VACC Response

CONSULTATION REGULATION IMPACT STATEMENT

Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework

23 April 2018

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 specialists, 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.

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EXECUTIVE SUMMARY

The Victorian Automobile Chamber of Commerce (VACC) welcomes the opportunity to comment on the proposals and implementation options as outlined within the Consultation Regulation Impact Statement into the review of Australian Consumer Law (ACL).

VACC asserts that an increase in the threshold in the definition of 'consumer' from $40,000 to $100,000 is fundamentally flawed. Within the ACL definition of a 'consumer', there is already an increased limit above $40,000 by default, i.e. no threshold applies when goods are used solely for personal domestic or household use. There is also evidence that in the case of new motor vehicles, computers, electronic and other consumer whitegoods, that a $40,000 threshold remains very relevant and fit for purpose.

VACC also argues strongly against a consumer threshold value of $100,000, as it is based primarily on an unsound methodology that utilises an adjustment for inflation over time, based on an inappropriate Consumer Price Index (CPI) calculation.

In terms of clarifying the consumer guarantees, VACC does not support the proposal to instigate a short time period within the ACL (either 30 days or longer), during which a consumer is entitled to a refund or replacement without needing to prove a major failure. VACC industry modelling shows that this would lead to the closure of 3,294 car retailing businesses and the loss of 20,000 people employed nationally within the automotive industry, which is unacceptable.

On the issue of multiple non-major failures, VACC argues that these can collectively amount to a major failure under the consumer guarantee regime, provided that the non-major failures relate to a consistent and repetitive problem or issue, that cannot be satisfactorily repaired after many attempts.

VACC also maintains that the existing regulatory regime for extended warranties is appropriate and no enhanced disclosure for extended warranties is necessary.

For goods sold at auction, VACC believes that auction houses should be accountable within the ACL, and have greater responsibility for the accuracy of information regarding the description and quality of goods advertised in on-line auctions.

RECOMMENDATIONS

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

VACC Recommendation 1:

That the ACL threshold in the definition of 'consumer' be maintained at $40,000.

Proposal 2: Clarifying the consumer guarantees remedies

VACC Recommendation 2:

That the status quo should remain in relation to the application of consumer guarantee remedies

Proposal 3: Enhanced disclosure for extended warranties

VACC Recommendation 3:

That the status quo should remain in relation to the provision of extended warranties

Proposal 4: Access to consumer guarantees for goods sold at auctions

VACC Recommendation 4:

That auction houses be accountable within the ACL, and provide greater clarity and accuracy regarding the description and quality of goods advertised on-line.

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

VACC Recommendation 1:

That the ACL threshold in the definition of ‘consumer’ be maintained at $40,000.

VACC strongly believes that an increase the monetary threshold from $40,000 to $100,000 is flawed on many levels. As a first point of reference, a consumer as defined within the ACL, encapsulates provisions where there is no monetary threshold.

Section 3(1) of the ACL defines a consumer as someone who acquires goods in any of the three circumstances listed below:

a) Where a person acquires goods or services that do not exceed the monetary threshold of $40,000
b) Where a person acquires goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. There is no monetary threshold set for this situation
c) Under subsection 3(2), the goods or services acquired must not be used for any of the following purposes:
   - Resupply; or
   - Using them up or transforming them, in trade or commerce; in the course of production or manufacture, or in the course of repairing or treating other goods or fixtures on land.

As highlighted in item b) above, there is no monetary limit in the definition of a consumer where goods or services are acquired for personal, domestic or household or consumption. This is demonstrated almost daily within institutions such as the Victorian Civil and Administrative Appeals Tribunal (VCAT) that regularly decides on ACL cases that are in excess of $40,000. Therefore, raising the threshold from $40,000 to $100,000 for consumers is not warranted as there is an increased limit by default, i.e. no threshold applies when goods are used solely for personal domestic or household use.

Most consumers purchase goods and services that are below $40,000

Outside of the family home, for most consumers the motor vehicle represents their second largest purchase in dollar terms. Annual new vehicle sales data from the Federal Chamber of Automotive Industries (FCAI) shows that the overwhelming majority of new vehicles purchased by consumers (approximately 70% of new cars purchased) are below $40,000 in value[1].

[1] FCAI VFACTS National Report, New vehicle sales 2017

Despite arguments by some that the value of the $40,000 ACL threshold has deteriorated in real terms since 1986, this does not apply in the case in terms of motor vehicles as well as computers, electronic and many other whitegoods.

Constant technological change and quality upgrades in motor vehicles over the past few decades have meant that motor vehicles today represent far better value for consumers than ever before. In real terms, a $35,000 motor vehicle today is cheaper, laden with sophisticated technology and of a far better quality than motor vehicles that were at or above $35,000 in price in 1986. Therefore, for mass market motor vehicle purchases, the $40,000 ACL threshold remains very relevant and fit for purpose, even for the foreseeable future.

CPI calculators and inflation adjustments should be used with caution

Adjusting the value of the $40,000 ACL threshold for inflation over long time periods is fraught with potential error. The Australian Bureau of Statistics (ABS) makes this explicit in regard to its CPI calculator on its website, where it states the results of the CPI calculator should not be regarded as official ABS calculations. Furthermore, ABS claim the following:

'The ABS accepts no liability or responsibility for the resulting calculations. The ABS recommends that users exercise their own care and judgment with respect to the Calculator's use, and interpretation of its results.'

ABS further acknowledge that there is no single best measure of inflation. Ideally, such an indicator would be comprehensive and cover price changes for all goods and services traded in the economy, which the CPI does not.

ABS advocates that different measures of price change are suited to analysing different parts of the economy, therefore in addition to the CPI, the ABS also produce and recommend a range of price indexes to analyse inflation. These include:

- Selected Living Cost Indexes (SLCIs) designed to measure changes in living costs for selected population sub-groups. They are particularly suited for assessing whether or not the disposable incomes of households have kept pace with price changes;

- Producer Price Index (PPI) that measures inflation of products either as they leave the place of production or as they enter the production process;

- International Trade Price Index (ITPI) that measure changes in the prices paid for imports of merchandise that are landed in Australia each quarter (the Import Price Index (IPI)) and the prices received for exports of merchandise that are shipped from Australia each quarter (the Export Price Index (EPI));

- Wage Price Index (WPI) that measures changes in the price of labour in the Australian labour market, and
- the Implicit Price Deflator (IPD) for Domestic Final Demand is used as a measure of inflation experienced by consumers, governments and other domestic institutions.

By excluding these supplementary inflation measures, any proposals to increase the ACL threshold from $40,000 threshold to $100,000 based on the ABS CPI calculator to account for inflation on the cost of goods and services since 1986, is based on expediency and convenience, rather than proper science or facts.

The proposed $100,000 ACL threshold is not an accurate value that is verified by ABS or any other eminent institution or economist. If a new ACL monetary threshold is warranted, then a proper evaluation and methodology into determining the fair value of this threshold is required. Such work would need to be commissioned accordingly, and at considerable cost.

Any proposal to enshrine a new monetary threshold within in the law, must be based on empirically sound evidence and methodology, to eliminate the probability of introducing an inaccurate monetary threshold or distortion into the ACL. A simple CPI calculator will not suffice.

Alternatives to CPI indexation

The ‘grey area’ of CPI adjustments and the associated costs of developing a sound methodology for a new consumer monetary threshold, can be avoided to a considerable extent. This could be achieved through the following:

- Instead of indexation, amend the existing ACL to incorporate increases in the monetary threshold over time. For example, mandate within the ACL, $5,000 increments every five years in the value of the consumer threshold. Therefore, starting today in 2018, the threshold would rise to $45,000 in 2023, and to $50,000 in 2028, and so forth.

The advantage of this process is that it would be a lot simpler, requiring only a minor adjustment to the ACL, and at little cost. It would avoid the uncertainty of using annual or quarterly CPI adjustments in determining the actual value of the monetary threshold for consumers and businesses alike. It would provide better certainty for all parties within the ACL, and is far preferable to the complexity, and costs associated with indexation.

Proposal 2: Clarifying the consumer guarantees

VACC Recommendation 2:

That the status quo should remain in relation to the application of consumer guarantee remedies

Failure within a short period of time – 30-day time period proposal

VACC asserts that the proposal to instigate a short time period within the ACL (30 days), during which a consumer is entitled to a refund or replacement without needing to prove a major failure, will have extremely adverse consequences for new and used motor vehicle dealers and ultimately consumers. The proposal is therefore ill-advised.

Table 1 shows the results of VACC industry modelling which show the impacts on the car retailing sector by jurisdiction, of the introduction of a 30-day time period within the ACL:

Table 1: Forecast Business Closures – Car Retailing, by Jurisdiction and Employment Size

State	Sole Traders	Businesses 1 – 19 employees	Businesses 20-199 employees	Businesses 200+ employees	Total Closures
NSW	586	320	79	3	988
VIC	507	248	76	2	833
QLD	521	209	49	1	780
SA	178	75	20	1	274
WA	176	103	24	1	304
TAS	40	19	3	0	62
NT	14	11	2	0	27
ACT	10	11	2	0	23
Total Business Closures	**2,035**	**996**	**255**	**8**	**3,294**

Source: ABS data, modelled estimates.

According to VACC automotive industry modelling, the net effect of the introduction of a 30-day time period within the ACL would be the closure of **3,294** car retailing businesses nationally. Table 1 shows that proportionately, the largest impact would be on sole traders and small businesses with up to 19 employees, which represent a combined 92 per cent of total business losses within the sector. In terms of employment, these business closures are estimated to account for a loss of around **20,000** people employed nationally.

By any measure, a loss of 3,294 businesses nationally and 20,000 people employed is unacceptable. Furthermore, these losses would be in addition to the business and employment losses already sustained by the automotive industry through the closure of local car manufacturing.

There are many reasons as to why the car retailing sector will be so adversely impacted by a 30-day refund/replacement policy within the ACL. Firstly, 85 per cent of the car retailing sector is comprised of small businesses – both new and second-hand car dealers, which consequently will bear the brunt of the policy, rather than large car retailers.

The overwhelming feedback received by VACC from its small car dear membership base regarding a 30-day refund/replacement proposal, is that it would amount to an unsustainable financial impost for their business and they would most likely exit the industry.

Unlike whitegoods and other items, there are so many variables and technologies present within motor vehicles, that it is impossible to guarantee absolute perfection across every component of every vehicle, and especially in second-hand and high mileage vehicles that are close to the end of their life expectancy. It is not only the value of the good that is the critical issue, but also the complexity of the good, and in both these respects motor vehicles stand as being unique from any other goods within the ACL, and therefore warrant separate consideration.

VACC has observed a rising incidence of reports from its dealer members of frivolous and vexatious ACL claims by consumers, who demand refunds on highly travelled second-hand vehicles for issues as minor as a squeak or a rattle, or an inconsistent Bluetooth connectivity with their smart phones. It has also been conveyed that there is a strong element of buyer's remorse attached to such claims. Such behaviour would only escalate exponentially if a 30-day refund/replacement policy was implemented within the ACL, as the option to repair the fault would be eliminated. This would hasten the demise of many hard-working small business owners and the people they employ, as small car dealers operate on very thin margins (typically 2.6 per cent) and are unable to absorb the financial costs imparted through the introduction of a 30-day refund/replacement policy.

A further negative externality associated with a 30-day time proposal is an escalation in the degree of wastage of second-hand vehicles as returns become more common. The thin margins involved in the sale of second-hand vehicles means that for many dealers, it would be uneconomic to repair and resell such vehicles. This would increase the number of vehicles going to landfill every year, compounding the millions of tons of plastics and toxic waste materials already polluting the environment.

Apart from second-hand car dealers, new car dealerships would also be adversely affected by a 30-day time period. New car dealers are bound by franchise agreements with original equipment manufacturers (OEMs). These franchise agreements are often heavily weighted in favour of the OEMs and typically contain lengthy warranty return protocols for dealers, such as waiting on OEM warranty and engineering forensics personnel to come out and identify the problem and make recommendations. It is often the case that OEMs divest themselves of the responsibility of rectifying warranty complaints and leave this to the franchise dealer to resolve. Franchise dealers often fear retribution from OEMs if they contest such matters, such as termination or withdrawal of the franchise agreement by the OEM. A 30-day refund/replacement policy would place immense strain on many dealer/OEM relationships and franchise agreements, thereby compounding the level of business and employment losses already described.

Whilst it may not be the explicit intention of the proposal, what a 30-day or even longer refund/replacement policy will do in practice, is create a 'lemon law' by default. This will encourage frivolous and damaging behaviour by consumers, with the knowledge that they can use and abuse any vehicle they purchase and get a full refund or replacement back for the most minor of issues if they return the car within 30 days or more. These behaviours could go unhindered from vehicle make to vehicle make, and from brand to brand, as the power balance would lie heavily in favour of the consumer. The economic consequences of such actions however, as demonstrated by Table 1, are catastrophic. Inevitably, such policies would also lead to higher vehicle prices for consumers to counter the added financial costs for businesses. This is also an undesirable policy outcome.

Given the serious economic, social and environmental impacts associated with a 30-day or longer refund/replacement time period in relation to goods as technically sophisticated as motor vehicles, VACC strongly advises that motor vehicles be exempted from such proposals. Vehicle repairs remain the most economical and reasonable remedies for both small businesses and consumers. VACC asserts that the current status quo in the ACL in relation to motor vehicles should remain, where consumers need to establish that a major failure has occurred under the existing legal test, to access a refund or replacement.

Multiple failures

VACC has given due consideration to the proposal in the Consultation Regulatory Impact Statement that the ACL be amended to clarify that multiple non-major failures can collectively amount to a major failure under the consumer guarantees regime. VACC agrees with this proposal on the proviso that the non-major failures relate to a consistent and repetitive problem or issue.

As highlighted, motor vehicles represent the most complex of consumer goods, consisting of many thousands of individual components that are integrated with cutting edge systems and technologies. Given the sheer volume of componentry and its interdependence across different vehicle functions, it is unrealistic to expect absolute perfection and no minor faults of any kind in any new or second-hand vehicle.

VACC believes that the critical issue is whether a particular minor fault is repetitive and cannot be satisfactorily repaired even after several attempts. In these situations, the problem should be classified as a major failure, with the appropriate recourse available to consumers under the law. An example of this would be an automatic car window that fails to close or seal properly, despite numerous attempts by the dealer to fix the problem.

In the case of a few sporadic minor faults over time such the odd squeak, intermittent Bluetooth connectivity or a light appearing on the dashboard, VACC believes that these issues collectively should not amount to a major failure if they are repaired satisfactorily by the dealer as such. Only if a problem is of a recurring nature and is unable to be repaired after many attempts, should it be considered a major failure and the consumer therefore be entitled to a refund or replacement.

In addition, due to difficulties often encountered in diagnosing and repairing faults in contemporary motor vehicles, VACC also does not support the notion that there should be a limit within the ACL on the number of failed attempts to repair minor faults.

Proposal 3: Enhanced disclosure for extended warranties

VACC Recommendation 3:

That the status quo should remain in relation to the provision of extended warranties

VACC's preferred option is to maintain the current status quo in relation to the provision of extended warranties. Whilst at face value the provision of enhanced disclosure for extended warranties may seem beneficial, there is a lot more to this issue than the simple options and reasoning presented in the Consultation Regulatory Impact Statement.

As a first point of reference, there is no robust data available that indicates that there is a major problem with consumers understanding their existing rights under the ACL or with the terms and conditions of an extended warranty. There is also no substantiated data identifying that consumers have problems comparing their rights under the ACL with an extended warranty or any manufacturer warranty. Good policy must be based on sound empirical evidence, and there is a considerable amount of work that is required in order to establish the facts.

In terms of empowering consumers to make an informed decision on the value of extended warranties compared to their ACL rights, through the provision of enhanced written and oral disclosure and a 10 day cooling off period, VACC asserts that these measures are one-sided and unsatisfactory in fulfilling that purpose. This is due to the fact that consumers are still lacking fundamental information that will help them reach a truly informed and appropriate decision concerning the value and take-up of extended warranties. This additional disclosure relates to the processes and costs associated with consumers enforcing or exercising their ACL rights.

In order to properly evaluate the worth of an extended warranty, consumers need to be informed about the implications and costs of seeking recourse under the law, in disputes where the manufacturer warranty has expired. State tribunals such as VCAT publish details on the costs relating to making an application by category of claim, and dollar value of the goods and services, on their website. Such information could be readily incorporated within the written and oral disclosure information for the benefit of consumers.

It is quite probable that once armed with this added information, consumers may decide that even though an extended warranty offers little value above their existing ACL rights, they may still prefer to purchase an extended warranty, based on the costs and rigmarole of seeking redress under the law. This would not only represent a more informed outcome for consumers, but also contribute to more rational decision making. Consumers must not be misled into thinking that obtaining redress under the ACL is a simple and inexpensive process. This lack of knowledge may lead to frustration and regret on the part of many consumers that had they purchased an extended warranty, they could have avoided a protracted dispute.

In reality, the provision of enhanced disclosure for extended warranties would impose significant costs on individual businesses, and especially small businesses. Small businesses cannot be burdened with the responsibility and cost of developing and publishing written materials for consumers, and training staff to inform consumers orally on rights and legal principles contained within extended warranties and the ACL. If businesses are required to engage the services of legal experts to produce enhanced disclosure materials, then in all likelihood these costs will borne by the consumer.

In light of the arguments presented, VACC recommends that the existing regulatory regime for extended warranties is appropriate and adequate.

Proposal 4: Access to consumer guarantees for goods sold at auctions

VACC Recommendation 4:

That auction houses be accountable within the ACL, and provide greater clarity and accuracy regarding the description and quality of goods advertised on-line.

As a general principle, VACC supports the notion that there should be greater accountability for auction houses within the ACL. Despite generating substantial revenues from the sale of goods, auction houses have little to no liability within the operation of the ACL, and this can result in negative impacts for consumers.

For on-line auctions in particular, greater clarity and accuracy is required regarding the description and quality of goods advertised on-line. Often, the description of goods sold on-line via auction does not meet the expectations of purchasers, and therefore there is a need for auction houses to be accountable within the framework of the ACL, for the accuracy of information supplied.