



Australian Automotive Dealer Association Ltd.

ACN: 167 598 085

The Sir Jack Brabham Automotive Centre of Excellence

8/2728 Logan Road, Eight Mile Plains, Brisbane Queensland 4113

17 June 2016

Mr Garry Clements

Chair

Consumer Affairs Australia and New Zealand

Email: ACLReview@treasury.gov.au

Dear Mr Clements

AADA SUBMISSION TO THE AUSTRALIAN CONSUMER LAW REVIEW ISSUES PAPER 2016

1. Australian Automotive Dealer Association

1.1 The Australian Automotive Dealer Association (AADA) is the peak industry body representing franchised new car dealers in Australia. There are over 1500 new car dealers in Australia that operate in the order of 2600 new vehicle outlets. Dealerships range from family-owned small businesses to larger businesses including two public companies operating in regional Australia and capital cities across all States and Territories.

1.2 The franchised dealer network generates revenue in excess of \$72 billion, employs more than 66,000 people, pays wages in excess of \$5.6 billion and has invested around \$17 billion in facilities.

2. Executive Summary

2.1 AADA welcomes the Commonwealth's review of the Australian Consumer Law (ACL) as it presents the opportunity to provide meaningful input into possible amendments that will provide greater clarity and certainty for business owners.

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2.2 This submission makes a number of observations and recommendations regarding the ACL including:

- a) the current framework of the ACL is extensive and provides adequate redress for consumers with respect to motor vehicle defects;
- b) there is uncertainty surrounding several concepts relating to motor vehicles sales and repair including what constitutes a major and minor defect; and
- c) the ACL provides a substantial set of remedies for a consumer and any proposal to introduce lemon laws is unnecessary and not justified.

2.3 Accordingly AADA makes the following recommendations:

- a) it is recommended that the current provisions in the ACL regarding motor sales and repairs be clarified and further defined; and
- b) there is no justification for the introduction of lemon laws on a cost/benefit basis and consumers are adequately protected by the current framework of the ACL.

3. Framework and adequacy of existing laws

3.1 Australia's national consumer policy framework has an overarching objective that emphasises confident consumers, effective competition and fair trading.

3.2 The delivery of this objective is supported by six operational objectives as identified by the Intergovernmental Agreement for the ACL as follows:

- a) to ensure that consumers are sufficiently well informed to benefit from, and stimulate effective competition;
- b) to ensure that goods and services are safe and fit for the purposes for which they were sold;
- c) to prevent practices that are unfair;
- d) to meet the needs of those consumers who are most vulnerable, or at greatest disadvantage;
- e) to provide accessible and timely redress where consumer detriment has occurred; and

- f) to promote proportionate, risk based enforcement.

3.3 There are numerous bases upon which consumers can obtain redress for motor vehicle defects under the ACL and in this regard AADA is of the view that the objectives regarding consumer protection and redress are being achieved.

3.4 Consumer guarantees

3.4.1 Under Part 3-2, Division 1, Subdivision A of the ACL there are nine consumer guarantees that apply to new and used motor vehicles sold to consumers:

- a) Suppliers and manufacturers guarantee that motor vehicles are of acceptable quality;
- b) A supplier guarantees that motor vehicles will be reasonably fit for any purpose the consumer or supplier has specified;
- c) Suppliers and manufacturers guarantee that their description of motor vehicles (for example, in a catalogue or television commercial) is accurate;
- d) A supplier guarantees that motor vehicles will match any sample or demonstration model;
- e) Suppliers and manufacturers guarantee that motor vehicles will satisfy any extra promises – or 'express warranties' – made about them;
- f) A supplier guarantees they have the right to clear title, unless they alert the consumer before the sale that they had 'limited title';
- g) A supplier guarantees 'undisturbed possession' or that no one will try to repossess or take back motor vehicles, or prevent the consumer using them, except in certain circumstances;
- h) A supplier guarantees that motor vehicles are free of any hidden securities or charges and will remain so, except in certain circumstances; and
- i) Manufacturers or importers guarantee they will take reasonable steps to make spare parts and repair facilities available for a reasonable time after purchase.

3.4.2 A consumer is entitled to seek a statutory remedy under the ACL where a motor vehicle does not comply with a consumer guarantee. The rights of a consumer

(i.e. repair, replacement, refund, or compensation) depend on whether the failure is considered a major or minor failure under the ACL (S259).

3.4.3 The ACL provides that a consumer may also sue the supplier for any loss or damage suffered by the consumer as a result of the failure to comply with a consumer guarantee (s 259(6)).

3.4.4 In relation to a minor failure, a dealer is not permitted to continuously remedy a failure. If the dealer fails to remedy the failure within a reasonable amount of time, the consumer may recover all costs incurred by the consumer in having the failure remedied or notify the supplier that the consumer rejects the goods (s 259(2)(b)). This remedy already provides consumers with redress in relation to defective goods and is a de facto "lemon law" but without the definitional uncertainty associated with lemon laws.

3.5 Express Warranties

3.5.1 Consumers are also additionally protected by the issue of an express warranty to the purchaser of any new vehicles which entitles a consumer to various contractual remedies, such as repair and replacement of parts at no cost to a consumer for a period which may be up to 7 years.

3.6. Voluntary and mandatory product recall procedure

3.6.1 Under the ACL motor vehicle manufacturers may conduct a voluntary recall if a vehicle is found to be hazardous or non-compliant with a mandatory standard or subject to a ban. Recalls may also be compulsory and ordered by the Australian Competition and Consumer Commission (ACCC) under s 122.

3.6.2 Affected consumers are provided a remedy in the form of a repair, replacement or refund.

3.7 Product Safety and Product Liability

3.7.1 All consumer products supplied must be safe and meet the consumer guarantees under the ACL. Products which are banned are not permitted to be sold and suppliers must ensure that their products or product related services comply with relevant mandatory standards before they are offered for sale.

3.7.2 The safety of goods and services dealt with in Pt 3-3 of ACL which deals with:

- a) safety standards for consumer goods and product related services: s 104–108

- b) interim bans on unsafe consumer goods or product related services (lasting 60 days unless extended, and applying on either the Commonwealth, state or territory level): s 109–113, s 118–119;
- c) permanent bans on unsafe consumer goods or product related services (applying across Australia): s 114–119;
- d) compulsory recall of consumer goods: s 122–127;
- e) mandatory reporting of voluntary recalls of consumer goods (within two days): s 128;
- f) safety warning notices: s 129–130; and
- g) mandatory reporting where consumer goods or product related services are associated with death, serious injury or illness: s 131–132A (see also s 202).

3.7.3 Manufacturers and suppliers which breach these statutory standards will be liable to compensate consumers for loss and damage suffered. In addition, manufacturers and suppliers of goods which breach the provisions of the ACL may face enforcement action and pecuniary penalties from the ACCC.

3.8 Public enforcement by the ACCC

3.8.1 The ACCC is empowered to conduct investigations into alleged breaches of the ACL. There is also scope for the ACCC to commence an action on behalf of one or more persons who are entitled to take action against suppliers or manufacturers for failing to comply with a consumer guarantee (s 277).

3.8.2 Recently the ACCC has taken action against a major Australian distributor following an investigation into consumer guarantee complaints concerning vehicle faults and the distributor's handling of those complaints (see <https://www.accc.gov.au/media-release/chrysler-undertakes-to-remedy-customer-service-complaints-following-accc-investigation> and case study 5 in the Australian Consumer Law review discussion paper). This is an example of how the ACL works in favour of consumers and currently provides satisfactory remedies for consumers.

3.8.3 As demonstrated above, the framework of the ACL is extensive and provides adequate options for redress by consumers with respect to motor vehicle defects. The objectives of the ACL relating to consumer protection and redress are being achieved.

4. Clarity of ACL

4.1 There is considerable uncertainty for small business surrounding the interpretation of provisions of the ACL relating to motor vehicle sales and repairs and in particular what constitutes a major failure and minor failure.

4.2 Providing greater clarity and inserting clearer definitions of these concepts with respect to motor vehicle sales and repairs will be of benefit to all parties. Currently, the determination of these concepts is largely subjective, resulting in inconsistent interpretation by consumers, business and determination of outcomes by Tribunals under the ACL

4.3 It is recommended that the current provisions be further clarified in order to provide greater certainty surrounding this concept which will result in a more objective and consistent understanding and application of the law. In this regard we recommend that examples be included in the legislation to make it clear as to what constitutes a major failure or a minor failure.

5. Lemon Laws

5.1 The introduction of lemon laws is being considered either specifically for motor vehicles or more generally as part of the Australian Consumer Law Review.

5.2 This is following recent reviews which have considered whether a lemon law provision is warranted.

5.3 A 2015 inquiry by the Queensland Parliament's Legal Affairs and Community Safety Committee found that there were issues with the ability of the ACL and other state based legislation to assist consumers who had purchased "lemons" including:

- a) A lack of clarity in the ACL as to what constitutes a 'lemon';
- b) Demarcation issues- consumers sometimes experience confusion as to their rights; the responsibilities of dealers and importers/manufacturers; and the demarcation of responsibilities between dealers and importers/manufacturers;
- c) Adjudicators are not technical experts, and the tribunals and courts have no investigatory function themselves; and
- d) Seeking legal redress is thus costly to consumers financially.

5.4 AADA submits as follows:

5.5 Lack of clarity as to what constitutes a 'lemon'

5.5.1 There is no agreed definition regarding what constitutes a "lemon" and in the USA (where lemon laws have existed for many years) the definition of a 'lemon' or 'non-conformity' differs between the states.

5.5.2 We do not consider it would ever be possible to draft a definition that provides sufficient certainty for consumers, businesses and Tribunals as to the problem that is intended to be addressed. In any event AADA considers that the problem is adequately addressed by existing legislative provisions as outlined below.

5.6 Demarcation issues

5.6.1 With regard to the demarcation issues, this can be resolved through further and improved education to consumers regarding their rights under the ACL, which currently outlines the framework of responsibility for suppliers and manufacturers.

5.6.2 Under the ACL consumers may seek remedies from suppliers for a breach of any of the consumer guarantees regardless whether the fault was as a result of a manufacturing issue or not. The ACL gives suppliers an explicit right of indemnity from the manufacturer to recover costs incurred for providing a remedy to the consumer for a failure to meet a consumer guarantee where the relevant failure was the manufacturer's fault, not the suppliers.

5.6.3 Consumers may also claim cost for loss or damages suffered against a manufacturer where the goods do not meet the following consumer guarantees:

- a) acceptable quality;
- b) matching description;
- c) any extra promises made about such things like performance, condition and quality; and
- d) repairs and spare parts.

5.6.4 Adjudicators are not technical experts and the tribunals and courts have no investigatory functions themselves

5.6.5 In Australia, adjudicators, tribunals and courts have never had investigatory functions, rather their function is with respect to decision making.

5.6.6 Regulators are imbued with investigatory functions and under the ACL and *Competition and Consumer Act 2010 (Cth) (CCA)* the ACCC has extensive powers to investigate, regulate and prosecute suspected breaches of the ACL. These powers are found to be in the body of the CCA and in Ch. 5 of the ACL.

5.6.7 The ACCC has power to:

- a) issue Public Warning Notices where it has reason to believe that a person has breached the ACL and one or more persons has suffered loss or detriment as a result of the breach and it is in the public interest to issue the notice (s 223 , ACL);
- b) issue an Infringement Notice where it has reason to believe that a person has breached the ACL (s 134A , CCA);
- c) accept court enforceable undertakings where it believes there has been a breach of the ACL and the party in question agrees to give the undertaking (s 87B , CCA); and
- d) commence proceedings to enforce breaches of the ACL, on its own behalf and as representative for a class of persons affected by the offending conduct. It can also seek compensation orders on behalf of injured persons and non-party consumers.

5.6.8 The extensive powers of the ACCC has resulted in effective outcomes for consumers.

5.6.9 An example of this is the ACCC's investigation into consumer guarantee complaints concerning vehicle faults by a major motor vehicle distributor in handling of those complaints. The ACCC's investigation resulted in the distributor providing an administrative undertaking to the ACCC which included a commitment to establish a consumer redress program, a review of its handling of previous complaints as well as an ACL compliance program which includes a complaints handling system.

5.7 Are Lemon Laws warranted?

5.7.1 AADA does not support the introduction of lemon laws in the ACL on the basis that:

- a) there is inadequate evidence to demonstrate that lemon laws are required;
- b) there is no agreed definition as to what constitutes a 'lemon' and it is unlikely that it will be possible to draft a definition which provides sufficient certainty for

consumers, businesses and Tribunals as to the problem that is intended to be addressed;

- c) the existing comprehensive legislative framework applying to motor vehicles meets the objectives of the legislation providing redress for consumers;
- d) the existing and extensive provisions in the ACL adequately provide consumers with effective remedies for motor vehicle faults; and
- e) the administrative and business costs of introducing of lemon laws would outweigh any likely benefits; and
- f) there is some anecdotal evidence from motor dealers that Tribunals are too ready to find in favour of consumers and that it is not worth defending such claims in view of the costs of doing so, irrespective of the merits of the case.

5.8 Lack of evidence

5.8.1 It is noted that in the 2015 Queensland Parliamentary Committee's "lemon" laws inquiry into consumer protections and remedies for buyers of new motor vehicles, data about complaints made to the Queensland Office of Fair Trading (OFT) suggests that while complaints about motor vehicles are consistently one of the top five subjects of all the complaints lodged by consumers with the OFT over the last 4 years, complaints about 'lemons' represent less than 1 % of those. Importantly the data simply recorded 'complaints', and there is no mention of whether the complaints are justified or if they were withdrawn or resolved.

5.8.2 Given the fact that there is no substantial evidence of 'lemon laws" being a significant issue, the introduction of lemon laws is unnecessary.

5.9 Adequate protection

5.9.1 Warranty claims are generally resolved without recourse to statutory consumer protections. However, to the extent to which a consumer feels that they have a justifiable complaint which requires legal redress, the existing statutory regime provides them with more than adequate and comprehensive rights and achieves the objectives of providing redress for consumers.

5.9.2 As explained in more detail above, under the ACL a consumer has rights to remedies where a motor vehicle fails to meet the consumer guarantees, with the nature of the remedy depending on whether the failure to comply with the consumer guarantee is major or not.

5.9.3 In relation to a minor failure, a dealer is not permitted to continuously remedy a failure. If the dealer fails to remedy the failure within a reasonable amount of time, the consumer may recover all costs incurred by the consumer in having the failure remedied or notify the supplier that the consumer rejects the goods (ACL s 259(2)(b)). This remedy already provides consumers with redress in relation to defective goods and is a de facto "lemon law" but without the definitional uncertainty associated with lemon laws.

5.9.4 Consumers are also protected by the issue of an express warranty to the purchaser of any new vehicles which entitles a consumer to contractual various remedies, such as repair and replacement of parts at no cost to a consumer for a period which may be up to 7 years.

5.9.5 The ACCC is also empowered to conduct investigations into alleged breaches of the ACL.

5.10 Costs and benefits of lemon laws

5.10.1 The proposed benefits of the introduction of lemon laws are that:

- a) it could impose requirements for remedies and responsibilities over and above the general remedies for other goods, thereby increasing the level of protection for consumers against motor vehicle defects; and
- b) it could clarify the responsibilities of and obligations of suppliers and manufacturers about how to remedy faulty or defective vehicles.

5.10.2 Notably, evidence indicates that the problem of lemon vehicles is a not a significant issue. The 2015 Queensland Parliamentary Committee's Lemon Laws Inquiry, complaints about lemons represent less than 1% of complaints regarding motor vehicles. Importantly the data simply recorded 'complaints', and there is no mention of whether the complaints are justified or if they were withdrawn or resolved. It follows that the introduction of lemon laws would benefit a very small sector of the community.

5.10.3 The financial and industry impact of the introduction of lemon laws however would be high for both motor dealers and consumers

5.10.4 Regardless of the drafting of the definition of what constitutes a "lemon" there will always be an element of uncertainty when assessing if a motor vehicles meets this definition. It is also likely that there will be a significant overlap between 'lemon laws' and the existing concepts of 'acceptable quality' and 'fit for a particular purpose'. This

will undoubtedly lead to greater uncertainty and complexity and an increase in costs through administration, compliance programs, and litigation. Subsequently, suppliers will be forced to increase the costs of new vehicles to cope with the increased compliance and regulatory burden of 'lemon laws' and as a result the increased costs will ultimately be passed onto the consumer.

5.10.5 Motor vehicle dealers would also be adversely affected by the introduction of 'lemon laws' as the dealer will often be the first point of contact for any customer with a claim that they have a 'lemon'.

5.10.6 Whilst the ACL gives suppliers an explicit right of indemnity from the manufacturer to recover costs incurred for providing a remedy to the consumer for a failure to meet a consumer guarantee where the relevant failure was the manufacturer's fault, manufacturers will often exert control over matters such as:

- a) whether a reported problem is warrantable in the first instance;
- b) the time allowed to effect a remedy; and
- c) the level of financial reimbursement a dealer may receive.

5.10.7 Additional regulation will put undue pressure on dealers and will further increase administrative and compliance costs, which will undermine small business confidence.

5.10.8 The introduction of a 'lemon laws' regime will not lead to a more cost effective resolution of unresolved customer complaints and will most likely increase costs for a consumer.

5.11 Recommendations

5.11.1 AADA strongly opposes the introduction of lemon laws.

5.11.2 The existing and comprehensive legislative framework applying to motor vehicles adequately provides consumers with effective remedies for motor vehicle faults and achieves the objective of the legislation of providing redress for customers. Furthermore the introduction of greater regulatory burden is unnecessary as the administrative and business costs of lemon laws would outweigh any likely benefits.

6. Conclusion

6.1 AADA submits that the current framework of the ACL is extensive and provides adequate redress for consumers with respect to motor vehicle defects and the

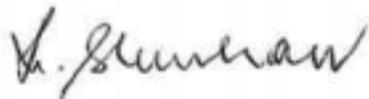
objectives regarding consumer protection and redress are being achieved. Accordingly, any proposal to introduce lemon laws is unnecessary and unjustified. There however remains uncertainty surrounding several concepts relating to motor vehicle sales and repair, including what constitutes a major and minor defect.

6.2 AADA reiterates that the following recommendations should be considered as part of the review:

- a) it is recommended that the current provisions in the ACL regarding motor sales and repairs be clarified and further defined which will result in a more objective and consistent understanding and application of the law. In this regard we recommend that examples be included in the legislation to make it clear as to what constitutes a major failure or a minor failure; and
- b) there is no justification for the introduction of lemon laws on a cost/benefit basis and consumers are adequately protected by the current framework of the ACL.

6.3 We thank you for the opportunity to provide a submission. If you require further information please do not hesitate to contact me on mobile 0413 007 833, email dblackhall@aada.asn.au or our Policy Director, Michael Deed, on mobile 0417 742 956, email mdeed@aada.asn.au.

Yours sincerely



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