FEDERAL CHAMBER
OF AUTOMOTIVE
INDUSTRIES

ABN No 53 008 550 347

LEVEL 1
59 WENTWORTH AVENUE
KINGSTON ACT 2604
AUSTRALIA
PHONE: 02 6247 3811
FAX: 02 6248 7673

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Consumer Policy Unit
Market Conduct Division
Treasury
Langton Crescent
PARKES ACT 2600

By email: morecompetition@treasury.gov.au

***Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices***

Thank you for the opportunity to comment on the exposure draft of the Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022. The Federal Chamber of Automotive Industries (**FCAI**) is the peak industry body representing the importers and distributors of new passenger motor vehicles, light commercials, and motorcycles into Australia.

In the short time available, the FCAI will comment on the proposed penalty increases as they apply to the Australian Consumer Law (**ACL**). By not commenting on all the proposed penalty increases for breaches of the *Competition and Consumer Act 2010* (Act) more broadly, it should not be taken that the FCAI agrees with them: to the contrary it believes that they are egregious and unnecessary. However, the proposed penalty increases for breaches of the ACL are particularly relevant to our members and are particularly pernicious.

First, some context. Prior to September 2018 the maximum penalty for a corporation breaching the ACL was $1.1million. Now, it is the greater of $50 million, or 3 times the value of the benefit obtained and if that cannot be ascertained, 30% of the corporation's turnover during the relevant period (which is a minimum of 12 months). Motor vehicles are high value items and consequently many of our members have high annual turnovers – many in excess of $1billion - with high expenses. With an annual turnover of $1billion, the maximum penalty facing a company would be $300 million. So, for these companies, in 3 years the maximum penalty has increased by almost 300 times.

Even putting to one side the turnover criteria and just focusing on the figure of $50million, in 3 years the maximum penalty has increased by almost 50 times.

One needs to ask: what has happened in the last 3 years to justify such an enormous increase? The answer is, nothing has happened. The only justification in the Explanatory Memorandum seems to be that the penalties in the ACL need to be the same as for the rest of the Act and because these penalties need to increase (for reasons that are not readily apparent) the penalties for the ACL also

need to increase. This is completely flawed logic. There is no requirement that the maximum penalties should be the same. Maximum penalties for breaches of the ACL should be looked at separately and when they are, it is clear that the current maximum penalties are more than adequate.

The FCAI's main points can be framed by reference to the statement in the Explanatory Memorandum that the penalty increases are *'Consistent with the principles set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers'*[1]. Put simply, they are not.

The Guide sets out 2 principles that are relevant.

> '*A maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme. A higher maximum penalty will be justified where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging'*[2] *(*Adequacy of Penalty to Deter)

and

> '*A penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. This should include a consideration of existing offences within the legislative scheme and other comparable offences in Commonwealth legislation such as the Criminal Code'*[3] *(*Consistency of Penalties*)*

Before addressing each of these briefly, one initial point should be made. The Guide, and these principles, seem to be referring to penalties for criminal offences where the standard of proof is beyond reasonable doubt. Breaches of most of the provisions in the ACL also attract a civil penalty, where the burden of proof is "on the balance of probabilities". Clearly, it is much easier to establish a breach on the civil standard of proof and yet the maximum penalty is the same whether it be a civil penalty or a penalty for a criminal offence.

**Adequacy of Penalty to Deter**

As the Guide states, a higher maximum penalty is justified when there is a strong incentive to commit the offence and where the consequences are particularly dangerous or damaging. Table 1.2 in the Explanatory Memorandum sets out the civil penalty provisions in the ACL. While the FCAI does not want to diminish the importance of these provisions, their breaches do not have consequences that are 'particularly dangerous or damaging'. Also, there are not strong incentives on automotive manufacturers to commit these offences. In fact there is the opposite. Manufacturers spend large amounts of money and devote significant resources to protecting their brand. Being found to have breached any of the provisions in table 1.2 would have a substantial impact on the brand of the manufacturer. This in itself acts as a substantial deterrent and means that there are incentives on automotive manufacturers not to breach the ACL.

**The consistency of penalties**

As far as the FCAI is aware, the proposed penalties will be the largest maximum penalties in Australia. For example:

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[1] Paragraph 1.57.
[2] Page 38 off the Guide
[3] Page 39 of the Guide

- under the model Work Health and Safety Laws, a company that exposes an individual to a risk of death or serious injury or illness faces a maximum penalty of $3 million[4]; and

- a company that takes an action that has or will have a significant impact on the world heritage values of a declared World Heritage property faces a maximum penalty of just over $11 million[5].

To compare either of these breaches to a company that engages in, for example bait advertising, is clearly, and with respect, ludicrous.

Even within the Act, the comparisons demonstrate the excessiveness of the proposed penalties for breaches of the ACL. It is beyond argument that cartel conduct is much more serious, with much wider detrimental impacts on the community as a whole than a company engaging in, for example, bait advertising. Nonetheless, breaches of both of these carry the same maximum penalty.

**Accrued benefit and turnover**

There is one further matter that the FCAI would like to highlight and it relates to the second limb of the proposed maximum penalty:

- *'if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly—three times the value of that benefit; and*

- *'if the court cannot determine the value of the benefit obtained—30% of the body corporate's adjusted turnover during the breach turnover period for the offence, contravention, act or omission*.

The issue is clearly demonstrated by Example 1.1 referred to in the Explanatory Memorandum. In that example a successful action is brought against a company for misleading conduct in relation to the nature of goods over a period of 24 months. The company's adjusted turnover is $1 billion for the 24 month period. In one hypothesis, the value of the benefits to the company as a result of the breach are able to be ascertained. They are $25 million, meaning that the maximum fine for that company is $75 million. In the alternative hypothesis, the benefit cannot be determined and so the maximum penalty is 30% of the adjusted turnover of the company - $300 million.

There is no reason why, simply because a benefit cannot be determined to accrue to a company that the company should then be subject to such a substantial maximum penalty. In fact, the result is perverse. Invariably the value of a benefit to the offending company will not be able to be determined because no benefit has accrued. Given the nature of the possible breaches, if no benefit has accrued to the company because of the breach it is very likely that no harm has been caused. And yet, that company faces the prospect of a substantially greater maximum fine than if it was able to demonstrate some benefit (and presumably that it caused some harm).

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[4] A category 1 offence

[5] S 12 of the Environment Protection and Biodiversity Conservation Act 1999 (50,000 penalty units)

For these reasons it is clear that the current maximum penalties for breaches of the ACL are more than adequate. Any increase is unnecessary and does not comply with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

We are happy to expand upon any of the points we have made.

Yours sincerely

Tony Weber
Chief Executive