HWL EBSWORTH
LAWYERS

AUTOMOTIVE INDUSTRY GROUP

Regulatory Update

December 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

- The Federal Government releases Future Fuels and Vehicles Strategy aimed at reducing emissions in the Transport sector (see parts 1.1 and 3.1).
- The Australian Government releases automotive franchising discussion paper (see part 2.2).
- Amendments to the Franchising Code of Conduct, turning voluntary principles into mandatory obligations (see part 3.2).

1. Legislation Update

The Australian Government's response to the Senate Education and Employment References Committee's report, "*Driving a fairer deal: Regulation of the relationship between car manufacturers and car dealers in Australia*", released in March 2021, confirms it has no major plans for further regulation or review of the automotive sector beyond the regulations already announced.

1.1 The Federal Government's Future Fuels Strategy

NSW Government Electric Vehicle Package

The NSW Government is investing almost half a billion dollars in tax cuts and incentives to drive uptake and reduce barriers for electric vehicle purchases over the next four years.

These reforms include eliminating stamp duty on electric vehicles together with non-financial benefits for access to transit lanes for electric vehicle drivers, and are consistent with practices undertaken by Governments across the world. New buyers will potentially pay no net tax to the NSW Government until 2035 under this proposed package, the intention being to provide an incentive for consumers to purchase an electric vehicle and facilitate growth in the shift towards electric based vehicles.

Under this electric vehicle strategy, the NSW Government is:

i. making it more accessible to afford an electric vehicle by providing financial incentives and phasing out stamp duty on eligible electric vehicles;
ii. transitioning the NSW Government passenger fleet to electric vehicles by 2030;
iii. investing $171 million to build a road network of ultra-fast charging stations; and
iv. introducing a distance-based road user charge (RUC) for eligible electric vehicles of 2.5c/km from 1 July 2027 or when EVs reach 30% of new vehicle sales, whichever comes first.

Specifically, the NSW Government will reimburse the stamp duty paid on purchases of new or used battery electric vehicles that cost up to $78,000. The Government is also co-investing in rolling out an ultra-fast charger at 100km intervals across major highways in NSW to make is easier for city and regional electric vehicle drivers to travel in regional areas.

These reforms will no doubt stimulate the interest and demand for electric vehicles in Australia. Accordingly, it is critical that all dealers understand the rules under the strategy to ensure that prospective electric vehicle consumers can capitalise on the benefits under this strategy.

A complete copy of the strategy can be accessed here.

Motor Vehicle (Electric Vehicle Levy) Amendment Bill 2021 (SA)

The Government's new *Motor Vehicle (Electric Vehicle Levy) Amendment Bill 2021* (SA) passed on 29 October 2021, to incentivise consumers to purchase battery electric vehicles through continued infrastructure investment, tax relief and consumer incentives.

The amendments, which are part of a package worth approximately $22.7 million, include:

i. a $3,000 subsidy available for the first 7,000 (up from 6,000) battery electric vehicles purchased in South Australia following the passage of the Bill;
ii. a three year motor registration fee exemption for new battery electric vehicles purchases following the passage of the Bill up until and including 30 June 2025; and
iii. a Select Committee of the Legislative Council will be established as soon as practicable after one year from commencement of the Act to consider long term issues relating to the use of electric vehicles in the State.

1.2 Fair Work Commission Annual Wage Review

The Fair Work Commission (**FWC**) completed its Annual Wage Review and as a result the national minimum wage increased by 2.5% effective from 1 July 2021. The new national minimum wage is $772.60 per week, or $20.33 per hour.

The FWC has announced that wages under the Modern Awards will also increase by 2.5% but will take effect in a staggered fashion. Wage increases for most Modern Awards took effect on 1 July 2021. Relevantly, wages under the General Retail Industry Award increased from 1 September 2021, while wages under 22 Awards covering the aviation, tourism, hospitality and some retail industries increased from 1 November 2021. Dealers will be required to adhere to the changes announced by the FWC and pay their employees in accordance with the Modern Awards to avoid liability.

1.3 *Motor Dealers and Repairers Amendment (Miscellaneous) Regulation 2021*

On 1 November 2021, the following two new specialised classes of repair work were added to the *Motor Dealers and Repairers Amendment (Miscellaneous) Regulation 2021* as part of the NSW Government's Better Business Reforms:

i. specialised glazing class of repair work for installing, repairing, or removing windscreens or other glass in or from the bodies of motor vehicles; and
ii. electrical accessory fitting class, recognising the specialised skills required to undertake this class of repair.

These reforms will assist in creating opportunities for dealers and small businesses by reducing costs and complexity without reducing consumer protections.

1.4 Australian Design Rule 85/00

New regulations, officially known as "*Australian Design Rule 85/00 – Pole Side Impact Performance*" (or ADR 85), require all newly introduced passenger cars and SUVs sold from 1 November 2021 to pass a stringent new side-impact testing protocol. Australia's decision to enforce new side-impact regulations means some performance cars will not be available after November 2021 as certain manufacturers opt to stop selling certain vehicles in Australia.

Whilst these reforms will see a slight reduction in the availability of certain vehicles, this temporary reduction will be significantly outweighed by the reduction of serious injuries and fatalities from side-impact crashes through the use of improved passive safety systems brought in under these regulations.

1.5 *Motor Dealers and Repairers Amendment (Tradesperson's Certificates) Amendment Regulation 2020*

The following amendments will be made to the *Motor Dealers and Repairers Amendment (Tradesperson's Certificates) Amendment Regulation 2020*:

i. the delay of the commencement of the glazing and electrical accessory fitting repair classes until 1 November 2021. Accordingly, tradespersons who do not hold a relevant tradesperson's certificate for this work, but wish to undertake work in these new classes, will have needed to complete the prescribed qualification and obtain a tradesperson's certificate by 1 November 2021;
ii. the removal of wheel balancing from the scope of work of the steering, suspension and wheel alignment repair class;
iii. the removal of the exclusion to work on hybrid or electrically powered motor vehicles from the exhaust and glazing repair classes; and
iv. the requirement that an additional qualification be obtained in vehicle glazing – Certificate III in Automotive Glazing Technology.

These amendments not only assist tradespersons in becoming qualified in these types of repair works, but also aid in the development of a formalised and nationally accredited training program more broadly.

1.6 Road Vehicle Standards Legislation

On 1 July 2021, the Australian Government replaced the *Motor Vehicle Standards Act 1989* with the *Road Vehicle Standards Act 2018* (**RVSA**). Supported by the *Road Vehicle Standards Rules 2019*, the RVSA has been designed to strengthen the safety, environmental and anti-theft performance of all road vehicles being provided to the Australian market.

Among other things, the RVSA has introduced an online, publicly searchable database known as the Register of Approved Vehicles (**RAV**), which will contain the details of all vehicles that have met the requirements of the RVSA and have been approved for use in the Australia market. Accordingly, all vehicles entering the Australian market will need to be listed on the RAV. This new process will see the end of compliance plates by 1 July 2022, with the initial phasing out process beginning from 1 July 2021.

The introduction of the RVSA should not significantly impact dealers. From 1 July 2021, dealer vehicle inspectors may be presented with a vehicle without an identification plate. In these instances, the vehicle's information, and the status of its compliance will be contained on the RAV, which can be accessed by entering the vehicle identification number (**VIN**). Under the new system, the compliance date of a vehicle will be the date of entry on the RAV.

As per current policy, there are some vehicles where the build date must be used for the compliance date. Inspectors can access the information on the vehicle's build date from the RAV.

2. Proposed Legislation

2.1 Draft scheme rules released for the motor vehicle service and repair information sharing scheme

In June 2021, the Australian Government passed the Competition and *Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021* (Cth) which introduced a mandatory scheme for the sharing of motor vehicle service and repair information (**Scheme**). Under the Scheme, service and repair information provided to car dealership networks and manufacturer-preferred repairers are to be made available to independent repairers and registered training organisations (**RTOs**) to purchase at no more than 'fair market price'. The Scheme is scheduled to come into effect on 1 July 2022.

To support the Scheme's implementation and operation, draft scheme rules (**Scheme Rules**) were released for public consultation from 2 September 2021 to 24 September 2021. The key features of the Scheme Rules are set out below:

(a) Overview of the Scheme and Scheme Rules

Under the Scheme, data providers, including car manufacturers, will be required to make 'scheme information' available for purchase by all repairers and RTOs. Scheme information is defined as information prepared by, or for manufacturers that is used in conducting diagnostic, services or repair activities on, or training relating to, scheme vehicles.

However, the Scheme recognises that the widespread access to certain safety and security information would create risks to the security and safety of vehicles. As a result, information related to safety and security will only be available to individuals that meet specified access criteria. The Scheme Rules provide further details on how this aspect of the Scheme will operate.

(b) Definition of 'safety information' and 'security information'

'Safety information' refers to information relating to either the hydrogen, high voltage, hybrid or electric propulsion system installed in a vehicle, or each system that is connected to any of these systems.

On the other hand, 'security information' is defined as information related to a vehicle's mechanical and electrical security system. The Scheme Rules further provide that security information includes information related to the locking and immobilising of a vehicle that is either unique to the vehicle, or only usable for a limited period of time.

(c) Safety and security criteria for an individual to be a fit and proper person

Safety and security information can only be made available to individuals working for an Australian repairer or RTO if they are considered to be a 'fit and proper person'.

The Scheme Rules prescribe that the following criteria will be taken into account when considering whether an individual is a 'fit and proper person':

i. that the individual's relationship to the Australian repairer, or RTO, is appropriate for the purposes of ensuring that the safety and security information is solely used for the purposes of the repairer's business, or providing an RTO course; and
ii. in relation to safety information:
    a. that the individual has completed training in safely working on the specific system in a vehicle, for which safety information is requested; and
    b. that the training was provided by the manufacturer of that system or vehicle; or
iii. in relation to security information:
    a. that the individual holds a repairer licence that was issued or renewed no earlier than two years before the security information is requested, and has declared in writing that they have since not been convicted of certain offences since the licence was issued or renewed, or
    b. that the individual has had a national police check report no earlier than two years of the security information being requested and has declared in writing that they have not been convicted of certain offences since.

It is necessary that dealers have a complete understanding of the mandatory Scheme and the Scheme Rules to ensure that they change any existing practices that are not in line with the new legislation.

The Scheme Rules can be accessed here.

2.2 Automotive franchising discussion paper

On 10 August 2021, the Australian Government released its automotive franchising discussion paper (**Discussion Paper**). Building upon reforms to the Franchising Code of Conduct (**Franchising Code**) introduced in June 2021, the Discussion Paper aimed to canvass stakeholder views on the merits of a standalone automotive franchising code and options to achieve mandatory binding arbitration for automotive franchisees.

Stakeholders were invited to provide their views on the Discussion Paper during the consultation period between 10 August 2021 and 13 September 2021.

(a) A standalone automotive franchising code

Under the current Franchising Code, automotive franchising and new vehicle dealership agreements are dealt with under Part 5. The Government has now sought views as to whether there is any merit in developing a standalone automotive industry franchising code that would no longer be part of the Franchising Code.

The Government has provided two options for reform:

i. Option 1: Maintain the status quo by amending the Franchising Code and its automotive specific provisions as required. This would allow for consistency in the laws and protections afforded to the franchising sector as a whole, whilst allowing for matters unique to the automotive franchising industry to be addressed.
ii. Option 2: Establish a standalone automotive franchising code. This would provide tailored regulation that meets the unique needs of the automotive franchising sector.

(b) Options for arbitration

The Discussion Paper also considers how different arbitration models could be implemented to effectively resolve disputes between new car dealers and manufacturers under the Franchising Code. Under the current voluntary binding arbitration model, parties are not bound to undertake arbitration but can do so if both parties agree.

The Discussion Paper sets out different options for having a pre-contractual arbitration model, which would involve having an arbitrator determine any disputes between the parties whilst they are negotiating or bargaining a contract. As such, pre-contractual arbitration would not apply to disputes which would arise under existing contracts. Pre-contractual arbitration is concerned with what will be the rights and obligations between parties and how these rights and obligations would be incorporated into a subsequent agreement.

(c) Other considerations in the Discussion Paper

The Discussion Paper states that one of the main purposes of automotive franchising reforms is to ensure that automotive dealerships are protected from unfair contract terms in their agreements with manufacturers. In this regard, the Government has indicated that it will soon release draft legislation on reforms to unfair contract term protections.

The automotive franchising discussion paper can be accessed here.

2.3 Potential reforms to the unfair contract terms regime

On 23 August 2021, the Australian Government released an exposure draft of the *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021: Unfair Contract Terms Reforms* (**Bill**) and related explanatory materials, detailing proposed reforms to the *Australian Consumer Law* (**ACL**) and the *Australian Securities and Investments Commission Act 2001* (Cth), in a bid to reduce the prevalence of unfair contract terms in consumer and small business standard form contracts. Specifically, the Bill seeks to strengthen protections for consumers and small businesses by prohibiting unfair contract terms (**UCT**) and providing for pecuniary penalties in response to their use.

Among other matters, the Bill proposes the following amendments to the current regime:

i. **Prohibition and multiple contraventions**: Contracting parties will be prohibited from including, applying or relying on UCT in standard form consumer or small business contracts. It will be possible to breach these prohibitions multiple times in respect of the same contract, or even in relation to the same unfair term where that term is relied upon on multiple occasions.
ii. **Pecuniary penalties**: In addition to the current law which renders a court-determined unfair contract term automatically void, courts may order pecuniary penalties for contracting parties who breach the UCT laws (either in response to an application by a contracting party or the ACCC). Each contravention of the UCT laws (which, as above, can multiply quickly) would be subject to the current ACL penalty regime, which has the potential to produce eye-watering penalties.
iii. **Broader court powers**: As well as pecuniary penalties, courts will be afforded additional powers to respond to breaches of the UCT laws. This includes the power to make injunction orders to restrain contracting parties from including, applying or relying on a term that is the same or similar to a term that has been declared unfair in that party's other contracts, to issue public warning notices and to make orders to disqualify a person from managing a corporation in response to a breach.
iv. **Rebuttable presumption**: To assist the efficiency of the regulator, where a term has, in previous court proceedings, been found to be unfair, the same or a similar term will be presumed to be unfair in any subsequent proceedings. This applies not only where the term is proposed by the same contracting party, but also where the term is proposed by a person in the same industry.
v. **Expanded scope for small business contracts**: The definition of 'small business' will be expanded, meaning that the UCT regime will apply to any standard form contract where one party has fewer than 100 employees or an annual turnover of less than $10 million. In addition, the 'upfront price payable' requirement in the definition of 'small business contract' will be removed, significantly widening the scope and application of the UCT regime.

The changes proposed by the Bill will have significant impact on the operation of standard form and small business contracts. Accordingly, it is recommended that all dealers take proactive steps in having their contracts reviewed to ensure that they comply with the requirements of the UCT regime.

2.4 Improving consumer guarantees and supplier indemnification provisions

On 14 December 2021, Assistant Treasurer, the Hon Michael Sukkar issued a Consultation Regulation Impact Statement (**CRIS**) entitled *'Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law'*.

Among other things, the CRIS will consider:

i. options to ensure businesses comply with their consumer guarantees under the ACL, including consideration of civil prohibition for a failure to provide consumer guarantee remedies; and
ii. options to prohibit manufacturers from failing to indemnify suppliers and prohibit retribution by manufacturers against suppliers who seek indemnification.

For dealers, the CRIS should be a welcomed opportunity to raise any issues and provide any recommendations to improve the warranty process and procedures. Dealers are welcomed to response to the consultation up until 11 February 2022.

Further information on the CRIS and the process of how to respond can be found here.

3. Policy Update

3.1 Federal Government's technology-led approach to reducing emissions

(a) Future fuels and vehicles strategy

In November 2021, the Federal Government released a strategy to work with the private sector to make it easier to roll out future fuel technologies and provide information to consumers. The Government will focus on the following five priority initiatives:

i. electric vehicle charging and hydrogen refuelling infrastructure where it is needed;
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.

Since February 2021, there has been a 20% increase in the number of battery electric, plug-in hybrid and hybrid vehicles available in Australia.

As part of the strategy, the Government has made $2.1 billion available for low emission vehicles and future fuel technologies, in addition to the Future Fuels Fund. The Government has also established an Emissions Reduction Fund which will provide further investment in battery charging and hydrogen refuelling.

The strategy can be found here.

(b) Low emission technology statement

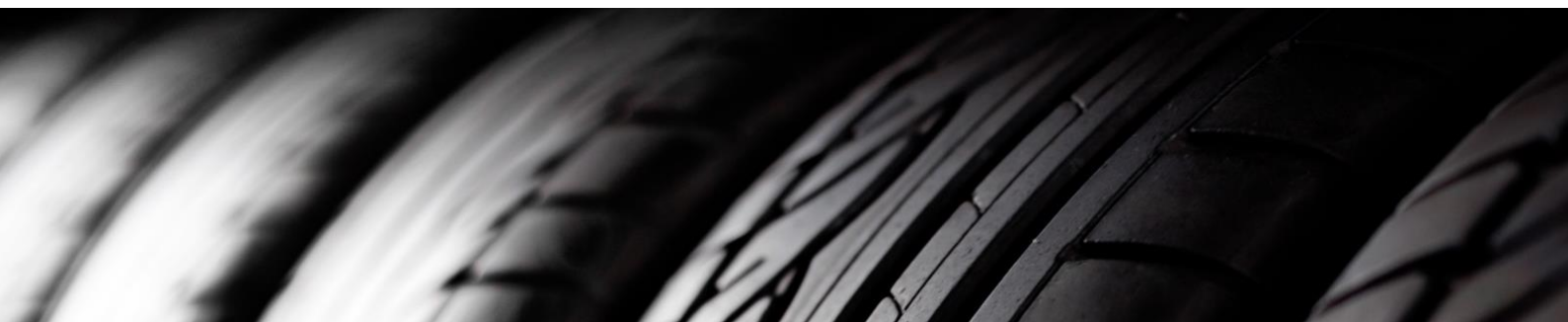
The Federal Government aims to be recognised as a global low emissions technology leader through the following principles:

i. technology not taxes;
ii. expanding choices, not mandates;
iii. driving down the cost of new technologies;
iv. keeping energy prices down; and
v. accountability for progress.

In relation to the automotive industry, the Government is prioritising infrastructure through battery charging and hydrogen refuelling stations and an enhanced digital grid.

The Future Fuels Fund will also support businesses in integrating new technology vehicles into their fleets.

The statement can be found here.



As alluded to in part 1.1 of this report, these Government initiatives will see increased consumer demand for electric vehicles in the Australian market, and in turn will greatly benefit dealers across Australia. It is important note however, that the shift from internal combustion engine vehicles towards electric vehicles will require a significantly change in the way dealers approach the sale of these vehicles.

3.2 Automotive franchising arrangement

(a) Franchising Code of Conduct Amendments

On 1 July 2021, the Federal Government introduced reforms to the Franchising Code that apply to new motor vehicle dealership agreements of new passenger road vehicles or new light goods road vehicles. These changes transformed voluntary principles into mandatory obligations. The principles can be found here.

As alluded to in part 2.2, the Federal Government released a Discussion Paper on 10 August 2021, which, amongst other matters, outlined two options for the automotive industry:

i. the amendment of specific provisions of the Franchising Code when issues arise; or
ii. the establishment of a standalone automotive franchising code that better meets the needs of the industry.

A standalone code would provide tailored regulation for the automotive industry, however it could lead to significant costs to the industry and consumers. The Discussion Paper considers that as a standalone code evolves, it may become inconsistent with the current Franchising Code, and in turn, lead to unnecessary confusion. The Federal Chamber of Automotive Industries made submissions to the effect that a standalone code was not necessary, and reiterated that consumers should be the focus of any further reforms.

The Discussion Paper also considers three options for arbitration structures:

i. mandatory arbitration in a voluntary Code;
ii. voluntary arbitration in a mandatory Code; or
iii. mandatory arbitration in a mandatory code.

Arbitration is confidential, more efficient and cost-effective than litigation, and an arbitrator's determination is binding. Arbitration does carry costs and risks for the industry, however this may motivate parties to negotiate an outcome before turning to formal dispute resolution processes.

(b) Franchise disclosure register

The Federal Government has proposed the implementation of a Franchise Disclosure Register (**Register**) with the aim of increasing transparency in the franchising sector and assisting prospective franchisees in making informed decisions. The public Register is proposed to include:

i. a franchisor Disclosure Document (excluding personal and sensitive information); and
ii. certain material information regarding franchisors.

Franchisors must ensure that their Disclosure Document is updated annually and that they update any other material information on the Register to avoid civil penalties. The register will be ready by March 2022, and the deadline for uploading documents is 31 October 2022.

3.3 Foreign company Lynk & Co to enter Australian market

Lynk & Co was formed as a joint venture between Volvo Car Group and Chinese parent company Geely Auto Group with plans to launch in Australia and New Zealand by 2025. Lynk & Co incorporates a direct-to-customer online model, similar to Tesla, which includes a subscription model allowing consumers to rent a vehicle from the company on a monthly basis.

There are no details of what the launch in Australia will look like, however Lynk & Co will release their first dedicated electric vehicle before the end of 2021, with a further five electric models to be released over the next five years.

3.4 Privacy law changes

On 25 October 2021, the Australia Government announced significant reforms to the *Privacy Act 1988* (Cth) (**Privacy Act**), which saw the release of an exposure draft of *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021* (**Online Privacy Bill**).

Online Privacy Code

The Online Privacy Bill is a major step in the Australian Government's commitment to strengthening the Privacy Act. The Online Privacy Bill will introduce a binding online privacy code (**OP Code**) for social media and certain other online platforms, and increases penalties and enforcement measures, in a bid to address online privacy issues and ease the prevailing community concern regarding the misuse of personal information.

The Online Privacy Bill anticipates that the OP Code will be developed by industry for approval by the Commissioner, and set out more prescriptive detail about the manner in which the operators of social media services, data brokerage services and other large online platforms meet their obligations under the Australian Privacy Principles.

It is proposed that the OP Code will apply to the following categories of private sector organisations:

i. organisations that provide social media services;
ii. organisations that provide data brokerage services; and
iii. large online platforms.

These organisations will need to meet the requirements of the OP Code, as well as the ordinary provisions of the Privacy Act. Private sector organisations that are not already subject to the Privacy Act will not be subject to the OP Code.

Accordingly, the OP Code will require organisations to:

i. ensure that their privacy policies clearly and concisely explain the purposes for which they collect, hold, use and disclose personal information;

ii. provide clear and understandable notice to individuals about the collection of their personal information; and
iii. ensure that they obtain consent from individuals to deal with their personal information, and ensure that the consent given is voluntary, informed, unambiguous, specific and current.

Penalties and enforcement measures

In addition to the introduction of the OP Code, the Online Privacy Bill will strengthen the penalties and enforcement measures available under the Privacy Act.

Specifically, the Online Privacy Bill increases the maximum civil penalty for serious and repeated interferences with privacy by a nature person to 2,400 penalty units (which, based on currently penalty unit values, equates to $532,800).

For a body corporate, the maximum penalty will increase to an amount not exceeding the greater of:

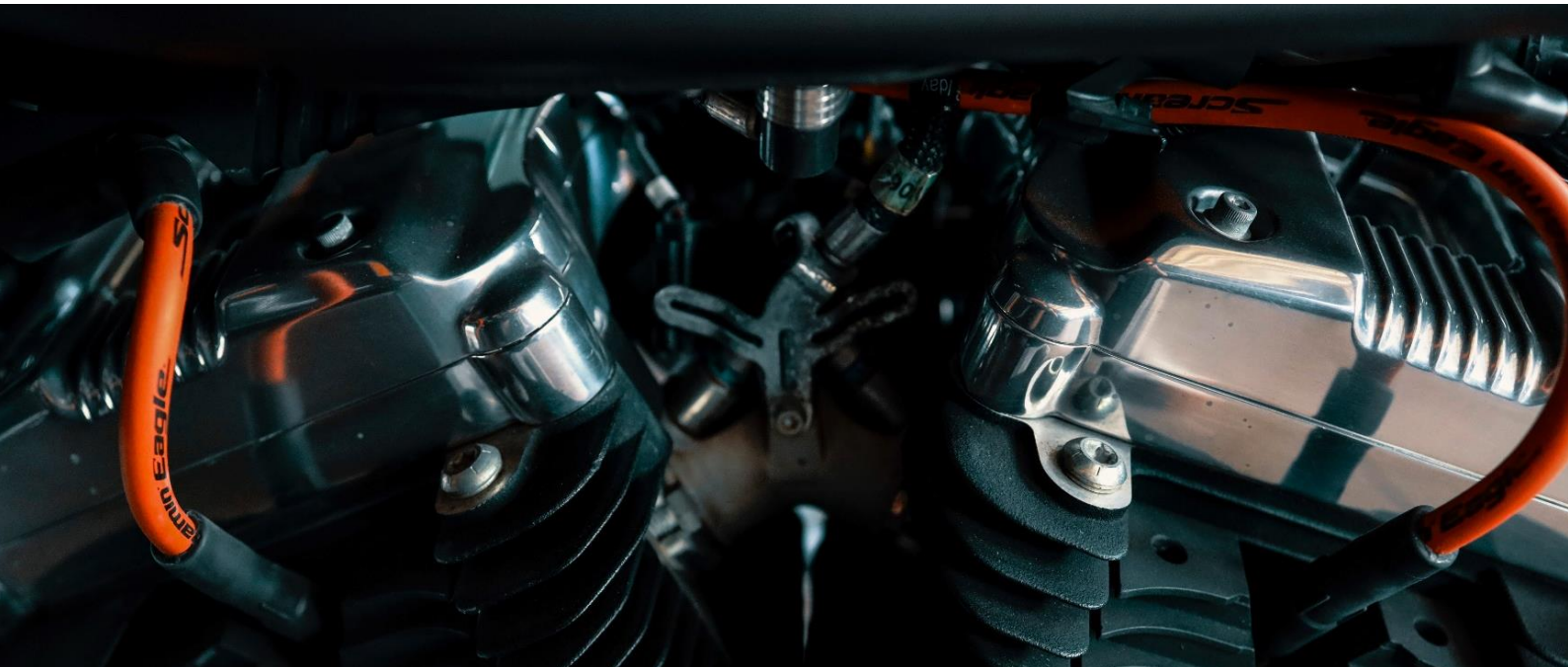
i. $10,000,000;
ii. three times the value of the benefit obtained by the body corporate from the conduct constituting the serious and repeated interference with privacy; or
iii. if the value cannot be determined, 10% of their domestic annual turnover (noting that the Bill sets out how to calculate turnover for the purposes of this provision).

In relation to the new enforcement measures, the Online Privacy Bill will, among other things:

i. enhance the Commissioner's capacity to conduct assessments;
ii. improve the Commissioner's information-sharing arrangements with relevant enforcement authorities; and
iii. expand the types of declarations that the Commissioner can make in a determination at the conclusion of an investigation.

The proposed changes to the Privacy Act are significant for all companies operating in Australia. Companies must ensure that their practices comply with the changes brought in under the proposed OP Code to avoid significant pecuniary penalties.

A copy of the Online Privacy Bill and related materials can be accessed here.



3.5 Director identification number regime

In June 2020, the Australian Government introduced the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth) (**Act**). Among other changes, the Act introduced the requirement that, from the 1 November 2021 all company directors, or anyone who intends to become a director, will need to apply for and obtain a director identification number (**DIN**). A DIN is a unique 15-digit identifier given to a director, or someone who intends to become a director to verify the identity of the holder. Once issued, the DIN will be kept by the individual permanently.

The introduction of DINs form part of the measures taken by the Government under the its Digital Business Plan aimed at:

i. reducing the prevalence of identity fraud;
ii. making it easier for external administrators and regulators to trace directors' relationships with companies over time; and
iii. protecting the privacy of directors by allowing them to be identified on public registers without disclosing personal information such as their dates of birth or residential address.

It is strongly recommended that directors, or those intending to become directors, apply and obtain their DIN if they have not done so already.

Further details on how to apply for a DIN and the timeframes for applying can be accessed on the Australian Business Registry Services website here.

4. Case Law Update

4.1 *AHG WA (2015) Pty Ltd ACN 603 598 750 t/a Mercedes-Benz Perth & Westpoint Star Mercedes-Benz v Mercedes-Benz Australia/Pacific Pty Ltd ACN 004 411 410*

Background

The Applicants, comprising 38 of the 49 Mercedes-Benz dealers in Australia have filed a $650 million claim in the Federal Court of Australia against Mercedes-Benz under the Competition and Consumer Act 2010 (Cth) and the ACL. Legal action was commenced after Mercedes-Benz made the decision to change its business model from a 'dealership model' to an 'agency model' which has the effect of appropriating the goodwill built by dealers over decades, without providing for compensation. Under the agency model rather than the dealers being party to a franchise agreement where they operate as independent businesses and are able to sell vehicles to customers and determine their own margins as of 31 December 2021, this is to be replaced with agency agreements, where the dealers are agents delivering vehicles for a set commission for Mercedes- Benz at prices fixed by the distributor. The dealers have no control over sales and consumers will be subject to higher prices as a result.

The Applicants are represented HWL Ebsworth Lawyers.

Issue

The main issues between the parties are:

a. the proper construction of the current franchise agreements and their terms;
b. whether the Respondent served notices of non-renewal under the franchise agreements to bring the dealership model to an end, in good faith, for a proper purpose and/or unconscionably – for the purposes of clause 6 of the Franchising Code of Conduct, section 21 of the ACL, and/or at general law;
c. whether the agency agreements and their terms are unconscionable, by reason of the loss of the Applicants goodwill to the Respondent; and
d. what relief ought to be granted in response to the claims made by Applicants which could be compensation and or a return to the franchise model.

Outcome

At the time of this Update, the claim is on foot pending an outcome.

The Court has ordered that the Applicants file and serve their evidence in chief and statement of claim on or before 31 January 2022.

Significance to the automotive industry

This puts the regulation of the automotive industry under the spotlight again, after similar claims (followed by a Senate Inquiry) were launched against General Motors Holden in 2020. Multinationals are being criticised for withdrawing and restructuring their networks disproportionately. Whilst the industry agrees that the Respondent is within its rights to do so, it is has been suggested, that it be done fairly and with just compensation.

4.2 *Vanderstock & Anor v the State of Victoria 2021 HCA M61*

Background

Two electric car drivers, Christopher Vanderstock and Kathleen Davies, are bringing a claim in the High Court of Australia against the State of Victoria to challenge the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (VIC) (**ZLEV Act**). The ZLEV Act came into operation on 1 July 2021 and requires registered operators of zero and low emission vehicles (**ZLEVs**) to pay a charge for the use of vehicles on certain roads (**ZLEV charge**). The ZLEV Act introduces a distance-based charge on the use of roads for Victorian registered ZLEVs (between 2 and 2.5 cents per kilometre), with charges to apply to vehicles not predominantly powered by a fuel source that is subject to a Commonwealth Government fuel excise (i.e. petrol, diesel or LPG). To do so, vehicle owners will have to photograph their odometers and regularly pay invoices to the Department of Transport, and ensure they retain accurate records for five years (or otherwise, face criminal action).

Issue

The issue at hand is whether the State of Victoria has the authority to impose such a charge from a constitutional point of view. The Plaintiffs argue that according to section 90 of the *Commonwealth Constitution*, the Commonwealth reserves exclusive power to levy such charges on consumption, not the State governments.

Outcome

At the time of writing, the claim is on foot pending an outcome.

The claim was first filed in the Melbourne Registry of the High Court of Australia on 16 September 2021. Orders were made by the Court on 19 October 2021, setting out the timetable for the proceeding.

Should no special case be filed or served by the Plaintiffs on or before 9 February 2022, the parties are to file and serve short submissions as to the next steps they contend are appropriate on or before 11 February 2022.

Significance to the automotive industry

Australia's electric vehicle uptake is reported to be lagging behind other developed countries. Whilst there is evidence to suggest that many Australian consumers are eager to reduce their greenhouse gas emissions on an individual level, electric vehicles have not made their way as swiftly into the Australian market as they have in others.

On 9 November 2021, the Federal government announced their Future Fuels and Vehicles strategy, which included greater investment in charging infrastructure, and did not include any subsidies, tax incentives, sales targets or minimum fuel emission standards for electric vehicles. Alongside the ZLEV Act, many Australians and legal professionals are arguing that Australia's lack of support for electric vehicles is bad public policy and prolonging dependence on polluting oil.

Experts in technology and manufacturing are expecting electric vehicles to take over the Australian automotive market in the future. Accordingly, a successful outcome for the Plaintiffs in this case, may see this change occur sooner than expected.

4.3 Takata Airbag Class Actions against Toyota, Subaru, Honda, BMW, Nissan and Mazda

Background

In 2017 and 2018, proceedings were filed in the Supreme Court of New South Wales in relation to approximately 2 million Toyota, Lexus, Subaru, Honda, BMW, Nissan and Mazda branded vehicles on behalf of consumers affected by Takata airbag recalls (together, the **Takata Airbags Class Actions**). The parties and proceedings numbers are:

a. 2017/340824: *Haselhurst v Toyota Motor Corporation Australia Ltd* ('the TOYOTA proceedings');
b. 2017/353017: *Whisson v Subaru (Aust) Pty Ltd* ('The SUBARU proceedings');
c. 2017/378526: *Kularathne v Honda Australia Pty Ltd* ('The HONDA proceedings');
d. 2018/9555: *Brewster v BMW Australia Ltd* ('The BMW proceedings');
e. 2018/9565: *Jaydan Bond v Nissan Motor Company Australia Pty Ltd* ('The NISSAN proceedings'); and
f. 2018/42244: *Coates v Mazda Australia Pty Ltd* ('The MAZDA proceedings').

Issue

In summary, the Plaintiffs allege that, in importing, marketing and supplying certain vehicles fitted with specific Takata airbags in Australia, the Defendants:

a. failed to comply with the merchantable quality guarantee in the *Trade Practices Act 1974* (Cth) or acceptable quality guarantee in the ACL;
b. engaged in misleading or deceptive conduct; and
c. engaged in unconscionable conduct, as a result of which the Plaintiffs say that group members suffered economic loss, including out of pocket expenses.

The Defendants have denied the above allegations.

Outcome

The parties to the Takata Airbag Class Actions have reached an in-principle settlement of $52 million, inclusive of all legal costs, costs of settlement administration and any funder's remuneration. If the settlement is approved by the Court, eligible group members will be entitled to receive a settlement payment. The deadline to register for a settlement payment is 4:00pm AEDT on 18 February 2022, as is the deadline to object to the terms of settlement.

Significance to the automotive industry

In February 2018, the Federal Government's treasury portfolio issued a compulsory recall for all vehicles fitted with defective Takata airbags, after an investigation was launched by the Australian Competition and Consumer Commission (**ACCC**). As Takata is one of the world's largest automotive parts suppliers, an estimated 3.7 million airbags have since been replaced in Australia alone. Approximately 100 million vehicles throughout the world were potentially holding defective airbags, making it one of the largest automotive recalls in history.

Vehicle owners can check whether or not their airbags are affected by checking here.

For more information on the compulsory recall, see here.

4.4 *Capic v Ford Motor Company of Australia Pty Ltd [2021] FCA 715 and Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions) [2021] FCA 1320*

Background

In May 2016, Ms Biljana Capic (**Applicant**) filed a class action proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth) against Ford Motor Company of Australia Limited. The main concern of the class action alleged defects in the automatic transmission mechanism (**PowerShift Mechanism**) in a range of models such as the Ford Focus, Ford Fiesta and Ford EcoSport (**Affected Vehicles**) which were imported, sold and distributed across Australia. Between 2011 and mid-2016, it was estimated to have sold 70,000 Affected Vehicles.

In April 2018, Ford was fined $10 million by the ACCC for its response to consumer complaints about PowerShift vehicles fitted with PowerShift transmissions between 1 May 2015 and 29 February 2016. The ACCC accepted an enforceable undertaking by Ford to institute a complaints review program that only a small proportion of PowerShift vehicle owners may qualify for.

Capic claimed relief on behalf of herself and members of an open class who purchased the models between 2011 and 2016 for breaches of the statutory guarantees under the ACL and misleading and deceptive conduct arising out of the promotional literature distributed by Ford Australia on the PowerShift Mechanism.

The Court found that the Affected Vehicles suffered from certain component and design deficiencies and therefore, did not fall within the meaning of "acceptable quality" under the ACL.

Additionally, Ford contended to making representations about the quality, reliability, durability, safety, comfort and performance of the cars that were misleading or deceptive in contravention of the ACL. Under the ACL, consumers are entitled to recover the amount of any loss or damage they suffer as a result of misleading or deceptive conduct.

Issue

The acceptable quality claim hinged on two key issues:

a. that there was a real risk that four individual components of the transmission would fail; and
b. that the 'architectural' features of the transmission created a risk of failure.

Due to effects of the current pandemic, it was also raised whether s 37M of the *Federal Court of Australia Act 1976* (Cth) and considerations of fairness meant that a mode of trial conducted over virtual platforms was not feasible and that the trial had to be postponed.

Outcome

The Court found that the Affected Vehicles suffered from certain component and design deficiencies and therefore, were not of "acceptable quality" within the meaning of the ACL. This aspect of the case was largely successful, with the Court holding that (except in two particular respects) cars supplied with the original components had failed to comply with the statutory guarantee. Though the second issue was only partially successful, with the Court finding:

a. that the vehicles failed to comply with s 54 because they had a tendency to display a slight audible rattle and a slight shudder at slow speeds; and
b. that the Applicant had failed to prove that heat management within the transmission created any risk of failure.

The Applicant was awarded damages of $17,248.19 in her individual claim. However, the Court declined to award aggregate damages, holding that Ford had a potential defence under s 271(6) of the ACL where it had fixed a problem with a particular car within a reasonable time. Because that issue depended on the individual position of each group member and had not been litigated at trial, no award of aggregate damages was appropriate.

4.5 *Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions) [2021] FCA 1320*

Background

Following the aforementioned case, a list of "common questions" were recorded in the Schedule regarding defects and knowledge for the Court to better structure this class action and also make determinations. This Schedule helps unify the common questions outstanding from the original proceeding and provides greater clarity as it acts as amended statement of claim. The Court gave judgment on common questions, that is the group members have to demonstrate that Ford is liable and also they have suffered loss as a result.

Outcome

It is expected that the Court will order that (subject to any possible defences being raised) the Affected Vehicles were not of acceptable quality under the ACL, with some vehicles being more defective than others. This decision is important as group members can rely on these findings and will not have to prove separately.

Significance to the automotive industry

The decision has provided support to respondents' ability to respond in class actions, particularly in an unprecedented time.

The class action is for the benefit of any person who bought or leased (or otherwise acquired an interest in) any of the Affected Vehicles at any stage over the period 1 January 2011 to 29 November 2018 (no matter whether the car was purchased or leased through a Ford dealer, and regardless of whether the car was purchased or leased new or used).

4.6 *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd [2021] FCA 1493*

Background

In 2019, the ACCC initiated proceedings in the Federal Court against Mazda Australia Pty Ltd (Mazda) seeking declarations that Mazda engaged in misleading and deceptive conduct, made false or misleading representations and engaged in unconscionable conduct in contravention of the ACL.

Issue

Among other things, the ACCC alleged that Mazda contravened the ACL by only offering customers who had purchased new vehicles with major and recurring faults the option of repair rather than a refund or replacement. Interestingly, the ACCC did not seek to prove that the vehicle faults were in fact major failures for the purposes of the ACL, rather based its case on the representations made by Mazda.

Outcome

The Federal Court handed down its decision on the 30 November 2021, finding Mazda guilty of 49 separate false or misleading representations in contravention of the ACL.

At the time of writing, the Court is yet to decide on the penalties and other orders sought by the ACCC. However, based on penalties given to dealers for recent similar contraventions of the ACL, it is likely that the penalty given to Mazda will be significant.

Significance to the automotive industry

This case will have far reaching implications for the automotive industry. Responding to the Federal Court's decision, ACCC chair Rod Sims stated that “the message to the new car industry is clear, consumer rights are not negotiable and must not be misrepresented to consumers”. As such, this case should serve as a timely reminder for those operating in the automotive industry to ensure that their practices and standards are in compliance with the ACL and in particular, that their employees are fully aware of the consequences of the representations they make to consumers.

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