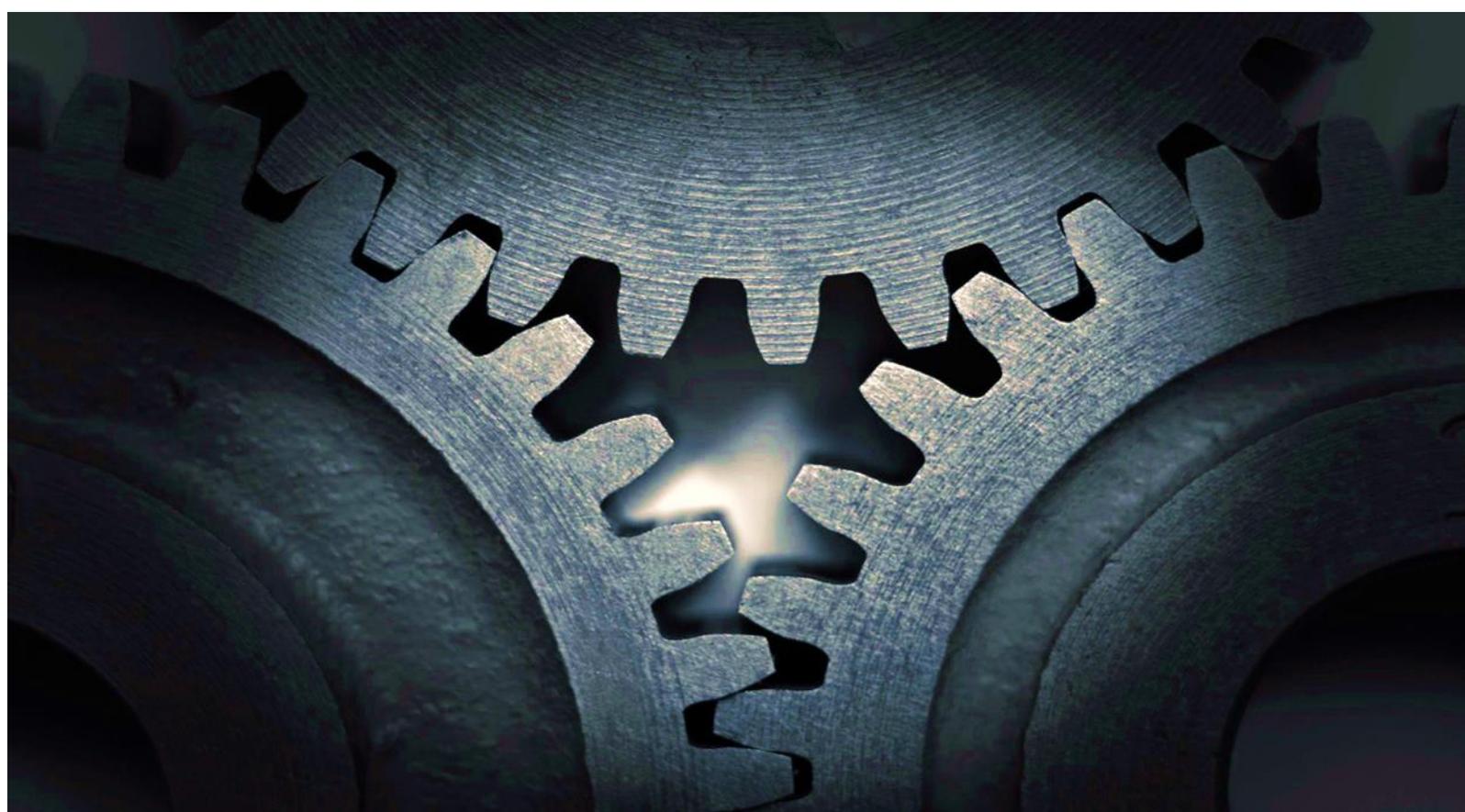




VACC Submission

Australian Consumer Law Review Interim Report response

Dec 2016



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About VACC

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

VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialist, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), and automotive dismantlers and recyclers.

In addition to VACC, its sister organisations – the Motor Trade Associations, represent the automotive industry for their respective states.

Background of the automotive industry

The automotive industry contains approximately 65,000 businesses nationally, the vast majority of which (95%) are small and family owned and operated businesses.

For the year ended June 2016, aggregate employment for the industry was recorded at 360,000 persons. In gross domestic product (GDP), the automotive industry as a whole accounted for approximately \$38.3 billion or 2.5% of Australia's annual GDP in current prices in 2014-15.

The industry is very competitive with small profit margins; consumer behaviour limits capacity of industry to raise prices, and large multi-nationals (insurance companies, the oil industry, supermarkets, and vehicle manufacturers) heavily influence consumer behaviour and/or price. The cost of doing business is high due to rapid vehicle technology advances requiring high-level skills and expensive technology in the repair service process.

VACC response to selected questions within the Interim Report

Consumer Threshold

1.2.4. (4) Should the \$40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?

In its submission to the Australian Consumer Law Review in May 2016, VACC argued for maintenance of the current \$40,000 consumer guarantee threshold, with future increases in the value of the threshold to be tied to annual increases in the Consumer Price Index (CPI).

VACC does not support the notion that the threshold should be adjusted retrospectively by the CPI back to 1986, which would determine its value at over \$100,000 in today's prices.

The arguments for not adjusting the threshold value retrospectively are based on the following:

- Such action may contravene an important legal concept - the *Principle of Legal Certainty*, which states that the retroactivity of laws and decisions must be limited and that there should maximum predictability of official's behaviour within the law
- A change in threshold value from \$40,000 to \$100,000 would constitute an extreme change and disruption towards business activity, particularly that of small business
- Many consumers could see this introduction as an opportunity to 'cash in' when experiencing minor or trivial issues.

VACC would therefore recommend that annual CPI indexation should commence from the current period only moving forward.

In this respect, appropriate models/formulas that could be followed include those currently pertaining to all State Government Departments in Victoria, where automatic indexing of certain fees and fines (e.g. Penalty Units) occurs each year for inflation, so that the value of those fees and fines is maintained.

Similarly, within federal legislation such as the *Crimes Act 1914 - SECT 4AA*, indexation of *penalty units* occurs under the following formula which could also be readily adopted:

(3) On 1 July 2018 and each third 1 July following that day (an **indexation day**), the dollar amount mentioned in subsection (1) is replaced by the amount worked out using the following formula:

$\text{Indexation factor for the indexation day} \times \text{Dollar amount immediately before the indexation day}$

(4) The **indexation factor** for an indexation day is the number worked out using the following formula:

$$\frac{\text{Index number for the reference quarter}}{\text{Index number for the base quarter}}$$

Where:

"base quarter" means the March quarter 3 years before the reference quarter.

"index number", for a quarter, means the All Groups Consumer Price Index number (being the weighted average of the 8 capital cities) published by the Australian Statistician for that quarter.

"March quarter" means a quarter ending on 31 March.

"reference quarter" means the March quarter immediately before the indexation day.

(5) An indexation factor is to be calculated to 3 decimal places (rounding up if the fourth decimal place is 5 or more).

(6) Amounts worked out under subsection (3) are to be rounded to the nearest whole dollar (rounding 50 cents upwards).

(7) Calculations under subsection (4):

(a) are to be made using only the index numbers published in terms of the most recently published index reference period; and

(b) are to be made disregarding index numbers that are published in substitution for previously published index numbers (except where the substituted numbers are published to take account of changes in the index reference period).

Consumer Guarantees – ‘Acceptable quality’ for goods

2.1.2 (10) Could the issues about the durability of goods be addressed through further guidance and information?

The durability of goods is an issue that is often subject to considerable conjecture on the part of stakeholders concerned with the ACL. This is exemplified in the expectations of some stakeholders concerning the durability of a \$500 appliance such as a washing machine, where it is thought that consumers should be entitled to a full refund after eight years or more if the product fails.

VACC argues that the issue of durability of goods is complex matter, particularly in the case of second hand motor vehicles, where further guidance and information is necessary for decision makers and other parties to an ACL dispute.

Whilst the durability of a new motor vehicle is generally predictable and expected, in relation to second hand motor vehicles, the issue of durability cannot be determined with any degree of certainty. For example, an automatic transmission contains hundreds of individual parts and short of completely dismantling the transmission and examining the state of its component parts, it is not possible to determine its durability through simple assumptions, a visual inspection or casual drive of

the vehicle. The very complex nature of this product makes the guarantee of durability an unreasonable impost on traders and increases unrealistic expectations amongst consumers.

The durability of second hand motor vehicles is closely related to their prior history of use, which is often unknown, particularly for vehicles that have been traded more than once. Prior abuse of such vehicles can seriously distort perceptions of durability and this can negatively affect both licensed motor vehicle dealers and consumers. Using the same criteria towards a second hand car, driven in many different ways and conditions and maintained by many different types of mechanics (some qualified, some not) as opposed to a television that is passive in its application and usually never serviced or taken out of the same environment, is both illogical and unfair.

More often than not, inaccurate perceptions concerning second hand vehicle durability are manifested through an inconsistency of decision-making by courts, tribunals and regulators and can be a source of angst and financial distress for parties involved such disputes. The issue of durability and expectation has been permitted to be exaggerated by consumer groups with little industry or product knowledge. This warrants an improved understanding of the durability of second hand motor vehicles by decision makers and participants.

VACC recommends that the issue of durability of second hand motor vehicles be explored more broadly with reference to appropriate resources, technical advice and information from state based motor trades associations and other specialist sources. The information gained could be used a reference point for guidance by decision makers in complex disputes involving durability of second hand motor vehicles or their components. The information could also be disseminated more broadly for the benefit of consumers and businesses in order to better manage expectations in such matters and help reduce any costly and unnecessary litigation.

Lack of clarity about ‘major’ failures and industry specific concerns

2.1.4 (14) Can issues about the acceptable quality of goods that are raised in particular industries be adequately addressed by generic approaches to law reform, in conjunction with industry specific compliance, enforcement and educations activities? What are the advantages and disadvantages of this approach?

In terms of the supply of new goods and services, VACC supports the notion of generic approach to law reform, involving compliance, enforcement and education across all industries. This is because perceptions and expectations concerning the quality of new goods are far more likely to be in unison or agreeable amongst stakeholders and this promotes both a degree of certainty and efficiency in the application of the law across industries.

The same propositions however, are more difficult to substantiate in the case of second hand goods and in particular, used motor vehicles. In its submission to the Australian Consumer Law Review in May, VACC argued for either an exemption of used vehicles from the ACL or the harmonisation of the ACL with the statutory warranty provisions of the Motor Car Traders Act. This is due to the inconsistency of outcomes by decision makers in disputes involving second hand motor vehicles.

Either of these options would provide greater clarity and certainty under the law, with fewer decisions based on spurious assumptions as well as a lack of knowledge concerning the quality and durability of old vehicles that have travelled extensive kilometers.

VACC believes that the unique technical complexity of used motor vehicles and the propensity for repair work that can cost far more than the value of the vehicle itself, distinguishes motor vehicles entirely from that of used goods supplied by other industries. The generic approach of the ACL in relation to the sale of used vehicles only, has led to an unacceptable level of incoherence and inconsistency in decision making, with the unfortunate cost being the increased closure of small businesses and loss of employment for many within the community. VACC argues that these are strong grounds for appropriate reform within the ACL.

2.1.4 (16) In what circumstances are repairs and replacement not considered appropriate remedies?

VACC believes that repairs and replacement are not appropriate in the following circumstances:

- Where there is consumer remorse
- Where claims are of a frivolous nature
- Where there are instances of user neglect or abuse
- Where claims are clearly of a vexatious nature

In terms of consumer remorse, it is evident that the ACL often fails to protect retailers. Experience in Victoria through VCAT and CAV, demonstrates that consumer claims are often accepted without challenge which enable consumers to focus on a minor issue characterised as a major fault requiring a full refund. The operational objectives in this case should include principles supporting fair trade and protection of businesses from vexatious or unmeritorious claims.

VACC has observed actual cases of this nature that have led to incoherent and financially crippling outcomes for motor vehicle retailers. This can potentially lead to bankruptcy and the closure of small businesses, including the loss in employment of many people employed by those businesses. It is therefore VACC's view that there is a large responsibility on the part of the ACL and relevant decision makers to 'get the balance right', as the consequences can be economically and socially significant.

2.1.4 (17) What are the costs associated with businesses providing refunds in circumstances that are above the costs associated with existing business policies or refunds? What impact would this have on consumers?

For a vehicle dealership, costs incurred over and above that of providing refunds to customers can include:

- The costs associated with the supply of a loan vehicle
- The cost of taxi fares
- The cost of downtime for a business involved in disputes

- Businesses paying customers compensation or sums of money to simply ‘go away’

For a small business, these costs can be crippling and ultimately can flow on to increase the costs of goods and services supplied to consumers by those businesses. Many dealerships have the added burden of suffering as a consequence of sensationalist and misguided media attention focusing on issues that are covered by factory warranty that leave consumers in a position of being unjustly enriched. This should not be the intention or effect of the ACL.

Product Safety

2.2.12 Product bans and recalls

In practice there is an assumption that safety recalls constitute a major failure, which can potentially give rise to claims for full refunds. Manufacturers and suppliers of vehicles can initiate a voluntary recall where the product may have a defect in its design, manufacture, assembly or modification, addition, alteration or repair made which may affect its drivability, operation or its use in a safe manner which will or may cause injury to a person. Vehicles have thousands of movable or attached parts and components, many of which are supplied to the manufacturer from a second party supplier. Therefore, it is not uncommon for a manufacturer to apply a voluntary recall where there is any reason or there is a likely possibility that may risk the safety of any person. The number of safety recalls are often prompted by the manufacturer’s objective of preserving their brand.

During the public consultation period the question arose whether recall processes and their awareness are sufficient to protect the consumer. The current process reflects in the manufacturer initiating a voluntary recall where they identify a possibility of a safety risk.

The process of informing consumers, whether the original owner or subsequent owner, is quite simple. The onus for current registered owners to ensure correct address of domicile for vehicle is paramount to being informed of a recall.

The FCAI ‘Code of Practice for the Conduct of an automotive safety recall’ is quite explicit in advising of the process for manufacturers to advise NEVDIS of recalls. Using the vehicle data (i.e. the VIN number, unique to every vehicle registered into Australia) consumers are notified multiple times of a recall.

In addition, the manufacturer is required to report any recalls to the ACCC and responsible Federal Minister. The responsible Federal Minister also has the ability to order a compulsory recall. Where the manufacturer completes the recall service on all recall products prior to the expiration of three years, the safety recall is closed.

In relation to vehicles, VACC considers that the current recall regime is satisfactory and any further legislation such as a ban on ‘unsafe goods’ is unnecessary, as the current legislative framework together with the application of vehicle standards (Australian and international) allows for identification and removal of unsafe products from the market by licensed dealers and legitimate repairer businesses.

Unsolicited Consumer Agreements

2.5.4 (50) Should the cooling-off period be replaced with an opt-in mechanism?

VACC would argue for the retention of the cooling-off period in regards to the sale of motor vehicles. Evidence shows that the cooling -off period is effective in the protection of both motor vehicle retailers and consumers and there is no need for change. Existing penalties for consumers that change their mind after the expiry of the cooling-off period must also be maintained.

VACC however, would support a national harmonisation of the cooling-off period, as it can vary significantly between states and territories. For example, in Victoria consumers are entitled to a cooling off period of three business days, compared to only one business day in New South Wales. Such discrepancies can place both consumers and businesses at a comparative disadvantage in some jurisdictions, which is undesirable.

Purchasing online

4.1.5 (68) Are current measures sufficient to ensure price transparency in online shopping?

VACC believes that current measures pertaining to price transparency in the online shopping environment could be further improved. Price variations for identical products are observed between different states based on different state legislative requirements. A key example involves the display of stamp duty and other taxes/charges on motor vehicles advertised for sale online in Victoria, compared to other states that have no requirements to display these additional duties and charges.

A harmonisation of online pricing standards nationally would benefit both consumers and traders through improved transparency of pricing and present a more level playing field for businesses competing online for sales in different states.

4.1.6 (70) Should the sale-by auction exemption for consumer guarantees be amended with regard to sales by auction sites?

VACC believes that with the increasing proliferation of online sales through digital auction sites such as Graysonline and Ebay, there is an inherent responsibility upon these auction sites to comply with the provisions contained in the consumer guarantees. The current exemption of auction sites from consumer guarantees is causing a distortion within the market which favors these business operators at the expense of businesses that are required to comply with consumer guarantees.

Consumers have no legal redress against online auction sites in cases of failure of products or the provision of services. There is little justification for such operators to continue to be exempt from the ACL. The consequences of undertaking this reform would be a structural change in terms of processes and policies applied by auction houses, along with associated rises in the prices of some

goods and services for consumers. These increases however are unlikely to outweigh the overall net benefit available to consumers through the protection of their rights by the ACL.

Lemon Laws

During the review and at public consultations, the question of introducing lemon laws for new vehicles had been raised. VACC considers that the ACL provides sufficient protection, and with the provision of guidance material developed jointly between industry and the regulator, that additional complexity with a lemon law is unwarranted. Much has been said about “lemon laws”, to the point that their definition and application would be unclear. A further layer of regulation that may give rise to further disputation over its application, is unwarranted, and not supported by any evidence.

Table 1 below is supplied by Consumer Affairs Victoria (CAV) and shows that the number of investigations and enforcement of motor vehicle related issues by CAV is rather miniscule, at only 0.6% of enquiries and 2.9% of disputes. The CAV data and evidence base does not support the introduction of vehicle lemon laws, but rather highlights the effectiveness of the current ACL provisions.

Table1: Overall number of motor vehicle related cases recorded by CAV, July 15- Sep 30 2016

1 July 15- Sep 30 2016 Cases by Category	1 Jul 2015 to 30 Jun 2016
Enquiries	8,281
Disputes	1,639
Proactive Compliance	443
Investigations and Enforcement	48
Grand Total	10,411

Source: CAV

VACC reiterates that the ACL satisfactorily protects consumers purchasing vehicles through licensed dealers, although no protections under the law apply to vehicles purchased through auction, via private sale or where personally imported. Vehicle dealers are required to comply with the guarantees of “fit for purpose”, “acceptable quality”, “free from defects” and “must last for a reasonable time”. A dealer will under the ACL resolve the problem with the vehicle if it has a minor or major fault and this is clearly demonstrated in the overwhelming majority of cases.