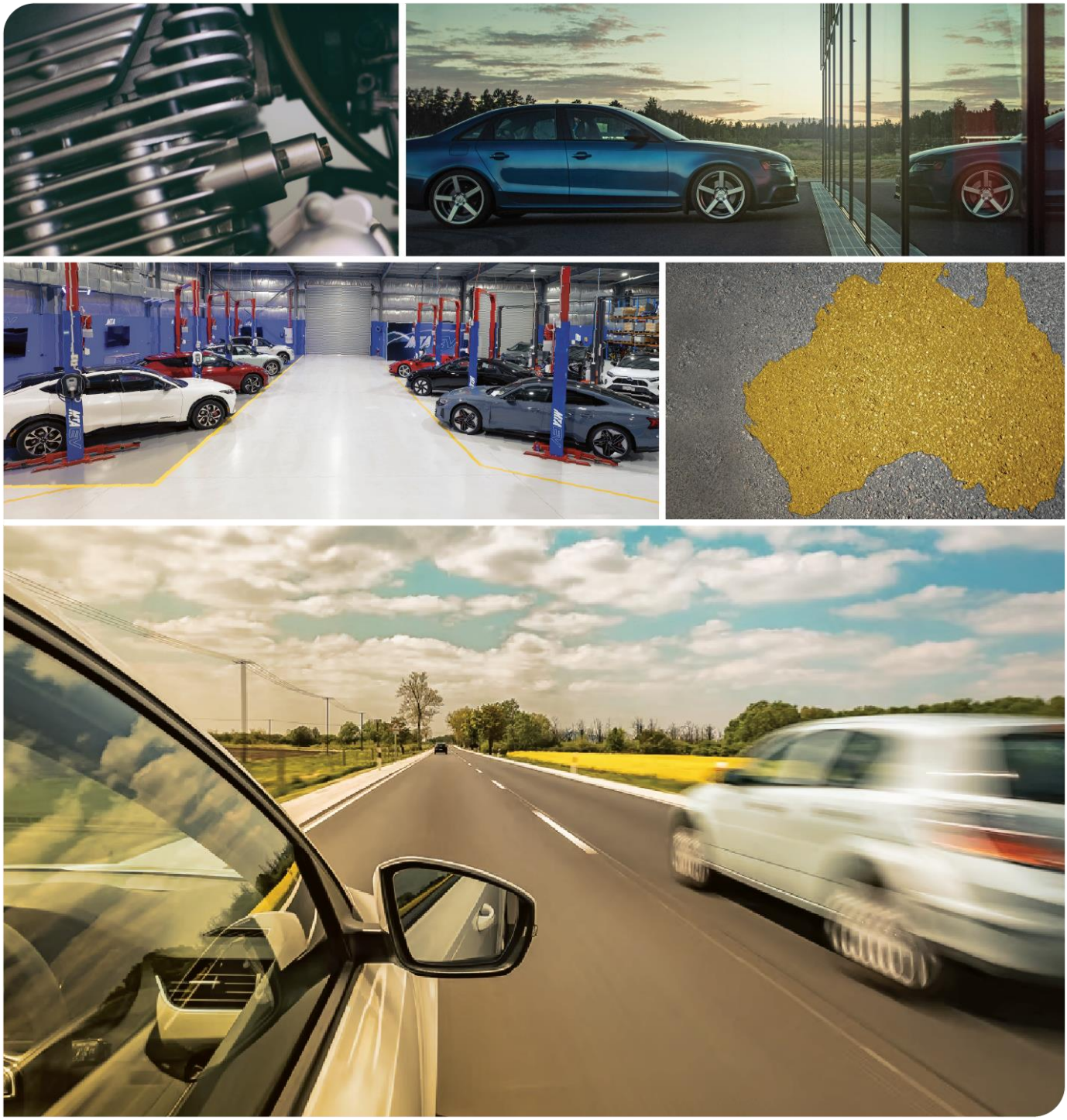

# MTAA RESPONSE TO CONSUMER GUARANTEES AND SUPPLIER INDEMNIFICATION UNDER THE ACL:

## CONSULTATION ON THE DESIGN OF PROPOSED NEW CIVIL PROHIBITIONS AND PENALTIES

**NOVEMBER 2024**

MOTOR TRADES ASSOCIATION OF AUSTRALIA

# CONTENTS

## ABOUT THE MOTOR TRADES ASSOCIATION OF AUSTRALIA

The Motor Trades Association of Australia (MTAA) is the peak Australian retail automotive association and represents the interests of its State and Territory Motor Trade Associations and Automotive Chambers of Commerce.[1]

MTAA members represent more than 95% of the automotive supply chain including over 15,000 automotive businesses that are central to the automotive industry's contribution of over $39.35 billion or 2.1 per cent of Australia's GDP.[2]

MTAA members include automotive retail, service, maintenance, repair, dismantling and recycling businesses who provide essential services to a growing Australian fleet of vehicles, which currently sits at over 21.2 million.[3]

MTAA is unique in its position as the only national retail automotive specific Australian member association representing the entire spectrum of the automotive industry from a cradle to grave perspective. This includes sub-sectors such as franchise new and used vehicle dealer participants to aftermarket, service and repair sectors to automotive dismantlers.

MTAA and its members provide a voice of pragmatism and aim to inform sensible policy reform to the Australian Consumer Law (ACL) while promoting best outcomes for the retail automotive sector and its consumers.

## ABOUT THE AUSTRALIAN VEHICLE FLEET

The Australian vehicle fleet has experienced rapid change and is progressing toward a market dominated by zero and low emissions vehicles (ZLEV).

MTAA worked closely with industry and government to ensure data and evidence driven development of the Australian Government's New Vehicle Emission Standard (NVES) which will commence from 1 January 2025. With supply to the market and consumer preferences for diverse vehicle models at all-time highs, competition among manufacturers, and the pressure on their dealership networks to offer the right vehicle mix, has never been greater.

[1] Motor Trades Associations of News South Wales, Northern Territory, Queensland, South Australia, Western Australia and the Tamanian Automotive Chamber of Commerce and Victorian Automotive Chamber of Commerce.
[2] Steve Bletsos, MTAA *Directions in Australia's Automotive Industry – An industry report .(2021),* <https://vacc.com.au/Portals/0/Publications/Industry%20Report%202021/2021%20Directions%20in%20Australias%20Automotive%20Industry_pp.pdf?>,8,[2].
[3] Steve Bletsos, MTAA *Directions in Australia's Automotive Industry – An industry report .(2021),* <https://vacc.com.au/Portals/0/Publications/Industry%20Report%202021/2021%20Directions%20in%20Australias%20Automotive%20Industry_pp.pdf?>,17, [2]-[3].

The transition to advanced technological systems, power sources and capabilities, including extensive use of electric powered propulsion, computers, sensors, radars and cameras that provide complex vehicle system interdependencies to make vehicles safer, more efficient, and environmentally sustainable. Such systems can also contribute to necessary software updates, minor manufacturing faults, and sometimes recalls (almost all are voluntary and initiated by vehicle manufacturers); most of which do not adversely affect vehicle safety, environmental efficiency, drivability or intended purpose.

Consequently, MTAA urges Treasury to further consider the changing face of an industry in transition, the arrival of many new brands to Australia who have different and varied approaches to their supplier network and the potential withdrawal from the Australian market of more traditional brands, when reviewing the ACL and proposing policy changes.

## MTAA'S UNDERSTANDING OF THE CONSULTATION

The MTAA welcomes the opportunity to provide this submission to the Treasury's consultation process 'Consumer guarantees and supplier indemnification under the Australian Consumer Law. Consultation on the design of proposed new civil prohibitions and penalties October 2024' (the consultation).

MTAA notes that the purpose of the consultation is to build on the work undertaken by the Treasury in 2021 and seek stakeholder feedback on the design and proposed new civil prohibitions and penalties. The consultation in 2021 was developed with regard to past consultations such as the Legislative and Governance Forum on Consumer Affairs, where it was agreed that the Australian Consumer Law (ACL) was generally beneficial and fit for purpose.[4] From this perspective, MTAA has seen no evidence to dictate that the ACL was not operating as intended from a supplier – consumer perspective.

It is noted that once the consultation period has concluded that a Decision Regulation Impact Statement (Decision RIS) will be developed to outline the evidence gathered and the preferred policy option for consumer guarantees and supplier indemnification breaches. The consultation paper also advises that options to amend the ACL will be considered and agreed in consultation with states and territories in accordance with the Intergovernmental Agreement for the Australian Consumer Law. In this regard, MTAA notes with interest the work currently being undertaken by the National Working Group (NWG), a group consisting of ACL regulators,[5] that has sought stakeholder responses to a series of survey questions to better understand the issues impacting consumers buying second hand vehicles in each state and territory.[6] MTAA members remain concerned with the

[4] Office of Best Practice Regulation *Decision Regulation Impact Statement – Legislative and Governance Forum on Consumer Affairs (2018)* < https://obpr.pmc.gov.au/published-impact-analyses-and-reports/consumer-guarantees> [2].
[5] Australian Consumer Law (ACL) regulators.
[6] Communication from Consumer Affairs Victoria to VACC CEO and South Australian Attorney General to MTASANT CEO September 30, 2024.

tone of the questions posed by the NWG and whether there was a predetermined outcome that would see a greater degree of scrutiny placed upon the automotive retail industry.

MTAA observes the findings outlined in the Australian Consumer Survey 2023 final report which underpin the position adopted as being “The Problem”. We understand that 5,452 consumers and 1,290 businesses responded to the survey. This sample represents less than 1% of eligible consumers and business which rely upon the ACL.

In addition, there is not identified a specific automotive sector in the survey results and therefore it is unlikely that many businesses in the automotive sector were engaged in the survey. Consequently, MTAA cautions against use of the data from this survey to form a position on the requirements to impose any civil penalty regime under the current ACL.

## CONTEXT OF THE MTAA RESPONSE TO THE CONSULTATION

In MTAA's consultation response, the term 'supplier' is substituted with 'dealer' or 'franchisee' or 'independent' unless otherwise stipulated. Additionally, in the context of this RIS response, 'manufacturer' refers to the franchisor, Original Equipment Manufacturer (OEM), importer, or distributor, unless otherwise specified.

In principle, MTAA supports the central theme of designing civil prohibitions and penalties being applied in instances where manufacturers deny indemnity and reimbursement to their suppliers for rectification and remedial work completed on products that were subjected to claim under the provisions of the ACL. MTAA members advise that dealers in this sector are at times coerced or encouraged to not pursue their rights under the indemnity provisions as per Division 2 and Division 3 of the ACL. In this regard, MTAA supports any prohibition or penalty regime introduced where it is established that a manufacturer has contravened legislated obligations by not dealing fairly with a supplier, as mandated by those Divisions.

Similar to the MTAA response to the 2021 consultation, significant numbers of automotive businesses have informed MTAA they feel unfairly disadvantaged by the ACL, with the stated position that it is biased towards protecting consumers, encourages consumers to seek windfall gains and provides inadequate protection for businesses of all sizes. MTAA remains concerned at the lack of resolve state and federal government regulators have to intervene in the private selling of motor vehicles and also address the impact those private-to-private sales have upon our most vulnerable community members.

## THE AUSTRALIAN USED CAR MARKET

The Automotive Insight Report (AIR) [7] prepared by Autograb states that nationally, used car sales for the month of August 2024 returned a total of 209,102 vehicles and that used car listings continued to increase in August 2024 by 5.2% to 314,672.[8]

Furthermore, given the importance of the future used car market in the consideration of the operation of further regulation, MTAA commissioned research undertaken by Blueflag which forecasts a significantly changing car parc in relation to the brand of vehicles in the fleet, the source of vehicles and technology of powertrains and advanced driving technology. MTAA is happy to share fine level detail of the future Australian car parc with Treasury however high-level results include:

- An additional 160 EV vehicles to be brought to market
- 12 additional car brands to enter the market; and
- The continuation of the significant shift to vehicles sourced from China.

It is important that the complexity and durability of motor vehicles is considered in the proposed regulatory impact on the market's operation.

## THE COMPLEXITY OF MOTOR VEHICLES AND THE FUTURE OF TRADING IN USED VEHICLES

MTAA recommends that government carefully considers how it defines a used or second-hand motor vehicle, why a used vehicle must always be treated separately from a new motor vehicle or other consumer products, and the complexities involved with used vehicles and how previous owners, often unclear, use and maintenance of the vehicle.

In its 2017 reply to ACCC's New Car Retailing Industry market study draft reply, the Federal Chamber of Automotive Industries (FCAI) advised the Federal Government of the complexities of motor vehicles and how motor vehicles should be viewed in isolation compared to other consumer products. The FCAI advised that motor vehicles are so ubiquitous and have been with us for such a long period of time that the level of engineering sophistication is often overlooked. Being able to enter a car, press a button, and be safely and comfortably transported, often through challenging conditions, is a remarkable achievement in engineering, one that should not be taken for granted. Motor vehicles contain more than 60,000 parts and more lines of computer code than a commercial jet aircraft. To have a regulatory regime that treats motor vehicles, both new and used, in the same way as a toaster is problematic.

The ACL guarantee that applies to acceptable quality (section 54) provisions notes that second-hand goods sold in trade or commerce are covered by the guarantee of acceptable quality, but age, price and condition of these

[7] AADA September Automotive Insight Report, (2024), < https://www.aada.asn.au/air-used-cars-taking-longer-to-sell-amid-oversupply/>,1.
[8] Ibid,2.

products must be a considering factor in any decision with regard to a claim under this guarantee.[9] This is an aspect of used car retailing that consumers and consumer groups do not always understand. The conjecture surrounding exactly how a used motor vehicle should be assessed under a quality perspective, and the ability for consumers and traders alike to know exactly how that product's quality and performance is guaranteed is a challenging and often cost prohibitive exercise. For example, a complete forensic analysis on a used motor is an impossible task to complete. You must factor in time constraints, dismantling of every component and accessories. It is a task of great complexity, and the costs associated make it unfeasible.

The arguments advocating for dealers or repairers to conduct comprehensive (forensic) mechanical inspections or overhauls before selling or repairing vehicles to and from consumers would add thousands of dollars to each vehicle sale and repair bill, which is neither reasonable nor practical. Another claim widely misunderstood by consumers and consumer lobby groups is that if a vehicle has undergone a roadworthy check using the mandatory criteria of, for example, Victoria's Vehicle *Standard Information (VSI) 26*,[10] or VSI 4 for motorcycles, it does not guarantee the vehicle's mechanical performance. This inspection is often mistakenly assumed to be equivalent to a pre-purchase inspection by consumers. It is important to stipulate that a roadworthy inspection and attainment of a roadworthy certificate is not an inspection of mechanical quality, reliability, or cosmetic aspects of the vehicle. A certificate of roadworthiness issued by a licensed vehicle tester is a certification that at the time of inspection, a vehicle meets the requirements of VSI 26 and is safe for use on public roads.[11]

MTAA cannot overstate the importance of recognising and acknowledging that a used vehicle is not a new vehicle. A dealer demonstrator vehicle is not considered a new vehicle. Used vehicles vary significantly in condition and performance based on many factors, including the age of the vehicle and kilometres travelled, as well as how it has previously been driven, maintained, repaired or stored. In many cases, a used car may have had more than two owners. Its use has not necessarily been for highway driving and has been driven with many different driving techniques through varying weather events.

Applying ACL provisions to used vehicles of varying conditions in the pursuit of remedies that require new-like repairs places a burden on the industry and creates expectations for consumers that are unlikely to be met and therefore these considerations must be recognised where applicable, as "relevant matters" for the purposes of section 54(3) of the ACL. When a vehicle is driven to destruction by a consumer, resulting in a melted engine or buckled components, when it misses service schedules or is driven through rivers, it is not unreasonable to suggest that this is not a liability for the dealer or warranty provider.[12] But these are the type of claims often made to dealers.

[9] ACCC, Consumer guarantees: A guide for consumers, (2021), < https://www.accc.gov.au/system/files/Consumer%20guarantees%20-%20a%20guide%20for%20consumers%20-%20July%202021.pdf>,3[4].

[10] VSI 26 and VSI 4 constitute written directions provided to Victorian Licensed Vehicle Testers by DTP under Regulation 220 of the Road Safety (Vehicles) Regulations 2009. LVTS must ensure a vehicle meets the standards of VSI 26 or VSI 4 before a certificate of roadworthiness is issued.

[11] VSI 26 Roadworthy requirements, (2023),1,[8].

[12] Actual ACL claim received by VACC member LMCT in 2023.

Importantly most used vehicles sold by a dealer have a published owner's manual provided by the manufacturer (or access to one online) that offer detailed guidance on maintenance practices and intervals that must be met.

An unintended by-product when the law is misapplied is that the most vulnerable consumers in our community may have no other option but to trade in the private market, leaving them with more limited consumer protection when purchasing a used vehicle. It is assumed this was not the intention of the ACL.

## THE AUTOMOTIVE RETAIL INDUSTRY AND THE AUSTRALIAN CONSUMER LAW

Dealers and vehicle repairers attending to consumer guarantee claims are in a difficult position. They are obliged to respond to ACL consumer guarantee claims, while having no certainty that they will be compensated for their time and materials despite the manufacturer indemnities included in section 274 of the ACL.

If they are in the position where indemnity will be provided, it is usually at the rate of labour or time dictated by the manufacturer, notwithstanding section 274 of the ACL. It is a well-known fact that dealer agreements go as far as to stipulate that all customer complaints be reported to the manufacturer, who may choose to intervene and instruct the dealer on how to respond.

In an ideal world, the retail automotive industry would seek no greater outcome than working collaboratively with consumers to resolve issues related to the sale or repair of a motor vehicle. What the retail automotive sector is often faced with are baseless accusations and reports, some of which have been cited by Treasury as reference points in the preamble of this consultation paper. These examples are used to highlight the hardships consumers face when dealing with retailers or attempting to access justice through the various mechanisms available. It is of concern to MTAA members that those reports have not been publicly scrutinised to any degree and yet receive the imprimatur of the government to be based as fact.

## INDEPENDENT MECHANICAL REPAIR PERSPECTIVES

Independent mechanical repairers also often find themselves caught in the middle of consumer guarantee claims where a defective replacement part is found, or alleged, to be the cause.

It may transpire after tense negotiation that a manufacturer may compensate the repairer with another replacement part or credit note. However, despite section 274(2) of the ACL compensation for consequential loss such as the labour involved in replacing the part, or other remedy costs, are never considered. Labour costs are usually never to the favour of the supplier nor is the time allocated in repair and service methodologies.

Labour costs can quickly escalate into the thousands of dollars, particularly with modern vehicles where recalibration is a factor. Such services often cost more in terms of time and labour than the component.

Similarly, where consumer behaviour or misuse has contributed to extensive damage caused by a defective part, a repairer seeking a remedy from a supplier/manufacturer can be challenging.

Most automotive replacement parts are imported, and there can be lengthy delays before any form of remedy is provided. These examples occur daily, including when a defective part is sent back to the original manufacturer for assessment. In some cases, the manufacturer may find that poor workmanship or inappropriate use has caused the defect, leading to a warranty claim being rejected.

Section 274 of the ACL provides, where a supplier is liable to a consumer for breach of consumer guarantees, that the supplier has a right of indemnity against the manufacturer to recover its losses, provided that the consumer guarantee has been breached in one of the following ways:

- s54 acceptable quality
- s55 fitness for any disclosed purpose made known to the manufacturer (although the indemnity appears to apply in a more limited way)
- s56 supply of goods by description

While these protections offer some relief for small businesses, the prohibitive costs of seeking adequate remedy through the courts can be cost and time prohibitive.

This position is not assisted by some of the vagueness and apparent inconsistency in section 274 of the ACL. Section 274(1) of the ACL requires the manufacturer to indemnify the supplier where the supplier is "liable" to pay damages to a consumer under section 259(4) (which are damages for reasonably foreseeable loss for breaches of most of the consumer guarantees) but only where the manufacturer would also be liable for the same damages under its consumer guarantees (i.e., where a consumer guarantee applies to both the manufacturer and the supplier). Section 271(2) expands on this further and requires the manufacturer to also indemnify the supplier for their costs where the supplier is liable for a breach of consumer guarantee relating to acceptable quality, fitness for a disclosed purpose (where the manufacturer was made aware of that purpose) or goods not matching their description. It is unclear what being "liable" means under these clauses. Is a court or tribunal order required before a supplier is said to be liable or is a supplier liable because they choose to honour a customer's consumer guarantee claim and pay the damages that the consumer has claimed? This should be clarified so that suppliers know when they are entitled to be indemnified and how costs are assessed.

The manufacturer's obligation to indemnify the supplier for a fitness for purpose consumer guarantee breach is also uncertain. Under section 271(1), if the supplier pays damages for a breach of the consumer guarantee as to fitness for purpose, the manufacturer is not required to indemnify the supplier for the payment of those damages, because a manufacturer is not liable to pay damages to consumers for breaches of this particular consumer guarantee (the indemnity in this section only applies where the relevant consumer guarantee is one that applies to both the manufacturer and the supplier).

On the other hand, section 271(2) which is headed "Extent of indemnity" and which states "without limiting subsection 1" states that the manufacturer is liable to indemnify the supplier for a failure to comply with a fitness for purpose consumer guarantee, where the purpose was "made known to the manufacturer". This seems to suggest that if a disclosed purpose was made known to the manufacturer and the supplier "was liable" to pay the consumer damages for breaching the consumer guarantee for fitness for purpose, that the manufacturer would not be required to indemnify the supplier in such circumstances - the manufacturer would only have to pay the supplier's costs (which seem to relate to costs, other than damages). This appears to be an inconsistency or error in the legislation that should be addressed along with the concerns around the meaning of "is liable" as set out above.

Ultimately the lack of clarity on how these protections work and the lack of fulsome adherence to the provisions by manufacturers may lead to a business accepting liability and paying out a consumer guarantee claim for no fault of their own making. It is not viable for small businesses to continue to provide consumer remedies in these situations without there being a clear pathway for suppliers to obtain adequate redress from the manufacturer.

## CAR MANUFACTURERS: A NEW FRONTIER

In the next 12 months, Australia is expected to see the arrival of more than 12 new entrants into the Australian car market. This growth is largely driven by the opportunities provided by the NVES for full ZLEV manufacturers.[13] This is in addition to the already 68 brands offering 380 models being sold in Australia.[14]

This consultation offers a timely opportunity for the ACCC to issue public statement to all market participants, new or old, of their obligations to the consumer, and supplier, under the ACL.

## RIS FOCUS QUESTIONS

### PART 1: PROHIBITIONS AND PENALTIES FOR FAILURE TO PROVIDE A CONSUMER GUARANTEE REMEDY

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

MTAA advises that aspects of the existing consumer guarantees regime need to be clarified prior to the introduction of prohibitions and penalties.

[13] Jordan Hickey and Mike Stevens, 2024/2025 New Car Calendar: All the new cars coming to Australia, (2024), < https://www.whichcar.com.au/news/2024-new-car-calendar-australia>

[14] FCAI, About us, (2023), <fcai.com.au/about-fcai/>.

For the purposes of this review the two consumer guarantees that MTAA seek clarity and reform are ACL Sections 54 and 55.

MTAA is also mindful that at present there is inconsistency between the consumer law regimes imposed in the automotive sector at a state and federal level. There is inconsistency between the consumer guarantees across new and used vehicles at a state level under various legislation and sections 54 of the Australian Consumer Law. This inconsistency needs to be resolved to avoid a business from inadvertently falling foul of the federal consumer law regime whilst complying with the state legislative requirements.

By way of example in New South Wales there are consumer guarantees by motor dealers under Part 4 division 4 of the Motor Dealers and Repairers Act which impose requirements and obligations which are inconsistent with the current ACL.

MTAA considers that prior to consideration of a civil penalty regime upon businesses, Treasury should look to align the consumer law regimes to avoid constitutional law arguments (section 109 of the Constitution) arising.

**RECOMMENDATION 1**

**MTAA recommends that a review of the Consumer Law regime across both State and Federal legislative frameworks be undertaken.**

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

Aspects of the existing consumer guarantees regime that need clarification include**:**

**SECTION 54 ACCEPTABLE QUALITY**

MTAA members advise that this consumer guarantee is commonly relied upon by consumers when exercising their rights under the ACL.

It is a consumer guarantee that is difficult for both consumers and industry to interpret. Significant portions of the criteria associated with this section lead to confusion and a lack of clarity, particularly within the context of motor vehicle retailing. This hinders the ability to reach a common-sense resolution to issues that arise between customers and suppliers.

Confusion reigns with consumers and industry with regard to the statement contained within s 54(2)(a) and the utterance to goods being of an acceptable quality if those goods are fit for all the purposes for which goods of that kind are commonly supplied.[15] While section 54(3) which would require the court to take into account the nature and price of the goods and all other relevant factors (for second hand goods, this would include the age of the goods) and 54(6) relating to the consumer's (abnormal) use of the goods. Experience to date is that depreciation and use are rarely taken into account and can lead to windfall gains.

[15] ACL, Section 54 (2)(a).

MTAA members seek further clarification and greater clarity on this aspect of used motor vehicles and how they meet sections of the criterion in the current legislative format. For instance, s 54(2)(c) refers to goods being free from defects.[16] When comparing a brand-new motor vehicle to one that is five years old, it is impossible for the older vehicle to meet the stated or implied standard of being defect or blemish-free, as expected of a new vehicle. Similarly, the use of recycled or used parts in repairs or servicing cannot possibly meet the same standard as brand-new parts.

While sections 54(3) sets out some considerations that must be taken into account when determining whether goods meet this guarantee, such as the nature and price of the goods, MTAA believes that this term could create misinformation and false expectations for consumers when addressing used motor vehicles, resulting in distress for both the consumer and industry.

## RECOMMENDATION 2

**MTAA recommends that specific and stated criteria be inserted to Section 54 that specifically announces that used motor vehicles are not a new product, and therefore cannot be considered to be blemish or defect free.**

Given the average age of passenger vehicles in Australia is 11 years,[17] it can be best assumed that problems in vehicles of that age may be present.

### SECTION 55 GUARANTEE AS TO FITNESS FOR ANY DISCLOSED PURPOSE

Section 55 of the ACL deals with the suitability of goods for one or more specific disclosed purpose(s) made known by the consumer to the supplier, or by a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made, or the manufacturer.

However, no liability is imposed on the supplier where the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the supplier's skill or judgment, or that of the person who conducted the negotiations or the manufacturer.[18]

This particular provision of the ACL is widely misinterpreted by consumers and their advocates. The use for suppliers with regard to s 55 is that the supplier could be held liable for misinterpreting or not really understanding a purpose that is being explained to them by the consumer.

Evidence from MTAA members suggests that this consumer guarantee is often included spuriously in any claim as an attempt to reinforce a claim that relates solely to s 54.

[16] ACL, Section 54 (2)(c).

[17] Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Bureau of Infrastructure and Transport Research Economics, Road Vehicles Australia 2023,(2023), < https://www.bitre.gov.au/sites/default/files/documents/BITRE-Road-Vehicles-Australia-January-2023.pdf.> 1,[9].

[18] Jeanie Paterson, *Corone's Australian Consumer Law* (Thomson Reuters Australia, 4th ed, 2019),262,.[2]-[3].

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

Under all circumstances there must be greater clarity as to where a major failure has ensued or not.

This clarity can only take effect if the correct diagnostic processes are evident, the failure is not beyond what a reasonable person would deduce as being outside the rejection period, and there is an understanding of how the failure transpired.

The use of language in section 260 such as "substantiality unfit" and "reasonable consumer" in determining when a consumer guarantee for a "major failure" applies is vague and uncertain. In circumstances where a civil penalty regime is being considered the legal tests to be applied to a "major failure" need clarity.

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

Most certainly a major failure, or more broadly speaking, a diagnosis of a major failure, is not a diagnosis that you can reasonably leave to the sole discretion of a consumer agency or lobby group.

MTAA considers it unfair on the retail automotive industry to be subject to repeated spurious claims where the term 'major failure' is applied without any supporting evidence. A consumer who relies upon an express warranty from the manufacturer to replace or repair goods cannot then claim damages for the failure to honour the statutory guarantee in relation to acceptable quality.[19]

There is enough evidence to suggest that where there is an issue that a motor vehicle dealer or motor vehicle repairer diagnoses as a major failure,[20] then consumers in those instances have had their rights to their choice of remedy (repair, replacement, or refund) met. However, where consumers make a statement that they wish to reject a vehicle, and they do not, or refuse to return a vehicle to the dealer or manufacturer, they are in breach of s 263 of the ACL. Consumers and their representatives must be made responsible for this inaction. The result may be that what is initially only a minor fault could turn into a major fault if the vehicle continues to be driven by the consumer.

## RECOMMENDATION 3

**It should be clearly stated in Section 263 of the ACL that if a consumer rejects a vehicle based on a major failure, the vehicle must be returned to the retail dealer promptly.**

Currently, consumers across Australia rely on advice that in itself is not fit for purpose. As stated earlier in this submission, motor vehicles and motor vehicle repairs are complex products and services, relying on thousands of parts working in unison.

[19] ACL Section 271(6).
[20] ACL, Section 260.

The following statement with regard to the criteria for major failure can lead to consumers and industry confusion:

- A reasonable consumer fully acquainted with the nature and extent of the failure would not have bought the good.[21]

MTAA is of the view that s 260(1)(a) is drafted in such broad terms that it arguably subsumes most, if not all, of the other situations in which a failure could be considered a major failure.[22] This has resulted in situations where minor faults, which would/have not affected the performance or capabilities of a product, being considered as a 'major failure' and taking a course of action that will ultimately lead to unfair outcomes for the supplier. This is irrespective of whether the failure can be easily remedied within a reasonable time.

The issue for many motor vehicle dealer centres is around the fact that diagnoses for a major fault are typically related to latent manufacturing defects that are almost impossible for the dealer to identify or rectify before the retail sale. S 260(1)(a) should have an exemption attached to it that makes it only applicable to vehicle manufacturers or connected to a new vehicle, not a vehicle sold as a used vehicle.

## RECOMMENDATION 4

**An amendment should be made to Section 260(1)(a) of the ACL to specify that this section does not apply in the case of consumers purchasing second-hand or used motor vehicles, or parts.**

***5. 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?***

Not all failures to provide a remedy to a consumer guarantee remedy should be classified as a contravention of the ACL. If a consumer seeks a remedy under the ACL, it does not mean that a supplier or manufacturer must acquiesce immediately. A supplier and manufacturer can investigate how a fault has transpired, and the rights of the supplier and manufacturer should not be trampled on, be withdrawn nor hindered. They can disagree with a consumer and defend a position in a court of law or tribunal. Asking a supplier or manufacturer to accept a consumer's claim of a major fault as unchallengeable removes one party's rights under the law.

This approach, or inferred right, has caused significant distress to both consumers and the industry, as consumers demand instant remedies with no questions asked, without providing the dealer an opportunity to inspect the goods. It is considered unreasonable and denies access to justice to all parties.

Ultimately, dealers, as suppliers, should not be held accountable for major failures under the ACL. They did not manufacture the vehicle and cannot reasonably be expected to be aware of all faults prior to sale.

[21] ACL Section 260(a),
[22] Allens Linklaters, *Allens submission to the Australian Consumer Law Review* (2016) 15, [9.2].

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

MTAA has serious concerns with the proposal to target motor vehicles for specific attention with regard to punitive measures.

There is considerable industry concern regarding the research methodologies and sources of data that the Treasury has used to inform this review**.** It is noted that some of these research sources, and the subsequent reports cited, have been inserted into the consultation paper as fact. For instance, consumers can access various tribunals on a raft of issues, but research show they are simply not present in great numbers. Nor are consumers using fast-track mediation that some states make available. This would indicate that consumers are resolving issues without the need to litigate.

This is validated by research undertaken by MTAA member, the Victorian Automotive Chamber Commerce (VACC) who conducted and analysed two years of research that highlights the misnomer of used motor vehicles being a highly ranked source of unresolved consumer complaints. The VACC research conducted in 2023 and 2024 shows that LMCTs comprise less than one per cent of all Victorian Civil and Administrative Tribunal (VCAT) hearings as a respondent and that motor vehicle dealers in that state (LMCTs) are not in the top five ranked industry sector categories as a respondent under the Goods and Services category.[23]

The evidence strongly refutes the claim that consumers lack the opportunity to have their say in VCAT or find it difficult to find a remedy for a consumer guarantee failure.[24] If there is a delay in consumers and dealers having hearings heard in a timely manner in places such as at VCAT, then MTAA would suggest that this is a problem for VCAT, not for the Australian Government to introduce more legislation to penalise industry.

The evidence compiled by VACC in 2023 and 2024 shows an insignificant rate (0.4 per cent) of LMCTs being listed as the respondent. This is well behind building property and maintenance suppliers, IT providers and repairers, retail consumer sector and real estate agents.[25]

Further research by VACC highlights those findings published in the 2023 ACCC Consumer Survey. The ACCC Survey Question 32 asked survey respondents the following:

> *Thinking again about the past two years, have you experienced any problems when purchasing any of the following product or service categories?*

The survey respondents ranked how problematic it was when purchasing a motor vehicle product. The survey respondents' responses placed motor vehicle sectors (fuel, repair, service, sale, detailing, rental etc.) as the 14th ranked sector in the survey response to this question.[26] This substantially contradicts many of the claims made by many consumer advisors as they relate to problems with motor vehicles.

[23] VACC research conducted for 17-week period in 2023- and 13-week period in 2024.
[24] Australian Government, The Treasury, Consumer guarantees and supplier indemnification under the Australian Consumer Law **CONSULTATION ON THE DESIGN OF PROPOSED NEW CIVIL PROHIBITIONS AND PENALTIES OCTOBER 2024, (2024),8,[8].**
[25] VACC (n 23).
[26] The Treasury, Australian Consumer Law Survey, *Incidence of problems by category*,(2023), https://consumer.gov.au/sites/consumer/files/inline-files/acl-aust-consumer-survey-2023.pdf> , 47.

Much of the negative data in the ACCC consumer survey that relates to motor vehicles is associated with poor customer service. VACC has not been able to establish a direct link between poor customer service and the quality of used cars on the market and would argue that the consumer experience from a customer service perspective, when dealing with a LMCT or franchise dealer, easily outperforms many other retail enterprises.

Importantly, the 2023 Consumer Survey conducted by the ACCC indicates the level of awareness and knowledge by consumers of consumer rights and the key considerations in the purchase of a new or used vehicle.

In light of the ACCC survey response data, it could be argued that another inquiry into motor vehicle trading is considered unnecessary, that no punitive measures (financial or other) should be levelled against any motor vehicle supplier and the very notion suggests the industry is being unfairly targeted.

---

***7. 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?***

For the purposes of determining whether a vehicle is new or used under the guise of an ACL claim, MTAA submits the following points to determine the vehicle status as new or used in the ACL claim:

- a new vehicle within the ownership of the very first registered owner
- that has not been modified outside of OEM specifications
- maintained a service schedule under the manufacturer's guidelines
- not sustained any panel or under carriage damage
- not written off under any state legislation
- specified period from the vehicle's build date

A vehicle that was used/retailed dealer demonstrator or factory driven vehicle with an odometer reading of less than 5,000 kilometres should be considered a new vehicle.

You cannot use build date or compliance date to verify whether a vehicle should be treated as new or other. The issue will gain greater significance as we draw closer to the implementation of the Australian Government's New Vehicle Efficiency Standard and the very real likelihood of overseas based manufacturers dumping high volumes of stock in the Australian market, that will not be retailed for extended periods of time.

---

***8. 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?***

All vehicles nominated should be included in the definition. Caravans are unique and should have their own definition. Included in the definition should be e-bikes and e-scooters.

9. ***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?***

MTAA sees merit in having a value limit placed on used motor vehicles and provide greater emphasis to consumers and industry on what their rights under the law may or may not be.

MTAA recommends that a price threshold be introduced for used motor vehicles priced between $1-$14,999 be exempted from the consumer guarantees owed by suppliers under s 54 but not from the consumer right to guaranteed clear title and encumbrance free. If this is to occur, dealers must provide an opportunity for the consumer to access an external warranty to consumers who purchase the vehicle as well as abide by all conditions under the various state-based Motor Vehicle Traders Acts as it applies to statutory warranty.[27]

When a vehicle is driven to destruction by a consumer, resulting in a melted engine or buckled components, that is not a liability for the dealer or warranty provider to bear.[28] However, this is the type of claim that many dealers face. The reality is that car dealers can no longer sustain the unrealistic demands that require absorption of the costs of new-like remedies insisted upon by consumers and other advisors.

In jurisdictions like Victoria, consumers have the option to seek a VCAT Fast Track Mediation (FTM) for disputes involving vehicles priced under $10,000. The state is now seeking to raise the FTM threshold to $20,000. It is chronically underutilised in Victoria.

An outcome of such a misapplied law is that the most vulnerable consumers in our community may have no other option but to trade in the private market, leaving them with more limited consumer protection when purchasing a used vehicle.

**RECOMMENDATION 5**

**Apply an option for a licensed motor vehicle dealer to be exempt from providing remedies to consumers under the ACL s 54 for vehicles priced between $1-$14,999.**

**RECOMMENDATION 6**

**MTAA recommends that dealers who retail vehicles priced between $1- $14,999 must provide the consumer with an opportunity to acquire an external extended warranty product.**

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

MTAA is of the view that the ACL is doing as intended and that there is no need or evidence to dictate that higher priced goods or services should have a higher penalty regime.

[27] For e.g., *Motor Vehicle Traders Act 1986* (Vic).
[28] Actual ACL claim received by VACC member LMCT in 2023.

What should be factored in is a higher penalty regime for recidivist manufacturers and serial litigants who look to game the system.

---

***11. 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?***

MTAA believes it to be entirely appropriate to factor in a percentage of product depreciation when determining an appropriate refund amount in most claims.

There would of course be circumstances where that refund amount should vary from 100 per cent refund to no refund at all. The simple approach of having a Red Book Valuation or Kelley Blue Valuation conducted on a vehicle may seem simple in theory, there are some aspects that must be factored in. The likelihood of a consumer being unjustly enriched as a result of such a valuation without taking into account varying factors, is very high. A reasonable claimant surely would not expect such a windfall opportunity under these circumstances given that there are potential issues for refund that occur many years after delivery.

The overriding principle should be that consumers are returned to the position they would have been in had their vehicle not failed to meet expected or advertised quality standards and section 263(4) of the ACL be amended to include depreciation and other third party costs.

What should be factored in?

MTAA is of the view that a depreciation methodology should be factored in to account for:

- A consumer's unfettered or uninterrupted use of the vehicle over a period of time or distance travelled.
- An independent panel and mechanical assessment must also ensue to ensure the supplier or manufacturer losses are mitigated in the event of the vehicle having been abused by the consumer.
- Modifications made by the consumer outside of manufacturer's specifications.
- In many cases consumers would have claimed depreciation using the Australian Taxation Office' (ATO) diminishing value method as well as other taxation and duty claims such as the Instant Asset Write Off and the implications connected to the ATO Log Book Method.
- It must also be factored in that with regard to refunds applying to the purchase of a motor vehicle that the dealer does not keep money collected on behalf of government agencies and statutory bodies. In fact, dealers have legislative requirements to pass money collected in those circumstances in a prescribed period of time.
- Under this guise, on road costs such as vehicle registration, motor vehicle stamp duty, Goods and Services Tax, Luxury Car Tax, Super Luxury Duty, and other fees that have been remitted by the dealer to the various governments (for e.g. to the ATO) must be deducted from any potential base line refund.
- If a refund for government fees is sought the consumer in most cases is the only party the statutory bodies will deal with. Under these circumstances the consumer should make claim outside of the dealer under the basis of a contract rescission.

## RECOMMENDATION 7

**Amend section 263(4) of the ACL to include depreciation and other third party costs.**

12. ***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 does concern MTAA that the consultation paper does not refer to the evidence provided by MTAA in its 2021 reply of where consumers had made unmeritorious claims citing the ACL. Instead, the consultation paper refers to a conglomerate of consumer groups who provided a joint submission stating they were not aware of any data showing there was a pattern of behaviour of people gaming the system.[29]

In an investigative report conducted by CHOICE, it is reported that car loan delinquencies are rising currently with mainstream auction houses, reporting that reclaimed/repossessed vehicles are rising by 13 per cent from February 2024 and 11 per cent over the second quarter of 2024.[30] It could be inferred that, due to the cost-of-living crisis affecting all Australians, those who purchased vehicles during or after COVID-19 are now facing difficulties and suffering bouts of buyer's remorse as the used car market steadily declines and vehicle owners struggle to refinance. This scenario is analogous to what we are seeing at dealerships, with claims of an unmeritorious nature being driven by buyer's remorse or just a desperation for consumers to separate themselves from a product that they have overpaid for.

## RECOMMENDATION 8

**MTAA recommends that the Australian Government conduct a national survey to investigate whether there is a direct link to consumer claims citing the ACL and a major default and vehicle repossession.**

It is MTAA members' view that consumers will, without hesitation, use any prohibition to coerce a supplier into fully refunding a purchase for any issue.

The coercive and confrontational nature that currently exists, driven by misleading expectations of a full refund or a guarantee of 'new-like' performance that consumers are often led to believe when seeking advice, will undoubtedly lead to a new wave of consumer complaints.

This cannot be the intended outcome of any proposed prohibition or penalty regime.

[29] Australian Government, The Treasury, Consumer guarantees and supplier indemnification under the Australian Consumer Law **CONSULTATION ON THE DESIGN OF PROPOSED NEW CIVIL PROHIBITIONS AND PENALTIES OCTOBER 2024, (2024), 17[5]-[6].**

[30] Bernadette Lunas, Cost of living crisis hits the road: Car loan delinquencies and repossession rise in Australia, (2024), < infochoice.com.au/news/rising-car-delinquencies-repossessions-australis >, [2].

The only way to counterbalance this scenario is to have penalties applied to consumer cases where the action is seen to be inappropriate, coercive, unlawful and vexatious in nature.

## RECOMMENDATION 9

**If a penalty regime is introduced, it should apply equally to all businesses and consumers. A penalty regime must be introduced and apply to consumers and their advisors who seek to use the new prohibition or penalty regime to coerce a supplier or manufacturer in a vexatious, belligerent or unlawful manner.**

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

MTAA does not have evidence or a member position on this to say either way that the introduction of civil prohibition and penalties will result in higher costs for consumers.

However, MTAA does state that if the civil penalties and prohibitions become so poorly administered, interpreted, and applied that many retailers of used motor vehicles will withdraw lower end priced vehicles from their inventory. This may well force the most vulnerable of consumer to deal in an unregulated private market.

***14. Should the ACCC be given the authority to issue an infringement notice for an alleged failure to provide a consumer guarantees remedy?***

The MTAA agrees that the ACCC should be given the authority to issue an infringement notice for an alleged failure to provide a consumer guarantees remedy.

The ACCC penalty should only occur after the supplier or manufacturer has been provided with the opportunity to remedy and investigate how the consumer guarantee was breached.

***15. At what amount should infringement notice penalties be set for an alleged failure to provide a consumer guarantee remedy when required by the ACL?***

The ACCC advises that the current penalty unit prescribed by the Crimes Act 1914 (Cth) is $313 per penalty unit.[31]

If it is the intention to introduce an infringement notice, then any penalty notice must have a penalty regime for a body corporate contravention and an individual (person) contravention.

***16. 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 guarantee remedy when required by the ACL? Why?***

[31] ACCC, Fines and penalties, (2023), < https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties>.

In arriving at the quantum of a penalty for failure to provide a remedy, MTAA is of the view that the emphasis should be on a pathway for the transgressor to actively address and solve the consumer guarantee issue, and to not leave the supplier stranded in such a predicament that a remedy will only realistically come from one party (i.e. the supplier).

No number of threats or commencement of litigation from the supplier will help resolve some of those scenarios. Increased penalties for businesses that repeatedly fail to comply with a consumer guarantee required under the ACL may or may not deter businesses from behaving in a negative way. Certain manufacturers, for instance, may see civil penalties as a cost of business, where many suppliers could not sustain such an approach.

This is particularly evident in automotive retail, where participants vary in size, from multinational, publicly listed entities, to small, family-owned businesses. The vast majority are small businesses.

MTAA suggests that any punitive measure applied should be enough to deter such behaviour from repeating but should not be such that it cripples the entity from trading or result in job losses.

For dealers (supplier) in this sector, reputation and the fear of a negative Google review is significant. If the ACCC wishes to have an immediate effect, then MTAA advises that the preferred model of penalty should not be an initial financial sanction, but rather a publicly stated enforceable undertaking with the added condition of the supplier being subjected to a probationary period with the possibility of financial sanction should the conduct continue.

ACCC has a robust model applied to the penalty and enforcement regime for the telecommunications sector for instance.[32]

---

***17. 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 or why not?***

MTAA members advise that there is no requirement to have maximum penalties for contraventions set at different amounts for goods and services above and below a particular monetary threshold.

As stated in question 16, any penalty for contraventions should be based on the individual, supplier or manufacturer capacity to meet the requirement of that penalty and the penalty be sufficient enough to discourage future iterations of the initial issue.

[32] ACCC, Stronger penalties an enforcement powers against telcos breaching the law, (2024), <https://www.accc.gov.au/about-us/news/media-updates/stronger-penalties-and-enforcement-powers-against-telcos-breaching-the-law>.

18. ***Are there any 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?***

See reply in Q 16 and 17.

MTAA also reiterates that the sanctions applied for a used product should be rigorously reviewed with the language or text used to advise customers to be simple and easy to understand.

## PART 2: PROHIBITION AGAINST MANUFACTURERS NOT INDEMNIFYING AND RETALIATING AGAINST SUPPLIERS WHO REQUEST INDEMNIFICATION.

19. ***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?***

MTAA is of the view that a manufacturer's failure to provide supplier indemnification be a contravention of the ACL in all instances, not solely for major failures.

For clarity, it must be stated that vehicle technicians from franchise dealer operations are considered subject matter experts when determining whether a vehicle issue is due to normal wear and tear or day-to-day operation, or if it is a manufacturing defect. These technicians have received factory-trained instruction over time on how to service and repair vehicles of that specific brand. They also have unrestricted access to service campaigns or vehicle characteristics that may contribute to a fault, which could lead to an ACL claim.

For this purpose, the dealer technician can determine whether a vehicle has a major or minor issue relating to a manufacturing defect.

If the issue is determined to be a major failure, the remedy and process connected to it should be managed in all instances by the manufacturer. This will save the dealer and the consumer much time and lead to better consumer and supplier outcomes. This is particularly relevant for independent (non-franchise or brand aligned) motor vehicle dealers who experience much frustration attempting to invoke their rights under section 274 of the ACL.

**WARRANTY UNDERPAYMENT**

Many dealers referred to issues in relation to the computerised diagnostic systems to detect issues as well as provide solutions to fix them and the time duration of the repair. For instance, a dealer who headed a dealership group for over 30 years, referred to multiple examples across multiple brands in which the diagnostic systems have failed.

Inefficient systems along with the level of operational requirement posited by car manufacturers is often perceived by dealers as an inability to optimise the productivity of their workforce. Moreover, it is commonly

referred to by dealers as having unrealistic expectations set on technical teams to achieve repairs within the posited timeframe.

**COMMENTS FROM A DEALER REGARDING WARRANTY UNDERPAYMENT**

*'They (dealers) will get in some cases in a dispute because the manufacturer doesn't believe it takes four and a half hours to change a gearbox over in a factory environment (dealership workshop), (…) so they (car manufacturer) will only pay for two and a half hours to replace a gearbox. The technicians have been trained in accordance with what the manufacturer prescribes. They can't do it any faster than that. They've done all the training; so, if you added up four or five of those cases over a 12-month period there's two hours on each job that's been lost and not compensated for.'*

## RECOMMENDATION 10

**That any claim for a major failure be managed in the first instance by the manufacturer and that in any litigation the dealer be the second applicant.**

Where a vehicle fails to comply with a consumer guarantee, the consumer can choose to take action, under the ACL, against either the dealer, or the manufacturer, or both, provided that the consumer does not seek to recover twice in respect of the same loss. Manufacturers indemnity stretches to reimbursement of any damages paid by the dealer to the consumer for reasonably foreseeable loss or damage suffered by the consumer because of the failure to comply with a consumer guarantee, provided that the manufacturer would itself be liable under the ACL to pay damages to the consumer for the same loss or damage.

Where a consumer could claim against a manufacturer under the consumer guarantee regime, but instead makes a claim against the dealer, the dealer has a statutory right of indemnity against the manufacturer under the ACL for certain costs or damages it incurs as a result. Importantly, this statutory indemnity cannot be excluded or limited, and it is not conditional on a dealer getting prior approval from the manufacturer for the costs or damages so incurred.

For instance, a manufacturer cannot refuse to indemnify a dealer under the dealer's statutory right of indemnity in the ACL on the basis that the claim does not fall within the manufacturer's applicable 'warranty claim guidelines' that dealer did not follow a particular warranty process procedure. The issue facing the dealer in this regard is that there is a cohort of manufacturers who will only pay a predetermined time allocation for repair work conducted by a dealer for a manufacturing defect.

**CASE STUDY**

*It seems I have been told to claim 0.3hrs when we clocked 1.59hrs completing this work. We have followed the (brand deleted) diagnosis as attached, checking voltages, Ohms & DTC codes. This does*

*not come close to the time we spent on this car, we had to book the car in, check it in when it arrived, order the part which arrived via courier at our expense and complete the work.*[33]

***20. 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?***

The MTAA offers two different scenarios for the Treasury's consideration on whether the introduction of a penalty would change a supplier's incentive to seek an indemnification from the manufacturer, or the manufacturer's response to a request for indemnification. They are:

**If a franchise new vehicle dealer**

MTAA does not believe that the introduction of a penalty would change a supplier's incentive to seek an indemnification from the manufacturer, or the manufacturer's response to a request for indemnification for a franchise dealer.

Franchise agreements are still structured heavily in the favour franchisor. If a franchise dealer is having issues with elements connected to that business (e.g. not meeting sales targets) then that relationship may already be under strain and the default decision made by the franchisee to not aggravate the relationship.

**If a non-brand aligned / non franchise independent used car trader**

MTAA believes that the introduction of a penalty would change a supplier's incentive to seek an indemnification from the manufacturer, or the manufacturer's response to a request for indemnification for an independent used car trader.

As the situation currently stands, car traders not of the brand or aligned with a franchise system of the manufacturers brand do not have any relationship with the manufacturer. It is often the case that independent traders have communications ignored by manufacturers. This is overly amplified when the vehicle is in the ownership of the second, third or fourth owner yet a manufacturing defect has emerged. The most effective way for independent used car traders, or owners of those vehicles is to engage the manufacturer in this type of scenario by co-joining them as a respondent in any litigation commenced by the consumer.

The independent used car trader will have no qualms of reminding the manufacturer that under the indemnity provisions of the ACL that they may well be in contravention of the ACL and be subject to punitive measures and penalties should the matter come to the regulator's attention.

Some MTAA members have a standing series of advice to car trader members to co-join the manufacturer in every action where a manufacturing defect is manifested, and litigation has been threatened or begun.

[33] Actual dealer email to MTAA member VACC rework done for manufacturing defect on year old vehicle.

**21. *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 most obvious 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 via dealer or franchise agreement, including the often-utilised franchise operations manual that is often used as a default dealer guideline by the franchisor:

One agreement reviewed by MTAA has a specific clause:

*Except as specifically set out in the relevant XXXX Warranty or as otherwise required by law, XXXX will not be liable for any loss or damage (whether indirect or consequential) however caused that may arise from or in connection with the use, failure of, or fault with, any XXXX Good or Used Product. In circumstances where XXXX cannot lawfully exclude its liability, the liability will be limited to (at XXXX option) the cost of the replacement or repair of the relevant good, or the supply of equivalent goods.*[34]

And:

*Where In Warranty Servicing is conducted in strict accordance with this Agreement and the XXXX Standards, XXXX will pay for all parts and reasonable labour costs incurred by the Franchisee in undertaking the servicing (as set out in the XXXX Standards).*

In these or similar arrangements with other brands, the manufacturer is seeking to limit its obligation under their indemnity provisions of the ACL (using "as otherwise required by law" presumably to overcome the voiding provisions in section 276 of the ACL). It is more than likely that in these examples the manufacturer will only pay for the hours they think it will take to remedy a defect not the actual out of pocket time of the dealer service department in rectifying the manufacturing defect.[35]

It is rare for a dealer or franchise agreement to not have a provision for warranty reimbursement based on agreed rates for labour and parts, which are significantly lower than retail rates. This quite often can place the dealer in an invidious position and may result in the dealer not being able to 'break even' on remedial work done under warranty provision. The imbalance is so real in these agreements with the dealer often agreeing to the agreement conditions under sufferance.

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

MTAA does not believe that the introduction of civil prohibitions with existing ACL enforcement remedies will affect the relationship between manufacturers and suppliers in any way.

[34] Motorcycle dealer agreement received by MTAA member.
[35] Motorcycle dealer agreement received by MTAA member.

This is probably a question more appropriately posed to manufacturers.

---

***23. What are examples of retaliatory practices by manufacturers against suppliers seeking to enforce their indemnification rights? Which practices should be prohibited?***

MTAA wishes to state that not all manufacturers adopt a combative or negative approach to the issue of supplier indemnification. There is evidence to show that many automotive manufacturers are employing positive practices in pursuit of ensuring best outcomes for consumer and supplier. It must also be repeated the manufacturers (and suppliers) have a right to investigate how a claim for indemnification has arisen and if indeed indemnification is even warranted.

However, the retaliatory practices from manufacturers can occur before a claim is even made. It makes sense that some manufacturers are acting under instruction from overseas-based head offices and do, from time to time, attempt to enforce their own warranty procedures and form of remedy without regard to the law(s) of Australia. There is evidence that some manufacturers place the following restrictions on their dealers by:

- prohibiting their dealer networks from making admissions of liability without prior approval of a manufacturer;
- introducing complicated and long-winded avenues for the dealer to actually submit a claim for warranty work and then deferring reimbursement if the administrative process has not ensued;
- compel or demand their dealer network to fall in line with the manufacturer instructions in relation to a consumer's request, complaint, claim or legal proceeding; and
- threaten dealers will the loss of their right of indemnity if they did not adhere to such manufacturer instructions.

Manufacturers conduct random audits of warranty work submitted by a dealership. At the whim of the manufacturer appointed auditor(s), a reimbursement or warranty payment clawback notice is served upon the dealer for a raft of alleged procedural or administrative oversight. This is highlighted in what is referred to as warranty extrapolation.

**WARRANTY EXTRAPOLATION**

Warranty extrapolation is the withdrawal or refusal to reimburse dealers for repairs under warranty if they have not completed the warranty process according to the manufacturer's administrative guidelines or operating manual of the franchise agreement.

Research into the franchising relationship between car manufacturers and new car dealers in Australia has highlighted concerning issues regarding warranty reimbursements in the retail sector. An excerpt from the 2023

study specifically addresses challenges related to warranty reimbursement, including implied or actual threats from manufacturers to dealers concerning warranty work repayments.[36]

The research highlighted common practice by manufacturers in denying dealers their right of indemnification under the ACL, known a warranty extrapolation. Warranty extrapolation is the withdrawal or refusal to reimburse dealers for repairs under warranty if they have not completed the warranty process accordingly. This process of warranty audit consists of ensuring that all the processes are followed by dealers, and the course of action was exercised for those who failed. As one of the participants in this research explained:

Comments (1) from a dealer with regard to warranty extrapolation:

*"The warranty inspector audits all of the dealers' warranties for the past five years, but they (warranty inspector) will only pick five random case studies. And if in two of the five they found there's something wrong with the paperwork, they'll take back 40 per cent of all of the dealers claims in the past five years. It's called warranty extrapolation. That's another example of behaviour that a lot of dealers don't like."*

Additionally, the research shows that some franchisors are notorious for making it difficult for dealers to receive compensation for warranty work. Dealers expressed concerns about a fear of retaliation for pursuing reimbursement for such work. The research reported several instances where dealers faced difficulties with manufacturers when seeking reimbursement for warranty repairs. Dealers who participated in this study reported the following:

Comment (2) from a dealer with regard to manufacturer retaliation:

*"If you (dealer) are going to have a minor dispute about whether the manufacturer is paying you (dealer) adequate compensation for legitimate warranty repair, I mean, to go through a mediation and dispute resolution process for that can take months. And at the end of the day, the manufacturer can turn around and say, if you keep agitating like this, then we might have to examine whether you guys (dealer) are still one of our preferred dealers going forward."*

Comment (3) from a dealer with regard to manufacturer retaliation:

*"As those screws (profit of car sales) are tightened, the relationship comes under pressure because it's more and more and more being asked of the dealer but less and less and less in terms of recognition of the costs involved."*

[36] Fattah, Adiba. *An Evaluation of the Franchise Model in the Australian Automotive Industry*. Diss. University of the Sunshine Coast, Queensland, 2023.

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

MTAA agrees that presumptive tests should apply if a civil prohibition was introduced to address manufacturer retaliation. Those presumptions should include:

- The nature of the retaliation
- The impact of the retaliation on the supplier
- That the affected supplier is willing to assist in any investigation
- The number of instances where that manufacturer has previously transgressed

**25. *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 failures? Why or why not?***

MTAA agrees that the ACCC be given the authority to issue an infringement notice for an alleged contravention of supplier indemnification provisions and for retaliating against suppliers. It must be a contravention for cases of minor and major failures.

This is especially important from the perspective of independent used car traders and aftermarket repairers who may not have the same form of communication or vested relationship with the manufacturer than that of a franchise dealer.

Minor failures must be included for automotive and quite often the remedy for the failure can be cost prohibitive or resource intensive.

**26. *How long should suppliers and manufacturers be given to dispute a claim after an 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?***

MTAA suggests that a 28-day period apply to provide an opportunity for suppliers and manufacturers to dispute a claim after an infringement notice has been issued. Suppliers are typically not as resourced as manufacturers and should not be forced to bear the burden of carrying a debt for which they were not responsible.

What should be monitored and reported upon are the number of disputes before the regulator, along with the time period attached to each dispute. If a dispute exceeds 60 days, it should be referred to the regulator for follow-up. It would also be sensible for the regulator to maintain a publicly accessible online register of all outstanding claims older than 28 days.

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

Under the ACL, s 21 and s 22 deal with unconscionable conduct and unconscionable conduct in business transactions.

The quantum for an infringement penalty for an alleged retaliatory practice by a manufacturer against a supplier seeking to enforce their indemnification rights should be using the same or similar methodology based upon the following:

i. The relative strengths of the bargaining positions of the parties (s22(2)(a)), including scale and resources of the contravener.
ii. Whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services (s22(2)(d)).
iii. The extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers (s22(2)(f)).
iv. The financial harm or loss as a result of the conduct.

***28. 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?***

Using the factors advised in Question 27, MTAA believes the regulator should be guided by elements cited within the ACCC's '*Guidelines on ACCC approach to penalties in competition and consumer law matters, September 2023*'.

***29. 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?***

Using the factors advised in Question 27, MTAA believe the regulator should be guided by elements cited within the ACCC's '*Guidelines on ACCC approach to penalties in competition and consumer law matters, September 2023*.'

**MATT HOBBS, CEO**
**M** 0419 608 845 **E** matt.hobbs@mtaa.com.au

MOTOR TRADES ASSOCIATION OF AUSTRALIA