



MTAA Limited

**Submission to the Commonwealth
Treasury review of Australian Consumer
Law (ACL): Clarification, simplification
and modernisation of the consumer
guarantee framework**

Executive Summary of recommendations

- Increase the Monetary Threshold to \$100,000 and apply indexation on a regular basis.
- Reviewing the definition of ‘consumer’, as it relates to small business as ‘consumers’ and to include factors such as:
 - Intention of the purchaser.
 - Characteristics of the purchaser.
 - All intended uses of the products being purchased.
 - The power differential between the purchaser and the seller.
- Rewrite Section 3 to better reflect business inclusion in consumer protection and ability to access those protections.
- The MTAA opposes the introduction of increased consumer guarantees based on failures within a short period of time and / or on multiple minor failures.
- MTAA reiterates calls for the inclusion of a schedule or some other mechanism for the automotive industry to more properly describe consumer guarantees and their applicability to highly complex products such as a motor vehicle.
- MTAA urges policy makers and legislators to stop using comparisons between highly complex and technology rich products such as modern motor vehicles with other products such as whitegoods in developing and clarifying consumer guarantees policy.
- Government may increase requirements to disclose information associated with extended warranties and provide comparison with consumer rights under the ACL, but the consumers right to purchase at the point-of-sale should not be compromised through opt-in and cooling-off arrangements.
- MTAA respectfully suggests Treasury must consider any review of the ACL in conjunction with reviews being undertaken in other Commonwealth Departments and agencies: i.e. the Australian Competition and Consumer Commission’s (ACCC) New Car Market Study and the recommendations, including current work to increase awareness and education on consumer guarantee obligations.
- Auction houses should not be provided a competitive advantage over other retail models (i.e. franchised automotive retailers) due to reduced obligations to consumers and should be required to provide the same consumer protections as other retailers.

Australian automotive industry in context

- The MTAA is the peak Australian automotive association and represents the interests of its State and Territory Motor Trade Associations and Automobile Chambers of Commerce.
- The MTAA Members represent more than 95% of the automotive supply chain consisting of many of the 69,365 automotive businesses across Australia that employs over 379,365 Australians and contributed over \$37.1 Billion or 2.2% of Australian GDP in 2016¹. Many of these businesses have informed MTAA that they feel unfairly disadvantaged by Australian Consumer Law (ACL) which is biased towards protecting consumers and provides inadequate protection for businesses (large, medium and small).
- MTAA Member constituents include automotive retail, service, maintenance, repair, dismantling and recycling businesses, providing essential services to a growing Australian fleet of vehicles (18.4 million in January 2016 and growing annually by 2.1%²) that has rapidly advancing technological systems and capabilities.
- These sophisticated technologies including extensive use of computers, sensors, radars, cameras provide complex vehicle system interdependencies that make vehicles safer, more efficient, and environmentally sustainable. They can also contribute to necessary software updates, minor manufacturing faults, and sometimes recalls (almost all are voluntary and initiated by vehicle manufacturers); most of which do not adversely affect vehicle safety, environmental efficiency, drivability, or intended purpose. Consequently, MTAA urges the Treasury to further consider these complexities when reviewing the ACL and proposing policy changes.
- The Australian Competition and Consumer Commission's (ACCC) recently completed a market study into the new car retailing, including the application of ACL within the automotive industry. The ACCC has made a number of recommendations to Government including increasing the onus on manufacturers rather than dealers to address consumer complaints and an increased need for consumer awareness and education materials at point-of-sale to better inform consumers of their rights under consumer guarantee and warranty provisions. Consequently, the MTAA urges the Commonwealth Treasury to further collaborate with the ACCC, other Government departments and industry when reviewing ACL and proposing any changes. This will ensure that any implemented changes implemented are complimentary and do not have contradicting aims and objectives.
- This submission compliments evidence provided by MTAA Members either in consultation hearings conducted by the Treasury Department or in individual submissions provided by MTAA members.

¹ Motor Trades Association of Australia (2017) Directions in Australia Automotive Industry: An industry report 2017, Victoria Automotive Chamber of Commerce, St Kilda Australia. p. 16

² Motor Trades Association of Australia (2017) Directions in Australia Automotive Industry: An industry report 2017, Victoria Automotive Chamber of Commerce, St Kilda Australia. p. 6

MTAA Support for Reform

- The MTAA supports Government efforts to review Australian Consumer Law (ACL) and to clarify, simplify and modernise the consumer guarantee framework.
- The MTAA also supports efforts by Treasury to engage industry stakeholders during the review process to ensure that any proposed changes protect consumers *and* businesses.
- However, MTAA does not support any ACL changes which further diminish protections offered by the ACL for businesses and in particular small business.

MTAA Key Considerations

This section of the submission outlines the five proposals for change that are identified in the Regulation Impact Statement (RIS), identifies MTAA's preferred option, and provides MTAA rationale for selecting the preferred option.

Proposal 1: Increasing the threshold in the definition of 'consumer' from \$40,000 to \$100,000

- In relation to this proposal (Increasing the threshold in the definition of 'consumer' from \$40,000 to \$100,000), MTAA's preferred option **is option 3:**
 1. Maintain the status quo
 2. Increase the threshold in the definition of consumer from \$40,000 to \$100,000
 3. **Increase the threshold in the definition of consumer from \$40,000 to \$100,000 and apply indexation.**
- Increasing the threshold in the definition of consumer from \$40,000 to \$100,000 is MTAA and Members preferred option. MTAA considers that indexation on a regular basis provides greater certainty for businesses, although it is recognised this may increase compliance costs which may be passed on to the consumer. MTAA has insufficient information from constituent businesses to quantify or provide additional clarity on what the quantum of these additional costs might be in the automotive sector.

Proposal 1: Increasing the threshold in the definition of 'consumer' from \$40,000 to \$100,000 (Continued)

- However, the MTAA while supporting an increase to the threshold to \$100,000, does not consider that this change in isolation will address the objective.
- MTAA reiterates its call made in previous submissions that definitions of a 'consumer' and 'business' need to be re-examined, particularly if, as stated in the RIS, that the aim of the review is 'to broaden the group of consumers who were protected under the regime, with a specific emphasis on protecting small businesses'³.
- MTAA suggests there remains merit (as expressed by it and its Members in earlier submissions) for a further rewrite of Section 3 so that it accurately reflects all obligatory requirements relating to the purchase of goods and services. Further clarity and direction should be provided on:
 - **Intention of the purchaser** (i.e. for personal use, for capital investment, resupply, transformation and other business uses, domestic requirements, etc.).
 - **Characteristics of the purchaser** (i.e. business, household, non-profit sector etc.).
 - **All intended uses of the products being purchased** (i.e. for personal use, for capital investment, resupply, transformation and other business uses, domestic requirements, etc.).
 - **The power differential between the purchaser and the seller.** (While 'Power' is explicitly noted in terms in the RIS, MTAA respectfully suggests this is not adequately incorporated or defined in the policy options presented).
- Such changes will ensure a business is not excluded from consumer protection and if necessary taking appropriate action against a supplier through consumer protection agencies such as Fair Trading Departments or Civil and Administrative Tribunals in respective jurisdictions.

³ Consumer Affairs Australia and New Zealand (2018) Consultation Regulation Impact Statement: Australian Consumer Law Review: Increasing the threshold in the definition of 'consumer' from \$40,000 to \$100,000. Accessed 10 April 2018 at https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/supporting_documents/20180322Chapter_1_increasing_monetary_thres.pdf

Proposal 1: Increasing the threshold in the definition of 'consumer' from \$40,000 to \$100,000 (Continued)

- MTAA and some Members in evidence provided to consultation hearings, highlighted the purchase of vehicles and equipment (particularly capital equipment and tools) used by automotive businesses in the delivery of services as examples where they are currently not afforded the same level of consumer protection where they purchase such goods for:
 - (a) Resupply; or
 - (b) Use them or transform them, in trade or commerce: in the course of production or manufacture, or in the course of repairing or treating other goods or fixtures on land.
- Without definitional clarity or reduced uncertainty, business protection is potentially compromised regardless of an increased monetary purchase threshold.
- MTAA is concerned about the limited resources and ability of the regulator to manage an allotted monetary threshold if:
 - Goods are purchased over a period of time in which individual payments are below the threshold but exceed the threshold in total.
 - There is an increase in cases of non-compliance due to the increased threshold from \$40,000 to \$100,000.

Proposals 2 and 3: Clarifying the consumer guarantees remedies- Failure within a short period of time *and* multiple failures

As in the RIS, MTAA addresses both of these ACL proposed changes under the title of clarifying consumer guarantees and remedies.

- In relation to this proposal (Clarifying the consumer guarantees remedies-Failure within a short period of time), MTAA's preferred option is option 1:
 1. **Maintain the status quo.**
 2. Specify a short period of time during which a consumer is entitled to a refund or replacement without needing to prove a major failure. The proposed period is 30 days;
 3. Option 2, but specify a different time period for high value goods, such as motor vehicles and white goods, based on a monetary threshold, during which a consumer is entitled to a refund or replacement without needing to prove a major failure.
 - 1.1. Within Option 3, there is consideration of two approaches: A longer period of time for high value goods and an exemption (status quo) for high value goods.
- In relation to this proposal (Clarifying the consumer guarantees remedies-Multiple failures), MTAA's preferred option is option 1:
 1. **Maintain the status quo.**
 2. Clarify that multiple non-major failures can amount to a major failure.
 3. Specify the number of non-major failures that can amount to a major failure.
- MTAA, while welcoming attempts in the RIS to address long standing calls (even before the arrival of the final ACL) by the MTAA and Members for better definition of terms, criteria and thresholds, particularly in relation to complex goods; it cannot support any of the options presented other than maintaining the status quo, which still does not address existing issues.
- This is not a criticism of legislation drafters who continue to tackle the vexed issue of generic Consumer Law for all goods and services, while trying to balance the inclusion of very high profile, very specific sectors and highly complex products from those sectors. Rather it further illustrates the complexities and work still to be done, if we are to achieve the clarity sought by all and avoid making court determinations the first option for resolution.

Proposals 2 and 3: Clarifying the consumer guarantees remedies- Failure within a short period of time *and* multiple failures (Continued)

- While recognising the drivers for the options presented, and the difficulties in dealing with definitional clarity for a generic, whole of economy, policy framework; MTAA remains deeply concerned with the continuing use of comparisons such as motor vehicles and whitegoods as examples of 'high value' goods in the RIS to more generally to explain potential approaches to any ACL change.
- Respectfully, it is the opinion of MTAA that there is no comparison between a contemporary modern day motor vehicle - even at a lower price point - and a LCD television, washing machine or refrigerator. To 'link' such products as 'high value' products in order to clarify proposed changes and their application, undermines the intent of increasing clarity, improving current issues with the ACL and providing future direction.
- MTAA is concerned that the proposed changes fail to address the characteristics of modern automotive vehicles. For example, some new vehicles are subject to some form of recall (almost all voluntarily by manufacturers), to address minor faults or identified issues directly linked to the increasing complexity and technology of modern vehicle systems. Almost all of these do not impact the overall safety, environmental efficiency or drivability of the vehicle, but are concerned with software updates, or coding matters, or faults or failures in components supplied by other Original Equipment Manufacturers.
- MTAA suggests that the subjectivity associated with definitions of 'low' and 'high' value goods, 'major' versus 'non-major failures'; and 'short', periods of time, as presented in the RIS, prevents the effective application of the options presented for proposals 2 and 3. Subjectivity is further exemplified when consumer perceptions of product value, utility value, financial thresholds, and brand status (to name just some) are also taken into account.
- Emphasis on 'cooling off' or 30 day periods does not address the quantum of 'major' versus 'minor' and potentially opens up further interpretations leading to potential negative behaviours and actions which cannot be associated with high value, highly complex goods. These behaviours can include 'buyer remorse' at least, increasing to 'model and vehicle shopping / swapping' on a regular basis, at worst.
- MTAA reiterates that due to the complexity and high technology and value of motor vehicles, it is entirely unreasonable to legislate for a situation where a vehicle that has multiple, separate minor faults is then defined as having a 'major' fault.
- MTAA also reiterates that existing protections from Statutory Warranties address potential situations where vehicles that have the same fault fail repeatedly.

Proposals 2 and 3: Clarifying the consumer guarantees remedies- Failure within a short period of time *and* multiple failures (Continued)

- 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, does not appear to have been given the consideration required for definitional clarity in the RIS. As previously mentioned definitions can be highly subjective and has a material impact on the performance of a vehicle and on the efficacy of any repairs. Again some examples of these matters and importantly differing interpretations and actions by regulatory bodies that unfairly apportion accountability with new car retailers were highlighted in previous MTAA and Member submissions and remain relevant in this inquiry. To exclude these other considerations seems at odds with stated intentions of increasing protections for all consumers including small business.
- MTAA strongly suggests that a more detailed framework, that considers highlighted issues specific to motor vehicles including: definitions (new and used), time frames, uses of vehicle and consumer behaviours, be undertaken and included as a specific schedule or amendment to the ACL.
- MTAA and Members including MTA-WA and MTA NSW have previously suggested in submissions for the ACL review such an approach. MTAA recognises this is not an attractive proposition to policy and legislation drafters, and has the potential to highlight a group of products from others. However this MTAA strongly suggests a separate schedule or amendment is more beneficial to all consumers than to try and craft law and regulations by lumping refrigerators and motor vehicles under the one description and set of rules
- For example, statutory warranty provisions contained in the Western Australia Motor Vehicle Dealers Act (1973) and similar Acts in other jurisdictions it is suggested may provide an excellent starting point for such an approach.
- MTAA suggests motor vehicles, heavy vehicles, commercial vehicles and farm and industrial machinery are truly high value products and standalone from almost all other product classifications.
- MTAA also believes that the attempted definition and time period changes suggested in the RIS options, if introduced as is, may cause unintended consequences by enabling some consumers to 'game' or 'manipulate' the ACL and provisions. MTAA is aware of cases reported to it of situations where purchasers of motor vehicles with strong knowledge of the ACL can (and do) use conditions within existing legislation to replace vehicles within warranty periods for spurious reasons.

Proposals 2 and 3: Clarifying the consumer guarantees remedies- Failure within a short period of time *and* multiple failures (Continued)

- For example, it is conceivable that a purchaser could demand a full refund for vehicle if a number of easily repairable minor faults were to be considered a major fault regardless of proof that the faults do not impact the vehicles serviceability, drivability and purpose; and irrespective of the use of the vehicle and the reduced value of that vehicle as a result of such use.
- Consequently, if the ACL provides more specific definitions (i.e. a prescribed number of minor faults constitute a major fault) in the options presented, there is strong likelihood multiple vehicles and vehicle types that are currently registered for Australian roads could be impacted. Human behaviour suggests that if faced with a scenario that a number of minor faults (all rectifiable and in themselves not an impact on the safety, environmental compliant, drivability or fit for purpose) a consumer may increasingly seek a refund as opposed to repair / rectification or a replacement vehicle.
- This in turn could make the vehicle unable to be resold, because of this definition, and subsequent action, regardless of the vehicle being serviceable. This could have disastrous effects on manufacturers and dealers who may be required to provide refunds for perfectly serviceable vehicles with little or no ability to resell the vehicle. The repercussions could result in automotive businesses closing and manufacturers leaving the Australian market.
- MTAA considers that any arbitrary period of time (i.e. 30 days) as outlined in the proposed options needs further clarity to reduce uncertainty. There needs to be exclusions if pursued, to omit 'buyer remorse' or other vexatious or frivolous claims which results in the vehicle being returned for refund or replacement.
- Automotive retail businesses that are at or near the end of the supply chain receive an unfair burden under the ACL by having to shoulder the liabilities and responsibilities for consumer guarantees on products originally supplied from vehicle manufacturers and where the faults occurring are manufacturing faults. This is both unfair and a source of detriment and financial hardship for MTAA's Members constituents, particularly small and independently-owned vehicle retailers. This has been somewhat recognised in the ACCC New Car Market Study and Recommendations and is raised here because any changes to the ACL must be cognisant of underlying consumer guarantee obligations as well as stator warranties.

Proposals 2 and 3: Clarifying the consumer guarantees remedies- Failure within a short period of time *and* multiple failures (Continued)

- 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.'
- 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.
- MTAA urges Treasury to further consult with the ACCC regarding the recommendations of the New Car Market Study to seek clarity on the nuances of the automotive industry and implications of that study and recommendations as part of the review of the ACL through this RIS.

Proposal 4: Enhance disclosure for extended warranties

- In relation to this proposal (Enhance disclosure for extended warranties), MTAA's preferred option is option 1:
 1. **Maintain the status quo**
 2. A legislative amendment comprising a cooling-off right, oral disclosure and written disclosure; and
 3. Oral and written disclosure with an opt-in process.
- MTAA supports Government efforts to ensure consumers are provided with clear disclosure of warranty products so that consumers can determine if extended warranties offers value for money and provides the additional protection they seek.
- MTAA also supports requirements for sellers to disclose extended warranty product arrangements, including information about what the ACL offers in comparison.
- However, MTAA is opposed to cooling-off and opt-in processes for consumers as it assumes a lack of confidence in consumers to make a purchasing decision at the point-of-sale and potentially reduces business activity for automotive businesses.
- MTAA is concerned that ACCC enforcement of the alternative options proposed is impractical, difficult to administer and increases business costs. Furthermore, it may also open up potential for misrepresentation, particularly in non-automotive related industries where seller may not be as fluent in warranty requirements (i.e. whitegoods and appliance retailers).

Proposal 5: Access to consumer guarantees for goods sold at auctions

- In relation to this proposal (Access to consumer guarantees for goods sold at auctions), MTAA's preferred option is option 4:
 1. Maintain the status quo;
 2. Goods purchased through online auctions that are conducted entirely online, with no reasonable opportunity to inspect goods, receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales). The status quo remains if the auctioneer makes the goods reasonably available for inspection;
 3. Goods purchased through online auctions, regardless of the ability for a prior inspection (including traditional auctions that allow online bidding) receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales). The status quo will remain for consumers who purchase from auctions in person ; and
 4. **All goods purchased through auctions will receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales).**
- MTAA advocates that auction houses should not be provided a competitive advantage over other retail models due to reduced obligations to consumers. For example, MTAA is concerned that auction houses are retailing farm equipment from a manufacturer that also provides products to the Australian market through an established franchised retail network of businesses. The parallel imported products sold through the auction house are commonly built for other international markets and may not comply with Australian Design Rules (ADRs) and may not include specific safety and environmental equipment. Consequently, not only are consumers exposed to potentially unsafe equipment but franchised retailers who are selling ADR compliant equipment and are often obliged to honour consumer guarantees are then disadvantaged due to higher costs and exposure to liability under the ACL.
- MTAA advocates for competitive markets where businesses and their business models succeed on merit rather having a competitive advantage based on reduced consumer responsibility and accountability.

END OF SUBMISSION