



Automotive Industry Group Regulatory Update

December 2017

Table of Contents

Table of Contents	2
Introduction.....	0
1 Legislation update (new and current legislation)	1
1.1 Harper Competition Review Act	1
1.2 Misuse of Market Power Act 2017	1
1.3 Competition and Consumer Amendment (Payment Surcharges) Act 2016	2
2 Proposed legislation	3
2.1 ASIC prohibition of flex commissions.....	3
2.2 Anti-money laundering/counter-terrorism financing statutory review	3
2.3 Amendment to the Fair Work Act targets franchises	4
2.4 The ACL review in action.....	5
2.5 National transport commission releases enforcement guidelines for automated vehicles	6
3 Policy update	7
3.1 ACCC puts new car industry on notice about alleged consumer law breaches	7
3.2 ASIC explores options to reform add-on insurance products	10
3.3 Parallel imports - amendments to the Motor Vehicle Standards Act (Cth)	11
3.4 Review of the Australian small business and family enterprise ombudsman	11
3.5 ACCC small business in focus report	12
3.6 ACCCount - 1 April to 30 June 2017	13
3.7 ACCCount - 1 July to 1 September 2017	14
3.8 Australia Bureau of Statistics - Sales of new motor vehicles, Australia, September 2017	15
3.9 National transport commission clarifying control of automated vehicles.....	15
3.10 Closure of Holden Brings an end to Australian motor vehicle manufacturing	16
4 Case law update	17
4.1 Holden - Customers and repair rights.....	17
4.2 Australian consumer law - No duty on a supplier to advise customers other than in respect of mandatory Text	17
4.3 Contract terms declared unfair and void	19
4.4 Takata class action	20
4.5 Consumer guarantees/claims	20
4.6 Expiry of claims	21
4.7 Dealer repairs and servicing.....	22
4.8 Breaching dealer finance	22
4.9 Termination of Volkswagen franchise	23
5 Our National Automotive Team	24

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Introduction

Welcome to the HWL Ebsworth Automotive Industry Group - Regulatory Update

HWL Ebsworth seeks to keep you updated with the changing automotive industry environment across new legislation, developing policy and pertinent case law developments.

Through our Regulatory Updates we provide essential information for those wanting to stay abreast of the challenges and issues facing the automotive industry, especially those affecting dealers.

This Regulatory Update has been published with the assistance Evan Stents (Partner), Maria Townsend (Partner), Christian Teese (Senior Associate) and Robert Gardini (Consultant), who are members of the HWL Ebsworth Automotive Industry Group.

Headlines

- Harper Competition Review Act amends third-line forcing provisions (page 4)
- ASIC prohibition of flex commissions (page 6)
- ACCC puts new car industry on notice about consumer law breaches (page 10)
- ASIC explores options to reform add-on insurance products (page 13)
- Latest ACCCount highlights enforcement action (page 16)

Case Law Headlines

- Holden - Customers and repair rights (page 20)
- Contract terms declared unfair and void (page 22)
- Takata class action (page 23)
- Termination of Volkswagen franchise (page 26)

1 Legislation update (new and current legislation)

1.1 Harper Competition Review Act

On 18 October 2017, the Federal Government passed the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*. From a franchising context, the most relevant changes are in relation to 'third line forcing' and resale price maintenance.

Third line forcing

Third line forcing is where a business restricts the supply of its goods to the purchaser if it does not meet a condition to obtain the goods from a particular party. Third line forcing is currently banned on a per se basis. That is, the conduct of third line forcing is prohibited irrespective of whether it has the purpose, effect or likely effect of substantially lessening competition.

The changes are likely to make it easier for distributors to require dealers to obtain goods or services from a third party.

Resale price maintenance

Resale price maintenance occurs if a supplier pressures a business not to sell products below a certain price. Resale price maintenance can manifest in several ways, including if the supplier makes it a condition of supply that the business must (or threatens to withdraw supply if the business does not) sell at a certain price, not sell below a certain price, only discount to an extent that is 'agreed' or not discount at all or comply with a recommended retail price.

Under the new *Competition and Consumer Amendment (Competition Policy Review) Act*, changes have occurred to the resale price maintenance provisions. Under the old legislation resale price maintenance was prohibited. However under the new legislation, a notification process has been introduced which allows suppliers to notify the ACCC if they intend to engage in resale price maintenance. If the ACCC does not object within 60 days immunity will automatically apply.

As a result of the changes, it is likely that some distributors will make notification applications to the ACCC where they have concerns about discounting prices by dealers.

As highlighted in our last update, the Act will also strengthen the law on cartel conduct and anti-competitive conduct; however the legislative changes are unlikely to shield dealers from the exploitative conduct by distributors.

The changes in the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* are in effect as of 6 November 2017.

The Competition Policy Review Act can be found here:

http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r585

1

1.2 Misuse of Market Power Act 2017

In addition to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, the Harper Review also sought to prohibit a business from abusing its substantial market power. This has been enacted through the Competition and Consumer Amendment (Misuse of Market Power) Act 2017, which gained royal assent on 23 August 2017. Any legislative changes under the new law will not come

into effect until the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 receives Royal Assent.

The new law prohibits a business with substantial market power from engaging in conduct if the conduct has the purpose, effect or likely effect of substantially lessening competition in markets that the business directly or indirectly participates in.

In view of the high level of competition in the retail automotive market having regard to the number of brands, it is unlikely that the new provisions will meet the test of substantially lessening competition. Accordingly, the new misuse of market power provisions are unlikely to apply to competition between distributors, or between dealers.

Like the Competition Review Act, changes under this Act are in effect as of 6 November 2017.

The *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* can be found here: <https://www.legislation.gov.au/Details/C2017A00087>

1.3 Competition and Consumer Amendment (Payment Surcharges) Act 2016

As of 1 September 2017, businesses are only able to pass on card payment surcharges that are equal to the cost of acceptance (the fee charged by the bank to the business for providing that payment facility). The 'cost of acceptance' is calculated by totalling the bank fees and any applicable permissible costs (such as gateway fees, terminal fees, fraud prevention and insurance).

In most cases, this will be no more than the annualised cost of accepting a payment type. That is, if for example the annualised cost of accepting MasterCard Credit payments is 1.5%, and the cost of accepting Visa debit payments is 0.8%, the maximum surcharge for a \$10 transaction is \$0.15 for MasterCard and \$0.08 for Visa debit.

It is not acceptable to charge the higher rate for all cards. If a business chooses to charge a single surcharge rate, then it must be equal or lower than the lowest cost of all payment types that it will accept.

Businesses are not required to impose a surcharge under this law.

For more information, see:

https://www.accc.gov.au/system/files/1193_Payment%20surcharges_FA_web02.pdf

2 Proposed legislation

2.1 ASIC prohibition of flex commissions

Following a review of commission arrangements undertaken by ASIC commencing in 2015, ASIC has formally banned flex commissions through the ASIC Credit (Flexible Credit Cost Arrangements) Instrument. This instrument is an example of ASIC using its delegated powers to make binding statements about the application of the law.

From 1 November 2018, car dealers are prohibited from setting the interest rate on loans. Under the new arrangements, consumers will no longer be subject to higher interest rates that typically translate into higher commissions for dealers.

Dealers will be provided with the limited ability to reduce the interest rate set by the lender by up to 2% providing consumers with the opportunity to access credit at lower costs.

Dealers will have the next 14 months to transition to new arrangements. Lenders who fail to comply with the new regulation may be liable for a maximum civil penalty of \$420,000. A person in breach of the new regulations may face a maximum penalty of \$21,000, 2 years imprisonment or both.

This change has been opposed by the AADA, notably for ASIC's failure to provide evidence of alleged consumer harm and unfair conduct arising from flex commissions. While the AADA's submission to the draft legislation opposed the changes on 12 separate grounds, the announcement has prompted car dealers to review their business models for finance.

An analysis conducted by the AADA speculated that dealers will be able to continue to rely on F&I as a strong source of income. While income from commissions is likely to decrease, dealers will be able to make separate arrangements with finance companies that do not directly impact the consumer.

The Instrument can be found here:

<https://www.legislation.gov.au/Details/F2017L01141>

2.2 Anti-money laundering/counter-terrorism financing statutory review

The Attorney-General's department released a report on 29 April 2016 reviewing Australia's approach to curb money laundering and terrorism financing. The review has since taken a first round of submissions and the Australian Transaction Reports and Analysis Centre (AUSTRAC) has put forward a draft bill for comment.

Relevant to automotive dealers is the draft bill's categorisation of automotive dealers as "high-value dealers". In February 2017, the AADA made submissions in response to the review. AADA argued for minimal regulation, stating that it would be too burdensome for an industry which was subject to significant registration and licensing requirements. The AADA submitted that a cash transaction prohibition on the industry would be sufficient to curb money laundering opportunities without affecting dealers or customers.

Consultation and implementation stages of this review are expected to continue until 2019, with an exposure draft of the Bill for comment to be released in the first half of 2018.

To read the Attorney-General's Department consultation paper on 'High-value dealers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime':

<https://www.ag.gov.au/Consultations/Documents/AML-CTF/high-value-dealers-model-for-regulation.pdf>

To read the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006:
<https://www.ag.gov.au/Consultations/Pages/StatReviewAntiMoneyLaunderingCounterTerrorismFinActCth2006.aspx>

2.3 Amendment to the Fair Work Act targets franchises

On 15 September 2017, the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (**Vulnerable Workers Amendment**) came into force, targeting the exploitation of workers in franchises. The Vulnerable Workers Amendment targets illegal or careless conduct with higher penalties, wider offences and joint liability of franchisees and franchisors.

The move comes after a highly publicized string of cases involving high profile franchisors from a variety of industries including retail pharmaceutical, petroleum, food and convenience store franchisors. . In particular, a convenience store franchisor drew a lot of attention with the franchisor ultimately returning \$42 million to over 1,100 underpaid workers.

The Act amends the *Fair Work Act 2009* (Cth) (**Fair Work Act**) by:

- Introducing higher civil penalties for 'serious contraventions' of the Fair Work Act (the current maximum penalties will increase ten fold from \$10,800.00 to \$108,000.00 for individuals and from \$54,000.00 to \$540,000.00 for corporations);
- Increasing penalties for record-keeping failures;
- Making franchisors and holding companies responsible for contraventions of the Fair Work Act by their franchisees or their subsidiaries, if they knew or could reasonably have been expected to have known the contraventions would occur in their business networks and failed to take reasonable steps to manage the risk. This new responsibility will only apply where franchisors and holding companies have a significant degree of influence or control over their business networks;
- Expressly prohibiting employers from unreasonably requiring their employees to make payments e.g. demanding a proportion of their wages be paid back in cash; and
- Strengthening the evidence-gathering powers of the Fair Work Ombudsman including the power to compel witnesses to answer questions on oath or affirmation.

These proposed amendments are wide reaching and will require franchisors to urgently and thoroughly review their business models, operations and interactions with their franchisees. It is anticipated that franchisors will look to introduce wider auditing provisions in their franchise agreements.

Dealers should be diligent by keeping accurate records and ensuring that all employees are paid correctly including any and all entitlements under applicable awards.

The Vulnerable Workers Amendment can be found here:
<https://www.legislation.gov.au/Details/C2017A00101>

2.4 The ACL review in action

Consumer Affairs Australia and New Zealand (CAANZ) commenced a review into the Australian Consumer Law regime on 31 March 2016. This review concluded in March 2017, and the final report was published on 19 April 2017. The final report made the following recommendations:

- Amending the consumer guarantees to specify that where a good fails to meet a guarantee within a short, specified period of time, a consumer be entitled to a refund or replacement without needing to prove a 'major failure' (for example, similar legislation in the United Kingdom specifies a 30 day refund entitlement where goods fail to meet certain standards);
- Clarifying that multiple minor failures can now accumulate to amount to a major failure (whether or not those minor failures relate to the same or different issues);
- Imposing additional requirements relating to extended warranties - including additional disclosure requirements such as a comparison to ACL rights and a ten day cooling-off period (which becomes an unlimited cooling off period if the disclosure obligations are not met);
- Adding additional guidance for what 'reasonable durability' and 'unsafe' means in the context of consumer guarantees;
- Expanding consumer guarantees so that they apply to all online auction sales;
- Requiring any additional fees and charges to be included in the headline price for online sales;
- Reducing the evidentiary burden on consumers to prove claims for breaches of the consumer guarantees;
- Increasing maximum financial penalties for breaches of the ACL; and
- Extending the ACL prohibitions on unconscionable conduct to apply to publicly listed companies.

Since the release of the final report, the recommendations CAANZ have been adopted in other areas of government and legal decision making, such as the ACCC's investigation into GM Holden Ltd's handling of consumer complaints about a manufacturing fault. This resulted in Holden making court enforceable undertakings resembling many of the recommendations put forward by the ACL Review. You can read more about the case in section 4.2.

The Productivity Commission conducted a concurrent review of the enforcement and administration of the Australian Consumer Law. In particular, the Commission focussed on the role of regulators play in making the law accessible and effective for consumers. Relevant to the motor vehicle industry is the Commission's recommendation that the Government consider expanding the powers of the ACL regulators where there is no industry specific ombudsman (such as in the retail new motor vehicle industry). In light of the Commission's recommendations and in response to consumer feedback, the ACCC conducted a review of the new-car industry. You can read more about the ACCC's draft report in section 3.1. We expect to see many more aspects of the ACL Review being implemented in the coming months.

2.5 National transport commission releases enforcement guidelines for automated vehicles

The National Transport Commission (NAT) has released guidelines about how the requirement of *proper control* in the Australia Road Rules should apply to vehicles with automated functions. The NAT is the body responsible for developing law reform proposals to apply to and accommodate vehicle automation. Australia's current road traffic laws are based on the premise that the driver must not drive a vehicle unless the driver has 'proper control'. The concept of 'proper control' has been challenged by the emergence of vehicle automation.

The guidelines provide:

- For who is responsible for compliance with road traffic laws and examples of behaviours indicating 'proper control' by a human driver in control of a vehicle with some degree of automation;
- That it is the human driver who will be responsible for complying with road traffic laws, even when a vehicle has 'conditional automation' engaged at that particular point in time;
- That there is a distinction between varying levels of automation, such that the guidelines:
 - only apply to vehicles whose level of automation requires input from the human driver (whether that be full or partial control or only supervision and object detection); and
 - do not apply to vehicles described as operating at a 'high or full level of automation', because it is not expected that those vehicles will be commercially released on the marked until 2020 (in the case of vehicles with 'high automation' and beyond (in the case of 'full automation'));
- For how enforcement agencies should interact with automated vehicles, and how human drivers could demonstrate vehicle automation was engaged and the *level* of that automation at a particular point in time.

The guidelines do not extend to the question of civil liability or criminal responsibility for a crash or road trauma.

The next stage in the development of law reform to address the introduction of automated vehicles will be for proposed amendments to be drafted to Australia's road traffic laws which reflect and implement the guidelines.

The full guidelines can be viewed here: <http://www.ntc.gov.au/roads/technology/automated-vehicles-in-australia/>

3 Policy update

3.1 ACCC puts new car industry on notice about alleged consumer law breaches

Australian Competition and Consumer Commission's (ACCC) retail market study on Australia's new car industry was highlighted by ACCC Chairman, Mr Rod Sims to the AADA Convention in September 2017. The draft report was released on 10 August 2017. Submissions in response to the draft report were due on 7 September 2017 and a round table with invited stakeholders was conducted on 25 September 2017. Mr Sims expressed concern at the failure by manufacturers to properly address consumer rights and he referred to dealers as being under pressure from manufacturers to respond to consumer complaints in particular ways.

The draft report makes three key findings and makes a number of draft recommendations to address those findings which include law reform and enforcement action. The draft findings and recommendations have significant implications for motor vehicle dealers and other businesses involved in the new car retailing industry.

The draft report comes in the context of what ACCC Chairman Rod Sims has said is a 'deep concern about the level of non-compliance with the Australian Consumer Law' in the new car retailing industry. By 'new car retailing', the ACCC is referring to conduct occurring:

- Before the sale of a vehicle (such as advertising and representations about a vehicle's performance or emissions);
- At the time of sale (such as the sale of add-on finance and insurance products and representations about different types of warranties); and
- After sale (such as maintenance and repair costs and the availability of parts).

Key findings

There are three key findings in the draft report. According to the ACCC:

1. There are 'material deficiencies' in the way that consumers are able to enforce their rights under the existing law when purchasing new cars, and the way these rights are represented to them by manufacturers and dealers;
2. There is a concern about the effect of what is said to be limited access to information and data required to repair and service new cars (for example, in the case of independent repairers who are not authorised by or affiliated with car manufacturers and are reliance on voluntary sharing of information and data); and
3. Consumers are not being given accurate information about the fuel consumption or emissions performance of new cars.

In addition to these key findings, the report contains some key assertions in relation to consumer guarantees. Namely, that:

- There is a 'significant body of evidence suggesting a systemic failure in consumers enforcing consumer guarantees after the purchase of a new car';

- The ACCC views this systemic failure as caused chiefly by a compliance problem with manufacturers and a dominant ‘culture of repair’ underpinning the approach to dealing with car defects and failures (for example, including the widespread used of non-disclosure agreements by manufacturers when resolving complaints); and
- There is an Australian Consumer Law (ACL) compliance problem with respect to information given to consumers about their ACL rights at the point of sale.

Draft recommendations

The ACCC has made the following recommendations in order to address its draft key findings:

- The Australian Consumer Law should be amended so that:
 - consumers are entitled to a refund or replacement if there is any failure of the good to meet a consumer guarantee within a specified period of time (such as 30 or 60 days after purchase) regardless of whether the failure is major or minor;
 - multiple minor failures can accumulate to a major failure (even if the minor failures are unrelated) entitling the consumer to elect a refund or replacement; and
 - require additional disclosure obligations for extended warranties, including a 10-day cooling off period;
- The ACCC work with manufacturers and dealers to develop an approved explanation of Australian Consumer Law consumer guarantees and their difference to a factory warranty, to be provided to consumers at the point of sale;
- Target, through enforcement action, any misrepresentations or misleading or deceptive conduct in relation to the use of independent repairers or non-OE spare parts (in the draft report, the ACCC asserts that this is because:
 - the majority of consumers have a ‘mistaken belief that the manufacturer’s warranty requires them to only use an authorised dealer’;
 - this is a ‘misunderstanding’ caused by ‘direct and implied representations made by a number of manufacturers in their logbooks and service manuals to the effect that authorised dealers must carry out services or repairs (or that Original Equipment (OE) parts must be used)’ and that ‘many of these representations are likely to contravene the provisions of the ACL, and may also raise competition concerns under the Competition and Consumer Act.’); and
 - it is unclear what the ACCC’s legal basis for either of these assertions is;
- Publish an updated version of the Motor vehicle sales & repairs Industry Guide including specific guidance on what amounts to a ‘major failure’;
- Target, through enforcement action, any complaints handling systems, policies and practices of manufacturers or dealers that do not comply with the consumer guarantee requirements of the ACL;
- Introduce a mandatory scheme for the sharing of technical information – on commercially fair and reasonable terms – by car manufacturers with independent repairs. The mandatory scheme is envisaged to cover real time access to the same digital files, codes and software updates made available to authorised dealers;

- Scrutinise, through possible enforcement action, any refusal by manufacturers to supply security-related OEM parts for repair and service by independent repairers (which the ACCC says is a reason being potentially abused in order to restrict independent repairer access to spare parts);
- Change the fuel consumption label affixed to new cars (including by introducing a star-rating system or estimate of annual operating costs in 'real-world driving conditions');
- Change the current fuel consumption and emissions testing regime; and
- Allow consumers access to all digitally held data about themselves.

Guides to the draft report

Alongside the draft Report, the ACCC has released two guides – for consumers and independent repairers. The guides summarise the findings as they relate to consumers and independent repairers and their publication suggests that the ACCC recommendations are targeted towards the enhancement of the rights consumers and independent repairers, not other industry participants.

Stakeholder submissions

According to the draft report, the market study on which it has been based was supported by commissioned research and stakeholder submissions and consultation. The stakeholders who participated in the forum included the Australian Automotive Dealers Association (AADA), AP Eagers, the Federal Chamber of Automotive Industries (FCAI), manufacturers Ford, Holden, Hyundai, Mazda, Nissan, Toyota and Mercedes Benz, aftermarket repairers such as UltraTune, Consumer Affairs Victoria, the State Offices of the Small Business Commissioner, the Victorian Automobile Chamber of Commerce (VACC) and the Australian Automotive Aftermarket Association.

Responses to the report

The ACCC received numerous submissions in response to the draft report, and has since held a further roundtable discussion with key stakeholders of the new car retailing industry. In response to the three key findings of the draft report:

- There were mixed opinions as to how the industry could rectify the information imbalance. Some stakeholders were of the view that the existing processes to improve consumer literacy required further time to come into effect, whilst others argued that independent oversight was needed if further regulation was imposed on the industry;
- Discussion was had about the introduction of a licensing system to screen and mandate the appropriate training of independent repairers;
- Stakeholders expressed their support in favour of changes to fuel consumption labelling on new cars to assist consumer awareness. However, there were concerns that the diverse tests and results may lead to consumer confusion;
- The definition of 'major failure' was subject to discussion, with stakeholders requesting clarity on how the term will be defined; and

- Concerns were voiced about draft report's emphasis on dealer compliance with consumer law. In particular, some stakeholders raised that dealers were often unable to engage negotiate the terms of their dealer agreements due to the imbalance of power that swayed in favour of the manufacturer.

Stakeholders were subsequently invited to provide further comment on the draft report. The AADA focused its submission on the imbalance of power between dealers and distributors. Their submission highlighted concerns over provisions in dealership agreements which do not provide security of tenure, process for dealing with customer complaints and the financial hardship that results from ambiguous 'buy back' clauses.

The final report is expected to be released in late 2017.

Takeaways for dealers

At the recent Australian Automotive Dealer Association conference, Mr Rod Sims who is the chairman of the ACCC, offered the following key points arising from its study:

1. Car manufacturer's complaints handling systems and policies are often preventing or discouraging consumers from obtaining the remedies to which they may be entitled under the Australian Consumer Law.
2. A mandatory scheme should be introduced for car manufacturers to share technical information with independent repairers.
3. Buyers of new cars need more accurate information about new cars' fuel consumption and emissions.

To read the draft report:

<https://www.accc.gov.au/about-us/market-studies/new-car-retailing-industry-market-study>

3.2 ASIC explores options to reform add-on insurance products

Following the release of a series of reports investigating the purchase of add-on insurance products in February 2016, ASIC now seeks consultation from stakeholders in relation to their proposals to reform. The reports expressed an overall sentiment that consumers were ill-informed about the insurance product sold, leading to higher costs and unfair outcomes. Consultation Paper 294 (CP294) titled '*The sale of add-on insurance and warranties through caryard intermediaries*' was released in August 2017. It sought feedback from insurers, credit providers, insurance and finance brokers, consumers and other interested parties.

ASIC has put forward two proposals in CP294. The proposals aim to achieve the following objectives:

- Improved value for consumers when purchasing add-on products;
- More competitive premiums;
- Fairer sales processes to empower consumers;
- Eliminating products that provide minimal or no value to consumers; and
- Reform should apply market-wide.

The first proposal put forward by ASIC is a deferred sales model for add-on products. Under this option, add-on sales products can only be sold after a period of time has elapsed. This would ensure can rationally assess the suitability of products without undue pressure at the time of sale. The option also includes a propose requirement for dealers to provide a notice with mandated content to educate consumers of the options in a standardised and accessible format.

CP294 can be found here:

<http://download.asic.gov.au/media/4422973/cp294-published-24-august-2017.pdf>

3.3 Parallel imports - amendments to the Motor Vehicle Standards Act (Cth)

The Federal Government has reversed its February 2016 announcement to reduce existing restrictions on the parallel import of new motor vehicles. It has decided to retain the existing regulatory regime to protect consumer's rights and safety. In a Ministerial statement, Mr Fletcher noted significant compliance investigations would have been necessary to ensure their compliance with Australian safety requirements. In addition, consumers would need to be educated about the absence of manufacturer warranties and protections in the event of a defect.

To read the ministerial statement:

http://minister.infrastructure.gov.au/pf/releases/2017/August/pf037_2017.aspx

3.4 Review of the Australian small business and family enterprise ombudsman

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) was established in 2016 to provide small businesses and family enterprises with a conduit to government and to make it easier for them to access assistance. Specifically, its intended functions are to:

- Advocate for small businesses and family enterprises in relation to relevant legislation, policies and practices; and
- Assist small businesses and family enterprises in relation to disputes and other relevant actions if requested to do so.

These are in addition to any other functions conferred on it by any Act or legislative instrument.

Under the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (the **Act**), the Minister for Small Business is required to initiate independent reviews of the ASBFEO's assistance function. This is the first independent review of the ASBFEO's functions under the Act and was required to be completed by 30 June 2017. The ASBFEO is required to be independently reviewed no later than every four years thereafter.

The independent review was led by Ms Su McCluskey with support from a secretariat provided by Nous. The key questions for the review were how effectively and efficiently the ASBFEO has undertaken its functions since its establishment in March 2016 and how these functions can be improved.

Stakeholder consultations were held with Commonwealth and state/territory agencies whose functions impact small businesses and family enterprises, as well as with state small business commissioners and industry bodies. The review also considered data and documentation that Treasury and the ASBFEO provided.

The report was released on 19 June 2017.

The following findings and recommendations were made:

1. Any expansion in the ASBFEO's assistance function should be carefully considered in light of its important advocacy role and occur only in response to a clearly identified gap.
2. The ASBFEO should continue its efforts to raise its profile among small businesses and family enterprises, with a focus on clarifying its role in relation to family enterprises.
3. The ASBFEO should establish one or more forums through which to directly engage with small businesses, family enterprises and their representatives on an ongoing basis.
4. The ASBFEO should bolster its input into policy and legislation that affects small businesses and family enterprises, including through training, secondments, consultation and evaluation.
5. The ASBFEO should work with other agencies to share data and research about small businesses and family enterprises.
6. The ASBFEO should work with states that do not have small business commissioners to establish clear protocols for its referrals.

The final report can be accessed from this link:

<https://static.treasury.gov.au/uploads/sites/1/2017/08/r2017-186923-Final-ASBFEO-Report.pdf>

3.5 ACCC small business in focus report

On 24 July 2017, the ACCC released its half-yearly '*Small business in focus*' report (Half Year Report No. 14) which contains updates relating to small business and franchising complaints data and highlights the ACCC's work in the small business sector from 1 January to 30 June 2017. Highlights of the report include an increase in enquiries from franchisees between 1 January and 30 June. These enquiries related to a range of different matters, with the three most popular topics being misleading conduct/false representations, Franchising Code related issues such as inadequate disclosure and termination of agreement and issues of exclusive dealing.

Continuing its focus on small business issues, the ACCC has launched a number of key enforcement actions. In the last six months the ACCC has brought actions against:

- Ultra Tune Australia Pty Ltd;
- Geowash Pty Ltd;
- A fast food franchisor; and
- Sensis Pty Ltd.

The ACCC is continuing its market study into the new car retailing industry, focusing on competition and consumer issues that may be present or emerging in the industry. In the first half of 2017, the ACCC continued to engage with key stakeholders to collect and discuss matters relevant to the new car retailing industry. This has included gathering additional supplementary information from key stakeholders to inform analysis for the study.

Relevance to dealers

Motor vehicle dealers should be aware that breaches of the Franchising Code, unconscionable conduct and misleading and deceptive continue to be key areas of focus for the ACCC. The final report for the

new car retailing industry market study is due at the end of 2017 and should be of interest to all motor vehicle dealers.

The report released by the ACCC is available here:

https://www.accc.gov.au/system/files/1233_Small%20business%20in%20focus%20%2314_D11.pdf

3.6 ACCCount - 1 April to 30 June 2017

The ACCC has released the June quarter edition of the '*ACCCCount: A report of the Australian Competition and Consumer Commission's activities*'.

The following range of activities represented the key activities of the ACCC during the April to June 2017:

- Enforcing competition laws in relation to cartel conduct, anti-competitive agreements, misuse of market power, and mergers which substantially lessen competition;
- Protecting consumers from unfair business practices and unsafe products;
- Regulating national services, infrastructure and markets with limited competition or natural monopoly characteristics;
- Studying, monitoring and reporting on competition and consumer issues in specific markets and industries, and
- Advocacy and collaboration to promote competition and fair trading.

In the June quarter the ACCC was involved in 15 legal proceedings relating to competition enforcement in a range of industries including shipping, pharmaceuticals, construction, travel and financial services.

Of the 15 competition enforcement proceedings:

- 14 cases were carried over from the previous quarter;
- 1 new case was commenced in the quarter;
- Nil cases were concluded, and
- 15 cases remained ongoing at the end of the quarter.

In May 2017 the ACCC instituted proceedings in the Federal Court against Ultra Tune Australia Pty Ltd (Ultra Tune), a national motor vehicle repair franchisor, for a number of alleged failures to comply with the Franchising Code (the Code) and for alleged breaches of the ACL.

The ACCC alleges that in 2015 Ultra Tune:

- Failed to act in good faith in its dealing with a prospective franchisee, and:
 - failed to provide this prospective franchisee with documents the Code specifies must be provided before accepting a non-refundable payment; and
 - made false or misleading representations about the franchise site, in breach of the ACL ;
- Failed to provide marketing fund financial statements and audit reports for three financial years to its franchisees;

- Failed to provide these documents for the 2015 financial year within the time period prescribed by the Code; and
- Failed to update its disclosure document or provide it within the time prescribed by the Code.

The ACCC is seeking a refund of the prospective franchisee's payment, declarations, injunctions, pecuniary penalties, compliance and adverse publicity orders.

In the June quarter the ACCC continued to engage with key stakeholders, to collect and discuss matters relevant to the new car retailing industry market study. This has included gathering additional supplementary information from key stakeholders to inform analysis for the study.

Relevance to dealers

The ACCC continues to pursue litigation against both small and large business which engages in anti-competitive, cartel style conduct and misuse of market power activities. Automotive dealers must ensure they are aware of their legislative requirements and abide by them to avoid similar such legislative intervention by the ACCC.

The ACCCount Reports are available here:

<https://www.accc.gov.au/system/files/ACCCCount%20-%20June%202017%20quarter.pdf>

3.7 ACCCount - 1 July to 1 September 2017

The ACCC has recently released the '*ACCCCount: A report of the Australian Competition and Consumer Commission's activities*' for the period of 1 July 2017 to 1 September 2017 .

The highlights of the report include:

- The ACCC institutes proceedings in the Federal Court against Viagogo alleging it breached the Australia Consumer Law when reselling entertainment, music and live sport tickets;
- A fine of \$25 million in respect of cartel conduct in contravention of the *Competition and Consumer Act 2010*;
- The ACCC forms the Takata Taskforce and investigates the safety of motor vehicles containing Takata airbags;
- A fine of \$8 million against Get Qualified Australia for multiple breaches of the Australian Consumer Law;
- A fine of \$750,000 against Snowdale Holdings for making or misleading representations that its eggs were 'free range';
- A ban on excess payment surcharges applying to all businesses across Australia;
- In August 2017 the ACCC (as in this report) released its draft report for the New Car Retailing Market Study; and
- In August 2017 the ACCC (as in this report) accepted a court-enforceable undertaking from Holden, which commits Holden to comply with its consumer guarantee obligations under the Australian Consumer Law and adopt recommendations from the recent ACL review.

Takata airbag recall

On 25 July 2017 the Minister for Small Business, the Hon Michael McCormack MP and the Minister for Urban Infrastructure, Mr Paul Fletcher MP, wrote to vehicle manufacturers with models potentially affected by voluntary recalls demanding answers about their Takata airbag recall efforts.

The ACCC identified the overall measures to implement the calls fail to adequately address the urgency of the safety issue. Actions to date proposed by vehicle manufacturers arguably fail to demonstrate a sufficient level of urgency and commitment to their consumer safety obligations.

3.8 Australia Bureau of Statistics - Sales of new motor vehicles, Australia, September 2017

The Australian Bureau of Statistics has published *Sales of New Motor Vehicles, Australia, September 2017* which presents details for the sales of new motor vehicles for September 2017.

- The September 2017 trend estimate (99,850) decreased by 0.3% when compared with August;
- When comparing national trend estimates for September 2017 with August 2017, sales for Other vehicles increased by 0.7%. By contrast passenger vehicles and Sports utility vehicles decreased by 1.0% and 0.1% respectively;
- The largest upward movement across all states and territories, on a trend basis, was in Tasmania (1.5%), continuing an upward trend that began in April 2017; and
- The largest downward trend movement across all states and territories, on a trend basis, was in the Australian Capital Territory (-0.9%).

3.9 National transport commission clarifying control of automated vehicles

In November of 2016, the Transport and Infrastructure Council asked the National Transport Commission (NTC) to develop national enforcement guidelines to clarify regulatory concepts of *control* and *proper control* for automated vehicles.

The NTC is an independent statutory body charged with improving the productivity, safety and environmental performance of Australia's road, rail and intermodal transport systems. The NTC is established to submit law reform recommendations to a council of federal and state transport, infrastructure and planning ministers known as the Transport and Infrastructure Council.

Automated vehicles are expected to challenge existing concepts of a driver being in control of his or her vehicle and the enforcement of road rules and other traffic laws.

In response to the above questions the NTC released a discussion paper titled '*Clarifying control of automated vehicles*' in April of 2017.

The following four key issues were posed within the discussion paper:

1. Who is in control?
2. What will it mean to have proper control of an automated vehicle?
3. How should proper control apply to the automated driving system?
4. How do enforcement agencies interact with automated vehicles?

In respect of the four key points the NTC proposed the following:

- National enforcement guidelines provide that the human driver is in control of a vehicle with conditional automation, even when the automated driving system is engaged in the dynamic driving task.
- Interpretation of proper control is amended to allow the human driver to not have a hand on the steering wheel when a vehicle is operating at conditional or high automation, but introducing new indicators of proper control related to alertness and readiness to intervene.
- Guidelines do not have regard to the application of proper control to the automated driving system for high levels of automation, but that the guidelines are updated to do so when the automated driving system entity is recognised in the road rules.
- Technology solutions to assist enforcement agencies to interact with automated vehicles and to access relevant information should be included as part of the NTC's future project to regulate government access to automated vehicle data (scheduled to commence in FY 2017–18).

Submissions to the discussion paper closed on Friday, 2 June 2017. The NTC are to report to the Transport and Infrastructure Council in November 2017 with proposed national enforcement guidelines that will adopt a preferred option on each of the key issues.

Subject to feedback from the Transport and Infrastructure Council, the NTC plans to finalise the national enforcement guidelines in late 2017.

A copy of the discussion paper is available here:

[https://www.ntc.gov.au/Media/Reports/\(7995F420-95ED-216A-5C6D-F79655DE9963\).pdf](https://www.ntc.gov.au/Media/Reports/(7995F420-95ED-216A-5C6D-F79655DE9963).pdf)

3.10 Closure of Holden Brings an end to Australian motor vehicle manufacturing

On Friday, 20 October 2017, Holden brought an end to its Australian manufacturing operations after 70 years. The end to Holden's manufacturing operations follows that of Ford and Toyota in 2016 and 2017 respectively and means that motor vehicle manufacturing in Australia has now come to an end. Each of Holden, Ford and Toyota will remain in Australia as new motor vehicle retailers, but for imported vehicles only.

4 Case law update

4.1 Holden - Customers and repair rights

Background

The ACCC commenced investigations into the conduct of GM Holden Ltd after receiving consumer complaints about Holden's response to customers about a manufacturing fault. Holden had informed customers that they had discretion to decide whether or not to give a refund, repair or replacement vehicle, and any remedy provided was a "goodwill gesture". Some consumers were told that no remedy would be provided if the vehicle had not been serviced by a Holden dealer or with sufficient regularity or purchased second hand.

Settlement

On 3 August 2017, the ACCC accepted a court enforceable undertaking from Holden that would see it comply with its consumer law obligations. In accepting that its conduct was "likely to" have breached the law of consumer guarantees, Holden undertook to:

1. Recognise that a 'major failure' can be made up of multiple minor failures;
2. Providing consumers with a refund or replacement if they have a new car. The consumer only needs to demonstrate that the vehicle was not driveable within 60 days from the date of purchase;
3. Obtain an external review of complaints made since 1 January 2006 and provide remedies where necessary;
4. Update all dealer policies and procedures to comply with the ACL; and
5. Ensure consumers have access to information about issues with their vehicle.

Relevance to dealers

Holden's undertakings reflect the proposals put forward by Consumer Affairs Australia and New Zealand in the Australian Consumer Law Review highlighted in the April edition of the Automotive Industry Group Regulatory Update. The ACCC strongly supported the proposals in the Australian Consumer Law Review. This case serves as a reminder for manufacturer's to meet their obligations under consumer law alongside any manufacturer warranties.

4.2 Australian consumer law - No duty on a supplier to advise customers other than in respect of mandatory Text

In September 2017, the Federal Court handed down a significant decision in the case of *Australian Consumer Law (ACL)* in the case of *ACCC v LG Electronics Australia Pty Ltd* [2017] FCA 1047. The decision has broad implications for automotive dealers because it deals with the extent to which suppliers of consumer goods have any obligation to inform customers about customers' rights under the ACL.

In that case, the ACCC alleged that LG engaged in misleading conduct in contravention of the ACL by communicating with consumers, retailers and repairers as though their LG 'factory warranty' was the *only* source of their rights in relation to the TV defects, and refrained from making any express reference to the ACL.

The ACCC claimed that because the ACL provided consumers with rights in respect of defective goods (the consumer guarantees), consumers had a reasonable expectation of being informed of their ACL rights and the failure to do so was a misleading 'half-truth'.

The ACCC alleged that the misleading conduct extended to LG's website because it was focused mainly on the LG warranty, and did not specify that ACL consumer guarantees applied in addition to the LG warranty and were not limited in time.

The Court rejected each of the allegations of the ACCC and held that:

- Representations which do not reflect the representor's possible obligations arising under the consumer guarantee provisions might be misleading. However, the case was about legal liability, not about whether LG had some 'moral responsibility' of LG to inform or generally advise the public about their legal rights;
- All LG's communications to consumers should be assessed in light of the *actual* enquiries made to LG by those consumers;
- There was no direct evidence that any consumer asked LG to be advised of their rights generally (such as their rights under the ACL). If a consumer made an enquiry to LG only concerning the LG warranty or asking for a TV to be replaced or repaired, a response confined to that specific enquiry would not be misleading even if it did not mention the ACL;
- Even assuming that the overwhelming inference is that the consumer guarantee applied, there was a major failure and a consumer could have been entitled to a refund, replacement or damages, this does not lead to the conclusion there was a half-truth in failing to mention the ACL;
- There was no allegation that LG had a responsibility to volunteer information to consumers and to advise them generally about the ACL, other than to display the mandatory text in their LG warranty material, which LG had done;
- The onus of proving a major failure is on the person alleging it. LG was entitled to require a consumer to satisfy LG that a claim was accurate and substantiated;
- Broad denials of liability by a supplier may mislead a consumer as to his or her rights. However, it would be unfair, and therefore unwise, to penalise a retailer for a *bona fide* denial of liability which later turns out to be wrong;
- The ACL does not prevent a manufacturer or supplier requiring a consumer to pay costs associated with the assessment or repair of the goods (*at the first instance*);
- The LG website did make reference to the ACL. However, LG was entitled to promote and accurately refer to its LG warranty. There was no half-truth or other misleading conduct in highlighting this aspect of protection to the consumer; and
- Other than the mandatory text, there is no obligation for LG to provide information to a consumer about his or her rights under the ACL.

The reference to 'mandatory text' is to the text required to be included in any factory warranty material, which refers customer to their specific rights under the ACL. However, other than the requirement on suppliers to include that mandatory text, then on the basis of the Federal Court's decision, it is clear that there is no legal obligation on suppliers to refer customers to, or to give advice about, the ACL.

The ACCC has appealed the decision and that appeal is scheduled for hearing on a date to be fixed between 7 May to 1 June 2018.

4.3 Contract terms declared unfair and void

ACCC v JJ Richards & Sons Pty Ltd [2017] FCA 1224

After court action by the ACCC, JJ Richards has consented to a court declaration that several of the terms in its standard contracts for waste management services were unfair and therefore void.

What are 'unfair contract terms'?

Unfair contract terms are terms or clauses of standard form contracts that are 'unfair'.

A term is 'unfair' if it causes a significant imbalance in the rights of the parties to the contract, and is not reasonable necessary to protect the interests of the advantaged party. An example would be the term of the JJ Richards standard contract that enabled JJ Richards to unilaterally increase its prices.

In considering whether a contract term is 'unfair' a court will take into account how 'transparent' the term is. That is, a term that is clearly presented and readily available is less likely to be 'unfair'.

If a court of tribunal declares a term is an unfair contract term, then that term will not be binding on the parties. In most cases, the remainder of the contract will still operate, potentially leaving the previously advantaged party in a poor contractual position.

Which terms of the JJ Richards standard form contract were 'unfair'?

According to the ACCC, the terms declared to be unfair had the effect of:

- Allowing JJ Richards to unilaterally increase its prices;
- Creating an unlimited indemnity in favour of JJ Richards;
- Binding customers to subsequent contracts unless they cancel the contract within 30 days before the end of the term;
- Removing any liability for JJ Richards where its performance is “prevented or hindered in any way”;
- Allowing JJ Richards to charge customers for services not rendered even when caused by reasons beyond the customer’s control;
- Granting JJ Richards exclusive rights to remove waste from a customer’s premises;
- Allowing JJ Richards to suspend its service but continue to charge the customer if payment is not made after seven days; and
- Preventing customers from terminating their contracts if they have payments outstanding and entitling JJ Richards to continue charging customers equipment rental after the termination of the contract.

Relevance to dealers

This case highlights the role of the ACCC in enforcing the new unfair contracts legislation which commenced in November 2016. Dealers should review their own standard form contracts with customers to remove or amend any unfair contract terms.

For more information, including JJ Richard's standard form contract in full, please see:
<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1224>

4.4 Takata class action

A class action has been brought against Toyota, Honda and Mazda, seeking refunds for cars fitted with faulty airbags from Takata. The action has been brought in the Federal Court and is based on the Australian consumer law which provides for refunds if a product has a fault that makes it unsafe and the problem cannot be rectified in a reasonable time.

There is currently a worldwide recall for Takata airbags which involves over 60 million vehicles. About 60 models across the Toyota, Mazda, BMW, Subaru, Nissan, Honda, Mitsubishi, Chrysler, Dodge, Jeep, Lexus and Ford range in Australia are affected. This represents approximately 2.3 million cars in Australia.

The airbags have been directly linked to 200 injuries worldwide as well as 18 deaths. In 2017 a Sydney man was killed as a result of having Takata airbags in his car.

A full recall for all affected airbags is in place from both the ACCC and all of the listed car makers, dealerships are encouraged to assist in the recall process.

4.5 Consumer guarantees/claims

Kiehne v Graham Betts Motors Pty Ltd [2017] NSWCATCD 60

Background

This case concerned a misrepresentation by a dealer in relation to the sale of a utility vehicle.

In early 2017, the Applicant purchased a Nissan Navara utility vehicle from a licensed dealer for \$9,490. The Applicant alleged they were told during a telephone call that the vehicle was a turbo diesel. This was not true as the vehicle was not a turbo. The Applicant provided three properly executed affidavits to support their position.

The dealer denied that the representation was made, and argued that it should have been evident to the Applicant from the documents that the vehicle was not a turbo diesel. The dealer provided witness statements to the Tribunal, however these documents were not signed not dated.

Outcome

The Tribunal accepted the dealer's witness statements as evidence. However, the Tribunal gave no weight to these documents as they were not properly executed. As a result, the Applicant's evidence was preferred and it was found that the representation did in fact occur.

The Tribunal did not accept that the Applicant should have known that the vehicle was not a turbo from the documents.

As a result, the Tribunal held that the Applicant was induced to enter the sale by an incorrect description of the goods. This was a breach of sections 18 (misleading and deceptive conduct), 29 (misrepresentation) and 56 (goods do not correspond with description) of the Australian Consumer Law.

The Tribunal ordered the dealer refund the Applicant the full purchase price of the vehicle.

Relevance to dealers

Any misrepresentation made to a customer can provide grounds for a claim under the Australian Consumer Law. A dealer cannot rely on the contract of sale or other documents to remedy an incorrect statement.

Disputes regarding representations by a dealer are usually decided on the weight of evidence. If a dealer does find itself in any dispute with a customer, it should ensure that their witness statements are properly executed to allow for the best chance that they will be preferred by the adjudicator.

Becke v Caravans & Motorhomes Pty Ltd [2017] NSWCATCD 62

Background

The Applicant purchased a Jayco Sterling caravan for \$56,000. The Applicant later identified several problems with interior furnishings as well as water leaks causing corrosive damage.

The Applicant sought a replacement or refund, arguing the caravan was not of acceptable quality and in particular that it was not fit for the purpose of being used as a primary residence.

Outcome

The Tribunal found that the Applicant did not advise the supplier that the caravan was to be used as a primary residence. After consideration of the nature of the problems, the Tribunal held that the caravan was fit for purpose as a holiday vehicle.

However, the Tribunal held that the caravan was not sold free from defects if it could not withstand 3 years in the environment. Accordingly, the supplier was ordered to assess and repair the damage.

The Tribunal rejected the Applicant's claim for replacement or refund, noting that the supplier had not had an opportunity to remedy the defects. If the issues with the caravan could be adequately addressed by the supplier, there would be no 'major failure' and therefore the Applicant could not elect for a replacement or refund.

Relevance to dealers

It is possible that the Tribunal would have held the problems with the caravan in this case to be a 'major failure' if the supplier had refused an opportunity to repair the vehicle. Dealers should therefore be cautious about denying a legitimate warranty repair claim so as to avoid the more costly outcomes of replacement and refund.

4.6 Expiry of claims

Appliance & Air-conditioning Services Pty Ltd v ACM Liverpool Pty Ltd trading as Liverpool Nissan [2017] NSWCATCD 55

Background

Appliance purchased a 2009 model vehicle from Liverpool Nissan on 23 February 2010. From the date of purchase up until March 2016, the car required constant repairs as the car had developed a number of defects. On 29 March 2016 a claim was made for a full refund of the purchase price of the car. The claim for a full refund or for a replacement vehicle was made under subsection 79N(g) of the *Fair Trading Act 1987* (NSW) (**Fair Trading Act**).

Outcome

The claim was made outside the time limit imposed in the Fair Trading Act and as such the tribunal did not have jurisdiction to make a decision.

Relevance to Dealers

Under the Fair Trading Act, a claim can only be brought within three years otherwise the Fair trading Act does not provide any protection for consumers. In this case, the time limit for a refund under the contract for sale had also expired. Dealers should be aware of the time-limits for claims under legislation as well as in the contracts for sale. If you are unsure, then advice should be sought from a legal expert.

4.7 Dealer repairs and servicing

Liu v Zaccaria trading as Precision Automotive Engineers [2017] NSWCATD 59

Background

Mr Liu took his truck into Precisions Automotive for repairs to the pistons in his engine as well as other 'general repairs'. Precision advised Mr Liu that a full engine replacement was required in order to properly repair the problems but offered a cheaper solution which required less work than a full engine replacement. Mr Liu advised that money was a major factor and could only afford the cheaper repairs. The repairs were undertaken. After 550kms, the engine failed and had to be fully replaced as a result.

Outcome

Precision was found to have breached its obligations under the Australian Consumer Law for two separate reasons. Firstly, the repairs were not undertaken with due care and skill and as a result led to the total failure of the engine after 550kms of use. Secondly, because Precision Automotive claimed to be a 'specialist in all mechanical repairs petrol and diesel injection services', they should not have undertaken repairs they knew to be inadequate. It was held to not be relevant that Mr Liu was unable to afford the entire engine overhaul, Precision Automotive as an 'expert' should not have undertaken repairs it knew to be inadequate.

Relevance to dealers

Dealers, especially their service departments, must be aware that the services they offer must be adequate to resolve the problem at hand. The price range of the customer or their specific demands are not relevant. The commercial reality is that you are the experts in the field and you should only offer a service that is adequate, otherwise you will be found liable under the ACL.

4.8 Breaching dealer finance

ASIC continues to take action against motor vehicle finance brokers, issuing bans in the following cases.

17-146MR - Christopher Con Foo - Banned for 7 years for forging letters from customers' accountants to falsify the customer's business income.

17-347MR - Daniel Kenneth Wilson - Permanently banned for submitting false income verification and employment status.

ASIC has also cancelled the credit licence of a second hand car dealer in the following case:

17-361MR - William Barry Young - Licence cancelled for failing to be a member of an ASIC approved External Dispute Resolution (EDR) scheme. Membership to an EDR scheme, through either the Financial Ombudsman Service or the Credit and Investments Ombudsman, is a mandatory condition of all credit licences.

4.9 Termination of Volkswagen franchise

On 11 October 2017 an application by the owner of Werribee Volkswagen in Melbourne to prevent Volkswagen Group Australia (VGA) from terminating the dealer agreement based on fraudulent conduct of one its directors was dismissed by the Supreme Court of Victoria. VGA alleged fraudulent conduct in relation to the sale of fleet cars to third parties in other states who, VGA alleged, proceeded to on sell them.

5 Our National Automotive Team

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