MTAA's response to the Department of The Treasury's Consultation Regulation Impact Statement:

'Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law.'

February 2022

MOTOR TRADES ASSOCIATION OF AUSTRALIA

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1. Australian Automotive Industry in context

The Motor Trades Association of Australia (MTAA) is the peak Australian retail automotive association and represents the interests of its State and Territory Motor Trade Associations and Automotive Chambers of Commerce.

MTAA Members represent more than 95 per cent of the automotive supply chain consisting of many of the 72,521 automotive businesses across Australia[1] who employ over 384,810 Australians and contributed over $39.35 billion or 2.1 per cent to Australia's GDP in 2020.[2] Significant numbers of automotive businesses have informed MTAA they feel unfairly disadvantaged by the Australian Consumer Law (ACL), citing it is biased towards protecting consumers and provides inadequate protection for business (large, medium and small).

MTAA member constituents include automotive retail, service, maintenance, repair, dismantling and recycling businesses who provide essential services to a growing Australian fleet of vehicles (19.8 million as of January 2020).[3] This fleet has rapidly advancing technological systems, power sources and capabilities, including extensive use of electric powered propulsion, computers, sensors, radars and cameras that provide complex vehicle system interdependencies to make vehicles safer, more efficient, and environmentally sustainable.

Such systems can also contribute to necessary software updates, minor manufacturing faults, and sometimes recalls (almost all are voluntary and initiated by vehicle manufacturers); most of which do not adversely affect vehicle safety, environmental efficiency, drivability, or intended purpose. Consequently, MTAA urges Treasury to further consider these complexities when reviewing the ACL and proposing policy changes.

This submission compliments evidence provided by MTAA members, either in consultation hearings conducted by the Treasury Department or in individual submissions provided by MTAA members.

2. Introduction, context and assumptions

The MTAA notes that the purpose of this Consultation Regulatory Impact Statement (RIS) is to canvass the regulatory options under consideration and to determine the relative costs and benefits of those options.

It is noted that the RIS has also been developed with regard to past consultations such as the Legislative and Governance Forum on Consumer Affairs, where it was agreed that the Australian Consumer Law (ACL) was generally beneficial and fit for purpose.[4] The Office of Best Practice Regulation published that RIS consultation.[5]

In MTAA's RIS response, , the term 'Supplier' is substituted with 'dealer' or 'Franchisee' or 'Independent' unless otherwise denoted.

1 Steve Bletsos, MTAA Directions in Australia's Automotive Industry- An Industry Report (2021) 8[2].

2 Ibid 17 [2]-[3].

3 Ibid 8 [5].

4 Office of Best Practice Regulation Decision Regulation Impact Statement – Legislative and Governance Forum on Consumer Affairs (2018) < https://obpr.pmc.gov.au/published-impact-analyses-and-reports/consumer-guarantees> [2].

5 Ibid.

Also, in the context of this RIS response, MTAA has adopted the term 'Manufacturer' to mean the Franchisor, Original Equipment Manufacturer (OEM) ,Importer or Distributor unless otherwise denoted.

MTAA acknowledges the term 'Supplier' is broadly defined in Section 2 of the ACL and:

- It is accepted that a supplier is anyone – including a trader, a retailer or a service provider – who, in trade or commerce, sells, exchanges, leases, hires or provides products or services.
- A manufacturer is a person or business that makes or puts products together or has their name on the products. If the maker does not have an office in Australia (ACL s 7) ,[6] it also includes an importer or distributor.

MTAA has a particular issue with the term distributor in the context of these definitions. There can be, and are, differences between an importer and a distributor of vehicles. But a dealer is not a distributor according to the definition described in the ACL. The Federation can cite numerous examples where the ACL definition of the distributor has been wrongly applied to a new vehicle (be it car, motorcycle, truck or agricultural machinery) franchised dealer.

This concern is core to many complaints and consumer remedies being wrongly apportioned to a franchised new vehicle dealer rather than the manufacturer through an importer or distributor. It is pertinent to this RIS and indemnification discussions.

2.1 Other considerations for this submission

The term 'new motor vehicle' is interspersed throughout the RIS. MTAA has formulated its reply based on this term meaning a new car or demonstrator vehicle purchase and the provision and supply of new automotive parts (OEM or aftermarket).

For this paper, we have not included, nor referred to, ACL issues experienced by car dealers who trade specifically in second-hand (or used) motor vehicles or franchise dealers who deal in second-hand motor vehicles. The RIS appears to seek only specific information about sections of the supply chain (i.e., new vehicles). MTAA could argue that there are also specific, if not identical issues for a new motorcycle, truck or agricultural machinery franchised dealer. It is unclear whether the RIS wishes to discuss these areas.

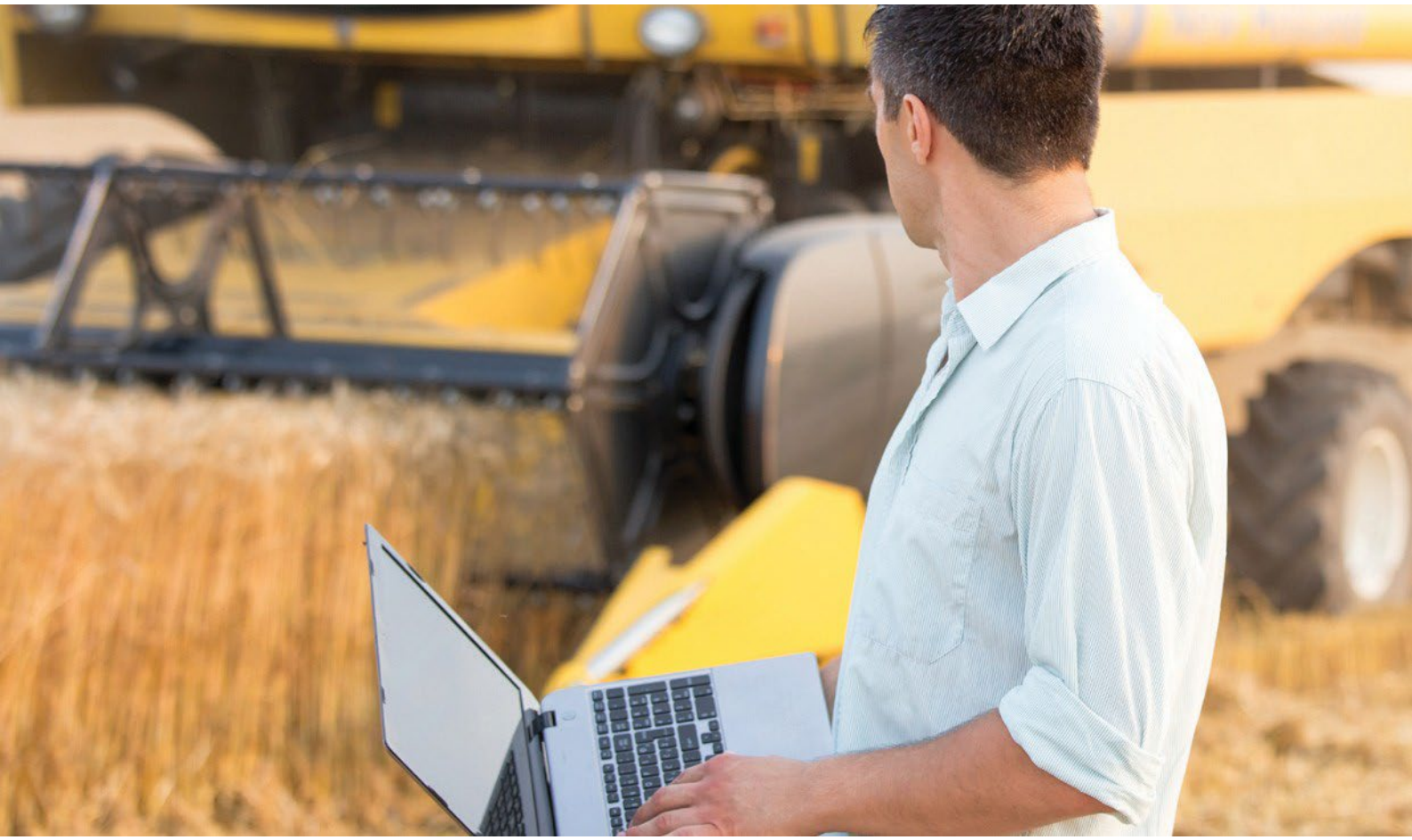
These are essential considerations. MTAA advises the Department that ACL claims are more likely experienced by independent used motor vehicle dealers or franchise dealers' sale of used motor vehicles. These types of claims outweigh the total claims experienced in the new vehicle sector. Nor does the MTAA response delve into the myriad of issues affecting consumers who choose to purchase a used motor vehicle at auction or in the private-to-private market.[7] The sheer volume of those claims come with corresponding increases in consumer misinterpretation and opportunism. There is a different level of manufacturer ease of access to indemnification than for used car traders not of their brand.

With these matters in mind, MTAA respectfully suggests the RIS review team:

- Missed an opportunity to immediately consider the effects of COVID-19 regarding how ACL consumer guarantees have or have not worked in this review.

6 Jeanie Paterson, Corone's Australian Consumer Law (Thomson Reuters Australia, 4th ed, 2019) 471 [11.7]

7 VicRoads transfer data shows that approximately 68% of Victorian vehicle transfers are in the private-to-private market.



- Provided to narrow a scope for the automotive supply chain to adequately capture ACL issues permeating other industries, including used vehicles, motorcycle, farm machinery and parts.
- Provided no scope for industry and consumer groups to focus on the consumer disadvantage when purchasing a motor vehicle privately or through an auction process.

2.2 How MTAA has informed its response

MTAA has informed its response to the RIS, citing data from previous ACL reviews and historical data gleaned from industry and consumers from when the ACL became active. MTAA has utilised surveys of member businesses, particularly those undertaken by MTAA member, the Victorian Automotive Chamber of Commerce (VACC) and the Motor Trade Association of South Australia and Northern Territory (MTA SA/NT)

VACC surveyed 5,500 member businesses to ascertain how consumers use the ACL and how manufacturers and franchisors interact with their supplier network regarding indemnification where the criteria have been met under the ACL guidelines.

Much has changed in the consumer, manufacturer and motor industry retailer behaviour with MTAA of the view significant consumer detriment issues are initiated by a belligerent, and at times, audacious manufacturer sector.[8] Those manufacturer behaviours have often

8 For e.g., Volkswagen emissions scandal.

left the dealership network to be solely accountable to consumers. Multi-franchise dealers advise on different approaches and attitudes to indemnification by different OEMS. VACC and MTA SA/NT surveyed its members in January 2022 to ascertain the most current trends being experienced by industry participants from the automotive retail and repair sector.

Advice from multi franchise dealership group on OEM approaches to indemnity

A car dealership across multiple manufacturers notes when seeking indemnification there are different approaches by each OEM. Some are proactive through the indemnification process and will work with the dealer along the remedy process, whereas others will take a hands off approach and notify the dealer to undertake the warranty repairs and contact the OEM after the remedy has been finalised. The latter example for dealers presents a large risk where under ACL the dealer will undertake the repairs or replacement in good faith, to have the OEM argue the indemnification for the fault. This is owing to each OEM having a different interpretation of ACL and indemnification responsibilities.

The RIS references the term 'gaming' to describe opportunistic consumer behaviour when citing provisions of the ACL.[9] MTAA does not agree to the term 'gaming' and respectfully suggests the term appears a concession by the Government of unacceptable consumer behaviour. The term shows that a consumer fraud issue is somehow a game simultaneously downplaying the time, stress and resource-intensive costs and business impacts for industry participants who are forced to defend such vexatious claims. Often these matters are more centred on buyer remorse or an intent to gain an advantage by deception. Given the increased scrutiny and tightening of regulations for elements of the automotive supply chain by the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC), and the Financial Services Royal Commission, it could

9 Department of The Treasury Consultation Regulation Impact Statement 'Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law'(2021) 33 [1-2].

be argued there has not been a corresponding examination of consumer behaviour and conduct in environments now rich in information sources, social media, news and 'fake news', opinions, reviews, applications and services. Such conduct and behaviours are heightened in issues where the consumer has not met their obligations. Those obligations include consumers not meeting maintenance requirements for a high technology, complex product or misusing or modifying the product beyond manufacturer tolerances and requirements. The current trend has seen consumers who cannot pair their iPhone with their vehicle as apportioning the issue solely to the dealer and seeking restitution from the dealer.

MTAA also respectfully disagrees with the RIS statement that a dealer would deliberately deviate from their ACL obligations if that remedy amounted to a full refund for a vehicle. To say as such is simply incorrect and indicates a level of bias.

In a market of over 1 million new vehicles sold annually, 300 000 retailed in Victoria alone,[10] and over four times that amount in the private-to-private market for used vehicles,[11] MTAA urges the Government to cease making such statements. MTAA baulks at such presumptions and is angered when complaint databases to Administrative Appeals Tribunals, the ACCC, and others continually illustrate historical and incorrect perceptions. MTAA is not saying the entire industry is without reproach, but its members and the industry itself do not tolerate such conduct or behaviour and will, and have, called it out when known

MTAA can cite numerous examples where a dealer has gone 'above and beyond' ACL obligations, including instances when a manufacturer has refused to meet their obligation or inadequately compensated a dealer for the rectification work or remedy.

Multi franchise dealer view on manufacturer approach

When it comes to manufacturers indemnifying faulty vehicles, one dealer has experienced it is easier to seek a remedy from an OEM with a longer warranty greater than five years than one with a warranty shorter than this level.

What is also not recognised is the significant increases in regulation, scrutiny, requirements and investments in new car franchising and automotive generally. The investments are enormous and dealers trade in an unpredictable and fluctuating market with much at stake including family homes and assets. Factors that make not meeting ACL obligations simply not an option.

Claims can at times, on the first examination, be treated with scepticism. Where a vehicle is presented in a state of disrepair, or where a claim is for a repair not in any way related to a previous service and potential misuse is evident, dealers and repairers must be able to challenge such claims without fear of additional reprisal. Unfortunately, many dealers will accede to spurious consumer complaints claims citing the ACL as the resources to refute the claim are intensive. Common sense, and good practice, dictate a dealer would ascertain the veracity of the root cause of any consumer claim under the ACL before providing an instantaneous, no questions asked, complete vehicle or service refund. MTAA will provide evidence in this response of examples of spurious consumer claims and highlight how such claims are at times enabled by organisations representing consumers.[12]

10 VFACTS December 2021.

11 VicRoads transfer data shows that approximately 68% of Victorian vehicle transfers are in the private-to-private market.

12 In 2014 a Victorian LMCT was forced to defend a Supreme Court appeal from a consumer who was not successful in VCAT under ACL conditions when seeking a full refund for the purchase of an $8,000 car. The Supreme Court appeal was to be funded by a consumer organisation using taxpayer money. The LMCTcould not afford to pay $10,000 per day anticipated court costs for Supreme Court action, so access to natural justice for the LMCT was denied.

3. Dealers and the impact of COVID-19 on ACL claims

MTAA disagrees with the RIS intent to not consider COVID-19 cancellations and the role of the consumer guarantees in those circumstances for this review. It is noted that Consumer Senior Officials are separately considering how the ACL has operated in response to consumer issues that have arisen during the COVID-19 pandemic.[13]

MTAA agrees that there are always instances of consumers looking to cancel a purchase or invoke their ACL rights for genuine, valid reasons. MTAA argues that the issue of consumers mischievously using COVID-19 related reasons for either the cancellation of an order, or purchase, or to invoke their rights under the ACL, is a genuine issue. This issue puts unnecessary pressure on a dealer network currently facing diabolical supply chain issues and staff shortages.

In September 2020, it was reported that consumer-facing tribunals such as the Victorian Civil Administrative Appeals Tribunal (VCAT) experienced difficulty in keeping to an

13 Department of The Treasury, Consultation Regulation Impact Statement 'Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law (2021) 2[2].

acceptable hearing schedule. COVID-19 has interrupted how all businesses operate, and VCAT is not immune to such interruption. Organisations dealing with consumer claims do not need work schedules overrun by consumer claims where mediation could have been an alternative option, or where a screening process to identify vexatious or opportunistic claims is not in place.

The COVID-19 pandemic impacted the automotive retail industry as it did to all sectors of the economy, with subtle differences. However, many automotive retail businesses could not access Federal and State Government relief measures due to turnover thresholds. Thresholds perpetrate another misnomer that turnover equals profit. For the benefit of the RIS reviewer, MTAA can advise that a 2019 Deloitte Profit Focus report reveals that dealer net profitability for Q2 of 2019 as a percentage of sales was 1.2 per cent. That average profit in Q1 was 1.0 per cent. Deloitte in March 2020 further advised that dealer profitability percentage for both 2018 and 2019 was benchmarked nationally at 0.90 per cent.[14]

In a series of communications from April 2020,VACC expressed concern to the Australian Government that dealers would be impacted by purchasers of new cars who may be suffering from buyer's remorse as a result of issues connected to COVID-19 lockdowns. It was VACC's concerned view that consumers may use the consumer guarantees under ACL to make spurious claims, seeking full or partial refunds or a return of a product.[15] Those concerns were prophetic. At that time VACC requested that consumer complaints citing the ACL should be vetted by either the ACCC or CAV to determine whether they are vexatious and supported, or not, by those organisations,[16] thus saving the legal system the burden of hearing such claims.

4. PART A: Receiving remedies

MTAA provides specific responses to the RIS questions in the following sections.

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?

MTAA does not believe consumers cannot access consumer guarantee remedies when entitled. MTAA does not support any industry participant who does not follow the law or is unwilling to provide consumers with the remedies they are entitled to.

MTAA suggests sufficient consumer awareness materials are available at the automotive retailing point of sale, on the Internet of Things, and other sources. However, MTAA believes consumer awareness and education is a never-ending and constant process of improvement and renewal.

MTAA suggests that due to electronic information access to countless sources of information and materials, today's consumers are generally more informed, more aware, and across rights and entitlements. MTAA suggests it is also for this reason that some vexatious and spurious claims are attempted and, in many cases, succeed.

However, MTAA cannot provide any relevant information or data that can help estimate the extent to which consumers cannot access consumer guarantee remedies when entitled.

14 Deloitte e- Focus (2019).

15 VACC, The impact of COVID-19 on Victorian Automobile Dealer Association (VADA) dealership businesses, 7[2-4]

16 Ibid.

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.

Example 1

Leonard v Mitsubishi Motors Australia

MTAA cites the Queensland Civil and Administrative Tribunal (QCAT) of Leonard v Mitsubishi Motors Australia,[17] a case where the concepts of 'durability' and 'rejection period' under the ACL were interpreted to be too uncertain and must be clarified by new, clear regulations. In this case, from the time of purchase to the time of QCAT deliberations, a period of 10 years had elapsed. The case also highlighted the limitation periods when it comes to bringing actions against manufacturers of goods. The three-year limitation period only begins when the consumer first becomes aware, or reasonably ought to have become aware, that a guarantee has not been complied with.

Example 2

Mitsubishi Motors Australia Ltd v Begovic [18]

Mitsubishi Motors Australia Limited (MMAL), and its franchisee dealer, were unsuccessful in their Supreme Court appeal for "misleading and deceptive" claims on fuel consumption. The court upheld a previous VCAT decision that the fuel consumption figures were misleading or deceptive in contravention of section 18 of the ACL.

The court held that MMAL (and its dealer) had contravened section 18 of the ACL by engaging in misleading or deceptive conduct. VCAT originally held that there was likely to be an indemnity arrangement between the dealer and Mitsubishi. If this were not the case, the selling dealer would not be prevented from claiming against MMAL.

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?

Dealer comments on 'gaming' by consumers

Fraudulent claims are few in number, but when you get one, they are very time consuming and costly in terms of a significant waste of management time to defend. Quite often we offer something to just get them out of our face.

MTAA has evidence of where consumers have used the provisions of the ACL because of buyer's remorse.

Example 3

An owner returned a new high value, high-performance sports car several times to the dealer, each time claiming the car was not performing to manufacturer specifications and had numerous issues regarding the engine and gearbox.

The gearbox was replaced several times and the entire engine once. Nothing seemed out of the ordinary, but technicians concerned with the frequent returns and apparent ongoing problems and lack of explanation, delved further into engine and system diagnostics with the manufacturer.

17 (2021) QCAT 35.

18 [2021] VSC 252.

As part of diagnostic investigations and providing remedies, the dealer inquired on vehicle use, weather conditions, fuel used, driving style etc. Concerning trends were identified, including specific days where the car appeared to endure the sustained high revolutions, fuel use, braking dynamics and other characteristics.

When presented with this information and that the cars recorded activity matched public race days at a local track, the owner admitted to racing the vehicle – a use expressly prohibited and not covered by the manufacturer.

In the VACC survey, Industry participants noted that consumers who modify vehicles are prevalent in many claims. This is particularly relevant in the agriculture sector, where farmers and other agriculture industries will modify a vehicle (usually done by the farmer) to suit a particular need, and then look to the dealer for compensation because of a malfunction connected to the modification.

Example 4

Public vexatious slandering of automotive retail businesses, and individual professionals are sometimes extraordinary, resource-intensive and morale-sapping.

In this example, it was simple enough for both parties to ascertain that a tyre at 3.7mm and deduct 1.6mm was appropriate for the service advisor to offer a replacement. The consumer argued that offering to replace tyres on a 5-year-old, lightly driven Mercedes Benz constituted bad or deceptive conduct.

In this example, the customer made litigious threats and received a 'goodwill' adjustment of $686. The dealer acceded to the threat as the resources taken to defend their position were considerable and that the consumer was litigious in nature.

This compensation was granted after owning the car for five years and having travelled more than 11,000 km. This type of use of the ACL or its consumer guarantees should not be permitted.

Example 5

The following example illustrates failure on the part of the consumer to meet their obligations to perform proper maintenance.

A demonstrator Mercedes Benz was driven for six months after delivery and never serviced by the consumer, despite travelling over 20,000 km in that period.

The vehicle had never failed, was of acceptable quality and was purchased from the franchise dealer as a demonstrator model. At the point of delivery, the consumer conducted a personal inspection with the franchise staff, validated by the customer signing documents to the effect all obligations had been provided and that the vehicle was in new condition with no vehicle damage evident.

Some six months later the consumer, via legal representation, demanded a full refund , to keep the vehicle , plus damages for a vehicle alleged to have body damage after six months and 20,000km with no service

Correspondence from the consumer legal representative requested:

1. *'You pay to my client the sum of $37,000.00 in full and final settlement, and my client retains possession and ownership of the vehicle '; or*
2. *'My client returns the vehicle to your premises upon receipt of $75,000.00 in full and final settlement'.*

This example typifies the impact of buyer remorse on new car dealers.

Example 6

Elder v Hyundai Motor Co Australia Pty Ltd (Civil Claims).[19]

This example illustrates failure on behalf of the consumer to meet their obligations to perform proper maintenance. VCAT found that applicants who owned the vehicle and that had driven over 200,000km since purchasing it new in 2012, and was never serviced, should mitigate their losses when maintaining a vehicle.

The applicant had claimed $82,543 in damages for an alleged breach under s 54 of the ACL.

Example 7

A consumer who purchased a new Mitsubishi Eclipse failed to agree to the year of manufacturer stamped on the vehicle, as recorded correctly by the OEM, and recorded correctly by VicRoads. The consumer proceeded to harass the dealership for two years for a full refund, plus costs, citing ACL and other legislation.

The consumer complaint was rejected by the Australian Financial Complaints Authority (AFCA), VicRoads, CAV and VCAT. The cost for defending the claim for the dealer was estimated to be over $50,000.

Example 8

A consumer takes their 1-year-old SsangYong Rexton to their local dealership to have its first service and a tow bar fitted.

While at the dealership, the vehicle sustained minor bumper bar damage caused by a technician when reversing the vehicle. The dealer advised the consumer of the incident with the suggested remedy that the best way forward was for the dealer to provide and fit a new bumper bar at no cost to the consumer or need for the consumer to claim on their own insurance. The dealer also offered a courtesy car for one day whilst the new bumper bar was to be fitted.

The consumer rejected the proposed remedy and proceeded to claim for an entire vehicle refund under the ACL, a further demand of $5,000 was presented for inconvenience and the consumer also sought to have the credit request removed from Equifax with the promise to include 'A Current Affair' in the issue.

Example 9

A customer purchases a 2013 Honda Civic as a new vehicle from the Honda dealership. The Honda Civic developed a minor oil leak after two years and 20,000km after purchase. The Honda had never been serviced in the period of ownership. The dealership offers a loan car, at no cost to the consumer, while the vehicle is in the Honda workshop for diagnosis and repair under the manufacturer warranty.

The consumer rejects this remedy and proceeds to hire a vehicle. The consumer then instigates VCAT action under s 54 of the ACL and seeks consequential losses.

Before the VCAT case, the dealer offered to purchase the vehicle for $2,000 more than the consumer initially purchased the vehicle, but the consumer rejected this.

Independent mechanical repair perspectives

Independent mechanical repairers also often find themselves caught in the middle of a consumer guarantee claim where a defective replacement part is found, or alleged, to be the cause.

19 [2017] VCAT 2120.

Advice from an independent South Australian repairer

A repairer received a second-hand part from a supplier covered under a guarantee. The part was deemed to be faulty, and a replacement was provided, however the supplier did not cover labour costs. A similar story occurred with an OEM part where the replacement part was faulty and the OEM would not cover the labour on the second installation.

The same business used another second hand part to fix a vehicle, and offered a discount on the rework needed to ensure the part was appropriate for the vehicle. The part supplier argued the cost of the labour and offered a fee that was half of the already discounted rate

In the following example, and many like it, a repairer will be forced to provide a remedy under ACL, without ever receiving compensation from the supplier or manufacturer of the defective part.

In some situations, after tense negotiations, a manufacturer may compensate the repairer with another replacement part or credit note; however, compensation for consequential loss such as the labour involved in replacing the part, or other remedy costs, are never considered.

Labour costs can quickly escalate into thousands of dollars, particularly with modern vehicles where recalibration is a factor. Such services often cost more in terms of time andlabour than the component.

Similarly, where consumer behaviour or misuse has contributed to extensive damage caused by a defective part, a repairer seeking a remedy from a supplier/manufacturer can be challenging. Most automotive replacement parts are imported, and there can be long delays before any form of a remedy is provided. These examples occur daily, including when a defective part is sent back to the original manufacturer for assessment. In some cases, the manufacturer may find that poor workmanship has caused the defect, leading to a warranty claim being rejected.

Section 274 of the ACL provides, where a supplier is liable to a consumer for breach of consumer guarantees, that the supplier has a right of indemnity against the manufacturer to recover its losses, provided that the consumer guarantee has been breached in one of the following ways:

- s54 acceptable quality
- s55 fitness for any disclosed purpose
- s56 supply of goods by description

S (3) provides that the supplier may, concerning the manufacturer's liability to indemnify the supplier, commence an action against the manufacturer in a court of competent jurisdiction for such legal or equitable relief as the supplier could have obtained if that liability had arisen under a contract of indemnity made between them.

While these protections offer some relief for small businesses, the high costs of seeking adequate remedy through the courts can be a barrier that may lead to a business accepting liability and paying out a consumer guarantee claim for no fault of their own making. It is not viable for small businesses to continue to provide consumer remedies in these situations without adequate redress from the manufacturer.

One of the biggest issues faced by parts covered under warranty is the lack of labour paid as a part of the indemnification. This is true for both parts direct from an OEM and second-hand reconditioned parts under warranty. There needs to be strengthened rules to clearly define labour is a part of the cost of replace and repair to reduce the impact to repair businesses keeping large costs on their books.

Member feedback was also consistent that any part or vehicle that is deemed to have a fault (either major or minor) the costs incurred by that supplier to remedy the fault should be revenue neutral if the fault is with the manufacturer. All warranties and indemnification should be fair and reasonable and not put the supplier in the position of loss due to the fault of another party.

Repairer case example

A repairer has fitted a radiator to a vehicle driven to Queensland from a southern state. The radiator has failed en route and caused considerable damage to the engine.

The consumer subsequently sought remedy from the repairer.

The repairer has submitted a warranty claim to the supplier, which is denied based on the supplier's lack of involvement in all aspects, including the repair, transportation and driver obligations.

The inspection report provided to the repairer from the supplier clearly describes a manufacturing fault and a shared responsibility by the vehicle driver due to ignoring warning

signs, (i.e., temperature gauge warning lights). On further investigation, the repairer confirmed that no warning lights were illuminated at the time.

The supplier has accepted liability for the faulty radiator, however, has denied responsibility for the damage caused to the engine and transportation costs of $11,000.

The explanation provided by the supplier is that the driver should have taken preemptive measures to avoid further damages to the vehicle.

The result is that the repairer was confronted with an aggrieved consumer and had to pay for damages and towing, for what was originally a $300 job. The consumer was also inconvenienced as they were without their vehicle for six months while investigations were carried out for the cause of the defective part.

Ultimately, the repairer was forced to lodge an insurance claim to recoup a portion of the losses resulting in ongoing premium increases and issues with obtaining insurance cover.

(Please see attached Appendix A, B and C).

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.

MTAA suggests a depreciation deduction be factored in determining a refund amount.

Factors that must be considered in determining the depreciated value include appropriate wear and tear, kilometres travelled, vehicle use (per its design and function), adherence to maintenance schedules and other owners/user obligations and overall vehicle condition. Professional experts should be engaged to assist in determining these factors as part of a mediation process.

This is analogous with the findings in Peters v Panasonic Australia Pty Ltd (Civil Claims).[20] VCAT considered the claim that a fault in a television constituted a failure to comply with the guarantee as to acceptable quality. VCAT considered that the life of the television in question was eight years and that the rejection period for the good had passed. The defect did not become apparent until almost a third of the life of the television had passed. On this basis, the tribunal reduced the applicant's damages to consider the benefit the applicant had received from the television for the years that it was in working condition.[21]

A mediation, including determining depreciation and refunds, if appropriate, should be available to prevent unnecessary applications through administrative appeals tribunals.

Any refund must be calculated on the current market value and the vehicle's condition regarding post-purchase increases. Similarly, non-refundable items to be paid by the supplier or manufacturer must include vehicle registration, Luxury Car Tax, and stamp duty. Those duties and taxes are legislated for the dealer to collect on behalf of the respective state and federal government(s) with avenues available through those agencies for the consumers to apply for a pro-rata refund

20 [2014] VCAT 1038.

21 Allens Linklaters, Allens submission to the Australian Consumer Law Review (2016) 15, [9.2].

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

MTAA will address this issue in response to Part B, where manufacturer and supplier remedies can significantly impact dealership businesses. MTAA also refers to the above example for independent mechanical repair.

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

While the MTAA understands there may be some merit in maintaining the status quo, as the environment is known, they make the point that this would not appear to appropriately cater for the demonstrated need for increased clarity and resolution to matters which prompted the RIS in the first place.

In terms of benefits, these will only be realised with adequate resources to implement, increase awareness, educate, administer, monitor and enforce. MTAA has concerns these requirements may not be met given the existing constraints on regulators and government cost reduction strategies.

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

MTAA believes this question has been answered with other responses throughout this submission. In terms of benefits, these will only be realised with adequate resources to increase awareness, educate, administer, monitor and enforce. MTAA has concerns these

requirements may not be met given the existing constraints on regulators and government cost reduction strategies.

But it is important to note that there is a difference between what OEMs see as refundable or replaceable and what the ACL and consumers perceive. The suppliers (dealers) are put in a difficult position with this difference in perception of guarantees and indemnification. The ACL is sufficient as it is and has improved over recent years, however, the dealer must make decisions considering legal, reputation, and fairness with the knowledge that there is a real risk the OEM will not support their decision to replace, repair or refund.

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.

MTAA respectfully suggests this question is fraught with potential problems. It will likely garner a myriad of responses dependent on personal and group perspectives, shared or individual experiences, and weight given to these in responses.

MTAA recommends using existing penalty regimes that already deter breaches of other ACL elements, including Industry Codes, etc.

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.

Again, MTAA would suggest an existing regime. This may include a capacity to provide a warning, a formal infringement notice, and a full penalty as a graduated response. Such a mechanism allows stakeholders to increase awareness, implement compliance checks, educate necessary people, and implement practices to meet obligations.

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?

MTAA is not able to respond to this question, other than to ensure any implementation is fit for purpose, consistent with other processes and requirements, and is not burdensome. There is already limited capacity, if any, for small businesses to absorb further regulatory or business compliance requirements.

For consumers

While understanding the intent of direct consumer questions and MTAA would not have responded, there is a significant concern with the wording of the RIS questions. MTAA acknowledges the necessity to group things and make them easier and simpler to understand. However, this can inadvertently create problems leading to poor policy and regulatory outcomes.

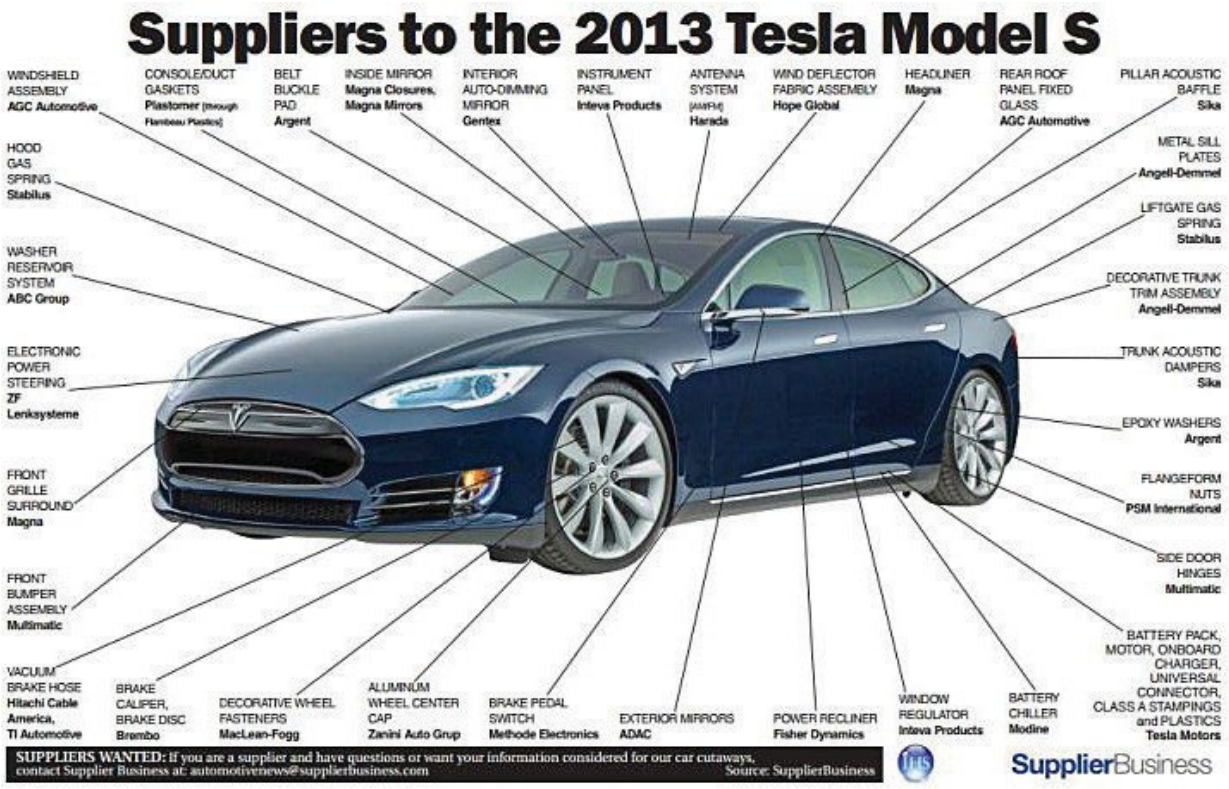
MTAA, its members and businesses constituents have long railed against classifying expensive, complex, non-passive, high technology unique products such as motor vehicles in the same classification as white goods, computers or other 'high-value' electronic goods.

It may appear trite but describing motor vehicles in the same vein as white goods is not a realistic comparison. Consumers mistakenly believe a refund on the entire vehicle is the only acceptable remedy because they view the remedy as they might with a television, computer or refrigerator.

To demonstrate the complexities of motor vehicle production, diagram 1 below depicts the range of suppliers and components required for a 2013 Tesla Model S vehicle. [22]

The suppliers will differ from component part, brand to brand and model to model. There may be suppliers to numerous brands, such as Bosch, while others are exclusive to a particular brand or model. MTAA makes the point that remedies for a component, or part failure, do not necessitate a refund for the entire vehicle as to the 'preferred remedy'. Grouping motor vehicles with white goods and describing both as 'high value' is misleading. This is a significant issue being faced when applying remedies. MTAA argues there needs to be a common-sense approach to applications and claims. With the technology, complexity, safety, and security, multiple components could fail and require replacement. This does not dictate that the entire product requires remedy.

Diagram 1 – Suppliers to the 2013 Tesla Model S



Source: Automotivenews@supplierbusiness.com

For businesses

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

See above

12. 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?

MTAA advises that this question has been primarily dealt with in other responses.

22 Automotivenews@supplierbusiness.com

13. 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?

MTAA advises that this question has been primarily dealt with in other responses.

5. PART B: Supplier indemnification

16. Suppliers: to what extent are you able to enforce your indemnification rights?

The extent of motor vehicle dealers being able to enforce their indemnification rights are highlighted by the VACC survey as being primarily limited to the manufacturer not assisting with what is determined as a minor issue.

Dealers advise that goodwill gestures overcome many refund product complaints by the dealership, typically in the form of a complimentary vehicle service. Rarely does the manufacturer contribute to these types of remedies. Dealers advise that even if the consumer calls the manufacturer; they are usually advised to "speak to their selling dealer". When the issue cannot be resolved, consumers usually lodge paperwork against the dealership at administrative appeals tribunals or similar avenues without creating joined applications, including the manufacturer. Dealers, therefore, undertake all the lobbying with the manufacturer to receive any level of assistance and secure an acceptable and amicable resolution. Such a resolution may take weeks or even months. Dealers are then forced to forgo all margin on any solution of a replacement vehicle to the customer while the manufacturer contributes proportionally less to the solution.

17. What are the barriers to seeking indemnification?

MTAA contends that the statutory indemnity against manufacturers available to dealers under s 274 of the ACL is not as clear. This section of the ACL will only be exercised if a manufacturer has been found to have breached one of the consumer guarantees. It would be preferable that the manufacturer be more expedient and address what is inevitable and assist the dealer in upholding the consumer ACL rights without the need for court action. With a very high bar and invariably necessitating court action, MTAA suggests dealers and consumers avoid it.

Unscrupulous manufacturers may use the current s 274 as a ploy not to reimburse their dealers. In recall work, manufacturers dictate the hourly rates for labour and the time for recallwork to be performed that often does not reflect actual time to perform the work or the actual cost of labour.

As most claims are usually settled before court or tribunal, dealers find themselves in an invidious position attempting to negotiate reimbursement or indemnification from their manufacturer. Some dealers have expressed a reluctance to co-join a manufacturer to action and often rely on the tribunal to issue such a direction.

MTAA suggests that reform to the ACL be undertaken to improve the dealer's indemnity and allow dealers who decide to provide a consumer remedy expediently under the ACL. dealers, and consumers who choose to bypass the dealer and deal directly with the manufacturer, should not be required to have to go through the lengthy process of manufacturer investigation before such dealer indemnification is granted. MTAA is aware of manufacturers who send overseas-based warranty audit teams to Australian dealerships to ensure that dealers follow the strict franchisor terms and conditions as they apply to complete warranty or service repair in their respective franchise agreements.

18. Has your business been subject to retribution when you have sought indemnification? If yes, what form did it take?

MTAA members report no evidence of manufacturers seeking retribution on the dealer when seeking indemnification. However, this is tempered with many dealers commenting that dealers are expected to contribute to any refund and will not likely receive compensation from manufacturers if the dealer incurs legal fees.

Comments from dealer

Very hard as we need to include manufacturer in the discussions and ultimately bound by what they say, even if we disagree.

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?

MTAA has intelligence that contained within dealer franchise agreements are terms that dictate specific franchisor instructions the dealer must follow regarding how to handle a product or service defect when raised by a consumer.

MTAA response to the Department of The Treasury Consultation Regulation Impact Statement 'Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law.'

Whilst the ACL gives suppliers an explicit right of indemnity from the manufacturer to recover costs incurred for providing a remedy to the consumer for a failure to meet a consumer guarantee where the relevant failure was the manufacturer's fault; manufacturers will often exert control over matters such as:

a. whether a reported problem is warrantable in the first instance.
b. the time allowed to affect a remedy; and
c. the level of financial reimbursement a dealer may receive.

An example of this is contained with the New Holland (Agricultural Machinery) dealer agreement, where it is stated under the general warranty provision that the franchisor will only indemnify the dealer against losses if:

- The dealer has not taken any action that may compromise the franchisor's position.
- The dealer has rendered what the franchisor would deem to be prompt and courteous service. How this can truly be measured is not documented anywhere within the agreement. [23]
- The dealer has advised the franchisor within seven days of the issue.[24]

Further, in a variation to a Dealer Agreement from 2017, FCA Australia Pty Ltd has terms contained within its contract variation that announce that FCA Australia would not indemnify a dealer who fails to comply with any of the terms contained within a certain clause within that document.[25] This includes consumer complaints that cite the ACL. It is implied or stated within those agreements that a dealer may lose their indemnity if they do not follow the procedure mandated in the franchise agreement.

Many franchisors will take control of the administration of a complaint and handle it in a manner that suits the franchisor.[26] The brand damage for the dealer is immense, whilst the consumer can have their remedy prolonged or challenged.

The dealer is constantly under pressure to ensure the franchisor controls any ACL or legal type claim. The imbalance of franchise agreements dictates that dealers will always be subservient to the franchisor.

20. Please provide any relevant information or data you have that quantifies the proportion of suppliers that do not seek indemnification?

MTAA data reflects that 80 per cent of its members obtain indemnity from their manufacturer or franchisor for any claim made upon it under the ACL.[27]

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.

MTAA members report varying degrees of success in obtaining an indemnity from their manufacturer or franchisor. However, while dealers do not necessarily fear the process or retribution for this aspect of a franchisor/franchisee relationship, dealer frustrations arise from selective approaches by some manufacturers as to how much they will contribute to the indemnity and an insistence that dealers must also contribute.

23 CNH Industrial Australia Pty Ltd Sales and Service Agreement. (Available upon request).
24 Similarly, Yamaha Dealer Agreement (2017) 30(21.4.(b)).
25 FCA Australia Pty Ltd Dealer Agreement (2017) 25[22]. (Available upon request).
26 FCA Australia Pty Ltd Dealer Agreement (2017) 25[23]. (Available upon request).
27 VACC survey data January 2022.

No members report a fear of retribution from the manufacturer or franchisor when seeking indemnification.

Comments from dealers re minor request for indemnity

Many members are of the view 'that on minor issues many manufacturers are reluctant to become involved, they see it as our cost to be their dealer. As the issues get more serious, they become increasingly co-operative.

22. Have you sought indemnification from manufacturers under the existing law? If not, please provide details.

Not applicable

23. Have you experienced difficulties getting indemnified from manufacturers? If so, please provide details.

As highlighted above, dealers and independent workshops sometimes experience issues with manufacturers over indemnification.

Comments from independent workshop with regards to part suppliers

Similarity in the parts supply sector, parts suppliers will assist by agreement, but that it tends to depend on the relationship and business value between the parties.

24. Would your inclination to seek an indemnification change if a civil prohibition was introduced?

No.

25. Would your approach to providing consumer guarantee remedies to consumers change if a civil prohibition was introduced? If so, how?

MTAA members believe that supplier indemnification should be foremost in manufacturers' thinking and offer partial refunds for breach of the consumer guarantees in appropriate circumstances.

Consumers may seek ACL supplier remedies for a breach of any of the consumer guarantees, regardless of whether the fault resulted from a manufacturing issue or not. The Government must make it abundantly clear in its communications that the ACL provides suppliers with an explicit right of indemnity from the manufacturer to recover costs. Costs including those incurred for providing a remedy to the consumer for a failure to meet a consumer guarantee, where the relevant failure was the manufacturer's fault, not the suppliers. If such a proclamation were made and supported by immediate, public punitive action against manufacturers or franchisors be taken, then MTAA would consider supporting such a civil prohibition.

The current regime requires suppliers to grant full refunds to consumers for product defects, notwithstanding those consumers, in almost all automotive related cases, have usedand enjoyed the product for a period before the defect appeared.

For retailers

26. Have you experienced retribution from a manufacturer after seeking indemnification? If so, please provide details.

No

27. Would your inclination to seek indemnification change if a civil prohibition on retaliation was introduced?

No

28. Would your approach to providing consumer guarantees remedies to consumers change if a civil prohibition on retribution was introduced? If so, how?

No. It is the view of MTAA that consumers have every right to exercise their rights under the ACL.

For manufacturers

Not Applicable

Additional Information

MTAA draws attention to Allen Linklaters Submission28 to the ACL Review of 2017 for other critical perspectives that MTAA shares as concerns relevant to this response, including the limitation of rejection periods and definitions of major versus minor failures.

- Section 262(2) defines the rejection period as follows:

  9.10 The rejection period for goods is the period from the time of the supply of goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee referred to in section 259(1)(b) to become apparent having regard to:

  - the type of goods.
  - the use to which a consumer is likely to put them; and
  - the length of time for which it is reasonable for them to be put before such a failure has become apparent
  - the concept of 'major failure' is excessively broad and arguably leaves little room for the operation of the remedy provisions regarding non-major failures.
  - the current refund regime has the potential to put consumers in a better position than they would have been if there had been no breach of the consumer guarantees.
  - the prescribed requirements for warranties against defects are excessively broad and the prescribed text requirements are liable to mislead consumers; and
  - it should be clarified that suppliers may consult with manufacturers about product defects in the course of responding to customer complaints.

28 Allens Linklaters (n 21).

When a consumer finds that they have purchased a faulty good, they will only have a right to return the good on the basis that it is not of acceptable quality if the good is not 'durable' and the 'rejection period' has not ended. A consumer's right to reject goods on the basis that other guarantees have been breached also depends on whether the product fails within the 'rejection period'. Consumers and suppliers are required to grapple with these concepts on a daily basis, but they are inherently uncertain.

The definition of 'major failure' is excessively broad

The definition of 'major failure' is excessively broad and lacks precision. As currently drafted, it has the potential to capture any issue with a good and arguably leaves little role to play for the provisions regarding non-major failures. It is possible that some may argue that no reasonable consumer would acquire a good knowing that it had a fault, no matter how minor. Sub-section 260(a) is drafted in such broad terms that it arguably subsumes most, if not all, of the other situations in which a failure could be considered a major failure. As a result, even minor faults which do not materially affect the performance or capabilities of a product may be elevated to a 'major failure' irrespective of whether the failure can be easily remedied within a reasonable time.

Manufacturers are best placed to determine whether the returned product is faulty and, if it is, the nature of the fault, including whether it is a major or non-major failure. Important consequences flow from allowing a supplier to consult with a manufacturer about a fault, namely:

- *First, it provides greater certainty that the supplier offers the appropriate remedy to a customer and will be reimbursed by the manufacturer for the costs of offering that remedy. This remedy will depend on whether the fault with the goods is a 'major' or 'non-major' failure. It is often the manufacturer, not the supplier, that is best placed to assess whether a failure is major or non-major.*
- *Second, consultation between supplier and manufacturer alleviates the risks of disputes arising between manufacturers and suppliers seeking indemnification as to whether faults are minor or major. If suppliers were not able to consult manufacturers about alleged faults, the supplier may provide a remedy to the consumer and then seek to be indemnified by the manufacturer, only to be told by the manufacturer that the product was not faulty, that the fault was a result of the consumer's conduct, or that the product could have been repaired differently or in a less costly manner (potentially leading to a dispute about the extent of indemnification to which the supplier is entitled). As it is arguable that the manufacturer must indemnify the supplier for whatever remedy is given, (assuming the supplier is liable to provide remedies to the consumer), there is a real risk of suppliers having adverse incentives to grant remedies to consumers on the basis that a failure is a major failure where the facts do not support such a response. This is also important since a manufacturer is expected to indemnify a supplier and the costs of doing so are therefore greater for a major fault than a minor fault. We recommend that section 274 or ACCC guidelines be amended to confirm that suppliers can consult with manufacturers in the course of responding to a consumer complaint.*[29]

29 Allens Linklaters (n 21) 14-18.

6. Conclusion and Recommendations

Part A Receiving Remedies and Options

As discussed earlier in this submission, MTAA does not believe consumers cannot access consumer guarantee remedies when entitled and suggests sufficient consumer awareness materials are available at the automotive retailing point of sale, on the Internet of Things, and other sources. However, MTAA believes consumer awareness and education is a never-ending and constant process of improvement and renewal.
Option 3 is rejected. MTAA is concerned about the 'benefits' assumed in the Consultation Paper, including:

- *'More consumers likely to receive the remedies they are entitled to'.*
- *'Consumers likely to spend less time and resources pursuing remedies' and*
- *'Consumers may be more confident about purchasing goods covered by the consumer guarantees.*

MTAA suggests that for highly complex, technology-rich, legislated, and regulated motor vehicle products; with thousands of parts and components, 100 million-plus lines of computer code, systems and interdependent sub-systems, the remedy of refund and or replacement should be graduated. Refund/replacement should not be the first (and by consequence of well-meaning laws and regulations) the only remedy consumers seek.

Further refinements must be made to definitions and provisions in the ACL reflecting the motor vehicle is unlike other products it is continually grouped with. It must include improvements to major versus minor fault definitions related to motor vehicles.

The application of Option 3 MTAA respectfully suggests is an overarching solution that fails to reflect adequately and appropriately that motor vehicles are NOT white goods computers or electronics such as TVs etc.

Recommendation

1. MTAA supports Option 1 to maintain the Status Quo.

2. MTAA recognises there may be potential benefits of Option 2 and supports ongoing awareness and communication campaigns, particularly where the rules and requirements change. However, any voluntary awareness and education campaign resulting from this consultation must be specific to manufacturers/suppliers/consumers and other necessary stakeholders, and inclusive of the considerations of matters raised in this submission. Monitoring is required for options 1 and 2.

3. MTAA its members and their business constituents do not support Option 3.

4. Further refinements must be made to definitions and provisions in the ACL reflecting the unique product nature of the motor vehicle. It must include improvements to 'major' versus 'minor' fault definitions as they relate to motor vehicles. Disconnection from other product groupings and improved recognition of specific treatments as remedies more aligned with the nature of the motor vehicle product.

Part B Supplier Indemnification

The rationale expressed in this submission provides the context why MTAA does not support Option 1- Status Quo. The specific accountabilities of Manufacturers, suppliers and in-country distributors of motor vehicles and products must be better defined and reflected in regulations and the ACL. For example, the confusion that a new car franchise motor vehicle, motorcycle or agricultural machinery dealer is a 'distributor' as defined in the ACL must be addressed.

As outlined above, MTAA is not opposed to Option 2 to increase awareness and understanding, mainly if undertaken to detail any outcomes introduced from this RIS process.

MTAA supports Options three and four.

Recommendation
5. MTAA does not supports Option 1 to maintain the Status Quo.
6. MTAA recognises there may be potential benefits of Option 2 and supports ongoing awareness and communication campaigns, particularly where the rules and requirements change. However, any voluntary awareness and education campaign resulting from this consultation must be specific to manufacturers/suppliers/consumers and other necessary stakeholders, and inclusive of the considerations of matters raised in this submission, including those that may not be in scope.
7. MTAA support Option 3 and 4.

For consideration

MTAA recognises the following observations and recommendations may be outside the terms of reference. However, they are provided because MTAA considers they may directly relate to RIS outcomes. MTAA has identified the following for further consideration.

Recommendation
8. Consideration be given to a specific mechanism/process/mechanism to assess, mediate and if appropriate adjudicate dispute arising from the application of ACL, Consumer guarantees, remedies provided, indemnifications and any other pertinent requirements.
9. One approach might include the addition of mediation and dispute resolution services for ACL interpretation for motor vehicle matters. Such services would be specific to motor vehicle products and potentially as part of dispute resolution arrangements being considered for Franchising Code and the automotive-specific schedule and Access to Service and Repair Information. It may include: - independent expert advice on the nature and extent of faults and appropriateness of remedies applied. - market value as guidance to authorities / tribunals.

[redacted]

From: [redacted]
Sent: Wednesday, 1 April 2020 2:45 PM
To: [redacted]
Subject: [redacted]

[redacted]

Re; Chrysler 300C Radiator failure

I received a copy of Adrads' email advising they were not accepting liability for the damage caused by their faulty radiator and question their reasons.

1.The coolant sensor is mounted in a coolant passage and not the engine block as they suggest. A rapid loss of coolant will certainly cause a gauge inaccuracy that may not display an overheat situation. The PCM was scanned and there were no overheat codes found. I believe that would confirm this was the case.

2. They also state that Supergas has repaired the vehicle. This is not true, I did mention on my previous email that repair work has not yet commenced and any inspection by yourselves or third party is welcome.

3. The vehicle was on the highway from Melbourne to Tenterfield when the overheat occurred.
I suggest that any sort of steam cloud or abnormal engine noise may not have been evident in that circumstance.

4. The vehicle was on its way to Hillier Design for refurbishment work when it overheated. They were contacted by their driver when the vehicle stopped. Not knowing what the fault was
they dispatched a truck to pick up vehicle. I was made aware of this after they inspected the vehicle at Tenterfield and diagnosed the failed radiator.
At this point I contacted Natrad and explained the situation. They advised they had no one local to check vehicle and It was agreed the vehicle stay there for refurbishment work.
The vehicle was then transported back to us for repair under instruction from the owner.
The owner then sent us a copy of the towing invoice and made it very clear that they were not going to be paying it or the repair. There was also mention of losses incurred from the vehicle being out of service.

Given the information I have supplied could you please resubmit this claim to your supplier for further consideration.

1

Appendix B

Quality Assurance Department Product Warranty Report

Report Date	Number	Status	
[redacted]	[redacted]	Report Report Review	
Distribution Method	Report Emailed	Transfer Number	
Customer Reference	[redacted]	Technician	Quality Manager: [redacted]

Customer Details		
Name	Contact Name	Warehouse
[redacted]	[redacted]	

History

We are sorry to hear that your customer has experienced a radiator problem with a unit recently purchased.The replacement [redacted] unit has been in service for 3.5 months.

Findings

1.Dye pressure test revealed End Tube leak, top RH side.
2.Removed both tanks: No chemical contamination.
3.No signs of abuse or damage.
4.Inspected of the end tube found: split tube at the braze joint.
Serila no: [redacted]

Conclusion

The end tube has failed at the braze joint line.
This appears to be a manufacturing fault.
Please submit any relevant documentation for review.
Please also note that if the vehicleâs cooling system develops a leak or experiences a dramatic loss of coolant. An increase in engine temperature will be evident, there will be a loss of power, an increase in engine noise and visible signs of a coolant steam cloud emanating from the vehicle.
All vehicles are equipped with a temperature gauge and or temperature warning lights that warn the driver long before engine damage occurs.
The vehicle driver has a shared responsibility to monitor and to react to the vehicles temperature gauge reading or warning lights and other tell-tale signs.

Appendix C

Australia's No.1 Radiator Manufacturer & Supplier

Freecall 1800 882 043

Adrad Pty Ltd
ABN 66 199 056 450
26-50 Howards Rd
Beverley SA 5009

Ph. (08) 8243 9876
Fix (08) 8347 7245

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Dear [redacted]

We are sorry to hear that your customer, [redacted] has experienced a radiator problem with a unit recently purchased.

In response to the engine claim from [redacted].

ADRAD cannot accept responsibility for the engine claim.

In response to the transportation charges from [redacted], invoiced to [redacted] on the [redacted]

ADRAD cannot accept responsibility for these transportation charges.

The ADRAD management team has reviewed the case and is not convinced that ADRAD is totally culpable for the claim payment as requested.

This conclusion has been reached based upon:

1. The fact that the vehicle driver has a shared responsibility to monitor and to react to the vehicle's temperature gauge reading or warning lights and other tell-tale signs that would have been present.
2. The fact that the decision to repair the vehicle by [redacted] did not involve ADRAD. The decision was made by other parties without any advice or consultation involving ADRAD.
3. ADRAD cannot be expected to agree to pay for vehicle repairs without consultation and no supporting evidence other than a returned radiator and an estimate for repair work.
4. The fact that a commercial decision was made to transport the vehicle utilising specialist transportation by other parties without any advice or consultation involving ADRAD.
5. The fact that the vehicle was transported on multiple occasions by other parties without any advice or consultation involving ADRAD.

Please note that if the vehicle's cooling system develops a leak or experiences a dramatic loss of coolant. An increase in engine temperature will be evident, there will be a loss of power, an increase in engine noise and visible signs of a coolant steam cloud emanating from the vehicle. All vehicles are equipped with a temperature gauge and or temperature warning lights that warn the driver long before engine damage occurs. Based upon the supplied value of damaged components. It is our conclusion that the driver drove the vehicle continually while it was over heating causing engine damage. The vehicle involved has a temperature sender unit which is located within the engine block and it is connected to a temperature gauge. It reads and monitors engine temperature regardless of coolant level.

Failure to respond to the temperature gauge or warning lights or other tell-tale signs indicating an increase in vehicle operating temperature, is outside ADRAD's control. The driver has the responsibility to monitor and react to the vehicle temperature gauge reading. Failure to respond to overheating is outside ADRAD's warranty terms and conditions.

Kind Regards

[redacted]

Quality Assurance Manager

[redacted]


MOTOR TRADES
ASSOCIATION
OF AUSTRALIA