

Motor Trades Association of Australia

SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Thank you for the opportunity to respond to the Government's discussion paper on the proposed new arrangements for Australia's national consumer law. The comments presented below are made on behalf of the Motor Trades Association of Australia (MTAA).

MTAA is the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry. The Association represents the interests, at the national level, of over 100,000 retail motor trade businesses with a combined turnover of over \$160 billion and which employ over 308,000 people. The Association is a federation of the various state and territory motor trades associations, as well as the Service Station Association (SSA) and the Australian Automobile Dealers Association (AADA). MTAA also has a number of Affiliated Trade Associations (ATAs), which represent particular sub-sectors of the retail motor trades ranging from motor vehicle body repair to automotive parts recycling. Those ATAs are as follows:

- Australian Motor Body Repairers Association (AMBRA)*
- Australian Motorcycle Industry Association (AMIA)*
- Australian National Radiator Repairers Association (ANRRA)*
- Australian National Towing Association (ANTA)*
- Australian Service Station and Convenience Store Association (ASSCSA)*
- Australian Tyre Dealers and Retreaders Association (ATDRA)*
- Auto Parts Recyclers Association of Australia (APRAA)*
- Automotive Repairers Association of Australia (ARAA)*
- Automotive Transmission Association of Australia (ATAA)*
- Engine Reconditioners Association of Australia (ERA of A)*
- Farm and Industrial Machinery Dealers Association of Australia (FIMDAA)*
- National Brake Specialists Association (NBSA)*
- National Heavy Vehicle Repairers Association (NHVRA)*
- National Rental Vehicle Association (NRVA)*
- National Steering and Suspension Association (NSSA)*
- National Vehicle Airconditioning Association (NVAA)*

All of the ATAs listed above are composed of the relevant sections of each of the MTAA Member bodies and are represented, at a national level, by MTAA.

Retail motor traders, both as providers of goods and services to consumers, and as small business consumers themselves, have a substantial interest in this proposed new Australian consumer law framework. In addition, consumers of course make a substantial investment in the purchase and ongoing operation of their motor vehicle. Equally in many of their business relationships, retail motor traders have fewer rights of redress against larger suppliers/acquirers for harsh and unfair behaviour than do consumers against retailers and manufacturers.

MTAA supports the proposed reform of Australia's consumer laws and supports the introduction of a new national consumer law. MTAA believes that there will be benefits of such reform for both consumers and businesses and particularly so for those businesses which operate across a number of jurisdictions.

MTAA notes that in the discussion paper there are a number of questions relating to what is a 'consumer'. 'Consumer' is currently defined in section 4B of the Trade Practices Act. MTAA notes also, that in addition to the questions on the definition of consumer contained in this discussion paper, the Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, has recently announced a review of warranty arrangements. The definition of consumer as set out in section 4B of the Act will be an important aspect of that Review and the question of whether the current definition is sufficient and including the issue of whether the current exclusion of goods and services for 're-supply' should remain in the definition, will be addressed by the Association in the context of that Review.

In relation to the other issues raised in the discussion paper, MTAA believes that one of the most important matters is whether in the context of the proposed unfair contract terms regime the protections under that regime are to be extended to small businesses in their dealings with their larger acquirers/suppliers (and that would include franchisees in their dealing with their franchisors).

Small business in its dealings with larger business stakeholders (such as landlords, franchisors and so on) often finds itself in a position similar to many consumers. That is, contracts are presented as standard form agreements, there is little and often no negotiation on the terms of the contract (without which the business can often not operate) and many contain terms which are detrimental to the small business and are in excess of what is required to protect the normal commercial rights of the larger party.

To that extent MTAA believes that small business in its dealings with larger businesses should have access to the rights under the proposed unfair contracts regime. Part IVA of the Trade Practices Act currently has three sections which deal with unconscionable conduct. Section 51AA prohibits a corporation from engaging '*in conduct that is unconscionable conduct within the meaning of the unwritten law, from time to time, of the States and Territories*', but does not apply to conduct covered by sections 51AB and 51AC. Importantly, those two sections deal with unconscionable respectively in relation to consumers (s51AB) and in business dealings (s51AC). The only threshold applying in relation to those sections is in s51AC where a listed public company cannot claim relief under that section.

MTAA submits that similar arrangements could be introduced into the Trade Practices Act in respect of the proposed unfair contracts regime. That would allow the proposed new regime to apply to business-to-business dealings without there being a need to introduce thresholds based on the type of transaction or the size of a business; which would avoid all the confusion and debates inevitably associated with the introduction of 'artificial' barriers.

In that connection MTAA notes that it has correspondence from the Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, dated 22 January 2009, which states that:

‘... COAG has agreed to introduce a national provision regulating unfair contract terms as part of a new national consumer law. The new law will apply nationally and in each State and Territory. The new provision will prohibit the use of contract terms where there is a significant imbalance in the bargaining positions of the parties and where the term is not reasonably necessary to protect the legitimate interests of the supplier. The new provision will apply to non-negotiated contracts and will extend to contracts entered into by businesses, including small businesses. Remedies will only be available where there is proof of detriment or a substantial likelihood of detriment.

The introduction of a national unfair contract terms provision will provide for national consistency in regulation and will enhance competition and consumer protection by improving the clarity and transparency of contracts, all of which will benefit the franchising sector.’

The same advice was provided to MTAA in a letter from the Minister for Small Business, Independent Contractors and the Service Economy, the Hon Dr Craig Emerson MP, dated 22 December 2008. MTAA therefore believes that there is a clear commitment on the part of the Government to include business-to-business dealings in the proposed unfair contract terms regime.

The discussion paper seeks comment on the national public warning power (the proposed ‘name and shame’ arrangements). MTAA understands that while such a power does not exist in the Trade Practices Act, it does exist in some state and territory legislation. The Association recognises that such powers can be quite effective in securing behaviour change. However, reputation is extremely important to every business and should be the basis for a regulator ‘naming and shaming’ a business ultimately be shown to be incorrect, then the agency concerned should be liable for damages to that small business (in the way that any other person could be for making false statements about a business). That is, governments should not be able to claim immunity from such damage claims, where the regulator is shown to have acted on incorrect or unsubstantiated information.

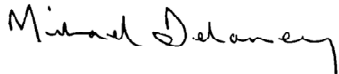
The final matter on which MTAA wishes to comment is that relating to the question of whether the Trade Practices Act should be renamed. MTAA understands that Australia has had a trade practices act (in various forms) since 1965. The purpose and intent of the current Act is well known, as is the regulator; notwithstanding that they have seemingly unrelated names. MTAA assumes that the ‘Trade Practices Act’ is also referenced in other legislation; both federally and at state and territory level and of course in many government publications.

MTAA believes that there would be a considerable cost associated with changing the name of the Act – for no apparent benefit. In fact, MTAA would argue that to change the name to the *Competition and Consumer Act* implies that the only relevant ‘constituencies’ for the Act are to be competition and consumers. MTAA would argue that competitors and small business should equally be recognised if the name of the Act is to be changed, as should, for example, the fact that access to important infrastructure can be determined under the Act. To refer only to ‘competition’ and ‘consumers’ implies in my Association’s view, a ‘narrowing’ of the focus of the Act.

MTAA has long argued that the Objects of the Act should in fact be widened to recognise that all sectors of society and the economy benefit from a strong and effective Trade Practices Act and that section 2 of the Act should therefore include reference to small business and competitors.

Should you have any questions about these comments, please do not hesitate to contact me.

Yours faithfully

A handwritten signature in black ink that reads "Michael Delaney". The signature is written in a cursive style with a long, sweeping tail on the final letter.

MICHAEL DELANEY
Executive Director

17 March 2009