



AUSTRALIAN CONSUMER LAW REVIEW SUBMISSION



Australian
Automobile
Association

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Part 1 – Introduction

1. Overview

The AAA welcomes the opportunity to provide a submission in response to the Interim Report of the Australian Consumer Law (ACL) Review (the Interim Report).

The Australian Automobile Association (AAA) is the peak organisation for Australia's motoring clubs and their eight million members. The AAA advances the interests of its constituent motoring clubs as well as all road users across Australia to ensure motoring is safe and affordable, and that Australia's transport infrastructure delivers for the community and the economy.

The purchase of a new vehicle is one of the biggest financial investments a consumer will make, yet the protection is often less than that afforded to the purchase of a toaster. The AAA is concerned that the Interim Report does not account for consumer vulnerability and disadvantage factors that are unique to new car purchases.

There is a significant power imbalance between consumers and car manufacturers, and a lack of clarity under the current ACL framework is leaving car buyers especially vulnerable. The AAA believes there is strong evidence in support of affording special consideration to consumers purchasing a new car compared to a common household appliance.

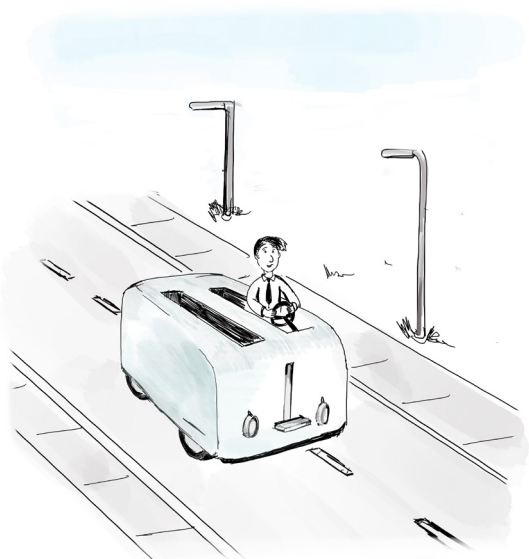
Every day across Australia, two thirds of Australians, or more than 6 million people get up and travel to work by car¹. If the car is inoperable, the ability to get to work and meet family obligations can be seriously impacted. A car is an essential item for most Australians.

Given the reliance many Australians have on their cars, the AAA is concerned that the current laws don't provide enough clarity to ensure adequate protection. There are inherent differences between problems associated with cars, compared to other household goods. For example, a broken toaster or white good is highly unlikely to be subjected to repeated rounds of repair. The consumer is unlikely to have to hire a replacement toaster or white good while the original one is repaired or replaced. The consumer is also unlikely to have to acquire third party advice as to the likely source of a problem. However, the laws and protections afforded to consumers with a broken toaster or white good are those afforded to the consumer with a broken car. Simply, your way of life and ability to earn are less likely to be impacted by problems associated with a broken toaster or white good.

The AAA believes the uncertainty around the interpretation of provisions of the ACL relating to what constitutes a major and minor failure, and thus what triggers a refund or replacement, contributes significantly to consumer detriment. The problem is also not isolated to consumers, businesses have also expressed concern around the interpretation of this aspect of the ACL. The Motor Trades Association of Australia recommended the development of clear definitions and thresholds for major and minor faults and other provisions in legislation². The AAA believes that the current ACL provisions would benefit greatly by including a clarifying statement that outlines what constitutes a major and minor failure for motor vehicles.

The ACL would also greatly benefit from any measure that increases its accessibility and relevance to consumers. This could be achieved by tailoring content to specific industries as well as making a consumer friendly version available. Greater transparency and clarity around the interaction of the ACL with warranties and extended warranties is also critical. Although the subject of a parallel review by the Productivity Commission, access to justice through different state and territory tribunals is also restricted and requires review.

Finally, the AAA supports increasing the threshold to the definition of 'consumer' from \$40,000 to \$100,000 for business transactions. This would ensure that small businesses across Australia have better access to the ACL for some vehicle purchases worth over \$40,000.



¹ According to the 2011 Census, transport by car continues to be the most reported method of travel to work. Almost two thirds (65.5%) of employed persons aged 15 years and over reported that they travelled to work by car (either as driver or a passenger) on 9 August 2011.

² MTAA submission to the ACL review; accessed at: https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Motor_Trades_Association_of_Australia.pdf

Summary of findings

AAA Position 1

The AAA supports increasing the threshold to the definition of 'consumer' from \$40,000 to \$100,000 for business transactions and for this to be indexed ongoing by the Consumer Price Index.

AAA Position 2

The AAA strongly supports clarifying the law on what can trigger a 'major failure' by including the following in the ACL legislation or alternatively in a legislative example:

- Multiple 'non-major failures' can trigger a 'major failure';
- A 'major failure' is triggered where the good cannot be repaired within three attempts except in the case of significant safety defects, which require only one attempt; and
- A 'major failure' is triggered where the good has 10 cumulative days out of service in its first two years.

AAA Position 3

The AAA supports the provision of greater information about consumer rights under the ACL at the point of sale.

AAA Position 4

The AAA strongly supports enhanced transparency of extended warranties including providing a comparison of what is being offered by the warranty and the ACL.

AAA Position 5

The AAA believes that the current product safety system is working well, however greater emphasis around streamlining investigation and recall processes is required. The AAA also considers that rectification rates for some safety recalls could be improved.

AAA Position 6

The AAA strongly supports any measure that improves the accessibility and knowledge of the ACL.

AAA Position 7

The AAA supports any measure that eases the evidentiary burden for private litigants.

AAA Position 8

The AAA supports expanding the availability of public information while also undertaking ongoing research to support consumer policy development.

AAA Position 9

The AAA is closely monitoring the online new car sales market and would support any additional transparency that could be afforded to consumers who choose to purchase their vehicle 'sight unseen'.

2. The problem

2.1 Anecdotal evidence

(case studies referenced are at Attachment A)

Motoring clubs across Australia offer a range of motoring and technical advice services to their collective eight million members. Clubs also provide information via factsheets regarding member rights around vehicle purchases and in doing so, enhance the accessibility of the ACL. Given motoring clubs perform this important highly visible role, members regularly contact advice services in relation to problems they have encountered with new motor vehicles.

Motor vehicles are probably the most technically complex and high value consumer item the average person is likely to own. This complexity and the resulting difficulty in diagnosing and repairing issues in a cost effective and timely manner can present problems for consumers and industry alike.

According to feedback from member clubs, issues generally relate to a situation where either: the exact source of a defect cannot be found; the customer is not satisfied that the problem has been satisfactorily fixed; the problem is fixed but keeps recurring; or alternatively there is a string of issues with the new car. **Consumer Case Study 1** details a situation where multiple 'minor' defects amount to a 'major' defect and result in the consumer on-selling the vehicle.

Member motoring clubs also report that disputes between owners of vehicles and sellers become increasingly difficult to resolve as relationships breakdown and positions become entrenched. This was highlighted by the case of Ashton and Vanessa Woods (see **Consumer Case Study 2**) who eventually destroyed their Jeep after negotiations hit a standstill.

Member clubs have advised that in a practical sense, the assistance various motoring and technical advice departments provide is often limited to offering general advice about courses of action that can be taken. Often this advice is 'to work with the dealer' rather than encouraging the member to pursue alternative remedies. An example of a member club intervening to assist in a situation experienced with a problem vehicle is outlined in **Consumer Case Study 3**.

Legal remedies, while an option, can be difficult and time consuming and rely on the consumer being financially capable of mounting a sufficiently strong case in support of their claim. Vehicle manufacturers can present their own expert advice on the subject, while the costs of securing expert testimony for consumers may be expensive and difficult to secure as well as possibly exceeding the value of the repair in dispute. In addition, consumers aren't incentivised to incur these costs as there's no guarantee of a favourable outcome.

The AAA recognises that consumers do have a level of protection under the ACL. However, the experience of member clubs over the years has proven that this does not always ensure a satisfactory outcome. In a very small number of cases consumers may receive a trade-in offer for their car from the dealer, possibly with some, often unseen, level of assistance from the manufacturer. However, the trade-in offer is at trade-in price, which is well below the original purchase price. So, even if a trade-in offer is made, the consumer commonly incurs some level of financial loss. **Consumer Case Study 4** outlines a situation where an RAA member was offered a compromise rather than being offered a full refund.

Our belief however is that not all issues are resolved and a proportion of them take a significant financial and personal toll on the consumer involved. The financial and personal impact on affected consumers should also not be understated. **Consumer Case Study 5** outlines an example where a dispute endured for an extended period of time, resulting in both personal and commercial hardship. This anecdotal evidence is consistent with the findings in the Choice report 'Turning lemons into lemonade – consumer experiences in the new car market'. Affected consumers are spending \$1,295 on average to fix problems with their new cars that should be covered by the ACL. This cost includes the significant amount of time spent seeking remedies, an average of 31 hours. This finding aligns with the anecdotal evidence provided by clubs that seeking a remedy under ACL is often a difficult drawn out process.

2.2 Empirical evidence

The AAA notes that the Australian Consumer Survey found that:

- 8 per cent of new car buyers faced problems with their new cars in the first two years of owning them;
- 15 per cent of problems were not resolved to the consumer's satisfaction.

Given the fact that almost 1.1 million new cars are sold in Australia every year, these findings equate to:

- 88,000 consumers experiencing problems with their new cars every year; and
- 13,200 of these consumers potentially left financially worse off due to problems with new vehicles not being resolved to the consumer's satisfaction.

Therefore, the net worth of the purchases involved total almost \$355 million³. While higher incidences of problems were recorded in other categories, for example white goods and electrical appliances, the potential financial impact on the household would be small in comparison.

The incidents of consumers experiencing problems with motor vehicles is also confirmed by NSW fair trading which reported that motor car related consumer complaints in 2013-14 totalled 5,073 or 11.3 per cent of all consumer complaints received.⁴ Of these 1,338 related to new motor vehicles, or 3 per cent of total complaints. It is difficult to derive a national figure for complaints as there is not consistent data collection across the state and territory regulators, however on a population basis, if the NSW result was consistent across Australia, this would result in almost 4,100 new motor vehicle complaints to fair trading organisations each year⁵.

The AAA's Transport Affordability Index provides a snapshot of the costs of transport for a typical household in Australia's capital cities, including public transport costs and costs associated with car use. The Index finds that the average family in Australia is now paying around \$16,894 a year on land transport or around 13 per cent of total average income. The Index also shows that the largest transport expense incurred by an average Australian family is the cost of servicing a new car loan at around \$121 per week. This highlights the significance of transport to the average Australian family, a much larger expense than telecommunications, electricity and water which consume a much smaller share, at around one to three per cent, but it also shows the financial stress a family can be placed under if the family motor vehicle is compromised in any way.

Other relevant research which was conducted by the RACV found that 20% of people who purchased a new car had issues with the vehicle; with 2.6% dissatisfied with the process.⁶

For that 2.6%, the key issues were:

- The process of going back to the dealer was difficult, and in some instances the dealers made themselves difficult to contact;
- When the vehicle was returned, the dealer was reluctant to fix the problem;
- The dealer indicated the buyer had no rights that enabled them to insist a problem be rectified;
- It would take too long to get the problem fixed;
- Dealers would refuse to do things or agreed to do them but then did not;
- Despite the dealer saying the problem was fixed, it would still be present, it was only partially rectified or the quality of the repair was inadequate; and
- An unexpected charge for fixing the problem was regarded as unreasonable.

The RACV has also estimated that 1% of new vehicles would end up in dispute resolution, which would result in around 10,000 vehicles per year requiring dispute resolution if current new car sales are considered.

³ This figure was derived using the weighted average of the top 10 selling vehicles in Australia of \$26,875 as reported in the AAA Transport Affordability Index multiplied by 13,200 cars with problems that were not resolved to the customer's satisfaction.

⁴ NSW Fair Trading Annual Report 2013-14. Access here: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Publications/Annual_reports/Year_in_Review_1314.pdf

⁵ ABS Population Statistics - NSW currently represents around 32 per cent of Australia's population

⁶ RACV, Car Failure and consumer rights information. Access here: <http://www.racv.com.au/wps/wcm/connect/royalauto/home/motoring/information-advice/general-information/consumer+rights+and+car+failure>

3. Proposed Solutions

While the ACL is considered by some to be a 'Lemon Law', the AAA believes it lacks a definitive performance standard by which to judge if a vehicle is of acceptable quality or reliability. We believe there must be a clear guide as to the number of defects and repair attempts a vehicle may have in a defined period, the number of days it is off the road for repair, as well as a definition of what constitutes a 'major defect'. For example, the RACV supports a definition of a 'lemon' as a vehicle:

Less than two years or 40,000km old (whichever comes first) that is not repaired within three attempts (except in the case of significant safety defects, which require only one attempt), or has 10 cumulative days out of service.⁷

By introducing definitions that include time frames, repair attempts or incidents of the same or different problem arising, the clarification of both major and minor failures would place pressure on dealers and manufacturers to resolve problems in a timely manner. A positive for dealers and manufacturers would be that such legislation could provide a means of managing the myriad minor points of conflict that regularly occur between customers and dealers. That is, it should be clear enough to be able to determine if a fault is of a major or minor nature, or if it is in fact an acceptable 'characteristic' of the vehicle type.

In addition, to ensure a vehicle being replaced by its manufacturer or distributor does not simply disappear into the used car market, its status should be flagged, possibly on the Personal Property Security Register or similar, to alert future buyers to its history. Ideally, the manufacturer or distributor should be compelled to repair the defects and warrant the repairs before it can be resold. In the interest of transparency, it would also be useful to have greater visibility of the extent of consumer complaints about their new cars, and one suggestion would be to require car companies to report to the ACCC summarised data on the nature of such complaints.

The AAA also believes appropriate remedies need to be clearly set out. Parties should be on an equal footing that neutralises the inequities in access to legal, financial, and technical resources that can be an impediment to consumers having issues fairly resolved.

The problem with many state and territory tribunals is that they simply don't have the expertise to be able to make an informed decision, or in some cases don't have the authority to make decisions to the value of many claims.

The AAA and member clubs believe a specialist group, like the New Zealand Motor Vehicle Disputes Tribunal as outlined in the **Case Study below**, that has relevant technical and industry experience, would assist the referee in making the necessary assessments of such cases. There should also be an increased financial threshold for cases that involve motor vehicles. Or alternatively, a consistent threshold applied across Australia. This would seek to address the issue of the imbalance in power and knowledge between the consumer and the vehicle manufacturer.

Case study – New Zealand Specialist Motor Vehicle Dispute Tribunal

In New Zealand the Specialist Motor Vehicle Disputes Tribunal (MVDT) is a specific tribunal set up under the Motor Vehicle Sales Act (MVSA) to hear claims about motor vehicles that cannot be resolved with the trader. The MVDT deals with disputes of amounts up to \$100,000, however a higher figure can be considered if both parties agree in writing. For the period 1 July 2014 to 30 June 2015, 258 applications were filed with the MVDT and 154 were heard by the MVDT.⁸

The AAA supports access to justice where a framework meets the following principles:

- be structured and capable of delivering outcomes that are quick, decisive and fair to all parties;
- provide clarity in terms of eligibility of defects;
- deliver decisions that are binding;
- be inexpensive (preferably avoiding the need for legal representation, as is currently the case across some jurisdictions);
- ensure consumers' access to the process is not dependant on their financial, technical or other resources;
- discourage frivolous and vexatious claims; and be able to order
 - Rectification repairs.
 - Reimbursement of repair costs.
 - Replacement of the vehicle.

⁷ RACV Introducing Victorian Motor Vehicle Lemon Laws – November 2007

⁸ New Zealand Motor Vehicle Disputes Tribunal Annual Report (1 July 2014 to 30 June 2015). <https://www.consumerprotection.govt.nz/assets/PDFs/MVDT/MVDT-July-2014-June-2015.pdf>

4. Scope and coverage of the ACL

The AAA supports greater protection of small business and their access to unfair contract terms and dispute resolution. The current threshold for business transactions has not been adjusted since 1986 and no longer covers the basket of goods that it originally intended to cover.

As noted in the Interim Report, a variety of commercial vans acquired for tradespeople that are used to travel to jobs, as opposed to transporting goods, would not be covered by the current \$40,000 threshold. This is due to the ACL providing coverage for commercial vehicles used to transport goods on public roads. Vehicles used in businesses to travel to jobs would need to fall under the \$40,000 threshold to be covered by the ACL. As such the AAA recommends the threshold be increased noting that this is also supported by industry members.

The AAA agrees with the Motor Trades Association of Australia's recommendation that:

"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."⁹

The RBA's Inflation Calculator finds that goods costing \$40,000 in 1986, cost \$101,679 in 2016 with a total increase in cost of 154.2 per cent over 30 years, at an average inflation rate of 3.2 per cent.¹⁰

4.1 AAA position on proposed options

Option 2 - Increase the \$40,000 threshold in the definition of 'consumer'

AAA Position 1

The AAA supports increasing the threshold to the definition of 'consumer' from \$40,000 to \$100,000 for business transactions and for this to be indexed ongoing by the Consumer Price Index.

4.2 AAA answers to consultation questions

Question 4: Should the \$40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?

Yes. See previous section of this submission.

Question 5: What goods or services would be captured that are not already?

Motor Vehicles used by small businesses, to travel to jobs that are currently over the \$40,000 threshold. The AAA notes that the ACL has a special provision that covers commercial vehicles, that are used to transport goods on public roads. As such these vehicles are not subjected to the \$40,000 threshold.

⁹ https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Motor_Trades_Association_of_Australia.pdf
¹⁰ <http://www.rba.gov.au/calculator/annualDecimal.html>

5. Consumer guarantees

Australia is a small automotive market in global terms with annual sales representing less than 1.5% of global production.¹¹ As Australia moves towards importing 100% of its motor vehicles due to the closure of domestic manufacturing, it will become increasingly important to adopt international best practices in regards to consumer regulatory regimes.

The United States is one of the largest new car markets globally. As such, a move towards a consumer framework that reflects this market should lower compliance costs for global manufacturers. While there is no national US definition of what constitutes a 'lemon', each state has a definition based on non-conformity which is determined by the number of repairs or days out of service within a specified time period or distance.¹² If the vehicle is a 'lemon' the manufacturer must offer the consumer a replacement vehicle or a refund of the purchase price with a mileage reduction.

California will top 2 million new vehicle registrations for the second straight year, almost double that of Australia. California's criteria for a major failure includes: 4 repairs or 2 repairs where the repair relates to a safety defect; 30 calendar days out of service within 18 months or 18,000 miles; and a reasonable number of unsuccessful repair attempts during a warranty period.¹³ Given that global manufacturers already operate under regimes that afford consumers additional protection, like the framework in California, the AAA does not consider that the introduction of such a regime in Australia would unduly impact manufacturers.

In regards to transparency and consumer information, the Interim Report acknowledges the issue of information asymmetry between traders and consumers. Greater transparency and consumer information of extended warranties would be beneficial. It would be worthwhile for consumers buying a car, or any other product, to know what additional protection they're buying and how the extended warranty compares to what already exists under the ACL. This would allow consumers to more accurately assess the value of the extended warranty. This information could be provided relatively cheaply at (and prior to) the point of sale, as well as through other communication channels, such as retailer and regulator websites.

The AAA believes that the ACL would benefit from the inclusion of definitions around what constitutes a major failure in line with international best practice. In addition, the AAA supports the introduction of any measures that increase consumer understanding and knowledge of the ACL at the point of sale, including when extended warranties are offered.

¹¹ FCAI submission to the ACMA "Proposed regulatory measures for the introduction of C-ITS in Australia" accessed at: <http://www.acma.gov.au/-/media/Spectrum%20Transformation%20and%20Government/Issue%20for%20comment/IFC%2020-2016/FCAI%20submission%20pdf.pdf>
¹² Queensland Parliamentary Inquiry into consumer protections and remedies for buyers of new motor vehicles; Departmental Information Brief: Accessed at: <https://www.parliament.qld.gov.au/documents/committees/LACSC/2015/04-Lemons/04-tp-30Jul2015.pdf>
¹³ Queensland Parliamentary Inquiry into consumer protections and remedies for buyers of new motor vehicles; Departmental Information Brief: Accessed at: <https://www.parliament.qld.gov.au/documents/committees/LACSC/2015/04-Lemons/04-tp-30Jul2015.pdf>

5.1 AAA position on proposed options

Option 1 - Clarify the law on what can trigger a 'major failure'

AAA Position 2

The AAA strongly supports clarifying the law on what can trigger a 'major failure' by including the following in the ACL legislation or alternatively in a legislative example:

- Multiple 'non-major failures' can trigger a 'major failure';
- A 'major failure' is triggered where the good cannot be repaired within three attempts except in the case of significant safety defects, which require only one attempt; and
- A 'major failure' is triggered where the good has 10 cumulative days out of service in its first two years.

Option 2 - Amend the current requirements regarding manufacturers' warranties against defects

AAA Position 3

The AAA supports the provision of greater information about consumer rights under the ACL at the point of sale.

Option 3 - Enhance transparency regarding extended warranties

AAA Position 4

The AAA strongly supports enhanced transparency of extended warranties including providing a comparison of what is being offered by the warranty and the ACL.

5.2 AAA answers to consultation questions

'Acceptable quality' for goods

Question 10: Could the issues about the durability of goods be addressed through further guidance and information?

Yes. The AAA believes that there is significant uncertainty in regards to the durability of a motor vehicle under the ACL. Manufacturers have been known to offer remedies where a vehicle is out of warranty, however this is usually linked to service history with the manufacturer.

For example the RACQ website currently states that:

"Few people realise that most vehicle manufacturers operate a system of discretionary goodwill assistance that is over and above that provided under the terms of the warranty. Among the many factors used to determine if goodwill assistance will be offered, and if so to what extent, is the vehicle's service history. In essence, if you don't support the dealer network it's unlikely that the manufacturer will support you any further than is legally required."¹⁴

This implies that manufacturers are willing to assist customers, in some circumstances, where the vehicle is out of warranty, however this is dependent on customer loyalty. The AAA considers that this disadvantages consumers that may not be able to access a dealership and also implies that claims around durability are subjective and not transparent.

Question 11: Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance? For example, the cost of returning rejected goods, including what may constitute 'significant' cost?

Yes. Where assistance has been provided to members to resolve disputes, it is often noted that consumers are faced with significant out of pocket expenses. Dealers provide replacement vehicles on an inconsistent basis and consumers are rarely offered compensation for the time taken to take vehicles back and forth from dealers.

The AAA strongly supports the development of guidance material that clearly sets out what a dealer/manufacture should cover in the event of a problem. At the bare minimum, this should cover the cost of a loan vehicle where a replacement vehicle is not available.

For example, one manufacturer's website states the warranty "covers repairs or replacement of parts that are defective. It does not cover consequential claims for compensation."¹⁵ This would seem to be contrary to provisions in the ACL and would certainly cause consumer confusion.

Question 12: If they are not suited to this approach, why not? For example, do the issues (such as the costs of technicians or returning a good) require further legislative clarification, or should the status quo remain to ensure a high level of flexibility?

As detailed in Question 11, the AAA considers that further legislative clarification is needed around what constitutes 'significant' cost. A legislative example could be included with respect to motor vehicles that references the need to provide a replacement vehicle, or the reimbursement of loan car costs.

Question 13: What more, if anything, can be done to encourage businesses to provide more information about the durability of their products? What, if any, further guidance on durability is feasible while still allowing important differences between goods of a certain type to be recognised?

Manufacturers should clearly state under what circumstances discretionary goodwill assistance, over and above that provided under the terms of the warranty, is provided.

Lack of clarity about 'major failure' and industry specific concerns

Question 14: Can issues about the acceptable quality of goods that are raised in particular industries be adequately addressed by generic approaches to law reform, in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?

The AAA supports greater clarification of what constitutes a 'major' and 'minor' failure and whether a series of minor failures constitutes a major failure through a separate schedule or annex mechanism within the ACL. Another possible option would be to include a legislative example.

The AAA considers that the reference in the ACL should be motor vehicle specific, however where a generic option is developed, this would need to achieve the same policy objective and clearly define where a vehicle incurs a major failure.

Question 16: In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a 'major' failure? If so:

- What are these circumstances, and should they be defined, or deemed, to be major failures? For example, should there be discretion for courts to determine the number of 'non-major failures' or type of safety defect that would trigger a 'major failure'?
- Are there any relevant exceptions or qualifications?

¹⁴ RACQ, Dealer vs non-dealer servicing information. Access here: <http://www.racq.com.au/cars-and-driving/cars/owning-and-maintaining-a-car/car-maintenance/dealer-vs-non-dealer-servicing>
¹⁵ Toyota Australia website <http://www.toyota.com.au/toyota/faqs/warranty>

As noted previously, the AAA considers that having a definition for what constitutes a major failure in motor vehicles is critical. The development of such a definition is also in line with international best practice.

For example, the RACV supports a definition of a major failure as a vehicle:

Less than two years or 40,000km old (whichever comes first) that is not repaired within three attempts (except in the case of significant safety defects, which require only one attempt), or has 10 cumulative days out of service.¹⁶

Question 17: What are the costs associated with businesses providing refunds in circumstances that are above the costs associated with existing business policies on refunds? What impacts would this have on consumers?

As previously detailed in this submission, providing a definition for a major failure for new motor vehicles is consistent with one of the largest new vehicle markets in the world, the United States. As Australia represents such a small component of the global new car market, moving further towards the US model would have limited consequences for international manufacturers and their dealers.

The AAA also notes that the Motor Trades Association of Australia recommended the development of clear definitions and thresholds for major and minor faults and other provisions in legislation, which clearly highlights that there would be associated benefits to traders as well as consumers.

Question 18: Are there any unintended consequences, risks or challenges that need to be considered? For example, how would they affect current business policies regarding refunds?

See answers to Question 17. The new car industry has claimed in previous submissions that vehicles with major failures represent a very small percent of all vehicles sold in Australia each year. As such, any clarification to the ACL around major failures should not represent a significant cost to industry. However, it is important to consider that additional costs may be passed on to consumers.

Disclosure of rights under the ACL

Question 19: Is there a need to amend current requirements for the mandatory notice for warranties against defects? If so:

- how should the text be revised to ensure that consumers are provided with a meaningful notice about the consumer guarantees?
- would it, in practice, reduce ongoing costs for business or were they largely incurred when the requirement was introduced?
- would it require any transitional arrangements and, if so, what are the preferred arrangements and why?

The AAA strongly supports any change to the mandatory notice for warranties against defects that increase consumer understanding of their rights. The notice would benefit from explicitly referencing consumer rights in regards to refund or replacement in the event of a major failure, including clarifying how a major failure is determined.

Question 20: Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirement?

The AAA considers that more information regarding the ACL needs to be made available at the point of sale rather than being provided at the time of transaction. As consumers move to purchase vehicles online, greater information regarding the ACL may need to be incorporated into manufacturers and dealers websites.

For example, after a desktop review, many websites simply state that warranties “do not limit and may not necessarily exceed your rights under the Competition and Consumer Act 2010”. This does not provide enough information to consumers regarding their rights. One manufacturer’s website does not include any reference to refund or replacement of the new motor vehicle in the warranty frequently asked questions section and only references ‘repairs or work done’¹⁷, which may give the impression that there would be no circumstance where a refund or replacement would be offered.

¹⁶ RACV Introducing Victorian Motor Vehicle Lemon Laws – November 2007

¹⁷ Toyota warranty FAQs <http://www.toyota.com.au/toyota/faqs/warranty>

Question 21: Is there a need for greater regulation of extended warranties? If so:

- is enhanced disclosure adequate or is more required?
- what are the costs of providing general and specific disclosure for businesses? Would disclosure change, in practice, outcomes for consumers?
- what has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)?

Yes. In regards to transparency and consumer information, the Interim Report acknowledges the issue of information asymmetry between traders and consumers. Greater transparency and consumer information of extended warranties would be beneficial. It would be worthwhile for consumers buying a car, or any other product, to know what additional protection they're buying and how the extended warranty compares to what already exists under the ACL. This would allow consumers to more accurately assess the value of the extended warranty. This information could be provided relatively cheaply at (and prior to) the point of sale, as well as through other communication channels, such as retailer and regulator websites.

6. Product Safety

Motoring clubs across Australia have had a long history of being involved in monitoring vehicle safety. The AAA has previously been involved in the process for recalling defective motor vehicles through the Committee Advising on Recalls and Safety (CARS). AAA constituent clubs also provide advice to government departments on defects reported by members, club vehicle inspectors, and road patrols. The AAA is also a strong advocate for replacement parts for motor vehicles being fit for purpose to ensure continued safe operation of the vehicle as per its original design.

Vehicle defects can have detrimental impacts on safety, performance and usability of cars. Hence, the provision of timely information on, and fixing of, defects is crucial for motorists. Generally, we believe the current processes to identify and rectify systemic safety defects in motor vehicles work reasonably well. However, transparency of information relating to consideration/investigation of defects, the speed of such investigations, and the rectification rate of vehicles could be improved. For example, the AAA understands that vehicle brands have been actively pursuing vehicle owners regarding replacement of defective Takata airbags, but only a relatively small percentage of owners are taking vehicles to be repaired.

The AAA has also been a supporter of mandatory safety standards for products that may be sold separately, but are related to motor vehicles, such as child restraints, helmets, vehicle jacks, axle stands and vehicle ramps. Inappropriate use, inadequate design or poor quality manufacturing processes of these products have resulted in death and injury.

6.1 AAA position on proposed options

Option 1 - Introduce a general prohibition against the supply of unsafe goods ('general safety provision')

Option 2 - Introduce a 'performance-based' approach to compliance with product safety standards

Option 3a - Clarifying the mandatory reporting triggers through greater regulator guidance on the meaning of 'serious injury or illness' and 'use or foreseeable misuse'

Option 3b - Increasing the mandatory reporting time frame and requiring immediate notification of a death or serious illness or injury

Option 3c - Introducing a statutory definition of a voluntary recall, and increasing penalties for failure to notify a recall

Option 3d - Streamlining the processes for implementing product bans and mandatory recalls

7 - Improving the quality of information made available to consumers about safety risks

AAA Position 5

The AAA believes that the current product safety system is working well, however greater emphasis around streamlining investigation and recall processes is required. The AAA also considers that rectification rates for some safety recalls could be improved.

6.2 AAA answers to consultation questions

The AAA does not have specific answers to consultation questions 25-36.

7. Administration and enforcement

While the AAA understands that the administration and enforcement arrangements underpinning the ACL are being independently assessed by the Productivity Commission, the AAA believes that the current dispute resolution framework that differs between each state and territory does not adequately provide access to justice for consumers who have problems with new motor vehicles.

The financial and personal impact on owners of problem vehicles can be significant and we know that some are unable to resolve disputes and ultimately sell the vehicle, thereby passing the problem on to the next owner. Shifting the vehicle on typically involves financial loss.

Legal remedy under the ACL can be problematic as those charged with hearing these cases and administering the remedy often have little technical knowledge with which to make an informed decision. For the consumer, independent expert evidence to support such claims can be difficult and prohibitively costly to secure and may well exceed the value of the issue in dispute. Additionally, there is no guarantee of the outcome. Vehicle manufacturers are in a stronger position in that they generally have ready access to their own experts on the subject and have greater financial resources. We believe that a panel of independent technical experts should be set up to assist courts and tribunals in making decisions about these issues.

We note that some industry submissions to the Australian Consumer Law review suggest there is a bias in dispute decisions in favour of the consumer. According to feedback provided to the AAA, this has not been the experience of our clubs. We also note suggestions, usually from industry, that the number of problem vehicles is unknown but is likely to be small and that vehicle manufacturers resolve these problems, therefore there is no justification for strengthening legislation. If this is the case though, vehicle manufacturers should have no issue with enhancing this legislation.

The AAA also supports greater consumer education and transparency of ACL with respect to vehicles and other purchases. The AAA and Clubs already provide information via factsheets and advisory services to members regarding their rights around vehicle purchases, and in doing so enhance the accessibility of the ACL.

7.1 AAA position on proposed options

Option 1—Improve the accessibility of the ACL and related guidance material

AAA Position 6

The AAA strongly supports any measure that improves the accessibility and knowledge of the ACL.

Option 2—Ease evidentiary requirements for private litigants through an expanded 'follow-on' provision enabling them to rely on facts and admissions established in earlier proceedings

AAA Position 7

The AAA supports any measure that eases the evidentiary burden for private litigants.

Option 3—Enhance the evidence base for the future development of consumer policy

AAA Position 8

The AAA supports expanding the availability of public information while also undertaking ongoing research to support consumer policy development.

7.2 AAA answers to consultation questions

Question 54: What enhancements to existing communication channels would be most useful, and what is the level of consumer need? In a context of finite resources, what should be prioritised?

The AAA supports the reference in the Interim Report to tailoring information to appropriate audiences, for example consumers who purchase new motor vehicles. The use of case studies that involve common problems would also be very helpful. For example, a case study that outlines what consumers should expect when a new motor vehicle needs repairing i.e. compensation for loan car payments, public transport tickets or taxi fares.

Question 55: To what extent would a standalone version of the ACL be used by consumers and businesses? How should it be formatted, and what additional information (if any) should it contain?

The AAA supports a standalone accessible version of the ACL being developed. Currently no accessible version is available, other than the actual version of the long form legislation. As outlined previously this needs to be tailored to suit different industry segments to achieve maximum accessibility.

Question 56: Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?

See question 54 and 55.

Question 57 & 58: What are your views on an expanded 'follow-on' provision, and the extent to which it would assist private litigants? What, if any, unintended consequences, risks and challenges should be considered? For example, would this option affect the extent to which businesses are prepared to make admissions of fact?

The AAA supports any measure that eases the evidentiary burden for private litigants.

Question 59: Are there any other ways that ACL regulators can support private litigants, noting the existence of other review processes?

While the AAA understands that the administration and enforcement arrangements underpinning the ACL are being independently assessed by the Productivity Commission, this submission has provided a number of options for further strengthening the framework for private litigants.

Question 60: What kind of evidence base is required for future policy development, and what is the most useful way to engage stakeholders about future research and data needs?

In the interest of transparency, it would be useful to have greater visibility of the extent of consumer complaints about their new cars, and one suggestion would be to require car companies to report to the ACCC summarised data on the nature of such complaints.

Question 61 & 62: Are there other ways that ACL regulators can support stakeholder engagement in policy development? Are there further ways for stakeholders to contribute and share their research and data with the wider community?

The AAA would support an ongoing arrangement where feedback on the operability of the ACL is continuously received and analysed. Consistent, national data collection would support stakeholder engagement and provide opportunity for stakeholders to be engaged. This could be through a national annual data release, where feedback is requested on trending consumer issues.

8. Emerging Consumer Policy Issues and Purchasing Online

The AAA is closely monitoring the online new car sales market to ensure that consumers aren't facing increased consumer detriment. While the number of consumers currently purchasing cars online is small, the use of the internet in the search process has increased significantly.

The internet allows consumers to compare multiple vehicles from their home and only decide to visit a car dealer when they are in the final stages of the purchasing decision process. McKinsey's 2013 Retail Innovation Consumer Survey of 4,500 customers across the US, Europe and China found that the average number of customer visits to dealers before buying a car has dropped from up to five to just one for some brands in some geographies.¹⁸ Importantly, more than half of the surveyed buyers would consider buying a vehicle online, and 90 per cent of car buyers use Google Search for a more efficient research process.

However, while the availability of information can make it easier for some buyers to search for a new car, a recent survey commissioned by the AAA found that even though 79% of respondents believed it was easy to find reviews and evaluations of cars, almost half (49%) felt confused with the volume and complexity of information they found on different cars. Almost one third of consumers (32%) were unsure where to start their search for a new car.

In New Zealand, the Motor Vehicle Dispute Tribunal has processed an increasing number of claims where consumers buy vehicles sight unseen and uninspected¹⁹. The trend is increasingly, with more than 12 per cent of claims heard by the tribunal annually arising from internet purchases made 'sight unseen'. The highest recorded price for a vehicle bought sight unseen was \$33,130. This trend is concerning and the AAA will carefully monitor this policy space going forward.

8.1 AAA position on proposed options

Option 1—Introduce measures to enhance transparency in online shopping.

Option 2—Remove the 'sale by auction' exemption for consumer guarantees in the online environment.

AAA Position 9

The AAA is closely monitoring the online new car sales market and would support any additional transparency that could be afforded to consumers who choose to purchase their vehicle 'sight unseen'.

8.2 AAA answers to consultation questions

The AAA does not have specific answers to Questions 68-70, however this is a policy space that will be closely monitored going forward as consumers increasingly move to online platforms for motor vehicle purchases into the future.

¹⁸ McKinsey's 2013 Retail Innovation Consumer Survey: https://www.mckinsey.de/sites/mck_files/files/brochure_innovating_automotive_retail.pdf

¹⁹ New Zealand Motor Vehicle Disputes Tribunal Annual Report (1 July 2014 to 30 June 2015). <https://www.consumerprotection.govt.nz/assets/PDFs/MVDT/MVDT-July-2014-June-2015.pdf>

Attachment A: Consumer Case Studies

Consumer Case Study 1

Example found at www.productreview.com.au

"At first I thought it was the best vehicle, within a month a seal went on the turbo, within 3 months my remote control started playing up, the car would remain unlocked even though it gave you the idea it was locked, passenger side electric window would not close all the way and when driving you could hear the wind noise, dealer tried many times and never fixed it to an acceptable level. At 23,000 Km my air con compressor died. At 28,000 km my water pump failed and leaked water into the motor, it was me noticing what happened and stopping the vehicle that saved the motor from also failing, we found 3 litres of water in the motor mixed with the oil. At 34,000km had problems with the power steering. After 37,000 km the turbo kept going into over boost and the car would go into limp mode. At 38,000 km the motor started making strange noises. After 38,000 km not sure what happened because I sold it. Never, ever again. The dealer was just as bad as the car, that's another story I want to forget. Would I buy another, not in my lifetime."²⁰

Consumer Case Study 2

Chrysler Australia

Ashton and Vanessa Woods are leading the calls for a new rule in line with 'lemon laws' legislated in the US in 1975, with advocates calling for a vehicle to be replaced or a refund given if it requires three major repairs keeping the car off the road for 20 days or longer while under warranty.

The Woods family publicly demolished and incinerated their Jeep last year after it suffered 22 faults requiring repair, starting with a massive fuel leak on the salesroom floor immediately after they purchased it in 2010. When Mr Wood asked Chrysler Australia for a refund or replacement vehicle they said they could only repair the car. Chrysler later offered to buy Mr Wood's car at market price, \$22,000, less than half of what he bought it for. Mr Wood sought assistance from the ACCC however was told that 'they do not investigate individual cases' and also sought assistance through the Queensland Civil and Administrative Tribunal (QCAT) however the case was dismissed due to the jurisdictional limit of \$25,000.²¹

Consumer Case Study 3

RACQ

The vehicle in question is a dual cab utility fitted with a diesel engine and automatic transmission. It was bought new and cost around \$65,000. The owners live in a regional area some 30 kilometres from the nearest town. Initially there was a dealer for the make in the town but it closed after the vehicle was purchased. The next closest dealer was about 200 kilometres away.

The vehicle suffered a transmission problem in the first year of warranty. Other issues experienced during the warranty included numerous overheating events, inoperative air conditioning, problems with the alarm, charging problems, discharged batteries, three battery replacements, and engine failure that necessitated its replacement. One month out of the vehicle's three-year warranty, the vehicle was incapable of moving under its own power and a transmission fault was diagnosed by a local repairer.

The manufacturer was contacted but offered no resolution or commitment. The owner was instructed to have the vehicle towed to the closest dealer (at the owner's cost), for assessment. This involved a considerable cost as the tow was around 200 kilometres. After several weeks of inaction from the manufacturer, the owner contacted RACQ for assistance. RACQ attempts to contact the manufacturer's customer service line were frustrating. RACQ were regularly told that someone would call back – they rarely did – and when they did they were generally unhelpful. The vehicle's owners reported that the only way they could get through to someone in customer service was to call from a phone other than their own i.e. a number that was not known to the vehicle's manufacturer. Eventually the RACQ approached FCAI for assistance in obtaining a manufacturer's contact, and while this was provided and the person assured us that they'd investigate, it appears to have made little difference.

Eventually the owners needed the car back as they had no other transport options and were forced to borrow a vehicle, which now had also broken down. The owners eventually authorised the transmission repairs at a cost of around \$6,500. After many weeks the vehicle manufacturer finally agreed to reimburse the repair costs. We were never told what the cause of the transmission problem was, but we have since started receiving reports of other examples of this make and model having similar transmission issues.

²⁰ See product reviews at: <http://www.productreview.com.au/p/volkswagen-transporter-2004-present.html?rating=5#reviews>

²¹ Ashton Woods, "Submission to the Legal Affairs and Community Safety Committee on Consumer Protections and Remedies for buyers of new motor vehicles", August 2015. Access here: <http://www.parliament.qld.gov.au/documents/committees/LACSC/2015/04-Lemons/submissions/001.pdf>. NRMA, "A guide to warranties and 'lemon laws'", 3 June 2015. Access here: <http://www.mynrma.com.au/get-involved/advocacy/news/a-guide-to-warranties-and-lemon-laws.htm>

This issue caused the vehicle owners a considerable amount of stress and personal disruption and is typical of many similar cases we've dealt with in the past. They are also questioning the vehicle's ongoing reliability, particularly now that it's out of warranty, and whether it's suitable for the use for which it was purchased. They have contemplated selling the vehicle but are concerned about passing the problems onto another party.

Consumer Case Study 4 – RAA

Ford Fiesta

A RAA member purchased a new Ford Fiesta and very quickly experienced problems with the PowerShift automatic transmission. Since purchasing the vehicle, the transmission had been shuddering and erratic. It had been returned to the dealer over five times with many clutch replacements and software updates. The RAA advised the member to push for a full refund as per ACL as the vehicle was not fit for purpose and also provided advice as to how the member could negotiate back and forth between the relevant parties, including the ACCC. The member advised that, in their opinion, the ACCC and other avenues of assistance were not helpful, despite the vehicle having major problems in its first 12 months.

Eventually the member arrived at a compromise with the dealer. The dealer gave the member normal retail trade-in value for the faulty vehicle and the member contributed an amount towards a new 2016 Ford Focus Trend Auto Hatch that was provided by the manufacturer. The member was satisfied with the outcome since the compromise resulted in a large saving on a new car. However, the dealer and Ford would not entertain the idea of providing the member with a new Fiesta automatic, which says something about the problematic Powershift transmission still used in the new Fiesta.

A class action has now been filed with the Federal Court of Australia, as the PowerShift transmission has a well-documented history of having issues, although has never been recalled.²² It has also been reported that some customers that have already traded in their affected vehicles were asked to sign 'confidentiality agreements' that agreed that the customer would 'never take legal actions or make disparaging comments against Ford in the future'.²³ The fact that many of these vehicles have been traded in, suggests that the same problems are now being recycled through the used car market.

Consumer Case Study 5 – RACV

Volkswagen T4 Transporter

It took one RACV member nine years, nine months, two weeks and five days to satisfactorily fix a Volkswagen T4 Transporter which displayed defects the day after the member collected the new car. One issue was the steering, which made a horrendous noise when the car was cold. The same loud noises were also coming from the transmission. The vehicle was largely garaged for three years while the member sought an outcome. Eventually it was discovered that T4s between designated VINs had been fitted with faulty power steering reservoirs. The member was offered an amount to purchase the vehicle back; however the offer was significantly under the purchase price as it allegedly reflected fair market value. The member was also requested to sign a confidentiality agreement, which they refused to do.

According to the member, consumer protection laws must be 'clear, absolute and easy to interpret' and importantly while 'most will never have any idea why we need them, the safety net must be there'. The member experienced considerable personal and financial hardship attempting to secure a fix for the vehicle over several years and their small business ultimately suffered from the vehicle being garaged for long periods.

²² Motoring, "Ford under threat from class action", 18 May 2016. <http://www.motoring.com.au/ford-under-threat-from-class-action-102268/>

²³ News.com.au, "Unhappy Ford Powershift customers asked to sign confidentiality agreements before trading in their cars", 29 June 2016. <http://www.news.com.au/lifestyle/real-life/news-life/unhappy-ford-powershift-customers-asked-to-sign-confidentiality-agreements-before-trading-in-their-cars/news-story/b148260aa52413c0e27e51fec33b8223>

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