



Australian Consumer Law Review

Motor Traders' Association of NSW

Submission



27 May 2016

The Motor Traders' Association of NSW (MTA NSW) is one of the largest state based industry associations in Australia.

MTA NSW is widely known for addressing issues affecting Association Members through a multitude of initiatives, including lobbying at Local, State and Federal Government levels.

Founded in 1910, the MTA NSW represents the interests of over 3,600 owners and business principals and 60,000 employees in the automotive industry throughout NSW and ACT. The Association provides extensive industry information to its membership base through a number of forums and media.

MTA NSW is held in high regard by industry stakeholders due to the longevity of its establishment, where it has been representing the automotive industry in both NSW and ACT for more than 100 years. MTA offers members great value for their membership subscription with a range of services and products supplementing its traditional core services.

MTA's advertising and promotional activities over many years has developed a public recognition of the MTA NSW logo and catch phrase 'Look for the sign and deal with someone you can trust.' Both in NSW and the ACT, MTA NSW is strongly placed to represent the interests of Members. The MTA NSW is also a Registered Training Organisation (RTO) and delivers on-site training at business premises, to apprentices in the motor trade industry.

MTA NSW is in continual contact with politicians and Government officials and regularly provides advice to them on matters affecting the motor industry. The Association is the principal consultative party and a leader in employment relations issues impacting the Retail Motor Industry in the State.

MTA NSW is a founding member of the Motor Trades Association of Australia (MTAA), which is the National Body that draws together MTA's sister organisations from other States and Territories to represent the industry at Federal Government level.

Member and industry suppliers' support is most appreciated and adds greatly to the success of the Association and the activities it undertakes.

As a peak body, the MTA NSW represents the interests of the following automotive industry participants:

Auto Dismantlers; Auto Electrical Specialists; Auto and Marine Trimmers; Auto Mechanical Repairers; Auto Transmission and Rebuilders; Automobile Dealers – New and Used; Australian Heavy Vehicle Repairers; Body Repairers; Brake Repair Specialists; Caravan Industry; Commercial Vehicle Industry; Engine Reconditioners; Exhaust System; Farm Machinery Dealers; General Trades; Hire Car and Chauffeur Driven Limousines; Motor Bus; Motor Cycle Industry; Motor Vehicle Assessor and Inspector; Parts and Accessories; Radiator Specialists; Rental Vehicles; Rustproofing Specialists; Service Stations; Steering and Suspension Specialists; Tow Truck Operators; Tyre Dealers and Retreaders.



Executive Summary

The Motor Traders' Association of NSW (MTA NSW) appreciates the opportunity to provide a submission to Consumer Affairs Australia and New Zealand in regards to the 'Issues Paper', concerning the first review of the Australian Consumer Law (ACL).

It is to be recognised and acknowledged that a strong and mutual working relationship has been developed with NSW Fair Trading and the MTA NSW, with a number of issues jointly addressed for the betterment of the industry.

The MTA NSW appreciates and supports the sentiments of the prevailing consumer policy framework that:

To be effective in this environment, the consumer policy framework must appropriately balance addressing consumer harm in a meaningful way, while not imposing unnecessary compliance burdens on business or stifling effective competition and market innovation¹.

In order to provide an appropriate balance between consumer guarantees and our members' requirements, MTA NSW makes the following recommendations and comments in relation to issues raised within the Australian Consumer Law Review Issues Paper. MTA NSW would like to formally recognise the assistance and content contribution provided from the Motor Trade Association of South Australia in the preparation of this submission.

Recommendations

1. In the first instance, the consumer must give the trader a reasonable opportunity to meet any obligations under the consumer guarantees or statutory warranty
2. The definition of consumer in Schedule 2, Chapter 1, Section 3 of the ACL requires amending to include traders who have 'purchased Goods and/or Services for resale'
3. The current consumer guarantee threshold of \$40,000 be removed
4. Motor Vehicles, Plant, Agricultural Vehicles / Equipment and the like require a separate, specific category within the ACL
5. A number of terms used within the ACL to be revisited and clearly defined for both consumers and traders
6. An industry guide be prepared, once the ACL review has been completed, specifically for the motor trade industry in 'plain English' format
7. The MTA NSW is not in favour of the need for a specific 'lemon' law to be introduced as the current consumer guarantees in place under the ACL in relation to the purchasing of new or used motor vehicles are working well
8. Include the same protections for businesses from misleading conduct by consumers, as consumers are parties to transactions covered by the ACL.

¹ Source: The Australian Government Consumer Affairs Australia and New Zealand

Consumer Policy in Australia

It is stated in the Australian Consumer Law Review Issues Paper, that the overarching objective for the national consumer policy framework is:

To improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.¹

It is also noted that the signed *Intergovernmental Agreement for the Australian Consumer Law* (2009) identified six operational objectives:

- *to ensure that consumers are sufficiently well informed to benefit from, and stimulate effective competition*
- *to ensure that goods and services are safe and fit for the purposes for which they were sold*
- *to prevent practices that are unfair*
- *to meet the needs of those consumers who are most vulnerable, or at greatest disadvantage*
- *to provide accessible and timely redress where consumer detriment has occurred*
- *to promote proportionate, risk-based enforcement.¹*

In general terms the MTA NSW is in agreement with these six identified objectives which provide fair and reasonable grounds to conduct transactions with consumers. It is however to be noted that within the overarching objective it states that:

... in which both consumers and suppliers trade fairly...¹

In relation to the actions of consumers, the MTA NSW members, who are predominantly small to medium businesses, have encountered situations which would indicate an unevenness when consumers and suppliers interact. It needs to be remembered that businesses / suppliers are also consumers and warrant the same protection that consumers are provided.

Situations arise that a vexatious complaint is made against a business which can be a time consuming and costly exercise to defend, let alone reputational damage could result. Many times a business would just 'settle' the consumer complaint for expediency purposes, regardless of the rights or wrongs of the situation. The consumer is in a position of strength which needs to be balanced with the needs of the business.

When complaints or disputes arise between consumers and businesses, it should be clearly and concisely enunciated within a revised ACL legislation that: *In the first instance, the consumer must give the trader a reasonable opportunity to meet any obligations under the consumer guarantees or statutory warranty.*

¹ Source: *The Australian Government Consumer Affairs Australia and New Zealand*

The objective of the above is to ensure the trader is given every opportunity to resolve a complaint (if there is an obligation to provide a remedy) made against them by a consumer, prior to any escalation to the relevant consumer protection agency or Tribunal as;

Due to the lack of clarity in the current legislation, **it is not uncommon for consumers to purchase motor industry related goods or services which, if a failure occurs, the consumer then takes those goods to another trader to have the failure rectified** (or in the case of services provided – has them performed by another trader) and then presents the original trader with an account for payment having never given that trader an opportunity to provide a remedy.

The Legal Framework

The Meaning of 'Consumer' and Current Threshold

The definition of consumer in Schedule 2, Chapter 1, Section 3 of the ACL requires amending to include traders who have 'purchased Goods and/or Services for resale'² as the present definition prevents them from taking appropriate action against a supplier through the consumer protection agencies such as Fair Trading or the Civil and Administrative Tribunals in their respective jurisdictions.

The simple answer may be to completely rewrite Section 3 so that it accurately reflects all obligatory requirements and entitlements relating to the purchase of Goods and Services.

When traders purchase goods/services for resale to their customers *and* a failure occurs which deems the goods/services to be of 'unacceptable' quality, the trader must provide a remedy to the customer to rectify that failure. Unfortunately, the current definition does not afford the trader the same rights against its supplier as enjoyed by its customer.

Currently, it is recommended that the trader ask the customer to take an 'action' against them with the respective civil and administrative tribunal and to join the offending supplier to the claim.

This is an impost on customers *and* a totally unacceptable method by which a trader can receive appropriate consideration and/or compensation.

For the purposes of consumer guarantees, a \$40,000 threshold was established in 1986 and has remained unchanged since that time. It would be recommended that the current threshold be removed as any form of threshold is essentially null and void.

With the growth of comparison websites and online transactions of goods and services, the ACL should address the protection provided to businesses as well as consumers.

² Source: Competition and Consumer Act 2010

Consumer Guarantees

Schedule 2, Chapter 3, Part 3-2, Section 54 of the ACL refers to Guarantees as to acceptable quality and notes at sub-sections 4, 5 and 7 that goods that are not of acceptable quality are taken to be of acceptable quality if it is 'specifically drawn to the consumer's attention before the consumer agreed to the supply'² etc.

A problem exists with the terminology, in that, to suggest the goods are 'not of acceptable quality' potentially detracts from the fact that the good/s may be nearing the 'end of life' cycle but are still quite serviceable providing they are treated by the consumer appropriately.

An example may be a motor vehicle that has travelled 300,000 kilometres and, although road worthy, is approaching its end of life and is sold to a consumer (who has been informed that the vehicle is approaching/has reached its 'use by date') and shortly after purchase a component fails.

The consumer is generally encouraged by the regulators to approach the trader for a remedy – even though they had agreed to purchase the vehicle with the knowledge it was at/had reached its 'end of life'.

It may be Motor Vehicles, Plant, Agricultural Vehicles / Equipment and the like require a separate, specific category within the ACL to address this anomaly.

Clarity of the ACL

To ensure that there is clarity around definitions that are used in the ACL, it is suggested that a number of terms used within the ACL are revisited and clearly defined for both consumers and traders.

The terminologies that are of particular relevancy for the motor trade industry which require a clear definition are as follows:

- Acceptable Quality
- Major Failure
- Reasonable Time

It is suggested that an industry guide be prepared, once the ACL review has been completed, specifically for the motor trade industry in 'plain English' format. This guide could be modelled upon the publication entitled: **Motor Vehicle Sales and Repairs** which was produced in 2013.

² Source: Competition and Consumer Act 2010

Australian Consumer Law's Specific Protections

'Lemon' Laws

The current consumer guarantees in place under the ACL in relation to the purchasing of new or used motor vehicles are working well and the MTA NSW is not in favour of the need for a specific 'lemon' law to be introduced.

Consumers currently enjoy protection under the consumer guarantee when there is a 'major' failure with a motor vehicle via the choice of:

- Choosing a refund or replacement of the motor vehicle
- Keeping the motor vehicle and asking for compensation for any drop in its value caused by the problem

A consumer can also be remedied if a 'minor' failure occurs via the business providing:

- A repair, replacement or refund

Does a vehicle that has multiple, separate faults constitute a lemon or does the vehicle that has the same fault occurring repeatedly constitute a 'lemon'? It is entirely unreasonable to legislate against the former statement, as there are already existing protections that address the latter.

As stated in the Motor Vehicle Sales and Repairs guide issued in 2013: *Vehicles are not expected to be indestructible; a consumer's use of a vehicle can affect its durability.*³

The issue of whether a fault occurs because of product failure or because of poor use; unreasonable expectation; natural wear and tear or inappropriate vehicle selection for a given task is highly subjective and has a material impact on the performance of a vehicle and on the efficacy of any repairs.

The Federal Chamber of Automotive Industries undertook a survey to determine the size and extent of vehicle complaints in Australia.

That survey found that 55% of cases are settled prior to determination by a tribunal, 40% are resolved in favour of a manufacturer and only 5% are resolved in favour of the complainant.⁴ This suggests that vehicle dealers are acting responsibly and providing appropriate levels of consumer support for their products.

The risk of introducing broad, ill defined, 'lemon' laws is that they will actually increase litigation costs for both dealers and consumers, who receive minimal benefit given that 95% of complaints are either resolved amicably or against the consumer.

³ Source: Commonwealth of Australia

⁴ Federal Chamber of Automotive Industries, Response to 'Consumer Rights: Implied Conditions and Warranties', 2009

'Lemon' laws will create an unrealistic expectation of the types of claims that can be redressed and add to the level of grievance and agitation being experienced by those few consumers who are having difficulties.

ACL already provides sufficient remedy in these matters. An increase in the compliance burden will not improve the fault rate experienced by purchasers, as the more defined the legislation is the greater the exclusion of specific faults.

The modernisation of the vehicle fleet and the high level of technological integration have made diagnosis of vehicle faults increasingly complex.

Repair or replacement of a fault can be relatively straight forward once the component at issue is identified. However, it is diagnosis that poses the biggest obstacle to addressing faults. As an example, identifying where an electrical system is malfunctioning and diagnosing the specific component that has failed is multifaceted and often involves multiple components.

The success or otherwise of the attempted repair cannot always be immediately determined given the highly integrated nature of modern electrical components and software. This typical diagnostic process should not form the basis for 'lemon' laws in Australia.

The MTA NSW is an advocate of consumer and industry education to facilitate new and used vehicle dealerships in addressing consumer complaints via a structured complaint handling and mediation process for both parties.

Protecting Consumers from Unsafe Products

The MTA NSW expresses concerns in regards to a recommendation from the Competition Policy Review (Harper Review) to progressively relax restrictions on the importation of second-hand vehicles. Whilst this would be of appeal to used car buyers, this well may have a detrimental impact not only on the existing value of vehicles but also on the safety standards of motor vehicles.

Individual imports of second hand vehicles raise issues such as compliance standards, particularly in relation to safety which also appear to have been missed or ignored by the review.

Many consumers fail to understand that vehicles sold in Australia have, in the majority of cases, been specifically engineered for Australian conditions. If these modifications aren't made consumers purchasing imported used vehicles could experience significant maintenance issues.

Further, various vehicle components available online are supplied absent essential features and require alteration or modification for fitment. This can be done through qualified businesses and tradespeople, but there are a great many that attempt to undertake these safety critical modifications at home or through backyard operators. This poses a serious safety risk and such products should not be available in Australia.

Administering and Enforcing the Australian Consumer Law

Effective Dispute Resolution

In many disputes involving a consumer and business, the perception is that the current ACL is designed to penalise businesses and fall in the favour of consumers.

There are several reasons why a product does not meet consumer expectations, and these do not necessarily involve a failing by the retailer or wholesalers.

In many cases a product can be subject to ACL due to poor use, unreasonable expectation, natural wear and tear or inappropriate selection for a given task and buyer remorse. Additionally, the product may have been supplied to the retailer or wholesalers from the manufacturer in an unfit state that is unable to be detected in the normal course of trading until the product is used.

It should be considered that an ACL claim needs to be interpreted to establish that there is in fact a fault that has occurred, as opposed to a misunderstanding or buyer's remorse, and that the retailer or wholesalers could have reasonably been aware of this at the time of purchase but did not disclose it.

ACL should also make provision for retailers and wholesalers to be able to more easily reclaim their costs from manufacturers where it is established that the product was supplied in an inadequate form or to make manufacturers party to an ACL claim if they feel it appropriate.

ACL should consider the provision of a manufacturer's warranty that protects third party installers from faulty or substandard supplied parts. Currently, these parts become the responsibility of the installer when a fault occurs for ACL purposes.

Emerging Business Models and the Australian Consumer Law

The use of online motor vehicle sale websites, customer forums and online vehicle manufacturer interest groups pose new risks for businesses, particularly via social media.

There is a growing reliance on consumer online reviews for making purchasing decisions and passing judgements on the quality of businesses that consumers are interacting with which can be positive or negative to the business.

The consumer making the complaint can negatively review the product or service, and simply because it is their genuine opinion, be free to damage the reputation and sales of a business, regardless of whether the customer fully understands the capability of the product or service, the businesses obligations under ACL, if they are using it correctly or simply suffering a change of mind.



There is an underlying assumption that a business will seek to do harm by the consumer and therefore must be afforded a greater level of protection than a businesses or business owner who can be subject to commentary that affects their livelihood because of a disgruntled customer who may or may not have a legitimate complaint.

The revised ACL should be amended to include the same protections for businesses from misleading conduct by consumers, as consumers are parties to transactions covered by the ACL and therefore should have similar obligations to act with integrity and with due regard to the impact of their conduct on fair trading and effective competition.

Additionally, online review platforms can boost the placement of products and the influence the reputation of the brand. Unlike conventional advertising or even online advertising, these platforms purport to be independent assessors of products and companies acting in the consumer's best interest.

It is usually undisclosed that many of the rated businesses have commercial relationships with the review platforms and are either afforded a screening process prior to reviews being published, or act effectively as brand boosters to their commercial partners, or only include those with commercial relationships in their review spectrum.

This creates obvious distortions in the consumer's preference for goods and is clearly misleading.

Such relationships and methodologies should be disclosed prominently so consumers understand how ratings are awarded for brand and businesses. Equally, star rating systems should also identify how many reviews have been submitted that contribute to the determination of the star rating.

Summary

The recommendations of MTA NSW on behalf of our members going forward would be to see the appropriate balance struck between the consumer guarantees and our member's business requirements, within a revised ACL.

The Motor Traders' Association of NSW appreciates the opportunity provided by Consumer Affairs Australia and New Zealand in providing feedback and looks forward to further dialogue regarding the feedback provided. The MTA NSW also offers its services to participate in an education program with our members, as appropriate.

Yours faithfully,

MOTOR TRADERS' ASSOCIATION OF NSW



Greg Patten
Chief Executive Officer