Automotive Industry Group

Regulatory Update

June 2019

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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Headlines

- Parliamentary Joint Committee on Corporations and Financial Services report of inquiry into franchising in Australia (see 2.1).
- Amendments to *Road Transport Act 2013* following Takata airbag recall (see 1.2).
- Banking Royal Commission final report has significant consequences for the automotive industry (see 3.2).
- Proposal that Unfair Contract Terms be expanded to apply to car dealers and in particular to car dealer agreements (see 2.3).

1. Legislation Update

1.1 Competition and Consumer Regulations Update

From 8 June 2019, businesses who give consumer warranties against defects for the supply of services (as well as goods and services) will be required to include additional mandatory text in those warranties. The requirement is a part of an amendment to the *Competition and Consumer Regulations 2010 (Cth)*.

Under the existing legislation, the mandatory text is only required to be included in warranties against defects for the supply of goods (such a motor vehicle), but not services (such as motor vehicle service and repair work).

The mandatory text alerts consumers to the existence of the Australian Consumer Law (**ACL**) and reminds consumers and others involved in the transaction that the consumer guarantees set out in the ACL cannot be excluded by the warranty.

It is an offence under the ACL (attracting civil and/or criminal penalties) to give a consumer a warranty against defects that does not comply with the requirements prescribed in the regulations.

There are exceptions to the requirement to include the mandatory text in warranty documentation. However, the exceptions are limited to very specific services which are either:

1. already regulated under other legislation (such as insurance contracts or telecommunications services); or
2. services supplied under a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored.

The exceptions do not apply to the supply of motor vehicle service and repair work.

In addition to the mandatory text, the existing provisions which prescribe the contents of warranties against defects will remain in force. These prescribed contents include that a warranty against defects must (for example):

1. be in a document that is transparent; and
2. concisely state:
   (a) what the person who gives the warranty must do so that the warranty may be honoured; and
   (b) what the consumer must do to entitle the consumer to claim the warranty.

Any businesses (including motor vehicle dealers) which provide consumers with a warranty against defects in connection with the supply of services must update their warranty documentation to include the new mandatory text by 9 June 2019.

1.2 Road Transport Act Amendment (NSW)

The *Road Transport (Vehicle Registration) Amendment (Consumer Recalls) Regulation 2019 (NSW)* was passed on 15 February 2019 as a direct response to the ongoing mandatory recall of vehicles equipped with faulty Takata airbags. Takata had been found to have fitted millions of airbag inflators that over time are prone to

deteriorate and shoot sharp pieces of metal into occupants of the vehicle upon ignition, having resulted in the death of a man in NSW, the serious injury of a woman in the Northern Territory and numerous other fatalities around the world.

The Amendment of the *Road Transport (Vehicle Registration) Regulation 2017* allows the NSW Roads and Maritime Services to "refuse to register a registrable vehicle if the Authority is satisfied that the vehicle, or any part of the vehicle, is subject to a recall notice under section 122 of the Australian Consumer Law".

While the Amendment does not target vehicles with Takata airbags specifically, it will permit the Government to suspend the registration of those who have not complied with the mandatory recall. New South Wales is the most recent state to change its laws to reflect the Takata airbags, with Victoria being the only state left not to have done so.

Car owners who possess vehicles fitted with Takata airbags will not be able to re-register their vehicle until the offending airbags have been completely replaced by the manufacturer, which will be at no cost to the consumer.

1.3 Road Vehicle Standards Legislation (Cth)

On 28 November 2018, the Federal Parliament passed the Road Standard Bills, which received Royal Assent on 10 December 2018. The main provisions of the Road Vehicle Standards Act 2018 will come into effect on 10 December 2019. However, there will be a 12 month transitional period during which transitional arrangements will be in place, allowing some approval holders to continue operating under existing approvals until 10 December 2020.

The Road Standard Bills aim to create uniform national standards for all road vehicles in Australia, as a means of aiding consumers in choosing safer vehicles and coordinating Australian standards for vehicles with international ones.

The new laws will establish a register of approved vehicles, an online database for consumers to comply with national vehicle standards and create a greater sense of clarity surrounding vehicle recall. The Acts associated with the Road Vehicle Standards are as follows:

- The *Road Vehicle Standards Act 2018* (**RVSA**) replaces the *Motor Vehicle Standards Act 1989*, updating and modernising the regulation of road vehicles in Australia.
- The *Road Vehicle Standards (Consequential and Transitional Provisions) Act 2018* contains the necessary provisions to foster the introduction of the RVSA as the Government's primary legislation for the regulation of road vehicles. The Hon Michael McCormack, Deputy Prime Minister and Minister for Infrastructure and Regional Development, has acknowledged that businesses with existing approvals under the old legislation will require additional time to conform their practices in accordance with the new requirements. This is accounted for in the Act.
- The *Road Vehicle Standards Charges (Imposition - General) Act 2018*, the *Road Vehicle Standards Charges (Imposition - Customs) Act 2018* and the *Road Vehicle Standards Charges (Imposition - Excise) Act 2018* provide the requisite authority for the Australian Government to implement charges to recoup the costs from industry that arise through the administration of the RVSA.

1.4 Road Vehicle Standards Rules

The *Road Vehicle Standard Rules 2019* (**Rules**) were made under the RVSA on 13 February 2019 and apply to used and new vehicles being introduced to the Australian market for the first time, specifically concerning the regulation of these vehicles and the associated vehicle components.

The Rules cover the operational aspects of the RVSA including:

- The information required for the Register of Approved Vehicles (**RAV**);
- The powers to grant approvals for the importation of road vehicles into Australia and the powers to revoke or suspend these approvals;
- The recalling of road vehicles and road vehicle components; and
- The entering of vehicles on the Specialist and Enthusiast Vehicles Register.

1.5 Vehicle Exemption Notices 2019

Various Exemption Notices have been exercised this year under existing legislation relating to Australia's automotive industry.

The relevant Notices are as follows:

- **National Heavy Vehicle Concrete Agitator Work and Rest Hours Exemption Notice 2019 (No 1)**
    - This notice, enacted on 1 January 2019 and expiring on 31 December 2021, was enacted to provide concrete agitator drivers the legal right to (subject to conditions), take a "short work break" of at least 15 minutes where the vehicle is stationary, the driver occupies the driver's seat while the engine is running and no other work is conducted other than sitting in the driver's seat.
    - The notice applies to concrete agitator drivers in NSW, VIC, QLD, SA and TAS and was made under Section 266 of the Heavy Vehicle National Law.

- **New South Wales Class 3 Platform Container Exemption Notice 2018 (No.1)**
    - This notice, commencing on 17 December 2018 and expiring 5 years from its commencement, exempts certain heavy vehicles transporting platform containers from a number of dimension and mass conditions under the Heavy Vehicle National Law.
    - This notice was enacted to simplify the movement of platform containers to and from NSW ports, reducing time and costs and was made under Section 117 of the Heavy Vehicle National Law.

- **National Heavy Vehicle Standards (Special Purpose Vehicles Exceeding 40 tonnes Total Mass) Exemption Notice 2018 (No. 1)**
    - This notice, commencing on 4 January 2019 and expiring 5 years from its commencement, exempts certain types of Special Purpose Vehicles with a total mass of more than 40 tonnes from a number of specifications under the Heavy Vehicle (Vehicle Standards) National Regulation.
    - This notice was made under Section 61 of the Heavy Vehicle National Law and applies in the ACT, QLD, NSW, SA, TAS and VIC.

1.6 Victorian Motor Vehicle Duty Rates & Exemptions

- As foreshadowed in the the 2019/20 Victorian budget handed down on 27 May 2019, the *State Taxation Acts Amendment Act 2019* will come into effect from 1 July 2019. In summary, the amendments which affect motor vehicles are thatMotor vehicle duty for used passenger motor vehicles valued above the luxury threshold will be aligned with the rate for new cars ensuring consistent treatment of new and used cars regardless of the value.
- Motor vehicle duty rates for passenger vehicles valued at above $100,000 have increased - with the exception of 'low emission' and/or 'primary producer' passenger vehicles.

Specifically, all passenger motor vehicles valued between $100 001 and $150 000 will be charged a motor vehicle duty of $14.00 per $200 of the market value and increasing to $18.00 per $200 for passenger motor vehicles valued above $150 001. Passenger cars with low-emissions (carbon dioxide emissions less than 120g/km), or owned by primary producers used in the business of primary production are exempt from the increased duty rates so that existing duty rates ($8.40 per $200) will continue to apply for those vehicles.

The CEO of the Australian Automotive Dealer Association's (**AADA**) , David Blackhall, released a statement on the increase duty for vehicles over $100,000, saying that the industry is already doing it tough (with the new-car retail industry in Victoria having contracted by more than 10 per cent year to date) and that the duty is "incredibly concerning" as it puts at risk people's businesses and jobs.

The industry did however enjoy a victory with the Victorian State Revenue Office (**SRO**) announcing that from 1 July 2019, it will consider service demonstrator vehicles to be exempt from motor vehicle duty on registration. The SRO defines 'service demonstrator vehicles' as 'motor vehicles used solely or primarily by a licensed motor car trader to promote sales by making the vehicle available to customers as a courtesy vehicle while their car is being serviced.'

Under a previous Revenue Ruling (DA.034), the SRO had made clear that it considered service demonstrator vehicles to be ineligible for the duty exemption under section 231 of the *Duties Act* .

2. Proposed Legislation

2.1 Franchising Code Inquiry

In March 2019, the Parliamentary Joint Committee on Corporations and Financial Services released a report recommending major regulatory changes to protect franchisees, and in particular car dealers, from certain conduct of motor vehicle distributors.

The recommendations focused on the unequal bargaining power of distributors evidenced by the prevalence of unfair terms in dealer agreements, including the power of distributors to unilaterally change dealer agreements.

The recommendations made within the report included the following:

- The introduction of an inter-agency **Franchising Taskforce** to examine the feasibility and implementation of a number of the report's recommendations;

- The amendment of the franchising Code of Conduct to **ban unilateral variation** to terms and conditions, and on retrospective variations unless approved by a majority of dealers or elected representative bodies such as a dealer council;
- The addition of the conditional **right to exit franchise agreements** to the Code of Conduct;
- The confirmation of the Franchising Taskforce's obligation to consider greater transparency around the allocation of **goodwill** in franchise agreements, and protections for franchisees when required to undertake significant capital expenditure near the end of the term of a franchising agreement;
- Greater scope for **collective action** for lawful collective bargaining with franchisors;
- The **amendment of core franchising codes** that applies to multiple franchising sectors with industry-specific aspects to be included in schedules or sub-codes that would better support the fair handling of capital intensive stock when franchise agreements between car manufacturers and new car dealers are not renewed;
- The availability of **civil pecuniary penalties** and infringement notices for breaches of the Franchising Code that is similar to penalties available under the Australian Consumer Law; and
- The inclusion of a **clear definition of 'significant capital expenditure'** by the Franchising Taskforce so that franchisees are able to make an appropriate return on investment within their existing terms including only paying pro-rata portions and compensation if franchisors terminates the franchise agreement (the Taskforce recommended amendments to the Code to deal with the interaction between the capital expenditure provisions and the law of unconscionable conduct and unfair contract terms).

At this stage, it is unclear whether a separate code of conduct for the automotive industry will be established. AADA has strongly advocated for a separate automotive industry code in its submission to the Parliamentary Joint Committee. The Motor Trades Association of Australia (**MTAA**) also issued its own proposal for a separate automotive industry code of conduct, similarly focussing on the power imbalance between manufacturers and dealers. Both major political parties support the establishment of an inter-agency Franchising Taskforce to consider the implementation of the Joint Committee's recommendations.

Since this report, there have been further developments in the area of collective action bargaining with franchisors, with an ACCC proposal seeking to introduce a class exemption for small businesses (see Item 2.2).

2.2 ACCC Collective Bargaining Proposal

On 6 June this year, the ACCC released a media statement regarding a proposal to introduce a class exemption so that small businesses may engage in collective bargaining with suppliers and processers. The proposal would also extend to franchisees and fuel retailers, allowing them to collectively negotiate with their fuel wholesaler without ACCC first seeking approval under the current authorisation process.

The class exemption would apply to businesses and any independent contractors which comprise or are members of a bargaining group and which, in the financial year before the bargaining group was formed, reported an aggregated turnover less than $10 million. The exemption would also extend to any franchisee and fuel retailer governed under the Franchising Code of Conduct or the Oil Code of Conduct.

The proposed exemption would apply to approximately 98.5% of Australian businesses. However, the ACCC Deputy Chair Mich Keogh has stated that "the class exemption would not force anyone to join a collective bargaining group, or force a customer, supplier or franchisor to deal with the bargaining group if they did not want to".

It is important to be aware that historically, feedback from dealer councils has suggested that individual dealers would not be inclined to appoint a dealer council or other negotiator as an appointed agent to engage in

collective bargaining on their behalf. Distributors typically are also reluctant to engage in such an option, instead asserting that they have individual agreements with each dealer.

The ACCC's proposal will likely streamline and minimise the costs of collective bargaining procedures. However, distributors must still be willing to participate and engage in the process.

The ACCC's press release can be accessed here.

The legislative instrument has been released for consultation and can be accessed here.

2.3 Proposed Changes to "Unfair Contract Terms"

On 29 March this year, the Morrison Government announced its intention to introduce amendments to Unfair Contract Term (UCT) laws, subject to a consultation through a Regulation Impact Statement (RIS) process. Options included in the consultations are:

- Making UCTs illegal and attracting civil penalties to breaches;
- Removing 'minimum standards' as prescribed by states and territories;
- Redefining small business as a business from one that employs fewer than 20 persons at the time the contract was entered into to a business that employs fewer than 100 persons at the time the contract was entered into or had an annual turnover less than $10m; and
- Removing the value threshold which is currently $300,000 or $1 million for contracts running more than 12 months.

These amendments could afford car dealers greater protection because it would broaden the scope of what a small business is for the purposes of UCT laws. It should be noted that the Joint Parliamentary Committee on Franchising recommended that there should be no value threshold and the UCT laws should apply to all franchises.

The ACCC has also proposed amending the law on UCTs to make it illegal for an UCT to be included in a standard form contract under the Competition and Consumer Act (**CCA**) and that civil pecuniary penalties and infringement notices are made available for breaches of that prohibition. This proposal was made on the basis that because it is not illegal for franchisors to include an UCT there is no real disincentive for franchisors to not include UCTs in standard form contracts.

The ACCC supported the AADA's position on increasing the small business threshold to afford greater protection to car dealers under UCT laws. The AADA submitted that car dealers have received no benefit from UCT because of small business thresholds and while the ACCC supported increasing thresholds they had not formed a view on what this increase may be.

A full copy of the Franchising Report can be found here.

A full copy of the Assistant Treasurer's media release can be found here.

2.4 Mandatory Scheme for Distribution of Information

In December 2017, the ACCC released its New Car Retailing Industry Report in which a number of proposals were proposed for legislative change.

Amongst these proposals was the suggestion by the ACCC for there to be the introduction of a mandatory scheme (**Code**) for car manufacturers to share technical information with independent repairers.

In regards to this specific proposal, there has been recent progress as the Government has stated that they intend to implement a Code in 2019, subject to a consultation process.

As part of this consultation process, the Government released a Consultation Paper on 12 February 2019. Submissions for the consultation closed on 11 March 2019.

This Consultation Paper outlined what the Code could potentially include, such as that were it to be implemented, it would apply to new passenger and light goods vehicles as they are defined in the *Vehicle Standard (Australian Design Rule - Definitions and Vehicle Categories) 2005* and that a Code would allow manufacturers to restrict access to safety, security or environmental (**SSE**) information.

The Government is also considering whether the Code should be reviewed 18 months from its commencement.

Alongside the Code, the Government is contemplating establishing a Service and Repair Information Sharing Advisory Committee. The function of the committee would be to provide a fair and transparent mechanism for industry to contribute to the development and implementation of service and repair information sharing rules and mechanisms. If established, the Committee would be the primary body the Government would refer to for advice on motor vehicle service and repair information and related issues.

The Consultation Paper can be accessed here.

3. Policy Update

3.1 The Senate Select Committee on Electric Vehicles

On 30 January 2019, the Senate Select Committee Inquiry into Electric Vehicles released its report to the Government, listing 17 recommendations on how the country should prepare itself for the adoption of electric vehicles.

A key recommendation by the Committee was for the Government to consider introducing electric vehicle (**EV**) quotas for government vehicle fleets to assist in introducing a steady flow of battery-electric cars to the used car market. The Committee also recommended that the Government consider establishing national EV targets for light passenger vehicles, light commercial vehicles and metropolitan buses.

With regard to manufacturers, the Committee recommended that the Government develop and implement a comprehensive 10-year EV manufacturing roadmap.

It was also recommended that the Government introduce a vehicle emissions standard in Australia and that the Government work closely with Standards Australia to establish a series of national standards in relation to EVs.

The release of the Committee's report was welcomed by the Federal Chamber of Automotive Industries (**FCAI**), with the CEO of the FCAI Tony Weber stating that it would be wise for the Government to take on the various recommendations given by the Committee.

The Report can be accessed here.

3.2 Banking Royal Commission Final Report

The conclusion of the Royal Commission into the Banking, Superannuation and Financial Services Industry saw a number of recommendations made by Commissioner Kenneth Hayne that will affect participants in the automotive industry.

Of the 76 recommendations made, the three key points that affect the automotive industry include:

- The proposed abolition of the point-of-sale exemption that most car dealers rely upon to be a loan intermediary without holding an Australian Credit Licence (**CL**) or being appointed as a credit representative of a licensee. While some dealers may obtain their own CL to provide credit assistance, the abolition would likely result in most car dealers having to be appointed as credit representatives by credit providers and being recorded accordingly on the ASIC register. As a result, appointed credit representatives will need to become members of the Australian Financial Complaints Authority (**AFCA**) and provide their own credit guides, which will open up their business to an external complaints process unless otherwise specified by AFCA.
- The proposed development of a Treasury-led working group to implement an industry-wide deferred sales model for the sale of add-on insurance (excluding comprehensive motor vehicle insurance policies). The model would require insurers or their representatives to wait for a specified amount of time before trying to sell add-on insurance products to their customers, such as tyre and rim insurance. However, it is currently unclear how the deferred sales model will apply to products sold under the 'incidental product' exemption of the *Corporations Act 2001*.
- The proposed introduction of caps on commissions for add-on insurance products sold in the course of motor vehicle sales, with the cap being determined from time to time by an ASIC legislative instrument. According to its 2016 report, ASIC found that the amounts paid in commission on these products exceeded the amounts paid out to customers who made claims. As such, Insurance Council Australia proposed in 2017 that the insurers cap commissions at 20% of the premium.

3.3 ATO introduces new transfer pricing guidelines

In March 2019, the Australian Taxation Office (**ATO**) released their Practical Compliance Guideline 2019/1, which focused on transfer pricing issues related to inbound distribution arrangements.

The Guideline joins the growing list of transfer pricing and anti-avoidance related guidelines that aim to encourage taxpayers into adopting lower risk transfer pricing positions and facilitate greater engagement with the ATO, and outline the ATO's risk framework for assessing the transfer pricing arrangements of inbound distributors.

Having specifically targeted inbound distributors in the motor vehicle industry, the Guideline assesses the risk of inbound distributors (broadly defined by the ATO as any business that involves the distribution of goods purchased from related foreign entities for sale) by comparing their five year weighted average EBIT margin against EBIT margins in their relevant industry sector. The Guideline's schedules provide profit markers for the motor vehicle industry sector with risk zones being low, medium and high.

The Guideline did not outline specific activities that are considered to incrementally generate value for motor vehicles distributors. As such, a single category with one set of profit markers is used to assess transfer pricing

risk. Although this may simplify matters for distributors, it also assumes that they undertake mostly the same activities. It is more realistic to expect that profit outcomes are similar amongst distributors that outsource warehousing, or to compare alike distributors, for example those dealing solely in spare parts as opposed to vehicles.

The ATO's motor vehicle risk assessment framework outlines EBIT margins as high risk when the margin is below 2%, medium risk when the margin is between 2-4% and low risk if the margin is above 4.3%.

3.4 ACCCount

The ACCC released its quarterly report on 8 May 2019, covering the activities of the body from the 1 January 2019 to 31 March 2019 entitled ACCCount.

While the ACCCount is applicable to a range of industries, there are a number of passages which are directly relevant to the motor industry.

- Regulatory Interventions
  - Following the ACCC's new car retailing market study which was published in December 2017, the Australian government is proposing regulatory interventions into the area.
  - In December 2018 the Department of Industry, Innovation and Science released a Regulation Impact Statement (**RIS**) relating directly to the relationships between new car dealers and manufacturers, and the ACCC has submitted a response to this.

- Proposed Motor Vehicle Code
  - In March 2019 the ACCC submitted to the Treasurer in the Government's recent consultation paper for the introduction of a mandatory scheme for the disclosure of information relating to motor vehicle service and repair.
  - The submission also stated that the ACCC was also in favour of a motor vehicle code of conduct, if the code was able to properly define the obligations for market participants and if the courts were able to put in place financial penalties for contraventions of the code.

- Takata Recall
  - The recall of faulty Takata airbags has been included as one of the ACCC’s Compliance and Enforcement priorities for consumer and small business protection.
  - As of 28 February 2019, some 2.97 million Takata airbags have been replaced in approximately 2 million vehicles, but the ACCC is continuing to work with the FCAI to ensure the effectiveness of the ongoing national consumer awareness campaign that the FCAI has undertaken.
  - The ACCC produced "Communication Ideas: reaching consumers affected by the compulsory Takata recall" in February 2019 as a means of aiding suppliers as they seek to reach as many consumers as possible and maximise the effectiveness of the recall.
  - The ACCC also continues to work within the Takata Interagency Group and by extension with the relevant bodies including state fair trading agencies and road traffic authorities in the continuing implementation of the recall.

3.5 MDR Act (NSW) - Operation Greenacre

A recent crackdown on motor businesses in Sydney's southwest has culminated in 83 penalty notices being submitted to licensees amounting to more than $50,000 in May 2019.

Operation Greenacre was coordinated by NSW Fair Trading in conjunction with NSW Police, Roads and Maritime Services and City of Canterbury Bankstown and assessed some 50 businesses in the area for their compliance with the *Motor Dealers and Repairers Act 2013* and other applicable legislation.

The notices issued were for offences that included:

- Failing to maintain an up to date register;
- Inadequate signage displayed by licence holders;
- Motor vehicle repairers and motor recyclers operating without a licence; and
- Certain car parts and accessories not being properly marked.

Motor businesses should take particular note of the severity of punishments that are issued for operating without a licence, which can range from a $5,500 penalty notice or prosecution with a maximum penalty of $110,000.

4. Case Law Update

4.1 *GM Global Technology Operations v SSS Auto Parts* (2019) FCA 97 (11 February 2019)

Background

Holden Ltd, operating under GM Global Technology Operations (**GMH**), sold top of the range Holden Commodores, modified from regular models by upgrading the engine and using different design features. Holden became aware that car owners were upgrading their standard Holdens with these parts to imitate the top of the range models. Holden alleged that SSS Auto Parts (**SSS**) was importing replica parts to be used on second hand cars, thus infringing its designs.

Holden then sought a declaration under s 71 of the *Designs Act 2003* (Cth) (**Design Act**) in addition to injunctions on the importation or sale of the parts. SSS argued that the parts were used for repairs for second hand vehicles, and were thus exempt from seeking approval for use of the parts.

Issue

To what extent can spare parts be used for 'repairs' without infringing s 71 of the Design Act? Furthermore, did the letters of demand issued by Holden contain content which was an unjustified threat?

Outcome

Two major issues arose for GMH in attempting to prove SSS guilty of infringing their intellectual property design rights. The first was purpose, namely whether SSS imported and sold the parts for repair or for a different purpose. SSS was able to avoid liability if it was able to prove that it was selling these parts for repair purposes of a complex product, known as the 'repair defence' (under s 72 of the Design Act).

The Court found that even if there is a dual purpose to the part (i.e. repair and enhancement), this does not exclude the repair defence. Unless SSS had knowledge that the customers were going to use the parts for non-repair purposes, then they were found not to have infringed Holden's intellectual property. Only in a small number of cases did SSS know that parts were not going to be used for non-repair purposes (i.e. when advised by a customer). The Court found that SSS was, to a large degree, importing and selling parts for the primary purpose of repair.

The other element GMH was required to prove was whether SSS as a company, had actual or constructive knowledge that the parts were being imported or sold for purposes other than repair. GMH alleged that SSS had actual knowledge that such importation of parts was not for the purposes of repair. The Court looked at SSS's corporate hierarchy, identifying the primary shareholder and sole director of the relevant companies or his delegate as being one of the primary decision makers, whose knowledge would be crucial. The focus of SSS's business model was the sale of spare parts of damaged motor vehicles. Therefore, it was difficult for GMH to prove that SSS had knowledge that it was deliberately importing parts not for the purpose of repairs, which was in line with SSS's business practice.

The sole director took active steps to ensure that he was not infringing on design laws and communicated this to staff and customers when selling the relevant parts. Repair notices were issued to customers detailing that the parts could only be bought if used for repairs. GMH referred to the unusual number of sales for repairs for such cars and that SSS knew or 'reasonably ought to have known' that the market share for the parts was much smaller than the demand they received. The Court found that this corporate knowledge was specialised and that there was no reasonable way for SSS to have known the market for use of these parts.

The final issue deals with the cross-claim by SSS against GMH for a series of letters of demand sent to SSS claiming that they had infringed on registered designs and copyright. SSS alleged that the letters contained 'unjustified threats' and that the statements were misleading under s 18 of ACL. The Court rejected the argument that the letters of demand were misleading by way of not disclosing that GMH had the existence of the 'repair defence'. The letters were found to be justified in most instances. However, in letters which referenced designs that had not been certified, the letters were held to be unjustified.

Significance to dealers

Now that the scope of the 'repair defence' has been defined, spare part dealers can feel comfortable when selling parts for the purpose of repairs that they are not infringing design marks.

Further, manufacturers now understand what is and what is not covered under the 'repair defence' and can adjust their design protection strategy accordingly.

Design owners should ensure their registrations are certified prior to issuing letters of demand to avoid a letter being found to be an unjustified threat.

The full judgment can be found: here

4.2 *Red Earth Automotive v CEVA Logistics (Australia) Pty Ltd* (2018) VCC 2086 (13 December 2018)

Background

Red Earth, a major car dealer, hired CEVA, a global logistics supply company, to deal with the transport of a vehicle, a new Porsche. It provides these services pursuant to a standard agreement signed by both parties.

Due to the risk of damaging the Porsche on the way from Victoria to the Northern Territory, CEVA requested Red Earth sign a waiver form, containing an exemption clause that CEVA would not be liable for damages during transport of the vehicle, even if occurring due to CEVA's negligence.

In a discussion, CEVA assured Red Earth that the waiver was only for stone chip damage which might occur during the transport of the vehicle in an open trailer. Thieves later broke into CEVA's storage facility and stole the Porsche as the keys were left in the car.

Issue

If a liability waiver is in effect, can CEVA still be liable to Red Earth for damages to the product being transported?

Result

CEVA argued that the exemption clause provided no ambiguity and that it covered them from any loss of damage resulting from their negligence during transport.

Red Earth took issue with the waiver, submitting that the circumstances of the signing of the waiver showed that it was signed on the basis that the clause was limited in scope to the damages that might occur on the road from Brighton to Darwin.

The Court held that when reading the language of the contract it referred to 'transport' and not 'storage' or 'handling'. This showed that the exemption clause was limited in its scope to transport matters. The theft dealt with their storage services, not their transport services, which is a distinct function.

CEVA was found liable to pay for Red Earth's loss of the porsche.

Significance to dealers

Exemption clauses for liability are not absolute and a Court will read the clause in its context.

Staff or employees should be cautious when making representations about the scope of exclusion clauses.

When standard terms and conditions are amended, dealers should ensure there is consistency between the amendments and the original document.

The full judgment can be found: here

4.3 *Fyshwick Automotive Pty Ltd v Bretherton* (2019) WL 1314849 (22 March 2019)

Background

Fyshwick Auto was a car repair shop which assisted in replacing aftermarket wheels for a Ford Ranger owned by Mr Bretherton. One of the newly fitted wheels failed and fell off the car.

Mr Bretherton returned the car to Fyshwick Auto to replace the tire. He subsequently had the same car serviced at John McGrath Ford 10 days later. Shortly after, one of the wheels, but different to the earlier wheel which failed, fell off.

Mr Bretherton argued that Fyshwick Auto's service was unprofessional and failed their statutory guarantee of service.

Issue

Was there a breach of the ACL statutory guarantees in failing to provide due care and diligence to consumers and were the wheels fit for purpose?

Outcome

Fyshwick Auto was accused of breaching statutory warranties for services rendered to Mr Bretherton for the replacement of aftermarket wheels. These warranties are that services must be given with due care and diligence and the products delivered must be fit for purpose, as stipulated in the ACL.

The original NCAT proceeding found that Fyshwick Auto was liable because they facilitated the failure of the wheel by not employing the necessary skill in fitting it. One of the witnesses who worked for Fyshwick Auto and delivered evidence on their behalf was considered not reliable because he had omitted or misreported minor details in the case.

However, on appeal, the Tribunal found that the Original Tribunal erred in failing to give proper weight to the evidence from a witness produced by Fyshwick Auto. The witness testified that the original repair for the hub locators were properly fitted and was not the reason why the wheels had failed. Instead, the overtightening or loosening of the wheel nuts were to blame for the wheels falling off.

In between the time Fyshwick Auto put on the wheels and after it had fallen off, the car was taken for service to John McGrath Ford. The witness said that the wheel nuts could have been over-tightened during this service, thus causing the tires to fall off. The Tribunal held that this was a new interceding event, which broke the cause and effect chain from Fyshwick Auto's repairs to the instance the wheels fell off.

The Court held that Fyshwick Auto was not liable for the damage because the cause of the damage occurred as a result of the wheel nuts being over-tightened or left loose, and overturned the Original Tribunal's finding.

Significance to dealers

Dealers who operate services and repairs should be conscious of the statutory guarantees in the ACL relating to providing services with due care and diligence when repairing cars.

There is no presumption against repair shops when determining if a statutory guarantee has been breached. Tribunals will consider all appropriate evidence to assign liability for a failure to exercise due care when repairing vehicles.

The full judgment can be found: here

4.4 *Australian Competition and Consumer Commission v Ultra Tune Australia Pty Ltd* (2019) WL 266225 (18 January 2019)

Background

Ultra Tune is a franchisor for motor vehicle engine repair and maintenance service, with a national network of approximately 200 franchises. The ACCC alleged that Ultra Tune failed to comply with minimum franchisor obligations such as disclosure obligations and release of financial statements for the collective marketing fund. It was also alleged that Ultra Tune was in breach of its duty to act in good faith when negotiating with a potential franchisee because it refused to refund a deposit once the franchisee decided to withdraw from the franchise agreement.

Issue

Did Ultra Tune fail to act in good faith when negotiating with the franchisee and did it properly discharge its disclosure obligation relating to information in their financial statements under 'old' (pre-2015 Code) and 'new' Franchising Code of Conduct (**Franchising Code**)?

Outcome

The first issue was whether Ultra Tune failed to prepare and provide financial statements to the franchisee for Ultra Tune's marketing fund. Under cl 17 of the Pre-2015 Code and cl 15 of the Franchising Code, if a franchisee is paying money to a general marketing fund, the franchisor must disclose 'sufficient details' of the fund's receipts and expenses in an annual financial statement to give 'meaningful information' to the franchisee regarding sources of income and items of expenditure.

The Court determined that the marketing fund statement should have some explanatory force which enables the franchisee to understand how their money will be spent. The general guide that the Court gave was that the more significant the expense, the greater level of detail that was required. In this case, more than 75% of expenses were simply described as 'Promotion & Advertising - TV'. It was held that for such a large franchisor spending a large sum of money, it was a serious contravention to not provide sufficient detail in its financial statements.

Ultra Tune was also found in breach of a number of other important disclosure obligations including to include necessary details in the 'disclosure document', which are required to be given by the franchisor to the franchisee under the Franchising Code. These failures included:

- Failing to update its disclosure documents by the required deadline;
- Failing to prepare financial statements for its marketing funds by the required deadline;
- Failing to provide audited marketing fund financial statements to franchisees by the required deadline; and
- Failing to provide a disclosure document on request by a franchisee.

Finally, there was the issue of Ultra Tune's failure to act in good faith when negotiating with the franchisee. Ultra Tune had understated the rent and purchase price to the franchisee and had stated that it had only been open for less months than it actually was during negotiations to enter the agreement.

Furthermore, certain correspondences alleged that the deposit the franchisee had given would be used to purchase equipment and would not be returned. However, the Court found that the letter was backdated and was not reflective of what the franchisee had agreed to. The Court criticised the "manufacturing of evidence" and found that Ultra Tune had failed to act in good faith in its dealings and had made misleading representations to the franchisee regarding rent and the purchase price.

The Court ordered a considerable fine to Ultra Tune, one of the largest for its category, for the breach of disclosure obligations and good faith under the Franchising Code, in excess of $2.6 million.

Ultra Tune has since attempted to appeal the fine and the ACCC has responded by seeking to block it. On 17 June 2019, Ultra Tune was given approval to challenge the $2.6 million penalty, following a judge saying that she had "no sympathy" for the ACCC's opposition to Ultra Tune's bid for more time to lodge an appeal.

Significance to dealers

Disclosure obligations are critical for franchisees and it is important as a franchisee to understand what documents and details a franchisee is entitled to request, especially in relation to funds a franchisee provides to be used by the franchisor (such as for marketing).

The ACCC will not tolerate unfair dealings of franchisors with franchisees and a Court may impose significant fines. It is important to remember the duty of good faith owed during negotiations.

The full judgment can be found: here

4.5 *Azad t/as GT Western Autos v Schaaf [2019]* NSWCATAP 99 (23 April 2019)

Background

Ms Schaaf bought a second-hand motor vehicle for $9,384 from Mr Azad, acting for GT Western Autos. The vehicle had defects which were not explained by Mr Azad, relating to its features and the year it was manufactured.

The original Tribunal found Mr Azad guilty of breaching s 54 of the ACL relating to acceptable quality and a failure to repair the vehicle. It ordered Mr Azad to pay back to Ms Schaaf the assessed amount of $9,384. However, Ms Schaaf had a finance loan securitised to the vehicle for $11,854, which was higher than the price Mr Azad was ordered to pay back. Ms Schaaf did not bring to the Tribunal's attention the loan securitised to the vehicle. Mr Azad had to accept return of the vehicle. Mr Azad appealed on the basis that the decision was not equitable and fair.

Issue

Was the original Tribunal correct in ordering the assessed damages amount be paid back to the customer, notwithstanding that Ms Schaaf was not required to pay the remainder of the finance loan securitised to the car?

Outcome

The Tribunal found that the existence of a security interest in the form of a loan agreement for the car would mean Mr Azad was obliged to pay the remainder of the loan balance plus pay back Ms Schaaf. Further, the Appeal Tribunal held that although Ms Schaaf indicated an intention to make the necessary payments for the remainder of the loan balance and obtain a release from the financer, the Appeal Panel was not able to make orders requiring her to do. This would have left Mr Azad in a worse off position as he would have paid Ms Schaaf and then have had to pay the financer to release the security interest in the returned vehicle, if Ms Schaaf did not pay it herself.

The Appeal Tribunal held in favour of Mr Azad and ordered that if Ms Schaaf did not pay the remaining balance of the loan to the financer to release the security interest then he would have liberty to apply to the Consumer and Commercial Division of the Tribunal for an order.

They further noted that if the financer had been made a party to the proceedings at the onset, the Tribunal would have been able to make an order to Ms Schaaf to discharge the loan.

Significance to dealers

When a dispute arises and a customer wishes to return a vehicle due to a breach of a consumer guarantee, dealers should keep in mind the security interests that exist on the car and should ensure the financer is a party to the proceedings.

The full judgment can be found: here.

4.6 *Begovic v Northpark Berwick Investments Pty Ltd & Mitsubishi Motors Australia Pty Ltd (Civil Claims) [2019] VCAT 772* (27 May 2019)

On 27 May 2019, the Victorian Civil & Administrative Tribunal (**VCAT**) ordered Mitsubishi Motors Australia Pty Ltd (**Mitsubishi**) and a Mitsubishi dealer to pay a full refund to a customer on the basis that both Mitsubishi and the dealer contravened the *Australian Consumer Law* (**ACL**) by engaging in misleading & deceptive conduct and breaching the consumer guarantees as to acceptable quality, fitness for a disclosed purpose and supply by description in relation to the fuel consumption figures displayed on a 2017 Mitsubishi Triton purchased brand new by the customer.

Background

In what may prove to be a very significant decision for the industry, the relevant facts in the case of *Begovic v Northpark Berwick Investments Pty Ltd & Mitsubishi Motors Australia Pty Ltd* are as follows:

- Mr Begovic purchased a brand new Mitsubishi Triton in 2017.
- A fuel consumption label was adhered to the front windscreen of the 2017 Triton prior to purchase.
- Mr Begovic alleged that:
  - he purchased the 2017 Triton because he wanted a more fuel efficient vehicle than his previous vehicle (a 2008 Mitsubishi Triton);
  - the fuel consumption he experienced from the 2017 Triton was much higher than both his 2008 Triton and the fuel consumption label adhered to the 2017 Triton (12.44 L/100km Extra Urban vs 8.5 L/100km); and
  - he would not have purchased the 2017 Triton had he known that its actual fuel consumption would be much higher than both his previous Triton and the fuel consumption label.

Issues

The issues for VCAT to determine were whether:

- the fuel consumption label was misleading or deceptive;
- the 2017 Triton was defective or not of acceptable quality;
- Mr Begovic was entitled to any remedy.

Outcome

VCAT found that:

- independent expert test result evidence on the actual fuel consumption of Mr Begovic's 2017 Triton proved that:
  - the 2017 Triton's actual fuel consumption was significantly higher than the fuel consumption on the label provided by Mitsubishi (and Mr Begovic's previous vehicle);
  - based on the methodologies allowed for fuel consumption tests under the ADR, the expected variation in fuel consumption test results is small - less than 1 or 2% - and could not account for the significant variation seek in this vehicle (some 26.7% combined);

- on the basis of the independent expert evidence, the fuel consumption label provided by Mitsubishi was misleading or deceptive in respect of this particular vehicle;

- in purchasing the 2017 Triton, Mr Begovic relied on the misleading or deceptive representation contained in the fuel consumption label as to the 2017 Triton's fuel consumption characteristics;

- Mr Begovic had suffered a loss by reason of increased fuel costs which he did not bargain for when purchasing the 2017 Triton;

- it was not necessary to calculate what compensation Mr Begovic might be entitled to in respect of the increased fuel costs because Mr Begovic sought relief limited to a refund of the 2017 Triton;

- the 2017 Triton failed to be of acceptable quality because its fuel consumption was substantially more than represented by the fuel consumption label;

- the 2017 Triton failed to be fit for the specific purpose disclosed by Mr Begovic (namely, the vehicle be more fuel efficient than his previous vehicle);

- there was also a breach of the guarantee contained in section 56 of the ACL that the Triton would match its description - given that the fuel consumption of the 2017 Triton departed in a material sense from the description of fuel consumption on the label.

- the failures of acceptable quality and fitness for specific purpose were *major failures*; and

- Mr Begovic was still within time to 'reject' the 2017 Triton for the purposes of enforcing a right to refund or replacement because he had raised complaints about its fuel consumption almost immediately after purchase and repeatedly raised the issues until he issued proceedings in VCAT.

Aside from VCAT's findings, there are several other important observations to make about this case:

- Mitsubishi was not legally represented at trial and although Mr Begovic produced independent expert evidence in support of his claims, that evidence was not contested by Mitsubishi (rather, Mitsubishi simply asserted that its fuel consumption label was correct having regard to its own testing conducted by unnamed technicians);

- the findings by VCAT do not amount to a finding that *all* 2017 Triton fuel consumption labels are misleading or deceptive - that finding was limited to Mr Begovic's particular 2017 Triton based on the evidence presented in relation to that vehicle's actual fuel consumption;

- the dealer was not found to have done anything other than sell the 2017 Triton to Mr Begovic with the Mitsubishi fuel consumption label (which was found to be misleading or deceptive) attached. In other words, the findings in relation to misleading & deceptive conduct and breaches of the consumer guarantees arise against the dealer solely as a result of the misleading or deceptive fuel consumption label; and

- the dealer was entitled to claim an indemnity from Mitsubishi in relation to Mr Begovic's claim and VCAT's judgment.

Mitsubishi has sought leave to appeal VCAT's decision in the Supreme Court of Victoria. However, appeals from VCAT are limited to questions of law. Consequently, it will not be open to Mitsubishi to bring in new evidence on appeal that it could have brought before VCAT at first instance. For Mitsubishi to succeed on appeal, it will need to establish that VCAT made a mistake in the way in which it applied the law to Mr Begovic's case.

5. Our National Automotive Team

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