AUTOMOTIVE INDUSTRY GROUP

Regulatory Update

December 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.

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Headlines

- Federal Government introduces further updates to the Motor Dealers and Repairers Act 2013 (NSW) (see part 1);
- ASIC updates proposed intervention order for caryard financial products following consumer and business consultation (see part 2.1);
- Further investments in technology and innovation in the automotive industry announced by the Federal Government (see part 3.2); and
- Federal Government Announces Further Amendments to Unfair Contract Terms Regime (see part 3.4).

1. Legislation Update

1.1 Better Regulation Legislation Amendment Act 2020

The *Motor Dealers and Repairers Act 2013* (NSW) (**Act**) was developed following a review of the automotive industry legislation after extensive consultation with industry stakeholders. It established a regulatory framework covering the operation of motor dealers, recyclers, repairers, and related tradespersons. The Act is intended to support consumer protection, reduce red tape, and simplify and modernise regulation of the automotive industry in NSW.

The Act replaces the *Motor Dealers Act 1974* (NSW) and the *Motor Vehicle Repairs Act 1980* (NSW). Since its commencement, the Act has been amended to address changes and challenges within the automotive industry. It is currently undergoing further review by NSW Fair Trading.

Under the *Better Regulation Legislation Amendment Act 2020* (NSW), the following amendments were made to the Act which commenced on 28 September 2020:

- The Commissioner for Fair Trading can cancel a motor dealer's licence, motor vehicle repairer's licence, motor vehicle recycler's licence or tradesperson's certificate, if it was issued in error or due to misrepresentation.
- Repair work on transport service vehicles must now be done by a licensed motor vehicle repairer and certified motor vehicle tradesperson.
- A person selling a trailer that is used for the purpose of transporting a second-hand boat sold by that person is no longer required to hold a motor dealer's licence.
- There is now a prescribed maximum amount of compensation payable from the Motor Dealers and Repairers Compensation Fund pursuant to the *Motor Dealers and Repairers Regulation 2014* (NSW).

1.2 Motor Dealers and Repairers Amendment (Tradesperson's Certificates) Amendment Regulation 2020 (NSW)

Pursuant to the *Motor Dealers and Repairers Amendment (Tradesperson's Certificates) Amendment Regulation 2020* (NSW) (**Amendment Act**), a number of changes have been made to several classes of automotive repair work in the *Motor Dealers and Repairers Act 2013* (NSW) (**Act**), including:

- **Steering, suspension and wheel alignment repair work**: wheel balancing is no longer in this class of repair work.
- **Exhaust and glazing repair work**: work on hybrid or electrically powered motor vehicles is no longer in this class of repair work.
- **Glazing repair work**: a Certificate III in Automotive Glazing Technology is now a prescribed qualification.
- **Glazing and electrical accessory fitting repair work**: commencement of this class of repair work has been delayed until 1 November 2021. This means tradespersons who do not currently hold a relevant tradesperson's certificate in this class of report work will need to complete the prescribed qualification and obtain a tradesperson's certificate by 1 November 2021.

Since 1 September 2020, the Amendment Act allows tradespersons to obtain a Certificate II Qualification for specialised classes of repair works including exhaust repair work, radiator repair work, and steering suspension and wheel alignment repair work. If a tradesperson currently holds a tradesperson's certificate authorising them to perform these types of repair works, they are not required to apply for a Certificate II Qualification for these specialised classes of repair works. This amendment is intended to make it easier and cheaper for tradespeople to become qualified for these types of repair works.

1.3 Motor Dealers and Repairers Amendment (Miscellaneous) Regulation 2020 (NSW) - Consumer Safety

Commencing on 12 June 2020, the following amendments were made to the *Motor Dealers and Repairers Amendment (Miscellaneous) Regulation 2020* (NSW):

- Dealers, repairers and recyclers are now required to hold a licence if their business involves 'written-off light vehicles'.
- There are now additional signage requirements for interstate dealers exhibiting at trade shows.
- The term for an 'approved' trade show has now been changed to a 'declared' trade show. This is intended to make it clearer to consumers that the exemption is for interstate dealers to exhibit at trade shows, and not that the trade show itself is approved.

These changes are designed to improve and maximise the accessibility of information to consumers and, ultimately, to improve consumer safety and transparency.

2. Proposed Legislation

2.1 Prohibitions on the sale of motor vehicle insurance and manufacturer's warranty in recent updated ASIC product intervention order

Following the Australian Securities and Investments Commission's (**ASIC**) consultation on the proposed product intervention order, "*The sale of add on financial products through caryard intermediaries*" (**Intervention Order**) published in October 2019, ASIC has revised the Intervention Order further after having received various submissions from businesses and individuals likely to be affected. The Intervention Order was released late last year in response to the Department of Treasury's 2019 proposal paper, "*Reforms to the sale of add-on insurance products*" and included the introduction of a deferred sales model for add-on insurance and a cap on vehicle dealer commissions relating to add-on risk products, both of which were explored in our June 2020 update.

ASIC's most recent revision is entitled "*ASIC Corporations (Product Intervention— Add-on Motor Vehicle Financial Risk Products) Instrument 2020/XX*" (**Instrument**), and one notable deviation is the title of the Instrument itself which has been changed from the sale of 'add on insurance and extended warranties', to the sale of 'add on motor vehicle financial risk products'. This change reflects a broadening of the order somewhat reminiscent of ASIC's submission to the Department of Treasury in 2019, that "*a clear and broad definition of 'add-on insurance products' is integral to the effectiveness of the Government's deferred sales model…. A narrow definition may also create a risk of avoidance where de facto add-on insurance products are artificially structured to avoid the narrow definition*". Essentially, the replacement of 'insurance and extended warranties' with 'motor vehicle financial risk products' now covers those products that may fall into the definition of 'de facto' or 'artificially structured' insurance or warranty products.

The Instrument has also introduced three general prohibitions and one specific prohibition, with exceptions now set out separately. The prohibitions apply in connection with motor vehicle purchases, loans and leases; with the general prohibitions applying in respect of add-on motor vehicle financial risk products and the specific prohibition applying in respect of mechanical risk products. The prohibitions can be summarised as follows:

- **Prohibition 1**: The first prohibition is applicable only for the first 6 months of the Instrument's commencement. It prohibits an intermediary from applying on behalf of the consumer, or arranging for a consumer to apply or acquire, an add-on motor vehicle financial risk product. If an intermediary does engage in such conduct, a product issuer is prohibited from issuing that add-on motor vehicle financial risk product. The exceptions to the prohibition are contained under clause 9 of Part 2 of the Instrument.
- **Prohibition 2**: The second prohibition is expressed in the same terms as the first, except that it is applicable 6 months from the instrument's commencement, and that exceptions will apply if certain conditions under Part 3 and Part 4 are met.
- **Prohibition 3**: The third prohibition applies only to intermediaries and begins on the day the instrument commences. It stipulates that an intermediary must not require a consumer to sign an acknowledgement saying that the consumer will be required to personally pay, and not make a claim under the product, if they do not acquire for an add-on motor vehicle financial risk product.

- **Specific Prohibition**: The specific prohibition is expressed in the same terms as Prohibition 1, with the difference being that it is applicable to mechanical risk products instead of add-on motor vehicle financial risk products. Notably, an exception to the specific prohibition arises if the intermediary and/or product issuer are satisfied that the consumer does not maintain a level of retail cover under a manufacturer's warranty. In that situation, the intermediary can apply on behalf of the consumer, or arrange for a consumer to apply or acquire, a mechanical risk product; and the product issuer can issue that mechanical risk product.

Other notable revisions include:

- ASIC is now limited in the types of information and the time frame by which it can request a 'written statement'.
- The removal of the requirement to determine unsuitable classes of retail clients for the online consumer roadmap.
- New concepts, including a new class of products called 'assistance insurance products', the term 'arranging conduct' and the modification of the content and form of the 'online consumer roadmap'.

A copy of the Instrument may be accessed here.

2.2 Simplification of Australia's consumer credit regulatory regime

Over the past quarter the Morrison government has proposed credit regulation reforms aimed at reducing barriers for individuals and small businesses to access credit. The proposed reforms have emerged as part of the government's economic stimulus package, as Australian Treasurer Josh Frydenberg told reporters "*The flow of credit will be absolutely critical to our economic recovery…. our current regulatory framework, with respect to lending...has become overly prescriptive, and responsible lending has become restrictive lending.*"

Part of the proposed credit regulation reforms includes the removal or simplification of the responsible lending obligations under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**), which are likely to impact various credit industry participants. Those credit industry participants will include car dealers, dealer finance companies and intermediaries who provide consumer credit products.

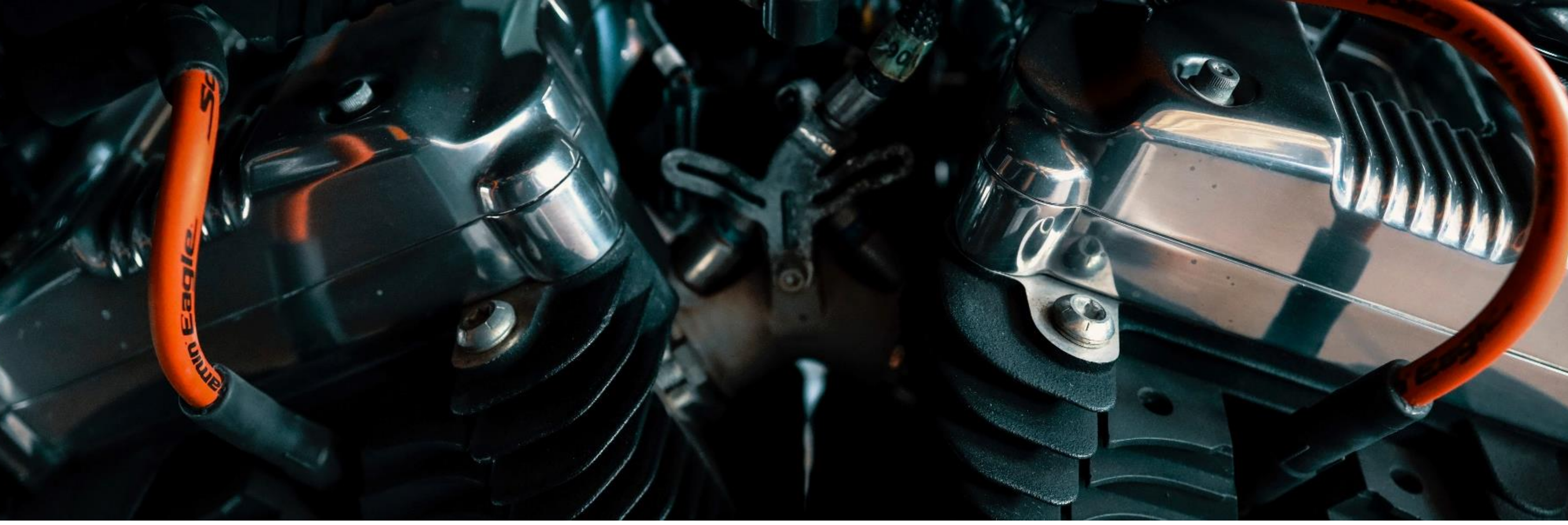
As it currently stands, the responsible lending framework prohibits credit providers from entering into a contract with a consumer that is 'unsuitable'. A contract that is 'unsuitable' under the NCCPA includes a contract for a loan that the consumer cannot repay without suffering hardship, or a contract that does not meet the consumer's requirements and objectives. To assess whether the contract is unsuitable, credit providers are obligated to conduct 'reasonable inquiries' to determine the consumer's suitability for the credit product before offering credit.

Under the Government's new proposed reforms due to commence on 1 March 2021, the existing responsible lending obligations in the NCCPA will now only apply to small amount credit contracts - being contracts where the credit limit is $2,000 or less, where the term of the contract is between 16 days and 1 year, and the consumer's obligations under the contract are not secured. The responsible lending obligations under the NCCPA for non-authorised deposit-taking institutions (**ADI**), which will include most car dealers, dealer finance companies and intermediaries, will be removed as a result of the proposed reforms. Instead, non-ADIs must comply with the risk-based lending management framework similar to the draft APRA Prudential Standards (**Standards**) that ADIs are expected to comply with.

The Standards are likely to change the current 'reasonable inquiries' test by reducing the need to verify the borrower's financial situation to the same extent currently required. To that end, credit providers must still maintain systems, policies and processes to assess whether consumers will be able to comply with their financial obligations without experiencing substantial hardship. However, that assessment will be carried out using self-determined criteria. The criteria needs only to ensure that the assessment is proportionate to the nature, type and size of the credit; and that it considers a range of specified factors, including the purpose of the credit, the structure of the credit and the consumer’s sources of repayment, risk profile, repayment history and reasonably foreseeable expenses.

The proposed reform also enables credit providers to rely on the information obtained from the consumer, unless there are reasonable grounds for the credit provider to believe it is unreliable. Accordingly, there are still requirements for the credit provider to ensure that there is verification of the consumer's ability to repay the loan, and a determination of the consumer's risk profile through inquiries of the consumer's expenses. There is also an expectation that, where information is provided about a consumer by a third party, reasonable steps are taken to verify the accuracy and completeness of that information.

As the consultation process takes effect leading up to March 2021, there may be additional key elements, tests and standards that will be imposed in relation to the reforms.



3. Policy Update

3.1 2020-21 Federal Budget

On 6 October 2020, the Federal Government (**Government**) announced its latest budget which included a substantial allocation of spending on public infrastructure. As the 2020-21 federal budget is the first budget released since the COVID-19 pandemic, there is a heavy focus on promoting activity and confidence in the economy.

Tax relief

The budget introduced a number of new policies which are aimed to increase consumer confidence and promote increased expenditure on larger assets through tax cuts for individuals and businesses. Personal income tax cuts will deliver $17.8 billion in tax relief for around $11.6 million individuals and businesses with aggregated annual turnover of less than $5 billion. Despite the focus on relieving taxes on most consumers and small businesses, the Government will keep the Luxury Car Tax and Passenger Vehicle Tariff in effect.

Apprenticeships and employment incentives

The Government has also announced that it will provide $1.2 billion over four years from 2020-21 in wage subsidies to apprentices and trainees. From 5 October 2020 to 30 September 2021, eligible businesses and Group Training Organisations of any size can claim the new Boosting Apprentices Wage Subsidy for new apprentices or trainees who commence during this period. This subsidy allows participating businesses to be reimbursed up to 50 per cent of an apprentice or trainee's wages and will be capped at $7,000 per quarter per apprentice, with 100,000 places available for the subsidy.

In addition, the Federal Government released details of its JobMaker Hiring Credit scheme which is a three year, $4 billion scheme to provide hiring credits to eligible employers hiring additional staff between 7 October 2020 and October 2021.

The JobMaker Hiring Credit will be available when the employer can demonstrate that the new employee increases the overall headcount and payroll of the organisation. The purpose of this condition is to ensure that businesses do not terminate existing staff to be replaced with new, lower cost employees or reduce the hours of existing staff to make those hours up with new employees on the JobMaker scheme. Additional eligibility information has been provided by the Government which is accessible here.

Employers can receive a credit of $200 per week if an eligible new employee is aged 16 to 29 years or $100 per week if that eligible new employee is aged 30 to 35 years. To be eligible, the employee will need to have worked for a minimum of 20 hours per week, averaged over a quarter, and received the JobSeeker Payment, Youth Allowance (other) or Parenting Payment for at least one month out of the three months prior to when they are hired.

Infrastructure

The Government is investing $110 billion over 10 years from 2020–21 in automotive and transport infrastructure across Australia. As part of this investment, the Government has identified a potential $7.5 billion of spending on road and rail projects, a new $2 billion investment in road safety upgrades and $1 billion for local councils to upgrade roads, footpaths and street lighting. The investments will also be directed towards keeping Australians using their own cars, and the $7.5 billion package offers no funding for any major public transport projects. The Government expects that increased road capacity and usability will induce a greater demand for consumer mobility and use of cars.

3.2 Investment in the future - Technology and Innovation

In addition to fostering economic recovery and consumer confidence, investment in future technology was a significant feature of this year's budget. These investments include $1.9 billion dedicated towards funding a number of innovative programs which "*herald a quantum step forward for the Australian environment, and Australian industry*" according to Tony Weber, Chief Executive of the Federal Chamber of Automotive Industries. Policies also include a $838,000 deal with Origin Energy to install 150 smart charges, and the 2020-21 Federal Budget included a Future Fuels Fund to provide $74.5 million over four years to enable businesses to integrate new vehicle technologies, perform integration analysis and develop improved information on electric vehicles and charging infrastructure.

Federal Government investment of $1.9 billion in future technologies

The Federal Government is encouraging businesses to adopt the use of electric vehicles through a $74.5 million subsidy known as the Future Fuels Fund. This subsidy is also anticipated to create a benefit to the used-car market. A Future Fuels Fund will provide $74.5 million over four years to enable businesses to integrate new vehicle technologies, perform integration analysis and develop improved information on electric vehicles and charging infrastructure.

Federal funding of $838,000 allocated to Origin Energy Ltd for installation of 150 smart chargers

In August 2020, the Australian Renewable Energy Agency (**ARENA**) announced $838,000 of funding for an electric vehicle smart charging trial. This funding has been allocated to Origin Energy Ltd, who will provide and install 150 smart chargers across residential, commercial, and industrial premises.

The initiative is part of a $2.9 million trial run by ARENA which seeks to evaluate the benefits and barriers to controlled smart charging, including improving understanding of electric vehicle driver behaviour. The trial runs across the National Electricity Market which covers Queensland, New South Wales and the ACT, Victoria, South Australia and Tasmania.

This initiative will promote the use of low emissions vehicles, including plug in hybrid and battery electric vehicles, which are already either in development or production for most automotive manufacturers. However, the uptake of electric vehicles in Australia has been slow for various reasons, including lack of policy, lack of both financial and non-financial incentives, and a lack of infrastructure development to support the technology – particularly a shortage of convenient charging.

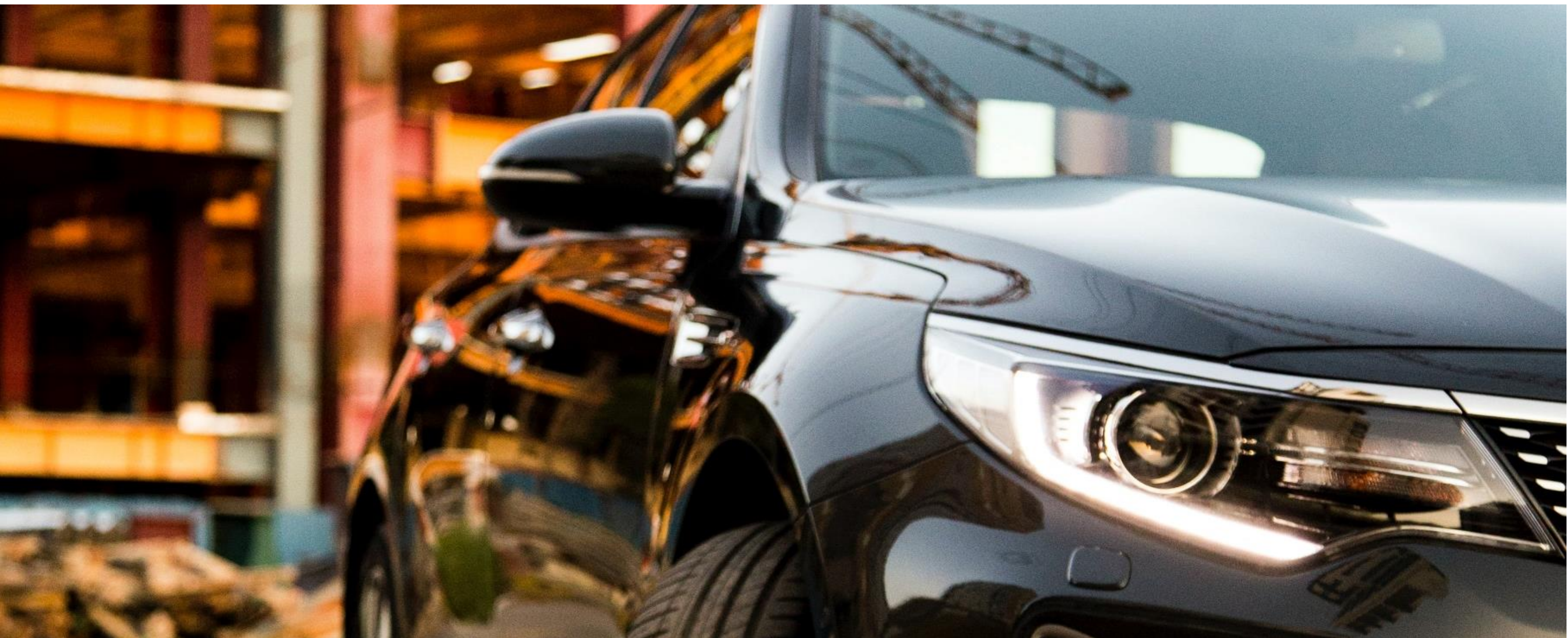
The announcement of this electronic vehicle smart charging trial by ARENA will provide significant support to the growth of the demand for electronic vehicles in Australia and address some of the barriers to entry of this important technology.

Australian automotive industry has introduced new voluntary CO2 emissions standards

In line with the push in Government policy, the automotive industry has been active in promoting environmental initiatives in Australia. In July 2020, the Federal Chamber of Automotive Industries (**FCAI**) announced a new industry-led, voluntary reporting system. The FCAI CO2 Emissions Standard sets out industry and brand CO2 emissions reduction targets to be met by 2030. The initiative is supported by more than 40 major automotive brands and aims to provide certainty to manufacturers to enable them to plan for future products for the Australian market.

This industry initiative is part of a comprehensive approach which includes Government investment to address motor vehicle emissions that includes fuel quality standards, the introduction of Euro 6 and the introduction of a CO2 standard. Despite the CO2 emissions produced in the manufacturing process, purely electric cars will get a free pass as they are considered zero emissions vehicles under the scheme. Under the scheme, the FCAI will publish an annual report from 2021 onwards showing how every major automotive brand in Australia is tracking with its CO2 emissions targets. While it appears that Government regulation in Australia is unlikely to adopt Euro 6 standards in the near future, the local car industry has signed up to a new voluntary agreement to reduce vehicle CO2 emissions between 2021 and 2030.

Importantly, the scheme is not aimed at increasing costs of higher emissions vehicles such as utes, SUVs and four-wheel-drives, which are popular in the Australian market. Rather, the CO2 emissions targets will vary according to the size and type of vehicle, where for example, passenger cars and most SUVs will be required to meet a lower CO2 emissions average than utes, vans, and heavy duty four-wheel-drives. The voluntary code does not therefore provide incentives for automotive manufacturers to steer away from those larger, heavier and less fuel-efficient vehicles which produce higher CO2 emissions than smaller vehicles.



3.3 COVID-19 restrictions on Victorian car dealers

Like all retail businesses in Australia, the automotive industry has been significantly impacted by the coronavirus pandemic. The effect of the virus has been particularly felt in Victoria where stage 4 lockdowns recently forced the temporary closure of motor vehicle showrooms and a variety of other retail, wholesale and manufacturing businesses in Melbourne.

Car dealerships in Victoria were reduced to operating on a 'click and collect' basis, in which consumers could purchase a car online or over the phone and only attend the dealership to complete the transaction, providing it was no more than 5km away from their home. Stage 4 restrictions in Victoria allowed service departments to remain active under the State Government’s transport sector provisions to perform vehicle repairs, servicing, maintenance and, where applicable, towing services.

While the Government's emergency response to COVID-19 has been specific to the circumstances of this outbreak, the World Health Organisation notes the possibility of future pandemics with similar characteristics. While many restrictions have lifted in Victoria, the hardships suffered by those in the automotive and transport industry highlight the need to invest in greater e-commerce capability.

Importance of transport and automotive businesses

Despite the hardships suffered by transport and automotive businesses throughout Australia, the treatment of the transport and automotive industry in the Victorian stage 4 lockdowns demonstrates that the industry remains critical to the Australian economy.

Exemptions to the lockdown were made for businesses conducted by a sole operator and at the discretion of Victoria’s Chief Health Officer in circumstances where businesses, if forced to shut down, would likely result in permanent closure or where a major supply chain gap in the state’s industrial capability would occur that was unlikely to be filled after a return to normal conditions.

Similarly, exemptions were made for businesses which were critical to global supply chains in the local and international manufacture of essential products overseas, such as manufacturers of medical equipment and supplies. Heavy truck manufacturers were also allowed to remain open, as were component manufacturers that were diversified into other areas deemed critical such as defence or security industries.

If Victoria or other Australian states face pandemic induced lockdowns in the future, it is likely that similar exemptions to automotive business would apply.

3.4 Federal Government announces further amendments to Unfair Contract Terms Regime

The Federal and State governments have recently announced greater protections for small businesses under the unfair contract terms regime that will give long awaited protection to vehicle automotive dealers. Consultation with various stakeholders throughout 2019 and 2020 has resulted in the detection of deficiencies within the unfair contracts regime which still left many dealers subject to unfair and rigid standard form dealer agreements.

In response to these findings, the Federal government is now looking to draft new legislation that will make unfair contract terms unlawful, impose civil penalties upon perpetrators and expand the range of businesses to which the unfair contract terms regime will apply.

Once the new legislation is enacted, dealers and dealer councils should carefully review any proposed changes to dealer agreements and the powers and rights given to vehicle distributors under those dealer agreements, including the setting and enforcing of uncommercial performance targets, to ensure that they do not constitute unfair terms. The anticipated changes to the regime are intended to significantly reduce the occurrence of vehicle distributors including unfair terms in their standard franchise agreements and result in greater fairness across the industry.

For more information, please see our recent article on this topic here.

3.5 An ACCC First: Collective Bargaining Class Exemption to apply to Motor Vehicle Dealers

On 22 October 2020, the Australian Competition and Consumer Commission (**ACCC**) announced that from early 2021, car dealers will receive an exemption from normal competition laws to allow them to form bargaining groups and collectively negotiate with their suppliers, processors, franchisors or fuel wholesalers without needing to apply to the ACCC for approval. This means that dealer councils are now able to collectively negotiate terms of dealer agreements, KPIs and bonuses without needing to worry about a possible competition law breach.

Dealer councils have been formed in the past but have always required the approval of the ACCC to enter into collective bargaining negotiations. This new exemption has emerged due to the fact that the ACCC authorisation process can often be slow and costly, leading to unfair contract terms and decreased opportunity for deals which can be passed on to consumers.

An important limit on the exemption is that it will not extend to ‘collective boycott’ conduct. This means that dealers cannot agree to ‘stick together’ by agreeing that they won’t deal or negotiate with a manufacturer individually, or that they will all refuse to deal with a particular manufacturer. The inability to agree to stick together in this way significantly reduces the power of any dealer council because the manufacturer can simply refuse to deal with the dealers as a group if it so wishes.

For more information, please see our full article on this topic here.

3.6 Senate Committee Investigation into the relationship between car manufacturers and car dealership models in Australia

On 7 October 2020, a Federal Government Senate Committee (**Committee**) announced that it will be investigating the regulation of the current model of relationship between car manufacturers and car dealerships in Australia. The Committee called for submissions from the public regarding the issue, the deadline for which was 30 October 2020.

The investigation is said to include:

- Practices employed by manufacturers in their commercial relations with dealers;
- Existing legislative, regulatory and self-regulatory arrangements;
- Current and proposed government policy;
- Dispute resolution systems and penalties for breaches of the Franchising Code of Conduct;
- Current and proposed business models in selling vehicles;
- Legislative, regulatory and self-regulatory arrangements found in international markets; and
- The imposition of restraints of trade on car dealers from car manufacturers.

For more information, please see our full article on this topic here.

3.7 Federal Government response to the 2019 Franchising Code Review

Following the Franchising Code Review carried out in 2019, the Federal Government (**Government**) has announced its response to the Joint Committee on Corporations and Financial Services inquiry into the operation and effectiveness of the Franchising Code of Conduct (**Franchising Code**) report: "*Fairness in Franchising*".

While the date for any amendments to come into effect is yet to be announced, changes will be made to the rules around disclosure, cooling off and dispute resolution (such as a voluntary binding arbitration option), and fines and penalties are to be doubled for breaches of the Franchising Code.

Although the Government had already made changes specifically for the automotive industry in June 2020, the Government has since recognised that the sector would be benefit from the broader reforms to the Franchising Code.

Proposed amendments include the following:

- Increasing accuracy and transparency of financial and non-financial disclosures;
- Updating requirements for Information Statements;
- Introducing a requirement for franchisors to provide prospective franchisee a "Key Disclosure Information Fact Sheet";
- Cooling off periods to extend to 14 days; and
- Amending disclosure requirements to ensure that obligations regarding franchisee goodwill for end of term arrangements are clearly expressed.

The Government has also stated that it will continue to work with the automotive franchising sector on the development of an industry-led, principles based voluntary guide to improve the transparency and fairness of agreements.

For more information and for a full summary of the key proposed amendments to the Franchising Code, please see our full article on this topic, here.

3.8 Federal Government announces best practice principles for new car dealership agreements

To complement the anticipated amendments to the Franchising Code of Conduct, the Federal Government has released the best practice principles for new car dealership agreements for the automotive retailing industry. These principles are voluntary and are said to be in line with existing obligations rather than introducing new obligations on car dealers or manufacturers.

The principles include:

- Compensation for franchisees in the event of early termination due to a withdrawal from the Australian market, rationalisation of network or changes to distribution models;
- Allowances for lost profit, capital expenditure, loss of the sale of goodwill and wind up costs;
- Provisions for timely commercial settlement and dispute resolution between the parties.

The principles are intended to improve transparency and fairness for future dealership agreements that will benefit consumers, dealers and manufacturers.

For more information and a full outline of the principles, please see our full article on this topic here.

4. Case Law Update

4.1 *Vizcarra v Delorian Motors Pty Ltd t/as Woollahra Auto Repairs* [2020] NSWCATAP 31

Background

In early 2017, Ms Vizcarra (**Customer**) purchased a vehicle from a third party. The vehicle was approximately 13 years old and had been driven more than 150,000km. On 3 September 2018, the Customer took the vehicle to Delorian Motors Pty Ltd t/as Woollahra Auto Repairs (**Repairer**) to have a heater repaired and the vehicle serviced. A red oil light warning was subsequently noticed by the Customer, who returned the vehicle to the Repairer on 11 October 2018.

The Customer reported further issues with the vehicle following its second service with the Repairer. A report was issued by the NRMA on 8 November 2018 which found that the vehicle had blown a head gasket, lost compression and had an empty coolant reservoir. A further report from the NRMA dated 25 January 2019 recommended that the engine be replaced.

The Customer lodged an application with the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal (**NCAT**) claiming $8,313 against the Repairer for the costs of both services and the cost to replace the vehicle's engine. The basis of the Customer's claim was that the Repairer had not performed the work with due care and skill and, had it done so, it would have realised there were problems with the head gasket and should have taken steps to rectify those issues.

NCAT found in favour of the Repairer at first instance. The Customer appealed.

Issue

The Customer relied upon 7 grounds of appeal. The main substantive issue on appeal was whether NCAT erred in finding that the Repairer had not failed to act with due care and skill in breach of its obligations under the Australian Consumer Law (**ACL**). In particular, the Customer contended that NCAT erred in:

a) making a finding of fact that the vehicle was driven 900km between the first and second service despite the presence of a red oil light warning;

b) finding that the Repairer was engaged to remove sludge from the sump during the second service and not to refurbish the engine; and

c) misapplying section 60 (guarantee that services be supplied with due care and skill) and section 61 (guarantee that services be reasonably fit for purpose) of the ACL.

Outcome

The Appeal Panel reaffirmed the decision made at first instance.

It held that while there was competing evidence led by the Customer and Repairer as to the distance driven between the two services, it was open to the Tribunal to accept the Repairer's evidence (based on odometer readings displayed on the first and second repair invoices). The Tribunal's finding that the vehicle had been driven 900km between the two services supported a finding that the work undertaken during the first service was undertaken with due care and skill.

The Appeal Panel rejected the Customer's claim that during the second service, the Repairer was engaged to return the vehicle in working order. It instead accepted the Repairer's evidence that it was engaged to perform the tasks that were identified in the Repairer's invoice. The basis of the Appeal Panel's reasoning in this respect was that if the Repairer was engaged to return the car in working order (rather than the more limited work invoiced by the Repairer), the Customer would have received an invoice for a sum of money greatly in excess of the invoice actually received.

The Appeal Panel finally rejected the Customer's claim that the Tribunal had misapplied sections 60 and 61 of the ACL. The Customer relied upon authority which supported the position that where a repairer is tasked with repairing a particular part of a vehicle, and expert evidence can be led to the effect that it would have been prudent to check other parts in close proximity, then a failure to check the other parts might amount to a failure to undertake work with due care and skill. The Customer contended that this essentially required the Repairer to "go over the vehicle from top to bottom." The Tribunal rejected this interpretation. Because the Tribunal found that the Repairer was engaged to perform limited work during the second service, namely to remove sludge from the sump, it found that the Repairer was not obliged to inspect the head gasket.

In addition to the Appeal Panel's finding that the Repairer had not failed to act with due care and skill, the point was raised that regardless of whether the Repairer had failed to perform the services with due care and skill, the Customer would likely have been required to replace the engine anyway.

Significance to the automotive industry

This case demonstrates the importance of discussing with customers what work is to be performed when servicing a vehicle, and clearly documenting the work. The broader the work to be performed, the more likely it is that the obligation to perform services with due care and skill will require the consideration of issues with other parts of the vehicle in close proximity.

It is important to clearly delineate between what work falls within and outside of the scope to manage both customer expectations and risk. Such an approach may offer protection against claims arising from issues that were outside the scope of the work and, importantly, this case shows that it is not generally required to "go over the vehicle from top to bottom" where the scope of the work is narrow. The customer may insist on a wider scope of work, in which case it may be required to inspect the entire vehicle, but in such circumstances the servicing or repair fee should adequately reflect the greater amount of work that is to be performed.

This case also identified an important issue regarding causation. The Appeal Panel questioned whether the Customer would have had to bear the cost of replacing the engine regardless of whether the Repairer had acted with due care and skill. This raises the point that even where services might be inadvertently undertaken without due care and skill, and a vehicle or part of a vehicle subsequently fails, in order for the customer to recover money for the cost of replacing a vehicle or part it is necessary for a customer to establish that the service provider's failure to act with due care and skill caused their loss. If it is the case that the vehicle or part would have failed in any event (i.e. if the service was undertaken with due care and skill), the customer might not be able to recover the cost of replacement (although they may be able to recover the cost of the servicing fee).

4.2 *Barbour v Autosports Five Dock Pty Ltd* [2020] NSWCATAP 141

Background

In June 2013, Ms Barbour (**Customer**) purchased an Audi Q7 from Autosports Five Dock Pty Ltd (**Dealer**) for $95,000. The Customer lodged an application to the Consumer and Commercial Division of NCAT on 24 October 2019, claiming that the Audi was never fit for sale and the Dealer breached guarantees under section 54 (a guarantee that goods are of acceptable quality) and section 55 (a guarantee that goods are reasonably fit for any disclosed purpose) of the ACL.

The Customer provided evidence that the Audi was returned to the Dealer's workshop countless times over the 6 year period since it was purchased and that the Dealer held the Audi for months at a time. The Customer's evidence showed that the paint on the engine bay was permanently damaged and could not be fixed, and that the engine made unnatural noises and continuously leaked oil. The Customer claimed that the oil leak started soon after she purchased the Audi, and that it had caused damage to the concrete floor of her underground parking.

The Customer sought a refund of the purchase price (or alternatively, to fix or replace the Audi), as well as damages in respect of the repairs carried out since the Audi was purchased and damages in respect to the concrete floor.

The Tribunal found at first instance that the vehicle was not of acceptable quality at the time of supply in breach of section 54 of the ACL, and that the relevant guarantees first accrued at the time of sale in June 2013, regardless of whether or not the Customer was aware at that time that she had an entitlement to pursue a consumer claim under the ACL.

However, the Tribunal found that it did not have jurisdiction to determine a consumer claim because NCAT only has jurisdiction to hear and determine a consumer claim if the cause of action giving rise to the claim first accrued within 3 years of the date on which the claim was lodged. The Tribunal determined at first instance that the cause of action giving rise to the claim accrued at the time of sale (June 2013), being more than 3 years before the claim was lodged with NCAT.

The Customer appealed.

Issue

The main issue on appeal was whether the Tribunal had erred in law in determining that the Customer's cause of action first arose upon the Dealer's failure to supply goods of an acceptable quality (i.e. the sale of the Audi).

If the Tribunal had erred in determining that the Customer's cause of action accrued upon the sale of the Audi, a subsidiary issue would arise as to the time at which the Customer's cause of action accrued, and whether it was within 3 years of the Customer lodging her application with NCAT.

Outcome

The Court The Appeal Panel held that the Tribunal had erred in determining that the Customer's cause of action accrued on the date at which the Dealer supplied the faulty Audi to the Customer.

The Appeal Panel found that consumer guarantees are not implied terms of a contract, as held by the Tribunal, and therefore the Customer's cause of action did not *necessarily* accrue on "breach" of the contract of sale (which would be the time of sale as this was the time at which the Dealer supplied the Audi in breach of the ACL guarantee that it would be of acceptable quality).

The question then arose as to what time the Customer's cause of action did accrue.

The Appeal Panel considered the various remedies that might be available to the Customer for a breach of the consumer guarantees under sections 54 and 55 of the ACL and noted that where a failure to comply with a guarantee amounts to a "major failure" under section 260 of the ACL, as was the case here, the Customer could under section 259 of the ACL either:

a) notify the Dealer that the Customer rejects the Audi and claim a refund (which involves the Customer returning the vehicle); or

b) recover compensation for any reduction in the value of the Audi below the price paid for it by the Customer (which involves the Customer retaining the vehicle).

The Appeal Panel held that if the Customer was merely seeking to recover compensation, in which notification of rejection of the Audi was not required, the cause of action would accrue on breach of the guarantee (i.e. supply of the Audi).

However, if the Customer was seeking to reject the Audi or have it replaced, as was the case here, the cause of action would only accrue on the date on which she notified the Dealer that she rejected the Audi. The Customer was, however, required to notify the Dealer of rejection within the "rejection period" under section 262 of the ACL (the length of the rejection period depends on various factors).

The Appeal Panel finally concluded that whether the Customer could succeed in an action against the Dealer for breach of the consumer guarantees in sections 54 and 55 of the ACL depended on whether:

a) the Customer had notified the Dealer that she rejected the goods *within* the rejection period (whatever that period might be); and

b) the Customer's rejection of the Audi occurred not more than 3 years prior to lodging her application to NCAT.

Because these two factors involved complex questions of fact that had not been considered at first instance, the Appeal Panel considered it appropriate to remit the matter to the Tribunal to be decided correctly in accordance with the law as set out by the Appeal Panel.

Significance to the automotive industry

This case is significant for two key reasons.

First, it demonstrates that even though a car dealer may have supplied a vehicle that was not of acceptable quality to a customer, it does not necessarily follow that the dealer will be liable for a breach of consumer guarantees under the ACL if, for example, a significant period of time has elapsed since the vehicle was supplied. Limitation periods may arise both in respect of NCAT's jurisdiction to hear and determine a consumer claim, and in respect of the claim itself.

Secondly, this case demonstrates the complexity that can often arise in determining seemingly simple consumer law cases arising from the supply of a motor vehicle. In this case, even though the vehicle was supplied with an obvious and major defect, the outcome of the case depended on whether:

a) the Customer sought a refund/replacement or compensation;

b) the Customer had notified the Dealer that it rejected the Audi;

c) the Customer's rejection of the goods occurred within the "rejection period" (whenever that might be); and

d) the Customer's rejection of the goods occurred within 3 years of the Customer lodging an application with NCAT.

This case demonstrates that even where the outcome of a claim might seem obvious, it is often worthwhile to seek advice as to the available prospects from a legal practitioner.

4.3 *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637

Background

This case follows on from the case of *Australian Competition and Consumer Commission (ACCC) v Volkswagen Aktiengesellschaft* [2019] FCA 2166 which was featured in the June 2020 Update and concerns the worldwide "VW global emissions scandal". This was an incident in which Volkswagen AG implemented software in certain vehicles which could detect whether the vehicle was being operated in a test environment and accordingly lower the levels of nitrogen oxide produced in order to pass environmental regulation standards testing.

While that case concerned the regulatory proceedings against Volkswagen AG and the imposition of a pecuniary penalty, this case concerned the approval by the Federal Court of the settlement of five class actions brought against Volkswagen AG by Bannister Law (the **BL Proceedings**) and Maurice Blackburn (the **MB Proceedings**).

Issue

Under section 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), a class action cannot be settled or discontinued without the approval of the Court. If the Court gives such an approval, it may make "such orders as are just with respect to the distribution of any money paid…".

The first issue to be considered was whether the settlement ought to be approved.

The second issue to be considered concerned the funding arrangements of the litigation funder to the BL Proceedings (being 2 of the 5 proceedings). The litigation funders applied for:

1. a common fund order (CFO) under section 33V of the FCA Act in which the litigation funder would receive 10% of the settlement payable to each group member that had not explicitly opted into the MB Proceedings or opted out of the BL Proceedings; or alternatively
2. a funding equalisation order (FEO) under sections 33V and 33ZF of the FCA Act under which the total amount payable under the funding agreement entered into between the litigation funder and certain members would be borne equally by the "unfunded" members in the BL Proceedings.

Outcome

The settlement of the 5 proceedings was approved. The total amount payable was approximately $120 million plus litigation costs of approximately $52 million.

In approving the settlement, the court was required to be satisfied that the settlement is "fair and reasonable having regard to the interests of the class members as a whole, including as between class members." In doing so, the court considered in detail, among other things, the complexity and length of the litigation (and associated costs), and the risk of establishing liability and loss or damage against the terms of settlement themselves before concluding that it was satisfied that the settlement was fair and reasonable.

However, the court refused both the CFO and the FEO sought by the litigation funder on discretionary grounds. In refusing the CFO, the court also noted (in obiter) that following the High Court decision in *BMW Australia Ltd v Brewster* (2019) 374 ALR 627, it was unclear whether the Federal Court has the power to grant a CFO at any stage of the proceedings (although this interpretation of Brewster has been doubted by other judges of the Federal Court and the question remains undecided).

Significance to the automotive industry

This case serves as another reminder of the Court's supervisory role in relation to settlements. Whereas the case of *Australian Competition and Consumer Commission (ACCC) v Volkswagen Aktiengesellschaft* [2019] FCA 2166, covered by the June 2020 Update, concerned an application for approval of a regulatory settlement between Volkswagen AG and the ACCC (which was determined to be manifestly inadequate), the present case concerned an application for approval of a settlement between Volkswagen AG and affected customers.

Taken together, the cases serve as a reminder that, although the settlement in the present settlement was in fact approved, if the Court is not satisfied that a settlement is "fair and reasonable having regard to the interests of the class members" it will not "rubber stamp" unsatisfactory settlements.

4.4 *Strogylos (t/as Auto Clinic St Andrews) v Vella* [2020] NSWCATAP 156

Background

In mid to late 2019, Mr Vella (**Customer**) sought to have his Toyota Supra (**Vehicle**) repaired by Strogylos (t/as Auto Clinic St Andrews) (**Repairer**) and was quoted the sum of $7,500 to rebuild the motor of the Vehicle.

Between August and October 2019, the Repairer had possession of the Vehicle and attempted to repair and rebuild the motor. In late October 2019, the Repairer arranged for the Vehicle to be sent to a third party for the engine to be tuned. The third party informed the Repairer that there were difficulties starting the motor and that the motor emitted an unexpected noise. The Repairer performed further work on the engine before sending it to another tuner to be tuned in November 2019. This tuner also raised misfire issues regarding the Vehicle.

In December 2019, the Customer collected the Vehicle from the tuner and paid it and the Repairer for the work that they had performed. The next day (and after driving 96km since collecting the vehicle), the Customer heard a loud knocking noise from the engine and immediately arranged for it to be collected and repaired by Powertune Australia.

The Customer subsequently commenced proceedings in the Consumer and Commercial Division of NCAT claiming $14,189.75 against the Repairer for failure to comply with the guarantee contained in section 60 of the ACL, that work be performed with due care and skill. Evidence was presented by a Powertune mechanic that the most likely cause of damage was due to an oil leak from the engine sump causing the engine to be starved of oil. That mechanic estimated that approximately $10,000 of the $14,189.75 claimed was attributable to the work of the Repairer.

At first instance, the Customer was awarded the sum of $10,000 on the basis of the evidence of the Powertune mechanic. The Repairer appealed.

Issue

The Repairer relied upon 6 grounds of appeal, but the substantive reasons for appeal were that the findings of NCAT were against the weight of evidence, or alternatively that the decision was not fair and equitable. The submissions of the Repairer were based on a perceived lack of evidence to support a finding that the actions of the Repairer caused the damage to the engine, and that it was instead possible that the damage was caused by the actions of the third party tuner.

Outcome

The Appeal Panel dismissed the appeal.

In doing so, it noted that causation was a question of fact and that in the context of breach of a guarantee under the ACL, the relevant test is whether as a matter of common sense the relevant act or omission was a cause of the damage, and not necessarily the sole cause. That is, the Member at first instance was not required to be satisfied that the Repairer's work was the only cause of the damage, but merely a cause of the damage. In light of this test, the Appeal Panel was satisfied that the conclusion reached at first instance was open to be found.

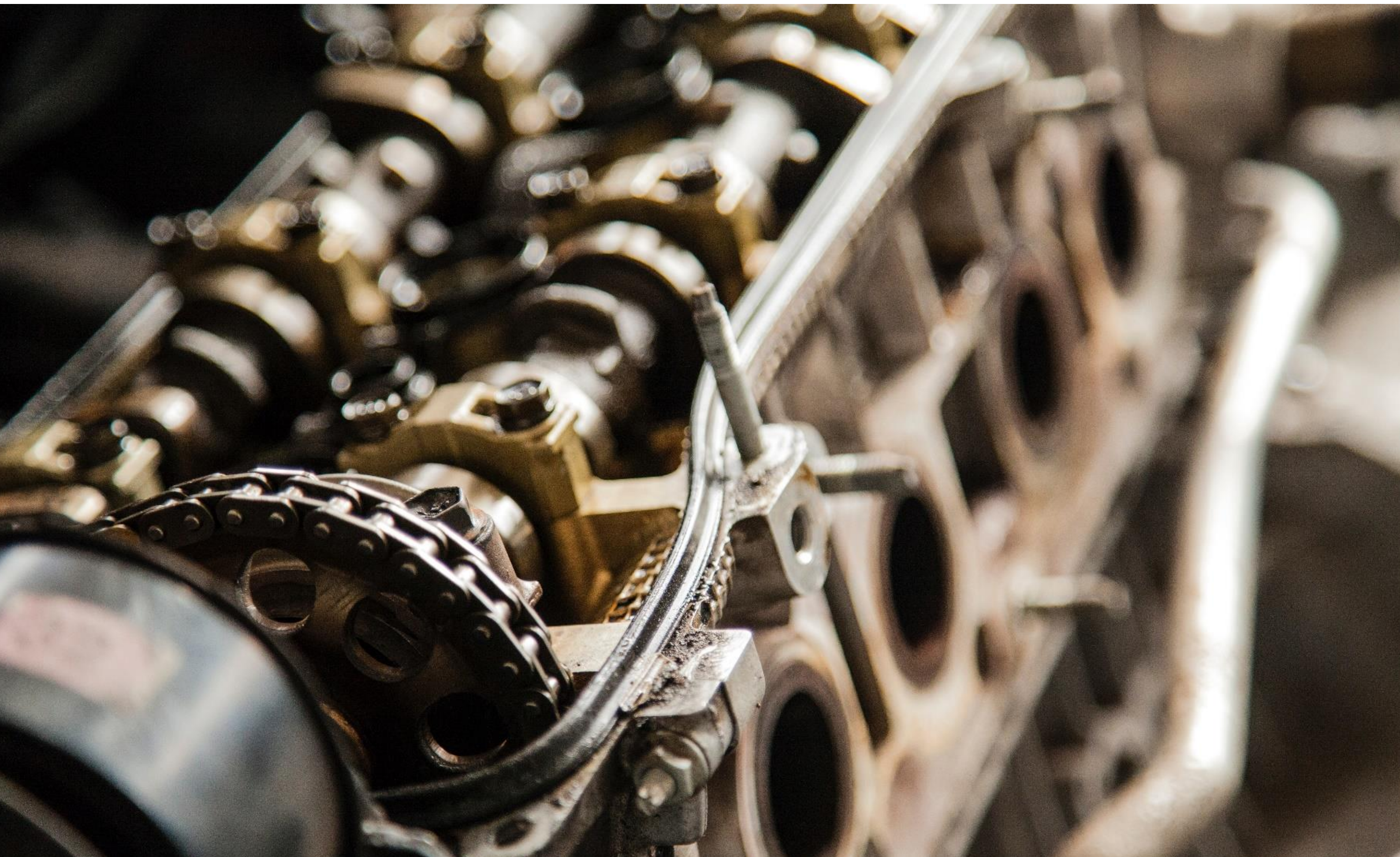
The Repairer also sought to raise as an issue the fact that the motor was not made readily available for inspection to the Repairer after the motor failed but before repairs were carried out by Powertune. On this basis, it was claimed that the decision was not fair and equitable. The Appeal panel, in rejecting this claim, noted that this issue was not raised at first instance and therefore could not be raised on appeal. Likewise, the Repairer was not granted leave to rely upon further evidence that was not before the Member at first instance.

Significance to the automotive industry

Ultimately, this case highlighted a failure by the Repairer to lead independent, expert evidence at first instance which left the Repairer unable to rebut the evidence of the Powertune mechanic to the effect that the Repairer was responsible for approximately $10,000 worth of damage to the Vehicle's engine.

The Appeal Panel noted that the Member at first instance either did not accept, or gave little weight to, the evidence of "Mr Farhad" which was led by the Repairer, because Mr Farhad performed sub-contract work for the Repairer. This lack of independence was in contrast to the evidence given by the Powertune mechanic, which was independent because Powertune was not a party to the dispute and had already been paid for its work.

This case also demonstrates the importance for automotive industry members of getting their case right at first instance. It will often not be possible to raise arguments or issues, or present evidence, on appeal that was available at first instance but not relied upon.



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