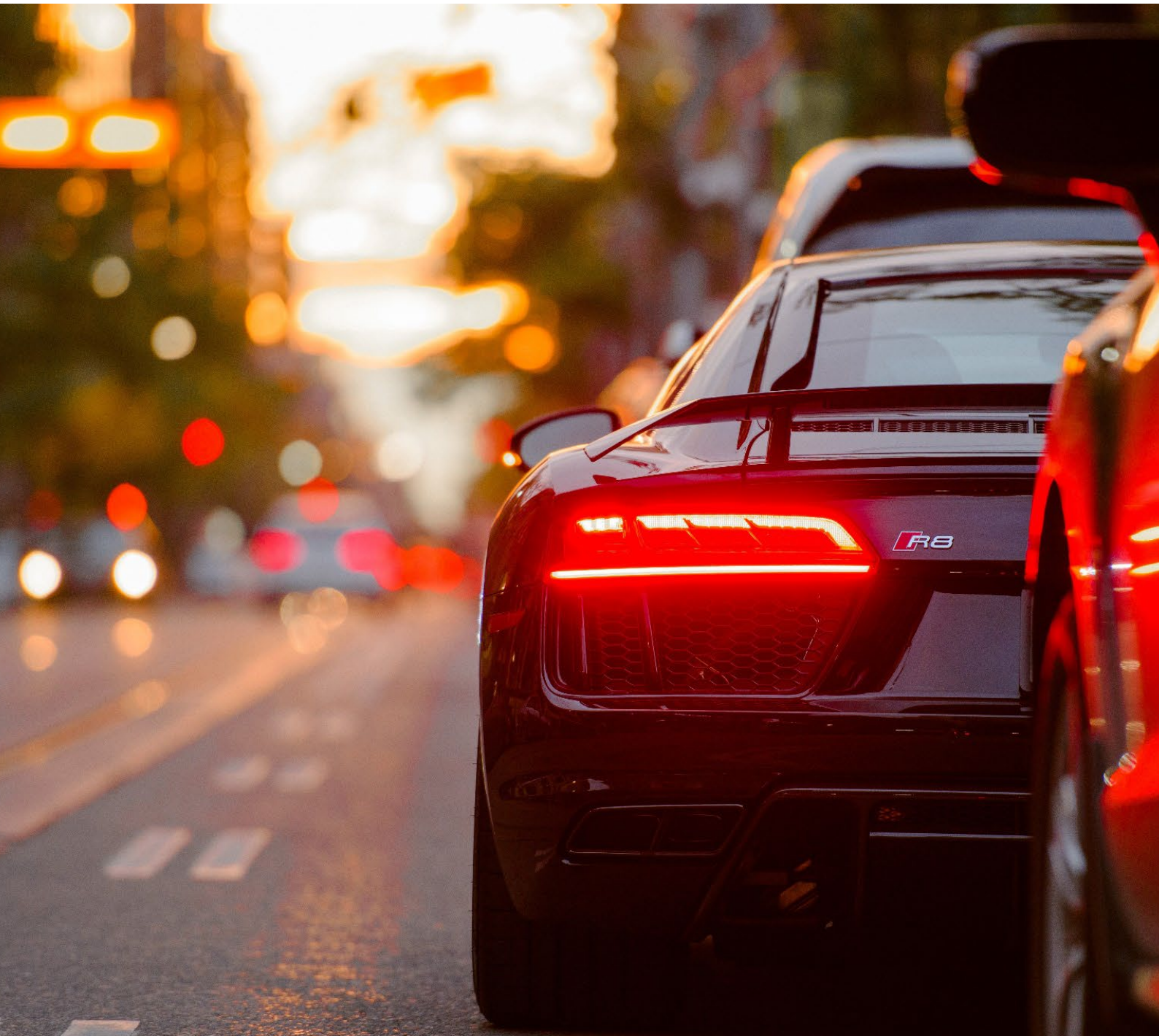
HWL EBSWORTH
LAWYERS

AUTOMOTIVE INDUSTRY GROUP

Regulatory Update

July 2024



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Introduction

Welcome to the HWL Ebsworth Automotive Industry Group - Regulatory Update

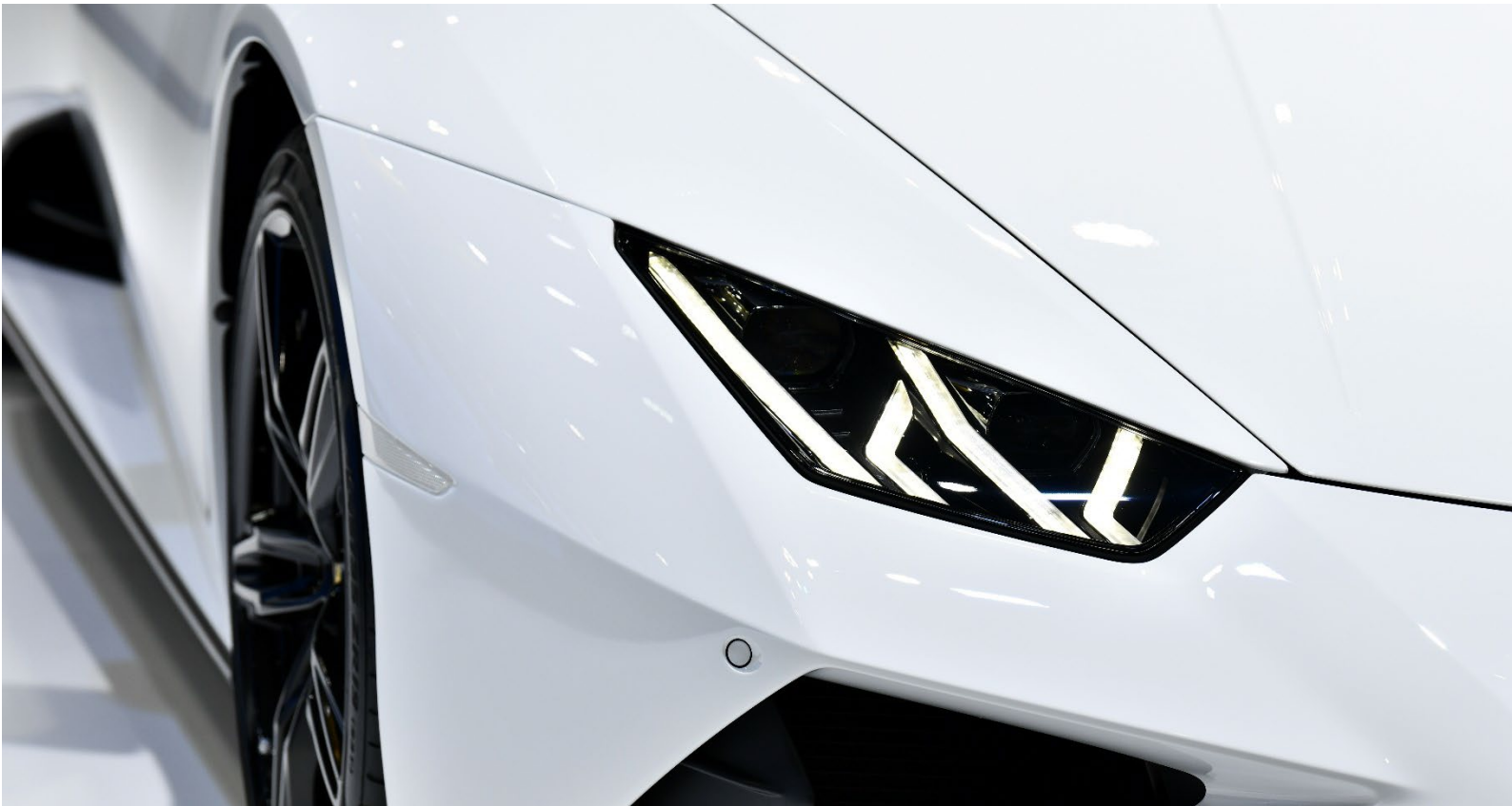
HWL Ebsworth Lawyers seeks to keep you updated with the changing automotive industry environment across new legislation, developing policy and pertinent case law developments.

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

- Substantive changes to the *Motor Dealers and Repairers Act 2013* (NSW) including licence cancellations, larger penalties, and new powers for the Secretary and Governor (see Part 1.1)
- Proposed new ESG reporting requirements to start 1 July 2024 (see Part 2.1)
- New designated complainants' regime for consumer protection to start 1 May 2024 (see Part 2.4)
- Australian government announced New Vehicle Efficiency Standards (see Part 3.1)
- ACT to ban internal combustion engines from 2035 (see Part 3.2)
- Australian government releases response to Franchising Code Review (see Part 3.5)



1. Legislation Update

1.1 Changes to the *Motor Dealers and Repairers Act 2013* (NSW)

A number of changes have been made to the *Motor Dealers and Repairers Act 2013* (NSW) (**Act**) which came into effect on 1 December 2023.

Licence cancellation

Section 37 of the Act has been reinstated. Section 37 of the Act requires the Secretary of the Department of Fair Trading New South Wales (**Secretary**) to cancel a person's licence if the Secretary would have been required to refuse a licence application under section 25 of the Act. Additionally, it sets out the process and mechanisms the Secretary must adhere to when cancelling a licence under section 37(1) of the Act. This change enhances the Secretary's ability to maintain high standards within the automotive industry of New South Wales and ensures that those who would not qualify for a new licence can now also have their existing licence revoked, thereby maintaining the integrity and trust requisite in the industry.

Disciplinary actions

Furthermore, a new section 39A has been inserted into the Act. This new section sets out the grounds upon which disciplinary action can be taken against the holder or a former holder of a motor dealer's licence, a motor vehicle repairer's licence, or a motor vehicle recycler's licence. Such grounds include circumstances where a business authorised by a licence has been carried on in a dishonest or unfair manner.

The inclusion of this section broadens the accountability framework of licensed corporate and partnership structures, emphasising that individual accountability extends beyond personal actions to include the actions of the entity that they manage or control.

An additional disciplinary action that can be imposed has been granted to the Secretary by way of the insertion of a new section 45(d1) into the Act. This disciplinary action will require payment of up to $11,000 for an individual and up to $50,000 for a body corporate within a specified time. Guidance has been provided to the Secretary in imposing this disciplinary action through the insertion of section 45(4) into the Act, which restricts the Secretary from imposing the new disciplinary action for those grounds of disciplinary action contained at sections 38(1)(c)-(f), 39(j), and 40 of the Act, or if the person has been found guilty of an offence relating to the grounds specified in a show cause notice issued. In addition to these changes, a new ground for administrative review under the *Administrative Decisions Review Act 1997* (NSW) has been inserted into the Act by section 176(1)(d) for instances where a payment pursuant to section 45(1)(d1) of the Act is required.

These changes highlight the severity with which non-compliance is viewed. However, checks and balances are provided to these changes to ensure its satisfactory and just application, both of which may lead to a more compliant and ethical industry.

Odometer tampering changes

Further guidance has been provided regarding the Secretary's power to approve the repair or replacement of an odometer contained under section 52(5) of the Act through the insertion of section 52(5A), which stipulates that such approval by the Secretary can be conditional. This affords the Secretary and the automotive industry with greater certainty as to the scope of odometer tampering approval that can be provided, as well as the restrictions that may apply.

Section 53 of the Act has also been expanded, so that it is now an offence for someone to tamper with an odometer, unless that person holds a motor vehicle repairer's licence and has lawfully repaired or replaced the odometer in the course of carrying on their business as a motor vehicle repairer. This in turn allows for consistency and certainty around the approval of odometer tampering which the Secretary can provide, as it is now clear that it is not an offence

to use an odometer tampering device if such use is approved, whereas previously the section provided that it was plainly an offence to fit an odometer tampering device to a motor vehicle.

By providing specific conditions under which the Secretary can approve odometer repairs or replacements, these amendments reduce ambiguity, ensuring that such approvals are transparent and within well-defined parameters. This could assist in preventing and deterring future unlawful odometer tampering which would provide new service offerings for motor vehicle repairers whilst simultaneously fostering and improving consumer trust in the automotive market.

Prohibiting or regulating employment

The Governor's ability to make regulation has been expanded with the re-structuring of section 186(2)(f) of the Act which allows for regulations to be made prohibiting or regulating the employment of certain people who are required to hold a licence. This ability has been extended, whereby a person found guilty of offences, whether or not in New South Wales, can be prohibited or regulated. This ability also extends to a person who is disqualified from holding a licence or being involved in the direction, management or conduct of a business for which a licence is required. However, the expansion of the Governor's power has been lessened with the introduction of section 186(2)(a) into the Act which provides that the Secretary may exempt a person from a regulation made under section 186(2)(f) of the Act.

By allowing the Governor to regulate or prohibit the employment of certain individuals within the industry, especially those guilty of relevant offences, the Act aims to enhance industry standards and reputation as well as safeguarding public interest. However, the introduction of an exemption clause provides flexibility and discretion to the Secretary, balancing strict regulations with practical industry needs.

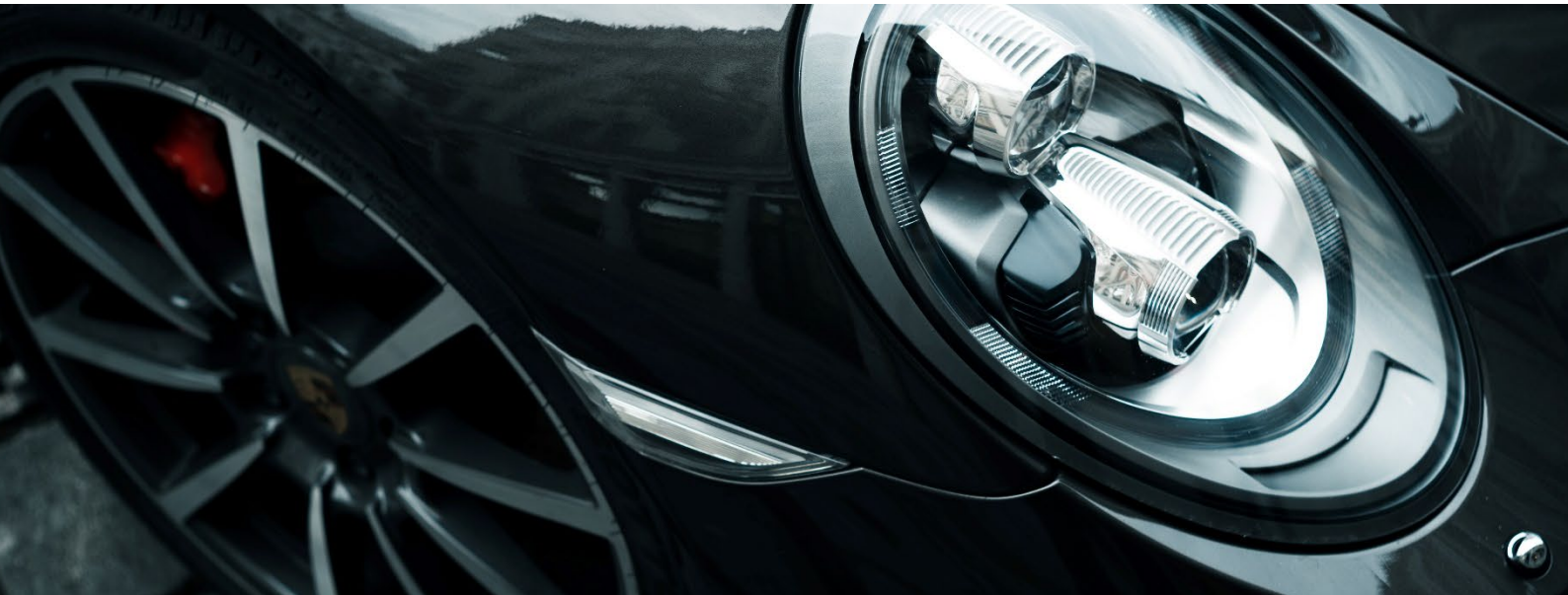
Updated penalty units

Throughout various sections of the Act, the maximum penalty units that can be issued for breaches of the Act have been amended, as well as inserted in some instances. These changes in penalty units across the Act reflect an adjustment in the severity and deterrent effect of penalties, aiming to ensure they remain effective and proportionate to the misconduct.

The table below sets out the amended sections together with the new penalties.

Section	Prior Maximum Penalty	Updated Maximum Penalty
15 Repair Work must be done by licensed motor vehicle repairers		
15(1)	-	50
15(1A)	-	50 - Individual 250 - Body Corporate
15(2)	-	50
15	20	-
16 Repair work must be done by holder of tradesperson's certificate		
16(1)	-	50
16(1A)	-	50 - Individual 250 - Body Corporate
16(2)	20	50
17 Holding Out		
17	20	50
18 Transfer or loan of tradesperson's certificate		
18(1)	-	50
19 Production of licenses and certificates		
19	10	20
47 Offences		
47(1)	20	200
47(2)	20	50
48 Motor vehicles must be sold at licensed premises		

48(1)	20	50
49 Failure to disclose being motor dealer		
49(1)	20	50
52 Odometer tampering		
52(1)	200	500
53 Devices to facilitate odometer tampering		
53(1)	-	500
53(2)	200	500
57 Sale at auction with numberplates		
57(1)	20	50
58 Other sales with numberplates		
58(1)	20	50
59 Sale of motor vehicles without numberplates attached		
59	20	50
63 Sale notices for second-hand motor vehicles		
63(2) and (3)	20	50
64 Sale notices for demonstrator motor vehicles and other second-hand vehicles		
64	20	50
83 Motor dealer may not dispose of trade-in during cooling off period		
83(1)	20	50
89 motor dealers must notify consignment rights		
89(1)	20	50
90 Trust account to be established		
90	20	50
91 Payment of consignment sale amounts to trust account		
91	20	50
92 Application of money in dealer's trust account		
92(1)	20	50
94 Period for accounting to consignor		
94	20	50
95 Audit of dealer's trust account		
95(1)	20	50
97 Numberplates on motor vehicles acquired by motor vehicle recyclers		
97	20	50
98 Sale of motor vehicles by motor vehicle recyclers		
98	20	50
99 Certain parts or accessories to be marked		
99	20	50
103 Motor vehicle broker's obligations		
103	20	50
184 Tender of documents for signing		
184	20	50



1.2 *Amendments to the definitions contained in the Sale of Motor Vehicles Act 1977* (ACT)

Changes have been made to the *Sale of Motor Vehicles Act 1977* (ACT) (**Act**) on 27 November 2023.

Removal of explanatory notes

References previously made to sections 126 and 132 of the *Legislation Act 2001* (ACT) under notes to sections 25(2) and 70D(1) of the Act and in the definition of 'Accessory' in section 2 of the Act (Dictionary) have been removed. The notes previously provided that '*An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).*' It has been suggested that this change has arisen as the notes were considered to overly complicate the understanding and operation of the law and that the legislative framework has evolved in a way that the detailed guidance provided by the notes in these sections is no longer necessary. This may be true when considering that section 2A of the Act provides that the notes included in the Act are explanatory only and do not form part of the Act, with reference made to section 127 of the *Legislation Act 2001* (ACT) in the note in section 2A.

'ACTPLA certificate' removal

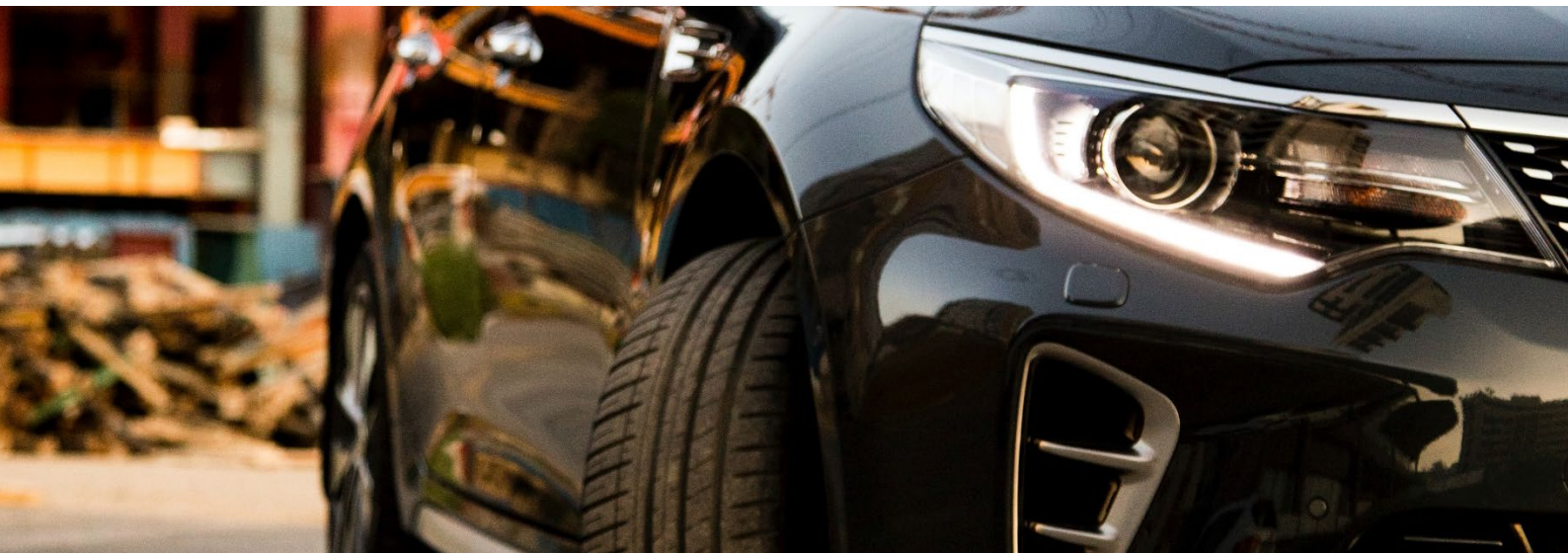
The definition of 'ACTPLA certificate' has been removed from the Act . Possessing an ACTPLA certificate for the relevant premises for the sale of motor vehicles was previously a requirement for a person other than a corporation to be eligible to be granted a dealer's licence. This requirement had been removed from amendments made to the Act in the version of the Act released and effective on 2 October 2018. However, the definition of an 'ACTPLA certificate' remains. Additionally, the definition had been removed by the *Planning (Consequential Amendments) Act 2023* (ACT) which was effective from 27 November 2023, given the introduction of the *Planning Act 2023* (ACT).

Significance to the Industry

These changes hold significance to the automotive industry for a variety of reasons.

The simplification of the Act by removing the notes set out above could, for automotive dealers and industry stakeholders, lead to a clearer interpretation of the law without the burden of navigating through complex legislative references. This in turn could reduce the legal overhead for compliance, making it easier for businesses to ensure they are operating within the legislative framework. Furthermore, the clarification that notes contained in the Act are merely explanatory and not legally binding helps automotive industry stakeholders focus on the substantive provisions of the law rather than potentially being misled by the explanatory nature of the notes. This underscores that the operational parts of the law are contained in the substantive parts of the Act, enhancing legal certainty for businesses.

The introduction of the *Planning Act 2023* (ACT), which led to the removal of the definition of the 'ACTPLA certificate', suggests a broader overhaul of planning and regulatory processes in the Australian Capital Territory. This can lead to reduced costs and administrative burdens for dealers, a more competitive market, and a legal environment with clearer compliance paths. For consumers this could translate into better services and more competitive pricing as market barriers are reduced.



1.3 *Motor Vehicle and Insolvent Under Administration changes within the Motor Dealers and Chattel Auctioneers Act 2014* (QLD)

Changes have been made to the Motor Dealers and Chattel Auctioneers Act 2014 (QLD) (Act), which came into effect on 19 February 2024, and which focus on definitions, and specifically, the definition of a 'motor vehicle'.

Meaning of Motor Vehicle Updated

Section 12 of the Act was amended whereby additional items were inserted into the list of what is not considered a 'motor vehicle' at what is now subsections 12(2)(b) & (e) of the Act. These two new items are 'a low powered toy scooter and 'a personal mobility device'. The inclusion of these two items in the list of what is not considered a 'motor vehicle' means that a low powered toy scooter and a personal mobility device cannot be considered a motor vehicle for the purposes of the Act.

Furthermore, a 'motorised scooter' is now considered as a 'motor vehicle' for the purposes of the Act as this had previously been listed at subsection 12(2)(c) of the Act as an item that did not meet the meaning of a motor vehicle but has since been removed.

The removal of 'motorised vehicle' and the insertions of 'a low powered toy scooter' and 'a personal mobility device' within subsection 12(2) of the Act is furthered by the insertion, at subsection 12(3) of the Act, of a reference to the dictionary section of the Transport Operations (Road Use Management) Act 1995 contained at Schedule 4 in relation to the definition of a low powered toy scooter. Additionally, subsection 12(3) has been further amended whereby what had been a reference to the definition of motorised scooter under the Transport Operations (Road Use Management) Act 1995 is now a reference to the definition of a 'personal mobility device', with the words 'motorised scooter' being removed and replaced by the words 'personal mobility device'.

Powered Scooter within the meaning of Motor Vehicle

Under the *Transport Operations (Road Use Management) Act 1995*, a 'low powered toy scooter' is defined as a scooter that is propelled by at least one electric motor and complies with the requirements stated in paragraph (e) within the definition of 'scooter'. Paragraph (e) of the definition of scooter requires that the maker certifies the ungoverned power output of the motor(s) used on the scooter, the maximum power output of the motor(s) is not more than 200 watts and that when the scooter is propelled by the motor(s) it cannot exceed a speed of 10 km/h on level ground. Furthermore, a 'personal mobility device' is defined under the *Transport Operations (Road Use Management) Act 1995* as a vehicle designed for one person's use and which is prescribed by regulation to be a personal mobility device.

These updates hold significance to the automotive industry as certainty has been provided in that a powered toy scooter will be considered a motor vehicle if it is fitted with the capacity to drive faster than 10km/h. This extends the rights and obligations contained within the *Motor Dealers and Chattel Auctioneers Act 2014* (QLD) to the sale of a powered toy scooter, and therefore greater care and consideration should be had if/when dealing with a motored scooter. Furthermore, it provides certainty that personal mobility devices, such as a motorised wheelchair, is different to a motorised scooter.

Insolvent Under Administration

The definition of 'insolvent under administration' has been omitted in the dictionary contained at Schedule 3 of the Act. This had previously referred to the definition of 'insolvent under administration' contained at section 9 of the *Corporations Act 2001* (Cth). The removal of this definition could be seen as providing greater flexibility in applying the term 'insolvent under administration', whereby updates or changes to the primary source, being the *Corporations Act 2001* (Cth), does not require amendments to be made to the Act each time. Furthermore, this outlines that the Act has greater focus on the consequences of being insolvent under administration and regulatory enforcement and compliance measures rather than on the criteria to

be deemed insolvent under administration. This dynamic referencing can be particularly useful in an area like insolvency, which might evolve due to economic changes or shifts in corporate governance practices. This change, however, does not impact the implications of being insolvent under administration contained throughout the Act.

2. Proposed Legislative Updates

2.1 Proposed mandatory ESG reporting for Australian companies

The Australian Government is seeking to mandate reporting obligations for environmental, social, and governance (**ESG**) matters and climate related financial disclosures for all public and private Australian companies. The changes aim to provide Australians and investors with greater transparency and more comparable information about an entity's exposure to climate-related financial risks and opportunities and climate-related plans and strategies.

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 two of the following criteria:

(a) the consolidated revenue for the financial year of the company and any entities it controls is $50 million or more;

(b) 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; or

(c) the company, and any entities it controls, has 100 or more employees at the end of the financial year.

Phased commencement

The proposed changes will be staggered and 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	1 July 2024 - 30 June 2025 and onwards

Group 2	Over 250 employees	$500 million or more	$200 million or more	1 July 2026- 30 June 2027 and onwards
Group 3	Over 100 employees	$25 million or more	$50 million or more	1 July 2027- 30 June 2028 and onwards

Contents of disclosures

There are over 20 proposed disclosures, and each disclosure aims to identify how an entity is responding to, managing, and foreshadowing its climate related risks and opportunities. These 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 now closed for comment. We have summarised a number of the key disclosures:

(a) **Materiality:** This is information about the climate related risks and opportunities that could reasonably be expected to affect the entity's prospects;

(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) **Strategy:** To enable users of general-purpose financial reports to understand an entity's strategy for managing climate-related risks and opportunities;

(d) **Business model and value chain:** To enable users of general-purpose financial reports to understand the current and anticipated effects of climate-related risks and opportunities that impact the entity's business model and value chain;

(e) **Climate statements for example:**

(A) if an entity determines they do not have any material climate-related risks and opportunities, they must disclose this and how the entity came to this conclusion;

(B) provide information in a manner that enables users to locate its disclosures;

(C) requires climate resilience assessments against at least two possible future states, one of which must be consistent with the most ambitious global temperature goal set out in the Climate Change Act 2022; and

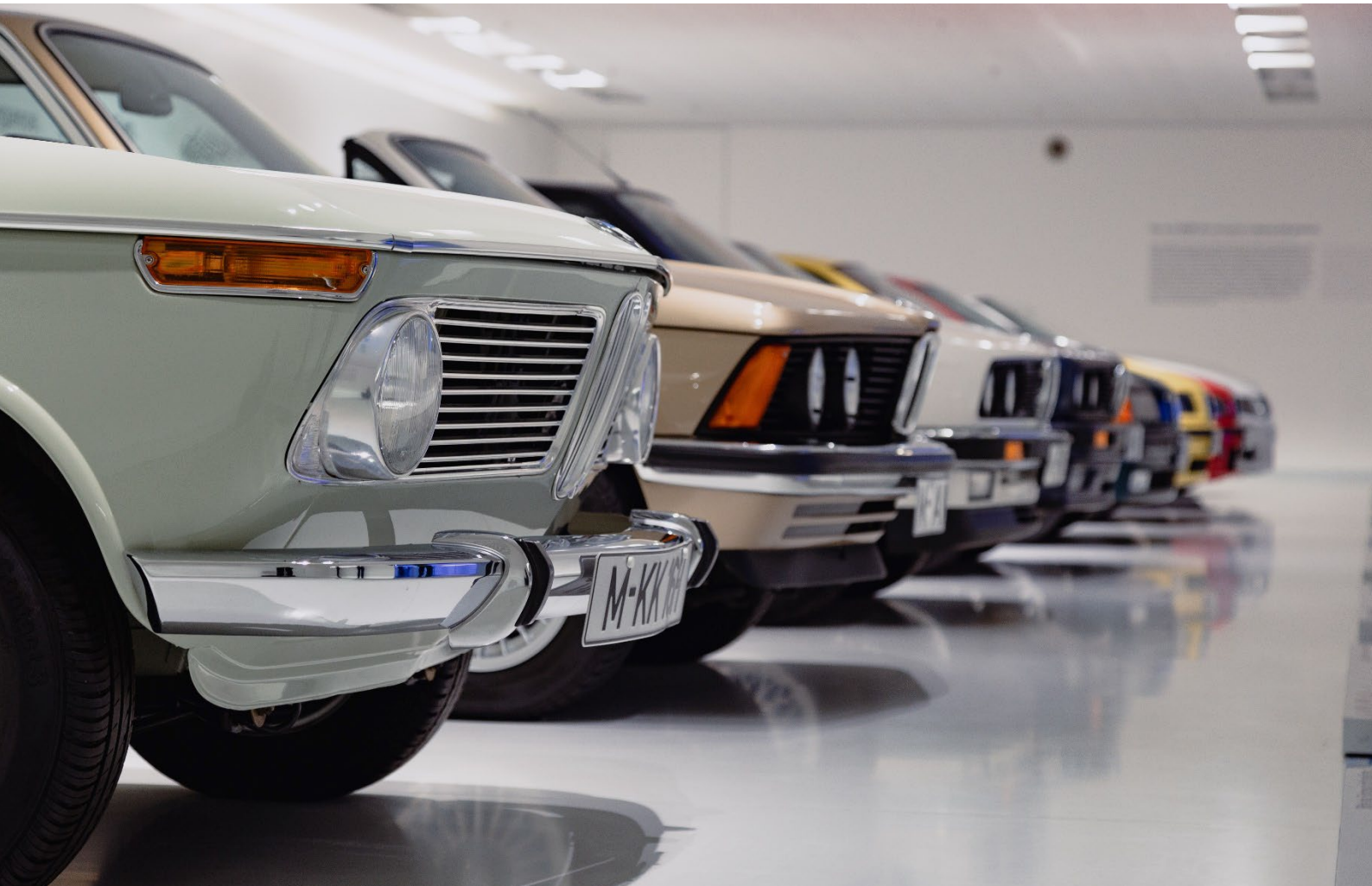
(D) greenhouse gas emissions.

What happens if you do not report?

Climate disclosures interact with the existing legal framework in several 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).

The draft bill introduces several new civil and criminal penalty provisions which range from 30 penalty units to a sentence of 2 years imprisonment outlined below. The main issue is the accuracy and correctness of the information contained in the sustainability report.

Section	Effect	Penalty
286A	Failure to keep written sustainability records that correctly explain and record the entities preparation of: • the climate statements; • any notes to the climate statements; and • any statements mentioned regarding the threshold requirements.	2 years imprisonment or 60 penalty units
289A	Failure to comply with ASIC direction to produce sustainability records kept outside of Australia.	60 penalty units
307AC	Audit reports must be conducted and reviewed in accordance with the auditing standards.	2 years imprisonment or 50 penalty units
309A	Audit reports must contain certain information.	50 penalty units
316B	Failure to make the sustainability report available on the entity's website on the day after the report is lodged with ASIC.	30 penalty units
1705C	If ASIC considers statements in the sustainability report to be incorrect, incomplete, or misleading in any way ASIC may direct the entity to confirm, explain, or amend that statement. Entities must comply with ASIC notices.	60 penalty units



2.2 Federal Government releases draft bill for new vehicle efficiency standards (NVES)

On 26 March 2024, the Federal Government released a draft Bill to legislate the New Vehicle Efficiency Standards (**NVES**). The draft Bill contains changes to the emission standards that were proposed in the Consultation Impact Analysis released by the Government in February 2024. The changes were made in response to submissions it received in response to its Consultation Impact Analysis.

Proposed amendments

The proposed Bill categorises vehicles into Type 1 and Type 2 vehicles. Type 1 vehicles include passenger cars, forward-control passenger vehicles, or light off-road passenger vehicles. Type 2 vehicles include light goods vehicles, medium goods vehicles, or heavy off-road vehicles.

The Government intends to introduce legislation this year with the NVES commencing from 1 January 2025. However, to further assist manufacturers and the regulator in making the transition to the new fuel standards, the penalties and credits mechanisms are now intended to commence on 1 July 2025.

The headline figure that was proposed in the Consultation Impact Analysis for Light Commercial Vehicles will be amended as set out below and represents a 12.2% reduction for Type 1 vehicles and a 12.4% reduction for Type 2 vehicles. The headline figure for passenger vehicles will remain unchanged.

Year	Amended Target: For Type 1 Vehicle CO2 (g/km)	Amended Target: For Type 2 Vehicle CO2 (g/km)
2025	141	210
2026	117	180
2027	92	150
2028	68	122
2029	58	110

The Government has also amended the mass limits for the upper breakpoints for both passenger vehicles and light commercial vehicles. The breakpoint mechanism operates to adjust the headline figure based on the weight of the vehicle to set the emissions target, with heavier vehicles to have a higher emissions target. Under the previous proposal, the emissions target would reach a peak at 2,000kg for passenger vehicles and 2,200kg for light commercial vehicles, with vehicles above this mass having the same emissions target.

The Government proposes to increase the upper breakpoint by 200kg for both passenger vehicles and light commercial vehicles which will result in passenger vehicles above 2,000kg and light commercial vehicles above 2,200kg now having a higher emission target.

The Government also amended the classification of four-wheel drive vehicles that have a rated towing capacity of 3 tonnes or more and a body-on-frame chassis.

These vehicles will now be classified as Light Commercial Vehicles and will have higher emissions targets.

The Bill and the Explanatory Memorandum are accessible here.

2.3 Competition and Consumer Act Bill - reduction of market power - by court order

On 20 March 2024, Parliament introduced the Competition and Consumer Amendment (Divestiture Powers) Bill 2024 (**Divestiture Powers Bill**). The amendment will add a further legal remedy available where a corporation that has, or is likely to have, a substantial degree of market power has been found to have misused their market power under section 46 of the *Competition and Consumer Act 2010* (Cth) (**CC Act**). Pursuant to section 46 of the CC Act, misuse of market power is conduct that substantially lessens competition in that market, or markets in which the corporation directly or indirectly supplies or acquires goods or services.

The Divestiture Powers Bill

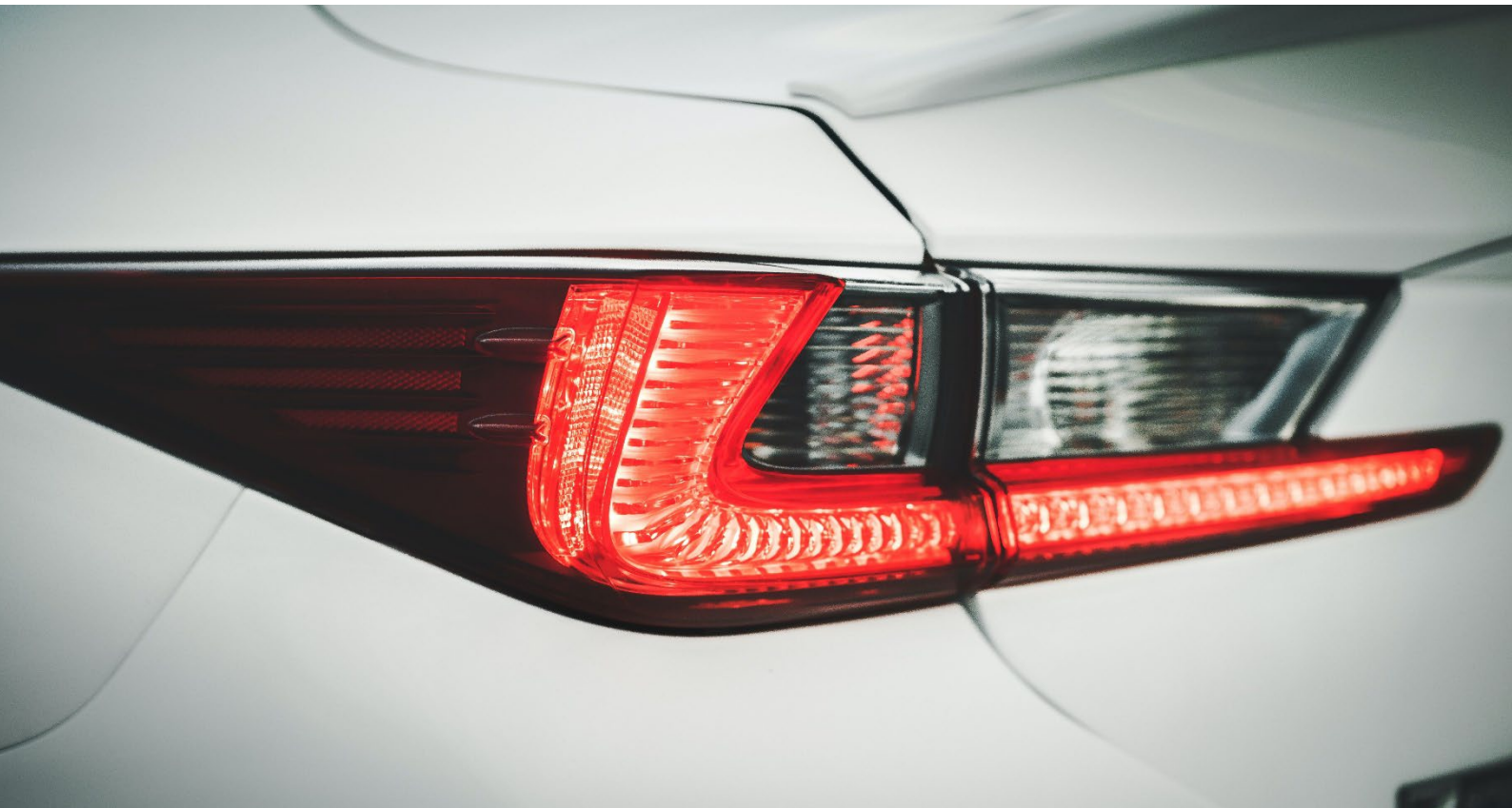
Under section 80AD (1)-(6) of the Divestiture Powers Bill, if a Court determines a misuse of market power, the Divestiture Powers Bill will grant the Court the following powers:

- Upon application by the Australian Consumer and Competition Commission (**ACCC**), corporations will have a maximum of two years to follow an order that reduces the corporation's power in, or share of, the market.
- The ACCC can apply for this order within 3 years after the date of the contravention.
- If consented to by the parties, despite a Court not making a finding of misuse, the Court may still make an order to reduce a corporation's market share.
- The Court may, instead of making the order, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the corporation to take particular action to reduce the corporation’s power in, or share of, the market.

Impact

Large motor vehicle dealers should exercise caution when purchasing new dealerships as the essential features of breaching the new provisions are having substantial market power and lessening competition.

This may also have broader implications for how large dealerships enter into contracts and the methods they use when negotiating contracts.



2.4 Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024

On 26 March 2024, the Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024 (**Bill**) was passed by both Houses of Parliament and will commence on the later of 1 May 2024 or the day after receiving Royal Assent.

The Bill amends the *Competition and Consumer Act 2010* (Cth) (**CC Act**) to establish a new designated complaints function that allows certain designated entities to bring evidence of significant or systemic market issues to the ACCC.

The ACCC will be required to assess, and respond to, designated complaints. The ACCC may take additional action if the complaint relates to significant or systemic market issues that affect consumers or small businesses (or both) and relates to either a breach of the Act or a power or function of the ACCC under the Act.

Who can make a designated complaint

The Minister may grant the approval to an entity to become a designated complainant. The designated complainant must:

(a) be an entity that represents the interest of consumers and/or small businesses in relation to a range of market issues that affect the entity; and

(b) in exercising the powers of a designated complainant, do so with integrity.

The Minister may not grant more than three designated complainants, it appears from the wording and explanatory memorandum that this limitation is across all markets. The limit is likely to assist in ensuring the ACCC has appropriate resources to deal with the complaints as they arise. However, the ACCC bears the burden of pursuing these complaints and is constrained by its own resources.

What happens when a complaint is made

Within 90 days of receiving a complaint, the ACCC must notify the entity that either no further action is required or the ACCC will commence further action.

If the ACCC is satisfied the complaint relates to a significant or systematic market issue the ACCC must commence the actions set out in its notice within a 6-month period and notify the designated complainant.

Relevance

Once the ACCC and the Minister express the priorities for designated complainants to consider, this will likely increase the compliance cost with the management and monitoring of the issues associated with certain entities in the relevant markets. When this is coupled with the Courts ability to reduce an entities market power, it is clear that Parliament has an intention to empower consumers and increase competition amongst small businesses.

It appears that entities who have been diligent in reporting issues may be preferable for the role of designated complainant as they often play an important role in bringing publicity and attention to governments, policymakers and the community on serious and systemic issues impacting Australians.

3. Policy Update

3.1 ACT ban on internal combustion engine sales from 2035

The Australian Capital Territory Government has announced a ban on the sale of new internal combustion engine (**ICE**) vehicles starting from 2035. The Australian Capital Territory will be the first State or Territory in Australia to implement such a measure. This initiative is part of a comprehensive strategy to transition towards zero-emission vehicles and achieve the ambitious target of having 80-90% of new vehicle sales being zero-emission by 2030.

To address concerns about the affordability of electric vehicles, the Government is offering incentives such as stamp duty waivers, free vehicle registration, and interest-free loans of up to $15,000. Additionally, stamp duty waivers will be extended to buyers of used electric and hydrogen vehicles purchased after 1 August 2022, reducing the costs of second-hand vehicles. However, challenges remain, as the cost of transitioning to electric vehicles may lead some individuals to hold onto ICE vehicles for longer periods, counteracting emissions reduction efforts. There is also a risk of vehicle circumvention, with people potentially purchasing ICE vehicles from neighbouring regions and re-registering them as used cars in the Australian Capital Territory.

Despite these challenges, the move aligns with global efforts to achieve net-zero emissions by 2050, as emphasized by the International Energy Agency.

3.2 Memorandum of Understanding to improve dispute resolution

The Australian Automotive Dealer Association (**AADA**), the Motor Trades Association of Australia (**MTAA**), and the Federal Chamber of Automotive Industries have recently formalised a Memorandum of Understanding (**MoU**) aimed at enhancing dispute resolution mechanisms within the automotive industry.

This MoU establishes a structured framework to facilitate the resolution of disputes, promote transparency, and cultivate equitable relationships between dealers and original equipment manufacturers (**OEMs**). It specifically addresses three key areas of the dealer-OEM relationship:

(a) where a brand exits the market with existing dealer agreements still applying;

(b) significant restructuring of a brand's business model during a dealer's term; and

(c) reductions in the brand's footprint during the agreement period.

The MoU is expected to streamline dispute resolution processes, leading to more amicable settlements and reduced costs for both parties involved. Furthermore, this development holds significance within the franchising domain, as it empowers the AADA to provide ongoing reports to the government regarding the progress of franchising relationships, thereby ensuring continued oversight and accountability in the industry.

3.3 Luxury Car Tax change

The Federal Government has announced that the Luxury Car Tax (**LCT**) will undergo substantial changesstarting 1 July 2025. The LCT is paid by car dealerships that sell or import luxury cars and also by individuals who import luxury cars. This adjustment will result in numerous petrol, diesel, and hybrid cars, previously exempt from tariffs, being subjected to them. This decision comes despite persistent appeals from the car industry urging the complete abolition of the tax.

The LCT applies to cars that have a GST-inclusive value above the LCT threshold which is currently $76,950 for vehicles with fuel ratings of more than 7L/100km or $89,332 for fuel-efficient vehicles which consume less than 7.L/100km. Under the new rules, the definition of a 'fuel-efficient vehicle' is tightened. Consequently, cars that consume more

than 3.5L/100km will not be able to meet the fuel-efficient vehicle threshold significantly limiting the number of cars that will qualify for the threshold. For example, vehicles such as the Toyota Kluger which has a fuel rating of 5.6L/100km will now have higher taxes imposed on them.

Whilst this change is intended to encourage consumers to purchase electric vehicles to avoid hefty taxes there is concern that it will discourage consumers from choosing the vehicles with the best safety and fuel-efficient technology. The updated threshold has been met with resistance and criticism from the automotive industry who claim the LCT imposes unnecessary additional taxes on vehicles that already have low emission technology.

3.4 Federal Government releases response to Franchising Code Review

On 7 May 2024, the Federal Government issued its official response to the Franchising Code Review Conducted by Dr Schaper on behalf of the Government. In this response, the Government has agreed to all 23 recommendations put forth.

Dr Schaper was appointed to conduct an independent review of the Franchising Code of Conduct (**Code**) to assess the effectiveness of the current regulatory measures and offer recommendations for ensuring their suitability. The review consisted of 23 recommendations and implementation suggestions. The review determined that, overall, the Code is appropriate for its intended purpose and should be extended beyond its sunset date, with some adjustments to enhance its functionality. Additionally, it highlighted the potential for non-regulatory measures to improve the overall operational landscape through increased access to information and guidance on best practices.

Although the AADA and MTAA sought broader protections for motor vehicle dealers, including compensation for potential loss of goodwill resulting from distributor adoption of agency models, Dr Schaper did not make any additional recommendations in this regard, leading to the Government's decision not to adopt such measures.

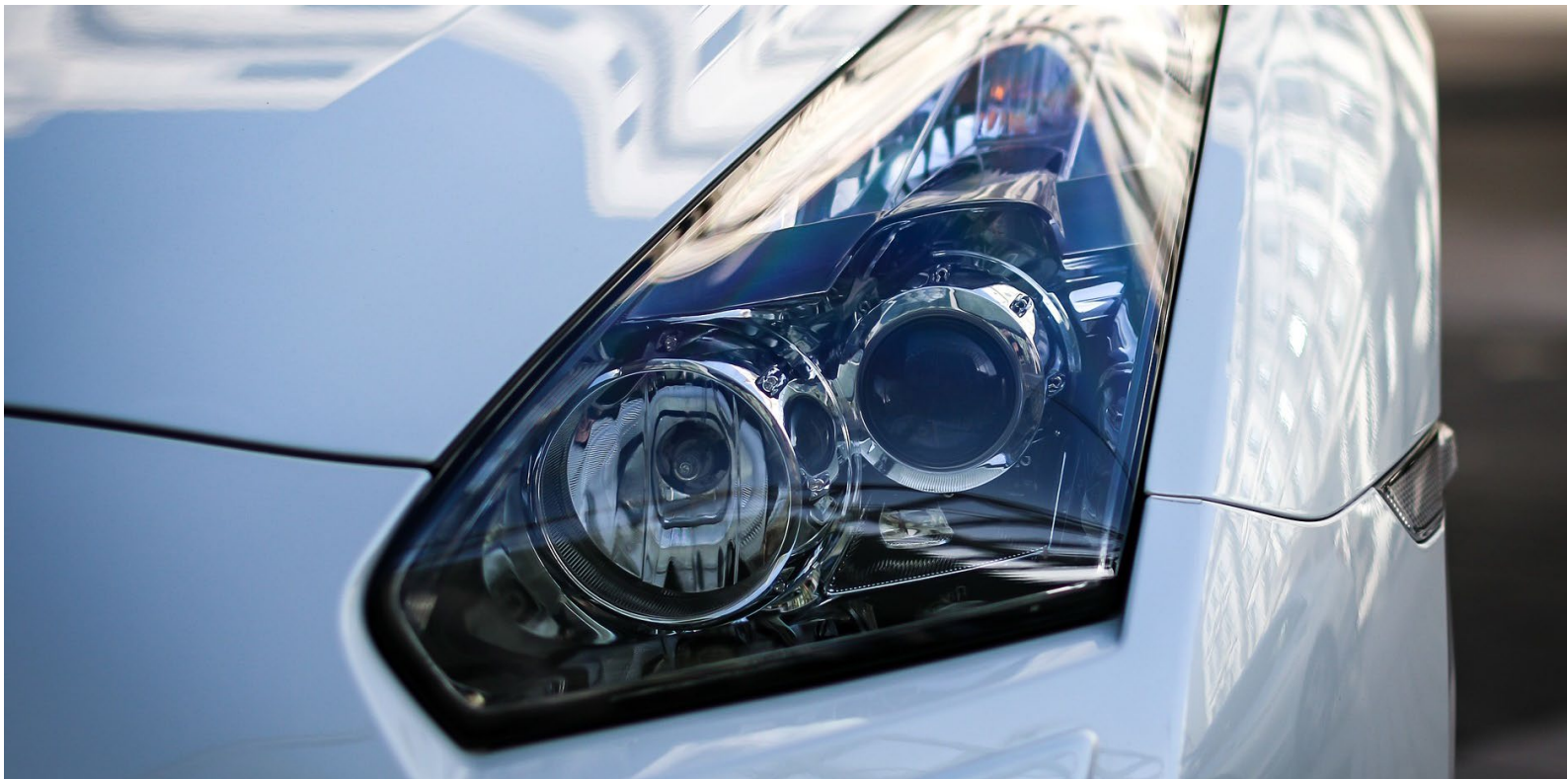
Below is a list detailing all 23 recommendations made by Dr Schaper and the Governments corresponding responses.

No.	Recommendation	Government Statement
1.	The Australian Government should ensure the provision of more comprehensive, robust statistics about the franchising sector.	Government notes the limitations of existing data collecting by public and private bodies about the franchising sector. The Government agrees that improved data on the franchising sector will support policymakers and the franchising community to better understand the sector, including the true level of disputation within it and assess the sector's health and the effectiveness of regulation. In the first instance, the Government will require the ASBFEO to lead on improving comparability and publication of existing data sets held by the ASBFEO, the ACCC, the state small business commissioners and the Treasury. Once a decision on licensing occurs, the Government will revisit enhancements to data collection.
2.	The Code should be remade, largely in its current format.	Government agrees that the Code should be remade prior to sunsetting in April 2025.
3.	A clear statement of purpose should be inserted into the Code.	The Government agrees that it is important for there to be a common understanding of the purpose of the Code and what it is intended to achieve for franchisees and franchisors. When remaking the Code, the Government will insert a clear statement of the purpose into the Code. This will provide clarity to the franchising community and assist in future

		reviews of the effectiveness of the Code (see Recommendation 5).
4.	Service and repair work conducted by motor vehicle dealership should be explicitly captured by the code.	Service and repair work is an essential part of motor vehicle dealerships. When remaking the Code, the Government will clarify that service and repair work performed by motor vehicle dealerships is within the scope of the Code.
5.	Reviews of the Code should be conducted in five yearly cycles in the future.	The Government agrees there should be future statutory reviews of the Code every 5 years to ensure the Code is delivering on its updated purpose and operating efficiently and effectively. When remaking the Code, the Government will implement this recommendation.
6.	Simplify and consolidate the pre-entry information given to prospective franchisees.	The Government supports streamlining information made available to franchisees in a way that will reduce unnecessary compliance burden and costs, but at the same time maintain important protections for franchisees. The Government will amend the Code to effectively merge the key facts sheet into the disclosure document.
7.	Franchisor obligations under the Code in relation to existing franchisees should be simplified.	The Government recognises there is an opportunity to streamline requirements in the case of established relationships, such as where a franchisee is renewing or extending an existing agreement. When remaking the Code, the Government will simplify disclosure obligations in relation to existing franchisees.
8.	The existing requirement that new vehicle dealership agreements must provide a reasonable opportunity to make a return on investment should be extended to all franchise agreements.	The Government agrees that all franchise agreements should provide a reasonable opportunity for the franchisee to make a return on their investment. When remaking the Code, the Government will extend this requirement to all franchise agreements.
9.	The existing requirement that new vehicle dealership agreements must include provisions for compensation for franchisees in the event of early termination should be extended to all franchise agreements.	The Government agrees that franchise agreements should include provisions for compensation in the event of early termination. When remaking the Code, the Government will extend this requirement to all franchise agreements.
10.	Enhance the public visibility and usage of the Franchise Disclosure Register.	The Government notes widespread support for the Franchise Disclosure Register to remain a part of the regulatory environment. The Government's immediate priority is to leverage existing mechanisms to promote the public visibility and use of the Franchise Disclosure Register. Once a decision on licensing occurs, the Government will consider if there are other initiatives that could enhance visibility and usage, such as mandating the disclosure of franchise agreements.
11.	Additional information should be included on the Franchise Disclosure Register relating to dispute resolution	The Government agrees there may be value in requiring the inclusion of additional information on the Franchise Disclosure Register. The Secretary to the Treasury has discretion to require the inclusion of additional information

	and adverse actions brought by enforcement agencies.	on the Franchise Disclosure Register by determination in accordance with Part 5A of the Code. Implementation of this recommendation will occur in accordance with the established legislative arrangements.
12.	Franchise systems should be encouraged, through education, to consult franchisees regarding any major change to the business model during the term of the franchise agreement.	The Government acknowledges there is an opportunity to support improved franchise relationships through improving the nature and access to education and guidance materials for the sector. The Government will require the ASBFEO to lead the development of best practice guidance in consultation with the sector and the ACCC.
13.	Provisions relating to termination for serious breaches should be simplified. Changes made in 2021 relating to termination under clause 29 of the Code should be revisited.	The Government recognises there is an opportunity to simplify provisions relating to termination for serious breaches and the importance of doing this in a way that will not diminish protections for franchisees. When remaking the Code, the Government will work with the sector to simplify termination provisions relating to serious breaches by franchisees.
14.	Best practice guidance should be provided to franchisees and franchisors regarding franchisee-initiated exist, to enhance the effectiveness of clause 26B of the Code.	The Government acknowledges there is an opportunity to improve the nature of, and access to, education and guidance materials for the sector. The Government will require the ASBFEO to lead the development of best practice guidance, in consultation with the sector and the ACCC.
15.	Further work should be done to limit the use of unreasonable restraints of trade in franchise agreements.	The Government will direct the Competition Taskforce to consider how restraints of trade and other uncompetitive terms in franchise agreements may be affecting franchise workers, as part of the Taskforce's review into the use of non-compete and related clauses that restrict workers from shifting to a better-paying job. The Government will also request the ACCC to consider providing further guidance on when a restraint of trade provision may constitute unfair contract terms.
16.	A comprehensive online government resource should be created, in the nature of ASIC's MoneySmart website.	Education and awareness-raising are important elements of an effective regulatory regime. Once a decision on licensing occurs, the Government will revisit creating an online resource on franchising.
17.	Australian Government agencies should work with relevant sector participants to improve standards of conduct in franchising by developing best practice guidance and education.	The Government agrees that small businesses need greater support to recognise and act against unfair contract terms and prospective new unfair trading practices under Australian Consumer Law. The Government will require the ASBFEO to lead the development of best practice guidance in consultation with the sector and the ACCC.
18.	ASBFEO should be given additional powers to name franchisors who have not participated meaningfully in alternative dispute resolution.	The Government recognises there are benefits in allowing for the naming of franchisors who have not participated meaningfully in dispute resolution, such as encouraging active participation. The Government will amend relevant legislation to provide the ASBFEO with the power to publicly name franchisors that fail to participate meaningfully in alternative dispute resolution.

19.	The Australian Government should assist franchisees to access low-cost legal advice on prospects prior to formal ADR.	Being able to obtain low-cost assistance for resolving franchising disputes is important for supporting access to justice for franchisees. The Government will expand the ASBFEO's Tax Concierge Service to support small businesses, including franchisees to access low-cost legal advice on alternative dispute resolution prospects.
20.	The Australian Government should consider an appropriate role for franchise interests when implementing its commitment to a designated complaints function for the ACCC.	The Government has progressed its commitment to establish the designated complaints function within the ACCC. There will be a process for interested parties that represent the interests of small businesses (such as franchisees) to apply to become a designated complainant.
21.	Franchisees should be able to seek a 'no adverse costs' order when bringing a matter against a franchisor for breach of the Code or the Australian Consumer Law.	The Government supports improving access to justice for franchisees and low-cost means to resolve franchising disputes. However, the Government notes that 'no adverse costs' orders are not common in Commonwealth legislation. The Government will consult further on extending arrangements for seeking access to 'no adverse cost orders' for franchising matters to assess the efficacy of such arrangements in the context of the administration of justice and ensure there are no unintended consequences.
22.	The scope of penalties under the Code and associated investigation powers and infringement notice regime in Part IVB of the Competition and Consumer Act 2010 (CCA) should be increased.	The Government will increase the scope of penalties to all substantive obligations placed on parties under the Code and set those penalties at 600 penalty units. The Government will consider the suitability of increasing the amount of penalty units to 60 penalty units for infringement notices issued under the CCA for a breach of the Franchising Code.
23.	The Australian Government should investigate the feasibility of introducing a licensing regime to better regulate most aspects of the franchisee-franchisor relationship.	The Government will establish a Taskforce in Treasury to conduct a comprehensive cost benefit analysis of introducing a licensing regime for the franchising sector.



International Policy Updates

3.5 UK Tax changes signal potential outcomes for Australia under NVES

The UK's forthcoming tax adjustments targeting dual-cab utes signify potential ramifications for Australia under the NVES. Scheduled to take effect from 1 July 2024, these changes will reclassify dual-cabs as company cars, altering their tax status.

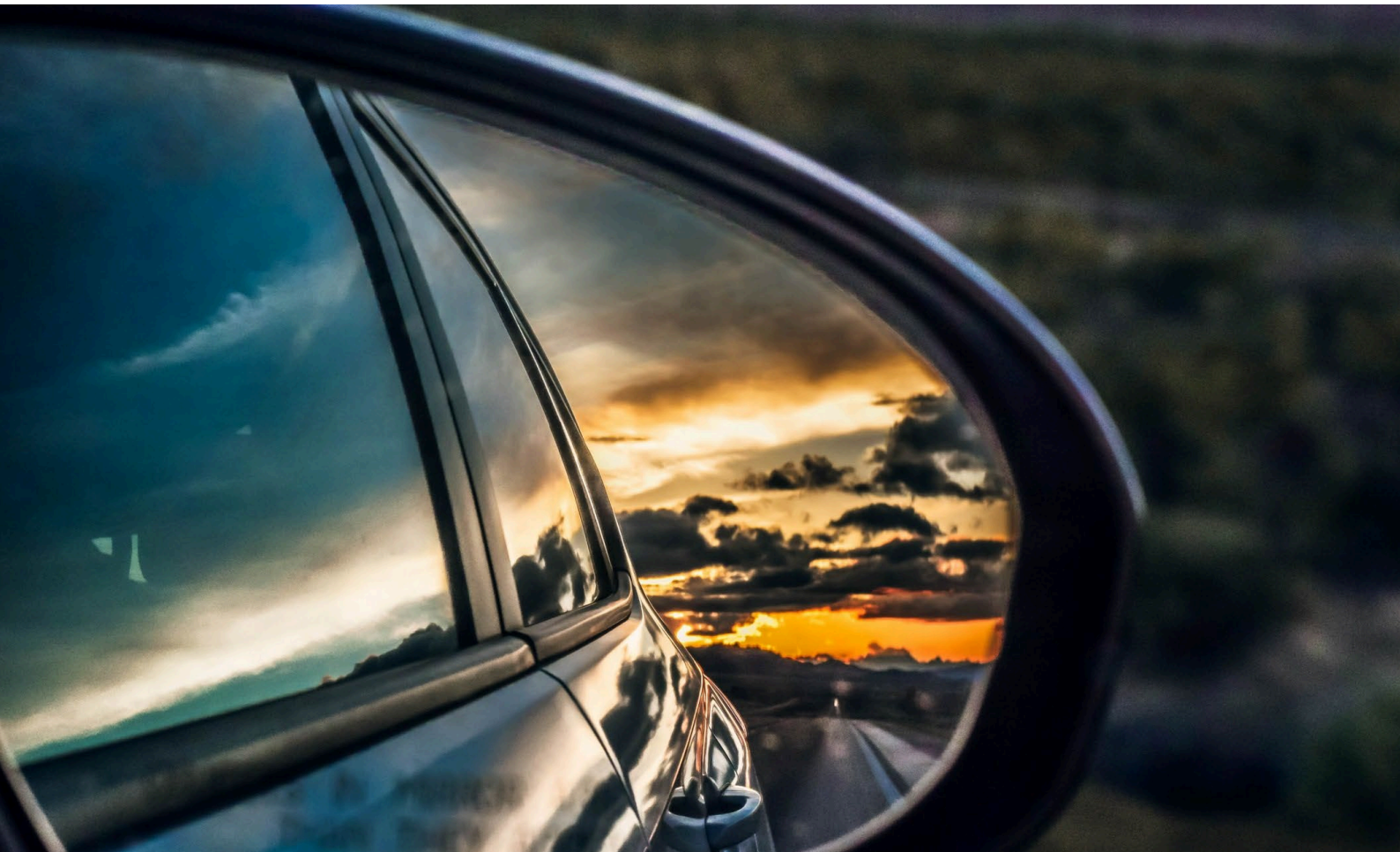
The primary objective behind these measures is to address a loophole that currently reduces tax liabilities for employees who opt for large, high-emission vehicles provided as company cars or through allowances. The anticipated tax restructuring is expected to lead to a surge in the prices of dual-cab utes, with employees facing substantial increases in their 'Benefit in Kind Tax' obligations, akin to Australia's 'Fringe Benefits Tax'. As most dual-cab utes sold in the UK are classified as company cars, employees are likely to encounter higher tax burdens. Consequently, car manufacturers might be compelled to raise the prices of utes and 4WDs to offset potential government fines.

Coinciding with the UK's reforms, Australia is pursuing the implementation of NVES, which could influence the pricing dynamics of dual-cab utes. This adjustment could have significant repercussions in Australia, particularly for Mitsubishi, as they constitute one-third of the top 10 car sellers and do not currently produce electric vehicles for the Australian market.

3.6 US to ease annual emissions requirements

The United States is set to announce softer annual emission standards and extend the transition period toward achieving a fully electric vehicle fleet. The decision reflects concerns that electric vehicle technology remains prohibitively expensive for the average consumer, necessitating more time for adoption.

In April 2023, the US Environmental Protection Agency initially proposed a substantial 56% reduction in new vehicle emissions by 2032. However, this ambitious plan faced criticism from trade groups such as Volkswagen and Toyota, which deemed it neither reasonable nor feasible. Highlighting the slow pace of electric vehicle uptake, data from 2023 revealed that only 7.6% of all new vehicle sales in the US were electric.



4. Case Law Update

4.1 *Arraj v Sime Darby Motors Retail Australia Pty Ltd t/as Parramatta BMW [2024]* NSWDC 78 (Heard in the District Court)

Background

The Plaintiff, Mr Arraj was a collector of BMW cars, and was very keen to acquire a new 2022 BMW M4 CSL (**2022 CSL**). This car was a special edition model and was only made in very limited numbers worldwide.

Mr Arraj's application to purchase a 2022 CSL via BMW Parramatta was unsuccessful and Mr Arraj commenced proceedings against BMW Parramatta alleging a breach of contract and in the alternative, misleading or deceptive conduct. A claim in restitution was also made arising out of Mr Arraj's offer to display his 2003 CSL in the BMW Parramatta dealership.

The allocation process for the 2022 CSL was ultimately conducted by BMW Australia, and the car was not allocated to BMW Parramatta although one of its customers did receive an allocation by BMW Australia.

Mr Arraj alleged that the contract arose from an email from him to senior staff members of BMW Parramatta, requesting confirmation that he would receive the first 2022 CSL that is allocated to BMW Parramatta (among other things) and an acknowledgement of receipt of that email by BMW Parramatta.

When Mr Arraj did not receive a car from BMW Parramatta, he purchased a virtually brand new 2022 CSL on the second-hand market for a higher price and claimed the difference between the cost of this vehicle and the new 2022 CSL which he applied for.

Issue

(i) Whether there was a valid contract between Mr Arraj and BMW Parramatta for the purchase of the 2022 CSL?

(ii) Whether BMW Parramatta breached the alleged contract?

Outcome

The District Court of NSW rejected Mr Arraj's claim that a contract existed on several grounds, namely that that there was:

1. no intention to create legal relations;
2. No offer and acceptance; and
3. No consideration.

Some of the factors relevant to the above conclusions were:

- That the 2022 CSL did not exist at the time of the email exchanges;
- Wording of the email exchange did not suggest a contract, or that a mutual understanding was reached to indicate that the display of the 2003 CSL was to take place on the condition that Mr Arraj was to receive the first car allocated to BMW Parramatta;
- That the display of the 2003 CSL occurred before the email exchange;
- The email exchange stated that various matters needed to be discussed including remuneration regarding the display of the 2003 CSL. It was held that including remuneration in the email was further indication that Mr Arraj was not making an offer, as his pleaded case was that the consideration for displaying the 2003 CSL would be priority allocation; and
- There was no discussion between the parties of a form of payment.

The Court further held that even if it was assumed that there was a contract, the action brought by Mr Arraj failed because he failed to prove a breach of contract. Furthermore, it was reiterated that the allocation process was decided by BMW Australia, and BMW Parramatta never had the 2022 CSL in its possession to allocate to Mr Arraj or anyone.

The claims in misleading or deceptive conduct failed, as the sub-representations alleged were held to never have been made, by BMW Parramatta and Mr Arraj did not rely on any of these representations in that they did not lead him to display his 2003 CSL. Mr Arraj was ordered to pay BMW Parramatta's costs.

Significance to the Automotive Industry

This case acts as a reminder to dealers to be cautious about communications with clients and keeping good records of those.

It is also a warning that care should be taken when you do not have control of the subject matter of the contract (eg allocation process). It is crucial to not make representations to customers or enter into contracts when you cannot guarantee that you can deliver on the subject matter of that contract.

Even though BMW Parramatta did the right thing through this process, it does not stop some claimants from making claims.

4.2 *Grays eCommerce Group Ltd*

Background

Grays eCommerce Group Limited (**Grays**), a supplier of retail and auction services utilising an Australia-wide online auction platform, has made a section 87B court enforceable undertaking (under the *Competition and Consumer Act 2010* (Cth)) to the ACCC admitting to contravening sections of the Australian Consumer Law (**ACL**).

Between July 2020 and June 2022, Grays is said to have misrepresented various attributes of the cars sold, impacting consumers' purchasing decisions and financial outlays.

These misleading listings spanned a variety of errors regarding the vehicles' make, model, features, and condition. The misrepresentations included serious discrepancies, such as listing cars as possessing automatic transmissions when they were manual transmissions.

The inaccurate listings affected approximately 750 consumers who purchased vehicles from Grays only to find that the cars were inaccurately described. Many of these consumers ended up buying vehicles they would not have chosen or paid a higher price than they would have, had the actual specifications been disclosed. Further issues include vehicles being advertised to possess features they lacked or vehicles having visible damages, like body impairments and illuminated dashboard warning lights, that were not disclosed. These widespread inaccuracies not only misled consumers but also affected a substantial number of transactions during this period.

Issue

Whether Grays engaged in misleading and deceptive conduct, breaching sections the following sections of the ACL:

(i) section 18 - misleading or deceptive conduct;

(ii) section 29(1)(a) - making a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style, or model or have had a particular history or particular previous use;

(iii) section 29(1)(g) - making a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefit;

(iv) section 29(1)(m) - making a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3 - 2); and

(v) section 33 - misleading the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

Outcome

Pursuant to Item 2.3 of the section 87B undertaking, the ACCC will institute proceedings in the Federal Court of Australia against Grays with an agreed statement of facts and admissions in connection with the admitted conduct. Grays and the ACCC will jointly seek relief orders in the proceedings, including declarations, compliance program orders, and a pecuniary penalty of $10 million.

The Federal Court will consider whether to make the orders sought on a date to be fixed. The undertaking will commence upon the making of final orders by the Court in the proceedings.

The undertaking also saw Grays make certain commitments to the ACCC, including that Grays will:

- review complaints made between 1 July 2020 and 30 June 2023 concerning misdescriptions of a vehicle purchased through Grays' auction site and identify customers eligible for redress;
- appoint an independent arbiter to review a sample of Grays' assessments of consumers' eligibility for redress; and
- provide updates to the ACCC on the redress program, including the number of consumers assessed as not eligible for redress and the number of accepted redress offers by eligible customers.

Significance to the Automotive Industry

This case highlights the importance of accurate product descriptions in the automotive industry and the legal obligations of online marketplaces, and in turn, highlights the risks of misleading advertising and the rigorous application of consumer laws. Furthermore, it reinforces the repercussions of violating consumer trust and emphasises the need for accurate descriptions and honest sales practices to maintain consumer trust and avoid legal repercussions.

4.3 *Honda's move to agency model*

Background

In July 2021, Honda Australia Pty Ltd (**Honda**) transitioned from a traditional dealership model to an agency model, under which, new cars are sold at non-negotiable fixed prices. This model centralises sales and removes pricing authority from individual dealerships. Under the new model, Honda owns all the inventory, while dealers are compensated with a fixed commission for each car sold, rather than profiting from negotiations on sales margins. Honda's decision to switch to this model followed a global trend among car manufacturers aiming to standardise sales practices and pricing.

However, this transition led to significant unrest among the existing network of dealers. Several dealerships initiated legal actions against Honda, claiming the compensation offered to them for the premature termination of their dealer agreements was insufficient.

Issue

The issues at the centre of the action by brought by 3 dealers was:

(i) whether the dealerships were provided sufficient compensation for the termination of their dealer agreements; and

(ii) whether Honda had misled dealers by not disclosing to them prior to entering into their dealer agreements that it was considering transitioning to an agency model during the term of those agreement - and therefore engaged in unconscionable conduct.

In a separate legal proceeding, Honda admitted the transition to the agency model during the term of the then current dealer agreements was a breach of contract.

Outcome

The legal proceeding was brought by 3 dealers in the Supreme Court of Victoria, but only Astoria Honda proceeded to trial after the other 2 dealers settled their claims with Honda.

Justice Mathews found that Honda had not misled dealers by not disclosing its agency plans and therefore it did not engage in unconscionable conduct. However, Justice Matthews rejected Honda's financial assumptions in support of its claims that Astoria Brighton did not suffer a loss or only a minimal loss of $1.6 million by reason of the premature termination of its dealer agreement. Justice Matthews ultimately agreed with most of Astoria Brighton's financial assumptions which, when finally assessed, are likely to result in a damages award in excess of $10 million.

Significance to the Automotive Industry

This proceeding demonstrates the risks in transitioning to an agency model during the term of an existing dealer agreement without providing adequate compensation to the terminated dealers.

4.4 *Stellantis (Australia and New Zealand) Pty Ltd*

Background

The ACCC began an investigation into Stellantis (Australia and New Zealand) Pty Ltd (**Stellantis**) after receiving a number of complaints about how the company's vehicles and ability to seek appropriate remedies.

On 25 October 2023, the ACCC accepted a court enforceable undertaking from Stellantis, the local national sales company and importer of Jeep vehicles into Australia. Stellantis provided consumers with a warranty at the time they purchased an eligible new Jeep vehicle. The term of the Jeep manufacturer's warranty is 5 years or 100,000km (whichever comes first).

The statutory guarantees under the ACL cannot be excluded, restricted, or modified and when these guarantees are not met the consumer is entitled to remedies. The undertaking will end on 25 October 2026.

Issue

The ACCC raised several issues in the undertaking around how Stellantis handled complaints, assessed claims about Jeep vehicle faults, and trained staff about the statutory guarantees under ACL.

Outcome

Review of complaints handling systems

Stellantis will have to complete a review of its complaints handling systems and procedures to identify any changes necessary to ensure that:

- consumers can access a refund or replacement vehicle, or a repair at the customers' request, where there has been a major failure;
- a purpose-based consideration of embedding ACL consumer rights and remedies into Stellantis' systems and procedures occurred; and
- consumers who request a refund or replacement vehicle receive a written advice of the outcome of the request, and, where applicable, an explanation of the reason that a remedy sought by the customer has been denied.

Within three months of completing the review, Stellantis will implement these changes and provide evidence of these amendments to the ACCC.

Review of training for staff and dealers

Within nine months of the commencement date, Stellantis will review and update, as applicable, its training for its staff or dealers involved in managing, resolving or approving customer complaints, particularly when a customer is entitled to a replacement or a refund, rather than a repair.

Stellantis will provide the updated training material to the ACCC and will require staff to attend the training at least once a year for the duration of the undertaking.

Annual review

Stellantis will prepare an annual report on the effectiveness and implementation of these undertakings.

Independent review

Stellantis will enlist an independent expert(s) with suitable experience in consumer law, such as Stellantis' external legal advisors to review the undertakings.

Significance to the Automotive Industry

One of the ACCC's top enforcement priorities are motor vehicles as the industry accounts for 24% of consumer guarantee complaints. Given this, it would be unsurprising if one of the appointed designated complainants was an entity related to the automotive industry.

This would bring increased scrutiny over how companies in the automotive industry conduct themselves, as the designated complainant has broad powers to bring forward complaints when companies have caused a significant or market power abuse issue and breached the ACL.

4.5 *Australian Competition and Consumer Commission (ACCC) v Honda Australia Pty Ltd (No 2) [2023]* FAC 1655 (ACCC v Honda (No 2)) - Honda $6 million fine

Background

On 22 December 2023, Justice Moshinsky delivered his costs order and pecuniary penalty for the case of *Australian Competition and Consumer Commission (ACCC) v Honda Australia Pty Ltd* [2023] FCA 1602 (***ACCC v Honda***).

The ACCC alleged that Honda engaged in misleading or deceptive conduct and made false or misleading representations to customers of three motor vehicle dealers:

- Brighton Automotive Holdings Pty Ltd (**Astoria**);
- Tynan Motors Pty Ltd (**Tynan**); and
- Buick Holdings Pty Ltd (Burswood).

Honda admitted it had represented that the dealers would close or had closed and that Honda vehicles could no longer be serviced by those dealers. In fact, Astoria and Tynan were not closing and continued to operate service departments capable of servicing Honda vehicles.

There was a dispute as to whether the representations were conveyed by other communications and the extent of the pecuniary penalties the ACCC had submitted. The ACCC had argued for a range of $7 million to $9 million and Honda had argued for a range of $1 million to $3 million.

Issue

(i) Had Honda made representations via other means of communication; and

(ii) the extent of pecuniary penalties to be issued.

Outcome

ACCC v Honda

In terms of the additional representations, the Court disagreed with the ACCC for the following reasons:

- Email exit communications stated the dealerships were ceasing not closing. As such the ordinary and reasonable owners of Honda vehicles would understand the distinction between the dealer ceasing to be an authorised Honda dealer and the dealer closing down.
- Website statements - 'How do I know if my local Honda dealership is one that is closing and what do I do if it is?' The reasonable user of the website would understand the list to be a list of authorised Honda dealers and not understand from this that Astoria and Tynan had closed or that they were no longer servicing Honda vehicles.
- Call centre representation was incorrect, but it was also inconsequential as the calls were in relation to purchasing a vehicle not repairing or servicing.

ACCC v Honda (No 2)

In deciding the size of the pecuniary penalties to create a general and specific deterrence for similar conduct occurring, the Federal Court considered that 2,133 customers of Astoria, Tynan, and Burswood were impacted, the dealerships were impacted, Honda is a large company with a revenue of $880 million per year, the contraventions occurred over a period of several months, and Honda had cooperated.

The Federal Court held that because the ACCC only failed in demonstrating that Honda had made additional representations, a 10% reduction in costs should be awarded to Honda.

The Court ordered Honda to pay 90% of the ACCC legal costs and $6,000,000 pecuniary penalty to the Commonwealth of Australia.

Significance to the Automotive Industry

This case demonstrates the importance of communications by distributors to customers concerning exiting dealers being accurate and not otherwise misleading.

4.6 *ACCC v Mazda Australia Pty Limited [2023]* FCAFC 45 - $11.5 million fine

Background

On 23 March 2023, the Full Federal Court in a 2:1 decision upheld the Federal Courts' judgment that Mazda had not engaged in unconscionable conduct but had made 49 false or misleading representations. The Full Federal Court gave directions that the Federal Court was to decide the issue of pecuniary penalties.

On 14 February 2024, the Federal Court handed down its pecuniary penalty decision. There was a wide gap between the penalties being sought by both parties, $23 million (by the ACCC) and $3 million (by Mazda).

The cars had several problems including losing power, engines cutting out in suburban streets and at speeds of over 100km/h, adaptive headlights failing making them unsafe to drive at night, camshaft failures, and transmission failures. In some instances, Mazda refused to offer replacements or refunds where there was clearly a major failure, and at other times, Mazda would state that a replacement or refund was impossible. Mazda would often forcefully negotiate with consumers and deny that they could offer anything else.

The representations affected nine customers over a period of two years. Some of the representations occurred over the period of a week whereas others occurred over several months. The false representations were predominantly made to consumers during, sometimes, lengthy telephone calls and occasionally in writing.

Issue

(i) What loss had been suffered; and

(ii) the extent of pecuniary penalties to be issued.

Outcome

In determining loss or damage, Justice O'Callaghan considered the 'relevant harm' suffered by the nine consumers, which was said to cause distress, disruptions, frustration, and inconvenience. The 'relevant harm' included:

- the cancellation of a family holiday;
- two consumers being forced to abandon their trip to the Birdsville Races and instead stay in a caravan park in Rockhampton due to vehicle failures;
- consumers missing work because their vehicle had broken down and they had not been provided with a loan vehicle; and
- a finding that consumers spent a lot of time engaging in interminable phone conversations with Mazda's call customer staff, and that all consumers were justified in feeling distressed at the disruption that inevitably ensues when one's motor vehicle repeatedly fails for one reason or another.

The Federal Court ordered Mazda to:

- pay $3,000 to each of the non-party consumers totalling $21,000;
- pay $11.5 million pecuniary penalty to the Commonwealth of Australia;
- pay 70% of the ACCC's legal costs;
- restrain its officers, employees, agents otherwise for a period of five years from making false or misleading representations while communicating with consumers;
- publish a disclosure notice describing the courts findings of contraventions and the effect of the Court's final orders by sending it by email to all Mazda dealers; and
- publish a notice for a period of 90 days on the Mazda support page.

Significance to the Automotive Industry

This case demonstrates the importance of ensuring that all employees, staff, officers, and representatives are appropriately trained in managing consumer complaints in accordance with the requirements of the ACL. Further training on the ACL and the statutory rights and guarantees should be a key consideration for all businesses operating in the automotive industry, as otherwise, businesses run the risk of consumers losing confidence in their business and products. This is especially true given the ACCC's ability to investigate and receive complaints is increasing.

4.7 *Mitsubishi Motors Australia Ltd v Begovic [2023]* HCA 43

Background

On 13 December 2023, the High Court unanimously allowed Mitsubishi's appeal against the decision of the Victorian Supreme Court of Appeal and dismissed Mr Begovic's application to the Victorian Civil and Administrative Tribunal.

Mr Begovic alleged that Mitsubishi and Northpark engaged in misleading or deceptive conduct as the fuel consumption label on his vehicle was inaccurate. The vehicle was tested and driven nearly 50,000km. The results showed that the vehicle's fuel consumption was 26.6 per cent higher for 'Combined', 17.8 per cent higher for Urban', and 36.8 per cent or 56.3 per cent higher for 'Extra Urban' driving (the difference in the 'Extra Urban' results being attributable to the different testing protocols applied) than the fuel consumption values disclosed on the label.

The Victorian Civil and Administrative Tribunal, Victorian Supreme Court, and the Victorian Supreme Court of Appeal all held that Mitsubishi had engaged in misleading or deceptive conduct based on the inaccuracies of the fuel consumption label.

Mitsubishi was granted special leave to appear before the High Court.

Issue

(iii) Had Mitsubishi engaged in misleading or deceptive conduct when it was required by law to apply a fuel consumption label to a vehicle; and

(iv) what discretion, if any, did Mitsubishi have regarding the testing of the fuel consumption.

Outcome

The High Court had to consider several issues that arose from the previous Courts interpretation of the law and a change in Mr Begovic's argument. These were as follows:

1. There was a statutory inconsistency between the misleading or deceptive conduct provisions of the ACL and the *Motor Vehicle Standard Act 1989* (Cth) (**MVS**). The inconsistency being the MVS give authority to the ADR 81/02, which is a safety standard under s 106 of the ACL.

2. Mr Begovic, impermissibly, attempted to introduce a new issue - that the form of the label not the content of the label was prescribed.

3. Although the respondent referred to cl 6.1 of ADR 81/02 in oral submissions, the respondent did not suggest that the appellants were wrong in their position that the fuel consumption testing Mitsubishi conducted was as required by Appendix C to ADR 81/02.

4. The only argument made by the responded about the testing protocol was that ADR 81/02 left it to Mitsubishi to decide which vehicle and how many vehicles to test to obtain the fuel consumption values for Mr Begovic's type of vehicle, including that Mitsubishi could have tested the fuel consumption of Mr Begovic's vehicle itself.

In resolving the commonwealth statutory inconsistency, the High Court applied the interpretive principles that stated the general provision may need to be subordinated to the specific provision to alleviate the apparent conflict.

The High Court held firstly, each party in the supply of the vehicle was prohibited from supplying and ultimately selling the vehicle without a fuel consumption label, and secondly, the parties engaged in the supply and selling of the vehicle were bound by the form and content that the label was required to have by law.

In these circumstances, Mitsubishi could not be found to have actively and willingly engaged in misleading or deceptive conduct because they had no choice or discretion in the matter.

Significance to the Automotive Industry

This case speaks to a potentially an interesting dynamic with the new vehicle efficiency standards and ADR 81/02. Given both provisions deal with specifics how should such an issue be resolved if there was an inconsistency between these two laws.

Importantly, had the High Court agreed with Mr Begovic, it would have grave implications for all manufactures and dealers that had inconsistent fuel consumption ratings.

4.8 *Automotive Invest Pty Ltd v Commissioner of Taxation (2023)* 299 FCR 288

Background

On 11 August 2023, the Full Federal Court, in a 2:1 decision, endorsed the primary Court's decision. Justices Wheelahan and Hespe ruled that luxury cars showcased in a car museum were not exclusively held for the purpose of sale as trading stock. Accordingly, adjustments for luxury car tax (**LCT**) on the appreciation of these vehicles were deemed applicable.

Automotive Invest Pty Ltd, the appellant, owned a business under the name 'Gosford Classic Car Museum'. The Commissioner of Taxation took issue with the word 'museum' and argued that each motor vehicle on display was trading stock and therefore, the appellant was responsible to pay LCT and GST.

Although the business was said to be a 'museum', the appellant generated more revenue from sales than from museum admission fees. Upon importation of the cars, the appellant had provided its Australian Business Number with the understanding that the cars would be held as trading stock and for no other purpose.

The ATO claimed that:

a) the appellant had 'increasing luxury car tax adjustments' under sections 15.30 and 15.35 of the *New Tax Systems (Luxury Car Tax) Act 1999* (Cth) (**LCT Act**); and

b) the input tax credits which the appellant could claim were limited by section 69.10 of the LCT Act.

On appeal, the appellant argued that the Court ought to have concluded that it did not at any time use or intend to use the vehicles for a 'purpose other than a quotable purpose' and thus no increasing LCT adjustments were applicable.

Issue

(i) Whether the appellant had increasing LCT adjustments; and

(ii) whether the appellant used cars for a purpose other than a quotable purpose' as defined in LCT Act.

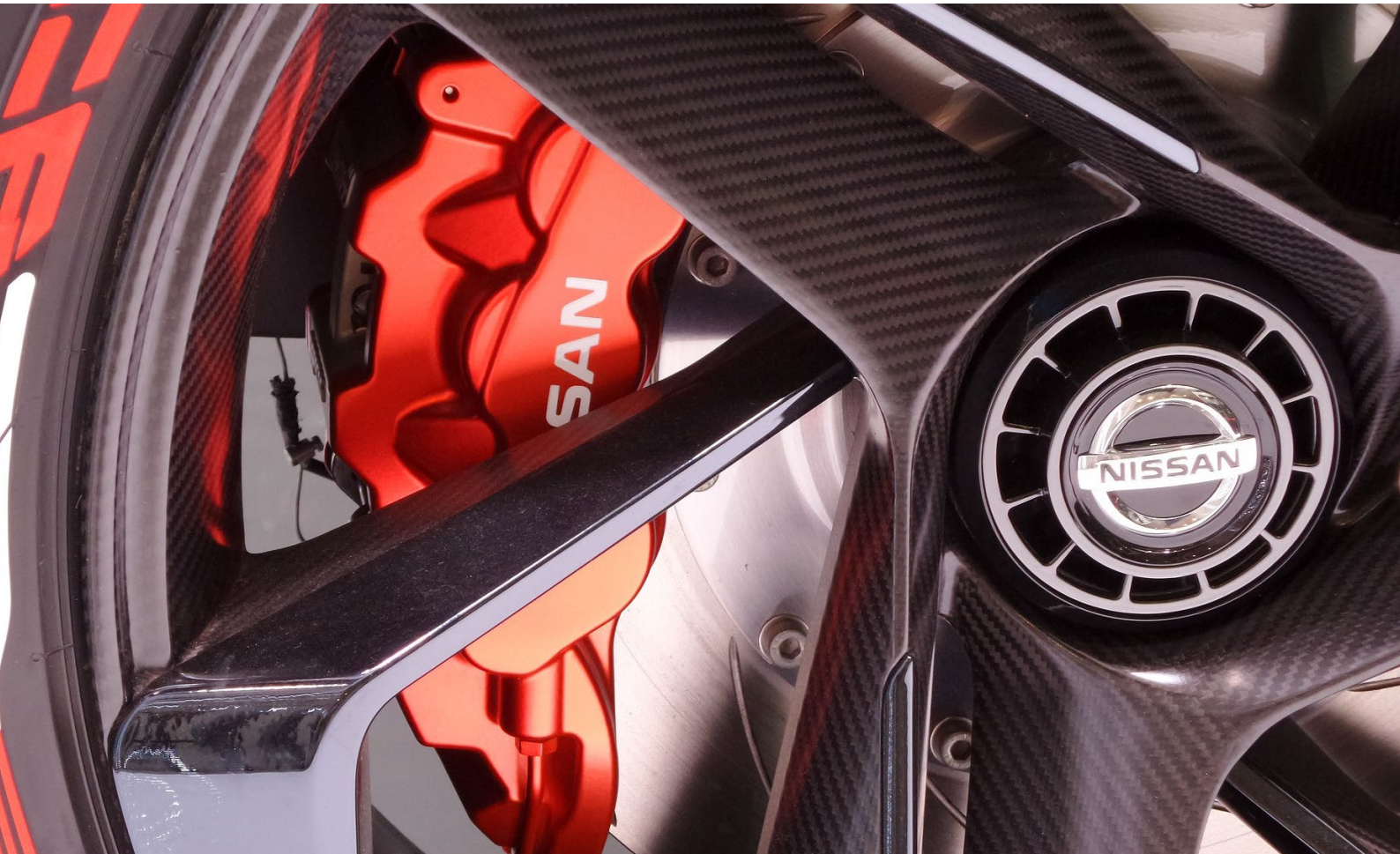
Outcome

The Court dismissed the appellant's appeal, asserting that an objective assessment of the totality of the circumstances, including the operation of the museum and its marketing, indicated that the cars served purposes beyond being held as trading stock. Factors such as the existence of facilities, charging of admission fees, engagement of staff, and marketing efforts portraying the exhibited cars as a tourist destination, were deemed inconsistent with the sole purpose of holding the cars as trading stock.

The majority of the Court rejected the appellant's interpretation of the law, which required the 'other purpose' to be exclusive or alternative to the purpose of holding the cars as trading stock. Instead, the Court considered whether the use of each car in the museum display was incidental to its role as trading stock, thereby constituting a singular purpose. This determination was regarded as a matter of fact and degree.

Significance to the Automotive Industry

This case explores the roles of the LCT and speaks more broadly to the complexity of its application. This highlights the importance for taxpayers to understand how to determine the principal purpose of a vehicle, particularly within a commercial or charitable setting. Additionally, this case draws on the jurisprudence developed in charity cases in the court assessing the purpose of an activity to determine taxation implications.



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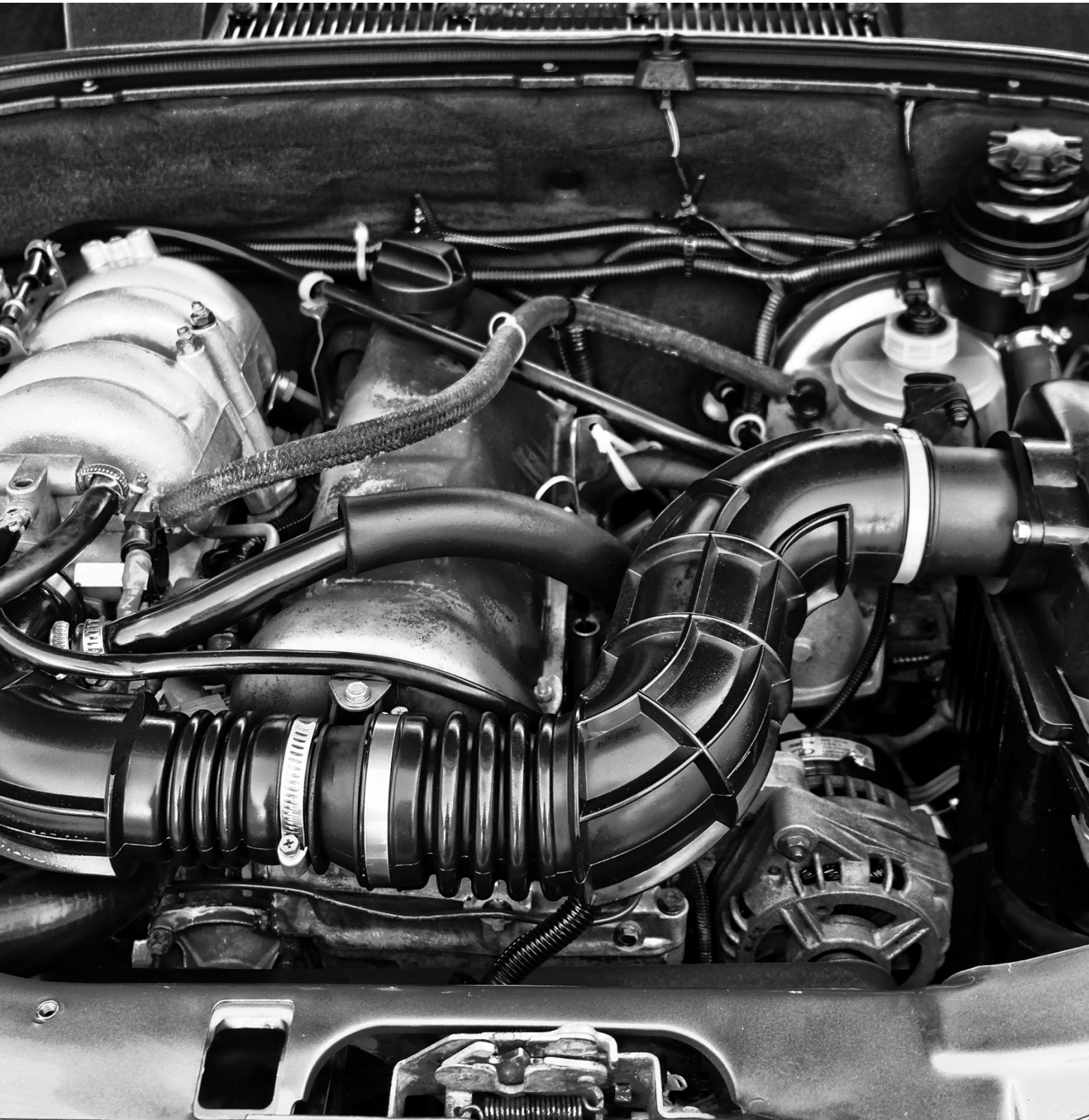

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