

**MOTOR TRADES
ASSOCIATION
OF AUSTRALIA**

Australian Consumer Law Review 2016

Submission Structure

Executive Summary & Recommendations

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Executive Summary and Recommendations

Executive Summary

The Motor Trades Association of Australia Limited (MTAA) and Members welcome the opportunity to make a submission on the distributed Issues Paper for the first scheduled review of the Australian Consumer Law (ACL). This Submission should be considered with those of the Association's Members most of whom have made individual submissions in support of the reforms being sought.

Legislation and /or regulation that have within it the judgement and determination of critical thresholds without clear definition and guidance, places a significant burden on those who are required to interpret those thresholds.

Critical thresholds such as 'minor' or 'major' faults or failures in a highly complex good such as a motor vehicle, has placed disproportionate capability in the hands of an unqualified consumer or consumer representative. This capability has amplified with a demonstrated predisposition of some to place greater emphasis or interpretation of ACL objectives on consumer protection over other equal key objectives of effective competition and fair-trading. In the opinion of MTAA and its Members, these factors have created an imbalance in the delivery of ACL objectives.

Over the past four years MTAA and Members have had numerous cases brought to their attention of matters proceeding to Courts as a result of unqualified consumers or consumer representatives making judgement calls on 'major faults or failures' in motor vehicles, while simultaneously adopting a dogmatic and 'black letter law' approach to the relevant provisions of the ACL.

On the one hand it can be argued that precedents determined by action in the Courts, such as the circumstances alluded to above, would provide welcome clarity on aspects of the ACL's interpretation. On the other hand, however, it could, and arguably may have already led, to the establishment of precedents that ossify in law unforeseen and unintended outcomes.

The need to address the original concerns of the MTAA to better define thresholds in regards to complex products and now arguably increasingly complex services, remain and is now critical with the development and delivery to market of even more complex automotive products with far greater integration and interoperability of systems and sub-systems, more technology, and increasing awareness and reliance on the ACL.

Recommendations

Australian Consumer Law Objectives and Structure

The MTAA recommends that:

1. No change is required to the overarching and enabling objectives or structure of the ACL.
2. No change is required to the agencies charged with educating, administering or enforcing the ACL.
3. Improved balance in the delivery of objectives of the ACL by reducing the risk of mis-interpretation or incorrect emphasis through improved definition, and clarity in thresholds and provisions.

Legal Framework

The MTAA recommends that:

4. Amend the definition of consumer in Schedule 2, Chapter 1, Section 3 of the ACL to include traders who have 'purchased Goods and/or Services for resale'
5. The Review consider the feasibility, development and application of a separate schedule or similar device or mechanism within the ACL, specific to the automotive sector including:
 - a. The removal of existing ACL provisions with proximity or specificity to the automotive sector, and their inclusion, where appropriate, to the suggested schedule or alternative mechanism;
 - b. The development of clear definitions and thresholds to be incorporated as provisions including:
 - i. Define a major fault;
 - ii. Define a minor fault;
 - iii. Define what constitutes 'reasonable time';
 - iv. Define 'fit-for-purpose'
 - v. Define 'acceptable quality'
 - vi. Define 'expected life span' of second hand vehicles (age, kilometres etc.)
 - vii. Clarify time length of consumer guarantees for particular types of vehicles
 - viii. Include businesses that purchase goods and services in the course of trading, including where they are held liable for the fault of a product supplied by a manufacturer, in the definition of consumers;
 - ix. Define the terms 'unconscionable conduct' and 'misleading' and 'deceptive' conduct, and 'reasonable person', and ensure consistency with the CCA and recommendations and changes occurring as a result of the Harper Review.
 - x. Without adding to the overall administrative burden.
 - c. Amend or provide additional provisions (where appropriate) in such a schedule or alternative mechanism to include:
 - i. Existing provisions that negate the need for other jurisdiction laws or regulation including 'Lemon Laws' and 'Cooling Off' periods (existing provisions are regarded as adequate).
 - ii. Define the responsibility for consumer guarantees between vehicle manufacturers and vehicle retailers, particularly for used vehicles and for vehicles sold through independent and non-manufacturer aligned dealerships and recourse actions available;
 - iii. Subject Government auction houses to the same ACL obligations as licensed vehicle dealers
 - iv. Incorporate common statutory warranty as contained in various jurisdictions Motor Car Traders / Dealers Acts, within the ACL as the relevant consumer guarantee in relation to second hand motor vehicles;
 - v. Define the application of the ACL, if at all, to 'end of life' second hand motor vehicles;
 - vi. Enable fair access of technical service and repair information by independent automotive businesses and consumers;

- vii. Ensure claims made under the ACL are not *res ipsa loquitur* evidence that a fault exists and that the retailer or wholesaler is at fault. Businesses should also be protected as consumers where they are purchasing from third parties in order to supply to the public and where they are unable to reasonably determine whether a fault exists at the time of purchase;
 - viii. Exclude personally imported motor vehicles as they are incompatible with the ACL;
 - ix. Provide broad guidelines, such as those contained within the statutory warranty system within the Western Australian Motor Vehicle Dealers Act 1973, and other jurisdictions, to establish the parameters under which a claim can be lodged.
 - x. Ensure consumer must give the trader a reasonable opportunity to meet any obligations under the consumer guarantees or statutory warranty with greater emphasis to be placed by the Courts on the determinations of State Consumer Affairs agencies when hearing cases brought before them by consumers.
 - xi. An industry guide be prepared, once the ACL review has been completed, specifically for the motor trade industry in 'plain English' format.
6. 'Lemon Laws' and 'Cooling Off Periods' should not be introduced as ACL provisions already provide significant consumer protections. The drafting of such jurisdiction based legislation and regulation is an unnecessary return to a potential patchwork of discrete laws and regulations for specific sectors, which will be administratively prohibitive to implement, and reinstate an environment the ACL's creation successfully addressed.

Consumer Guarantee Threshold

The MTAA recommends that:

- 7. The Consumer Guarantee Threshold (CGT) is investigated for its ongoing relevance and continuance, but as a minimum reform requirement, that the CGT currently set at \$40,000 in 1986, be indexed to 2016 prices and updated annually thereafter.

Emerging Policy Issues

The MTAA recommends that:

- 8. Personally imported vehicles are excluded from the ACL in accordance with draft policy determination that such transactions are 'buyer-beware' and that normal consumer protections do not apply.
- 9. The ACL should be amended to ensure Australian levels of quality and safety are reflected in international standards in line with our international trading partners and source markets and reflect requirement to operate in Australian conditions.
- 10. Online reviewers, including consumers, are equal parties to a transaction under ACL and should be subject to equal obligations for unconscionable conduct and misleading, deceptive and malicious conduct. Simply holding an 'genuine opinion' should not constitute a defence from these actions nor from defamation;
- 11. Intellectual property developed from data collected by businesses should not be made available in order to satisfy an academic argument about consumer empowerment, as it would risk providing Australia's competitive advantage to overseas competitors and contradicts the Commonwealth Cyber and Data Security Strategy.
- 12. Include the same protections for businesses from misleading conduct by consumers, as consumers are parties to transactions covered by the ACL.

Section 1 - Australian Consumer Law and the retail, service, repair, recycling and associated industries of the Australian Automotive Sector

Automotive Industry overview

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 persons. In gross domestic product (GDP), the automotive industry as a whole accounted for approximately \$38.3 billion or 2.5% of Australia's annual GDP in current prices in 2014-15.

The Sector and all industries within it are very competitive with usually small profit margins. Consumer behaviours limit capacity of industries to raise prices and large dominant market participants (insurance companies, oil industry, supermarkets, vehicle manufacturers) heavily influence consumer behaviours and / or price. The cost of doing business is high due to rapid vehicle technology advances requiring changing and higher-level skills and expensive technology in the repair / service process.

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.

The new car market is now over 1.2 million per annum with the national fleet fast approaching 20million vehicles.

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 be solely reliant on imported motor vehicle products, although there will still be some component manufacturing and niche manufacturing operations.

The touch points between the automotive sector and Australian Consumer Law (ACL), are many and varied and this scheduled ACL Review, starting with the delivery of an Issues Paper, provides an opportunity to ensure that objectives and underlying principles of the ACL keep abreast of unprecedented changes occurring in the automotive sector, with highly complex motor vehicle products and the implication of this relationship on consumers and business alike.

Motor Trades Association and Member Associations in context

MTAA Limited is the national association of 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.

The majority of MTAA Members have provided independent submissions to the ACL Review Issues Paper reflecting specific views of thousands of their business members across the more than 20 discrete industries within the automotive sector. These include: **new and used vehicle retail** (passenger, truck, commercial, motorcycles, recreational and farm machinery); **service** (dealer repairers, independent mechanical repairers, repair specialisations (- i.e. brakes, air conditioning, radiators, steering and suspension, exhaust, windscreen and engine), vehicle washing; **repair** (motor body, vehicle painting, upholstery); **automotive dismantlers and recyclers**; and **associated industries** (parts and component wholesale/retail; engine reconditioners; distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture); heavy vehicle repairers; caravan industry; commercial vehicle industry; general trades; hire car and chauffeur driven limousines; motor bus; motor vehicle assessors and inspectors; rental vehicles; rustproofing specialists; service stations; tow truck operators; tyre dealers and retreaders.

On behalf of its State and Territory Association Members, the MTAA has been at the forefront of national competition and consumer 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.

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 and the objectives and principles underpinning the Australian Consumer Law (ACL) including effective competition and fair-trading.

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.

Consultation on the ACL Issues Paper

MTAA State and Territory Members consulted extensively with their own diverse and geographically dispersed membership of thousands of automotive businesses across the nation through surveys, focus groups and other mechanisms. The major observations from these consultations

- The policy framework, overarching and enabling objectives and structure of the ACL remain relevant, appropriate and do not require any change.
- However, there exists a universal and strong view that emphasis and interpretation of the ACL is unbalanced with a predisposition to Consumer Protection, and less to the equally weighted objectives of effective competition and fair-trading.

- A better balance may be achieved through clarity of definitions, thresholds, and obligations incumbent on businesses and all market participants including consumers.
- Protection is tilted too far in favour of consumers and larger businesses such as insurers at the expense of fair-trading and effective competition.
- Lemon' laws and 'Cooling Off' periods are not required as there are already sufficient protections under ACL.
- A lack of understanding of the definitions, thresholds and obligations incumbent on businesses when considering major failures, major / minor faults, and reasonable time by businesses and consumers.
- A commensurate lack of confidence from business that regulators, consumers or courts of arbitration had sufficient understanding, clarity or direction of terms of applying that understanding consistently.
- Numerous members have been subjected to an ACL claim, and when they were, it was usually settled before determination.
- Views were largely, but not universally, in favour of ensuring that Australian Standards were reflected in international standards, rather than creating Australian Standards that were out of step with major trading partners.
- Strong agreement that there should be strengthened protections for businesses against faulty and substandard supplied parts, and that manufacturers do not provide sufficient support to retailers and wholesalers, when they are subject to ACL claims that are traceable to manufacturing problems.
- Most agreed that government auction houses should be subject to the same ACL obligations as licensed vehicle dealers, with the costs being absorbed by sellers or the auction house.
- There was universal agreement that online reviewers and consumers should be subject to the same ACL obligations as businesses where they post misleading reviews that damage a business or provide the basis for coercive bargaining.
- Online review platforms should disclose any commercial agreements, relationships and methodologies used to determine their review rankings or commentary.
- The ACL is too heavily biased towards the consumer and is inadequate in providing protections for small businesses in the automotive industry.

Section 2 - Australian Consumer Policy and the Australian Consumer Law

Objectives and Structure

MTAA and Members continue to support Australia's national consumer policy framework and overarching objective *'To improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly'*.

MTAA and Members also believe the six operational objectives, as identified by the Intergovernmental Agreement for Australian Consumer Law in 2009, remain relevant and appropriate in supporting the overarching objective.

The MTAA also believes and supports the mechanisms and agencies designed to educate, administer and enforce the ACL including the roles of The Treasury, the Australian Competition and Consumer Commission (ACCC), the newly formed Commonwealth Small Business and Family Enterprises Ombudsman, State and Territory based Small Business Commissioners (where they exist) and Departments of Fair Trading / Consumer Affairs (although the relationships with the latter are more of MTAA Members than MTAA itself) are appropriate and do not require change.

The MTAA enjoys and is appreciative of the positive, robust relationships with The Treasury, ACCC, agencies and relevant Departments, which continue to be based on mutual respect, professionalism and collaboration.

The MTAA and Members therefore see no need to change the foundations of Australian Consumer Policy ACL objectives or its delivery.

Imbalance in interpretation and emphasis

However, the MTAA and Members believe there is a significant issue with the emphasis and interpretation of objectives requiring further detailed exploration.

The objectives of ACL quite purposefully and rightly do not assign specific weighting to which elements are more important than any other. Consumer protection, effective competition and fair-trading are equally important as an objective of ACL, and of equal standing before the law.

The ACL also establishes that consumers are participants in markets and an equal party in any transactions that occur in that market. These are crucial foundation principles under ACL that the MTAA and Members contend are not being interpreted correctly by regulatory bodies.

It is the contention of the MTAA, its Members and their automotive business constituents that in practice there is a predisposition by regulators to the concerns of consumers at the expense of businesses and that the rights of consumers and the rights of businesses are not balanced.

It is also a strongly held view that the smaller the business at, or near, the end of a supply chain do not receive adequate protection, even though they are supposedly equal participants in markets and equal in any transaction.

As MTAA Member, MTA-South Australia points out in its submission: *‘Small and medium sized enterprises have limited resources to defend themselves against multiple frivolous claims. They are likely to exhaust the cash reserves of a business during litigation, in a process that is perceived to be biased anyway. It is easier and cheaper to allow a claim to be settled regardless of its merits. This is an unbalanced effect of current ACL interpretation.’*

The MTAA and Members share the expressed MTA-SA view that *‘...ensuring consumers are not unduly disadvantaged through dishonest conduct is an important economic standard that helps drive confidence in the Australian economy. Equally, it is important that it is recognised that effective competition and fair-trading are two-way streets. Businesses exist to provide goods and services to consumers and do so in a way that is a positive transaction for both parties. They do not exist to fleece their customer base or to deliberately provide inadequate goods or services. Therefore businesses should not be considered as having a starting position of doing so.’*

Legal Framework

The MTAA and Members considers the legal framework underpinning the ACL is basically sound in its current role of supporting one generic Australian Consumer Law applicable across all goods and services in the economy.

However, the MTAA believes that in the original creation of a generic Australian Consumer Law, an opportunity was lost to define terms, criteria and thresholds, particularly in relation to complex goods and an unintended consequence has been increased room for interpretation and emphasis – particularly in the automotive sector.

This is not a criticism of legislation drafters who had to tackle the vexed issue of establishing a generic Consumer Law Framework for all goods and services and also balance the inclusion of very high profile, very specific sectors and highly complex products from those sectors. If you start defining specific products and prescribing solutions, where do you stop? A policy framework suddenly becomes prescriptive and burdensome to administer and enforce.

MTAA suggests that due to rapidly changing consumer behaviours driven by even faster application of technology and connectivity, then perhaps the time is right for a more detailed framework, particularly for singled out sectors such as automotive.

Given the matters raised in this and MTAA Member submissions MTAA suggests that the creation of an automotive schedule or similar within the ACL.

The following examples involving MTAA member businesses highlight some of these issues and the problems and inappropriate and unjust outcomes resulting from a lack of clarity in the law:

Case Study 1:

A 2004 4WD motor vehicle with 324,000 kilometres on the odometer developed a coolant leak four months after purchase whilst towing a heavy trailer on the highway. The temperature gauge was functional, however the driver failed to stop and the result was that the engine was destroyed. The coolant leak was a minor defect, however the trader refused to repair the consequential damage.

Victorian Civil and Administrative Tribunal (VCAT) proceedings were initiated and the Tribunal ruled that the vehicle was not 'Fit for purpose' and the consumer awarded a full refund along with associated costs for damages, despite the consumer having contributed to the damage through failure in their duty to stop and minimise loss.

Case Study 2:

A motor vehicle had experienced balance shaft failures within the engine. The car would not run. It was taken to a workshop where the failure was confirmed and work taken to rectify the fault carried out. A short time later the engine warning light displayed indicating the presence of fault codes. These turned out to relate to worn cam phasers. This had no relevance with the original work carried out. An ACL claim was made and VCAT awarded full compensation to the car's owner because the workshop 'Should have known' that these components were going to be faulty in the future.

Case Study 3:

A motor vehicle that had travelled 300,000 kilometres and, although road worthy, was approaching its end of life and is sold to a consumer (who has been informed that the vehicle is approaching/has reached its 'use by date') and shortly after purchase, a component failed.

The consumer is generally encouraged by the regulators to approach the trader for a remedy – even though they had agreed to purchase the vehicle with the knowledge it was at/had reached its 'end of life'.

MTAA members have reported substantial examples of where a component has failed in such a vehicle and the cost of remedy is the same or even more than the original purchase price.

Case Study 4:

Two brand new identical model vehicles were purchased from a metropolitan dealer. Pre delivery actions were performed and the vehicles delivered. The owner on return to his country location showed his new vehicles to the local mechanic who raised concerns about a 'white residue' over the engine and engine bays of both vehicles. It was explained to the consumer that the residue was not of concern and was the result of pre delivery wash. Unconvinced the consumer sought advice on ability to hand back the vehicles using provisions of the ACL. The costs of the vehicles were refunded.

The examples above illustrate the unfair and highly subjective application of the ACL by regulatory authorities. It is clear from these cases and many others like them, that the objectives of the ACL were not served. This was caused by a lack of clarity concerning 'fit for purpose' and 'acceptable quality' along with other key provisions within the ACL. There was also confusion and misinformed expectations surrounding the lifespan of older, highly used motor vehicles on the part of the regulatory authorities involved.

In all likelihood, the litigation and financial losses suffered by the businesses could have been ameliorated or even possibly avoided had there been more explicit information and better clarity surrounding the particular provisions and guarantees contained in the ACL on motor vehicle sales and repairs.

The Meaning of 'Consumer' and Current Thresholds

The definition of 'consumer' in Schedule 2, Chapter 1, Section 3 of the ACL requires amendment to include traders who have 'purchased Goods and/or Services for resale' as the present definition prevents such traders from taking appropriate action against a supplier through the consumer protection agencies such as Fair Trading or the Civil and Administrative Tribunals in their respective jurisdictions.

MTA-NSW suggests in its submission that one solution may be to investigate a rewrite Section 3, armed with the hindsight of four years of operation of the ACL, so that it accurately reflects all obligatory requirements and entitlements relating to the purchase of Goods and Services.

The MTAA Member, MTA-NSW provides more detail on the requirement in their independent submission to the review.

Consumer Guarantees

It is crucial the consumer guarantee be extended to businesses that are consumers as well. One of the major concerns of MTAA Members and their business constituents is that retailers are often liable for consumer guarantees where they were supplied that product from manufacturers and where the fault occurred during manufacture. There should be greater protections for retailers and wholesalers from this type of claim; and manufacturers should be able to be made a party to a claim where appropriate.

For example: Schedule 2, Chapter 3, Part 3-2, Section 54 of the ACL refers to Guarantees as to acceptable quality and notes at sub-sections 4, 5 and 7 that goods that are not of acceptable quality are taken to be of acceptable quality if it is 'specifically drawn to the consumer's attention before the consumer agreed to the supply'.

The terminology used poses the problem that opens the door to differing interpretation. It could be inferred from the terminology that the goods are 'not of acceptable quality' potentially detracts from the fact that the good/s may be nearing the 'end of life' cycle, but are still quite serviceable providing they are treated by the consumer appropriately.

Dealers vs. Manufacturers

The ACL requires the consumer seek a remedy from the retailer, regardless of if the fault was as a result of a manufacturing issue or not. This is a reasonable proposition and would work well if the retailer could rely on the manufacturer providing acceptable levels of support.

As MTA-WA reports in their submission the current state of play sees dealers placed at a considerable disadvantage, and being exposed to high levels of liability if they are to deal with a consumer complaint in accordance of the intent of the ACL.

MTA-WA provides the following example: *The ACL requires that the retailer/dealer, repairs the consumer's vehicle and then the retailer/dealer claims reimbursement for costs from the manufacturer. The Act requires that the consumer can claim for out of pocket and additional expenses arising from the fault. This includes the use of a hire car, loss of earnings etc. The first issue impacting on dealers is that manufacturers will effectively penalise the dealer by limiting the amount that can be claimed for any repair. This is most commonly done by restricting the amount of time that the dealer can take to repair the vehicle and it is not uncommon for manufacturers to allow for half of the actual time that it takes to affect a repair. The second issue for dealers is that manufacturers will either not accept claims for out of pocket expenses or place limitations on these. An example of this can be seen with the provision of loan cars, which cost the dealer but which the manufacturer will not compensate for.*

MTAA and members therefore believe the review of the ACL therefore must place far greater and stringent compliance requirements on manufacturers to fully cover claims made against their product. If this were to be done the time taken to successfully resolve consumer complaint would be reduced as the dealer will have greater confidence that they will receive fair compensation for their time from the manufacturer.

Second hand vehicles

For second hand vehicles where the original manufacturer's warranty period has expired, the ACL provisions transfer the onus of responsibility to the used car dealer with regards to consumer's claims for major faults. This is despite the fact that these major faults are essentially manufacturing faults rather than the fault of the dealer. A manufacturer's culpability over the major fault is further distanced by the fact that independent used car dealers have no relationship with a vehicle's manufacturer due to the nature of second hand goods. This results in used car dealers bearing the full financial risk associated with the selling of the used vehicle.

MTAA Member, VACC, reports in its submission that its used car dealer members have suffered a spate of grossly unfair orders for compensation by consumers relying upon the ACL in respect of cars that have been purchased very cheaply and which fall outside the statutory warranty provisions contained in the Victorian Motor Car Traders Act 1986 (MCTA). The MCTA contains adequate and well-defined limits upon the obligations licensed motor car traders have to consumers.

This is similar in other jurisdictions where better definitions have alleviated some of the problems associated with the ACL.

As VACC reports in its submission, *Under section 54 of the MCTA Victoria, cars that are less than 10 years old and have been driven less than 160,000 km are covered by the statutory warranty for the first 3 months or 5,000 km after delivery. This statutory warranty also applies in most states and the exposure of the motor car traders to consumers is well defined and clear. The limits are also well defined.*

The provisions contained within the ACL however, have placed an intolerable burden on traders in favour of unscrupulous consumers.

Effectively, cars driven over 200,000 kilometres and that are 20 years old and priced accordingly, give rise to consumer rights to have repairs undertaken by traders that equates to the entire cost of the car purchased cheaply because of the age of the vehicle. In this regard, the ACL has consequently created an unfair line of responsibility and a debilitating effect on the financial viability of used car dealerships.

Case Study:

A 2004 Volvo XC90 that was more than 10 years old and had been driven 163,040 kilometres that was purchased for only \$13,875.00 failed after 4 months and having been driven roughly for 7,000 km after purchase. The applicant was awarded \$4,000.00 at VCAT for the cost of a new transmission along with \$8,200.00 for additional costs claimed to have been incurred. VCAT did not provide reasons for its decision. The car was sold with a roadworthy certificate. It was examined by mechanics and considered to be in good condition for its age and level of use.

This case study, provided by VACC, illustrates the fact that the provisions of the ACL - largely adopted from the New Zealand Consumer Guarantees Act 1993 – mean that the existence of the statutory warranty already in place under section 54 of the Motor Car Traders Act (Victoria), has become otiose.

Statutory warranties provide clear benchmarks for vehicle age and kilometres driven. By contrast, the ACL makes only the following vague statement: 'as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable having regard to the nature of the goods, price, any statement made about the

Access to Repair Information

Among the consumer guarantees that form the basis of the ACL, one states that 'manufacturers or importers guarantee they will take reasonable steps to provide spare parts and repair facilities for a reasonable time after purchase.' However, this consumer guarantee is insufficient in its scope of coverage, as it does not stipulate the fair distribution of vehicle service information to independent vehicle repairers. As such, vehicle manufacturers and importers providing vehicles into the Australian market have limited obligations in ensuring their repair information is made widely available to the automotive industry.

Not providing such information to independent vehicle repair businesses can disadvantage vehicle owners who are not able to access a vehicle dealership in their region or where a vehicle repairer cannot fairly access repair information. This is particularly true for vehicle owners that reside in rural regions where they do not have ready access to a nearby dealership. Consequently, this is detrimental to regional consumers as it may result in the need to travel long distances to dealerships for vehicle repairs.

The current arrangements in Australia regarding the fair access to vehicle repair information are currently embodied in an industry agreement (Access to Service and Repair Information). This voluntary industry agreement was all that could be managed from a fragmented industry that failed to agree to a Voluntary Code of Conduct or attract interest of government for the mandating of a Code of Conduct.

While it remains difficult to qualify the size and characteristics and number of businesses impacted, it is likely to increase given the complex systems and diagnostics required to identify fault cause.

It is clear the agreement in itself is unlikely to meet the objectives of Australia's Consumer Law. As such, further investigations may be required to develop a new Voluntary or Mandated Code of Conduct to ensure access to repair information and the ACL are synergistic

Safety Recalls do not necessarily equate to a major fault or failure

Safety recalls for motor vehicles are almost invariably the product of, and response to, demonstrated faults arising as a result of on-going product testing and development conducted by a manufacturer, or from a pattern of (potential) faults emerging or being discovered in the course of normal vehicle servicing. Those recalls are also almost invariably safety related and, thus, could potentially be construed as evidencing a major vehicle fault. In practice, however, recall campaigns, in the main, result in the prevention of a given fault / failure occurring in a vehicle. In that respect those campaigns represent effect being given to fault prevention measures.

A safety-related vehicle recall – by virtue of the fact that it provides both an opportunity for a vehicle to be either prevented from evidencing a fault, or to have any fault rectified – cannot be, of itself, evidence of a 'major' fault and, hence, a trigger for the relevant proscribed remedy. That, however, is not entirely clear and explicit within the ACL.

Section 3 – Emerging Issues

Personal importation of motor vehicles

The Federal Government has introduced a bill that, if passed, will allow for the personal importation of new or near new vehicles from 2018.

The automotive industry has raised its concerns with Government in relation to the differing standards that apply to vehicles manufactured for Australia to those manufactured for other markets, irrespective of whether they are right hand drive or not, and the real potential for consumer detriment.

There is a clear lack of understanding that models of vehicle that look the same, are not necessarily the same under the hood, with the systems and sub systems deployed or in their capacity to operate effectively in the Australian environment. Subtle but extremely important differences are made to Australian delivered vehicles even though the same model may well be available in another comparable right hand drive market.

MTAA is aware of several models of several brands that have significant changes to suspension, fuel, electrical and cooling systems to make them ‘fit for purpose’ in the Australian environment and operating conditions. Both models may well meet harmonised ‘international standards’, but still be fundamentally different because of Australian operating environments.

Key to these concerns is the perception by individuals accessing this opportunity, that because the vehicle is new, it will automatically be covered by the manufacturer’s warranty. This is not the case.

Dealers cannot be held accountable for issues such as warranty work or manufacturer recalls and on that basis the MTAA and Members strongly recommends that the ACL specifically exclude this type of vehicle, should it proceed.

MTAA and Members are puzzled by the contradiction of the Government allowing the personal importation of new motor vehicles and their stated position that it will be under the auspices of ‘Buyer Beware’ on the one hand, while on the other it appears comfortable that it undermines the intentions and purpose of the ACL. Personal importation of motor vehicles by individuals that bypass established local dealer networks or other regulated processes are effectively afforded no consumer protection. Essentially, it would be very difficult or impossible for consumers to be able to access the ACL to pursue claims against overseas sellers.

As Government estimates show that approximately 30,000 vehicles per annum will be personally imported into Australia, this has the potential to see a dramatic escalation in consumer grievances, with little course for legal redress.

Inadvertently, the burden of undertaking repairs to these vehicles will fall on local dealerships and repairers that may not be able to perform repairs and servicing on these vehicles, as they are not models intended for Australia, and are affected by the lack of availability of parts and technical repair information (also at odds with the ACL requirements).

The likely consequence of this decision will be a refusal to work on or provide advice on these personally imported vehicles to consumers by businesses for fear of ACL claims. Motor vehicle dealerships are also unlikely to accept such vehicles as trade-ins due to the inherent risks involved with ACL, thereby causing further angst and grief amongst consumers.

Even if they do for the sake of overarching brand reputation protection, how will the dealer be protected from any resulting problems that might arise despite best endeavors to repair the vehicle.

Regulators and various competition reviews have adopted inconsistent views on how to best protect consumer interests in regard to personal import of new or near new vehicles. Initial retail price is not the only determinant of consumer protection. Physical safety is at least as important to consumer protection as pricing considerations. The full cost of providing, maintaining and servicing a product, and access to remedies under ACL, all add to the lifetime cost of a product. These facts need to be considered when determining how best to deliver consumer protection.

It could be argued that in this instance there is a clear imbalance of a different perspective where consumer protection has taken a back seat to effective competition – even though in a market of 67 brands and 400 model variants of those brands, apparently consumer choice is still not satisfied.

In this context, the MTAA and Members restate total opposition to changes to the Motor Vehicle Act 1959 to allow for personal imports of new and nearly new cars and motorcycles, which seek to weaken physical safety considerations as well as increase the financial, safety and protection risks for consumer.

Lemon Laws

The MTAA and Members strongly oppose further penalties and sanctions under ACL for motor vehicles experiencing repeated faults.

In Australia, there is little empirical evidence in existence that supports the conclusion that there is a need for a legislative response. The recent 2016 'Turning Lemons into Lemonade' survey from consumer advocate Choice, and Treasury's 2016 Australian Consumer Survey are both unable to offer valid substantiation of reported motor vehicle faults as being a major consumer problem warranting 'lemon' laws. Similarly, the 2015 Queensland 'Lemon' laws inquiry found complaints to the Office of Fair Trading over the previous four years about 'lemons' represented less than 1% of complaints regarding motor vehicles. In Victoria, which already has state based 'lemon' laws, the number of complaints, prior to the introduction of those laws, totalled less than two dozen annually?¹

Does a vehicle that has multiple, separate faults constitute a lemon or does the vehicle that has the same fault fail repeatedly constitute a 'lemon'? It is entirely unreasonable to legislate against the former, and there do already exist protections from Statutory Warranties that address the latter.

Additionally, the issue of whether a fault occurs because of product failure or because of poor use; unreasonable expectation; natural wear and tear or inappropriate vehicle selection for a given task is highly subjective and has a material impact on the performance of a vehicle and on the efficacy of any repairs.

The Federal Chamber of Automotive Industries undertook a survey to determine the size and extent of vehicle complaints in Australia.

¹ *Consumer Affairs Victoria, Inquiry into Lemon Laws, 2007.*

That survey found that 55% of cases are settled prior to determination by a tribunal, 40% are resolved in favour of a manufacturer and only 5% are resolved in favour of the complainant.² This suggests that vehicle dealers are acting responsibly and providing appropriate levels of consumer support for their products.

The risk of introducing broad, ill defined, 'lemon' laws is that they will actually increase litigation costs for both dealers and consumers, who receive minimal benefit given that 95% of complaints are either resolved amicably or against the consumer.

ACL already provides sufficient remedy in these matters. An increase in the compliance burden will not improve the fault rate experienced by purchasers, as the more defined the legislation is the greater the exclusion of specific faults.

The modernisation of the vehicle fleet and the high level of technological integration have made diagnosis of vehicle faults increasingly complex.

Repair or replacement of a fault can be relatively straight forward once the component at issue is identified. However, it is diagnosis that poses the biggest obstacle to addressing faults. As an example, identifying where an electrical system is malfunctioning and diagnosing the specific component that has failed is multifaceted and often involves multiple components.

The success or otherwise of the attempted repair cannot always be immediately determined given the highly integrated nature of modern electrical components and software. This typical diagnostic process should not form the basis for 'lemon' laws in Australia.

Product Safety Standards

MTAA and Members have concerns about the nature of product safety standards in Australia. As highlighted above with the case of personal importation of new or near new motor vehicles, standards should not allow for the importation of products that are unsafe into the Australian market.

The MTAA and Members are aware of several situations where current ACL protections are not adequate.

MTAA draws attention to examples provided in MTA-SA's submission in regard to wheel rims as an example. This example illustrates the proliferation of various vehicle components available online, supplied absent essential features, sometimes of dubious standards and requiring alteration or modification for fitment, posing serious consumer safety risks.

The ACL should be amended to ensure Australian levels of quality and safety are reflected in international standards in line with our international trading partners and source markets.

New Business Models and ACL (Extract from MTA-SA submission)

The MTA is concerned that a spate of new business models pose serious consumer risk and threaten to create structural imbalances in certain markets that undermine fair trading and effective competition.

² Federal Chamber of Automotive Industries, *Response to 'Consumer Rights: Implied Conditions and Warranties'*, 2009

Firstly, government sponsored auction houses, particularly for motor vehicles; flood the market with particular models of vehicles at much cheaper prices than in the retail market. They are able to do this because the standard statutory warranties and aftersales support provided by licensed dealers are not offered.

On the other hand, these vehicles are of such concentration and the throughput of these vehicles so high, licensed dealers are competing against a price floor set on an uneven playing field by the auction houses.

ACL should require auction houses to provide the same warranties and guarantees and licensed vehicle dealers, with costs borne either by the auction house or recovered from the sellers as part of the auction houses commission fees.

Secondly, the increasing use of online sales, marketing and consumer interaction pose new risks for businesses, particular in the social media space.

The UK's Competition and Markets Authority has identified that up to £23 billion of spending is influenced by online reviews each year.³

Australian research has identified a similar consumer reliance on online reviews when making purchasing decisions and passing judgements on the quality of businesses they are considering transacting with. Nielsen surveyed over 5000 people and found that 71% of people read, discussed or commented on brands in the previous 12 months.⁴

Similarly, a Sensis social media survey found around 67% of respondents reported reading online reviews or blogs before making a purchase decision, those aged 30 to 39 were most likely to do so and on average, and people expected to read 3 reviews before making a decision.⁵

Evidence from the United Kingdom shows that malicious online reviews cost 20% of businesses of up to A\$60,000 annually.⁶

Slater and Gordon⁷ make the point those businesses with less than 10 employees (half than the Federal Government's definition of a small business) may be entitled to pursue defamation action against certain online reviews.

To be successful, such a business would need to prove that the online review was not the honestly held opinion of the reviewer or the review was malicious, i.e. damaging to the reputation of the business.

Conversely, a business may be subject to ACL action if a business *"encourages family and friends to write reviews about your business without disclosing their personal connection with your business in that review, write reviews when you have not experienced the good or service reviewed or which do not reflect a genuinely held opinion, solicit others to write reviews about your business or a competitor's business if they*

³ Oli Gross, *Protection needed against 'malicious' online reviews*, The Publican's Morning Advertiser, June 2015, http://www.morningadvertiser.co.uk/Running-your-pub/Marketing/Protection-needed-against-malicious-online-reviews?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright

⁴ The Nielsen Company, *New Online activities, services and devices bringing Australians more choices and new ways of doing old things*, March 2012, https://www.iabaustralia.com.au/uploads/uploads/2013-10/1382457600_c1cbecde1fbbced6e44563f0dca379e9.pdf

⁵ Sensis, *Yellow Social Media Report: What Australian People and Businesses are doing with social media*, May 2014, <https://www.sensis.com.au/content/dam/sas/PDFdirectory/Yellow-Social-Media-Report-2014.pdf>

⁶ Rebecca Burn-Callander, *Bad reviews and online 'trolls' cost UK businesses up to £30,000 a year*, The Telegraph, May 2015, <http://www.telegraph.co.uk/finance/businessclub/11635195/Bad-reviews-and-online-trolls-cost-UK-businesses-up-to-30000-a-year.html>

⁷ Jeremy Zimet, *Do Defamation laws apply to online reviews?* Slater and Gordon, March 2015, <https://www.slatergordon.com.au/blog/do-defamation-laws-apply-online-reviews>

have not experienced the good or service. Businesses and review platforms that selectively remove or edit reviews, particularly negative reviews, for commercial or promotional reasons may be misleading consumers. If the total body of reviews doesn't reflect the opinions of consumers who have submitted the reviews consumers may be misled.”⁸

The issue here is that once again there is an underlying assumption that a business will seek to do harm by the consumer and therefore must be afforded a greater level of protection than a businesses or business owner who can be subject to commentary that affects their livelihood because of a disgruntled customer who may or may not have a legitimate complaint.

The consumer making the complaint can negatively review the product, and simply because it is their genuine opinion, be free to damage the reputation and sales of a business, regardless of whether the customer fully understands the capability of the product, the businesses obligations under ACL, if they are using it correctly or simply suffering buyer's remorse.

Even if a business felt strongly enough about particular commentary, engaging in online discussions, even if done privately, often perpetuate the dispute and private communications are often published as some kind of proof of the intransigence of the business in accepting the consumer's opinion. This leads many businesses to simply forgo rectifying misleading statements made by consumers.

ACL should be amended to include the same protections for businesses from misleading conduct by consumers, as consumers are parties to transactions covered by ACL and therefore should have similar obligations to act with integrity and with due regard to the impact of their conduct on fair trading and effective competition.

Additionally, online review platforms can boost the placement of products and the influence the reputation of the brand. Unlike conventional advertising or even online advertising, these platforms purport to be independent assessors of products and companies acting in the consumer's best interest.

It is usually undisclosed that many of the rated businesses have commercial relationships with the review platforms and are either afforded a screening process prior to reviews being published, or act effectively as brand boosters to their commercial partners, or only include those with commercial relationships in their review spectrum.

This creates obvious distortions in the consumer's preference for goods and is clearly misleading.

Such relationships and methodologies should be disclosed prominently so consumers understand how ratings are awarded for brand and businesses. Equally, star-rating systems should also identify how many reviews have been submitted that contribute to the determination of the star rating.

Access to Purchasing and Consumption data

The proposal to increase access to a consumers purchasing and consumption data should be considered extremely carefully. Academically, a more informed consumer may make better choices but equally, exposing intellectual property rights to competitors' jeopardises legitimate property rights under common law and risks damaging effective competition and fair trading under ACL.

⁸ Australian Competition and Consumer Commission, Managing Online Reviews, May 2016, <https://www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews>

Section 4 – Conclusion

The MTAA and through its members remain available at any time to assist the review team with more detailed analysis, access to information or Member business constituents to further improve an important Australian Law and its significant role in the national economy and for Australian consumers and businesses.

While the framework of the ACL is understood, the MTAA believes the time is right to incorporate further expansion of definitions and thresholds to the point of an industry specific schedule.

If the review team would like any further information or additional clarity, please contact the MTAA Secretariat.

MTAA Secretariat

May 2016