

OUT17/36845

Manager
New Car Retailing Industry Market Study
Australian Competition and Consumer Commission

By email to newcars@accc.gov.au

Dear Sir or Madam

Submission on the draft report of the New Car Retailing Industry Market Study

Thank you for the opportunity to make a submission to the Australian Competition and Consumer Commission (ACCC) in relation to the draft report of the New Car Retailing Industry Market Study dated August 2017.

As the NSW Small Business Commissioner, I am appointed to support small businesses in NSW by:

- providing dispute resolution services
- delivering quality business advice through Small Biz Connect, and
- speaking up for small business within government.

The Dispute Resolution Unit of the Office of the NSW Small Business Commissioner (OSBC) provides:

- strategic and procedural advice for small business operators and their counterparts,
- mediation services when formal disputes arise in order to facilitate the prompt resolution of issues at the earliest possible point, and
- in particular, assistance to motor dealer and distributors or manufacturers under the Motor Dealers and Repairers Act 2013.

The OSBC is committed to supporting and improving the operating environment for small businesses throughout NSW. I provide the following submission in response to feedback received from NSW stakeholders in relation to the impacts of the current operation of the Australian Consumer Law (ACL) on small business new car retailers (motor dealers).

The commercially sensitive relationship between motor dealers and distributors or manufacturers (manufacturer) often prevents motor dealers from providing specific feedback to Government reviews, resulting in a lack of representation of their interests and experiences.

Enforcing rights under the Australian Consumer Law

In my view there is a need to improve the effectiveness of the ACL's consumer guarantees so that they do not operate unfairly and to the detriment of motor dealers who have no control over defects in the manufacture of new cars.

Motor dealer indemnification claims against manufacturers

Feedback received by OSBC from dealers outlines issues with the operation of the ACL in relation to motor dealer indemnification claims against a manufacturer for consumer claims. In my experience and through conversations with many motor dealers, I believe they are reluctant to exercise their right to seek redress from the manufacturer out of fear of damaging their commercial relationship.

I have years of experience in assisting small businesses across a multitude of industries where there are significant imbalances of power between the contracting parties. In every instance, small businesses are reluctant to exercise their rights and bring formal complaints out of fear of retaliatory action by the dominant party in the commercial relationship.

The current operation of the ACL allows the consumer to name either the retailer *or* the manufacturer as the party in the supply chain responsible for the fault. Unless the consumer names the manufacturer, the motor dealer bears the burden responsibility for the fault.

Statutory right to join manufacturer to a consumer claim or a cause of action

The dealer's right to seek redress should be strengthened in the ACL. Where a consumer makes a claim against a dealer, the motor dealer should have a statutory right to join the manufacturer as a party to the consumer claim, or make a claim for indemnification by the distributor or manufacturer that can be dealt with in the same proceeding. This change would provide an incentive for the manufacturer to share or pay the costs of defending the claim, and where a finding is made against the motor dealer, it would enable the court to make orders against the manufacturer.

The ACL currently operates to effectively absolve manufacturers from liability. The commercially sensitive relationship between motor dealers and manufacturers is a significant obstacle to a dealer's ability to effectively access the ACL right to be indemnified by the manufacturer. The imbalance in bargaining power in favour of the manufacturer, and a dealer's fear of retaliatory action by the manufacturer (such as withholding or terminating supply) prevents the dealer from accessing justice.

Extending the strict liability to retailers, including motor dealers, maximises consumer protection, and provides a viable defendant if the manufacturer is insolvent or beyond the court/tribunal's jurisdiction. Small business retailers of low value products are arguably better able to absorb the losses of consumer claims than motor dealers. Where the retail product is considerably high in value, a motor dealer is forced to absorb the cost of defending a consumer claim and held liable for the defects in a motor vehicle when they had no involvement in the design, manufacturer, assembly or repair of a motor vehicle.

OSBC has received feedback from motor dealers who have not pursued a manufacturer for reimbursement of an order to provide the consumer with a full refund for a vehicle, as they prefer to absorb the loss to prevent damage to their commercial relationship.

Unlike other sectors of the retail industry such as clothing, there is little mark-up on the sale of new cars which means dealers have to rely on profits made from servicing vehicles or the sale of finance, insurance, or accessories.

Misleading or false claims by dealers and manufacturers and lack of understanding of the concept of 'major failure'

I support ACCC action 3.1 on increasing consumer understanding of their rights. Feedback received from dealers indicates that there is a lack of understanding among dealers about

the operation of the ACL. This misunderstanding is often construed as a lack of technical expertise by the court or tribunal. There is also a lack of clarity regarding what constitutes a 'major failure' in the context of the ACL. Examples of consumer claims involving new motor vehicles received by the OSBC indicate that there is confusion particularly in relation to the operation of sections 260(c) and (d) which provide that if a product fails to be fit for purpose this will constitute a "major" failure if it cannot be remedied "easily and within a reasonable time". Where a court or tribunal finds that a fault that can quite easily be fixed constitutes a "major" failure and gives rise to a right of refund if it causes a consumer considerable inconvenience creates a lack of clarity in the intention of the ACL. These types of decisions have been misinterpreted by dealers as a lack of technical understanding by the tribunal.

The manufacturer's approval process may delay a dealer from commencing work in relation to consumer or warranty claims for minor technical issues creating further difficulties for the dealer. These lengthy delays naturally lead to 'major failures' for the purpose of the ACL and consequently dealers are held liable for full refunds, and losses. Damages the dealer cannot mitigate and costs that are not easily claimed back from a manufacturer.

Access to technical information for new cars and transparent pricing on parts

I support the ACCC's draft recommendation 4.1 on access to technical information for new cars and the introduction of a mandatory scheme for manufacturer's to share information with independent repairers. I also support an extension of the mandatory information sharing scheme to include manufacturers' pricing information for parts.

Withdrawal from Publication of Parts Pricing

I am concerned that the decision of particular motor vehicle manufacturers to withhold publication of the price of parts making it very difficult for repair work to happen outside a manufacturer's dealership network. This is a particular issue where genuine OE parts are required or are the preferred choice for a repair.

The OSBC has recently undertaken a significant amount of work with the repair and insurance sectors of the motor industry to amend the national *Motor Vehicle Insurance and Repair Industry Code of Conduct* (the Code) to increase the transparency of repair estimation and insurance assessment processes.

A complex methodology has evolved to improve transparency in the negotiations between repairers and insurers over repair work estimations for non-network repairers. While the industry is moving toward realistic times and rates, the pricing component for motor vehicle parts is a substantial component of a quote for repairers who are not on a 'fixed rate' contract with an insurer.

Transparent pricing information is critical to ensure fairness and clarity in the estimation and loss assessment processes of repairers and insurers. Consumers also need objective criteria (for example, manufacturer's prices) to be able to assess the fairness and reasonableness of a repair estimate.

I am concerned that manufacturers' decisions to withdraw pricing information will put additional pressure on the smaller independent repair businesses, as many will not be able to provide competitive quotes. The repair industry is already facing considerable challenges with technological advancements, access to vehicle repair information and skills shortages.

I support ACCC's recommendation that a new mandatory scheme be introduced that sets out the rules for car manufacturers to share technical information with independent repairers, and I suggest this should also include a requirement for manufacturers to publish parts pricing.

If you wish to discuss any of the issues raised in this submission further please contact Nicola Gorton, Senior Mediation Officer on (02) 8222 4882 or email nicola.gorton@smallbusiness.nsw.gov.au.

A handwritten signature in blue ink, appearing to read "Robyn Hobbs". The signature is stylized and includes a large, looping flourish that extends upwards and to the left.

Robyn Hobbs OAM
NSW Small Business Commissioner

6 September 2017