

Australian Consumer Law Review: ACL amendments | submission

27 February 2018



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ABOUT VACC

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

VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair 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.

CONTACT DETAILS

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EXECUTIVE SUMMARY

The Victorian Automobile Chamber of Commerce (VACC) welcomes the opportunity to comment on the legislative reforms as proposed by the Final Report of the 2017 Australian Consumer Law Review (ACL).

Amongst its industry roles, VACC is charged with a responsibility to communicate to government on matters adversely affect operations within industry, and in particular, amongst VACC member businesses.

Whilst VACC commends the ministerial agreement reached in August 2017 on the package of 14 legislative reforms to improve the operation of the ACL, VACC has some concerns however, regarding the design of certain elements of the exposure draft legislation and regulations.

In particular, VACC believes there is a need to add a further amendment to Item (4) *in Subregulation 90(2) Schedule 2 – Warranties against defects (proposal 4) of the EXPOSURE DRAFT - Competition and Consumer Amendment (Australian Consumer Law Review) Regulations 2018.*

VACC advises that this amendment include the words “*and equitable*” into the last sentence of the respective exposure draft legislation as follows:

You are also entitled to be compensated for any other reasonably foreseeable and equitable loss or damage from a failure in the goods or service’.

This would further enhance the draft legislation by imparting a need for equity in the allocation of compensation for “reasonably foreseeable loss” or “consequential loss” by courts and tribunals.

RECOMMENDATION

Recommendation 1:

That the design of Item (4) in *Subregulation 90(2) Schedule 2 – Warranties against defects (proposal 4) of the EXPOSURE DRAFT - Competition and Consumer Amendment (Australian Consumer Law Review) Regulations 2018*, which prescribes the new mandatory text for the supply of goods and services, be further amended to include the words “and equitable” as follows:

For subparagraph (1) (c) (iii), the text is ‘Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to cancel your service contract or be compensated for its reduced value for major failures with the service. You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, we must still rectify the failure in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable and equitable loss or damage from a failure in the goods or service’.

The Victorian Automobile Chamber of Commerce (VACC) supports in principle the package of 14 legislative reforms as proposed by the Final Report of the 2017 ACL Review and consequently endorsed by ministerial agreement in August 2017, to improve the operation of the Australian Consumer Law (ACL).

The proposed exposure draft legislation and regulations include amendments to:

- clarify existing provisions relating to consumer guarantees, voluntary recalls, unsolicited consumer agreements and false billing;
- enhance the regulators' information gathering powers for investigations in relation to product safety and unfair contract terms;
- extend the unconscionable conduct protections to publicly listed companies;
- expand the remedies available to the courts for contraventions of the ACL; and
- improve price transparency.

Whilst the design of the proposed exposure draft legislation and regulations (and accompanying draft explanatory materials) is basically sound, VACC advises that a further amendment is also required.

This additional amendment relates to the last sentence in Item (4) in **Subregulation 90(2) Schedule 2 – Warranties against defects (proposal 4)** of the **EXPOSURE DRAFT - Competition and Consumer Amendment (Australian Consumer Law Review) Regulations 2018**, which prescribes the new mandatory text for the supply of goods and services as follows:

For subparagraph (1) (c) (iii), the text is 'Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to cancel your service contract or be compensated for its reduced value for major failures with the service. You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, we must still rectify the failure in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service'.

The last sentence underlined in Item (4) above relates to the provision of compensation for foreseeable consequential loss. It is clear from the Australian case law that concepts of "reasonably foreseeable loss" or "consequential loss" do not have fixed and settled legal meanings, and this has often led to the inconsistent and inequitable application of these terms in legal disputes.

This is particularly demonstrated in cases involving motor vehicle sales and repairs, where crippling financial penalties are often awarded from "reasonably foreseeable loss" that can extend beyond the market value of the actual goods and services supplied to consumers and be considerably detrimental to small business.

For example, a plumber purchases a high kilometre second-hand vehicle for \$3,000 from a dealer. The dealer makes a \$300 profit on the sale of the vehicle. After 6 months, the vehicle suffers from a faulty gearbox. The plumber takes the vehicle back to the dealer for warranty repairs which take 4 days. A compensation claim is made for 8hrs x 4 days at \$ 95.00 per hour. Whilst the loss here may be foreseeable, to allow such a compensation claim to be made is inequitable given the complex nature of modern vehicles and the low dealer profit margin on the sale.

Amongst its industry roles, VACC is charged with a responsibility to communicate to government on matters adversely affect operations within industry, and in particular, amongst VACC member businesses. The example above demonstrates that careful attention must also be paid to what types of loss the definition of "*reasonably foreseeable loss*" is intended to cover, in order to avoid a court or tribunal interpreting the commercial intention of the parties in a way which leads to unintended consequences for one, or both parties.

In order to help ameliorate such detrimental outcomes, VACC believes that the inclusion of the term "equitable" within Item (4) in *Subregulation 90(2) Schedule 2 – Warranties against defects (proposal 4) of the EXPOSURE DRAFT*, would impart a need for fairness in the application of consequential loss by courts. This would also assist in minimising the impact and amount of compensation awarded to parties.

VACC therefore strongly advises that the last sentence in Item (4) of Subregulation 90(2) Schedule 2, be amended to include the term "*and equitable*" as follows:

'You are also entitled to be compensated for any other reasonably foreseeable and equitable loss or damage from a failure in the goods or service'.

VACC RECOMMENDATION:

That the design of Item (4) in *Subregulation 90(2) Schedule 2 – Warranties against defects (proposal 4) of the EXPOSURE DRAFT - Competition and Consumer Amendment (Australian Consumer Law Review) Regulations 2018*, which prescribes the new mandatory text for the supply of goods and services, be further amended to include the words "*and equitable*" as follows:

For subparagraph (1) (c) (iii), the text is 'Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to cancel your service contract or be compensated for its reduced value for major failures with the service. You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, we must still rectify the failure in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable and equitable loss or damage from a failure in the goods or service'.