AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION

RESPONSE TO THE CONSUMER GUARANTEES AND SUPPLIER INDEMNIFICATION UNDER THE AUSTRALIAN CONSUMER LAW CONSULTATION PAPER

NOVEMBER 2024

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FOREWORD

The Australian Automotive Dealer Association (AADA) welcomes the opportunity to submit a response to The Treasury – Consumer guarantees and supplier indemnification under the Australian Consumer Law Consultation Paper.

The AADA is the peak automotive industry body representing Australia's franchised car and truck Dealers. There are 3,179 new vehicle dealerships in Australia employing more than 61,000 people directly, including around 5,500 apprentices, and generating $73.9 billion in turnover and sales with a total economic contribution of over $18 billion.

Each year franchised new car Dealers across Australia sell over a million new vehicles and perform over 48 million service and repair jobs, with some of these performed as a warranty or consumer guarantee claim. There is rightly an expectation from the community that if a consumer has a fault with their vehicle and it is within the warranty period or due to a manufacturer fault, the vehicle would be to be fixed free of charge and in a timely manner.

They are entitled to this expectation not only due to their new vehicle warranty, but also because of the overarching consumer guarantees and protections they have under the Australian Consumer Law (ACL). The consumer guarantees require products to be of an acceptable quality and fit for purpose. If they are not, the customer is entitled to a remedy under the law which usually means repair, but in some circumstance could mean a refund or a replacement.

The AADA and its members are very supportive of these provisions under the ACL to ensure that products are fit for purpose and of an acceptable quality. This helps lead to better consumer outcomes and ensure fair trading in Australia.

Franchised new car Dealers rely heavily on word of mouth and reputation within the communities in which they operate. It is always in the best interests of the Dealer to ensure a timely remedy for a consumer under either warranty or ACL provisions, and in most circumstances, the Dealer will seek to rectify consumer concerns in a timely manner.

Often this will be done as a warranty claim, which places the Dealer in a less ambiguous situation. Manufacturers have very clear and prescriptive processes for Dealers to follow in order to submit a warranty claim on behalf of a consumer. The AADA has attached an example of a manufacturer warranty process in Appendix A.

The critical issue arises where the consumer makes a claim under the ACL. In these instances, Dealers often find themselves in the unenviable position of being the meat in the sandwich between consumers claiming repair, replacement, or refunds of goods, and vehicle manufacturer decision-makers who deny or obfuscate claims and refuse supplier reimbursements.

Section 1

One of the key findings from the ACCC's 2017 New Car Market Study was that "Commercial arrangements between manufacturers and Dealers can constrain and influence the behaviour of Dealers in responding to complaints". The ACCC went on to make several recommendations for manufacturers and the Government (See Appendix A) to address the perverse effects these commercial arrangements have on consumers. Very few of the actions recommended by the ACCC have been addressed and the power imbalance between Dealers and manufacturers continues to manifest in consumers ability to enforce their ACL rights.

For Dealers, the biggest hurdle with the remedying of ACL claims is their interaction with their manufacturer.

James Voortman
Chief Executive Officer

KEY POINTS

- Recommendations made by the ACCC in its 'New car retailing industry market study - final report' should be implemented urgently.
- Improve the clarity for definitions used in the consumer guarantees regime
- Key Franchising Code changes should be implemented to address the power imbalance between manufacturers and suppliers and protect suppliers claiming indemnification from retaliatory behaviour.
- Manufacturers should be the primary party responsible for complying with consumer guarantees, for allegations of manufacturing defects.
- The process for ACL claims should not rely on those seeking indemnification to have to take court or tribunal action to be compensated.
- Obligations and processes for manufacturers and suppliers when responding to consumer claims should be clearly established and explained.
- Outline for the motor vehicle industry a process that Dealers and consumers can access and know that a consumer claim meets the tests of the ACL, and therefore requires indemnification by a manufacturer.

Section 3

PROBLEMS WITH THE LACK OF CLARITY IN THE LAW

Franchised new car Dealers take their obligations under the Australian Consumer Law very seriously. Dealers devote significant time and resources towards understating claims and determining if they are legitimate or constitute a major failure, complying with these obligations, providing consumer remedies and seeking indemnification.

The AADA has serious concerns with the practical application of the consumer guarantee regime, these matters have serious flow-on effects on the relationship between suppliers (Dealers) and manufacturers (OEMS).

Many of the definitions and language used in the consumer guarantee regime are very vague and open to interpretation. This often leads to difficulties for suppliers in understanding and complying with their obligations. The legislation lacks clarity and tribunal decisions which are often used to determine if a particular consumer guarantee claim has merit are often not publicly available. This leads to a situation where a supplier, who has not manufactured a product is uncertain if a consumer claim is legitimate, and most notably if a claim constitutes a major failure.

This issue with determining if a failure is a 'major failure' is one that is faced by franchised new car dealers on a daily basis. If a claim is a 'major failure' this can have significant financial consequences, particularly as it opens a consumer to the option of a full refund. If a claim is a legitimate 'major failure' claim, dealers understand their obligations and will provide the customer with a remedy as required. The issue arises when the consumer has an alternate interpretation of one of the criteria used to determine if a failure constitutes a major failure.

The definition of a major failure is central to the operation of the consumer guarantee process and determines the remedies that a consumer is entitled to, and the AADA considers this to be a critical issue that must be cleared up immediately.

This criterion lacks sufficient clarity and does little to assist suppliers (Dealers) in understanding where their obligations lie and what remedies a consumer is entitled to. Dealing with such a high value product and often times unengaged manufacturers, creates significant uncertainty for Dealers and can leave them exposed to significant sums.

There is a strong need to provide greater clarity of the law, but also to design a better processes to assist all parties – consumer, supplier and manufacturer.

PROCESS FOR RESPONDING TO A CONSUMER CLAIM

Following discussions with several Dealers representing different brands, AADA has prepared a typical outline of how many (not all) Original Equipment Manufacturers (OEM's) respond to buyback scenarios.

1. Customer presents at the Dealership requesting a refund or replacement for their vehicle based on a major failure or vehicle off the road for an extended period.
2. The Dealer, who most often will have a good understanding of the history of the vehicle, explains to the customer that they accept the claim.
3. The Dealer contacts the OEM and informs them of the situation. There is no documented procedure for handling matters like this and the Dealer is forced to try and seek some degree of support and explain to the OEM why they have made the decision to accept the claim as a major failure.
4. The OEM indicates to the Dealer that acceptance of the claim is a supplier obligation and the fact they have done so does not mean the OEM agrees with the decision or is obliged to support the Dealer in any way, other than what is described in the Dealer Franchise Agreement.
5. Despite the misinformation in point four, the Dealer must proceed with the buyback/refund process, because they have an obligation to the customer.
6. The OEM informs the Dealer that they may assist and instructs the Dealer to repair the vehicle (as a warrantable repair, at substantially less than retail rates) and sell the vehicle on the second-hand market for the maximum amount possible.
7. Once repaired, the Dealer has to make a choice to sell the vehicle at auction or retail it as a second-hand vehicle with full disclosure that it has been the subject of a major failure. Either way the vehicle will be sold for a lesser amount than other second-hand vehicles of the same make, model, and condition.
8. The OEM may then offer to negotiate the reimbursement amount with the Dealer, based on the difference between the Dealers out of pocket expenses and the sale price of the second-hand vehicle. This is a lengthy, complex process during which the out-of-pocket expenses for the Dealer continue to grow. This can easily be in the hundreds of thousands of dollars for vehicles that have common manufacturing defects, effecting multiple vehicles.
9. The Dealer generally understands their right to indemnification for losses and will try and receive it but is wary of pushing the issue due to fears of souring the relationship, ending up in court, or retaliation by the OEM, which can take many forms.

Section 4

The AADA submits that the methods used by vehicle manufacturers in the description above should be discontinued and replaced by a transparent and agreed set of principles applied to all motor vehicle ACL/supplier reimbursement claims. The system should not rely on those seeking indemnification to have to take court or tribunal action to be compensated and should protect suppliers claiming indemnification from retaliatory behaviour.

The above examples clearly demonstrate that seeking indemnification from manufacturers is not straight forward and currently, Dealers are very unsatisfied with how their manufacturer handles these claims.

This is a critical issue for our industry and must be urgently addressed to ensure the best consumer and supplier outcomes. Dealers operating under a franchised system representing the brands of franchisors, selling, servicing, and repairing vehicles should have ready and transparent access to ACL supplier reimbursement in a timely manner, where it is required.

The AADA supports the proposal to implement prohibitions and apply penalties to suppliers and manufacturers who fail to remedy legitimate consumer ACL claims, but we consider that ahead of the implementation of any penalties there must be complete reform in this area. Responsibilities and obligations for the manufacturer must be clearly defined to ensure Dealers will not be subject to undue penalties or financial burdens due to the manufacturer avoiding their obligations.

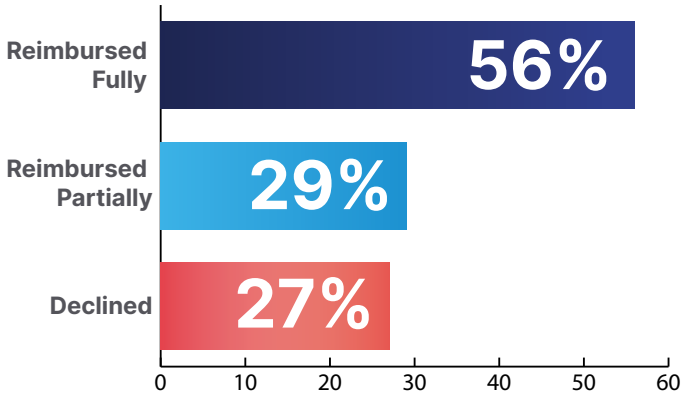
It must be made clear, that terms and conditions in franchise agreements, service and repair contracts, warranty procedures, Dealer bulletins or manufacturer operation manuals issued to Dealers should not establish barriers to making a claim for supplier reimbursement. Dealer claims for reimbursement should not be denied or constrained by manufacturer policies and procedures which are inconsistent with the intent of Section 274 which is clear and requires reimbursement of suppliers.

While the above examples show how manufacturers resist honouring their obligations under the ACL, there is also the issue of retaliation against Dealers who seek to purse claims to ensure they are indemnified as set out under the ACL.

DEALERS RIGHT TO INDEMNIFICATION

Dealers understand that consumer guarantee claims for repairs, replacement vehicles or refunds as a result of manufacturing defects, would trigger a claim consistent with s259(4) and S271 of the ACL and lead to supplier indemnification entitlements. However, in practice, many OEM's are avoiding reimbursement of suppliers by using a range of unfair market practices in an attempt to prevent, restrict, or delay franchisees from gaining access to supplier reimbursement.

On Average, what percentage of your ACL claims are:



AADA survey evidence that supplier indemnification is often not paid.

In 2021, AADA surveyed 132 Dealers on ACL practices by their manufacturer and found that on average, 56% of all respondents ACL claims were fully reimbursed, 29% of their claims were partially reimbursed and 27% of their claims were declined for reimbursement. These results show that the operation of S274 is not being applied as it should be, 27% of the time, on average, claims for indemnification were denied.

The AADA considers that the way to minimise this type of breach of the ACL is not only a prohibition, and the threat of penalties, but the introduction of transparent processes that Dealers, manufacturers and consumers can see and understand. For example, a process that Dealers and consumers can access and know that an ACL claim meets the tests under the ACL, which then must result in consumer satisfaction and require supplier reimbursement under s274.

Only by transparency, openness and enforcement will s274 deliver on the promise made to indemnify suppliers which will in turn improve consumer outcomes. The process must be known to consumers and adhered to by vehicle manufacturers.

Section 6

DEALER SENTIMENTS TOWARDS MANUFACTURER ACL HANDLING

In mid 2024, the AADA undertook an inaugural Dealer Satisfaction Survey, to gauge the state of franchisee relationships and measure the key issues impacting Dealers.

The survey results indicate that some manufacturers rated very poorly for their warranty and ACL management performances. The AADA has included the complete survey results in a confidential attachment to this submission (Appendix A, Section 6) .

A poor rating of the brand by franchisees indicates that consumer guarantees and supplier indemnification are being denied or that it is extremely difficult for Dealers to complete claims.

APPLICATION OF SUPPLIER INDEMNIFICATION IN DECISIONS

In mid 2024, the AADA undertook an inaugural Dealer Satisfaction Survey, to gauge the state of franchisee relationships and measure the key issues impacting Dealers.

The survey results indicate that some manufacturers rated very poorly for their warranty and ACL management performances. The AADA has included the complete survey results in a confidential attachment to this submission (Appendix A, Section 6) .

A poor rating of the brand by franchisees indicates that consumer guarantees and supplier indemnification are being denied or that it is extremely difficult for Dealers to complete claims.

The AADA submits that the application and interpretation of S274 is clear.

Where claims have progressed to consumer tribunals, such as in the case Morphy v Beaufort Townsville Pty Ltd & Jaguar Land Rover Australia (Morphy case), ACL consumer guarantees and resulting supplier indemnification have been reinforced.

In the Morphy case, the Victorian Civil and Administrative Tribunal (VCAT) ordered the manufacturer; Jaguar Land Rover Australia Pty Ltd, to pay a refund of $283,191.33 to the applicant in respect of a rejected Range Rover vehicle under the ACL provisions, and reimbursement of the supplier (Beaufort Townsville Pty Ltd), which included an order for compensation and costs.

"The Importer has conceded that it falls within the definition of "manufacturer" under s. 7 of the ACL and may be liable in damages to the Applicants under s. 271 of the ACL for non-compliance with the consumer guarantee provided by s.54 of the ACL and thereby also liable to indemnify the Supplier under s.274".
(Paragraph 98)

"I find that all requirements set out in s. 274 of the ACL have been made out by the Supplier. Further, I accept the evidence that the Supplier obtained no real net profit from the supply of the motor car to the Applicant".
(Paragraph 132)

"Given these findings, it is appropriate to make an order pursuant to section 274 of the ACL, to require the Importer to indemnify the Supplier to the full extent of the Supplier's liability to the Applicant. This includes any order that may be made as to costs". [89]
Paragraph 133)

The VCAT decision in the Morphy case makes it clear that Dealers have access to s274 indemnification in the ACL circumstances described and AADA submits that where manufacturing faults lead to a consumer claim, there must be a clear and accessible path to a timely resolution of the consumer guarantee issue in question.

Section 8

FEAR OF RETALIATION

While Dealers may be aware of their rights to indemnification, in practice obtaining compensation for losses incurred as part of a consumer guarantee claim is very difficult to achieve in the case of many franchises. Manufacturers who refuse to support and assist Dealers with claims can do so, despite their ACL obligations, because they hold a significant power advantage over Dealers.

The offending brands often have a preference for treating product quality issues, including those that might be reasonably regarded as major failures, as warranty repairs. Doing so gives them full control over the process and minimises their financial exposure

Dealers franchised to these recalcitrant brands are fearful of retaliation if they try and enact their rights to indemnity, as manufacturers can penalise Dealers through many avenues such as denial of target bonuses, punitive warranty audits or denials of warranty claims for minor indiscretions and even non-renewal of the franchise agreement. This is often done indirectly and not explicitly linked to a claim for indemnification. This presents issues for Dealers in trying to demonstrate retaliation as it is conducted covertly and under the guise of other procedural processes, separate from the indemnification claim.

Manufacturers are well resourced multi-national corporations. They have large legal teams able to ensure that their exposure and liabilities are strictly limited. As such, retaliation aimed at Dealers will be impossible to attribute to a Dealers acceptance of a consumer guarantee claim. Instead the retaliation will take the form of something not directly related.

Any changes made to the ACL regarding indemnification provisions need to consider that the supplier in a franchise relationship might be at a considerable size and power disadvantage, as is the case with new car Dealers and their franchisors. In these circumstances, suppliers need to be able to exercise their right to indemnification in a way that does not force them to go to war with a powerful manufacturer.

EVIDENCE OF FAILURE

Evidence of failure of the current s274 arrangements to adequately protect Dealers and consumers is found in attempts made by some manufacturers to deny claims for supplier indemnification or by the failure of Manufacturers to put in place transparent processes. As part of this submission, the AADA has included as Appendix B an extensive library of examples of manufacturers trying to resist or misinform Dealers on their right to indemnification.

ACCC RECOMMENDATIONS IN THE NEW CAR INDUSTRY MARKET REPORT 2017

In 2017, after researching the new vehicle market, the ACCC correctly identified supplier indemnification as an industry wide problem and made important and telling recommendations as follows:

ACCC Recommendation 3.2

Car manufacturers (the Australian or foreign distributor of the car brand) should transform their approach to the handling of consumer guarantee claims or risk action for noncompliance with the ACL.

The ACCC recommends that car manufacturers:

- Update their complaint handling systems to ensure that consideration of consumer guarantee rights are embedded in all relevant systems, policies and procedures with the objective of ensuring that a consumer's statutory rights under the ACL are given due consideration at the outset of responding to a claim.
- Update their Dealer agreements and policies to expressly state that obligations under the manufacturer's warranty are in addition to, and do not exclude or limit, the manufacturer's obligations to indemnify the Dealer under section 274 of the ACL.
- Review their Dealer agreements, policies and procedures to ensure that these commercial arrangements: do not contain unfair contract terms that go beyond what is reasonably necessary to protect their legitimate interests.
- Place appropriate limits on any terms which enable manufacturers to unilaterally vary the agreement and/or operations manuals.

Section 11

CHANGE AND CHALLENGES IN THE NEW VEHICLE MARKET

The new vehicle market is in the throes of immense changes occurring globally because of net zero Government policies. In Australia, those policies include implementation of the New Vehicle Efficiency Standard (NVES) and the National Electric Vehicle Strategy. (NEVS) which will change the market. Dealers are about to enter a period of considerable uncertainty, particularly with regard to new technologies that have begun entering the market such as battery electric vehicles (BEVs) and plug-in hybrid vehicles (PHEVs). Manufacturers selling BEVs and PHEVs often offer electric car battery warranties which typically cover the battery pack for a period of time or number of kilometres, and reduced capacity of the battery if it drops to less than 70 per cent. This will present many challenges for Dealers in determining battery degradation and often requires information and expertise that may not be available to dealerships.

AADA observes that the pressures applied by the changed market conditions may result in some vehicle manufacturers leaving the Australian market. The arrival in Australia of new entrants to the market with new products also run the risk of policies which do not meet the requirements of the ACL.

Laws apply to those who are in the market, but it is uncertain where indemnification sits when a manufacturer or importer leaves the market, is the supplier expected to be fully responsible for manufacturing defects?

The AADA recommends that the government begin consideration of funding and requirements for ACL reimbursement purposes if claims are made after the vehicle manufacturer or importer has left the market and is no longer trading. This is particularly time-critical as the industry has recently seen a number of new vehicle manufacturers enter the market, with an expected ten more to enter the market over the next months. As one of, if not the most competitive automotive retailing markets in the world, Australia will almost certainly face the prospect that market manufacturers may leave the market. This would leave consumers who purchased these vehicles vulnerable if they need to make a warranty or consumer guarantee claim, and must be urgently addressed.

The AADA recommends that careful attention be paid to any new developments in new vehicle warranty and supplier reimbursement practices.

FRANCHISING REFORM

As noted above the law is clear and the obligations on the Dealer and the manufacturer are unambiguous. However, the root of the problem lies in the power imbalance that exists between manufacturer and Dealer distorts the expected behaviour of both parties.

The AADA has long called for strong franchising protection to protect Dealers from unsavoury manufacturer practices, not the least of which being lack of indemnification. But in the context of this consultation, the AADA would call for this to be examined as part of changes to the franchising Code to specifically prohibit franchisors from pressurising franchisees not to claim ACL reimbursements.

Franchise agreements should be required to contain clauses that clearly set out the process for Dealers to access supplier reimbursement. Franchising laws should also prohibit the practice of extrapolation which is applied by franchisors following audits of Dealer warranty claims. It is an insidious activity to take a small sample of events and penalise according to the results. Such clawback arrangements are unbalanced unfair practices which are inconsistent with the franchise contract and work against the Dealer making claims for reimbursement under the ACL.

Dealers should be protected all forms of retaliation which may be applied by a manufacturer who seeks to teach the franchisee a lesson for daring to claim supplier reimbursements.

AADA ANSWERS TO QUESTIONS ASKED IN THE CONSULTATION PAPER

CLARITY IN THE LAW

Do aspects of the existing consumer guarantees regime need to be clarified prior to the introduction of prohibitions and penalties?

Automotive Dealers wrestle with definitions under the consumer guarantee regime on a day to day basis. Many of the consumer guarantee provisions in the ACL are ambiguous and very difficult to apply in practice. Little to no guidance is provided for suppliers to assist in determining how the concepts outlined in the ACL should be applied.

The criteria for determining if, for example, a failure is a 'major failure' or if the rejection period has ended are very broadly defined and the legislation does not shed any light on how a supplier should apply the definition in practice.

In the case of motor vehicles, these definitions are determined on a case by case basis at a relevant state tribunal and are not always made publicly available. Dealers as suppliers are often left to do their best to determine if a particular claim meets each or any of the relevant criteria under the consumer guarantees. This is fraught with danger for Dealers as if they make an incorrect assessment of a claim and determine that it does constitute a major failure, their manufacturer will sometimes have an alternate interpretation and be reluctant to indemnify them for remedying the consumer.

The AADA explores the issue of lack of clarity with the ACL consumer guarantee provisions below.

Which aspects of the consumer guarantees regime are unclear? How could they be clarified?

The AADA considers that the current set of guarantees for consumers under the ACL are not sufficiently clear for a supplier to determine if a product fails to meet a consumer guarantee (a 'failure'). This often has significant consequences for suppliers and their ability to comply with the required remedy, which depends on whether the failure to comply is a 'major failure' or not.

The criteria outlines that 'the seller guarantees that goods will be of acceptable quality, fit for a particular purpose, will match their description and any demonstration model, and will come with full title, undisturbed possession and be free from any hidden debts'. This criteria is very subjective and open to interpretation and what a consumer may consider to be 'fit for a particular purpose' may be different to what a supplier or manufacturer considers to be 'fit for a particular purpose'.

The AADA considers that this criteria must be urgently cleared up to be more prescriptive and less open for interpretation ahead of the introduction of any prohibitions or penalties. Without sufficient clarity, suppliers are extremely exposed where there are alternative interpretations of if the product meets the consumer guarantee criteria by involved parties. This is particularly so in the situation where a product is considered by the consumer to be a major failure. This is explored in more detail below.

MAJOR FAILURES

Should there be greater clarity about whether there has been a 'major failure' or not?

The definition of a major failure is central to the operation of the consumer guarantee process and determines the remedies that a consumer is entitled to and the AADA considers this to be a critical issue that must be cleared up immediately.

The criteria which determines a major failure is very subjective.

'Major failures are:

- where a good or service is unsafe
- where a good or service is significantly different from the description
- where the problem is such that the consumer would not have purchased the good or service if they had known about the problem
- where a good or service is not fit for its stated purpose, and cannot easily be fixed within a reasonable time.'

This criteria lacks sufficient clarity and does little to assist suppliers (Dealers) in understanding where their obligations lie and what remedies a consumer is entitled to. Dealing with such a high value product and often times unengaged manufacturers, creates significant uncertainty for Dealers and can leave them exposed to significant sums.

The key criteria that causes the greatest issue is the circumstance where 'the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent. This part of the criteria for determining if a claim constitutes a major failure is so broad that consumers could claim that almost any defect even minor ones constitutes a major failure. Dealers will often work with the consumer and explain that a minor fault is not a major failure and does not constitute a need for replacement (even if the consumer believes they would not have purchased the vehicle if they had known of the minor fault). However, consumers will often take this matter to a tribunal for a decision and thus, in most instances be decided in favour of the Dealer (see examples in Appendix A). Prior to a tribunal decision, seeking to persuade a consumer that it is 'not reasonable' is typically not possible ad fraught with risks around misleading a consumer regarding their consumer rights.

This creates significant uncertainty for Dealers as suppliers and constitutes significant resources and time spent on dealing with a particularly frivolous claim. Clearing up this criteria and being more prescriptive in the language used to determine what constitutes a major failure will significantly help to alleviate supplier uncertainty and lead to better consumer outcomes.

Section 13

Which aspects of the criteria for determining whether there has been a major failure are unclear? How should they be clarified?

The AADA is also aware of consumer guarantee claims alleging major failures that the Dealer cannot verify by testing, inspection, or interrogation of onboard fault codes. The AADA submits that vehicle manufacturers must be required to cooperate with Dealers and bring to the table all their technical knowledge and expertise to assist in the determination of an ACL major failure claim, for complex consumer goods such as motor vehicles. To deter this behaviour, penalties, if applied for lack of indemnification of a legitimate consumer claim would go some way towards assisting Dealers in determining if a failure constitutes a 'major failure', ultimately leading to enhanced consumer outcomes.

Oftentimes manufacturers will disagree that the failure was a major failure caused by a manufacturing defect, and refuse the claim. Due to the vagueness of the language with consumer guarantees, the Dealer is placed in a difficult situation where the consumer claims it is a major failure and the manufacturer does not. AADA submits that the language around what constitutes a major failure should be clear and unambiguous, therefore assisting consumers and Dealers to process consumer guarantees involving manufacturing defects or design faults.

Should all or only certain failures to provide a consumer guarantee remedy be a contravention of the ACL? For example, only in cases of major failures? Why or why not?

No, due to the extensive reasoning detailed above, until the language around whether a claim constitutes a major claim is cleared up, there should be no introduction of penalties.

ECONOMY - WIDE OF INDUSTRY SPECIFIC?

Should civil prohibitions and penalties for failures to provide a consumer guarantees remedy be applied economy-wide, or for new motor vehicles only?

It should be recognised that new motor vehicles and the franchising contracts between manufacturers/importers and Dealers are different and distinct from the manufacturer and supplier arrangements for many other consumer goods.

Therefore, AADA requests that recognition be made of the difficulties that Dealers encounter, and we have recommended that a set of principles be applied to the processing of ACL consumer guarantees between Dealers and manufacturers.

For how long should a vehicle be classed as a 'new motor vehicle'? Should the definition be based on the vehicle's build date, compliance date, delivery date, date of first registration or another date?

New cars are those sold into the market and registered for the first time. For example, demonstrator models are used cars, as the vehicle has already been registered by the Dealer for demonstration purposes. We note that the ACL applies without any distinction or definition of the age of vehicles and the ACL also applies to used vehicles sold by Dealers.

Build date and compliance date are not good indicators as long lead times in manufacture and delays can lead to new vehicles imported into Australia to be sold or delivered many months or sometimes a year or two after build or compliance.

For the purpose of a manufacturer warranty, the delivery date is used as the day of commencement. This date appears to be the most logical, as from that date the vehicle has left the Dealer and is in possession of the new owner.

There is a subjective element that consumers may apply to answering this question. For example, I bought this car new, it is still new to me, and within my expectation that it will be new for a long time. Such analysis ignores that cars will age and wear and tear even over a short time is a factor which cannot be ignored. Even with regular servicing and repair, mechanical components will deteriorate over time and are likely to need replacement. This is unavoidable and must be factored in by consumers and legislators. Vehicles driven and subject to the usual in-service wear and tear do not remain "new".

What types of vehicles should be captured under the definition of 'motor vehicle'? Should the definition include passenger vehicles, motorcycles, utility, light commercial, heavy and commercial vehicles? Should caravans and trailers be included?

AADA prefers the current definitions which include vehicles used by consumers and some up to a point by small businesses.

The current definitions should remain unchanged.

HIGH VALUE AND LOW VALUE GOODS AND SERVICES

Should the ACL prohibit suppliers from failing to provide a consumer guarantees remedy in relation to all goods and services, or only in relation to goods and services above a specified value? Why or why not? What should the value be?

No, as described above, in its current form this would create a significant compliance burden and increased costs for suppliers.

Is there a need to have penalties, or have stronger penalties, in relation to higher value goods and services?

No, as described above, in its current form this would create a significant compliance burden and increased costs for suppliers.

Is it appropriate to factor in depreciation (a reduction in value) when determining an appropriate refund amount? When would this be appropriate? How would the refund be calculated?

Yes, in relation to motor vehicles it is appropriate to assess depreciation where a refund is being paid. Under the ACL, where a consumer has rejected goods on the grounds that the good had failed to meet a guarantee and this constitutes a major failure, the consumer can elect to receive a refund of 'any monies paid by the consumer for the goods'.

This unconditional reference to any monies paid means that a consumer is entitled to a full refund irrespective of the fact that the consumer has enjoyed the use of these goods for a significant period of time without failure.

There are industry-based service providers who monitor the vehicle market and publish used vehicle valuations which could be referenced to establish the value of a vehicle at the time of refund. For example, Red Book and Glasses Guide publications.

If a Dealer is liable for a full refund being under the ACL it is also likely that supplier indemnification will be calculated by a manufacturer with a depreciation factor. Some manufacturers (not all) will require the Dealer to repair the rejected vehicle and sell it as a used car before considering reimbursement which will factor in depreciation. The AADA submits that Dealers should not be required to fund a shortfall caused by manufacturers who seek to reduce the supplier indemnification payment using this repair and sell method.

The AADA is concerned that without a deprecation factor, a consumer may be enriched by the refund that is paid and compensated despite having possessed the vehicle and driven it usefully for a period during ownership. Each ACL case is different, and each refund should be treated on its own merits but where the vehicle owner has used the goods and benefitted, such use should be taken into consideration.

The ACL provisions for rejection of goods and refunds should not enrich the consumer and the ACL provisions for supplier indemnification should not cause the supplier to be left unpaid or uncompensated by the manufacturer for amounts refunded or spent on the transaction.

CONSUMER BEHAVIOUR

Do you have any information to support the view that the introduction of prohibitions and penalties would encourage consumers to seek a consumer guarantees remedy when they are not entitled to one? For example, in a change of mind situation? How can this be addressed?

It is the experience of Dealers that some consumers seek refunds without evidence that there is a valid claim or an unresolved consumer guarantee issue. The manufacturer's warranty (or a statutory warranty) can often be applied and repairs undertaken without cost to the consumer, therefore not requiring consideration of an ACL rejection or a refund.

Sometimes consumers are blatant and belligerent in their claims for a full refund even though the claim is unfounded, based on misinformation, unproven, or resolved.

Some examples of such occurrences are provided in Appendix A.

Cooperation and assistance from the vehicle manufacturer are most useful in these circumstances. A manufacturer who is prepared to assess a claim, provide a second opinion, and communicate with the consumer may cause the consumer to accept that a rejection and refund is not required under the ACL. These issues may be addressed by the application of a set of principles which Dealers and manufacturers agree to apply to consumer guarantee claims.

In relation to the claim on page 17 of the consultation paper that "some car retailers are gaming the system to prevent people from receiving consumer guarantees that the consumers are legally entitled to", we have seen no evidence that franchised Dealers are gaming the system.

Will the introduction of civil prohibitions and penalties result in higher costs for consumers generally? Why or why not?

The AADA does not agree with the introduction of civil prohibitions and penalties for not providing a consumer guarantee remedy.

ENFORCEMENT POWERS AND AMOUNT OF PENALTY

- **Should the ACCC be given the authority to issue an infringement notice for an alleged failure to provide a consumer guarantees remedy?**
- **At what amount should infringement notice penalties be set for an alleged failure to provide a consumer guarantees remedy when required by the ACL? Why?**
- **At what amount should the maximum civil penalty be set for penalties that a court could impose after finding that a supplier or manufacturer failed to provide a consumer remedy when required by the ACL? Why?**
- **Is there a need to have maximum penalties for contraventions set at different amounts for goods and services above and below a particular monetary threshold? Why and Why not?**

The AADA has chosen to answer these questions as a group.

Yes, the prospect of receiving a fine by infringement notice and fine may deter unfair practices.

Setting the amounts of fines should consider the differences between franchisees and franchisors in size and position power. Vehicle manufacturers and importers are often large global corporations with resources which are far and away more powerful than their franchisees.

Penalties applied to manufacturers for breaches of the consumer guarantee and or supplier indemnification ACL provisions should be proportionally greater than those that may be applied to a Dealer who is shown to have breached the ACL.

Are there unintended consequences, risks or challenges that need to be considered when introducing civil prohibitions for suppliers or manufacturers failing to provide a consumer guarantees remedy when required by the ACL?

As above.

BARRIERS TO OBTAINING SUPPLIER INDEMNIFICATION

When should a manufacturer's failure to provide supplier indemnification be a contravention of the law? Should it apply to all failures or only in cases of major failures? Why or why not?

All manufacturers' failures to provide supplier indemnification should be a contravention of the law where the manufacturer fails to indemnify, does not reimburse all costs, or include compensation. In the case of franchised new car Dealers, the sheer number of aggregated minor failures that are addressed each year could leave a Dealer significantly out of pocket. By only prohibiting indemnification of major failures, manufacturers will have an incentive to try and manage consumer guarantee issues through the lens of minor failures with all the financial risk falling on the Dealer.

Penalties should also apply in all cases where the manufacturer resists or restrains the supplier from processing a claim and obtaining access to indemnification where the supplier is liable to the provide a consumer guarantee.

Penalties should apply in cases where there is systematic abuse of consumer guarantees by the manufacturer. For example, rejecting claims for refund and demanding that Dealers effect a repair where the outcome is likely to create delays or result in further failures.

The AADA is aware of some manufacturers (not all) that are uncooperative and actively resist assisting the Dealers with consumer guarantees and therefore place the Dealer as the meat in the sandwich between consumer and manufacturer.

The purpose of indemnification is to ensure that manufacturers are engaged and where appropriate required to indemnify. Manufacturer actions that work to delay or refuse resolution of a valid consumer guarantee claim and indemnification should be regarded as barriers and a contravention of the law.

Would the introduction of a penalty change a supplier's incentive to seek an indemnification from the manufacturer, or the manufacturer's response to a request for indemnification?

It very much depends on the franchisee and franchisor. Some Dealers will resist forcing the issue in relation to indemnification for fear of reprisals from manufacturers. We are currently experiencing a high number of non-renewals in our industry and Dealers fear falling victim to the OEMs unfettered power of non-renewal. The inclusion of a penalty would likely discourage outright rejection of supplier indemnification, and the AADA proposes that principles of how consumer guarantees should be managed by Dealers and manufacturers should be applied in the future. Therefore, creating a more transparent and cooperative approach. Claims might still be denied but manufacturers would need to provide a full set of information to the Dealer so the Dealer may properly assess the technical merits of a fault that has led to a consumer guarantee claim.

However, the root cause of the problems with indemnification stem from the power imbalance between local Australian Dealers and multinational automotive manufacturers. This can only be fixed by implementing protections similar to those that exist in markets like the United States.

What commercial arrangements between manufacturers and suppliers that relate to liability in cases of product or service failure would be impacted by the introduction of a contravention?

The AADA submits that the franchising code needs to urgently be amended, and franchise agreements altered to ensure the cooperation of all parties on consumer guarantees.

Warranty and ACL procedures and instructions from manufacturers to Dealers should be transparent and fair to Dealers. Warranty procedures and instructions on rejection, and buy back of vehicles are often included in operational manuals and such manuals should be regarded as forming part of the franchise agreement for this purpose.

Vehicle manufacturers often issue technical service bulletins to Dealers which are prescriptive for manufacturer warranty matters but under ACL consumer guarantees there is an unsatisfactory open field process unbalanced by the power and control that the manufacturer wields in the relationship.

Some manufacturers (not all) are currently uncooperative to the point of making all consumer guarantee claims difficult for Dealers to complete and forcing all decisions back on the Dealer.

Technical information on software upgrades, sometimes made over the air (OTA), are now available and common for new vehicles. Dealers will need to be fully informed of the impact of a software change when it occurs so that Dealers can manage any consumer guarantees that arise out of OTA upgrades.

Would introducing a civil prohibition with existing ACL enforcement remedies affect the relationship between manufacturers and suppliers in any way? If so, how?

A cooperative and transparent arrangement is likely to improve the relationship between Dealers and manufacturers. Manufacturers that are currently open and approachable about consumer guarantees are well rated by Dealers and this is reflected in the reputation of the franchise as being well managed and mutually beneficial business relationships. Brands that do not manage consumer guarantees well or force Dealers to make all decisions without assistance are not well regarded by Dealers. Refer to Appendix A.

RETALIATION AGAINST SUPPLIERS

What are examples of retaliation practices by manufacturers against suppliers seeking to enforce indemnification rights? Which practices should be prohibited?

Should presumptive tests apply if a civil prohibition was introduced to address manufacturer retaliation? If so, what presumptions should be considered?

These questions go to the power imbalance that exists between Dealer and manufacturer, which is in the opinion of AADA, available at any time for manufacturers to use if they are unhappy with how a particular Dealer may have processed consumer guarantee matters.

Because new car franchise agreements are for a set period and subject to approved renewal, Dealers are vulnerable, and the retaliation may come without any connection to a particular event. There are a range of reprisals a manufacturer could exercise in retaliating against a Dealer seeking indemnification. These include non-renewal of a franchise agreement, withholding crucial margin payments, conducting extrapolated warranty audits, putting in place excessive targets, making aggressive expenditure requirements and the list goes on.

Non-renewal of a franchise agreement at the end of term is uncompensated and all the power at that point is in the hands of the Franchisor. This power is even more profound given the recent precedent established in the court case Mercedes-Benz and its Dealers, which found that no "commercial goodwill" is payable upon non-renewal, it has become a very powerful tool for OEMs seeking to exploit their Dealers.

The AADA agrees that retaliation should be addressed by a prohibition which is specific and not left to be covered by the existing unconscionable conduct provisions of the ACL. A specific prohibition should prevent the practice of warranty audits which are used by Manufacturers to reassess and clawback via extrapolation consumer warranty and consumer guarantee payments from Dealers.

RELATIONSHIP WITH CONSUMER GUARANTEES

Should the ACCC be given the authority to issue an infringement notice for an alleged contravention of supplier indemnification provisions and for retaliating against suppliers? Should it be a contravention only in cases of major failure? Why or why not?

Yes, the ACCC should be authorised to issue infringement notices for a failure to indemnify suppliers and any form of retaliation. The contravention should also be applied to failures of the manufacturer to indemnify suppliers under the manufacturer's warranty systems.

How long should suppliers and manufacturers be given to dispute a claim after and infringement notice has been issued? At what amount should infringement notice penalties be set for an alleged failure to indemnify a supplier when required by the ACL. Why?

The period to dispute an infringement should be 90 days.

At what amount should infringement notice penalties be set for an alleged infringement notice retaliatory practice by a manufacturer against suppliers seeking to enforce their indemnification rights?

Such an offence should be regarded as serious and likely to damage the supplier.

In some cases retaliation may be in the form of a non-renewal of a contract or franchise.

Therefore the penalty for retaliation should be at the highest end of the scale for infringement notices issued by the ACCC.

At what amount should the maximum civil penalty be set for penalties that a court could impose after finding that a manufacturer contravened the supplier indemnification provisions? Why?

In the case of vehicle manufacturers considering the value of the goods which may have been rejected, returned and subject of a supplier indemnification claim, the penalty should be at the highest end of the scale.

The cost of a motor vehicle supplier indemnification could be in the hundreds of thousands of dollars and therefore the penalty should be consistent with the value of the goods concerned and for which indemnification was refused.

At what amount should the maximum civil penalty be set for penalties that a court could impose after finding that a manufacturer had engaged in retaliatory practices against suppliers seeking indemnification? Why?

Retaliatory behaviour by its very nature is designed to damage the victim and therefore the civil penalties should be at the highest end of the civil penalties scale in the ACL.

The result of vehicle manufacturer retaliation against a Dealer may be to cause the franchisee not to continue in the franchise or not be renewed. This would be an event that the business may not recover from. Therefore the highest level of civil penalty is appropriate.

Section 14

CONCLUSION

We would be happy 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.

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