HWL EBSWORTH
LAWYERS

AUTOMOTIVE INDUSTRY GROUP

Regulatory Update

December 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 (Partner), Evan Stents (Partner), Peter Pertsoulis (Associate) and Tasman Lillioja (Solicitor) who are members of the HWL Ebsworth Automotive Industry Group.

Headlines

- Introduction of the *New Vehicle Efficiency Standard Act 2024* (Cth) (see Part 1.1).
- New ACCC Mandatory and Suspensory Merger Notification Laws (see Part 1.2).
- Changes to the Franchising Code of Conduct (see Part 2.1).
- Review of Consumer Guarantees & Supplier Indemnification Under ACL (see Part 2.3).
- Department of Infrastructure, Transport, Regional Development, Communication and the Arts Transport and Infrastructure Net Zero Consultation Roadmap (see Part 3.1).
- Industry welcomes investment in electric-car infrastructure by the NSW Government (see Part 3.2).
- Australian Government consultation on Australian Design Rules system review for national road vehicle standards (*ADR Harmonisation Review 2024-25*) (see Part 3.3).
- Honda Australia ordered to pay significant damages to Astoria Brighton - *Brighton Automotive Holdings Pty Ltd (as trustee for Brighton Honda Unit Trust) v Honda Australia Pty Ltd (No 2)* [2024] VSC 262 (see Part 4.2).

1. Legislation Update

1.1 *Introduction of the New Vehicle Efficiency Standard Act 2024* (Cth)

On 31 May 2024, the Australian Government officially enacted the nation's first carbon dioxide (**CO2**) emission standards for new light-duty vehicles under the *New Vehicle Efficiency Standard (NVES) Act 2024* (Cth) (**Act**). This legislation follows years of attempts to implement mandatory fuel efficiency regulations. The NVES establishes yearly gCO2/km emission targets for new passenger cars, SUVs, utility vehicles like utes and vans for the period from 2025 to 2029. The national standard under the Act will take effect from 1 January 2025 and will apply to all new vehicles supplied to the Australian market from that date onwards.

New Australian design regulations for light vehicles

The Australian Government has introduced more stringent (Euro 6d equivalent) noxious emissions standards for light vehicles, encompassing both passenger and commercial vehicles with a gross vehicle mass of up to 3.5 tonnes, effective from December 2025. The updated standards have been formalised as new Australian Design Rules (**ADRs**) under the Act, drawing on international vehicle standards established by the United Nations.

Noxious emissions standards

The newly implemented standards impose stricter limits on the levels of noxious emissions, such as carbon monoxide, hydrocarbons, oxides of nitrogen, and particulates produced by new road vehicles supplied to Australia.

It is important to be aware that these standards do not regulate greenhouse gases like CO2. A separate initiative is currently underway to develop an Australian New Vehicle Efficiency Standard (**NVES**), which will establish limits on the average tailpipe CO2 emissions of new light vehicles supplied to the Australian market.

The relevant new ADRs are as follows:

- **ADR 79/05** (Emission Control for Light Vehicles), based on UN Regulation 83/08;
- **ADR 111/00** (Advanced Emissions Control for Light Vehicles), based on enhanced laboratory tests for tailpipe emissions, evaporative emissions, and durability in line with UN Regulation 154; and
- **ADR 112/00** (Control of Real Driving Emissions for Light Vehicles), derived from the on-road emissions .

Key differences between the new ADRs and current requirements

The new ADRs for light vehicle emissions offer several significant improvements over the existing (Euro 5 equivalent) standards, such as:

- **Reduction in NOx Emissions:** The emissions limits for oxides of nitrogen (NOx) in diesel vehicles will be reduced by 55%.
- **Control of Fine Particle Emissions:** A new limit will be established on the number of particles emitted from petrol vehicles equipped with direct injection fuel systems, addressing fine particle emissions.
- **Enhanced On-Board Diagnostics:** Stricter requirements will be introduced for on-board diagnostic systems that monitor emissions control systems, ensuring better oversight and compliance.
- **Improved Emissions Testing:** Both laboratory and on-road emissions testing protocols will be enhanced to confirm that emissions reductions are maintained during typical vehicle operation.

The tables below illustrates the key changes to emission limits for vehicles:

Emissions limits for passenger cars and SUVs				
Pollutant	**Euro 5 (ADR 79/04)**		**New Euro 6d (ADRs 79/05, 111/00 and 112/00)**	
	Petrol/LPG	**Diesel**	**Petrol/LPG**	**Diesel**
Oxides of nitrogen	60 mg/km	180 mg/km	60 mg/km	80 mg/km
Particulate matter	4.5 mg/km	4.5 mg/km	4.5 mg/km	4.5 mg/km
Particle number limit	No limit	6x1011/km	6x1011/km	6x1011/km

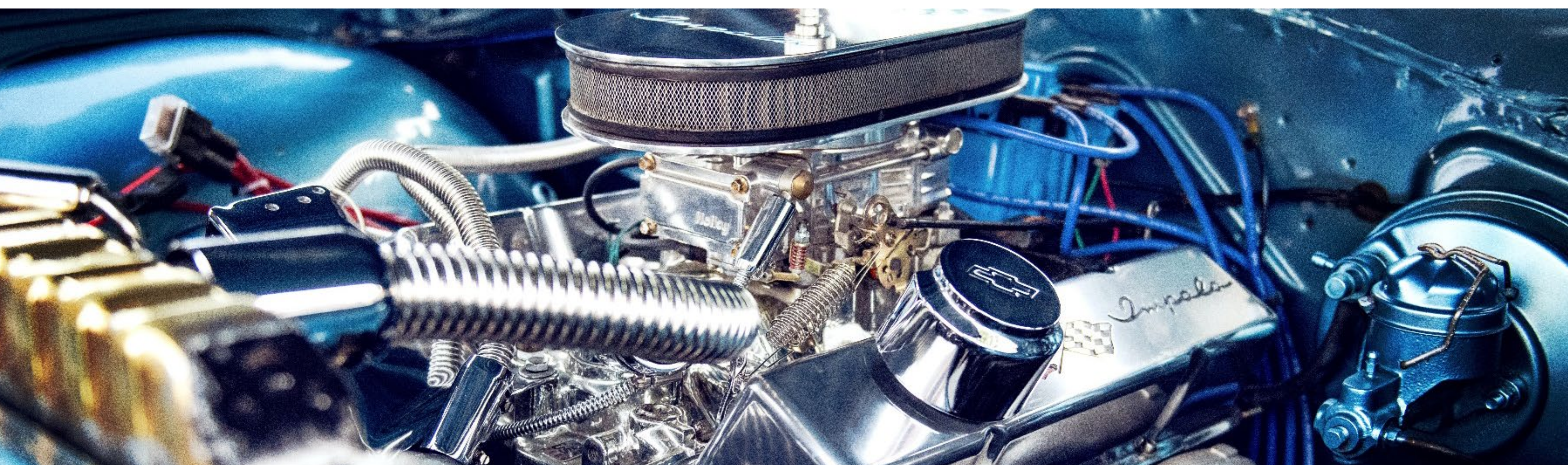
Emission limits for light commercial vehicles				
Pollutant	**Euro 5 (ADR 79/04)**		**New Euro 6d (ADRs 79/05, 111/00 and 112/00)**	
	Petrol/LPG	**Diesel**	**Petrol/LPG**	**Diesel**
Oxides of nitrogen	82 mg/km	280 mg/km	82 mg/km	125 mg/km
Particulate matter	4.5 mg/km	4.5 mg/km	4.5 mg/km	4.5 mg/km
Particle number limit	No limit	6x1011/km	6x1011/km	6x1011/km

Note: Limits on particulates and particle numbers for petrol vehicles are applicable solely to those equipped with a direct injection fuel system.

Timeline for compliance with the new ADRs

The new ADRs will apply to all new light passenger (MA, MB, MC, and MD categories) and light commercial (NA category) vehicles with a gross vehicle mass of up to 3.5 tonnes.

- **New Models**: Light vehicle models approved and supplied to Australia for the first time on or after 1 December 2025 will be required to comply with the new ADRs.
- **Existing Models**: Light vehicle models approved and supplied to Australia before 1 December 2025 must comply by 1 July 2028 if the manufacturer intends to continue supplying these vehicle models to Australia beyond that date.
- **Currently Registered Vehicles**: Vehicles that are already registered will not be affected by the new ADRs and will not require any retrofitting to remain roadworthy.



New Australian design regulations for heavy vehicles

Similarly, the Government has introduced ADR 80/04 which will apply to all new heavy vehicles that are passenger and commercial vehicles with a gross vehicle mass over 3.5 tonnes.

For new models, heavy vehicle models that receive approval and are supplied to Australia for the first time on or after 1 November 2024 will be required to comply.

As for existing models, heavy vehicle models that were approved and supplied to Australia prior to 1 November 2024 will also need to comply if the manufacturer intends to continue offering those vehicle models in Australia on or after 1 November 2025.

Key differences between Euro VI and current ADR standards

The introduction of Euro VI will offer several benefits compared to Euro V, including:

- a 70% reduction in emissions limits for hydrocarbons (HC);
- a 77-80% decrease in emissions limits for oxides of nitrogen (NOx);
- a 50-66% reduction in mass emissions limits for particulate matter;
- the establishment of limits on particle numbers to regulate fine particle emissions;
- more rigorous requirements for on-board diagnostic systems that oversee emissions control systems;
- increased durability requirements for vehicle emissions control systems; and
- enhanced emissions testing protocols (both laboratory and on-road) to ensure that emissions reductions are maintained during typical driving scenarios.

The table below illustrates the key changes to emission limits for heavy vehicles:

Euro V and Euro VI emissions limits for heavy diesel vehicles				
Emission	**Euro V (Stationary Cycle1)**	**Euro V (Transient Cycle2)**	**Euro VI (Stationary Cycle)**	**Euro VI (Transient Cycle)**
Oxides of nitrogen (NOx)	2,000 mg/kWh	2,000 mg/kWh	400 mg/kWh (80% lower)	460 mg/kWh (77% lower)
Particulate matter	20 mg/kWh	30 mg/kWh	10 mg/kWh (50% lower)	10 mg/kWh (66% lower)

1.2 *New ACCC mandatory and suspensory merger notification laws*

On 10 October 2024, the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (**Bill**) was introduced. These laws were passed by Parliament on 28 November 2024. They introduce a significant change to the treatment and consideration of mergers under Australian competition law. As with all laws affecting corporate governance and transactions, this legislation impacts stakeholders in the automotive industry with respect to mergers and acquisition transactions.

Under the new regime, acquisitions exceeding specific thresholds must be reported to the ACCC and cannot proceed without its approval. These specific thresholds include monetary thresholds, general turnover thresholds and three-year cumulative turnover thresholds. The lowest of these are the monetary thresholds, where an acquisition will be notifiable if:

1. combined Australian turnover of merger parties (including acquirer group) is at least $200 million; and
2. either:
   a. the Australian turnover is at least $50 million for each of at least two of the merger parties; or
   b. the global transaction value is at least $250 million.

The revised legislation applies to acquisitions 'carried out' after 1 January 2026. For agreements finalised after 1 January 2026, but entered into before this date, notifications under the new system will be permissible starting from 1 July 2025.

Follow the HWL Ebsworth Lawyers article link to read more including a greater analysis of the various notification thresholds at: New mandatory merger notification regime passed by Parliament - HWL Ebsworth Lawyers.

1.3 *Amendments by the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) to the *Fair Work Act 2009* (Cth)

On 12 February 2024, the Parliament of Australia enacted the second round of the Federal Government's 'Closing Loopholes' amendments to *the Fair Work Act 2009* (Cth) (**Act**), which received Royal Assent on 26 February 2024. These amendments require employers, particularly in the automotive industry, to review their contractor arrangements, casual employee contracts and policies, and hours of work provisions. The changes have applied from 26 August 2024 and introduce a comprehensive set of measures aimed at enhancing employee rights, improving workplace safety, and fostering a more transparent and equitable working environment within the automotive sector.

Several measures have been introduced, including:

- empowering the Fair Work Commission (Commission) to Establish Minimum Standards for a
- diving power to the Commission to amend, vary or set aside certain terms of services contracts that it finds to be unfair; and
- introducing a 'right to disconnect' for employees.

Powers to establish standards for road transport industry

The changes enable the Commission to establish fair minimum standards within the road transport industry where it deems appropriate. These standards can apply to road transport contractors and the businesses that engage them and parties within road transport contractual chains.

In the road transport sector, work is frequently carried out through a series of subcontracting arrangements, forming a contractual chain. A person or business is considered part of this chain if they enter into an initial contract or agreement for the delivery of goods, the driver executing the delivery, and any entities involved in the successive contracts or arrangements. However, individuals requesting delivery for personal or domestic reasons are excluded from this definition, as are employees, who do not form part of a contractual chain.

Powers to handle unfair contract terms

Under Schedule 2 of the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth), unfair terms are prohibited in standard form consumer and small business contracts.

The new provisions under the *Fair Work Act 2009* (Cth) empower the Commission to intervene in cases where independent contractors earning below a certain threshold face unfair terms in service contracts. Although this does not specifically target the automotive sector, its implications are significant for many industry participants. These reforms signal the need to reassess contractor agreements, as disputes can now be brought to the Commission if the terms would be considered workplace relations matters in an employment context.

With these changes, automotive dealers and businesses must carefully review their standard form contracts with contractors. They should ensure that no unfair provisions remain and that contracts align with the revised definition of a 'standard form contract'. This heightened scrutiny of unfair contract terms is intended to deter exploitative practices and promote fairness across the industry.

For contractors in the automotive sector, this means that disputes over unfair terms, such as those related to payment, hours of work, or other obligations can be reviewed by the Commission. When assessing whether a term is unfair, the Commission will consider factors including:

- the bargaining power of each party in the service contract;

- whether the contract as a whole presents a significant imbalance between the rights and obligations of the parties;
- whether the term is reasonably necessary to protect a party's legitimate interests;
- whether the term imposes harsh, unjust, or unreasonable requirements on a party;
- whether the contract offers total remuneration that is lower than that of comparable employees or independent contractors; and
- any other relevant considerations deemed important by the Commission.

Right to disconnect

The new 'right to disconnect' law generally affects industries where employees are expected to be responsive outside of working hours. While it primarily targets sectors with heavy reliance on remote work and digital communication, it could have implications for the automotive industry, particularly in areas such as:

- **Vehicle Sales and Service** : Sales and service staff might benefit from the right to disconnect, ensuring they are not required to respond to after-hours communication related to customer inquiries or emergencies.
- **Fleet Management:** For those working in fleet operations or logistics, this right could limit the expectation to respond to issues outside work hours, such as managing vehicle breakdowns or dispatching services during off-hours.
- **Customer Support**: Workers in the automotive industry who provide customer or technical support for EV or autonomous vehicles could invoke the right to disconnect to prevent burnout from constant connectivity demands.

While not directly automotive-specific, this creates a clearer boundary between work and personal time, which could indirectly affect professionals in automotive-related roles that depend on being constantly available.

Follow the HWL Ebsworth Lawyers article link to read more at: Closing Loopholes: Episodes I and II - HWL Ebsworth Lawyers.

2. Proposed Legislative Updates

2.1 Changes to the Franchising Code of Conduct

In October 2024, the Federal Government released an exposure draft of the Competition and Consumer (Industry Code – Franchising) Regulations 2024 (**Exposure Draft**). This draft outlines the proposed regulations set to replace the current Franchising Code of Conduct (**Code**), with implementation planned from 1 April 2025. These changes will apply to franchise agreements entered into on or after this date.

The Exposure Draft updates the framework for franchising agreements, building on recommendations from the 2023 Independent Review of the Competition and Consumer (Industry Codes – Franchising) Regulations 2014 (Current Code). The review, conducted by Dr Michael Schaper, a former ACCC Deputy Chair, focused on addressing issues raised in the franchising sector while refining existing obligations.

Key changes to the Code

1. Scope of motor vehicle dealership agreements

The proposed legislation revises the definition of a "motor vehicle dealership" to explicitly cover agreements involving the servicing or repair of motor vehicles.

Previously, some franchisors structured dealer agreements to exclude servicing and repair operations and issued separate servicing agreements, in an attempt to limit these arrangements being subject to regulation under the Code. Although the language in the Code could be interpreted to capture these separate service agreements, the proposed changes make the position clear that such agreements will fall under the Code's scope.

2. Statement of purpose

The statement of purpose under Section 2 is expanded, in response to a recommendation for greater transparency about the Code's aims. While this provides useful guidance, it may also influence legal disputes by framing how courts evaluate franchisor behaviour under the Code.

The statement of purpose is changed to:

a. regulate the conduct of participants in franchising towards other participants in franchising, in particular to address the imbalance of power between franchisors and franchisees and prospective franchisees; and

b. improve standards of conduct and practice in the industry to minimise disputes through:

   i. better disclosure of information, to inform decision-making; and

   ii. setting out requirements for franchise agreements; and

c. provide a fair and equitable dispute resolution procedure for disputes arising under this Code or a franchise agreement.

The revised purpose explicitly aims to address the imbalance of power between franchisors and franchisees, while enhancing industry standards and reducing disputes through improved disclosure, clearer contractual requirements, and fairer dispute resolution mechanisms. For dealers, these changes strengthen their ability to challenge unfair practices and demand greater transparency from

franchisors, particularly in relation to investments and agreements. The amendments are designed to promote a more balanced and equitable franchising relationship.

3. **Higher penalty thresholds**

The Exposure Draft widens the application of "super penalties," enabling fines up to $10 million or, in some cases, three times the financial benefit obtained or 10% of annual turnover. For example, section 51 mandates that franchisors address franchisee termination requests and is subject to these enhanced penalties.

4. **Return on investment and compensation requirements**

The proposed changes extend to all franchise agreements the obligation on franchisors to provide franchisees with a “reasonable opportunity to make a return on investment,” which was previously limited to new motor vehicle dealership agreements only. This obligation applies to any investment made by the franchisee as part of entering into the agreement and must be achievable during the agreement's term.

5. **Simplified disclosure requirements**

The draft proposes a more straightforward approach to pre-contract disclosure, eliminating the Key Facts Sheet requirement. Franchisees with relevant experience may opt out of receiving detailed disclosure, though some terms, such as "substantially the same" businesses, lack precise definitions and could complicate implementation.

6. **Record-keeping duties**

Franchisors must maintain required records for six years, with section 36 imposing civil penalties for non-compliance. This change highlights the importance of proper documentation in franchise management.

7. **Marketing and specific purpose funds**

   Marketing funds are redefined to include "specific purpose funds," such as collections for conferences, which must adhere to the same audit and reporting standards. These changes aim to increase transparency in fund management.

8. **Restriction clauses in agreements**

   A significant change involves section 41 (formerly clause 23), which prohibits the inclusion of a restraint of trade clause in franchise agreements where certain conditions are met, such as the non-renewal of the agreement.

   Additionally, section 64 introduces a retrospective element by applying to existing franchise agreements that are not extended. It prevents franchisors from enforcing restraint of trade clauses under the conditions set out in section 41.

9. **Streamlined termination processes**

   Sections 54 and 55 revise the provisions for terminating franchise agreements, simplifying procedures for cases involving serious breaches. The amendments differentiate between terminations based on regulatory findings and those requiring a franchisor's judgement.

You can read the full exposure draft for the proposed amendments to Code in full using the link at: Exposure Draft - Franchising Code, and use the accompanying link at: Explanatory Statement as a guide to the amendments and new structure.

Follow the HWL Ebsworth Lawyers article link to read more at: The Code will be changing: Exposure draft of new Code released - HWL Ebsworth Lawyers.

2.2 Submissions for licencing regime under the franchising code

In November 2024, the Federal Government sought public submissions on the consideration of a licensing regime for the franchising sector. The call for submissions followed the Federal Government's release on 8 February 2024 of the Independent Review of the Franchising Code of Conduct (**Review**), conducted by Dr Michael Schaper.

Recommendation 23 of the Review stated that a licensing regime may provide a more efficient and effective way to address persistent issues in the sector, without necessarily imposing a greater degree of complexity or regulatory burden than the current Code. Such a system would ordinarily require government authority to approve (or licence) a franchisor to be able to conduct business. This may assist to overcome some of the perceived shortcomings under the current Code where, for example, enforcement action can only occur after a breach has occurred.

Dr Schaper's review went on to say that the introduction of a licensing regime would establish obligations on potential licensees before they can engage in a regulated activity. If a licence holder breaches the terms of their licence, the regulator would then be able to immediately halt the licence holder's engagement in the regulated activity.

The proposed licensing regime for the franchising sector also covers dispute resolution under the Code. In particular, the Code makes it mandatory for the parties to participate in alternative dispute resolution (**ADR**) and genuinely try to resolve the dispute in good faith. The Review stated that while stakeholders were generally supportive of the Code's process for dispute resolution, some concern remains about the cost, timeliness and awareness of these existing processes.

The Code also outlines the use of arbitration as a method of ADR, but only through written agreement of both parties. Arbitration is a more formal dispute resolution process that resolves the dispute through a binding determination. However, the Review observed that licensing regime could require licensees to participate in mandatory binding arbitration as a term of their licence.

One of the questions posed by the Government review was whether the current dispute resolution framework under the Code offer meaningful, timely and cost-effective dispute resolution?

The closing date for submissions for the consideration of a licensing regime for the franchising sector was 8 December 2024.

The introduction of a licensing regime for the Code and changes to the indemnification provisions of the ACL can have far reaching and impactful outcomes to the operations of motor vehicle distributors and dealers in the Australian automotive industry. This is because all motor vehicle dealerships and their distributors are covered by the Code and are exposed to ACL claims on a regular basis. The outcome of these reviews will therefore be carefully studied by automotive industry participants so as to understand the full extent of their implications to their operations and the industry in general.

2.3 Review of consumer guarantees & supplier indemnification under Australian consumer law

In October 2024 the Federal Government released a consultation paper on Improving Consumer Guarantees and Supplier Indemnification Provisions Under the Australian Consumer Law (**ACL**) (**Consultation Paper**). The Consultation Paper sought stakeholder feedback on a range of options to improve proposed civil prohibitions and penalties for breaches of the consumer guarantees and supplier indemnification provisions of the ACL including the introduction of civil prohibitions and penalties to:

- prohibit suppliers from refusing to provide a remedy specified by the consumer for a major failure under the consumer guarantees;
- prohibit manufacturers from not indemnifying suppliers when requested; and
- make it unlawful for a manufacturer to retaliate against a supplier for seeking indemnification following a consumer guarantees failure.

The Consultation Paper observed that there is a substantial body of evidence that many consumers are finding it difficult to obtain remedies from suppliers and manufacturers for consumer guarantees failures, with the 2023 Australian Consumer Survey finding that 31 per cent of surveyed consumers have not had their problem resolved, while of the 69 per cent of those whose issues were resolved, a third of those were not satisfied with the resolution. The survey also highlighted that only 23 per cent of consumers were able to resolve their problem directly with the relevant business. Of the consumer guarantee-related contacts received by the ACCC, most contacts related to motor vehicles (24 per cent).

For high-value goods such as motor vehicles, many consumers who experience faults with their new or used vehicle can find it difficult to obtain a remedy for a consumer guarantees failure. The reasons for this include:

- difficulty understanding the processes involved in making a complaint;
- the time-consuming and costly application process for pursuing a complaint through a court or tribunal; and
- the cost and difficulty in gathering evidence that a tribunal will accept, such as expert reports.

With regard to supplier indemnification, the Consultation Paper observed that currently, manufacturers are not subject to a penalty if they fail to indemnify their supplier where the manufacturer is at fault for the

consumer guarantees failure or retaliate against suppliers who seek indemnification for remedies provided to consumers following a consumer guarantees failure where the manufacturer is at fault. A motor vehicle dealer who sells a vehicle to a consumer is a 'supplier' for the purposes of the ACL.

A consumer’s right to a consumer guarantees remedy from a supplier is separate from the supplier’s right to receive indemnification from the manufacturer. However, the difficulty and uncertainty faced by suppliers in securing reimbursement from the manufacturer could contribute to consumers not receiving the remedies they are entitled to.

The submissions for the Consultation Paper closed on 14 November 2024.

2.4 *Occupational Treasury Laws Amendment (Extending the FBT Exemption for Plug-In Hybrid Electric Vehicles) Bill 2024*

The Treasury Laws Amendment (Extending the FBT Exemption for Plug-In Hybrid Electric Vehicles) Bill 2024 was introduced and read for the first time in the Senate on 15 May 2024. A second reading was moved on the same day.

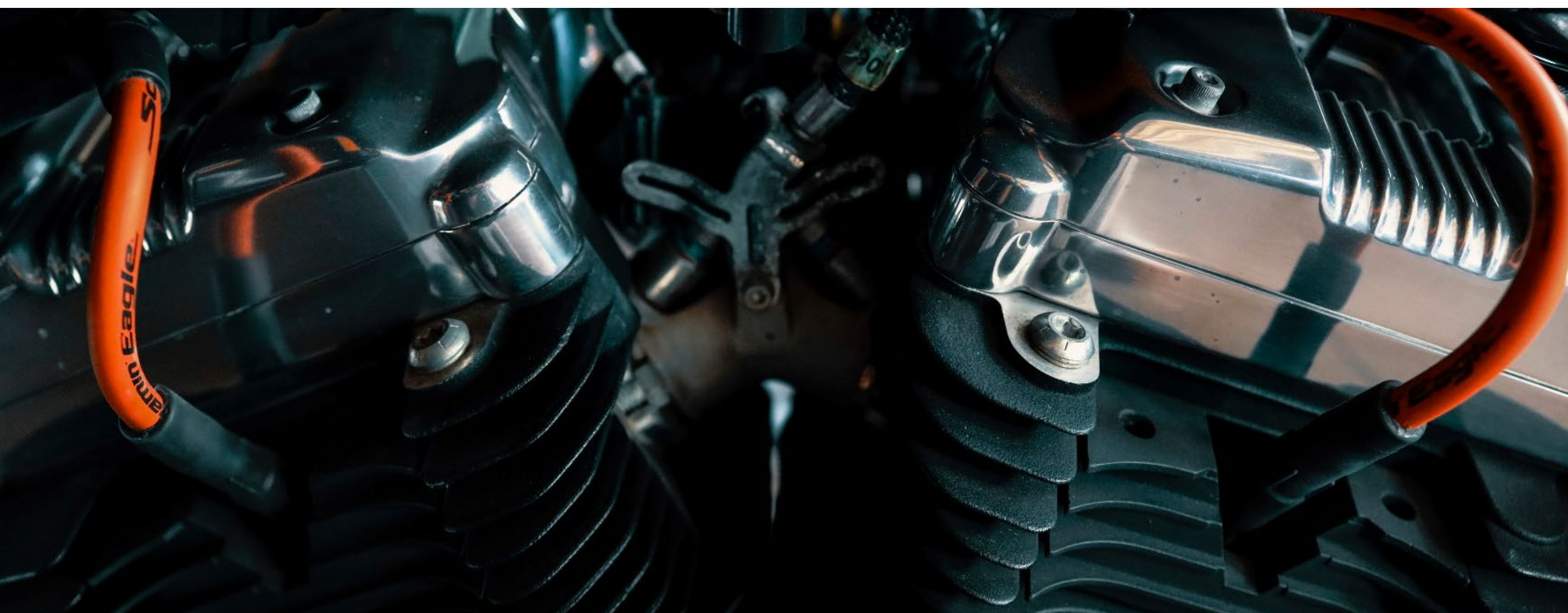
The Bill amends *the Treasury Laws Amendment (Electric Car Discount) Act 2022* (Cth) to extend the fringe benefits tax exemption for plug-in hybrid electric vehicles until 1 April 2030.

Currently, the tax exemption for plug-in hybrid vehicles is set to cease on 1 April 2025, so the extension would provide an additional five years for the exemption. The Bill is likely to be considered again by the Senate early next year.

2.5 *Cyber Security Bill 2024*

The Cyber Security Bill 2024 (**Cyber Bill**), introduced on 9 October 2024 and passed on 26 November 2024. Whilst it does not specifically target the automotive industry, its requirements will broadly apply to the motor industry, particularly for businesses collecting both customer information at the time of purchase and user information from their products. Additionally, automotive features in motor vehicles that connect to the internet may be classified as 'smart devices' and thereby be subject to the security standards mandated by the proposed Cyber Bill.

The Cyber Bill, as part of a broader legislative package, aims to implement seven initiatives under the 2023-2030 Australian Cyber Security Strategy. The Government anticipates that this will address legislative gaps to align Australia with international best practices and advance Australia’s position as a global leader in cyber security.



Key provisions under the Cyber Bill

1. **Mandatory ransomware reporting**

   The Cyber Bill introduces a mandatory 72-hour reporting requirement for businesses affected by a cyber security incident. Once in effect, the Cyber Bill would require organisations to report incidents to the Department of Home Affairs within 72 hours via an online platform administered by the Australian Cyber Security Centre if:

   - a cyber security incident has occurred, is occurring, or is imminent and is expected to impact the organisation;
   - an extortion demand has been made on the organisation or a related third party, either to gain benefit or harm the organisation; or
   - a ransom payment or other benefit is provided by the organisation or a related party in response to a demand or incident.

   Failure to comply with the mandatory reporting requirements may attract a civil penalty of $19,800, as per the current draft.

2. **Limited use obligations**

   In connection with the reporting requirements, the Cyber Bill restricts government bodies to a limited use of the disclosed information. The information can only be used for managing the incident and cannot be shared with or utilised by other government agencies for investigation, enforcement, or any other civil or regulatory purpose. This is intended to encourage transparent disclosure by organisations.

3. **Independent cyber incident review board**

   An independent Cyber Incident Review Board will be established under the Cyber Bill as a no-fault assessment body, meaning it will not assign liability for incidents. However, it will have the authority to request information, with potential civil penalties for non-compliance. The legislative package generally favours voluntary cooperation and disclosure, encouraging such approaches through various provisions.

   The Board will ultimately issue reports containing recommendations and general findings. While it will operate independently, oversight will be provided by the Minister for Cyber Security, who will handle appointments, dismissals, and approvals of Terms of Reference.

4. **Security standards for smart devices**

   The Cyber Bill defines 'smart devices' as 'connectable products,' which are devices capable of connecting to telegraphic, telephonic, or similar services, with internet connection specifically cited as an example. The Federal Parliament has the authority to regulate such services under paragraph 51(v) of the Australian Constitution.

   The Cyber Bill imposes reporting obligations on both manufacturers and suppliers to confirm that all devices meet the mandated security requirements specified in the Act's rules. The Cyber Bill also grants the Department Secretary powers to issue stop and recall notices, as well as public disclosure powers to the Minister when these notices are disregarded.

   Additionally, the Cyber Bill specifies that where two devices work together and only one is connectable, both devices (and any further devices connected to the connectable device) will be

considered smart devices. This is a notable point for the motor vehicle industry, as it could result in an entire vehicle being classified as a smart device.

2.6 *Roads and Road Safety Legislation Amendment Bill 2024* (VIC)

On 31 October 2024, the Roads and Road Safety Legislation Amendment Bill 2024 passed through the Victorian Legislative Council with amendments and has now returned to the Legislative Assembly for further consideration. If enacted, most provisions will commence on dates to be proclaimed, with a default commencement date of 13 August 2025. Even if the Bill is passed in the coming weeks, it is unlikely that enforcement cameras for monitoring no-truck zones will be operational before mid-2025.

The Bill seeks to amend the Road Safety Act 1986 (Vic) and other related legislation to allow evidence collected from prescribed no-truck zone cameras to be used in determining whether a heavy vehicle driver has breached no-truck zone restrictions. Additionally, the Bill supports the implementation of digital driver's licences, the continued sale of custom licence plates, and introduces minor changes to the infringement processes for Melbourne's toll roads.

The motivation for this legislation stems from the Victorian Government's commitment to enforcing a 24-hour truck ban in Melbourne's inner west following the opening of the West Gate Tunnel. Enforcement of the truck curfew currently relies on authorised officers apprehending non-compliant drivers directly, a resource-intensive and unsustainable approach. To address this, the government has allocated $10.2 million in the 2024–25 budget to fund the implementation of 24/7 camera enforcement.

Key features of the proposed amendments

1. **Use of no-truck zone cameras**

   The Bill introduces provisions enabling evidence from prescribed no-truck zone cameras to support enforcement of the offence of driving a heavy vehicle in prohibited areas. The cameras will help detect non-compliant trucks, allowing authorised officers from the Department of Transport and Planning and the National Heavy Vehicle Regulator (NHVR) to take enforcement action.

   The state of Victoria will be the first state to introduce legislation facilitating this form of technology-enabled enforcement, although similar measures using AI-assisted cameras for seatbelt and mobile phone offences have already been adopted in New South Wales and South Australia.

2. **Operator-onus offenses**

   Offenses detected by prescribed cameras will now fall under the operator-onus system, where responsibility for the offence is attributed based on vehicle registration details. Drivers can defend themselves by nominating the person who was in charge of the vehicle at the time.

3. **Admissibility of camera evidence**

   Provisions added to the Road Safety Act 1986 specify that:

   - Definitions of "no-truck zone camera" and "prescribed no-truck zone camera" have been incorporated, with cameras required to meet prescribed standards.
   - Certificates issued by authorised officers regarding camera-detected evidence, such as dates, times, and licence plate numbers, will be admissible in court.
   - Evidence from cameras can be used in addition to other types of proof without prejudice.

4. **Exceptions and regulations**

Future regulations will define exceptions, such as cases where trucks are escorted by police or authorised officers or where specific approval has been granted by the Secretary of the Department of Transport and Planning. Defendants must raise exceptions at least 28 days before a hearing.

The amendments enable the use of camera evidence to enforce compliance efficiently and ensure that local businesses and residents can continue to receive and supply goods through specified exceptions. Although enforcement is unlikely to begin before 2025, the Bill represents a significant step towards leveraging technology to enhance road safety and urban liveability.

3. Policy Update

3.1 Department of Infrastructure, Transport, Regional Development, Communication and the Arts Transport and Infrastructure Net Zero Consultation Roadmap

As the Australian and global economy moves towards net zero emission targets, Australia is steadily on the pathway towards decarbonisation of the light duty transport sector with government policy and consumer purchase patterns seeing the adoption of zero and low emission vehicles grow exponentially in recent years.

Commitment to decarbonisation

Australia is on a path toward decarbonising its light-duty transport sector, driven by evolving government policies and changing consumer preferences. The Federal Chamber of Automotive Industries (**FCAI**) in its response to the Roadmap, commented on the growth in in electric-like vehicles noting that the adoption of zero and low-emission vehicles has surged from just 1.17% of new vehicle sales in 2014 to 18.57% in 2023. The FCAI also commented on the pace of the transition with where zero and low-emission vehicles accounted for 24.88% of new vehicle sales in mid-2024, with Battery-Electric Vehicle (**BEVs**) specifically making up 7.9% of the market.

Despite this progress, there is still a slow transition ahead. The pace of change will vary across different market segments, influenced by advancements in electrification and battery technology.

Challenges and recommendations

While the availability of affordable electric vehicles is improving, upfront costs remain a barrier, especially for larger vehicles like SUVs and light commercials. To address these challenges, the FCAI suggests several demand-side mechanisms for government consideration as follows.

1. **Extend the Fringe Benefits Tax (FBT) exemption for PHEVs**

   The current FBT exemption for Plug-In Hybrid Electric Vehicles (**PHEVs**) is set to expire in April 2025. Extending this exemption could stimulate further PHEV adoption, which has already increased by almost 300% in fleet and novated leases since the exemption's inception. PHEVs can play a crucial role in reducing transport emissions and familiarising consumers with electric technology.

2. **Scrap the Luxury Car Tax**

   Originally designed when Australia had a local manufacturing industry, the Luxury Car Tax is now outdated. Removing this tax could enhance the affordability of safer and more environmentally friendly vehicles.

3. **Reset the Instant Asset Write-Off Scheme Threshold**

   Adjusting the instant asset write-off scheme threshold to $50,000 would support small and medium enterprises in transitioning to electrified vehicles, fostering a safer and more efficient fleet.

By implementing these targeted initiatives, the government can encourage the adoption of zero and low-emission vehicles, supporting both private consumers and fleet operators. This approach will not only facilitate the development of a second-hand market for electric vehicles but also align with Australia's broader decarbonisation goals. The FCAI remains committed to collaborating with policymakers to ensure a sustainable automotive future.

3.2 Industry welcomes investment in electric-car infrastructure by NSW Government

As part of the FY2024-2025 budget for NSW, the NSW Government has pledged $209 million to fund more charging points for electric vehicles (**EVs**).

The FCAI has announced its support of the commitment by the Government to allocate:

- $149 million for EV fast chargers;
- $20 million for EV chargers to be fitted within regional tourist hot spots; and
- $10 million for retrofitting EV chargers to apartment buildings.

This significant investment in NSW's EV infrastructure acts as a decisive step towards the wide-spread movement to focus on zero-emissions technology.

In addition, the State Government has also announced its intention to assist the procurement of EV fleets and the installation of the charging stations, setting aside $10 million co-fund kerbside chargers in metropolitan areas for the purposes of assisting EV owners without off-street parking.

FCAI acknowledges that this is a balanced investment which is essential to ensure that both metropolitan and regional areas are able to benefit from enhanced EV infrastructure.

Furthermore, this development holds significance within the automotive industry, as it looks to accelerate the update to the State Government's NSW EV Strategy which looks to abolish stamp duty and introduce a distance-based road-user charge in 2027. This can only be achieved if there is an increase in the public access to EV charging stations.

3.3 Australian Government consultation on Australian Design Rules system review for national road vehicle standards (*ADR Harmonisation Review 2024-25*)

The Australian Design Rules (**ADR**) ensure all new and used road vehicles are compliant with critical standards for safety, anti-theft and emissions performance. On 2 December 2024, the Australian Government appointed an independent party being Dr Warren Mundy to review and find ways to improve the process of having a vehicle approved for sale in Australia, particularly considering international standards alignment and the implication for ADR harmonisation locally. The review will consider how international standards can be streamlined to reduce timeframes without compromising the Government's road safety objectives, considering the risks of 'conversion' of standards set by agencies such as the United Nations.

The key areas of focus in balancing these considerations will include:

- Choice, safety and price outcomes for consumers;
- Productivity and innovation in the vehicle and related industry sectors; and
- The net zero transition.

For key stakeholders in the automotive industry, all feedback is invited to facilitate greater perspective on the improvement needed and how harmonisation practices with international standards could influence decisions about providing vehicles to the Australian market as well as the impact of such changes in conjunction with other government policies coming into effect, such as the New Vehicle Efficiency Standard.

Consultation is open for contributions via the Australian Government Department of Infrastructure, Transport, Regional Development, Communications and the Arts' website using the link at: click here which **closes on Friday 24 January 2025.**

International policy updates

3.4 Strategic regulatory updates impacting the EU automotive industry

Morgan, Lewis & Bockius LLP (Morgan Lewis), in their May 2024 article release on the EU's automotive industry reports that the European Union (EU) electric vehicle market continues to show positive signs of consumer and private investment. It is to be noted, however, that the automotive industry is facing a flurry of regulatory and legal developments, including new antitrust, supply chain, and intellectual property measures.

The EU has recently rolled out a series of regulatory updates designed to enhance competitiveness and innovation within the automotive sector. Morgan Lewis notes that these changes extend beyond traditional competition law, addressing crucial areas such as semiconductor development, raw materials sourcing, cybersecurity, data access, and artificial intelligence (AI) deployment.

EU Chips Act

One of the cornerstone initiatives is Regulation 2023/1781 (EU Chips Act), which aims to boost semiconductor development and investment across EU member states. The EU Chips Act targets ongoing supply shortages and seeks to ensure a secure supply chain for critical components. By promoting large-scale advancements in cutting-edge semiconductor technologies, the EU Chips Act is poised to enhance the automotive industry's capacity to innovate, particularly in the realm of electric and autonomous vehicles.

Critical Raw Materials Act

The Critical Raw Materials Act addresses the growing concerns over material shortages. By establishing benchmarks for materials extraction and promoting diversification of sourcing, this regulation aims to reduce reliance on non-EU suppliers. This is particularly vital for the automotive sector, which increasingly depends on rare earth elements and other materials for electric vehicle batteries and advanced technology.

Cyber Resilience Act

In an era of escalating cyber threats, the Cyber Resilience Act introduces mandatory cybersecurity standards for products sold in the EU. This regulation requires automotive manufacturers to integrate cybersecurity measures throughout the product lifecycle, fundamentally changing business processes. By prioritising cybersecurity, the Act enhances consumer trust and safety, ensuring that vehicles are protected against potential cyberattacks.

European Data Act

The European Data Act expands data access requirements for connected devices, including vehicles. This regulation significantly impacts data-sharing practices within the automotive sector, presenting challenges for manufacturers in terms of compliance while safeguarding trade secrets and proprietary information. As vehicles become increasingly connected, effective data management will be crucial for maintaining competitive advantage.

EU Artificial Intelligence Act

Finally, the EU Artificial Intelligence Act establishes regulatory frameworks for AI systems, imposing varying compliance obligations based on risk levels associated with AI applications in vehicles. This Act will shape the development and deployment of AI-driven automotive technologies, influencing everything from autonomous driving systems to advanced driver-assistance features.

These strategic regulatory updates represent a transformative shift for automotive companies operating within the EU. Automotive manufacturers must adapt to these changes, as compliance will be key to thriving in this complex regulatory landscape.

Impact on Australian market

Whilst the above regulatory developments are evolving in the EU automotive sector, these are important to note given the large percentage of new vehicles sold in Australia which are manufactured in the EU or for EU based manufacturers.

3.5 EU Supply Chain transparency measures

The EU is also increasingly focusing on supply chain transparency and corporate responsibility, with significant implications for the automotive industry. Recent developments noted below highlight the growing emphasis on ethical practices and due diligence within supply chains.

National Legislation: Germany's Supply Chain Act

Several EU member states have adopted supply chain laws to ensure companies address human rights and environmental concerns. Germany has notably introduced this Act on corporate due diligence obligations in supply chains. This legislation mandates that large companies implement robust risk management systems to monitor and mitigate risks related to human rights abuses and environmental harm throughout their supply chains. The German Supply Chain Act sets a precedent for corporate accountability in sourcing and production practices.

European Directive: Corporate Sustainability Due Diligence Directive (CSDDD)

In March 2024, the European Council advanced the Corporate Sustainability Due Diligence Directive (CSDDD), marking a streamlined approach to corporate responsibility across the EU. This directive is poised to supersede existing national supply chain laws, establishing a cohesive framework for due diligence practices. While the risk assessment criteria may vary slightly by industry, companies perceived as higher risk will face intensified scrutiny.

One of the most significant aspects of the CSDDD is the introduction of civil liability. Non-governmental organisations (NGOs) are now empowered to initiate representative actions against companies for non-compliance, raising the stakes for automotive manufacturers. Failure to adhere to both EU regulations and member state laws can lead to filed complaints, substantial fines, and exclusion from public contracts, emphasising the urgent need for diligence in supply chain practices.

The adoption of these supply chain regulations underscores the EU's commitment to ethical business practices within the automotive industry. As the CSDDD takes effect, companies will need to enhance their compliance frameworks and risk management systems to navigate the evolving regulatory landscape. Proactive measures in supply chain diligence will not only mitigate legal risks but also promote sustainability and social responsibility in the automotive sector.

The reach of these regulations will be felt in Australia by increased compliance requirements inserted into dealer and distribution agreements.

3.6 US FTC drives crackdown on connected cars' data privacy risk

In May 2024, the US Federal Trade Commission (FTC) issued a stark warning regarding the collection of sensitive personal data by automakers, highlighting a growing concern in the automotive sector. The FTC emphasised that car manufacturers and all businesses must take proactive measures to protect consumers from the illegal collection, use, and disclosure of their personal data.

As automotive technology advances, vehicles increasingly resemble personal devices capable of capturing vast amounts of sensitive information. Cars equipped with internet and wireless technologies, can collect data such as biometric information, geolocation, and consumer preferences. This allows the cars to gather data from users and passengers who may not have consented to such data collection. This data can easily be monetised through sales to data brokers or utilised in targeted advertising by automakers.

As data privacy becomes a national concern, various US states are enacting comprehensive data privacy laws, including California, Virginia, and Colorado which impose strict guidelines on how sensitive personal

data, such as geolocation, can be collected and used. By prioritising consumer privacy and adhering to evolving legal standards, automakers can foster trust and ensure compliance in a rapidly changing landscape. Both consumers and businesses must work collaboratively to minimise unnecessary data collection and protect individual rights in an increasingly connected world.

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4. Case Law Update

4.1 *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 1 January 2022, Mercedes Benz implemented a new fixed-price agency model, fundamentally altering its previous dealership framework. Under the prior model, dealers had the autonomy to set their own prices, allowing for the potential of higher profit margins through pricing strategies. The shift to the agency model significantly reduced this advantage, limiting dealers' ability to achieve increased profits through higher sales prices.

As a result, 38 out of approximately 50 Mercedes-Benz dealers initiated legal action against Mercedes-Benz Australia/Pacific Pty Ltd (**MBAuP**). The dealers contended that the new contractual arrangements imposed by MBAuP, which mandated the transition to a fixed-price agency model, placed them in a financially precarious position. They further alleged that Mercedes Benz violated its duty to act in good faith and engaged in unconscionable conduct by coercing them to abandon their previous dealership arrangements in favour of the new agency model.

The dealers asserted that the implementation of the agency model, along with the issuance of non-renewal notices terminating their existing dealer agreements, was not the result of a genuinely conducted process and lacked good faith. They claimed that their goodwill was appropriated without compensation, and that MBAuP was either aware or recklessly indifferent to the fact that the majority, if not all, of the dealers would be financially disadvantaged under the new model. It was alleged that this model was imposed on the dealers with blatant disregard for their interests.

Claims:

i) **Breach of Good Faith: The** dealers contended that MBAuP's shift to the agency model and the subsequent issuance of non-renewal notices were executed without good faith.

ii) **Unconscionable Conduct:** They alleged that MBAuP engaged in unconscionable conduct by compelling dealers to enter into agreements that undermined their financial interests.

iii) **Loss of Goodwill:** The dealers sought compensation for the loss of goodwill incurred as a result of terminating the prior dealership model.

iv) **Non-Genuine Process:** It was claimed that the non-renewal notices were not the product of a genuinely conducted process but were rather influenced by directives from Mercedes-Benz AG.

v) **Breach of the Franchising Code:** The dealers argued that MBAuP's exercise of its contractual right to terminate the previous dealer agreements and replace them was inconsistent with the Franchising Code.

Issue

i) Did there exist a duty to act in good faith?

ii) Did Mercedes Benz engage in unconscionable conduct?

iii) Was there a breach of the Franchising Code?

Outcome

The Court ultimately determined that Mercedes Benz acted lawfully in modifying its dealer agreements, which resulted in the implementation of non-negotiable fixed prices for its new vehicles. It rejected allegations of unconscionable conduct by Mercedes Benz, concluding that a party exercising contractual rights must do so honestly in relation to its contractual obligations and the exercise of non-renewal powers. The Court emphasised that the commercial arrangements established by the dealer agreements were not permanent.

The Court found that non-renewal notices could be issued without cause, provided they were executed in good faith. The new agency agreements were classified as standard-form contracts, and the Court did not identify any false representations made by MBAuP. The Court concurred with MBAuP's assertions that the dealers sought to alter the contractual terms to better align with their commercial interests.

Furthermore, it ruled that no compensation was owed to the dealers for the goodwill they claimed to have lost, as this loss resulted from a contractually valid exercise of a non-renewal notice. The Court clarified that while MBAuP was required to act honestly when exercising its non-renewal power, this did not guarantee that a renewal would occur. The court emphasised that the primary purpose of non-renewal is to terminate existing contractual arrangements.

The decision is subject to appeal which has been scheduled to be heard in March 2025.

Significance to the automotive industry

- Franchisees must understand the implications and risks involved when entering a franchising agreement, especially when they do so voluntarily.
- A party seeking to terminate a franchise agreement cannot be deemed to have engaged in unconscionable conduct, as the purpose of non-renewal is to end the existing contractual arrangement.
- The presence of a non-renewal right indicates that a franchise agreement is not a permanent arrangement and can be terminated by the party holding that right and is limited only by the duty of good faith, rather than by the nature of the contractual bargain.
- Goodwill is the legal right or privilege to operate a franchised business in substantially the same manner which in the past has attracted custom to the business. As such, on expiry or termination of a franchise agreement, goodwill ceases to exist. It is not the case that, once a franchise agreement expires or is terminated, there is some valuable intangible asset to which the franchisee still has an entitlement. A franchisee has no right at law to be compensated for goodwill on non-renewal of a franchise agreement.
- The judgment reinforces that while parties exercising non-renewal rights must act honestly, they are not obligated to renew contracts indefinitely.

- The ruling affirms that non-renewal for legitimate business reasons does not amount to unconscionable conduct.

4.2 Honda Australia ordered to pay significant damages to *Astoria Brighton - Brighton Automotive Holdings Pty Ltd (as trustee for Brighton Honda Unit Trust) v Honda Australia Pty Ltd (No 2)* [2024] VSC 262

Background

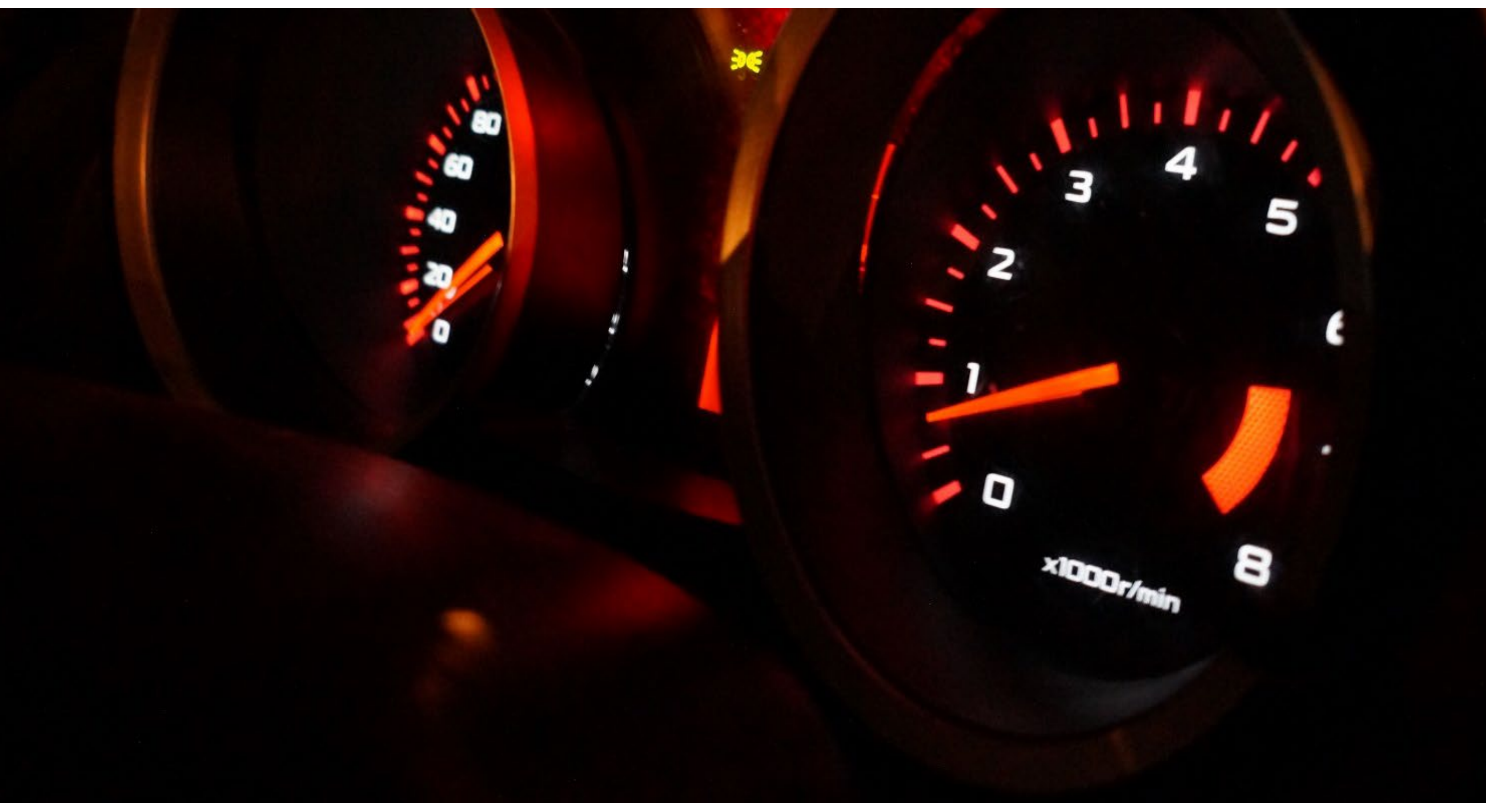
This case relates to a dispute between Honda and Astoria Brighton which arose after Honda elected to prematurely terminate its dealer network to effect a change in business model from a dealership to agency model. Astoria Brighton did not receive an offer to enter the agency model, rejected an offer for compensation from Honda Australia for the termination, and subsequently took the matter to trial in the Supreme Court of Victoria.

Issue

The Supreme Court considered claims made by Astoria Brighton against Honda Australia for damages arising from breaches of the dealer agreement such as unlawful termination.

Outcome

- Supreme Court has made final orders in the long running dispute between Astoria Brighton and Honda Australia in favour of Astoria Brighton.
- The Supreme Court has ordered that Astoria Brighton to receive compensation and interest in excess of $17M for the unlawful termination of its Dealer Agreement from Honda Australia.
- Indemnity costs also awarded against Honda Australia for part of the claim.



Significance to the automotive industry

The key findings made by the Supreme Court in favour of Astoria Brighton were that the:

- automotive industry in Australia experienced an unprecedented profit 'sugar hit' post-COVID and accepted the evidence of Mr Mark Avis, a director of Astoria Brighton, that dealers in Australia were experiencing a record demand for vehicles during that period. Mr Avis testified that this demand meant Astoria Brighton no longer discounted its vehicles and was making significantly higher profit margins than before.
- the volume of vehicles that would have been supplied by Honda Australia to Astoria Brighton had it not terminated the Dealer Agreement would have been similar to the levels of supply prior to termination as opposed to the volumes sold under the agency model (as contended by Honda Australia).

The judgement of the Supreme Court follows the $6 million fine that Honda Australia was ordered to pay by the Federal Court of Australia after the ACCC prosecuted Honda Australia for engaging in misleading and deceptive conduct towards Astoria Brighton's customers after its Dealer Agreement was terminated.

For further information on this case, please follow the HWL Ebsworth Lawyers article link at: Honda Australia ordered to pay significant damages to Astoria Brighton - HWL Ebsworth Lawyers

4.3 *Glascott v Mercedes-Benz Financial Services Australia Pty Ltd* [2024] QDC 127

Background

The plaintiffs lost confidence in the safety of their Mercedes-Benz ML350, acquired through an Asset/Hire Purchase Agreement dated 2 December 2010, after experiencing instances where the vehicle applied its brakes unexpectedly, causing it to veer or stop abruptly without any visible hazard. This issue occurred seven times between March 2011 and May 2014, under various conditions and locations, and persisted despite multiple attempts to diagnose and resolve it. The vehicle remained unused since 3 May 2014. The plaintiffs were seeking damages from the first defendant, the financier, and the second defendant, the car dealer, claiming that the car, which had an odometer reading of 5,744 km upon delivery, was not "new" and that its spontaneous braking rendered it unmerchantable, unsafe, and unroadworthy.

The plaintiffs took possession of the "new" ML350 SUV from a Mercedes dealership in Brisbane in December 2010 under a 60-month lease agreement. Although the contract specified that the vehicle would have fewer than 10 kilometres on the odometer, the plaintiffs received a demonstrator model that had already accumulated 5,744 kilometres from test drives.

On at least seven occasions, while driving, the brakes of the vehicle automatically engaged without warning. One incident in 2011 involved a crash into a light pole at approximately 10 kilometres per hour, resulting in over $3,000 in damages. In another instance, the vehicle was nearly rear-ended due to its unexpected stopping.

Despite repeated attempts to rectify the fault, the couple grew increasingly concerned about the SUV's safety. By 2014, they ceased driving it on public roads and stored it in a shed before filing a lawsuit against Mercedes-Benz Australia and its financial services.

Issue

The key issues in the proceeding were:

i) whether the Hire Purchase Agreement included a term stating that the car was supplied as 'new' with an odometer reading of 10 km;

ii) whether the agreement stipulated that the car was of merchantable quality, roadworthy, safe to drive, and reasonably fit for its intended purpose;

iii) whether the dealer represented to the plaintiffs that the car was new, of merchantable quality, and/or fit for purpose;

iv) whether the vehicle provided under the contract was not new but rather a demonstrator with an odometer reading of 5,744 km, constituting a breach of the Hire Purchase Agreement;

v) whether the car was so defective that it failed to meet standards of merchantable quality, fitness for purpose, roadworthiness, and safety, thereby breaching the Hire Purchase Agreement; and

vi) whether the dealer was negligent due to the car not being of merchantable quality and/or not fit for purpose.

Outcome

The Judge found that the plaintiffs' vehicle was defective, rendering it not roadworthy and unsafe for public use. As a result, the car was deemed to lack merchantable quality. The Court ordered that the plaintiffs be compensated $59,073.81, plus 10 years of interest, while requiring them to return the car to Mercedes.

The Judge determined that neither Mercedes-Benz Financial Services Australia nor Mercedes-Benz Australia were negligent, concluding they had taken all reasonable steps to ensure the vehicle's safety prior to the sale. He noted the defect's unusual nature and the low probability of harm, suggesting that expecting the dealership to take additional precautions would be unreasonable.

The car supplied was a demonstrator model with an odometer reading of 5,744 km, contrary to the Hire Purchase Agreement, which stated it should be "new" and have only 10 km.

The implied terms of the agreement stipulated that the vehicle be of merchantable quality, safe to drive, and fit for its intended purpose, which the car failed to meet. The defendants were found jointly and severally liable for damages under the *Trade Practices Act 1974* (Cth).

The Judge rejected the plaintiffs' claim of total failure of consideration, acknowledging that they had benefitted from the vehicle during the hire period from December 2011 to May 2014.

Damages were assessed based on the plaintiffs' losses stemming from the car's defects, relieving them from any further payments under the agreement. The defendants were also ordered to cover the plaintiffs' costs.

Significance to the automotive industry

- It is crucial for contracts to explicitly state the condition of the vehicle being sold. In this case, the Court affirmed that the vehicle was supplied as "new" with an odometer reading of 10 km. Dealers should ensure that any claims about the vehicle's status are clearly documented to avoid disputes.
- The ruling highlights the importance of understanding the duty of care owed to consumers. Automotive dealers should recognise that consumers may lack the knowledge or means to assess the vehicle's condition, especially in remote transactions where they do not physically inspect, or test drive the vehicle and may be held to a higher standard of care.
- As the sale was conducted electronically without the plaintiffs seeing the car in person, dealers should be mindful that this can increase consumer vulnerability. Adequate measures should be taken to ensure transparency and provide consumers with enough information to make informed decisions.
- The judgment suggests that courts will consider a dealer's duty to prevent economic loss to consumers.

4.4 Honda Australia Fined for Breach of Information Sharing Requirements under the MVIS Scheme

Background

Honda Australia came under scrutiny by the Australian Competition and Consumer Commission (**ACCC**) for allegedly breaching the Motor Vehicle Service and Repair Information Sharing Scheme (**MVIS scheme**). This scheme is designed to ensure that independent repairers have fair access to vital diagnostic software and technical information necessary for servicing and repairing modern vehicles. It requires vehicle manufacturers to provide this information on a daily, monthly, or annual subscription basis, or for any period chosen by the repairer.

Issue

The ACCC claimed that from 1 July 2022 to 6 May 2024, Honda Australia only made its software available through annual subscriptions, without offering more affordable short-term options like daily or monthly subscriptions. This limitation was seen as non-compliance with the MVIS scheme, as it restricted independent repairers' ability to access necessary information flexibly and affordably.

Outcome

As a result of these allegations, Honda Australia was issued an infringement notice by the ACCC and fined $18,780. This case marked the first enforcement action taken under the MVIS scheme, signalling the ACCC's intent to uphold compliance. Acting ACCC Chair Catriona Lowe highlighted that offering flexible access is crucial for increasing competition and enhancing consumer choice in the automotive repair market.

Significance to the automotive industry

This enforcement action highlights the need for automotive manufacturers to comply with the MVIS scheme. The scheme aims to level the playing field between independent repairers and dealership service centres, promoting competition and providing consumers with more repair options. The ACCC's actions demonstrate that restricting access to essential information will not be tolerated, urging other manufacturers in the automotive industry to review and align their practices with the MVIS requirements.

4.5 *Wawryk v Mercedes-Benz Australia/Pacific Pty Ltd (Subpoena Ruling)* [2024] VSC 120

Background

The plaintiffs, leading a class action against Mercedes-Benz regarding diesel vehicle emissions, issued subpoenas to various State and Territory motor registration authorities to obtain information about potential group members and their vehicles. The subpoenas were issued after the plaintiffs lodged their statement of claim and before the defendant had provided discovery or submitted its defence.

The plaintiffs outlined two primary reasons for issuing the subpoenas in the case:

- **Class Composition and Identification:** They sought to gather information regarding the identity of the group members and details of their vehicles. This information would help the plaintiffs understand the size, composition of the class, characteristics, facilitate communication with the group members, investigate individual claims, and carry out emissions testing on certain vehicles within the group.

- **Investigations:** The subpoenas aimed to enable a thorough factual investigation of each group member's vehicle.

The plaintiffs indicated that their goal was to compile a comprehensive database of contact information for all registered owners of the "Affected Vehicles". This information would be used to identify and communicate with group members, assess their individual claims, and evaluate the scope and potential economic impact of the claim. This approach would assist in determining the appropriate forensic strategy for the case.

Mercedes-Benz objected to the subpoenas, arguing that there was no legitimate forensic purpose for obtaining this information at the early stage of the proceedings, particularly before the defendant had filed its defence and given discovery.

Issue

i) **Legitimacy of Subpoenas:** Whether the subpoenas had a legitimate forensic purpose, given they were issued before Mercedes-Benz had filed its defence or provided discovery.

ii) **Privacy Concerns:** Whether the subpoenas risked disclosing personal information of individuals not part of the class and if the requested data was necessary at this stage.

Outcome

Associate Justice Steffensen held that the subpoenas were not issued for a legitimate forensic purpose. The Court agreed with the defendant's objection, ruling that since there were no disputes about the group members' identities or the class composition, the subpoenas were not valid. Furthermore, the court expressed concerns about the potential inclusion of personal information of individuals who were not part of the class.

However, while denying the plaintiff immediate access to the subpoenaed materials, the Court held them on its file. Associate Justice Steffensen acknowledged that the subpoenaed information might be useful for issuing opt-out notices to group members at a later stage in the proceedings.

Significance to the automotive industry

This ruling holds implications for the automotive industry, particularly in the context of class action lawsuits. By denying immediate access to the subpoenaed information, the decision emphasises the importance of balancing the need for detailed information about affected consumers with legal constraints and procedural fairness. This approach signals to automotive manufacturers and other industry stakeholders that the courts will scrutinise attempts to obtain sensitive customer data during litigation to ensure it aligns with legal standards and procedural integrity.

4.6 *Automotive Invest Pty Limited v Commissioner of Taxation* [2024] HCA 36

Background

In 2016, the taxpayer launched a museum that operated until its closure in 2019. Throughout this period, the taxpayer, licensed to sell motor vehicles, achieved significant sales, selling over 800 cars with total gross revenue reaching $114 million. The 40 cars at the centre of the dispute were acknowledged to be part of the taxpayer's trading stock, all available for sale, and the taxpayer experienced both profits and losses. The first full financial year of operations reflected a net revenue of $4.39 million from car sales. Sales were conducted on-site, supported by a sales office, and through online platforms.

To draw attention to the museum, the taxpayer marketed it as a distinctive tourist destination, particularly through its website and social media channels, highlighting it as an ideal excursion from Sydney for car enthusiasts. The website emphasised that it was "a car lover's dream". The museum initially attracted 13,000 visitors in its opening month, later stabilising to approximately 2,500 weekly visitors, and attracted about 100,000 visitors over its first year. Admission for adults started at $16 and was later increased to $20. Financial evidence indicated the museum operated at a loss, with its revenue being minimal compared to the income from car sales.

The director of the taxpayer confirmed that the museum concept was implemented purely as a strategy to promote and drive car sales, with the primary judge concurring in the finding that the museum concept served only to support the objective of selling cars. This determination went unchallenged in subsequent appeal proceedings.

The Commissioner of Taxation, however, issued assessments for both Luxury Car Tax (**LCT**) and Goods and Services Tax (GST) based on the assessment that each vehicle was dual-purpose: held as trading stock and displayed as an exhibit within the museum. The dispute before the Full Court involved 40 vehicles for which amended assessments were issued, attributing additional LCT. The Commissioner argued that the cars were not only trading stock but were also utilised as museum exhibits. The appellant contended that the museum concept's only purpose was to increase vehicle sales and thus challenged the assessments.

Issue

The central issue before the High Court was how to characterise the purpose under sections 9-5(1) and 15-30 of the LCT Act. Specifically, the question was whether the use of the cars as museum exhibits constituted a separate purpose that would affect the tax status of the cars as trading stock.

Outcome

The High Court upheld Justice Logan's dissent in the Full Court, ruling that the museum component was solely a means to achieve the primary commercial purpose of selling cars, rather than constituting a separate, dual-purpose use that would trigger LCT obligations. Key points from the judgment include:

- **Objective vs. Subjective Purpose:** The majority reiterated that the LCT Act requires an "objective characterisation" of purpose, but that subjective evidence, such as the taxpayer's stated intentions, can inform the assessment of purpose when it aligns with objective facts. They noted that subjective evidence could demonstrate the true commercial nature of an activity, unless contradicted by other facts or suggesting misuse.

- **Focus on Ultimate Purpose**: The Judgment clarified that “purpose” under the LCT Act should be interpreted in the “central sense” of the taxpayer’s ultimate objective, not any intermediate purpose or incidental use. This required a clear distinction between “purpose” (the end goal of selling cars) and “means” (using a museum display to attract buyers). According to the court, intermediate means are not a distinct purpose unless they independently serve a commercial goal.

- **Commercial Nature of the Museum Concept**: The majority accepted that the museum concept was only a tool for showcasing the cars as trading stock. They found that the museum layout was “subjugated” to the primary commercial aim of generating profit through car sales. The appointment of staff in roles typically associated with a museum, such as a “curator,” and the sale of entry tickets were viewed as further marketing strategies rather than evidence of a separate museum purpose.

- **Interpretation of LCT Act Language:** The Court examined the LCT Act’s language, particularly sections 9-5(1) and 15-30(3), which refer to “use” and “purpose”. The court concluded that the Act’s references to “your” purpose should be interpreted as the taxpayer’s specific intent in the use of cars as trading stock, rather than an inferred purpose based on outward appearances alone.

- **Relevance of the GST Act Observations**: The Court noted that the reasoning in the LCT Act analysis may extend to the interpretation of purpose under the Goods and Services Tax (GST) Act, particularly in sections where a taxpayer’s intent is crucial. They highlighted how similar provisions focus on the taxpayer’s subjective intention for certain supplies, such as the intended use of rights or property, further supporting a subjective approach to assessing intended use under tax law.

Significance to the automotive industry

This ruling is significant for the automotive industry as it provides clarity on how the use of vehicles in business strategies, such as showroom or museum displays, is treated under the LCT Act. The decision highlights that the ultimate purpose for holding a vehicle, such as using it as trading stock will take precedence over any intermediate steps or methods employed to facilitate its sale. This interpretation helps businesses in the automotive sector understand their tax obligations more precisely, especially when employing innovative sales techniques. The ruling underscores the importance of distinguishing between the end goal and the means to achieve it when determining tax liabilities under the LCT framework.

4.7 *Williams v Toyota Motor Corp Australia* [2022] FCA 344; *Toyota Motor Corp Australia Ltd v Williams (No 2)* [2023] FCAFC 70; *Williams v Toyota Motor Corp Australia Ltd (ACN 009 686 097)* [2024] HCATrans 21 (awaiting decision)

Background

This case involved vehicles sold with defective diesel after-treatment exhaust systems. The defects occurred between early October 2015 and late April 2020. From mid-2020, a field fix was available for affected cars.

In 2022 the case was heard by the Federal Court of Australia, and subsequently was appealed to the Full Court of the Federal Court of Australia.

It has now currently before the High Court of Australia, on which an outcome is yet to be determined.

Summary of Litigation History

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***Williams v Toyota Motor Corp Australia* [2022] FCA 344**

- On first instance, the Federal Court of Australia found that even though not all cars with the defective systems were affected, they were still all in breach and found to be misrepresented.
- Resultantly, the court found that the cars were actually worth 17.5% less than their price at the time of sale, and resultantly ordered requisite damages

***Toyota Motor Corp Australia Ltd v Williams (No 2)* [2023] FCAFC 70**

- This was appealed to the Full Court of the Federal Court by the Toyota Motor Group.
- Ultimately, the 2022 decision was largely upheld, except in relation to the conceptual approach undertaken by the judge.
- The Full Court found that, did not conceptually account for that fact that, at the time of sale, a remedy may have been available or may have become available.
- Therefore, the Full Court reassessed the actual worth at the time of sale to be 10% rather than 17.5%.

***Williams v Toyota Motor Corp Australia Ltd (ACN 009 686 097)* [2024] HCATrans 21 (awaiting decision)**

- Elements of the decisions by the Federal Court have been appealed by both parties.
- Toyota Motor Corp Australia Ltd argue that a person cannot claim damages for reduction in value from a defect in goods if, by the time of trial, the defect can be fully remedied free of charge such that the value of the goods has been restored.
- In essence, Toyota Motor Corp Australia Ltd are arguing that where a remedy can be achieved (such as a repair), this mitigates the need for damages for the defect, even if the remedy only becomes available after a period of time.

- Conversely, Williams argue that damages should always be assessed by reference to the true value of the goods at the time of supply, rather than a post-supply event.
- Thus, they argue that the damage should be assessed based on the value of the good at the time of purchase, therefore including the defect as it exists at the time of purchase in the assessment of the good's value.
- Therefore, Williams argue that the court's decision should return to the 17.5% depreciation that was found at first instance.

Significance to the automotive industry

This upcoming decision from the High Court will be significant to the automotive industry, as it will determine the rate of compensation that suppliers are required to pay for defects and the period over which these defects will apply.

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