SHOULD BE CONSIDERED?

AADA believes that the work on unfair trading practices needs to be supplemented by strengthening the automotive provisions of the Franchising Code of Conduct. We have attached a copy of our submission to the current review of the Franchising Code of Conduct.⁴ (Attachment 1)

OPTION 1 - STATUS QUO

1.1 DO YOU AGREE WITH THE IMPACT ANALYSIS OF THIS OPTION? ARE THERE OTHER ISSUES THAT SHOULD BE TAKEN INTO ACCOUNT WHEN ANALYSING THE IMPACT OF THIS OPTION?

The AADA does not support option 1 - Status quo. The automotive industry is currently in a state of transformation and with that change comes a real risk that unfair trading practices will be used by manufacturers looking to make significant changes to the long-term arrangements they have had in place with their Dealers. Maintaining the status quo will likely increase the risk of harm in the medium to long term.

1.2 IF A TRADING PRACTICE IS FOUND TO HAVE CAUSED CONSUMER HARM, DO YOU THINK THAT THE COURTS ARE ABLE TO DETERMINE APPROPRIATE REMEDIES IN LINE WITH COMMUNITY EXPECTATIONS UNDER THE CURRENT LEGAL FRAMEWORK? IF NOT, WHY NOT?

The AADA considers that the current framework does not protect consumers and businesses against unfair practices. This was highlighted in the recent court action between Mercedes-Benz Australia/Pacific Pty Ltd and the majority of its Dealers. The AADA would argue that the law has allowed Mercedes-Benz to essentially engage in unfair practices by changing the nature of a decades-long business relationship to its benefit and with no compensation to those Australian businesses.

Justice Beach stated that "... the shift to the agency model was in large part a case of franchisor opportunism because [Mercedes-Benz Australia] took advantage of its position after the dealers had made significant investments, and it intended to appropriate the gains in the industry margins associated with the move to the agency model;"⁵

From our perspective, the comments made by Justice Beach quoted above, underscore the crux of the matter. Without the introduction of any protections against unfair trading practices, businesses can continue to engage in these behaviours which are oppressive, exploitative, or otherwise unfair, but do not amount to the high bar which is unconscionable conduct.

Even when businesses are subject to unlawful behaviour, they are dissuaded from pursuing this in the courts due to the expensive, time-consuming, and emotionally draining nature of the legal system. On occasions that Dealers have pursued a claim through the courts such as the example above regarding Mercedes-Benz Dealers, they have been on the receiving end of the very high bar required to prove unconscionable conduct or failure to act in good faith, further highlighting the need for general and specific prohibitions to deter behaviour.

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1.3 COULD A FOCUS ON STAKEHOLDER EDUCATION HELP REDUCE THE PREVALENCE OF UNFAIR TRADING PRACTICES UNDER EXISTING CONSUMER PROTECTIONS?

The AADA considers that stakeholder education would not provide sufficient protection to consumers and businesses against unfair conduct. Even though it may be very clear that a business or consumer is being subject to unfair practices they are often placed at a position of disadvantage with no recourse, due to the size and resources behind the offending party.

OPTION 2 - AMEND STATUTORY UNCONSCIONABLE CONDUCT

2.1 DO YOU AGREE WITH THE IMPACT ANALYSIS OF THIS OPTION? ARE THERE OTHER BENEFITS OR COSTS THAT SHOULD BE TAKEN INTO ACCOUNT WHEN ANALYSING THE IMPACT OF THIS OPTION?

The AADA agrees with the impact assessment of option 2, which is assessed as having a medium regulatory impact - providing some benefits to consumers and businesses while acknowledging the imposition of some compliance costs. The AADA considers that option 2 has merit and as outlined in the RIS, its benefits outweigh the potential costs, which are largely comprised of compliance costs.

2.2 WHAT WOULD BE THE IMPACT OF PURSUING THIS POLICY OPTION FOR CONSUMERS AND BUSINESSES?

The AADA does see option 2 as having merit and this option could help to provide consumers and businesses with greater confidence in their business dealings that they will not be subject to unfair practices. If expanding the scope of statutory unconscionable conduct to capture a broad range of conduct considered to be harmful or unfair is pursued, clarity would need to be provided regarding how 'unfair' is defined and ensure that it is not just used as one factor in determining if actions are unconscionable. As noted above, unconscionable conduct has a very high threshold and under this option, reliance would continue to be placed on the term 'unconscionable' making it difficult to capture conduct that is considered unfair.

Option 2 must take the alternative approach outlined on page 23 of the discussion paper which is to add the concept of unfairness to the unconscionable conduct provision in s21 of the ACL. This is to ensure that courts must consider this concept of unfairness in determining unconscionable conduct by creating a clear distinction between the currently accepted meaning of unconscionable and the newly derived lower threshold.

2.3 ARE THERE ANY CONSEQUENCES OR RISKS THAT NEED TO BE CONSIDERED WHEN PURSUING THIS POLICY OPTION? PLEASE PROVIDE DETAILS.

The AADA considers that the risk associated with option 2 is the need for judicial precedent to be set on the amended definition of unconscionable conduct and could result in a situation where businesses and consumers continue to be subject to unfair practices while waiting for the courts to set precedent regarding what businesses practices amount to unfair conduct.

2.4 WOULD THIS POLICY OPTION PLACE ANY ADDITIONAL FINANCIAL OR ADMINISTRATIVE COST OR BURDEN ON SMALL BUSINESSES AND/OR CONSUMERS?

The AADA does not believe that option 2 would add any financial or administrative burden to Dealer's businesses. The AADA considers that without the addition of specific prohibitions, it will be up to the courts to decide if conduct would arise to

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the newly expanded definition of unconscionable conduct thus placing the onus on the business or consumer on the receiving end of these practices to take action.

2.5 DO YOU CONSIDER AMENDING 'UNCONSCIONABLE CONDUCT' UNDER THE ACL WOULD SUFFICIENTLY DETER BUSINESSES FROM ENGAGING IN UNFAIR TRADING PRACTICES? PLEASE PROVIDE REASONS FOR YOUR RESPONSE.

Amending unconscionable conduct under the ACL would in theory provide a significant deterrent for businesses seeking to engage in practices that are unfair. If businesses were aware that the newly expanded definition of unconscionable would apply to unfair practices, they would be deterred from engaging in these practices. However, as mentioned above, this option does run the risk that 'unconscionable' would continue to be central to these provisions and may be difficult to capture manifestations of unfair behaviour.

The aforementioned case of *AHG WA (2015) Pty Ltd T/A Mercedes-Benz Perth and Westpoint Star Mercedes-Benz and Others and Mercedes-Benz Australia/Pacific Pty Ltd*, highlights the high threshold to be met before conduct will be considered 'unconscionable'.

The AADA considers that amending unconscionable conduct in the ACL without the introduction of specific prohibitions outlining specific practices that broadly cover what is deemed an unfair practice, businesses and consumers may be reluctant to dispute these practices.

2.6 WHAT FORMS OF UNFAIR TRADING CONDUCT COULD BE INCLUDED AS ADDITIONAL FACTORS IN SECTION 22?

If this approach is taken under option 2, the AADA would welcome the inclusion of practices that occur as a result of imbalances of power in a list of additional factors to be included under s22.

An example of these, taken from '*Study on the Legal Framework Covering Business-To-Business Unfair Trading Practices in the Retail Supply Chain*' prepared for the European Commission, are listed as situations where:

- weak parties have no real alternative to the commercial relation at hand;
- when one of the parties depends on its counterparts due to other factors, such as technology and know-how;
- when one of the parties can exploit informational advantages to the detriment of the other party;
- and in case of incomplete contracts, which leave room for strategic behaviour during the course of the negotiation.³

The AADA would encourage the examination of international examples of how unfair trading practices are defined as a way to include particular conduct as additional factors in s22.

2.7 DO YOU THINK THAT THE PROHIBITION SHOULD BE MADE PROSPECTIVE, SO IT APPLIES TO CONDUCT THAT IS LIKELY TO BE UNCONSCIONABLE? WHY OR WHY NOT?

The AADA agrees that the prohibition should be made prospective.

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2.8 SHOULD THE LIST OF FACTORS CONTAINED IN SECTION 22 BE MANDATORY FOR COURTS TO CONSIDER IN DETERMINING WHETHER CONDUCT IS UNCONSCIONABLE? IN OTHER WORDS, SHOULD SECTION 22 BE AMENDED SO THAT THE COURTS MUST HAVE REGARD TO THE LIST OF FACTORS FOR THE PURPOSES OF SECTION 21?

Yes, if this option is pursued, the AADA would encourage that the list of factors contained in s22 be mandatory for consideration. This is to ensure that the true meaning of the newly expanded provisions of unconscionable conduct does capture that behaviour that may not necessarily meet the high bar for unconscionable conduct is mandatory.

2.9 ARE THERE ANY OTHER PRINCIPLES THAT WOULD BE USEFUL TO CONSIDER IN AMENDING STATUTORY UNCONSCIONABLE CONDUCT? PLEASE PROVIDE DETAILS

The AADA has no comment.

OPTION 3 - INTRODUCE A GENERAL PROHIBITION ON UNFAIR TRADING PRACTICES

3.1 DO YOU AGREE WITH THE IMPACT ANALYSIS OF THIS OPTION? ARE THERE OTHER BENEFITS OR COSTS THAT SHOULD BE TAKEN INTO ACCOUNT WHEN ANALYSING THE IMPACT OF THIS OPTION?

The AADA prefers options 2 and 4 over option 3 - Introduce a general prohibition on unfair trading practices - but would favour this option over retaining status quo.

OPTION 4 - INTRODUCE A GENERAL AND SPECIFIC PROHIBITION ON UNFAIR TRADING PRACTICES

4.1 DO YOU AGREE WITH THE IMPACT ANALYSIS OF THIS OPTION? ARE THERE OTHER BENEFITS OR COSTS THAT SHOULD BE TAKEN INTO ACCOUNT WHEN ANALYSING THE IMPACT OF THIS OPTION?

The AADA agrees with the impact analysis of option 4 which highlights that this option provides protection for consumers and businesses from the widest range of both current and emerging unfair trading practices.

4.2 ARE THERE ANY CONSEQUENCES OR RISKS THAT NEED TO BE CONSIDERED WHEN PURSUING THIS POLICY OPTION? PLEASE PROVIDE DETAILS.

The AADA notes that the judicial precedent on a general prohibition may take time to develop and the list of specific instances may not sufficiently cover every practice which is considered unfair and is not permitted, however, the AADA considers this to be the most comprehensive approach.

4.3 WOULD THIS POLICY OPTION PLACE ANY ADDITIONAL FINANCIAL OR ADMINISTRATIVE COST OR BURDEN ON SMALL BUSINESSES AND/OR CONSUMERS?

The AADA does agree with the conclusion in the RIS, that under this option uncertainty may arise over what constitutes an unfair practice and may create an environment where businesses are cautious. However, we believe it will

encourage more cooperative attitudes from franchisors towards their franchisees which will facilitate better discussion and negotiation. AADA considers that this option will best meet community expectations around what they expect in their dealings with businesses and would align Australia with international jurisdictions that have taken this approach to addressing unfair practices.

4.4 DO YOU CONSIDER A SPECIFIC PROHIBITION ON UNFAIR TRADING PRACTICES IN THE FORM OF A LIST OR SCHEDULE OF UNFAIR CONDUCT WOULD BE AN ADAPTABLE POLICY OPTION FOR TECHNOLOGICAL CHANGE?

The AADA considers that a list or schedule of unfair practices may be difficult to continue to update at the same rate as technological advancements in the business space. One example of this is the use of blended sales models in automotive retailing, where manufacturers will require some products to be sold on a regular franchise model basis, but other products to be sold on an agency basis. While many jurisdictions have prohibited franchisors from competing with franchisees, they are often able to overcome this through the changing business models when introducing new technologies.

This is largely seen in the retailing of new vehicle technologies such as electric vehicles (EVs) which are supplied to Dealers on an agency basis while traditional ICE cars remain on the franchised system. This practice the AADA would consider to be an unfair practice as it allows a manufacturer to

essentially compete with its Dealers while in effect using the franchisee's facilities and sunk investment to do so. Manufacturers should not be allowed to employ blended models – it blurs the lines around their ability to gain exemptions from retail price maintenance provisions; it potentially allows manufacturers to saddle Dealers with risk on undesirable products while cherry-picking the best and most profitable models for their own purpose to be sold at a fixed price.

This example highlights the risks associated with a stand-alone list of specific prohibitions as large businesses have vast resources to sidestep regulation and alter their business models to avoid running afoul of prohibited practices.

4.5 DO YOU CONSIDER A SPECIFIC PROHIBITION ON UNFAIR TRADING PRACTICES WOULD SUFFICIENTLY DETER BUSINESSES FROM ENGAGING IN CONDUCT THAT IS CONSIDERED UNFAIR, HARMFUL OR DETRIMENTAL TO CONSUMERS?

As noted above, a specific prohibition on unfair practices may not sufficiently cover all aspects of what constitutes an unfair practice, and any specific prohibition would need to be introduced in conjunction with a general prohibition. The AADA notes, as described in the RIS, that no international jurisdiction has introduced or enforced a stand-alone specific unfair practices prohibition without also having a general unfair practices prohibition in place.

4.6 WHAT TYPES OF UNFAIR TRADING PRACTICES SHOULD BE SPECIFICALLY PROHIBITED? SHOULD THEY BE INDUSTRY SPECIFIC OR ECONOMY-WIDE?

The AADA would call for the inclusion of practices that arise as a result of an imbalance of power in a bargaining arrangement, which could include things such as a party having no real alternative to the commercial relation or exploitation of informational advantages.

However, there are several factors that make the dealer and manufacturer relationship different to the typical franchising or business relationship.

The same is true of the OEM/Truck Dealer relationship, including:

- High levels of capital expenditure required.
- Unique facilities such as bespoke showrooms and workshops which are distinctive and very difficult to repurpose.
- Manufacturers are all subsidiaries of powerful offshore multi-national companies which are among the largest in the world.
- High value product which are mechanically and technologically sophisticated relative to other goods.
- There is an extended after sales relationship between a dealer and its customers.
- Continued aftersales relationship with the manufacturer related to warranty and servicing.

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These examples highlight the dependant nature of the Dealer on their manufacturer in their relationship and considers that this warrants further exploration of the need for an industry specific list of unfair trading practices prohibition.

Determining what practices should be specifically prohibited would take time to develop and would encourage further consultation on defining specific unfair practices.

4.7 SHOULD CIVIL PENALTIES BE ATTACHED TO A COMBINED PROHIBITION ON UNFAIR TRADING PRACTICES? PLEASE PROVIDE REASONS FOR YOUR RESPONSE.

The AADA considers that businesses who are found to have engaged in prohibited unfair trading practices, should be subject to monetary penalties.

CONCLUSION

We would be happy to meet with you to discuss our submission and participate in any further consultation. If you require further information or clarification in respect of any matters raised, please do not hesitate to contact me.

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REFERENCES

1 - An Evaluation of the Franchise Model in the Australian Automotive Industry Fattah, Adiba, <https://research.usc.edu.au/esploro/outputs/doctoral/An-Evaluation-of-the-Franchise-Model/99971186702621/filesAndLinks?index=0>

2 - Commentary to Trans-Lex Principle, <https://www.trans-lex.org/922830>

3 - INTERNAL MARKET AND CONSUMER PROTECTION Future Policy Options in Franchising in the EU: Confronting Unfair Trading Practices, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587325/IPOL_BRI\(2016\)587325_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587325/IPOL_BRI(2016)587325_EN.pdf)

4 - AADA Response to the Review of the Franchising Code of Conduct Consultation Paper, https://www.aada.asn.au/wp-content/uploads/2023/10/2023.09.29-Franchising-Code-of-Conduct-Review_Final.pdf

5 - AHG WA (2015) PTY LTD T/A MERCEDES-BENZ PERTH AND WESTPOINT STAR MERCEDES-BENZ and OTHERS And MERCEDES-BENZ AUSTRALIA/PACIFIC PTY LTD

ATTACHMENT A: MERCEDES-BENZ DEALER ACTION - CASE STUDY

Mercedes-Benz Australia (MBAuP) changed its business model from the traditional franchise model to an agency model. Almost 80% of MBAuP Dealers objected to the way in which the change to the business model was brought about, launching an action in the Federal Court of Australia. Among their claims was that MBAuP engaged in unconscionable conduct in the way it treated its Dealers.

All claims against MBAuP were dismissed, but in handing down his judgement Justice Jonathan Beach said, “that the applicants were successful on many issues of fact but lost on the law.”

He went on to state that “the applicants’ strongest case, although unsuccessful, concerned statutory unconscionable conduct”.

In the publicly available judgement, Justice Beach listed off a series of behaviours MBAuP, including:

- MBAuP cherry-picked the best bits of the dealers’ businesses on which the agency model was imposed and left the dealers with less desirable features.
- The dealers ultimately had a lack of choice concerning the terms of the agency agreements. Ultimately, they were presented on a take it or leave it basis they were given little time to negotiate the final form of the agency agreements and the associated agreements.
- There was no meaningful negotiation that the new model to be imposed would be an agency model.
- And on the main commission aspects, in my view MBAuP and MBAG ratcheted this down as low as they thought that they could get away with.
- I accept that the dealers were ultimately placed in a position of situational disadvantage and possibly constitutional disadvantage in terms of the agency model.
- MBAuP did not consider the individual circumstances of dealers. Moreover, it had little regard for the top 30% of dealers who were likely to suffer under the agency model. It noted that effect but had no sympathy for it.
- There were various themes that from time to time MBAuP put to dealers that were either exaggerated or turned out to be incorrect.
- It was put that the substantial reason justifying the agency model was because of the problem of disruptors, aggregators and future on-line transactions. These so-called concerns were also used in an effort to spook the dealers.
- MBAuP persistently ran the line that a concern was the intra-brand discounting between dealers and that the agency model was designed to avoid this. But the reality was that most of the intra-brand discounting was brought about by MBAuP’s and MBAG’s conduct in causing over-supply to increase market share and also the incentives to discount that MBAuP itself created flowing from its commission structure with the dealers.

Despite, these assertions, Justice Beach still decided that this behaviour did not amount to statutory unconscionable conduct, reinforcing the very high bar needed to prove such an offence as demonstrated by other cases in the franchising sector such as the Pizza Hut case and ACCC's undertaking with the Retail Food Group.

***Note the above material is taken from Justice Beach's judgement in AHG WA (2015) PTY LTD T/A MERCEDES-BENZ PERTH AND WESTPOINT STAR MERCEDES-BENZ and OTHERS And MERCEDES-BENZ AUSTRALIA/PACIFIC PTY LTD**



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