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Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law

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Key points

- With the vast majority of manufacturers providing at least five-year warranties there are five million plus vehicles per year covered by warranties and consumer guarantee provisions.
- Receiving remedies Option 3 is supported provided there is recognition of the complexity of issues that can come with motor vehicle warranty/consumer guarantee consumer claims.
- None of the canvassed consumer guarantee options are going to 'wave away' the complexity often associated with investigating consumer complaints, nor address unreasonable and unrealised consumer expectations.
- The ACL reforms should include provision for access to independent expert technical advice.

- Consumer guarantee arrangements should include provisions to better determine a fair and equitable remedy where a major fault is determined in a motor vehicle. The current refund or replacement provisions are inequitable in many circumstances.
- The current financial ceiling for consumer guarantee claims (currently \$100,000) is not adequate for motor vehicles.
- The primary responsibility for responding to major and other significant failure complaints in the motor vehicle industry that present to tribunals should be shared by manufacturers.
- Decisions around remedies and supplier indemnification should be made by tribunals concurrently.
- The current ACL provisions are no longer fit-for-purpose and a comprehensive review is required to develop provisions that better and more equitably address the needs and obligations of consumers, dealers and manufacturers.

Introduction

The Motor Trades Association of Queensland (MTA Queensland) welcomes the opportunity to provide advice on the proposals to enhance consumer protections and supplier indemnification under the Australian Consumer Law. As the consultation paper notes, motor vehicles comprise around a quarter of the consumer guarantee complaints to the Australian Competition and Consumer Commission (ACCC).

It is understandable that motor vehicles represent a significant proportion of the consumer guarantee and warranty complaints to regulators. They are high value goods of increasing complexity and innovation that are vital to most users' everyday activities.

The extension, in recent years, of new vehicle warranty periods has provided increased opportunities for consumers to raise issues of concern with their vehicles. It is worth noting that around one million new motor vehicles are sold in Australia each year. Most of these vehicles come with a three to five-year warranty, at least. The days of twelve-month warranties for new vehicles are 'long gone'.

The level of motor vehicle consumer guarantee and warranty complaints, significant or otherwise, is also a product of the structure and relationships in the industry. A raft of recent reports has highlighted the power imbalance between manufacturers and new motor vehicle dealers in Australia and the need for regulatory measures to address this imbalance. Recent regulatory measures to address the power imbalance in dealer franchise agreements and improve access to service and repair information, for example, highlight the need for appropriate regulation to address fundamental concerns about the structure and functioning of the industry.

The ACCC in a submission to a 2020 regulation impact statement commented:

The ACCC considers that mandatory solutions are required to overcome entrenched conduct in the new car retailing industry. A voluntary code is unlikely to resolve issues when there is a significant imbalance in power between parties.

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The regulatory proposals to enhance the supplier indemnification for the industry respond to this power imbalance. However, given the significance of the new motor vehicle industry nationally: its size, structure, relationships, product complexity and impact on consumers, there is a need for the implementation of proposals in the consultation paper (if adopted) to be better tailored to the needs of the industry.

MTA Queensland believes the ACL and its consumer guarantee provisions are no longer fit-for-purpose in relation to the new motor vehicle industry and that a more fundamental consideration of its suitability be undertaken in consultation with the industry and other key stakeholders.

PART A Receiving remedies

It is clear from the consultation paper, as well as other recent reports, that consumer guarantee issues relating to motor vehicles are prominent among complaints to regulators. As noted above, this is to be expected given the high value and complexity of modern motor vehicles and their importance to consumers.

Advice from MTA Queensland motor dealer members indicates the level of consumer complaints has grown with the extension of warranties beyond three years offered by almost all the major vehicle manufacturers. It is worth noting there were more than one million new passenger and light commercial vehicle sales in 2021 despite the supply difficulties posed by COVID-19. With the vast majority of manufacturers providing at least five-year warranties there are five million plus vehicles per year covered by warranties and consumer guarantee provisions.

The ACCC receives some 10,000 complaints relating to motor vehicles per annum with the consultation paper indicating a significant number of complaints are also lodged with other tribunals and agencies. The vast majority of these complaints, of course, are resolved without recourse to tribunals and other legal action by consumers. It is important, then, that perspective is maintained in assessing level of unresolved consumer complaints related to the motor vehicle industry.

The options

Nonetheless, the shortcomings of the ACL in not providing effective remedies where clear breaches of the consumer guarantee provisions are identified and not resolved appropriately should be addressed. There needs to be a more effective and efficient mechanism to deal with complaints than the costly, time consuming route of legal action by consumers to resolve protracted disputes. Option 1 - status quo, will not address this shortcoming in the ACL.

While the consultation paper indicates there would be a positive benefit/cost ratio related to Option 2 - an education and guidance campaign, the total benefits are relatively modest and would seem to be 'fiddling at the margins' based on previous campaigns cited in the consultation paper. Motor vehicle dealerships are also well versed in the consumer guarantee provisions. The value of an education campaign would be in accompanying significant regulatory reforms.

The implementation of Option 3 would address the shortcomings of existing ACL provisions that provide no real disincentive to simply ignore consumer guarantee complaints, for example. Of course,

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incentivising suppliers to respond to consumer guarantee complaints does not mean consumers will always receive the remedy they seek or in the timeframe they would wish.

Advice from members indicates significant time and resources involved in responding to consumer guarantee/warranty claims revolves around determining the nature of and responsibility for major and other significant failures and dealing with consumers who believe every fault or failure is covered by the manufacturer's warranty. None of the canvassed consumer guarantee options are going to 'wave away' the complexity often (necessarily) associated with investigating consumer complaints, nor address unreasonable and unrealised consumer expectations.

Implementing Option 3, supported by penalties and other enforcement mechanisms, would need to be undertaken with recognition of the complexity of issues that can come with motor vehicle warranty/consumer guarantee consumer claims. The thresholds for the use of Option 3 and the associated penalties and other enforcement mechanisms would need to be very clearly established, particularly in the motor vehicle industry where consumer claims can amount to tens of thousands of dollars and the financial, reputational and other 'costs' of a flawed decision by a regulator could be crippling, especially for a small dealership.

In relation to penalties and infringement notices they should, in the early stages of any implementation of Option 3, be graduated to enable an assessment of the reforms, noting MTA Queensland's concern about the costs of flawed decisions by regulators. In any event, they should not exceed the existing penalties for the related offences cited in the consultation paper.

Independent expertise

Given this concern and the complexity that can accompany motor vehicle warranty/consumer guarantee claims and the 'angst' often associated with determining faults, the reforms should include provision for access to independent expert advice at an early stage. This independent advice would not only assist in determining/confirming the nature and extent of faults but accelerate claims processing, particularly at a time when there are chronic skill shortages and limited time available for dealers to undertake diagnostic assessments. While MTA Queensland understands the Queensland Civil and Administrative Tribunal (QCAT) accesses this expertise, it should be required of all tribunals considering significant consumer guarantee matters relating to motor vehicles. Responsibility for the costs of accessing this expertise should reflect the responsibility for identified faults.

Ensuring appropriate remedies

Under the current provisions of the consumer guarantee, where a major fault is determined, the customer is entitled to a refund or replacement product. While this may be appropriate for a small appliance or one of limited financial value, it is not appropriate for a high-cost motor vehicle. As the consultation paper highlights and confirmed by MTA Queensland motor vehicle dealer members, consumers can operate a motor vehicle satisfactorily for a number of years and then under the current consumer guarantee provisions seek a replacement or refund of the purchase price when a major fault arises.

For example, a recent decision by the QCAT consistent with the ACL, required an MTA Queensland member to refund the purchase price of a vehicle that was 2.5 years old and had travelled some 90,000

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kilometres. A loan vehicle was provided during the cumulative 16 weeks the vehicle was off the road for repairs to address a significant fault that constituted a major fault under the consumer guarantee provisions of the ACL.

This is inequitable and inappropriate. The financial cost to the dealer will be very significant. With the extension of motor vehicle warranties this problem will only grow over time. Unfortunately, these arrangements also contribute to the consumer gaming concern raised in the consultation paper.

To address this concern, there needs to be some guidance provided in the ACL in determining a fair and equitable remedy where a major fault is determined in a motor vehicle. A schedule that takes into consideration the age and kilometres travelled by the vehicle, or some other market value determination, should be included in the ACL consumer guarantee legislative provisions to provide guidance to tribunals. Retaining the repair option for major faults also needs to be considered. Tribunals should, of course, also be able to take into consideration other factors and costs in determining remedies.

Setting an appropriate motor vehicle value threshold

A key benefit of the ACL and the arrangements for determining consumer guarantee claims is the avoidance of more costly and formal legal actions through the courts to settle matters relating to goods and services used on a day-to-basis by consumers. For this reason, the financial ceiling for claims (currently \$100,000) is more than appropriate for most products and services.

However, as motor vehicles become more complex and expensive, this ceiling will become a barrier to consumers and dealers having claims settled through this mechanism. This will lead to increased costs and delays for consumers and motor vehicle dealers. As with other aspects of the ACL, the ceiling needs to be reconsidered in respect to motor vehicles.

Part B Supplier Indemnification

The franchise agreements that dominate the new motor vehicle dealer network in Australia mean that warranty claim processes are largely 'controlled' by the manufacturers as it is they, after all, that provide these warranties. While there are variations, the manufacturers set the processes for warranty claims with significant claims being referred to them for approval before remedy options are considered. This is appropriate given major failures are most likely to involve considerable technical assessment, to be the responsibility of manufacturers and come with significant costs to remedy.

The current ACL framework that has suppliers bearing the primary responsibility for responding to consumer guarantee complaints with a separate supplier indemnification process is not appropriate for the motor vehicle industry. It may be appropriate for smaller value consumer items but not for complex, high-value motor vehicles. A dealer can't simply replace an expensive vehicle or authorise other expensive remedies, incur the relevant costs and expect the manufacturer to provide reimbursement without question. The manufacturers need to be more fully engaged given they make the decisions about what is covered by warranties, not the dealers.

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The options

For motor vehicle major failures under the consumer guarantee provisions of the ACL, the distinction between suppliers and manufacturers should be replaced with arrangements that better reflect the structure and other features of the industry and its products. The options, as canvassed in the consultation paper, are not adequate.

The primary responsibility for responding to major and other significant failure complaints in the motor vehicle industry that present to tribunals should be shared by manufacturers. The current processes for warranty claims recognise the role of manufacturers in assessing significant consumer complaints. The separate supplier indemnification arrangements and options canvassed in the consultation paper are less likely to be effective in the motor vehicle industry.

As numerous reports have highlighted, motor vehicle dealers are reluctant to raise significant franchise agreement concerns with their manufacturers. They will be equally (or more) reluctant to lodge claims with regulators for the reimbursement of costs associated with addressing consumer guarantee complaints that could also see financial penalties or other enforcement action taken against their franchisor. They mostly will 'wear the costs' regardless of any reforms canvassed in the consultation paper.

Dealers have the important responsibility to respond to initial consumer guarantee and warranty complaints and, based on MTA Queensland member feedback, devote significant time and resources to ensuring their customers receive appropriate outcomes. Many often go 'above and beyond', agreeing to claims on a goodwill basis. They should, of course, be held accountable for not responding in a timely or appropriate manner to consumer guarantee complaints. They should also be held accountable for their actions or omissions that may have contributed to or led to a failure, major or otherwise.

For the motor vehicle industry, the consumer guarantee complaints that present to a tribunal should be responded to by dealers and manufacturers whether they be major faults or otherwise. Decisions around remedies and supplier indemnification should be made by tribunals concurrently with the apportionment of responsibility and costs of remedies, indemnification and any enforcement actions determined on the circumstances of the particular complaint.

This should not only lead to a more streamlined process but overcome the 'reality' that motor dealers will be very reluctant to separately seek reimbursement through a tribunal despite implementation of Options 3 and 4 canvassed in the consultation paper. The likelihood of appearing before a tribunal with the prospect of an adverse judgement, penalty and public disclosure may incentivise some manufacturers to recalibrate their approach to consumer guarantee and warranty matters.

Review the consumer guarantee provisions

Given the above issues that relate specifically to the motor vehicle industry, MTA Queensland believes the current ACL provisions are no longer fit-for-purpose and that a separate review is required to develop provisions that recognise the significant features of the motor vehicle industry and its relationships with consumers. Just as dedicated franchising code arrangements have been developed for the industry, so

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too there is a need for dedicated consumer guarantee provisions of the ACL, in particular, that better and more equitably address the needs and obligations of consumers, dealer and manufacturers.

As with the establishment of the Australian Automotive Service and Repair Authority to implement reforms that will better meet the needs of consumers and repairers, the industry will 'step up' and play its part in working with government and regulators to develop these provisions.

Yours sincerely



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*****ENDS*****

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Background:

The Motor Trades Association of Queensland (**MTA Queensland**) is the peak body representing the interests of employers in the retail, repair, and service sectors of Queensland's automotive industry. MTA Queensland has been performing its vital representative role for the automotive industry since 1929. In Queensland there are some 16,000 automotive businesses employing more than 90,000 people, that generate more than \$7.24 billion to the state economy annually. The automotive industry is estimated to contribute \$37 billion to the Australian economy each year. The Association represents and promotes issues of relevance to all levels of government. In 2019 MTA Queensland was announced as an ABA100 winner in The Australian Business Awards and a finalist in the Lord Mayor's Business Awards, for Business Innovation.

The **MTA Institute (RTO 31529)** is the leading automotive training provider in Queensland offering nationally recognized training, covering technical, retail and the aftermarket sectors of the automotive industry. The MTA Institute is the largest independent automotive training provider in Queensland, employing experienced trainers who are geographically dispersed from Cairns to the Gold Coast and Toowoomba to Emerald. In the last year, the MTA Institute delivered accredited courses to more than 2,000 students. The MTA Institute is the first trade RTO in Australia to be approved under the ITECA Industry Certification Program and was the winner of the Small Training Provider of the Year at the 2019 Queensland Training Awards.

MTAiQ, Australia's first automotive innovation hub established by MTA Queensland in 2017, is an eco-system that supports innovation and research for the motor trades.

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