

caxton
legal centre inc

8 October 2015

ref:rw

Attention: The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000


email: lacsc@parliament.qld.gov.au

Dear Sir/Madam

RE: LEMON LAWS REVIEW

Please find enclosed a short submission from Caxton Legal Centre Inc. in relation to the Lemon Laws Inquiry.

If you wish to discuss any aspect of our submission, please do not hesitate to contact our office.


Yours faithfully
Scott McDougall (Director)

Caxton Legal Centre Inc.

Enclosure x 1

“LEMON LAWS” INQUIRY

LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

CAXTON LEGAL CENTRE INC.

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1. INTRODUCTION

1.1 Background to this submission and overview

Caxton Legal Centre Inc. (Caxton) has been involved in providing legal advice to clients about fair trading practices and related consumer rights for over 35 years. We are therefore well placed to contribute to this inquiry into:

“whether there is a need to improve the consumer protections and remedies for buyers of new motor vehicles with numerous, severe defects that reoccur despite multiple repair attempts or where defects have caused a new motor vehicle to be out of service for a prolonged period of time (‘lemons’).”¹

We endorse the introduction of “lemon laws” and any consolidation of State and Commonwealth legislation that improves consumer protection and enables members of the community to more easily access, understand and invoke consumer protections when they have purchased motor vehicles that prove to be defective.

1.2 About Caxton Legal Centre Inc. and our client base.

Caxton is Queensland’s oldest non-profit, community-based, legal service and is staffed by 29 staff members and approximately 200 volunteer lawyers and law students. Caxton operates free legal advice and information services, as well as social work services. As part of the legal service, we also run a consumer law clinic and a specialist elder law programme.

We specialise in ‘poverty law’ and the majority of our clients are economically and/or socially disadvantaged in some way. Many of our clients have literacy problems and difficulties understanding and accessing our legal system. Vulnerable clients from non-English speaking backgrounds are often the clients who are most disadvantaged and exploited in consumer transactions. In our experience, migrants and refugees with poor English skills are particularly vulnerable when it comes to purchasing motor vehicles.

We generally do not provide advice to clients about the purchase of new motor vehicles over \$40,000 in value, due to our limited resources. However, our reception staff have reported that they regularly take calls from clients who claim that they have bought new cars (over \$40,000.00 in cost) that are ‘lemons’ and they estimate that we receive approximately 1 call per week about these issues. These clients are referred to see private solicitors. Most of our recent experience advising clients about car disputes involves second hand cars; however, some of the things that we have learned through that work are still pertinent to this inquiry.

2. KEY ISSUES

2.1 The Australian Consumer Law (ACL) protections

Certain protections are currently offered under the Australian Consumer Law (ACL) regime and relevant warranties also already provide purchasers with some protections.

¹ <https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/04-Lemons>

Unfortunately, in practice, it is clear that purchasers often have difficulty enforcing their rights in both areas, especially when there is an argument about whether or not a defect is a major defect under the ACL.

If a dealer simply refuses to take a car back and to return the purchase price, and the manufacturer refuses to accept any liability in the dispute and refers customers to the dealers, the consumer usually is either forced to cooperate with requirements to get repairs undertaken under the warranty arrangements or is forced to institute formal legal proceedings under the ACL.

The ACL does need to be strengthened so that purchasers are not forced to deal with the significant inconvenience, stress, and other indirect costs of dealing with the warranty regime, if they have wholly lost confidence in the vehicle because of the significant defects that have become apparent. More specific lemon laws, arguably, will help to obviate this problem.

2.2 Definition of a "lemon"

A clear definition of lemon is required so that consumers know when they can take action because a car can rightly be classed as 'a lemon'. Reference to the number of major defects and days off the road would help to clarify any definition. The suggestion that was put forward by the Consumer Action Law Centre (CALC) in 2007² is a useful model for such a definition. The CALC stated:

"The definition of a lemon should include presumptions that a vehicle is a lemon in certain circumstances. A new vehicle should be presumed to be a lemon if the vehicle has been repaired at least 3 times by the manufacturer or importer and the vehicle still has a defect or if the vehicle is out of service for 20 or more days in total due to a defect.

This would of course need to be linked to an appropriate time period and some sort of mileage limit.

2.3 Lemon buy-back restrictions and second-hand cars

Any changes to the law to introduce lemon laws must address the problem of lemons being on-sold. There must be enforceable restrictions on lemons being passed on to unsuspecting second-hand car purchasers.

2.4 Costs involved in taking legal proceedings

We recently assisted a client in relation to the purchase of a second-hand car that was defective and dangerous from the outset. Initiating QCAT action was necessary because of the uncooperative conduct of the dealership concerned. We calculate that the pro bono assistance we received from a barrister who assisted our client amounted to approximately \$20,000.00 in fees. We were also able to obtain the kind assistance of an expert motor mechanic who agreed to assist in proceedings at no cost. Individual members of the public often cannot obtain this sort of assistance themselves and without expert evidence their cases may not succeed, even if they have merit.

² <http://consumeraction.org.au/wp-content/uploads/2012/11/Submission-to-CAV-lemon-law-inquiry-22-November-2007.pdf>

Although some matters will settle once a client gets a case into QCAT or the Magistrates Court, the process of getting to this stage is time consuming, costly and stressful. When cases go to trial, it is even worse and legal costs inevitably blow out even further. (There are limits on lawyers appearing in QCAT, but vulnerable clients may need leave for such assistance.)

When dealers simply refuse to take a car back, despite the provisions of the ACL, affected parties have *no option* but to go to Court/QCAT.

If people are forced to rely on warranties, they are also often left out of pocket with expenses incurred in missing appointments, taking time out to deal with delivering/collecting their car for repairs, and taxi/bus fares to travel to and from repairers/dealerships. If hire cars are offered as part of warranty arrangements, clients also may have to pay insurance fees as part of such arrangements. These are the added sorts of inconveniences which are often ignored in this debate.

2.5 Who is responsible?

One of the most significant and contentious issues seems to be that dealers try to deflect blame and responsibility for lemons to the manufacturers; while the manufacturers try to deflect responsibility by insisting customers simply follow through on their warranty rights and get the dealers to organise repairs. Ashton Wood's³ much publicised dispute regarding his jeep illustrates the problems people encounter, and we have certainly advised clients who have experienced difficulties obtaining redress when they approach dealers about their car problems.

Lemon laws need to clearly state who is required to pay the refund on a vehicle once it has been deemed a lemon. This needs to be something that, practically, can be enforced in Australia, given that car manufacturing companies are located in other jurisdictions.

2.6 Regulatory investigations

Some of our recent clients have certainly reported that when they have approached regulatory bodies to seek assistance in pursuing the complaints they have about the conduct of car dealers, they have not been assisted.

Regulation and enforcement of laws by regulatory bodies is an important part of any scheme to force dealers/manufacturers to take responsibility for lemons.

2.7 Unfair Terms

Section 23 of the Australian Consumer Law ("ACL") provides that a term of a consumer contract is void if:

- The term is unfair; and
- The contract is a standard form contract.

We note that most contracts for new cars are standard form contract and that the unfair terms provisions of the ACL could assist consumers in their disputes with car dealers.

³ <http://www.couriermail.com.au/news/queensland/ashton-wood-ready-to-destroy-his-lemon-jeep-after-viral-campaign/story-fnihsrf2-1227079770279>

Section 250 of the ACL gives the court the power to make a declaration that a term of a contract is unfair.

In Queensland, section 51 of the Fair Trading Act (Qld) 1989 provides that an application for a declaration that a term of a contract is unfair must be heard in the District Court. Given the risks associated with litigation consumers are reluctant to bring applications under section 250 of the ACL.

We recommend that consideration be given to giving QCAT jurisdiction to make declarations under section 250 of the ACL. We note that in other jurisdictions such as Victoria, QCAT like tribunals have express jurisdiction to make declarations under section 250 of the ACL.

2.8 Impediments in the legal process and QCAT's jurisdiction

Retaining a solicitor to pursue a case is costly and legal costs and court costs risks are often a disincentive for people who otherwise wish to pursue their legal rights under the ACL.

QCAT's jurisdiction is limited to \$25,000.00 in consumer matters and many new cars will cost more than this amount. The option then, of going to the Magistrates Court, places people at risk of adverse costs orders if they are unsuccessful. Self-represented litigants typically find take court action stressful and are often poorly equipped to adequately represent themselves and comply with court procedures.

We believe that QCAT's jurisdiction to deal with these types of consumer complaints needs to be increased to a more realistic amount. These disputes should be able to be dealt with without undue technicality, and keeping these matters within QCAT's jurisdiction is important.

2.9 Cooling off periods

Although the issue of cooling off periods has not been flagged in the inquiry, we believe that the laws relating to cooling-off periods need to be reviewed. The current very short cooling off period applicable to second-hand cars⁴ should be extended and a cooling-off period should apply to new car purchases. Furthermore, we do not believe that cooling-off periods in relation to motor vehicles should ever be allowed to be waived.

For disadvantaged clients who are more vulnerable to making poorly considered on-the-spot decisions, longer and more extensive cooling off periods would be of great value. From our perspective, it is very important for clients to be able to rely on a cooling-off period if they have made hasty, ill-considered decisions about purchasing property they cannot actually afford. (This could be particularly important if a client is experiencing emotional trauma or has a mental health condition that heightens a tendency towards impulsive behaviours.)

2.10 A note on statutory warranties for second-hand cars

We wish to briefly ventilate our concerns about statutory warranties for second-hand cars. Although this is not the focus of this particular inquiry, it is relevant in the sense that lemons often end up in the second-hand car arena and continue to cause problems.

⁴ *Motor Dealers and Chattel Auctioneers Act 2014 (Qld)*, see sections 99 & 105.

When the *Property Agents and Motor Dealers Act 2000 (Qld) (PAMDA)* was repealed last year, the two-tiered statutory warranty scheme that had previously existed to include older cars was reduced so that now statutory warranties only apply to cars that have travelled under 160,000 km and are under 10 years of age. Because our clients are typically disadvantaged, they tend to buy older vehicles. However, their exposure when things go wrong is significant because they tend not to have savings in order to deal with car repairs and associated losses. We believe that the previous regime of A class and B class warranties should be reintroduced.

It is worth noting that because our clients are often quite poor, they tend to be fully committed in terms of their debt levels. When suddenly faced with a major expense – for example, to repair a vehicle, this can cause our clients considerable hardship – especially if they need a car to get to work. (Many of our clients have no access to reliable public transport.) If a client has only just purchased the vehicle when it breaks down, they are better placed if they can rely on a warranty. (Unfortunately, it has been our experience that clients often have trouble getting the vehicle repaired quickly under warranty anyway. If a dispute ensues, the client may need to end up paying for a repair themselves and then chasing recovery of the cost via QCAT.

It is unclear why the provisions relating to Statutory Warranties were moved to become part of Schedule 1 in the *Motor Dealers and Chattel Auctioneers Act 2014 (Qld)*. In our view, containing them in the body of the Act makes them more accessible for self-represented litigants to identify.

2.11 Need for protection - the hidden costs

Apart from the need to ensure that 'lemons' are kept off the road from the perspective of public safety needs, there are many other policy arguments behind the need for strong consumer protections in the field of motor vehicle consumer law.

For many people, purchasing a car will be one of the largest investments they will make in life, and our clients certainly do not have spare funds to cope with unexpected and significant expenses when car purchases turn out to be problematic. For example, retirees will sometimes invest in a new car, expecting that it will 'see them out' and due to declining health, having a reliable motor vehicle may be paramount for them at this stage in life. They may not have spare funds to deal with the costs of unexpected car defects, and having to deal with the stress of fighting about a consumer dispute has many flow-on consequences for older people. In our experience, the stress of litigation can seriously diminish an older person's health, especially if they already have pre-existing health problems. Arguably, there are treasury and other social cost implications whenever people end up being involved in legal disputes that could have been avoided.

Similarly, we sometimes see impecunious clients who will buy a car on credit simply in order to 'get a job', and it can be financially catastrophic for them if the car turns out to be defective and ends up being off the road. These clients may end up either not being able to get work or not being able to keep the jobs they have secured and then they have spiralling debt problems, which can aggravate problems like relationship breakdown, health difficulties and even homelessness.

3. CONCLUSION

In summary, we endorse the introduction of a 'lemon law' protection. Amendments to the law in relation to unfair contracts are also required in this arena. All of these laws need to be able to be enforced promptly in a practical and real sense.

Because consumer law, at least in our experience, is complex and is not generally well understood by members of the public, any change to the law needs to involve an extensive community education campaign.

We are happy to discuss any aspect of this submission.

CAXTON LEGAL CENTRE INC.