



21 December 2018

Manager
Unfair Contract Terms Review
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

Email: consumerlaw@treasury.gov.au

To Manager

Re - *Review of Unfair Contract Term Protections for Small Business*

1. Introduction

1.1 The Motor Trades Association Queensland (MTA Queensland or the Association) responds to The Treasury's invitation for submissions to its Review of *Unfair Contract Term Protections for Small Business* Discussion Paper (the Review). The MTA Queensland's comments are submitted on behalf of its constituent divisions and are confined to issues which relate to the interests of Queensland's automotive value chain which inter alia includes: franchised new car dealers, independent mechanical and motor body repairers, recyclers and other discrete automotive technology and service providers.

1.2 The Review is timely, particularly in view of the Australian Competition and Consumer Commission (ACCC) Chairman Rod Sims' statements that 'the unfair contract law needs to be strengthened with tougher penalties introduced for breaking it. ... there was little the ACCC can do to hold big businesses to account for prior conduct and it cannot issue infringement notices for unfair contract terms (Waters, C, "Deeply flawed: Rod Sims calls for change to unfair contract law", Sydney Morning Herald, 31 August, 2018). The ACCC Chairman's statements regarding unfair contract law has the Association's in principal support.

1.3 The Association inadvertently omitted to respond to the invitation to lodge a submission to the June 2018 Proposal Paper, '*Extending unfair contracts protection to insurance contracts.*' This omission is regretted as we have been contributors on this matter by various agencies since 2010 including: **the ACCC's, the Australian Securities and Investment Commission's and State and Territory Consumer Protection Agencies' draft publication '*Australian Consumer Law: A guide to unfair contract terms*'.**

1.4 The review of the 'unfair contract term protection for small business provides the opportunity to present the following factors on behalf of the automotive value chain in support of the extension of the 'unfair terms' in standard form contracts to apply to insurance contracts in respect of small and medium enterprises (SMEs)

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2. Preamble

2.1 The MTA Queensland has supported the broadening and widening of the application of the principal that small to medium enterprises (SMEs) can seek relief from 'unfair clauses' in standard form business contracts to include standard form insurance contracts since the inception of this proposal.

3 The role of insurance

3.1 Access to effective and certain insurance coverage provide a critical risk management facility for automotive value chain SMEs. General and specific purpose insurance policies allow these businesses to contain their risk exposures to manageable levels, and to ensure that risk remains below risk appetite and financial exposure is mitigated within acceptable norms.

3.2 Australia's economy is in transition from reliance on resource exports to drive growth, to greater dependence on a broad base of SMEs generating growth employment and investment. The ability to manage risk exposure by the acquisition of effective insurance products that are both cost effective, but importantly, have certainty in indemnifying identified risk - is likely to increase.

3.3 In the instance of the automotive value chain, the technology revolution with the implementation of electric powered motor vehicles and autonomously controlled vehicles is likely to require advances in the design of insurance products to manage the risks that will be created for both SMEs and consumers.

3.4 The introduction of the new automotive technologies is likely to involve new technology definitions in Product Description Statements (PDS). The interpretations of these technological terms are likely to take some debate before they are standardised and their exact meanings enshrined in legal precedent or dispute resolution conventions. It appears therefore, important that the 'unfair terms' provision be extended to insurance to provide a mechanism to resolve any ambiguities in the interpretation of technology in the PDS during the transition from conventionally powered vehicles to electrically powered vehicles and during ramp up to the wider use of autonomously driven car technologies.

3.5 In these situations, it appears particularly germane that the effectiveness of the risk mitigation indemnities that insurance policies provide for both SMEs and the motoring public are not depreciated or devalued. Such a devaluation by the inclusion of and recourse to 'unfair terms' in insurance product policies purchased by business or motorists, whether unintended or not, should be remedied by the provision of statutory or regulatory relief as a last resort.

4 Insurance as a commodity

4.1 Insurance for SMEs in the automotive value chain is an intangible commodity that is purchased specifically to manage risk exposure. In this instance, the insurance policy's cost benefit is assessed by comparing specification and price. In most cases the architecture of the indemnity and the dimensions of the risk underwriting are specified in the PDS. The PDS forms a part of contemporary insurance policies and needs to provide certainty for the policy holder. Any subsequent claim disputes need to be settled in a timely matter between parties to the contract with the business or consumer having a right to seek a statutory resolution by way of relief from any 'terms' which are ambiguous or depreciate or devalue the product for purposes for which it has been acquired.

4.2 In respect of pricing, the MTA Queensland would simply support full pricing transparency which requires any and all broking fees or any other third-party payment connected to the purchase of any insurance instrument to be revealed at the time the product price is disclosed to the purchaser. This is required so that the real cost benefit of a policy can be determined and its real value compared.

4.3 Insurance as a commodity or a product is differentiated by being intangible without a physical form, and because its impact and incidence usually involves third parties that are prescribed as beneficiaries. These are unknown at the time the policy is concluded between the contacting parties. The provision of relief from unfair terms is likely to protect the position of the SME involved in any claim and is likely to have a flow on to the ultimate beneficiary claiming damages. In the case of the automotive value chain this is most likely to be a member of the public.

5. Dispute resolution

5.1` The automotive value chain's participants are both purchasers of insurance products to mitigate the commercial risk exposures of their businesses and retailers of insurance policies representing insurance instruments created by policy originators. Mainly, this is to meet the demand of consumers purchasing new cars requiring comprehensive indemnity cover for their acquisitions. In respect of the insurance instruments the automotive sector purchases, a mechanism to resolve disputes arising from clauses in standard form contracts that depreciate the scope of an insurance asset to manage risk exposure would help maintain equity and support a fair valuation of insurance assets.

5.2 Similarly, the consumer equity of insurance products retailed by the automotive value chain would be enhanced by recourse to a mechanism that provides timely and cost-effective relief from unfair terms in standard form contracts.

5.3 The MTA Queensland requests that detailed consideration be given to the dispute resolution mechanism that will accompany an extension of the 'unfair terms' provision to insurance contracts. The provision of such a relief mechanism would have limited effect unless there was a cost-effective graduated mechanism for resolving disputes. The Association would strongly favour a process which settles matters by arbitration in the first instance by the Small Business and Family Enterprise Ombudsman's Office directly or by the appointment of a low-cost arbitrator. The process should have an escalation competence with more severe matters with extensive financial consequences being referred to a formal tribunal and subsequently to the court system.

5.4 The denial of damages compensation due to the cost of dispute settlement is an important issue. Ultimately this denial can have disastrous consequences for the SME and also impact any third party which has suffered damages and is the eventual beneficiary of an insurance claim.

6 Enforcement

6.1 The MTA Queensland submits that if the 'unfair terms' provision is extended to insurance contracts; any finding of unfair contractual terminology be required to be published so that SMEs are aware of such precedents and interpretations. Further, insurance providers be required to notify policy holders and make amendments to their PDSs to reflect any resolution or dispute settlements that clarify contract terms that are commonly or widely used in insurance policies.

6.2 In addition to the notification, the Insurance Council of Australia should be required to notify its members when an 'unfair term' in a standard form contract dispute is resolved in favour of the policy holder. This should apply whether this resolution is under the aegis of an arbitrator or by the decision of the tribunal or results from a court's ruling.

6.3 If policies continue to include 'unfair terms' that have been the subject of a dispute that has been resolved in favour of the policy holder, such behaviour should attract a suitable enforcement protocol.

7. Conclusion

7.1 Insurance commodities serve an important role in the operation of the automotive value chain. The real value to an SME is the interpretation of the PDS product specification of a policy which determines the real extent of the risk mitigation that has been purchased. It would seem incongruous that the tangible products an SME purchases by contract are provided statutory consumer protection; but that an intangible commodity which is important in managing risk exposure, is not accorded similar treatment.

7.2 The MTA Queensland strongly supports the extension of 'unfair terms' in standard form contracts to cover insurance contracts. This initiative would appear to have beneficial consequences for the motoring public as well as supporting the technology transformation the automotive chain is facing.

7.3 The improved certainty in managing the risks SMEs face is likely to support the micro-economic transformation to a more broadly-based Australian economy being pursued by the Government.

7.4 We would be please to provide further comment on any matters in our submission that may require further clarification or amplification.

8 Background

8.1 The MTA Queensland is the peak organisation in the State representing the specific interests of businesses in the retail, repair and service sector of Queensland's automotive industry located in the State. There are some 15,500 automotive value chain businesses employing approximately 88,500 persons generating in excess of \$20 billion annually. It is an industrial association of employers incorporated pursuant to the *Fair Work Act* 2009. The Association represents and promotes issues of relevance to the automotive industries to all levels of Government and within Queensland's economic structure.

8.2 Australia's first automotive hub, the MTA/Q, has been established in specially prepared space at the corporate office. The hub is an eco-system that supports innovation for the automotive industry.

8.3 The Association is the leading automotive training provider in Queensland offering nationally recognised training, covering technical, retail and the aftermarket phases of the motor trades industry through the MTA Institute - a registered training organisation. It is the largest automotive apprentice trainer in Queensland employing trainers geographically dispersed from Cairns to the Gold Coast and Toowoomba and Emerald. The MTA Institute last financial year accredited courses to in excess of 1,600 apprentices and trainees.

Thank you for your deliberation.

Yours sincerely

A handwritten signature in black ink, appearing to read "Brett Dale". The signature is written in a cursive style with a small flourish at the end.

Dr Brett Dale DBA
Group Chief Executive

MTA Queensland