

## Manufacturer obligations under the Australian Consumer Law

The purpose of this Bulletin is to provide new vehicle dealer members with information regarding the obligations of vehicle manufacturers and distributors to dealers and consumers under the *consumer guarantee* regime in the Australian Consumer Law (**ACL**). The need for this Bulletin has arisen because AADA is aware of information published by some distributors regarding dealers' obligations under the ACL which does not adequately explain the obligations of vehicle manufacturers and distributors to dealers and consumers.

This Bulletin has been prepared with the assistance of HWL Ebsworth Lawyers and is provided for information purposes only. It is not intended to be legal advice given by AADA or HWL Ebsworth to be relied upon by dealers. Dealers should obtain independent legal advice if they have any queries in respect of their rights and obligations under the ACL, including against manufacturers and distributors

### 1. Suppliers and manufacturers under the consumer guarantee regime

- 1.1 A customer who purchases a vehicle from a dealer in Australia will generally be a 'consumer' for the purposes of the ACL and will therefore have the benefit of certain rights and remedies under the ACL against suppliers and manufacturers. In this regard:
  - (a) when a customer purchases a vehicle from a dealer, the dealer will be the 'supplier' under the ACL. For brevity, this bulletin simply refers to 'suppliers' as 'dealers'.<sup>1</sup>
  - (b) commonly, a vehicle distributor who imports vehicles into Australia and distributes them to dealers will be deemed a manufacturer for the purposes of the ACL.<sup>2</sup> For brevity, this Bulletin will refer to vehicle distributors as 'manufacturers'.
- 1.2 Vehicles purchased by consumers come with certain non-excludable consumer guarantees under the ACL. There are some consumer guarantees which only apply to dealers (as *suppliers*), some which only apply to manufacturers, and some which apply to both suppliers and manufacturers.<sup>3</sup>
- 1.3 Where a vehicle fails to comply with a consumer guarantee, the consumer can choose to take action under the ACL against either the dealer or the manufacturer or both of them provided that the consumer does not seek to recover twice in respect of the same loss.

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<sup>1</sup> This position is different under 'agency' distribution models where a dealer sells vehicles as agent for the manufacturer. This bulletin only applies to traditional 'dealer' models and does not apply to agency models. Under an agency distribution model, the manufacturer (and not the dealer) would generally be deemed to be the 'supplier' under the ACL.

<sup>2</sup> A manufacturer under the ACL includes the company that produced or assembled the goods, holds itself to the public as the manufacturer of the goods or imports the goods into Australia if the overseas manufacturer does not have a place of business in Australia.

<sup>3</sup> See Annexure A for a summary of the consumer guarantees applicable to suppliers and manufacturers.

## **2. Consumer rights against dealers**

2.1 If a consumer decides to take action against the dealer under the consumer guarantee regime of the ACL, the dealer must provide a remedy to the consumer. Importantly, the dealer cannot tell the consumer:

- (a) that it has no rights because the factory (contractual) guarantee applicable to the vehicle has expired; or
- (b) to deal directly with the manufacturer, even if the failure was due to a manufacturing defect.

2.2 The remedies available to a consumer against a dealer depend on whether the failure is 'major' or not, and the extent to which the failure can be remedied. If a failure is 'major' or cannot be remedied, the consumer has the right to choose which remedy they will receive. This includes a refund of the purchase price or a replacement vehicle. If a failure is not 'major' or can be remedied, the dealer is entitled to choose the remedy it will provide, which may be to repair or replace the vehicle. In addition, if a vehicle fails to comply with a consumer guarantee (regardless of whether that failure is 'major' or not) the consumer is entitled to claim compensation from the dealer for any reasonably foreseeable loss or damage that they incur as a result of that failure.

2.3 A dealer cannot exclude liability for breaches of consumer guarantees for a vehicle. However, in the case of a commercial vehicle, such as a truck or van, it may be able to limit its liability to a consumer, to repairing or replacing the commercial vehicle at the dealer's option by stipulating this in its contract with the consumer.

## **3. Consumer rights against manufacturers**

3.1 If a consumer decides to take action against a manufacturer in respect of a vehicle which fails to comply with a consumer guarantee owed by the manufacturer, the consumer cannot require the manufacturer to repair or replace the vehicle. However, the consumer can recover damages from the manufacturer for:

- (a) any reduction in the value of the vehicle resulting from the failure to comply with the guarantee below the price paid or payable by the consumer for the vehicle or the average retail price of the vehicle at the time of supply (whichever is lower); and
- (b) any reasonably foreseeable loss or damage suffered by the consumer because of the failure to comply with the consumer.<sup>4</sup>

3.2 However, a consumer can only take action against a manufacturer if, in broad terms, the consumer guarantee failure is the fault of the manufacturer. For example, a

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<sup>4</sup> This includes the cost of inspecting and returning the vehicle to the manufacturer.

manufacturer will not be liable to a consumer for a failure to comply with the 'acceptable quality' guarantee if the failure was only because of:

- (a) an act, default or omission of, or any representation made by, any person other than the manufacturer or an employee or agent of the manufacturer;
- (b) a cause independent of human control which occurred after the vehicle left the manufacturer; or
- (c) the dealer charging a price for the vehicle which was higher than the manufacturer's RRP.

3.3 If a consumer decides to take action against a manufacturer under the consumer guarantee regime, the manufacturer cannot refuse to deal with the consumer by, for example, telling the consumer that they can only make a claim against the dealer.

#### 4. Dealer right of indemnity against manufacturers

4.1 Where a consumer could claim against a manufacturer under the consumer guarantee regime, but instead makes a claim against the dealer, the dealer will have a statutory right of indemnity against the manufacturer under the ACL for certain costs or damages it incurs as a result. Importantly, this statutory indemnity cannot be excluded or limited, and it is not conditional on a dealer getting prior approval from the manufacturer for the costs or damages so incurred.<sup>5</sup> For instance, a manufacturer cannot refuse to indemnify a dealer under the dealer's statutory right of indemnity in the ACL on the basis that the claim does not fall within the manufacturer's applicable 'warranty claim guidelines'.

4.2 The costs that a dealer can claim from the manufacturer under the statutory indemnity are as follows:

- (a) any damages paid by the dealer to the consumer for reasonably foreseeable loss or damage suffered by the consumer because of the failure to comply with a consumer guarantee, provided that the manufacturer would itself be liable under the ACL to pay damages to the consumer for the same loss or damage (see paragraphs 3.1 and 3.2 above); and
- (b) any costs the dealer incurs because the dealer is liable for a failure to comply with the consumer guarantees that the vehicle:
  - (i) is of acceptable quality;
  - (ii) is fit for any disclosed purpose that the consumer made known to the manufacturer either directly or through the dealer; or

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<sup>5</sup> A manufacturer can limit its liability to the dealer to the cost of replacing the vehicle, obtaining an equivalent vehicle or having the vehicle repaired where the vehicle is not of a kind ordinarily acquired for personal, domestic or household use or consumption (for example, a commercial van or truck).

- (iii) matches any description that was applied to the vehicle by or behalf the manufacturer, or with the express or implied consent of the manufacturer,

(e.g. the costs of repairing or replacing the vehicle in accordance with the dealer's obligations under the consumer guarantee regime).

4.3 However, the statutory indemnity only applies to the costs and damages that the dealer is liable to incur, or pay to a consumer, under the consumer guarantee regime. Accordingly, the statutory indemnity would not allow a dealer to recover costs or damages from the manufacturer that the dealer incurs where the:

- (a) consumer's claim is not a consumer guarantee claim (e.g. if the claim is contractual or based on laws other than the consumer guarantee regime);
- (b) consumer's claim is a consumer guarantee claim, but it turns out that the consumer does not have a valid claim under the consumer guarantee regime. Accordingly, it is important that dealers properly assess any consumer guarantee claims and do not blindly provide remedies or damages to consumers on the assumption that the dealer will be able to claim any costs from the manufacturer under the statutory indemnity; or
- (c) dealer provides something to a consumer which goes over and above the dealer's obligations under the consumer guarantee regime. For example, if in addition to any remedies a dealer is required to provide to a consumer under the consumer guarantee regime, the dealer decides to throw in free vehicle servicing to keep a consumer happy, the dealer could not rely on the statutory indemnity to recover the costs of that free servicing from the manufacturer.

4.4 In addition, a dealer has a three-year window within which it can make an indemnity claim against a manufacturer under the ACL. The three-year period commences on the earlier of the day which:

- (a) the dealer made a payment with respect to, or otherwise discharged in whole or in part, the liability of the dealer to the consumer; and
- (b) a proceeding was commenced by the consumer against the dealer with respect to that liability or, if more than one proceeding was commenced, the day on which the first proceeding was commenced.

**Annexure A**

**Consumer Guarantees**

<b>Consumer Guarantee</b>	<b>Summary</b>	<b>Supplier / Manufacturer</b>
Guarantee as to title	The supplier of the goods has the right to dispose of the property in the goods when the goods pass to the consumer	Supplier
Guarantee as to undisturbed possession	The consumer has the right to undisturbed possession of the goods	Supplier
Guarantee as to undisclosed securities	The goods are free of any undisclosed security, charge or encumbrance	Supplier
Guarantee as to acceptable quality	The goods are of 'acceptable quality'	Supplier and Manufacturer
Guarantee as to fitness for any disclosed purpose	The goods are reasonably fit for: (i) a purpose for which the supplier represents they are fit; or (ii) a purpose that the consumer makes known to the supplier or manufacturer for which the goods are being acquired by the consumer	Supplier
Guarantee to supply by description	If goods are sold by description, they correspond to that description	Supplier and Manufacturer
Guarantee relating to supply by sample or demonstration model	If goods are sold by sample or demonstration model, they correspond to that sample or model	Supplier
Guarantee as to repairs and spare parts	The manufacturer of the goods will ensure that spare parts and facilities for repair of the goods are reasonably available	Manufacturer
Guarantee as to express warranties	The manufacturer will comply with any express warranty given by the manufacturer in relation to the goods and the supplier will comply with any express warranty given by the supplier	Supplier and Manufacturer