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Director
Consumer Policy and Currency Unit
Market Conduct Division
Treasury
Langton Cres
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Via Email: UCTprotections@treasury.gov.au

Dear Consumer Policy and Currency Unit,

Thank you for recent consultations regarding the exposure draft legislation and explanatory memorandum materials regarding Unfair Contract Terms (UCTs) and the opportunity to provide a further submission for consideration.

The Motor Trades Association of Australia (MTAA) Limited is a peak not-for-profit automotive sector organisation with the State and Territory Motor Trades Associations and Automotive Chambers of Commerce as Members. MTAA Member organisations serve thousands of automotive businesses constituents representing the entire automotive supply chain providing unparalleled capacity to consider and address policy and regulation across discrete automotive industries. The attached submission should be considered alongside any provided individually by MTAA Members.

While supporting the reforms, the following submission provides some recommendations that MTAA and Members believe would enhance the outcomes and intent of the reforms and better address specific concerns of automotive industries and their participants.

Yours Sincerely,

Richard Dudley
Company Secretary
Motor Trades Association of Australia Limited

1. Executive Summary

- MTAA welcomes the exposure draft legislation that cements reforms to Unfair Contract Terms (UCT) through amendments to the Australian Consumer Law and the *Australian Securities and Investments Commission Act 2001*.

- The UCT reforms add to a suite of legislative and regulatory changes over the past 18 months to address detrimental power imbalances in some markets negatively impacting automotive, small business participants.

- The reforms contained in the draft exposure legislation have a direct bearing on the 72,521 automotive businesses that represent Australia's automotive industry, of which over 95 per cent are small and family-owned automotive retail, service, and repair businesses.

- The exposure draft also reflects another milestone in MTAA representations and advocacy on behalf of Members and their thousands of automotive, small business constituents nationally since 2009. These representations helped secure improvements for small businesses and culminated in November 2020 with the agreement of Commonwealth, state and territory consumer ministers to proceed with reforms including:
  - Make UCTs unlawful and give courts the power to impose a civil penalty.
  - Provide more flexible remedies to a court when it declares a contract term unfair by:
    - Giving courts the power to determine an appropriate remedy, rather than the term being automatically void.
    - Clarifying that the remedies available for 'non-party consumers' also apply to 'non-party small businesses'; and
    - Creating a rebuttable presumption provision for UCTs used in similar circumstances.
  - Increase the eligibility threshold for the protections from less than 20 employees to less than 100 employees and introduce an annual turnover threshold of less than $10 million as an alternative threshold for determining eligibility.
  - Remove the requirement for the upfront price payable under a contract to be below a certain threshold in order for the contract to be covered by the UCT protections.
  - Improve clarity around the definition of standard-form contract by providing further certainty on factors such as repeat usage of a contract template and whether the small business had an effective opportunity to negotiate the contract; and
  - Enable certain clauses that include 'minimum standards' or other industry-specific requirements contained in relevant Commonwealth, state or territory legislation to be exempt from the protections.

- The draft legislation is supported, and MTAA believes the contents provide enhanced protections against UCTs. The matters raised in this submission intend to improve clarity, provide additional certainty, and raise the potential for unintended consequences for further consideration before Parliament considers the legislation.

2. Recommendations and rationale

Recommendation 1:

Amend the Bill to disallow parties to file joint submissions and jointly propose declarations and orders to resolve proceedings.

Rationale:

- MTAA Member, the Victorian Automotive Chamber of Commerce (VACC), in a separate submission, proposes an addition to the Treasury Laws Amendment Bill 2021 ('The Bill') to address concerns about stipulations for joint submissions joint declarations and orders that may disadvantage small businesses (Explanatory Draft Materials, under page 9 Summary, point 1.12).

- MTAA agrees consideration should be given to amending the Bill to disallow parties to file joint submissions that have jointly proposed declarations and orders to resolve the proceedings.

- Small business owners deserve the right to enter a fair contract, especially where they have little or no ability to negotiate the contract terms. Where the action is taken against a contract deemed to be unfair, regulators such as the Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC) must not be perceived to conspire through joint submissions to recommend or declare undertakings that may be further accepted by the courts as an acceptance of unfair contract terms in standard form small business contracts.

- Whilst the ACCC and ASIC may act against unfair practices in standard form contracts; whether it be for consumers or the small business community, every effort must be made to remove any perception of working together with a respondent in any claim against the respondent involving contraventions of the ASIC Act or the Australian Consumer Law.

- ASIC, the ACCC and the courts have specific duties conferred upon them by the general law, the ASIC Act and the Australian Consumer Law (ACL) to deter other corporations from entering contracts containing unfair terms.

- The Court especially serves to record their disapproval of contravening conduct and vindicate a claim by the regulators to carry out the duties independently as conferred upon them. As MTAA Member VACC points to in their submission, see *ASIC v Bendigo at [90]; Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405 (ACCC v Coles) at [78].*

Recommendation 2:

In addition to ***'A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term'*** *[page 10 of the Exposure Draft Explanatory Materials]* that the following words are also included ***'and where a court accepts an undertaking'.***

Rationale:

- Under the section titled '*Comparison of key features of the new law and current law, on page 10 of the Exposure Draft Explanatory Materials*,' it states that:
  'A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term'.

- MTAA and Members welcome this addition to the UCT legislation. However, as MTAA Member, VACC has noted in its submission, and the Federation concurs with, courts may rely on accepting undertakings from respondents to refrain from using unfair contract terms rather than imposing pecuniary penalties as shown in recent cases involving UCT law.

- A key example of courts accepting undertakings lies in the recent case of *ASIC vs Bank* of Queensland Limited [2021] FCA 957. In this case, on 12 August 2021, the judgement handed down was that the Bank of Queensland had entered unfair terms into standard form loan contracts with its small business customers after 12 November 2016 (see ASIC link https://bit.ly/3g02koy).

- Page 77/93 point 44 of the judgement states that: 44

> *44. However, ASIC does not contend that the Bank has deployed these terms unfairly. Further, ASIC does not allege that the Bank has relied upon any of the clauses in the Standard Form Contracts in a manner that is unfair, or that has caused any customers detriment or to suffer loss or damage. This application is preventative in nature.*

- VACC argues in its submission and input to MTAA that point 44 of the judgement demonstrates that ASICs intent to litigate against the Bank of Queensland was purely preventative in its nature. Page 66 of the judgement also refers to the joint submissions made in this case. VACC contends, and MTAA concurs with a view that such practice is unacceptable, especially when it is a regulator litigating against a large corporation.

- To deter such practice under the new UCT law, MTAA and Members recommend the addition of the phrase: ***'including if a court accepts an undertaking'*** to that of ***'A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term.'***

Recommendation 3:

Expand Point 1.31 (Explanatory Materials) to include: ***'when proceedings either by a person or a regulator are preventative in nature, and the terms are declared likely to cause a class of persons to suffer loss or damage only, then, and only then is an undertaking appropriate'.***

Rationale:

- Point 1.31 on page 16 of the Exposure Draft Explanatory Materials states that:

> *'Under the Bill, a person will only need to show that the orders will prevent loss and damage that may be caused. If loss and damage has already occurred, then the Court will need to be satisfied that the orders made will remedy this'.*

- In its submission and input to MTAA, VACC believes that the above point should also include a reference to undertakings made by courts where proceedings are ***preventative in nature***. Specifically, only when proceedings either by a person or a regulator (ACCC/ASIC) are preventative in nature, and the terms are declared *likely to cause* a class of persons to suffer loss or damage only, then, and only then is an undertaking appropriate. At all other times, a pecuniary penalty as a remedy available under the ACL and ASIC Act shall be ordered by the Court in addition to making any declaration that a term is unfair to the unfair contract terms regime and in addition to any other remedy the Court sees reasonable to apply.

- VACC went on to detail the case of the *Australian Securities and Investments Commission Vs Bank of Queensland Limited [2021] FCA 957*, the question for the Court when deciding whether an undertaking is appropriate as a *sole* remedy in addition to declaring the term unfair becomes confirmed only once a person(s), ASIC or the ACCC accepts that the respondent *has not* relied upon the impugned terms in a manner that is unfair, or that has caused any persons to suffer loss or damage.

Recommendation 4:

Amend points 1.38 and 1.39 (Remedies available, Exposure Draft Explanatory Materials) to compel regulators and courts to issue written notices to the public about persons who breach the unfair contract term provisions.

Rationale:

- Also relating to the previous recommendation, point 1.38 on page 17 of the Exposure Draft Explanatory Materials states that the Bill will extend the power of the courts and regulators to issue public warning notices about persons who breach the unfair contract term provisions.

- VACC, in its submission and input to MTAA, believes that having this power as an option is not sufficient. MTAA and Members agree with this position. Ideally, this should be a mandatory requirement for both parties to be an effective deterrent. MTAA agrees with VACC's assertion that regulators and courts must provide written public notices about persons who breach the unfair contract term provisions, and not simply if they choose to do so. This would ensure a firm and consistent approach towards publishing written notices to the public by courts and regulators.

- By extension, MTAA and Members support VACC's recommendation that the same argument applies to point 1.39. Regulators such as ASIC and the ACCC must use their powers against persons that have contravened the ACL or ASIC Act, through the use of an unfair contract term, to publish that they have breached the unfair contract term regime on their website or in another public domain.

Recommendation 5:

a) *Large proprietary companies (as defined under section 45A(3) of the Corporations Act 2001) must once every two years have their contract terms in consumer and small business standard form contracts reviewed by an external auditor.*

b) *This requirement applies to all consumer and small business standard form contracts provided by an insurer to a consumer or a business who is a 'fulfilment provider' and must occur every 12 months irrespective of the duration of the contractual term.*

Rationale:

- Point 1.45 on page 18 of the Exposure Draft Explanatory Materials, states that:

> *'The rebuttable presumption is intended to encourage contract issuing parties to maintain thorough monitoring and record keeping of their contracts to ensure that unfair terms are removed from or not included in standard form contracts'.*

While MTAA and Members agree with the principle, it is suggested there be legal compliance for large corporations to submit their standard form contracts for regular review by an external auditor. MTAA suggests such a measure would not place onerous or costly compliance requirements but provide the benefits of assisting with the successful operation of the rebuttable presumption and a source of materials for a reference database.

Recommendation 6:

The Bill and Exposure Draft Explanatory Materials provide further clarity on the treatment of annual business turnover regarding affiliated companies of small businesses.

Recommendation 7:

If the aggregate turnover of all affiliated companies to small businesses is required under the Bill, then the small business contract turnover threshold should be revised from $10 million to $50 million.

Recommendation 8:

That all automotive retail franchisees should qualify for UCT protections, irrespective of any thresholds.

Rationale:

- Recommendations 6, 7, and 8 all relate to thresholds and definitions.
- MTAA and Members applaud the removal of upfront contract value thresholds and the expansion of contract types captured by the reforms in the Bill.
- However, MTAA suggests the new definition of a small business still contains many anomalies that require further clarity, including:

- Aggregated turnover and how or if it applies to the definition of a small business. For example, many car dealerships or automotive workshops appear to fit the new requirements for UCT coverage by employing less than 100 people and having an annual turnover of less than $10 million. However, many small automotive businesses may be connected or affiliated with other entities that operate under the same or separate Australian Business Numbers (ABN's).

- Additional guidance material either in the explanatory memorandum or subsequent guidance material issued by regulators is needed. Specifically, whether aggregated turnover of all the connected entities applies to the definition of a small business, or whether small business affiliations with entities with separate ABNs are excluded for turnover purposes.

- MTAA is concerned that if the annual turnover requirements under the Bill include all small business connections with other entities with separate ABNs, this may push many small business owners above the $10 million annual turnover requirement for UCT protections. A similar argument also applies to the less than 100 employee's thresholds under the Bill.

- MTAA has previously suggested adopting solutions such as those determined by the ACCC in working out those businesses that can take advantage of the class exemption for Collective Bargaining. The ACCC determined, for example, thresholds do not apply to car dealers if they have a franchise or agent agreement. MTAA suggests the adoption of this approach may provide the clarity required.

- MTAA and Members suggest that excluding some dealers, be they car, motorcycle, farm machinery, or industrial equipment, may undermine significant other legislative reforms achieved in the past 18 months.

- MTAA also suggests the definitions and application contained in the Bill do not necessarily alleviate the observations by the ACCC Chair, Rod Simms. The ACCC Chair, in his address to the Council of Small Business Organisations Australia (COSBOA) National Small Business Summit in August 2018, stated concerns about car dealers and other automotive businesses being excluded from UCT protections by the high value of their trading stock. The automotive industries most impacted include:
    - Car dealers
    - Motorcycle dealers
    - Farm machinery and power equipment dealers
    - Commercial vehicle dealers
    - Marine equipment dealers
    - Car rental firms

Recommendation 9:

The exposure draft legislation is further amended to include either:

(a) A lesser pecuniary penalty for a cohort of small businesses, or

(b) An exemption of the UCT law for small businesses and corporations with less than $1 million annual turnover or less than ten employees.

Rationale:

- As referred in earlier recommendations, under the proposed reform, the courts have the discretion on whether or not to impose the minimum $10 million pecuniary penalties on small corporations. Where the offending small corporation has less than 5 employees and an annual turnover of less than $500,000, the courts would deem the penalty to be exorbitantly disproportionate. This puts the courts on a crossroads to either:
    - impose the penalty, which could open the floodgate of liquidation proceedings; or
    - not impose the penalty, which then defeats the primary incentive in the reform to ensure compliance (Refer Recommendations).
- Many small businesses also lack the resources to keep proper records of contract negotiation (i.e. to show that the counterparty has had the opportunity to negotiate the contractual terms). Also, large corporations further have the resources to litigate the matters in Court. As such, there is a stronger incentive to investigate small businesses instead, which could unintendedly form the bulk of future UCT related court cases.

3. Interpretation, unintended consequences

Differences between jurisdiction laws and proposed UCT law reforms

- MTAA suggests potential unintended consequences or possible points of confusion may exist between the draft exposure legislation and some State and Territory jurisdictional laws. These matters MTAA suggests may require additional guidelines or materials to explain such differences. They are worthy of consideration now if only to mitigate the risk of confusion or misinterpretation.
- Examination by MTAA Member, the Motor Traders Association of New South Wales suggests the UCT law may have the following unintended consequences for small automotive businesses in NSW and potentially other jurisdictions.

- For example, MTAA Member the Motor Traders Association of New South Wales (MTA-NSW) with new disclosure obligations under the *NSW Fair Trading Act 1987* (Sections 47A and 47B) that came into force on 1 January 2021.

- These obligations require a business, before supplying the consumer with goods or services, to take reasonable steps to ensure the consumer is aware of the substance and effect of any term or condition relating to the supply of the goods or services that may substantially prejudice interests of the consumer (i.e., "***Substantially Prejudicial Term***" or "***SPT***").

- MTAA understands businesses that have taken 'reasonable steps' to comply with the disclosure requirement under the SPT law in NSW are not absolved of their obligation under the UCT law, even though the SPT law covers much of the same ground as the UCT law. In other words, businesses are still required to remove or amend any UCT in their contracts despite already having a disclosure statement in place to make the consumer aware of any SPT.

- The followings are some important distinctions between the SPT law (NSW) and UCT law:

    - The UCT law applies to *standard form consumer contracts* and *standard form small business contracts* for the supply of goods or services or the sale or grant of an interest in land. The SPT law only applies to consumer contracts of a value not exceeding $100,000. Some contracts are exempt from the UCT law, but the SPT applies to all consumer contracts.

    - Under the UCT law, a term is not unfair when it is reasonably necessary to protect the supplier's interests. However, such a term may still be an SPT, and the supplier would still need to take reasonable steps to disclose it to the consumer.

    - The UCT law applies throughout Australia, but the SPT law applies in NSW only. As such, businesses outside NSW that supply goods or services to consumers within NSW are required to comply with the SPT law.

    - SPT law does not prohibit the inclusion of SPT in consumer contracts or limit their enforceability. Contrariwise, the UCT law can render UCT in contracts void and will soon attract penalties. Therefore, care should be taken to ensure that UCT is not included whereas SPT can be included but must be disclosed.

- MTAA also suggests there should be additional clarity in the explanatory memorandum or subsequent guidelines or assistance material regarding any existing court determinations. MTAA believes it remains unclear in the sections devoted to rebuttable whether previous court determinations (if any) can inform or influence any cases that occur after enactment of the legislation.

4. Conclusion

- MTAA thanks the Treasury Department for the constructive consultations and ongoing interest in policy reform for UCT. The team has remained responsive and inclusive in a long process.

- MTAA and Members remain available always to provide any additional information or clarity regarding this submission's content or any additional automotive industry data or supplementary information.

Ends.