

Mailing Address:

GPO Box 1555
Canberra ACT 2601

Address:

103 Northbourne Ave
Canberra ACT 2601

P 02 6247 7311

T @aaacomms

W www.aaa.asn.au

MEMBER OF



Consumer Policy Unit
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600
consumerlaw@treasury.gov.au

10 February 2022

Dear Sir / Madam

Please find attached a submission from the Australian Automobile Association (AAA) on the Consultation Regulation Impact Statement; *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law*.

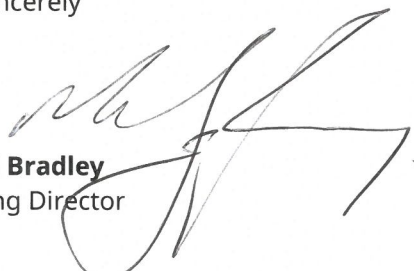
The AAA noted in its 2016 submission to the Australian Consumer Law (ACL) Review there is a "significant power imbalance between consumers and car manufacturers" and "consumer vulnerability and disadvantage factors that are unique to new car purchases". The AAA believes these factors remain for consumers when attempting to resolve quality issues with their motor vehicle.

Consumer responses provided to the AAA show that problems persist for consumers in achieving remedies for motor vehicles and the current arrangements in Australian Consumer Law are insufficient to prevent such issues.

The AAA considers there needs to be a revised overarching approach to managing disputes relating to vehicles so that a consumer is placed in a more equitable position with a motor dealer or manufacturer when attempting to resolve a complaint or concern about their vehicle. Achieving this requires an emphasis on designing an effective industry-wide complaint resolution model.

Should you wish to further discuss this matter, my office can be contacted on 02 6247 7311.

Yours sincerely


Michael Bradley
Managing Director



Submission on the Consultation Regulation Impact Statement; Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law

Mailing Address:

GPO Box 1555
Canberra ACT 2601

Address:

103 Northbourne Ave
Canberra ACT 2601

P 02 6247 7311
T @aaacomms
W www.aaa.asn.au

MEMBER OF



Introduction

The Australian Automobile Association (AAA) is the peak organisation for Australia's motoring clubs and their 8.7 million members. The Association's constituent clubs are the NRMA, RACV, RACQ, RAA, RAC, RACT and the AANT. The AAA regularly commissions research and develops in-depth analysis of issues affecting transport systems, including affordability, road safety and fairness.

The AAA welcomes the opportunity to provide a submission to the Department of the Treasury on the abovementioned Consultation Regulation Impact Statement (CRIS).

The AAA believes considerations in the CRIS regarding new motor vehicles should include motorhomes, caravans and motorcycles.

The AAA notes the statement in the CRIS regarding the "ongoing high number of complaints received by the state and territory ACL regulators and the Australian Competition and Consumer Commission (ACCC)" and that, under the current arrangements, remedies remain hard to obtain. The AAA supports the need to ensure businesses comply with the consumer guarantees and consumers can access the remedies to which they are entitled.

The AAA noted in its 2016 submission to the Australian Consumer Law (ACL) Review there is a "significant power imbalance between consumers and car manufacturers" and "consumer vulnerability and disadvantage factors that are unique to new car purchases". The AAA believes these factors remain for consumers when attempting to resolve quality issues with their motor vehicle.

A more equitable approach for consumers requires an emphasis on designing an effective industry-wide complaint resolution model where the disparities of resources, including both legal and technical, are removed. Other industries, such as finance and telecommunications, have implemented an Ombudsman to act as an intermediate body and achieve more accessible and faster solutions to complaints as an alternative to reliance on the legal system. The vehicle sector could benefit from the learnings of industries who have implemented these alternative dispute resolution pathways.

Achieving a successful resolution to a motor vehicle complaint can be a time consuming, expensive and stressful situation for consumers when a motor dealer shows a lack of interest or is dismissive of the issue being raised. Such issues can drag on for months leading to consumers being forced to rely on a legal solution which introduces further



time and financial costs as well as the challenge to prepare necessary technical evidence to support their claim.

This puts the consumer potentially 'out of their depth' and at a substantial disadvantage when they try to navigate the complexities of the legal system. As an example, while the ACL sets out the monetary limits for products it covers, consumers planning to initiate legal action will need to understand and comply with application criteria in state-specific tribunals, or applicable levels of court, along with their different monetary claiming limits. Consumers are also exposed to differing legal representation costs and case lodgement fees for different tribunals and courts.

Further to the above, the AAA provides the following responses to the key questions as set out in the consultation document:

PART A: Receiving remedies

1. *Please provide any relevant information or data you have to help estimate the extent to which consumers are unable to access consumer guarantee remedies when entitled?*

While individual manufacturers would have the means to track the number of formal consumer complaints relating to their vehicles, and state consumer protection agencies would track received motor vehicle complaints, the information to fully establish the extent of the problem is otherwise not readily available.

However, even without a complete picture of the extent of the problem, the following is noted as it addresses the equally important aspect of impact on a consumer:

- Unresolved vehicle quality issues cause a combination of additional and unplanned financial outlays, increased frustration, stress and inconvenience for consumers. These effects can be substantial and time consuming for the individual consumer, prevent ongoing use of their vehicle, and impact their work and recreational activities.
- Individual owners experiencing a vehicle quality issue may be unaware their situation is not unique and also affecting multiple similar vehicles of a particular model. This creates unnecessary effort, and disadvantage, on the consumer's part to resolve an issue when the manufacturer has the benefit of visibility of the full extent of the quality issue and therefore able to plan ahead their preferred response options to consumer complaints. A consumer may only realise after an issue becomes public that the quality issue or condition in their vehicle is an actual defect and not simply a characteristic of that model. There have been five instances since 2017 where a vehicle manufacturer (or importer/brand) has been required to make a s.87b undertaking in relation to how their customers were treated. An administrative undertaking in 2015 was also provided by a vehicle brand in relation to vehicle faults and their handling of customer complaints.ⁱ

- Reliance on undertaking legal action as a complaint resolution, underpinned by the ACL, is not an optimum pathway for a consumer to resolve a vehicle quality issue in a prompt and low/no cost manner.
- There is typically a disparity of technical and financial resources that favour the dealer and manufacturer and this disadvantages the consumer to mount a supportable case to counter any rejection of their complaint. The following extract from a Queensland Civil and Administrative Tribunal (QCAT) hearing in May 2021 in relation to an owner's need to acquire independent technical assistance illustrates this:
 - The respondent's service manager stated: "[the dealership] have considered the independent reports supplied by [the owner]. The reports have been provided by non-specialist service providers (all makes and models) and are very speculative and non-conclusive. They do not state the vehicle is not fit for purposes. [the dealership] is a Nissan specialised dealer – we focus only on the Nissan brand". Member Cranwell of QCAT stated in his findings "I regard [the service manager's] submission that [the independent mechanic's] evidence should carry little weight because he is not a specialised Nissan mechanic as self-serving, in that it was open to the respondent to obtain a report from a specialised Nissan mechanic but did not do so. It was reasonable for the applicant to obtain a report from an independent mechanic".ⁱⁱ
- As vehicles become increasingly complex this exacerbates the challenges and inequities for the consumer. Emerging complexity includes the proprietary engineering in vehicles with levels of automation or alternative powertrains where only the manufacturer's dealer networks can fully test componentry, interrogate systems, measure battery performance and associated charging equipment. As an example, with home recharging of electric vehicles, the consumer may be unable to determine whether a fault exists with a vehicle or the home charging equipment and therefore unable to convince the vehicle dealer or equipment supplier of a quality issue.
- Consumers may not be knowledgeable in legal matters and therefore unable to make informed decisions about progressing an unresolved vehicle quality issue when the dealer or manufacturer rejects a consumer's complaint or concern. While consumer education on ACL provisions and related legal protections may offer some benefit, the core issue is the importance of implementing a mechanism that ensures consumers are authentically dealt with in a prompt and fair manner by a motor dealer or manufacturer. The following extract from a Queensland Civil and Administrative Tribunal hearing in August 2020 in relation to an owner's complaint about a series of reliability problems illustrates this:
 - The respondent to an owner advised the tribunal of their position: "Nissan disputes [t]hat an order can be made against the Respondent. This is because under the Australian Consumer Law (ACL), the remedy of a refund or replacement is available only against the supplier of goods, namely, the used car dealership

from which the Applicant purchased the Vehicle. This is pursuant to section 269(3) of the ACL. The consumer's remedy directly against the manufacturer of goods, is limited to damages (section 271(3) ACL). As such, the used car dealership must be joined to the proceedings if the Applicant seeks the remedy of a refund or replacement.^{viii}

2. Do you have any information on consumers claiming refunds for new motor vehicles? If so, please provide details on how long after purchase refunds are requested, and the prevalence of such requests.

Please see examples to question 11.

3. Do you have any information or data to support the view consumers are 'gaming' the system to obtain replacement new motor vehicles or refunds?

No. The experience of motoring clubs has been the overwhelming priority of consumers is to have a vehicle problem resolved in a prompt and fair manner rather than engage in making frivolous or vexatious claims.

4. Do you consider it appropriate for factors such as a depreciation deduction (a reduction in the value of a refund for usage) to be considered relevant in determining a refund amount? In what circumstances do you consider this would be appropriate? How would a reduction work? How should post-purchase increases in value be factored in? Please detail reasons for your position.

While it is reasonable to factor in some recognition of the usage of a vehicle by a consumer when determining the value of a refund, the use of market depreciation values may not provide a fair valuation for a vehicle that has failed to meet its quality standards. The overriding principle should be that consumers are returned to the position they would have been in had their vehicle not failed to meet expected or advertised quality standards.

5. For new motor dealer representatives, please provide any relevant information or data on how providing remedies has impacted your business.

6. Are there any other benefits associated with maintaining the status quo?

There are no other benefits to the consumer by maintaining the status quo in lieu of implementing consumer protection improvements.

7. If the status quo was maintained, what other potential costs could there be to industry, consumers and businesses?

Manufacturers and dealers that already apply constructive and fair consumer complaint resolution processes should not be adversely affected by a change to the status quo.

8. What do you consider would be an appropriate maximum penalty for a supplier or manufacturer failing to provide a remedy for a failure to comply with a consumer guarantee when required under the ACL? Please detail reasons for your position.

In setting the quantum of a penalty for failure to provide a remedy, the emphasis should be on creating an incentive to actively address a consumer guarantee issue, and resolve a consumer complaint, rather than engage in actions that block or frustrate the consumer. Increased penalties for businesses that repeatedly fail to comply with a consumer guarantee required under the ACL may help deter this behaviour.

9. What do you consider would be an appropriate infringement notice amount for an alleged contravention of a requirement to provide a remedy for a failure to comply with a consumer guarantee? Please detail reasons for your position.

10. What would be the most effective way of implementing a civil prohibition for a failure to provide a consumer guarantee remedy? Should the circumstances in which a penalty applies be limited in any way?

For consumers:

11. Have you experienced issues with a trader not agreeing to provide your requested remedy for a major failure? If yes, please provide details. For example, what were the circumstances, including the types of goods or services involved, the nature of the problems experienced with the goods or services, and how the trader dealt with your issue?

Motoring clubs have had direct involvement in consumer issues relating to vehicle quality issues including the following examples affecting individual consumers:

- A new caravan was delivered with interior items and accessories missing or incorrectly fitted, incomplete wiring, along with safety concerns relating to the fire extinguisher, LPG components and towing hitch. The owner experienced difficulties over a period of several months getting the retailer to attend to numerous defects with the manufacturer being asked to help resolve the problems. During this time the owner has been unable to use their new caravan and is seeking legal advice.
- A utility vehicle with a major transmission failure that rendered the vehicle undriveable. The fault had developed and was initially repaired during the early stages of warranty, but again occurred shortly after the warranty period had expired. The dealer/manufacturer had been approached multiple times to repair the vehicle and was unhelpful to even assist with fault diagnosis or transport of the vehicle. The owner was based in a regional area and relied on the vehicle for transport to attend regular medical treatment of a serious health issue. The owner had to borrow a vehicle, as well as cover the cost of repairs, and then seek assistance from the manufacturer for reimbursement of approximately \$6,500. Eventually the owner was reimbursed for these repairs.
- A prestige vehicle developed a major transmission issue approximately one week after purchase with the dealer unable to supply parts for several weeks. The owner requested a replacement vehicle but this was not agreed to. The outcome to the complaint is not known.

- An eighteen month old prestige vehicle suffered from water ingress from its underbody areas and developed subsequent electrical issues. The local dealer confirmed the existence of a fault related to ineffective underbody sealing. The owner engaged a smash repairer to investigate the defect and assess the extent of necessary rectification work but the manufacturer would not agree to the recommended repairs, consider a replacement vehicle, nor provide a refund. The owner advised they were taking legal action and the outcome is not known.
- A motorhome required tyre replacements after suffering premature front tyre wear. Investigations found the vehicle exceeded the allowable front axle weight which subsequently resulted in the vehicle's registration being cancelled by the transport department. After prolonged negotiations the vehicle was eventually returned for a refund.
- A newly purchased caravan was found by its owner to exceed its certified mass. The manufacturer did not willingly offer assistance to resolve the issue. The owner commenced expensive legal action which resulted in the caravan being bought back by the manufacturer.
- In addition to the above examples, motorists continue to report to the AAA recent instances where a fault on their vehicle has not been satisfactorily resolved. They often indicate their frustrations with the dealer/manufacturer as illustrated by comments such as "Manufacturer's accusations of purchaser causing fault yet the vehicle is less than 30 days old and has no modifications" (a Utility with a reported steering problem) and "The dealer WILL NOT return calls or answer questions from head office" (a Large SUV with a reported paintwork problem).

12. *If you have experienced issues where a trader has offered to repair, rather than refund or replace a good with a major failure:*

Consumers have reported to motoring clubs instances where the manufacturer or dealer has resisted requests for replacement or refunding the cost of a motor vehicle with an identified quality issue. See examples listed in response to question 11.

a. *What direct financial costs did you incur during the period the good was being repaired (for example, visiting the retailer, taking the matter to a court or tribunal, or hiring a replacement for the good)?*

Consumers report to motoring clubs a combination of the following cost impacts when attempting to engage with a motor dealer in relation to a vehicle quality issue:

- The need to refer the issue to a court/tribunal and seek costly legal representation in preparing a claim.
- Obtaining alternative transport arrangements while their vehicle is unable to be used.
- Independent diagnosis/investigation of defects and costs associated with preparing technical reports.

- Premature selling of the vehicle with the quality issue unresolved. This unfortunately has the potential to further impact future consumers once the defect becomes apparent to the new owner after purchase.

b. How much time did you spend dropping off the good for repair, collecting the repaired good and/or negotiating with the trader?

Consumers have reported to motoring clubs the following:

- Multiple conversations with dealer staff and manufacturer customer service centres often with repeated revisiting of the consumer's concerns, resistance to acceptance of the existence of a vehicle defect, a lack of repair commitment or resolution of the complaint.
- Extended travel in regional areas where there is no local dealership, including the cost and inconvenience of transporting an immobile vehicle.
- Arranging independent investigations/diagnosis of faults including loss of use of the vehicle and labour costs to establish the existence of a defect. If a component requires disassembly to diagnose, there is an added cost and inconvenience while the vehicle remains out of service until there is an agreed rectification. If agreement cannot be reached, the consumer is exposed to further costs to reassemble components or have the vehicle transported in a partly dismantled state to a place for storage or repair. The practical reality for a consumer who organises dismantling of a component to enable independent diagnosis is the risk of them having to fund the entire cost of repairs to restore the vehicle to an operational condition.
- Time consuming preparation of documents, technical reports, records etc as the consumer attempts to strengthen their case in negotiations with the dealer or manufacturer.

c. Have you had different experiences with lower value goods (for example, toaster, kettle) than with higher value goods (for example, a white good or motor vehicles)

For businesses:

13. Are there any unintended consequences, risks or challenges that need to be considered with creating such civil prohibitions?

For everyone:

14. Do you think introducing a civil prohibition would deter businesses from failing to provide the applicable consumer guarantee remedy to consumers who are entitled to one?

Yes. Please refer to comments under question eight.

15. Please provide any relevant information or data on whether non-compliance with the consumer guarantees is a significant problem in the new motor vehicle sector compared to other sectors?

Please see examples listed under question 11.

PART B: Supplier indemnification

16. ***Suppliers: to what extent are you able to enforce your indemnification rights?***
17. ***What are the barriers to seeking indemnification?***
18. ***Has your business been subject to retribution when you have sought indemnification? If yes, what form did it take?***
19. ***Please provide any relevant information or data you have that quantifies the extent of manufacturers not indemnifying suppliers, or making it difficult for suppliers to obtain indemnification?***
20. ***Please provide any relevant information or data you have that quantifies the proportion of suppliers that do not seek indemnification?***
21. ***Please provide any relevant information or data you have that quantifies the proportion of consumer claims that suppliers refuse or do not consider due to the inability or difficulty in obtaining indemnification, or due to fear of retribution?***

For suppliers:

22. ***Have you sought indemnification from manufacturers under the existing law? If not, please provide details.***
23. ***Have you experienced difficulties getting indemnified from manufacturers? If so, please provide details.***
24. ***Would your inclination to seek an indemnification change if a civil prohibition was introduced?***
25. ***Would your approach to providing consumer guarantee remedies to consumers change if a civil prohibition was introduced? If so, how?***

For manufacturers:

26. ***How (if at all) would a civil prohibition change your response to requests for indemnification?***
27. ***What other issues might a civil prohibition create?***

For retailers:

28. ***Have you experienced retribution from a manufacturer after seeking indemnification? If so, please provide details.***
29. ***Would your inclination to seek indemnification change if a civil prohibition on retaliation was introduced?***
30. ***Would your approach to providing consumer guarantees remedies to consumers change if a civil prohibition on retribution was introduced? If so, how?***

For manufacturers:

31. How (if at all) would a civil prohibition on retribution change your response to requests for indemnification?

For everyone:

32. If a civil prohibition was created to address manufacturer retribution:

a. what form should it take? (e.g. effective models in other laws)

b. should presumptive tests apply? If so, what presumptions should be included?

33. What penalties or sanctions should be available to deter or compensate for retribution?

References

ⁱ <https://www.accc.gov.au/media-release/chrysler-undertakes-to-remedy-customer-service-complaints-following-accc-investigation>

ⁱⁱ <https://archive.sclqld.org.au/qjudgment/2021/QCAT21-183.pdf>

ⁱⁱⁱ [Hammond v Nissan Motor Co \(Australia\) Pty Ltd \[2020\] QCAT 302 \(sclqld.org.au\)](#)