



Easy and Transparent Trading Consultation Paper
Regulatory Policy, BRD
Department of Finance, Services and Innovation
Level 5, McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

Dear Sir/Mam,

Federal Chamber of Automotive Industries Submission – Easy and Transparent Trading

Thank you for the opportunity to make a submission on the above discussion paper. The FCAI represents the distributors of new motor vehicles, motor cycles and ATV's in Australia and our members are often involved in matters that are touched on in your paper.

While FCAI was represented at the recent industry roundtable attended by the Minister there were some matters raised in the paper that were not touched on in the discussions. Given the relevance of these other matters to our sector we have provided a short submission attached.

Please contact Tony McDonald in our office on 02 6229 8217 if you have any immediate questions or concerns regarding the attached.

Yours sincerely,

Tony McDonald

Director, Industry Operations

29 August 2018



SUBMISSION BY THE FEDERAL CHAMBER OF AUTOMOTIVE INDUSTRIES

on

THE CONSULTATION PAPER ON EASY AND TRANSPARENT TRADING – EMPOWERING CONSUMERS AND SMALL BUSINESS

by

THE NEW SOUTH WALES OFFICE OF FAIR TRADING

1. The Federal Chamber of Automotive Industries (**FCAI**) is the peak industry body for the motor vehicle industry in Australia. Its members comprise nearly all of the importers of passenger, light commercial and SUV vehicles and motor cycles in Australia (**Distributor**).
2. The FCAI welcomes the opportunity to make this submission, which it does so on behalf of its members.
3. There are two matters in the consultation paper which are particularly relevant to our members. These are:
 - Section 2.1 - notice of key terms in consumer contract; and
 - Section 2.3 – non-disclosure agreements.
4. Before making some specific comments on these matters the FCAI would like to make the point that it agrees with the general principle that transparency in the market helps consumers make informed choices and that this is facilitated by ensuring that consumers have ready access to accurate and relevant information.

Section 2.1 - notice of key terms in a consumer contract

5. The FCAI agrees with the policy objectives that consumers should be able to make meaningful choices and to do so they need to fully understand the terms and conditions that are part of their purchasing decision.

6. In the ACCC's market study into the new car retailing industry, the ACCC concluded that customers looking to acquire a new vehicle were often confused about their rights under the Australian Consumer Law and the interrelationship of these rights with the manufacturer's express warranty. One of the recommendations made by the ACCC to address this apparent confusion was to work with the industry to develop a short document explaining a consumer's rights. This document would be provided to every new car purchaser at the time they purchased their vehicle. The FCAI supported this recommendation and has been working with the ACCC to develop this document. We understand that it will be finalised and released in the near future.
7. The document will be in plain English and will be set out in such a way as to clearly and simply explain a customer's rights when purchasing a new vehicle. There is no reason for customers to be provided with further documentation about their purchase. Indeed, there is a significant risk that any further documentation will overwhelm the customer with the consequent risk that the customer will not read anything.

Section 2.3 – Non-Disclosure Agreements

8. A non-disclosure agreement (NDA) is generally entered into between a Distributor and a consumer for a number of reasons, including the following:
 - where there is real doubt about whether there has been a breach of the ACL or manufacturer's warranty, a Distributor may offer to settle the matter but will require a NDA to prevent the consumer from publicly disparaging the brand; and/or
 - where a Distributor settles a matter and in the interest of good customer service offers additional compensation to the consumer (such as free scheduled service, contribution to the cost of other repairs, discount or voucher for repairs).
9. In either case, the Distributor has a legitimate interest in keeping the terms of the settlement confidential. The extensive use of NDAs in commercial dispute settlement negotiations is a legal tool developed over a considerable amount of time to help parties to resolve disputes whilst still protecting their legitimate interests. NDAs are frequently used as a tool in general alternative dispute resolution negotiations and settlements across a range of disputes from minor complaints to multi million dollar law suits.
10. NDAs do not necessarily reduce the amount of information available to a consumer in any significant way. There are a plethora of online resources and forums which detail the experiences of consumers and problems that they have experienced with certain makes and models of cars.
11. The preferred option – void non-disclosure agreements to the extent that they constrain a person from reporting an alleged breach of New South Wales consumer law to the regulator – is problematic for a number of reasons including:

- there is a real risk that the disclosure will be taken out of context by the regulator and the fact that the Distributor has made a payment will be taken as a tacit acceptance of liability. As explained above, in many cases, this would not be a justified conclusion;
- as identified in the consultation paper, one of the reasons for requiring an NDA can be that the Distributor wants to avoid adverse publicity in circumstances where it is unclear whether the Distributor has any liability. With all due respect to the Regulator, it can be very difficult to keep these matters confidential once the information is known by an increasing number of people;
- if there is a risk that the circumstances of the claim will be reported to the Regulator, this could remove the incentive for Distributors to offer customers a fast resolution in exchange for non-disclosure;
- the limitation on using the information only in circumstances where '*it is in the public interest to do so and nor for minor infractions or unsubstantiated allegations*' is very vague and subjective.

Section 2.5 – Consumer information standards – extended warranties

12. The consultation paper suggests that it would be appropriate for there to be an information standard for extended warranties. As pointed out in the paper, the ACL review conducted by the ACCC made similar recommendations. In the FCAI's view, if there is to be a requirement to provide information to purchasers of extended warranties, it should be consistent across Australia. Accordingly this matter should be considered by the ACCC as part of its review, not by the NSW Officer of Fair Trading. For the sake of completeness, the FCAI made the following points in its submission on the ACL review:

- the FCAI is prepared to work with authorities to come up with some appropriate wording for customers who acquire an extended warranty. (As an aside, this would be yet another piece of paper being provided to a purchaser of a new car);
- the ACL prohibits false or misleading representations concerning a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy that the person has under law - these would include the Consumer Guarantees contained in the ACL regime;
- extended warranties which are offered to consumers when they are purchasing their new vehicle are not branded products offered by Distributors – they are usually offered by dealers or are insurance products; and
- the FCAI is supportive of the suggestion that a cooling off period is desirable, however it considers that 10 clear days is excessive. Three clear days, would be more than adequate. This is consistent with

legislation in a number of jurisdictions dealing with the purchasing of a motor vehicle¹ and is also consistent with the cooling off period when purchasing a house.²

¹ See, for example, s 80 of the *Motor Dealers and Repairers Act (NSW) 2013*, which provides for a one business day cooling off period for the purchase of a dealer financed motor vehicle.

² See, for example, s 66S in the *Conveyancing Act (NSW) 1919* which provides for a 5 day cooling off period for the purchase of residential real estate.