

WHY AUSTRALIA NEEDS A MOTOR VEHICLE 'LEMON' LAW

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I INTRODUCTION

On 30 November 2015, the Legal Affairs and Community Safety Committee of the Queensland Parliament tabled its report, *'Lemon' Laws – Inquiry into Consumer Protections and Remedies for Buyers of New Motor Vehicles* (*'Queensland Lemon Law Report'*).¹ In its terms of reference, 'lemons' are defined as 'new motor vehicles with numerous, severe defects that re-occur despite multiple repair attempts or where defects have caused a new motor vehicle to be out of service for a prolonged period of time'.² There are three different bases by which a consumer can obtain relief under the *Australian Consumer Law* (*'ACL'*) located in schedule 2 of the *Competition and Consumer Act 2010* (Cth) (*'CCA'*) in relation to loss or damage arising from the purchase of lemon motor vehicles. The first basis is where the motor vehicle manufacturer conducts an investigation and there is the possibility of a safety concern with one or more of the parts used in its vehicles. The manufacturer may initiate a voluntary recall of the vehicles in the range and repair the defect free of charge. If the manufacturer does not initiate a voluntary recall, the consumer can commence private action for relief under the consumer guarantee provisions of the *ACL* and adopted in the states and territories as a law of their respective jurisdictions.³ The third basis for obtaining relief is for the consumer to complain to the Australian Competition and Consumer Commission (*'ACCC'*) or state and

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1 Legal Affairs and Community Safety Committee, *Parliament of Queensland, 'Lemon' Laws – Inquiry into Consumer Protections and Remedies for Buyers of New Motor Vehicles* (2015).

2 *Ibid* v.

3 *Fair Trading (Australian Consumer Law) Act 1992* (ACT) ss 6–7; *Fair Trading Act 1987* (NSW) ss 27–8; *Consumer Affairs and Fair Trading Act 1990* (NT) ss 26–7; *Fair Trading Act 1989* (Qld) ss 15–16; *Fair Trading Act 1987* (SA) ss 13–14; *Australian Consumer Law (Tasmania) Act 2010* (Tas) ss 5–6; *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 7–8; *Fair Trading Act 2010* (WA) ss 18–19.

territory regulators for a contravention of the prohibition of misleading conduct in section 18 of the *ACL*, or for false or misleading representations by the manufacturer or dealer in relation to after-sales care, the availability of spare parts and servicing. There is also scope for the ACCC to bring a representative action on behalf of consumers to enforce the consumer guarantees. The ACCC has published a comprehensive industry guide on consumer remedies and obligations created by the *ACL*.⁴ Claims for damages or compensation for death or personal injury arising from lemon purchases are dealt with elsewhere in the *ACL*.⁵

A fundamental problem common to all three bases of obtaining relief is the need for someone to conduct an investigation to identify how the defect arose and whether it was present at the time of supply of the motor vehicle, or arose from abnormal use by the consumer or from normal wear and tear. In relation to the first basis for relief, the manufacturer will conduct the investigation. In relation to the second basis for relief, if the manufacturer denies liability, consumers are left in the dark and forced to conduct their own investigation. In relation to the third basis for relief, the regulator must conduct the investigation or appoint an independent arbiter to conduct the investigation.

The Queensland inquiry into the need for a 'lemon law' is not the first to be conducted in Australia. In 2006, the Victorian government made a commitment to introduce a 'lemon law' into the provisions of the then *Fair Trading Act 1999* (Vic). In 2007, the Victorian government released an issues paper entitled 'Introducing Victorian Motor Vehicle Lemon Laws' prepared by Mr Noel Pullen with the assistance of Consumer Affairs Victoria ('CAV').⁶ The purpose of the issues paper was to canvass with industry and the community options for the development and introduction of a motor vehicle lemon law.

In its response to the issues paper, the Royal Automobile Club of Victoria ('RACV') noted several obstacles to achieving effective outcomes for consumers of lemons based on there being no clear process to follow when claiming redress:

- difficulty in establishing the existence and cause of a vehicle's problems;
- the manufacturer being obliged only to repair the vehicle, rather than responding to a consumer's request for a refund or replacement vehicle;
- the respective responsibilities of dealers and manufacturers being unclear, leading to consumers being referred from one to the other; and

4 See Australian Capital Territory Office of Regulatory Services et al, *Motor Vehicle Sales and Repairs: An Industry Guide to the Australian Consumer Law* (Attorney-General's Department (Cth), 2013).

5 See *ACL* pt 3-5 div 1, replacing *Trade Practices Act 1974* (Cth) pt VA; *CCA* pt VIB. See generally Jocelyn Kellam, S Stuart Clark and Mikhail Glavac, 'Theories of Product Liability and the *Australian Consumer Law*' (2013) 21 *Competition & Consumer Law Journal* 1; Luke Nottage and Jocelyn Kellam, 'Product Liability and Safety Regulation' in Justin Malbon and Luke Nottage (eds), *Consumer Law & Policy in Australia & New Zealand* (Federation Press, 2013) 187.

6 Consumer Affairs Victoria, 'Introducing Victorian Motor Vehicle Lemon Laws' (Issues Paper, September 2007).

- the dispute resolution process being potentially 'lengthy and arduous'.⁷

A CAV report prepared by Ms Janice Munt MP ('Victorian Lemon Law Report') was released in July 2008.⁸ However, the Victorian proposal was abandoned following the commencement of investigations into the adoption of a single national law regulating all aspects of consumer protection. As a part of those investigations, the Australian government announced on 12 March 2009 that a review of the Australian law of implied terms would be undertaken by the Commonwealth Consumer Affairs Advisory Council ('CCAAC'). As a part of its terms of reference, the CCAAC was asked to consider 'the need for "lemon laws" in Australia to protect consumers who purchase goods that repeatedly fail to meet expected standards of performance and quality'.⁹ In its report, the CCAAC recommended that the implied terms regime be replaced with a statutory guarantees regime that applied in a generic way to all goods and services acquired by consumers, including motor vehicles. In the light of these reforms, it was thought that a special 'lemon law' for motor vehicles was not necessary.¹⁰ However, the CCAAC recommended that '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'.¹¹ No such specialist adjudicators or assessors have been appointed.

The structure of this article is to consider first, in Part II, the need for regulation to protect consumers in relation to 'lemon' motor vehicles. Next, in Part III, the three existing bases upon which consumers can obtain relief for economic loss arising from defects in motor vehicles under the *ACL* are considered. Part IV considers the difficulties encountered by consumers in litigating motor vehicle disputes in courts and tribunals. Part V examines the approach taken in other jurisdictions to resolving 'lemon' motor vehicle disputes. Part VI considers a number of possible reforms that could be made to the existing law and its enforcement to reduce consumer detriment arising from the purchase of 'lemon' motor vehicles.

7 Royal Automobile Club of Victoria, Submission to Consumer Affairs Victoria, Parliament of Victoria, *Introducing Victorian Motor Vehicle Lemon Laws*, November 2007, 2.

8 Consumer Affairs Victoria, 'Motor Cars: A Report on the Motor Vehicle Lemon Law Consultations' (Report, July 2008).

9 Commonwealth Consumer Affairs Advisory Council, 'Review of Statutory Implied Conditions and Warranties' (Terms of Reference, 2009) <http://archive.treasury.gov.au/documents/1521/PDF/Review_Of_Statutory_Implied_Conditions_And_Warranties.pdf>.

10 Ministerial Council on Consumer Affairs, 'Ministerial Council on Consumer Affairs Meeting' (Joint Communiqué, 4 December 2009) <http://consumerlaw.gov.au/files/2015/09/Meeting_22_4_Dec_09.pdf>.

11 Commonwealth Consumer Affairs Advisory Council, 'Consumer Rights: Reforming Statutory Implied Conditions and Warranties' (Final Report, October 2009) 99.

II MARKET FAILURE AND THE NEED FOR REGULATION

Where markets are characterised by high levels of competition they automatically produce efficient outcomes in terms of ‘lower costs, improved product quality, greater innovation and higher productivity’.¹² In its submission to the Queensland ‘lemon laws’ inquiry, the Federal Chamber of Automotive Industries (‘FCAI’) claimed that the competitive nature of the new vehicle market ensures that defects in new vehicles are minimised without the need for further regulation. According to the FCAI,

[g]enerally, Governments are only required to legislate where there is a need to redress an imbalance or where there is a commercial advantage for one party to act in a way which detrimentally affects another party. Selling new vehicles to consumers is not one of those situations. The interests of consumers are aligned with those of the vehicle manufacturers, importers and dealers.¹³

However, the FCAI submission fails to acknowledge the ‘imbalance’ in information that justifies regulating the market for new motor vehicles. Where market failure exists, markets left to themselves do not efficiently organise the production or allocation of goods and services to consumers in a way that improves living standards and there is a need for regulation. In relation to ‘lemon’ motor vehicles, information asymmetry, that is where one party to the transaction knows more than the other party, is a source of market failure. Motor vehicles have become increasingly computerised and complex over recent decades. Manufacturers are not obliged to share the technical information, software codes, or other information they might have concerning common problems with particular models or batches of vehicle. Information asymmetry makes it difficult for consumers to verify the quality of the new car they are purchasing, or bargain for terms that are more protective of their rights.

A consumer’s right to have a motor vehicle repaired is not a satisfactory remedy in the case of a ‘lemon’ motor vehicle because of the uncertainty and frustration suffered by a consumer who must continually deal with re-occurring faults. For many consumers, the purchase of a new motor vehicle is their most expensive outlay after their principal place of residence. Many consumers depend on a motor vehicle for transportation to and from their place of work, or use a motor vehicle in association with their work. The individual experiences of consumers who purchased ‘lemon’ motor vehicles are set out in Part 3.4 and Appendix C of the *Queensland Lemon Law Report*.¹⁴ Some of the individual

12 See Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Final Report No 45, (2008) vol 2, 28. See generally: at ch 3. See also Organisation for Economic Co-operation and Development, *Consumer Policy Toolkit* (2010) ch 2; Organisation for Economic Co-operation and Development, ‘Roundtable on Demand-side Economics for Consumer Policy’ (Summary Report, 20 April 2006).

13 Federal Chamber of Automotive Industries, Submission No 14 to the Legal Affairs and Community Safety Committee, ‘Lemon’ Laws – Inquiry into Consumer Protections and Remedies for Buyers of New Motor Vehicles, 8 October 2015, 4–5, quoted in Legal Affairs and Community Safety Committee, above n 1, 18.

14 Legal Affairs and Community Safety Committee, above n 1, 14–17, 70–1.

experiences are described in greater detail in the transcript of the public hearing that was conducted as part of the Queensland inquiry.¹⁵ The consumers who purchased 'lemons' spoke of the emotional and financial stress that they had suffered, including the detrimental impact it had on their wellbeing and state of mind.

The evidence of two witnesses will suffice. One witness, Ms Cicchini, stated:

I paid roughly \$40,000 including on-road costs for a brand-new Alfa Romeo 147 in 2009. Considering the price I paid, it was only a five-door hatch. A reasonable person would expect that a hatch costing this much would be a quality product and that it would be reliable and durable. It was not. The car faulted on the first day on my drive home, has been back to the dealership more than 20 times and has spent more than 160 days in the workshop during the three-year manufacturer's warranty period. It is currently at another authorised Alfa Romeo repairer while they too attempt to repair it. It has been there for about two months now.¹⁶

Another witness, Mr Wood, was so dissatisfied with his Chrysler Jeep that he conducted an online campaign to raise money that culminated in the Jeep's destruction and burning. Mr Wood stated that he destroyed his Jeep in frustration after three years of ownership because the manufacturer and car dealer refused to accept responsibility for the defects in the vehicle, and refused to replace the vehicle or give him a refund. Mr Wood stated:

You do not spend \$49,000 on a motor vehicle that you do not expect to drive. So there was the time that my car was off the road, the times that it broke down. I travel a lot for my work. So I would be catching shuttle buses and taxis to airports instead of being able to drive my car, which is why I bought it. I paid for solicitors as well to give me advice before I took on the manufacturer.

In terms of personal impact, it is hard to explain for someone who has not gone through it, but it kind of eats up your thoughts. Every time you are about to drive that car you are thinking, 'Am I going to get there? Should I take this car? Maybe I need to take a different car.' For our long trips we would not take that car. I have a Holden as well and we would take the Holden. When I destroyed that Jeep it had less than 60,000 kilometres in four years. It just goes to show how little I used it. A normal car gets around 20,000 kilometres a year. It eats up all your thoughts and it really does become consuming. As you can see, it has totally consumed us. It does. It is not something you should have to worry about. When you are going to jump in your car and go somewhere, you should be thinking about where you are going and what you are doing, not, 'Is this car going to start? Am I going to make it there? Am I going to be on a main road so a tow truck can get to me?'¹⁷

Having considered the need for regulation in relation to 'lemon' motor vehicles, Parts III–IV of this article will examine why the existing forms of consumer protection are inadequate to protect the purchasers of 'lemon' motor vehicles.

15 See Evidence to Legal Affairs and Community Safety Committee, Parliament of Queensland, Brisbane, 28 October 2015.

16 Ibid 8 (Connie Cicchini).

17 Ibid 14 (Ashton Wood).

III BASES FOR RELIEF

There are three principal bases upon which a consumer can obtain redress for defects in new motor vehicles under the *ACL*. The first is where the manufacturer admits liability and initiates the voluntary recall procedure provided for in section 128 of the *ACL*. Under this basis the manufacturer generally repairs or replaces the part subject to the recall free of charge. The second basis is where the manufacturer or dealer denies liability and the consumer initiates proceedings in a court or tribunal seeking a statutory remedy under the *ACL*, the nature of which will depend on whether the failure to comply with the consumer guarantee was major or not. The third basis upon which a consumer can obtain redress is pursuant to public enforcement by the ACCC. Each basis will be considered in this part. What all three bases have in common is the need to conduct an investigation to identify the nature of the defect and how it arose.

A First Basis: Manufacturer Initiated Voluntary Recall

Vehicle recalls occur where there is the possibility of a safety concern with one or more of the parts used in vehicles that are the subject of the recalled model range. A motor vehicle manufacturer that initiates a voluntary recall must, within two days of taking the action, provide the ACCC with a written notice that complies with *ACL* section 128(7).¹⁸ The notice requires the manufacturer to provide the ACCC with information about the consumer goods that are the subject of the recall, and the nature of the defect. The notice will then be published on the ACCC website.¹⁹ Details of the number of voluntary recalls, in relation to motor vehicle defects, by manufacturer are available on the ACCC's website.²⁰ A summary of the voluntary recalls of motor vehicles by manufacturer from 2011 to 2015 is presented in Table 1.

18 See Australian Competition and Consumer Commission, 'Product Safety: A Guide for Businesses and Legal Practitioners' (Guide, 23 December 2010) 14–15 <<https://www.productsafety.gov.au/content/item.phtml?itemId=983801&nodeId=34452c5e015282c3651c4e076ab001f2&fn=Product%20Safety%20-%20a%20guide%20for%20businesses%20and%20legal%20practitioners.pdf>>.

19 See Australian Competition and Consumer Commission, *Product Safety Recalls Australia* (13 May 2016) <<https://www.recalls.gov.au>>.

20 See Australian Competition and Consumer Commission, *Product Safety Recalls Australia: Cars* (18 April 2016) <<http://www.recalls.gov.au/content/index.phtml/itemId/952855>>.

Table 1: Voluntary Recalls of Motor Vehicles by Manufacturer 2011–15

Manufacturer	2015	2014	2013	2012	2011
Alfa Romeo	2	0	0	0	0
Audi	4	2	4	2	1
BMW	1	2	6	2	2
Chrysler	12	17	13	5	5
Citroën	1	1	0	2	9
Fiat	2	0	1	0	2
Ford	8	4	2	7	3
Holden	12	14	4	5	9
Honda	9	3	3	1	7
Hyundai	2	3	2	1	0
Jaguar	2	5	2	1	2
Kia	1	1	0	0	1
Land Rover	10	3	4	1	1
Mazda	4	3	2	2	2
Mercedes Benz	12	4	4	5	5
Mitsubishi	4	8	11	1	3
Nissan	10	6	6	3	2
Other Manufacturers	17	13	11	13	5
Peugeot	1	2	1	4	4
Porsche	2	1	1	3	0
Renault	2	2	0	0	0
Subaru	3	1	2	0	0
Suzuki	6	7	4	2	1
Toyota	10	9	7	9	5
Volkswagen	8	5	7	1	0
Volvo	6	1	2	1	10
Parts or Accessories	10	8	10	7	9

The total number of motor vehicle-related recalls for all manufacturers in each year since the *ACL* took effect in 2011 are:

- 2015 – 161;
- 2014 – 125;

- 2013 – 109;
- 2012 – 78;
- 2011 – 88.

The FCAI has a code of practice for conducting an automotive safety recall ('FCAI Code'). Clause 5 of the FCAI Code sets out the conditions under which an investigation into a possible recall must occur. It provides:

If a Member has reason to believe (based on information or advice received either from within or from outside the Member's organisation) that a Safety Defect exists, or may exist, in any model, type or category of the Member's Product, the Member must immediately commence an investigation to determine whether the Safety Defect exists.

The Member must ensure that the investigation is carried out without undue delay and in [a] manner which will enable the Member to determine properly and promptly whether the Safety Defect exists and, if the Safety Defect is found to exist, the nature of the Safety Defect and the Member's Products in which the Safety Defect exists.²¹

The Department of Infrastructure and Regional Development ('DIRD'), and its predecessor the Department of Infrastructure and Traffic ('DIT'), administers the *Motor Vehicle Standards Act 1989* (Cth) and the *Motor Vehicle Standards Regulations 1989* (Cth) which regulate the manufacture, importation, and supply of motor vehicles in Australia. Motor vehicle manufacturers must notify the DIRD if they are advised, or become aware, that a vehicle, part or accessory, may have a safety-related defect.²² The DIRD receives and considers complaints about vehicles that may cause injury and conducts investigations. Where there are a significant number of complaints that may indicate a systemic issue, the DIRD asks the manufacturer to conduct an investigation, but it has no powers to force a manufacturer to conduct a recall. The DIRD would refer the matter to the ACCC for their consideration.²³

Motor vehicle manufacturers do not always conduct a voluntary recall even where there is strong evidence that a safety defect exists. In 2013, the DIT received a Freedom of Information ('FOI') request, seeking access to documents regarding transmission issues experienced with Volkswagen vehicles. The DIT advised that it had received 15 complaints in relation to Volkswagen vehicles between 1 January 2007 and 29 May 2013, and 58 complaints between 30 May 2013 and 30 June 2013.²⁴ At the time Volkswagen Group Australia Pty Ltd was a

21 Federal Chamber for Automotive Industries, 'Code of Practice for the Conduct of an Automotive Safety Recall' (Code, January 2014) cl 5 <<http://www.fcai.com.au/library/publication/FCAI%20Recall%20Code%20January%202014.pdf>>.

22 See the DIRD website for information on vehicle standards and safety: Department of Infrastructure and Regional Development (Cth), *Department of Infrastructure and Regional Development* (10 May 2016) Australian Government <<https://infrastructure.gov.au>>.

23 See Department of Infrastructure and Regional Development (Cth), *Vehicle Recalls* (15 February 2016) Australian Government <<https://infrastructure.gov.au/vehicles/recalls/index.aspx>>.

24 Department of Infrastructure and Transport (Cth), *FOI Request Regarding Volkswagen Recalls (FOI 13-62)* (Freedom of Information Request, 16 December 2013) <https://infrastructure.gov.au/department/ips/files/log/The_Department_of_Infrastructure_and_Transport_FOI_13-62.pdf>.

member of the FCAI and had endorsed the FCAI Code. On 27–28 May 2013, an inquest hearing was conducted into the 2011 death of Ms Melissa Ryan, who had been killed when her Volkswagen Golf experienced a sudden deceleration while driving on the Monash Freeway, and the truck travelling behind her collided with her vehicle.²⁵

The Coroner's finding highlights the extent of the complaints.²⁶ On '6 June 2013, *The Age* was reporting that 243 motorists had confirmed that their cars experienced unexpected and rapid deceleration'.²⁷ The Coroner described the media coverage as 'extraordinary and overwhelming'.²⁸ In light of this overwhelming media coverage, Volkswagen announced a voluntary recall of affected cars manufactured between June 2008 and September 2011.²⁹ Volkswagen conceded that 'an electronic malfunction in the control unit inside the gearbox mechatronics may result in a power interruption'. The recall affected 25 928 vehicles.³⁰ Volkswagen agreed to replace the gearbox in affected vehicles at no cost to the owners.

The ACCC has issued Consumer Product Safety Recall Guidelines,³¹ setting out the requirements for conducting a recall. The recall strategy will vary according to the nature of the risk, the type of consumer for whom the product was intended, and the geographical distribution of the product. There are essentially two options that may be adopted by a supplier: a trade-level recall,³² or a consumer-level recall.³³ If a voluntary recall strategy is undertaken, the ACCC will be in a position to assess whether the supplier's recall strategy is adequate to deal with the perceived level of risk. The ACCC will assess whether the supplier has ceased distribution or supply of the product, and whether the supplier has taken steps to mitigate the product safety risk to consumers. The ACCC will act if the proposed action is inadequate in light of the risk to consumers.

According to the ACCC:

implicit in the requirement to notify the Commonwealth minister of measures taken by suppliers to address unsafe products is the expectation that the Commonwealth minister will act in the event that the intended action is insufficient. In the majority of cases, this will take the form of advice to the

25 *Finding into Death with Inquest: Inquest into the Death of Melissa Ryan* [2013] No 0418/2011 (15 November 2013).

26 Ibid 37–41 (Coroner Heather Spooner).

27 Ibid 36 [114] (Coroner Heather Spooner).

28 Ibid 36 [115] (Coroner Heather Spooner).

29 Volkswagen Group Australia Pty Ltd, 'Volkswagen Group Australia Announces Voluntary Recall' (Press Release, 11 June 2013) 1 <<https://www.recalls.gov.au/content/item.phtml?itemId=1048823&nodeId=308ffd82993a15b5458c0ef6540a6988&fn=Volkswagen%20Australia%20announces%20voluntary%20recall%20.pdf>>.

30 Ibid.

31 Australian Competition and Consumer Commission, 'Consumer Product Safety Recall Guidelines: What a Supplier Should Do When Conducting a Product Safety Recall' (Guidelines, December 2015) <<http://www.recalls.gov.au/content/index.phtml/itemId/1000105>>.

32 Withdrawing goods from all entities in the supply chain.

33 Retrieving or modifying goods in the hands of consumers.

supplier about various aspects of the proposed action – for example, refinement of the communication with consumers – and will reflect the cooperative relationship between the supplier and the regulator, and the regulator’s role in providing advice about the quick, thorough and efficient removal of product safety hazards. However, in cases where the regulator is not satisfied that the proposed action will adequately address the risk, it may recommend that the Commonwealth minister consider ordering a compulsory recall.³⁴

In order to avoid a compulsory recall notice pursuant to section 122 of the *ACL*, suppliers generally engage with the ACCC and seek input from it as to their recall plan. Generally, where a voluntary recall is conducted, manufacturers will repair or replace the part that is the subject of the recall. If the remedy offered by the manufacturer or its Australian representative is inadequate, in relation to motor vehicles purchased after 1 January 2011, consumers may seek to enforce their rights under the consumer guarantees regime.³⁵

B Second Basis: Private Action

The consumer guarantees in the *ACL* are imposed on manufacturers and suppliers of motor vehicles who are obligated to meet mandatory quality standards in relation to them.³⁶ For example, the guarantee of acceptable quality in section 54 of the *ACL* is not a guarantee that the motor vehicle supplied will be perfect and absolutely free from defects. Rather, it is a guarantee that the motor vehicle supplied is of a quality that a reasonable consumer would consider acceptable, taking into account the circumstances of the particular transaction. In particular, the vehicle must be:

- fit for all the purposes for which vehicles of that kind are commonly supplied
- acceptable in appearance and finish
- free from defects
- safe
- durable.

This test takes into account:

- the nature of the motor vehicle ...
- the price of the motor vehicle ...
- representations made about the vehicle; for example, in any advertising, on the manufacturer’s or dealer’s website or in the vehicle manual
- anything the dealer told the consumer about the vehicle before purchase, and
- any other relevant facts, such as the way the consumer has driven or used the vehicle.³⁷

The flexibility of the reasonableness test in the guarantee of acceptable quality is intended to protect consumers as well as manufacturers and suppliers:

34 Australian Competition and Consumer Commission, *Review of the Australian Product Safety Recalls System* (2010) 27.

35 *ACL* s 271.

36 Jeannie Paterson and Kate Tokeley, ‘Consumer Guarantees’ in Justin Malbon and Luke Nottage (eds), *Consumer Law & Policy in Australia & New Zealand* (Federation Press, 2013) 97, 97.

37 Australian Capital Territory Office of Regulatory Services et al, *Motor Vehicle Sales and Repairs*, above n 4, 4.

to protect consumers while not imposing unrealistic standards on manufacturers and suppliers.

Safety is an essential requirement of the guarantee of acceptable quality. However, vehicles subject to a voluntary recall by a manufacturer are not necessarily unsafe for the purposes of the guarantee of acceptable quality. This is because vehicle recalls occur where there is only the *possibility* of a safety concern, where one or more of the parts used in vehicles are part of the recalled model range. A recall applies to all vehicles and models that use the part. Generally, the vast majority of the vehicles that are the subject of a voluntary recall are perfectly safe, but there is a possibility that some of them may contain a defective part. A recall is not evidence that any particular vehicle that is part of a recalled model is unsafe or defective.

According to a document co-authored by the ACCC,

[a] recalled vehicle is not automatically considered 'unsafe' for the purposes of failing the guarantee of acceptable quality under the consumer guarantees. The two regimes operate independently and the reason for the recall will still need to be considered in relation to the test of 'acceptable quality'.³⁸

Where 'a particular vehicle is part of a category that is covered by a vehicle recall, the question of whether a consumer guarantee has not been complied with needs to be considered on a case-by-case basis for each vehicle', the recall does not of itself provide evidence of this.³⁹

Where there is a failure to comply with a consumer guarantee, the consumer has a choice. The consumer can seek recourse against the manufacturer, or pursue the person who supplied the goods to the consumer (typically, a retailer or dealer). The consumer's rights against the supplier are more extensive than they are against the manufacturer. The consumer can only recover his or her losses (monetary damages) from the manufacturer, whereas the consumer has specific repair, replacement and refund rights against the supplier.⁴⁰

The consumer's specific rights and remedies against the supplier depend on whether the fault is major, or not major. If the fault is *major* and cannot be remedied within a reasonable time, the *consumer* can either:

- reject the goods (in which case the supplier would have to collect the goods at the supplier's expense if the goods cannot be returned or removed without significant cost to the consumer), and, at the consumer's election, obtain a refund or have the goods replaced at the supplier's cost;⁴¹ or
- keep the goods and ask for compensation to make up the difference in value caused by the failure.⁴²

38 Ibid 8.

39 Australian Competition and Consumer Commission, 'Takata Airbag Recalls – Your Consumer Rights' (Media Release, 30 July 2015) <<https://www.accc.gov.au/update/takata-airbag-recalls-your-consumer-rights>>.

40 *ACL* ss 259 (remedies against the supplier), 271 (remedies against the manufacturer).

41 *ACL* s 259(3)(a); ss 263(2)–(4).

42 *ACL* s 259(3)(b).

If the failure to comply with a guarantee is *not major* and the goods can be fixed, the *supplier* may choose between either:

- repairing the goods within a reasonable time at the supplier's cost;
- replacing the goods; or
- giving a refund.⁴³

In all cases (whether the failure is major or not major) the consumer has, in addition, a right to sue the supplier for any reasonably foreseeable consequential loss or damage.⁴⁴

The dealer is not entitled to make any number of attempts to repair a defective motor vehicle. The dealer must repair the failure within a 'reasonable' time. If the supplier refuses or fails to remedy the failure within a reasonable time the consumer may choose between:

- having the goods repaired by a third party and recover the costs incurred from the supplier, or
- notify the supplier that the consumer rejects the goods, and of the ground or grounds for the rejection.⁴⁵

Where a consumer exercises his or her rights against the supplier, the supplier will have a right of indemnity against the manufacturer. Sections 271(1)–(2) of the *ACL* provide that the manufacturer is liable to indemnify the supplier in respect of the liability of the supplier to a consumer if the supplier is liable for a failure of the goods to comply with the guarantee of acceptable quality in section 54 of the *ACL*. Section 274(3) of the *ACL* states that the manufacturer's liability to indemnify the supplier is the same as if it had arisen under a contract of indemnity made between the supplier and the manufacturer. This means that the manufacturer must make good any losses suffered by the supplier in relation to the failure to comply with the consumer guarantee.

The consumer's specific rights against the manufacturer depend on whether the manufacturer has agreed to provide an express warranty. Manufacturers generally prefer to repair or replace faulty goods rather than pay damages. Where the manufacturer provides an express warranty specifying that they will remedy a fault by repair or replacement of the goods, they must remedy the failure within a reasonable time.⁴⁶ Where the manufacturer has not provided an express warranty, or fails to remedy the failure within a reasonable time, the consumer may recover damages against the manufacturer in accordance with section 272(1)(a) of the *ACL*, for any reduction in value of the goods resulting from the failure to comply with the guarantee. In addition, the consumer will be able to recover any reasonably foreseeable consequential loss or damage against the manufacturer pursuant to section 272(1)(b) of the *ACL*.

43 *ACL* s 259(2)(a); s 261.

44 *ACL* s 259(6).

45 *ACL* s 259(2)(b).

46 *ACL* s 271(6).

C Third Basis: Public Enforcement

The third basis upon which a consumer may obtain redress from a motor vehicle manufacturer or dealer is through public enforcement by the ACCC or one of the state and territory regulators.⁴⁷ The ACCC and the state and territory regulators are empowered to conduct investigations into alleged breaches of the specific and general protections in the *ACL*, including the general protection for misleading conduct in section 18.⁴⁸ A motor vehicle manufacturer or dealer may also contravene one of the specific protections in the *ACL* such as making a false or misleading representation that the motor vehicle was of a particular standard, quality, value, style, or model;⁴⁹ making a false or misleading representation concerning the availability of facilities for the repair of the motor vehicle or of spare parts for the motor vehicle;⁵⁰ or making a false or misleading representation concerning the existence, exclusion or effect of one of the consumer guarantees under division 1 of part 3-2 of the *ACL*.⁵¹

There is also scope for the regulators to bring a representative action on behalf of consumers to enforce the guarantees. Section 277 of the *ACL* provides that the regulator may commence an action on behalf of one or more persons who are entitled to take action against suppliers or manufacturers who fail to honour consumer guarantees. However, the regulator may only take such action if it has obtained the written consent of the person, or each of the persons, on whose behalf the action is taken.⁵² The regulator must conduct its own investigation into the nature of the defect, whether the failure to comply with the guarantee is major or not, and the remedy that is appropriate in the circumstances; or it can, as part of its settlement proceedings assign the investigation to an independent arbiter.

In 2015, the ACCC settled an investigation into Fiat Chrysler Australia ('Chrysler') in relation to motor vehicle faults and how consumer service complaints were handled by Chrysler and its dealers. The complaints 'related to various issues including delays in sourcing spare parts and failing to adequately

47 The state and territory consumer protection agencies are: Australian Capital Territory – *Fair Trading* (25 January 2016) Access Canberra <https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/2269>; NSW – *Fair Trading* (29 April 2016) <www.fairtrading.nsw.gov.au>; Northern Territory – *Consumer Affairs* (6 May 2016) <www.consumeraffairs.nt.gov.au>; Queensland – *Fair Trading* (13 May 2016) <www.fairtrading.qld.gov.au>; South Australia: *Consumer and Business Services* (2016) <www.cbs.sa.gov.au>; Tasmania – *Consumer Affairs and Fair Trading* (21 April 2016) <www.consumer.tas.gov.au>; Victoria – *Consumer Affairs Victoria* <www.consumer.vic.gov.au>; Western Australia – *Department of Commerce* <www.commerce.wa.gov.au>.

48 See generally, Australian Capital Territory Office of Regulatory Services et al, 'Compliance and Enforcement: How Regulators Enforce the *Australian Consumer Law*' (Guide, Attorney-General's Department (Cth), 2010).

49 *ACL* s 29(1)(a).

50 *ACL* s 29(1)(j).

51 *ACL* s 29(1)(m).

52 *ACL* s 277(2).

deal with customer concerns'.⁵³ The investigation was resolved by means of an administrative undertaking to appoint an independent reviewer to investigate and determine disputes. Under the Chrysler Consumer Redress plan, Chrysler agreed that it would appoint an independent person to review the consumer complaints and to determine whether the outcome was in accordance with *ACL* consumer rights. Chrysler agreed that where a review was conducted, and it was determined by the independent reviewer that the outcome was not in accordance with *ACL* consumer rights, Chrysler would provide or procure a dealer to provide a remedy on Chrysler's behalf as recommended by the independent reviewer. The ACCC has approved Ford's former in-house legal counsel, Mr Peter George, to be the independent reviewer in disputes between Chrysler and its customers.

The appointment of an independent arbiter to investigate and make determinations was first used by the ACCC following the Federal Court's decision in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*.⁵⁴ The Federal Court, by consent, made declarations that Coles had engaged in unconscionable conduct in contravention of section 22 of the *ACL* (now *ACL* section 21). The unconscionable conduct on the part of Coles consisted of the unilateral and retrospective variation of its trading terms with grocery suppliers. Coles also gave a court-enforceable undertaking to the ACCC to establish a formal process to enable those harmed by Coles' conduct to recover compensation.⁵⁵

Under the terms of the undertaking, Coles agreed to appoint former Victorian Premier, the Hon Jeffrey Kennett AC as independent arbiter to investigate and make findings in relation to disputes between each supplier and Coles. He did not act as a commercial arbitrator and was not governed by the commercial arbitration legislation enacted in Australian jurisdictions.⁵⁶ Coles agreed to provide any information or documents requested by the independent arbiter and to be bound by the determination of the independent arbiter in respect of each supplier.⁵⁷ Suppliers were not bound by the determination of the independent arbiter and were free to pursue the matter with the ACCC or in the courts. Coles agreed to pay to each supplier any refund determined by the

53 Australian Competition and Consumer Commission, 'Chrysler Undertakes To Remedy Customer Service Complaints Following ACCC Investigation' (Media Release, MR 174/15, 11 September 2015) <<http://www.accc.gov.au/media-release/chrysler-undertakes-to-remedy-customer-service-complaints-following-accc-investigation>>.

54 [2014] FCA 1405.

55 Coles Supermarkets Australia Pty Ltd and Grocery Holdings Pty Ltd, *Undertaking to the Australian Competition and Consumer Commission Pursuant to Section 87B of the Act* (Undertaking, 16 December 2014) <<http://registers.accc.gov.au/content/item.php?itemId=1183859&nodeId=dbcad4a6ce34f70e322b7e6331514739&fn=87b%20Undertaking%20-%20Coles%20-%20signed%2016%20December%202014.pdf>>.

56 See *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (Vic); Justice Clyde Croft, 'Commercial Arbitration in Australia: The Past, the Present and the Future' (Paper prepared for the Chartered Institute of Arbitrators, London, 25 May 2011) <<http://www.austlii.edu.au/au/journals/VicJSchol/2011/59.pdf>>.

57 Coles Supermarkets Australia Pty Ltd and Grocery Holdings Pty Ltd, above n 55, [14].

independent arbiter and to bear the costs of the independent arbitration process.⁵⁸ That process resulted in Coles agreeing to repay more than \$12.3 million to the suppliers.⁵⁹ The use of an independent arbiter by the ACCC as part of its public enforcement function is akin to the establishment of a temporary industry-based consumer dispute resolution scheme considered below in Part V.

IV ISSUES ASSOCIATED WITH PRIVATE ACTIONS

Section 138 of the *CCA* confers jurisdiction on the Federal Court of Australia over any civil matter in relation to the *ACL*. Jurisdiction is also conferred by section 138A of the *CCA* on the Federal Circuit Court in relation to civil matters where the loss or damage does not exceed \$750 000, or an amount specified in the regulations. Section 138B confers jurisdiction on the courts of the states and territories. The sums involved in relation to actions for defects in motor vehicles will generally not warrant the time and expense involved in bringing proceedings in the superior state courts or the federal courts. Such disputes will generally be brought in the state and territory tribunals.

In New South Wales ('NSW'), prior to 1 January 2014, the Consumer, Trader and Tenancy Tribunal of New South Wales ('NSWCTTT') had jurisdiction to hear consumer claims in relation to the enforcement of consumer guarantees under the *ACL* in NSW for less than the monetary limit of \$30 000.⁶⁰ This limit did not apply to new motor vehicles purchased for private use (under s 14(3) of the *Consumer Claims Act 1998* (NSW)). Since 1 January 2014, the New South Wales Civil and Administrative Tribunal ('NCAT') – Consumer and Commercial Division has had jurisdiction to hear consumer claims in relation to the enforcement of consumer guarantees under the *ACL* in NSW.⁶¹ In Victoria, chapters 7 and 8 of the *Australian Consumer Law Fair Trading Act 2012* (Vic), provide that the Victorian Civil and Administrative Tribunal ('VCAT') has jurisdiction to hear minor civil disputes in relation to the enforcement of consumer guarantees under the *ACL* in Victoria. In Queensland, section 11 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('*QCAT Act 2009*') provides that the Queensland Civil and Administrative Tribunal ('QCAT') has jurisdiction to hear minor civil disputes in relation to the

58 Ibid [17].

59 See Sue Mitchell, 'Coles To Pay Suppliers \$12m', *Australian Financial Review* (Melbourne), 1 July 2015, 1.

60 Jurisdiction was conferred on the Consumer, Trader and Tenancy Tribunal by the combined operation of *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 21(1), *Consumer Claims Act 1998* (NSW) s 7, *Fair Trading Act 1987* (NSW) s 74.

61 Jurisdiction is conferred on NCAT by Part 3 of the *Civil and Administrative Tribunal Act 2013* (NSW) ('*NCAT Act*'). NCAT took over the jurisdiction of the Consumer, Trade and Tenancy Tribunal. Information concerning the making of claims, jurisdiction and orders that can be made by NCAT is available on its website: NSW Civil and Administrative Tribunal, *Consumer and Commercial Division* (4 March 2016) <http://www.cc.ncat.nsw.gov.au/cc/Divisions/Consumer_claims.page>. See also Mark Robinson, Juliet Lucy and John Fitzgerald, *NCAT Practice and Procedure* (Thomson Reuters, 2015).

enforcement of consumer guarantees under the *ACL* in Queensland.⁶² The *ACL* is Queensland law by virtue of section 16 of the *Fair Trading Act 1989* (Qld). QCAT is a ‘court’ for the purposes of the *ACL* when determining cases within its jurisdiction which require consideration of the *ACL*.⁶³ In Western Australia (‘WA’), the Magistrates Court of Western Australia – Civil Division has jurisdiction to hear consumer disputes under the *ACL* in WA.⁶⁴ In South Australia (‘SA’), the Magistrates Court of South Australia had jurisdiction to hear minor civil disputes in relation to the enforcement of consumer guarantees under the *ACL* in SA until March 2015. Since March 2015, the South Australian Civil and Administrative Tribunal has jurisdiction to hear consumer disputes.⁶⁵ In Tasmania, the Magistrates Court of Tasmania has jurisdiction to hear minor civil disputes in relation to the enforcement of consumer guarantees under the *ACL* in Tasmania.⁶⁶ In the Australian Capital Territory (‘ACT’), the Australian Capital Territory Civil and Administrative Tribunal has jurisdiction to hear consumer disputes under the *ACL* in the ACT.⁶⁷ In the Northern Territory (‘NT’) the Northern Territory Local Court has jurisdiction to hear consumer disputes under the *ACL* in NT.⁶⁸

The following five issues may be encountered by consumers in litigating motor vehicle disputes in the courts and tribunals:

- lack of clarity under the *ACL*;
- evidentiary issues;
- consumer risk as to a cost award;
- time taken to resolve disputes; and
- the tribunals’ low monetary limits.

A Lack of Clarity under the *ACL*

Car manufacturers will generally attempt to repair a defect in a new motor vehicle if it is within the warranty period. They may even make multiple attempts at repair. They may be prepared to replace the vehicle if these attempts are unsuccessful, but they will generally resist providing a refund. To get a refund a consumer must be prepared to go to court and prove that the defect constitutes a

62 A ‘minor civil dispute’ is defined in relation to a ‘prescribed amount’, which is defined to mean \$25 000: *QCAT Act 2009* (Qld) sch 3 (definitions of ‘minor civil dispute’ and ‘prescribed amount’).

63 Section 164 of the *QCAT Act 2009* (Qld) provides that QCAT is a court of record. The Queensland Court of Appeal held that QCAT is a court of the State rather than a Tribunal for the purposes of the Constitution: *Owen v Menzies* (2012) 265 FLR 392, 396 [10], 400 [20] (de Jersey CJ), 407–8 [48]–[49], 409 [52], 410 [56] (McMurdo P). Muir JA agreed with de Jersey CJ: at 420 [101]. It was assumed that QCAT is a court for the purposes of the *ACL* in *Jennison v AW Admin Pty Ltd* [2011] QCATA 285.

64 *Magistrate’s Court (Civil Proceedings) Act 2004* (WA) pt 2 and the *Fair Trading Act 2010* (WA) s 2 (definition of ‘court’).

65 *Magistrates Court Act 1991* (SA) pt 2 div 3 and the *Fair Trading Act 1987* (SA) s 16.

66 *Magistrates (Civil Division) Act 1992* (Tas) pt 3, *Australian Consumer Law (Tasmania) Act 2010* (Tas) s 8, and *Magistrates Court Act 1987* (Tas) s 3B.

67 *ACT Civil and Administrative Tribunal Act 2008* (ACT) pt 4.

68 *Local Court Act 2015* (NT) pt 3 div 2.

major failure to comply with a consumer guarantee under the *ACL*. The consumer guarantees remedies in the *ACL* contain a number of complexities and uncertainties that limit their usefulness as a consumer protection measure in relation to 'lemons'. These include:

- The onus is on the consumer to prove that the motor vehicle was not of *acceptable quality* and that it had a defect at the time it was supplied (a latent defect).
- If the defect is *not major* the supplier is entitled to remedy the defect, but there is no guidance as what constitutes a *reasonable period* for allowing the supplier to remedy the defect.
- A *major failure* in a motor vehicle is one that cannot be remedied. The supplier or manufacturer who does not want to give a refund is likely to dispute a claim by the consumer that it cannot be remedied and is a major failure.
- Where it is a major failure the consumer may nevertheless lose the right to a refund if the rejection period has passed. The provisions regarding *loss of right to reject* the motor vehicle and ascertaining the rejection period are complex.

A failure to comply with *ACL* section 54 has been made out against motor vehicle dealers in a number of cases considered below. However, the decisions do not define what specifically amounts to a major failure to comply. A particular difficulty with the definition of 'acceptable quality' in *ACL* section 54 is that a motor vehicle must be durable. There is no definition of 'durable'.

Durability is determined by how long a 'reasonable' consumer would expect a motor vehicle to last taking into account the price paid by the consumer and any representations that were made at the time of purchase.⁶⁹

It is unclear how long a motor vehicle should last and continue to perform well and not break down. It is also unclear how many times the dealer is entitled to attempt to repair the vehicle and what constitutes a 'reasonable' time to effect the repairs.

B Evidentiary Issues

Courts and tribunals determine rights on the basis of the facts and evidence presented by the parties. They provide a process for the resolution of disputes in relation to defective motor vehicles, but the process requires a hearing of each party's evidence and submissions. They are not investigative bodies. An issue faced by consumers in court and tribunal proceedings is the evidentiary burden they must satisfy in proving that a motor vehicle was not of acceptable quality and that the failure to comply with the consumer guarantee amounts to a 'major failure'. The time at which goods are to be of acceptable quality is the time at which the goods are supplied to the consumer. The Full Federal Court held in

69 See *Barratta v TPA Pty Ltd* [2012] VCAT 679 (25 May 2012).

Medtel Pty Ltd v Courtney,⁷⁰ in relation to section 74D of the *Trade Practices Act 1974* (Cth) ('TPA') that the time for assessing whether goods were of merchantable quality was at the time they were supplied to the consumer. This approach has been applied by tribunals in relation to section 54 of the *ACL*.⁷¹ It was implicitly applied as the correct test by the New South Wales Court of Appeal in *Freestone Auto Sales Pty Ltd v Musulin*.⁷² The onus is on the consumer to prove that there existed an inherent defect in the vehicle that was present at the time of supply and that it was the cause of the damage suffered by the applicant. However, where a supplier contends that a defect arose after it was supplied from abnormal use or lack of maintenance by the consumer, the supplier bears the onus of proving that fact.⁷³

As Paterson and Tokeley observe,

It may be relatively straightforward for a consumer to establish that goods are not of acceptable quality where the goods are purchased new and the defect becomes apparent soon after the date of purchase. ... A consumer faces more difficult evidentiary challenges if the defect in the goods appears weeks or years after purchase. The defect might be one that existed at or near the time of purchase but did not cause problems until much later, in which case the goods would not be durable and would not meet the standard of acceptable quality, or it could be a defect that develops over time and is attributable to normal wear and tear.⁷⁴

In relation to motor vehicle disputes, NCAT operates on the basis that the applicant bears the onus of proof according to the civil standard, the balance of probabilities. In *Gurr v Carsplus Australia Pty Ltd*, the tribunal stated:

in order to succeed, the applicant, who bears the onus of proof, must show that there are problems with the vehicle, and that in all the circumstances the respondents or either of them is responsible for those problems. He has failed to discharge this onus of proof.⁷⁵

70 (2003) 130 FCR 182, 205 [64], 206 [70] (Branson J). This was confirmed by the Full Federal Court in *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145, 195 [180] (The Court).

71 See *Cicchini v Barbizon Pty Ltd* [2014] QCAT 675 (23 December 2014) [21]–[22] (Adjudicator Davern); *Burdon v Outback Generators Pty Ltd* [2013] NSWCTTT 270 (17 June 2013) [14] (Member Levingston); *Bialous v Budget Vehicles Pty Ltd* [2013] NSWCTTT 130 (9 April 2013) [36], [41] (Senior Member Goldstein); *Sereni v Wax Head Inc Pty Ltd* [2013] NSWCTTT 531 (29 October 2013) [15] (Member Holwell); *Barratta v TPA Pty Ltd* [2012] VCAT 679 (25 May 2012) [164]–[165] (Member French).

72 [2015] NSWCA 160. 'An inference is arguably available that the ignition problems were present, although latent, at the time of sale': at [63] (Simpson J). McColl and Ward JJA agreed with Simpson J: at [1]–[2].

73 *Effem Foods Ltd v Nicholls* [2004] ATPR ¶ 42-034, 49 298 [17] (Handley JA). See also *Cicchini v Barbizon Pty Ltd* [2014] QCAT 675 (23 December 2014) [21]–[22] (Adjudicator Davern); *Burdon v Outback Generators Pty Ltd* [2013] NSWCTTT 270 (17 June 2013) [22] (Member Levingston).

74 Paterson and Tokeley, above n 36, 109.

75 [2011] NSWCTTT 146 (14 April 2011) (Member Ross).

Such findings are not uncommon in tribunal disputes involving motor vehicles.⁷⁶

Similar evidentiary issues are faced by applicants seeking redress before tribunals in relation to other pieces of complex machinery such as tractors.⁷⁷

If the applicant fails to adduce sufficient evidence to allow the tribunal to conclude that there has been a failure to comply with a statutory guarantee, the tribunal has no choice but to dismiss the application.⁷⁸ Both parties are likely to give sworn evidence that is contradictory. The applicant may present evidence as to the general nature of the problem and be accepted by the tribunal to be an honest witness. However, honesty is not enough. In order to obtain a refund, the applicant must present *expert opinion evidence* that will persuade the tribunal that there is an inherent defect in the vehicle that was present at the time of supply; that it was the cause of the problems suffered; and, in order to obtain a refund, that the defect constitutes a major failure to comply with a consumer guarantee.⁷⁹

The high cost of obtaining inspections and expert mechanical reports may deter some applicants from doing so. Technical problems in motor vehicles are difficult and expensive to diagnose. A consumer may be reluctant to incur these costs, especially where the purchase price of a vehicle is relatively low in comparison to the costs of obtaining an expert's report. In *Hereford v Automobile Direct Wholesale Pty Ltd*,⁸⁰ the applicant purchased a used 2006 Honda Legend from the respondent in 2014. The applicant drove the vehicle from Sydney to the north coast of NSW where he lived. On the drive, the applicant noticed noises

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- 76 See *Salim Investments Pty Ltd v MCM Autos Pty Ltd* [2015] NSWCATCD 115 (14 October 2015) [44], [55]–[56] (General Member Charles); *Freestone Auto Sales Pty Ltd v Musulin* [2015] NSWCA 160, [62]–[63] (Simpson J); *Hereford v Automobile Direct Wholesale Pty Ltd* [2015] NSWCATCD 58 (10 April 2015) [48] (General Member Sarginson); *Reinhold v Ford Motor Co of Australia Ltd* [2014] QCAT 671 (1 December 2014) [28] (Adjudicator Bertelsen); *Smith v Family Auto Group Pty Ltd* [2014] NSWCATCD 244 (19 December 2014) [34]–[35] (General Member Sarginson); *Cicchini v Barbizon Pty Ltd* [2014] QCAT 675 (23 December 2014) [16]–[17], [20] (Adjudicator Davern); *Cornwell v The Trustee for Byrne No 2 Trust* [2014] QCAT 523 (11 June 2014) [22], [27] (Adjudicator Trueman); *Mbogua v Brookart Pty Ltd* [2013] NSWCTTT 293 (21 June 2013) [16]–[19] (Member Levingston); *Wise v Tapace Pty Ltd* [2013] NSWCTTT 309 (3 July 2013) [41] (Member Sarginson); *Minaway v Ford Motor Co of Australia Ltd* [2013] NSWCTTT 327 (4 July 2013) [28] (Member Eftimiou); *Brown v PPT Investments Pty Ltd* [2013] NSWCTTT 542 (31 October 2013) [21]–[22] (Member Ross); *Yaldwyn v Australian Warranty Network Pty Ltd* [2013] NSWCTTT 642 (16 December 2013) [15] (Member Holwell); *Cosgriff v Hyundai Motor Co of Australia Pty Ltd* [2012] NSWCTTT 51 (6 February 2012) [15] (Senior Member Durie); *Baxter v Mazda Australia Pty Ltd* [2012] NSWCTTT 251 (5 July 2012) [64] (Member O'Connor); *Sankari v GM Holden Ltd* [2011] NSWCTTT 186 (5 May 2011); *Alley v Crampton Automotive Pty Ltd* [2011] NSWCTTT 228 (2 June 2011); *Hogan v PTH Pty Ltd* [2011] NSWCTTT 269 (27 June 2011); *Neang v Duc Nguyen Pty Ltd* [2011] NSWCTTT 363 (11 August 2011).
- 77 For cases involving the same brand of imported Chinese tractor, see *Cary Boyd v Agrison Pty Ltd* [2014] VMC 23; *Madsen v Agrison Pty Ltd* [2014] NSWCATCD 79 (16 May 2014); *Marwood v Agrison Pty Ltd* [2013] VCAT 1549 (3 September 2013).
- 78 See *Alley v Crampton Automotive Pty Ltd* [2011] NSWCTTT 228 (2 June 2011); *Reinhold v Ford Motor Co Australia Ltd* [2014] QCAT 671 (1 December 2014) [47]–[48] (Adjudicator Bertelsen).
- 79 See NSW Civil and Administrative Tribunal, *Procedural Direction No 3 – Expert Witnesses*, 7 February 2014, discussing the procedure to gather expert opinion evidence.
- 80 [2015] NSWCATCD 58 (10 April 2015).

emanating from the motor. Two days after purchase, the applicant took the vehicle to an independent mechanic. The vehicle was ‘diagnosed ... as having a faulty timing belt tensioner, and a water leak from the cylinder heads’.⁸¹ A further \$1900 was required to determine the nature and extent of the damage to the engine. The applicant was not willing to pay this amount and therefore, the precise extent of the damage was not known. As a result of the lack of evidence that the applicant presented, the Tribunal was not satisfied that the damage to the engine amounted to a major failure.⁸²

In *Freestone Auto Sales Pty Ltd v Musulin*,⁸³ Ms Musulin purchased a used car for \$31 500. It was discovered that the vehicle had previously suffered major mechanical damage and was a ‘repaired write off’.⁸⁴ The dealer had purchased it at an insurance auction and subsequently replaced the engine. In 2012, the vehicle was leaking oil, and had difficulty starting. As a result, the applicant undertook investigations to determine the cause of the problems.⁸⁵ The cost of the further inspections was \$2000–\$3000. The New South Wales Court of Appeal noted it was arguable that the problems with the vehicle ‘were present, although latent, at the time of sale’ but the evidence was not sufficient to find that there was a failure to comply with the guarantee of acceptable quality.⁸⁶

Even if the applicant obtains an expert’s report there is no guarantee that the expert’s report will be admissible. In order to qualify as an expert, the person must have “specialised knowledge” ... by reason of specified training, study or experience’.⁸⁷ If the expert’s report is admissible, it may not be accepted by the tribunal. In *Smith v Family Auto Group Pty Ltd*, the applicant purchased a used 2008 Toyota Landcruiser for \$39 000.⁸⁸ The applicant was returning home with the vehicle from Sydney to Ballina when the vehicle developed engine problems. The vehicle was towed to Ballina for repairs.⁸⁹ The applicant sought to return the vehicle and to obtain a full refund. The respondent refused. Relevantly, the applicant’s evidence included:

- an undated written statement;
- oral evidence;
- the towing invoice;
- a vehicle inspection report;
- an RTA (Roads and Transport Authority) inspection station E-Safety Check Report; and

81 Ibid [4] (General Member Sarginson).

82 Ibid [48] (General Member Sarginson).

83 [2015] NSWCA 160.

84 Ibid [13] (Simpson J).

85 Ibid [31] (Simpson J).

86 Ibid [63] (Simpson J).

87 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 743 [85] (Heydon JA), cited in *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43, 57 [82]–[83] (Beazley JA).

88 [2014] NSWCATCD 244 (19 December 2014) [5] (General Member Sarginson).

89 Ibid [6] (General Member Sarginson).

- vehicle photographs.⁹⁰

The applicant stated that water began to leak into the driver's side floor area when it began to rain, and that upon stopping, he noticed a large pool of oil underneath the vehicle.⁹¹ The vehicle 'was losing power ... kept getting sluggish ... (and) was playing up'.⁹² The vehicle inspection report stated that the vehicle was 'unroadworthy'.⁹³ As a result of the faults identified in the report as well as the oil leaks and engine problems, the applicant submitted the vehicle was not of acceptable quality. While the Tribunal accepted the expert evidence in the inspection report, and accepted that the vehicle was not of acceptable quality, it did not find that there was a 'major failure' which entitled the applicant to a refund. This was because of the deficiencies in the expert's report, which did not specify why the engine was leaking oil, why the engine had inconsistent power, or to what extent the engine may be damaged.⁹⁴ The applicant was awarded the cost of towing the vehicle and the vehicle inspection costs.⁹⁵ The respondent was ordered to repair the car at their own cost.⁹⁶

A case that illustrates the evidentiary burden faced by the applicant in motor vehicle disputes where the cause of the problem is difficult to diagnose is *Reinhold v Ford Motor Co Australia Ltd*.⁹⁷ The case concerned the application of the TPA and manufacturer's warranty claims in relation to a motorhome purchased in July 2005. In 2006, the motorhome's dashboard lights illuminated and the engine stopped. The vehicle's odometer read 3995 km. No cause was found for the failure, and Mr Reinhold continued to use the motorhome. In 2010, the motorhome encountered a similar failure at 36 200 km on the odometer. Another similar failure occurred in June 2011. The fuel pump was replaced. A similar failure occurred in 2013. Reference was made to *Webby v Auckland Auto Collection Ltd*,⁹⁸ where an intermittent fault that stopped the engine was held to a 'failure of substantial character', the New Zealand ('NZ') equivalent of a 'major failure'. The Tribunal distinguished *Webby* on the basis that the faults in that case occurred within a three-year and one-year extended warranty period rather than over a period of eight years.⁹⁹ Despite expert evidence being produced, considering 'the possibility of an intermittent fault with the fuel system',¹⁰⁰ the Tribunal was unable to conclude what caused the intermittent fault, and dismissed the applicant's claim.

90 Ibid [10] (General Member Sarginson).

91 Ibid [12] (General Member Sarginson).

92 Ibid [15] (General Member Sarginson).

93 Ibid [20] (General Member Sarginson).

94 Ibid [34] (General Member Sarginson).

95 Ibid [40] (General Member Sarginson).

96 Ibid [41] (General Member Sarginson).

97 [2014] QCAT 671 (1 December 2014).

98 [2012] NZMVD 82 (3 August 2012) [21] (Adjudicator Cornwell) ('*Webby*').

99 *Reinhold v Ford Motor Co Australia Ltd* [2014] QCAT 671 (1 December 2014) [32] (Adjudicator Bertelsen).

100 Ibid [28] (Adjudicator Bertelsen).

Finally, in *Cornwell v The Trustee for Byrne No 2 Trust* the applicant purchased a new motorcycle from the trustee, Triumph Gold Coast ('Triumph').¹⁰¹ The bike reportedly stalled and overheated on numerous occasions. The applicant rejected Triumph's offer of a replacement bike. The Tribunal found that a refund of the purchase price was not appropriate, and that the dealer had done all that was necessary in repairing the bike in a timely way.¹⁰² The only evidence that Mr Cornwell could present to the Tribunal to explain the stalling issue was his own evidence and observations of his friends by way of sworn affidavits. This was not sufficient to satisfy the Tribunal and the applicant's claim was dismissed.¹⁰³

C Consumer Risk as to an Award of Costs

A third issue faced by consumers in court and tribunal proceedings is the risk that they may be exposed to an adverse award of costs if their application is dismissed. In superior courts, the usual rule is that 'costs follow the event' and an unsuccessful party is generally required to pay the costs of the opponent. The general position is set out in section 60(1) of the *NCAT Act*, which provides that each party is to pay its own costs.¹⁰⁴ Section 60(2) of the *NCAT Act* provides that before NCAT makes a costs order, it must be satisfied that there are special circumstances warranting an award of costs. However, special rules apply to the Consumer and Commercial Division of NCAT. Regulation 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) provides:

- (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
- (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if:
 - (a) the amount claimed or in dispute in the proceedings is more than \$10,000 but not more than \$30,000 and the Tribunal has made an order under clause 10 (2) of Schedule 4 to the Act in relation to the proceedings, or
 - (b) the amount claimed or in dispute in the proceedings is more than \$30,000.

As Griggs, Freilich and Messel point out, the manufacturer possesses the upper hand in circumstances where the consumer is seeking a refund rather than a replacement vehicle.¹⁰⁵ Assume the manufacturer offers to provide a replacement vehicle and the offer is rejected by the consumer: if the consumer's claim is successful the consumer would be ordered to return the vehicle and obtain a refund of the purchase price under section 259 of the *ACL*. In such

101 [2014] QCAT 523 (11 June 2014).

102 *Cornwell v The Trustee for Byrne No 2 Trust* [2014] QCAT 523 (11 June 2014) [26] (Adjudicator Trueman).

103 *Ibid* [27]–[28] (Adjudicator Trueman).

104 See also *QCAT Act 2009* s 100.

105 Lynden Griggs, Aviva Freilich and Nicolas Messel, 'Consumer Guarantees – Lessons To Be Learnt from Afar' (2015) 23 *Australian Journal of Competition and Consumer Law* 36, 40.

circumstances, each party would usually bear their own costs.¹⁰⁶ However, if the consumer's claim is unsuccessful, the consumer may be exposed to a costs order to cover the manufacturer's costs.¹⁰⁷

The common law also provides a basis for this through 'without prejudice' letters containing an offer to settle, referred to as Calderbank offers. Such letters can later be adduced in evidence at the costs stage of the proceedings to inform the court as to orders that should be made in relation to costs.¹⁰⁸

Section 105 of the *QCAT Act 2009* provides: 'The rules may authorise the tribunal to award costs in other circumstances, including, for example, the payment of costs in a proceeding if an offer to settle the dispute the subject of the proceeding has been made but not accepted'.¹⁰⁹

D Time Taken to Resolve Disputes

A fourth issue faced by consumers in tribunal and court proceedings is the period of time taken for a decision to be rendered. Tribunals are intended to provide a process by which small claims can be dealt with quickly and efficiently in a short time frame. However, most tribunals attempt to resolve consumer disputes through mediation prior to the matter going to hearing. For example, section 37(1) of the *NCAT Act* provides that NCAT 'may, where it considers it appropriate, use (or require parties to proceedings to use) any one or more resolution processes'. Section 37(2) of the *NCAT Act* provides that '[a] *resolution process* is any process (including, for example, alternative dispute resolution ['ADR']) in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings' (emphasis in original). The period of time taken for a decision to be rendered varies. Some decisions take several months, however, the period of time in others is significantly longer. The occurrence of a compulsory conference may extend the time taken for the conclusion of a dispute. Under the current tribunal procedure a consumer is only likely to obtain adequate compensation after a lengthy and arduous process.

The Consumer Action Law Centre ('CALC'), in its submission to CAV, in relation to the Victorian issues paper stated:

Consumer Action does not support a mandatory requirement that consumers attend ADR before filing an application in VCAT. Requiring consumers to attend ADR before initiating VCAT action will cause delay in consumer claims being finalised, and attrition of claims. In Consumer Action's experience, consumers who have complaints about goods or services are often 'shunted' between a trader, advice service (such as CAV) and VCAT. This commonly results [in] them giving up, with the consumer bearing the costs of defect[ive] goods or poor service. The goal for any dispute resolution process should be [to] ensure that it is as seamless as possible from a consumer's perspective.

106 See *QCAT Act 2009* (Qld) s 100; Scott Seefeld, 'Costs in QCAT: When Will They Apply?' (2014) 34(8) *Proctor* 24.

107 See *QCAT Act 2009* s 102.

108 Griggs, Freilich and Messel, above n 105, 41 (citations omitted).

109 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 86.

Requiring pre-filing mediation simply imposes another hurdle in the path of consumers who wish to have a lemon vehicle replaced or the purchase price refunded. Making an application in VCAT is difficult enough, and will cause attrition of consumers who do not have the skills to make an application or who are overwhelmed by the process. Requiring mandatory pre-filing ADR will cause further attrition of consumers who are overwhelmed by the greater time and complexity this will inevitably introduce. Additionally, in Consumer Action's experience, a motor car trader that refuses to make a refund or replace a vehicle is unlikely to seriously negotiate until VCAT action has been initiated. We believe that introducing a requirement that consumers attend ADR as a condition precedent to filing a VCAT application will lead to valid cases not being pursued.¹¹⁰

A case that illustrates the protracted nature of tribunal proceedings is *Rae v Volkswagen Group Australia Pty Ltd.*¹¹¹ The case concerned a dispute about repairs to a new motor vehicle. The Tribunal observed:

it has been a protracted proceeding over some 2 1/2 years from October 2010 to April 2013 along the way accruing numerous intermediate steps, orders and directions as follows:

- Mediation December 2010.
- Compulsory conference February 2011.
- Directions December 2010, January 2011, February 2011, May 2011 (2) August 2011, September 2011, March 2012, July 2012.
- Non compliance application February 2011.
- Application to dismiss April 2011.
- Tribunal orders with detailed reasons 7 February 2011 and 18 November 2011.
- Respondent's application to strike out February 2013.
- Listed for hearing 12, 13 and 14 March 2012 and 8 and 9 April 2013.¹¹²

In *Burton v Chad One Pty Ltd.*,¹¹³ Mr Burton purchased a 1998 Nissan Patrol on 19 October 2012. The car initially experienced overheating on 28 January 2013. Substantial damage was discovered upon dismantling the engine. An action was commenced in the NSWCTTT on 26 February 2013. The decision of the NSWCTTT was appealed to the District Court of New South Wales.¹¹⁴ The District Court concluded that the NSWCTTT erred in finding that a *Motor Dealers Act 1974* (NSW) Form 8 excluded the application of consumer guarantees contained within the *ACL*. The District Court remitted the matter to NCAT. The matter was decided,¹¹⁵ and subsequently appealed again.¹¹⁶ The appeal was allowed on grounds that expert evidence was unwarrantedly rejected. As a result, the matter is to be remitted again for a further hearing.

110 Consumer Action Law Centre, Submission to Consumer Affairs Victoria, Parliament of Victoria, *Introducing Victorian Motor Vehicle Lemon Laws*, 22 November 2007, 7.

111 [2013] QCAT 290 (23 May 2013).

112 *Ibid* [4] (Adjudicator Bertelsen).

113 [2015] NSWCATAP 88 (12 May 2015).

114 *Burton v Chad One Pty Ltd* [2013] NSWDC 301.

115 *Burton v Chad One Pty Ltd* [2014] NSWCATCD 191 (7 October 2014).

116 [2015] NSWCATAP 88 (12 May 2015).

Similarly, in *Freestone Auto Sales Pty Ltd v Musulin*,¹¹⁷ Ms Musulin purchased a used car in 2012.¹¹⁸ The vehicle was leaking oil, and had difficulty starting. An action was commenced in the NSWCTTT on 1 October 2012. On 29 July 2013 the Tribunal delivered judgment dismissing Ms Musulin's application. The decision of the NSWCTTT was appealed to the District Court of New South Wales. A further appeal to the New South Wales Court of Appeal was decided on 11 June 2015.

E Tribunals' Low Monetary Limits

A fifth issue faced by consumers in some tribunal proceedings is that the monetary limits may pose a bar to many consumers seeking remedies. The upper limit for most tribunals is between \$25 000 and \$40 000. QCAT has jurisdiction over matters that are minor civil disputes.¹¹⁹ Minor civil disputes concern amounts up to the prescribed amount.¹²⁰ The prescribed amount is \$25 000.¹²¹ At least two decisions have had the amount to be awarded reduced to reflect the statutory limit of QCAT and the NSWCAT Consumer and Commercial Division respectively. A large percentage of cars cannot be purchased for less than \$25 000. As a result, the limit on amounts to be awarded may force consumers to seek remedies in courts of law, thereby exposing consumers to higher costs, of filing claims, and the requirement to seek legal representation to ensure that their claim will proceed successfully.¹²²

For example, in *Cicchini v Barbizon Pty Ltd*¹²³ the applicant purchased a new or dealer demonstrator vehicle (Alfa Romeo) that had numerous problems. The vehicle was a 2008 model purchased in 2009 for \$41 050. The dealer dealt with most problems identified by the applicant, the most serious of which required a replacement transmission. The applicant chose to reduce the amount claimed from \$41 050 (the price of the car) plus costs to the monetary limit of \$25 000.¹²⁴

Similarly, in *Taskovski v Otomobile Shoppe Pty Ltd*¹²⁵ the applicant purchased a second hand vehicle for \$39 186. Upon collecting the vehicle and driving out of the respondent's car yard, the applicant noticed several defects and immediately returned the car and demanded a refund. Ultimately, the applicant's claim was allowed. However, the applicant claimed \$52 044, exceeding the NSWCTTT's limit of \$40 000. Accordingly, the sum awarded was reduced from \$52 044 to \$40 000.¹²⁶

117 [2015] NSWCA 160.

118 This case is discussed above in relation to evidentiary issues.

119 *QCAT Act 2009* (Qld) ss 10(1)(a), 11–12.

120 *QCAT Act 2009* (Qld) sch 3 (definition of 'minor civil dispute').

121 *QCAT Act 2009* (Qld) sch 3 (definition of 'prescribed amount').

122 See, eg, *Cicchini v Barbizon Pty Ltd* [2014] QCAT 675 (23 December 2014) [6], [10], [27] (Adjudicator Davern).

123 *Ibid.*

124 *Ibid.*

125 [2015] NSWCATCD 24 (3 March 2015).

126 *Ibid* [30]–[32] (General Member Levingston).

The NZ Motor Vehicle Disputes Tribunal has jurisdiction to determine claims where one party to the dispute is a motor vehicle trader, and the sum of the claim does not exceed \$100 000.¹²⁷ This limit is more appropriate in the context of motor vehicles than the current limits on tribunals in Australia.

V DISPUTE RESOLUTION SCHEMES IN THE UNITED STATES AND CANADA

The provision of an appropriate dispute resolution mechanism is an integral part of any consumer protection regime. Tribunals lack the specialised knowledge to resolve motor vehicle disputes, and consumers bear the costly evidentiary onus of proving that the defect was present at the time of supply and was not attributable to normal wear and tear. The way these difficulties are dealt with in the United States of America ('US') and Canada will be considered briefly in this part.

A United States

In the US, there are state automobile lemon laws in all 50 states. At the federal level, the *Magnuson-Moss Warranty – Federal Trade Commission Improvement Act 1975*, 15 USC § 2301 provides protection for consumers who purchase cars that are not free of defects. At the state level, the laws provide for the arbitration of disputes and mandatory buyback by manufacturers if the arbitrator finds in favour of the consumer. The US motor vehicle 'lemon' laws are the subject of chapter 3 of the *Victorian Lemon Law Report*.¹²⁸ There are three main systems of arbitrating consumer disputes regarding 'lemons'. The first and most common is that administered by the Council for Better Business Bureaus ('BBB'). Another system is administered by the National Center for Dispute Resolution.¹²⁹ Further, separate systems exist in some states.¹³⁰ In California, the Department of Consumer Affairs regulates arbitration programs.¹³¹ The BBB is a national system, with state offices. 'BBB AUTO LINE[®]' is a system established by BBB to settle automotive warranty claims. It does not charge any fee to

127 *Motor Vehicle Sales Act 2003* (NZ) s 90(1).

128 Consumer Affairs Victoria, 'A Report on the Motor Vehicle Lemon Law Consultations', above n 8, 7–8.

129 National Center for Dispute Settlement, *Consumers: Forms/Documents* (2012) <<http://www.ncdsusa.org/index.php?id=9>>.

130 See, eg, New York State Dispute Resolution Association Inc, *Lemon Law Arbitration* <<http://www.nysdra.org/?page=LemonLaw>>.

131 California Department of Consumer Affairs, *Arbitration Certification Program* (2016) <<http://www.dca.ca.gov/acp/>>; California Department of Consumer Affairs, 'Lemon-Aid: For Consumers' (Booklet, 2016) <http://www.dca.ca.gov/acp/pdf_files/englemn.pdf>.

consumers.¹³² Funding is provided in advance by participating manufacturers in order to maintain impartiality.¹³³ Neutrality is said to be maintained as:

BBB's value to the business community is based on [its] marketplace neutrality. [Its] purpose is not to act as an advocate for businesses or consumers but to act as a mutually trusted intermediary to resolve disputes and provide information to assist consumers in making wise buying decisions.¹³⁴

Steslow provides a short summary of the BBB AUTO LINE® state lemon law arbitration procedure that exists for resolving disputes under US lemon laws and the legal framework supporting vehicle warranty arbitration through the program:

Initially, the arbitrator must consider whether the vehicle is eligible for relief under the lemon law. Most state lemon laws limit consumers' rights by the time and/or mileage on the new or newly leased vehicle, for example, within the first 12,000 miles or within a specified period of time.

Next, a vehicle problem considered initially eligible under most state lemon laws must qualify as a 'nonconformity.' A nonconformity is commonly defined under lemon law statutes as a defect or condition that "substantially impairs" the "use, value or safety" of the vehicle.' Thus, an arbitrator must consider 'substantial impairment' as a result of a defect or condition. It should be noted that substantial impairment is not limited to mechanical defects or drivability; arbitrators are trained to understand that sometimes cosmetic defects or problems with interior accessories can be found substantial enough to constitute a nonconformity.

If a nonconformity is found to exist, the manufacturer (through a dealer) must have been afforded 'a reasonable number of attempts' to repair the nonconformity and not have done so. The Pennsylvania lemon law creates a presumption of reasonable number of attempts if:

1. 'the same nonconformity has been subject to repair three times by the manufacturer, its agents or authorized dealers and the nonconformity still exists'; or
2. 'the vehicle is out-of-service by reason of any nonconformity for a cumulative total of 30 or more calendar days.'

Finally, if the manufacturer can establish that the nonconformity is the result of the consumer's abuse, neglect, or modification of the vehicle, the consumer is not entitled to remedies under state lemon laws.¹³⁵

B Canada

The Canadian Motor Vehicle Arbitration Plan (CAMVAP) is a national dispute resolution program through which disputes between consumers and vehicle manufacturers – related to allegations of manufacturing defects or how the manufacturer is implementing the new vehicle warranty – can be resolved through binding arbitration.¹³⁶

132 Better Business Bureau, 'How BBB AUTO LINE® Works' (Publication No 96-96-01, Council of Better Business Bureaus, 2013) 1 <<https://www.bbb.org/globalassets/local-bbbs/council-113/media/bbb-auto-line/rules-national.pdf>>.

133 Ibid.

134 Better Business Bureau, *FAQs* (2016) <<https://www.bbb.org/council/about/frequently-asked-questions/>>.

135 Donna M Steslow, 'My Car Is a Lemon! Use of the Better Business Bureau's Auto Line® Program as a Pedagogical Model of ADR' (2010) 27 *Journal of Legal Studies Education* 105, 114 (citations omitted).

136 Canadian Motor Vehicle Arbitration Plan, '2012 and 2013 Annual Reports' (Annual Reports, 6 August 2014) 4 ('CAMVAP Annual Reports 2012–2013').

Most major manufacturers participate in the scheme. CAMVAP ‘is available to owners and lessees of new and used vehicles’.¹³⁷ It is voluntary, and consumers are entitled to choose between litigation or using CAMVAP.

If a consumer chooses CAMVAP, they must meet the following eligibility requirements:

1. The consumer must be the ‘registered Owner of [the] Vehicle when the dispute arose’ or ‘a single user Lessee under a lease agreement with a term of not less than twelve (12) months [where] the Lessor has signed the Claim Form’.¹³⁸
 - a. The consumer must continue to own or lease the vehicle throughout the arbitration.¹³⁹
2. The dispute with the manufacturer must be about ‘[a]llegations of a Current Defect in Vehicle Assembly or Materials specific to [the] Vehicle as delivered by the Manufacturer to an Authorized Dealer’.¹⁴⁰
3. The consumer must ‘live in a Canadian province or territory’;¹⁴¹
4. The vehicle must have been built to Canadian specifications and intended for sale inside Canada;¹⁴²
5. The vehicle must primarily be used for personal or family use;¹⁴³
6. The vehicle must be from the current or four previous model years;¹⁴⁴
7. The vehicle must not have travelled more than 160 000 km;¹⁴⁵
8. The manufacturer’s dispute resolution process must have been followed,¹⁴⁶ and
9. The consumer must have provided the dealer and manufacturer ‘a reasonable amount of time and opportunity to resolve the problem’.¹⁴⁷

According to ‘CAMVAP Annual Reports 2012–2013’, in 2012 there were 203 arbitrated cases, 16 conciliated cases and 20 consent awards were issued.¹⁴⁸ An ‘additional 36 cases were withdrawn by the consumer and 5 cases were found to be ineligible for the program during the processing stages before arbitration’.¹⁴⁹

137 Canadian Motor Vehicle Arbitration Plan, *FAQ* (2016) <<http://www.camvap.ca/faq/>>.

138 Canadian Motor Vehicle Arbitration Plan, *Agreement for Arbitration* (at December 2011) ss 4.3.4.1–4.3.4.2 (‘*Agreement for Arbitration*’).

139 *Agreement for Arbitration* s 4.3.5.

140 *Agreement for Arbitration* s 4.2.2.

141 *Agreement for Arbitration* s 4.3.6.

142 *Agreement for Arbitration* s 4.4.12.

143 *Agreement for Arbitration* s 4.4.7.

144 *Agreement for Arbitration* s 4.3.3.

145 *Agreement for Arbitration* s 4.3.2.

146 *Agreement for Arbitration* s 4.3.7.

147 *Agreement for Arbitration*.

148 Canadian Motor Vehicle Arbitration Plan, ‘CAMVAP Annual Reports 2012–2013’, above n 136, 6.

149 *Ibid.*

CAMVAP aims for a dispute resolution time of 70 days.¹⁵⁰ Consumers and manufacturers may call witnesses and give evidence.¹⁵¹ Evidence given at a hearing 'will be the most persuasive and determinative evidence'.¹⁵² It is 'given under oath or by affirmation'.¹⁵³ Arbitrators may also inspect a vehicle,¹⁵⁴ or order a technical inspection of the vehicle.¹⁵⁵ This includes allowing an arbitrator to drive or operate the vehicle.¹⁵⁶

Consumers 'are not required to pay any of the costs relating to the arbitration' as all costs are fully paid by participating manufacturers.¹⁵⁷ Consumers are still responsible for all costs incurred on their own, such as the cost of: (i) 'witnesses attending the hearing to give evidence on [a consumer's] behalf';¹⁵⁸ (ii) legal fees;¹⁵⁹ (iii) travel and accommodation expenses;¹⁶⁰ (iv) interpreter fees, if an interpreter is requested;¹⁶¹ and (v) any amount in excess of \$100 for summoning a witness to a hearing, as a \$100 reimbursement is available.¹⁶²

Arbitrators may order the manufacturer to:

- repair the vehicle at an authorised dealer at the manufacturer's expense;¹⁶³
- buy back the vehicle;¹⁶⁴
- reimburse the consumer for the cost of repairs already undertaken;¹⁶⁵
- reimburse the consumer for out of pocket expenses incurred prior to the hearing, not exceeding \$500;¹⁶⁶
- the Arbitrator can order that the manufacturer has no liability,¹⁶⁷ or that the vehicle is not eligible for arbitration.¹⁶⁸

150 Canadian Motor Vehicle Arbitration Plan, *About CAMVAP* (2016) <<http://www.camvap.ca/about/>>.

151 *Agreement for Arbitration* s 9.1

152 *Agreement for Arbitration* s 9.4.

153 *Agreement for Arbitration* s 9.2.

154 *Agreement for Arbitration* s 10.1.

155 *Agreement for Arbitration* s 10.3.

156 *Agreement for Arbitration* s 10.2.

157 *Agreement for Arbitration* s 13.1.

158 *Agreement for Arbitration* s 13.2.1.

159 *Agreement for Arbitration* s 13.2.2.

160 *Agreement for Arbitration* s 13.2.3.

161 *Agreement for Arbitration* s 13.2.4.

162 *Agreement for Arbitration* ss 9.9, 13.2.5.

163 *Agreement for Arbitration* s 6.2.1.

164 *Agreement for Arbitration* s 6.1.

165 *Agreement for Arbitration* s 6.3.1.

166 *Agreement for Arbitration* s 6.3.2.

167 *Agreement for Arbitration* s 6.4.1.

168 *Agreement for Arbitration* s 6.4.2.

VI REFORMS TO REDUCE CONSUMER DETRIMENT

There are a number of possible reforms to deal with the issues identified. The first reform is that a consumer should be entitled to a remedy for a deemed major failure of the guarantee of acceptable quality if they satisfy threshold criteria. The second reform is the appointment of independent assessors to deal with the issues of how consumers prove that they meet the threshold criteria. The courts and tribunals have not proved satisfactory for hearing motor vehicle disputes because they have no power to investigate and no specialised knowledge in relation to motor vehicle disputes. The third reform is the establishment of an industry-based consumer dispute resolution scheme.¹⁶⁹

The Queensland Legal Affairs and Community Safety Committee made the following general recommendation about the need for reform in this area:

The committee recommends that the appropriate mechanism to ensure a national approach to changes in existing ‘lemon’ motor vehicle laws, is to amend the *Australian Consumer Law*, such that it specifically sets out nationally consistent laws applicable to new ‘lemon’ motor vehicles.¹⁷⁰

A Threshold Criteria

As part of the Inquiry relating to the ‘Victorian Lemon Law Report’ (‘Victorian Lemon Law Inquiry’), CAV ‘proposed that Part 2A of the [*Fair Trading Act 1999* (Vic)] be amended to create a deemed breach of the merchantable quality implied term’¹⁷¹ as follows:

a deemed breach where the purchaser identifies defect(s) that substantially impair the vehicle’s use, value or safety within a reasonable time after purchase and the dealer and the manufacturer/importer are unable to repair the defect(s) within a reasonable period.¹⁷²

However, this leaves open a number of questions: What does ‘substantially impair’ mean? What is a ‘reasonable time’ after purchase? What is a ‘reasonable time’ in which to have the defect(s) repaired? Uncertainties under the current consumer guarantees regime should be clarified. What is required is a set criteria or an objective standard by which the faults in a motor vehicle can be determined to be a ‘major’ failure, such as a deemed major failure if fault cannot be repaired after three attempts. A reasonable period to allow the dealer to attempt to remedy the defect in the motor vehicle should be specified, such as three months.

In relation to threshold criteria, the Queensland Legal Affairs and Community Safety Committee made the following recommendation:

The committee recommends the incorporation of clear and practical definitions and provisions into any nationally consistent laws applicable to new ‘lemon’ motor vehicles, including:

169 See Justin Malbon, ‘Consumer Complaints’ in Justin Malbon and Luke Nottage (eds), *Consumer Law & Policy in Australia & New Zealand* (Federation Press, 2013) 339.

170 Legal Affairs and Community Safety Committee, above n 1, xv.

171 Consumer Affairs Victoria, ‘A Report on the Motor Vehicle Lemon Law Consultations’, above n 8, 11.

172 *Ibid*, quoting Consumer Affairs Victoria, ‘Introducing Victorian Motor Vehicle Lemon Laws’, above n 6, 15.

- *mandatory* time and repair limits, such as imposing limits on the number of times a supplier/manufacture can attempt to repair a defect in a motor vehicle and the number of days the vehicle can be 'off the road', before a buyer must be offered a refund or replacement
- clarity as to when a supplier/manufacture must repair, refund or replace motor vehicle
- an adequate definition of what constitutes a 'lemon' motor vehicle, such as –
 - adequate definitions of 'acceptable quality' and 'fit for purpose'
 - clarity as to the distinction between major and minor defects
 - clarity as to the distinction between a 'lemon' and generic design manufacturing defects (requiring general recall) or serious design safety defects (requiring urgent attention).¹⁷³

B Independent Assessors

The cost of securing proof that a consumer has been sold a lemon may prevent a purchaser of a lemon from securing justice. The Victorian Lemon Law Inquiry considered the appointment of independent assessors to deal with the issues of how consumers prove that they have met the threshold criteria set out in the 'Victorian Lemon Law Report'.¹⁷⁴ The CCAAC made a similar recommendation to the Minister for Competition Policy and Consumer Affairs that: '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'.¹⁷⁵ Such assessors would be able to provide impartial advice where the consumer and the manufacturer provide conflicting evidence as to the threshold criteria issues.

In relation to the need for independent assessors, the Queensland Legal Affairs and Community Safety Committee made the following recommendation:

The committee recommends the government consider appointing independent assessors, with investigative powers and specialised knowledge in relation to motor vehicle disputes, to deal with the issues of how consumers prove that they meet the 'lemon' motor vehicle threshold criteria (when established – see recommendation 5), as an alternative to consumers initiating Queensland Civil and Administrative Tribunal (QCAT) and/or court proceedings.¹⁷⁶

C Industry-based Consumer Dispute Resolution Scheme

Chapter 5 of the 'Victorian Lemon Law Report' sets out the dispute resolution process that was preferred by the various stakeholders who made submissions in response to the issues paper.¹⁷⁷ The model preferred by many stakeholders was mediation, conciliation, and adjudication with existing bodies

173 Legal Affairs and Community Safety Committee, above n 1, xv (emphasis in original).

174 Consumer Affairs Victoria, 'A Report on the Motor Vehicle Lemon Law Consultations', above n 8, 22 [5.2.2].

175 Commonwealth Consumer Affairs Advisory Council, 'Consumer Rights', above n 11, 99.

176 Legal Affairs and Community Safety Committee, above n 1, xv.

177 Consumer Affairs Victoria, 'A Report on the Motor Vehicle Lemon Law Consultations', above n 8, 7–8 [3.1], 21–4.

to administer the scheme. CAV would act as the mediator and VCAT as the adjudicator if CAV were unable to resolve the dispute and the consumer wished to seek a legal decision.

However, in its submission to the Victorian Lemon Law Inquiry, the CALC proposed a different basis of dispute resolution. The CALC proposed that an industry-based external dispute resolution scheme be introduced:

Consumer Action does believe more could be done to improve dispute resolution in the motor car industry. In particular, we believe the introduction of a compulsory industry-based external dispute resolution (EDR) scheme would be an excellent way of improving the resolution of consumer disputes in relation to motor cars. Industry-based EDR schemes exist in many other industries, including energy, water, telecommunications and financial services. Generally, such schemes are supported by consumers and industry alike, as they provide cheap, fair and accessible dispute resolution. ...

The Victorian Government could introduce an industry-based EDR in the motor vehicle industry by making membership of such a scheme a condition of holding a licence to trade in motor vehicles. If such a scheme were introduced, consumers would have access to a cost free dispute resolution service (all costs being paid by industry), that is independent, and that can make decisions binding on the industry member. We strongly welcome further consideration of such a scheme as part of the current consultations.¹⁷⁸

The Productivity Commission in its *Review of Australia's Consumer Policy Framework*, strongly supported the use of ADR schemes since they 'generally offer relatively economical, accessible, fast arrangements for dealing with individual complaints that could not be cost effectively tackled using any other method'.¹⁷⁹ Industry-funded ADR schemes do not simply mediate or conciliate disputes; they investigate the facts of a particular dispute. Commenting on such schemes, O'Shea observes that

[i]n becoming a member of a scheme, the industry party agrees to be bound by scheme decisions and is thus, to some extent, surrendering its legal rights to solve its consumer contractual problems in court. Although consumers have not so agreed and are therefore free to reject the scheme determination and take their issue up with the courts, for a variety of reasons, very few do so. Like the industry member, their rights have been effectively determined.¹⁸⁰

The structure and systems for handling complaints in industry-based consumer dispute resolution schemes in financial services, telecommunications and utilities are considered elsewhere.¹⁸¹ Most disputes under such schemes are resolved by mediation. In the absence of industry-based consumer dispute

178 Consumer Action Law Centre, above n 110, 8.

179 Productivity Commission, above n 12, 199.

180 Paul O'Shea, 'The Lion's Question Applied to Industry-based Consumer Dispute Resolution Schemes' (2006) 8(5) *ADR Bulletin* art 2, 4 <<http://publications.bond.edu.au/cgi/viewcontent.cgi?article=1340&context=adr>>.

181 See Malbon, above n 169, 350–1; Paul O'Shea and Charles Rickett, 'In Defence of Consumer Law: The Resolution of Consumer Disputes' (2006) 28 *Sydney Law Review* 139; Paul O'Shea, 'Underneath the Radar: The Largely Unnoticed Phenomenon of Industry Based Consumer Dispute Resolution Schemes in Australia' (2004) 15 *Australasian Dispute Resolution Journal* 156.

resolution, reliance will have to be placed on the appointment of an independent arbiter by the ACCC as part of its public enforcement function.

The Queensland Legal Affairs and Community Safety Committee was unable to reach agreement on the need for an industry-based consumer dispute resolution scheme for 'lemon' motor vehicles. However, the government members of the committee made the following recommendation:

The government members of the committee recommend the government bring to the attention of the Australian Consumer Law Review 2016, the government members' view that consideration be given to the establishment of a national Motor Vehicles and Automotive Services Ombudsman to:

- provide cheap, fair and accessible dispute resolution to resolve disputes between consumers and the motor industry
- utilise the experience and knowledge of specialist, industry experts who possess knowledge of the relevant issues.¹⁸²

VII CONCLUSION

On 10 July 2015, the then Minister for Small Business, Mr Bruce Billson, announced a wide-ranging review of the *ACL*. The review of the *ACL* will be overseen by Consumer Affairs Australia and New Zealand ('CAANZ') and formally commenced in 2016, incorporating an extensive public consultation process, with a final report to Ministers in early 2017.¹⁸³ CAANZ comprises the Australian Treasury (the Commonwealth department responsible for administering the *CCA*), federal agencies (the ACCC and the Australian Securities and Investment Commission), NZ bodies (NZ Ministry of Business, Innovation and Employment and the NZ Commerce Commission), and the eight state and territory regulators.

The principal reason for establishing a specific industry-based consumer dispute scheme to deal with motor vehicles is to address the information asymmetry arising from the increasing complexity of motor vehicles and the onerous and expensive task faced by consumers attempting to diagnose the cause of a fault in private actions before a court or tribunal. In order to avoid consumer detriment arising from 'lemon' motor vehicles, the introduction of a 'lemon' law and an industry-based consumer dispute resolution scheme, providing for the investigation and determination of complaints by an independent assessor, should be considered. The opportunity should be taken as part of the CAANZ review to reconsider the need for a 'lemon' law in Australia.

182 Legal Affairs and Community Safety Committee, above n 1, xvii.

183 Legislative and Governance Forum on Consumer Affairs, 'Australian Consumer Law Review' (Terms of Reference, 12 June 2015) <<http://consumerlaw.gov.au/review-of-the-australian-consumer-law/terms-of-reference>>; Bruce Billson, Federal Member for Dunkley, 'Review To Ensure National Law Continues to Protect Australian Consumers' (Media Release, 10 July 2015) <<http://www.brucebillson.com.au/2015/07/10/review-to-ensure-national-law-continues-to-protect-australian-consumers>>.