



PO BOX 6298
Kingston ACT 2604
Phone: 02 51008239
Email: admin@mtaa.com.au

ACCC New Car Retailing Market Study Final Report 14 December 2017

FACT SHEET FOR NEW CAR DEALERS

Overview

- The Australian Competition and Consumer Commission (ACCC) has spent 18 months studying the new car retailing market and in particular consumer guarantees and warranty; access to technical and repair information; parts; the relationship between market participants and in particular between manufacturers and dealers; fuel and emissions and a range of other matters including telematics.
- The 198 page final report was released on Thursday 14 December 2017 with a number of recommendations and actions.
- With many of the outlined actions within the powers of the ACCC, they will now move to implement those actions starting early in 2018.
- Some of the recommendations will require industry, the Federal Government, and industry and the Federal Government, to consider and act on them such as calls for further investigations into the commercial relationship between manufacturers and dealers and elements of Dealer agreements and a mandated scheme to provide access to technical and repair information.
- The Motor Trades Association of Australia (MTAA) and your Association are now working on making this happen as quickly as possible. Further updates will be provided over coming weeks on actions being taken to bring these recommendations to reality.
- The following are the key recommendations and what it means for your independent repair business to supplement a Fact Sheet produced by the ACCC, which is included for your information.

Key Points

- MTAA and Member made additional representations and complaints to the ACCC after the interim Market Study report and this has resulted in a better recognition and balance on the obligations of manufacturers in meeting consumer guarantee and warranty provisions, rather than the previous unfair portrayal of dealers.
- There are now recommendations which place greater onus on manufacturers and require them to review policies, processes and procedures, including ensuring the inclusion of indemnities for dealers available under the ACL.
- While considered by the ACCC to be 'outside the terms of reference' for the Market Study, the ACCC have nonetheless agreed there are sufficient concerns regarding elements of the commercial relationship and dealer agreements that warrant further investigation. While nominating one option that this further investigation be part of the next review of the Franchising Code, they have not ruled out the government conducting a separate review.
- There will be new awareness and education materials provided by the ACCC for point of sale to better inform consumers of rights under consumer guarantee and warranty provisions. MTAA has already been informed it will be contacted by the ACCC to participate in the development of these materials as it has been before.
- The mandatory scheme should be introduced for car manufacturers to share technical information with independent repairers on commercially fair and reasonable terms.
- The Mandatory scheme should provide access to the same technical information which car manufacturers make available to their authorised dealers and repairers, including environmental, safety and security-related information where such information is made available to dealers.
- MTAA's position is that there should be no competitive advantage of one sector over another in the fair and reasonable cost of accessing information and this has been reflected in the findings and recommendations along with requirements that repairs are carried out to manufacturer specifications to assure consumer safety.
- The ACCC has not ruled out and has mentioned the potential for an 'Automotive Code' in the body of the report.

Next Steps:

MTAA and your association are now:

- Starting a campaign targeting Federal Ministers, Parliamentarians and Commonwealth bureaucrats to get action on implementing the ACCC's recommendations.
- Finalising an action plan and arrangements to facilitate and develop a Mandated Code of Conduct, prescribed under the Competition and Consumer Act including appropriate safeguards, dispute resolution and definitions. Expertise is being sought and there will be engagement with government regulators and Departments and other key industry associations to progress.
- Aiming for a completed draft code to be ready for consideration as early as possible in 2018 to allow for the necessary regulations to be put into Parliament and passed for introduction in February 2019.
- Will call on the ACCC to consider including in its 2018 activities a further review of the commercial arrangements and matters it has highlighted in its Final Report prior to the next review of the Franchising Code. If there is no appetite then MTAA will advocate with Federal Parliamentarians for a separate review.
- Will now progress the notion of an Automotive Code which will take out of the Franchising Code elements applicable to new car retailing and dealer agreements and a range of other related matters.
- Ensure dealers are not materially or financially disadvantaged in terms of point of sale materials to be developed and produced for consumer benefit and will ask for dealer input into all materials as well as an examination of final drafts if possible.
- Will continue to express concern and seek modifications to proposed changes to Australian Consumer Law in defining major and minor faults and timelines. There will be consultation on ACL changes impacting consumer guarantees and warranty in 2018 and MTAA and your association will provide input into these consultation mechanisms.
- Where appropriate will work with other associations and organisations interested to achieve these outcomes.

Recommendations on proposed amendments to enhance the ACL

Recommendation 3.1

The ACCC supports the amendments proposed by Consumer Affairs Australia and New Zealand (CAANZ) in the recent ACL Review to enhance the ACL and address any uncertainties about the application of consumer guarantees. Of particular relevance to issues arising in this study, the ACCC supports proposals 1, 2 and 3 in the final report on the ACL Review:

Proposal 1: Where a good fails to meet the consumer guarantees within a short specified period of time, a consumer is entitled to a refund or replacement without needing to prove a 'major failure'.

Proposal 2: Clarify that multiple non-major failures can amount to a major failure.

Proposal 3: Enhance disclosure in relation to extended warranties by requiring:

- agreements for extended warranties to be clear and in writing
- additional information in writing about what the ACL offers in comparison to the extended warranties
- a cooling-off period of ten working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed and in writing

Relevant stakeholders, including manufacturers, dealers and consumer representative bodies, are encouraged to participate in the further consultation process on the ACL reform proposals to be conducted by CAANZ to express their views on issues which may arise in the application of the ACL to a car related complaint.

ACCC action on consumer understanding of their rights

ACCC action 3.1

The ACCC will work with manufacturers and dealers to develop a concise and simple explanation of consumer guarantees and their interaction with warranties, which should, as industry best practice, be provided to consumers at the point of sale of a new car.

Pg. 5 ACCC New Car Retailing Market Study Final Report

ACCC action on consumer understanding of their rights

ACCC action 3.2

To assist consumers better understand their rights when it comes to new car defects and failures, the ACCC will work with other ACL regulators to publish an updated version of *Motor vehicle sales & repairs – an industry guide to the Australian Consumer Law (August 2013)*¹ to ensure that this publication addresses the issues identified in this study, including specific guidance on criteria for determining a 'major failure'. Guidance may also be designed for use by businesses, including dealers, regarding their rights and obligations under the ACL.

ACCC action 3.3

Instances of misleading or deceptive conduct, or misrepresentations, in relation to the use of independent repairers or non-OE spare parts will be targeted through action by the ACCC, including enforcement action where appropriate.

Pg. 6 ACCC New Car Retailing Market Study Final Report

ACCC action on the consumer experience of enforcing their rights

The ACCC has recently instituted proceedings in the Federal Court against Ford, and it has also accepted a court enforceable undertaking from Holden, in relation to its concerns about alleged ACL non-compliance issues.

ACCC action 3.4

The ACCC will continue to actively monitor complaints and emerging issues in the sector, and take further compliance and enforcement action where necessary.

Manufacturers' complaint handling systems, policies and practices that do not comply with the consumer guarantee requirements of the ACL will continue to be targeted through action by the ACCC and fair trading agencies, including enforcement action where appropriate.

Such action may also address any instances of non-compliance by dealers. The ACCC is particularly concerned about manufacturers and dealers engaging in conduct that may be misleading or unconscionable.

Pg. 7 ACCC New Car Retailing Market Study Final Report

Recommendations on commercial arrangements between manufacturers and dealers

Recommendation 3.2

Car manufacturers (the Australian or foreign distributor of the car brand) should transform their approach to the handling of consumer guarantee claims or risk action for non-compliance with the ACL. The ACCC recommends that car manufacturers:

- update their complaint handling systems to ensure that consideration of consumer guarantee rights are embedded in all relevant systems, policies and procedures with the objective of ensuring that a consumer's statutory rights under the ACL are given due consideration at the outset of responding to a claim
- update their dealer agreements and policies to expressly state that obligations under the manufacturer's warranty are in addition to, and do not exclude or limit, the manufacturer's obligations to indemnify the dealer under section 274 of the ACL
- review their dealer agreements, policies and procedures to ensure that these commercial arrangements:
 - do not contain unfair contract terms that go beyond what is reasonably necessary to protect their legitimate interests
 - place appropriate limits on any terms which enable manufacturers to unilaterally vary the agreement and/or operations manuals.

Recommendation 3.3

Certain issues raised by dealers in relation to the imbalance of power in their commercial arrangements with manufacturers may require further examination.

Dealer agreements for the sale of motor vehicles are deemed by the Franchising Code of Conduct to be franchise agreements. One option for consideration of these issues is the next review of the Franchising Code of Conduct to occur from 2020.

Issues which may be further considered include:

Minimum tenure and capital investment requirements

- a required minimum term for dealer agreements with the objective of allowing dealers a sufficient period in which to recoup capital investment required by the manufacturer
- limitations on the level of capital investment that a manufacturer can require of a dealer based on the tenure of the dealer agreement offered
- enhancing a dealer's rights to be compensated for capital investment required by the manufacturer in the event of non-renewal of the agreement

Reasons for non-renewal

- providing dealers with reasons for non-renewal of a dealer agreement to enable an assessment of whether non-renewal has been exercised by a manufacturer in good faith

Changes to commercial arrangements

- providing national dealer councils and/or dealers with a minimum period of prior notice of proposed amendments to dealer agreements, policies and procedures and the ability for national dealer councils and/or dealers to challenge proposed amendments
- exempting certain aspects of the commercial arrangements between manufacturers and dealers from unilateral variation by either party

Reimbursement for remedies

- enhancing a dealer's right to reimbursement to recover the costs of providing remedies where the manufacturer is responsible for the failure
- strengthening the accountabilities of manufacturers and dealers when providing remedies to consumers.



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

New Car Retailing Industry market study: authorised new car dealers' factsheet

December 2017



The ACCC has looked into competition and consumer issues in the new car retailing industry.

We considered a number of issues which may affect authorised new car dealers, including an analysis of how manufacturers' agreements with dealers and related policies and procedures may impact on dealers' compliance with the Australian Consumer Law (ACL).

We're recommending that car manufacturers transform their approach to consumer guarantee claims, update their complaint handling systems, and review their commercial arrangements with dealers to ensure they comply with the ACL.

What we found

Commercial arrangements between manufacturers and dealers can constrain and adversely influence the behaviour of dealers in responding to complaints

Dealer agreements for the sale of motor vehicles are deemed by the Franchising Code of Conduct to be franchise agreements. As franchisees, dealers are contractually obliged to comply with the terms, policies and procedures set by the manufacturer (the franchisor). Dealers are often under commercial pressure to comply with these requirements so as to increase the prospects of having their franchise agreement renewed.

Manufacturer complaint handling policies and procedures normally determine a dealer's response to consumer guarantee or warranty claims. These policies usually focus on the customer's contractual rights under the manufacturer's warranty, and fail to adequately consider consumer rights under the ACL. This can limit a dealer's willingness to address a consumer's complaints and potentially prevent dealers from meeting their ACL obligations.

Dealers are frequently in the challenging position of balancing their ACL obligations to customers, safeguarding their own financial interests and maintaining a long-term commercial relationship with their manufacturer. However, it remains the responsibility of dealers to meet their ACL obligations, and for manufacturers in turn to meet theirs by not adopting commercial arrangements that stifle this.

Complex warranty claim processes can result in dealers being inadequately indemnified for remedies they have provided

Dealers, as retailers of new cars, have direct responsibility to provide remedies to consumers under the ACL if a new car (or any other goods or services they supply) does not meet one or more of the relevant consumer guarantees (for example, that goods must be of acceptable quality).

Dealers are entitled, under the ACL, to seek reimbursement from the manufacturer for any loss or damage incurred in meeting the consumer's rights, where the manufacturer was responsible for the failure.

Manufacturer processes and policies for dealing with claims that are unnecessarily complex, including arbitrary administrative and technical requirements, can lead to dealers being inadequately reimbursed or indemnified for remedies they have provided to their customers.

Consumers face difficulties understanding the difference between consumer guarantees and warranties

When it comes to buying a new car, many consumers face difficulties understanding how the ACL consumer guarantees apply and the difference between the consumer guarantees and any warranties offered by the manufacturer. This appears to be in part the result of a focus by dealers at the point of sale on the manufacturer's warranty and the potential sale of an extended warranty.

A verbal explanation of consumer guarantees at the point of sale of a new car is insufficient. Consumers need information that can be referred to at any time during their ownership of their car. We consider it best practice for dealers to provide an explanation about consumer guarantees in writing.

A balanced provision of written information about consumer guarantees requires not only an explanation of the statutory rights available to consumers, but also an explanation of the statutory obligations of manufacturers and dealers. It also requires an explanation of the potentially complex interaction between consumer guarantees and other consumer rights available under warranty in the event of a problem with the car.

Recommendations and ACCC actions

In our final report, we recommend:

- car manufacturers should transform their approach to the handling of consumer guarantee claims or risk action for non-compliance with the ACL. We also recommend that car manufacturers:
 - update their complaints handling systems to ensure consideration of consumer guarantee rights are embedded in all relevant systems, policies and procedures
 - review their dealer agreements, policies and procedures to ensure that their commercial arrangements with dealers do not contain unfair contract terms.
- the ACL be enhanced to:
 - provide consumers with additional clarity about when they are entitled to a refund or replacement under consumer guarantees
 - require specific forms of disclosure in relation to extended warranties.

We also support further consultation on the ACL proposals relating to major failure and encourage relevant stakeholders, including car manufacturers and dealers, to participate in further consultation to be conducted by Consumer Affairs Australia and New Zealand.

Certain issues raised by dealers and the Australian Automotive Dealer Association in relation to the imbalance of power in their commercial arrangements with manufacturers may require further examination. One option for consideration of these issues is the next review of the Franchising Code of Conduct.

We're also going to:

- work with manufacturers and dealers to develop a concise and simple explanation of consumer guarantee rights under the ACL, and their interaction with warranties, which should be provided to consumers when they buy a new car.
- update the *Motor vehicle sales and repairs—an industry guide to the Australian Consumer Law*, to ensure this publication provides additional guidance to consumers about consumer guarantees under the ACL. Guidance may also be designed for use by businesses, including dealers, regarding their rights and obligations under the ACL.

Enforcement

We will continue to actively monitor complaints made to us and will take further action to enforce the law where necessary. This includes action to address conduct which may be misleading or unconscionable or practices which do not comply with the consumer guarantee requirements of the ACL.

More information

For more information on the study and to read the final report, visit www.accc.gov.au/newcars.