



**FEDERAL CHAMBER
OF AUTOMOTIVE
INDUSTRIES**

ABN 53 008 550 347

LEVEL 1

59 WENTWORTH AVENUE

KINGSTON ACT 2604

AUSTRALIA

PHONE: 02 6247 3811

FAX: 02 6248 7673

Mr. Garry Clements
Chair, Consumer Affairs Australia and New Zealand
Langton Crescent
PARKES ACT 2600

Dear Mr. Clements,

Please find attached a submission from the Federal Chamber of Automotive Industries (FCAI) in response to the Interim Report into the Australian Consumer Law Review.

While the FCAI has provided responses to a range of questions that the Interim Report has suggested it is worth noting that at the broader level the FCAI is clearly of the view that after only five years of operation it is too early to make informed judgements on the appropriateness or effectiveness of many of the provisions within the Australian Consumer Law. While there may be a regulatory requirement for the conduct of the Review, the FCAI is of the view that initial findings from the work of CAANZ should be framed around particular areas of focus that are clearly, even at this early stage of implementation of the law, delivering unintended outcomes.

We would be more than happy to expand on the issues touched on in the attached or in our initial submission as necessary. Please contact me on 02 6247 3811 if this is necessary.

Yours sincerely

Tony Weber
Chief Executive

Submission to the Australian Consumer Law Review Interim Report



Federal Chamber of Automotive Industries
Level 1, 59 Wentworth Avenue
Canberra ACT 2604
Phone: +61 2 6247 3811
Facsimile: +61 2 6248 7673
Contact: Mr Anthony McDonald,
Director Industry Operations

16 December 2016

Australian Consumer Law Review

Interim Report

Response by Federal Chamber of Automotive Industries

Introduction

- As the FCAI recently expressed in its submission to the ACCC Issues Paper, there are a range of contributors to the consumer outcomes in the new motor vehicle market including:
 - the competitiveness of the market;
 - the significant investment by automotive brands and their authorised dealers;
 - the pro-active approach to management of consumer issues;
 - the strategy of ensuring the consumer experience is a positive one; and
 - the length of time that a manufacturer's warranty applies to a new vehicle.
- These factors all add up to show that the automotive sector is leading the way in not only delivering a level of customer satisfaction and ownership experience that not just meets mandatory standards, but far exceeds them.
- The Australian Consumer Survey conducted as part of this review indicates that the knowledge and understanding of the ACL continues to grow. The FCAI is of the view that this is a valuable observation and is equally an expected outcome from legislation that has only been in place for 5 years. There is likely to be a greater degree of specificity in suggested improvements once the legislation has been in place for a few more years.
- One of the particular issues with motor vehicles is that they are increasingly sophisticated and this brings a range of challenges in terms of identifying, duplicating and rectifying issues brought to the attention of the industry by the consumer. At times, there will be disagreement between parties as to the responsibilities that apply under the ACL, and where a third party is required to adjudicate on these it is important that they have a very good understanding of the technical issues and fast-paced advancements associated with modern motor vehicles.
- While we have addressed specific questions not all are relevant to the FCAI membership.

1.2.4 Who is protected under the ACL?

4. Should the \$40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?

While the FCAI has no particular view as to whether the \$40,000 threshold for the definition of "consumer" should be amended, we would acknowledge that there may be value in discussing with industry an updated threshold. However, FCAI re-iterates the comments that it made in Section 2 of its Submission to the Australian Consumer Law Review dated 27 May 2016, a copy of which is attached to this submission as **Annexure A ("First FCAI Submission")**.

In addition, FCAI notes that there remains concern with how the words "ordinarily acquired for personal, domestic or household use or consumption" is to be interpreted in the context of the

automotive industry as new complexities emerge with vehicles used by their owners in ride sharing schemes such as Uber. Arguably, such use is not “personal, domestic or household use or consumption”, and is often difficult for motor dealers and manufacturers to detect. Whether motor vehicles are “ordinarily acquired for personal, domestic or household use or consumption” is not always easy to determine, and therefore it could be helpful if the ACL made it clear that on receiving a claim suppliers are entitled to make reasonable enquiries and form a reasonable view as to whether this is the case for a particular vehicle, rather than the consumer guarantees applying to that type of vehicle even though it is not ordinarily used by that consumer for personal, domestic or household use. FCAI is of the view that there should remain a monetary limit and that this limit should be reflective of a transaction price that is reasonable to ensure that the original intent of the ACL remains. The FCAI does not support the proposal to align the limits with the limits included in the Unfair Contract Term legislation. Where significant sums of money are involved the existing commercial dispute mechanism pathways are appropriate.

5. What goods or services would be captured that are not already?

FCAI has no comment on this.

1.2.5 Exemptions under the ACL

6. Are there other priority exemptions that are not discussed in this chapter that should be considered? If so, what are these and why should they be considered?

FCAI re-iterates the comments made in Section 2 of the First FCAI Submission that vehicles used as taxis, charter, hire and light commercial type vehicles (e.g. vans), and “ride-sharing” vehicles mentioned in response to Q4 above, have not been acquired by “consumers” and, consistent with the over-arching objective of the ACL, they should not be provided with the same level of protection having regard to the commercial use.

1.2.6 Interaction between the ACL and ASIC Act

7. Should the ASIC Act be amended to explicitly apply its consumer protections to financial products?

FCAI has no comment on this.

8. What would suppliers of financial products need to change to achieve compliance, and what benefits or impacts would there be for businesses and consumers?

FCAI has no comment on this.

9. Are there any unintended consequences, risks or challenges in doing so?

FCAI has no comment on this.

1.1 Consumer guarantees (pages 43-69)

2.1.2 'Acceptable quality' for goods

10. Could the issues about the durability of goods be addressed through further guidance and information?

In Section 4 of the First FCAI Submission FCAI suggested that the ACL be clarified so that it is beyond doubt that a safety-related recall (ie, a safety related defect or potential defect with a motor vehicle for which the manufacturer/distributor conducts a voluntary safety recall) does not of itself mean that the vehicle is unsafe for the purposes of the consumer guarantees. This applies for the purposes of determining whether a motor vehicle is of "acceptable quality". The mere fact that a vehicle was subject to a recall should not automatically mean that a vehicle is unsafe such that it has suffered a major failure and the vehicle owner is entitled to a refund. FCAI considers this clarification to be of critical importance in ensuring the continued success of the voluntary automotive safety recalls regime.

FCAI suggests that as an initial step this be clarified with amendment to the ACL guidance material (such as the specific guidance material on motor vehicles released in 2014) with an appropriate amendment, perhaps in s260(e), to the ACL to follow.

The Interim Report canvasses a range of views from other stakeholders with which FCAI either has concerns or does not agree:

- (i) FCAI notes the consideration of development of specific guidance on the durability of goods. While CHOICE has proposed this, the FCAI points out that the likelihood of being able to offer definitive guidance in view of the wide range of vehicles available, the different specifications, the different locations, the different service and maintenance regimes and consumers' adherence to those regimes, along with additional complexities such as the different driving styles of consumers, means that with such a mix of wildly variable inputs there is no one output on "durability". The risk and complexity involved in heading in that direction is significant and in our view would produce a result that is unlikely to provide any stakeholders with any more clarity.
- (ii) FCAI strongly disagrees with the views expressed by CHOICE regarding non-disclosure agreements under the headings "Evidentiary issues" and "Non-disclosure agreements" in Section 2.1.3 of the Interim Report. As noted in FCAI's recent submission to the ACCC's Issues Paper regarding the New Car Retailing Industry Market Study, a claim for a refund or a replacement vehicle under the ACL will usually be a claim involving a substantial sum of money and/or other consideration which exceeds the manufacturer's statutory obligations in order to resolve the dispute. Where agreement is reached with a consumer to resolve such claims, it is a usual aspect of the settlement or resolution of such claims that settlement agreements might contain a confidentiality provision. The law encourages settlement of disputes without recourse to litigation and often the maintenance of confidentiality of the terms of the settlement will be an important consideration for the parties agreeing to the settlement.

For that reason, it is entirely reasonable and appropriate that settlement agreements resolving claims for refunds or replacement vehicles, whether under the ACL or in situations that go further than just meeting legal requirements, contain confidentiality provisions.

- (iii) If however CHOICE is concerned that the use of Non-disclosure agreements is limiting the amount of information available to consumers where a safety defect clearly exists in a product that does not have the integrity of the FCAI's Safety Recall Protocol under-pinning that product, then that perhaps is another matter. It is also relevant that in the case of motor vehicles there are systems in place to ensure that identification of the owner is possible as each vehicle has a unique identifier and safety recall information is publicly available on the ACCC's website.
- (iv) FCAI also disagrees with CHOICE's submission that there is a "power imbalance" between consumers and traders. To the contrary, consumers are arguably more empowered today than ever before – the power of social media, combined with the extent of remedial rights available to consumers under the ACL and the reach and extent of automotive manufacturers' warranties against defects means that consumers' powers have reached and continue to set a new high water mark.
- (v) FCAI has concerns with the proposed amendment to the ACL submitted by Legal Aid Queensland in Section 2.1.5 of the Interim Report. The circumstances proposed by Legal Aid Queensland as triggers for refund rights are impractical, somewhat arbitrary and do not take into consideration whether any repairs were indeed successful. It is conceivable that a motor vehicle could be off the road for repair for more than 5 weeks if a special part or component has to be specially ordered or manufactured. Further, the words "safety-related non-scheduled repairs" elude to safety recalls. FCAI is strongly of the view that the number of safety recalls, and indeed any safety recalls at all, should bear no reflection on whether a motor vehicle complies with any of the consumer guarantees.

FCAI notes the results of the Australian Consumer Survey 2016 detailed in Box 8 in the Interim Report with respect to the improvement in the reporting of motor vehicle problems between 2011 and 2016.

However, FCAI queries the integrity of some of the reporting. For example, CHOICE reported that 66 percent of survey respondents reported a problem with their new car within 5 years. Based on total new vehicle sales in 2015 of circa 1.1million, this would extrapolate to over 726,000 of those vehicles sold reporting a "problem", which based on FCAI's member's experience is simply incorrect – it begs the question: what is being defined as a problem? This is just one example of the application of their reported "research" data to the true quantity of new vehicles sold in recent years producing a result that bears no resemblance to reality.

11. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance? For example, the cost of returning rejected goods, including what may constitute 'significant' cost?

FCAI suggests that there are a few areas of uncertainty relevant to motor vehicles and relating to consumer's remedial rights that would benefit from further guidance and/or clarity in the ACL. FCAI is of the view that the remedial rights available to consumers, in the context of motor vehicles, raise some complexities and consequences that may not have been envisaged or were unintended when the ACL was introduced. These include:

- (i) As explained in Paragraph 4.4.1.2 of the First FCAI Submission, a major failure of a motor vehicle to comply with a consumer guarantee entitles the consumer to a full refund, notwithstanding that the consumer has had use of the vehicle, particularly when up to that point the vehicle may well have been trouble-free for months or even years. FCAI considers that this is an unfair windfall gain to the consumer and seems inherently unfair. 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, its condition and its depreciation in value because of that use or passage of time (since the vehicle was purchased). Whilst the ACCC has published some guidance material at <http://www.accc.gov.au/consumers/consumer-rights-guarantees/repair-replace-refund> suggesting that suppliers may take into account how much time has passed since the consumer bought the product and consider factors such as the type of product or how a consumer is likely to use the product, these matters remain unclear when applied to motor vehicles and it is not uncommon for consumers to seek full refunds several years after delivery.
- (ii) Similarly, a major failure of a motor vehicle to comply with a consumer guarantee entitles the consumer to reject the vehicle and choose an identical replacement (or one of similar value if reasonably available). New motor vehicles typically have a model cycle, during which a range of different variants may be made available and after which a vehicle may either be discontinued, replaced entirely or otherwise superseded with an entirely new model. Sometimes, an entirely new model may not be available at a similar price to the superseded model as the new model may have new features and technologies that result in a higher price than the old model. This can be exacerbated by the use and depreciation issue raised in paragraph (i) above. FCAI suggests that some guidance giving greater clarity on this issue would be helpful, including the potential for the consumer to contribute financially to the higher priced product.
- (iii) FCAI re-iterates its views expressed in Section 4.4.1.3 of the First FCAI Submission regarding damage to vehicles and accessories, and suggests this is an area also requiring clarity and guidance.
- (iv) FCAI re-iterates its views expressed in Section 4.4.2 about some complexities in the automotive sector regarding the fact that an inability to repair a minor defect within a reasonable time gives a consumer the right to reject the goods.

Complexities with diagnosis of vehicle issues or faults, and the availability of replacements parts (or requirement to order specific parts to be manufactured and/or imported) can mean that delays in the repair of motor vehicles can sometimes occur. As motor vehicles increasingly become more sophisticated the trouble shooting required to diagnose an issue or replicate a fault reported by an owner can take some time, notwithstanding the best efforts of dealers and manufacturers/distributors.

Many FCAI members report that they, and their authorised dealers, make substantial efforts to provide customers with loan vehicles and support, including free rental cars at the manufacturer's cost, in these circumstances. FCAI considers that a customer should not be entitled to reject the goods in situations where the servicing dealer or the manufacturer/distributor arranges or provides, free of charge to the customer, a loan vehicle during the time that their vehicle is off the road undergoing diagnosis and repair, or waiting for replacements parts or components for more than a few days (that is, in circumstances where the vehicle cannot safely be used while waiting for diagnosis, repair, parts or components).

- (v) As explained in Section 4.4.1.1 of the First FCAI Submission, the definition of "major failure" in Section 260(a) of the ACL presents some complexities for the motor vehicle sector. Section 260(a) 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".

FCAI remains strongly 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. Consumers often seek to rely on this section to convert a minor failure into a major failure, claiming that they would never have purchased the vehicle had they known about the minor issue. Vehicles are complex machines and it is reasonable to expect that issues may arise from time to time. The Australian Consumer Law acknowledges this, by allowing manufacturers and suppliers to remedy minor defects. Further, the widespread practice and consumer expectation in the automotive industry of having the benefit of an additional manufacturer's warranty is such that a reasonable consumer would accept that vehicles may have issues which will be rectified under the warranty, and therefore minor issues should not trigger the rights under section 260(a). Section 260(a) could as an example be replaced with wording along the lines 'the goods are not of acceptable quality in one or more significant respects which cannot, within a reasonable time, be remedied'.

- (vi) FCAI is of the view that it would be helpful to have further guidance provided to consumers on the risks involved from a consumer law perspective if the Government proceeds with their mooted changes to the concessions currently applying to personal imports of new motor vehicles direct from overseas suppliers rather than through the authorised Australian distributor. The ACCC has previously highlighted that goods purchased by Australian consumers direct from overseas will not necessarily have the protection afforded to consumers who purchase goods from domestic suppliers. Quite clearly, should such changes be made to the laws regulating the importation of new motor vehicles the effectiveness of the ACL would be undermined for these consumers.

12. If they are not suited to this approach, why not? For example, do the issues (such as the costs of technicians or returning a good) require further legislative clarification, or should the status quo remain to ensure a high level of flexibility?

FCAI's view is that whilst all measures to improve clarity would be beneficial to all stakeholders, including consumers, manufacturers and dealers, if that needs to be achieved via further guidance supported by the Federal and State/Territory Governments then that process should begin.

13. What more, if anything, can be done to encourage businesses to provide more information about the durability of their products? What, if any, further guidance on durability is feasible while still allowing important differences between goods of a certain type to be recognised?

FCAI members typically provide quite comprehensive information about durability, in the context of the maintenance requirements for their vehicles and that failing to undertake service and maintenance in accordance with those requirements may affect durability and performance, in the owner's manual of each new motor vehicle. Therefore, FCAI's view is that no further encouragement is necessary, nor

does the FCAI believe that any requirement to compel inclusion of any statements on durability would be of benefit to the consumer – refer response at 10(i) above.

2.1.4 Lack of clarity about 'major failures' & 2.1.5 Industry-specific concerns

14. Can issues about the acceptable quality of goods that are raised in particular industries be adequately addressed by generic approaches to law reform, in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?

Whilst FCAI is supportive of generic approaches to law reform in conjunction with industry specific activities and education, a concern is that guidance manuals and other materials do not have the force of law. It subsequently remains open for tribunals and courts to apply the law as they interpret it, with any unintended vagaries that may exist. If clarification of any issues, particularly those that are industry specific, can be achieved by means other than change to legislation, for example, with official practice notes or "rulings" (such as what the ATO provides with respect to tax issues), FCAI suggests such other means should be considered.

FCAI suggests that it is critical that all education and guidance activities and publications are correctly aligned and consistent. For example, FCAI has become aware that guidance material published by the ACCC at <http://www.accc.gov.au/consumers/consumer-rights-guarantees/repair-replace-refund> refers "major problem" and "minor problem" with goods and services, rather than a major or minor failure of either of them to comply with a consumer guarantee. Regrettably, this information is misleading and unhelpful to resolving customer issues in accordance with the ACL and should be corrected by the ACCC.

15. What kinds of industry-specific compliance and education activities should be prioritised in the context of finite resources?

FCAI supports the ACCC's industry specific guide for Motor Vehicle Sales & Repairs. However, the guide is now several years old and would benefit from a review and possible re-work in some areas, particularly relating to the issues canvassed in this submission as requiring greater clarity and certainty.

16. In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a 'major' failure? If so:

- **What are these circumstances, and should they be defined, or deemed, to be major failures? For example, should there be discretion for courts to determine the number of 'non-major failures' or type of safety defect that would trigger a 'major failure'?**
- **Are there any relevant exceptions or qualifications?**

FCAI refers to its response to Question 11 above. In addition, FCAI is strongly against any discretion for the tribunals/courts to determine (or for any other regime whereby) a set number of "non-major failures" or any type of safety defect with a motor vehicle that would trigger or constitute a major failure. As mentioned in Paragraph 4.4.1.1 of the First FCAI Submission, motor vehicles are complex

pieces of machinery, often advancing new and innovative technologies, and it is reasonable to expect that in their early life there might be some issues or "bugs" that need to be rectified, not unlike any other complex computerised goods. Increasingly now and in the future, some issues may well be able to be rectified with something as simple as a software update, such as is regularly offered in regards to mobile phones. It could produce very undesirable and unfair outcomes if a "3 strikes and it's a major failure" style of determination was introduced, especially if issues are resolved by regular software updates or other minor repairs.

FCAI is of the strong view that there would be very few circumstances where a repair to a motor vehicle is not an appropriate remedy. Most FCAI members report that either they or their dealers are almost always able to diagnose and fix or repair a bona fide issue with a motor vehicle. As mentioned elsewhere, diagnosis can sometimes require troubleshooting, long and/or multiple test drives and a repair can occasionally require a part or component to be ordered from overseas or to be manufactured specifically, adding to the time required to undertake the repair. However, for the reasons outlined elsewhere in this submission, this should not amount to a major failure of the vehicle to comply with a consumer guarantee. In certain instances it may be resolved by the distributor to replace a complete component rather than the faulty unit within the complete component. This decision may lead to a quicker repair and accompanied improved outcomes for the consumer, however the choice to replace a major component does not lead to a conclusion that the product suffered a major failure. For example, manufacturers will often elect to replace an engine or transmission rather than repairing a component of it, which can give the erroneous impression that perhaps the vehicle suffered a major failure, rather than a minor failure which was remedied with a major component replacement within a reasonable period of time.

17. What are the costs associated with businesses providing refunds in circumstances that are above the costs associated with existing business policies on refunds? What impacts would this have on consumers?

The costs to FCAI members of providing refunds (or replacement vehicles) are very significant. These costs are exacerbated when motor vehicle manufacturers or distributors are compelled to refund or replace motor vehicles that are:

- (i) more than one or two years old, and/or
- (ii) have been driven for a significant number of kilometres; and/or
- (iii) have questionable service and maintenance histories; and/or
- (iv) significantly depreciated in value due to their age, use or condition.

The costs are, for FCAI members, significantly greater than the cost of refunding or replacing a toaster, as an example. Motor vehicles are likely to be among if not the highest value goods to which the ACL applies. Ultimately, most FCAI members are likely to have no other choice than to pass on these costs to consumers in the way of higher prices for new motor vehicles if they are forced to provide replacements or full refunds without taking into account the factors above which reduce the value of a vehicle.

For context, it is important to remember that all motor vehicle manufacturers voluntarily offer a warranty in addition to the consumer guarantees, and that their warranties arguably provide market-leading consumer protection in terms of their duration (up to 7 years, depending on the brand) and comprehensiveness. Few goods come with warranties against defects that are as long as those offered with new motor vehicles.

Also, these manufacturer warranties are generally transferable with the vehicle upon sale to subsequent owners during the term of the warranty, including when a vehicle is sold privately. Therefore, in some circumstances motor vehicle manufacturer warranties against defects can provide a superior level of consumer protection than that provided under the consumer guarantees.

18. Are there any unintended consequences, risks or challenges that need to be considered? For example, how would they affect current business policies regarding refunds?

FCAI has no comment on this.

2.1.6 Disclosure of rights under the ACL

19. Is there a need to amend current requirements for the mandatory notice for warranties against defects? If so:

- **how should the text be revised to ensure that consumers are provided with a meaningful notice about the consumer guarantees?**
- **would it, in practice, reduce ongoing costs for business or were they largely incurred when the requirement was introduced?**
- **would it require any transitional arrangements and, if so, what are the preferred arrangements and why?**

The statement should begin with the words "When the consumer guarantees apply,". This will avoid inconsistency between the mandatory statement and the standard manufacturer's warranty in circumstances when the consumer guarantees do not apply (e.g. when the vehicle is acquired for re-supply or they are transformed into a different product – s.3(2) ACL). FCAI is of the view that there is no other need to amend the current requirements for the mandatory notice for warranties against defects.

20. Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirement?

FCAI is of the view that the current mandatory text requirements are appropriate.

21. Is there a need for greater regulation of extended warranties? If so:

- **is enhanced disclosure adequate or is more required?**
- **what are the costs of providing general and specific disclosure for businesses? Would disclosure change, in practice, outcomes for consumers?**
- **what has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)?**

FCAI has no comment on this.

22. What guidance and transition arrangements would businesses need?

FCAI has no comment on this.

23. Are there any unintended consequences, risks, or challenges that need to be considered?

FCAI has no comment on this.

24. Are there other ways to address the stakeholder concerns raised, without removing choice and flexibility for consumers?

FCAI has no comment on this.

1.2 Product safety (pages 70-104)

2.2.3 General safety provision

25. What are the key principles for an effective product safety regime?

FCAI has no view on what are the key principles for an effective product safety regime, other than to re-iterate that for more than 20 years recalls of motor vehicles with safety-related defects have been governed by a voluntary Code of Practice¹, to which all FCAI members and some non-members comply. This Code sits with the provisions of the ACL dealing with safety-related recalls. The current regime has worked, and continues to work, very well indeed and FCAI suggests it should continue in its current form, including the close cooperation between the industry, the Federal Department of Infrastructure and Regional Development and the ACCC. Importantly with respect to motor vehicles there are systems in place in conjunction with Government authorities that can, in certain circumstances, enable the tracking of the particular vehicle and the direct contact with the owner to ensure the reach of any recall.

26. Would a general safety provision in the ACL better meet those principles? Why, or why not?

FCAI does not support a "general safety provision" as it is concerned with how such a provision may be interpreted in the context of motor vehicles, and particularly in the context of a voluntarily safety recall regime for motor vehicles that works exceptionally well (in comparison to the recall of other goods). The FCAI is unaware of any concerns with the recall code or its members' compliance with it and both consumers and governments seem to have confidence in it such that an alternative legislative regime is not required. Further, FCAI notes that, as mentioned in Box 14 of the Interim Report, motor vehicles are an exception to Canada's specific regulations regarding safety of consumer products.

¹ The FCAI Code of Practice for the Conduct of an Automotive Safety-Related Recall Campaign.

27. Would a general safety provision provide an effective and proportionate response to concerns raised about the current regime?

- **What costs would it impose on business, for example, what processes or practices would need to be changed?**
- **What impacts would it have on safety outcomes for consumers?**
- **What, if any, transitional arrangements would be required for businesses?**
- **Are there any unintended consequences of a general safety provision?**

FCAI refers to its response to Question 26 above.

28. Are there any current overseas models, or features of models, that should be considered in any general safety provision? If so, why? Would adaptation be required for the Australian context?

FCAI has no comment on this.

2.2.8 Performance-based approach to compliance with standards

29. Should a 'performance-based' approach to product safety standards be introduced?

- **What changes would businesses need to implement, and what are the associated costs? What impacts would a 'performance-based' approach have for consumers?**
- **Are there any unintended consequences, and how could these be addressed?**

FCAI is of the view that any "performance based approach" is unnecessary with respect to product safety standards relevant to motor vehicles. FCAI notes that the standards to which motor vehicles must comply are presently governed by the *Motor Vehicle Standards Act 1989 (Cth)*, which is the subject of a separate review. FCAI suggests that this should not change and that additional standards regulation for vehicles in the ACL is unnecessary.

30. How could the approach be designed? For example:

- **Are there any current domestic or overseas models, or features of models, that should be considered?**
- **How would it interact with other elements of the current regime, or with a general safety provision?**
- **What, if any, transitional arrangements would be required for businesses?**

FCAI has no comment on this.

2.2.10 Mandatory reporting requirements

31. Should the mandatory reporting triggered be clarified? If so:

- **How should this be achieved?**
- **What changes would businesses need to implement to their current reporting processes, and what impact would this have on their compliance costs?**
- **How would this affect the information that is available to regulators, and product safety outcomes for consumers?**

The mandatory reporting regime captures minor injuries incurred by mechanics when repairing motor vehicles when such injuries are not reportable under work health and safety laws, which is potentially an unintended application of the regime having regard to the minor nature of the injuries. If such injuries are not intended to be covered by the reporting obligations, then this should be clarified. FCAI also notes that the Interim Report suggests on page 92 that the medical practitioner is required to draw detailed conclusions as to a range of matters. FCAI suggests that this requirement actually falls to the supplier of the product not a medical practitioner. The FCAI is otherwise of the view that the mandatory reporting requirements work well and do not require any other specific changes.

32. Should the current timeframe for making a mandatory report be extended? If so:

- **What time period should apply?**
- **Should it be accompanied by other requirements, for example, immediate notification?**
- **What changes to businesses processes would be needed, and what would be the impact on compliance costs?**
- **What, if any, transitional arrangements would be needed?**
- **Are there any unintended consequences, and how could these be addressed?**

FCAI refers to its response to Question 31 above.

2.2.12 Product bans and recalls

33. Should a statutory definition of a voluntary recall be introduced? Would this address the concerns raised? If so:

- **How should a voluntary recall be defined?**
- **What factors or criteria should be included?**

The FCAI is unaware of any concerns with the definition of a voluntary recall. As mentioned above in FCAI's response to Question 25, for more than 20 years recalls of motor vehicles with safety-related defects have been governed by a voluntary Code of Practice², to which all FCAI members and some non-members comply. This Code sits with the provisions of the ACL dealing with safety-related recalls. The current regime has worked, and continues to work, very well indeed and FCAI suggests it should continue in its current form.

² The FCAI Code of Practice for the Conduct of an Automotive Safety-Related Recall Campaign.

34. Should the penalty for a failure to notify a recall be increased and, if so, to what amount?

FCAI is of the view that the existing penalty regime is appropriate and that there is no justification for change.

35. Should current processes for implementing product bans and recalls be streamlined? If so:

- **How should they be streamlined?**
- **What would be the associated benefits and costs?**
- **Are there any unintended consequences, risks or challenges that need to be considered?**

FCAI refers to its response to Question 25 above, in particular the comments regarding the existing Code of Practice adopted by FCAI members.

2.2.13 Public information about unsafe products

36. Is there scope to improve the quality of information available to consumers on safety risks? If so:

- **What are the benefits of increased information, and what costs, risks or challenges need to be considered?**
- **What information is most helpful to consumers, and how should it be used? In a context of finite resources, what information should be prioritised?**
- **How could this be achieved? For example, in what format should information be provided?**

Apart from the support for the current new motor vehicle recall process, FCAI has no comment on this.

2.3 Unconscionable conduct and unfair trading (pages 105-116)

2.3.2 Are the provisions working effectively?

37. Is allowing the law on unconscionable conduct to develop an appropriate and proportionate response to the issues raised, and to future issues that may arise?

FCAI refers to the comments it made with respect to unconscionable conduct and unfair trading in Section 5 of the First FCAI Submission.

38. What are the consequences, risks and challenges of maintaining the status quo, compared with changing the law or codifying existing principles? Are there any better approaches that would address the issues raised while allowing concepts to develop in a flexible way?

FCAI has no comment on this.

2.3.3 Unconscionable conduct and publicly listed companies

39. Is it appropriate to continue to exclude publicly listed companies from the unconscionable conduct provisions and, if so, why?

FCAI refers to the comments it made with respect to unconscionable conduct and unfair trading in Section 5 of the First FCAI Submission. In addition, FCAI notes that several automotive dealership groups which operate a large number of franchised motor dealerships (ie, as a franchisee) are publicly listed companies which are significantly larger in scale and revenue than many motor vehicle manufacturers/distributors in Australia (ie, their franchisors). FCAI is of the view that publicly listed companies exclusion from the unconscionable conduct provisions is appropriate in these circumstances.

40. Should the unconscionable conduct provisions be extended to publicly listed companies?

- **What are the benefits for publicly listed companies?**
- **What changes would other business need to make to their existing business practices and what are the associated costs?**
- **Should the protections be extended to all publicly listed companies, or are some exceptions appropriate?**
- **Are there any unintended consequences, and how could these be addressed?**

FCAI has no comment on this.

2.3.4 Unfair trading

41. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?

FCAI refers to the comments it made with respect to unconscionable conduct and unfair trading in Section 5 of the First FCAI Submission.

42. Is there further evidence of a gap in the current law that justifies an economy-wide approach?

FCAI has no comment on this.

2.4 Unfair contract terms (pages 117-132)

As the question appears to relate to business-to-consumer unfair contracts terms, FCAI has no comment on this.

2.4.2 Unfair terms in insurance contracts

43. Should the ASIC Act's unfair contract terms protections be applied to contracts regulated under the Insurance Contracts Act? If so:

- **How should it be designed? For example, should it apply to all types of insurance contracts, or are some exemptions appropriate? Would any changes to the definition of 'main subject matter' be required? Would the same types of terms be considered 'unfair'?**
- **What this result in any likely changes to the insurance contracts that are offered to consumers? For example, to what extent would this option address the issues or examples of unfair terms raised by stakeholders?**
- **What would be the compliance costs of changing insurance contracts, and how would these affect consumers?**
- **What, if any, transitional arrangements would be required?**
- **Are there any unintended consequences, and how could these be addressed?**

FCAI has no comment on this.

2.4.6 Monetary penalties

44. Should the use of terms previously declared 'unfair' by a court be prohibited? If so:

- **What should be the extent of the prohibition? For example, would it only apply to identical or similar standard form contracts, within a particular sector, or more broadly?**
- **Would this increase the deterrent effect of the unfair contract terms provisions?**
- **What penalties and remedies should apply?**
- **What, if any, transitional arrangements would be required? How should business be made aware of contract terms that have been declared 'unfair'?**
- **Are there any unintended consequences, challenges or risks that need to be considered?**

FCAI has no comment on this.

2.4.7 Representative actions by regulators

45. Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be appropriate enforcement tool? If so, what should be the scope of this power?

FCAI has no comment on this.

46. Are there any unintended consequences, challenges or risks that need to be considered?

FCAI has no comment on this.

2.4.8 Legislative examples of unfair terms

47. Should the 'grey list' of examples of unfair contract terms be expanded? If so:

- **What examples should be added?**
- **Would this help address systemic issues or provide greater clarity for businesses and consumers?**
- **Are there any unintended consequences, risks or challenges that should be considered?**

FCAI has no comment on this.

2.5 Unsolicited consumer agreements (pages 133-152)

2.5.4 Concerns about the level of regulation & 2.5.5 Concerns about vulnerable and disadvantaged consumers

48. What are your views on maintaining the current unsolicited selling provisions? Is there another approach that would provide a more effective and proportionate response? If so, how?

FCAI has no comment on this.

49. Are there any unintended consequences, risks or challenges that should be considered?

FCAI has no comment on this.

50. Should the cooling-off period be replaced with an opt-in mechanism? If so:

- **How should it be designed? For example, should it apply to all unsolicited sales or only high-risk sales? How should 'high-risk' sales be defined?**
- **What would be an appropriate length of the opt-in period?**
- **Should there be any exemptions?**
- **What is the likelihood that consumers would exercise an 'opt in' right? What impact would this have on sales across all sectors that engage in unsolicited selling, and what difference would this make to consumers?**

FCAI has no comment on this.

51. Should additional rights and protections apply to the unsolicited sale of enduring service contracts? If so:

- **How should it be designed? For example, what rights should apply? How would 'enduring service contract' be defined? Are there any appropriate exemptions to consider?**
- **What should be the length, for example, of an extended cooling-off period? When should a termination right cease to apply?**
- **What, if any, transitional arrangements would be required, and which industries engaging in unsolicited selling would be most affected?**
- **Are there any unintended consequences, and how could these be addressed?**

FCAI has no comment on this.

52. Should an enhanced 'risk-based' approach to unsolicited consumer agreement protections be adopted? If so:

- **How should it be designed? For example, what would differentiate low-risk from high-risk sales? What different set of rights and protections would apply?**
- **What impacts would this have on sales across all sectors that engage in unsolicited selling, as distinct from direct selling?**
- **How would this affect outcomes for consumers?**

FCAI has no comment on this.

53. Can these matters be addressed through further guidance or is legislative change warranted?

FCAI has no comment on this.

3.1 Implementing the Australian Consumer Law and its objectives (pages 153-172)

3.1.3 Barriers to accessing information

54. What enhancements to existing communication channels would be most useful, and what is the level of consumer need? In a context of finite resources, what should be prioritised?

FCAI is of the view that the existing communication channels are adequate.

55. To what extent would a standalone version of the ACL be used by consumers and businesses? How should it be formatted, and what additional information (if any) should it contain?

FCAI has no comment on this.

56. Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?

FCAI has no comment on this apart from our earlier observation on improving/updating the current guidance material.

3.1.4 Access to remedies

57. What are your views on an expanded 'follow-on' provision, and the extent to which it would assist private litigants?

FCAI has no comment on this.

58. What, if any, unintended consequences, risks and challenges should be considered? For example, would this option affect the extent to which businesses are prepared to make admissions of fact?

FCAI has no comment on this.

59. Are there any other ways that ACL regulators can support private litigants, noting the existence of other review processes?

FCAI has no comment on this.

3.1.6 Access to consumer transaction data

60. What kind of evidence base is required for future policy development, and what is the most useful way to engage stakeholders about future research and data needs?

FCAI has no comment on this.

61. Are there other ways that ACL regulators can support stakeholder engagement in policy development?

FCAI has no comment on this.

62. Are there further ways for stakeholders to contribute and share their research and data with the wider community?

FCAI has no comment on this.

3.2 Penalties and remedies (pages 173-187)

3.2.3 Maximum financial penalties

63. Are the current maximum financial penalties adequate to deter future breaches of the ACL? Would an increase be an appropriate response to the issues raised?

- **If so, what approach should be adopted?**

FCAI is of the view that the current maximum financial penalties are more than adequate to deter future breaches of the ACL. Many FCAI members suggest that not only the prospect of significant financial penalties, but also the high risk and likelihood of reputational damage associated with any breach and/or regulator/ACCC action, act as a significant deterrent to breaching the ACL.

64. Are there alternative approaches to addressing the issues raised?

FCAI is of the view that the mix of penalties and remedies presently available is sufficient.

65. Are there any unintended consequences, challenges or risks that should be considered?

FCAI has no comment on this.

3.2.5 Effectiveness of non-punitive orders

66. Should traders be allowed or required to use third parties to give effect to a community service order? If so

- **How should this arrangement be designed? For example, under what circumstances would it apply? Which third parties should be allowed to give effect to a community service order? What requirements should be placed on them?**
- **What would be the benefits of such an arrangement for the party in breach, and for consumers?**
- **Are there any unintended consequences, challenges or risks that need to be considered?**

FCAI has no comment on this.

67. Are there other types of non-punitive orders to which this could apply?

FCAI has no comment on this.

4.1 Purchasing online (pages 188-202)

4.1.5 Pricing and safety information

68. Are current measures sufficient to ensure price transparency in online shopping?

FCAI has no comment on this.

69. Should measures to address pre-selected options during booking or payment processes be adopted? If so:

- **How should these be designed? For example, should pre-selected options be prohibited, or should any associated fees or charges be required to be included in the upfront price?**
- **Are the changes that would be required for websites and booking processes significant? What would be the costs of such changes? What transitional arrangements, if any, would be required?**
- **Are there any unintended consequences, and how could these be addressed?**

FCAI has no comment on this.

4.1.6 Application of the consumer guarantees in the online environment

70. Should the sale-by-auction exemption for consumer guarantees be amended with regard to sales by online auction sites? If so:

- **How should this be designed? For example, should the exemption be clarified, narrowed or removed altogether?**
- **Would it require online auction sites to change their existing processes and policies substantially, and if so, what are the costs of doing so and any transitional arrangements that may be required? What are the impacts for consumers?**
- **Are there any unintended consequences, and how could these be addressed?**

FCAI has no comment on this.

Additional comments

1. FCAI is of the view that there would be wisdom in considering whether to create a specialist tribunal, or have specialist adjudicators or perhaps even a "motor vehicle claims division" of

existing tribunals, that specialise in hearing and determining motor vehicle claims under the ACL and other statutory warranty legislation.

Motor vehicles are increasingly complex (and different) pieces of machinery, and this level of complexity will only continue to increase as the level of technology and computerisation of motor vehicles also increases. New technologies relating to automation and connectedness are on the horizon. Motor vehicles are among the most complex goods to which the ACL applies. To be fair to adjudicators that are not trained or experienced in these complexities, it will most likely be increasingly difficult for them to make decisions that are fair and reasonable.

In view of this, FCAI considers that there are a range of options that could be considered in this regard, such as a specialist tribunal, specialist adjudicators or a "motor vehicle claims division" of existing tribunals.

2. FCAI remains of the very strong view that "lemon laws" are unnecessary. We re-iterate the comments made in Section 4.3.1 of the First FCAI Submission. Additionally, FCAI members have made significant investments in ACL compliance and education both before and since the introduction of the ACL.

The current framework is sufficient but would benefit from refinement in the areas raised in this submission. Arguably, the ACL is a very effective de-facto "lemon law", it is just one that is not tainted or characterised by that term.

3. FCAI re-iterates the comments made in Section 5 of the First FCAI Submission regarding unfair small business contracts. In addition, FCAI queries the application of the new unfair contract terms legislation as it applies to small businesses with respect to its application to franchise agreements.

The detailed disclosure requirements set out in the Franchising Code of Conduct mean that all new and prospective franchisees receive a significant disclosure document before entering a franchise agreement with a franchisor. Prospective franchisees have ample opportunity to review, seek advice on and potentially negotiate the terms of a franchise agreement before they enter it. This doesn't seem to sit properly with an unfair contract terms regime that is intended to protect small businesses from unfair terms in "standard" or "take it or leave it" style contractual arrangements.

4. There should be a time limitation under the ACL for taking action against a supplier for breach of the consumer guarantees, as there is for actions against manufacturers under s. 273 of the ACL.