Automotive Industry Group

Regulatory Update

June 2018

HWL EBSWORTH
LAWYERS

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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.

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- ATO to investigate motor vehicle transfers (Cth) (See item 1.2)
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- Cases relating to consumer guarantees and dealer repairs and servicing highlight the need for dealers to manage these issues (See items 4.1 and 4.2)

1 Legislation Update (new and current legislation)

1.1 Stamp duty amnesty period for motor car traders (Victoria)

In a recent Duties Bulletin, the Victorian State Revenue Office (SRO) has offered licensed motor car traders (LMCTs) an opportunity to voluntarily disclose, before Thursday 31 May 2018, any motor vehicles they have incorrectly obtained a duty exemption on over the last five years. By doing this, they will reduce the amount of penalty tax payable to 5%, plus interest on any outstanding duty. The usual penalty tax rate is up to 90% where a voluntary disclosure is not made.

Loan vehicles, service demonstrator vehicles and service loan vehicles attract motor vehicle registration duty. The Victorian SRO says some LMCTs have incorrectly obtained a motor vehicle registration duty exemption for motor vehicles registered and/or used as service demonstrator or service loan vehicles.

Under the *Duties Act 2000*, the exemption from duty is only on demonstrator vehicles used exclusively for the purpose of sale of another vehicle of the same class. This means that motor vehicles, such as those used for a range of business or private purposes, including, for example, customer loans, service, workshop and deliveries, promotion and use by directors, employees and their family members are not exempt from duty.

It is likely that a compliance program will then be conducted by the SRO where LMCT's will be audited. Penalty tax will be imposed at between 25% and 90% (plus interest) on any motor vehicle registration duty assessments arising from those audits.

If you are concerned that you may have not correctly accounted for motor vehicle registration duty, you should seek legal advice.

1.2 ATO to investigate motor vehicle transfers (Commonwealth)

The Australian Tax Office (ATO) has announced that it will investigate motor vehicle transfers in the 2016-17, 2017-18 and 2018-19 financial years. The ATO will acquire data from all State and Territory motor vehicle registry authorities about vehicles which have been transferred or newly registered with a purchase price or market value of $10,000 or more.

The ATO has said it expects records of 1.5 million individuals will be acquired for each financial year. The records will include detailed information about the purchaser, seller and (if applicable) leasing company. The ATO will compare that information against ATO data on income, spending and tax payments to identify non-compliance by buyers and sellers with obligations under taxation, GST and superannuation laws.

If dealers are concerned about how this investigation could affect them, they should seek legal advice from a taxation law expert.

1.3 Consumer credit law changes (Commonwealth)

The Australian Parliament has passed a new law establishing the Australian Financial Complaints Authority (AFCA). AFCA will hear complaints from consumers relating to dealings with banks and small credit providers beginning from 1 November 2018.

Dealers who qualify as small businesses – with fewer than 100 employees – will be able to utilise AFCA's complaints and dispute resolution mechanism if they have issues with their credit providers.

Dealers may also be impacted by consumer claims heard by AFCA. The Authority will have the power to hear and investigate complaints relating to motor vehicle financing and insurance policies.

1.4 Privacy Act data breach notification scheme (Commonwealth)

The notifiable data breach scheme under the *Privacy Act 1988* (Cth) came into effect across Australia on 22 February 2018. The scheme requires many Australian entities, including organisations with an annual turnover of more than $3 million, to notify any individuals likely to be at risk of serious harm due to a data breach.

Under the *Privacy Act 1988* entities must notify the Privacy Commissioner and affected individuals where an "eligible data breach" takes place. An eligible data breach occurs when:

a) there is unauthorised access to, unauthorised disclosure of, or loss of, personal information you hold; and

b) the access, disclosure or loss is likely to result in serious harm to any of the individuals to whom the information relates, eg customers.

Not all data breaches are “eligible data breaches”. There is a seriousness threshold in terms of the harm to any of the affected individuals. A data breach can range from a sophisticated hack into the computer systems to grab highly confidential and sensitive information, to a low-level employee who loses their phone in a public place, where that phone has email access.

When assessing whether disclosure would be likely to result in serious harm, you should consider the seriousness of the harm associated with the information's type and sensitivity, any security measures in place or efforts taken to de-identify the information, the nature of the harm, and any other relevant matters.

Notice must be given to the Privacy Commissioner and affected individuals, for example your customers, as soon as possible where there are reasonable grounds to believe that an eligible data breach has occurred, or the Privacy Commissioner has issued you with a direction to do so. The notice must set out your identity and contact details, a description of the breach, the kind of information disclosed and recommendations about the steps that individuals should take in response. A copy of the statement must also be issued to the Privacy Commissioner.

Given what is at stake and the urgency with which a business should respond, dealers should prepare a tailor-made data breach response plan, and train staff accordingly, so that in the event that an eligible data breach takes place, you are best positioned to respond.

Given dealers will hold valuable personal information relating to current and prospective customers, dealers should take note of these changes, seek further advice where necessary, and train staff accordingly.

2 Proposed Legislation

2.1 Road Vehicle Standards

Currently before the Federal Parliament is a bill to replace the *Motor Vehicle Standards Act 1989* with a new law to regulate what vehicles can be imported into Australia. This law intends to create uniform national standards for all road vehicles in Australia, as well as to harmonise Australian vehicle standards with international ones.

The Bill would also create a national Register of Approved Vehicles, and renew the testing system for specialty vehicles imported or sold in Australia.

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6032

2.2 Amendments to the Competition and Consumer Law

New legislation has been introduced to Parliament to amend Australia's consumer protection laws. The Bills propose a number of amendments to the *Competition and Consumer Act* and the *Australian Consumer Law* which will be relevant to car dealers. The key changes proposed are:

- expanding the powers for the ACCC and the corporate regulator, ASIC, to use investigative powers to assess whether contract terms are unfair; and
- increasing the maximum civil and criminal penalties for a breach of the *Australian Consumer Law*.

If passed these amendments will see the ACCC's powers continue to grow. The increases in the penalties are significant. For corporations who breach the ACL, the current $1.1 million cap on penalties will be removed and replaced with a maximum penalty which is the greatest of three times the benefit of the offence, 10% of the company's annual turnover, or $10 million. The maximum penalty for individuals will also be increased from $220,000 to $500,000.

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6097

2.3 ACCC new car retailing – likely legislative changes

In December 2017 the ACCC released its New Car Retailing Industry report, discussed below at 3.1. As part of this report, the Commission has made a number of proposals for legislative changes. Although no action has yet been taken, the government may move to enact these proposals in the future.

The key proposed legislative changes in the report are:

- the *Australian Consumer Law* should provide additional clarity to consumers about when they are entitled to a refund or replacement under consumer guarantees;
- there should be a mandatory scheme for car manufacturers to share technical information with independent repairers; and
- changes need to be made to the Franchising Code of Conduct to correct the imbalance of power between dealers and distributors.

3 Policy Update

3.1 ACCC announces 2018 focus on new car retailing & consumer guarantees

In 2017 the Australian Competition and Consumer Commission (ACCC) conducted a retail market study on Australia's new car industry. In December 2017 the ACCC released its New Car Retailing Industry Report, and following that the regulator announced that new car retailing and consumer guarantees are compliance and enforcement priorities this year.

ACCC Chairman Rod Sims said that the ACCC will have a low tolerance for practices which mislead consumers or fail to deliver the full level of protection to which consumers are entitled. Based on the level of focus the ACCC gave to the new car retailing industry in 2017, the industry can expect the same amount of focus from the ACCC in 2018.

The ACCC's market study on new car retailing identified concerns including that there was a systematic failure in consumers enforcing consumer guarantees after the purchase of a new car, and a compliance problem with respect to information given to consumers about their *Australian Consumer Law* rights at the point of sale. As outlined below, the ACCC made a number of recommendations concerning how consumer guarantees are dealt with, which may indicate how the ACCC will focus in any future enforcement proceedings against car dealers and manufacturers.

Key findings

The 2017 New Car Retailing Industry Report identified what the ACCC sees as the most important concerns for consumers in the new car industry, and made recommendations that actions be taken to rectify these. In addition to the legislative changes discussed in item 2.3 above, the key issues noted by the ACCC included:

- manufacturers' complaint handling systems need updating, particularly to improve the approach to the handling of consumer guarantee claims;
- new car buyers need more accurate information about their cars' fuel consumption and emissions;
- dealer warranty claim reimbursement processes are unnecessarily complex, include arbitrary administrative and technical requirements and can lead to dealers being inadequately reimbursed or indemnified for remedies they have provided for their customers;
- car manufacturers should review their dealer agreements, policies and procedures to ensure that their commercial arrangements with dealers do not contain unfair contract terms – including in relation to the reimbursement by manufacturers of dealer warranty reimbursement claims;
- the need for ACCC to work with manufacturers and dealers to develop a concise and simple explanation of consumer guarantee rights under the *Australian Consumer Law* and their interaction with manufacturer warranties — to be provided to consumers when they buy a new car; and

Further, one issue raised by the ACCC in 2017 that remains to be resolved in 2018 is the extent to which there is any legal obligation on manufacturers and dealers to inform consumers of *their Australian Consumer Law* legal rights – other than by displaying mandatory text in any manufacturer warranty documentation. Significantly, this issue was tested unsuccessfully by the ACCC in 2017 in the case of *ACCC v LG Electronics Australia Pty Ltd*. In that case, the Court held that, aside from displaying the mandatory text in warranty documents, there was no obligation on LG to provide information to a consumer about the consumer's rights under the *Australian Consumer Law*. The ACCC has appealed that decision and the appeal hearing is expected to commence in the middle of 2018. The outcome of that decision will have a significant impact on sales practices in new car retailing.

Stakeholder submissions

The ACCC's market study also considered submissions from the Australian Automotive Dealer Association (AADA) in relation to the imbalance of power between dealers and manufacturers in their commercial arrangements. The ACCC has stated that it considers these issues may require further examination, including:

- Minimum tenure and capital investment requirements;
    - a required minimum term for dealer agreements with the objective of allowing dealers a sufficient period in which to recoup capital investment required by the manufacturer;
    - limitations on the level of capital investment that a manufacturer can require of a dealer based on the tenure of the dealer agreement offered; and
    - enhancing a dealer's rights to be compensated for capital investment required by the manufacturer in the event of non-renewal of the agreement.
- Reasons for non-renewal;
    - providing dealers with reasons for non-renewal of a dealer agreement to enable an assessment of whether non-renewal has been exercised by a manufacturer in good faith;
- Changes to commercial arrangements;
    - providing national dealer councils and/or dealers with a minimum period of prior notice of proposed amendments to dealer agreements, policies and procedures and the ability for national dealer councils and/or dealers to challenge proposed amendments; and
    - exempting certain aspects of the commercial arrangements between manufacturers and dealers from unilateral variation by either party.
- Reimbursement for remedies;
    - enhancing a dealer's right to reimbursement to recover the costs of providing remedies where the manufacturer is responsible for the failure; and
    - strengthening the accountabilities of manufacturers and dealers when providing remedies to consumers.

The ACCC states in its final report that one possible option for this further examination of these dealer issues – and how they should be addressed – may be in the context of the next scheduled review of the Franchising Code of Conduct. The next scheduled review will occur in 2020. This review has been brought forward by the recently announced Parliamentary Inquiry into the Franchising Code of Conduct, which is discussed in item 3.4 below.

Responses to the report

The CEO of the Australian Automotive Dealers Association (AADA), David Blackhall, said the investigation reflected a structural imbalance favouring car manufacturers at the expense of dealers. He agreed with the ACCC's assessment that there is a need for reform, saying 'An industry code needs to address the fact that Dealers have no security of tenure; are increasingly being served with non-renewal notices; have ineffective capital expenditure protections; and unfair end of term arrangements.'

3.2 ASIC explores options to reform add-on insurance products

In 2017 ASIC sought submissions from stakeholders regarding the reform of add-on insurance products following the release of a Consultation Paper (CP294) titled '*The sale of add-on insurance and warranties through caryard intermediaries*'.

That Consultation Paper made two key proposals. First, to create a deferred sales model for add-on insurance and warranties, which would mean add-on sales products could only be sold after a period of time has elapsed, so consumers could assess products without undue pressure at the time of sale. The second proposal is to introduce stricter obligations on insurance providers to supervise their representatives, such as car dealers, to ensure those representatives act fairly when selling insurance products.

The review of add-on insurance follows ASIC's previous investigation into flex commissions, which led to the ban on flex commissions which will come into effect in six months' time on 1 November 2018. That ban prohibits car dealers setting the interest rate on loans. There will be a maximum $420,000 penalty for lenders who fail to comply with the new regulation once they come into force, and a penalty of up to $21,000 or 2 years imprisonment, or both, for any person who breaches the new rules.

Consumer Refunds

While review of the add-on insurance submissions is underway, ASIC has signalled its intention to treat these matters seriously. It has required three insurers repay consumers for add-on insurance bought through car dealers:

1. Suncorp was made to return $17.2 million to 54,000 consumers;

2. Allianz was made to return $48 million to 110,000 consumers; and

3. Swann Insurance was made to return $37 million to 68,000 consumers.

In a press release, ASIC called the refunds ' a good start on making things right'. The active response ASIC has taken with insurers suggests that the review of add-on insurance products will make robust recommendations limiting the ability for lenders and dealers to engage in practices which ASIC perceives might harm consumers.

CP294 can be found here:
http://download.asic.gov.au/media/4422973/cp294-published-24-august-2017.pdf

ASIC's January press release on add-on insurance can be found here:
http://asic.gov.au/about-asic/media-centre/articles-and-responses/add-on-insurance-and-flex-commission-practices/

3.3 Mandatory recall obligations - Takata airbags

On 28 February 2018, the Assistant Minister to the Treasurer issued a compulsory recall for all vehicles with defective Takata airbags, following an ACCC safety investigation. As of June 2018 5 million cars nationally have been included in the current and 'future recall' list published by the ACCC. The recall is putting additional strain on dealer resources as they manage to extra workload, and is likely to continue throughout 2018.

The ACCC stated that the Minister decided to issue a compulsory recall because, based on extensive evidence provided to the ACCC:

- It is reasonably foreseeable that use of vehicles fitted with defective Takata airbags may cause injury to drivers and/or passengers; and
- One or more suppliers of vehicles with defective Takata airbags has not taken satisfactory action to prevent those vehicles causing injury to drivers and/or passengers.

The compulsory recall comes in the wake of many years of voluntary recalls concerning Takata airbags which, since 2009, have seen approximately 2.7 million vehicles in Australia being subject to voluntary recall notices. However, the ACCC estimates that replacement rates for individual suppliers conducting voluntary recalls varied from between 36% to 84%, with four Suppliers having replacement rates of less than 50% of the vehicles subject to voluntary recalls.

Compulsory recalls

The difference between a voluntary recall and a compulsory recall is that a compulsory recall:

- Is initiated by the responsible Minister under the *Australian Consumer Law*, as opposed to the Supplier;
- Requires all Suppliers of affected vehicles to recall all affected vehicles in Australia (whereas a voluntary recall Can specify whatever terms a Supplier decides);
- Specifies the manner and timing of all recall activity; or
- If contravened, makes the Supplier liable to potential penalties.

A compulsory recall does not compel *consumers* to take their vehicles to the Supplier for the recall activity.

To whom do the Takata recall obligations apply?

For the purposes of the Takata Airbag compulsory recall, a reference to 'Suppliers' will not usually apply to dealers. This is because under this specific recall, a vehicle's Supplier is deemed to be the first person to supply a vehicle with a defective Takata airbag into Australia. In most cases, this will be the Australian corporate subsidiary of the vehicle's manufacturer. Other Suppliers to whom obligations apply under the recall are businesses which import and supply 'grey' or parallel imports.

If a manufacturer (or its subsidiary), not a dealer, is the Supplier for the purposes of the compulsory recall obligations, the manufacturer may still use its dealer network to perform the action required by the recall (such as the replacement of the airbag).

The Takata recall obligations

- Recall, as soon as possible and on a rolling basis, all affected vehicles and replace the airbag at no cost to the consumer - with priority given to replacement of airbags that present the highest safety risk (these being the 'alpha airbags' fitted to certain makes and models between 2001 and 2004);
- Publish a recall 'schedule' by 1 July 2018 which specifies when - on a rolling basis - affected vehicles are scheduled to have their airbags replaced under the recall - in this way an affected vehicle will either be under 'active recall' or 'future recall';
- Complete all replacements by 31 December 2020;
- Contact consumers directly to initiate the recall action;
- Publish a VIN search tool on their websites by 1 July 2018 that allows consumer to identify if their vehicle is affected; and
- Make arrangements for towing or transporting a vehicle or providing loan or hire cars during the replacement process in certain circumstances.

The recall obligations apply regardless or whether a customer bought their affected vehicle new or second-hand.

Prohibition on sale of affected vehicles - new & demonstrator vehicles

The Compulsory Recall Notice prohibits the sale of a new or demonstrator vehicle with an affected Takata airbag after 31 December 2018.

A person may sell a new or demonstrator vehicle with an affected Takata airbag *before* 31 December 2018, but must, first if doing so, comply with a prescribed communications regime set out in the Compulsory Recall Notice. In summary, this requires the seller, before the sale, to:

- Inform the consumer using specific prescribed wording of the following summary of matters:
    - there is an affected Takata airbag in the vehicle;
    - to avoid future risk of injury or death, the affected Takata airbag needs to replace as soon as possible once the vehicle is on 'active recall'; and
    - suppliers will make direct contact with the consumer to arrange for the recall activity to occur once the vehicle is on 'active recall';
- Record, in the service record of the affected vehicle, the:
    - presence of an affected Takata airbag in the vehicle;
    - the location of the affected Takata airbag (e.g. driver side, passenger side or both);
    - the need to replace the affected Takata airbag during the active recall period; and
    - affix a notice to the vehicle's windscreen and engine bay containing prescribed text about the affected Takata airbag.

Prohibition on sale of affected vehicles - used vehicles

The Compulsory Recall Notice prohibits the sale by a car dealer of a used vehicle with affected Takata airbag if that affected vehicle is under active recall.

If a used vehicle with an affected Takata airbag is not under active recall (but is instead either on 'future recall' - or the used car dealer otherwise believes the vehicle has an affected Takata airbag - the Compulsory Recall Notice permits a sale of the vehicle, provided that the used car dealer first informs the prospective purchaser, using specific prescribed wording which, in summary, includes that:

- If the vehicle is less than six years post manufacture:
    - the vehicle has an affected Takata airbag which, depending on its age and other factors, will pose a risk of injury or death;
    - to avoid the risk of injury or death, the affected Takata airbag must be replaced as soon as possible after recall action is initiated by the Supplier because, as the airbag gets older, the risk of injury or death increases;
    - the Supplier will initiate the recall of the airbag at the time specified in the Recall Initiation Schedule on the Supplier's website;
    - the Supplier will contact the consumer if the Supplier has the consumer's contact details; and
    - the consumer can contact the Supplier for further information.
- If the vehicle is more than six years post manufacture:
    - the vehicle has an affected Takata airbag was poses a risk of serious injury or death which risk increases as the vehicle gets older;
    - the affected Takata airbag must be replaced as soon as possible after recall action is initiated;
    - the Supplier will initiate the recall of the airbag at the time specified in the Recall Initiation Schedule on the Supplier's website;
    - the Supplier will contact the consumer if the Supplier has the consumer's contact details; and
    - the consumer can contact the Supplier for further information.

The Compulsory Recall Notice does not prohibit the private sale of an affected vehicle by an individual. The ACCC advises that if an owner of a vehicle wishes to sell it privately before receiving a final replacement airbag, the owner should inform the new owner that the vehicle has an affected Takata airbag that will require replacement, and contact the Australian office of the manufacturer and provide them with the new owner's contact details (with the new owner's consent).

The Compulsory Recall does not render an affected vehicle un-roadworthy or un-registrable. The ACCC also advises that it should not affect a vehicle's insurance, and that if any insurer takes a contrary view, a consumer should report that to the ACCC.

For more information, and to view the Compulsory Recall Notice, please visit:
https://www.productsafety.gov.au/recalls/compulsory-takata-airbag-recall/about-the-compulsory-takata-airbag-recall

3.4 Franchising Code of Conduct review

On 22 March 2018 the Senate referred the *Franchising Code of Conduct* to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry.

The terms of reference of the Senate Inquiry are wide ranging, but include the following:

- The operation and effectiveness of the Franchising Code of Conduct, including the disclosure document and information statement and the Oil Code of Conduct, in ensuring full disclosure to potential franchisees of all information necessary to make a fully informed decision when assessing whether to enter a franchise agreement, including information on:
    - likely financial performance of a franchise and worse- case scenarios;
    - the contractual rights and obligations of all parties, including termination rights and geographical exclusivity;
    - the leasing arrangements and any limitations of the franchisee's ability to enforce tenant's rights; and
    - the expected running costs, including costs of goods required to be purchased through prescribed suppliers.

- The effectiveness of dispute resolution under the Franchising Code of Conduct and the Oil Code of Conduct;
    - The impact of the Australian Consumer Law unfair contract provisions on new, renewed and terminated franchise agreements entered into since 12 November 2016, including whether changes to standard franchise agreements have resulted;
    - Whether the provisions of other mandatory industry codes of conduct, such as the Oil Code, contain advantages or disadvantages relevant to franchising relationships in comparison with terms of the Franchising Code of Conduct;
    - The adequacy and operation of termination provisions in the Franchising Code of Conduct and the Oil Code of Conduct;
    - The imposition of restraints of trade on former franchisees following the termination of a franchise agreement;
    - The enforcement of breaches of the Franchising Code of Conduct and the Oil Code of Conduct and other applicable laws, such as the *Competition and Consumer Act 2010*, and franchisors; and
    - Any related matter.

The Senate Inquiry will call witnesses and will invite submissions from a variety of industry stakeholders in the Franchising and Oil Code sectors.

The report following the Senate Inquiry is due by 30 September 2018.

Independent to the Senate Inquiry, the Australian Automotive Dealer Association has made several submissions the ACCC and relevant Government Departments in connection with the terms of reference of the Senate Inquiry, in particular:

- Proposed reforms to the Franchising Code of Conduct and the Australian Consumer Law;
- The power imbalance between motor vehicle manufacturers and franchised new motor vehicle dealers; and
- The need for an industry specific Code of Conduct for the new motor vehicle retail industry (the Dealer Code)

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising

3.5 ACCC Small Business 2017 Snapshot

In March 2018 the ACCC released its Small business 2017 snapshot, giving an overview of the Commission's activities last year. The ACCC reported that there are 2.2 million small businesses operating in Australia, including 70,700 franchise units.

In 2017 4796 issues were reported to the ACCC by small businesses, a decrease of 2.9% compared to 2016. The top issues reported by small business were misleading conduct, breach of the consumer guarantees and wrongly accepting payment.

In 2017 the ACCC took 7 enforcement actions on behalf of small businesses, including 5 actions for alleged breaches of the Franchising Code, and the first court action to protect small businesses from unfair contract terms. The Commission levied $177,000 in penalties relating to misconduct towards small business.

The ACCC has said its focus in 2018 will be in relation to business-to-business unfair contract terms, and on breaches of the Franchising Code of Conduct by large or national franchisors.

https://www.accc.gov.au/media-release/franchising-misleading-behaviour-continues-to-be-an-accc-focus

3.6 ACCCount - 1 October to 31 December 2017

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

In its overview of the quarter's activities, the ACCC drew attention to a number of activities which directly impact upon car dealers in Australia:

- releasing the New Car Retailing Industry Market Study;
- holding the ACCC's Takata Taskforce conference with suppliers and interested parties in anticipation of the compulsory recall of vehicles fitted with defective Takata airbag inflators; and
- releasing an Issues Paper on the sale of quad bikes in Australia.

As well as these largely advisory roles, between October and December the ACCC was involved in 13 court proceedings relating to Australia's competition laws. The Commission signalled a particular focus of these proceedings and those in the future is targeting unfair contract terms which exploit small businesses entering into standard form contracts with large suppliers.

https://www.accc.gov.au/publications/acccount/acccount-1-october-to-31-december-2017

3.7 ACCCount - 1 January to 31 March 2018

The ACCC has also released its report on its activities in the first quarter of 2018.

The Commission reported that it has had an active role already this year. It has 13 cases currently proceeding enforcing Australian competition laws, and another 35 consumer enforcement cases on foot.

Of particular interest to dealers, the ACCC has continued to draw focus to its activities protecting small businesses against unfair contract terms. It also noted that it intends to monitor recall activities related to the Takata airbags recall (see above, item 3.3) to ensure compliance with recall obligations and to consider enforcement where those obligations are not complied with.

As discussed elsewhere in this Update, the Commission reiterated that it sees an industry-wide problem with the way car manufacturers handle consumer guarantee complaints, and expects to take further action in that area.

https://www.accc.gov.au/system/files/ACCCount%20-%20March%202018%20Quarter.pdf

3.8 Australia Bureau of Statistics - Sales of New Motor Vehicles, Australia, December 2017

The Australian Bureau of Statistics has published *Sales of New Motor Vehicles, Australia, December 2017* which presents details about the sales of new motor vehicles in Australia. The key details in the December report are:

- The December 2017 trend estimate (99,756) increased by 0.2% when compared with November.
- When comparing national trend estimates for December 2017 with November 2017, sales for Other and for Sports utility vehicles both increased by 0.5%. By contrast passenger vehicles decreased by 0.3%.
- The largest upward movement across all states and territories, on a trend basis, was in Tasmania (2.2%), continuing an upward trend that began in April 2017.
- The largest downward trend movement across all states and territories, on a trend basis, was in the Northern Territory (-1.9%). The only other downward trending market was the Australian Capital Territory (-0.3%).

This is the last issue of this data by the ABS. Future data on the sale of new motor vehicles will be published by the Federal Chamber of Automotive Industries, in a different form. It will continue to be publicly available.

3.9 Driving reform in the automotive market

The ACCC have released the speech of Mr Rod Sims, the Chairman of the ACCC regarding his address to the Australian Automotive Aftermarket Association (AAAA) at the 2018 Autocare conference. Mr Sims spoke of key issues that drove reform in the automotive market and these have been summarised below.

Need for mandatory access to technical service and repair information

Following a market study into new car retailing, it was found that car manufacturers generally own and control the technical information required to repair and service new cars. This allowed car manufacturers to control who had access to the technical information needed to fix cars, often favoring their own dealer and preferred repairer networks over independent repairers.

The ACCC have recommended that a mandatory scheme be introduced compelling the sharing of technical information with independent repairers to ensure that consumers would have a choice of providers to repair and service their cars. In December 2014, various automotive associations including the AAAA and the Australian Automotive Dealer Association (AADA), signed a Heads of Agreement to facilitate the voluntary sharing of technical information.

Despite the Heads of Agreement, independent repairers continued to experience problems accessing technical information from car manufacturers. The ACCC concluded that voluntary commitments to share technical information had not been successful and they recommended a mandatory scheme to share technical information with independent repairers on 'commercially fair and reasonable terms.' The ACCC also recommended that a mandatory scheme be put in place by the Government to facilitate the sharing of technical service and repair information.

Having done the market study, the ACCC have now vacated the field. However, they will continue to engage with stakeholders, and provide advice to Government to assist in the development of a mandatory scheme for independent repairers to gain access to the technical information.

Observations from Car Retailing Market Study

From the Car Retailing Market Study, the ACCC has found that there was a dominant 'culture of repair' underpinning systems and policies across the industry based mainly around the manufacturer's warranties, when enhanced remedies may be available under Australian Consumer Law.

Mr Sims went on to say that the ACCC will *"remain committed to industry wide change and investigations into other car manufacturers continue. The motor vehicle industry is now on notice, from manufacturers to dealers, that consumer issues need to be considered individually and consumers must be provided their rights under the ACL, in addition to any warranty rights.*"

Takata airbag recall

On 28 February 2018, Minister Sukkar announced a compulsory recall for all vehicles supplied in Australia fitted with a faulty Takata airbag inflator to be completed by 31 December 2020. The compulsory recall has not only affected Original Equipment Manufacturers (OEMs), they have also affected the suppliers of spare parts. See item 3.3 for more information about the Takata airbag recall.

Obligations on suppliers of spare parts

Suppliers of spare parts must use their best endeavours to identify if they have any faulty Takata airbags in their possession.

If a spare parts supplier has a faulty Takata airbag inflator they are required to contact the relevant OEM's head office who must make arrangements to retrieve the spare part from the spare parts supplier, at their cost. The OEM must wear the costs, but the spare part supplier must assist in identifying any in their possession.

Authorised representatives on behalf of a Supplier

Suppliers may satisfy their recall obligations, including conducting replacements by using their dealership network or other authorised representatives, which may include independent repairers**.**

Ultimately the responsibility for compliance with the key recall and replacement obligations falls upon the Suppliers, most notably the OEMs. It is they who are going to be exposed to significant penalties for failing to comply with replacement obligations, and they will need to have regard to these consequences when making decisions as to who and how Takata airbags are to be replaced.

OEMs have been given the flexibility to undertake these obligations by allowing authorised independent repairers to carry out the work, this flexibility will allow suppliers to service geographic areas where they may have no dealers present.

Mr Sims concluded by saying that "*Australia might not manufacture cars anymore, but we can still apply the Australian "fair-go mindset" to how we do business.*"

Link: https://www.accc.gov.au/speech/driving-reform-in-the-automotive-market

4 Case law update

4.1 Consumer guarantees/claims

WaxHed Incorporated Pty Ltd v Empire Real Estate Australia Ltd [2018] NSWCATAP 47 (21 February 2018)

Background

In 2016 WaxHed, a Toyota dealer in Tweed Heads, sold a 2010 Audi Q5 to Empire Real Estate for $26,520. At the time of sale the vehicle had travelled around 90,000 kms. The purchaser found the car was consuming a large amount of engine oil, and after having it inspected it was found to be consuming .79 L of oil per 1000 km. This amount was outside Audi's permissible tolerance of .50 L/1000 km for a new vehicle. Audi Australia offered to replace the car's engine at no cost provided the purchaser pay a service fee of $1,284.50. After an initial hearing before the NSW Civil & Administrative Tribunal the dealer agreed to pay that service fee.

Despite this agreement the purchaser insisted on continuing the claim before the Tribunal, seeking a full refund of the car's purchase price on the basis that the issue was a 'major failure' meaning the car was not of acceptable quality under the *Australian Consumer Law*.

Outcome

The Tribunal refused the claim, ordering that the purchaser take possession of the car although the dealer had to pay some costs for hire fees while the car was repaired. The Tribunal held that although the higher oil consumption might constitute a 'major fault', it was necessary to consider the purchase price, the age and the kilometres the car had travelled, and especially the repairs carried out and the cost of those to the purchaser. In light of all this, the Tribunal found the parties should be held to their bargain.

Relevance to dealers

Although dealers can be held responsible for major faults with second-hand vehicles, this case demonstrates that all faults must be viewed in context, including the level of inconvenience to the owner and any repairs which have taken place to rectify the fault. In cases of significant issues with recently sold vehicles, dealers should be cautious about denying claims to repair cars without proper investigation of the claims as they may later be required to totally refund the purchase price to the customer.

Whitton v Metro Motor Sales Pty Ltd (Civil Claims) [2017] VCAT 2122 (20 December 2017)

Background

Whitton bought a used 2008 Ford Mondeo that had travelled over 210,000kms from Metro Motor Sales, before purchasing the car Metro Motor Sales agreed to have all defects on the Mondeo to be repaired but Whitton signed the contract before he collected the car. Neither party had produced a written contract of the sale at the VCAT hearing.

After Whitton purchased the car, defects arose and Whitton took the car to an independent mechanic who stated that the defects were not fixed. Subsequently Whitton took the car following the direction by Metro to one of Metro's mechanic (Protune Automotive). Protune declined to fix the defects free of charge. The Mondeo was taken to another mechanic and during that time, Metro gave Whitton a loan car which was damaged through Whitton's negligence.

Following the unsatisfactory repair and return of the Mondeo to Whitton, Whitton took the car to an authorised Ford dealership to have the car inspected and satisfactorily carried out the repairs. However, before the Ford dealership carried out its repairs, Whitton, lacking in confidence in the Mondeo bought a VX Commodore.

Whitton argued that the Mondeo was unsatisfactory and that Metro had breached its obligations under the contract of sale. Metro's position is that the car was not subject of a statutory warranty under section 54(2A) of the *Motor Car Traders Act 1986* and that Metro did not breach its contract with Whitton.

Outcome

The Tribunal's decision was that no statutory warranty applied to the Mondeo. Under Section 54(1) of *the Motor Car Traders Act 1986* the Mondeo had been driven more than 160,000kms, which is the threshold to gain the statutory warranty.

However, the Tribunal went on to state that under the the *Australian Consumer Law*, consumers have additional rights and based on both oral and evidence presented by witnesses and through documents tendered at the hearing, the Tribunal concluded that Metro breached the express term of the contract of sale in that it did not repair the defects.

Secondly, if the Mondeo's defects amounted to a "major failure" the consumer can choose the remedy which includes the return of the Mondeo for a refund of the purchase price. The Tribunal in this instance decided that the repairs done by the Ford dealership was not significant or expensive as to establish that the car had a "major failure" within the meaning of the *Australian Consumer Law*. Therefore Whitton was only confined to claiming damages.

Whitton was awarded damages for the cost of repairs done by the Ford dealership to the Mondeo. In additional, he was awarded damages for the cost of purchasing the VX Commodore. The Tribunal decided that Whitton was seeking to mitigate his damage, as he no longer had a working car at the time.

Metro was awarded damages for Whitton's negligence in damaging the loan car. It was found that the amount of damages claimed by Whitton was equal to the amount of damages claimed by Metro. Since the set off extinguishes Whitton's claim, the tribunal concluded to dismiss the proceedings.

Relevance to Dealers

This case highlights the need for dealers to be aware of their obligations under the ACL, either to replace the vehicle or provide a refund of the purchase price in the event of a major defect. It is also important that dealers have all documents in writing to ensure that when a dispute arises, it is clear between the parties as to the obligations of each party.

BNMB Transport Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd [2018] FCA 223 (5 March 2018)

Background

BNMB Transport Pty Ltd bought a second-hand high performance Mercedes-Benz E55 AMG vehicle from Mercedes-Benz. The sale was financed through a hire purchase agreement with Mercedes-Benz Finance which was guaranteed by BNMB's principal officer and another guarantor.

Two months after the sale the rear suspension collapsed . BNMB sued Mercedes-Benz for breaches of consumer guarantees under sections 54 (Guarantee as to acceptable quality) and 55 (Guarantee as to fitness for a disclosed purpose) of the *Australian Consumer Law*.

Mercedes-Benz defended itself under section 54(6) contesting that the car it provided does not fail to be of acceptable quality if it was damaged through abnormal use. Mercedes-Benz stated that BNMB engaged in conduct that constituted damage by abnormal use through the repeated harsh acceleration done by the car, which lead to fractures in the rear sub-frame leading to the collapse of the suspension. BNMB in response argued that because the E55 AMG is a high performance vehicle it should be able to endure the forces of repeated harsh acceleration.

Evidence was led by Mercedes-Benz that the vehicle had presented to the relevant dealership with bald tyres and a significant build-up of molten rubber deposits on the underside of the rear wheel arches.

Outcome

The court decided in favour of Mercedes-Benz stating that even though the vehicle is classed as a high performance vehicle, it nevertheless is still a road sedan and therefore is not meant to be driven like a racing car.

Relevance to Dealers

This case offers protection to dealers selling high performance vehicles. It is important to note that when selling high performance vehicles, dealers should make it clear that such vehicles should be treated similar to that of a normal roadworthy vehicle. However, it should be noted that if a customer specifically asks for a vehicle capable of being driven on a racing track and where the car will be subjected to the forces and performance of racing cars, then the decision of this case and the protection offered to the dealer in this case, may not apply.

4.2 Dealer repairs and servicing

Elder v Hyundai Motor Co Australia Pty Ltd (Civil Claims) [2017] VCAT 2120 (21 December 2017)

Background

Elder purchased a new Hyundai iMax on the 13th of April 2012 for $42,500. As at the date of hearing the vehicle has travelled just over 200,000 kms, Elder asserts that the iMax has both major and minor mechanical problems and alleges Hyundai had been stalling and refusing to carry out repairs. As a result Elder sought damages in the amount of $82,543.

Hyundai denied the allegations of Elder and said that the vehicle was performing adequately. Hyundai considered that many of the problems arising were due to maintenance issues which is a responsibility of the owner and the fact that it had been driven in excess of 200,000kms.

Under section 54 of the *Australian Consumer Law* goods supplied to a consumer must be of acceptable quality. The term acceptable quality is defined to mean that the goods are fit for the purposes, for which they are commonly supplied, free from defects, of acceptable appearance and finish, safe and durable. Elder contended that the major mechanical problems were characterised as a major failure and accordingly he should be able to reject the goods under section 259(3) of the *Australian Consumer Law*.

Outcome

The Tribunal decided that where a person claims compensation from another, such as for breach of contract or breach of consumer guarantees, they must mitigate their damage. This requires the person to take reasonable steps to minimise their damage, and in this case it was apparent that through Elder's quantum of damage of $82,543, he did not mitigate his damage.

The Tribunal did not order Hyundai to pay the quantum of damage Elder wished to claim. Apart from items which Hyundai agreed to repair during the hearing, Hyundai was ordered to pay compensation for the replacement of an EGR valve and pipe which amounted to a minor mechanical problem. The remaining claims were dismissed.

Relevant to Dealers

With respect to minor claims for repairs, dealers should note that their liability would at most be for the cost of replacing or repairing a defective vehicle. It is highly unlikely that a situation would arise whereby the damages awarded against a dealer would be more than the actual cost of the vehicle.

4.3 Repurchase of commercial vehicles

Australian Motor Homes Pty Ltd v Maria's Farm Veggies Pty Ltd [2018] NSWSC 216 (28 February 2018)

Background

In 2015 Maria's Farm Veggies purchased a Winnebago motor home from Australian Motor Homes for use by the business. The negotiations were carried out by a director of Maria's Farm Veggies. In June 2016 Maria's Farm Veggies was placed into administration and as a result the powers of the directors (including to sell company property) were suspended.

Despite this, in July 2016 the same director approached Australian Motor Homes and arranged to sell the Winnebago back to them. A price was agreed upon and the moneys were subsequently paid into a bank account held by that director. An employee of Australian Motor Homes carried out a REVS check against the vehicle which found that no security interest or other interest was registered against the vehicle. No other searches were conducted and as a result it was not revealed that the company was in administration. The sale went ahead. Some time later, administrators of Maria's Farm Veggies brought proceedings against Australian Motor Homes for payment of the value of the Winnebago.

Outcome

The NSW Supreme Court found that Australian Motor Homes had possession of a vehicle (the Winnebago) belonging to Maria's Farm Veggies for which no payment had been made to Maria's Farm Veggies. As a result it was made to pay the value of the Winnebago.

The Court held that it was no defence that Australian Motor Homes purchased the vehicle in good faith without any knowledge of the company being in administration, as it had not taken reasonable steps to ensure that the director was acting on behalf of Maria's Farm Veggies.

Relevance to dealers

When purchasing pre owned vehicles, dealers should be aware of all necessary steps to ensure a seller has authority to sell the vehicle. Dealers should be wary of sellers who engage in behaviour which may arouse suspicion, such as a director or company executive requesting payment into a non-company bank account. If dealers are unsure of what steps and searches should be undertaken, then legal advice should be sought.

4.4 Termination of dealer agreements

Sandersons Eastern Suburbs v Mercedes-Benz Australia/Pacific [2018] NSWSC 52

Background

In 2003 Sandersons and Mercedes-Benz entered into a dealer agreement. The agreement was subject to the Franchising Code of Conduct, a mandatory industry code which regulates the conduct of all franchising participants in Australia and has been in place since 1998.

The dealer agreement purportedly operated as a yearly agreement that could be ended by a notice to not renew delivered between 1 January and 30 June. In early 2014 Mercedes-Benz sent a notice to Sandersons saying that the dealer agreement would not be renewed beyond the end of 2016. Some time later, Mercedes-Benz said it would renew the agreement for 2017 but not beyond that. Sandersons commenced legal proceedings seeking declarations that the notices given by Mercedes-Benz were of no effect to end the dealer agreement and that the dealer agreement should be interpreted as operating as an ongoing agreement which is subject to termination in accordance with the Code, namely:

1. the consent of the franchisee (the dealer);
2. reasonable notice, giving reasons for why the agreement is being terminated; or
3. a breach of the agreement by the franchisee.

The Court made orders sought by Sandersons declaring the notices issued by Mercedes-Benz as being of no effect. Sandersons sought further orders insofar as it related to how the dealer agreement could be ended, either by notice to not renew or by termination, the latter invoking the application of the provisions of the Code.

Outcome

The Court declined to make orders and dismissed the proceedings on the basis that because the notices were declared void, and Mercedes-Benz had not issued notices in the period 1 January and 30 June of the year it intended to not renew the dealer agreement, there was no basis for the court to intervene.

Relevance to dealers

In a climate of high competition and uncertainty in the automotive industry, and where dealers invest substantial resources in dealerships, dealers should be especially familiar with the operation of provisions in dealer agreements which relate to non-renewal and termination.

Metro Investments Holdings Pty Ltd v GM Holden Ltd [2017] FCA 1523 (6 December 2017)

Background

Metro Investments had operated a GM Holden dealership in Adelaide since 1988. The dealership was one of GM Holden's high performing dealerships. In 2001 GM Holden had allegedly told Metro Investments that the property their dealership operated at was the most strategically important site in Adelaide for a Holden dealership. Metro Investments claimed that, in 2006, GM Holden promoted the idea of turning the Metro Investments dealership into a 'premium dealership'. Metro Investments undertook significant costs to refurbish the dealership in order to become a premium dealership.

In 2015 GM Holden informed Metro Investments that it did not intend to renew the current Dealer Sales and Services Agreement (DSSA), which was due to expire in 2017. The reason given for this was that a strategic review of Holden dealerships in Adelaide had been conducted after the end of Holden manufacturing in Adelaide, and GM Holden had chosen to focus on a different, nearby Holden dealership.

Metro Investments sued, seeking an injunction requiring GM Holden to renew the DSSA. Metro Investments argued it would be unjust and unfair to end the agreement after the representations made about the importance of the location, the investments made by Metro Investments and the fact Metro Investments continued being a high performance dealer. Metro Investments also alleged that GM Holden had acted in breach of the Franchising Code of Conduct, as not renewing the DSSA after the representations made was not acting in good faith.

Outcome

The Court refused to make an injunction which would have ordered GM Holden to renew the DSSA. Although the Court said there might be a case that GM Holden had acted unfairly or in breach of the Franchising Code of Conduct, in granting an injunction a Court has to consider how appropriate the order is in light of all the circumstances. Because of weaknesses in Metro Investments' evidence (it lacked written records of many of the things it said GM Holden told it) and because Metro Investments delayed bringing the claim for 18 months, the Court found it was inappropriate to grant an injunction.

Relevance to dealers

The decision is another example of the lack of legal remedies available to dealers under the common law or under the Franchising Code of Conduct. The case also shows the importance of dealers quickly preparing complete records about their dealings with distributors. Where dealers are unsure about the legality or fairness of actions by distributors, legal advice should be sought.

5 Our National Automotive Team

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