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27 May 2016

Ms Azriane Rahman
ACL Review Secretariat
Market and Competition Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Ms Rahman

VACC Submission – Australian Consumer Law Review Issues Paper

Please find attached the VACC Submission to the Australian Consumer Law (ACL) Review Issues Paper. In making the Submission, VACC acknowledges the current Federal Government's commitment to ensuring that the Australian Consumer Law remains relevant, effective and sufficiently flexible to respond to new and emerging issues.

The automotive retail service and repair sector is a highly competitive sector that is subject to many challenges including business consolidation, a fragile operating environment, changing technologies and skill requirements. In this competitive environment, automotive businesses are faced with challenging and often unfair claims from consumers through the ACL.

In its submission, VACC has noted issues regarding the clarity of the ACL, provisions on second hand goods and 'lemon' laws, along with suggested reforms and recommendations that would facilitate a clearer and fairer ACL framework. Also, whilst not strictly under the terms of references for this review, VACC would like to mention that fair access to vehicle technical repair information may be an issue of some relevance for this Review and therefore we seek the observation of our previous submission on section 46 of the Competition and Consumer Act 2010.

VACC, on behalf of its members, and the industry more generally, thanks the Federal Government for the opportunity to make this Submission, and remains available to assist Government in reaching its decision.

Please do not hesitate to contact the undersigned should you require any additional clarity or further information.

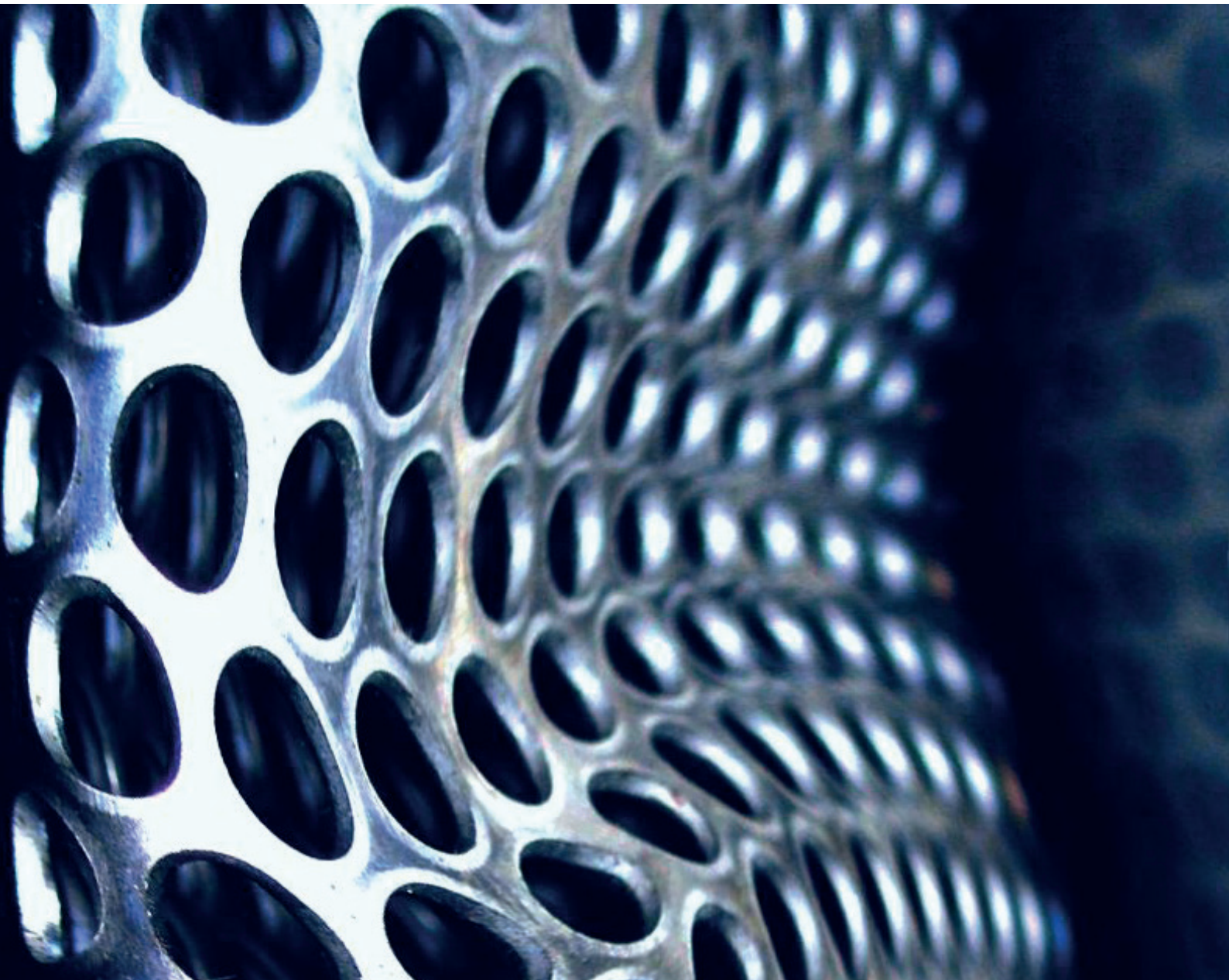
Yours sincerely

A handwritten signature in black ink, appearing to read 'G. Gwilym', is written over the typed name 'GEOFF GWILYM'. The signature is fluid and cursive.

Attach.

VACC Submission to the Australian Consumer Law Review

27 May 2016



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About VACC

The Victorian Automobile Chamber of Commerce (VACC) is Victoria's peak automotive industry association, representing the interests of more than 5,000 members in over 20 retail automotive sectors that employ over 50,000 Victorians.

VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialist, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), and automotive dismantlers and recyclers. In addition to VACC, its sister organisations – the Motor Trade Associations, represent the automotive industry for their respective states.

Background of the automotive industry

The automotive industry contains approximately 65,000 businesses nationally, the vast majority of which (95%) 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 industry is very competitive with small profit margins, consumer behaviour limits capacity of industry to raise prices, large multi-nationals (insurance companies, the oil industry, supermarkets, vehicle manufacturers) heavily influence consumer behaviour and/or price. The cost of doing business is high due to the ongoing regulatory creep and the rapid vehicle technology advances requiring high-level skills and expensive technology in the repair service process.

Executive Summary

The Victorian Automobile Chamber of Commerce (VACC) welcomes the Commonwealth's review of the Australian Consumer Law (ACL) and this submission makes a number of observations on the operation of the ACL as well as recommendations for reform which are outlined below.

For the purpose of this submission, VACC surveyed its 5,000 members and held focus group meetings across its divisions to better understand its membership's view on the ACL. The survey and the focus groups predicated a view that was already largely suspect, that the ACL is heavily biased towards the consumer and is inadequate in providing protections for small businesses in the automotive industry. This much is evident in the issues raised by VACC members almost on a daily basis. Issues that were once dealt with under the auspices of the Motor Car Traders Act, Trade Practices Act or Goods Act are now automatically referred to by the appointed Regulators to the misunderstood and applied ACL provisions.

Specifically, VACC members highlighted that:

- There is a lack of clarity in the ACL on the provisions concerning 'major' and 'minor' faults, 'acceptable quality', 'fit for purpose', 'reasonable time', and second hand goods;
- There is an inequitable line of responsibility between the manufacturer, the dealer, and the consumer, in which the dealer holds a disproportionate level of liability over the purchased vehicle compared to that of the manufacturer and the consumer;
- 'Lemon' laws are not required as there are already sufficient consumer protections under the ACL. Adding another layer of superfluous legislation imposes against Government mantras of lessening the impact of red tape upon business and consumer.

Accordingly, VACC argues for the following recommendations:

- Greater clarity in the existing ACL provisions concerning motor vehicles sales and repairs;
- That the common statutory warranty as contained in the Motor Car Traders Act (VIC) 1986 be incorporated within the ACL as the relevant consumer guarantee in relation to second hand motor vehicles or alternatively, that second hand motor vehicles should be excluded entirely from the ACL;
- Personal imports of motor vehicles are incompatible with the ACL as purchasers are afforded no consumer protections in the ACL;
- 'Lemon' laws should not be introduced as there is no empirical basis for such laws in Australia. Existing provisions within the ACL relating to motor vehicle sales and repairs more than adequately meet consumer expectations for legal redress without the need for 'lemon' laws.

As the current ACL is unfairly biased towards the consumer, VACC believes that it must be reformed so that a more balanced law is created that takes into consideration the rights of both businesses and consumers equally.

Consumer Policy Framework

Australia's national consumer policy framework has an overarching objective that emphasises confident consumers, effective competition and fair trading. The delivery of this objective is supported through six operational objectives as identified by the Intergovernmental Agreement for Australian Consumer Law.

These operational objectives include:

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

VACC considers that both the overarching objective and the six operational objectives are key priorities that should continue to underpin Australia's national consumer policy framework.

VACC also believes however, that there are areas for improvement. VACC members have identified that the interpretation of the ACL by regulatory bodies such as the Australian Competition and Consumer Commission (ACCC) and State based agencies such as the Victorian Civil and Administrative Tribunal (VCAT) and Consumer Affairs Victoria (CAV) can be inconsistent and often contradicts the national policy objectives.

In particular, VACC has received numerous reports from members that often these regulatory bodies are excessively biased towards the rights of consumers. These reports are supported through factual cases which demonstrate that regulatory bodies are emphasizing the rights of consumers, who often make vexatious claims at the expense of small businesses. It is the view of many automotive industry participants that the ACL is being used as an excuse for 'buyer's remorse.' This is unpalatable and not within the spirit of the original legislation.

Small businesses have limited resources to defend themselves against multiple claims that are often frivolous but can exhaust the finances and cash-flows of a business during litigation in a process that is perceived by business operators to be biased.

The objectives of the ACL do not assign specific weighting as to which elements are more important than others. Consumer protection, effective competition and fair trading have all equal value and importance under the law and VACC believes that this balance should be effectively observed and reinforced by regulatory authorities.

Consumers and businesses both need the confidence and belief that the ACL's objectives are fair and impartial, providing protection where necessary, along with promoting effective competition and fair trading in a manner that sees neither party being disadvantaged.

The Legal Framework

VACC believes that the legal framework underpinning the ACL is basically sound.

VACC also believes that the current consumer guarantee threshold (\$40,000) needs to be indexed to 2016 prices with annual indexation thereafter tied to movements in the Consumer Price Index (CPI). This would help ensure that the real value of consumer guarantees on goods and services covered within the ACL, is not eroded over time and remains relevant to prevailing economic and business conditions.

VACC also believes that whilst there are advantages in having a single generic Australian Consumer Law that is applicable across all goods and services in the economy, in the case of motor vehicles and parts, there are issues concerning product liability that warrant greater specificity and delineation within the legal framework of the ACL. In particular, automotive retail businesses that are at or near the end of the supply chain receive an unfair burden under the ACL. This is due to having to shoulder the liabilities and responsibilities for consumer guarantees on products originally supplied from vehicle manufacturers and where the faults occurred are manufacturing faults. Used car dealers, general mechanics and engine reconditions are prime examples of business types who are exposed to the full weight of consumer guarantees, even when a vehicle is nearing the end of its life. This is both unfair and a source of detriment and financial hardship for VACC members, particularly small and independently-owned used vehicle retailers.

Recommendations

VACC recommends the following changes should be incorporated within the legal framework of the ACL:

- Greater specificity and delineation of 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
- Indexation of the consumer guarantee threshold (\$40,000) to 2016 prices with annual CPI based indexation to be applied thereafter. This indexing should be retrospectively applied back to 2011

Key ACL issues identified by VACC

Clarity of the ACL

Reports received by VACC across its new and used vehicle trader members indicate that there is a considerable level of misunderstanding among consumers, motor car traders, and State-based regulators with respect to the provisions contained in the ACL regarding motor vehicle sales and repairs. Specifically, a lack of clarity within the law has contributed towards grievances amongst consumers and traders leading to unnecessary litigation.

Particular areas of confusion and dispute as reported include:

- A lack of clarity as to what constitutes a ‘minor failure’ and a ‘major failure’ under section 259 of the ACL
- A lack of clarity concerning the provision of ‘reasonable time’ for conducting vehicle repairs
- A lack of clarity on expectations relating to ‘fit for purpose’, ‘acceptable quality’ and expected product life span of second hand vehicles and further categorised by vehicle class and brand
- Misunderstandings concerning the time span of consumer guarantees for particular types of vehicles
- A lack of clarity for consumers concerning the statutory warranties as applicable under the Motor Car Traders Act and their rights under the ACL
- Disputes surrounding the liability and responsibilities associated with product failures between vehicle manufacturers and the application of the ACL

The lack of specific definitions for these and other related provisions contained in the ACL relating to motor vehicle sales and repairs has caused expensive litigation and financial hardship for many VACC member businesses. This is mainly a result of inconsistent, unfair and ignorant application of the law by regulatory authorities.

In addition it is argued that members of the public have wasted time and resources arguing cases that have multiple potential outcomes, with little clarity or direction being received from state consumer agencies.

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

Case Study 1:

A 2004 Toyota Prado 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 and showed the engine was too hot, 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 Mercedes Benz 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.

Both of the examples above illustrate the unfair and highly subjective application of the ACL by regulatory authorities. It is clear from both cases 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 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. A significant contributing factor in this regard is the blurring of the rights of businesses and consumers through the existence of both the Motor Car Traders Act and the ACL. This has also been reported as a cause of major confusion and disputes.

Recommendations

Given the technical complexity of motor vehicles, VACC recommends that:

- The current provisions within the ACL relating to motor vehicle sales and repairs should be further defined and developed to provide better clarity for consumers, businesses and regulators. This would help ensure a more consistent application of the law for all parties through better delineation of rights and responsibilities. In particular, consideration should be given to the incorporation of the provisions of the Motor Car Traders Act within the ACL in order to ensure certainty for business operators and consumers.

Second Hand Motor Vehicles and the ACL

Further to the issues raised concerning the need for better clarity within the ACL, VACC believes that specific reform is needed within the ACL in relation to the sale of second hand motor vehicles.

For second hand vehicles and where the original manufacturer's warranty period has expired, the ACL provisions transfer the onus of responsibility to the used vehicle 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 vehicle dealers have no relationship with a vehicle's manufacturer due to the nature of second hand goods. This results in used vehicle dealers bearing the full financial and litigation risks associated with the selling of the used vehicle.

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

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 5000 km after delivery. This statutory warranty also applies in most states and the exposure of the motor car traders to consumers and dealers is well defined. The limits of the Act are also clearly defined. In Victoria, consumers are made aware of these warranty provisions in the contract of sale and through the signing of the contract. In Victoria, consumers also have a statutory three business day cooling off period that provides consumers ample time to arrange a pre purchase inspection or activate their right to cool off.

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.

Industry data shows that vehicle dealers are already operating under very low to negative profit margins. According to Deloitte’s 2016 Dealership Benchmarks report, average dealerships face very real risks to their profitability with almost one in five failing to make a profit over the course of 2015. Furthermore, Australian Bureau of Statistics (ABS) yearly business counts of automotive retail businesses indicate an environment where business closures are accentuating.

VACC has serious concerns around the viability of the used car industry operating under the conditions of the ACL and strongly suggests that the likely demise of licenced car dealers will leave consumers open to the potential abuses of an unregulated car sales market consisting of individuals, unlicensed dealers selling cars on the side of the road and up to their local state limit. In these cases, consumers will have no capacity to apply state or national consumer law with obvious consequences.

VACC wishes to have this point amplified and recorded in the discussions surrounding the ACL.

The tables below show that there is a declining trend in business counts for motor vehicle, motor cycle and trailer and other motor vehicle dealerships over the past 5 years:

Table 1: Counts of Car Retailing Businesses, Australia

Year	Non Employing	1-19 Employees	20-199 Employees	200+ Employees	Total
2011	2008	1922	800	60	4790
2012	1980	1912	796	57	4745
2013	1963	1904	737	27	4631
2014	1996	1820	733	23	4572
2015	1987	1811	670	26	4494
Change over the last 5 years	-21	-111	-130	-34	-296
Change over the last 2 years	-9	-9	-63	3	-78

Source: ABS, Counts of Australian Businesses, including Entries and Exits, cat.no 8165.0

Table 2: Counts of Motor Cycle Retailing Businesses, Australia

Year	Non Employing	1-19 Employees	20-199 Employees	200+ Employees	Total
2011	397	528	58	6	989
2012	388	522	58	0	968
2013	341	516	25	3	885
2014	316	532	29	3	880
2015	291	512	21	3	827
Change over the last 5 years	-106	-16	-37	-3	-162
Change over the last 2 years	-25	-20	-8	0	-53

Source: ABS, Counts of Australian Businesses, including Entries and Exits, cat.no 8165.0

Table 3: Counts of Trailer and Other Motor Vehicle Retailing Businesses, Australia

Year	Non Employing	1-19 Employees	20-199 Employees	200+ Employees	Total
2011	255	243	44	0	542
2012	237	233	56	3	529
2013	244	267	38	0	549
2014	236	267	36	0	539
2015	218	258	39	0	515
Change over the last 5 years	-37	15	-5	0	-27
Change over the last 2 years	-18	-9	3	0	-24

Source: ABS, Counts of Australian Businesses, including Entries and Exits, cat.no 8165.0

The decline in business counts is particularly pronounced in small and medium sized motor vehicle dealerships, motorcycle retail shops and trailer and other motor vehicle retail businesses. Motor vehicle dealerships are operating within a fragile economic environment where high costs and marginal profits are the norm. This is compounded by the additional risk that dealers face regarding the ease to which consumers can lodge claims against a dealership using the ACL as the legislative basis.

The following recent case study demonstrates the unfair and costly exposure faced by used motor car traders:

Case Study 3:

A 2004 Volvo XC90 which 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 aggressively 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.

The case study illustrates the fact that the provisions of the ACL - largely adopted from the New Zealand Consumer Guarantees Act 1993 – means that the existence of the statutory warranty already in place under section 54 of the Motor Car Traders Act, has been overshadowed by less effective legislation found in the ACL.

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 goods and any other relevant circumstances’*.

Recommendations

Given the need for certainty and clarity surrounding the description of cars and the fact that consumer's rights under a statutory warranty are very clearly spelt out with no cause for confusion amongst any party, VACC therefore recommends that:

- The statutory warranty as contained in section 54(1) and (2B) of the Motor Car Traders Act (VIC) 1986 be incorporated within the ACL as the relevant consumer guarantee in relation to second hand motor vehicles¹, or;
- that second hand motor vehicles be excluded from the ACL.

Either of these measures would enhance the dispute resolution processes of the ACL by facilitating greater certainty and quicker and fairer outcomes for consumers, businesses and regulators without added administrative or financial burdens.

'Lemon' Laws

VACC strongly opposes the introduction of further penalties and sanctions under the ACL for motor vehicles experiencing repeated faults.

Apart from the fact that there is very little in the way of empirical evidence demonstrating a need for 'lemon' laws, there is no common or agreeable definition as to what constitutes a 'lemon'. Even in countries that have had 'lemon' laws over a considerable period of time such as the United States, there are widespread discrepancies between States both in the definition of a 'lemon' and the application of respective laws.

In Australia, there is little empirical evidence 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 concerning 'lemons' represented less than 1% of complaints regarding motor vehicles.

The existing provisions of the ACL relating to motor vehicle sales and repairs more than adequately meet consumer expectations for legal redress without the need for 'lemon' laws. Furthermore, there is the risk that introducing broad, ill-defined 'lemon' laws will actually increase litigation costs for both dealers and consumers, who in particular receive minimal benefit from such laws given that the vast majority of complaints are settled amicably. Additionally, the creation of a 'lemon' law is likely to create an unrealistic expectation for consumers regarding the types of claims that can be pursued and add to the level of frustration and grievance being experienced by those few consumers who are facing difficulties.

Given the very low levels of disputation, it is perplexing as to why the Government would even consider the introduction of 'lemon' laws and by doing so effectively single out the retail automotive sector. The ACL is a broad regulatory framework and is not designed to apply industry specific interventions – this was the underlying premise of the ACL and supported the mandate upon which the ACL was created. The introduction of a 'lemon' law would further undermine small business confidence and growth within the sector. Additionally, there is a risk with 'lemon' laws that unscrupulous consumers could tamper or

1 Similar statutory warranties exist across all States.

sabotage a vehicle in an attempt to obtain a refund or exchange for personal reasons or to gain a financial advantage at the expense of legitimate business operators.

VACC also identifies a key contradiction with the Government's recent decision to allow personal imports of motor vehicles in that it undermines the intentions and purpose of the ACL. Personal importation of motor vehicles by individuals that bypass established local dealer networks 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 common to Australia and thus are affected by the lack of availability of parts and technical repair information. 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. This position has been clearly articulated to government with a response that consumers should adopt a 'buyer beware' stance before purchasing a personally imported vehicle. This position appears to be at total odds with the suggestion that a 'lemon' law is needed to 'protect consumers' when the Australian Government is actively facilitating a vehicle buying system that has almost zero protections for consumers.

VACC seeks clarity from Government on this matter.

Recommendations

VACC recommends that:

- 'Lemon' Laws should not be introduced as there is no empirical basis for the argument of such laws in Australia. Existing provisions within the ACL relating to motor vehicle sales and repairs that are coated with a consumer-oriented bias, more than adequately meet consumer expectations for legal redress without the need for 'lemon' laws;
- Personal imports of motor vehicles should not be part of the ACL as they are incompatible with the consumer protections afforded in the ACL