FCAI Submission in relation to the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021

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FCAI Submission to Litigation Funding Inquiry

1. Executive Summary

1.1 The Federal Chamber of Automotive Industries (**FCAI**) is the peak industry organisation representing the importers of passenger vehicles, light commercial vehicles and motorcycles in Australia. The FCAI welcomes the opportunity to make this submission in relation to the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (the **Bill**) related to the proposed regulation of litigation funding.

1.2 FCAI members have been subject to a number of recent class actions supported by litigation funders, including one where at the point of approving settlement the Court held that the Funder in question had during the course of the proceeding engaged in "*entrepreneurial activity entered into solely for the financial benefit of [the Funder] and in complete disregard of the interests of group members*."[1]

1.3 FCAI accepts that litigation funding has a role to play in the Australian class action landscape to facilitate the efficient resolution of multiple claims arising from the same, similar or related circumstances. However, it strongly supports appropriate regulation of the industry through legislation to ensure that litigation funders are exposed to appropriate levels of risk in relation to the litigation they support in order to limit the exposure of FCAI members to speculative litigation which does not have a significant level of support among potential claimants.

1.4 FCAI therefore welcomes and supports the Bill as an important next step in the regulation of litigation funders and empowering Courts to ensure that funders' returns are limited to what is appropriate in the specific circumstances of the case.

1.5 FCAI's Submission is structured to:

(a) provide some background for the Committee on FCAI and the Australian automotive industry;

(b) explain the basis for FCAI's support for the Bill; and

(c) identify some residual concerns which the FCAI has in relation to the Bill.

2. FCAI and the Australian Automotive Industry

2.1 Size, Shape and Importance to Australia

(a) In the 2019 calendar year, there were 1.06 million new vehicles sold in Australia out of a total estimated 91 million sales worldwide.[2] There are currently over 18 million vehicles on Australia's roads, meaning that the Industry plays an essential role in the work and social lives of most Australians.

(b) FCAI member organisations employ approximately 60,000 Australians across a number of roles, both directly and indirectly. Further, many automotive brands are major providers of specialist training for automotive technicians who may diversify into other industries.

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[1] Cantor v Audi (No 5) [2020] FCA 637 (***Cantor***) at [472].

[2] International Organization of Motor Vehicle Manufacturers, 2005-2019 Sales Statistics http://www.oica.net/category/sales-statistics/; FCAI, 'New vehicle sales down in challenging 2019 market' (6 January 2020) https://www.fcai.com.au/news/index/view/news/600.

2.2 **Automobiles, Recalls and the ACL**

(a) Motor vehicles and motorcycles are extremely advanced consumer goods made from tens of thousands of component parts (which themselves are made by hundreds of separate manufacturers from around the globe). The mechanical, chemical and computer technology contained within vehicles, and the way that this technology interacts with the driver, other drivers and pedestrians, communication systems and the external environment, is evolving at a rapid rate as the benefits of these new technologies to society becomes more readily identifiable.

(b) The advanced and complex nature of motor vehicles, coupled with the nature of their use, means that they require routine inspection, servicing, and repair or replacement of component parts. As a result:

(i) new motor vehicles are generally supplied with express warranties in addition to those contained in the Australian Consumer Law (**ACL**);

(ii) regular servicing is required; and

(iii) safety recalls are common - approximately one-third of all voluntary recall notifications in the 2018 and 2019 financial years related to motor vehicles (not including those relating to Takata airbags).[3]

(c) FCAI has worked with the Industry and Government to develop a Code of Practice for automotive safety recalls which recognises not only the particular complexities associated with motor vehicles but also the ability to trace each individual unit of product in the market.[4] The initiation of a motor vehicle recall does not mean that there is automatically a consumer remedy available under the ACL. Rather it results from the identification of a potential risk higher than that entertained at the time of release of the vehicle to market. It may be that the recall is precautionary, so that the risk is later shown not to exist. It may be that the issue which gives rise to the recall only actually affects a small fraction of the vehicles recalled. It may also be that the appropriate ACL remedy is repair of the goods at no cost to their owner, which is achieved by the recall in any event.

(d) In addition to the protection afforded by express warranties and voluntary safety recalls, the ACL creates a regime which supports the rights of Australian consumers. In the context of the automotive industry, this means that consumers are able to have their vehicles campaigned by dealers to ensure that the potential problem is eliminated. Further, in the case of complex products like motor vehicles, the ACL creates a delicate balance between recognising the inevitable need for service and repair over a lengthy operating life and providing additional remedies to consumers in rare cases of serious product failure. Whether the ACL strikes the right balance in the case of motor vehicles is a matter of ongoing dialogue between the FCAI and the government.

(e) **I**t is important that FCAI members are able to promptly and transparently communicate to the market in respect of potential safety issues is critical for products such as motor vehicles. No FCAI member wants to see a user of their vehicles affected by a safety issue. However, the FCAI is concerned that its members are not subject speculative class actions claiming economic loss

[3] ACCC and AER, Annual Report 2017-18, 113: https://www.accc.gov.au/system/files/ACCC-%26-AER-Annual-Report-2017-18_0.pdf; ACCC and AER, Annual Report 2018-19, 106: https://www.accc.gov.au/system/files/ACCC-AER%20annual%20report_2018-19.pdf.

[4] The current edition, FCAI, Code of Practice for the Conduct of an Automotive Safety Recall (26 August 2021), may be found at: https://www.fcai.com.au/news/codes-of-practice/view/publication/185.

emerging from recall announcements, particularly if the recall offers a complete remedy for the issue for the vast majority of, if not all, vehicle owners.

2.3 **Recent Class Actions Affecting the Industry**

(a) In recent years, several FCAI members have been the subject of significant class action proceedings - all but one of which have been commenced following a vehicle safety recall or customer service exercise (that is, a non-safety related field fix or product improvement) by the member company.

(b) In the cases following recall or customer service exercise, the claim brought on behalf of group members includes a claim that the relevant recall or exercise (or the issue underlying the recall or exercise) has caused affected vehicles to lose value and that group members are entitled to be compensated for that loss in value.

(c) Each of these proceedings has attracted significant media attention. They also demonstrate that class actions involving large classes and complex technical issues can take many years from commencement to hearing or settlement:

(i) **Volkswagen Diesel Emissions:** Five class actions were commenced in late-2015 on behalf of 100,000 Australian car owners against Volkswagen, Audi, and Skoda, in relation to breaches of the ACL. There were two law firms involved in bringing the class actions.

In 2020 the Federal Court approved a settlement of the class actions. One of the law firms was funded by Grosvenor Litigation Services, the other was not funded.

(ii) **Ford Transmission:** A class action against Ford in relation to certain models equipped with the Powershift transmission was commenced in May 2016 on behalf of 70,000 group members. The class action is funded by Martin Place Litigation Services.

The Federal Court delivered its first instance judgment in June 2021[5], more than five years from the date the proceedings were filed. The applicant was successful in respect of some but not all claims.

(iii) **Takata Airbags:** In 2017 and 2018 class actions were brought against Toyota, Honda, Mazda, BMW, Subaru, Nissan and Volkswagen on behalf of an estimated 2.3 million group members whose vehicle were subject to Takata Airbag recalls. The proceedings have a common law firm and funder (Regency Litigation Funding).

Six of these proceedings have settled in principle, with group members now able to register process for the settlement[6]. The settlement is for $52 million across all six proceedings, with the funder seeking $13 million by way of funding commission and the plaintiffs seeking $15.3 million by way of costs.

Volkswagen was entirely successful in its defence of the seventh proceeding (which is presently on appeal)[7].

(iv) **Toyota Diesel Particulate Filter:** Class action proceedings were commenced by two law firms, supported by a litigation funder, in July

[5] *Capic v Ford Motor Company Of Australia Pty Ltd* [2021] FCA 715

[6] *In re the Takata Airbags Class Actions Settlement (Preliminary Orders)* [2021] NSWSC 1153.

[7] *Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia* [2021] NSWSC 715

2019 against Toyota on behalf of 250,000 consumers who purchased various models fitted with diesel particulate filters which are alleged to be faulty and were subject to a customer service exercise. These proceedings are ongoing.

(d) In addition to the actions outlined above, a number of other class actions have been threatened against FCAI members. The threats follow a similar structure to those outlined above, namely that they allege that vehicles which have been subject to remedial action by the local owner have nevertheless lost value because of the presence of an alleged defect in the vehicle or caused other out of pocket losses.

3. The FCAI supports the Bill

(a) The FCAI believes that litigation funding arrangements should be regulated so as to ensure that class actions continued to fulfil the original purpose of access to justice and the vindication of group member rights and not the commercial interests of litigation funders. Most often a motor vehicle safety recall will provide a sufficient remedy for a motor vehicle owner and the suggestion that a motor vehicle may suffer a diminution in value merely because it has been subject to such an action does not accord with common experience in the motor vehicle market.

(b) The Bill provides that funding agreements are not enforceable unless approved by a court and further that in order for such approval to be given, the proposed claims proceeds distribution method must be fair and reasonable when considering the interests of a scheme's members as a whole. This will increase court supervision of litigation funders, give participants in funded class actions comfort that their interests are a key consideration of the court in approving payment to a funder and help to ensure that the remuneration paid to litigation funders is commensurate with the investment and risk and is not excessive.

(c) Therefore the FCAI supports the Bill, subject to the specific concerns raised in section 4 below.

4. Specific concerns about the Bill

4.1 The factors which may be considered by the Court in applying the fair and reasonable test (s 601LG(3))

(a) The Bill provides that when determining whether a claims proceeds distribution method is fair and reasonable, a court must only have regard to the limited and mandatory factors as set out in section 601LG(3). While the factors identified in section 601LG(3) are clearly appropriate matters to be considered by a Court, the requirement in section 601LG(3) that a Court must only have regard to those factors carries a risk of unintended consequences. This is because class actions are brought in relation to a diverse range of legal claims and the list at section 601LG(3) may not allow for relevant case specific factors to be considered.

(b) For example, the proposed new section should also permit the Court to have regard to whether the claimants have recovered in respect of each of their claims for remedies and, if not, whether there was a reasonable basis for making each of those claims when the litigation was commenced. A plaintiff's failure to recover in respect of a particular remedy which they nevertheless had a reasonable basis to pursue may be a reason why it is appropriate for the funder to recover a greater percentage of the proceeds than is otherwise the case. Such a settlement may be in the interests of all parties because it fairly reflects the actual value of group member's claims.

4.2 The 30% “rebuttable presumption” (s 601LG(5))

(a) The proposed rebuttable presumption that a distribution method is not fair and reasonable if it results in more than 30% of the claim proceeds being paid to a

person who is not a member of the scheme is not a well-adapted measure to prevent abuses by funders. It is an arbitrary measure which bears no necessary relationship to the actual risk and reward in a particular class action. It also assumes a relationship between the amount invested by the funder in the litigation and the entitlements of group member which may not exist. It therefore carries a risk of unintended consequences.

(b) It is possible that a funder who recovers 30% of the proceeds of a particular class action may still achieve a return which does not justify their investment. Equally, there may be class actions where the ultimate entitlements of group members are ultimately shown to be less than 70% (including, for example, minimal or non-existent). The question of whether a litigation funder should make a profit from such litigation and, if so at what level, will need to be determined by a Court, but that should not be done by reference to an arbitrary limit on recovery.

(c) At a practical level, the FCAI is concerned that the rebuttable presumption may result in the 30% maximum becoming the 'norm' and encourage litigation funders to seek remuneration of 30% of the total settlement sum, regardless of the actual amount of capital invested in the proceedings. As it is difficult for litigation funders to predict whether they will be adequately remunerated for their contribution (both in terms of capital and the risks assumed) until the end of a proceeding, it is likely that any settlement negotiations will be driven by the funder's desire to make good their investment. Imposing a maximum 30% return for funders may have the unintended consequence of making the litigation funder's investment a baseline for settlement and, in turn, settlement more difficult to obtain.