

Enforcement Coordination Team
Australian Competition and Consumer Commission

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AADA RESPONSE TO THE ENVIRONMENTAL AND SUSTAINABILITY CLAIMS 'DRAFT GUIDANCE FOR BUSINESS'

The AADA welcomes the opportunity to make a submission in response to the ACCC's Draft Guidance for Business on environmental and sustainability claims.

The AADA is the peak automotive industry body representing Australia's franchised new car Dealers. There are approximately 660 new car Dealers in Australia that operate over 3,000 new vehicle dealerships. Franchised new car Dealers employ more than 59,000 people directly and generate \$59 billion in turnover and sales with a total economic contribution of over \$14 billion.

The AADA is supportive of the Australian Competition and Consumer Commission's (ACCC) moves to improve the integrity of environmental and sustainability claims made by businesses and welcomes the publishing of draft guidance to help businesses understand their obligations.

Consumers and governments are becoming increasingly focused on reducing emissions, as such, businesses are finding ways to communicate their environmental performance to consumers, and the automotive retail industry is no exception.

The Australian transport industry is currently undergoing rapid transformation in the transition to net zero emissions. This includes the large increase in Electric Vehicles (EV) and hybrids, and the industry is taking significant steps to improve the sustainability and environmental impacts of their business practices.

Naturally, these businesses will want to highlight legitimate progress on environmental or sustainability measures, however, without clear guidelines and definitions around sustainability terms, businesses can find themselves navigating very complex waters.

The AADA considers that there is a growing need for detailed guidance on how entities can comply with existing laws. In the absence of clear guidance, organisations may unintentionally make vague or unclear assertions regarding the environmental impact or sustainability of their products or services. Clearly defined guidance regarding key definitions and concepts, would provide greater clarity for businesses and help improve outcomes for stakeholders and entities.

The AADA also considers the issue of joint liability between a manufacturer and retailer of a product warrants further exploration and clarity for businesses. Franchised new car Dealers are conscious of the environmental and sustainability claims they make, and their manufacturers may make related to the products they sell. However, Dealers are often at a significant power disadvantage in the relationship they have with their franchisor. Negotiation on the terms of their Dealer agreements is often not possible to a reasonable degree and operation of Dealer businesses is heavily influenced by the prescriptive obligations contained in those agreements. This can lead to a situation where a Dealer is inadvertently captured when a manufacturer makes a sustainability or environmental claim related to a product they sell.

These issues are explored in more detail below.



General Comments – Guidance for Automotive Sustainability Claims

Clear guidance is essential for businesses making environmental or sustainability claims to ensure compliance with obligations under the Australian Consumer Law (ACL). This guidance would help ensure that businesses have a standardised framework to follow, enabling them to accurately communicate their environmental credentials. This can also help consumers make more informed decisions based on reliable and transparent information.

The example below clearly defines a term that can be used when communicating an environmental credential of an electric vehicle e.g. “Zero exhaust emissions”.

Example – claims that are likely to be false or misleading

A business has begun designing and manufacturing electric vehicles and claims that it “creates zero emission electric vehicles”. This claim only considers the emissions produced while the vehicle is being driven. It does not account for the emissions generated, for example, during the manufacturing process or when charging the vehicle.

While it is true that the vehicle produces zero emissions while being driven, this claim risks creating the impression that the vehicle produces zero emissions for its entire life cycle and misleading consumers in contravention of the ACL.

The business could instead qualify the claim that its vehicles produce “zero exhaust emissions while driving”.

While understanding that guidance and specific definitions cannot be provided for every term within a particular industry. The AADA considers that there would be strong and clear benefits for businesses and consumers by providing clear definitions of common terms within the automotive industry.

Dealer and OEM relationship – Joint liability

When an organisation makes a sustainability or environmental claim, it is often clear who is making the claim and who would be held responsible if it is found that the claim may potentially be misleading.

However, the AADA would like to draw attention to the nature of the franchised new car retailing industry and how this presents areas for further consideration when examining sustainability or environmental claims that are potentially misleading.

The Australian automotive new car retailing industry can be broadly defined into two categories. Vehicle manufacturers, which are largely multinational businesses which supply vehicles into the Australian market. Car Dealers, which are generally Australian privately owned or family businesses who enter franchise agreements to purchase vehicles from these manufacturers to retail into the Australian market. This system is known as the franchising model and is used by the majority of new car automotive businesses in the Australian marketplace.

While many Dealers enjoy good relations with their respective manufacturers and work in a mutually beneficial partnership, there is a well-documented power imbalance in the Dealer OEM relationship. This power imbalance significantly favours manufacturers and presents complexities for franchisees where the franchisor (the manufacturer of the product) makes decisions that affect a franchisee (the dealer who retails the product).

Often a franchisor will develop the product, market it at a national or large geographic level and the franchisee will ultimately have no say over any aspect of these processes.



This leaves franchisees in a situation where they could be potentially held liable for business decisions made by the franchisor in which they have no input or ability to critique.

This is especially so for Dealers, they are often presented with franchise agreements on a 'take or leave it basis', and manufacturers retain considerable discretion to impose obligations on Dealers. For example, as part of a franchise agreement provided to a Dealer, the manufacturer will generally include obligations for the Dealer to participate in the advertising, marketing and promotional campaigns of the distributor. The Dealer will be allowed discretion and license to market their products in their local area, but they will ultimately not have any power to challenge or question a manufacturer's marketing campaigns.

Under the ACL as retailers of new cars, Dealers have a direct responsibility to provide remedies to consumers if a new car does not meet one or more of the relevant consumer guarantees and seek reimbursement from the manufacturer for any loss or damage incurred in meeting the consumer's rights, where the manufacturer was responsible for the failure. This underscores the joint liability that often exists for Dealers and their OEMs. It is well known that the law does not distinguish between Dealers and OEMs in relation to compliance with obligations under the ACL.

The AADA considers that when examining sustainability claims made by automotive manufacturers, Dealers should not be held jointly liable for their manufacturer making false or misleading environmental claims regarding the products they sell, over which they have no control.

This separation of liability should be even more clear under a new model for automotive vehicle retailing called the 'agency model'. This model of new car sales enables direct sales of new cars from manufacturers to customers while still utilising traditional dealerships but to a reduced extent. In an agency model, the role of car Dealers is transformed to that of 'agents' who act on behalf of the manufacturer and are remunerated through a fee paid to dealerships on each vehicle that is delivered. As the agents are just a facilitator of the sale, they should not be liable for claims made by automotive manufacturers.

Conclusion

The AADA is keen to continue to engage with the ACCC on the development of guidance for businesses on environmental and sustainability claims and welcomes the opportunity to meet with you to discuss our submission and participate in any further consultation. If you require further information or clarification in respect of any matters raised, please do not hesitate to contact me.

Yours Sincerely,



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