Motor Trade Association
of South Australia

ACL Interim Report Feedback Submission

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Background

The following comments are provided on behalf of Motor Trade Association of South Australia (the MTA), an employer organisation representing the interests of approximately 1,100 members and their approximately 15,000 employees in the automotive retail, service and repair sector.

Eighty per cent of these businesses employ less than 20 employees in South Australia. The automotive retail, service and repair sector adds more than $2.85 billion to the State economy annually and employs almost 27,000 people in South Australia – more than the ten largest South Australian companies combined.

The MTA Group Training Scheme is a Registered Training Organisation and Group Training Organisation, which delivers post trade and apprentice training to automotive tradespeople, employing 450 apprentices and placing them in over 240 host businesses.

As a representative state body, the MTA has 13 divisions representing the full range of trades within the motor industry, excepting mass vehicle manufacturing. These include:

- Australian Auto Dealers Association
- Automotive Repairs
- Automotive Dismantlers
- Commercial Vehicle Industry Association
- Farm Machinery Dealers
- Licensed Vehicle Dealers
- Collision Repair
- Motorcycle Industry Association of South Australia
- Rental Hire
- Service Stations
- Tyre Dealers
- Towing
- Independent Bus and Coach Operators

Executive Summary

The MTA wishes to add further comment following the release of the ACL Interim Report.

Principally, our submission will focus on five key areas discussed in the report that most impact on our membership and the ACCC has sought further advice on. These are:

- The Consumer Guarantee Threshold;
- Small Business Considerations;
- Lemon Laws;
- Product Safety; and
- Manufacturer's Warranties

As stated in our substantive submission earlier this year, the MTA supports reforms that rebalance ACL consideration to give businesses, particularly small businesses, a fair go

Over 80 per cent of the automotive retail service and repair industry are small businesses, who are too time and resource poor to be able to manage and defend ACL claims or to exercise their rights under ACL against large suppliers.

The MTA supports lifting the consumer guarantee threshold to $100,000 and building in indexation to ensure that the products and services small businesses purchase are better protected under ACL. This is done on the understanding that small businesses involved in business to business transaction have comparable rights to private consumer for remedies under ACL.

Financial products, including insurance and loan products, offered via the dealership sales channels, are worthy of further investigation to gauge whether they are effective and meet consumer needs. However, the MTA considers this issue separate from the compensation levels afforded to dealerships in the act of selling these products, for which the MTA considers there to be little to no basis for further action. Attempts at altering remuneration levels in this space will have significant consequences for the vehicle dealerships.

The MTA reiterates its position that small businesses should be treated equally under ACL in terms of business to business transactions and when subject to online reviews from private consumers.

Difficulties arise for small business in enforcing their rights under ACL principally because they do not have the financial or time resources, nor access to relevant knowledge to enforce their rights to enforce their rights.

Businesses can incur significant reputational damage when enforcing these rights.

The ACCC and ACL are not geared towards providing avenues for enforcement of small business rights for the myriad of small to medium sized transactions such businesses engage in.

The MTA does not accept the proposition that common law remedies are a viable avenue for small businesses to pursue in enforcing their rights. This is particularly the case when smaller

businesses are defending themselves against large multinational suppliers, franchisors or from vexatious and frivolous consumer claims.

The MTA supports the establishment of a low cost, easy access dispute resolution process that enables representation of parties by lay advocates, similar to a civil or administrative tribunal. Such a tribunal would allow businesses to more easily seek financial redress or limited enforcement orders to protect their businesses from unconscionable conduct by large businesses and vexatious consumers.

The MTA reiterates its opposition to industry specific lemon laws. ACL is designed as a broad framework rather than a prescriptive solution to consumer protections. Industry specific laws would act against the central tenets of ACL. Highly prescriptive regulations risk placing either excessive cost burdens on one sector of the economy, or being so restrictive so as to make them inaccessible to consumers with legitimate concerns.

There is also no evidence base that demonstrates there is an actual need, as opposed to a perceived need, for additional regulation.

In this context, the MTA notes previous ACCC advice to government regarding personal imports of vehicles. We contend that these imports pose a serious threat to consumer protection and the inconsistencies between the proposed personal imports legislation and consumer rights under ACL have not been reconciled.

Further, various vehicle components available online can be supplied absent essential features and require alteration or modification for fitment. This can be done through qualified businesses and tradespeople, but there are a great many that attempt to undertake these safety critical modifications at home or though backyard operators. This poses a serious safety risk and such products should not be available in Australia.

With respect to manufacturer's warranties, under the current application of ACL, third party installers and retailers are largely held liable for faults that are not detected in the normal course of supply of products and services from a manufacturer.

The MTA sees considerable merit in ACL requiring a reverse onus of proof on manufacturers to prove that the actions of a retailer or third party installer materially contributed to the defect present in the product.

Consumer Guarantee Threshold

In order to better protect businesses in purchasing transactions, the MTA supports lifting the threshold from the current $40,000 to $100,000 and then indexed annually.

The crucial element to consider when lifting the threshold value is expanding and\or ensuring that businesses have equal access to remedies to breaches of ACL when they purchase goods and services relative to consumers.

Goods purchased through auction houses should be included in the consumer guarantee threshold definition. Currently, consumers purchasing vehicles sold through auction houses, particularly government owned auction houses, do not enjoy the same level of protection that licensed vehicle dealers provide to consumers.

This creates a consumer detriment both for private buyers and other businesses that do not have access to manufacturer's warranties and unnecessarily distorts the market by introducing a flood of cheap vehicles which may not meet product safety guidelines or the consumer protections stipulated by the ACCC.

Financial Products

The MTA notes that consumer guarantees for financial and insurance products are governed by specific laws relating to vehicle dealerships. We also note these are currently under ASIC review.

The MTA considers there are two separate questions to evaluate in this space. One is the question of the suitability of the products on offer, over which there can be some legitimate difference of opinion. The second, wholly different question is remuneration for access to the dealership sales channels.

The MTA does accept that while in some circumstances, product offerings by financiers and insurers could be better designed, sales channel access remuneration is already tightly regulated and operates to maximise consumer rights through the granting of access to products and services which they would not otherwise have access to if going directly through banks, insurers or other financial institutions.

Proposals to cap or limit commissions would, in the MTA's view, constitute price fixing. ASIC's stated issue with variance in commission rates is in fact an indicator of a competitive market, rather than one causing consumer detriment.

Small Business

The MTA has previously stated its position that small businesses should be treated equally under ACL in terms of business to business transactions and when subject to online reviews from private consumers.

Difficulties arise for small business in enforcing their rights under ACL principally because:

- They do not have the financial or time resources, nor access to relevant knowledge to enforce their rights;
- The reputational risk incurred in enforcing these rights is greater than perceived benefit; and
- The ACCC and ACL are not geared towards providing avenues for enforcement of small business rights for the myriad of small to medium sized transactions such businesses engage in.

The MTA does not accept the proposition that common law remedies are a viable avenue for small businesses to pursue in enforcing their rights. This is particularly the case when defending smaller businesses against a large multinational supplier, franchisor or from vexatious or frivolous claims.

It is also the case that pursuing claims against consumers acting maliciously through online reviews or against comparator websites who fail to disclose commercial relationships is vexing. Claims against individual consumers, which the ACCC has not, to date, sought to enforce, risks severe cost implications for businesses. The actions must then either be pursued through common law remedies, which are expensive and time consuming, or seek to engage directly with the consumer, which often becomes a self-defeating exercise where the business suffers reputational damage.

The MTA supports the establishment of a low cost, easy access dispute resolution process that enables representation of parties by lay advocates, similar to a Civil or Administrative Tribunal, whereby businesses can readily seek financial redress limited enforcement orders to protect their businesses from unconscionable conduct by large businesses and malicious consumers.

This federal body could fill the gap between state based tribunals and small claims courts and State Supreme Courts in determining civil matters. This could be auspiced through the Small Business and Family Enterprise Ombudsman.

Lemon Laws

The MTA reiterates its opposition to industry specific lemon laws. ACL is designed as a broad framework rather than a prescriptive solution to consumer protections. Even though it may be argued that ‘lemon’ laws could be more broadly applied there is no doubt that ‘lemon’ laws are intended to single out the retail vehicle sector as a bad actor in the economy, a claim which is just not true. This would undermine confidence in an industry that already has very robust consumer protections, and very low levels of disputation.

It would be unconscionable that government would seek to place additional barriers in the way of growth of this already heavily regulated and highly competitive sector, without conclusive proof that a need existed.

The Government’s decision to allow for the personal importation of motor vehicles thoroughly undermines the purpose of ACL. The basis of the personal imports decision towards consumer

protection is ‘buyer beware’. This is wholly inadequate to protect consumers and it is staggering that the ACCC supports such a laissez faire attitude to consumer protection.

Notwithstanding some level of theoretical legislated protection, in practice consumers will not be able to access ACL to pursue claims against overseas sellers, who are beyond the jurisdiction of ACL. This policy decision seems to be completely out of step with other competition and consumer protection settings initiated by government and supported by the ACCC.

Even under existing legislation, the ACCC and its South Australian counterpart, Consumer and Business Services, have significant difficulty in securing prosecutions and stemming the insidious spread of unlicensed and unregulated backyard vehicle sellers domestically – that is, in locations they can access physically and where they have jurisdiction to prosecute. This is not a criticism of either of those agencies; it is an observation of the inherent difficulty of their task.

Product Safety

Standards should not allow for the importation of products that are unsafe into the Australian market. Currently, safety standards are voluntary unless expressly made mandatory by Ministerial intervention. This is a cumbersome and slow process which is not working as effectively as it could as products are made available faster than government can regulate them.

The MTA is aware of several situations where current ACL protections are not adequate. Personal imports of vehicles, as stated above, pose a serious threat to consumer protection. These inconsistencies have not been reconciled by the naïve and inefficacious framework put forward by the Government.

Further, various vehicle components available online are supplied absent essential features and require alteration or modification for fitment. This can be done through qualified businesses and tradespeople, but there are a great many that attempt to undertake these safety critical modifications at home or though backyard operators. This poses a serious safety risk and such products should not be available in Australia.

Figure 1

This figure shows rims that have not had the stud holes drilled to enable fitment to a vehicle. Currently, this work can be done by anybody and is unregulated, when in reality, this work should be undertaken in consultation with a qualified engineer or metallurgist to ensure the is rim is not weakened by the alteration through cracking, bending or distortion.

Figure 2 & 3

This figure shows stud holes that have been elongated to enable fitment to multiple stud patterns on a vehicle rather than being fit for purpose. This is evident through the partial eclipse like drill pattern on the rim. A vehicle travelling at speed would be at risk when moving over undulating surfaces, causing slippage, and would cause impact damage on the stud hole perimeter, and potentially, damage the studs themselves, making the vehicle unstable.

These products figured above self-evidently pose safety risks for consumers. Rim and tyres not made to Australian Standards that are imported from overseas and deteriorate faster and at lower impact speeds while travelling than the certified Australian equivalent.

The justification for this from regulators is typically there is a cost difference between the items that places the consumer at some level of financial disadvantage.

Such cost saving are a pyrrhic victory for consumers. The initial cost differential in these circumstances is more than offset by the cost of replacement of affected parts, repair costs to damaged vehicles and the potential for physical harm in the event of product failure.

Additionally, the theoretical cost saving realised by the consumer during the initial purchase is brought about precisely because those products and practices which do not go through regulated and accredited imports channels are not subject to the same vigorous standards, and are generally of poorer quality.

ACL should be amended to ensure Australian levels of quality and safety are reflected in international standards in line with our international trading partners and source markets.

Manufacturer's Warranties

Under the current application of ACL, third party installers and retailers are largely held liable for faults that are not detected in the normal course of supply of products and services from a manufacturer.

This places small business retailers and installers in the inherently unfair position of bearing the cost and reputational damage incurred from faulty products supplied to that business.

The extent and application of manufacturer's warranty should be made clear to purchasers at point of sale, including the fact that these protections cannot be bargained out of a purchase.

Additionally, small businesses who have sold products in their original packaging and contain a fault should have easier access to redress under a manufacturer's warranty.

This could be achieved by indicating a reverse onus of proof on manufacturers to prove that the actions of a retailer or third party installer materially contributed to the defect present in the product.