



Addressing flex-commissions under the National Consumer Credit Protection Act 2009

Australian Securities and Investment Commission Consultation Paper (June 2016)

Executive Summary and Recommendations

Executive Summary

- The Australian Securities and Investment Commission's (ASIC) proposal for the prohibition or limitation of finance incentives in the retail car market **is not supported** by the Motor Trades Association of Australia Limited (MTAA) and Members. MTAA Members include the Motor Traders Association of New South Wales, Victorian Automobile Chamber of Commerce, Tasmanian Automobile Chamber of Commerce, Motor Trades Association of South Australia, Motor Trades Association of Western Australia and the Motor Trades Associations of the Northern Territory and Australian Capital Territory - representing their new and used car retailing business constituents in regard to this matter.
- While recognising and respecting the roles and accountabilities of the ASIC, particularly in regard to the National Consumer Credit Protection Act 2009 and obligations to consumers and the broader community, MTAA does not believe ASIC has provided sufficient evidence, quantification or justification that *'...flex-commissions create an inherent risk of unfair conduct, with a disproportionate impact on vulnerable (but not credit impaired) consumers';* or *'...that flex-commissions operate in a way those results in financial harm through consumers being charged a higher interest rate than would otherwise be available'*.
- In determining it's response, MTAA is of the view that:
 - The rationale for the proposed Government market intervention is not justified.
 - The 'unfairness' of current arrangements as described in consultation material is subjective given the Act does not define such a term.
 - Analysis of the matter presented fails to adequately examine the consumer benefits versus the described consumer harm. Nor does it appear investigations have taken into consideration the impact of such a regulatory change on the whole business model of automotive dealers and the industry.
 - Systemic conflict of interest suggests behaviours and actions that are commonplace and identifiable through significant increases in compliance and enforcement action, which has not been proven.
 - Other potential remedies including revised enforcement or compliance provisions, appear to have been largely overlooked in preference for the proposed legislative prohibition.

- MTAA respectfully suggests the nature of this identified matter can be found in other industries and sectors and suggests no evidence has been provided that explains why the automotive vehicle retailing industry has been singled out, nor any justification provided for the strongest regulatory response, for the vehicle retailing sector alone?
- MTAA is concerned that the emphases of ASIC investigations to date do not appear to have adequately explored the entire dealer business model in automotive retailing and the impact of sudden, and in the opinion of MTAA unjustified, regulatory change on the industry and its ongoing service in a competitive environment to consumers.
- Nor has it explored the potential of driving consumers through regulatory prohibition to other more costly and potentially harmful finance options.
- Investigations by MTAA Members of their dealer constituents reveal that the proposal to ban or limit flex commissions will significantly alter the vehicle finance market and cause impacts that will be of greater significance and damage than the withdrawal of floor plan financiers at the height of the Global Financial Crisis.
- From distributed materials, it is not apparent to MTAA that ASIC has proven the nature of neither the problem nor its magnitude in the Australian context.
- MTAA is of the view that other alternatives to the proposed legislative prohibition, particularly in regard to stronger enforcement, improved disclosure requirements or a combination of alternative approaches, have not been fully investigated consistent with enforcement actions taken to date.

Recommendations

The MTAA recommends that:

1. Current arrangements remain
2. That if change continues to be pursued by ASIC then:
 - a. The implications on the consumers, the broader economy and industry are further investigated and that all sectors and industries are subjected to the same regulatory review.
 - b. Alternative remedies including revised provisions for compliance and enforcement are more thoroughly canvassed.
 - c. Further examination of disclosure provisions to address any concerns regarding transparency
3. Improved consumer awareness and education programs.
4. Improved communications and education program and actions in partnership with industry.

Basis for Legislative remedy

- The flex commissions matter which ASIC is concerned with, is inextricably linked to various matters and concerns which MTAA Limited and Members have periodically engaged with various Government Departments and Agencies, and specifically with Treasury, since the inception of the National Consumer Credit Protection Act (NCCP) in 2009.
- MTAA has argued strongly and consistently in various forums and consultations that change the NCCP must not fall disproportionately upon dealers, nor bring an impact upon them arbitrarily and detrimentally. It has been a consistent message that any such actions require careful and full assessment of the impact on consumers and on the industry and sector as a whole, particularly given the complexity of dealership operations within a highly competitive market, with significant global and domestic influences.
- Central to MTAA advocacy on behalf of member constituents has been a reminder that dealership operations, in particular, operate under licensing and other regulatory requirements not found in 'generic' retailing and are therefore already compelled to be held to higher standards. This includes clear obligations to explain detailed product documentation, consumer obligations and commitments and the availability of access to independent advice and counsel.
- Despite positive ongoing engagement and consultation there is little evidence MTAA can point to since 2010 which tracks the growth magnitude of the flex commissions matter or indicates companion increases in ASIC concern.
- This observation is seemingly supported by the lack of enforcement or compliance action over the same timeframe. MTAA is therefore concerned by what it believes to be a disproportionate legislative remedy.
- MTAA believes the dealer based financial market, products offered within it, and the regulations governing its operation; fulfil government competition, consumer, and finance policy objectives; meet consumer needs for competitive choice while being protected; and has the capacity to identify and correct the behaviour or punish market participants who deliberately digress from the objectives and requirements of the NCCP.
- It is respectfully the opinion of MTAA that consultation and exploration of the total impact of the ASIC proposal has been less than ideal and appears driven by a narrow construct with an even narrower proposed solution to a largely unsubstantiated 'problem'.

Basis for Legislative remedy – threshold for breach

- MTAA does not believe the evidence as presented in the revised or originating consultation papers meet the threshold for breach and certainly not for legislative rectification of the nature proposed by ASIC.
- MTAA would expect a primary indicator of systemic breaches of the NCCP and relevant provisions, as previously mentioned, would be compliance / enforcement action. Four identified compliance and enforcement actions over the past few years, MTAA would suggest does not constitute a level of magnitude requiring or justifying ASIC's proposed solution. For example:
 - **15-312MR Esanda compensates consumers for conduct of finance broker**
Following an ASIC investigation of Get Approved Finance, A WA car finance provider, Esanda has agreed to compensate more than 70 borrowers for car loans organized by Get Approved Finance. ASIC investigation found that between 2011 and 2014, over 15 brokers employed by Get Approved Finance engaged in unfair conduct by having Esanda approve loans for consumers with poor credit histories, who otherwise did not meet Esanda's lending criteria.
 - **ASIC pulls over Cash Converters car leaser Caboodle, Sydney Morning Herald, 22/10/2015**
ASIC has accused Cash Converters car financier Caboodle of not complying with responsible credit laws and ordered an independent review of its systems and procedures.
 - **15-105MR ASIC bans Sydney finance broker and cancels licence**
ASIC has banned a Sydney finance broker from engaging in credit activities for 3 years and cancelled an Australian credit licence. The broker in question submitted loan applications to Volkswagen Financial Services on behalf of Betar Prestige Cars Pty Ltd where Betar was not authorized to do so.
- Given these examples, the type of enforcement actions resulting, and lack of any evidence that singles out automotive vehicle dealer finance agents or intermediaries as being at fault, MTAA believes that ASIC's view that *'flex commissions create an inherent risk of unfair conduct, with a disproportionate impact on vulnerable (but not credit impaired) consumers'* is fundamentally flawed.
- MTAA believes that in the area of vehicle purchase the majority of consumers are well informed of the nature of products available; documentation relating to the product selected; their obligations; and the availability of independent advice.
- This proposition is seemingly supported in ASIC report REP 470, referenced in the flex commissions consultation paper (June 2016) which states:
 - *'....Due to the high level of financial and emotional investment, most of the consumers in this study invested a significant amount of time researching the vehicle they wished to purchase and shopping around for the best price and what they considered to be the best dealership.'*

- *'Generally, the purchase involved visiting a number of dealerships over a period of weeks or even months. For some consumers, the investigation and researching took up to 12 months and was considered a major investment of their time and effort.'*
- MTAA contends these observations, support known consumer behaviours and clearly illustrate that the majority of consumers take considerable time and effort in researching the purchase of a motor vehicle and as part of that are informed to the best financial deal suited to their circumstances.
- Again the lack of enforcement / compliance action taken over the past five plus years, suggests a lack of legislative basis for change of a nature being proposed.
- The ASIC view expressed in the June 2016 Consultation Paper that *'... there is an additional reason why holders of an Australian credit licence may be in breach of paragraph 47(1)(a), as the conduct of the intermediary may be dishonest or unfair under section 180A of the NCCP Act and the licensee is necessarily aware of this conduct and the unfair outcome for the consumer.* MTAA rejects the implied assertions expressed in this statement. It assumes behaviours and /or breaches are prevalent and actual which are not substantiated or evidenced.
- It is the view of MTAA that ASIC has identified a **risk** rather than proven non-compliance, proven deliberate behaviours and / or actions or proven consumer harm.
- If the problem presented by ASIC is of such a magnitude as purported, then why has it singled out vehicle retailing for specific action and prohibition and not all other sectors where similar products and arrangements are in place?

Impact on consumers, the broader economy and the vehicle retailing industry

- Comparisons can be drawn between identified consumer protection and potential harm in relation to other policy and regulatory settings and considerations.
 - In 2015 the ACCC has decided not to revoke a motorcycle manufacturer / distributor notification which allowed it to restrict its franchisees to offering only that brands affiliated finance and insurance products in relation to that brands new motorcycle and marine products.
 - The ACCC provided reasons for its determination that *'Ultimately consumers are still able to purchase (finance) insurance elsewhere. As a result, the ACCC is currently unable to be satisfied that the notified conduct is likely to substantially lessen competition, and considers that it does not have grounds to revoke the notification, and accordingly does not intend to take any*

further action at this time. But the ACCC will review the impact of the notified conduct over time to assess its effect on competition, including in the context of any changes within the sector more broadly’.

- MTAA argues that in considering other matters relating to product and service provision, regulators have regularly made the observation that consumers have significant ability to compare financial product offerings including interest rates and terms and conditions; and availability of independent advice and sources of that advice.
- Even in the case of obtaining assurances that a vehicle is debt free and has not been written off or declared as stolen (in the event of a used car purchase) consumers can choose to obtain the information from the Federal Government’s Personal Property Securities Register (PPSR) at a cost of \$3.40 per certificate. This has not stopped a leading credit reporting company from identifying a business opportunity, developing three independent online websites (including the registration of one that is almost identical to the government website) and charging \$25.00 for the same information albeit presented differently.
- MTAA does not support the latter, but it is interesting that this version of competition is seemingly acceptable to regulators.

Impact on vehicle dealers

- Vehicle retailing is a multifaceted complex industry within the automotive sector with more than 60,000 employees across more than 2600 businesses nationwide.
- An automotive retailing business is not as ASIC appears to have assumed or over simplified, but a complex integrated model with many elements operating at small margins. The dislocation or interference of any single element without reference to the whole has many potential unintended consequences including: unemployment, increased price to consumers of other elements in order for the business to remain sustainable. There will also be other unintended consequences including reduced consumer choice for: avenues of finance, number of dealers, and price restrictions.
- The vehicle retailing market is consolidating like many industries in the automotive sector in an environment of considerable change driven by globalisation, rapid application of new technology, high competition, significant market volatility and unsurpassed consumer choice when population and product availability are compared.

- In the Australian market more than 67 brands with more than 400 model variants are servicing an Australian consumer appetite for over 1.2 million new vehicles per annum with the national fleet fast approaching 20 million vehicles, or more than 700 vehicles per 1000 Australians.
- Vehicle retailing, unlike many other retail markets, are governed by multi-jurisdictional licensing and regulatory frameworks and requirements. Consumers are already well served with regulatory oversight, and significant communication on the choice, benefits dangers and pitfalls of differing sources of finance and attributes (positive and negative) of all. Even ASIC's 'MoneySmart' guide advises buyers on finance sourcing, product disclosure and to get a loan from a different finance provider.
- Dealers are adapting to significant, changing and increasing demands from manufacturers and distributors and other involved sectors including finance and insurance, which in turn are also experiencing significant structural adjustment.
- A diminishing labour pool and ability to attract people to automotive trade professions are also contributing to challenging trading environments with a shortage of some 16,000 skilled tradespeople evident from the last Auto Skills Australia Environmental Scan of the automotive industry.
- These and other factors are all contributing to industry consolidation, and business margins and sustainability.
- Sudden and structurally invasive regulatory change of the scale and type being proposed by ASIC MTAA argues carries an obligation to also investigate on the impact of such change on competition, consumer choice, other policies, the economy as well as the industry being targeted.
- There is little question such a regulatory change as that proposed by ASIC will have a significant and detrimental impact on dealership operations, and potentially dealership sustainability and ultimately dealership numbers and their employment of Australians and ability to service Australian consumer need.
- Consumer choice will actually be disadvantaged due to the potential removal of buyers from one stream and redirecting them to more costly options including sub-prime loans with much higher interest rates.

Automotive Industry in context

- The Australian Automotive Sector consists of more than 65,000 businesses nationally (*Australian Bureau of Statistics figures, but not all automotive sector related businesses are necessarily included*), the vast majority of which are small and family owned and operated businesses.
- For the year ended June 2015, aggregate employment for the industry was recorded at 362,000 Australians.
- Modern motor vehicles are now highly complex products, integrated, interoperable, and connected. Increased safety, efficiency, environmental, driving and connectivity outcomes are being achieved with increasing reliance on computerisation and often with multiple third party involvement particularly in advanced systems and sub-system integration.
- Combined with other influences including, globalisation, industry consolidation, the influence of dominant market participants in some automotive industries, and a lack of 'whole of sector' policy; the provision (and in some cases the type) of services, the skills and qualifications required and traditional business models are all changing, necessitating structural adjustment of almost all industries.
- The closure of the domestic vehicle manufacturing industry between now and late 2017 will see approximately 18% of the total automotive sector disappear with thousands of jobs lost. The nation will for the first time since the late 1940's be solely reliant on imported motor vehicle products, although there will still be some component manufacturing and niche manufacturing operations.

Motor Trades Association and Member Associations in context

- MTAA Limited is the national association of participating State and Territory Motor Trades Associations and Automobile Chambers of Commerce Members and is the voice of what will be more 95% of the automotive sector, when car manufacturing ceases, with largely key Commonwealth Government stakeholders and the community.
- Some MTAA Members may have provided independent submissions to the ASIC Consultation Paper reflecting specific views of their retailing business members. This submission supports member representations.
- On behalf of its State and Territory Association Members, the MTAA has been heavily involved in matters connected to and at the forefront of national policy development in regard to the automotive industry for more than 25 years and has been instrumental in influencing many policy outcomes for the benefit of members and their business constituents in the automotive sector and consumers.

- The MTAA, State and Territory Association Members and the thousands of diverse retail, service, repair, recycling, and associated motor trade businesses support strong consumer protection measures including effective competition and fair-trading.

Conclusion

- Retail, service, repair, recycling, and associated motor trade businesses in all of their various forms on the whole operate fairly. They also commonly operate under various other legislative and regulatory regimes and do not shirk their responsibilities to uphold consumer rights. MTAA members are also committed to voluntarily uphold Codes of Practice and ethics that have consumer protection as the central focus. In many instances MTAA and Members and business owners have been instrumental in the establishment of these Codes and ethics for the benefit of Australian consumers as well as the many industries that make up the Australian automotive sector.
- The underlying premise of ASIC in its consultation papers on the flex commissions matter is that there is a financial service / product delivery problem by agents and intermediaries of finance providers in the automotive market, translating to questionable or unwanted behaviours of dishonesty, avoidance and non-compliance, that harms consumers, and requires a regulatory 'sledgehammer' solution.
- The automotive vehicle retailing sector has been identified without investigation / regard to other industries / sectors and potential treatment options across the economy.
- No evidence has been provided to demonstrate actual behaviours, actions or non-compliance from the nominated persons / businesses in the market, but a **risk** has been identified.
- Arbitrary and unilateral regulatory change is proposed without proper investigation of the impact on Consumers, the economy and the industry.
- The MTAA view is that:
 - An identified risk is mitigated at a level commensurate to the risk – not a risk that has been presented as an actual problem without supporting compliance / enforcement action or proof of behaviour / actions.
 - Such risk mitigation strategies / actions should be cognisant of the potential for wider consumer detriment, negative policy impacts, reduced choice and unintended outcomes and be based on a thorough understanding of all contributing elements not just the highlighted matter.

- The overall position and recommendations are contained in the Summary at the start of this submission and through it members remain available at any time to assist ASIC with more detailed analysis, access to information or Member business constituents to further improve understanding and potential mitigation of ASIC concerns and identified risks. If the review team would like any further information or additional clarity, please contact the MTAA Secretariat.

MTAA Secretariat

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