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The Committee Secretary
Senate Economics Reference Committee
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Enquiry into the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015

Thank you for the opportunity to make a submission on the Treasury Legislation Amendment (Small Business and Unfair Contracts Terms) Bill 2015 (**Bill**).

The Federal Chamber of Automotive Industries (FCAI) is the peak industry organisation representing the manufacturers and importers of passenger vehicles, light commercial vehicles and motorcycles in Australia. Our members are listed on our website www.fcai.com.au and this membership represents well over 95% of new passenger, light commercial and motor cycles sold in Australia each year.

This submission focuses upon one particular aspect of the legislation. It is however noted that there is a wide range of complexities that arise from an extension of the existing consumer law protections to small business. The submission by the Franchising Council of Australia has raised quite a few of these issues. A further contrast to rectify is that the draft legislation would appear to potentially provide UCT protections to listed companies and their subsidiaries which is far from the stated aim of protection for small business. These organisations should be clearly and unambiguously excluded from the reach of the legislation.

No exemption – just clarity

1. Our members do not want to be exempted from the Bill; they just want clarity. They understand the focus of the Bill - to offer protection to 'small business' from 'low value, standard form small business contracts' (paragraph 2.7 of the Explanatory Memorandum).
2. The issue is how the Bill defines a 'low value' small business contract.

'Upfront price' is the issue

3. In the Bill a 'small business contract' is of low value if the 'upfront price' is less than the thresholds nominated in the Bill. Our members have no concern about the thresholds as such. Their concern stems from two assumptions that are implicit in the definition of 'upfront price'.

These are that:

- (a) the 'consideration' referred to in the definition of 'upfront price', is passing between the parties to the contract; and
- (b) the consideration has an ascertainable monetary value.

Neither of these assumptions necessarily apply when our members appoint a dealer to distribute their products.

4. For a contract to be enforceable, consideration must pass between the parties to the contract. While the consideration has to have some value, it does not necessarily have to have a monetary value¹.
5. When a dealer enters into a dealer agreement with one of our members, the consideration (in a legal sense) is often not directly for the benefit of our member – for example the dealer might promise to carry out certain work such as renovating facilities. In this instance there is no reason why the cost of carrying out the works, which is paid to a third party, should determine whether or not the contract is of 'low value' and therefore subject to the Bill.
6. In addition, invariably a dealer agreement will require the dealer to promise to represent and promote the distributor's brand to the best of the dealer's ability (or words to that effect). In a legal sense, this promise can also be categorised as 'consideration' and it is likely to fall within the definition of 'upfront price'. The issue – and our members' concern – is how will this promise be valued for the purposes of determining the 'upfront price'? In our view, the simple answer is that the Bill is not intended to capture this type of consideration: it is only concerned with consideration which has a monetary value.

A suggested solution

7. This issue can be addressed by some relatively minor amendments to the definition of 'upfront price' as shown below.
8. It might be that there is a reluctance to amend the current definition of 'upfront price', given that it applies to other provisions in the Australian Consumer Law. If so, a separate definition, in the same form as that below, could be incorporated into the Bill to apply to small business contracts.

'Upfront price payable under a contract is the amount of money (which must be more than zero) consideration that:

- a. is provided or is to be provided by one party to another party to the contract, for the supply, sale or grant under the contract; and
- b. is disclosed at or before the time the contract is entered into;

¹ This is acknowledged in para 1.21 of the EM which provides that:

'Further clarification of this is provided in the TPA Bill 2010 explanatory memorandum, at paragraph 2.68: 'Consideration includes any amount or thing provided as consideration for the supply of a good, service, financial service, financial product or a grant of land.....'

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.'

We would be pleased to provide more detailed analysis and legal opinion if this would be of benefit to the Committee. Please contact me on [REDACTED] if you have any questions.

Yours sincerely,

Tony Weber
Chief Executive