



# Australian Automotive Dealer Association Ltd.

ACN: 167 598 085

The Sir Jack Brabham Automotive Centre of Excellence

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Mr Simon Cohen  
Chair  
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Dear Mr Cohen

## AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION (AADA) AUSTRALIAN CONSUMER LAW REVIEW (ACL) – INTERIM REPORT

### 1. Introduction

1.1 The Australian Automotive Dealer Association (AADA) responds to the invitation from Consumer Affairs Australia and New Zealand (CAANZ) to provide views on issues and options on its Interim Report dated October 2016. The Interim Report follows the release of an issues paper in March 2016 with CAANZ to prepare a final report to the Legislative and Governance Forum on Consumer Affairs by March 2017. Our comments are on behalf franchised new car dealers in Australia and are limited to issues which directly affect our members.

1.2 We note CAANZ is drawing on a range of sources to build a broad evidence base to support its findings and options for reform including the CAANZ-commissioned Australian Consumer Survey 2016 and *Comparative study of overseas policy frameworks consumer frameworks*, as well as other research.

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**2. AADA**

2.1 AADA is the peak industry advocacy body exclusively representing franchised new car dealers in Australia. There are around 1500 new car dealers in Australia that operate about 2600 new vehicle outlets. Dealerships range from family-owned small businesses to larger businesses including three public companies (AHG Ltd, AP Eagers Ltd and Autosports Group) operating in regional Australia and capital cities across all States and Territories.

2.2 It is important to note that these listed entities account for around 12 per cent of total 'rooftops'. Put another way, 88 per cent of franchised new car businesses continue to be owned by individual operators or family groups. This is not a retail industry dominated by large multinational operators. This is not an industry with monopoly market dynamics such as have been allowed to develop in banking or groceries in Australia.

2.3 This is an industry predominately of small to medium enterprises (SMEs) but with important economic consequences for our country. The franchised dealer network generates revenue in excess of \$66 billion, employs more than 66,000 people, pays wages in excess of \$4 billion annually and has invested around \$17 billion in facilities. Dealership agreements are subject to the *Franchising Code of Conduct*.

**3. Background of Australian new vehicle industry**

3.1 The automotive retail sector in Australia is regarded as the most competitive in the world. Around 67 brands offer more than 400 models for customers in a relatively small market of just over 1.1 million units annually (less than 1.5 per cent of global demand). The competition between dealers is fierce and consumers are not lacking in choice, with a wide range of model specifications on offer and manufacturer warranties protecting consumers for between 3 and 7 years with optional fixed price servicing also a common feature in the market (over and above the consumer guarantees provided under law).

**4. Competitiveness of global markets<sup>1</sup>**

	Australia	Canada	UK	USA
<b>No. brands in market</b>	67	49	53	51
<b>Sales</b>	1,112,032	1,620,221	2,249,483	13,040,632
<b>Market size per brand</b>	16,597	33,066	42,443	255,699

<sup>1</sup> Australian Government, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013 Automotive Update.

4.1 The Australian motor vehicle market is close to saturation point with an estimated vehicle density of close to 685 vehicles per 1,000 people. In Australia today, there are approximately 17.2 million registered road vehicles (excluding trailers).<sup>2</sup>

4.2 The economic impact of the automotive retail sector in Australia is not insignificant and provided a direct contribution to Australian GDP of \$7.8 billion in 2015 and a total economic contribution of \$17.5 billion, which makes up 2 per cent of the Australian total economy.<sup>3</sup>

4.3 Competition in the industry has increased significantly over time challenging all aspects of a dealership's revenue streams.

4.4 New car dealers in Australia operate a business model that requires considerable business acumen to achieve a nuanced balance between five important profit centres:

- new car department;
- used car department;
- parts, accessory and aftermarket sales;
- service workshop sales; and
- finance and insurance commissions.

4.5 Studies by Deloitte and others show that a modern well run Australian franchised new car dealership will generally achieve a net profit of around 2 per cent to revenue – that is to say two dollars of profit for every one hundred dollars of sales revenue. Coles and Woolworths by comparison generally achieve 5-7 per cent. These studies also show that in 2015 about 19 per cent of all franchised new car dealers failed to make a profit.

4.6 Motor vehicle manufacturers compete in a globalised mainly free trade market. Even for high-end, luxury and prestige brands, investments in manufacturing plant and equipment can only be paid back by relentless attention to appropriate scale. This translates into unremitting pressure to win and retain customers and so deliver the required volume of sales at the retail end of the business.

4.7 As a matter of policy all manufacturers and distributors operating in Australia have attached significant proportions of retail dealer margin to the achievement of ambitious but attainable Customer Satisfaction Index (CSI) scores.

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<sup>2</sup> Australian Government, Department of Infrastructure and Regional Development, 2014, 2014 Review of the Motor Vehicle Standards Act 1989, p11, [https://infrastructure.gov.au/vehicles/mv\\_standards\\_act/files/MVSA-Options\\_Discussion\\_Paper.pdf](https://infrastructure.gov.au/vehicles/mv_standards_act/files/MVSA-Options_Discussion_Paper.pdf).

<sup>3</sup> Federal Chamber of Automotive Industries, 2016, The Australian new vehicle industry, [https://www.fcai.com.au/library/new-vehicle-industry/fcai\\_a4\\_infographic-final.pdf](https://www.fcai.com.au/library/new-vehicle-industry/fcai_a4_infographic-final.pdf)

4.8 On average, around 50 per cent of total dealer margin<sup>4</sup> is now paid in the form of post-facto bonuses tied to a combination of key performance indicators but always with a heavy emphasis on CSI.

4.9 This development over the last decade drives intense focus on customer satisfaction by franchised new car dealers.

4.10 The Australian automotive value chain is undergoing structural change and business model disruption for a myriad of reasons including:

- dismantling of vehicle manufacturing in Australia in 2017;
- technological disruption including ubiquitous connectivity and digitalisation;
- information and communication technology (ICT) companies entering the market;
- online dealership models;
- customer data/big data;
- automated, electric/hybrid vehicles and downsizing of internal combustion engines (ICEs);
- car concierge services;
- customer purchase journey; and
- regulatory intervention affecting revenue streams.

## **5. Coverage of the Australian Consumer Law – Motor vehicles and associated goods and services**

5.1 The Australian Consumer Law (ACL) commenced as a law of the Commonwealth and of each State and Territory on 1 January 2011. The text of the ACL is set out in Schedule 2 of the *Competition and Consumer Act 2010* (CCA). Where the ACL is applied as a law of a State or Territory, its citation refers to that jurisdiction. For example, under section 16 of the Fair Trading Act 1989 (QLD), when the ACL is applied as a law of Queensland, it is referred to as the Australian Consumer Law (Queensland).

5.2 The development and administration of the ACL is governed by the Intergovernmental Agreement (IGA) for the ACL, which was signed by the Council of Australian Governments (COAG) on 2 July 2009. The IGA provides that the operation of the ACL will be reviewed within seven years of implementation (2016).

5.3 Consumer Affairs Australia and New Zealand (CAANZ) issued an Interim Report for comment with a final report to be provided to Legislative and Governance Forum

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<sup>4</sup> Estimated average of Franchised new car dealers' franchise agreements

on Consumer Affairs by March 2017. AADA supports the current national and consistent generic approach to consumer protection and guarantees. It avoids regulatory duplication and inconsistency through industry specific regulation and enhances productivity.

5.4 Enactment of State industry specific laws such as those which were initially considered by Queensland could lead to unintended consequences and place Queensland motor vehicle dealers at a competitive disadvantage relative to dealers in other States and Territories. Such a law, if enacted in Queensland, would fail to recognise the national consumer market in which manufacturers, distributors and dealers operate.

5.5 Any barriers to the creation of a truly national market have been reduced if not completely eliminated by the proliferation of internet aggregators (e.g. Carsales.com.au) operating to the benefit of consumers. This new reality (compared to the era in which the CCA was drafted) strongly reinforces the need to continue with a consistent generic national approach.

5.6 A consumer's rights under the ACL are extensive and the provisions not only apply to a 'consumer' being an individual acquiring goods of a kind ordinarily acquired for personal, domestic or household use or consumption (which includes most motor vehicles) but can apply to a businesses' consumer contracts.

## 6. *Definition of consumer*

6.1 The ordinary meaning of the word consumer is a person who acquires or uses goods and services. The nomenclature is used internationally to acknowledge the different experiences, perspectives and areas of vital interests of those who seek goods and services and those who produce them.

6.2 Section 3 of the ACL defines a person (which can include a corporation) as a consumer which acquires goods if:

- the amount payable does not exceed \$40,000;
- the goods are of a kind ordinarily acquired for personal domestic or household use or consumption (which includes most motor vehicles); or
- the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads,

and the goods are not acquired for re-supply or to be used up or transformed in a manufacturing process.

6.3 The current definition is flexible and includes individuals, SMEs and large corporations in relation to the purchase of goods under \$40,000. AADA considers that the current definition of consumer under section 3 of the ACL is generally satisfactory. However, it could be expanded to include consumers who purchase goods for re-supply e.g. franchised motor vehicle dealers.

6.4 The definition of consumer also protects all three categories of consumers in relation to goods purchased above \$40,000 provided the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption.

6.5 The vast majority of consumers who purchase motor vehicles, including light commercial vehicles, are covered by the definition of consumer in the ACL. From an automotive industry perspective, the notable exclusions are the purchasers of buses, coaches and tractors/farm vehicles.

6.6 AADA considers that an entity that purchases goods for re-supply (either individual, SME or a large corporation) should also be considered a consumer. By including this category, if suppliers are aware of a defect they would be more likely to return defective goods supplied by a manufacturer or importer prior to the goods being delivered to the end customer.

6.7 Furthermore, given suppliers of goods are responsible for product defects under the ACL (despite product defects being completely outside of their control), they should be given adequate protection under the ACL. The current manufacturer's indemnity provisions are supposed to assist suppliers, however, they are not working as intended due to the imbalance in bargaining power between the manufacturer/importer and the supplier. Often, it is the supplier that ultimately pays for a product defect.

6.8 The policy rationale for excluding re-suppliers does not appear to be strong.

## *7. Threshold of \$40,000*

7.1 AADA supports increasing the monetary threshold of \$40,000. The threshold was increased to \$40,000 in 1986 to take into account inflation since its introduction into the Trade Practices Act in 1977 which set the threshold at \$15,000.

7.2 Increasing the threshold will give greater protection to small businesses seeking capital investment.

7.3 Motor vehicles purchased as company cars or taxis may be excluded from ACL protection if the purchase price exceeds \$40,000. Buses, coaches, tractors and other farming machinery are also entirely excluded by the current threshold.

## 8. *Small businesses (SMEs) as consumers*

8.1 On 12 November 2016 the unfair contract terms protection regime was extended to protect SMEs from unfair terms in standard form small business contracts. A similar regime applies to protect consumers in relation to unfair terms in consumer contracts.

8.2 A *standard form* contract is a contract prepared by one party where the other party has no genuine opportunity to negotiate its terms. Accordingly, a contract for the sale of a motor vehicle, motor vehicle finance, insurance or extended warranty would likely be considered to be a standard form contract.

8.3 The unfair contracts regime therefore provides individuals and small businesses who purchase motor vehicles or ancillary financial products with additional protections to the consumer guarantees and prohibitions against misleading and deceptive conducts found in the ACL.

## 9. *ACL consumer guarantees*

9.1 The consumer guarantee provisions of the ACL will in our view apply to sales of practically all motor vehicles designed to be driven on public roads regardless of the cost of the vehicle. Our comments are restricted to new motor vehicles purchased by an individual rather than a business or a used motor vehicle.

9.2 In the Interim Report at page 43 “CAANZ notes that stakeholders, and the findings of the Australian Consumer Survey 2016, suggest that the introduction of a consistent set of rights across Australia in 2011 has increased awareness of the law, lowered compliance costs for businesses and improved resolution of disputes between consumers and traders, Also, CAANZ notes that consumer guarantees are often supported by voluntary store policies, which may often provide protections that meet or exceed legal obligations.”

9.3 There are nine guarantees that apply to the supply of goods:

- the supplier of goods has the right to sell the goods;
- the purchaser will receive undisturbed possession;
- the goods are free from undisclosed securities;
- the goods are of acceptable quality;

- the goods are fit for any disclosed purpose;
- the goods will match descriptions given (if any);
- the goods will match any samples previously provided (if any); and
- the manufacturer guarantees the reasonable availability of repairs and spare parts; and
- that any express statement made by a manufacturer about the goods (e.g. a vehicle's towing capacity) has effect as a statutory consumer guarantee.

9.4 The Interim Report noted that there was support for 'acceptable quality' but sought comment on whether it was feasible to provide specific guidance on the 'reasonable durability' of a good and how long a certain type of good should last.

9.5 A failure to comply with the consumer guarantee of acceptable quality can be established by showing that the product has failed to last as long as a consumer would reasonably expect. A guarantee of acceptable quality is not a guarantee of perfection or that the product will last forever. Rather, it is a guarantee that a vehicle will reach standards that a reasonable consumer would regard as 'good enough' for a vehicle of the relevant type and price.

9.6 In determining the 'reasonable durability' of a good a number factors may be taken into consideration including:

- cost;
- poor quality of Australian road infrastructure;
- quality of Australian fuel;
- physical life;
- manufacturing specifications;
- intensity of use;
- use of asset in different industries;
- industry standards;
- repairs and maintenance;
- retention period;
- commercial or technological obsolescence – predictable and unpredictable;
- scrapping or abandonment practices;
- lease periods;
- market value; and
- regulatory including environmental standard changes.

9.7 At page 44 of the Interim Report, reference is made to the practical implication issues with estimating the lifespan of goods, and there may be scope to expand guidance material with further examples of key factors to consider.

9.8 In considering whether any further 'guidance material' is necessary, regard needs to be had to the operation of section 262 of the ACL. Section 262 of the ACL provides that, in certain circumstances, a consumer is not entitled to return goods for a refund or replacement even though they have suffered a 'major failure'. This will occur where the goods are lost or destroyed, have been attached to other property in such a way that they cannot be removed without damage, or the 'rejection period' has ended.

9.9 The most important of these limitations is the 'rejection period'. 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.

9.11 This important limitation would seem to have the following consequences if:

- consumers do not act reasonably promptly once they discover a fault, they may lose their right to claim a refund or replacement and will instead have to accept a repair; and
- a fault takes longer than could reasonably be expected to manifest, such as where the consumer only rarely uses their car so that the fault takes an unusually long term to emerge, the right to return the product may be lost.

## 10. *Disclosure of ACL rights*

10.1 We note that issues were raised about how consumers are informed by businesses about their ACL rights and in particular:

- manufacturer's warranties against defects and whether the mandatory text about the ACL is clear and effective in alerting consumers to the ACL; and
- extended warranties offered by retailers (which provide coverage over and above the manufacturer's warranty) and whether their relationship with the ACL is fully disclosed.

10.2 The disclosure of a consumer's ACL rights is mandated by section 102 of the ACL. This section prescribes the form of written warranties that must be provided to consumers. Among other things, the warranty must state:

- what the person giving the warranty must do to honour the warranty;
- what consumers must do to be entitled to the claim;
- that the goods (the vehicle in this case) come with guarantees that cannot be excluded under the ACL;
- the period or periods within which a defect in the goods or services to which the warranty relates must appear if the consumer is to be entitled to claim the warranty; and
- the procedure for claiming under the warranty.

10.3 Franchised new car dealers take their legal obligations in this regard very seriously and any statements made in relation to repair and replacement accord with the requirements of the ACL.

10.4 Franchised new car dealers also provide manufacturer's warranties to consumers when purchasing a new vehicle and, in many instances, consumers can purchase extended warranties (over and above that provided in manufacturer's warranties). In both these instances, franchised new car dealers make it clear in the terms of the warranty that these warranties are in addition to the rights conferred to them under the ACL.

10.5 AADA does not support the review or simplification of the 'mandatory text' to be included with a manufacturer's warranty as raised in page 45 of the Interim Report. This is because:

- a 'traditional' manufacturer's warranty is essentially a private contract between the seller and the customer and there should no mandating of any text in what is essentially a private contract;
- section 102 of the ACL already provides that a consumer must be provided with a written warranty that states, among other things, that the goods (the vehicle in this case) come with guarantees that cannot be excluded under the ACL; and
- consumers are already protected by unfair contract terms in the ACL.

10.6 AADA is aware that in general terms franchised new car dealers make continuous and professional efforts to ensure all consumer-facing staff are trained in and are familiar with consumers' rights under the ACL. Some larger groups also retain in-house legal counsel or paralegals to ensure that if consumer issues arise

that are more complex, customers can receive expert guidance and assistance from the dealership.

10.7 AADA is aware of the need of the need to keep its franchised new car dealers informed on the status of the ACL. To this end AADA:

- includes in its monthly magazine 'Automotive Dealer' sent to members a legal column that reports on legal developments affecting automotive dealers. This has included in the part the developments and changes to consumer laws as they relate to the purchase of motor vehicles; and
- has consistently over the years included in its National Conferences speakers who have presented on developments on consumer laws, properly addressing consumer complaints and the differences between manufacturer and statutory warranties under the ACL.

### *11. Major failure and multiple non-major failures*

11.1 AADA acknowledges there would be benefit in providing greater clarity and definitions in relation to concepts such as what constitutes a major failure. This will be dependent on the type of good purchased by a consumer. It should be noted that a purchase of a motor vehicle is not a usual product that a consumer purchases 'off the shelf' every day. A motor vehicle is a highly complex mechanical product with computer, safety and technological innovations requiring skilled technicians to maintain and service the product and significant investment by a franchised dealer in training, tooling and diagnostic equipment.

11.2 There is considerable pressure on the motor vehicle industry in relation to consumer guarantees. Various stakeholders promote so called 'lemon laws' as if such laws will offer greater protection than what currently is available for Australian consumers. Under the ACL, a consumer is entitled to a full refund or replacement of a vehicle where this is a 'major failure' to comply with a consumer guarantee. A major failure can include repetitive minor failures or if a major failure cannot be remedied easily and within a reasonable time.

11.3 Accordingly, Australia already has lemon laws in place under the ACL. Those promoting lemon laws are actually requesting an expansion of the current regime and/or clarification of the circumstances in which a full refund or replacement can be demanded.

11.4 AADA recognises that a motor vehicle continues to represent a singly significant and important purchase for the vast majority of consumers (behind their home). Moreover, the purchase of a motor vehicle often comes with emotional attachment

given the aspirational nature of many marques and affection for motor vehicles that lies buried in our unique Australian culture. Therefore, given the heightened emotion and expenditure, if a problem occurs, the impact on individuals can be more significant than if the humble toaster fails.

11.5 Despite this, the motor vehicle cannot be held to a perfect standard. As indicated previously, a motor vehicle is a highly complex product with thousands of components manufactured by hundreds of different supply chain manufacturers, all of which work together in a moving product. Furthermore, like any goods, the motor vehicle can be subject to misuse, abuse or modification by consumers. It is not an indestructible piece of equipment and requires regular service and maintenance.

11.6 The complexity factor has increased dramatically in the last decade and the rate at which motor vehicles will 'on board' even more sophisticated features, software and hardware is set to rise exponentially in the next 10 to 15 years.<sup>5</sup> Already, 55 per cent of all vehicles produced in the United Kingdom are connected to the internet. This will rise to 100 per cent by 2020.<sup>6</sup>

11.7 These unstoppable changes to motor vehicle complexity need to be borne uppermost in mind when revisions to the ACL are contemplated.

11.8 The CHOICE report entitled "Turning Lemons into Lemonade" (March 2016) stated that 14 per cent of 1,505 car owners surveyed suffered from a major issue in connection with their motor vehicle, or its purchase. The representative sample size must be put in the context of sales of new vehicles, which regularly exceeds 1.1 million. In fact, CHOICE surveyed people who said they had purchased a new car '*in the last 5 years*'.

11.9 That is to say that CHOICE surveyed 0.03 per cent of the approximately 5.5 million car buyers in the five year period. The survey percentage rises to 0.06 per cent if we discount 49 per cent of vehicles sold to fleet and government purchasers.

11.10 This survey cannot be used as the baseline measure for customer issues in the industry as the sample is insignificant.

11.11 The CHOICE report also stated that "*Overall, the majority of consumers were able to resolve their problems.*" This is not surprising given the new motor vehicle industry is one of the most customer conscious and service conscious businesses in the economy, with significant incentives given by manufacturers to dealers to provide

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<sup>5</sup> KPMG 2015, *Connected and Autonomous Vehicles – The UK Economic Opportunity*, <https://home.kpmg.com/content/dam/kpmg/pdf/2015/04/connected-and-autonomous-vehicles.pdf>

<sup>6</sup> *ibid*

high levels of customer service. AADA welcomes a discussion to describe in more detail how particular brands deal with product defects and related customer issues.

11.12 In relation to the precise issue of what constitutes a major failure, there is currently an industry guide entitled “*Motor Vehicle Sales and Repairs: An Industry Guide to the Australian Consumer Law*”, that is available to all consumers and businesses.

11.13 The guide helpfully sets out examples of defects and failures that may constitute a major or minor failure.

## 12. Major failures

12.1 A major failure to comply with the consumer guarantees is when:

- a reasonable consumer would not have bought the motor vehicle if they had known about the full extent of the problem. For example, no reasonable consumer would buy a new car with so many recurring faults that the car has spent more time off the road than on it because several mechanics have been unable to solve the problem.
- the motor vehicle is significantly different from the description, sample or demonstration model shown to the consumer. For example, a consumer orders a car with a diesel engine after test-driving the demonstration model, but the car delivered has a petrol engine.
- the motor vehicle is substantially unfit for its normal purpose and cannot easily be made fit within a reasonable time. For example, the engine of a pick-up vehicle, with a stated towing capacity of 3,500 kilograms and normally used for towing, has a design flaw that causes it to overheat when it tows a load of more than 2,500 kilograms.
- the motor vehicle is substantially unfit for a purpose that the consumer told the supplier about, and it cannot easily be made fit within a reasonable time. For example, a sports utility vehicle does not have enough towing capacity to tow a consumer's boat, despite the consumer telling the supplier the boat's specifications.
- the motor vehicle is unsafe. What is ‘unsafe’ will depend on the circumstances of each case. For example, a truck has faulty brakes that cause the vehicle to require a significantly greater braking distance than safe for normal use.

12.2 When there is a major failure to comply with a consumer guarantee, the consumer can choose to:

- reject the motor vehicle and choose a refund or an identical replacement (or one of similar value if reasonably available); or
- keep the motor vehicle and ask for compensation for any drop in its value caused by the problem.

### 13. *Minor failures*

13.1 Minor failures to comply with the consumer guarantees of acceptable quality or fitness for purpose include those where a vehicle has a fault that significantly affects its operation, but can be fixed within a reasonable time. For example:

- a vehicle where the windscreen wipers stop working; or
- a vehicle with a small fault in its transmission, which the manufacturer can quickly resolve by, for example, replacing the entire transmission rather than repairing only the faulty component.

13.2 A minor failure does not initially allow the consumer to reject the motor vehicle and demand a refund, replacement or compensation for the difference in value.

#### 13.3 Example:

13.4 A consumer buys a new car, which soon develops a slight rattling noise that does not interfere with its normal operation. The consumer returns the car to the dealer, who inspects it, determines the cause of the noise and offers to repair it in two days. The consumer refuses this offer and demands a refund, claiming a major failure to comply with the guarantee of acceptable quality. However, in those circumstances, the fault would in all likelihood be considered a minor failure. The dealer would not have to offer a refund in this case and instead elect to repair the vehicle.

13.5 When the failure to comply with a consumer guarantee is minor, the dealer can choose the remedy to be provided. The dealer may choose to repair the vehicle, offer the consumer a refund, or replace the vehicle with an identical vehicle (or one of similar value if reasonably available).

13.6 If, however, the dealer has identified a minor failure which it has been unable to repair within a reasonable time, the failure will be deemed to be a 'major failure'. In those circumstances, provided the rejection period, has not expired, the consumer may elect to return the vehicle for a replacement or refund, repair the vehicle elsewhere and charge the dealer for the reasonable cost of repair, or seek compensation for the loss in value caused by the defect. This may apply even if the delay is due to unavailability of parts.

13.7 AADA recommends that the lack of clarity on what constitutes a major failure could be addressed through further guidance and consumer education. This can be achieved by providing more comprehensive industry by industry guidance and examples of major failures and minor failures, such as in the guide referred to above. Specific industry guides and resources can also clarify concepts of 'durability', 'acceptable quality', 'fitness for purpose' and 'rejection periods' that may apply in particular circumstances.

13.8 AADA notes that the ACL is only 5 years old and if allowed time to mature, a body of case law would emerge across a range of industries, which would provide more certainty and clarification for the benefit of all stakeholders. It took considerable time for a body of case law to emerge in relation to concepts such as misleading and deceptive conduct and unconscionable conduct, but eventually significant case law emerged which provided considerable clarity on these legal concepts.

#### 14. *Extended warranties*

14.1 Extended warranties are essentially a private contract between a dealer and consumer that is offered at the point of sale. They are optional and tend to cover potential liabilities over and above those covered by manufacturers' warranties. AADA is not aware of any significant instances of complaints regarding 'extended warranties' that are offered with the purchase of a motor vehicle. AADA is also of the view that there is no need for legislative intervention to establish disclosure requirements and for agreements to be clear and in writing as was raised as an option at page 45 of the Interim Report. This is because:

14.2 Extended warranties as they apply to motor vehicles are always in writing:

- section 102 of the ACL already provides that a written warranty must be provided to a consumer that states, among other things, the goods (a motor vehicle) comes with guarantees that cannot be excluded under the ACL; and
- consumers are already afforded protection against unfair contracts, misleading or deceptive conduct and unconscionable conduct under the ACL.

#### 15. *Non-disclosure agreements*

15.1 The Interim Report raises the issue of non-disclosure agreements and some suggest banning non-disclosure agreements for settlements that do not offer more than existing ACL rights.

15.2 Most dispute resolution methods in Australia are facilitated and enabled by a combination of confidentiality and "*without prejudice*" privilege. During the course of

litigation claims, many confidential and “*without prejudice*” offers of compromise may be made.

15.3 Most alternative dispute resolution processes, including mandatory alternative dispute resolution processes (such as those contained in the *Franchising Code of Conduct*) provide for mediation. Mediation is a form of assisted “*without prejudice*” negotiation and is enabled and facilitated by confidentiality and privilege. Without confidentiality, the parties would be unwilling to negotiate. In fact, a mediator usually provides the parties with a mediation agreement that contains a clause related to confidentiality of the proceedings and the result of any mediated agreement. The fact that a consumer and a business negotiate “*without prejudice*” or confidentially is a fundamental pillar of settlement negotiations. It cannot and should not be used against the parties willing to negotiate as an admission of guilt.

15.4 A settlement is not an admission of guilt. Often parties negotiate not on the merits of the case but on the cost of having to defend or bring proceedings in court. Many SMEs can and do choose to compensate a consumer even where there is no merit to the claim. If every potential litigant was aware of each negotiated settlement that a small or large business made, it would encourage more unmeritorious claims and discourage settlement of claims.

15.5 Confidentiality clauses are very common in settlement agreements of legal disputes and have not been held to be unlawful by the Courts. AADA strongly opposes any change to the fundamental system of settling claims in Australian dispute resolution processes and the banning of non-disclosure agreements.

## 16. *Lemon laws*

16.1 Why did the ACL not include specific lemon laws when it was introduced?

16.2 On 12 March 2009, the then Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, requested the Commonwealth Consumer Affairs Advisory Council (CCAAC) to undertake a review of statutory implied conditions and warranties as part of the broader ACL reforms.

16.3 The CCAAC, in its final report dated October 2009, recommended that Australia should adopt a system of statutory consumer guarantees to replace existing laws that imply conditions and warranties into consumer contracts. As part of its review, the CCAAC considered whether there was a need for specific lemon laws for motor vehicles or other goods.

16.4 The CCAAC examined whether there was a need to introduce lemon laws for new and used motor vehicles and other goods. It found that *“There is little empirical evidence to suggest that ‘lemons’ are a common feature of the market for motor vehicles or any other market in Australia.”* Furthermore, it found *“There is no need for a lemon law in Australia at this time. However, this is an area which policy makers should consider in the future.”*

16.5 The CCAAC findings with motor vehicle issues are reproduced below:

16.6 Findings 9.1 - CCAAC does not believe the case for the introduction of a separate ‘lemon law’ has been made at this time. However, governments should monitor the effectiveness of national consumer guarantees as they apply to motor vehicles, including gathering data about the number and nature of complaints and disputes about statutory guarantees involving new and used motor vehicles.

16.7 Findings 9.2 - The new statutory consumer guarantees should cover new and used motor vehicles.

16.8 Findings 9.3 - Australian consumer agencies should provide clear, consistent information about the application of statutory consumer guarantees to motor vehicles, particularly about consumers’ rights, businesses’ obligations and the options for resolving disputes about statutory consumer guarantees as they relate to motor vehicles.

16.9 Findings 9.4 - State and Territory governments should give active consideration to the appointment of specialist adjudicators and assessors to deal with disputes involving motor vehicles and statutory consumer guarantees.

16.10 In the CCAAC final report reference was made to the submission from the Motor Trades Association of Australia (MTAA) which noted *“In the period from 2004/2005 to 2007/2008, some 410 applications were made to the CTTI with respect to seeking a determination as to ‘merchantable quality/fit for purpose’ nature on new vehicles sold in NSW... Of that 410, only three vehicles – or 0.0003 per cent of all vehicles sold in that period – were deemed by the CTTT to be not of merchantable quality.”*<sup>7</sup>

16.11 On 14 March 2016 CHOICE released the following statement: *“CHOICE found two thirds of all new car buyers (66%) reported that their cars experienced problems in the first 5 years. [3].”* - [3] n=1,505 car owners who answered the survey. Q; Have

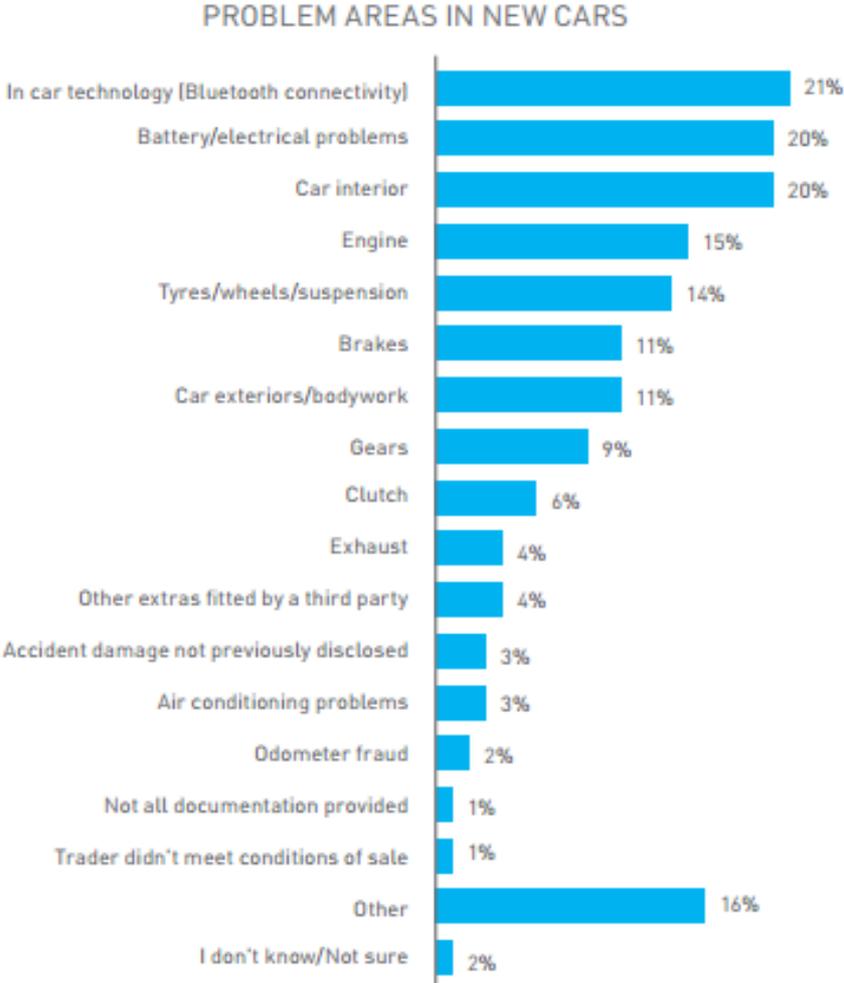
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<sup>7</sup> Commonwealth Consumer Affairs Advisory Council 2009, *Consumer rights – Reforming statutory implied conditions and warranties Final Report*, p. 92, [http://www.ccaac.gov.au/files/2012/10/ConsumerRights\\_FinalReport.pdf](http://www.ccaac.gov.au/files/2012/10/ConsumerRights_FinalReport.pdf).

you experienced any of the following types of problems with your new car in the last four years? The online survey in-field was conducted from 25 December 2015 to 21 January 2016.

16.12 In New Zealand there is a Specialist Motor Vehicle Motor Vehicle Disputes Tribunal (MVDT). For the period 1 July 2013 to 30 JUNE 2014, 222 applications were filed with MVDT and 149 were heard by the MVDT (which includes some carried over from 2012/2103). Assuming 222 applications all related to alleged defects in motor vehicles, this represents approximately 0.1 per cent of new and ex-overseas vehicles sold in New Zealand in this period.<sup>8</sup>

16.13 The CHOICE report identified problem areas in new cars:<sup>9</sup>



<sup>8</sup> Federal Chamber of Automotive Industries 2015, *'Lemon' Laws – An enquiry into Consumer Protection and Remedies for Buyers of Motor Vehicles*, p. 3, <http://www.parliament.qld.gov.au/documents/committees/LACSC/2015/04-Lemons/submissions/014.pdf>.

<sup>9</sup> CHOICE 2016, *CHOICE Lemon Car Report 2016*, p. 8, <https://www.choice.com.au/~/-/media/86ab0351e67441fd9da29de5bf011d16.ashx>

16.14 We would therefore question the assertion that CAANZ has “broad evidence” to support findings for reform with the introduction of specific lemon laws for motor vehicles.<sup>10</sup>

## 17. *Unfair contract terms*

17.1 AADA welcomes the expansion of the unfair contracts terms regime and considers the expansion has not gone far enough. The unfair contract terms regime has been expanded to include businesses with less than 20 employees who enter into standard form contracts of no more than \$300,000 (or \$1,000,000) if it is more than 12 months long).

17.2 The policy rationale that underpins the decision to limit protection to “*small business*” is that a business greater in size can negotiate its own terms. This is far from reality and businesses both large and small suffer from unfair contract terms in standard form contracts. Standard form contracts require regulation.

17.3 In late 2013, the NSW State Government introduced the *Motor Dealers and Repairers Act 2013* prohibiting unfair contract terms in motor vehicle franchise agreements and unfair conduct. Despite prior substantial scaremongering, the introduction of the legislation did not result in a flood of litigation claims. Instead, the overriding response was a subtle change in corporate behaviour and a gradual balancing of some of the more onerous provisions in motor vehicle franchise agreements.

17.4 AADA supports an expansion of the unfair contract terms legislation to cover more small business transactions as it would likely result in more equitable outcomes in business to consumer and business to business transactions.

17.5 Individual consumers in NSW also benefit from the *Contracts Review Act 1980*, which grants NSW Courts the power to declare an entire contract void if it considers it just to do so.

17.6 Given the States are moving in the direction of protecting small business, it is difficult to support the policy rationale to exclude protection for any person or category of consumer from unfair contract terms.

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<sup>10</sup> Consumer Affairs Australia and New Zealand 2016, *Australian Consumer Law Review – Interim Report*, p. 7, [https://cdn.tspace.gov.au/uploads/sites/86/2016/10/ACL\\_Review\\_Interim\\_Report\\_v2.pdf](https://cdn.tspace.gov.au/uploads/sites/86/2016/10/ACL_Review_Interim_Report_v2.pdf).

## 18. Unconscionable conduct

18.1 AADA does not consider that there is any need to extend the operation of the unconscionable provisions of the ACL as they would apply to consumers purchasing motor vehicles. In this regard AADA:

- agrees with the findings in the CHOICE report that outright fraud and deception by salespeople was an issue for a very small percentage of new car buyers;
- considers that where deception occurs, the existing laws under the ACL prohibiting misleading or deceptive conduct are adequate; and
- considers that in the vast majority of instances in which a fraud may be perpetrated against a consumer purchasing a motor vehicle, the existing laws prohibiting unconscionable conduct are adequate.

18.2 In that sense, AADA agrees with CAANZ's findings that a case has not been made for amending the unconscionable conduct provisions.

18.3 AADA, however, is of the view the existing unconscionable conduct provisions should be extended to publicly listed companies. This view is based on the fact that some automotive dealer groups as publicly listed companies and more dealer groups are looking to become publicly listed companies. Despite operating as publicly listed companies, they still operate as franchisees with respect to their commercial relationships with manufacturers and distributors. There is well recognised commercial imbalance in franchisee/franchisor relationships. Accordingly, publicly listed motor vehicle dealers that operate as franchisees ought to be afforded the same protections with respect to unconscionable conduct as other franchisees.

## 19. Conclusion

19.1 We would be happy to meet with you to discuss our submission and matters raised in other submissions. Please do not hesitate to contact me on mobile 0413 007 833, email [dblackhall@aada.asn.au](mailto:dblackhall@aada.asn.au) or our Policy Director Michael Deed on mobile 0417 742 956, email [mdeed@aada.asn.au](mailto:mdeed@aada.asn.au).

Yours sincerely



David Blackhall  
Chief Executive Officer