

AUTOMOTIVE INDUSTRY GROUP

Regulatory Update

July 2022



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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 passed amendments to the Franchising Code of Conduct, which aim to add protections for new franchisees and harsher penalties for franchisors (see parts 1.6 and 1.7)
- New amendments announced for the *Motor Dealers and Repairers Act 2013 (NSW)* (see part 2.3)
- Changes to Mandatory Data Sharing Arrangements commenced 1 July 2022 (see part 1.1).



1. Legislation Update

1.1 Changes to Mandatory Data Sharing Arrangements

From 1 July 2022, the *Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Act 2021 (Act)* has come into effect and will mandate that information pertaining to motor vehicle service and repairs be provided to Australian repairers. The Act amends the *Competition and Consumer Act 2010 (CCA)* and applies to passenger vehicles and light goods vehicles excluding omnibuses which were manufactured on or after 1 January 2002. Importantly, the Act will not apply to farm, construction or heavy vehicles, or two or three wheeled vehicles, buses or motor homes.

Prior to this legislation, only car manufacturers and the repair bodies affiliated with them were able to access important service and repair information, thereby creating an unfair environment for independent repairers and preventing them from being able to compete properly in the market. This has also created issues for consumers by the generating of additional costs and unreasonable delays in repairs.

The intention behind the Act is for all Australian motor vehicle repairers to have fair and equitable access to the information they require to properly conduct repairs on vehicles, including access to technology and software updates. This will also have a positive impact on consumers by allowing them to properly access the best prices and service through independent repairers, not only the large car manufacturing bodies.

Repairers will need to qualify under the safety and security criteria prescribed in the scheme in order to access the information, which can be accessed [here](#). Motor dealers who provide repair services ought to become familiar with these new changes, in order to properly access the benefits the scheme provides. The Act can be accessed [here](#).

1.2 Cost of Living Support: Fuel Excise

From 12:01am on 30 March 2022, the Fuel Excise Tax was cut for six months to ease the rising cost of living in Australia. The *Excise Tariff Amendment (Cost of Living Support) Act 2022 (Cth)* was assented to on 31 March 2022, amending the *Excise Tariff Act 1921 (Cth)*, and reducing the CPI indexed fuel rate by 50%. This temporary reduction will see the average Australian household with at least one vehicle, receive a benefit of \$300 over the six-month period.

Between 29 March and 5 April 2022, the average daily regular unleaded petrol prices fell by between 25 and 27 cents per litre in Sydney, Melbourne, and Brisbane, by around 31 cents in Adelaide, and by 35 cents in Perth. The Australian Competition and Consumer Commission have indicated that it will be monitoring fuel retailers to ensure that the excise cut is passed on to consumers. They have indicated that enforcement action will be taken if any misleading and deceptive statements are made to consumers.

1.3 Reduction in Pre-Estimated Liquidated Damages in Western Australia

Under the *Motor Vehicle Dealers (Sales) Regulations 1974 (WA)* (**Regulations**), a dealer may terminate a contract if the purchaser has breached any of their obligations. Following this, any deposit paid by the purchaser may be used to meet the pre-estimated liquid damages payable.

From 1 January 2022, the maximum amount a motor vehicle dealership in Western Australia can charge a consumer for cancelling a purchase contract was reduced from 15 per cent to 5 per cent of the contract's value. Such reduction was implemented after Western Australia's Consumer Protection became aware of dealers who were using the previous maximum rate of 15 per cent as the automatic default amount, and the increased wait time for new cars due to increased demand and global production shortages. Whilst there is no provision in the Regulations which prohibits the now maximum rate of 5 per cent to be used, it should be general practice for the cancellation cost to be a genuine and reasonable assessment of likely losses that would result from the deal failing to proceed.

Additionally, there are certain events where the purchaser should not be charged for any pre-estimated liquidated damages and is entitled to receive their full deposit back. Such events are:

- a) where the contract is terminated due to the dealer breaching their obligations;
- b) the purchaser withdrawing their offer before it was accepted by the Dealer; or
- c) where the purchaser cannot meet their obligations despite taking all reasonable steps to do so.

Dealers should be aware of these changes and ensure that consumers are charged with appropriate rates or the cancellation of their purchaser contracted to avoid any potential claims brought against them.



1.4 Duties Amendment Bill 2022 (WA)

The *Duties Amendment Bill 2022 (WA)* (**Bill**) amends the *Duties Act 2008 (WA)*, among other things, to introduce a new single general rate of duty for real estate transactions in Western Australia. The Bill passed both houses on 19 May 2022.

The key proposed amendments are set out below:

a) Aligning the general and residential property transfer duty

The Bill amends the general rate of duty that applies to non-residential property to align with the concessional residential rate of duty. This change effectively provides that the concessional residential rate of duty will apply to all dutiable transactions.

b) Adjusting the residential or business property concession

Transactions involving residential land or business property valued at less than \$200,000 are assessed at a separate concessional rate of duty. The Bill adjusts this concessional rate to provide a concession to all eligible transactions valued at less than \$200,000.

c) Vehicle licence duty exemptions

The Bill introduces a vehicle licence duty exemption for new service demonstrator vehicles that are loaned to customers having their vehicles serviced at a dealership. These vehicles are allocated to customers the dealer hopes to entice into upgrading their vehicle after experiencing the features of the service demonstrator vehicle. These vehicles do not currently qualify for the demonstrator exemption because they are not acquired solely for demonstration purposes.

The Bill also introduces an exemption for transactions when a vehicle is returned to the seller for a full refund of the purchase price or a replacement vehicle. It ensures a consumer does not pay duty a second time when replacing a faulty vehicle and aligns Western Australia with other jurisdictions.

Further details about the Bill can be found in the explanatory memorandum [here](#). All interested parties intending to conduct real estate transactions should look out for the final deliberation and passing of the Bill on the Parliament website [here](#).

The proposed amendments relating to the rates of transfer duty commenced on 1 July 2022 and apply to transactions or acquisitions that occur on or after 1 July 2022.

1.5 State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022 (NSW)

On 23 March 2022, the *State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022 (NSW)* (**Bill**) introduced, among other things, miscellaneous amendments to the state revenue legislation, including with regard to transfer duty and land tax.

One of the key amendments to the *Duties Act 1997 (NSW)* is section 8, which allows for duty to be charged on transactions that result in a change of beneficial ownership of dutiable property. However, a transaction is exempted from duty if it occurs in accordance with an agreement or an arrangement entered into before the commencement of the proposed amendment.

1.6 Competition and Consumer (Industry Codes - Franchising) Amendment (Franchise Disclosure Register) Regulations 2022 ("Franchise Disclosure Register Regulations")

The Franchise Disclosure Register Regulations were introduced to the Franchise Code of Conduct (**Code**) on 1 April 2022 and will require all franchisors to create a profile on the Franchise Disclosure Registry by 14 November 2022, which will be available to the public on 15 November 2022.

These changes follow the landmark reforms that were enacted 1 July 2021, a number of which specifically related to the automotive industry, namely:

- a) replacing the definition of a motor vehicle dealership to include a business of selling motor vehicles where the dealer (franchisee) sells them as agent for a principal (franchisor);
- b) the introduction of Clause 46A requiring a franchisor to pay compensation for early termination of an agreement where it is terminated before it expires because the franchisor withdraws from the Australian Market, rationalises its networks in Australia or changes distribution models in Australia;
- c) dealer agreements must now specify how compensation is determined with specific reference to loss profit from direct and indirect revenue, unamortised capital expenditure requested by the franchisor, loss of opportunity in selling established goodwill and costs of winding up the business;
- d) agreements must include a provision to compensate a dealer for new road vehicles, spare parts and special tools if the agreement is not renewed or new agreement entered into or it is terminated before it expires because the franchisor withdraws from the Australian Market, rationalises its networks in Australia or changes distribution models in Australia;
- e) a prohibition on entering into an agreement that contains a clause seeking to exclude compensation for those reasons;
- f) the dealer agreement must allow the franchisee a reasonable opportunity to make a return on the investment it is required by the franchisor to make; and
- g) a new Clause 6(3A) amends the good faith provision and introduces an additional factor that courts must consider in determining whether a party to a new vehicle dealership agreement has acted in good faith.

A summary of all the changes to the Code that were enacted on 1 July 2021 can be found [here](#).

According to clauses 53C and 53D of the Code, franchisors who are required to register are those that:

- i. have created a disclosure document pursuant to clause 8 of the Code and have given that disclosure document on or before 31 October 2022 pursuant to clause 9; or
- ii. are proposing to enter into a franchise agreement with a prospective franchisee and are required to give a disclosure document to the prospective franchisee pursuant to clause 9; or
- iii. if they are a master franchisor, the master franchise system has two or more sub franchisors.

Pursuant to clauses 53C(2)(a)-(g) and 53D(2)(a)-(g) of the Code, the profile must contain the franchisor's name, ABN, registered address and principal place of business, business phone number and email address. The ANZSIC division and subdivision codes for the industry the franchise operates in must also be included.

Additionally, under clauses 53C(4) and 53D(4) franchisors can now be mandated to provide additional information from their disclosure documents, provided it does not include personal information about an

individual or franchisee other than the franchisor. Franchisors may also disclose information that is relevant to their franchise system, such as disclosure documents, key facts sheets and the standard form of franchise agreement.

Clauses 9(1A)(b) and (c) have been updated to require franchisors to provide disclosure documents and key fact sheets created in the financial year they were created, not just those that have been updated in the financial year.

The amendment introduces a penalty for not disclosing the information pursuant to clauses 53C(2) and 53D(2), and failing to update the profile pursuant to clause 53E(2). Civil penalties of up to 600 penalty units or \$133,200 apply.

1.7 Competition and Consumer (Industry Codes - Franchising) Amendment (Penalties and other Matters) Regulations 2022 (Amending Regulations)

On and from 15 April 2022 new and increased penalties were introduced to the Code.

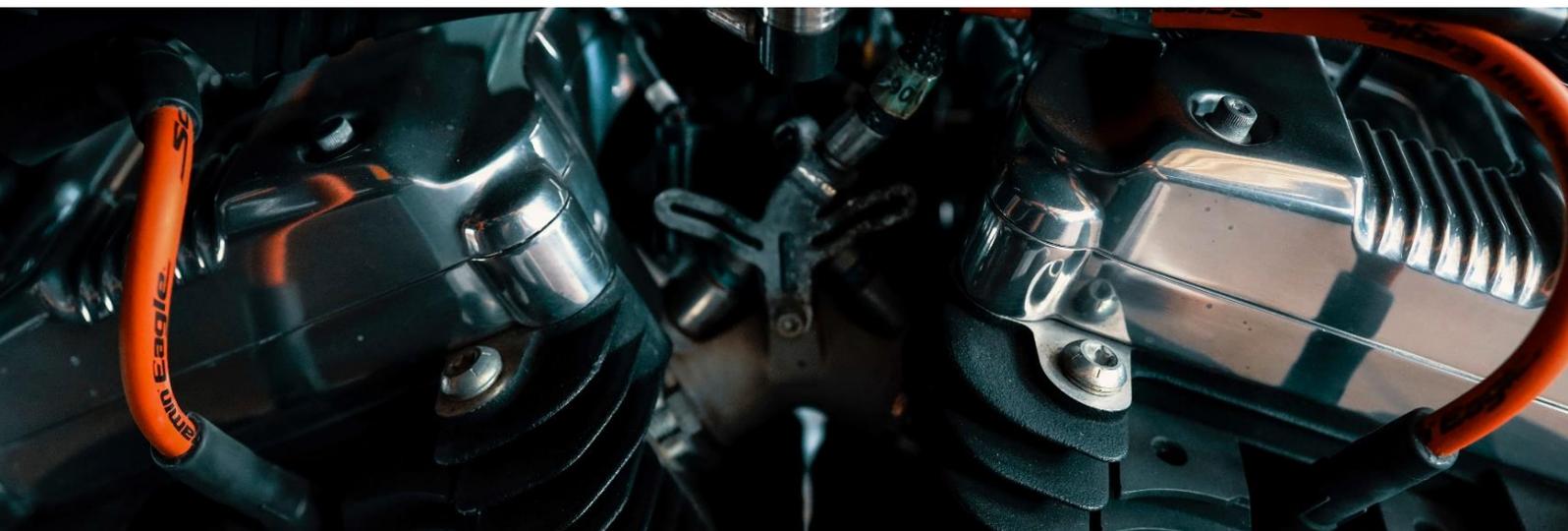
a) Super Penalty

The Amending Regulations have introduced a new 'super penalty' which can amount to:

- i. If the franchisor is a body corporate, the greater of,
 - a) \$10M;
 - b) if the Court can determine the value of the benefit, whether a direct benefit or indirect benefit, obtained by the franchisor (or related body corporate of the franchisor) attributable to the contravention - 3 times the value of the contravention; or
 - c) if the Court cannot determine the value of the benefit, 10% of the annual turnover of the franchisor in the prior 12 months from the contravention.
- ii. if the franchisor is not a body corporate, \$500,000.

The clauses to which the super penalties apply are:

- i. clause 17, which requires a franchisor to give ongoing disclosure of financial details;
- ii. clause 33, which obligates franchisors not to restrict or impair with a franchisee's ability to associate with other franchisees for a lawful purpose; and
- iii. clauses 46A(1), (2) and (3) and 46B, which applies to New Vehicle Dealership Agreements.



b) Increased Penalty Units

The Amending Regulations have increased the maximum civil penalty for many clauses from 300 penalty units to 600 units or \$133,200.00. These new penalties apply on and from 15 April 2022. A summary of the penalties increased to 600 units are as follows

Clause(s)	Heading/Issue	Penalty
6(4) and 6(5)	Good Faith - Agreement or another document cannot limit or exclude good faith obligation(s)	600 Units
11(1)	Obligation to give an information statement	600 Units
15(4)	Obligation to give a copy of annual marketing fund financial statement and audit report within 30 days	600 Units
22	Prohibition on require a franchisee to pay franchisor's costs of settling a dispute	600 Units
25(2)	Obligation not to unreasonably withhold consent to a transfer of a franchise agreement	600 Units
25(6)	Obligation not to unreasonably revoke consent to a transfer of a franchise agreement	600 Units
27(4)	Obligation not to terminate a franchise agreement because of a breach if remedied	600 Units
29(2)	Obligation not to terminate for particular grounds unless it has given 7 days written notice of the termination and grounds for it	600 Units
30(1)	Obligation not to require a franchisee to incur a significant capital expense	600 Units

c) Information Statements

The Amending Regulations will require that franchisors provide a copy of the Information Statement not later than seven days after a prospective franchisee applies or expresses interest in a franchise agreement. The Information Statement must be given before any formal disclosure documentation is provided to prospective franchisees.



2. Proposed Legislation

2.1 Australian Light Vehicle Standards Rules and Heavy Vehicle (Vehicle Standards) National Regulation 2022 Amendment Package Consultation Report

The *Australian Light Vehicle Standard Rules (ALVSR)* and the *Heavy Vehicle (Vehicle Standards) National Regulation (HV(VS)NS)* are updated by the National Transport Commission (NTC) about every two years. The NTC is currently analysing feedback from the proposed amendments and will seek ministerial approval once this process has concluded. The updates are made to support contemporary, productive and safe transport outcomes.

a) Key points of the proposed amendment

The proposed amendments address emerging issues with the standards identified by key stakeholders. Specifically the amendment seeks to:

- i. clarify the position on left-hand drive vehicles within the standards and the Australian Design Rules (ADRs);
- ii. seek to improve the safety of after-market accessories fitted to vehicles update terminology and references to align with the *Road Vehicle Standards Act 2018* and address minor drafting errors; and
- iii. clarify the flash rate of warning lights on school buses.

b) Left-hand drive - conflict between ALVSR and ADR

Vehicles supplied to the Australian market must meet the ADRs in relation to their design and manufacture. When being used for transport on roads, vehicles must also meet the corresponding in-service standards (e.g. ALVSR). Different references to age in relation to the position of the steering column has caused confusion amongst officers of state and territory departments responsible for enforcing vehicle standards. For example:

- i. the ADR 42/00 section 42.5.1 provides that from 1 July 1988, all vehicles designed and manufactured for first supply to the Australian market must be right-hand drive; and
- ii. rule 26 of the ALVSR states that a left-hand drive vehicle cannot be driven on Australian roads unless it meets the age criteria set by the jurisdiction (usually 30 years) or is otherwise exempt.

The proposed amendment seeks to clarify that the ALVSR applies with regards to the position of the vehicle's steering column, and not the equivalent ADR. The amendment will not alter the position of the age reference in the ADR.

c) Security of Equipment Fitted to Vehicles

There have been incidents of after-market accessories detaching from vehicles during its journey. The ADR's set requirements for the design, construction and manner in which exterior objects or fittings are affixed to vehicles by the original manufacturer. These requirements do not apply to subsequent manufacturers who fit accessories to the exterior of the vehicle once it is dispatched from the original vehicle manufacturer. For example, there is no requirement in the ALVSRs to ensure that after-market accessories fitted to vehicles from the original manufacturer are fitted and maintained appropriately so that they do not detach from the vehicle. The amendment seeks to provide a mechanism in the ALVSRs to enhance the security of after-market accessories fitted to vehicles.

d) School Bus Warning Lights - Flashing Lights

The vehicle standards set requirements for warning lights and signs on buses carrying children. The busses must be fitted with warning lights and signs to the front and rear of the bus. The standards also specify how they must perform and operate. The current standards specify that the 'warning light' must flash alternatively between a rate of 90 and 180 flashes per minute. The proposed amendments seek to clarify that the flash rate applies to a pair of warning lights as opposed to a single warning light.

In light of the above, it is necessary that dealers have a complete understanding of the proposed ALVSR amendments to ensure that all practices are in compliance with the new amendments.



2.2 Extension on rule changes for vehicle importers under the Road Vehicles Standards Act 1989 (Cth)

Vehicle importers in Australia are governed by the *Motor Vehicles Standards Act 1989 (Cth)* (**MVSA**), which as of November 2018 is being slowly phased out for the *Road Vehicles Standards Act 2018 (RVSA)*. The transition period between MVSA and the RVSA has recently been extended for a further 12 months, following a recent bill introduced by the Federal Government.

This delays the effective start date of the new Act from 1 July 2022, until 1 July 2023. The extension of the transition period aims to ease such delays and provide more time for adaptation between the Acts, a spokesperson from the Department of Infrastructure, Transport, Regional Development and Communications (Department) saying that the extension period would now *'ensure the uninterrupted supply of a range of road vehicles by allowing impacted businesses to finalise their transition to the RVS legislation while managing demands for their vehicles using the transitional arrangements.'*

Under the MVSA and the Specialist and Enthusiast Vehicle Scheme (**SEVS**), the number of privately imported vehicles into Australia is capped. The MVSA requires buyers to apply for vehicle import approval, following which the vehicle must be checked by an independent engineer to ensure it meets compliance regulations under the Australian Design Rules and SEVS criteria. Whilst the MVSA caps the number of vehicles approvals it will provide, the RVSA does not operate with a strict cap. It also reduces the number of SEVS criteria that need to be met by the imported car from two out of four criteria, to one out of six.

As the transition between the two systems is occurring, vehicle importers are currently operating under a combination of the two systems. This has resulted in confusion, and a hold-up in the importation process after the Department froze certification of vehicles imported by agents, as some were exceeding their quota while many importers were not aware that this system was still operating.

2.3 Motor Dealers and Repairers Amendment (Statutory Review) Bill 2022 (Bill)

The *Motor Dealers and Repairers Act 2013 (NSW)* (**Act**) and the Motor Dealers and Repairers Regulation 2014 (**Regulation**) provide the regulatory framework for the buying, selling and repair of motor vehicles in NSW.

In 2020, NSW Fair Trading undertook a Statutory Review of the Act (**Review**) as required under section 191 of the Act to ensure that its policy objectives remain valid and the terms of the Act remain appropriate for securing those objectives.

While the Review found that the objectives of the Act were still valid, NSW Fair Trading, on behalf of the NSW Government, prepared the Bill outlining amendments to ease regulatory burdens and adapt to changing business models and new technologies in the automotive industry. A spokesperson from the Australian Automotive Dealers Association said in a statement in response to the Bill that 'This decision will help prevent consumer detriment and harm to all licensed Dealers in NSW'.

The key proposed amendments are set out below:

a) New legislative framework to permit and regulate the online sale of motor vehicles by motor dealers

To recognise shifting consumer preferences and emerging online motor dealing trends, amendments have been made to the notified premise provisions to allow for the entire purchase process of a vehicle to take place online.

Specific requirements for online motor dealers have been introduced, including additional information on licence applications (the website URL), motor dealer licence numbers on all website and advertising materials, restricting online end-to-end sales to new cars only, protections for a purchaser around inspection and maximum deposits and additional protections for online purchasers when a motor vehicle is defective.

b) Replace the requirement for motor dealers, motor vehicle recyclers and motor vehicle repairers to maintain separate registers for specified matters

To streamline administrative work for dealers and future-proof vehicle sales, repairers and recyclers, the Bill amends section 100 of the Act to remove the requirement to maintain physical registers. Instead moving to a requirement that ensures particulars required by the Regulation are captured in a flexible system that can meet the needs of authorised officers in ensuring compliance with the Act.

c) Cashless transactions to help prevent fraud

The Bill incorporates elements of the *Scrap Metal Act 2016* (NSW) to introduce cashless transactions for recyclers which would allow for greater enforcement and auditability of scrap metal dealers and prevent the theft and disposal of stolen vehicle and parts.

The Bill introduces a new offence for anyone who advertises to pay in cash for scrap metal. The Bill also removes section 57(2) of the Act that currently allows for exceptions/alternatives to the requirements to provide a current inspection report at a sale auction.

d) Dealer guarantee for defective vehicles under the Act and consumer guarantees under the ACL

The Bill amends sections 67, 68, 77 and 113 to better align the current dealer guarantees under the Act, with consumer guarantees under the Australian Consumer Law (ACL).

There will be more remedy options for the consumer, including obtaining a refund or a replacement vehicle where there is a defective vehicle in addition to the current remedy of having the vehicle repaired.

Authorised officers will be able to be issued a Rectification Order, where there is a breach of a consumer guarantee.

e) New offences and increases in maximum monetary penalty for various offences

Further details about the Bill can be found in the Explanatory Paper [here](#). Public consultation was closed on 14 March 2022 for evaluation and review of the feedback. Motor dealers and repairers should look out for a final report on the outcomes of the consultation, including a summary of the feedback collected as well as any relevant recommendations, on NSW Fair Trading's website [here](#).

2.4 Tasmanian Bill follows a major review of retail leases law in Tasmania

The *Retail Leases Bill 2022 (TAS) (Bill)* will replace the existing Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 which is due to be repealed on 1 January 2023. The Bill seeks to provide a new and contemporary regulation of retail leases in Tasmania.

The Bill applies to all retail leases entered into after the commencement of the Bill, excluding leases with a lettable area of more than 1000 square metres or retail leases for terms of less than six months where there is no right for the tenant to extend a lease.

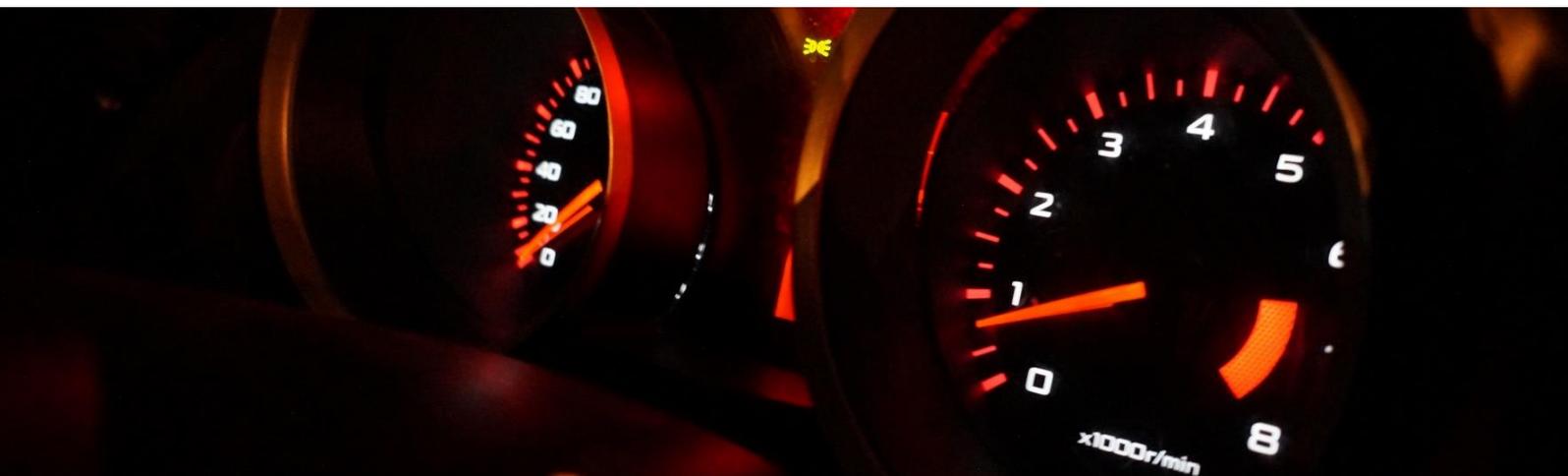
The Bill proposes to regulate the following matters within the retail leasing sector:

- a) mandatory pre-contract disclosures regarding costs and charges arising under a lease and other matters relevant to a retail premises and/or a retail lease;
- b) rent payments and rent calculations (i.e. the bases and formulae for rent calculations);
- c) timing and conduct of rent reviews;
- d) prohibition of the payment of key-money;
- e) renewal, termination and expiry of retail leases (setting out processes or procedures and the rights of the respective parties in relation to those things);
- f) prohibition of unconscionable conduct by landlords or tenants; and
- g) mandatory dispute resolution mechanisms and processes for retail lease disputes.

The Bill also proposes to give the Director of Consumer Affairs certain powers and functions relating to retail lease matters, including:

- i. the power and function to create a Retail Leases Guide, which a landlord must provide to a prospective tenant during negotiations about a retail lease or retail premises;
- ii. powers to make determinations relating to retail leases and requiring persons to provide a retail lease for inspection;
- iii. powers and functions to investigate and research matters relating to retail leases;
- iv. powers and functions of informing the public, tenants and landlords regarding retail leases;
- v. powers to investigate infringements and take appropriate actions to ensure enforcement of matters dealt with by the draft Bill; and
- vi. powers to produce model retail lease documents for viewing or for sale.

Further details about the Bill can be found in the Infosheet [here](#). Public consultation was closed on 30 April 2022 for evaluation and review of the feedback. Anyone with an interest in retail lease arrangements in Tasmania should keep a look out for a final report on the Bill on the Department of Justice's website [here](#) once the Tasmanian Government has determined proposed policy positions for the Bill.



3. Policy Update

3.1 Australia-Germany Hydrogen Incubator (HyGATE) Funding | ARENA & \$20M Renewable Hydrogen Freight Refuelling Network

The National Hydrogen Strategy, released in 2019, outlines Australia's aim to become a major producer and exporter of clean hydrogen by 2030.

In March 2022, the Australian Renewable Energy Agency (ARENA) opened funding rounds focusing on supporting 'real world pilot, trial and demonstration projects that deliver innovative hydrogen technology projects' including funding proposals for deployment stage projects related to any aspect along the entire value chain for hydrogen produced from renewables. Australia and Germany have respectively committed up to \$50 million and €50 million to establish the HyGATE Initiative, aiming to bring down costs through international collaboration. Former Minister for Industry, Energy and Emissions Reduction Angus Taylor said that 'it is through these important partnerships and attracting international investment that we will reduce the costs of the low emissions technologies and accelerate their widespread deployment in industry'.

Further to this, in March 2022, the Victorian, NSW and Queensland Governments jointly funded a \$20 million project to build Australia's first renewable hydrogen refuelling station network. The funding will be used towards the construction of at least four renewable hydrogen refuelling stations between Sydney and Melbourne. The project is expected to be operational by 2026 and the three governments have signed a Memorandum of Understanding to cooperate on the development. While the funding is aimed at improving the trucking industry, it lays foundations in preparing the broader transport sector for large scale renewable hydrogen use.

3.2 ACCC 2022-23 Compliance and Enforcement Priorities

On 3 March 2022, the Australian Competition and Consumer Commission (ACCC) has published its 2022-2023 Compliance and Enforcement Priorities. The ACCC identified two key priorities that impact the vehicle dealership and vehicle hire industry:

a) Empowering consumers and improving industry compliance with consumer guarantees, with a focus on high value goods including motor vehicles and caravans:

The sale, hire or lease of a vehicle will be bound by the consumer guarantees within the ACL if the sale, hire or lease is for under \$100,000 or over \$100,000 and are normally used for personal or household use. Therefore, the type of vehicle sold, leased or hired will increasingly become relevant if the cost exceeds \$100,000.

b) Ensuring that small businesses receive the protections of the competition and consumer laws and industry codes of conduct, including in agriculture and franchising:

See update to franchising Code of Conduct set out in section 1.6 above.

3.3 Queensland's Zero Emission Vehicle Strategy 2022 - 2032

The Queensland Government has announced their Zero Emission Vehicle Strategy for 2022 - 2032. The aim of the strategy is to power Queensland with 50% renewable energy by 2030, a 30% reduction on 2005 emissions by 2030 and zero net emissions by 2050. The Queensland Government aims to meet their targets by encouraging greener transport modes through Zero Emission Vehicle manufacturing and supply chain capability, facilitating supportive Zero Emission Vehicle infrastructure and advocating to encourage the adoption of Zero Emission Vehicle's and ensure the transport network funding is sustainable.

3.4 Funding to Increase Fuel Quality

The Federal Government has allocated \$250 million in funding to improve Australia's fuel quality. The funding will be split equally between the Ampol facility in Brisbane, QLD, and the Viva Energy refinery in Geelong, VIC, for major upgrades in the standard of fuel produced. The funding will be matched by the companies, making the total investment in upgrading the facilities to \$500 million.

The funding has been welcomed by the Federal Chambers of Automotive Industries stating that increasing Australia's fuel quality is an important move in assisting "Australia's internal combustion fleet to run more efficiently".

3.5 Further EV Subsidies - Victoria

The Victorian Government has allocated an additional \$7.2 million in electric vehicle subsidies. The extra funding equated to another 2,600 buyers for Victorian motorists at \$3,000.00 per vehicle. On 2 May 2021, the subsidy was first introduced for the first 20,000 electric vehicles (**EVs**) or fuel-cell electric vehicles (**FCEVs**) sold under \$68,740.00 before on-road costs.

In addition to the subsidy, Victoria's EV incentives include a \$100 discount on annual registration fees and reduced stamp duty for all zero-emission vehicles. The Federal Chambers of Automotive Industries has welcomed the subsidies but states a broader approach to lowering emission is still necessary.

3.6 Luxury Car Tax Thresholds Increase

Changes to the Luxury Car Tax (**LCT**) were enacted on 1 July 2022 and have resulted in significant tax threshold increases, significantly benefiting consumers who purchase zero-emissions and fuel-efficient luxury vehicles as opposed to less fuel efficient vehicles.

The threshold for the LCT has increased by its most significant margin in years, rising by 3.9 per cent to \$71,849 for the financial year 2022-23, a dramatic rise from \$69,152 in the 2021-2022 financial year. However, zero-emissions vehicles such as electric cars and vehicles with fuel consumption that does not exceed 7.0L/100km on the combined cycle, have received a drastically more favourable threshold increase, jumping by 6.6 per cent to \$84,916 for the financial year 2022-23 (up from \$79,659 in the 2021-2022 financial year).

The new thresholds mean that the LCT rate of 33 per cent will be applied to every dollar above these new thresholds.

4. Case Law Update

4.1 *Snowy Mountains Grammar School Ltd v Adventurer AWD Pty Ltd [2021] NSWSC 1602*

Background

The Applicant, Snowy Mountains Grammar School, purchased a bus for \$150,000. Pursuant to the *Motor Vehicle Standards Act 1989 (Cth)* the bus was a 'new vehicle' with a 'date of manufacture' of February 2018. The bus was imported from China where it had undergone a relatively protracted design and manufacturing process, because the standards which applied to vehicles supplied to the Australian market, the Australian Design Rules, had changed. Different elements of the bus were produced at different times; the chassis was manufactured in 2012, while other components were manufactured as late as 2017. Compliance plates were affixed to the Bus in February 2018, after it was imported to Australia.

The Applicant sought declaratory relief that it validly rescinded the contract for sale. Failing that, the school sought damages for misleading and deceptive conduct as the bus was represented to be 'new'.

Issue

The main issues between the parties was whether the representation that the bus was 'new' contravened the ACL.

Outcome

The claims for declaratory relief were declined. However, it was found the defendants did contravene the ACL. While the bus was 'new' according to the Motor Vehicle Standards Act, it was not 'new' for the purposes of the ACL as the vehicle had suffered significant deterioration due to prolonged outdoor storage, was not of recent origin, and the vehicle had not been repaired such that it was "as good as new".

Significance to the automotive industry

While a vehicle may be considered as 'new' pursuant to the Motor Vehicle Standards Act, it may not be 'new' for the purposes of ACL.

The full judgement of this case can be found [here](#).



4.2 *Williams v Toyota Motor Corp Australia Ltd [2022] 344*

Background

This case was a class action. Between 1 October 2015 and 23 April 2020, 264,170 Toyota cars in the Prado, Fortuner and HiLux ranges that were fitted with '1GD-FTV' or '2GD-FTV' diesel combustion engines, were supplied to consumers in Australia. Each of these vehicles were supplied with a diesel exhaust after-treatment system which was defective because it was not designed to function effectively during all reasonably expected conditions of normal operation and use of the vehicle. Members of the class action were experiencing faults such as smoke coming out of their cars exhaust, malodour and, as a result, the car would use more diesel leading to excessive service notifications.

Issue

Two claims were made by the members of the class action:

1. Firstly, that the vehicles were not of 'acceptable quality' and therefore failed to comply with the statutory guarantee in s 54 of the ACL.
2. Secondly, that Toyota made misleading representations and omissions about the vehicles, in contravention of sections 18, 29(1)(a) and (g), as well as section 23 of the ACL.

Outcome

The Court found that the vehicles were not of acceptable quality because of the defective diesel filter systems. It was also found that Toyota's conduct in marketing the vehicles as being of acceptable quality was misleading. The court found that the defects to the cars reduced the value of each vehicle by an average of 17.5%.

Significance to the automotive industry

The amount of damages awarded could total more than \$2 billion. Car and vehicle manufacturers should be diligent about their manufacturing and marketing processes, as significant penalties can apply.

The full judgement for this case can be found [here](#).



4.3 *Automotive Invest Pty Ltd v Commissioner of Taxation (Gosford Classic Car Museum) [2022] FCA 281*

Background

The Applicant opened the Gosford Classic Car Museum on 28 May 2016. The Museum had a collection of vintage and luxury cars which were on view for visitors. Alongside its museum business the Applicant also held auctions, actively selling from its collection. The Applicant operated on the understanding that they did not need to pay the Luxury Car Tax, which is not paid on trading stock car fleets, since they were selling vehicles.

The ATO decided that the Applicant held the cars for a purpose other than being trading stock. Despite the Applicant dropping the word 'museum', not advertising as a museum, and not charging admission fees, the Applicant was required to pay a Luxury Car Tax on the vehicles it bought. The Applicant appealed the ATO's decision.

Issue

The main issue of this case was whether the Applicant was using the cars as trading stock "and for no other purpose".

Outcome

The Court found that the Applicant was using the cars for a purpose other than trading stock. The Museum's argument that the museum concept was only a unique and inventive means of selling stock. To avoid paying Luxury Car Tax, being used as trading stock must be the sole purpose.

The Museum has since closed, citing its dispute with the ATO as the primary reason for closing.

Significance to the automotive industry

Dealers must take care to ensure that cars are used as trading stock only, otherwise some tax exemptions will not be available. 'Creative' marketing, such as museums, may expose you to additional tax liabilities.

The full judgement for this case can be found [here](#).



4.4 *Edwards v Caravan & RV Central Pty Ltd [2022] NSWCATCD 26*

Background

On or about 29 April 2018, the Applicants attended the Sydney Caravan and Camping Show. During their attendance, they spoke with a sales representative of the Respondent, expressing interest in a caravan and disclosing that they needed a caravan which could be towed in remote areas and that they wanted to free camp for periods of up to two weeks. The Applicants were told by the sales representative that the caravan was suitable, but extra care was needed on rutted, corrugated, or uneven surfaced and extra solar panels and a battery was required for a compressor fridge. The Applicants also received a flyer that promoted the caravan as one that allowed purchasers to access more remote locations by allowing them to be self-sufficient for longer. The Applicants subsequently purchased the caravan and followed to advice on the solar panels and battery.

On receiving the delivery, the Applicants noticed issues with the door sticking, but were told that the issues would ease over time. Over time, other issues arose including issues with the power, fridge, heater, hot water system, piping, meters, the floor, cracks in welding and walls, and the affixation of various items. Consequently, the Applicants could not use the caravan as intended. They could not camp in remote areas for extended periods of time. They had taken the caravan in for multiple repairs but many issues were not adequately addressed. The caravan was put into storage late in 2020 before being traded in on 8 March 2021 to a third party.

Issue

The Applicants sought compensation under the ACL claiming that the caravan was not of acceptable quality and was unfit for purpose. The ACL requires goods supplied in trade or commerce to be of acceptable quality and fit for purposes that a consumer makes known to the supplier.

Outcome

The Tribunal held that the caravan was not of acceptable quality as it did not meet the standards that are imposed by ACL. The Tribunal held that the caravan was not fit for all the purposes for which caravans are commonly supplied. It was also held that the caravan was not free from defects, safe, or durable due to the issues experienced by the Applicants. The issues with the door were highlighted as a safety issue.

The Tribunal also held that the caravan was not fit for the purposes that the Applicant's disclosed to the Respondent's sales representative during the Sydney Caravan and Camping show. Through the sales representative, the Respondent made representations to the Applicants that they could use the caravan for their disclosed purposes. The Applicants relied on those representations and subsequently could not use the caravan for the disclosed purposes due to the power and fridge issues they experienced.

The Respondents argued that the Applicants had breached the terms of their warranty, however, warranties cannot restrict or modify rights and obligation contained in consumer law.

Due to the ongoing nature of many of the issues, the Tribunal also rejected claims that the issues experienced by the Applicants amounted to teething issues and that they had not been given a proper opportunity to repair the caravan. The Tribunal found that occasionally, the Applicants engaged third parties to carry out repairs out of necessity, but that this did not impact the Respondents' opportunities to carry out repairs.

Finally, contemporaneous records of the initial conversations between the Applicants and Respondents about the issues contained no denial of responsibility for the ongoing and recurring defects or any allegations of misuse.

The Tribunal, therefore, awarded compensation for reduction in value and foreseeable loss and made separate determinations on each item of foreseeable loss claimed by the Applicants.

Significance to the automotive industry

This case is a reminder of the strict nature of consumer law requirements. Additionally, it shows that care needs to be taken in the preparation of marketing materials and training of sales representatives. Additionally, evidence that sales representatives are not trained to make certain representations may not be enough to overturn direct evidence that a sales representative made such representations.

The full judgement for this case can be found [here](#).

4.5 *ZG Operations Australia Pty Ltd v Jamsek (2022) 96 ALJR 144*

Background

The Respondents were engaged by the Applicants from 1977-2017. Beginning in 1980, the Respondents were employed as truck drivers. However, in later 1985 or early 1986, the company decided that they would only continue engaging the truck drivers under a contractual relationship. This arrangement would also require the Respondents to purchase their own trucks. The Respondents agreed to this, setting up partnerships with their respective wives.

They purchased trucks and entered into the agreement through those partnerships. Any accrued annual leave was paid out at this point. The Respondents continued providing trucking services in this manner until 1993, when a new contract was negotiated. The new contract changed the calculation of their payment from a daily to an hourly rate and also provided for unpaid annual leave. In addition, it stated that the hourly rate included allowances for annual leave, public holidays, and sick days. New contracts were negotiated several times between 1998 and 2008, each increasing the hourly rate of pay due to concerns about rising operating costs. However, there was no substantial change in the parties' obligations.

After the agreement to provide trucking services was terminated in 2017, the Respondents commenced proceedings in the Federal Court seeking to recover statutory entitlements owed to them as employees. Initially, the primary judge held that the Respondents were not employees, but were independent contractors. On appeal to the Full Court of the Federal Court, it was held that they were employees. This case is an appeal from the decision of the Full Court of the Federal Court.

Issue

The main issue was whether the Respondents were employees or contractors. The resolutions of this issue would determine whether the Respondents were able to receive the statutory entitlements that they had claimed.

Outcome

The High Court held unanimously that the Respondents were not employees.

In contrast to the assessment of the substance and reality of the relationship carried out by Full Court of the Federal Court, the majority of the High Court referred to the rights and obligations set out in each contract in order to determine whether the Respondents were employees. The Court considered the partnerships were obligated to incur the maintenance costs related to the vehicles, insurance policies including motor vehicle and public liability insurance, and complying with all legal requirements to drive including maintaining driver's licenses and motor vehicle registrations. Essentially, the partnerships were each obligated to provide, maintain, and operate the trucks to carry out delivery services and bear the costs for doing so in return for monetary compensation.

Additionally the partnerships were not required to provide services exclusively to the Applicants. Finally, while the contract gave the Applicants the right to give directions regarding deliveries, the majority of the High Court determined that this was not a right that extended to directing how the partnerships could carry out the deliveries. Rather, the partnerships were obliged to follow directions regarding what deliveries to carry out but were able to determine for themselves how to carry out the deliveries.

Significance to the automotive industry

This case gives dealerships some further insight on dealings with contractors especially where the contractors are responsible for their own equipment and expenses. For relationships governed comprehensively by written contracts, courts will look to the rights and obligations set out in the contract to determine the nature of the relationship despite some provisions of the contracts otherwise referring to terminology or benefits traditionally associated with an employment relationship.

The full judgement for this case can be found [here](#).



4.6 *PPT Investments Pty Ltd v DRE Group Pty Ltd [2022] NSWCATAP 157*

Background

PPT Investments (**Appellants**) appealed the decision of the Tribunal which found that a new BMW X5 motor vehicle sold to the Respondent in 2015 was not of acceptable quality under section 54 of the ACL.

When the turbo failure was presented to the Appellants, it was stated that the vehicle was out of warranty, and considering that it had not been serviced in the BMW network, BMW Australia would not cover the cost of repair of the turbo charger.

During the Tribunal hearing the mechanics of the Respondent (who were related to a director of the Respondent), who carried out servicing of the vehicle, gave evidence that the disintegration of the turbo was not consistent with wear and tear. The Tribunal gave weight to this evidence, determining that the failure of the vehicle represented a major failure.

The Appellants were represented by HWL Ebsworth Lawyers.

Issue

Whether the Tribunal correctly applied the test in section 54(2) of Australian Consumer Law, which sets out the five matters required for goods to be judged of acceptable quality. That is, (1) fit for purpose, (2) acceptance in appearance and furnish, (3) free from defects, (4) safe, and (5) durable.

To be of acceptable quality goods must 'must possess all of the qualities listed in s 54(2), to the requisite standard': *Williams v Toyota Motor Corporation Australia Limited (Initial Trial)* [2022] FCA 344

Outcome

The appeal was allowed and the decision of the Tribunal was set aside.

The Respondent had the onus of proving that the vehicle was not of acceptable quality at the time of supply by showing that the vehicle did not possess one or more of the qualities listed in section 54(2) of the ACL (as set out above). The court found that the vehicle only lacked one of the qualities, being durability. However, a lack of durability could not be proven by the evidence at the time of supply.

The court also found that *'the question of acceptability is a question of fact and degree. In addition, in our opinion, goods are not lacking in durability merely because some risk (of failure) is inherent in them'*. It is also important to bear in mind that, when assessing acceptable quality, the reasonable consumer will accept some degree of risk as to durability in relation to motor vehicles.

Significance to the automotive industry

This decision highlights the integrity of the section 54(2) test for acceptable quality and the requirements for courts and tribunals to expressly deal with the factors contained in section 52(2) of the ACL, being fit for purpose, acceptance in appearance and furnish, free from defects, safe and durable.

The full judgement for this case can be found [here](#).

4.7 ***Australian Competition and Consumer Commission v Honda Australia Pty Ltd [2022]***

Background

In May 2019 Honda Australia moved from a franchised model to an agency model. By 30 June 2021 Honda terminated 36 of its authorised dealerships' franchise agreements, this included the Astoria and Tynan dealerships.

The ACCC alleges that between January 2021 and June 2021 Honda Australia falsely represented through emails, text messages and phone conversations, to Astoria and Tynan customers that the dealerships had closed and would no longer service any Honda vehicles. It is also alleged that Honda Australia directed Astoria and Tynan customers to contact a Honda dealership or Honda Service Centre to book their next service.

This information was false, both dealerships continued to operate after the franchise agreements were terminated and were still able to service Honda vehicles.

On 13 April 2022, the ACCC started Federal Court proceedings against Honda Australia alleging that they deprived customers of making an informed choice about options for servicing their car and that they caused harm to the Astoria and Tynan businesses. The ACCC is seeking declarations, pecuniary penalties and costs.

Issue

The key issue is whether Honda Australia misled consumers about their options for servicing their Honda vehicles.

Outcome

Proceedings are ongoing.

Significance to the automotive industry

ACCC has demonstrated that it will try to protect dealerships from the conduct of former franchisors.



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