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Improving the Effectiveness of the Consumer Guarantee and Supplier Indemnification Provisions Under the Australian Consumer Law

Thank you for the opportunity to comment on the Consultation Regulation Impact Statement (RIS) in regard to the Australian Consumer Law (ACL). The Federal Chamber of Automotive Industries (FCAI) is the peak industry body representing the importers and distributors of new passenger motor vehicles, light commercials and motorcycles into Australia. The FCAI members have a keen interest in the administration and application of the ACL across the various states and territories within Australia, and a range of submissions to the numerous enquiries over recent years are available to assist you in understanding our views if required. FCAI is particularly pleased to see the inclusion of the issue of depreciation in this consultation.

The FCAI also notes that the data employed by the RIS to estimate the financial impact of particular proposals is indicative only, so it is not possible to test this data set, or the calculations made. As a general observation, it is clear that the data appears to heavily weight the savings to consumers in terms of time lost, and little consideration is given either to compliance costs or increased losses amongst deemed manufacturers / importers (manufacturers).

As outlined in more detail in the attached economic analysis[1] there is an emphasis within the RIS on replacement and refund. Given the range of products subject to the provisions of the ACL this type of consideration can clearly have significantly different implications for manufacturers and consumers. FCAI would ask that we further explore whether, in the case of a major failure with high value products, the reflexive remedy should be a refund or replacement rather than a repair. Most faults can be fixed, without any residual problems. A range of jurisdictions include the concept of "final attempt to repair" at the manufacturer's option (and the repair attempt may well be by the manufacturer, not the supplier) as an alternative to refund or replacement.

In answer to the specific questions and information sought within the RIS we provide the following response.

[1] Consumer Guarantee Consultation RIS, Economic Commentary for FCAI, Evaluate, February 2022

RIS Q1. Please provide any relevant information or data you have to help estimate the extent to which consumers are unable to access consumer guarantee remedies when entitled?

In answering this question it would be necessary to provide data on something that did not happen, namely that a consumer did not receive a remedy when entitled. FCAI has no such data and suspects that other than anecdotal claims, neither would any other organisation. More to the point, the data that appears to be relied on in the RIS to justify the 'vehicle-specific options' is inconclusive at best and verging on misleading at worst.

The data appears to be:

> *'the high instance of unresolved problems with new motor vehicles found by the 2016 Australian Consumer Survey and by an ongoing high number of complaints received by the state and territory ACL regulators and the Australian Competition and Consumer Commission (ACCC)'*[2]

According to footnote 3 in the RIS:

> *'The 2016 Australian Consumer Survey revealed that consumers experience problems with new motor vehicles in approximately 8 per cent of new motor vehicle purchases. Further, in 45 per cent of these instances, consumer problems had either not been resolved or were resolved but not to their satisfaction. See: EY Sweeney, Australian Consumer Survey 2016, pp. 40 and 50'*

When looked at more closely, the Sweeney Survey does not provide any basis whatsoever for justifying any new motor vehicle specific options and the statements in the RIS are, with respect incorrect. In particular, the FCAI makes the following observations:

The survey does not relate to "*new motor vehicles*". The questions in the survey and therefore the results relate to a category called "*motor vehicles (including fuel)*". There is no way of determining from the responses how many relate to new motor vehicles as opposed to used motor vehicles or fuel.

As acknowledged in the RIS[3] the Sweeney Survey does not distinguish between a consumer 'complaint' and a consumer 'entitlement under the Australian Consumer Laws'. It is trite to say, but worth saying anyway that consumers do make complaints that are unjustified and/or do not entitle the consumer to any relief at law. The RIS endeavours to address this by assuming *'in the absence of any further evidence'*[4] that half of the complaints that were resolved but not to customer satisfaction involved consumers who were entitled to a remedy. With respect, this is completely arbitrary.

The RIS seems to rely on the findings on 2 pages of the Sweeney Survey: pages 40 and page 50. On page 40 is a table headed "*Incidence of experiencing a consumer problem – 2011 and 2016 comparison*". It refers to 22 categories of which "*motor vehicles (including fuel)*" is the seventh best. That is, there are 15 industry categories that are worse including electrical goods, furniture and building repairs to name but a few.
On page 41 is another table headed "*Number of consumer problems experienced in the last two years.*" This lists the same 22 categories. "Motor vehicles (including fuel)" is the fifth best category.

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[2] p4 of the RIS

[3] At footnotes 33 and 34

[4] p20 of the RIS

On page 41 the Sweeney Survey notes:

> *'As shown in Figure 25, categories with the highest average number of problems were:*
>
> ► *Internet service providers (0.8)*
>
> ► *Telecommunication products and services (0.7)*
>
> ► *Food and drink (0.7)*
>
> ► *Public transport (0.5)*
>
> ► *Home building, renovations, repairs and maintenance (0.5)'*

No mention is made of motor vehicles (or fuel), be they new or used, in this statement.

On page 50 appears a table headed "*Status of the problem – by purchase category*". It shows that for the product category "motor vehicles (including fuel)" of the consumers who had a problem, 45% had either not had the problem resolved or the problem had been resolved but not to their satisfaction (as mentioned above on page 2 of this submission). There is however another category which is "*in the process of being resolved.*" 10% of the complaints fell into this category.

The figures from the Sweeney Survey can be interpreted in another, equally valid way: of the 8% people who purchased a new or used vehicle, or fuel and had a complaint, 64% had the complaint resolved. In other words, only 2.9% of people who purchased a motor vehicle had a complaint that was not resolved. Conversely 97.1% of people who purchased a motor vehicle either had no complaint or the complaint was resolved.

The suggestion that there has been an *'ongoing high number of complaints received by the state and territory ACL regulators and the Australian Competition and Consumer Commission (ACCC)'*, with respect is based on limited, if any, empirical evidence. There is no tracking of the nature of the complaints - i.e., whether they related to new or used vehicles, to repairs, or to interactions with retailers – be they selling new or used vehicles or supplying repair services. In fact, in 2016 following the ACCC Market Study into the New Car Retailing Industry the FCAI wrote to the ACCC (see attached) seeking to jointly improve the quality of data collected by the ACCC on motor vehicle contacts. We have not received the data sought in that request, and to our knowledge the accuracy of the contact reporting does not allow a deep analysis of the particular circumstance, for example whether the vehicle is in fact new or used. We did receive advice from the ACCC that they were taking action to improve the data relevance, however those steps did not allow for any manufacturer input into the particular circumstances of the issue behind the consumer contact.

While there is a need to ensure that the Australian Consumer Laws remain relevant and contemporary, it is important to note the commentary in the attached Evaluate report[5]:

> *"It is Evaluate's view that there can be some effective rebalancing of the ACL, but it needs to take into account all costs and risks, and not be distracted by the mirage of costless benefits".*

In short, there is no demonstrated need for an increase in the legislative burden to be borne by motor vehicle manufacturers. The FCAI has no conclusive evidence that consumers were not able to obtain

[5] Page 15, Evaluate

consumer guarantee remedies when entitled – and to our knowledge neither does anybody else have contemporary quality, tested data to suggest that this is the case.

> ***RIS Q2. Do you have any information on consumers claiming refunds for new motor vehicles? If so, please provide details on how long after purchase refunds are requested, and the prevalence of such requests.***

FCAI has data indicating that over the period 2020-2021 there were refunds or replacements provided in instances approximating 0.2% of sales. It is not clear from our data whether this was as a result of the request from the consumer or a decision by the supplier/manufacturer.

What we do know is that over this period over 97% of customer contacts[6] were resolved to the consumers' satisfaction. This indicates an even greater resolution rate than that referred to in the RIS[7] based on the dated Consumer Survey data.

It is of interest to note that the RIS[8] observes *"While the obligation is on the trader to provide the remedy, the ACL does not currently provide any disincentive if they fail to do so."* The assumption is that without an obligation or disincentive under the ACL, the supplier/manufacturer has no incentive to provide a remedy.

Clearly the data above regarding resolution of consumer complaints demonstrates that this is not the case which reflects the reality of the market and the critical importance of a manufacturer protecting its brand value and reputation in highly competitive local markets.

Problems with motor vehicles or customer service cannot be hidden - disgruntled or dissatisfied customers are very quick to publicise their displeasure. If there are a number of disgruntled customers, even though they might be geographically dispersed, it becomes very easy for a potential customer to get an immediate sense of any problems or product defects in a motor vehicle. The old adage was 'one bad experience leads to ten lost sales'. Now, in this connected world through the use of social media and the accompanying increasing engagement and sharing of experiences by consumers on blogs etc, one bad review can lead to a multitude of lost sales. As a result, increasingly there will be no 'asymmetry of information' and the market will quickly and readily punish those businesses which supplied defective products or unsatisfactory customer service. In addition, the availability of service and repair information could increase the broader community's knowledge base on issues, or potential issues, with particular vehicle models. Interestingly, in this age of ever increasing range of connected vehicles it is not unusual for a consumer to complain that the vehicle is not connecting to their nomadic device. While this might be characterised as a consumer complaint about the vehicle, the issue may in fact be with the device and compatibility.

The importance of maintaining a brand's reputation for reliability is particularly important in the hyper competitive Australia market. There are approximately 60 brands sold in the Australian market representing approximately 17,000 new vehicles sold per brand. In the USA for example, this figure is approximately 255,000 new vehicles sold per brand.

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[6] FCAI member survey Feb 2022

[7] Page 20, RIS

[8] Page 11 RIS

As Evaluate comment[9], *"It is noted on this front that comparison websites are more effective in changing purchasing behaviour than are consumer refund laws".*

> ***RIS Q3. Do you have any information or data to support the view consumers are 'gaming' the system to obtain replacement new motor vehicles or refunds?***

The FCAI is aware of examples where customers have sought remedies when the finance payout is nearing. Whether this is due to "gaming" will always be a matter of opinion, and in this context the most appropriate approach is to ensure that, without damaging the rights of the many, the potential for the few is dealt with. Our attached economic analysis deals with this further.

> ***RIS Q4. Do you consider it appropriate for factors such as a depreciation deduction (a reduction in the value of a refund for usage) to be considered relevant in determining a refund amount? In what circumstances do you consider this would be appropriate? How would a reduction work? How should post-purchase increases in value be factored in? Please detail reasons for your position.***

The fact that under the current law, a consumer can recover the full purchase price they paid for a vehicle, notwithstanding that they have had the use of the vehicle for some years is the most important aspect of this RIS and a significant concern for the motor vehicle manufacturers.

A fundamental principle of our legal regime is that if a person suffers a loss which is recoverable, the wrongdoer is required to put the person back in the position they would have been in had the wrong not been committed – no more and no less than this.

In our context the "wrongdoer" is the manufacturer[10] and the 'wrong' is supplying a vehicle that subsequently displays a major failure.

A consumer whose motor vehicle has suffered a major failure some years after it was purchased has typically had the use of the motor vehicle during this period. If the consumer had not had the vehicle, they would presumably have had to expend money on alternative means of transport. A measure of the value of this use is the reduction in the value of the vehicle over the relevant period – i.e., the amount the vehicle has depreciated.

By allowing a consumer to recover the full amount of the price they originally paid for their vehicle without recognising the value the consumer has gained through the use of the vehicle means that the consumer is being put in a better position than they would have been if they had purchased a vehicle without a major failure. A depreciation discount would do nothing more than level the playing field for all consumers and introduce an improvement which significantly reduces the confusion created as the current law goes against common sense and the general principles of compensation.

The inherent unfairness of this is recognised in Case Study 1 in the RIS (Padma)[11]. Notwithstanding that the law provided that the applicant was entitled to a replacement vehicle or a full refund, the member;

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[9] Page 4, Evaluate

[10] While a consumer's right to recover a refund or replacement is against the 'supplier' the supplier has a right of indemnity against the manufacturer.

[11] See page 21

'told Padma it was unreasonable for her to ask for a full refund because she had received fair use of the vehicle for four years and the most she could receive would be the motor vehicle's current market value'

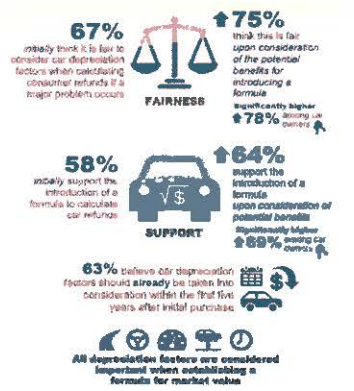
While this may have been wrong at law it reflects the fact that even specialist tribunal members (i.e., specialists charged with adjudicating motor vehicle claims in the NSW Civil and Administrative Tribunal and other State equivalents) think that 'depreciation' should be allowed for.

An argument is often made that the windfall gain enjoyed by the consumer is justified because of the inconvenience the consumer would no doubt have suffered prior to receiving their refund or replacement. This is clearly absurd as it means there is no relationship between the extent of the inconvenience suffered by the consumer and the value of the windfall gain - it might be more, or it might be less. In fact, the ACL addresses this argument as it provides the consumer with the ability to recover from the supplier the reasonably foreseeable damages the consumer has suffered (e.g., payment for alternative transport or loss of income).[12] These damages are in addition to receiving a refund or replacement[13].

This unfairness in the current legal regime where 'depreciation' is not allowed for seems to be recognised in the general community. The FCAI has conducted contemporary quantitative and qualitative consumer research in February 2022 which shows that there is strong public support for factoring in depreciation in the case of refunds for new cars.

The research found that the majority of Australians acknowledge that cars depreciate by a greater dollar amount than most other products. They agree that a methodology which considers depreciation factors will be fairer and more equitable for consumers, particularly for consumers who look after their cars.

The results found that two thirds of Australians (67%) believe it is fair to consider factors that depreciate car values when calculating consumer refunds if a major problem occurs. Upon hearing the potential benefits for introducing a formula for calculating car refunds, perceived fairness increases significantly, to 75% overall and 78% among people who own or lease a car. [14]



Similarly, initial support for the introduction of a formula for calculating car refunds that considers the factors impacting the current value of a car receives support from nearly six in ten Australians (58%). This increases significantly to 64% of Australians and 69% of people who own or lease a car upon consideration

[12] s 259(4) of the ACL

[13] s259(6) of the ACL

[14] FCAI Consumer Survey, February 2022

of the potential benefits. More than six in ten Australians (63%) believe depreciation factors should already be taken into consideration within the first five years after initial purchase of a new car if a major problem occurs (and the consumer is seeking a refund). All the depreciation factors are considered important when establishing a market value.

In addition, the consumer research found that Australians believe repairs should first be attempted and in the case of refunds, a depreciation formula will be fairer. Australians generally (79%) and particularly Australians who own or lease a car (84%) agree that before a refund by the manufacturer is considered, manufacturers should be able to try, at their cost, to first repair or address the issue.

Additionally, the research found that:

- A full refund being possible after years of use can result in some people unfairly taking advantage of the situation. This ultimately results in increased costs for all consumers.
- It is currently unfair that the same rules apply to those who look after their cars and those who don't.

In addition, it was clear from many of the comments made by the participants that they were surprised that there would be such a regime in existence and thought that it was fundamentally unfair. (Having said that, they were nonetheless happy to exploit the situation and accept what they acknowledged was an unfair windfall gain).

> *"If you've had 5 years out of a car, no one can say how you've driven it for 5 years. If the car falls apart, you're going to have to cop the cost of that. You're basically saying, 'there should be warranty forever at full value'. If there is a major failure that shouldn't have happened, it should be fixed. If it wasn't fixable, you'd be looking for a refund determined by the Redbook value.[15]"*

Furthermore, more than two thirds of Australians (68%) agree that 'cars are serviceable products where the owner has a responsibility to ensure it is taken care of to prevent problems from occurring, unlike other products where owners have less responsibility'. This is seen as a reason why there should be a formula or

[15] FCAI Consumer Focus Groups, January 2022

market value assessment approach to calculate car refunds. Agreement with this reason rises to 74% among people who own or lease their car.

Importantly participants in the research also agreed that a more consistent approach will be fairer and be in the best interests of all consumers.

> *"When we open stuff up to interpretation with too many grey areas, it messes with the rights and responsibilities of both parties. I think people will do that sort of thing, try to get more than what they deserve.*[16]*"*

International comparisons

Many countries comparable to Australia recognise that when determining the relief that a consumer should be entitled to when they have purchased a defective vehicle, an allowance should be made for the use the consumer has had of the vehicle. Specifically:

- the US, and the UK have legislation that provides for a reduction in the refund amount to reflect the customer's usage of the vehicle;[17]
- the EU Directive on the Sale of Goods allows Member States the freedom to regulate the consequences of terminating contracts for the sale of goods and whether an allowance should be made to reflect the use of the goods by the consumer prior to termination.[18] As an example of how this 'freedom' has been taken up, Ireland is currently considering some new consumer law legislation.[19]
- in the US, consumer legislation regularly contains a formula (based on the age and mileage of the vehicle) which is used to calculate an offset from the amount that would otherwise be payable to the consumer;[20] and
- in Canada, there is a voluntary state-based arbitration system which has a 'vehicle buyback calculator', allowing a reduction for the use of the vehicle by the claimant and any accident damage to the vehicle.[21]

In addition, many countries limit the right of a consumer to receive compensation for a defective vehicle to a specific time period. For example, in the European Union the right to recover a remedy is limited to 2

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[16] FCAI Consumer Focus Groups, January 2022

[17] For the United States, see the Californian Civil Code, s 1793.2. For the United Kingdom, see *Consumer Rights Act 2015* (UK), s 24. (both extracted below.

[18] *Directive (EU) 2019/771/EEC* of 20 May 2019 on Sale of Goods, Recital (60).

[19] *Scheme of Consumer Rights Bill* 2021, head 28(2)

[20] For the United States, see for example the Californian Civil Code, s 1793.2(2)(C).

[21] See the Canadian Motor Vehicle Arbitration Plan 'Agreement for Arbitration Revised June 2021' pg. [22] – [26].

years[22]. The FCAI is of the view that from an international perspective, the Australian consumer protection laws are comparatively strong.

As to the appropriate formula to determine the value of the vehicle in the case of a major failure of the product some years after purchase, FCAI would suggest that the existing recognised valuation systems for used motor vehicles is the appropriate standard. These valuations adjust the price depending on a range of factors including the distance the vehicle has travelled. A further driver for the independent valuation approach is that the use of a formula approach may not fairly reflect the depreciation rates of all marques. Should the above independent valuation approach be accepted there is no need to consider different approaches for vehicles that may increase in value, should that occur. Having said that, in typical market situations it is very difficult to imagine a situation where a vehicle which has suffered a major defect, is nonetheless worth more than it was when it was purchased.

RIS Q6. Are there any other benefits associated with maintaining the status quo?

FCAI is of the view that the three options considered within the RIS are incomplete. The best result for the consumer and the supplier/manufacturer is to amend the ACL and include the specific provision for calculating the appropriate value of the product at the time of a major failure, at which point the consumer can choose the remedy (refund, or replacement). Once this is acknowledged, then option 1, the status quo, will be operating under a very different scenario to that of today, and one not anticipated when the RIS cost benefit analysis was conducted.

Additionally, it may be worth considering a floor value for the application of the market appraisal approach, although often the market will operate to implement this floor in practice without regulation.

RIS Q7. If the status quo was maintained, what other potential costs could there be to industry, consumers and businesses?

If the legislation is left as it currently is there is an ongoing significant cost to manufacturers in providing full refunds of which the cost must ultimately be passed onto consumers in the form of higher prices for new vehicles. Manufacturers and suppliers would be left to continually consider every claim in great detail to determine that there had been no major failure in line-ball situations given the implications of having to pay a full refund of the original purchase price.

By contrast, amending the status quo to include depreciation would provide significant benefits to all parties, through greater surety of outcome, increased cooperation and overall improved consumer outcomes that are not at the expense of consumers at large (which is the case under the current law and new vehicle replacements).

RIS Q8. What do you consider would be an appropriate maximum penalty for a supplier or manufacturer failing to provide a remedy for a failure to comply with a consumer guarantee when required under the ACL? Please detail reasons for your position.

This question assumes that a penalty should be levied against a supplier or manufacturer for failing to provide a remedy in compliance with a consumer guarantee. This assumption is incorrect. There is no reason for any penalty to be levied.

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[22] *Directive (EU) 2019/771/EEC* of 20 May 2019 on Sale of Goods, art 10. Note that each member state can extend this based on their own consumer legislation.

A fine (or penalty) is appropriate when there is a requirement for a deterrent and the impact of the breach is on the community (a good example of which is cartel conduct) or the damage suffered by the wronged person is not an adequate deterrent (e.g., an assault).

As an initial point, there is no evidence that there is any requirement or need for a deterrent as explained in the earlier sections of our response which demonstrates that the 'evidence' is unreliable and if anything suggests that the vast majority of consumer complaints are resolved. This is supported by the fact that, based on a limited survey of members, cases commenced in Tribunals and lower courts by consumers against suppliers or manufacturers in the new motor vehicle sector resulted in decisions in favour of the supplier/manufacturer in over 80% of instances. This data does not support the need to introduce a penalty regime to drive particular behaviours.

Second, in the case of a failure to comply with the consumer guarantee provisions of the ACL the breach affects one person – the vehicle owner – and the impact on that person can easily be quantified in dollars. Indeed, the provisions in the ACL spell out how this damage is to be quantified. The 'punishment' suffered by the non-complying manufacturer/supplier is to be required to pay to the owner the amount of their loss, as well as to suffer the risk of a substantial impact on its brand. Putting this another way, it is not possible to identifiably link the damage caused by the breach to the penalty. Given that the remedy under the ACL is to basically ensure the consumer is returned to the position they were in prior to the occurrence of the major failure, it is difficult to see the need for a penalty. In other words, the likelihood is that any penalty regime will be completely out of proportion to the potential impact of the breach.

Finally, the determination of what is a major failure for a sophisticated product such as a motor vehicle is complex, and the actions of consumers, suppliers and manufacturers (including aftermarket accessory fitters) results in a complex matrix of circumstances that do not lend themselves to a strict formula driven approach for a penalty.

Another aspect of the discussion on penalties is the potential for the ACCC to decide that a consumer is entitled to a remedy that has not been provided, and of its own accord issue a penalty notice. The ACCC has neither the technical, practical legal or market knowledge to warrant such an authority (we are not sure that in fact the ACCC have proposed this, however the RIS does). While it is true that there will, presumably, be an ability to appeal and contest the issuing of a penalty notice, this in itself costs a significant amount of money and the aim should be to ensure that if a penalty notice is to be issued, there are good grounds for doing so.

Clearly the above demonstrates that there is no capacity for a penalty regime to drive any behaviour that is not already driven by other more powerful drivers within the market.

> ***RIS Q9. What do you consider would be an appropriate infringement notice amount for an alleged contravention of a requirement to provide a remedy for a failure to comply with a consumer guarantee? Please detail reasons for your position.***

See above.

> ***RIS Q10. What would be the most effective way of implementing a civil prohibition for a failure to provide a consumer guarantee remedy? Should the circumstances in which a penalty applies be limited in any way?***

See above.

RIS Q13. Are there any unintended consequences, risks or challenges that need to be considered with creating such civil prohibitions?

Depending on how the legislative provisions were drafted, the follow-on provisions in s 137H of the CCA could be engaged. This would potentially encourage opportunistic class actions despite the consumer already having been compensated.

A further unintended consequence is the stifling effect a civil prohibition would have on the introduction of new technology, including evolving safety technologies. New motor vehicles are becoming more and more advanced as we progress to a market with a higher potential percentage of electric and automated vehicles. Manufacturers would need to carefully consider the release of these new technologies into Australia (particularly when the technology is safety related and could be seen to take control of the vehicle from the driver, which is not always anticipated) if there was to be a civil prohibition added to the existing ACL.

> *"We already struggle to get a lot of the cars from other markets into Australia. We don't have manufacturers over here, I feel like that would be a huge risk* [manufactures having to provide full refunds] *and would discourage car manufacturers from releasing newer models. We're looking at electric vehicles being released here in Australia, and I feel like it would be a* ***huge discouragement to manufacturers*** *to actually sell newer models in Australia, and* ***then we miss out.****"*[23]

Finally, it is worth noting that any further compliance burdens do not come at zero cost. Those costs are passed onto consumers.

RIS Q14. Do you think introducing a civil prohibition would deter businesses from failing to provide the applicable consumer guarantee remedy to consumers who are entitled to one?

There are already significant incentives to provide a remedy for a consumer in the case of a failure to meet the consumer guarantees. A penalty regime does not add to the ability to determine the existence of a need to provide a consumer guarantee remedy. However, a penalty regime will drive a manufacturer to consider not only the legitimacy of the consumer law claims, but also to consider the cost of defending the issue of a penalty notice by an external party who would lack the capacity to understand the root cause of a particular issue and comprehend whether or not it is covered by the consumer guarantees. This added consideration could lead to a commercial decision to provide a remedy where none was justified and increases costs to all consumers.

RIS Q15. Please provide any relevant information or data on whether non-compliance with the consumer guarantees is a significant problem in the new motor vehicle sector compared to other sectors?

For the reasons expressed above, there is no significant problem in the new motor vehicle with non-compliance with consumer guarantees. FCAI has no data on other sectors.

PART B: Supplier indemnification

RIS Q26. How (if at all) would a civil prohibition change your response to requests for indemnification?

It would make no difference.

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[23] FCAI Consumer Focus Groups, January 2022

It is important to understand that all members have a 'warranty' regime pursuant to which they agree to reimburse their dealers for claims made by the dealers for work done on consumers' vehicles under the factory warranty. Under this regime, dealers are reimbursed quickly and as a matter of course, provided the dealer complied with certain requirements. Some of these 'warranty' claims could equally be claims under the consumer guarantees, entitling the dealer to reimbursement. In theory, an alternative regime could be established to deal with these claims, but the members would have to satisfy themselves that the claims are justified. This would take time and cost money.

RIS Q28. Have you experienced retribution from a manufacturer after seeking indemnification? If so, please provide details.

FCAI is not aware of such claims by dealers.

RIS Q30. Would your approach to providing consumer guarantees remedies to consumers change if a civil prohibition on retribution was introduced? If so, how?

The context of this question is such that the decision on whether or not a consumer was entitled to a remedy at the expense of the manufacturer would belong with the supplier (in the case of new motor vehicles). It is entirely inappropriate that such a situation would exist, particularly in the case of high value products such as new motor vehicles. The manufacturer must be able to attempt a diagnosis and evaluation of the situation. Currently dealers have the capacity to adjudicate consumer claims (often together with the manufacturer in the case of claims for refunds) and this is subject to reconciliation at regular intervals with the manufacturer.

While some dealers have and will continue to make claims that the process to claim back costs involved are time consuming and complex (which is a direct consequence of the complexity of the product and no lack of trying on the part of manufacturers) this is not a fundamental issue with the ACL, but a commercial consideration for the dealer and the respective manufacturer.

Note that the above comments are made from the perspective of the traditional dealership model. Under alternate models the question of indemnification would need to be considered in a different light given that the manufacturer, in most cases, is also the supplier.

RIS Q31. How (if at all) would a civil prohibition on retribution change your response to requests for indemnification?

Suppliers are appropriately indemnified by manufacturers under the current arrangements. A civil prohibition, as described in the RIS, seeks to make it compulsory for manufacturers to indemnify suppliers "when requested". This suggestion seeks to allow the supplier all rights to determine a remedy under the ACL using the manufacturers' resources without regard to the validity of the claim. There are major incentives for a supplier to agree to any request by a consumer if there is no risk to their own revenue. This is further addressed in the economic analysis attached to this paper including a section considering the principal/agent relationship and also the issue of "free rider" theory.

FCAI is not aware of any instances where there has been a claim of retribution.

RIS Q32. If a civil prohibition was created to address manufacturer retribution:

a. **what form should it take? (e.g., effective models in other laws)**

There should not be a civil prohibition.

b. **should presumptive tests apply? If so, what presumptions should be included?**

It is grossly unfair and inappropriate to make presumptions in such technical and potentially expensive situations.

If there is to be any presumption, it cannot be against the manufacturer. This is because the supplier (the dealer) has an incentive to make exaggerated claims and the manufacturer has no ability to influence this – they are a passive recipient of the claim. There needs to be an incentive on the supplier to make valid claims. This can be achieved by the following: if the manufacturer rejects a claim on grounds that are not spurious then there is a presumption acting against the supplier that the claim is not valid.

RIS Q33. What penalties or sanctions should be available to deter or compensate for retribution?

Given the lack of evidence of any retribution in the new motor vehicle sector we are not in a position to judge appropriate penalties or sanctions.

If you have any questions or would like further information in respect of the above, please contact me on 0400 012 810 or Tony McDonald, Director Industry Operations, on 0410 451 342.

Yours faithfully

Tony Weber
Chief Executive