HWL EBSWORTH
LAWYERS

AUTOMOTIVE INDUSTRY GROUP

Regulatory Update

July 2021

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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) and Jock Lehman (Solicitor) who are members of the HWL Ebsworth Automotive Industry Group.

Headlines

- ASIC cap commissions by motor vehicle dealerships following Royal Commission (see part 1.1)
- Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020 introducing class exemptions from collective bargaining for motor vehicle dealerships (see part 1.3);
- Amendments to the Franchising Code introduced to better protect small business franchises (see part 3.2); and
- Senate releases Inquiry into the Relationship Between Car Manufacturers and Car Dealers (see part 3.3) .

1. Legislation Update

1.1 ASIC cap commissions by motor vehicle dealerships

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry determined that levels of commissions paid to motor vehicle dealers for the sale of add-on insurance products had resulted in widespread mis-selling of these products. These products, sometimes referred to as 'car-yard insurance', are financial products that enable a person to manage financial risk.

Over the three year period of 2013 to 2015, ASIC found that car buyers payed a total of $1.6 billion in premiums, only to receive $144 million in successful insurance claims. Customers therefore only received nine cents to the dollar for add-on insurance products. Some insurance providers such as Allianz, Suncorp and Swann have vowed to return some their commissions back to customers. A SIC claims that this is one of their largest compensation programs and expects to see refunds of 'more than $122 million' to more than 250,000 customers who purchased unneeded insurance products.

In response to this, the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) now provides a cap on the commission payable to add-on risk products supplied in connection with the sale or long-term lease of a motor vehicle (**ASIC Cap**), which is now legislated under section 12DMC of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). A person will contravene the ASIC Cap if they receive or provide a commission in connection with the supply of an add-on risk product to a person, the provision of credit or the provision of a warranty by the recipient of the add-on risk product in connection with a motor vehicle transaction.

Importantly, for motor vehicle dealerships, a contravention of the ASIC Cap will be an offence under section 12GB of the ASIC Act and commissions paid in contravention of the new provisions will entitle consumers to recover the value of that commission. While these changes have applied since 1 January 2021, ASIC is yet to determine a cap under the new legislation. To further remedy the exposed issues, ASIC has proposed a deferred sales model for add-on insurance products, the recommended model for which will commence on 5 October 2021. It requires a 'clear four-day pause' between the time when a customer commits to purchasing a motor vehicle, and when they are offered an add-on insurance product, such as consumer credit insurance or tyre and rim insurance. The intention of the deferral period is that it will enable and encourage customers to consider the merits of the insurance product offered and allow the consumer to consult alternative providers before purchasing.

1.2 Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery)

On 27 March 2021, two key changes to the *Fair Work Act 2009* (Cth) (**FWA**) came into effect, namely the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) introducing a new definition of 'casual employee' and provisions for casual employees to convert to permanent employment after a 12-month period.

(a) New definition of 'casual employee'

Under the revised FWA, an employee will be considered a casual employee if their offer of employment makes no firm advance commitment of regular work and the employee accepts this offer on that basis. What determines an offer of casual employment, and thus whether a person is legally a casual employee, will be based on certain criteria including whether the employee can elect to accept or reject work and will work as required according to the needs of the employer. Importantly, the new definition clarifies that a regular pattern of hours does not indicate a commitment to continuing and indefinite work according to an agreed pattern.

(b) Conversion from casual to permanent employment

Apart from small businesses, the FWA amendment requires employers to offer casual employees a conversion to permanent employment after 12 months of employment. The statutory conditions for this conversion are that the employee:

i. must have been employed for at least 12 months;
ii. has had a regular pattern of hours on an ongoing basis for at least the last 6 months; and
iii. could continue to work those hours as a full-time or part-time employee.

Employers will be required to make a number of considerations regarding their employees, including an assessment of whether any of their existing casual employees (employed before 27 March 2021) are eligible to be offered to convert to permanent employment and that all new casual employees need to be given a 'Casual Employment Information Sheet (CEIS)'.

Employers in the automotive industry are obliged to comply with these recent amendments and will need to ensure that any arrangements regarding casual employees are reviewed to avoid breaching the new provisions.

A copy of the bill can be found here.

1.3 Class exemptions from collective bargaining

Described as one of the most impactful industry shifts of the decade, the *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020* (**Determination**) became available for businesses to use on 3 June 2021. The Determination allows three classes of corporations to form bargaining groups and collectively negotiate with their suppliers, processors, franchisors or fuel wholesalers without needing to apply to the ACCC for approval.

Typically, local motor vehicle dealerships have experienced significant power disparities when negotiating with large offshore multinational franchisors. Dealers have also for years formed 'Dealer Councils' to represent them during negotiations with manufacturers, but these negotiations are often restricted out of concern of breaching provisions of the *Competition and Consumer Act 2021* (**CCA**) and the process to obtain authorisation from the ACCC is slow and time consuming. The Australian Automotive Dealer Association (**AADA**) CEO James Voortman believes that "this class exemption provides dealers with a much more effective and efficient negotiation tool and avoids dealers having to navigate through complex red tape and administrative burdens to obtain collective bargaining rights".

The three classes that are now able to engage in collective bargaining conduct are as follows:

a) eligible corporations, being corporations that reasonably believe their aggregated turnover for the preceding financial year was less than $10 million;
b) franchisees such as motor vehicle dealerships as defined by the *Competition and Consumer (Industry Codes - Franchising) Regulation 2014* (Cth) and the Oil Code of Conduct; and
c) fuel retailers who are retailers under a fuel re-selling agreement.

Eligible corporations may engage in collective bargaining conduct if the corporation makes a contract regarding the supply or acquisition of particular goods or services to or from a target entity (an 'initial contract') or it engages with one or more persons in a concerted practice in relation to an initial contract. The class exemption for motor vehicle dealerships eliminates the administrative and financial hurdles typical of collective bargaining applications and allows motor vehicle dealerships to negotiate with target corporations with confidence that they are not breaching competition law.

The exemption is limited insofar as it does not extend to 'collective boycott' conduct, which occurs when a group agrees to refuse to supply to or purchase from a particular party, unless they reach an agreement. Motor vehicle dealers are therefore not able to side together in agreement and refuse to deal or negotiate with an individual manufacturer. However the ACCC anticipates that the impact of the exemption will still affect more than 98% of Australian business.

To access this exemption, bargaining groups will be required to complete a one page form and lodge it with the ACCC. There is no fee associated with lodgement of the form and immunity from competition laws in respect of the collective bargaining conduct will commence automatically.

The Determination in full can be accessed here and the corresponding Explanatory Statement here.

1.4 Road Vehicle Standards (RVS) Legislation

The RVS legislation will replace the existing *Motor Vehicle Standards Act 1989* (Cth), the most significant updates being the provisions regarding the Registration of Approved Vehicles (**RAV**). The RVS legislation will commence in full on 1 July 2021 after being postponed by the *Road Vehicle Standards Legislation Amendment Act 2019* (Cth). From the day of commencement, a 12-month transitional period will begin, during which arrangements will be in place that allow some approval holders to continue operating under existing approvals.

The RAV is an electronically maintained register containing the information about vehicles that have satisfied the requirements of an entry pathway, as set out by the *Road Vehicle Standards Rules 2019* (Cth) (**RVS Rules**). The incoming legislation supplements the RVS Rules as they give effect to certain provisions in the RVS legislation. Specifically, provisions becoming effective relate to the entry of compliant and non-compliant vehicles on the RAV, the importation of road vehicles and the recall of certain vehicles.

1.5 Duty to notify of land contamination

From 1 July 2021, Victoria's new environment protection framework under the *Environment Protection Act 2017* (Vic) will effect a duty upon a person in management or control of land to notify the EPA in instances of notifiable contamination.

Motor vehicle franchisees may be required to make such notifications to the EPA, as they typically hold a legal interest in the land or have access and use of the land. The cause of the contamination is immaterial, as the duty is continuous and positive, such that the responsibility will not shift to the EPA even after notice has been given.

It is recommended that land managers have awareness of the sites in their control, are able to conduct physical assessments and understand the level of contamination that imposes the duty of notification. Implementing the correct processes will be essential to avoid severe penalties for contravention.

Further information on this duty can be found here.

2. Proposed Legislation

2.1 Establishment of a service and repair information sharing scheme via the CCA

On 24 March 2021, the Federal Government announced proposed changes to the *Competition and Consumer Act 2010* via the *Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021* (Cth) (**Bill**).

Automotive manufacturers generally own and control motor vehicle service and repair information (**Service and Repair Information**). However, following the New Car Retailing Industry Report released in December 2017, the ACCC found that repair and service work by independent repairers could at times be inhibited for want of relevant information.

(a) Proposed changes

The proposed changes establish a mandatory scheme for the sharing of Service and Repair Information. The Bill states that Service and Repair Information is to be made available for Australian repairers and Registered Training Organisations (RTOs) to purchase at no more than 'fair market price'. Service and Repair Information must be made available even if it would result in a breach of copyright of the manufacturer or any other person, a breach of contract or a breach of an equitable obligation of confidence.

(b) Just compensation

A manufacturer is obliged to provide 'just compensation' to a third party copyright holder for the supply of the information if compliance constitutes a breach of their copyright. The following categories of service and repair information will be excluded from the scheme by the Bill:

i. a trade secret;
ii. a source code version of a program;
iii. intellectual property (other than copyright);
iv. information supplied or to be supplied only to a restricted number of Australian repairers to develop a solution to emerging or unexpected faults;
v. information necessary to reset a vehicle's immobiliser; and
vi. commercially sensitive information about an agreement between the manufacturer and another person.

The scheme will initially apply only to passenger and light goods vehicles manufactured after 2002.

(c) Other features of the Bill

Some other notable features of the Bill include that:

i. persons seeking service and repair information must show that they are fit and proper persons to obtain access and, sensitive information may be obtained by manufactures in order to consider this question;

ii. an advisory office will be established to facilitate mediation of disputes and to provide information about the operation of the scheme; and

iii. an automotive manufacturer must keep a record of the supply of certain information including in relation to a vehicle's mechanical and electrical security system for a period of 5 years after the day it is supplied.

Failure to make available service and repair information in accordance with the proposed scheme can attract a maximum pecuniary penalty of $10 million. The proposed scheme is significant for manufacturers, repairers and RTOs alike. Manufacturers must ensure compliance with the scheme to avoid significant pecuniary penalties and repairers and RTOs seeking information should be aware of the scope of service and repair information accessible and changes in market value in relation to the same.

A copy of the Bill may be accessed here.

2.2 Proposed changes to establish an annual property tax as an alternative to Stamp Duty in NSW

In the 2020/2021 Budget Consultation Paper, the NSW Government announced proposed changes to Stamp Duty legislation. Under the proposed changes, purchasers of property will be able to 'opt in' to pay either an annual property tax or to up-front Stamp Duty along with ongoing land tax. The current proposal for annual property tax rate payable in relation to commercial property is 2.6% of unimproved land value, but this is expected to change after public consultation.

Initially, purchase price thresholds will apply to limit the number of properties eligible to 'opt in' where only properties with a market value beneath the purchase price threshold would be eligible to 'opt in' to the annual property tax. Notwithstanding this, the NSW Government estimates that approximately 95% of commercial property would fall below the purchase price thresholds, although no precise threshold amounts have been specified yet. The intention is to minimise the impact of the proposed changes on state revenue whilst the NSW Government prepares to include all property gradually.

The proposed changes seek to prevent owner-landlords from passing on the costs of the annual property tax through increased rental prices, without agreement from tenants. A hardship scheme will also apply, recognising that an owner-taxpayers' financial situation may change over time and thereby avoiding the need to sell their property to satisfy annual property tax.

At this stage, the NSW Government has not clarified whether or how the annual property tax will apply to foreign buyers and whether the existing surcharge purchase duty and surcharge land tax will continue to apply to foreign buyers if they have 'opted in' to annual property tax.

The proposed changes were subject to a public consultation process that ended on 15 March 2021. The NSW Government is due to review the submissions and report its outcomes in mid-2021 but the proposed changes could be a significant commercial tool for dealerships and other players in the automotive industry. Most notably, the proposed changes would allow for selection of the most suitable tax structure in relation to commercial properties purchased.

In the meantime, these entities should plan for and deal with the proposed changes in its current transactions, particularly where the transaction involves land development coupled with future land acquisitions.

A copy of the NSW Government's Budget Consultation Paper may be accessed here.

3. Policy Update

3.1 Federal Government's environmental policies targeting lowered carbon emissions

(a) The Federal Government's Future Fuels Strategy

The Federal government has introduced measures designed to foster consumer choice, stimulate industry development and reduce emissions in the road transport sector, through the announcement of its Future Fuels Strategy (**Strategy**). The Strategy will address barriers to the roll out of new vehicle technologies and provide funding in early-stage technologies with an intention to stimulate the market and make access to information easily available for consumers so they will be able to make informed choices.

In doing so, it will focus on five priority areas:

i. electric vehicle charging and hydrogen refuelling infrastructure;
ii. early focus on commercial fleets;
iii. improving information for motorists and fleets;
iv. integrating battery electric vehicles into the electricity grid; and
v. supporting Australian innovation and manufacturing.

Energy Minister Angus Taylor says that the Strategy is the smartest way to help the transition to low-emission cars. The focus on technological advancement and infrastructure is intended to reduce the total cost of ownership gap between battery vehicles and engine vehicles as costs decline, technology improves and mass production increases.

(b) National Freight Energy Productivity Program

The $24.5 million Freight Energy Productivity Program will provide grant funding to develop 'investment grade' information for heavy freight businesses. The program will support road freight businesses to access experts with the skills and knowledge to test, assess and evaluate the benefits of new technologies. This follows research carried out by the Australia Alliance for Energy Productivity, which highlighted the transport sector's position as the largest energy user in Australia and forecasts significant growth in freight. Chair of the Australian Trucking Association (ATA) David Smith indicated that the Program would address the need of supporting the industry to reduce emissions through grants to invest in efficiency improvement for diesel vehicle fleets, vehicle modifications or new vehicle technologies.

3.2 Amendments to the Franchising Code to better protect small business franchises

The Federal Government has introduced reforms to the Franchise Code of Conduct (**Code**), following the recent announcement that General Motors would be permanently discontinuing the Holden brand. The new measures announced on 1 June 2021 include increased penalties to $10 million and additional protections intended to strengthen compliance by large and profitable multinational companies and force them to reconsider acting unfairly towards their franchisees.

One of the most significant reforms is the transition of voluntary best practice principles into mandatory obligations, designed to address concerns that multinational manufacturers will not follow voluntary principles. These principles include for example, that manufacturers ought to provide reasonable compensation to franchisees for early termination such as changes to their distribution models or withdrawal from the Australian market.

Furthermore, dealers operating as a manufacturer's agent in relation to new vehicle sales will be explicitly recognised and protected by the Franchising Code, as currently the Code uses the model of buying cars from the manufacturer and then reselling to the consumer, creating uncertainty regarding whether the agency models are regulated by the Code or not.

These amendments will protect both consumers and local dealers from multinational automotive corporations unfairly treating Australian stakeholders and further ensure that the Code can keep pace with contemporary business practice in the industry.

The ACCC's statement on these amendments can be found here.

3.3 Senate Inquiry into the Relationship Between Car Manufacturers and Car Dealers

On 18 March 2021, the Senate released a Report that investigated the relationship between car manufacturers and car dealers in Australia, making seven recommendations which were supported by the Australian Automotive Dealer Association (**AADA**) and can be found here. The dominant theme throughout the investigation was that there is a substantial power imbalance between manufacturers and local new car dealers. A significant issue raised in the Report as to why this is occurring was the level of compensation offered to dealers after termination or non-renewal of dealership agreements. Additionally, stakeholders raised concerns about the potential impact of changes to distribution models on individual dealerships.

In response to the investigation, the AADA submitted that currently under an agency arrangement, a dealer ceases to be the owner of the vehicle stock and instead is given a fee for service. As such, vehicles are sold at a non-negotiable price, which limits a dealer's ability to use their entrepreneurial skills to compete and maximise profits. Dealers therefore no longer hold the stock and as a result, they are stuck with large expensive facilities that are not fit for purpose. It was also found that despite section 274 of the *Australian Consumer Law* which provides for the indemnification of the supplier by the manufacturer if certain conditions are met, there was a practice of franchisors shifting the costs of legislative compliance to the franchisee when dealing with consumer guarantees.

There were also increases in instances of manufacturers tightening the area of warranty and indemnity definitions and process to reduce manufacturer costs. For example, the Motor Trades Association of Australia (**MTAA**) cited certain costs not included in the warranty reimbursement such as initial and ongoing diagnostic work, unrealistic times set by the manufacturer for repair, administration costs, freight costs and costs associated with loan vehicles.

The Senate recommended that the best practices principles should include a provision for the reimbursement for all reasonable expenses incurred in relation to warranty and recall work, including expenses associated with diagnosis, administration of claims and claim audits. This would ensure certainty and promote compliance with statutory obligations. The Senate further stressed that dealers should be adequately compensated to account for their reduced earning capacity and the significant investments they have made because of shifts in distribution models and recommended that that the amendments proposed to the Franchise Code of Conduct be implemented as soon as possible.

The report also highlighted the fact that termination or non-renewal of a dealership agreement could lead to millions of dollars of goodwill lost by dealers, and the AADA proposed in response that 'fair and reasonable compensation' be paid to franchised new car dealers in the event of termination or non-renewal. The compensation would factor in the entire effort car dealers have put into generating sales, marketing and maintaining customer relationships. The AADA further emphasised that the recognition of goodwill in a code would enable dealers to adequately carry out their job to their maximum potential and ensure they are protected in the event of a manufacturer terminating an agreement, noting that there is an already significant power imbalance in the industry.

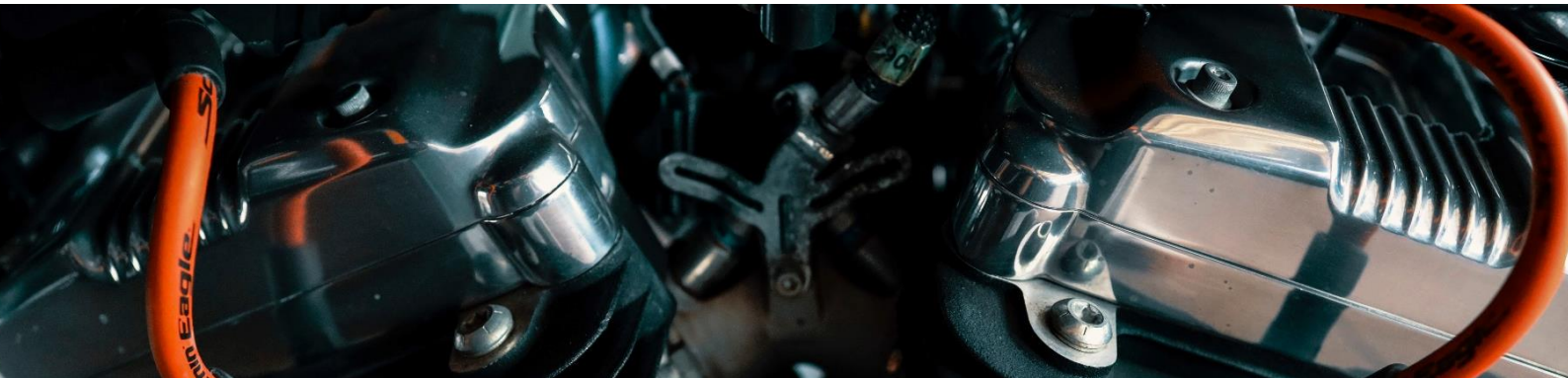
A full copy of the Senate Report can be found here.

3.4 Renault reducing Australian operations

Since mid-2020, a pandemic-triggered financial downturn caused Renault to steadily scale down its Australian operations as it undergoes a global reorganisation. In the 20 years since the French automaker established its own distribution business in Australia, Renault has built a network of roughly 60 dealerships.

The 'Renaulution', as the Renault Group has coined it, has begun in Australia and looks to 'move away from volumes and on to value'. As part of this strategy, Renault motor vehicles will no longer be distributed through dealerships but instead imported by Ateco Group.

Ateco Group is a Sydney based vehicle importer, which currently services other automotive names in Australia such as LDV, Maserati, RAM Trucks, and Upfitter. Renault claims to be looking to secure its future within the Australian market. The connection between the two companies marks the first time Ateco has taken over an existing Original Equipment Manufacturer. Existing Renault dealers in Australia are said to have endorsed the change, a sentiment that is supported by Anouk Poelmann, Managing Director of Renault Australia. Poelmann claims the existing network of around 60 dealers will remain unchanged.



3.5 Honda & Mercedes move to agency model

Honda have also announced an overhaul to business operations in Australia, planned to take effect on 1 July 2021, whereby owner-dealers will be replaced by an agency-based site that offer fixed pricing and fewer models. Honda Autralia currently remains embroiled in a legal proceedings with at least 2 of of its former dealers over the compensation to be paid to them for the premature termination of their dealerships.

Mercedes-Benz Australia are also implementing similar changes to 'agency' to take effect on 1 January 2022.

3.6 Federal Chambers of Automotive Industries Voluntary Code of Conduct for Automotive Data and Privacy Protection

The Federal Chambers of Automotive Industries Voluntary Code of Conduct for Automotive Data and Privacy Protection (**Privacy Code**) commenced on 1 July 2021, which will establish principles for manufacturers to abide by when technology is incorporated into vehicles that have the capacity to collect, receive, create and store generated data and personal information. The key principles are listed below:

(i) Transparency

Members of the Privacy Code will notify customers who use the connected vehicles and services about personal information, vehicle generated data, the way personal information is handled, the types of third parties who the information may be shared with and the countries in which those third parties are located.

(ii) Customer choice

Where reasonably possible, customers can choose whether to share personal information.

(iii) Privacy by design

Data protection requirements are taken into account when designing, developing and engineering new products, services and processes.

(iv) Maintaining data security

Appropriate and ongoing physical, technical and security measures are to be put in place to protect the personal information of customers against accidental or unlawful destruction, loss, alteration or disclosure.

(v) Process information in a proportionate manner

Personal information that is adequate, relevant and not excessive will be collected and processed. For example, location data of vehicles provided to navigation providers can inform recommended travel routes. In this case, when personal information is not required in order to provide the service, it may be removed prior to sharing with these providers.

(vi) Responsible Sharing of Data

Customer's choices will be respected and data sharing will be compliant with the relevant laws.

3.7 Disclosure obligations under the Fair Trading Act

Vehicle suppliers must now ensure that their contracts comply with the new disclosure obligations under the *Fair Trading Act 1987 (NSW)* (**FTA**). The purpose of the new disclosure requirements is to ensure that consumers are fully informed about the terms and conditions associated with the goods or services that they are looking to acquire. For the purpose of the provisions, 'consumer' has the same meaning as in section three of the *Australian Consumer Law*. The key provisions effecting the industry include:

(a) Section 47A

A business, before supplying a consumer with goods or services, is required to take reasonable steps to ensure that the consumer is aware of the substance and effect of terms or conditions of contracts with consumers that may substantially prejudice the interests of the consumer. Examples include excluding the liability of the supplier, if the consumer is liable for damage to delivered goods, permitting the supplier to provide data about the consumer to a third party and requiring the consumer to pay an exit fee.

(b) Section 47B

Before an intermediary acts under an arrangement that provides for the intermediary to receive a financial incentive, the intermediary must take reasonable steps to ensure the consumer who will be supplied with the goods is aware of the existence of the arrangement. For example, if a consumer approaches a vehicle dealer to buy a vehicle and the dealer recommends a particular insurance product, for which the dealer is paid a commission, the new law requires the intermediaries to take reasonable steps to ensure the consumer is aware of the financial incentive received.

These obligations will require car suppliers to review their existing contracts to determine whether the disclosure obligations may apply and evaluate their contracting process to highlight to customers potentially prejudicial terms.

For more information on the new disclosure obligations, see here.

3.8 Extension of unfair contract terms for small businesses

Since late 2016, small businesses have enjoyed the protection of unfair contract term law that was previously only available to consumers. Like consumers, small businesses have limited market power and can therefore be vulnerable to unfair contract terms and unconscionable professional conduct.

As of 5 April 2021, the protections for small businesses and consumers were extended further to cover insurance contracts. Protections will apply to standard form or 'take it or leave it' contracts for the supply of financial goods or services, where at least one party is a small business and the upfront price payable is less than $300,000, or $1 million if the contract is for more than 12 months.

Late last year, the Senate Education and Employment References Committee resolved to investigate the regulation of the relationship between vehicle manufacturers and vehicle dealerships. Amongst other things, investigations were made into unfair contract terms enforced by this relationship. The findings highlight a prevalent imbalance in small business standard form contracts in the automotive industry and beyond,

suggesting a number of reforms to bring clarity to protections in order to improve small business confidence. Our trading partners are following suit on the policy front, with NZ looking to align protections with Australia that are afforded to small businesses with the newly introduced Fair Trading Amendment Bill.

Importantly, only a court can determine whether a contract term is unfair. If you believe your business is subject to an unfair contract term, a complaint can be made to either your financial services provider or the Australian Financial Complaints Authority. Alternatively, an application can be made to the relevant court to have the term declared unfair and voidable.

Further information on unfair contract terms can be found here.

4. Case Law Update

4.1 *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49

Background

This case was an appeal from the decision in *ACCC v Volkswagen Aktiengesellschaft* [2019] FCA 2166 which was featured in the June 2020 Update and concerned the high publicised Volkswagen global emissions scandal.

Volkswagen admitted to making false representations when importing vehicles to Australia between 2011 and 2015, and listing them on the Australian Government's Green Vehicle Guide website. The company also failed to disclose that the vehicles had 'two mode software', meaning that they operated in different modes for emission testing and driving. If tested in driving mode, they would have breached Australian emissions standards.

Volkswagen admitted to breaching section 29(1)(a) of the *Australian Consumer Law* ('ACL'), which provides a person must not make a false and misleading representation that goods are of a particular standard, on 473 occasions.

In the 2019 decision, the Federal Court determined that a settlement amount of $75 million, as agreed and jointly proposed by the Australian Competition and Consumer Commission (ACCC) and Volkswagen, was manifestly inadequate. Instead, the Court imposed a $125 million penalty, demonstrating the highest penalty awarded under the ACL to date.

Volkswagen appealed the penalty. The ACCC supported its appeal in principle, though it took issue with the contention that that the penalty imposed by the primary judge was manifestly excessive.

Issue

The issue on appeal was whether the primary Federal Court judge was incorrect to reject the penalty jointly proposed by the ACCC and Volkswagen and impose the significantly higher penalty, and whether the penalty imposed was manifestly excessive.

Outcome

The Full Court of the Federal Court unanimously dismissed the appeal, determining that the penalty imposed by the primary judge was not excessive, let alone manifestly excessive.

In considering the appeal, the Full Court noted that the lower agreed penalty would be insufficient for general and specific deterrence, especially given that the contraventions were extremely serious. The Full Court considered at length the nature and extent of the deceptive conduct of Volkswagen, repeating the primary judge's findings that the contraventions of the ACL constituted 'corporate conduct of the worst possible kind' involving 'a dishonest scheme deliberately concocted and put into effect which was designed to deceive' the Department and Australian consumers. There were very few mitigating factors.

In its appeal, Volkswagen argued that the Court should have given weight to the fact that significant penalties were imposed on the company in the course of the global scandal in both Germany and the United States. However, the penalties imposed by foreign courts did not relate to the contravening conduct in Australia.

Significance to the automotive industry

This line of case law once again demonstrates the Court's supervisory role in relation to settlements. There can be no guarantee that the Court will agree with the parties and impose the penalty requested.

Further, this case serves as a salient reminder of the seriousness with which the Courts treat the deception of the government and the Australian public. The penalty imposed on Volkswagen was the highest under the ACL thus far, but it was decided under old law and future penalties may be even higher. The maximum penalty at the time of writing for each breach of many consumer law provisions, including unconscionable conduct and specific types of misleading representations, is the greater of $10 million, 3 times the benefit from the breach or 10% of the company's Australian annual turnover.

4.2 *Muscat v TS Spraypainting Pty Ltd [2020]* NSWCATAP 285 [23 December 2020]

Background

In December 2019, Mr Muscat (**Customer**) engaged TS Spraypainting Pty Ltd (**Repairer**) to conduct repairs to the bodywork of 38 year-old motor vehicle, whereby the Repairer was to spray-paint the vehicle.

A document entitled 'Quote 19', dated 20 December 2019, described 4 items of work to be completed and 1 item of parts to be supplied and fitted. The total cost was $6,940 inclusive of GST. A document entitled 'Tax Invoice No 136' was also dated 20 December but contained additional notations on the second page under 'Notes' including 'Added on after official quote', 'Repaired locations are only spots with warranty due to painting over old paint' and 'Painted locations have warranty unless cracking due to painting over old paint and experiencing a lot of bog work under old paint witch [sic] created paint cracks and painting chipping off'.

The Repairer originally informed the Customer that the work he wanted done would cost around $13,000. The Customer said he did not want to pay this amount and they negotiated a reduced price of $6,940. The Customer paid a deposit of $1,000 and the remaining balance after the Repairer had told him the work had been completed but before the vehicle was picked up.

The Repairer alleged this reduced price included a reduced amount of work, but the Customer denied that he had agreed to a reduction in the standard of work to be completed.

The Customer filed an Application in the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal (**NCAT**) seeking compensation against the Repairer for unsatisfactory workmanship arising from the repair work.

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

Issue

The Customer appealed on the basis that it was not fair and equitable and was against the weight of the evidence. The main issue on appeal was whether NCAT had erred at first instance in its finding that the requisite standard had not been met for either a breach of contract or a breach of applicable consumer law. In particular, the Customer contended there was an error in law in the consideration of the evidence.

Outcome

The appeal was allowed and the order at first instance made on 3 September 2020 was quashed. The proceedings were referred to the differently constituted Tribunal for reconsideration.

It was held that there was an error in identifying the terms and conditions of the contract upon which the Repairer relied on. These terms were fundamental and affected the reasoning of the decision at first instance.

The Repairer had informed that he had only made the above notations in January 2020 as the work was in progress. This occurred after the Customer had paid a deposit of $1000, and after the Repairer had commenced work on the vehicle.

These notations were never part of the initial contractual terms between the parties. They were never accepted by the Customer and therefore do not form any part of the contract.

Significance to the automotive industry

This case demonstrates the importance of discussing with customers the work that is to be performed, the standard to which it will be performed and clearly documenting the agreement between the customer and the repairer or other third parties.

Any concessions that are discussed at first instance should be properly noted on either the Quote or Tax Invoice to ensure that both parties clearly understand the agreed terms of the work that is to be completed.

This case is also an important reminder that any new findings made after beginning the repairs on a vehicle would not be binding on the customer. Any revisions to be made to the contract and the agreed work after commencing the work should be properly communicated to the customer and a detailed record of the agreement should be documented.

4.3 *ACCC v Jayco Corporation Pty Ltd* [2020] FCA 1672

Background

Jayco is Australia's largest caravan and recreational vehicle manufacturer. It supplies vehicles to its dealers who sell them on to consumers. Each dealer is typically an independent business but adopts the Jayco name and style to some extent.

In November 2017, the ACCC commenced proceedings against Jayco (but not against any one dealer) alleging that Jayco had breached the consumer guarantees of acceptable quality, fitness for purpose and express warranties because of defects in caravans sold to four consumers through a dealer. The ACCC alleged the defects, specifically water leaks caused by rain or roof collapses, which were reported in multiple cases, were 'major failures'. If a major failure to comply with consumer guarantees occurs, consumers are entitled to reject the goods and choose a replacement or a refund. However, the consumers were told by Jayco that they were only entitled to a repair while the caravans were still under warranty.

Jayco admitted that the consumers' caravans may have had defects, but denied any further failures. Further, it claimed that the caravans were sold to the consumers by the dealers, who were not agents of Jayco. Jayco denied that it had effective control over the dealers' compliance with the consumer guarantees, and denied that it obstructed the dealers from meeting their obligations.

Issue

Three main issues were identified by the Federal Court:

1. whether the defects were a 'major failure' and thus whether the consumers were entitled to reject the caravans and obtain a refund or replacement;
2. whether any false, misleading or deceptive representations were made by Jayco; and
3. whether Jayco's conduct was unconscionable.

Outcome

The Federal Court found that Jayco had made a false or misleading misrepresentation that one of the consumers was only entitled to a repair, when in fact a consumer's rights under the ACL entitle consumers to a refund or a replacement. Jayco's responsibility to comply with the ACL was not altered simply because the caravans were purchased through a dealer, and this did not absolve Jayco of its failure to comply with consumer guarantees.

However, the Court dismissed the majority of the ACCC's case, finding that Jayco did not make false and misleading representations to the other three consumers or act unconscionably towards the four consumers. Despite this finding, the Court did find that the caravans purchased by the consumers were not of acceptable quality, and that some of the defects were major.

On 3 May 2021 Jayco was ordered to pay a penalty of $75,000 for making the misleading representation to the consumer about their consumer guarantee rights.

Significance to the automotive industry

This case serves as a reminder to manufacturers and dealers that it is important to be aware of and transparent about the remedies available to consumers, especially in the case of defective vehicles. In this case, manufacturers can be held liable under the ACL even when vehicles are purchased by the consumer through a dealer and not directly from the manufacturer themselves.

The fact that the ACCC considered this issue as serious enough to bring proceedings on behalf of four consumers should also be noted. In a statement, the ACCC Chair said that the ACCC took this action because they were concerned that consumers were 'denied remedies available under the Australian Consumer Law for products that had clear defects.' The present case illustrated more widespread issues within the RV industry, with the ACCC stating in 2017 that it had received over 1000 complaints about caravans, and that the industry needed 'to be put on notice.' This case demonstrates the ACCC's effort to change the behaviour of the RV industry.

4.4 *Leonard v Mitsubishi Motors Australia* [2021] QCAT 35

Background

Ms Leonard (**Customer**) purchased a new Mitsubishi Triton (**Vehicle**) in 2011. The Vehicle was manufactured by Mitsubishi Motors Australia Ltd (**Manufacturer**) and the Customer purchased it from Toowong Mitsubishi Pty Ltd (**Dealer**) on 22 November 2011 for $39,130.

The Customer alleges that the engine overheated on numerous occasions, several years after the purchased the vehicle and that the Manufacturer had replaced the engine on two occasions as a result. The Customer alleges that this occurred due to some unidentified design or other manufacturing defect.

The Customer filed an application in the Queensland Civil and Administrative Tribunal (**QCAT**) seeking $19,544.79 plus costs for an alleged breach of a statutory guarantee relating to acceptable quality.

Issue

There were three issues that was put before the QCAT:

a) whether the guarantee of acceptable quality was not complied with;
b) whether any remedies were available to the Customer; and
c) whether the Customer was out of time in her application.

Outcome

It was held that the Vehicle was not of acceptable quality and damages were awarded to the Customer of the amounts of $4,544.79 payable by the Manufacturer and $5,380 payable by the Dealer.

(a) Acceptable quality

The time in which goods are to be of acceptable quality is the time when the goods were supplied to the consumer, but later information may be taken into account in deciding whether goods were of acceptable quality at that time.

Several factors pointed to the Vehicle being of acceptable quality at the time of supply in 2011, most notably that it was fit to drive and there was no suggestion as to problems with the appearance, finish or safety. However, real questions arose as to whether the Vehicle was durable or had hidden defects.

The Customer provided no expert evidence as to the cause of overheating but there was no evidence to suggest the overheating problem occurred due to abnormal or excessive use, poor maintenance or any other factor that arose after the time of supply. On the balance of probabilities on the available evidence, it was determined that there was a hidden design or other manufacturing defect in the vehicle at the time of supply that caused the later overheating problem.

It was held that a reasonable consumer, at the time of supply in 2011, fully acquainted with the state and condition of the Vehicle including the hidden defect, would not regard the Vehicle as acceptable quality.

(b) Timing

The Manufacturer submitted that even if QCAT found the guarantee was not complied with, that the Customer was out of time anyway as the three-year period would run from 26 February 2016. This date marked when the Customer first experienced the overheating problem. On the available evidence, the Customer could not have known at the time of the first engine replacement whether the cause was a design or systemic problem.

It was not until the second engine replacement in early 2020, could the Customer have known or been in a position to know that there was some design or systemic problem. It was at this time that the Customer's three-year period began to run. Hence, the Customer had brought her action within time.

(c) Remedies

i. Against the Manufacturer

Emails between the Customer and Manufacturer showed that the Customer was under the mistaken impression that she was entitled to a refund from the Manufacturer when the remedy of refund would only be available against the Dealer. Against a Manufacturer, a Customer can only recover damages noting that a refund is different in nature, and typically in amount, to damages. A refund would be for the amount paid at the time of supply, while damages on the other hand, are designed to compensate the consumer for the loss they have sustained.

ii. Against the Dealer

The Customer could have required a refund from a Dealer assuming there was a 'major failure' of the Vehicle. However, the Customer would need to notify the Dealer, within the rejection period that she was rejecting the vehicle. The Customer did not do so. Accordingly, there was no basis for a refund.

However, the Customer can potentially be awarded compensation for 'any reduction in the value of the goods below the price paid' under section 50A of the *Fair Trading Act 1989* (Qld). It was held that the Vehicle was worth $9,500 whereas a vehicle in good condition would be worth $14,980. The Dealer was ordered to pay the difference in damages.

Significance to the automotive industry

This case is an important reminder to the automotive industry that the guarantee of acceptable quality is assessed at the time that the goods were supplied but later evidence may be considered when determining whether this guarantee has been met.

The case also highlights the limitation periods when it comes to bringing actions against manufacturers of goods. The three-year limitation period only begins when the consumer first becomes aware or reasonably ought to have become aware of that a guarantee has not been complied with. This threshold may not be met at the first sign of damage or need for repair but rather consecutive or successive indicators that become suggestive of more design or systemic problems to the vehicle.

This case also demonstrates the differing positions of manufacturers from dealers when customer seeks remedies in a dispute regarding the guarantee of acceptable quality. It is a common misconception by consumers that refunds can be sought from Manufacturers. As provided for by the Australian Consumer Law, when a consumer seeks remedy under the guarantee of acceptable quality, the consumer may only recover damages from the manufacturer of goods.

4.5 Mitsubishi appeal to Supreme Court unsuccessful regarding "misleading and deceptive" claims on fuel consumption

Background

In what may prove to be a significant decision for the automotive industry, on 12 May 2021 the Supreme Court of Victoria upheld a decision that fuel consumption figures displayed on a brand-new vehicle contravened the Australian Consumer Law (ACL) on the basis that the figures were 'misleading or deceptive'.

In May 2019, the Victorian Civil and Administrative Tribunal (VCAT) found that the actual fuel consumption of the 2016 Triton purchased by Mr Begovic was 'significantly higher' than the fuel consumption figures displayed on the vehicle as was required by law. Expert evidence testing under Australian Design Rules standards showed a 27.6% higher actual fuel consumption (on average between the combined Urban and Extra-Urban portions of the test). VCAT accepted the expert evidence that the

variation was 'unusual and excessive'. Accordingly, VCAT found that both Mitsubishi Motors Australia Pty Ltd and the Mitsubishi dealer (collectively, Mitsubishi) contravened the section 18 of the ACL by engaging in misleading or deceptive conduct.

Additionally, VCAT found that the fuel figures contravened consumer guarantees that the Triton was of 'acceptable quality' and would 'correspond with [its] description' in contravention of sections 54 and 56 of the ACL respectively.

Issue

Mitsubishi's appeal to the Supreme Court of Victoria was limited to questions of law. This meant that VCAT's findings that the actual fuel usage of the 2016 Triton was significantly higher than the figures on the label, which has proven most significant for the industry, was not open to challenge. Rather, Mitsubishi's only avenue for appeal was that VCAT made a mistake in the way it applied the law to Mr Begovic's case.

Outcome

The Supreme Court of Victoria upheld VCAT's decision that the fuel consumption figures were misleading or deceptive in contravention of section 18 of the ACL. In coming to this conclusion, the Court commented that:

a) a reasonable consumer would…expect to be able to rely on the fuel consumption figures as a form of baseline from which an adjustment could be made to reflect real world driving conditions; and
b) decisions to purchase a vehicle may often be made in the dealer's showroom without the opportunity to consult information available on a website.

The Court however rejected VCAT's finding that Mitsubishi had contravened the consumer guarantees under the ACL. The Court held that since VCAT was not satisfied that Mr Begovic's 2016 Triton was 'defective' it was legally incorrect to conclude that the vehicle was not of 'acceptable quality' in contravention of section 54 of the ACL.

Finally, the Court also rejected VCAT's finding that the Mitsubishi contravened section 56 of the ACL as the 2016 Triton did not 'correspond with the description'. The Court's decision was based on the fact that Mitsubishi was not given a proper opportunity to address this issue before VCAT.

The Supreme Court is set to determine the remedy for Mitsubishi's contravention of section 18 of the ACL for misleading or deceptive conduct (along with costs) at a later date.

The available remedies for such a breach include an order allowing Mr Begovic to reject the 2016 Triton and obtain a refund of his purchase price. Importantly, VCAT held that there was likely an indemnity arrangement between the dealer and Mitsubishi and if that was not the case, the dealer would nonetheless not be prevented from making a claim against Mitsubishi Motors.

There may be a number of class actions that follow from this decision if it can be established that a particular model vehicle had 'significantly higher' fuel consumption figures than those displayed on the vehicle. If any consumer claim is brought against a dealer, the dealer should investigate its indemnity position against the manufacturer.

Significance to the automotive industry

Although the Court's findings were limited to the 2016 Mitsubishi Triton purchased by Mr Begovic, the case may have far-reaching implications for the thousands of light vehicles sold in Australia displaying a Fuel Consumption Label (as has been required by law since 2001).

The case also demonstrates key factors impacting on exposure to liability for misleading or deceptive conduct within the automotive industry. These include that:

a) liability for misleading or deceptive conduct can apply to both manufacturers and dealers;
b) section 18 of the ACL does not require an intent to mislead or deceive; and
c) the ACL applies to representations whether or not they are required under law.

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