

## AUTOMOTIVE INDUSTRY GROUP

Regulatory Update

December 2022



## Table of Contents

<b>Introduction.....</b>	<b>3</b>
<b>1. Legislation Update .....</b>	<b>4</b>
1.1 Expansion of Unfair Contract Terms and Competition Penalty Regimes .....	4
1.2 Fringe benefits tax exemptions for electric cars .....	5
1.3 Proposed Legislation in previous iterations of the Auto-Reg Update .....	6
<b>2. Proposed Legislation .....</b>	<b>8</b>
2.1 National Electric Vehicle Strategy Consultation Paper .....	8
2.2 Road Vehicle Standards (Consequential and Transitional Provisions) Amendment Bill 2022 (Cth) .....	9
2.3 Treasury Laws Amendment (Electric Car Discount) Bill 2022 (Cth) .....	9
2.4 Occupational Licensing (Automatic Mutual Recognition Consequential Amendments) Bill 2022 (TAS) .....	10
<b>3. Policy Update .....</b>	<b>11</b>
3.1 ACT Zero Emissions Vehicles Strategy 2022 - 2030 .....	11
3.2 Queensland's Zero Emission Vehicle Strategy 2022 - 2032 and Zero Emission Vehicle Action Plan 2022 - 2024 .....	12
3.3 Powering Australia Plan .....	12
3.4 South Australia's Electric Vehicle Action Plan .....	14
3.5 National Battery Strategy .....	15
3.6 Broader Development of the NSW Net Zero Emissions Freight Policy .....	16
<b>4. Case Law Update .....</b>	<b>17</b>
4.1 <i>Haselhurst v Toyota Motor Corp Australia Ltd t/as Toyota Australia; Whisson v Subaru (Aust)         Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia [2022] NSWSC 1076</i> .....	17
4.2 <i>Class action against Toyota Motor Corporation Australia Limited</i> .....	18
4.3 <i>BMW Australia Finance Ltd v Trigas [2022] NSWDC 279; BMW Australia Finance Ltd v Trigas         (No. 2) [2022] NSWDC 342</i> .....	18
4.4 <i>Competition and Consumer Commission (ACCC) v Mercedes-Benz Australia/Pacific Pty Ltd         [2022] FCA 1059</i> .....	19
4.5 <i>Mitsubishi Motors Australia Ltd v Begovic [2021] VSC 252</i> .....	20
4.6 <i>AHG WA (2015) Pty Ltd T/A Mercedes-Benz Perth &amp; Westpoint Star Mercedes-Benz &amp; Ors v         Mercedes-Benz Australia/Pacific Pty Ltd</i> .....	21
<b>Our National Automotive Team .....</b>	<b>22</b>

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## Introduction

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### Welcome to the HWL Ebsworth Automotive Industry Group - Regulatory Update

HWL Ebsworth Lawyers 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), Jock Lehman (Associate) and Peter Pertsoulis (Solicitor) who are members of the HWL Ebsworth Automotive Industry Group.

### Headlines

- The expansion of the unfair contract terms and competition penalty regime (see [part 1.1](#)).
- The Federal Government continues to develop its National Electric Vehicle Strategy aimed at increasing the supply of affordable and accessible electric vehicles (see [parts 2.1](#) and [3.3](#)).
- The Federal Government announces its 'A Future Made in Australia' policy to promote domestic manufacturing (see [part 3.5](#)).



# 1. Legislation Update

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## 1.1 Expansion of Unfair Contract Terms and Competition Penalty Regimes

On 27 October 2022, the Commonwealth Parliament enacted the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth) (Act)*, introducing amendments to the *Competition and Consumer Act 2010 (Cth)* and the *Australian Securities Investments Commission Act 2001 (Cth)*. Characterised by Assistant Minister for Competition, Charities and Treasury, Dr Andrew Leigh MP, as increasing fairness, improving the cost of living, enhancing the resilience of supply chains, and promoting jobs and skills, there are effectively two types of reform implemented by the Act, namely:

1. increased penalties for contraventions of certain provisions of the *Competition and Consumer Act 2010 (Cth)* (and, relatedly, the Australian Consumer Law); and
2. the introduction of penalties for businesses that include unfair contract terms in their standard form contracts.

The increased penalties for contraventions of the *Competition and Consumer Act 2010 (Cth)* will apply to contraventions occurring from the day of Royal Assent while the penalties for unfair contract terms will come into effect 12 months thereafter. The amendments that will be explored below are largely designed to deter bad behaviour by increasing the scale and scope of penalties under the Act.

### Increased Competition Penalties

Previously, the maximum financial penalties for a contravention of the *Competition and Consumer Act 2010 (Cth)* by a business was the greater of: \$10 million; three times the value of the 'reasonably attributable' benefit obtained from the business as a result of its contravening conduct; or, if a court could not determine the benefit, 10 per cent of the business' adjusted turnover during the breach period.

Under the Act, the maximum financial penalties for businesses have been increased to the greater of:

- i) \$50 million;
- ii) three times the value of the 'reasonably attributable' benefit obtained from the business' conduct; or
- iii) if a court cannot determine the benefit, 30 per cent of the business' adjusted turnover during the breach period.

The Act also increases the maximum penalties for individuals from \$500,000 to \$2.5 million.

These maximum penalties apply to a range of offences and penalty provisions under the *Competition and Consumer Act 2010 (Cth)*, including cartel offences and Australian Consumer Laws relating to unconscionable conduct, false or misleading representations and the supply of products that are non-compliant with safety or information standards. Businesses should be cautious of the widened scope of offences to which these penalty provisions apply.

## Unfair Contract Terms

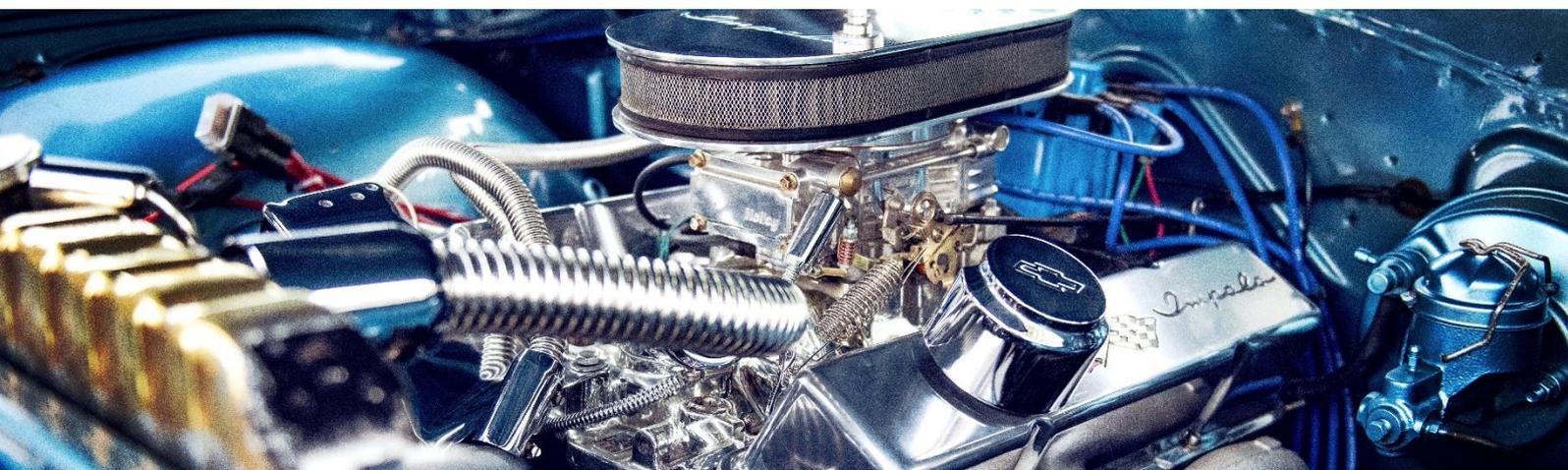
Schedule 2 of the Act introduces greater protections for consumers and small businesses by prohibiting the inclusion of 'unfair' terms in standard form consumer and small business contracts. In endowing Courts with the power to impose penalties against businesses that contravene this new unfair contracts terms regime, the Act represents a marked departure from the previous regulatory landscape where unfair terms were not prohibited and could only be declared void by Courts. Significantly, this new regime adopts a relatively broad definition of 'small business contracts', being contracts with businesses that employ fewer than 100 persons or have an annual turnover of less than \$10 million. Given the breadth of the operation of the regime it will be prudent for all businesses to review their standard form contracts before these new prohibitions come into effect in 12 months.

While the Act does not specifically target the automotive industry, its reforms will surely affect many of its participants. Similarly, while its amendments are largely designed to deter bad behaviour, the increased scale and scope of the competition penalties under the Act should encourage all businesses to evaluate their contracts, practices and strategies. It would be prudent for dealers to conduct a review of any standard form consumer or small business contracts they provide to customers in order to ensure that any unfair contract provisions have been amended or removed. Dealers should also be mindful of the revised definition of 'standard form contract' and confirm that contracts under which customers may have some power to change the contract provisions also do not contain contract terms that would be considered as unfair.

### 1.2 Fringe benefits tax exemptions for electric cars

On 28 November 2022, Federal Parliament passed the *Treasury Laws Amendment (Electric Car Discount) Act 2022 (Cth) (Act)*, amending the *Fringe Benefits Tax Assessment Act 1986 (Cth)* to exempt certain electric vehicles made available by employers to their current employees from fringe benefits tax. This exemption will apply to battery electric cars, hydrogen fuel cell electric cars and plug-in hybrid electric cars with a first retail price below the luxury car threshold for fuel efficient cars first made available for use on or after 1 July 2022. The luxury car threshold for fuel efficient cars for 2022-2023 is \$84,916.00.

While a joint press release issued by Treasurer Jim Chalmers and Minister for Climate Change and Energy Chris Bowen posited that the 'legislation will encourage greater take up of electric cars and contribute to reducing transport emissions', government forecasts of the financial impact of the Act anticipate that the exemption will result in only a modest increase in the sale of electric vehicles. In any event, the Act can be understood to have some impact on vehicle purchasing practices and is a reflection of the Labour government's interest in electric vehicle policies and its political capacity to effect such policies through legislation.



### 1.3 Proposed Legislation in previous iterations of the Auto-Reg Update

#### July 2022

1. Australian Light Vehicle Standards Rules and Heavy Vehicle (Vehicle Standards) National Regulation 2022 Amendment Package Consultation Report
  - a. **Update:** The consultation period for amendments to the Australian Light Vehicle Standards Rules and the Heavy Vehicle (Vehicle Standards) National Regulation closed on 31 March 2022.
  - b. The National Transport Commission has advised that it is currently working with the Australasian Parliamentary Counsel's Committee to turn the draft amendments into model law. No bill has been introduced yet.
  
2. *Road Vehicles Standards Act 1989* (Cth)
  - a. **Update:** This article reported that the transition date for the *Motor Vehicles Standards Act 1989* (Cth) to be phased out for the *Road Vehicles Standards Act 2019* (Cth) had been delayed to 1 July 2023. This has not changed.
  
3. *Motor Dealers and Repairers Amendment (Statutory Review) Bill 2022* (NSW)
  - a. **Update:** Consultation in relation to the proposed Bill closed on 14 March 2022 but it has not yet been introduced in Parliament.
  
4. *Retail Leases Bill 2022* (TAS)
  - a. **Update:** *The Retail Leases Bill* is currently before Tasmanian Parliament, having received its second reading speech in the House of Assembly on 8 September 2022.

#### December 2021

1. *Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021* (Cth)
  - a. **Update:** The *Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Act 2021* (Cth) came fully into force on 1 July 2022 and was discussed, by way of legislation update, in the July 2022 edition of the automotive regulatory update. This can be found [here](#).
  
2. Automotive franchising discussion paper
  - a. **Update:** While this discussion paper canvassed feedback in relation to the development of a standalone automotive franchising code and arbitration for automotive franchisees, no laws have been introduced to give effect to it.

3. Consultation Regulation Impact Statement ('CRIS') entitled 'Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law'
  - a. **Update:** The consultation period for the CRIS was completed on 11 February 2022. No bill has been introduced yet in relation to it.

#### July 2021

1. Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021 (Cth)
  - a. **Update:** *The Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Act 2021 (Cth)* came into force on 1 July 2022. Further details about the Bill were discussed in the December 2021 automotive regulatory update (as proposed legislation) and a legislation update was provided in the July 2022 edition of the automotive regulatory update. This can be found [here](#).
2. Proposed changes to establish an annual property tax as an alternative to Stamp Duty in NSW
  - a. **Update:** No such change has been implemented or bill introduced.
  - b. However, as part of the 2022/2023 NSW Budget announcements, the NSW Government has outlined a proposal that will allow first home buyers only to 'opt in' to pay an annual property tax instead of stamp duty.



## 2. Proposed Legislation

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### 2.1 National Electric Vehicle Strategy Consultation Paper

The National Electric Vehicle Strategy Consultation Paper (**Paper**) outlines the Federal government's national strategy regarding electric vehicles (**EVs**). The overall aim of this strategy is to promote the usage of EVs in Australia through financial and infrastructure support.

Key proposals contained in the Paper include:

- EVs should be made more affordable for consumers;
- the uptake of EVs in Australia should be expedited;
- motorists should be offered greater choice in their selection of EVs;
- transport-related emissions should be reduced;
- motorists should be treated more fairly at the petrol pump and EV charging stations; and
- local manufacturing of EVs should be better supported.

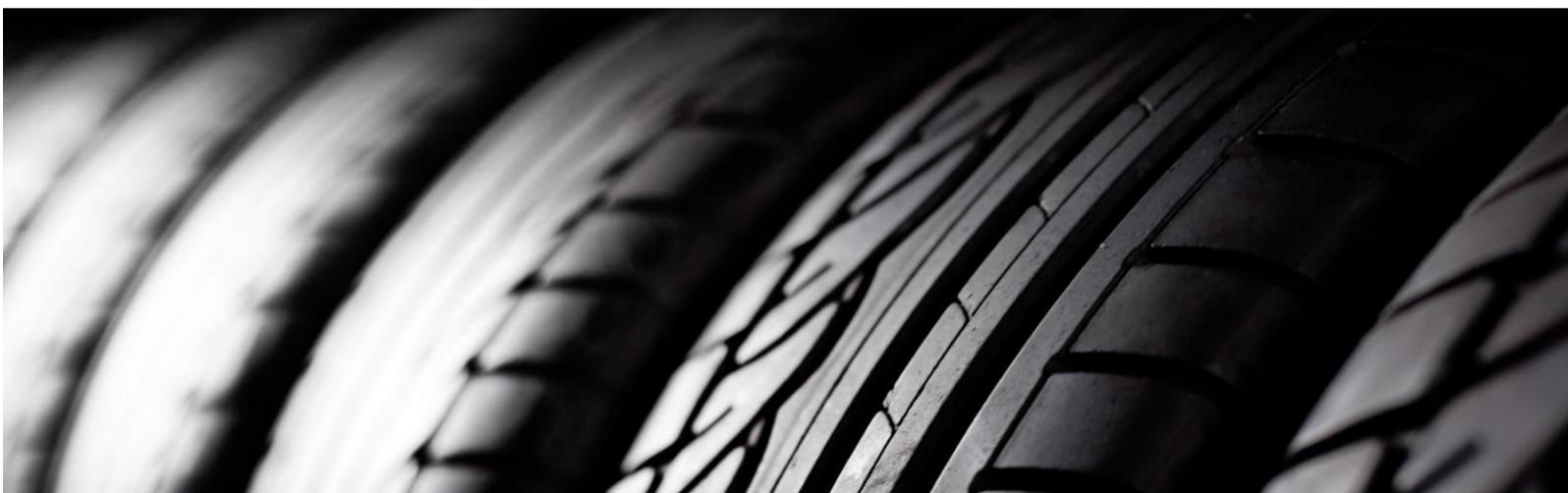
Given the relatively low usage of EVs in Australia at the present moment and the Federal government's targets for emissions reductions, the government has identified EVs as an area of high interest that would assist in reducing Australia's overall emissions levels.

The Paper outlines a framework for Australia to 'catch up' to the rest of the world in relation to the sale and usage of EVs. The Paper also indicates that the government will be seeking views on the implementation of fuel efficiency standards for new vehicles sold by dealers in Australia, noting that Australia and Russia are the only major economies without such standards currently in place.

The Paper also focuses on the economic benefits that may be derived from an increased uptake in EVs and its associated infrastructure such as charging stations. In particular, the government sees an opportunity for increased job creation and upskilling of the workforce, increasing export revenue and increasing fuel security in Australia.

The proposed strategies will likely operate in conjunction with State and Territory based frameworks.

Given the goals and proposed strategies outlined in the Paper, dealers should be aware that the Federal government is seeking to incentivise the purchase of EVs while simultaneously reducing the amount of internal combustion engine vehicles sold in Australia. As such, dealers should be conscious of short- and long-term effects on business strategies and dealership offerings.



## 2.2 Road Vehicle Standards (Consequential and Transitional Provisions) Amendment Bill 2022 (Cth)

The *Road Vehicle Standards (Consequential and Transitional Provisions) Amendment Bill 2022 (Cth)* (**Bill**) addresses the transition period that was initially granted in response to the repeal of the *Motor Vehicle Standards Act 1989 (Cth)* and the introduction of the *Road Vehicle Standards Act 2018 (Cth)*, which was initially intended to run for 12 months, commencing on 1 July 2021.

The Federal government introduced the Bill in order to extend the existing transition period due to the effects of the COVID pandemic on vehicle manufacturers and importers arising from extensive delays in global supply chains. As such, this Bill proposes an additional 12-month transition period to the new legislation for road vehicle providers who have not yet started using the new regulatory framework. This extended transition period does not impact manufacturers and importers who have already transitioned to the new legislation and have obtained approvals under the *Road Vehicle Standards Act 2018 (Cth)*.

Dealers should be aware of the proposed extension to the transition period and the potential for vehicles to be assessed and sold in Australia in accordance with differing safety standards until the new end date of the transition period, being 30 June 2023.

## 2.3 Treasury Laws Amendment (Electric Car Discount) Bill 2022 (Cth)

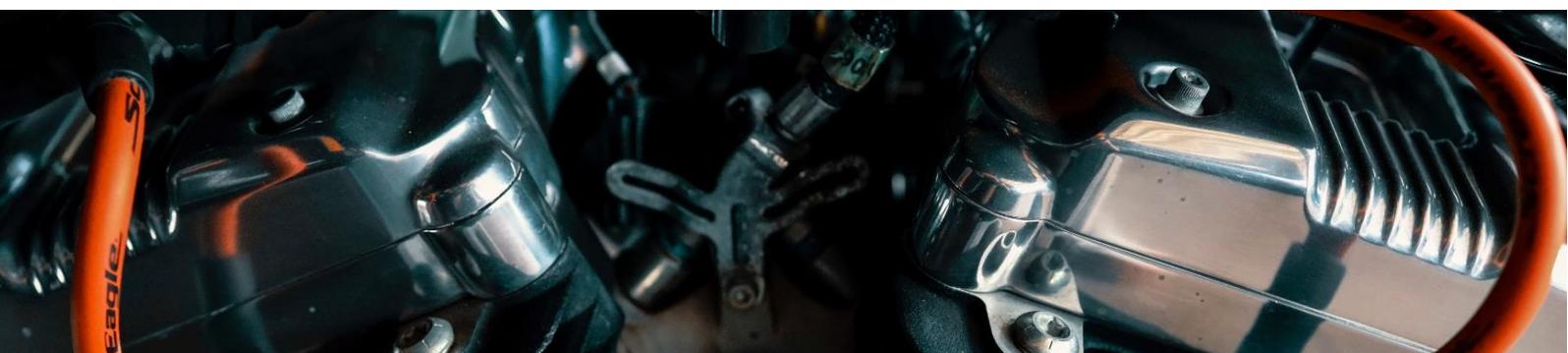
The *Treasury Laws Amendment (Electric Car Discount) Bill 2022 (Cth)* (**Bill**) proposes amendments to the *Fringe Benefits Tax Assessment Act 1986 (Cth)* in order to exempt benefits relating to zero or low emissions vehicles.

Currently, certain vehicles are classed as an 'exempt benefit' for the payment of Fringe Benefits Tax. These vehicles currently include:

- panel vans and utility trucks;
- cars used for taxi travel; and
- other road vehicles designed to carry a load of less than one tonne (other than vehicles with the principal purpose of carrying passengers).

The Bill proposes to insert a new section 8A into the *Fringe Benefits Tax Assessment Act 1986 (Cth)* whereby battery electric vehicles, hydrogen fuel cell electric vehicles and plug-in hybrid electric vehicles will be classed as an 'exempt benefit' and therefore become exempt from Fringe Benefits Tax.

This proposed legislation is in line with the Federal government's overall emissions reduction strategy and its aim to promote the use of electric vehicles within Australia. If this Bill is enacted, dealers should consider the impact these tax incentives would have on consumer behaviour and adapt their dealership strategies accordingly.



## 2.4 Occupational Licensing (Automatic Mutual Recognition Consequential Amendments) Bill 2022 (TAS)

The *Occupational Licensing (Automatic Mutual Recognition Consequential Amendments) Bill 2022 (TAS) (Bill)* proposes to amend several Tasmanian Acts, (including the *Motor Vehicle Traders Act 2011 (TAS)* and the *Occupational Licensing Act 2005 (TAS)*) to enable the practical implementation of the Automatic Mutual Recognition Scheme (**AMR Scheme**) for motor dealers in Tasmania. Under the Bill, it is proposed that motor vehicle dealers currently licenced in another State or Territory that participate in this scheme would be able to work in Tasmania without the need to obtain a Tasmanian motor dealer licence. All other States and Territories currently participate in the AMR Scheme with the exception of Queensland.

Importantly, the AMR Scheme only operates in respect of individuals who hold motor dealer licences and is not applicable to other entities such as companies or partnerships who hold such licences.

Any dealer that plans to operate in Tasmania under the AMR Scheme must notify the Director of Consumer Affairs and Fair Trading before they are able to carry on work. Any work carried out in Tasmania must be within the scope of the licence the dealer holds.

The Director of Consumer Affairs and Fair Trading has the power to cancel automatic deemed registration under the AMR Scheme for several reasons, including bankruptcy, conviction of certain offences or on the basis that the dealer has been refused a licence in another jurisdiction.

If this Bill is passed by the Tasmanian parliament, licenced motor dealers will have greater flexibility in operating in most jurisdictions in Australia. However, as the AMR Scheme is not available to companies holding a motor dealer licence, and is intended for use by individual dealers that operate in another State or Territory on a short-term basis, dealers seeking to operate in different jurisdictions should consider further licensing options available and how it would apply to them.

The Bill would allow for individuals holding motor vehicle trader licences to work in Tasmania, within the conditions of their licence. However, unlike other similar legislation, the Bill does not allow for licences in areas related to motor dealers to be recognised, as this is dependent on the types of licences provided in Tasmania. For example, the NSW AMR Scheme allows for recognition of licences such as a Motor Vehicle Tradesperson Certificate, a Motor Vehicle Recycler Licence, and a Motor Vehicle Repairer Licence, as these licences can be obtained in NSW. As Tasmania does not offer such licences, they are not recognised under Tasmania's AMR Scheme. In addition, occupations that require certain qualifications or certificates to operate, but do not have licencing requirements (such as mechanics) are not regulated under the AMR Scheme.

This Bill would bring Tasmania in line with other States and Territories who have already adopted similar legislation in relation to the AMR Scheme, the most recent being Western Australia, who adopted the AMR Scheme from 1 July 2022. If the Bill is passed, individuals who hold motor dealer licences issued by any other State or Territory (excluding Queensland) would be able to operate in Tasmania and be deemed to hold a Tasmanian motor vehicle trader licence. As the AMR Scheme operates in a mutual manner, individuals who are licenced in Tasmania as a motor vehicle trader are also able to operate across Australia (except Queensland) subject to the notification requirements or any exemptions imposed by a particular State or Territory.

## 3. Policy Update

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### 3.1 ACT Zero Emissions Vehicles Strategy 2022 - 2030

This strategy developed by the ACT Government, aims to reduce the cost of owning an electric vehicle (EV) and increase the availability of EVs and EV chargers. These aims broadly align with the aims of the Federal government as set out in the *National Electric Vehicle Strategy Consultation Paper* discussed at [part 2.1](#) of this report.

Importantly, this strategy also aims to phase out new light internal combustion engine vehicles from 2035, and notes that as the ACT now operates on 100% renewable electricity, transport now accounts for the largest source of emissions in the ACT. On this basis, the strategy aims to address some barriers to the use of zero emissions vehicles (including EVs) in the ACT, including affordability and 'range anxiety'.

The strategy proposes several measures to improve affordability of EVs, including two years' free registration, stamp duty exemptions and zero-interest loans for the purchase of zero emissions vehicles. The zero-interest loans of up to \$15,000 are provided under a scheme in which EV dealerships register as participants. Individuals then approach these participants and the dealer may either arrange finance on the customer's behalf or the customer can apply directly for the loan.

In addition, the ACT government aims to expand the EV charging network in both public spaces and in residential buildings in order to encourage drivers to switch to EVs. This strategy interacts with several other proposals by the ACT government including the Transition to Zero Emissions Vehicles Action Plan 2018-21, the ACT Climate Change Strategy 2019-25, and the ACT Transport Strategy and Zero Emission Plan for Transport Canberra.

The proposals put forward by the ACT government require the cooperation of EV dealerships to provide interest-free loans to customers purchasing EVs. As such, dealers and particularly those interested in or already selling EVs, should take note of these strategies and review their current operations to ensure compliance with these frameworks when implemented.



### 3.2 Queensland's Zero Emission Vehicle Strategy 2022 - 2032 and Zero Emission Vehicle Action Plan 2022 - 2024

These strategies, developed by the Queensland government, aim to reduce transport-related emissions emitted by passenger vehicles, Queensland government fleet vehicles, and public transport vehicles.

Key aims addressed in these strategies include:

- 50% of new passenger vehicle sales to be zero emission by 2030;
- 100% of new passenger vehicle sales to be zero emission by 2036;
- Zero Emission Vehicles (**ZEVs**) subsidies; and
- developing a roadmap for ZEVs research, manufacturing, and training in Queensland.

In a similar manner to the ACT and Federal strategies explored above, these proposals aim to encourage consumers to move towards electric vehicles (**EVs**) and ZEVs as a reliable and affordable alternative to internal combustion engine vehicles. As such, affordability measures and the variety of EVs currently available on the market are addressed as concerns for the Queensland government, given the relatively high upfront cost of purchasing an EV and the small range of models currently available to choose from.

Overall, the strategies proposed by various State, Territory and Federal governments this year highlight the emphasis placed on the reduction of emissions through incentives and the promotion of the use of EVs and ZEVs. This shift recognises the impact of motor vehicle emissions in proportion to Australia's emissions as a whole, and encourages importers, dealers and consumers to consider more environmentally friendly transport alternatives.

As with the additional Federal and State proposals discussed above, dealers should take into account the impacts of these strategies on consumer behaviour in the future, as well as any prohibitions on the sale of internal combustion engine vehicles that may be implemented.

### 3.3 Powering Australia Plan

The Australian Labour Party has developed the Powering Australia Plan to achieve their target of net zero emissions by 2050. The plan has tailored measures for the key sectors of electricity, transport, industry, and carbon farming.

Within Australia, 19% of emissions are attributable to transport with almost 85% of this arising from road transport. With only 2% of annual vehicle sales being for electric vehicles (**EVs**), Australia is falling behind many advanced and emerging economies. Accordingly, the Federal government has been pushing for the electrification of road transport as a crucial step to achieving the net zero emissions target by 2050.

#### Transport: National Electric Vehicle Strategy

As set out in [part 2.1](#), the National Electric Vehicle Strategy (**Strategy**) aims to address Australia's lagging sales of EVs by encouraging the uptake of EVs, increasing the supply of affordable and accessible EVs and establishing the necessary systems and infrastructure to facilitate the uptake of EVs.

The Federal government has proposed several strategies aimed at providing social, economic, business, health and environmental benefits for the orderly transition to transport electrification. Some of the key proposed strategies include:

- enabling financial incentives through stamp duty, registration incentives and tax measures;
- creating non-financial incentives such as transit lane access and free car parking and charging;
- increasing the supply and quality of EVs in Australia;
- transitioning government and commercial fleets to EVs in order to supply more affordable second-hand EVs to the market;
- developing smart and nationally standard EV charging and hydrogen refuelling networks; and
- investment in skills and workforce necessary for the EV industry to succeed in Australia.

It is expected that, in addition to benefiting the environment, the deployment of EVs will also present several benefits for the Australian economy. Australia has the resources to manufacture the batteries for EVs and other components necessary for the function of EVs, including mechanical and electronic componentry, control systems and intelligent electricity grid integration systems. Hence, the uptake of EVs in Australia and the current Federal government's approach will likely lead to the creation of more jobs, funding towards the uptake of workforces connected to the EV industry, increases to export revenue and an increase in fuel security.

Automotive dealers will play a critical role in the roll-out of this strategy as they are largely responsible for the supply of zero emission vehicles to the market. Dealerships should be capable of demonstrating and educating customers on the operation and implication of zero emission vehicles. Whilst this will bring many opportunities and financial benefits for automotive dealerships, this may also result in heightened expectations and potential reform associated with selling EVs.



### 3.4 South Australia's Electric Vehicle Action Plan

The South Australian government has introduced the South Australia's Electric Vehicle Action Plan (**Plan**) that will see more electric vehicles (**EVs**) on the road and a significant investment in charging infrastructure. The government is investing \$53.25 million to deliver the Plan, aiming to make EVs the common choice for motorists by 2030, and the default choice by 2035, in line with achieving net-zero emissions by 2050. They are also working with businesses and organizations to promote the use of EVs and providing financial incentives for people to switch to these cars.

#### South Australia's Electric Vehicle Action Plan

The plan is made up of the following four action themes:

##### 1. A state-wide public EV charging network

The South Australian Government is planning on achieving this by:

- developing a prospectus for investment in the public EV charging infrastructure aimed at covering metro, regional and remote areas;
- private investment to enable an accelerated rollout of state-wide public EV charging; and
- communicating with the relevant industries to identify efficient ways to charge EVs and develop hydrogen refuelling hubs for heavy vehicles.

##### 2. Leading by example

The South Australian Government is planning on achieving this by:

- purchasing electric models for the new government fleet vehicles; and
- investing in an Electric Bus Grid Integration Study of battery and hydrogen fuel cell electric buses.

##### 3. Catalysing fleet and private uptake

The South Australian Government is planning on achieving this by:

- financially encouraging the construction of two-way charging technologies for EVs (including virtual power plants to charge fleets aggregately);
- encouraging the usage of EVs in the private sector by securing private investments for charging stations in workplaces, overnight accommodation and taxi and rideshare locations; and
- initiating Fleet Pledge Programs with local governments aimed at educating and empowering investors to transform emitting fleets to zero emitting fleets.

##### 4. Developing a framework to speed up the transition to electric transport

The South Australian Government is planning on achieving this by:

- nationally advocating for vehicle fuel efficiency, fuel quality, smart charging standards, tax reform addressing fuel excise, fringe benefits taxes and road user charging, and extended producer responsibility for batteries; and

- establishing a framework that supports EVs by educating the relevant industries and incorporating the development of charging infrastructure into the relevant schemes and reforms.

### **Electric vehicle subsidy package**

The South Australian Government has introduced an EV subsidy package in support of the uptake of EVs. The \$22.7 million subsidy package includes:

- \$3,000 purchase subsidy and a 3-year registration exemption for the purchase of eligible new battery-electric and hydrogen fuel cell vehicles; and
- \$12.25 million Electric Vehicle Smart Charging Subsidy, to provide up to 7,500 subsidies of up to \$2,000 to households installing EV smart charging systems.

Whilst this action plan has not had much success yet, it nonetheless brings much opportunity, focus and resources to the automotive industry in South Australia. Accordingly, automotive dealerships within South Australia should actively monitor developments in the government's investment in ZEVs and changes to its strategies to successfully capitalise on new opportunities that may arise in the future.

### **3.5 National Battery Strategy**

The Federal government has campaigned the 'A Future Made in Australia' policy that promotes domestic manufacturing and increased training of apprentices, trainees and cadets to see the onshoring of Australian manufacturing of electric vehicle batteries. This comes as Australia has a vast and untapped quantity of rare earth minerals required in battery manufacturing. The Federal Government has committed to a \$100 million battery precinct, partnering with the Queensland Government to kick-start Australia's battery manufacturing industry. According to Accenture research, this opportunity may see the addition of \$7.4 billion within the industry and the creation of 34,000 jobs by 2030. This development provides a clear indication of the government's focus on battery production that will likely move up the value chain to both export and domestic use. This highlights the government's emphasis on the uptake of electric vehicles and its investment in the manufacture of electric vehicle batteries. The investment and focus on components of electric vehicles such as batteries serves as encouragement for dealerships who are considering or are currently engaged in the sale of electric vehicles. Dealerships should monitor the development of this strategy to gauge how this may affect its business approach moving forward.



### 3.6 Broader Development of the NSW Net Zero Emissions Freight Policy

Transport for NSW is partnering with the Australia Road Research Board and Mov3ment to research hydrogen powered heavy vehicle demand and infrastructure within Australia. The research will aim to identify the size of the market and identify key segments of the heavy vehicle fleet that are able to transition to hydrogen fuel technology. This research will provide the NSW government with a roadmap to explore the opportunities available domestically and add to the development of a broader NSW Net Zero Emissions Freight Policy. Hydrogen fuel is gaining market share internationally as it is a cleaner fuel alternative. Many countries have already invested heavily into the sector, with China already producing almost 25 million tonnes, or roughly a quarter of the global total.

The NSW government's research into hydrogen fuel is widely accepted, as many key stakeholders in the hydrogen industry such as hydrogen cell truck manufacturers and mainstream transport operators are located in NSW. This is furthered by the fact that councils such as Fairfield, Wollongong and Cessnock have aims to set up hydrogen plants in their areas.

The following four key objectives underpin the research:

1. the collation and analysis of data on the international experience, including the state of the industry and planning for hydrogen refuelling infrastructure, new and emerging technology options, and local industry readiness;
2. the differentiation of vehicle types to identify market demand in NSW;
3. identifying barriers to market adoption, including cost, availability of vehicles, infrastructure constraints, safety, policy leavers and regulations; and
4. identifying the pathway for the NSW government to assist early adopters and lay the foundations for the infrastructure necessary to scale adoption in line with the development of a broader NSW Net Zero Emissions Freight Policy.

This strategy highlights that a diverse range of options are currently being sort in order to reduce the emissions from all modes of transport. Accordingly, it is important that members of the automotive industry are wary of this and are able to adopt a dynamic business approach in the near future.



## 4. Case Law Update

### 4.1 *Haselhurst v Toyota Motor Corp Australia Ltd t/as Toyota Australia; Whisson v Subaru (Aust) Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia [2022] NSWSC 1076*

#### Background

This judgement is the final part of the six Takata airbag class actions that were first filed on 22 October 2018. The Volkswagen proceedings were previously dismissed at trial. The proceedings were a class action against car manufacturers who had used Takata airbags which, in a crash, were capable of causing sharp metal fragments to explode through the car.

#### Issue

The NSW Supreme Court needed to decide whether to approve the \$52 million settlement offered by Toyota, Subaru, Honda, BMW, Nissan, and Mazda.

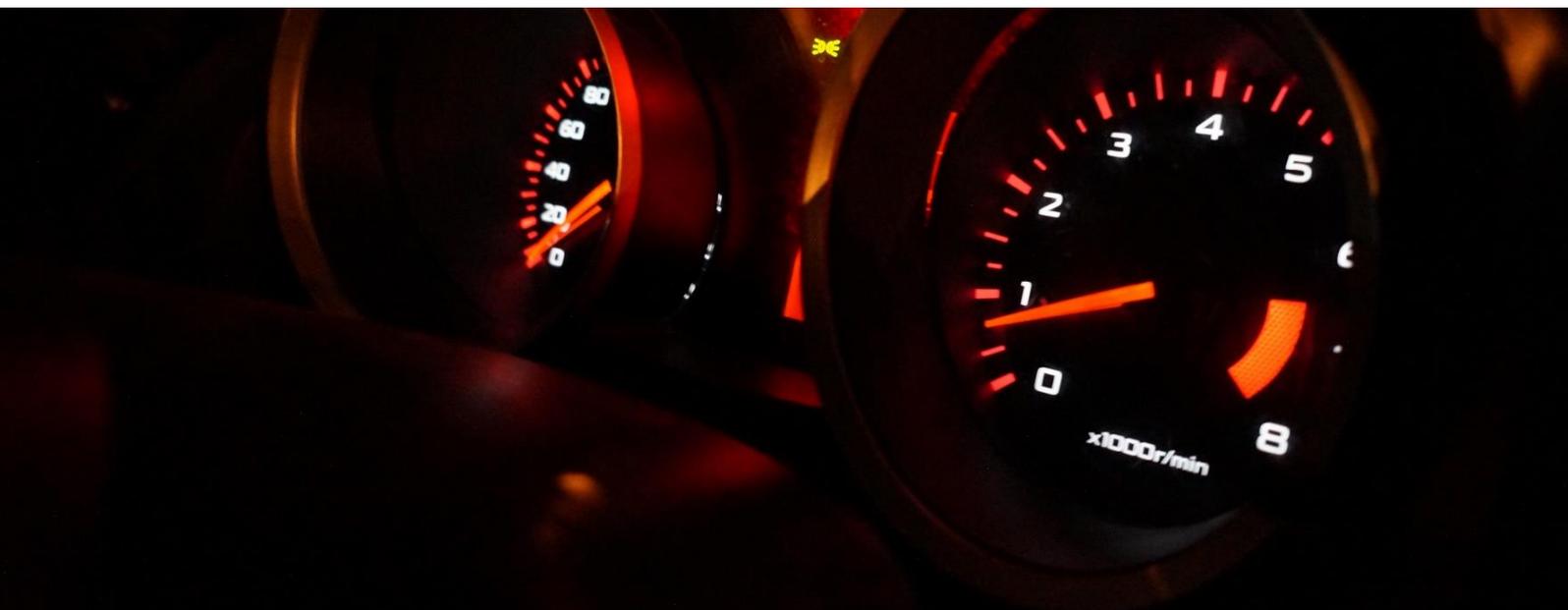
#### Outcome

The court approved the settlement which was broken down as follows:

- Total amount to be divided between the Plaintiffs - \$20.3 million
- Legal costs - \$16.1 million
- Litigation funder's commission - \$13 million
- Administration costs - \$2.5 million
- Reimbursement of lead plaintiffs - \$120,000

#### Significance to the automotive industry

The conclusion of these proceedings is a timely reminder of the risks faced by manufacturers when a defective product is sold, and the difficulty all parties involved face to resolve a claim. We encourage any parties concerned about potential product liability to seek legal advice as soon as possible to mitigate the potential risk of litigation and escalating pay out fees to plaintiffs that may arise from a product liability claim.



#### 4.2 *Class action against Toyota Motor Corporation Australia Limited*

##### Background

In October 2022, Maddens Lawyers filed a class action in the Victorian Supreme Court against Toyota for installing 'diesel defeat devices' in certain popular car models such as the Hilux, Landcruiser and RAV-4. This is the same style of device that Volkswagen was caught using in 2015 which cost the manufacturer \$48.84 billion.

##### Issue

The issue for the Court to consider was whether Toyota should be held liable for these devices causing cars to pass emission tests when they emit unlawful amounts of pollutants.

##### Significance to the automotive industry

While there is still very little known about this case, registration is open for a potential 500,000 car owners. One estimate suggests that if the case can be proven in court, Toyota may be liable to pay up to \$1 billion in compensation. This will be a case to watch as it is likely that the judgement will form the basis for future climate-based litigation against manufacturers given the increasing concern for consumers and regulatory bodies.

#### 4.3 *BMW Australia Finance Ltd v Trigas [2022] NSWDC 279; BMW Australia Finance Ltd v Trigas (No. 2) [2022] NSWDC 342*

##### Background

The following facts are alleged by the Defendant, Mr Trigas in the current proceedings, which are part of a series of claims between the various parties. Mr Shade, a luxury car salesman, organised for BMW Finance, the Plaintiff, to finance the Defendant to purchase a luxury car. However, the Defendant alleges he was not aware and gave no instructions for Mr Shade to organise this finance. Subsequently, Mr Shade also organised for the Defendant to purchase a second luxury car. The Plaintiff agreed for the finance of both cars to be covered by a new finance agreement provided certain conditions were met such as the cars being covered by comprehensive insurance. Once again, the Defendant alleges he was not aware of these conditions or finance contracts. BMW Finance is attempting to enforce the finance contracts.

##### Issue

The key issue for the Court to determine is whether the finance contract can be enforced by BMW Finance against Mr Trigas and whether Mr Shade acted with Mr Trigas' instructions or whether Mr Trigas can successfully establish that the contract did not, or should not, bind him.

##### Significance to the automotive industry

Proceedings in this case are currently ongoing, however, the legality of the conduct of the salesman and the financier in this matter will be important for dealers who assist in organising finance and insurance for vehicle customers and for vehicle financiers generally.

#### 4.4 *Competition and Consumer Commission (ACCC) V Mercedes-Benz Australia/Pacific Pty Ltd [2022] FCA 1059*

##### Background

In 2018, the Minister issued a recall notice under section 122 of the Australian Consumer Law (ACL) for all vehicles that were fitted with two types of airbag inflators produced by the Takata group of companies: Alpha inflators and non-Alpha (or Beta) inflators. Mercedes-Benz Australia/Pacific Pty Ltd (**Mercedes**) vehicles had only the Beta inflators, which posed a safety risk but not as significant a risk as the alpha inflators. In response to the recall notice, Mercedes submitted two communication and engagement plans, one for cars and the other for vans (**C&E Plans**), to the Minister, which the Minister subsequently approved. Importantly, the C&E Plans both stated that Mercedes would *'use attention-capturing, high-impact language in all general and direct communications to consumers in order to try and avoid consumers ignoring notices.'*

A number of contentious statements were made by Mercedes' call centre staff members. These statements included 'precaution statements' which included where staff stated that the recall was a precaution and 'no incidents statements' where staff stated that Beta inflators in other manufacturer's vehicles had not had any faults or caused any accidents, injuries or deaths.

##### Issue

The ACCC argued that Mercedes had breached section 127(1) of the ACL. Section 127(1) of the ACL requires that, where a recall notice for consumer goods is in force and the notice requires a person (which includes a company) to do one or more things, the person must comply with the notice. The ACCC therefore argued that by using the statements to consumers, Mercedes had not complied with the terms of the C&E Plans and accordingly contravened section 127(1) of the ACL.

Accordingly, the key question for the Court to consider was whether Mercedes had contravened section 127(1) of the ACL.

##### Outcome

The Federal Court of Australia held that Mercedes had breached section 127(1) of the ACL and ordered Mercedes to pay pecuniary penalties under section 224 of the ACL and a contribution amount to the ACCC to cover the ACCC's costs.

##### Significance to the automotive industry

This judgment sends a strong message that vehicle distributors in Australia must ensure that they are compliant with their product safety obligations under the ACL. Furthermore, this judgment makes it clear that a failure to be compliant with these obligations under the ACL can result in hefty financial penalties, as in this case, Mercedes was ordered to pay over \$12.5 million in penalties.

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



#### 4.5 *Mitsubishi Motors Australia Ltd v Begovic [2021] VSC 252*

##### Background

This case was brought by Mr Zelko Begovic who purchased a 2016 Mitsubishi Triton vehicle from a Mitsubishi dealer. Soon after driving the vehicle, Mr Begovic considered that the vehicle was consuming significantly more fuel than the fuel consumption label indicated it would, and on this basis Mr Begovic commenced proceedings in the Victorian Civil and Administrative Tribunal (**VCAT**) seeking an order that he be entitled to reject the vehicle and receive a refund of the purchase price being \$39,500 on the basis that the fuel consumption label was misleading and deceptive, under section 18 of the ACL and that the high fuel consumption meant the vehicle was defective and not fit for purpose under sections 54 and 56 of the ACL.

##### Issue

The key issue in this case was whether the fuel consumption label was misleading or deceptive so as to contravene section 18 of the ACL and whether the vehicle was of acceptable quality or defective under sections 54 and 56 of the ACL.

##### Outcome

Ultimately the VCAT, the Supreme Court of Victoria and the Supreme Court of Appeals Victoria, all held that the fuel consumption figures were misleading or deceptive in contravention of section 18 of the ACL. However, the Appeal Court found in relation to the Supreme Court's findings against VCAT's finding, that Mitsubishi had contravened the consumer guarantees under the ACL, as the VCAT was not satisfied that the Triton was 'defective'.

The Appeal Court found it was legally incorrect to conclude that the vehicle was not of 'acceptable quality' in contravention of section 54 of the ACL. The Appeal Court further rejected VCAT's finding that Mitsubishi contravened section 56 of the ACL as the 2016 Triton did not 'correspond with the description'. The Appeal Court's decision was based on the fact that Mitsubishi was not given a proper opportunity to address this issue before VCAT.

##### Significance to the automotive industry

This judgment has potentially significant ramifications for the automotive industry as there is potential for class actions to follow this decision if it can be established that a vehicle had 'significantly higher' fuel consumption figures than those displayed on the vehicle. This case also reaffirms the importance of ensuring information such as fuel consumption figures are as accurate as possible to avoid claims of misleading or deceptive conduct.

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

#### 4.6 *AHG WA (2015) Pty Ltd T/A Mercedes-Benz Perth & Westpoint Star Mercedes-Benz & Ors v Mercedes-Benz Australia/Pacific Pty Ltd*

##### Background

In 2021, Honda Australia switched from its traditional dealership model to a non-negotiable fixed price model in Australia. Mercedes-Benz then followed suit in Australia and under the new model, which came into effect on 1 January 2022, Mercedes-Benz retains ownership of its cars while dealers act as agents and must sell cars at a fixed price for a set commission. Most of the Australian Mercedes-Benz dealers then launched legal action against Mercedes-Benz Australia/Pacific Pty Ltd (**MBAuP**) claiming they were not fairly compensated for drastic changes to their business structure, customer base and goodwill and were unduly pressured into signing new 'agency' contracts, allegedly contravening the Australian Franchising Code and engaging in unconscionable conduct in violation of the ACL.

Much of MBAuP's defence centred around the assertion that it alone was responsible for pushing the dealership change in the good faith belief that it was seeking to address such things as market 'disruptors' and it was not acting on the directives of its parent company. MBAuP also claimed that most dealers would not be worse off under the agency model.

##### Issue

The issues in this case were as follows:

- whether MBAuP acted in good faith within the meaning of the Franchising Code of Conduct;
- whether MBAuP exceeded its contractual powers when it issued non-renewal notices to its dealers for the purpose of instigating the agency model;
- whether MBAuP engaged in unconscionable conduct by implementing the agency model in the circumstances that it did;
- whether MBAuP engaged in economic duress to force the dealers into the agency agreement; and
- what rights do dealers have in the goodwill they develop in their customer base.

##### Outcome

The trial concluded in late October and Federal Court judge, Justice Beach is expected to hand down his decision in the first quarter of 2023.

##### Significance to the automotive industry

The outcome of this case will have a considerable impact on the automotive industry and could set a precedent that will impact the way all new cars are sold in Australia. The decision will influence how much money car dealers across other automotive brands in Australia would be willing to invest in showroom facilities and the customer experience they offer. If vehicle distributors are permitted to transition to agency retail models without compensating dealers and at lower profit margins, it could discourage dealers to upgrade their facilities or open showrooms and services in new areas. If the goodwill of dealers is not protected, then there is a risk that the confidence in investing in the automotive industry will be undermined. Furthermore, the outcome of this case will set a precedent in the treatment and construction of automotive franchise agreements in the future, as it will set out the boundaries of what can be done under a franchise agreement, the meaning and valuation of goodwill and what happens to goodwill at the conclusion of a franchise agreement.

## Our National Automotive Team

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