



9 December 2016

Mr Simon Cohen

Chair

Consumer Affairs Australia and New Zealand

Dear Mr Cohen

Re: Australian Consumer Law Review Interim Report

1. Introduction

1.1 The Motor Trades Association – Queensland (MTA Queensland) (the Association) responds to the Chair's, Consumer Affairs Australia and New Zealand invitation for views to the *Australian Consumer Law Review* (the Interim Report). The MTA Queensland's comments are on behalf of its constituent divisions and are confined to issues which relate to the interest of Queensland's automotive value chain.

1.2 The MTA Queensland has considered the issues documented in the Interim Report and correlated these to the interests of its Members. Careful thought has been given to the Interim Report's contents as the Australian Consumer Law (ACL) framework represents a significant contribution to the proper functioning of the markets that comprise Australia's automotive value chain.

2. Context

2.1 The MTA Queensland from 2008, engaged in the ACL consultative dialogue which culminated in the *Competition and Consumer Act 2010*, the consolidated generic consumer protection framework harmonised across the Commonwealth. A consumer survey undertaken to assess the impact of the ACL since its introduction corresponding with a similar survey in 2011 shortly before the law came into effect found across all categories positive improvements in consumer and business awareness of the ACL (EY Sweeney Ref No. 25364 - 5th May 2016.) Anecdotally similar trends have been observed in Queensland's automotive industry sectors.

2.2 The Interim Report states that whilst the '2016 survey's finding suggest there have been important gains in the last five years ...there is room for improvement'. As an example the survey found that 'consumers are now less confident that businesses will do the right thing, and not mislead or cheat consumers (64 per cent compared to 71 per cent in 2011 (Interim Report, p. 9).

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3. Setting the context

3.1 The ACL has evolved as an important statutory framework governing commercial behaviour in Australia's markets. It is therefore fundamental that attention be given to the evolution of the *definition* of 'consumer' so that this allows this framework to function in an effective and equitable manner and contribute to sound and productive functioning of the Australian economy.

3.2 The MTA Queensland has considered the definition of 'consumer' and the exemptions as discussed in the Interim Report. It is the Association's view that the provisions of the ACL should apply with minimum exemptions and minimum restrictions to transactions that involve final consumption. This would mean the definition would exclude goods that are acquired for re-supply or stock-in-trade and goods and services acquired as components for manufacturing.

3.3 The definition of 'consumer' involving final consumption should have the competence to include both personal and business transactions involving final consumption and should not be limited either by size of transaction or size of entity. This would not mean that the concept of final consumption is a singularity. Final consumption could involve partial consumption or a sequential transaction or simultaneous transactions until a good or a service is entirely consumed and there is no tradable utility remaining e.g. the subsequent on-selling of a motor vehicle either in a private transaction or through a broker. The subsequent purchaser should be accorded consumer protection, however there would need to be limits to subsequent consumer protection but the legislation should have the competence to afford portability.

3.4 In the case of goods acquired for re-supply or stock-in-trade or as components for further manufacture there may be justification to protect small businesses from unfair behaviour from large scale suppliers and this would warrant a threshold or other limits to be applied. The MTA Queensland has previously indicated a threshold of \$50,000 indexed for the Consumer Price Index (CPI) (response to New Car Retailing Industry - a market study by the ACCC 14 November 2016). The Association is of the view that the definition of consumer should be equitable and based on merit and determined by the classification of the transaction as being one that consumption takes place rather than one designated by the scale of the entities involved in the transaction.

3.5 The provisions of the ACL should be available to incorporated persons whether they are publicly listed or not. Whether large scale entities wish to use the provisions of the competition framework to protect their commercial interest should be a decision made by the company when considering the protection of its legitimate commercial interests and not by a statutory provision exclusion based on scale.

4. Legal Framework

4.1 On the issue of **consumer guarantees**, the Association in its response to the 14 November 2016 Australian Competition and Consumer Commission's (ACCC) *New Car Retailing Industry - a market study* offered the following views:

'The MTA Queensland is of a view that there is a definitive lack of understanding of the consumer protection framework as it applies to new car purchases. This deficiency in being unaware or having a working understanding of the provisions of the ACL extends in particular to the statutory guarantee over the purchase of a 'new' motor vehicle for private or business use (less than \$40,000). It is apparent at all levels of the automotive value chain including manufacturers and distributors; franchised dealers; sales representatives; repairers; servicing entities; car purchasing executives in businesses and consumers.'

The automotive value chain is dominated by private incorporated businesses mostly linked in vertical supply chains with formal rigid and complex commercial supply agreements that often impose robust commercial performance criteria in respect of 'new car' and original equipment (OEM) promotions and sales e.g. franchised new car dealerships. In these circumstances, the ACCC must appreciate that the main efforts of distributors, retailers and authorised repairers is the performance of the commercial obligations in the commercial treaty/agreement they operate under.

It is challenging therefore for commercially oriented entities in a highly competitive marketing environment to understand and appreciate that 'new cars' are sold under the aegis of a statutory guarantee that has a 'reasonable' time span and that take precedence over the commercial treaties/agreements provided by the manufacturer's warranty and subsequently by the extended warranty offered by the dealer or other downstream entities in the value chain.

The commercial focus of the automotive value chain means that sales teams are well briefed on commercial issues. At the point of sale, the commercial warranties offered by the dealer on behalf of the manufacturer are a selling feature and a point of market differentiation. For example warranties of five to seven years are now quite common in the 'new car' market.

Inevitably, sales teams are able to brief customers comprehensively in regard to manufacturers' warranties which are time certain and prescriptive. The manufacturer or distributor provides clear and definitive guidelines to dealers in regard to the warranty that is to accompany the sale of a 'new car' and the commercial obligation that is being entered to remedy manufacturing faults by the dealer on behalf of the manufacturer.

Similarly, sales teams are well briefed in regard to extended warranties which can leverage vehicle sales in particular 'road side' assistance arrangements which are now increasingly common. This again is a commercial contract between the buyer and the seller.

The issue of the statutory guarantee is significantly different. Sales teams generally are limited in their awareness that a 'new car' transaction invokes a statutory guarantee with rights and obligations for the parties enshrined in the ACL. Correspondingly 'new car' buyers are largely unaware that they have recourse to remedies under a statutory guarantee in respect of a 'new car' purchase.

This deficiency appears to extend across the value chain and includes manufacturers and distributors, dealers and authorised repairers of 'new cars'. In these circumstances usually, consumers are not briefed on their statutory rights in respect of a 'new car' fault remedy at the time of the purchase of a 'new car'. Sales teams usually do not have the knowledge needed to undertake such a briefing, thus the statutory guarantee is a 'market neutral' issue in relation to the actual selling of the motor-vehicle.

The MTA Queensland is of the view that comprehensive training programmes should be available to familiarise all the automotive value chain participants relevant to 'new car' sales; 'new' equipment sales and authorised repairs with the intent, obligations and provisions of the statutory guarantee as it applies to 'new cars' and the consumer protection afforded by the ACL.

The Association has formed a view that if a wider and deeper knowledge of the statutory guarantee existed, remedies for consumers in respect of 'new cars' would be expedited. This means that the franchised car dealers need recourse to the manufacturer if they are to properly comply with the intent of the statutory guarantee. For this to happen the manufacturer must comprehend the provisions of the ACL in respect of the product they manufacture, otherwise the systems will inevitably fail the consumer to the detriment of the value chain.

Further, if consumers were properly aware of the guarantee under the ACL in respect of 'new cars' and if the system was operating effectively, it is unlikely that a 'lemon law' would be demanded by consumers as they could seek and achieve remedies to 'new car' faults by recourse to the statutory guarantee.

The Association would be pleased to discuss the provision of training to the automotive value chain in respect of the ACL statutory guarantee and other consumer related issues.'

4.2 To supplement the above views, the Association submits that the status of statutory consumer guarantee rights in relation to the sale of motor vehicles, components and services along the automotive value chain is not sufficiently understood at the point of sale by either the consumer or the sellers or the agent involved in the transaction. We concur with the views of other stakeholders that while the ACCC has made considerable efforts to educate consumers and retailers in respect of statutory guarantees further work needs to be done. The MTA Queensland has previously indicated that it would be pleased to be involved in an educative curriculum with a syllabus agreed by the ACCC to deliver a program to participants in the automotive value chain.

4.3 Undoubtedly consumer awareness of the law has improved significantly. It remains the MTA Queensland's view however, that there is a need to inform consumers about the rights they acquire under the ACL and under the manufacturer's warranty irrespective of the endorsements required by the current regulations in respect of statutory guarantees and manufactures warranties. Manufacturers are clear as to their rights and obligations in the context of the warranties they offer and their requirements to support their distributors and dealers. It would appear worthy to canvass options to enhance transparency and comprehension of the ACL obligations for all automotive value chain stakeholders.

4.4 The seminal issue in regard to the framework of guarantees and warranties is a definition of a major failure as opposed to a minor failure of a product or service. In the automotive value chain this is a difficult distinction to make because the severity of any failure could differ or depend on whether it is viewed from the seller or the buyer side of the motor vehicle transaction.

4.5 Safety issues by definition in the automotive value chain are considered as significant and inevitably they involve vehicle recalls and remedies which accord with the statutory provisions. In the automotive value chain each situation has to be treated on its merits. It appears difficult to establish a general classification for major failures in respect of the automotive value chain.

Industry specific laws

4.6 It appears that if the statutory protection framework is understood by consumers, it is robust and has the competence to protect the interests of the private consumer without the inclusion of specific industry regulations in the ACL. If there is however, a perception by the private consumer that a new motor vehicle purchase risks are not sufficiently mitigated in respect of a situation where a new vehicle is not fit for purpose (i.e. commonly known as a 'lemon' or a 'Friday car') then governments need to give this situation consideration. Any enhancements to the legislative framework however need to be carefully considered. The situation is unlikely to be remedied by the simple application of additional layers of legislation that replicate existing protections that have the effect of increasing compliance costs but not consumer confidence.

4.7 Contemporary Australian consumer legislation has been based on generic regulation that is applicable to products generally in the market rather than sector specific legislation. If sector specific legislation was to be considered in respect of the ACL regime, it would tend to indicate that there were very high level of risks existed in the acquisition of new market vehicles.

4.8 Anecdotally, and traditionally this is unlikely to be the case. The risk associated with the purchase of new motor vehicles has been relatively modest particularly with the increase in technical sophistication and statutory requirements in relation to safety and environmental performance. Concomitantly, there may be a tendency for greater after sales servicing to ensure that technical performance meets specifications and consumer expectation. The percentage of vehicles that manufacturers deliver to the market that are not fit for purpose is unlikely to be high because of the reputational risk this constitutes to brand value.

4.9 It is the Association's strong view that the ACL should be based on generic regulation applicable to final consumption products generally in the market and not sector specific legislation.

Product Safety

4.10 In the automotive value chain, product safety is underpinned by the Australian Design Rules embodied in the *Motor Vehicle Standards Act 1989*. It would appear that Australian consumers of automotive products have been well served by this comprehensive framework which has protected the motoring public and the transportation of goods. Vehicles identified with safety or designs defects or issues in Australia, manufacturers institute voluntary recalls and this has resulted in a minimisation of the exposure of the motoring public.

Unconscionable conduct and unfair trading

4.11 The MTA Queensland has the view that the unconscionable conduct provisions are important in ensuring competitive markets and protecting businesses from predatory practices. Fundamentally, the existing provisions in relation to unconscionable conduct in the ACL should be retained. These should apply to exceptional predatory behaviours and be allowed to evolve based on the values that society adopts in regard to commercial behaviour that is both acceptable to Australia's communities and consumers and which facilitates the efficient operation of the national economy.

4.12 There is a need for the framework to have the competence to deal with a lower grade of unfair commercial behavior and predatory practices. The law should be expanded to deal with a lower threshold of predatory conduct which is unacceptable in the Australian business environment creating distortions in markets preventing them from operating properly. This results in unwarranted costs and the loss of

confidence by consumers. Such provisions if enacted in the ACL should constitute a general prohibition which applies to these aspects of Australia's commerce without exception.

4.13 The Association reiterates the statement in 3.6 that incorporated persons whether listed on the Australian Stock Exchanges or not listed should have recourse to the ACL provisions relating to protection from unconscionable conduct. In particular we are of the view that any provisions included in future in respect of unfair trading would benefit from a particular reference to Small Medium Enterprises (SMEs.)

Unfair Contracts

4.14 In previous submissions, the Association has robustly advocated the extension of unfair contract terms to business to business transactions. We recognise that the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms Act 2015)* provisions came into effect on 12 November 2016. Contracts covered include those between businesses where one of the businesses employs less than 20 people and the contract is worth up to \$300,000 in a single year or \$1 million if the contract runs for more than a year. The Association is of the view that the limit of the contract threshold should be raised up to \$500,000 or \$1.5 million if the contract runs more than a year.

Unfair terms in insurance contracts

4.15 The MTA Queensland contributed via a submission to The Treasury's Corporations and Financial Services Division's 2010 Options Paper *Unfair terms in insurance contracts*. The consultative process ultimately, resulted in the *Insurance Contract Amendment Bill 2013* being introduced into the Parliament which lapsed before the 2013 Federal Election. In the Association's submission we stated that:

'Members in the automotive repair business operate within a tripartite arrangement comprising the following commercial relationships:

- *the policy holder with the insurance company,*
- *the policy holder with the automotive repairer; and*
- *the automotive repairer with the insurance company.*

In this arrangement:

- *There is a contract between the Insurer and the policy holder in the form of an insurance policy; and*
- *Generally, two contracts or agreements between the Insurer and the automotive repairer and refer to:*
 - *A standard form contract granting status as an authorised automotive repairer; and*
 - *An agreement to repair an automotive in the form of an authorisation to proceed with work up to an approved amount.*

In the contract between the policy holder and the Insurer, there are not any terms which may be directly attributable to loss. Generally, this contract may be quite fair and requires a Product Disclosure Statement (PDF).

In the contracts between the automotive repairer and the Insurer, there are terms that maybe unfair to both the automotive repairer and the consumer/policy holder that result in a direct cost to the consumer. This direct cost to the

consumer may be in quality of the workmanship, or paint, or parts, or warranty or safety implications etc.

Considering automotive insurance, the seminal issue is the tripartite nature of automotive insurance policies which has two parties related to the Insurer.

- a. The absence of a remedy to unfair terms and conditions in the business to business agreements between the automotive repairer and the Insurer results in a loss of consumer benefit. The equity the policy holder has in the automotive can be depreciated because the comprehensive policy is circumvented by the agreement/contract the Insurer has with the automotive repairer which imposes cost disciplines which may result in inferior workmanship, unbranded parts and compromises safety.*
- b. The contract between the Insurer and the automotive repairer may infringe the PDF forming part of the Insurance policy that protects the consumer's valuable asset and may result in a loss in consumer value.*

The automotive repairer also loses as he/she is required to either accept the job as per the assessors demands including cost cutting measures or reject the work. If the automotive repairer does not agree, the business may lose authorised repairer status.

- a. If the repairer accepts the work and installs unbranded or second hand parts conforming to instructions from the Insurer, the automotive repairer has to accept liability for a warranty that is sometimes for the life of the motor vehicle.*

In the instance of tripartite agreements where automotive insurance policies are involved, the solution is that there must be both:

- a. a remedy in the form of strengthening insurance policies for consumers; and*
- b. some regulation of the arrangement between the Insurer and automotive repairer to ensure that the obligations and understandings of the PDF of the insurance policy is not negated by the provision of the overarching agreement between the Insurer and the automotive repairer – that is the generic agreement between business to business and the specific agreement to repair the motor vehicle that is the subject of the insurance policy.*

We submit that automotive repairers in these circumstances are consumers. The absence of business to business unfair terms and conditions in contracts in the ACL is disadvantageous to automotive repairers in business dealings with insurance companies.

Alternately, this situation could be resolved by the ACL defining automotive repairers as "consumers" for the purposes of the unfair terms and conditions in contract provisions of the ACL.'

4.16 The MTA Queensland is of the view that the ACL should have the competence to extend consumer protection to insurance contracts and specifically the provisions in relation to unfair contract terms should apply to insurance instruments.

5 MTA Queensland background

5.1 The MTA Queensland is the peak organisation in the State representing the specific interests of businesses in the retail, repair and service sectors of Queensland's automotive industry located in the State. There are some 13,000 automotive value chain businesses employing in excess of 90,000 persons generating in excess of \$14.5 billion annually. It is an industrial association of employers incorporated pursuant to the *Fair Work Act* 2009. The Association represents and promotes issues of relevance to the automotive industries to all levels of Government and within Queensland's economic structure.

5.2 The Association is the leading automotive training provider in Queensland offering nationally recognised training, covering technical, retail and the aftermarket phases of the motor trades industry through the MTA Institute (MTAI) - a registered training organisation. It is the largest automotive apprentice trainer in Queensland employing in excess of 35 trainers geographically dispersed from Cairns to the Gold Coast and Toowoomba and Emerald. The MTAI last financial year accredited courses to in excess of 1,600 apprentices and trainees.

Thank you for your consideration.

Yours sincerely



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