HWL EBSWORTH
LAWYERS

AUTOMOTIVE INDUSTRY GROUP

Regulatory Update

December 2023

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Introduction

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 Maria Townsend, Evan Stents and Peter Pertsoulis who are members of the HWL Ebsworth Automotive Industry Group.

Headlines

- Tighter domestic regulations on vehicle designers, manufacturers and importers (see Parts 1.1, 1.2 and 1.3).
- Proposed legislation for mandatory ESG reporting for Australian companies (see Part 2.1).
- European Commission formally launches an investigation into battery electric vehicles imports (see Part 4.2).
- High Court of Australia rules that certain electric vehicle tax laws are invalid (see Part 5.1).

1. Legislation Update

1.1 New Unfair Contract Terms regime takes effect under the Reforms introduced by Treasury Laws Amendment (More Competition, Better Prices) Act 2022

From 9 November 2023, it is a contravention of the ACL to propose, apply or rely on an unfair contract term in a standard form consumer or small business contract. No longer is a clause which contains an unfair term, just void and unable to be relied upon, now just by including that clause in a contract a supplier may be liable for substantial penalties.

The definition of a consumer contract has not changed but the definition of a small business contract has such that it will be small business contract if at least one of the parties has fewer than 100 employees or an annual turnover of less than $10 million, so more businesses are eligible under this new definition.

A term of a standard form consumer or small business contract is unfair if it causes a significant imbalance in the parties' rights and obligations, is not reasonably necessary to protect the legitimate interests of the party; and would cause financial or other detriment if relied upon.

Examples of standard form consumer contracts or small business contracts, include motor vehicle sales contracts and vehicle repair contracts. Examples of terms which may be considered unfair include but are not limited to terms which allow unilateral variation of the contract, unilateral termination, limit one party's rights to sue, certain types of exclusion of liability clauses and more. Some form of these types of clauses may be acceptable if they do not go beyond what is reasonably necessary to protect the legitimate interest of the party who issues the contract.

Pecuniary penalties can be imposed for contravention of the UCT regime in addition to other remedies.

The maximum penalty that can be imposed applies to each contravention with the maximum penalty for company being up to the greater of $50 million, 3 x the benefit obtained and 30% of the adjusted turnover for the period of the breach.

For an individual the maximum penalty imposed could be up to $2.5 million.

1.2 End of the two-year transitional period for the Road Vehicle Standards Act 2018 (Cth)

From 1 July 2023, the *Road Vehicle Standards Act* 2018 (Cth) (**RVS Act**) is now the only law governing the design, manufacture, importation and first provision of all road vehicles in Australia, as well as certain vehicle components. The RVS Act has replaced the former *Motor Vehicle Standards Act* 1989 (Cth) (**MVSA**).

The transitional period allowed vehicle manufacturers and importers to continue providing MVSA plated and imported vehicles from 1 July 2021 to 30 June 2023. From 1 July 2023, importers, and manufacturers of road vehicles and trailers, must hold a Road Vehicle Standards approval before providing a vehicle to the Australian market for the first time.

Under Division 3 of the RVS Act, road vehicles must be entered on the Register of Approved Vehicles (**RAV**), an online database of vehicles that have met the requirements of the RVS Act and approved for provision to the Australian market. The RAV replaces the need for physical compliance plates fitted to MVSA approved vehicles. To be entered on the RAV, a road vehicle must first be granted either a vehicle type approval or a concessional RAV entry approval. Under the RVS Act, a Vehicle Type Approval holder is responsible for ensuring ongoing compliance. Notably, section 17 provides that if information is entered onto the RAV dishonestly or improperly, a penalty of 120 penalty units can be imposed upon the Vehicle Type Approval holder.

Some vehicle marking arrangements from the MVSA remain, including Vehicle Identification Numbers (VINs), and vehicle plates for trailers and some heavy vehicles.

Low Volume Trailer Manufacturers

Trailer manufacturers producing more than 4 low-ATM trailers in a 12-month period will be required to obtain a Vehicle Type Approval from the Commonwealth Department of Infrastructure, Transport, Regional Development, Communications, and the Arts. This involves applying on ROVER, the Department's online application and approval portal.

In addition, from 1 July 2023, trailer manufacturers in NSW will need to supply evidence to Transport for NSW that they are the holder of a current Vehicle Type Approval to obtain NSW Trailer Certifications. Blue slips will no longer be required to obtain a NSW Trailer Certification.

1.3 Federal Government introduces a requirement for all new vehicles to be fitted with reversing technology

The Federal Government's *Vehicle Standard* (*Australian Design Rule 108/00 – Reversing Technologies*) 2023 came into force on 30 June 2023. This new Standard requires all new vehicles made from existing models to be fitted with reversing technology, meaning either a rear-view camera or sensors by 1 November 2027. Any new models introduced to the Australian market after 1 November 2025, will be required to have either cameras or sensors as standard. It applies to all types of light, medium and heavy vehicles, with the only exemption being cab-chassis vehicles known as 'Partially Complete Vehicles'.

The purpose of this new requirement is to increase driver awareness and vision of road users behind their vehicle when reversing, and to avoid or mitigate the severity of reversing collisions. This has been introduced to reduce the number of pedestrian deaths and injuries caused by cars reversing. The Federal Assistant Minister for Infrastructure and Transport, Carol Brown, stated the mandate comes after many years of advocacy from organisations such as KidSafe, and parents who have experienced both fatal and non-fatal driveway incidents.

This Standard is largely based on the United Nations Regulation No. 46, which was established in 2022 and requires all new cars sold in Europe to be fitted with a reversing detection system by mid-2024. Additionally, reversing cameras have been mandated for new vehicles sold in the United States from 2018.

1.4 Federal Government amends Australian Design Rules to increase dimensional limits for commercial vehicles with safety technology

The Federal Government's Safer Freight Vehicles package introduced key policy updates to increase the overall width limit for new commercial trucks and a number of key safety features. These updates were in response to a number of direct calls from key industry stakeholders to increase the width limit and improve commercial vehicle driver safety and efficiency.

On 14 September 2023, following extensive public consultation and feedback, Catherine King, Minister for Infrastructure, Transport, Regional Development and Local Government, implemented the *Vehicle Standard (Australian Design Rule) Safer Freight Vehicles Amendment No. 2 2023*. This amended the *Vehicle Standard (Australian Design Rule 43/04 – Vehicle Configuration and Dimensions) 2006* to increase the overall width limit for heavy commercial vehicles (so long as they are equipped with the latest safety features) from 2.50 to 2.55 metres (or 2500mm).

Specifically, this increase applies to Heavy Goods Vehicles (exceeding 12 tonnes gross vehicle mass (GVM)) - category NC vehicle, and Medium Goods Vehicles (exceeding 4.5 tonnes GVM and up to 12 tonnes GVM) - subcategory NB2 - Medium Goods Vehicle under the *Australian Design Rules*.

The required safety features include:

- devices to reduce blind spots;
- electronic stability control;
- advanced emergency braking;
- a lane departure warning system;
- better reflective markings; and
- side guards to stop pedestrians and cyclists from being caught up under the rear wheels of trucks.

Additionally, several safety devices and sensors will be able to be fitted to trucks without counting towards width and length measurements. These include front and kerb view mirrors, external parts of camera monitor systems, blind spot sensors, and cross-view mirrors.

The Federal Government has made this change to the national road vehicle standards to facilitate the supply of safer trucks in Australia and encourage freight productivity. It is estimated that the changes will provide a net benefit of over $500 million to the Australian economy. This legislative change came into effect on 1 October 2023.

1.5 Reforms to the *Motor Dealers and Repairers Act* 2013 (NSW) will improve consumer protection and discourage illegal behaviour when selling, repairing or recycling motor vehicles in NSW

With NSW making up for 31% of the 1 million purchases of new vehicles in Australia, the State holds the largest proportion of Australia's $37 billion automotive industry.

On 11 October 2023, NSW Parliament passed the *Motor Dealers and Repairers Amendment Bill 2023* (**Bill**), which seeks to improve consumer protections for motor vehicle buyers. The Bill was introduced due to concerns that motor vehicles were being sold with their odometers wound back, or were stolen vehicles tied to criminal activity, or had key parts removed and replaced with faulty ones.

The reform seeks to ensure that consumers can have confidence that the vehicle they are buying is exactly as advertised. The Bill gives effect to recommendations brought about by a statutory review of the *Motor Dealers and Repairs Act 2013* (NSW). This review involved extensive consultation with key stakeholders in the motor industry, such as the Motor Traders' Association of NSW.

The NSW Government has announced that the reforms will improve consumer protection and compliance of sellers, repairers and recyclers in the following ways:

a) allowing for the online end-to-end sale of motor vehicles in NSW (**section 66A**);
b) introducing specific consumer protection requirements for online motor dealers, including capping deposits from potential buyers (**section 66D**) and requiring dealers to display their licence number on all advertising material to enable buyers to research the vehicle (**section 19A**);
c) providing new protections for consumers when purchasing vehicles at auction by providing access to a vehicle's inspection report before a purchase (**section 66B**);
d) enhancing powers to crack down on odometer tampering by banning possession of odometer tampering devices, to minimise fraud in the sale of second-hand vehicles (**section 53**); and
e) reducing the potential for sale of stolen parts by supporting the introduction of cashless transactions for motor vehicle recyclers by banning licensed recyclers from accepting cash or in-kind payment (**sections 99A and 99B**).

The reforms also include the addition and increase of maximum penalty unit amounts for various penalty provisions.

1.6 Amendment to the *Fair Trading Regulations* 2010 (SA) creates greater disclosure obligations for insurers

In South Australia, the *Fair Trading (Motor Vehicle Insurers and Repairers) Amendment Regulations 2023* (SA) was recently introduced to increase the disclosure obligations of insurers, ensuring that consumers making claims have greater transparency of information regarding details of car repairs and insurance policies.

The changes follow the introduction of a mandatory new national Motor Vehicle Insurance and Repair Industry Code of Conduct in February 2023, promoting transparent, informed, effective and cooperative relationships between insurers and repairers. The National Code also outlines alternative dispute resolution processes.

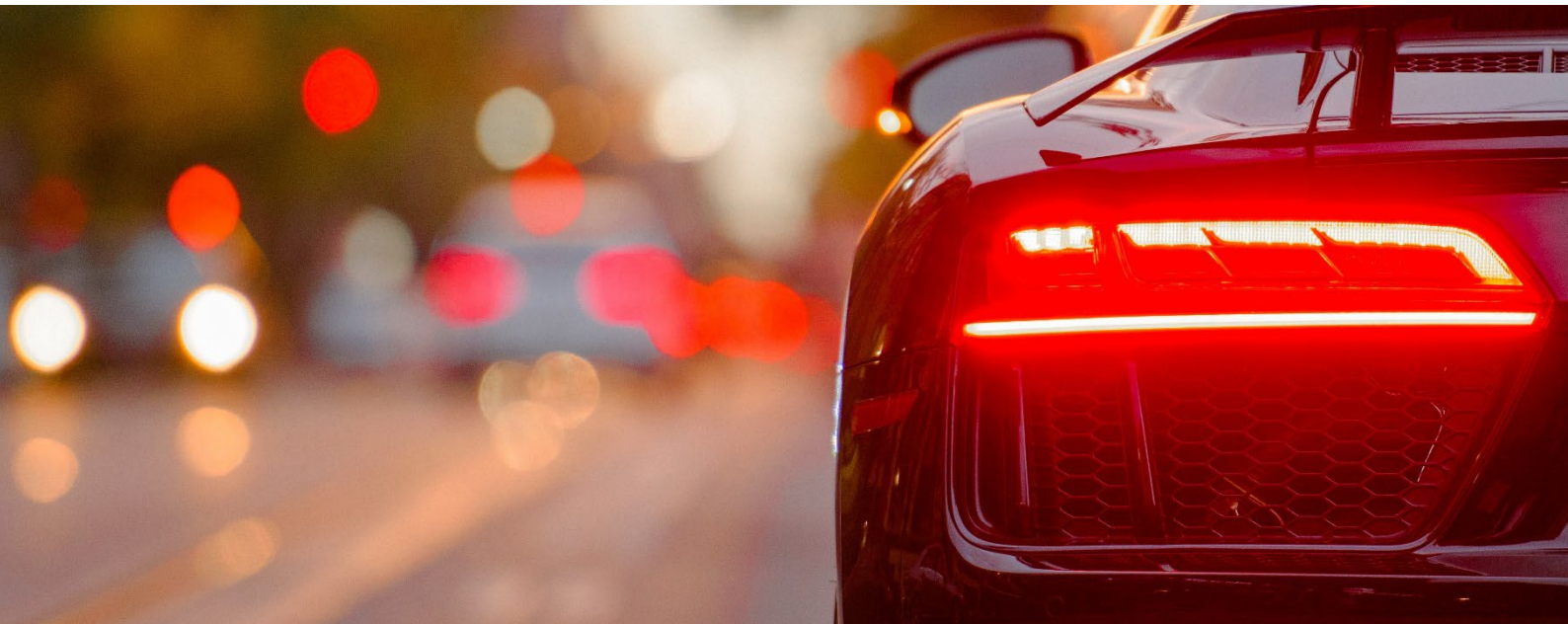
The Amendment arose after concerns were raised to SA's Economics and Finance Committee about difficulties in consumers accessing a motor vehicle repairer of choice, as insurers would often steer them to their own preferred car repairer network without providing any opportunity for the consumer to explore their options.

This Regulation adds greater obligations by inserting into the *Fair Trading Regulations 2010* (SA) a reg 4A: 'disclosure of relevant interest by insurer' (also reflected in section 28K(1) of the *Fair Trading Act 1987* (SA)) and reg 4B 'disclosure of choice of repairer by insurer' (also reflected in section 28K(2) of the *Fair Trading Act 1987* (SA)) as follows:

- Reg 4A provides that an insurer must disclose any relevant interest held in relation to a repairer (1);
- An insurer must provide the policy holder of insurance with a statement of relevant interest and a statement advising the policy holder of the availability of all statements of relevant interest on the insurer's website (2);
- A statement required to be provided, must be either given to the policy holder personally, read out over the telephone, be posted in an envelope, or provided by electronic means as agreed with the policy holder (3); and
- A statement of relevant interest must include the name, address and contact details of the repairer in relation to whom the insurer holds a relevant interest (6).

Reg 4B establishes that at the time of entry into a contract of insurance, renewal or making a claim, an insurer must give a policy holder a statement regarding whether the insurance policy allows the policy holder to make a choice of repairer.

This amendment came into effect on 1 June 2023 and gives the industry 6 months to make the necessary changes to its systems in order to meet compliance requirements.



2. Proposed Legislation Update

2.1 Proposed mandatory ESG reporting for Australian companies

The Australian Government is seeking to mandate reporting obligations for ESG and climate related financial disclosures for all public and private Australian companies. The changes reflect the Labor Government's greater focus on issues relating to climate issues.

Who does this apply to?

Reporting entities required to make climate-related financial disclosures are all the entities that meet the prescribed size thresholds and are required to lodge financial reports under Chapter 2M of the *Corporations Act 2001* (Cth) (**Corporations Act**). They must meet 2 of the following criteria:

- the consolidated revenue for the financial year of the company and any entities it controls is $50 million or more;
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is $25 million or more; and
- the company and any entities it controls have 100 or more employees at the end of the financial year.

Phased commencement

The proposed changes will commence from 1 July 2024. Reporting entities are categorised as groups 1-3.

Entity group	Number of Employees (threshold 1)	Consolidated gross assets value $AU at EOY of the company and any controlled entities (threshold 2)	Consolidated revenue $AU at EOY of the company and any controlled entities (threshold 3)	Reporting commencement (must satisfy 2/3 thresholds)
Group 1	Over 500 employees	$1 Billion or more	$500 Million or more	2024-25 FY reporting period onward
Group 2	Over 250 employees	$500 Million or more	$200 Million or more	2026-27 FY reporting period onward.
Group 3	Over 100 employees	$25 Million or more	$50 Million or more	2027-28 FY reporting period onward

Contents of disclosures

ESG disclosures will be generally presented in an entity's annual report alongside the directors and financial report. The Australian Accounting Standards Board released draft standards for sustainability reporting (AASB draft standards) which are open for comment until 1 March 2024. These are modified from the Sustainability Reporting Standards of the International Sustainability Standards Board.

Entities should ensure that their disclosures contain information which will address:

a) **Financial materiality of climate risks and opportunities**: This will include the process which the entity adheres to in the identification and prioritisation of climate related risks and opportunities, assessments of impacts of such risks and opportunities.
b) **Governance:** This includes processes, controls and procedures used to monitor and manage climate-related financial risks and opportunities. Entities should have detailed outlines on the delegation of responsibilities and who is tasked with governance.
c) The ASRS notes that *'the objective of climate-related financial disclosures on governance is to enable users of general-purpose financial reports to understand the governance processes, controls and procedures an entity uses to monitor, manage and oversee climate-related risks and opportunities'*.
d) **Strategies for addressing climate risks and opportunities:** Entities will need to report how their climate targets are to be resourced and achieved. This will also need to include any climate-related transition plans, adoption of new technologies, use of offsets as well as other matters which fall within the scope.
e) **Metrics and Targets:** As the draft AASB documents are draft at present, the metrics are not completely settled. However, the draft does contain some specified metrics which align with disclosure requirements, being:
    i) climate-related transition risks—the amount and percentage of assets or business activities vulnerable to climate-related transition risks;
    ii) climate-related physical risks—the amount and percentage of assets or business activities vulnerable to climate-related physical risks;
    iii) climate-related opportunities—the amount and percentage of assets or business activities aligned with climate-related opportunities; and
    iv) capital deployment—the amount of capital expenditure, financing or investment deployed towards climate-related risks and opportunities.

Where entities conclude that they do not have any material climate disclosures to make, the AASB draft standards state that the entity shall disclose the fact that there are no material climate-related risks and opportunities that could reasonably be expected to affect the entity's prospects and explain how it came to that conclusion.

What happens if I don't report?

The Consultation Paper in relation to the new regime argues that Reporting Entities which fail to make climate-related disclosures will be subject to civil penalties. Climate disclosures interact with the existing legal framework in a number of areas including directors' duties, misleading representation provisions and reporting requirements. These requirements are found across the Corporations Act, *Australian Securities and Investment Commission Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth).

Continuous disclosure obligations would also continue to apply requiring that entities should make timely and accurate disclosures.

3. Policy Update

3.1 Strategy NSW and VIC repealing rebate / stamp duty exemptions for EVs

The stamp duty exemption for eligible new and used electric vehicles with a dutiable value under $78,000, and the $3,000 rebate for the purchase of new electric vehicles with a dutiable value of less than $68,750, will no longer be available from 1 January 2024 due to the *Treasury and Revenue Legislation Amendment Bill 2023* (NSW) amending the *Duties Act 1997* (NSW).

The NSW electric-vehicle incentive scheme has been available since 1 September 2021. The scheme aimed to incentivize the purchase of electric vehicles which are significantly pricier than the traditional internal combustion engine vehicles, by making them more affordable for consumers. However, transitional provisions allow for individuals and businesses that have purchased or placed a deposit on an eligible EV prior to 1 January 2024, and are awaiting delivery of the vehicle, to access the stamp duty exemption and rebate.

NSW Premier Chris Minns claimed that the subsidy is 'pushing up the costs of EVs' as car companies are increasing prices accordingly.

Victoria's Zero Emissions Vehicle (**ZEV**) subsidy which commenced in May 2021 was also suspended prematurely in June 2023 prior to the cap of 20,000 subsidies being claimed. Similar to NSW, it offered a $3,000 subsidy for new zero emissions vehicles less than $68,740.

This policy change was announced in the light of strong growth in the uptake of EVs in Australia. According to the Electric Vehicle Council, from January to June 2023, 46,624 EVs were sold in Australia, which is almost three times higher than the amount sold in the same period in the preceding year. However, Australia's rate of adoption of electric vehicles is well below the global average, and is significantly behind many EU countries, the UK and China, which raises concerns for the removal of such incentives, considering the country is already lagging behind other countries.

Both states have set targets for the adoption of electric vehicles. Victoria has set a goal that 50% of all light vehicle sales in Victoria will be zero emissions vehicles, and New South Wales has committed to achieving 52% of all new car sales to be electric vehicles by 2030-2031.

3.2 Victorian Road-User Charges for Electric Vehicles found invalid

The High Court of Australia recently handed down a decision on the validity of the *Zero and Low Emission Vehicle Distance-Based Charge Act 2021* (VIC) (**ZLEV Charge Act**) in the case of *Vanderstock & Anor v. The State of Victoria* [2023] HCA 30 (see Part 4.1 for more information).

The ZLEV Charge Act which purported to make drivers of electric, hydrogen and hybrid vehicles also contribute to the funding of Victorian roads through a road user charge (**RUC**), based on the distance as shown on a vehicle's odometer readings at the start and end of a registration period, has been ruled as unconstitutional by a slim 4:3 majority of the High Court.

The Court held that it was invalid as it imposed a duty of excise within the meaning of s 90 of the Constitution which specifically reserves this power for the Federal government. The majority of the court rejected the argument that the Act was imposing a tax on the activity of driving a ZLEV on specified roads.

Petrol, liquefied petroleum gas (**LPG**) and diesel vehicle drivers contribute to the funding of roads through the Commonwealth fuel excise, currently charged at 48.8 cents per litre of petrol or diesel, and 15.9 cents per litre of LPG purchased. In comparison, the Victorian RUC was set at a rate of 2.6 cents per km for battery electric vehicles (**BEVs**) (increased to 2.8 cents from 1 July 2023), and 2.1 cents per km for plug-in hybrid electrical vehicles (**PHEVs**) (increased to 2.3 cents from 1 July 2023), which when compared with the burden placed on traditional vehicles by the Commonwealth fuel excise, was a concessionary rate.

According to transport expert, Marion Terrill, 'if electric vehicles were to pay their way on road construction and maintenance, they'd be paying about four cents per kilometre which is well above the charge that Victoria had'. Nonetheless, there are arguments that placing an excise or other tax on drivers of electric vehicles would discourage the uptake of electric vehicles.

Another issue with the ZLEV was that the method of average calculation had been met with strong objection by PHEV drivers, who may have been double charged, as both the ZLEV RUC as well as the Commonwealth fuel excise may apply.

Furthermore, an investigation by the Victorian Ombudsman into the administration of the charge found that the Department of Transport and Planning had wrongly imposed penalties by charging for more kilometres than travelled where odometer readings were not provided on time and recommended that it refund all monies collected in this way. In light of their investigation, the Ombudsman had recommended that the Department of Transport and Planning, subject to the High Court's decision, develop and publish processes for drivers to dispute inaccurate ZLEV charges, request waivers of the requirement to declare their odometer reading, and request discretionary waivers.

How and whether owners of electric vehicles will be taxed in the future remains unclear. As the uptake of electric vehicles increase, it will be a source of revenue that both the state and federal governments will take an interest in. Notably, the Electric Vehicle Council supported a uniform charge imposed by the Federal Government rather than a state-based tax. An alternative would be for the state and territory governments to impose 'congestion pricing', that is, a charge for people to enter a congested zone such as the CBD, similar to those found in crowded cities such as London.

4. New from Overseas

4.1 US Auto Workers strike

The United Auto Workers strike against Ford, General Motors and Stellantis (formerly Fiat Chrysler) that began on 15 September 2023, culminated with deals being reached between the Union and each of the three automakers, after six weeks of striking by over 40,000 workers throughout 38 distribution centres and plants of the three major US automakers across the United States.

It was a strike that was attended by President Joe Biden, the first time in modern history that a US president attended a workers' strike, who showed his support for the workers by attending a rally at a parts distribution centre in Michigan on 26 September 2023.

The Union had demanded 36% pay rises increasing over four years, 32 hour work weeks, the restoration of traditional defined benefit pensions for new hires, and the elimination of wage gaps between newer and older employees.

The United Auto Workers successfully compelled Ford to agree to a tentative agreement, and on Saturday 8 October 2023, reached a deal with Stellantis on similar terms. The proposed agreed deals include 25% pay increases over the term of the four and a half year agreements, and 68% increases to starting wages.

The automakers have been arguing that the union demands would affect their competitiveness in the global market and their long-term viability with Ford announcing that the strike had come at a cost of $1.3 billion, and the deal, if ratified by UAW members, would increase labour costs by approximately $900 per vehicle.

The competitiveness of Chinese vehicles by contrast will be boosted, as Chinese electric vehicles are getting cheaper while the prices of American and European vehicles are being pushed up.

4.2 UK delaying Zero Emissions Vehicle Mandate until 2035 in line with Australia - how government belt-tightening may see delayed take-up of EVs in Australia and worldwide

The UK government's Zero Emissions Vehicle (**ZEV**) Mandate which requires car manufacturers to gradually increase the proportion of ZEVs they sell each year, has been delayed by five years, with the final target of 100% of new car sales being ZEVS, being pushed back from 2030 to 2035.

The mandate aligns the UK with the European Union, which has agreed to ensure that 100% of all new cars sold from 2035 onwards will be ZEVs.

The UK mandate will expedite the shift toward ZEVs and also provide market certainty for the automotive, charge point and energy sectors and their supply chains. It requires car manufacturers to gradually increase the share of zero-emission cars they sell in the UK to:

- 22% in 2024;
- 33% in 2026;
- 52% in 2028;
- 80% in 2030; and
- 100% in 2035.

The targets for new vans will be set at:

- 10% by 2024;
- 70% by 2030; and
- 100% by 2035.

A car manufacturer that fails to comply with the mandated targets, would face fines expected to be approximately £15,000 per vehicle, or would be required to buy surplus credit from a company that has exceeded its ZEV sales percentage targets.

The mandate will compel a significant increase and place pressure on car manufacturers to produce more electric vehicles. According to the European Automobile Manufacturers' Association (**ACEA**), from January to June of 2023, electric vehicles accounted for 16% of total new car sales in the UK. This figure will have to increase to 22% by 2024. In comparison, according to the Electric Vehicle Council, the figure in Australia for the same period was just 8.4%.

The figures show the low uptake of electric vehicles in Australia in comparison to other major economies. Unlike the UK and the EU, Australia has not mandated a nationwide target for a certain proportion of new car sales to be ZEVs. However, some states have set similar targets. For example, the ACT has set a sales target of 80-90% of all car sales being ZEVs by 2030, while NSW and QLD is aiming to increase sales of electric vehicles to more than 50% of new car sales by 2030-31.

5. Case Law Update

5.1 High Court decision - *Vanderstock & Anor v. The State of Victoria [2023] HCA 30*

Background

The Victorian zero & low emission vehicles (**ZLEV**) road-user charge or 'EV tax' was introduced by the Victorian government in 2021, whereby it has been reported that approximately $5 million has been generated so far. The state had aimed to raise $30 million through the tax over a four-year period.

The charge meant that registered owners of an electric or hydrogen vehicle would have to pay the state government 2.8 cents for every kilometre that the vehicle travelled on public roads. Correspondingly, plug-in hybrid vehicle owners were to be charged at a slightly lower rate of 2.3 cents per kilometre.

The contested Victorian Act imposed a charge for the use of 'specified roads' which encompassed roads not only in Victoria, but Australia wide. Under the ZLEV Charge Act, failure to provide the odometer readings meant that the Victorian Department of Transport and Planning could suspend or cancel the vehicle's registration, and/or issue an automatic pro-rata invoice based on the 'average distance' a ZLEV travels per year, that is, 13,500 km per year.

The plaintiffs, Christopher Vanderstock and Kathleen Davies, both being registered operators of Zero and Low Emission Vehicles, brought proceedings against the State of Victoria, filing in the High Court on 6 June 2022.

The plaintiffs argued that the imposition of the tax by the Victorian government per kilometre driven was unconstitutional as the states do not have the power to impose excise taxes on consumption.

Issue

Whether the EV tax is unconstitutional in that it breached section 90 of the Australian Constitution.

Outcome

The High Court, by majority, held that the relevant tax provision, being section 7(1) of the ZLEV Charge Act was invalid, as the power to impose duties of customs and of excise was found to be held exclusively with the Commonwealth.

The Court held that an excise within the meaning of s 90 is an inland tax on goods. The Court noted that the key question at hand was whether the tax was a tax on goods, which turned on whether, the tax bore a close relation to the production or manufacture, sale, distribution, or consumption of goods. This question also turned on whether the tax is of such a nature as to affect the goods as the subjects of manufacture, production or as articles of commerce.

The ZLEV charge was deemed to be a tax on goods as there was found to be a close relation between the tax and the use of ZLEVs, and the tax affects ZLEVs as articles of commerce, including because of its tendency to affect demand for ZLEVs.

Significance to the Automotive Industry

This decision represents a victory for the ZLEV industry, and consumers of such vehicles. The industry may experience a rise in interest over ZLEV as consumers may potentially be influenced by this High Court decision.

It should be recognised that this issue may not disappear with the Victorian provision being struck down. Further repercussions may follow as it is likely that many electric vehicle owners will be looking at this outcome while hoping for a mass refund from the Victorian government following this decision.

5.2 Ongoing update - *AHG WA (2015) Pty Ltd T/A Mercedes-Benz Perth & Westpoint Star Mercedes-Benz & Ors v Mercedes-Benz Australia/Pacific Pty Ltd [2023] FCA 1022*

Background

On 30 August 2023, a case brought against Mercedes Benz Australia/Pacific Pty Ltd (**Mercedes-Benz**) by 38 Australian Mercedes-Benz dealers in the Federal Court received its judgement which was in favour of the respondent.

The cause of action arose with Mercedes-Benz converting their dealership agreements from the previous 'dealership model' to a new 'agency sales model'. The Dealers made allegations that in doing so, Mercedes-Benz had breached not only its obligation to act in good faith, but also had engaged in unconscionable conduct as a consequence of the non-renewal and end of their dealership agreements. The Dealers claimed that this was a forced move, made to push the 'agency sales model' as the new standard agreement.

The Dealerships argued that the switch was based on a misleading consultation being pushed through even though there was opposition from the Dealers. The Dealers also argued that the new model would affect their bottom line, as the showroom stock would become the property of Mercedes-Benz rather than the dealership, creating a non-negotiable fixed price for consumers.

Issue

1. Whether Mercedes-Benz engaged in unconscionable conduct; and
2. Whether Mercedes-Benz did not act in good faith by breaching Australia's Franchising Code of Conduct and the Australian Consumer Law.

Outcome

The Court found in favour of Mercedes-Benz for the following reasons;

- The dealership agreements granted Mercedes-Benz the power to issue non-renewal notices for the purpose of ending dealership agreements, provided that this was done so in good faith. Beach J disagreed that the power of non-renewal was contingent on Mercedes-Benz not being antithetical to that bargain, and the Dealers were incorrect to argue such.
- In signing the agency agreements, Mercedes-Benz had not placed the dealers under economic duress.
- The existence of goodwill between the Dealers and Mercedes-Benz was founded on the continued existence of the dealership itself. The dealership agreement ceased to operate and therefore there was no goodwill to which the dealers could rely on as a form of legal right or privilege. In essence, the goodwill had dissolved with the previous dealership agreement.

Importantly, the Judge found that Mercedes-Benz had not engaged in unconscionable conduct through entering into the agency agreements.

At the time of publication, the time for lodging an appeal had yet to expire.

The judgment has important implications for the broader industry and franchising sector as discussed below.

Significance to the Automotive Industry

A non-renewal rights existence does not define the franchise agreement as a permanent bargain, and the agreement can be ended by the party who holds the non-renewal right.

There is no constraint on the right of non-renewal under a franchise agreement, aside from the duty of good faith. The nature of the bargain provides no limitation to this right.

As it applies to termination, when without cause, provision or power of non-renewal, the good faith duties substance is distinguishable from contractual provisions concerned with cooperation to produce a result beneficial to all the parties of the agreement. A power intended to serve only the interests of the party upon whom the power is conferred and if in the pursuit of that party's interest will be considered an exercise in good faith. In this circumstance, it was the right of non-renewal being exercised for the benefit of the dealerships.

Taking a universal approach to the non-renewal of the dealership agreements was not a breach of the obligation of good faith, and it is not necessary to consider the individual circumstances of each dealer.

Goodwill was defined as the legal right privilege to operate a franchised business in substantially the same manner which attracted customers to the business in the past. Due to this, on the expiry or termination of a franchise agreement the goodwill then ceases to exist. On the expiry or termination of such an agreement, there is no valuable intangible asset of which the franchisee has an entitlement. In simple terms, a franchisee holds no right at law to be compensated for goodwill on non-renewal of a franchise agreement.

5.3 Unconscionable Conduct - *ACCC v Mazda Australia Pty Limited [2023] FCAFC 45*

Background

In 2019, the ACCC brought proceedings against Mazda Australia (**Mazda**), alleging that Mazda engaged in unconscionable conduct and made false or misleading representations through its dealings with customers who bought vehicles from 2013 to 2017.

At the first instance, O'Callaghan J found that Mazda made 49 separate false or misleading representations to nine customers, who had each experienced significant faults with their recently purchased Mazda vehicles. His Honour held that the customers had suffered harm, stating that Mazda had given customers the run around and provided 'appalling customer service'. Although, His Honour did not accept that Mazda had engaged in unconscionable conduct.

On appeal, the ACCC sought to overturn the trial judge's dismissal, alleging the following:

- the affected customers in question were in a substantially weaker bargaining position relative to Mazda;

- the consumers were vulnerable and disadvantaged, and had paid significant amounts to purchase the vehicles and were entirely dependent on Mazda as to how faults and requests with new vehicles were dealt with;
- Mazda took advantage of that vulnerability and disadvantage; and
- Mazda's refusal to provide a refund or replacement vehicle at no cost caused harm to the customers.

Following this decision, appeals were lodged by both the ACCC and Mazda. The ACCC claimed that the Federal Court should have found that Mazda engaged in unconscionable conduct in addition to the findings of false and misleading representations. Conversely, Mazda asserted that it had not made any of the 49 representations alleged.

Issue

1. Whether Mazda engaged in misleading and deceptive conduct in breach of the ACL by reason of the statements made by its sales representatives and customer service representatives to the specified consumers.
2. Whether Mazda engaged in unconscionable conduct in making specific statements with regard to its conduct towards those customers.

Outcome

Both appeals were dismissed, and Justice O'Callaghan's decision was affirmed by the Full Court in a 2-1 decision. The Court agreed that Mazda's poor conduct was serious. The Full Court reasoned that Mazda's conduct had not diverged sufficiently from acceptable business practices to such that it constituted unconscionable conduct.

In its reasoning the Court noted the following:

- Mazda did not act dishonestly;
- the conduct relied upon by the ACCC did not involve deception in the form of a ruse or a scheme by sales representatives to gain access to a consumer for the purpose of achieving sales pursuant to explicit directions from their employer;
- the ACCC did not advance a 'systems' case or expose evidence of any systemic conduct by Mazda; instead, the individual cases were advanced involving the same type of conduct;
- the absence of a 'systems' case meant that the Court had to assess Mazda's conduct in respect of each customer, not as a system or pattern of conduct in respect of a class or group of customers of which would likely have been more significant; and
- the ACCC did not seek to prove that each customer's vehicle suffered a major failure.

Significance to the Automotive Industry

This decision reinforces the very high bar set to prove unconscionability. It is a reminder to automotive dealerships to meet consumer protection regulatory obligations and the value of taking a proactive approach to ensure compliance with the ACL.

This decision further illuminates how the Courts interpret manufacturer documentation and its method of servicing consumer's needs.

5.4 Standards of Acceptable Quality - *Toyota Motor Corporation Australia Ltd (ACN 009 686 097) v Williams and Another (2023) 296 FCR 514*

Background

In 2022, a judgment was made against Toyota Motor Corporation Australia Ltd (**Toyota**) in the Federal Court. The Judgment was made in favour of customers who were in possession of certain Toyota vehicles, being defective diesel vehicles, which were acquired between 1 October 2015 and 23 April 2020 (**Relevant Period**).

The vehicles in question were fitted with a diesel exhaust after treatment system (**DPF**) which aimed to reduce the harmful pollutants and other emissions from the engine. The Plaintiffs had alleged that as the DPF was not designed to function during all reasonable driving conditions and that because there was a propensity for the exhaust to cause reduced fuel efficiency and require service or repair, the vehicles were defective due to these faults.

The primary judge had found that these such vehicles and others whereby the defect had not yet manifested were supplied in breach of the acceptable quality guarantee. Further, the primary judge also stated that the relevant customers were entitled to recover reduction in value damages pursuant to sections 271(1) and 272(1)(a) of the ACL. Earlier estimations stated that at this time Toyota's total aggregate damages bill was likely to be in excess of AU$2 billion.

Toyota lodged an appeal in the Federal Court following this decision, bringing 15 grounds of appeal, which can be grouped into 3 main categories. These include a challenge to the primary judge's findings on liability, the primary judge incorrectly construed and applied the statutory test under the ACL, and the primary judge's approach to the assessment of the reduction in value of the relevant vehicles.

Issue

1. Were the relevant vehicles of 'acceptable quality' in that they complied with a consumer guarantee in the ACL?
2. Did Toyota make misleading representations and omissions about the vehicles, in contravention of the ACL?
3. Was the primary judge's finding that there was a reduction in value of all relevant vehicles of 17.5% made in error?

Outcome

The Full Court upheld the primary judge's findings that the Relevant Vehicles were not of acceptable quality because of their defective DPF systems. Furthermore, it was also held that Toyota engaged in misleading or deceptive conduct regarding their engagement with the marketing and selling of the vehicles, and that the value of the Relevant Vehicles at the time of initial supply was reduced because of their DPF systems.

However, it was found that the amount of reduction in value was 10% instead of the initial figure found by the primary judge being 17.5%.

The Full Court also found that the fact that Toyota had developed an effective fix for the defect in May 2020, and had begun offering it for free after the Relevant Period was relevant and hence was taken into account in forming the above figure. Following this, the Full Court remitted the proceeding back to the primary judge for the purposes of reassessment regarding the necessary compensation amount.

Significance to the Automotive Industry

Defects in vehicles are not restricted to safety defects and it is enough for the adverse consequences and symptoms associated with the defect to impact significantly upon the use and enjoyment of the vehicle for a court to find a defect.

Defects in vehicles do not need to be material, and it does not matter that the defect is not so substantial, and the vehicle can still function effectively as a mode of transportation. There is an expectation from consumers that a vehicle should be capable of doing more than just travelling between two points.

If there is an inherent propensity that one or more adverse consequence is manifested through malfunction, then there is enough to breach the acceptable quality guarantee.

In addition, it is important for dealers to ensure representations made to customers regarding vehicles, whether as to capability or use do not stray from manufacturer's recommendations so there are no grounds for liability to fall on dealers for misrepresentations that cannot be the subject of indemnity from the manufacturer.

5.5 Standards of quality - *Dwyer v Volkswagen Group Australia Pty Ltd [2023] NSWCA 211*

Background

In 2018, proceedings were commenced against Volkswagen Group Australia Pty Ltd (**VGA**) in the New South Wales Supreme Court by the appellant, Professor Dwyer, who represented himself and relevant group members. The claim was in relation to roughly 83,000 vehicles which were equipped with Takata airbag inflators. These inflaters were alleged to have a tendency to degrade and malfunction over time.

VGA had replaced the airbags free of charge to consumers before any malfunctions had materialised. The primary judge, Justice Stevenson, found no breach of s 54 of the ACL and that the representative plaintiff had failed to establish any loss.

On appeal, Professor Dwyer limited his case on breach of the acceptable quality guarantee to the alleged risk of rupture of the airbags in the VW Vehicles.

Issue

1. Did the Appellant's vehicle breach the acceptable quality guarantee in section 54 of the ACL?
2. As far as the hypothetical reasonable consumer would regard as acceptable, could the relevant vehicles be considered safe and defect-free?

Outcome

The Court upheld the primary judgement, and that the appellant's vehicle was of acceptable quality. Much expert and technical evidence was relied upon in this decision with the Court of Appeal agreeing with the trial judge that the appellant had not demonstrated that the airbags risk of rupture could eventuate within a meaningful timeframe.

Significance to the Automotive Industry

The Court of Appeal considered two keyways in which it may be said that a vehicle is not of acceptable quality in a propensity case:

- Unacceptable quality may be demonstrated on the basis of an inherent risk associated with a product without that risk actually having materialised, it being paramount to establish that the inherent risk actually exists; and
- A merely speculative theoretical possibility of a risk and not within any meaningful timeframe, would not be regarded as unacceptable by a reasonable consumer.

This operates to reduces auto manufacturers exposure to class actions under the ACL to a certain extent, however this is still an area of law which remains in flux as judgments of other appeals are yet to be made, such as Ford v Capic. As such, this space should continue to be watched.

5.6 Jaguar Land Rover Diesel Particulate Filter Class Action

Background

A class action is being brought against Jaguar Land Rover (**Jaguar**) in relation to the Diesel Particulate Filter (**DPF**) system in certain diesel vehicles purchased, exchanged or lease-hired between 1 March 2013 to 31 October 2018.

It is being alleged that the DPF system is defective and is prone to blockage during regular driving conditions. This would pose a safety hazard to drivers, passengers, and pedestrians as it could cause the vehicle to lose power suddenly without warning. This would inhibit not only the performance but also the safety of the vehicle while on the road.

It was also alleged that the defective DPF system would cause ongoing mechanical issues as well as reduced fuel efficiency, requiring more frequent servicing and maintenance.

These allegations culminate around the claim that Jaguar failed to comply with the guarantee of acceptable quality under the ACL, also engaging in misleading and deceptive conduct. The action seeks to recover compensation for both the loss and damage on behalf of consumers regarding vehicles affected by the DPF issues.

Issue

1. Was the Diesel Particulate Filter system defective, to such an extent that Jaguar failed to comply with the guarantee of acceptable quality under the ACL?
2. Did Jaguar engage in misleading and deceptive conduct?

Significance to the Automotive Industry

While the action is still underway, its outcome will be of great importance to the industry - as it has implications on how the Courts continue to interpret the guarantee of acceptable quality under the Australian Consumer Law as well as issues of misleading and deceptive conduct.

5.7 ACCC Update - ACCC investigates Mitsubishi discount offer

Background

On 16 June 2023, the ACCC published its concerns that Mitsubishi Australia Limited (**Mitsubishi**) may have made false or misleading claims to members of the Queensland Farmers' Federation (**QFF**) concerning discounts available to them regarding the price of vehicles.

The ACCC received a complaint in September 2022 alleging that Mitsubishi made false or misleading representations about a 15% discount on the entire range of Mitsubishi Vehicles, which were advertised to targeted QFF members. However, when the QFF members purchased the vehicles, the full discount only applied to a specific model of the Mitsubishi Triton.

Outcome

The ACCC commended Mitsubishi for providing partial refunds to affected customers who were entitled to the full discount but did not receive it for their respective purchases, and by updating its compliance handbook with a formal Australian Consumer Law compliance program. The ACCC did not commence any further legal action.

Significance to the automotive industry

The case highlighted that motor dealers should diligently review marketing material which has been provided to consumers and refer to the manufacturers where it appears that it does not match the programs announced by the manufacturers to the dealers. Doing so may highlight at the time of sale any discrepancies which may preclude claims of false or misleading representations in contravention of Australian Consumer Laws.

5.8 Fuel consumption labelling - Mitsubishi & Dealer

Background

In 2017 proceedings were brought against Mitsubishi Motors Australia Pty Ltd and the Mitsubishi Dealer by the purchaser of a Mitsubishi vehicle on the basis that its windscreen fuel consumption label was misleading or deceptive in contravention of section 18 of the Australian Consumer Law (**ACL**).

At the time of purchase, the vehicle had applied to its windscreen a fuel consumption label in compliance with provisions of the *Motor Vehicle Standards Act 1989* (Cth) (**MVS Act**) and the *Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008* (Cth) (**ADR 81/02**). The purchaser became dissatisfied with the vehicle's fuel consumption exceeding the fuel consumption values on the label and filed a claim in the Victorian Civil and Administrative Tribunal (**VCAT**) alleging that Mitsubishi and the Dealer had relevantly, contravened section 18 of the ACL in that the fuel consumption label was misleading and deceptive.

The purchaser succeeded before VCAT and Mitsubishi and the Dealer subsequently had their appeals dismissed by the Supreme Court of Victoria and thereafter by the Court of Appeal.

Mitsubishi and the Dealer subsequently appealed to the High Court.

Outcome

The High Court found that in circumstances where the Mitsubishi and the Dealer were bound, respectively, to apply and to maintain the fuel consumption label on the purchaser's vehicle by the MVS

Act, a label the form and content of which were dictated by ADR 81/02, Mitsubishi and the Dealer did not, by that conduct, contravene section 18 of the ACL.

Significance to the Automotive Industry

As stated by the Federal Chamber of Automotive Industries, this decision brings certainty to Australian dealers and manufacturers on government-mandated fuel consumption labels.

Furthermore, as stated by the CEO of the Australian Automotive Dealer Association, James Voorman, this decision "is a victory for common sense which will allow Australian Dealers and manufacturers to continue to service the needs of their customers without fear of inadvertently breaching the law".

5.9 Misleading and deceptive conduct - Honda Australia

Background

The ACCC alleged that between about January 2021 and June 2021, Honda Australia Pty Ltd (**Honda**) represented to customers of Brighton Automotive Holdings Pty Ltd (**Astoria**), Tynan Motors Pty Ltd (**Tynan**) and Buick Holdings Pty Ltd (**Burswood**) that the dealerships would close or had closed and would no longer service Honda vehicles, when this was not the case. These representations were allegedly made in emails, text messages and phone conversations with customers.

The communications were made in the context of Honda Australia restructuring to an agency mode which resulted in some franchise agreements with authorised dealers being terminated, including agreements with Astoria, Tynan and Burswood. However, the Astoria, Tynan and Burswood dealerships continued to operate independent service centres to service and repair vehicles, including Hondas.

Honda admitted that in certain statements to thousands of customers it had breached the Australian Consumer Law by making misleading representations that the dealerships had closed and would no longer service Honda vehicles.

Outcome

The Federal Court of Australia found that Honda engaged in misleading or deceptive conduct and made false or misleading representations to customers of former authorised Honda dealerships, Astoria, Tynan and Burswood.

The Federal Court of Australia imposed penalties totalling $6 million on Honda.

Significance to the Automotive Industry

As stated by ACCC Commissioner Liza Carver 'Honda Australia deprived consumers of the opportunity to make an informed choice about their options for servicing their vehicle. It also caused likely financial loss to the dealerships by the false claim they were closing or had closed.

This case also highlights the substantial penalties courts are prepared to impose on companies for engaging in conduct which misleads or deceives consumers.

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