HWL EBSWORTH
LAWYERS

AUTOMOTIVE INDUSTRY GROUP

Regulatory Update

June 2020

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Introduction

Welcome to the HWL Ebsworth Automotive Industry Group - Regulatory Update

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

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

This Regulatory Update has been published with the assistance of Evan Stents (Partner), Maria Townsend (Partner), Alex Beagley (Senior Associate) and Jock Lehman (Solicitor) who are members of the HWL Ebsworth Automotive Industry Group.

Headlines

- Franchising Code of Conduct amendments as the Federal Government looks to bolster the rights of franchisees (see part 1.1);
- Federal Government implements widespread support mechanisms for consumers and SMEs in response to the COVID-19 pandemic (see part 1); and
- State governments mobilise plans to implement electric vehicle infrastructure (see part 3.1).

1. Legislation Update

1.1 Amendments to the Franchising Code of Conduct

On 1 June 2020, the Competition and Consumer (Industry Codes—Franchising) Amendment (New Vehicle Dealership Agreements) Regulations 2020 (**Regulations**) came into effect, enacting amendments to the Franchising Code of Conduct. This came as a result of the Australian Competition and Consumer Commission (**ACCC**) publishing a market study of retailing for new cars which noted the power imbalance between large car manufacturers, new car dealers and independent repairers. These concerns prompted the Department of Industry, Science, Energy and Resources (**DISER**) to run public consultations with key stakeholders and industry bodies in 2019 to examine these relationships.

An exposure draft of the Regulations were released on 14 February 2020 and the implemented Regulations are largely synonymous with the draft, however the anticipated implementation date of 1 July being moved forward to 1 June has taken many in the industry by surprise. It is important to note that the changes apply to all new vehicle agreements entered into or on after 1 June 2020, but only to those which fall under the definition of a "new vehicle dealership agreement" and would thereby exclude agreements regarding motorcycles, used cars, farm machinery and trucks. The most significant amendments to the Regulations are as follows:

a) If the term of the dealer agreement is 12 months or longer, manufacturers and dealers are to provide at least 12 months' notice when opting to not renew a dealership agreement. Where the term of the dealer agreement is less than 12 months but longer than 6, the notice must be made no less than 6 months prior to the end of the term, and if the term of the agreement is less than 6 months then the notice must be no less than 1 month prior to the end of the term. This also requires manufacturers and dealers to discuss, plan and agree to termination arrangements when not renewing an agreement;

b) Manufacturers and dealers to provide a statement to the other party outlining why a dealership agreement is not being renewed, and also agree to a written plan for managing the wind down of the dealership, including how stock such as new vehicles, spare parts and repair equipment will be managed over the remaining term of the agreement. Moreover, in an effort to reduce the likelihood of a "fire sale" (the sale of goods or assets at extremely discounted prices), the parties would also be required to reduce stock over the remaining term of the agreement, all with the goal of safeguarding franchisees;

c) Pre-contractual disclosure of significant capital expenditure to be more specific and comprehensive in nature, in particular through limiting the circumstances in which franchisors may require franchisees to undertake significant capital expenditure during the term of franchise agreements. Namely, the previous exemption for capital expenditure that the franchisor considers 'necessary as a capital investment in the franchised business' will be removed in relation to new vehicle dealership arrangements, narrowing the scope of expenditure that may be required by franchisors and expanding the rights of franchisees. This essentially means that unless capital expenditure is provided in the disclosure document, before a new agreement is entered into, renewed or extended, the only way that such expenditure can be imposed is if it is to be incurred by a majority of dealers and agreed to by a majority of those dealers, if it is required to comply with any legislative changes or a dealer agrees to do so; and

d) The allowance for multi-franchisee dispute resolution, specifically where two or more franchisees who each have a dispute of the same nature with a common franchisor will be able to ask the franchisor to deal with the franchisees together, which should serve to strengthen the bargaining power of some franchisees.

The complete implemented Regulations may be accessed here.

1.2 COVID-19 Response - JobKeeper Subsidies

On 9 April 2020, the Federal Government allocated a $130 billion subsidy to Australian businesses in order to enable them to continue to pay their employees following the widespread job losses resulting from the COVID-19 crisis (**Jobkeeper Scheme**). The JobKeeper Scheme was introduced into law with the passing of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

The Jobkeeper Scheme entitles eligible businesses to access $1,500 fortnightly payments per eligible employee until the preliminary sunset date of 27 September 2020 and is significant to the Australian motor vehicle industry as it will allow many industry participants to retain their workforce and maintain a greater proportion of their pre-crisis cash flow.

While many vehicle dealerships and repair services have remained open across Australia, the Federal Chamber of Automotive Industries has confirmed that car sales are down 17.9 per cent compared to the same month last year, which is prompting an increasing number of automotive businesses to temporarily close their doors.

Automotive industry employers will be eligible for the JobKeeper Scheme wage subsidy if all of the following apply:

a) On 1 March 2020, the employer carried on a business in Australia or were a not-for-profit organisation that pursued their objectives principally in Australia;

b) The employer employed at least one eligible employee on 1 March 2020;

c) The employer's eligible employees are currently employed by their business for the fortnights claimed (including those who are stood down or re-hired);

d) The employer's business has faced either a:

   i. 30% fall in turnover (for an aggregated turnover of $1 billion or less);

   ii. 50% fall in turnover (for an aggregated turnover of more than $1 billion); or

   iii. 15% fall in turnover (for ACNC-registered charities other than universities and schools); and

e) The employer's business is not in one of the ineligible categories.

Importantly, the method utilised for testing the decline in turnover is done on an individual employer entity basis, only taking into account the turnover of the employer as its own entity, and no other members of a corporate group. This will be relevant to car dealerships that operate as part of a larger corporate group or participate in a franchising scheme.

The government's guides to the Jobkeeper Scheme and eligibility requirements can be accessed here:

https://www.ato.gov.au/General/JobKeeper-Payment/JobKeeper-guides/

1.3 COVID-19 Response - SME Commercial Leasing National Code of Conduct

On 7 April 2020, Prime Minister Scott Morrison announced the National Cabinet's Mandatory Code of Conduct - SME Commercial Leasing Principles During COVID-19 ("**Code**"), in order to counter the commercial disruption and negative economic impacts that COVID-19 has caused for such entities, including automotive industry participants, which are reliant on their brick and mortar premises. Commencement of the Code is to be determined by each jurisdiction, while the length of application is expected to be the same period of operation of the JobKeeper Scheme.

The Prime Minister confirmed that the purpose of the Code was to impose a mandatory framework of good faith leasing principles for the benefit of small and medium sized commercial tenancies with an annual turnover of up to $50 million (**SME Tenant**) during the COVID-19 pandemic. In order to be protected by the Code, the SME Tenant must also be an eligible business under the Jobkeeper Scheme.

The intention of the Code was for landlords and tenants to negotiate together in order to facilitate appropriate amendments to rental agreements for their particular commercial circumstances in order to aid the management of cash-flow for SME tenants and landlords on a proportionate basis. In other words, to enable each party to the commercial tenancy arrangement to share the short-term financial pain in order to secure long-term trading benefits for SME Tenants and landlords nationwide.

While the focus of the Code is SME Tenants, the Code suggests that the principles should apply "in spirit" to leasing arrangements for any business suffering financial hardship as a result of the COVID-19 pandemic.

The key leasing principles of the Code are summarised below:

Leasing Clause	Effect of the Code
Termination	▪ Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period. ▪ This moratorium on termination will extend to a reasonable subsequent recovery period.
Lease Obligations	▪ Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. ▪ A material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under the Code.
Rent Reductions and Deferrals	▪ Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of up to 100% of the amount ordinarily payable. ▪ These rent reductions ought to be based on the reduction in the tenant's trade and revenue during the COVID-19 pandemic period and subsequent recovery period.
Security	▪ Landlords must not draw on a tenant's security for the non-payment of rent during the period of the COVID-19 pandemic and the subsequent recovery period.

Rent Increases	▪ Landlords agree to a freeze expected rent increases (except for retail leases based on turnover rent) for the duration of the COVID-19 pandemic and the subsequent recovery period ▪ Subject to any negotiated arrangements between the landlords and the tenant.
Interest	▪ No fees, interest, or other charges should be applied with respect to rent waived under this Code.

Please see below for the full list of overarching and leasing principles contained in the Code:

https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf

The compulsory application of the Code and as such it is necessary for businesses in the automotive industry bound by commercial tenancy arrangements to be aware of the legislation enacting the Code's leasing principles in their State or Territory.

1.4 COVID-19 Response - Supporting the Flow of Credit

The Coronavirus Small and Medium-sized Enterprise (**SME**) Guarantee Scheme was enacted to provide support for SMEs. Under this scheme, the Government will provide a guarantee of 50 per cent to SME lenders for new unsecured loans to be used for working capital. This is designed to enhance lenders' willingness and ability to provide credit, while allowing SMEs to access additional funding in order to maintain their businesses.

SMEs with a turnover of up to $50 million will be eligible to receive these loans, while eligible lenders will be provided with a guarantee for loans with the following terms:

a) maximum total size of loans of $250,000 per borrower;

b) the loans will be up to three years, with an initial six month repayment holiday; and

c) the loans will be in the form of unsecured finance, meaning borrowers will not have to provide an asset as security.

The scheme commenced in early April 2020 and will be available for new loans made by participating lenders until 30 September 2020.

1.5 *Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Act 2020*

On 25 March 2020, the *Motor Vehicle Dealers and Repairers Act 2013* (NSW) (**MDRA**) and *the Motor Dealers and Repairers Regulation 2014* (NSW) (**MDRR**) were amended by the *Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Act 2020* (NSW) (**Act**). The Act, introduced by the NSW Minister for Customer Service, Victor Dominello, amends various Acts and regulations administered by the Minister for Better Regulation and Innovation to provide for the waiver, reduction, postponement or refund of fees in response to the recent bushfire crisis.

The Act provides provisions relevant for automotive industry participants, relating largely to the power of the Secretary to discretionarily waive, reduce, postpone or refund fees paid or due to be paid if a person has suffered financial hardship or is under a special circumstance during the period between 18 July 2019 and 25 March 2020. An example of a special circumstance as contemplated by this amendment is a natural disaster, and is targeted at those who suffered as a result of the recent bush fires.

The Act also allows for amendments aiming to further the objects of the MDRA, particularly to provide consumer protections and remedies to those who purchase motor vehicles from motor dealers or obtain motor vehicle repair services.

As the MDRA and MDRR apply to motor dealers and motor vehicle repairers, individuals and entities operating in the industry should familiarise themselves with the new amendments to become aware of the circumstances affecting their customers that may trigger the Secretary's power to waive, reduce, postpone or refund fees owed under the regulatory relief scheme.

2. Proposed Legislation

2.1 Reform - Add-on Insurance Products

Last year, the Department of Treasury published a proposal paper titled *'Reforms to the sale of add-on insurance products*', which addressed potentially unfair outcomes for consumers in respect of motor vehicle finance and the sale of add-on insurance products that were highlighted during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Financial Services Royal Commission**). Broadly speaking, add-on insurance a financial product sold alongside, or in relation to, the offer or sale of a principal good or service.

Since our last Update, the Government has moved to implement substantive reforms to the sale of add-on insurance having released exposure draft legislation and regulations. Of particular relevance to the automotive industry are the changes proposed in relation to:

a) deferred sales model for add-on insurance; and

b) a cap on vehicle dealer commissions relating to add-on risk products.

Deferred sales model for add-on insurance

The Financial Services Royal Commission identified several issues relating to the sale of add-on insurance products primarily that the sale of add-on insurance often represents poor value for consumers and may create risks associated with subjection to unfair sales tactics. One particular suggested avenue of reform to remedy these issues is the concept of a deferred sales model for add-on insurance, the details of which have been clarified in the exposure draft of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: Deferred sales model for add-on insurance* (**Draft DSM Regulations**).

The key takeaways from the Draft DSM Regulations for those involved in motor vehicle finance may be summarised as follows:

- The sale of a principal product or service will be separated from the sale of add-on insurance through the introduction of deferred sales model that prohibits the sale of add-on insurance for at least four days after a consumer has entered into a commitment to acquire the principal product or service (otherwise known as the 'deferral period');
- During the deferral period, each of the principal product provider and related third parties will be prohibited from offering the sale of add-on insurance to a consumer. However, principal providers and third parties are still entitled to respond to consumer inquiries regarding add-on insurance;
- In the period after the deferral period, but prior to six weeks after the deferral period began, add-on insurance products may be sold to consumers. However, communication with the consumer in forms other than writing is prohibited;
- Consumers may, at any time for a period of six weeks after the commencement of the deferral period, indicate that they no longer wish to receive offers, requests or invitations in relation to add-on insurance products; and

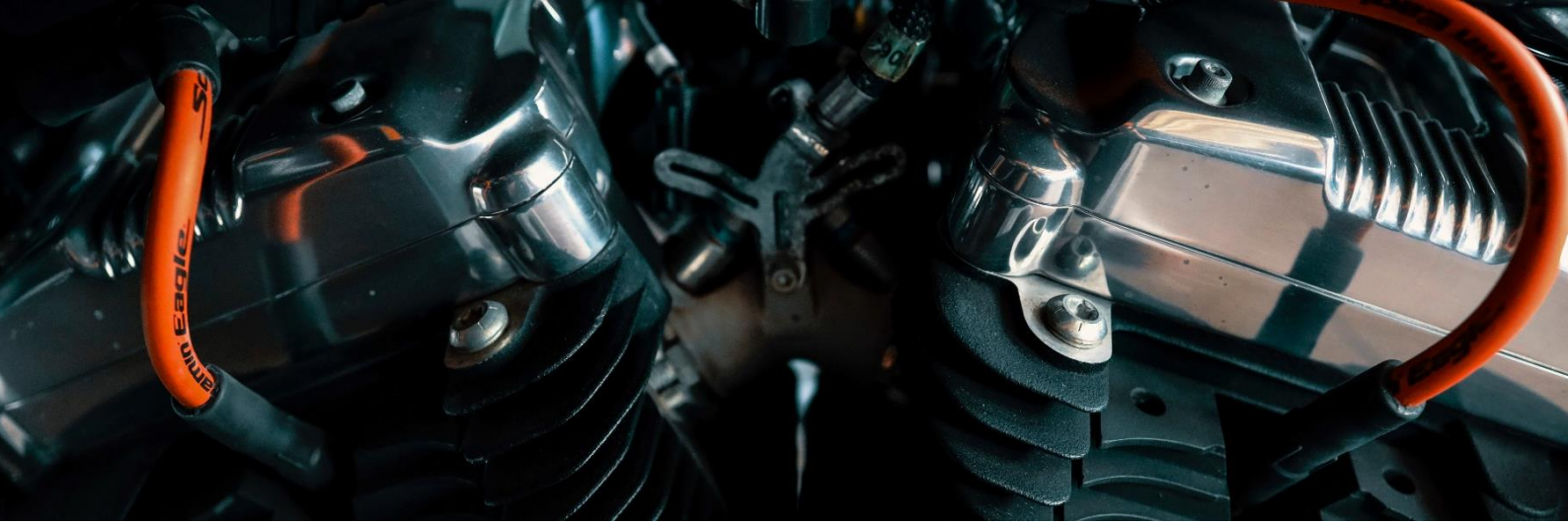
- The Draft DSM Regulations apply to the sale of add-on insurance products in respect of loans for the purchase of a motor vehicle or the hire of a motor vehicle, but do not apply to comprehensive car insurance sold as an add-on insurance product.

Cap on vehicle dealer commissions

The Financial Services Royal Commission also found that the levels of commissions paid to motor vehicle dealers in connection with the sale of add-on risk products may contribute to widespread inappropriate selling of these products. In response, the Federal Government proposes to place a cap on the amount of commissions that may be paid in relation to 'add-on risk products', such as tyre and rim insurance, mechanical breakdown insurance and consumer credit insurance supplied in connection with the sale or long-term lease of a motor vehicle.

The exposure draft of the *Financial Sector Reform (Hayne Royal Commission Response— Protecting Consumers (2020 Measures)) Bill 2020: Caps on Commissions* seeks to introduce three new laws in respect of vehicle dealer add-on risk product commissions, these being:

- ASIC will have the power to set caps on the value of commissions that may be paid relating to the sale of certain add-on risk products sold in connection with the sale or long-term lease of a motor vehicle;
- It will be a criminal offence, civil penalty and offence of strict liability for a person to receive a commission in relation to an add-on risk product that exceeds the cap determined by ASIC for that product; and
- Consumers will be afforded the ability to recover amounts paid that are in excess of the relevant cap.



3. Policy Update

3.1 Electric Vehicles

Infrastructure Priority List 2020 - Fast-Charging Network for Electric Vehicles

Infrastructure Australia (**IA**), an independent statutory body providing research and advice to all levels of government and industry on potential Australian projects and reforms, has identified the need for the development of a fast-charging network for electric vehicles as a High Priority Initiative.

Through the IA publication, "The Infrastructure Priority List 2020", IA has cited a lack of charging stations as a major hindrance to electric car adoption. IA has recommended developing a network of fast-charging stations on, or in proximity to, the national highway network to provide national connectivity. This is in addition to the continual development of policies and regulation to support such charging technology uptake, with both to be complemented by investment in network infrastructure to ensure the reliable supply of electricity for additional electric vehicles. If this proposal gathers momentum, the face of the automotive industry will be on the cusp of a dramatic change in composition.

NSW Net Zero Plan

The NSW Government announced its climate strategy for the next decade in March 2020 (**the Net Zero Plan**), placing a heavy emphasis on the need for an increased policy focus on electric vehicle as part of its plan to reduce emissions from 2020 to 2030. This includes increased investment, through the running of competitive funding processes, to co-fund:

a) the deployment of fast electric vehicle charging infrastructure state-wide; and

b) vehicle fleet owners, (such as car rental companies), car share companies and local councils to procure accessible electric vehicles.

It is intended that the rolling out of efficient, time-effective and conveniently located electric car charging infrastructure will encourage more NSW motorists to purchase electric vehicles. In addition, a widespread change in consumer preferences and the opening of new market opportunities may urge vehicle fleet procurers to purchase greater quantities of electric vehicles for retail sale. Their bulk purchasing power will have a flow-on effect and incentivise importers to sell a greater range of electric vehicle models in the Australian market.

The NSW Government will also support the Net Zero Plan to foster the uptake of electric vehicles and the efficient rollout of charging infrastructure through amending:

a) the National Construction Code and NSW Building Sustainability Index to ensure new buildings are electric vehicle-ready; and

b) licencing and parking regulations.

Victoria's Transition to a Net Zero Emissions Economy

The Victorian Government, in preparing a Zero Emissions Vehicle Roadmap, has underlined the importance of a robust electric vehicle policy within its climate change strategy. In supporting the State's transition to a zero emissions economy, thereby promoting increased electric vehicle uptake, the Victorian Government has funded:

a) a commercial electric vehicle manufacturing facility in Morwell in the Latrobe Valley, which is to commence operations in 2021, manufacturing approximately 2,400 vehicles per year and creating up to 500 jobs; and

b) the roll out of Australia's fastest electric vehicle charging stations to date, powered entirely by renewable energy and capable of fully charging an electric vehicle to a range of 400km in under 15 minutes, at 7 sites - Euroa, Barnawartha North, Melbourne, Torquay, Latrobe Valley, Ballarat and Horsham.

Queensland Incentivises Electric Vehicle Adoption

The Queensland Development, Manufacturing, Infrastructure and Planning Minister, Cameron Dick, announced in November 2019 Australia's first electric vehicle tourism driving network, building on the 'Queensland Electric Superhighway' extending from the Gold Coast to Cairns.

The 500km Tropical North Queensland Electric Vehicle Drive will feature six electric vehicle charging stations, at six tourist attractions in the Cairns region, and is expected to provide free vehicle recharges for 2020.

The State Member for Cairns, Michael Healy, publically stated that such destination chargers were crucial for the uptake of electric vehicles, and in conjunction with free vehicle charges in 2020 would allow people to act on their curiosity and increase electric vehicles purchases.

Further, in a joint statement in December 2019, the Queensland Minister for Transport and Main Roads, Mark Bailey, and Queensland Minister for Natural Resources, Mines and Energy, Dr Anthony Lynham, announced the "EV Home Charging Plan". In this plan, the Queensland Government, with energy company Ergon Pty Limited, intends to offer cheaper electricity prices for customers in conjunction with further domestic oriented electric vehicle incentives, such as 18 hours of guaranteed charge time per day. The Minister for Transport and Main Roads asserted that providing incentives in the form offered by this joint government and private sector initiative was an excellent strategy to raise electric vehicle uptake.

3.2 Update - Takata Airbag Recall

The ACCC have remained active in relation the nationwide Takata Airbag Recall, even prompting many automotive companies to go beyond the official recall, conducting further reviews into products installed into their vehicles.

Regarding the specific Takata Airbag Recall program, the ACCC announced an update on 31 January 2020 indicating that there still remained 2611 critical-alpha vehicles and 8585 critical non-alpha vehicles remaining for airbag replacement as at 31 December 2019.

The ACCC released the following statistics regarding airbag inflator components:

- about 3.56 million airbag inflators have now been rectified in about 2.59 million vehicles; and
- there remain 299,122 airbag inflators in 256,670 vehicles outstanding for replacement.

Further, on 10 January 2020, a further ACCC media release provided that 8 vehicle manufactures had issued voluntary recalls for 78,000 vehicles manufactured between 1996 and 2000, which were potentially fitted with a different faulty Takata airbag, the NADI 5-AT propellant, which are not captured under the existing compulsory recall.

The Federal Chamber of Automotive Industries (**FCAI**) has since launched an advertising campaign warning of the risks associated with the airbags and encouraging consumers to have their vehicles properly rectified. The campaign was launched initially on social media in May with the intention to later expand to television and radio advertising, alongside a website entitled 'IsMyAirbagSafe' which allows consumers to check whether their vehicle has been affected by the Takata airbag recall. This website can be accessed here.

3.3 COVID-19 Response - Increasing the Instant Asset Write-off Value

The instant asset write-off threshold has been increased from $30,000 to $150,000 and expanded to include businesses with an annual turnover of less than $500 million (**Asset Write-off**). The expansion of the Asset Write-off for new or second hand assets first used or installed ready for use within this timeframe and reflects the Federal Government's attempts to encourage businesses to continue to make key capital acquisitions. The higher Asset Write-off threshold provides additional cash flow benefits for businesses that will be able to immediately deduct the purchase value of eligible assets each costing less than $150,000. The threshold applies on a per asset basis, so eligible businesses can immediately write off multiple asset acquisitions.

While initially applying until 30 June 2020, the Federal Government has decided to extend the Asset Write-Off for an additional six months until 31 December 2020, a move which has been welcomed by the automotive industry. From 1 January 2021 the instant asset write-off will only be available for small businesses with a turnover of less than $10 million, the threshold for this being $1,000.

4. Case Law Update

4.1 Commitment to negotiate reached between Holden and the ACCC

Background

On February 17 2020, General Motors (**GM**) announced its decision to retire the Holden brand in Australia amid concerns that it was no longer a profitable entity. General Motors had stopped manufacturing cars in Australia in 2017 as a result of a number of debilitating external factors including decreasing import tariffs, an influx of cheap vehicles from Asian car companies, dwindling government subsidies and changing consumer preferences. GM's decision to retire the brand meant that Holden would not be renewing any of its existing dealership agreements with the 185 dealerships throughout Australia.

Issue

Following the announcement of Holden's withdrawal from the Australian market, the ACCC received complaints from dealers that Holden was placing unwarranted pressure on them through imposing an unreasonable deadline for them to accept their proposed compensation package by 31 May 2020.

Dealers argued that the imposition of this deadline meant they were being forced to accept the offer without properly completing a dispute resolution process and engaging in negotiations. As such the ACCC purported that this may breach the unconscionable conduct provisions of the Australian Consumer Law (**ACL**) and the good faith obligations of the Franchising Code of Conduct (**Franchising Code**), especially considering that dealers have substantially less bargaining power than Holden.

Outcome

Following ongoing pressure and statements from the ACCC that it was prepared to undertake legal action against Holden, Holden has publicly committed to negotiate with its dealers regarding appropriate compensation in accordance with the requirements under the Franchising Code and the ACL. The deadline for the dealers to accept the offers of compensation has been extended to June 30 2020, with the ACCC continuing to monitor the negotiations in the meantime to ensure fair conduct.

Significance to car dealers

This is a significant development for all car dealers in Australia, not only for those associated with the Holden brand, serving as a reminder of their rights available under the Franchising Code and ACL, particularly with regard to a dealer's right to negotiate in good faith and without untoward pressure.

4.2 *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166

Background

Towards the end of 2015, Volkswagen AG, the German company that manufactures and sells Volkswagen, Audi and Skoda branded motor vehicles, revealed that since 2006, certain models of its motor vehicles in the United States contained Two Mode Software. That software had the effect of falsely satisfying local emissions regulations. The software operated so that when switched to 'Mode 1' for the purposes of emissions testing, the software caused its vehicles to produce lower nitrogen oxide emissions in order to pass legislative requirements, but when driven in on road conditions, the vehicles switched to 'Mode 2' and produced higher NOx emissions for improved performance (**Software**).

In Australia, soon after the US announcement, five class actions were brought against Volkswagen AG and related companies concerning Volkswagen, Audi and Skoda branded vehicles that had been sold in Australia containing the Software.

At the same time, the ACCC commenced two sets of regulatory proceedings against Volkswagen AG and related entities in the Federal Court of Australia concerning:

a) 57,605 Volkswagen branded diesel vehicles sold in Australia between 2011 to 2015; and

b) 12,368 Audi branded diesel vehicles sold in Australia within that the same period.

In both proceedings, the ACCC's allegations included claims that Volkswagen AG and related entities:

c) deliberately concealed certain matters from the Commonwealth relating to the Software, including the fact that the Software existed; and

d) made false representations to the Commonwealth and consumers about the vehicles and their compliance with emissions standards.

Before trial, Volkswagen AG reached a settlement with the ACCC. As part of the settlement, Volkswagen AG admitted to only some of the allegations that had been made and agreed to take sole responsibility for only those contraventions. In exchange, the ACCC agreed not to pursue the other allegations against Volkswagen AG including the allegations relating to the Audi vehicles.

The parties returned to the Federal Court of Australia and requested that Foster J determine the amount of the penalties that should be imposed. The parties jointly proposed that an appropriate penalty was $75 million.

Issue

What is the appropriate pecuniary penalty that should be imposed on Volkswagen AG in accordance with s 224(2) of the Australian Consumer Law (**ACL**) for Volkswagen's admitted contraventions of the ACL?

Outcome

The Court first considered "all relevant matters" for determining an appropriate pecuniary penalty, including the "nature and extent of the act or omission and of any loss or damage suffered as a result" and "the circumstances in which the act or omission took place". The established principles regarding the imposition of pecuniary penalties include:

a) the size of the contravening company;

b) the degree of the company's market power;

c) the deliberateness of the contravention;

d) the period over which the contraventions took place;

e) whether the contravention arose from conduct the of senior management;

f) whether the company's corporate culture was conducive to compliance with the Act; and

g) whether the company has shown a willingness to co-operate with relevant authorities.

The Court emphasised that the overriding objective of civil penalties is to promote deterrence from engaging in contraventions in the future.

Ultimately the suggested $75 million penalty was found to be "manifestly inadequate" and insufficient to meet the objective of deterrence. Instead, a penalty of $125 million was imposed, the highest penalty that has been awarded under the ACL to date.

The following factors justified the record penalty:

a) the "egregious" and "calculated" nature of Volkswagen AG's fraud;

b) the fact that the fraud was carried out by senior management;

c) the "very serious deception of Australian government regulatory authorities";

d) the very significant impact upon consumers;

e) the harm that excessive emissions can have on people and the environment;

f) Volkswagen AG's lack of contrition or remorse; and

g) the fact that Volkswagen AG took "every point possibly available to it" throughout the course of the proceedings, only settling before the proceedings were escalated.

Significance to car dealers

In regulatory proceedings under the ACL, even if a settlement is reached, there is no guarantee that the Court will make the penalty requested or submitted by the parties. The Court will make the pecuniary penalty that it deems appropriate, which can be far more than the amount proposed by the parties. In Volkswagen AG's case, the ultimate penalty of $125 million was almost doubled the initial proposal.

The decision in *ACCC v Volkswagen* serves as a good reminder of the importance of the defendant's behaviour and demeanour during the course of regulatory proceedings. Foster J dedicates considerable space in his judgment to detail Volkswagen's conduct, its lack of contrition, and why this contributed towards justifying the final penalty.

4.3 *Tudor v Smart Buy Auto's Pty Ltd* [2019] NSWCATAP 142

Background

In 2017, after inspecting the vehicle personally, Mr Tudor purchased a used 2010 Audi Q7 TDI (**Audi**) from Smart Buy Auto's Pty Ltd (**Smart Buy Autos**) for $28,000.00. At the time, the Audi had an odometer reading of 189,789 kilometres. Several days after purchasing the Audi in Sydney, whilst attempting to obtain a roadworthy certificate in Queensland, an oil leak was discovered.

Mr Tudor lodged a claim in the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal (**NCAT**). Mr Tudor alleged that, as a result of the oil leak:

a) the Audi was not of acceptable quality within the meaning of the guarantee implied by s 54 of the ACL; and

b) the Audi was not reasonably fit for purchase within the meaning of the guarantee implied by s 55 of the ACL.

Mr Tudor's application was heard by a member of NCAT, who dismissed the application for the following reasons:

a) the oil leak was so minor that it did not manifest itself on a 1000km journey from Sydney to the Gold Coast;

b) the oil leak was so slight that it was not detected or not thought significant during the roadworthy inspection;

c) the Queensland inspector passed the car as fit for registration after surface oil was washed from the engine; and

d) the only damage suffered by Mr Tudor is that a drop of oil might fall on his garage floor from time to time.

Mr Tudor appealed the Tribunal's decision to the Appeal Panel, arguing that the Tribunal had made an error of law.

Issue

Did the Tribunal fall into an error of law by failing to consider whether Smart Buy Autos breached the implied guarantees under sections 54 and 55 of the ACL?

Outcome

The Appeal Panel held that the Tribunal's failure to consider Mr Tudor's claims (whether there had been breaches of the implied guarantees under sections 54 and 55 of the ACL) amounted to an error of law. As such, the Appeal Panel allowed Mr Tudor's appeal and ordered the claim to be reconsidered by the Tribunal, but constituted with a different member.

The Appeal Panel stated that the Tribunal's sole focus on the oil leak was an error. In relation to Mr Tudor's claims, the Tribunal had failed to consider:

a) whether Smart Autos had made any representation that the Audi was free from oil leaks;

b) whether Mr Tudor's inspection would reasonably have revealed the oil leak in the Audi;

c) whether Mr Tudor had disclosed the purpose for which he wanted the Audi and whether the Audi was reasonably fit for that purpose; and

d) whether the Audi was not fit for purpose because it had an oil leak at the time it was sold.

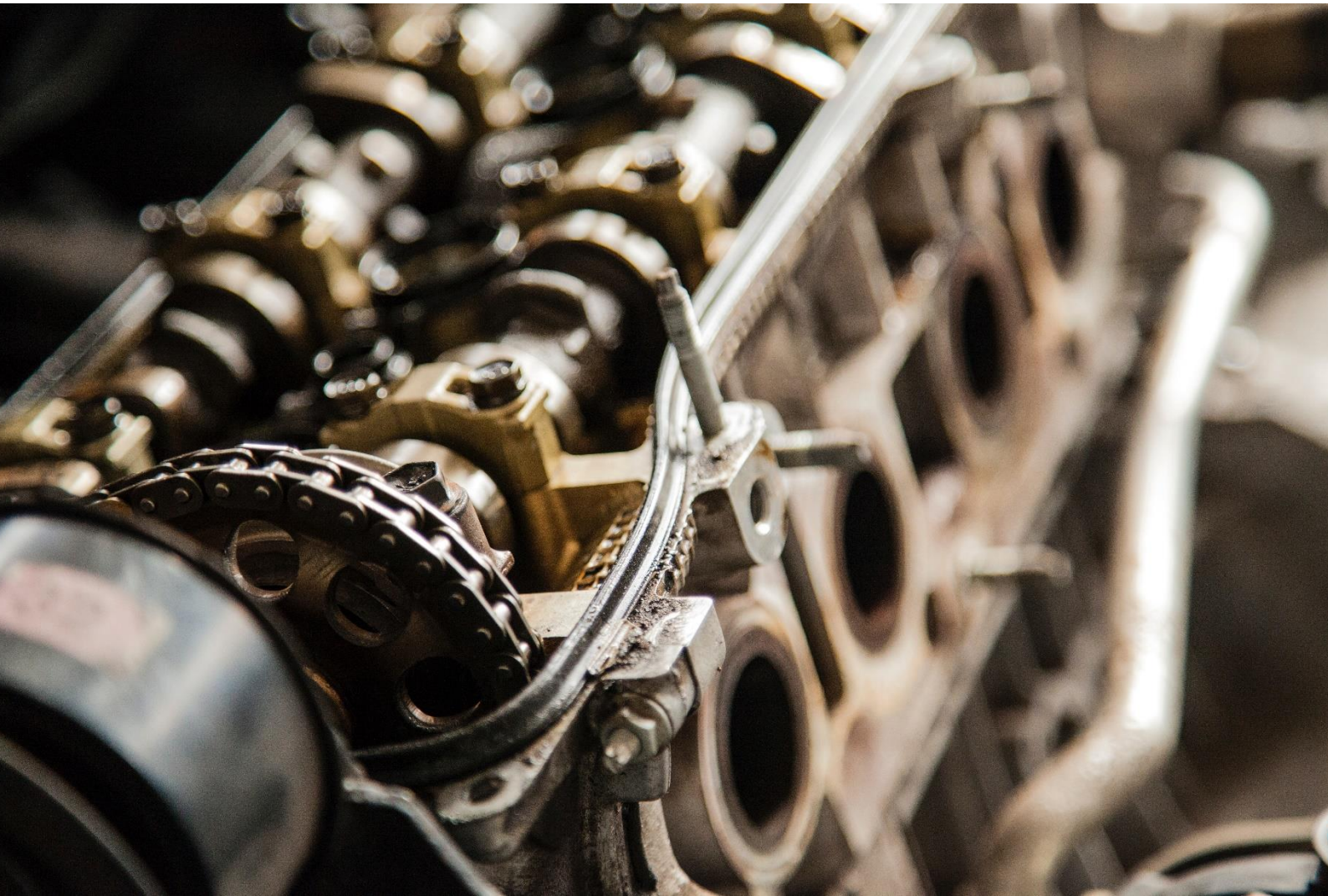
These were all mandatory issues that had to be resolved, in order to determine whether there had been breaches of the implied guarantees under sections 54 and 55 of the ACL.

Significance to car dealers

This case serves as a reminder to auto-industry members that even relatively innocuous seeming defects in vehicles, known or discoverable, may give rise to liability.

Tribunals can fall into error, even when dealing with relatively straightforward, automotive related claims under the ACL. Whether it is a decision of a tribunal, the appeal panel, or a court, it is always important to carefully review a decision for errors to identify any potential avenues for appeal in order to potentially obtain a more favourable outcome.

The Appeal Panel criticised Mr Tudor for failing to "precisely articulate" an alleged error of law made by the Tribunal in his notice of appeal. Whilst the Appeal Panel gave concession to the appellant since he was not legally represented, there is no guarantee that the Appeal Panel will do so in all cases. By failing to precisely articulate grounds of appeal, appellants run the risk of compromising their own appeals before they are even heard.



4.4 Voivodich v CMG Automotive Pty Ltd (Civil Claims) [2019] VCAT 1846 (3 December 2019)

Background

Mr Voivodich purchased a Nissan Navara from CMG Automotive Pty Ltd (**CMG**). Mr Voivodich alleged that two days after this purchase, he experienced issues with the car intermittently stalling. He subsequently took the car to the mechanic and was informed that the EGR valve and fuel injectors were faulty. CMG inspected and performed some repairs, but Mr Voivodich continued to experience problems which required him to replace the battery, fix the shock absorber and suspension. He refused to replace the clutch and requested that CMG take possession of the car and refund him his initial payment, which CMG refused.

Under section 54 of the ACL, goods supplied ought to be free from defects, safe and as durable as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable considering the nature and price of the goods. Mr Voidovich argued that the various problems he experienced with the car amounted to a breach of a consumer guarantee under the ACL.

Further, Mr Voivodich claimed that this breach of a consumer guarantee entitled him to reject the goods and receive a refund as there was a "major failure" under section 249(3) of the ACL.

Issue

In what circumstances will the consumer guarantee of "acceptable quality" be breached when selling a car?

If there was a failure of a consumer guarantee, is the customer able to reject the goods and demand a refund?

Outcome

The Victorian Civil and Administrative Tribunal (**VCAT**) found that due to the high number of repairs and associated costs within the short period after the purchase, the vehicle was not of acceptable quality when it was sold to Mr Voivodich and thereby breached section 54 of the ACL.

VCAT found that there was no 'major failure' as the vehicle was repairable, but not all repairs had been completed due to Mr Voivodich's personal grievances against CMG. As there was no major failure and the defects were remediable, VCAT found that Mr Voivodich should not receive a refund before CMG was given an opportunity to repair (or pay for the repair of) the defects.

Significance to car dealers

When a dealership sells a vehicle to a customer and shortly thereafter it requires extensive repairs, it may not be of acceptable quality under the ACL and the dealership could be liable to pay for those repairs. However, this of itself does not automatically entitle the customer to reject the goods and receive a refund. The circumstances entitling a consumer to a refund will be varied and very dependent on the particular conditions.

4.5 *Bailey v BMW Sydney Pty Ltd* [2020] NSWDC 53

Background

In April 2013, Mr Bailey purchased a BMW X5 vehicle from BMW Sydney Pty Limited (**BMW Sydney**) and obtained finance from BMW Australia Finance Limited. From mid-October 2013, Mr Bailey experienced several problems with the car, including abnormal internal noises, a flat battery on multiple occasions, self-locking doors when the keys were inside, a faulty digital system that failed to identify a flat tyre and a jammed handbrake.

Mr Bailey argued that the sales representative's conversations and the sales brochure were representations which he relied on in purchasing the vehicle. As the car did not perform in accordance with these representations, Mr Bailey asserted that these representations amount to misleading and deceptive conduct under section 18 of the ACL.

Issue

Did the sales representative's oral statements and the sales brochure amount to 'representations' about the car's high performance and ongoing maintenance?

If representations were made with respect to future matters, were these representations misleading or deceptive?

Outcome

The NSW District Court did not consider the oral statements made by the service representative to be representations regarding the quality of the car. However, the Court did find that the sales brochure contained representations as to the safety and roadworthiness of the vehicle.

The Court then considered whether these representations about the characteristics and performance of the car were misleading or deceptive under the ACL. From the date Mr Bailey purchased the car on April 2013 to mid-October 2013, there were no faults with the vehicle. The defects were absent upon purchase and the vehicle was safe and roadworthy when the representations were made.

The defects developed in the months following the installation of a tow bar, which was not contemplated in the representations made. As there was no evidence of fault with the vehicle at the time of purchase and the car operated in accordance with the brochure, the Court ruled that the representations made as to the first class capabilities of the vehicle were not misleading or deceptive.

Additionally, the Court did not find that the representations made in the sales brochure as to the timing of servicing and replacement of parts for the car were misleading or deceptive. The brochure contained representations that the car would undergo maintenance in a timely manner. The Court found that BMW Sydney had reasonable grounds for making these representations as to future matters, given their extensive maintenance and servicing facilities. As the servicing and supply of parts to Mr Bailey were conducted to an acceptably high level, the representations in the brochure were not misleading or deceptive.

Significance to car dealers

Representations made in a car brochure will only be misleading or deceptive if the car was defective at the time it was purchased, not if the defects came about after a long period of use, or possibly where there has been some intervening cause, such as additional modification, to which the defects may be attributable.

4.6 *Edward Lees Imports Pty Ltd v Department of Finance Services and Innovation (t/as Commissioner of Fair Trading)* [2020] NSWSC 256

Background

Edward Lees Import (**ELI**) held a motor dealer and repairer license. The Commissioner of Fair Trading (**the FT Commissioner**) issued three Show Cause Notices. The Second Cause Notice alleged that ELI was dishonest in applying for its motor vehicle repairer's licence as there was a failure to disclose the previous criminal convictions of its company director, Mr Lee.

The Third Show Cause Notice alleged contraventions of the *Motor Dealers And Repairers Act 2013* (NSW) (**MDR Act**) on the grounds that the plaintiff carried on a business in a dishonest and unfair manner and its 'close associates' were not fit and proper persons to hold a motor dealer's licence. Notably, it did not contain the allegations in the Second Cause Notice relating to Mr Lee's previous convictions. Based on the Third Show Cause Notice, the FT Commissioner cancelled ELI's motor dealer licence, with a disqualification period of 10 years.

ELI unsuccessfully applied to NCAT to overturn the Commissioner's determination, before appealing the decision to the Appeal Panel of NCAT. The Appeal Panel upheld the Tribunal's decision that as Mr Lee was a 'close associate' of ELI, he was not a fit and proper person to hold a motor dealer licence due to the false statements made in the original application.

ELI was granted leave to appeal to the NSW Supreme Court.

Issue

Was it open to the Tribunal and Appeal Panel of the Tribunal to consider material outside of the Show Cause Notice upon which the Commissioner's decision was based upon?

Outcome

ELI was successful in its appeal to the NSW Supreme Court which set aside the Appeal Panel's decision due to the administrative decision makers committing an error of law. The Court was critical of the Appeal Panel for not basing its decision on the grounds and particulars in the Third Show Cause Notice under section 41 of the MDR Act.

The Commissioner, the Tribunal and Appeal Panel were all subject to the same particulars in the Third Show Cause Notice. The Appeal Panel was not entitled to rely on particulars and allegations which were outside of the Show Cause Notices, as to do so was denying ELI procedural fairness.

As it was not clear what was being alleged against ELI, ELI could not fairly defend these allegations and as such the licence cancellation amounted to an error of law.

Significance to car dealers

The court will be strict in interpreting the statutory requirement that all allegations and grounds for a motor dealer and repairer licence cancellation be particularised in the Show Cause Notice. Failure to do so may be considered an error of law and a denial of procedural fairness.

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