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Motor Vehicle Standards Act (MVSA) Review
The Department of Infrastructure, Regional Development and Cities
GPO Box 594
Canberra ACT 2601

Sent by email: MVSAreview@infrastructure.gov.au

To MVSA Review

2018 Public consultation on the draft new Road Vehicle Standards legislation

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on the Exposure Draft for Road Vehicle Standards Bill 2017, the Explanatory Memorandum for the Bill and the Road Vehicle Standards Rules 2017. The ACCC supports in-principle the proposed new legislation, particularly the introduction of powers for the Department of Infrastructure, Regional Development and Cities (DIRDaC) to administer voluntary and compulsory recalls of consumer and commercial road vehicles; and provides the following submission.

The Role of the ACCC

The Australian Competition and Consumer Commission (ACCC) promotes competition and fair trading in markets to benefit consumers, businesses and the Australian community. Our primary responsibility is to ensure that individuals and businesses comply with the *Competition and Consumer Act 2010* (the CCA) which includes the Australian Consumer Law (the ACL).

The ACCC's role is critical in making markets work by:

- maintaining and promoting competition and remedying market failure by preventing anti-competitive mergers, stopping cartels and intervening when misuse of market power is identified
- protecting the interests and safety of consumers and supporting a fair marketplace by addressing misleading behaviour, removing unsafe goods and tackling unconscionable dealings
- driving efficient infrastructure through industry-specific regulation and access regimes.

In relation to consumer protection, the ACCC's role is twofold – we seek to ensure consumers can confidently participate in markets and consumer goods are safe.

The ACCC's role in relation to consumer protection and product safety

Under the ACL, persons in trade or commerce who supply consumer goods and product-related services are required to comply with a number of general protections, including the prohibition on misleading or deceptive conduct and unconscionable conduct. The national consumer product safety laws in the ACL also provide for a number of specific protections including notification requirements for a voluntary recall, issue of a compulsory recall notice, consumer guarantees and the publication of a safety warning notice for consumer goods.

The ACL is administered and enforced by the ACCC jointly with State and Territory consumer affairs agencies.

Exposure Draft for Road Vehicle Standards Bill 2017

Voluntary and compulsory recalls

The ACCC is particularly interested in the compliance and notification requirements for voluntary and compulsory recalls in the Exposure Draft for Road Vehicle Standards Bill 2017 (the Bill), given they intend to be modelled on the corresponding provisions in the ACL.

Responding to voluntary recall notifications is a function currently shared between the ACCC and DIRDaC, with the ACCC assessing supplier notifications of the nature of the safety defect of the vehicle and DIRDaC monitoring the progress of these recalls. Currently only Commonwealth, State and Territory Consumer Affairs Ministers have powers to issue compulsory recall notices for consumer goods.

Under the arrangements outlined in the Bill, DIRDaC would have powers for compliance and notification requirements for voluntary recalls and issuing compulsory recall notices for consumer and commercial vehicles, and for vehicle components. This extends the recall reach beyond that of the ACCC's product safety regime, which only has remit for consumer goods and provides an additional level of safety.

Application of the ACL

The ACCC notes that section 77 of the Bill preserves the current section 41 of the MVSA. This section states that 'for the purposes of sections 106 and 122 (excluding subsection 106(7)) of the ACL, a national road vehicle standard is taken to be a safety standard within the meaning of the ACL'. The 1989 Explanatory Memorandum for section 41 of the MVSA states that the intent of the provision was to allow the compulsory recall provisions to compel the recall of nonstandard vehicles.

Given the Bill introduces compulsory recall powers for motor vehicles, combined with access to civil penalties and other contemporary enforcement tools by triggering the *Regulatory Powers (Standard Provisions) Act 2014*, the ACCC considers that the ACL is no longer needed to be referenced in the Bill and removal of that provision will ensure clarity of regulatory responsibility and avoid regulatory duplication.

Furthermore, removing section 77 from the Bill would signal a clear transfer of responsibility of the administration of voluntary and compulsory recalls of road vehicles from the ACCC to DIRDaC. This would enable DIRDaC to administer both voluntary and compulsory recalls for consumer and commercial road vehicles through a single system, and would improve clarity for suppliers in terms of their legal obligations.

Disclosure notices

Part 3 Division 4 of the Bill includes provisions for disclosure notices, including the power to obtain information and offences for giving false or misleading information. These provisions

appear to only apply to recalls of road vehicles or approved road vehicle components, and may present a risk of being read as having a narrow application. DIRDaC may wish to consider whether this was the desired policy intent or an omission, and if there may be utility in such provisions having a broader application.

Extended Geographical Jurisdiction

Given the majority of road vehicles are manufactured outside of Australia, the Bill and Explanatory Memorandum provide that the Act would introduce extended geographical jurisdiction for a number of offences, whether or not the conduct occurs in Australia and will extend to conduct by any person outside Australia.

It appears that the extended geographical jurisdiction does not explicitly apply to compulsory recalls. DIRDaC may wish to consider whether such provisions should apply to compulsory recalls so as to capture international manufacturers.

Exposure Draft of the Road Vehicle Standards Rules

Voluntary and compulsory recalls

The ACCC notes that the exposure draft of the Road Vehicle Standards Rules (the Rules) include provisions for voluntary and compulsory recalls of road vehicles or approved vehicle components that intend to be modelled on the corresponding provisions for voluntary and compulsory recalls in the ACL. While the legislative tests for voluntary and compulsory recalls in the Rules apply the same thresholds as the ACL, there appears to be some discrepancies in their operation as outlined below.

Remedies

Section 128 of the ACL (notification requirements for a voluntary recall) does not explicitly require the supplier to specify in the recall notice whether the consumer can seek a remedy in the form of a refund, repair or replacement. However the ACCC would typically negotiate with the supplier to have regard to the consumer guarantees provisions under the ACL to specify whether consumers will be entitled to a refund, repair or replacement on returning the recalled goods.

Section 200 of the Rules (voluntary recall of road vehicles or approved road vehicle components) is silent on the remedy for a voluntary recall. Given the Rules do not provide for consumer guarantees, DIRDaC may wish to consider including a provision for the supplier to specify in the recall notice the remedy (refund, repair or replacement) that consumers will be entitled to on return of the recalled goods.

ACL reforms to voluntary recalls

The ACL is currently undergoing a suite of reforms as a result of the Consumer Affairs Australia and New Zealand (CAANZ) led review of the effectiveness of the ACL provisions. One of these reforms relates to voluntary recalls and has potential implications for DIRDaC's proposed Rules.

This ACL reform involves clarifying and strengthening voluntary recall requirements by introducing a statutory definition of 'recall' and increasing penalties for failure or refusal to notify a voluntary recall, proportionate to other ACL penalties. The inclusion of such a definition will aid suppliers in determining when a 'recall action' has taken place and notification requirements are triggered. Triggering these requirements means that suppliers must notify the Commonwealth Minister of the action 'within 2 days after taking the action'. The ACCC will then publish the notice on behalf of the Commonwealth Minister. It is the ACCC's experience that the absence of a definition of 'recall', has resulted in supplier

confusion about when an action needs to be notified, enabled some suppliers to circumvent the law and has also impeded compliance and enforcement efforts.

For these reasons the ACCC recommends that DIRDaC consider the inclusion of a definition of 'recall' into the Bill or the Rules consistent with that which is adopted by the ACL. This would provide clarity for both DIRDaC and suppliers regarding the distinction between voluntary recalls and service campaigns.

Additional matters

Separate to the ACCC's comments on the Exposure draft, the ACCC would also like to bring to your attention the following matters.

Safety warning notices

The Bill or the Rules do not include provisions for safety warning notices and the announcement of results of an investigation (sections 129 and 130 of the ACL). It is the ACCC's experience that these tools have proven to be very useful when warning the public about the potential risks associated with a consumer good and how they may best mitigate them. This may also be of utility to DIRDaC in the motor vehicle context. For example, in August 2017, the Commonwealth Minister for Small Business issued a safety warning notice to the public about motor vehicles containing Takata airbags:

www.productsafety.gov.au/publication/safety-warning-notice-takata. This notice also included advice to consumers about how to identify whether their vehicle has a Takata airbag and what the steps they should follow to address the problem. DIRDaC may wish to consider the inclusion of these powers in their new legislation.

Publicly searchable Register of Approved Vehicles (RAV)

The ACCC considers that broadening the utility of the RAV is likely to be of significant benefit to consumers in accessing Vehicle Identification Number (VIN) records. However, the ACCC is also aware that the U.S National Highway Traffic Safety Administration's (NHTSA) VIN search tool extends to vehicle recall information. DIRDaC may wish to consider the merits of this function as part of the RAV.

Memorandum of Understanding (MOU)

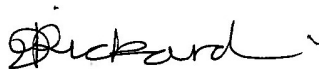
The ACCC notes that the MOU between DIRDaC and the ACCC, which establishes a framework for cooperation between both parties, would require review and variation to reflect the passage of the new legislation.

The ACCC also supports the explicit inclusion of provisions in the Bill to permit information exchange with the ACCC and certain other agencies as it accords with the existing MOU.

Next steps

If you would like to discuss any aspect of the ACCC's submission, we would be happy to arrange a meeting. Please contact Neville Matthew, General Manager, Consumer Product Safety Branch on (02) 6243 1066 or by email at neville.matthew@accc.gov.au.

Yours sincerely



Delia Rickard
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ACCC