AADA
AUSTRALIAN AUTOMOTIVE
DEALER ASSOCIATION

AADA RESPONSE - UNFAIR TRADING PRACTICES PROTECTIONS FOR SMALL BUSINESSES

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EXECUTIVE SUMMARY

The Australian Automotive Dealer Association (AADA) welcomes the opportunity to provide a submission in response to the 'Unfair trading practices protections for small businesses' consultation paper. The AADA strongly supports the introduction of a broad statutory prohibition on unfair trading practices (UTPs) and submits that such protections must extend to all franchisees.

The AADA is the peak industry advocacy body exclusively representing franchised new car and truck dealers in Australia. There are over 3,900 car and truck dealerships, ranging from family-owned small businesses to larger and publicly owned businesses operating in regional areas and capital cities across the country. The new vehicle retailing sector employs more than 64,000 people including approximately 7,500 apprentices, contributes over $21.5 billion to the national economy, has a total turnover/sale of $91.3 billion and generates in excess of $8.2 billion in tax/duty revenue.

The consultation reflects an important step in the Government's commitment to addressing power imbalances within franchise relationships and ensuring that dealers receive appropriate protection from unfair commercial conduct. While extending protections to small businesses when acting as consumers may provide important additional safeguards, that approach would not address the structural issues arising within franchise relationships that form the focus of this submission. As the Prime Minister recently observed, "in order to protect consumers from unfair practices, we have to protect dealers as well."

Australia has well-established frameworks regulating business-to-business conduct, which perform an important role in regulating commercial relationships and provide protections against a range of unfair practices. However, as the consultation paper recognises, they do not address every form of commercially harmful conduct. Businesses operating within relationships characterised by significant power imbalances may continue to experience substantial commercial detriment despite compliance with existing legal obligations.

The automotive retail sector provides one of the clearest and most compelling examples of this broader policy issue. Automotive dealers commit significant long-term capital to land, buildings, facilities, equipment, technology and staff in order to establish and operate businesses under a manufacturer's brand. Those investments are made on the expectation of an ongoing commercial relationship, yet many of the commercial decisions that ultimately determine the value and viability of those businesses remain with the manufacturer. As a result, dealerships generating substantial annual turnover may nevertheless remain commercially vulnerable despite appearing significant by traditional measures of business size. Dealers carry much of the commercial risk, while retaining limited influence over many of the decisions that most directly affect the success of their business, and it is this disconnect between commercial dependency and legal protection that sits at the centre of this consultation.

The Franchising Code of Conduct, the unfair contract terms regime and the unconscionable conduct provisions each perform an important function within Australia's broader regulatory framework. Together, however, they are directed towards particular forms of conduct and are not designed to address every circumstance in which structural dependency may be used to the commercial detriment of a franchisee. As the dealer-manufacturer relationship continues to evolve through changing business models and increasing manufacturer control over technology, digital platforms and customer relationships, that disconnect becomes more pronounced and reinforces the need for a framework capable of responding to commercially harmful conduct before it reaches the high thresholds required under existing law.

The experience of automotive franchising demonstrates that the policy issue Treasury is seeking to address is not theoretical. It is occurring in practice despite the existence of important legal protections and provides a compelling case for reform. The AADA supports reforms that address this regulatory gap and provide effective protection against commercially harmful conduct arising from structural dependency.

INTRODUCTION

The Australian Government's consultation paper 'Unfair trading practices protections for small businesses' reflects an important recognition that modern commercial markets increasingly generate forms of harmful conduct that existing legal frameworks do not adequately address. Treasury acknowledges throughout the consultation paper that current business regulation does not always sufficiently protect commercial participants operating in relationships characterised by significant bargaining power disparity.

Particularly relevant is Treasury's recognition that certain harmful practices occur where one contracting party exercises disproportionate leverage, where meaningful negotiation does not exist and where conduct falls below the threshold currently required to establish legal wrongdoing under existing statutory protections like unconscionable conduct.

The AADA submits that franchised automotive retail relationships demonstrate precisely this commercial reality. Dealers across Australia operate under franchise arrangements with some of the world's largest multinational corporations, including manufacturers such as Mercedes-Benz, Toyota, Ford, Volkswagen and an increasing number of emerging global manufacturers entering the Australian market from China.

Unlike ordinary commercial supply relationships, automotive franchising involves substantial long-term capital investment coupled with extreme economic dependency. Dealers routinely commit millions of dollars toward land acquisition, showroom development, workshop construction, specialised tooling, diagnostic technology, technician training, inventory financing and ongoing compliance with manufacturer-imposed operational standards.

Despite this investment, dealers possess little practical ability to negotiate the terms governing the relationship. The imbalance is structural rather than incidental.

The manufacturer determines the contractual framework, controls supply allocation, dictates facility standards, regulates operational processes, and increasingly controls the digital systems through which dealerships conduct business. The result is a commercial relationship fundamentally different from ordinary contractual bargaining.

AADA RECOMMENDATIONS

INTRODUCE A PROHIBITION ON UNFAIR TRADING PRACTICES THAT EXTENDS TO ALL FRANCHISEES

- The AADA recommends that the proposed prohibition on unfair trading practices apply to all franchisees, without limitation by reference to turnover, employee numbers or other traditional small business thresholds.

RECOGNISE STRUCTURAL DEPENDENCY AS THE RELEVANT POLICY CONSIDERATION

- The AADA recommends that the proposed framework focus on commercial dependency and bargaining power rather than business size when determining the availability of protections.

ADDRESS COMMERCIALLY HARMFUL CONDUCT THAT FALLS OUTSIDE EXISTING LEGAL PROTECTIONS

- The AADA recommends that the proposed prohibition be directed toward commercially harmful conduct arising from structural dependency that is not adequately addressed under existing legislative frameworks.

ENSURE THE FRAMEWORK INCLUDES EFFECTIVE ENFORCEMENT MECHANISMS

- The AADA recommends that any UTP framework include enforcement mechanisms capable of addressing systemic conduct, including representative standing for recognised industry associations where widespread unfair conduct affects franchise networks.

ADOPT THE MOST APPROPRIATE LEGISLATIVE MECHANISM TO ACHIEVE THE POLICY OBJECTIVE

- The AADA recommends that Government adopt the legislative mechanism best capable of delivering effective protection against unfair trading practices within franchise relationships. Whether implemented through a broad UTP framework, industry-specific regulation or another legislative mechanism, the objective should remain the same: addressing commercially harmful conduct arising from structural dependency.

RATIONALE FOR UTP REFORM

Australia has a well-established framework regulating business-to-business conduct, including the Competition and Consumer Act 2010 (Cth), the unfair contract terms regime and the Franchising Code of Conduct (the Code). These frameworks provide important protections and continue to play a critical role in regulating commercial relationships.

However, as noted in the consultation paper, commercially harmful conduct can continue to occur despite these protections, particularly in commercial relationships characterised by structural dependency and significant power imbalances. In those circumstances, conduct may cause substantial commercial detriment while remaining technically lawful because it falls outside the scope of existing legislative protections.

The automotive franchising sector provides a compelling example of this broader issue, where dealers make significant long term investments in their businesses operating under a manufacturer's brand and become increasingly reliant on that ongoing relationship. While this does not mean every dealer-manufacturer relationship is unfair, it does create circumstances where commercially harmful conduct may occur despite existing legal protections.

Examples observed within automotive franchising frequently include:

- unilateral alteration of remuneration frameworks;
- mandatory capital expenditure requirements imposed shortly before contract expiry;
- restructuring of distribution models after substantial dealer investment has already been committed;
- reduced dealer autonomy through manufacturer-controlled operational systems; and
- commercial pressure applied through non-renewal uncertainty and supply allocation decisions.

While this conduct can result in significant commercial harm for franchisees, it will often fall outside the scope of Australia's existing legislative framework because it does not breach an existing prohibition, leaving businesses with limited legal recourse despite the commercial consequences. It is this gap between conduct that is commercially harmful and conduct that is currently unlawful that the proposed UTP reforms seek to address, with the experience of automotive franchising providing a compelling example of why reform is required.

THE FRANCHISING CODE OF CONDUCT REMAINS PROCEDURAL RATHER THAN SUBSTANTIVE

The AADA acknowledges the important role played by the Franchising Code and supports efforts by government to improve franchise regulation. However, the Code remains fundamentally limited in both design and practical operation, with the principal limitation of the existing framework being that it regulates process rather than substantive fairness.

The Code focuses primarily on disclosure obligations, dispute resolution mechanisms, termination procedures and general obligations requiring parties to act in good faith. While these are important safeguards, they do not directly prohibit conduct which, although procedurally compliant, may nonetheless be commercially unfair or unjust.

This distinction is particularly significant within automotive franchising, where manufacturers may fully comply with the procedural requirements of the Code while simultaneously imposing commercial conditions that substantially diminish dealer profitability or transfer enterprise value away from the franchisee. Although recent amendments have strengthened aspects of the Code, they do little to address this type of conduct because the focus remains on procedural compliance rather than the substantive fairness of the commercial outcome.

First, the Code remains heavily complaint driven. Enforcement frequently depends upon franchisees being willing to initiate formal disputes against their franchisor. Within the automotive sector, this is often commercially unrealistic. Dealers remain dependent upon manufacturers for future allocation decisions, franchise renewal, warranty reimbursement approval and ongoing commercial support, which creates an obvious enforcement imbalance.

Second, the statutory obligation to act in good faith has proven limited in practical effect. Australian courts have generally interpreted good faith obligations cautiously. Conduct may be commercially harsh, strategically coercive and economically damaging while remaining technically consistent with the legal concept of good faith, as illustrated by the Mercedes-Benz litigation discussed later in this submission.

Third, the Code does not directly prohibit unfair trading practices themselves, it regulates how parties conduct the relationship. It does not prevent conduct that is commercially unfair but nevertheless complies with the procedural requirements of the Code.

The consultation paper recognises that commercially harmful conduct frequently occurs below the threshold required to establish legal wrongdoing under existing frameworks. The automotive industry demonstrates this problem clearly. The existence of the Franchising Code should therefore not be regarded as evidence that further reform is unnecessary. Rather, the persistence of harmful conduct despite the Code demonstrates precisely why broader reform is required.

EXISTING UNCONSCIONABLE CONDUCT PROTECTIONS ESTABLISH AN UNNECESSARILY HIGH THRESHOLD

Australia's existing unconscionable conduct protections under the Competition and Consumer Act 2010 (Cth) remain an important safeguard against extreme forms of exploitation. However, these provisions are directed towards a fundamentally different category of conduct than the unfair trading practices currently under consideration. Unconscionability has historically been interpreted by Australian courts as requiring conduct that departs markedly from acceptable commercial standards and is considerably more serious than ordinary commercial unfairness.

This creates an important regulatory gap, where conduct may be economically coercive, strategically exploitative and commercially harmful while falling well below the legal threshold required to establish unconscionability.

In the context of automotive franchising, a manufacturer may impose operational conditions that substantially diminish dealer profitability, alter supply allocation systems in ways materially affecting business performance, or require dealers to undertake substantial capital expenditure programs linked to future franchise continuation. Each example may create serious commercial disadvantage without necessarily reaching the threshold currently required to establish unconscionability.

Former Chairman of the Australian Competition and Consumer Commission, Rod Sims, repeatedly observed during his tenure that harmful market conduct frequently occurs in ways existing competition law struggles to adequately regulate. This observation remains directly relevant to the current consultation. The absence of legal remedy does not necessarily indicate fairness. It may simply indicate that the law has failed to keep pace with evolving commercial reality.

The automotive industry provides a practical example of why unconscionability alone cannot address all forms of commercially harmful conduct. The proposed UTP reforms are intended to regulate this category of behaviour precisely, recognising that conduct need not be unconscionable before legislative intervention is warranted.

THE MERCEDES-BENZ LITIGATION DEMONSTRATES THE REGULATORY GAP

Perhaps the clearest recent example demonstrating the inadequacy of Australia's existing legal framework in regulating commercially harmful conduct is the dispute arising from the decision by Mercedes-Benz Australia to transition its dealer network toward an agency distribution model.

The litigation represented one of the most significant legal disputes within Australia's automotive sector in recent years and exposed fundamental weaknesses within Australia's franchise protection framework. Historically, dealers purchased inventory directly from the manufacturer, sold vehicles independently and generated revenue through negotiated retail margins.

The agency transition fundamentally altered this relationship. Under the new structure, control over vehicle pricing, customer transactions and much of the consumer relationship shifted directly to the manufacturer. Dealers were effectively reduced to performing delivery and service functions under a remuneration framework determined by the manufacturer.

Dealers argued that this transition materially reduced the value of their businesses and appropriated enterprise value that had been built through decades of dealer investment in local markets, customer development and physical infrastructure. The litigation ultimately failed. However, the significance of the case lies not simply in its outcome. Rather, it demonstrates a broader legal problem. A group of franchisees experienced substantial commercial disadvantage arising directly from unilateral restructuring imposed by a far more powerful contracting party.

The AADA has consistently maintained that the transition to an agency model was not, of itself, unlawful, but rather, the significance of the litigation lies in demonstrating how conduct capable of having significant commercial consequences for franchisees may nevertheless remain lawful under Australia's existing legislative framework. This is precisely the regulatory gap UTP should seek to address.

JUSTICE BEACH'S OBSERVATIONS CAPTURE THE STRUCTURAL REALITY OF AUTOMOTIVE FRANCHISING

One of the most important aspects of the Mercedes-Benz litigation was judicial recognition of the practical imbalance between manufacturers and dealers. During proceedings, Justice Jonathan Beach observed that negotiations between the parties appeared focused largely on what he described as "rats and mice issues" rather than substantive commercial matters.[1] This observation is deeply significant.

It reflects a broader structural reality recognised across automotive franchising. Manufacturers frequently engage in consultation processes with dealers. However, these discussions often concern peripheral operational matters while fundamental commercial decisions remain entirely controlled by the manufacturer.[2]

Dealers may be consulted regarding implementation details. They are rarely capable of influencing strategic decisions affecting the long-term economic structure of the relationship. This creates the appearance of negotiation without genuine bargaining power. Justice Beach's observation captured an uncomfortable but important truth. Participation in consultation should not be mistaken for equality of bargaining position.

The Mercedes-Benz case demonstrates that even where courts recognise practical inequality, the absence of an appropriate statutory framework may prevent meaningful legal remedy. This is evidenced by Justice Beach acknowledging the dealers put forward a "powerful and thorough" factual case regarding their distress, but ruled the law was not in their favor.

AUTOMOTIVE DEALERS REMAIN STRUCTURALLY VULNERABLE REGARDLESS OF BUSINESS SIZE

The consultation paper raises an important question concerning whether protections should extend beyond businesses currently captured by existing small business definitions. The AADA submits that the automotive sector demonstrates why traditional turnover thresholds are fundamentally inadequate when assessing commercial vulnerability. Automotive dealerships frequently generate annual turnover figures that may substantially exceed thresholds traditionally associated with small business regulations. However, turnover within automotive retail bears little relationship to actual bargaining power.

Automotive dealer businesses operate within low-margin environments. It is not uncommon for dealerships generating annual turnover exceeding $100 million to operate on net profitability margins below three per cent. At the same time, these businesses carry substantial fixed operational obligations including workforce costs, inventory financing, manufacturer compliance expenditure, property costs, warranty administration obligations and substantial technology infrastructure requirements. Superficially, such businesses may appear financially significant. In reality, they remain commercially dependent upon manufacturers possessing dramatically superior bargaining power.

A multinational manufacturer generating global revenues more than $200 billion retains unilateral authority over matters fundamental to dealer survival, including:

- allocation of product supply;
- franchise renewal decisions;
- warranty reimbursement frameworks;
- facility compliance requirements;
- access to proprietary software systems;
- approval of future investment programs; and
- access to consumer and vehicle data.

The consultation framework correctly focuses on bargaining imbalance and dependency relationships rather than simplistic measures of business size. The AADA submits that excluding franchisees because turnover exceeds thresholds would undermine the very purpose of the proposed reforms. The relevant question is not whether a dealer appears large, it is whether that dealer possesses genuine bargaining power when dealing with a multinational manufacturer. In the automotive sector, the answer is plainly no.

AUTOMOTIVE FRANCHISE RELATIONSHIPS DO NOT REFLECT GENUINE FREEDOM OF CONTRACT

One argument advanced against broad unfair trading protections is that commercial parties should remain free to negotiate contractual arrangements without legislative interference. The AADA submits that this argument does not accurately reflect the practical realities of automotive franchising.

The principle of freedom of contract assumes relative equality between contracting parties and genuine capacity to negotiate terms. That assumption does not apply in automotive franchise relationships. Dealer agreements are almost universally standard form contracts drafted entirely by manufacturers and presented on a take-it-or-leave-it basis. Dealers possess no realistic capacity to negotiate substantive terms.

Manufacturers routinely reserve broad contractual rights, permitting unilateral operational changes during the life of the agreement.

Increasingly, dealers are confronted with contractual frameworks allowing manufacturers to impose:

› revised facility investment obligations;
› amended remuneration structures;
› altered performance metrics;
› changes to distribution architecture;
› revised supply allocation systems; and
› shortened contract periods creating long-term commercial uncertainty.

In practical terms, refusal to accept such conditions may jeopardise future access to supply or result in franchise non-renewal. This cannot properly be characterised as ordinary contractual bargaining. Rather, it reflects a relationship of economic dependency in which one party exercises overwhelming structural leverage.

These characteristics demonstrate why extending UTP protections to franchisees does not represent an unwarranted interference with contractual freedom. Where bargaining conditions are fundamentally unequal, freedom of contract becomes legal fiction rather than an economic reality.

DEALERS MAKE LONG TERM INVESTMENTS UNDER MANUFACTURER-CONTROLLED BUSINESS MODELS

The AADA considers that one of the defining characteristics of automotive franchising is the level of long-term investment required of dealers in businesses operating under manufacturer-controlled distribution systems.

Unlike ordinary franchise relationships, automotive dealers are routinely required to commit substantial capital toward infrastructure investments dictated almost entirely by the manufacturer.

These investments frequently include:

- leasing of strategically located commercial property;
- construction of manufacturer-prescribed/approved retail facilities;
- workshop development and servicing infrastructure;
- electric vehicle charging installations;
- specialised diagnostic equipment;
- manufacturer-specific tooling requirements;
- workforce training programs;
- Substantial replacement parts inventories at stock levels determined by the manufacturer; and
- branding redevelopment programs mandated by global standards.

Individual dealer investment frequently reaches tens of millions of dollars and is often committed over successive franchise terms. Despite this level of investment, dealers have little practical ability to influence the strategic decisions that ultimately determine the value of those investments, including changes to distribution models, facility standards and broader network strategy.

Dealers also make these investments on the expectation that franchise agreements will be renewed over multiple terms, recognising that the scale of investment is often disproportionate to the return achievable during a single agreement. The value of that investment is therefore inherently linked to the continuation of the franchise relationship.

Manufacturers may fundamentally alter the business model after substantial sunk capital investment has already been committed. Recent global transitions toward agency sales models demonstrate this clearly. Manufacturers increasingly restructure distribution arrangements after dealers have invested substantial capital building the very retail infrastructure upon which the manufacturer’s market presence depends.

These characteristics distinguish automotive franchising from ordinary commercial contracting and demonstrate why franchisees making substantial long-term investments under conditions of structural dependency warrant consideration under the proposed UTP reforms.

EMERGING CHANGES IN AUTOMOTIVE FRANCHISING

The dealer-manufacturer relationship has changed significantly over recent years and continues to evolve. While dealers have traditionally operated as relatively independent businesses responsible for developing local markets, building customer relationships and retailing vehicles on behalf of manufacturers, emerging market conditions are increasingly concentrating commercial control at manufacturer level.

The dealer-manufacturer relationship continues to evolve in response to broader structural changes occurring across the automotive industry. The transition to electric vehicles, the implementation of the New Vehicle Efficiency Standard (NVES), increasing digitisation of vehicle sales and servicing, greater reliance on connected vehicle technology and changing global distribution models are all contributing to a relationship that is increasingly complex and increasingly controlled by manufacturers. While each of these developments presents significant opportunities, they also reinforce existing power imbalances and create new forms of commercial dependency that were not contemplated when many of Australia's existing legislative protections were developed.

As these changes continue to reshape the sector, technology and digital infrastructure have become a particularly clear example of how commercial dependency is increasingly exercised in practice, with manufacturers controlling the systems through which dealerships operate, including sales platforms, customer relationship management systems, diagnostic software, connected vehicle data, warranty administration processes and other critical operational infrastructure.

Manufacturers now frequently exercise control over:

- vehicle pricing and retail transactions (in the case of distribution model changes);
- service pricing;
- customer relationship management systems;
- customer and vehicle data;
- vehicle ordering and supply platforms;
- warranty processing and diagnostic software;
- connected vehicle telematics and over-the-air software updates;
- digital sales platforms and mobile applications;
- subscription-based products and services; and
- financing, insurance and other ancillary products.

This creates a modern form of economic dependency that existing legal frameworks do not adequately recognise. Increasingly, manufacturers control both the transaction itself and the digital ecosystem surrounding the consumer relationship.

Perhaps most importantly, manufacturers increasingly control valuable consumer behavioural data. Historically, dealerships developed long-term customer relationships extending well beyond the initial vehicle sale. Today, connected vehicle systems increasingly allow manufacturers to bypass dealers entirely and interact directly with the customer throughout the ownership lifecycle. This allows manufacturers to progressively appropriate enterprise value historically created by dealer networks.

The consultation paper repeatedly identifies 'information asymmetry' as a central factor contributing to unfair trading practices. The automotive franchising sector demonstrates how technological control has become a modern mechanism through which such asymmetry is created and maintained.

The AADA considers that these developments demonstrate that structural dependency is no longer created solely through contractual arrangements. Increasingly, it is reinforced through proprietary software, customer data and digital infrastructure controlled by manufacturers. The proposed UTP reforms should therefore be sufficiently flexible to recognise these emerging forms of commercial dependency as the dealer-manufacturer relationship continues to evolve.

EXISTING STATE LEGISLATION ALREADY RECOGNISES THAT THE AUTOMOTIVE INDUSTRY REQUIRES ENHANCED STATUTORY PROTECTION

The AADA submits that Australian legislatures have already recognised that the inherent structural power imbalance in the automotive sector gives rise to unique commercial relationships requiring protection beyond ordinary principles of contract law.

A clear example is the *Motor Dealers and Repairers Act 2013*, NSW (MDRA), which establishes a specialised statutory framework governing conduct within the motor vehicle industry and reflects an important legislative principle: certain market relationships within the automotive sector create sufficient imbalance and vulnerability to justify direct statutory intervention. This principle is highly relevant to the current consultation.

The existence of sector-specific legislation regulating conduct within the automotive industry demonstrates that lawmakers have already accepted that ordinary commercial law alone does not adequately protect participants operating within this market. This is particularly significant because the current UTP consultation is founded upon precisely the same policy rationale.

The consultation paper recognises that certain commercial relationships involve bargaining power disparities and forms of harmful conduct not sufficiently addressed by traditional legal frameworks.

The automotive sector has long demonstrated precisely these concerns. If Parliament has already recognised the need for specialised statutory intervention within automotive transactions at the state level, it follows logically that dealer-manufacturer relationships should receive equivalent protection under a national prohibition on unfair trading practices. The existence of state intervention demonstrates an important policy reality. Concerns regarding unfair conduct in automotive markets are not hypothetical. They have already been recognised legislatively.

PART 6 OF THE MOTOR DEALERS AND REPAIRERS ACT DEMONSTRATES LEGISLATIVE RECOGNITION OF UNJUST CONDUCT IN AUTOMOTIVE MARKETS

Part 6 of the MDRA is particularly instructive in understanding why broader national reform is now necessary.

While the Act is commonly understood as establishing licensing and regulatory obligations for dealers and repairers, Part 6 reflects a broader legislative recognition that participants operating within the motor vehicle sector require statutory safeguards designed to prevent unfair or unjust commercial conduct.

The framework moves beyond the traditional assumption that contractual freedom alone is sufficient to regulate commercial relationships within the sector. Instead, it recognises that motor vehicle transactions frequently involve information asymmetry, unequal bargaining power and circumstances in which one party may exercise disproportionate influence over another.

This legislative approach closely mirrors the rationale underpinning the proposed UTP reforms. Importantly, Part 6 demonstrates that Parliament has already accepted a broader regulatory proposition. Namely, that automotive market participants should not be left entirely to ordinary contractual bargaining where structural inequality exists.

The AADA submits that dealer-manufacturer relationships reflect an even stronger case for legislative intervention. Unlike ordinary consumer transactions contemplated under state legislation, automotive franchisees frequently commit tens of millions of dollars toward manufacturer-directed infrastructure investment while remaining contractually dependent upon a far more powerful multinational corporation. The principle underlying Part 6 remains directly applicable.

Where structural imbalance creates conditions in which one party may exercise disproportionate commercial leverage, statutory safeguards become necessary. Federal UTP reform extending protection to franchisees would therefore not represent a novel regulatory departure. It would simply reflect principles already recognised within Australian automotive legislation.

The AADA submits that any new UTP framework must include mechanisms allowing recognised industry bodies to bring representative proceedings where systemic unfair conduct affects franchise networks. This issue is particularly important within automotive retail.

Individual dealers frequently remain unwilling to challenge manufacturers directly, even where significant commercial harm has occurred. This reluctance is entirely rational. Dealers remain economically dependent upon manufacturers for matters fundamental to business continuity, including:

- future model allocation;
- access to product supply;
- warranty reimbursement approval;
- franchise renewal decisions;
- access to proprietary operational systems; and
- future investment approval and commercial support.

Commencing legal action against a manufacturer frequently creates significant commercial risk. Dealers may reasonably fear direct or indirect retaliation affecting future commercial dealings. This creates a serious enforcement problem. Legal rights may exist formally, yet franchisees remain commercially incapable of exercising those rights in practice. In the absence of representative standing, statutory protections risk becoming largely illusory.

The AADA submits that recognised industry associations should be permitted to bring representative proceedings where systemic unfair conduct affects multiple franchisees. This option currently exists in Part 6 of the MDRA and as such should be extended to the new drafting of the UTP laws.

The AADA's experience under Part 6 of the MDRA demonstrates the practical value of representative standing. Appendix A outlines a number of matters in which these powers have been exercised to address issues affecting multiple dealers, without requiring individual franchisees to pursue proceedings themselves.

INTERNATIONAL JURISDICTIONS HAVE RECOGNISED THE NEED FOR STRONGER PROTECTION AGAINST MANUFACTURER CONDUCT

Comparative international experience demonstrates that Australia is not alone in recognising the need for additional protections in franchise relationships characterised by significant power imbalances. A number of comparable jurisdictions have introduced legislative frameworks that provide stronger protections for automotive franchisees than those currently available under Australian law.

United States

The United States provides perhaps the strongest example of legislative protection for automotive dealers. Virtually all states have enacted dedicated motor vehicle franchise legislation regulating manufacturer conduct toward dealers, including restrictions on termination without cause, coercive conduct, unreasonable facility upgrade requirements and retaliation against dealers exercising their legal rights. Importantly, these protections do not depend upon whether a dealer qualifies as a small business. Rather, they recognise the structural dependency inherent in the dealer-manufacturer relationship.

Canada

Several Canadian provinces, including Ontario, provide statutory franchise protections that are broader than those currently available under Australian law. Legislation such as Ontario's Arthur Wishart Act 2000 imposes statutory obligations of fair dealing and provides franchisees with enhanced legal remedies. Like the United States, these protections recognise that franchise relationships involve structural dependency requiring safeguards beyond ordinary commercial contracting.

In addition, the Canadian automotive industry has established the National Automobile Dealer Arbitration Program (NADAP), an independent mediation and arbitration scheme for dealer-manufacturer disputes. NADAP has reportedly resolved more than 70 per cent of disputes through mediation, typically within 30 to 60 days and at minimal cost, demonstrating the value of industry-specific mechanisms that provide dealers with accessible and effective avenues to enforce their rights.

European Union

The European Union has similarly recognised the risks associated with excessive manufacturer control through competition and motor vehicle distribution frameworks. While the legislative approach differs from the United States, it reflects the same underlying policy objective: where concentrated market power enables one party to dictate commercial outcomes, additional regulatory safeguards may be required.

These international examples demonstrate that extending stronger protections to franchisees would not represent a novel or disproportionate regulatory response. Rather, they illustrate a growing recognition that where one party exercises significant structural and economic power over another, additional statutory safeguards may be necessary to ensure fair commercial conduct.

AADA RESPONSES TO THE FOCUS QUESTIONS - UNFAIR TRADING PRACTICES IN BUSINESS-TO-BUSINESS DEALINGS

9. What types of unfair trading practices are occurring in business-to-business dealings, and what harm does this cause small businesses?

In automotive franchising, unfair trading practices most commonly arise in long-term dealer-manufacturer relationships characterised by significant bargaining power imbalance, structural dependency and limited practical ability for dealers to negotiate terms. As outlined in our submission under Rationale for UTP reform, examples include unilateral changes to remuneration frameworks, mandatory capital expenditure shortly before agreement expiry, restructuring of distribution models after dealer investment has been committed, reduced dealer autonomy through manufacturer-controlled systems, and commercial pressure linked to non-renewal uncertainty or product allocation.

These practices can cause significant harm by reducing profitability, undermining enterprise value, increasing sunk-cost exposure and limiting a dealer's ability to compete or plan commercially. Existing protections, including the Franchising Code, unfair contract terms regime and unconscionable conduct provisions, do not adequately address this conduct because much of it may be procedurally compliant or commercially harsh without meeting the high legal threshold for unconscionability.

10. What factors affect whether a small business is likely to be harmed by unfair trading practices in business-to-business dealings (e.g. bargaining power imbalances, whether it is a medium or long-term relationship, whether the small business is a purchaser or supplier, whether an industry code applies)?

The key factors affecting whether a business is likely to be harmed include the degree of bargaining power imbalance, the level of economic dependency, the duration of the relationship, the extent of sunk investment, and whether the stronger party controls essential inputs such as supply, data, systems, renewal rights or remuneration. In automotive franchising, these factors are particularly acute because dealers make substantial long-term investments under manufacturer-controlled business models, as expanded in the sections 'Automotive dealers remain structurally vulnerable regardless of business size' and 'Dealers make long-term investments under manufacturer-controlled business' models'. The existence of an industry code does not remove vulnerability where the code regulates process rather than substantive fairness.

11. If the Government were to introduce an economy-wide unfair trading practices prohibition that applies to business-to-business conduct.

- **What types of conduct should be captured and are there any specific forms of conduct that should be protected against (for example in a 'grey list')? Please provide reasons and evidence.**
- **Should it apply to all business-to-business dealings involving a small business, or just a subset of these (for example, where there is a significant power imbalance between the parties, where there is a medium or long-term relationship between the parties, and/or where the small business is a supplier or purchaser)? Please provide reasons and evidence.**
- **Should there be an exception for conduct that is reasonably necessary to protect the legitimate business interests of the party engaging in it? Please provide reasons and evidence.**
- **Should there be a harm element and, if so, should that harm element include financial and non-financial harm? Please provide reasons and evidence.**
- **What would be the potential costs and benefits? Please provide reasons and evidence. What costs (including time, money, or forgone opportunities) are currently incurred by small businesses in guarding against or attempting to avoid being harmed by unfair trading practices? Please provide examples and evidence.**

The proposed prohibition should capture conduct that exploits structural dependency or a significant imbalance in bargaining power to the commercial detriment of another business, even where that conduct does not breach existing legal protections. While a non-exhaustive 'grey list' of common practices could assist businesses in understanding the intended scope of the legislation, the prohibition should remain principles-based to ensure it can respond to evolving commercial practices. The framework should apply wherever there is structural dependency and a material bargaining power imbalance, rather than being limited by traditional measures of business size. Should a legitimate interests defence be available, it must be objective and narrowly framed so that it cannot be relied upon to justify otherwise unfair conduct. The prohibition should also require harm, with that concept extending beyond direct financial loss to include material commercial detriment such as reduced enterprise value, loss of commercial opportunity or diminished ability to compete. Although some businesses may incur modest compliance costs in reviewing commercial practices, these are likely to be outweighed by the benefits of reducing harmful conduct, increasing confidence to invest, and providing businesses with a practical remedy where existing legal protections do not currently apply.

The experience in New South Wales is instructive. Part 6 of the Motor Dealers and Repairers Act 2013 has contained prohibitions on unjust conduct in automotive markets for many years, yet there is no evidence that these protections have discouraged investment or reduced commercial activity. To the contrary, the Australian automotive market continues to attract significant investment, with numerous new manufacturers entering the market in recent years. This demonstrates that appropriate statutory protections can coexist with a competitive and dynamic commercial environment.

12. Would a new economy-wide unfair trading practices prohibition that applies to business to-business conduct interact with other existing laws and regulations (such as industry codes)? How should any overlap or duplication be managed?

A new economy-wide UTP prohibition should complement, rather than replace, existing regulatory frameworks such as the Franchising Code of Conduct, the unfair contract terms regime and the unconscionable conduct provisions of the Competition and Consumer Act. Each of those frameworks addresses different forms of conduct and serves a distinct purpose. As outlined throughout this submission, the current regulatory gap is that commercially harmful conduct arising from structural dependency may still occur despite compliance with those existing laws. A UTP prohibition would fill that gap rather than duplicate existing protections. The experience of the automotive industry also demonstrates that industry-specific regulation and broader unfair conduct protections can operate effectively together. Part 6 of the Motor Dealers and Repairers Act 2013 (NSW) already provides additional statutory protections against unjust conduct for motor dealers in that State. A national UTP regime would complement, rather than displace, these protections while promoting greater consistency across Australia. Dealers operating outside New South Wales should not have access to a lesser standard of protection simply because of the jurisdiction in which they operate. A nationally consistent framework would ensure businesses across Australia benefit from the same baseline protections against unfair trading practices, while allowing states to retain or introduce additional industry-specific safeguards where appropriate.

13. What costs or impacts would a new economy wide unfair trading practices prohibition that applies to business-to-business conduct have on businesses (e.g. compliance costs, changes to contracting practices or prices) and who would bear these costs? Please provide estimates where possible.

Some businesses may incur compliance costs from reviewing standard form contracts, operational policies, renewal practices, remuneration frameworks and dispute-handling processes. However, these costs should be proportionate and largely borne by businesses with greater bargaining power that are best placed to prevent unfair conduct. In automotive franchising, manufacturers already control the key contractual and operational settings, so any compliance burden would primarily involve ensuring that those settings are not applied in a way that unfairly transfers risk or value to dealers. The benefit would be greater commercial certainty and reduced harm for franchisees who currently bear substantial costs in guarding against unfair conduct, including legal advice, delayed investment, dispute management and forgone commercial opportunities.

As described above, the experience in New South Wales is instructive. Part 6 of the Motor Dealers and Repairers Act 2013 has contained prohibitions on unjust conduct in automotive markets for many years, yet there is no evidence that these protections have discouraged investment or reduced commercial activity.

14. Previous consultations identified barriers that prevent small businesses from enforcing their rights, including cost of legal action, fear of retaliation, and knowledge of rights. How would such barriers affect the effectiveness of any new protection?

Barriers such as legal cost, fear of retaliation and limited practical ability to enforce rights would significantly affect the effectiveness of any new protection unless enforcement mechanisms are carefully designed. As expanded in the submission's discussion of representative standing and Part 6 of the NSW Motor Dealers and Repairers Act, individual dealers may be reluctant to bring claims against manufacturers because they remain dependent on them for product supply, franchise renewal, warranty reimbursement, systems access and future commercial support. For this reason, any UTP framework should include effective enforcement mechanisms, including the ability for recognised industry associations to bring representative proceedings where systemic unfair conduct affects multiple franchisees.

15. Should unfair trading practice protections apply in respect of franchisees who exceed the proposed small business threshold (i.e. franchisees with 100 or more employees and more than $10 million annual turnover)? Please provide reasons, including addressing the questions above where relevant.

Yes. UTP protections should apply to franchisees that exceed the proposed small business threshold because business size is not an accurate proxy for vulnerability in franchise relationships. Automotive dealers may have turnover above $10 million or more than 100 employees, but still operate on low margins and remain structurally dependent on multinational manufacturers for supply, renewal, systems, data, warranty processes and brand participation. As outlined in the section Automotive dealers remain structurally vulnerable regardless of business size, the relevant policy issue is not whether a dealer appears large on paper, but whether it has genuine bargaining power in the relationship, and the lack thereof exposes them to unfair or unjust conduct.

16. If unfair trading protections were to apply to franchisees who exceed the small business threshold, what is the most appropriate mechanism to do this?

The AADA does not consider the precise legislative mechanism to be the critical issue, the chosen approach should effectively address commercially harmful conduct arising from structural dependency within franchise relationships. Whether this is achieved through a broad economy-wide UTP prohibition, industry-specific legislation, or another legislative mechanism, the outcome should be the same: ensuring all franchisees receive appropriate protection from unfair trading practices regardless of turnover, employee numbers or other traditional measures of business size. As outlined throughout this submission, structural dependency and bargaining power, rather than business size, should determine the availability of protection.

CONCLUSION

The consultation paper recognises that commercially harmful conduct can continue to occur despite existing legal protections, particularly in commercial relationships characterised by significant bargaining power imbalances and structural dependency. The AADA considers that the experience of automotive franchising provides a compelling example of this broader regulatory gap.

As this submission has demonstrated, existing protections under the Franchising Code of Conduct, the unfair contract terms regime and the unconscionable conduct provisions of the Competition and Consumer Act 2010 (Cth) perform important functions but do not adequately address conduct that may be commercially harmful while remaining technically lawful. The persistence of these issues demonstrates that the current framework does not always provide an effective remedy where one party possesses overwhelming commercial leverage.

Manufacturers are exercising greater control over pricing, customer data, digital platforms and other aspects of dealership operations, creating new forms of commercial dependency that were not contemplated when many of Australia's existing legislative protections were developed. These developments reinforce the need for a regulatory framework that remains capable of responding to evolving commercial practices.

The AADA supports the introduction of effective protections against unfair trading practices that address this regulatory gap and ensure franchisees are afforded appropriate protection from commercially harmful conduct arising from structural dependency. While the legislative mechanism ultimately adopted is a matter for Government, **the policy objective should remain clear: businesses should not be left without meaningful protection simply because harmful conduct falls outside the scope of existing legal frameworks.**

REFERENCES

1. *AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd* [2023] FCA 1022
2. Commonwealth of Australia, Senate Education and Employment References Committee, *Driving a Fairer Deal: Regulation of the Relationship Between Car Manufacturers and Car Dealers in Australia* (2021) 45.

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