



**FEDERAL CHAMBER
OF AUTOMOTIVE
INDUSTRIES**

ABN 53 008 550 347

27 May 2016

Garry Clements
Chair, Consumer Affairs Australia and New Zealand
The Treasury
Langton Crescent
PARKES ACT 2600

LEVEL 1
59 WENTWORTH AVENUE
KINGSTON ACT 2604
AUSTRALIA
PHONE: 02 6247 3811
FAX: 02 6248 7673

Dear Mr Clements

The Federal Chamber of Automotive Industries is the peak industry body representing Australian manufacturers and importers of new passenger motor vehicles, light commercials and motor cycles. The membership of the FCAI is indicated on the FCAI website at www.fc.ai.com.au and these members represent well over 95% of sales of new motor vehicles and motor cycles sold in Australia.

We have attached for your consideration a submission to the 2016 Australian Consumer Law Review Issues Paper. The submission focuses upon those areas of the ACL which are of particular importance to the motor vehicle industry. We would be delighted to meet with the review team to expand on the attached or to discuss other issues of interest in the Review.

Yours sincerely

Tony Weber
Chief Executive

Submission to the Australian Consumer Law Review

27 May 2016



**Federal Chamber of Automotive
Industries**
Level 1, 59 Wentworth Avenue
KINGSTON ACT 2604
Phone: +61 2 6247 3811

Contact:
Mr Tony Weber
Chief Executive

SUMMARY OF SUBMISSION

1. Definition of 'Consumer'

The intended purpose of a motor vehicle should be taken into account when determining whether the person acquiring that vehicle is a 'consumer'.

2. Component pricing

Having to include statutory on-road costs when advertising the price of a vehicle is unnecessary and potentially misleading.

3. Safety-related defects

The existing regime relating to the recalling of vehicles with safety-related defects is working effectively.

It should be made clear that because a safety related recall has been implemented this does not, of itself, mean that the vehicle is 'unsafe' for the purposes of the consumer guarantees.

4. 'Lemon Laws'

There is no justifiable reason to implement 'lemon laws'.

5. 'Major failure'

The definition of 'major failure' should be clarified so that it only relates to failures which are 'major' or 'significant'.

If a vehicle is returned, an appropriate allowance should be made to take into account the consumer's use of the vehicle.

The limitation on a consumer not being able to return a damaged vehicle should be clarified to include rectification work necessary to remove accessories fitted by the consumer.

6. 'Reasonable' time to repair a breach

When determining what is a 'reasonable time' to repair a vehicle, it should be recognised that vehicles are complex piece of machinery and provided the customer does not suffer any loss as a result of his/her vehicle being off the road, the customer should not be entitled to reject their vehicle.

7. Parallel imports

If parallel imports are to be allowed, or in the case of vehicles and motor cycles imported under other concessional schemes, it should be made abundantly clear to subsequent purchasers that the authorised Australian distributors and their local networks are not responsible for any repairs or recalls.

8. Unconscionable conduct

Motor vehicle dealers do not need any additional protections in their dealings with distributors.

9. Small business unfair contracts

The small business unfair contracts amendments raise some specific concerns for the automotive industry, especially relating to the definition of "upfront price".

10. Access to Information

Independent repairers have access to service and repair information to ensure that consumer rights are protected and that systemic issues do not preclude a choice of repairer.

1. INTRODUCTION

1.1. The FCAI

This submission is made by the Federal Chamber of Automotive Industries (FCAI) on its own behalf and on behalf of all of its members. The FCAI is the peak industry body representing the automotive industry in Australia. The FCAI's membership comprises the three Australian passenger motor vehicle manufacturers and all of the major international brands which import and market passenger, light commercial and four wheel drive vehicles and motor cycles in Australia. For the purposes of this submission, they are referred to as 'distributors'.

This submission addressed those aspects of the ACL¹ which are of particular importance to the Australian automotive industry. If aspects of the ACL are not commented on, it does not necessarily mean that the FCAI is in favour of them.

1.2. The Australian automotive industry is a significant contributor

The Australia automotive industry makes a substantial contribution to the Australian economy. In 2015, 1.15 million new vehicles were sold in Australia representing more than \$20 billion in value. This generated \$6.5 billion in tax revenue. The industry employs more than 300,000 people and involves almost 50,000 businesses.

1.3. The industry in Australia is extremely competitive

There are approximately 65 brands sold in the Australian market representing approximately 17,700 new vehicles sold per brand. In the USA for example, this figure is approximately 255,000 new vehicles sold per brand².

The extremely competitive nature of the retail Australian automotive market is a theme we will come back to in this submission.

1.4. The ACL is of particular importance to the automotive industry

The ACL is an extensive piece of legislation which has permeated all facets of commerce in Australia. It is however, of particular relevance to the automotive industry.

This is in part because of the consumer focussed nature of the industry. It is also because the ACCC has, on a number of occasions, made the point that the purchase of a motor vehicle is invariably the most, or second most, expensive acquisition a person will make in their lifetime and accordingly the automotive industry will be a focus for the ACCC. The FCAI does not take exception to this, but rather simply makes the point that the ACL is of particular importance to the automotive industry.

¹ We have used the same abbreviations as referred to on page 3 of the ACL Review Issues Paper

² Approximately 51 brands competing for about 13 million new vehicle sales per year

1.5. Changing consumer behaviour

The automotive industry, along with many other retail exposed industries, is undergoing significant change driven predominantly by technology. Potential consumers are able to access a vast array of information about a vehicle they might be considering buying, well before making contact with a dealer. They are able to access detailed independent reviews as well as information and feedback on vehicles and any potential problems through any number of specialist forums. Not only can a potential customer access this information, the likelihood of them doing so is high, given the relative cost of a motor vehicle.

The increasingly informed consumer will be another theme we will return to this submission.

The methods of selling vehicles are also changing, albeit not necessarily at the same rate as in some other retail industries. Geographic proximity is becoming less important and there have been some tentative steps towards selling motor vehicles online. This is likely to increase as consumers become more comfortable with buying goods online.

The ACL will need to be sufficiently flexible to take into account these changes, which is likely to be a challenge.

2. THE CONSUMER

We agree with the overarching objective of Australia's national consumer policy framework being:

'To improve consumer well-being through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly'.

This overarching objective is reflected in the focus of the ACL on 'consumers'. A 'consumer' is someone who has acquired goods which are less than the threshold (currently \$40,000) or which are *'ordinarily acquired for personal, domestic or household use or consumption'*.

The way in which *'ordinarily acquired for personal, domestic or household use or consumption'* has been interpreted is problematic for the automotive industry. This is because the phrase has been taken to include all passenger vehicles even though, in a number of instances the motor vehicles are clearly not acquired for personal, domestic or household use or consumption. Examples of this include vehicles to be used as taxis and light commercial type vehicles. These vehicles have not been acquired by 'consumers' and, consistent with the overarching objective of the ACL, they should not be provided with the same level of protection.

In our view the ACL should be amended to make it clear that the intended purpose of a motor vehicle should be able to be taken into account when determining whether the person acquiring that vehicle is a 'consumer'.

3. COMPONENT PRICING

The FCAI agrees with the general concept of 'truth in advertising', especially in relation to prices. However, there are specific challenges which face the automotive industry and which should be taken into account. These challenges relate to 'on-road costs'.

On-road costs include mandatory statutory charges (such as third-party insurance) and usually a dealer delivery fee. We accept that the dealer delivery fee is within the control of dealers. Statutory charges however, are not. They are mandated by state governments and vary not only between states but also, in a number of instances, within states. They are not retained by the dealer but go directly to the relevant authorities. The existence of these charges is well known to all consumers and having to incorporate them into an advertised price is unnecessary, unwieldy and ultimately potentially misleading as the figure will not be accurate for all consumers.

PRODUCT RELATED ISSUES

4.1. General

As mentioned above, the Australian automotive industry is extremely competitive and potential purchasers of motor vehicles are increasingly very well-informed.

In this environment, brand value and reputation is critically important. 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, 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.

For these reasons the FCAI is of the view that, a 'light tough' approach will increasingly be appropriate when dealing with possible defects in motor vehicles. In this context the FCAI agrees with the view expressed on page 4 of the Issues Paper:

'The consumer policy framework must appropriately balance addressing consumer harm in a meaningful way, while not imposing unnecessary compliance burdens on business or stifling effective competition and market innovation.'

4.2. Safety-related defects

The one possible exception to adopting a 'light-touch' is in relation to safety-related defects. The FCAI accepts that when dealing with defects that could have an impact on people's safety, it is not enough to just rely on a future market response as a deterrent.

For more than 20 years, recalls of vehicles with safety-related defects have been governed by a voluntary Code of Practice³, to which all of the FCAI members and some non-members comply. This Code is an adjunct to the provisions in the ACL dealing with safety-related recalls. Notwithstanding that the underpinning legislative basis for the safety-related recalls is the ACL, automotive safety recalls have been supervised largely by the Commonwealth Department of Infrastructure and Regional Development. This has worked very well and we suggest that it should continue. If any other enforcement body was to try and play a significant role in safety-related recalls, there would be unnecessary duplication and confusion.

There is one aspect of safety-related recall that should be clarified. The current regime is dependent on distributors voluntarily deciding that there is (or might be) a safety issue in their vehicles which requires a recall. Distributors invariably, and rightly, adopt a very conservative approach when determining whether or not there is a safety-related defect. That is, if there is any doubt at all, the distributors will invariably decide that the defect is safety-related.

³ the Code of Practice for the Conduct of an Automotive Safety-Related Recall Campaign

The bias towards protecting consumers is as it should be but it does expose distributors to a possible breach of the consumer guarantees - in particular, the consumer guarantee referring to acceptable quality and whether there has been a 'major failure' (both of which have as one of the determinants whether the products are 'safe').

The general view has been that when a factory decides to implement a safety related recall, it does not necessarily mean that the vehicle is not 'safe' for the purposes of the consumer guarantees. However, this is by no means clear. Factories should be encouraged, rather than discouraged, to always act in the interests of consumer safety, even though the risk to consumers might be very slight. The FCAI suggests that the ACL be clarified so that it is beyond doubt that a safety-related recall does not of itself mean that the vehicle is unsafe for the purposes of the consumer guarantees.

4.3. 'Lemon Laws'

4.3.1. Summary

Over the last few years there has been some discussion about whether or not 'lemon laws' should be introduced into Australia. The FCAI is strongly of the view that they should not, for the following reasons:

- the current legislative regime is more than adequate to address issues to do with defects in vehicles generally and the insignificant number of 'lemons' specifically;
- the number of new vehicles being sold in Australia that could be categorised as 'lemons' are insignificant;
- the competitive nature of the new vehicle market will ensure that defects in vehicles are kept to a minimum and customer's concerns are properly dealt with; and
- the experience with lemon laws in other jurisdictions has been inconclusive at best.

Each of these matters is addressed in more detail below.

4.3.2. The current legislative regime is more than adequate

As stated in the CCAAC Report:

'Even the most enthusiastic supporters of lemon laws acknowledge that the current laws in respect of implied terms cover the supply to consumers of motor vehicle lemons'.

Since 2011, the ACL, through its consumer guarantee provisions, has provided a comprehensive regime for consumers to seek redress for alleged defects in vehicles from manufacturers, importers and retailers. The ACL is, in effect a 'lemon law'.

The FCAI agrees with the departmental information brief prepared for the Legal Affairs and Community Safety Committee of the Queensland Parliament last year:

'The ACL applies to the purchase of new vehicles since 1 January 2011. It is arguable the Statutory Consumer Guarantees, in effect provide lemon laws for new vehicles.

Although the ACL protections do not prescribe the number of attempts to repair a vehicle or define a repair period, the ACL provides broad and general protections where a vehicle cannot, easily and within a reasonable time, be remedied to make it fit for purpose. Where a Court finds that there has been a major failure, the consumer is able to obtain a refund or replacement.’

The FCAI agrees, with one exception. It is not ‘arguable’ that the Statutory Consumer Guarantees provide lemon laws for new vehicles, it is clearly the case.

In addition to the robust statutory rights available, a motor vehicle purchaser also has recourse to manufacturers’ express warranties. These warranties are comprehensive and cover the vehicle for 3 and sometimes 7 years.

4.3.3. The number of ‘lemons’ sold in Australia is insignificant

Even if you accept that the ACL is not, in effect a ‘lemon law’ (and to reiterate, we believe it is) there are likely to be such a small number of ‘lemons’ in Australia that there is no justification for any further amendments.

As far as the FCAI is aware, there are no meaningful statistics on the potential number of ‘lemons’⁴ sold in Australia. However, in a number of other jurisdictions some useful analysis has been done which demonstrates that the number is likely to be insignificant. This includes the following:

- In the report of the Commonwealth Consumer Affairs Advisory Council in October 2009 on ‘Consumer Rights – Reforming Statutory Implied Conditions and Warranties’ (CCAAC Report) it is noted that:

‘Submissions from the motor vehicle industry suggest that the number of new vehicles sold in Australia which might be called lemons has declined significantly since that time. As the Motor Trades Association of Australia (MTAA) notes,

‘Approximately 1,000,000 new motor vehicles are sold in Australia every year. Of those, approximately one third are sold in New South Wales: a jurisdiction that, through the operation of its Consumer Trader and Tenancy Tribunal (CTTT), is able to make a determination on a vehicle in terms of its being of ‘merchantable quality’ or as being ‘fit for purpose’ ...

In the period from 2004/2005 to 2007/2008, some 410 applications were made to the CTTT with respect to seeking a determination as to the ‘merchantable quality / fit for purpose’ nature of new motor vehicles sold in NSW ... Of that 410, only three vehicles — or 0.0003 per cent of all vehicles sold in that period — were deemed by the CTTT to not be of merchantable quality.’

⁴ The FCAI notes the definition of a ‘lemon’ as referred to in the Enquiry conducted by the Legal Affairs and Community Safety Committee of the Queensland Parliament last year: ‘a new motor vehicle with numerous severe defects that reoccur despite multiple repair attempts or where defects have caused a new motor vehicle to be out of service for a prolonged period of time’. FCAI is of the view that this should be further clarified to ensure that the multiple repair attempts are made by suitably qualified persons. This amended definition is a more appropriate definition than the CCAAC approach referenced at Page 24 of the April 2016 Australian Consumer Law Review Issues Paper.

Of course, these figures may not definitively represent the incidence of the supply of lemon vehicles in NSW. Not every consumer who is of the opinion that they have a lemon will go to the CTTT, and any number of lemon claims may be settled to the consumer's satisfaction before they reach any tribunal. However, the fact that such a small number of vehicles are ultimately the subject of a finding of unmerchantable quality by a tribunal indicates both that the number of lemons supplied to consumers is small, and that the law is operating effectively by providing appropriate incentives for retailers and manufacturers to address consumer concerns in relation to faulty motor vehicles.

- In Canada there is a national dispute resolution program for disputes with vehicle manufacturers called the Canadian Motor Vehicle Arbitration Plan (CAMVAP). In 2014 the CAMVAP statistics revealed that out of 5,130 initial enquiries, 858 applications were sent to eligible consumers, 357 applications were returned and 222 cases were arbitrated, conciliated or a consent award issued⁵.

Assuming that the number of returned applications (357) is a reasonable reflection of the number of consumers who felt that their vehicle was defective, this represents approximately 0.02% of the vehicles sold during that time⁶.

- In New Zealand there is a Specialist Motor Vehicle Disputes Tribunal (MVDT). For the period 1 July 2014 to 30 June 2015, 258 applications were filed with the MVDT and 154 were heard by the MVDT (which includes some carried over from 2013/2014). Assuming the 258 applications all related to alleged defects in motor vehicles, this represents approximately 0.1% of the number of new and ex-overseas vehicles sold in New Zealand in this period⁷.

The figures referred to for Canada and New Zealand are likely to very significantly overstate the potential number of lemons sold in those countries. Merely because a claim was made does not mean it was substantiated and, if it was, it does not mean that the vehicle in question was a lemon.

As stated in the CCAAC Report:

'There is little empirical evidence to suggest that 'lemons' are a common feature of the market for motor vehicles or any other market in Australia'

4.3.4. The competitive nature of the motor vehicle market in Australia

As mentioned previously, the Australian automotive industry is extremely competitive.

Motor vehicle manufacturers spend many millions of dollars (globally many hundreds of millions of dollars) creating and building their brand. The manufacturers, distributors and their dealers are acutely aware that their brand can be damaged by defective or unreliable vehicles and by poor, unresponsive after-sales service.

⁵ CAMVAP, 2014 Annual Report available at: <http://www.camvap.ca/annual-reports/2014-annual-report/>

⁶ Based on a new vehicle sales of 1.7 million

⁷ Approximately 200,000 New Zealand Motor Vehicle Registration Statistics, New Zealand Transport Agency

Consequently, manufacturers spend substantial amounts of money ensuring that their new motor vehicles are as reliable as possible. They also spend significant amounts of money on after sales service and on trying to satisfy those few customers who are not happy with their purchase.

It is in the commercial interests of the manufacturers, importers and dealers for the customers to be satisfied. The introduction of another layer of legislation will not alter this fact.

4.3.5. The overseas experience is inconclusive at best

Often, much is made of various lemon laws in the USA. There were enacted in the late 1950's, largely because, at that time, consumers were offered little protection by way of legislation or manufacturers' express warranties.

It is however, by no means clear that motor vehicle customers have obtained any significant increase in protection by virtue of the lemon laws in the various states across the USA. In this respect, the Issues Paper prepared by Consumer Affairs Victoria on lemon laws concluded that *'there is no conclusive evidence about what has driven [the improvement in the quality of motor vehicles in the US since lemon laws were introduced]'*. The Report further stated that *'there does not appear to be any conclusive qualitative studies'* and accordingly that *'it is difficult to say exactly what impact the introduction of lemon laws had in changing the behaviour of the industry in dealing with customer complaints'*.

4.4 Consumer Guarantees

The provisions dealing with the consumer guarantees have only relatively recently been introduced but there are 3 issues which are problematic.

4.4.1. 'Major Failure'

4.4.1.1 Clarify what is meant by 'major'

The consequences of a breach of a consumer guarantee being a 'major failure' are significant. In particular, the consumer may terminate the contract and obtain a refund. Indeed, this seems to have been recognised in the use of the word 'major'. The problem is however in the definition. Section 260 of the ACL defines a major failure by means of 5 alternatives. Four of these alternatives ((b)-(e)) are acceptable: they use words such as; 'significant', 'substantially unfit', 'cannot easily be remedied', all relative and consistent with a failure being 'major' (as opposed to 'minor'). Subclause (a) however, is different. It provides that a major failure is if:

'The goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure'.

Motor vehicles are complex pieces of machinery and it is not unreasonable to expect that in their early life, there might be some issues that need to be rectified. It is well known in the Australian community that all vehicle manufacturers voluntarily offer a warranty in addition to the statutory guarantees, so a reasonable consumer would expect that manufacturing defects may arise from time to time and that the manufacturer will rectify those defects within the warranty period at no cost to the consumer. It would be unreasonable for a consumer to think that a vehicle will always be defect-free such that minor defects should

be expressly excluded from subclause 260(a) of the ACL. By way of example, if there was a vehicle which had a small easily rectified defect (say a small dent in the bumper bar) and a consumer was asked if they would buy this vehicle, as opposed to one without the bump, what consumer would say yes?

The FCAI is of the view that section 260(a) (and s268(a) which deals with services) should either be deleted or amended so that it reflects the need for the failure to be serious or major. The FCAI also suggests that a 'major failure' should not include the situation where a repairer chooses to rectify the vehicle by replacing a complete component with a complete new component, rather than repairing the component and replacing any failed parts within the component. This would mean that the vehicle is 'as new' and accordingly the consumer should not be entitled to reject the vehicle.

4.4.1.2. Make allowance for use of vehicle

There is another problem with this section. A major failure of a consumer guarantee entitles a consumer to a full refund, notwithstanding that the consumer might have had the use of the vehicle, sometimes for an extended period of time. This is an unfair windfall gain to the consumer. FCAI is of the view that if the consumer is entitled to a 'refund', an appropriate allowance should be made to take into account the consumer's use of the vehicle.

4.4.1.3. Damage to vehicles and accessories

The ACL currently provides that a consumer cannot return a vehicle even though it might have been subject to a major failure, if the vehicle has been damaged after it was delivered to the consumer (section 262 (1)(c)). FCAI agrees with this but is of the view that it should be extended and clarified.

Often, shortly after buying a vehicle a consumer will fit accessories to their vehicle. These accessories often require modifications to the vehicle. These modifications may not 'damage' the vehicle in the normal sense but can require significant work by the dealer to restore the vehicle to its original condition. If a vehicle is returned with accessories fitted, the dealer has to bear the costs of returning the vehicle to its original condition, before the dealer can sell the vehicle.

The dealer does not have to accept a vehicle which has been damaged by the consumer and consistent with this should not have to accept a vehicle which has had accessories fitted, the removal of which requires rectification work to be carried out by the dealer. The consumer would not be denied a remedy as he/she would still be entitled to sue for damages.

4.4.2. Failing to repair within a reasonable time

An inability to repair a minor defect within a reasonable time gives a consumer the right to reject the goods (s259(2)(b)). As mentioned, motor vehicles are complex and sometimes, with the best will in the world, it can be difficult and time consuming to identify, diagnose and fix a problem. If a customer does not suffer any significant loss while their vehicle is being repaired (e.g. is provided with an equivalent loan vehicle), there is no reason why the customer should be entitled to reject the vehicle.

It might be said that this issue is addressed because the section refers to a "reasonable" time. The FCAI accepts this but points out that it means there is a high degree of uncertainty which, given the serious consequences (i.e. being able to return the vehicle) is inappropriate.

4.4.3. Unsafe

A major failure is where the goods are not of acceptable quality because they are unsafe. As mentioned previously, it should be made clear that a distributor which institutes a safety related recall is not conceding that the affected vehicles are unsafe.

4.4.4. Available experts

If it is felt that there is a need to improve the manner in which disputes relating to the alleged defects in motor vehicles are decided, the FCAI suggest that a body of independent suitably qualified motor vehicle technical experts could be established. These experts could then be called upon by a tribunal or court to assist them in understanding technical matters.

4.5. Parallel imports

The ACL is clear – the distributor and the local dealer network are not liable for any issues or concerns relating to any vehicles that have been privately imported into Australia. This should remain the case.

People who sell 'grey imports' are the classic free riders. They obtain vehicles at prices that do not properly reflect the legitimate costs imposed on authorised distributors and dealers such as marketing and warranty costs.

The FCAI is also concerned about safety issues relating to parallel imports. Currently, there is a comprehensive and successful safety related recall process which covers all vehicles sold through authorised distributors. How are safety related issues to be dealt with in relation to grey imports? If the vehicle has been retained by the person who imported it, there is perhaps justification for saying that the person should have been aware that they themselves are responsible for these matters. The issue becomes more complex once the import is sold and perhaps resold. It will often be very difficult for a subsequent purchaser to be able to ascertain whether the vehicle is a grey import and who was responsible for importing it. Under this scenario, we would have vehicles on the road which should have been rectified under a recall but no-one is aware of the recall and this poses a threat to the driver and other road users.

There seems to be an assumption that the authorised Australian distributor and its local network will carry out any required recalls on grey imports. This is demonstrably unfair and steps should be taken to ensure that this does not become a statutory responsibility. This unfairness is compounded when (as is often the case) the Australian distributor is an independent company not owned by the manufacturer of the vehicle. Further, the Australian distributor will not be aware that the vehicle is in the domestic market so any suggestion that that distributor has a responsibility for that vehicle is not soundly based.

5. DISTRIBUTORS AND DEALERS

5.1. Dealers are not small

There seems to be a general perception that there is an imbalance of bargaining power between dealers and distributors. In many instances this is simply not the case. A number of dealers are very large corporations in their own right. For example, AHG Limited has annual revenue of about \$3.7 billion and employs about 7,500 people.

Even the smaller regional and rural dealers have to be financially and commercially sophisticated. They are not the 'mums and dads' who are taking on a business for the first time and selling one simple product. Invariably they are multi-franchised and in addition to selling new cars, also sell used cars and financial and insurance products.

In the metropolitan areas most dealerships are concentrated in particular areas – for example Church Street in Parramatta and the Nepean Highway in Melbourne. Properties in these areas are very tightly held and in many instances they are owned by a dealer. This gives the dealers substantial negotiating power and leverage.

By treating dealers in the same way as those small businesses that do need protection, distributors are subjected to an onerous and unnecessary regulatory burden.

5.2. Unconscionable conduct/unfair conduct

There have been numerous enquiries into unconscionable conduct generally, and specifically in relation to the franchising industry. These enquiries have led to a number of changes to the Franchising Code of Conduct and to the ACL, including:

- an obligation to act in good faith;
- increased disclosure requirements;
- 6 month end of term notification requirements; and
- the unfair small business contract amendments.

These changes provide more than enough protection for franchisees and any more (i.e. a prohibition against 'unfair conduct') would lead to unnecessary uncertainty.

More generally, the unconscionable conduct provisions provide adequate protection for anyone being unfairly exploited.

5.3. Unfair Small Business Contracts

FACI agrees with the thrust of the unfair small business contracts regime - to offer protection to 'small business' from 'low value, standard form small business contracts' (paragraph 2.7 of the Explanatory Memorandum).

The Explanatory Memorandum suggests that the Bill intends to catch the usual, straightforward situation where one party acquires goods or services from another party and

pays money to that other party for those goods or services. Dealer agreements however, are usually not so straight-forward.

A 'small business contract' is one where one party is a 'small business' and the 'upfront price' is less than the nominated thresholds. The FCAI has no concerns about the definition of 'small business' or the thresholds. The concern stems from two assumptions that are implicit in the definition of 'upfront price'. These are that:

- the 'consideration' referred to in the definition of 'upfront price', is passing between the parties to the contract; and
- the consideration has an ascertainable monetary value.

Neither of these assumptions necessarily apply when a distributor appoints a dealer to distribute their products.

When a dealer enters into a dealer agreement with a distributor, there is usually no payment made directly to the distributor, such as a franchise fee. In the case of a dealer which has purchased a dealership, the 'consideration' for the acquisition is paid to the selling dealer; it is not provided under the dealer agreement.

Often, a dealer will agree to carry out some upgrading of facilities as a condition of the dealer agreement. This could be categorised as 'consideration' but it is arguably not '*...to be provided, for the supply, sale or grant under the [dealer agreement]*' as required by the section. Even if it is, there is no reason why the cost of carrying out the works, which is paid to a third party, should determine whether or not the contract is of 'low value' and therefore subject to the regime.

In addition, invariably a dealer agreement will require the dealer to promise to represent and promote the distributor's brand to the best of the dealer's ability (or words to that effect). In a legal sense, this promise can also be categorised as 'consideration' and it could fall within the definition of 'upfront price'. The issue – and the FCAI's concern – is, how will this promise be valued for the purposes of determining the 'upfront price'? If it is valued at zero (in a monetary sense), then presumably this means that the upfront price payable will be less than the threshold.

Finally, the ordering of vehicles and parts by a dealer are not included in the 'upfront price payable' because this is '*consideration that is contingent on the occurrence or non-occurrence of a particular event*' (i.e. placing an order) which is excluded. This means that even though the value of the goods being acquired by the dealer will probably far exceed the threshold, the contract might still be a 'small business contract'.

6. ACCESS TO INFORMATION

There have been suggestions that independent repairers (i.e. those which are not in a distributor's authorised network) are not getting access to information which is necessary for them to be able to repair customers' vehicles. The reality is that this is not a problem or concern for consumers as explained in the 2012 Treasury review, which found that there is no evidence of consumer detriment relating to access to service and repair information in the automotive industry.

Nonetheless, the FCAI along with four other industry associations representing independent repairers, new motor vehicle dealers and motorists, have developed and signed an industry Agreement on Access to Service and Repair Information. Underpinning this Agreement are various industry codes that demonstrate sectoral compliance with the principles in the Agreement to ensure that the consumer interests are the driver for the competent service and repair of motor vehicles.