AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION

SUPPLEMENTARY SUBMISSION REVIEW OF NSW MOTOR DEALERS AND REPAIRERS ACT

JUNE 2022

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FOREWORD

The AADA is the peak automotive industry advocacy body and is the only industry association which exclusively represents new car Dealers in every Australian state and territory. There are approximately 1,500 new car Dealers in Australia that operate some 3,100 new vehicle Dealerships. Franchised new car Dealers employ more than 59,000 people directly and generate in excess of $59 Billion in turnover and sales with a total economic contribution of over $14 Billion.

In New South Wales there are almost 1,000 new vehicle outlets, employing over 17,000 people. Dealers across the state, generate $4.12 billion in economic activity and more than $800 million in taxes for both state and federal governments.

Following up on our earlier submission made in relation to the consultation draft of the Motor Dealers and Repairers' Amendment (Statutory Review) Bill 2022, this submission comments on changes made to the Bill in April and May and advised to AADA by emails received on 20 April and 3 May.

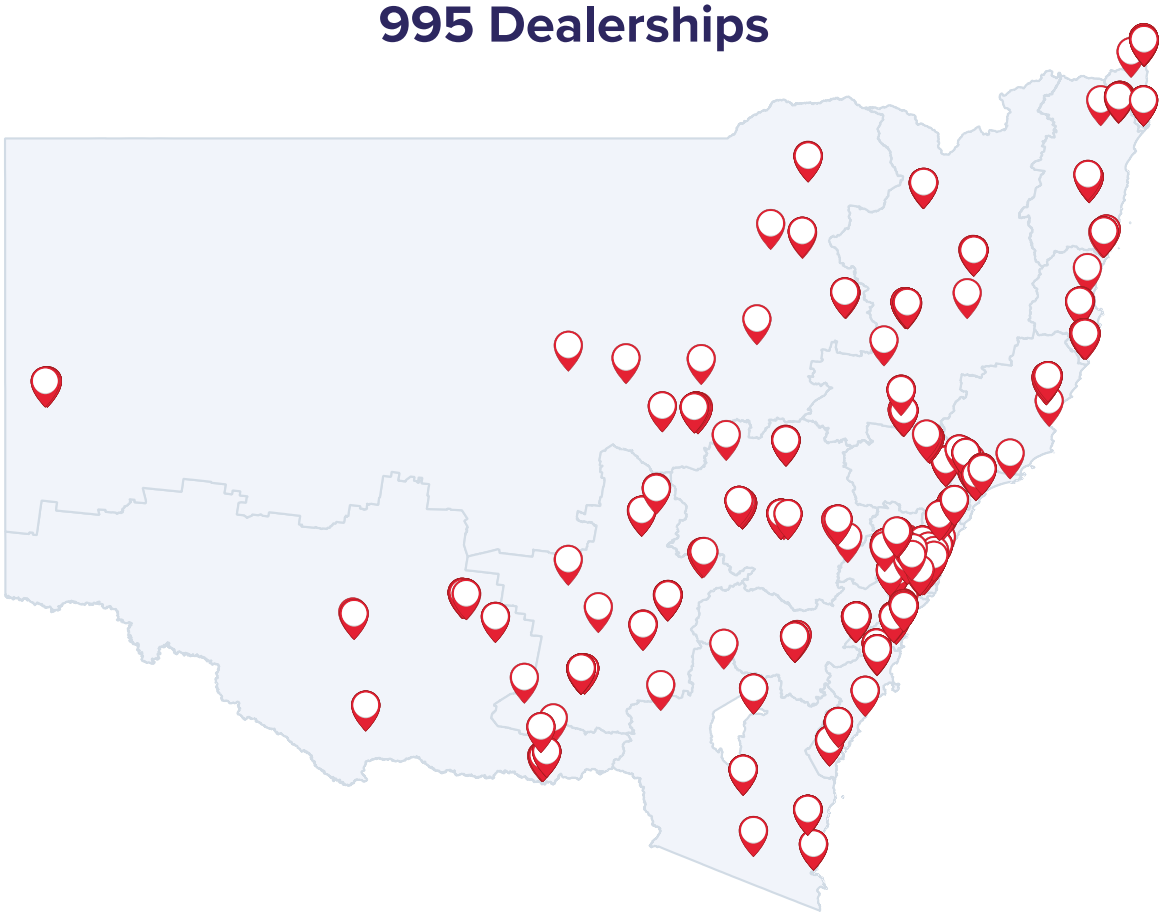
The content of those changes and breadth of their detrimental impact on the consumer/ Dealer relationship has made it necessary for ADDA to add this supplementary submission.

AADA is opposed to new sections 66 and 68 proposed in the Bill.

James Voortman
Chief Executive Officer

New South Wales

995 Dealerships



Economic Contribution

17,501
Dealer Employees

$1.58 billion
Dealer Wages

$804.13 million
Tax Contribution

$4.12 billion
Total Economic Contribution

Section 2

AADA RECOMENDATIONS FOR THE BILL

1 The draft bill should not proceed to Parliament.

2 Section 66 does not proceed.

3 Section 68 be left unamended.

4 Further comprehensive consultation occurs with AADA and Dealers.

5 Evidence of the reasons why these unexplained amendments are proposed be supplied by the Department in further discussions with AADA.

INTRODUCTION

AADA observes that, the franchised motor Dealer and consumer relationship is a heavily regulated and congested intersection. All States have legislated car Dealer licensing laws to provide a regulated industry and consumer protection.

The Australian Consumer Law (ACL) applies across the whole country and overlaps with State based Dealer licensing and motor car trading legislation.

An Intergovernmental Agreement on the ACL is in place and supports harmonised consumer protection under the ACL across all States and Territories.

There is an urgent need for a simplification of State based motor car trading laws to avoid confusing and unnecessary crossover with the ACL.

REVIEW OF THE MOTOR DEALERS AND REPAIRERS ACT (NSW)

The NSW Department of Customer Service recently reviewed the NSW Motor Dealers and Repairers Act.

Amendments to the Act were proposed by Dept of Customer Services in a public consultation draft of an amending Bill.

The Draft Motor Dealers and Repairers (statutory review) 2022 Bill[1] released for public consultation has yet to be finalised or introduced to Parliament.

The draft includes new sections which are inconsistent with the Australian Consumer Law.

The distributed public consultation draft does not simplify the Act or make the legislation easier to understand.

New Sections 66 & 68 are of particular concern and opposed by AADA as an unnecessary overreach of regulation of the consumer and Dealer relationship.

Deviation from the Australian Consumer Law

The NSW Motor Dealers & Repairers Act 2013[2] regulates motor car trading in NSW and provides consumer protection.

Interpretation of the NSW Motor Dealers and Repairers Act is difficult and must be read in conjunction with the Australian Consumer Law (ACL).

The crossover of the ACL and the NSW Motor Dealers and Repairers Act is confusing for consumers and Dealers alike.

Proposed amendments to sections 66 and 68 in the public consultation Bill add to the confusion and are unworkable.

The NSW Motor Dealers and Repairers Act is heading down a different path to the ACL.

[1] Draft Motor Dealers and Repairers (statutory review) 2022 Bill

[2] NSW Motor Dealers & Repairers Act 2013

Intergovernmental Agreement – Australian Consumer Law

The Australian Consumer Law is harmonised across the nation by agreement of the Commonwealth and all States and Territories.

When the Australian Consumer Law was introduced to the NSW Parliament, the then Minister The Hon. Virginia Judge said:

"The intergovernmental agreement governs the development, administration and enforcement of the Australian Consumer Law. Importantly, ***it also governs future amendment of the law, so that uniformity can be maintained.*** *The Australian Consumer Law scheme is an applied law scheme. Legislation is enacted by the Commonwealth and applied, as in force from time to time, by other participating jurisdictions as a law of those jurisdictions."*

The proposed amendment of the Motor Dealers and Repairers Act flies in the face of the Ministers statement, both draft sections 66 and 68 are inconsistent with, and in effect alter the operation of the ACL. The amendments are, for reasons not declared, an attempt to establish a different "NSW version" of the ACL applicable only to Motor Dealers in NSW.

The Australian Consumer Law was a Game Changer

Speaking on this subject last year, Rod Sims, at the time, Chair of the ACCC delivered a speech[3], in which he espoused the game changing benefits of the ACL and cautioned against a return to individual consumer protection laws in the States.

Mr Sims called the ACL a game changer that allowed for the ACCC and state and territory regulators to collaborate much more easily and heralded a new era in Australian consumer protection by introducing a single national consumer law and civil penalties.

Mr Sims said:

''The importance of the ACL reforms cannot be overstated. Prior to the introduction of the ACL, Australia's general consumer laws consisted of 13 separate Acts providing for consumer protection across Australia. In addition to this, there were another eight state and territory laws about the sale of goods.

The introduction of the ACL replaced at least 850 sections in these Acts, not including many of the ancillary enforcement and other provisions that supported them.

In addition, the commencement of the ACL saw a golden era in collaboration among consumer law regulators. By introducing, for the first time, a single national consumer law, the Australian Competition and Consumer Commission (ACCC) and State and Territory ACL regulators have been able to collaborate far more easily on issues of consumer concern. A great example of this was evident last year at the height of the COVID

[3] Reflections on the 10th anniversary of the Competition and Consumer Act 2010

pandemic, with the ACL regulators establishing an Urgent Response Group to deal with the deluge of consumer issues that arose as a result of the pandemic and its societal and economic effects."

And further,

"Returning to the ACL, I will leave you with one final comment. ***This is to caution against divergence in consumer law across jurisdictions in Australia. We all must remember the benefits achieved through harmonisation 10 years ago. We need the continued, if not increased, cooperation between jurisdictions to meet the challenges of the present and future****."*

– Reflections on the 10th anniversary of the Competition and Consumer Act 2010 Mr Rod Sims, Chair ACCC, 3 March 2021, Monash University National Commercial Law Seminar Series.

These wise words apply to the NSW Motor Dealers and Repairers (Statutory Review) 2022 Bill.

Do not be tempted to overreach, introduce overlays, and unnecessary laws which are confusing and diminish the harmonisation achieved by the ACL.

Why is NSW Attempting to Alter the Application of the ACL in NSW?

It is unclear why the 66 and 68 amendments are proposed.

Sections 259 and 263 of the ACL apply to the rejection and return of defective goods including vehicles.

The proposed 66F effectively amends 259 and 263 of the ACL.

Is there Evidence that the Existing Law, Including the ACL, is Failing?

The consultation process did not attempt to explain why particular amendments are proposed.

Further changes to be Bill were made in April and May.

The Draft Bill does not include evidence-based information, statistics, or reasoning.

Why is this very Specialised Adaptation of the ACL Required in NSW?

The Motor Dealers and Repairers (Statutory Review) 2022 Bill[4] itself is confusing and unlikely to illicit comments from individual Licensed Dealers because it is too difficult to understand. Further changes were made by the Dept of Customer Service after the consultation period closed.

AADA contends that it is wrong to attempt to regulate an industry with an amending legislation which has not been fully explained, justified, or distributed to those who will be subject to the new law.

[4] Motor Dealers and Repairers (Statutory Review) 2022 Bill

AADA SUBMISSIONS MADE ON BEHALF OF DEALERS

Upon release of consultation papers and draft Bill, the AADA submitted comments during the consultation period[5] opposing amendments which introduced new regulation of online sales.

Following AADA consultations, and discussions at a meeting with the Hon. Eleni Petinos, Minister for Small Business and Minister for Fair Trading, emailed correspondence was received from the NSW Department of Customer Service to notify a change to section 66 in the consultation draft.

The proposal to effectively ban end to end online sales of used vehicles was withdrawn by NSW Customer Service. AADA has yet to see the actual words, however AADA agrees with the withdrawal of the ban on end-to-end online sales of used vehicles.

And then, 14 days later, further emailed correspondence received by AADA signalled changes the proposed clause 66F. AADA has yet to see an amended draft of the new wording proposed. It is sufficient to say here that AADA is opposed to the concept described in the email reproduced below.

On 3 May 2022 Department of Customer Service said:

Subject: Motor Dealers and Repairers Bill Amendment - Expansion of collection of defective vehicles obligations to all dealers

Further to our correspondence on the 20 April 2022, we are writing to provide a further update on changes to the Motor Dealers and Repairers Amendment (Statutory Review) Bill 2022.

Following feedback from stakeholders, section 66F of the Bill which introduced motor dealers' obligation to collect defective vehicles sold online only, has been extended to all motor dealers regardless of sales method (online or offline).

Section 66F was intended to clarify the existing Australian Consumer Law obligation on motor dealers to collect a defective vehicle under section 263(2)(b) & (3), an essential consumer protection for consumers. During consultation, stakeholders contended that restricting this obligation to collect defective vehicles to vehicles sold online only, would provide a competitive advantage to offline sellers, and undermine consumer protections.

It is important to note that the proposed legislation does not prevent a motor dealer and consumer arranging for a consumer to drive a vehicle (if it is safe) to a suitable repair location, and that a motor dealer is not required to pay for the collection of vehicle if it is not defective (section 66F(4)).

The decision to prescribe this process in the Act aims to ensure parity in the motor dealer market, making it fair for all businesses no matter how they choose to sell a vehicle. It also ensures consumer protections that align with the Australian Consumer Law are reflected in the Motor Dealers and Repairers Act – a recommendation in the Statutory Review Report.

Compliance officers will have the ability to enforce this provision – ability to compel dealers to collect, repair and return defective vehicles, with a maximum penalty of 50 penalty units for breaches of the provisions (similar to other penalties in the Act).

Regards

NSW Customer Service

[5] AADA Submission to the Consultation on the Motor Dealers and Repairers' Amendment (Statutory Review) Bill 2022

AADA Commentary on the Changed Amendment to Section 66

Section 66F of the Consultation Draft Bill is a concern, and with the online Dealer removed, even more so, as the amendment now extends to apply to all purchasers and all vehicles sold by Motor Dealers when the vehicle is defective, or is suspected by a purchaser to be a defective vehicle:

The motor Dealer **must, if requested by an online purchaser,** arrange for a motor vehicle—

(a) to be collected from the purchaser for the purpose of—

(i) assessing liability for the dealer guarantee for the motor vehicle, or

(ii) complying with the dealer guarantee for the motor vehicle, and

(b) to be delivered to a purchaser following the completion of an action referred to in paragraph (a).

(3) The motor vehicle must be collected from, or delivered to, the purchaser within the period prescribed in the regulations, if any.

(4) If the motor vehicle is a defective vehicle, the motor dealer must pay for the costs of collecting from, and delivering the motor vehicle to, the online purchaser.

In this section— defective vehicle has the same meaning as in Part 4, Division 4

In other words, if the purchaser suspects a defect, and **if requested** the Dealer **Must collect the vehicle** and assess liability for Dealer guarantee, comply with the guarantee, **re-deliver** to the purchaser within a period to be prescribed in regulations, if defective pay for costs of collecting and redelivery.

If the purchaser makes a request for collection there is no flexibility for the Dealer.

Must is must, it is not may, or can, or may elect to, it is unequivocally a must.

NSW Dealers will be Unfairly Affected by 66F

It is not hard to think of situations where 66F would become completely unfair on the Dealer.

A defect may be minor, not prevent the vehicle being driven, the vehicle is safe, and yet under proposed 66F the consumer could force the Dealer to collect the vehicle.

Location of the vehicle is immaterial in the proposed 66F, the Dealer must collect. In many cases this may involve towing the car or sending employees long distances to drive the vehicle for assessment.

Covering the same field as sections 259 and 263 of the ACL, 66F is also inconsistent and onerous on the Dealer.

Goods must be of acceptable quality and free from defects. That is a given under the ACL.

However, consumers in NSW reading the 66F amendment are likely to think; “I suspect my vehicle has a defect, therefore I will request that the Dealer collect the car” and the Dealer has no choice under 66F but to comply.

Imagine, that a car within a warranty period, has an interior light failure, the lamp is out. It has a small defect, annoying but readily rectified.

The consumer requests (demands) collection, repair and return under 66F. Is that a reasonable outcome in a regulated industry where the goods (vehicles) are inherently mobile, moving to and from locations far and wide?

Dealers will be outraged by this result, and 66F is likely to lead to disputes with consumers that would otherwise be easily avoided.

In the simple interior light example given above, the consumer having contacted the Dealer could either drive the car in for a quick lamp replacement, or at the request of the Dealer, drive the car to a nearby repairer for attention, all paid for by the Dealer, and at the utmost convenience to all concerned.

66F would Legislate Inconvenience, Increase Costs of doing Business & Create Disputes

Unnecessary demands for collection from locations remote from the Dealership would be unreasonable, unjust, and unfair on the Dealer when simple rectification or remedies may be applied locally, and the ACL is already in play to fully protect consumers.

Vehicles located long distances from a Dealer, or appropriate repairer, could create considerable additional cost to the Dealer for no cause. Compulsory collection of a car from a rural or regional location for assessment by the Dealer is in effect a penalty applied by the consumer on the Dealer because of the remote location of the vehicle.

Assessing and processing a guarantee claim should not be a penalty against the Dealer.

The Australian Consumer Law does not seek to penalise the Dealer, costs of collection only apply upon consumer rejection where the cost of return of the rejected goods is substantial.

Another scenario may go like this:

“Something is wrong with the brakes”

There are defects which are not always covered by guarantees, they occur because of accidental damage, wear and tear, or neglect.

For example, brake pads can wear out producing worrisome grinding and screeching noises from the brake assembly upon application of the brakes.

A consumer, unfamiliar with the mechanical operations of a vehicle, thinks, and suspects there is a defect to be covered by guarantee.

The request is made to collect (tow), “something is wrong with the brakes.’

The Dealer has no choice and must collect the vehicle.

Once collected and inspected by the Dealer, it is clear the brakes had worn beyond the minimum thickness for replacement. This is not a defect. It is a matter of wear and tear. Neglect has caused the problem and could have been avoided by regular maintenance.

The consumer is now in a situation where they will need to pay for a repair and towing fees, they thought would be covered by a guarantee. At this point 66F is causing consumer detriment. Leading the consumer down the garden path.

The proposed 66F is unworkable in the retail automotive context.

AADA is opposed to Clause 66 in whole. It is an unnecessary regulatory overreach.

PROPOSED 66F COMPARED TO ACL SECTIONS 259 TO 263

As may be expected The Australian Consumer Law, adopted in all States and Territories, provides a comprehensive regulatory environment for guarantees, acceptable quality, and return of goods including motor vehicles.

In New South Wales, the Motor Dealers and Repairers Act also applies.

The crossover between the Acts is confusing, and further amending the NSW Motor Dealers law is adding to confusion and misunderstanding of the ACL.

The ACCC is the responsible National regulator regarding the ACL. The ACCC provides guidance to the ACL[6].

Section 263 of the ACL applies where the consumer notifies rejection of the goods under section 259 of the ACL[7].

Proposed 66F allows a consumer to demand collection and redelivery of a vehicle.

Unlike 66F, under the ACL the consumer must reject the goods before return to the Dealer.

66F is not a rejection Clause, it is open ended for the consumer, and a must comply for the Dealer.

66F is an open door through which the horse has bolted, requiring collection under the terms of 66F is inconsistent with and at odds with ACL provisions for the return or rejection of goods.

In 263 of the ACL, where the consumer is taking action under section 259, and rejecting the goods the consumer must return the goods.

ACL 263 (2) (b) requires supplier collection of rejected goods in certain limited circumstances, where delivery maybe costly or difficult. Therefore, already covering the ground of the proposed 66F.

66F attempts to reverse the direction of section 263 of the ACL by allowing the consumer to demand that a vehicle be collected under suspicion that the vehicle is defective.

66F does not empower the consumer to reject the goods but to have the goods collected.

Under the ACL:

- ACL 259, 262 & 263[7] combine to manage return of goods.
- Where the car is disabled, it would be in the interest of all parties to communicate plainly and agree on how best to manage a situation.

[6] Repair, replace, refund - ACCC

[7] Section 259 & 263 of the ACL

PROPOSED SECTION 68 MOTOR DEALERS AND REPAIRERS ACT BILL

The current provisions of section 68 – Dealer Guarantee for defective vehicles, are a workable and relevant consumer protection. The current words are simple and allow flexibility while affording consumer protection, these words are preferred by AADA, well understood, and should not be amended, added to, or deleted.

68 (1) Dealer guarantee A motor dealer must, at the motor dealer's own expense, repair or make good a motor vehicle sold by the motor dealer, if it is a defective vehicle, so as to place the motor vehicle in a reasonable condition having regard to its age.

Note—

Any repairs must be carried out by the holder of a tradesperson's certificate (see section 16).

Dealers apply the common-sense of this provision daily. Consumers having identified that there is a defect, usually by direct communication with a service advisor at the Dealership, are assisted, the Dealer makes good at the motor Dealer's own expense. The vehicle is not rejected, it is repaired under guarantee.

AADA has not seen any evidence that this provision is failing.

AADA does not support the proposed amendments to section 68.

66 AND AMENDED 68 ARE UNNECESSARY

It is unnecessary for the NSW Parliament to regulate for supplier collection of vehicles under the Motor Dealers and Repairers Act.

Changes proposed to introduce a section 66 are inconsistent with the ACL and the Nationwide Intergovernmental Agreement on the ACL.

It would be irresponsible for the NSW Parliament to cold forge the provisions of the ACL and the proposed 66F into one unevenly welded consumer entitlement.

Can 66F be applied as a trump card to overpower the ACL?

Any interpretation that says yes, is going to cause many uncertainties and difficulties for Dealers in NSW.

Section 66F is an unnecessary rewrite of sections 259 & 263 of the ACL.

And instead of making laws simpler it introduces new concepts, repeats the ACL, in part, and is also inconsistent with the ACL and with the proposed section 68 (1) of the Bill.

The aim of a reviewed legislation should be to remove doubt, improve and simplify for the benefit of achieving the desired outcome and that Consumers and traders both readily understand their obligations.

The proposed section 66 (F) proposes to redraw the law and does not align with the ACL.

Consumers are Protected by the Australian Consumer Law

Consumers are succeeding in Court using the provisions of the ACL to claim consumer guarantees.

The process of section 259 and 263 of the ACL have been upheld in the Victorian Civil and Administrative Tribunal see: Morphy v Beaufort Townsville Pty Ltd, Lawless v Austral Pty Ltd trading.

Included in these decisions and others, are the ACL requirements to notify of rejection and return the goods.

The ACL is constructed to allow rejection of defective goods and for the supplier to pay where the section 263(2) applies. This issue had also been determined in Ferraro v DBN Holdings Australia Pty Ltd, where the Court agreed to allow the consumer to hold the goods because of the cost of return.

The ACL allows consumers to reject goods yet retain them where the cost of return is significant.

In these circumstances a consumer is permitted to hold the goods and the supplier must, within a reasonable time, collect the goods at the supplier's expense.

Consumers are not disadvantaged. The ACL in operation, and upon interpretation by the Courts covers this eventuality.

The ACL does not create a blanket clause which entitles the consumer to call, mention a suspected defect and require that the supplier must collect the goods.

The Motor Dealers & Repairers Act of NSW should not depart from the Australian Consumer Law.

[8] Morphy v Beaufort Townsville Pty Ltd (Civil Claims) [2018] VCAT 152

[9] Lawless v Austral Pty Ltd trading as Brisbane City Land Rover [2021] QCAT 297

[10] Ferraro v DBN Holdings Australia Pty Ltd.

Communication Between Consumers and Dealers Should be Encouraged

- It is in the interests of Dealers and consumers to communicate and cooperate quickly if there is a defect in need of attention.
- Dealers employ expert technicians and access to a huge database of information and specialist equipment which is used to identify faults and effect repairs.
- New car Dealers are supported by the expertise and experience of the vehicle manufacturers with whom they have special business relationships under franchising contracts.
- Returning a vehicle under warranty to a franchisee of the vehicle manufacturer will illicit the best possible response in terms of technical knowledge and experience of the make and model.

Making the right arrangements for a customer to drive the vehicle in, deliver to a repair location nearby, or arrange for towing, is important.

What is concerning now is that consumers may misunderstand their obligations because of the complexity of the overlapping laws. More laws are likely to create further confusion.

The better method of resolving any issue or query with vehicle warranty or vehicle defects is for the consumer to quickly communicate with the Dealer.

Dealers are ready to manage warranty and repair issues, they have processes and procedures in place.

CONCLUSION

So far, the brief explanation of what the amending legislation is trying to achieve is wholly inadequate, and AADA could not justify taking this information to our constituent members to request their response.

There is no detail, and we are unable to say why this amendment is being pushed through at this late stage of consultation. AADA will request that Minister Petinos rejects 66 and 68 and allows a further period of public consultation.

The speech given by Rod Sims mentioned above, remains relevant, States should not legislate to erode the harmonised and agreed Australian Consumer Law.

In this case, the proposed amendments are unnecessary and, have not been supported by evidence which identifies why the amendments are necessary.

We would welcome the opportunity for the AADA and some of our members to meet with you to discuss our submission in more detail. If you require further information or clarification in respect to any matters raised, please do not hesitate to contact me.

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REFERENCES

Return of defective goods references

Australian Consumer Law

The Australian Consumer Law Legislation

Ministerial Council on Consumer Affairs Meeting 22

ACL Guarantees and return of goods

The Australian Consumer Law Used to Recover a Landmark Sum in Relation to A Motor Vehicle

Consumer Law

Australian Consumer Law Resources - Vic

APPENDIX A

Competition and Consumer Act

Australian Consumer Law

Section 259 of the ACL allows the consumer to take action against suppliers

259 Action against suppliers of goods

(1) A consumer may take action under this section if:

(a) a person (the supplier) supplies, in trade or commerce, goods to the consumer; and

(b) a guarantee that applies to the supply under Subdivision A of Division 1 of Part 3-2 (other than sections 58 and 59(1)) is not complied with.

(2) If the failure to comply with the guarantee can be remedied and is not a major failure:

(a) the consumer may require the supplier to remedy the failure within a reasonable time;

or

(b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time--the consumer may:

(i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or

(ii) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection.

Section 261 ACL

261 - How suppliers may remedy a failure to comply with a guarantee

If, under section 259(2)(a), a consumer requires a supplier of goods to remedy a failure to comply with a guarantee referred to in section 259(1)(b), the supplier may comply with the requirement:

(a) if the failure relates to title--by curing any defect in title; or

(b) if the failure does not relate to title--by repairing the goods; or

(c) by replacing the goods with goods of an identical type; or

(d) by refunding:

(i) any money paid by the consumer for the goods; and

(ii) an amount that is equal to the value of any other consideration provided by the consumer for the goods.

Section 262 ACL

262 - When consumers are not entitled to reject goods

(1) A consumer is not entitled, under section 259, to notify a supplier of goods that the consumer rejects the goods if:

(a) the rejection period for the goods has ended; or

(b) the goods have been lost, destroyed or disposed of by the consumer; or

(c) the goods were damaged after being delivered to the consumer for reasons not related to their state or condition at the time of supply; or

(d) the goods have been attached to, or incorporated in, any real or personal property and they cannot be detached or isolated without damaging them.

(2) The rejection period for goods is the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee referred to in section 259(1)(b) to become apparent having regard to:

(a) the type of goods; and

(b) the use to which a consumer is likely to put them; and

(c) the length of time for which it is reasonable for them to be used; and

(d) the amount of use to which it is reasonable for them to be put before such a failure becomes apparent.

Section 263 ACL

263 - Consequences of rejecting goods

(1) This section applies if, under section 259, a consumer notifies a supplier of goods that

the consumer rejects the goods.

(2) The consumer must return the goods to the supplier unless:

(a) the goods have already been returned to, or retrieved by, the supplier; or

(b) the goods cannot be returned, removed or transported without significant cost to the consumer because of:

(i) the nature of the failure to comply with the guarantee to which the rejection relates; or

(ii) the size or height, or method of attachment, of the goods.

(3) If subsection (2)(b) applies, the supplier must, within a reasonable time, collect the goods at the supplier's expense.

(4) The supplier must, in accordance with an election made by the consumer:

(a) refund:

(i) any money paid by the consumer for the goods; and

(ii) an amount that is equal to the value of any other consideration provided by the consumer for the goods; or

(b) replace the rejected goods with goods of the same type, and of similar value, if such goods are reasonably available to the supplier.

(5) The supplier cannot satisfy subsection (4)(a) by permitting the consumer to acquire goods from the supplier.

(6) If the property in the rejected goods had passed to the consumer before the rejection was notified, the property in those goods revests in the supplier on the notification of the rejection.

APPENDIX B

Motor Dealers and Repairers Amendment (Statutory Review) Bill 2022 [NSW]

NSW proposed section 66F

Public consultation draft

66F Online motor dealers to collect and remedy defective vehicles

(1) This section applies to a motor vehicle that—

(a) is purchased by an online purchaser, and

(b) is, or is suspected by an online purchaser to be, a defective vehicle.

(2) The online motor dealer must, if requested by an online purchaser, arrange for a motor vehicle—

(a) to be collected from the online purchaser for the purpose of—

(i) assessing liability for the dealer guarantee for the motor vehicle,

or

(ii) complying with the dealer guarantee for the motor vehicle, and

(b) to be delivered to an online purchaser following the completion of an action referred to in paragraph (a).

(3) The motor vehicle must be collected from, or delivered to, the online purchaser within the period prescribed in the regulations, if any.

(4) If the motor vehicle is a defective vehicle, the online motor dealer must pay for the costs of collecting from, and delivering the motor vehicle to, the online purchaser.

(5) The online motor dealer is liable for all loss of or damage to the motor vehicle that occurs between the collection of the motor vehicle from the online purchaser and the delivery of the motor vehicle to the online purchaser.

(6) Subsection (5) applies whether the loss or damage occurred while the motor vehicle was in the possession of the online motor dealer or an employee or other person associated with the online motor dealer.

(7) An online motor dealer is not liable under subsection (5) if the online motor dealer proves

that the motor dealer took all reasonably practicable measures to prevent the loss or damage.

(8) In this section—

defective vehicle has the same meaning as in Part 4, Division 4.

Motor Dealers and Repairers Amendment (Statutory Review) Bill 2022 [NSW]

Public consultation draft

Section 67 Definitions

Insert in alphabetical order in section 67(1)—

consumer guarantee means a guarantee that applies under the Australian

Consumer Law (NSW), Part 3-2, sections 54–57.

[28] Section 67(1), definition of "defective vehicle"

Omit "guarantee (a consumer guarantee) that applies under sections 54–57 of Part 3-2 of the Australian Consumer Law (NSW)."

Insert instead "consumer guarantee".

[30] Section 77 Effect on Australian Consumer Law remedies

Omit "is made good or repaired". Insert instead "has been dealt with".

[31] Section 77(2)

Insert at the end of the section—

(2) A person who has enforced a consumer guarantee in relation to the condition of or a defect in a motor vehicle is not, if the consumer guarantee is fully complied with, entitled to take action against the motor dealer under the dealer guarantee under this Division in relation to an aspect of the motor vehicle that has been dealt with under the consumer guarantee

Section 10

Motor Dealers and Repairers Amendment (Statutory Review) Bill 2022 [NSW]

Public consultation draft

NSW proposed Section 68

Section 68 Dealer guarantee for defective vehicles

Omit section 68(1). Insert instead—

(1) Dealer guarantee

If a motor vehicle sold by a motor dealer is a defective vehicle, the motor

dealer must—

(a) arrange for the repair of the motor vehicle, at the motor dealer's own expense, so as to place the motor vehicle in a reasonable condition having regard to its age, or

(b) replace the motor vehicle, at the motor dealer's own expense, with another motor vehicle of the same type and of similar value as the motor vehicle if it did not have the condition or defect that causes it to be a defective vehicle, or

(c) refund the purchase price paid for the motor vehicle by the person having the benefit of the dealer guarantee.

APPENDIX C

Current provisions - Dealer guarantee for defective vehicles.

MOTOR DEALERS AND REPAIRERS ACT 2013 - SECT 68

68 Dealer guarantee for defective vehicles

(1) Dealer guarantee

A motor dealer must, at the motor dealer's own expense, repair or make good a motor vehicle sold by the motor dealer, if it is a defective vehicle, so as to place the motor vehicle in a reasonable condition having regard to its age.

Note: Any repairs must be carried out by the holder of a tradesperson's certificate (see section 16).

The Victorian Motor Car Traders Act applies a simple solution.

Victorian Section 54 – Obligations of Motor car Trader

Obligations of motor car trader

(1) This section applies if a motor car trader sells a used motor car to a person and the car—

(a) was manufactured not more than 10 years before the date it is sold; and

(b) has been driven for less than 160 000 kilometres.

(2) The warranty set out in subsection (2A) is a part of the sale contract.

(2A) The motor car trader warrants that if a defect appears in the motor car before the end of the warranty period, the motor car trader at her, his or its own expense—

(a) will arrange for the car to be taken to a place where it can be repaired or made good; and

(b) will repair or make good, or cause to be repaired or made good by another motor car trader or by a qualified repairer, the defect so as to place the car in a reasonable condition having regard to its age.

APPENDIX D

Second reading speech Australian Consumer Law - Dr Emerson: 17.3.2010

Speech PDF

This bill is the second legislative step to give effect to the most far-reaching consumer law reforms since the inception of the Trade Practices Act 35 years ago.

It completes the initial text of the Australian Consumer Law, following on from the Trade Practices Amendment (Australian Consumer Law) Bill, which I introduced on 24 June 2009.

This bill reflects the efforts and toil of many people, including my state and territory colleagues on the Ministerial Council on Consumer Affairs, which, on 4 December 2009, agreed to the content of the Australian Consumer Law. The personal commitment of my ministerial council colleagues has ensured that this landmark reform of Australia's consumer laws will—at long last—happen, the Australian Senate permitting.

The complex array of 17 national, state and territory generic consumer laws, along with other provisions scattered throughout many other laws, must be rationalised.

While these laws may work well for many purposes, each of them differs and that is to the cost of consumers and business.

Australian consumers deserve laws which make their rights clear and consistent, and which protect them equally wherever they live. At the same time, Australian businesses deserve simple, national consumer laws that make compliance easier.

A single national consumer law is the best means of achieving these results. Rather than relying on nine parliaments making piecemeal changes, the Australian Consumer Law will ensure responsive consumer laws with a truly national reach.

In developing the reforms contained in this bill, the Australian government, in close consultation with the states and territories, has also drawn on the views of many consumers and businesses, and those bodies which represent their interests. I thank those many people who have provided the government with the benefit of their views and expertise in preparing the legislation.

I also thank the many state and territory officials who have contributed to the development of the Australian Consumer Law, as well as, of course the Treasury officials who have worked tirelessly on this reform.

The reforms implemented by this bill represent one of the great successes of the Business Regulation and Competition Working Group of COAG—which I co-chair with the Minister for Finance and Deregulation—and are a great example of cooperation between Australia's governments

And further...

Section 10

A single set of statutory consumer guarantees replaces the existing system of implied conditions and warranties in the Trade Practices Act under state and territory laws. Statutory consumer guarantees will give consumers clearer and more effective laws regarding their rights when buying goods and services. They will also make business obligations clearer.

These reforms are to be supported by administrative changes and changes to enforcement regimes to make the law more effective, through greater coordination of enforcement and better provision of information to consumers and businesses. These reforms are based on comprehensive analysis by the Commonwealth Consumer Affairs Advisory Council, which examined all of these issues in 2009. Those well-considered recommendations were adopted by the Ministerial Council on Consumer Affairs on 4 December 2009. I thank the council for its excellent contribution to the development of this reform.

The consumer guarantees law is closely aligned to the existing New Zealand law, and I also thank my New Zealand colleague the Minister of Consumer Affairs, the Hon. Heather Roy MP, on the ministerial council for the contributions that Minister Roy and her officials have made to the development of these reforms. Indeed, this reform reconfirms the commitment of our two nations to a single economic market.

APPENDIX E

Intergovernmental Agreement for the Australian Consumer Law

The current agreement was signed by the NSW on 10.3.2020

Intergovernmental agreement on Consumer Law includes the following:

The Legislative Scheme

1. Each Party will use best endeavours to have its Parliament repeal, amend or modify any legislation that is inconsistent with or alters the effect of the Australian Consumer Law.

2. Except as agreed by the Parties, a Party will not submit a Bill to its legislature which would be inconsistent with or alter the effect of the Australian Consumer Law.

Question is the NSW proposal for 66 & 68 inconsistent with or alter the effect of the ACL?

Even if the answer is unclear, it could be argued that NSW should take it's plans to the Commonwealth and all States seeking unanimous agreement before proceeding.

Amending the ACL

Amendments to thew ACL can be processed by the Commonwealth. There is a voting requirement, at least the Commonwealth and 4 jurisdictions including 3 States must agree.

https://consumer.gov.au/consumer-affairs-forum/communiques/meeting-22

APPENDIX F

NSW Fair Trading Amendment (Australian Consumer Law) 2010

Fair Trading Amendment (Australian Consumer Law) Act 2010 No 107

Agreement in Principle

Second reading speech the Hon. Virginia Judge - Minister for fair Trading NSW - 24.11.2010

On 1 January 2011, the new consumer policy framework envisaged by the Council of Australian Governments will be in place. This has been described as the most significant overhaul of consumer law in a generation. The last serious attempt to introduce uniform laws and reduce the level of complexity, duplication and fragmentation was in the mid 1980s, when State and Territory governments agreed to mirror the consumer protection provisions in part V of the Trade Practices Act 1974 by introducing fair trading Acts. Unfortunately, there was no mechanism in place to ensure that uniformity was maintained. During the intervening years governments of all political persuasions faced new consumer protection and fair trading issues, and communities demanded action to minimise detriment particularly for disadvantaged and vulnerable consumers.

A federal system of government can benefit from innovation in different jurisdictions to find solutions to problems, leading to better public policy and service delivery. The problem is that regulatory innovation can lead to divergence in legislation. It was against this background that the Productivity Commission held an inquiry into Australia's consumer policy framework during 2007. By the time the commission was finalising its report, the Council of Australian Governments had agreed to an ambitious regulatory reform agenda, including an enhanced national consumer policy framework. The Ministerial Council on Consumer Affairs had the task of developing a new national approach to consumer policy, based on the recommendations in the Productivity Commission's report of May 2008. In their communiqué of 23 May 2008, Ministers noted that the reforms would serve to overcome inefficiencies resulting from the division of responsibilities between Australian governments so as to deliver better outcomes for consumers and lower costs for businesses, and to more speedily tackle practices that harm consumers.

As far as changes to the law are concerned, the intergovernmental agreement provides that any jurisdiction may submit a proposal to the Commonwealth, supported by best practice regulation documentation similar to that required in New South Wales. Any Commonwealth proposal must be similarly justified. There is a three-month consultation period, after which a vote is held. Although consensus is the preferred outcome, in the end no amendments can be introduced to the Commonwealth Parliament unless they are supported by the Commonwealth plus four other jurisdictions, including at least three States.

Before I speak in more detail about the provisions of the bill, I acknowledge the legacy that has made New South Wales the pre-eminent lawmaker for consumer protection and fair trading in Australia. Some would say that Victoria has the honour of passing the first specific consumer-protection legislation in this country, but in 1969 it was New South Wales that

introduced the comprehensive Consumer Protection Act: a statute that served as the model for corresponding legislation in other States and territories, including Victoria. The Consumer Protection Act operated successfully for nearly 20 years, supplemented by industry-specific regulation and innovative laws such as the Contracts Review Act and the former Consumer Claims Tribunals Act. The Fair Trading Act was enacted in 1987 in response to the agreement to mirror the consumer-protection provisions of the Trade Practices Act. At the time it was described—in words that have a familiar ring—as a groundbreaking piece of legislation and the most comprehensive overhaul of consumer law in New South Wales since 1969.

This bill amends the Fair Trading Act 1987 to apply the Australian Consumer Law as a law of New South Wales. I can assure members that the Fair Trading Act will not disappear. Although the core provisions of the Act are now replicated in the Australian Consumer Law, we will retain those provisions that are required for the exercise of Fair Trading's other administrative and regulatory functions. The Fair Trading Act gives our State agency power to advise and educate consumers; take action for remedying infringements of or for securing compliance with all legislation administered by the Minister for Fair Trading; receive, investigate and refer complaints; and examine and research laws and matters affecting consumers.

Staff will continue to carry out these functions with respect to both the Australian Consumer Law and industry specific laws, such as those that regulate motor dealers and real estate agents.

And further

The Australian Consumer Law replaces approximately 20 Commonwealth, State and Territory statutes, including parts of the New South Wales Fair Trading Act. For the first time, all Australian businesses and consumers will have the same rights and obligations concerning the supply of goods and services. The national consumer policy objective, agreed by the Ministerial Council on Consumer Affairs in May 2008, is as follows: To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly. ***On 2 July 2009 the Council of Australian Governments signed the Intergovernmental Agreement for the Australian Consumer Law. The intergovernmental agreement governs the development, administration and enforcement of the Australian Consumer Law. Importantly, it also governs future amendment of the law, so that uniformity can be maintained. The Australian Consumer Law scheme is an applied law scheme. Legislation is enacted by the Commonwealth and applied, as in force from time to time, by other participating jurisdictions as a law of those jurisdictions.*** *The relevant Commonwealth legislation is the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010. Under the amendments the Trade Practices Act becomes the Consumer and Competition Act 2010 and the Australian Consumer Law is schedule 2 to the Competition and Consumer Act. All States and Territories are passing application laws—the only exception to this is Western Australia. It has been Western Australian Government practice to adopt a different mechanism so that the Western Australian Parliament has the opportunity to consider any changes to national legislative schemes before they are made. This is the case with the*

Australian Consumer Law. Unlike some other applied law schemes, the States and Territories have, and will maintain, an active role in the development of consumer policy and the enforcement of consumer laws. This is of particular significance to New South Wales. It is vital that New South Wales—Australia's most populous State with the largest economy—is able to influence the decision-making process when national action is contemplated. As far as changes to the law are concerned, the intergovernmental agreement provides that any jurisdiction may submit a proposal to the Commonwealth, supported by best practice regulation documentation similar to that required in New South Wales. Any Commonwealth proposal must be similarly justified. There is a three-month consultation period, after which a vote is held. Although consensus is the preferred outcome, in the end no amendments can be introduced to the Commonwealth Parliament unless they are supported by the Commonwealth plus four other jurisdictions, including at least three States.

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