From: Bernice Watson
To: Lorraine Bowden
Subject: FW: "Lemon Laws" Inquiry
Date: Thursday, 24 September 2015 11:50:26 AM
Attachments: MLA Submission.docx

From: Stephen Corones [redacted]
Sent: Thursday, 24 September 2015 10:39 AM
To: Bernice Watson
Subject: RE: 'Lemon Laws' Inquiry

Dear Bernice,

As discussed on the telephone last Friday, I attach a copy of my submission.

I confirm that I am happy to appear before the Committee and answer any questions in relation to the submission at 10:00 a.m. on 28 October 2015.

Please acknowledge receipt of my submission.

Kind regards,

Stephen

Legal Affairs and Community Safety Committee

'Lemon Laws': an inquiry into consumer protections and remedies for buyers of new motor vehicles

Submission

I Introduction

1. Under the Terms of Reference for the Committee's Inquiry, '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'. Consumers are currently protected in relation to lemon purchases by the Australian Consumer Law (ACL) located in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA). The ACL applies as a law of Queensland pursuant to the *Fair Trading Act 1989* (Qld). The voluntary recall and consumer guarantees law took effect on 1 January 2011.

2. In 2006, the Government of Victoria made a commitment to introduce a lemon law into the provisions of the then *Fair Trading Act* 1999 (Vic). The public consultation process on the proposal to introduce a lemon law for motor vehicle purchases in Victoria was conducted by Ms Janice Munt MP, with the assistance of Consumer Affairs Victoria (CAV). CAV released an Issues Paper to canvas with industry and the community options for the development and introduction of a motor vehicle lemon law.(Consumer Affairs Victoria, *Introducing Victorian motor vehicle lemon laws*, Issues Paper, (September, 2007).

3. A CAV report prepared by Janice Munt MP was released in July, 2008 (Consumer Affairs Victoria, *Motor Cars: A report on the motor vehicle lemon law consultations* (July 2008) (Victorian Lemon Law Report). However, the Victorian proposal was overtaken by events leading to the adoption of a uniform consumer protection law in all Australian jurisdictions, the ACL.

4. The structure of this submission is to consider first the three different bases upon which consumers can obtain relief for economic loss arising from defects in motor vehicles. The second part of the submission considers the difficulties encountered by consumers in litigating motor vehicle disputes in the courts and tribunals. The third part of the submission examines the approach taken in other jurisdictions to resolving motor vehicle disputes. The final part of the submission 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.

II Existing Bases for Relief

5. 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 s 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 is initiates proceedings in the 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.

First Basis: Manufacturer Initiated Voluntary Recall

6. Vehicle recalls occur where there is the possibility of a safety concern with one or more of the parts used in vehicles that are part of the recalled model range. A motor vehicle manufacturer that initiates a voluntary recall must, within two days of after taking the action provide the Australian Competition and Consumer Commission (ACCC) with a written notice that complies with ACL, s 128(7). 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. Details of the number of voluntary recalls in relation to motor vehicle defects by manufacturer are available on the ACCC's web site. The total number of motor vehicle related recalls in each year since the ACL took effect are:
    - 2015 – 109
    - 2014 – 125
    - 2013 – 108
    - 2012 – 78
    - 2011 – 88.
7. The Federal Chamber for Automotive Industries (FCAI) has a code of practice for conducting an automotive safety recall (FCAI Code). Clause 5 of the CAI 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 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.

8. Motor vehicle manufacturers do not always conduct a voluntary recall even where there is strong evidence that a safety defect exists. The Department of Infrastructure and Transport (DIT) administers the *Motor Vehicles Standards Act 1989* (Cth) and the *Motor Vehicles Standards Regulations 1989* (Cth) which regulate the manufacture, importation and supply of road vehicles in Australia. DIT 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 DIT asks the manufacturer to conduct an investigation, but DIT has no powers to force a manufacturer to conduct a recall. DIT would refer the matter to the ACCC for their consideration. DIT received an FOI request seeking access to documents regarding transmission issues experienced with Volkswagen vehicles. DIT advised that it had received 15 complaints in relation to Volkswagen vehicles between I January 2007 and 29 May 2013, and 58 complaints between 30 May 2013 and 30 June 2013. At the time Volkswagen Group Australia Pty Ltd was a member of FCAI and had endorsed the FCAI Code. On 27 and 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.

9. The Coroner's finding highlights the extent of the complaints. On 6 June 2011, *The Age* newspaper reported that 243 motorists had confirmed that their cars had experienced unexpected and rapid deceleration. The Coroner described the media coverage as "extraordinary and overwhelming". In the light of this overwhelming media coverage Volkswagen announced a voluntary recall of cars manufactured between June 2008 and September 2011. 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. Volkswagen agreed to replace the gearbox in affected vehicles at no cost to the owner

10. The ACCC has issued *Consumer Product Safety Recall Guidelines*, (Recall Guidelines) 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; or a consumer-level recall. 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 the light of the risk to consumers.

11. In order to avoid a compulsory recall notice pursuant to s 122 of the ACL, suppliers generally engage with 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 the subject of the recall. If the remedy offered by the manufacturer or its Australian representative is inadequate the consumer in relation to motor vehicles purchased after 1 January 2011, consumers may seek to enforce their rights under the consumer guarantees regime.

Second Basis: Private Action

12. The guarantees are imposed on manufacturers and suppliers of motor vehicle who are obligated to meet statutory minimum standards in relation to them. For example, the guarantee of acceptable quality in s 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; and
    - durable.

13. The 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.

    The flexibility of the reasonableness test in the guarantee of acceptable quality is intended to protect consumers as well manufacturers and suppliers: to protect consumers while not imposing unrealistic standards on manufacturers and suppliers.

14. In relation to the requirement of safety that is an essential part of the guarantee of acceptable quality, it appears that vehicles subject to a voluntary recall by a manufacturer are not deemed to be unsafe for the purposes of the guarantee of

acceptable quality. According to the ACCC,

> Vehicle recalls occur where there is the possibility of a safety concern with one or more of the parts used in vehicles that are part of the recalled model range. A recall applies to all vehicles and models that use the part. Generally where there is a vehicle recall, the vast majority of vehicles covered by the recall are perfectly safe, but there is a remote possibility that some of the vehicles 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.
>
> The consumer guarantees provide for certain remedies where one of the guarantees is not complied with. This includes the guarantee that vehicles will be as free from defects and safe as a reasonable consumer would regard as acceptable. 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 evidence this.

15. Failures to comply with consumer guarantees give rise to statutory remedies that are enforced by private litigation, although there is scope for the ACCC to bring a representative action on behalf of consumers to enforce the guarantees. 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.

16. The consumer's specific rights and remedies against the supplier depend on whether the fault is major, or not major. ACL, s 259 (3) provides that 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; or

    - keep the goods and ask for compensation to make up the difference in value caused by the failure.

17. ACL, s 259 (2) provides 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; or

    - replacing the goods; or

- giving a refund.

18. ACL, s 259 (6) provides 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.

19. The existing consumer guarantees regime is a 'lemon law' in the sense that the dealer is not entitled to make any number of attempts to repair a defective motor vehicle. Section 259 (2)(b) provides that 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.

20. 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) and (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 s 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 hold the supplier harmless in relation to the failure to comply with the consumer guarantee.

21. 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. Section 271(6) provides that 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. 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 s 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 s 272(1)(b) of the ACL.

C Third Basis: Public Enforcement

22. 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. 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 s 18 of the ACL. 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; 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; or making a false or misleading representation concerning the existence, exclusion or effect of one of the consumer guarantees under Div 1 of Pt 3-2 of the ACL.

23. 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 application is made. 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.

24. In 2015, the ACCC settled an investigation into Fiat Chrysler Australia (Chrysler) in relation to motor vehicle faults and how their complaints were handled by Chrysler and its dealers. The complaints related to various issues including delays in sourcing spare parts and failing to deal adequately with customer complaints. The investigation was resolved by means of an undertaking under ACL, s 218 to appoint of an independent arbiter to investigate and determine disputes. Under the Chrysler Consumer Redress plan, Chrysler agreed that it would appoint an independent person review the consumer complaints to determine whether the outcome was in accordance with ACL consumer rights. Chrysler agreed that where a review is conducted and it is determined that the outcome was not in accordance with ACL consumer rights, it would provide or procure that a dealer 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 arbiter in disputes between Chrysler and its customers.

III Issues Associated with Private Actions

24. QCAT has jurisdiction to hear to hear minor civil disputes under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). Sch 3 (definition of 'minor civil dispute' and 'prescribed amount')
Minor civil dispute means—

> (b) a claim arising out of a contract between a consumer and trader, or a contract between 2 or more traders, that is—

(i) for payment of money of a value not more than the prescribed amount; or

[...]

(iii) for performance of work of a value not more than the prescribed amount to rectify a defect in goods supplied or services provided; or

(iv) for return of goods of a value not more than the prescribed amount; or

(v) for a combination of any 2 or more claims mentioned in subparagraphs (i) to (iv) where the total value of the combined claim is not more than the prescribed amount; or

The *prescribed amount* means $25,000.

25. No specific information is publicly available as to the exact number of motor vehicle disputes brought before QCAT. However, claims concerning repairs or refunds for defects in motor vehicles are classified as 'minor civil disputes'. Only four QCAT decisions concerning new motor vehicles have been reported. It is not possible to draw any firm conclusions about the effectiveness of QCAT as a dispute resolution mechanism for cases involving lemons; however, the small number of reported cases strongly suggests that it not effective. The following five issues are faced by consumers bringing proceedings in QCAT:

- lack of clarity under the existing law
- evidentiary issues;
- consumer risk as to a cost award;
- period of time taken for a decision to be rendered;
- low monetary limits.

Lack of clarity under the existing law

23 While the consumer guarantees law is a significant improvement over the implied terms regime under the *Trade Practices Act* 1974 (Cth) (TPA), it contains a number complexities and uncertainties that limit its usefulness as a consumer protection measure. 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.

26. A failure to comply with ACL, s 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, s 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. 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.

Evidentiary Issues

27. 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. The first difficulty 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 *Medtel Pty Ltd v Courtney*, in relation to s 74D of the 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 s 54 of the ACL. It was implicitly applied as the correct test by the New South Wales Court of Appeal in *Freestone Auto Sales Pty Ltd v Musulin*. 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.

28. In relation to motor vehicle disputes State civil and administrative tribunals operate on the basis that the applicant bears the onus of proof according to the civil standard, the balance of probabilities. If the applicant fails to adduce

sufficient evidence to allow the tribunal to conclude that there has been a major failure to comply a statutory guarantee, the tribunal has no choice but to dismiss the application. Both parties are likely to give sworn evidence that is contradictory. The applicant may present evidence as 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 damage suffered; and that the defect constitutes a major failure to comply with a consumer guarantee.

29. The high cost of obtaining inspections and expert mechanical reports may deter some applicants from doing so. Motor vehicles are difficult and expensive to diagnose. Thus, a consumer may be reluctant to pay, especially where the purchase price of a vehicle is relatively low. In *Ross Hereford v Automobile Direct Wholesale Pty Ltd* 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 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'. A further $1,900 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 the applicant presented, the tribunal was not satisfied that the damage to the engine amounted to a major failure.

30. In *Freestone Auto Sales Pty Ltd v Musulin,* 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". 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. 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.

31. 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 'training, study or experience'. If the expert's report is admissible, it may not be accepted by the tribunal.

32. 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 Company.* 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 3,995km. No cause was found for the failure, and Mr Reinhold continued to use the motorhome. In 2010, the motorhome encountered a similar failure at 36,200km reading on the odometer. Another similar failure occurred in May 2011. The fuel pump was replaced. A similar failure occurred in 2013. Reference was made to *Webby v Auckland Auto Collection Ltd*, where an intermittent fault that stopped the engine was held to a 'failure of substantial character', the New Zealand equivalent of a major failure. The tribunal distinguished *Webby* on the basis that the faults in that case occurred within a 3 year and 1 year extended warranty period rather than over a period of 8 years. Despite expert evidence being produced, considering 'the possibility of an intermittent fault with the fuel system', the Tribunal was unable to conclude what caused the intermittent fault, and the tribunal dismissed the applicant's claim.

33. Finally, in *Cornwell v The Trustee for Byrne No. 2 Trust t/a Triumph Gold Coast* the applicant purchased a new motorcycle from Triumph Gold Coast. 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. 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.

Consumer risk as to an award of costs

34. A second difficulty 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. 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. (L Griggs, A Freilich and N Messel, Consumer guarantees - lessons to be learnt from afar (2015) 23 *Australian Journal of Competition and Consumer Law* 36, 41).

35. 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 of the vehicle and obtain a refund of the purchase price under s 259 of the ACL. In such circumstances, each party would usually bear

their own costs. However, if the consumer's claim is unsuccessful the consumer may be exposed to a costs order to cover the manufacturer's costs.

36. 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. Section 105 of the *QCAT Act 2009* (Qld) 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.

Time taken to resolve disputes

37. A third difficulty 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 dispute through mediation prior to the matter going to hearing. 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.

38. The Consumer Action Law Centre, in its submission to Consumer Affairs Victoria, in relation to the Victorian Lemon Law Inquiry 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 them giving up, with the consumer bearing the costs of defect goods or poor service. The goal for any dispute resolution process should be ensure that it is as seamless as possible from a consumer's perspective. 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.

39. A case that illustrates the protracted nature of tribunal proceedings is *Rae v Volkswagen Group Australia Pty Ltd.* 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.

40. In *Burton v Chad One Pty Ltd*, 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 Consumer Trader and Tenancy Tribunal on 26 February 2013. The decision of the CTTT was appealed to the District Court of New South Wales. The district court concluded that the CTTT 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 the NSW Civil and Administrative Tribunal. The matter was decided, and subsequently appealed again. 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.

41. Similarly, in *Freestone Auto Sales Pty Ltd v Musulin*, Ms Musulin purchased a used car in 2012. The vehicle was leaking oil, and had difficulty starting. An action was commenced in the Consumer Trader and Tenancy Tribunal on 1

October 2012. On 29 July 2013 the Tribunal delivered judgment dismissing Ms Mussulin's application. The decision of the CTTT 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.

Low monetary limits

42. A fourth difficulty 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. Minor civil disputes concern amounts up to the prescribed amount. The prescribed amount is $25,000. At least two decisions have had the amount to be awarded reduced to reflect the statutory limit of QCAT and NSWCATCD 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.

43. For example, in *Cicchini v Barbizon Pty Ltd* 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's choice to reduce the amount claimed from $41,050 (the price of the car) to the monetary limit of $25,000.

44. Similarly, in *Taskovski v Otomobile Shoppe Pty Ltd* 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 tribunal's limit of $40,000. Accordingly, the sum awarded was reduced from $52,044 to $40,000.

45. The New Zealand 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. This limit is more appropriate in the context of motor vehicles than the current limits on tribunals in Australia.

IV Dispute Resolution Schemes in Other Jurisdictions

46. 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, who 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 issues are dealt with in the United States and Canada will be considered briefly in this part.

United States

47. In the United States of America there are state automobile lemon laws in all 50 states. At a Federal level, the Magnuson – Warranty Act 1975 provides protection for consumers who purchase cars that are not free of defects. At a State level the laws provided for the arbitration of disputes and mandatory buy back 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. There are three main systems of arbitrating consumer disputes regarding lemons. The first and most common is administered by the Council for Better Business Bureaus. Another system is administered by the National Centre for Dispute Resolution. Further, separate systems exist in some states. In California, the Department of Consumer Affairs regulates arbitration programs. The Council for Better Business Bureaus is a national system, with state offices (Better Business Bureaus, BBB). BBB AUTO LINE is a system established by BBB to settle automotive warranty claims. It does not charge any fee to consumers. Funding is provided in advance by participating manufacturers in order to maintain impartiality. Neutrality is said to be maintained as: BBB's value to the business community is based on our 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.

48. Ms Donna Steslow provides a short summary of the Better Business Bureau 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”. (Donna Stetslow, “My Car is a Lemon! Use of the Better Business Bureau’s Auto Line Program as a Pedagogical Model of ADR” (2010) 27 (1) *Journal of Legal Studies Education* 105 at 114 (footnotes omitted).

Canada

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

50. 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 12 months and the Lessor has signed the Claim Form’;
        a. The consumer must continue to own or lease the vehicle throughout the arbitration.
    2. The dispute with the manufacturer must be about ‘allegations of a Current Defect in Vehicle Assembly or Materials specific to Your Vehicle as delivered by the Manufacturer to an Authorized Dealer’; The consumer must ‘live in a Canadian province or territory’’. The vehicle must have

been originally purchased from a manufacturer authorised dealer in Canada;

3. The vehicle must primarily be used for personal or family use;
4. The vehicle must be from the current or four previous model years;
5. The vehicle must not have travelled more than 160,000km;
6. The manufacturer's dispute resolution process must have been followed; and
7. The consumer must have provided the dealer and manufacturer 'a reasonable amount of time and opportunity to resolve the problem'

51. According to CAMVAP Annual Report 2012-2013, in 2012 there were 203 arbitrated cases, 16 conciliated cases and 20 consent awards were issued. 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.

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

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

54. Arbitrators may order the manufacturer to:
    - Repair the vehicle at an authorised dealer at the manufacturer's expense;
    - Buy back the vehicle;
    - Reimburse the consumer for the cost of repairs already undertaken;
    - Reimburse the consumer for out of pocket expenses incurred prior to the hearing, not exceeding $500;

The Arbitrator can order that the manufacturer has no liability, or that the vehicle is not eligible for arbitration.

V Reforms to Reduce Consumer Detriment

55. There are a number of possible reforms to deal with the issues identified. First, 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.

Threshold criteria

55. As part of the Victorian Lemon Law Inquiry, CAV proposed that Pt 2A of the FTA (Vic) be amended to create a deemed breach of the merchantable quality implied term 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 time.

56. 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 a set criteria or an objective standard by which the faults in a motor vehicle can be determined to be a "major" failure, e.g., 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.

Independent assessors

57. 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. CCAAC made a similar recommendation to the Minister for Competition 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". Such assessors would be able to provide impartial advice where the consumer and the manufacturer provide conflicting evidence as to the threshold criteria issues.

Industry-based consumer dispute resolution scheme

58. 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. The model preferred by many stakeholders was mediation/ conciliation/ adjudication with existing bodies to administer the scheme. CAV would act as the mediator and VCAT as the adjudicator if CAV was unable to resolve the dispute and the consumer wished to seek a legal decision.

59. However, in its submission to the Victorian Lemon Law Inquiry, CALC proposed a different basis of dispute resolution. 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".

60. The Productivity Commission in its *Review of Australia's Consumer Policy Framework*, strongly supported the use of alternative dispute resolution (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".

61. 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:

> In 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. (P O'Shea, "The Lion's question applied to industry-based consumer dispute resolution schemes" (2006) 8(5) ADR Bulletin 1, 4.)

VI Conclusion

62. On 10 July 2015, the former 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 will formally commence in 2016, incorporating an extensive public consultation process, with a final report to Ministers in early 2017. CAANZ comprises, the Australian Treasury, the Commonwealth Department responsible for administering the CCA, and the Federal agencies, the ACCC and ASIC; the New Zealand Ministry of Business, Innovation and Employment and the NZ Commerce Commission; and the eight State and Territory regulators.

63. The principal reason for establishing a specific industry-based consumer dispute scheme to deal with motor vehicles is 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 re-consider the need for a lemon law in Australia

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