
**SUBMISSION TO THE
COMMONWEALTH
CONSUMER AFFAIRS
ADVISORY COUNCIL**

on

***Consumer Rights – Statutory
Implied Conditions and
Warranties***

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Federal Chamber of Automotive Industries
GPO Box 313
Canberra ACT 2601
Phone: +61 2 6247 3811
Facsimile: +61 2 6248 7673

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Executive Summary

The Federal Chamber of Automotive Industries (FCAI) is the peak industry body representing motor vehicle manufacturers, distributors and importers of passenger cars, light commercial and four-wheel vehicles and motor cycles. This submission has been prepared in response to the Commonwealth Consumer Affairs Advisory Council's (CCAAC) July 2009 Issues Paper, *Consumer rights – Statutory implied conditions and warranties*.

Australian consumers have access to significant protections through the provision of warranties, statutory rights and legal remedies in the event that a motor vehicle is defective or not fit for purpose.

The Trade Practices Act (Cth) 1974 (TPA) provides that products must be of merchantable quality and fit for their purpose. In addition, consumers rights are enhanced through various fair trading acts in the states and territories of Australia.

FCAI contends that through the provision of warranty, and the protections of the TPA and the State legislation, consumers are provided a more than adequate level of protection against the risk of faulty product.

Based on a survey of FCAI members, it is estimated, on average, less than 100 cases relating to customer dissatisfaction with a motor vehicle covered under new vehicle warranty proceed to action before a court or tribunal. Of these, less than 5% of claims are determined in favour of the complainant.

With around half a million sales of new vehicles a year to private buyers and given standard new vehicle warranty coverage of three years (in some cases longer), the FCAI contends that this level of legal dispute/litigation is very low and does not provide support for the introduction of additional regulation in the form of a lemon law.

As an alternative to a lemon law, the FCAI would support further discussion on the merits of a national, low cost forum for consumers to seek redress for goods that are not fit for purpose. Such a forum should have a strong focus on early informal dispute resolution processes and consumer education.

1 Lemon Laws

1.1 In what circumstances can a faulty or defective good be characterised as a lemon?

There is no commonly accepted definition of a 'lemon'. Page 6 of this submission provides an example of a definition of a 'lemon'.

1.2 Are lemons particularly prevalent – or are they particularly problematic – in the market for motor vehicles? Are lemons a problem in any other market?

(a) Are lemons particularly prevalent – or are they particularly problematic – in the market for motor vehicles?

As an initial point, a complaint made by a customer does not necessarily relate to a complaint about a defect in the vehicle which is the responsibility of the Manufacturer.

The experiences of FCAI members indicates that the majority of customer complaints received are about:

- indifferent dealer performance or behaviour;
- parts taking too long to arrive / availability of parts;
- customers not accepting repair costs which relate to normal wear and tear, or misuse of a product;
- customers expectations not being met because their expectations were unrealistic given the product that was purchased or because they selected the wrong type of vehicle for their requirements;
- buyer remorse; and,
- problems occurring through poor use rather than product malfunction.

The only available data on the prevalence of lemons is a simple totalling of individual complaints in the findings of Consumer Affairs Victoria as referred to in the 2007 Victorian enquiry regarding lemon laws (Victorian Inquiry). Between 2005 and 2007 Consumer Affairs Victoria analysed the complaints made to them to see how many related to vehicles that were subject to multiple repair attempts, within the first three years of ownership.

The Victorian Inquiry found that in 2005, there were 21 complaints relating to multiple repair attempts, in 2006 there were 18 complaints relating to multiple repair attempts and in 2007, there were 22 complaints relating to multiple repair attempts¹. Consumer Affairs Victoria goes on to extrapolate that, on the basis that only 4% of people with concerns make complaints, the 'real' number of complaints of multiple defects was 25 times the actual number. This seems a somewhat dubious basis for an extrapolation.

¹ Vic Report at page 5.

In light of this lack of empirical data the FCAI surveyed vehicle manufacturers and importers seeking more detail on the number and nature of complaints.

The survey indicates that customers and dealers make effective use of the existing warranty system to address or rectify most claims or to address identified vehicle faults or required repairs. Only a very small number of cases were identified not to be addressed, or resolved, under standard servicing or warranty arrangements.

In particular the survey indicated that there are less than 100 claims per year, on average, which result in some form of litigation or legal action, before a court or tribunal. Of these cases:

- Around 55% are settled prior to determination by relevant court/tribunal
- Around 40% are resolved in favour of the manufacturer.
- Around 5% are resolved in favour of the complainant.

With around half a million sales of new vehicles a year to private buyers and given standard new vehicle warranty coverage of three years (in some cases longer), the FCAI contends that this level of legal dispute/litigation is very low and does not provide support for the introduction of additional regulation in the form of a lemon law.

1.3 What is meant by a 'lemon law' and what should it deal with? Should lemon laws apply to new goods, used goods, or both? Should lemon laws differ according to the type or class of good?

(a) Should lemon laws apply to new goods, used goods, or both?

As far as the FCAI is aware, the only lemon laws that relate to motor vehicles apply to new vehicles and are limited in duration, either by time or by a maximum number of kilometres.

2 Problems a lemon law might address

2.1 Are there any specific product or service markets where information asymmetries are especially problematic? Are they as problematic for both new and used goods? What detriment is caused by these asymmetries?

(a) Are there any specific product or service markets where information asymmetries are especially problematic?

There is no evidence of an information asymmetry in relation to the market for new motor vehicles.

To the contrary, there is extensive independent testing and review of new motor vehicles and this information is widely available to consumers.

2.2 Are there any non-regulatory means available to consumers, industries or governments which might deal with asymmetries of information?

As noted in the Issues Paper, one way to deal with an asymmetry of information in relation to a particular used vehicle is by having that vehicle examined thoroughly by a mechanic in advance of purchase, and the mechanic issuing some sort of rating. It should be noted that in most jurisdictions in Australia this is done, to an extent, by the need for a

road worthy certificate to be issued prior to a used vehicle being transferred. In addition, there are various independent bodies which will perform a more thorough investigation of a vehicle for a small fee.

To the extent to which there might be some issue with a particular model of vehicle, an increasingly popular place for finding this out is by way of one of the many blogs or Internet sites that discuss vehicles. There are many such sites that can be readily accessed.

The FCAI wishes to note that it is not supportive of any regime that would require manufacturers or dealers to either report complaints to a central body or publish such information. Merely because a customer makes a complaint does not necessarily mean that a vehicle is a 'lemon'. Tracking of complaints could place an administrative cost on manufacturers without improving customer satisfaction.

2.3 Would a lemon law provide a clearer indication of the rights and responsibilities of consumers and businesses? Would this increase the likelihood that those rights would be enforced and those responsibilities carried out?

(a) Would a lemon law provide a clearer indication of the rights and responsibilities of consumers and businesses?

A lemon law will only provide a clearer indication of the rights and responsibilities of consumers and businesses if it is highly specific. Inevitably, this would mean that the laws would apply to only a very limited number of consumers.

If the law is to have broad application, it will need to have the capacity to be interpreted depending on the individual circumstances in question. This will not provide a clearer indication of the rights and responsibilities of consumers and businesses. Wherever there is scope for interpretation, there will be dispute.

(b) Would this increase the likelihood that those rights would be enforced and those responsibilities carried out?

It would be fair to assume that if a consumer is able to point to legislation which clearly provides that consumer with rights, then the consumer is more likely to enforce those rights. (This, of course, assumes that the consumer is aware of the rights). Likewise, if the Manufacturer sees that the consumer has clear rights, it is more likely to respond to the consumer without the need for any further proceedings. However, as explained above, the only way to have clear rights is to have very prescriptive legislation which will narrow the application of that legislation.

As acknowledged in the Issues Paper² one of the most, if not the most, serious issues under the present regime is consumer's lack of awareness of their existing rights. Rather than providing consumers with new rights and having to make them aware of these new rights, resources would be more efficiently and effectively spent by making consumers aware of their existing rights.

² P. 7

3 Lemon Laws in other jurisdictions

3.1 How do lemon laws in other jurisdictions identify a 'lemon' as distinct from a good which simply needs repair?

The Issues Paper makes reference to the position in the United States, Canada and New Zealand. Neither Canada nor New Zealand has lemon laws as such but they do have schemes which provide consumers with some additional rights. The FCAI is of the view that there is no need to adopt either of these schemes in Australia, because the existing legal regime is adequate and appropriate. However, brief mention is made of Canada and New Zealand to demonstrate that other jurisdictions that have felt the need to introduce an additional regime to deal with motor vehicles have not chosen to implement lemon laws.

United States

As noted in the Issues Paper, lemon laws have been widely adopted in the United States and generally provide that *'when a vehicle is identified as a lemon, the consumer is entitled either to a replacement vehicle from the manufacturer, or a refund of the purchase price'*³.

While the laws do vary between the various states as to how a particular vehicle may be identified as a 'lemon', the following principles are generally applicable⁴:

- there is rebuttable presumption that the vehicle is a 'lemon' if a Manufacturer is unable, within a specified period, to correct any defects which substantially impair the use, value or safety of the vehicle;
- depending on the state in question, a reasonable period might be:
 - one failed attempt to repair a serious safety defect involving brakes or steering;
 - two failed attempts to repair a safety defect that this not a serious safety defect;
 - three or four failed attempts to repair any other defect; or
 - at any time, the vehicle is off road for 20-30 days in a one-year period;
- personal use is usually covered, business use is not always covered;
- most states usually require the customer to first seek relief under the Manufacturer's arbitration procedure (if the Manufacturer has one);
- a vehicle will not be a lemon if:
 - the alleged defect is the result of abuse, neglect or alteration of the vehicle;
 - the alleged defect does not substantially affect the use, value or safety of the vehicle; or

³ P. 33

⁴ Victorian Report at page 7-8. See also, 'US Lemon Laws vs. The Canadian Motor Vehicle Arbitration Plan: Two Approaches to Resolving New Car Defect Issues', Canada's Office of Consumer Affairs (Automobile Consumer Coalition) 'A Vehicle Lemon Law in Canada: Should Canada Have a Motor Vehicle Lemon Law? and What would it look like?' and Kirwan.

- the claim is out of time; and
- if the vehicle is a lemon, the Manufacturer must offer the consumer a replacement vehicle or a refund of the purchase price (usually with provision for a millage reduction).

Canada

As noted above, Canada does not have lemon laws as such. Instead, the Canadian Motor Vehicle Arbitration Plan (CAMVAP) is a national dispute resolution plan for disputes with vehicle Manufacturers.

CAMVAP covers two types of dispute:

- allegations of defects with respect to defects in vehicle assembly; and
- disputes regarding the application or administration of the Manufacturers new vehicle warranty.⁵

Vehicles eligible under CAMVAP are new vehicles from the current year, plus vehicles from the four previous model years that have travelled less than 160,000 kilometres. It covers most passenger cars, light trucks, sports utility vehicles, vans and multi-purpose passenger vehicles purchased or leased in Canada.⁶

It is also worth noting that before qualifying for CAMVAP:

- consumers must first follow the Manufacturers' specified dispute resolution process; and
- dealers and Manufacturers must be given a reasonable amount of time and opportunity to fix the problem.⁷

In terms of remedies, CAMVAP arbitrators can order buybacks, reimbursement for repairs and, sometimes, reimbursement for out of pocket expenses.⁸

New Zealand

Like Canada, New Zealand does not have a 'lemon law'. In fact, the New Zealand statutory landscape with respect to consumer protections is similar to Australia. However, New Zealand has a specialist Motor Vehicle Disputes Tribunal (the **MVDT**), the purposes of which is *'to provide consumer purchasers of motor vehicles with a speedy, cost-effective, independent means of resolving disputes with motor vehicle traders'*⁹.

⁵ CAMVAP 16 April 2009 media release, available at: http://www.camvap.ca/eng/media_release_04_15_09.htm

⁶ CAMVAP, *Is CAMVAP for me?* available at: http://www.camvap.ca/eng/camvap_for_me.htm

⁷ CAMVAP, *Is CAMVAP for me?* available at: http://www.camvap.ca/eng/camvap_for_me.htm

⁸ CAMVAP, *Is CAMVAP for me?* available at: http://www.camvap.ca/eng/camvap_for_me.htm

⁹ <http://www.justice.govt.nz/MVDT/home.asp>

Specifically, the MVDT allows a customer who has a claim for less than \$50,000 arising under the *Consumer Guarantees Act 1993* (NZ) (faulty or defective vehicles), the *Fair Trading Act 1986* (NZ) (misleading and deceptive conduct and/or false representations) or the *Sale of Goods Act 1908* (NZ), to lodge a complaint against the relevant trader for resolution by the MVDT.

It costs NZ\$50 to file a complaint. Once a complaint is filed, the MVDT will write to the trader in question requesting them to attend mediation and/or discuss the complaint with the complainant. The trader then has 14 days to report back to the MVDT in writing as to whether or not the claim has been settled. If it has not settled, an informal private hearing, usually of 1 to 2 hours duration, will take place before an 'adjudicator' (lawyer) and an 'assessor' (expert). Lawyers are generally not allowed.¹⁰

The MVDT can order a range of remedies, including repairs, refunds and compensation.¹¹

3.2 How effective have these laws been at addressing the existence of lemons in the market?

United States

Lemon laws were introduced in the USA around 1960. At that time consumers were offered little protection by way of legislation or Manufacturer express warranties. Typical warranties were restricted to repair remedies and covered a limited period of twelve months or 12,000 miles, whichever occurred first. In addition, investment and emphasis in quality management and tracking systems was not as it is today. In this context it is understandable that lemon laws were needed to protect consumers in the USA.

Since the 1960s the situation has changed in the USA and today, it is not at all clear that motor vehicle customers obtain any significant increase in protection by virtue of the lemon laws. In this respect, the Victorian Report concluded that *'there is no conclusive evidence about what has driven [the improvement in the quality of motor vehicles in the US since lemon laws were introduced]*¹². The Victorian Report further stated that *'there does not appear to be any conclusive qualitative studies'* and accordingly that *'it is difficult to say exactly what impact the introduction of lemon laws had in changing the behaviour of the industry in dealing with customer complaints'*¹³.

Further to this, many commentators have noted the apparent dissatisfaction within the US market with lemon laws. For example, in an article published in the *Suffolk Transnational Law Review* comparing the US and Canadian approaches, James A. Lack noted that *'with the passage of time since the initial enactment of [the lemon laws]... there has been great disillusionment over their results as these laws have failed to adequately protect consumers'*¹⁴. Lack also suggests the Canadian CAMVAP program

¹⁰ New Zealand Ministry of Consumer Affairs, Back on the Right Road – Your consumer rights after buying a motor vehicle available at <http://www.justice.govt.nz/MVDT/forms/backontherightroad-may2008.pdf>

¹¹ New Zealand Ministry of Consumer Affairs, Back on the Right Road – Your consumer rights after buying a motor vehicle available at <http://www.justice.govt.nz/MVDT/forms/backontherightroad-may2008.pdf>

¹² Vic Report, p. 8.

¹³ Victorian Report, page 8.

¹⁴ Lack at 321.

commenced as result of the knowledge that *'U.S. lemon laws had fostered litigation and failed to promote redress through arbitration'*¹⁵.

Given the proximity of Canada to the USA and the commonality of their automotive markets it is a salutary point that Canada has not introduced any lemon laws for their automotive industry.

It is clear from the experience of FCAI's US counterparts that there has been an increase in legal activity in the USA as a result of lemon laws, which has increased costs to the automotive industry and consumers, without necessarily giving consumers greater protection.

Canada

In a press release celebrating 15 years of operation earlier this year, CAMVAP stated as follows:

*CAMVAP's customer satisfaction record is exemplary. In 2007 a survey found that 74% of consumers that used the program rated their experience with CAMVAP as excellent or good...The success of the CAMVAP program can be largely attributed to the commitment of participating manufacturers and their authorized dealers to see a fair and balanced outcome for their customers when disputes arise and cannot be resolved. While vehicle manufacturers are building better quality vehicles and try to resolve consumer concerns as soon as possible, the no cost CAMVAP program remains an effective 'court of last resort'*¹⁶.

In 2008 only 346 cases were handled through the CAMVAP and in over 40% of these cases the Manufacturer was found to have no liability.¹⁷ Given that the Canadian new vehicle market is approximately 65% larger than the Australian market, this would equate to only approximately 126 cases in Australia where the Manufacturer was found to have some liability¹⁸. Of these, it would be fair to assume that the vast majority would have rights under the existing legal regime.

New Zealand

Each year, the MVDT releases an annual report, the most recent of which was released in December 2008 for the period from 1 July 2007 to 30 June 2008 (the 2008 Auckland Report). The 2008 Auckland Report indicates that during this period:

- 185 applications were filed with the Auckland MVDT;

¹⁵ Lack at 325.

¹⁶ http://www.camvap.ca/eng/media_release_04_15_09.htm

¹⁷ See the material on the official CAMVAP website at http://www.camvap.ca/eng/media_release_04_15_09.htm and http://www.camvap.ca/eng/stats_2008.htm

¹⁸ In 1998 new vehicle sales in Australia were 1,012,164 (VFACTS). In 2008 in Canada they were 1,674,145 - see <http://www40.statcan.gc.ca/l01/cst01/trade12-eng.htm?sdi=vehicle>.

346 cases x 60% where the manufacturer had liability = 208 cases, Reduced to reflect the size of the Australian market 208 / 1.65 = 126 cases in Australia

- 142 disputes were heard by the Auckland MVDT (which included some carried over from 2006/2007);
and
- of the 142 disputes that were heard, 56 found for the trader (39.4%), 85 for the consumer (59.9%) and 1 case was dismissed / transferred for want of jurisdiction.¹⁹

These figures are consistent with previous years - in 2006, a report was presented to the New Zealand House of Representatives arising out of a review of the operation of the *Motor Vehicles Sales Act 2003* (NZ). The review included a review of the motor vehicle disputes resolution regime and the MVDT, and the report sets out a summary of statistics in respect of complaints filed with the MVDT for the period from 15 December 2003 to 30 June 2005. During this period:

- the MVDT received 390 applications;
- on average, 31 applications were filed each month;
- 32% of applications were settled prior to hearing and withdrawn;
- of those applications which proceeded to a formal hearing, almost 40% were dismissed (96 of 247 claims).²⁰

In relation to the level of satisfaction with the MVDT, the 2008 Auckland Report sets out the results of a satisfaction survey. 130 responses were received, as follows:

- in regards to process, 62% of applicants thought the process was "easy" and 35% thought it was "satisfactory";
- as for traders, 55% thought the process was "easy" and 43% thought it was "satisfactory";
- in relation to fairness, 55% of applicants thought the hearing was "very fair" and 41% thought it was "fair"; and
46% of traders thought the hearing was "very fair" and 34% thought it was "fair".²¹

3.3 Are enhanced consumer warranties or new dispute resolution processes – or both – more effective means of addressing problems associated with lemons?

The experiences in Canada as compared to the USA would suggest that an alternative dispute resolution process is a more effective means of addressing problems associated with lemons. However, in the Australian context, the real issue is that there is no

¹⁹ *Annual Report of the Adjudicator of the Motor Vehicle Disputes Tribunal Based in Auckland (Number 1): Period 1 July 2007 to 30 June 2008*, available at: <http://www.consumeraffairs.govt.nz/businessinfo/mvsa/mvdt/adjudicators-reports/auckland/no1/2008/Cornwell2008.pdf>

²⁰ *Review of the Operation of the Motor Vehicle Sales Act 2003: Report Presented to the House of Representatives Pursuant to section 163 of the Motor Vehicle Sales Act 2003*, available at <http://www.consumeraffairs.govt.nz/policylawresearch/mvsa-review/report-to-the-house/report-to-the-house-06.html>

²¹ *Annual Report of the Adjudicator of the Motor Vehicle Disputes Tribunal Based in Auckland (Number 1): Period 1 July 2007 to 30 June 2008*, available at: <http://www.consumeraffairs.govt.nz/businessinfo/mvsa/mvdt/adjudicators-reports/auckland/no1/2008/Cornwell2008.pdf>

evidence-based or quantifiable problem associated with lemons and, to the extent to which there is a need for any legal redress for defective goods, the existing regime is more than adequate.

As a further comment, enhanced consumer warranties are not required as Manufacturers already provide lengthy warranty terms – in some cases up to 5 years.

4 Is there a need for a lemon law in Australia?

4.1 Are existing consumer protections well used in connection with lemons? Is their applicability to lemons well understood?

(a) Are existing consumer protections well used in connection with lemons?

As discussed, warranty claims are generally resolved without recourse to the statutory consumer protections. Accordingly, in the experience of FCAI members the statutory consumers protections are little needed, and therefore little used.

However, to the extent to which a consumer feels that they have a justifiable complaint which requires legal redress, the existing statutory regime provides them with more than adequate rights. As explained previously, those rights include the implied terms under the TPA and the various Fair Trading Acts in the States and Territories.

In addition, in a number of States, proceedings can be issued in jurisdictions other than the traditional court system (eg. VCAT in Victoria and the CTTT in NSW) which offer a low cost, less formal option for resolution of their complaint.

(b) Is their applicability to lemons well understood?

While the existing legal regime is more than adequate to address the small number of unresolved complaints, the real issue is that consumers are not particularly well informed of the existing regime. In this respect, it is worth noting that the Victorian Inquiry also found that 'many consumers (and also sellers) are not aware of their rights under the implied terms regime'²².

The FCAI is supportive of initiatives aimed at increasing consumer awareness of their statutory rights. The FCAI would be pleased to work with CCAAC to explore avenues to address this issue.

4.2 Do the remedies currently available provide adequate redress for consumers who purchase lemons?

In short, yes. As set out in the Issues Paper, a range of remedies are available if a good is not fit for its purpose or of a merchantable quality, including rescission (entitling the customer to a refund of monies paid for the vehicle in question). Moreover, where a vehicle is not of merchantable quality, the customer will usually be entitled to damages compensating him or her for losses flowing from that fact.

One particular comment that the FCAI wishes to make is in respect of the statement in the Issues Paper that '*if a consumer wishes to rescind the contract because the good is*

²² Vic, p. 4

unmerchantable, they must do so within a reasonable time...It may be that problems associated with lemons are not likely to be revealed to the consumer within a 'reasonable time'²³. While this may be the case, if a particular defect has not presented itself within a reasonable time, then such a defect should not be covered by a lemon law either – after a reasonable time has passed, it becomes less and less likely that the defect arises from a manufacturing issues, and it is simply not fair to expect a Manufacturer to assume responsibility for a defect which could have been caused by any number of factors. In addition, if a defect arises after a reasonable time, consumers are usually covered by Manufacturers' express warranties (as discussed below).

In addition to consumers' rights under Manufacturers' express warranties, consumers are protected by statutory rights and the *Code of Practice for the Conduct of an Automotive Safety Related Recall Campaign* (Code).

Manufacturers' express warranties

Express warranties on new vehicles are offered by all Manufacturers and provide a contractual basis for customers to have their concerns about their vehicle addressed by the Manufacturer. The warranties are comprehensive and cover vehicles for ever-increasing periods of time. When express warranties were first offered, they generally were for one year/20,000 kilometres. Now, most express warranties are for three years, with some Manufacturers extending their warranties to five years.

Not only do the express warranties offer substantial protection to customers, but the fact that Manufacturers are prepared to offer them for such lengthy periods of time indicates that the Manufacturers are confident about the high quality of their products.

Code

The Code is part of the existing regime and requires special mention. It has been in place since 1982 and all FCAI members are signatories. The Code deals with the circumstances in which a member will institute a recall of a vehicle to rectify a safety related defect. It also mandates a process which must be followed when a recall is instituted. Manufacturers take their responsibilities under the Code very seriously and strictly adhere to the Code.

²³ P. 35.

4.3 Does the existing regime provide suppliers, manufacturers and importers with the incentives necessary to respond to lemon problems in a timely and effective manner?

Suppliers, manufacturers and importers do not resolve dispute with their customers or produce high quality reliable vehicles because of the existing regulatory regime. This is because suppliers, manufacturers and importers are driven by a much more powerful and immediate force – the extremely competitive and responsive motor vehicle market in Australia.

There is a real commercial incentive for Manufacturers to resolve customer complaints as effectively as possible. This is generally done in the following manner:

- The selling dealer is normally the first port of call for customer complaints. Dealers are expected and encouraged by our members to resolve the issue with the customer.
- Manufacturers have centralised Customer Relations Departments to handle customer contact.
- The Manufacturers log contacts using computer-based software. The response to each contact is determined by the nature of the contact.
- The Manufacturers generally have policies regarding, and measure dealerships on, their ability to “fix the problem first time”. Training of mechanics and technicians at dealerships is directed at identifying the technical problem and solving it the first time rather than having 3-4 attempts.
- The Manufacturer's practice is usually to arrange for an authorized dealer to repair vehicles wherever possible. If the dealer is unable to identify or rectify the fault, the Manufacturer will usually send one of its experienced mechanics to inspect and diagnose the fault. On rare occasions, if a vehicle cannot be repaired in a timely manner, the Manufacturer may offer to replace or buy-back the vehicle. The replacement or buy back is arranged to maintain customer satisfaction in a timely manner rather than an inability to repair the vehicle.
- If a refund/buy-back is deemed appropriate, then this action is initiated within the Customer Relations department. The Dealer is normally kept involved in the process.
- Further, if a customer has genuine grounds for a replacement vehicle, then it will most likely be addressed well before the matter reaches a court or tribunal. The majority of cases are resolved at the dealer and/or Manufacturer level. However, where a Manufacturer considers the customer to be completely unrealistic in his or her demands and the Manufacturer decides not to offer a replacement vehicle, then some customers may choose to take their complaints to external bodies (eg CTTT, VCAT). It would be most unusual for a Manufacturer not to attempt to resolve the problem to the customer's satisfaction well before the matter proceeded to legal action in response to a valid and reasonable complaint. In an industry where customer satisfaction is paramount, the quicker a concern is resolved, the more likely it is that customer satisfaction will be restored.

- Manufacturers are acutely aware of the impact of bad publicity and the consequent loss of sales that can be caused by just one disgruntled customer. As a result, and as discussed above, all Manufacturers have well resourced and highly sophisticated customer service departments to handle customer concerns. In addition, dealers and their staff are highly skilled and receive comprehensive training in dealing with customers. Dealerships are measured on customers' satisfaction as a critical criteria under their franchise arrangements, with dealers facing various sanctions if their customers' satisfaction rating is unacceptable.

4.4 Does the existing regime give consumers sufficient confidence to engage with markets and buy the goods they desire?

There is no evidence to suggest that customers are choosing not to buy new motor vehicles because they do not have sufficient confidence in their ability to exercise their rights should the vehicle not be of a sufficient quality.

5 Is additional regulation required?

5.1 Is there a need for a lemon law in Australia? What would it add to existing conditions and warranties? To what type of goods might a lemon law apply? What business costs might such a law impose?

(a) Is there a need for a lemon law in Australia?

The FCAI is strongly of the view that there is no demonstrated need for the introduction of lemon laws in Australia. In the absence of any empirical evidence demonstrating that there is a significant problem that the existing regime does not address, new or additional regulation cannot be warranted.

(b) What would it add to existing conditions and warranties?

As explained above, there would be little purpose in introducing a lemon law if it did not add to consumers' existing rights. However, it is simply not necessary to do this because to the extent to which there are defects in vehicles which need to be addressed, the existing legal regime provides consumers with adequate rights. The preferred approach is to streamline the existing regime and better promote it to consumers.

(d) What business costs might such a law impose?

The introduction of any lemon laws will result in an overlay of additional cost and complexity which will ultimately find their way to consumers by way of increases in prices.

Access to records

If Manufacturers are expected to take responsibility for their brand's vehicles, they must have access to the complete historical repair records of these vehicles. This does not present a problem if all vehicles are serviced and repaired by the Manufacturer's authorised dealers, as the Manufacturer can access its dealers' records. There will however be a cost to access and collate these records.

The issue is more complicated when the vehicle in question has not been repaired and/or serviced by the Manufacturer's dealer network. In this instance, the cost of obtaining the records is likely to be significantly higher – and might involve the need to issue legal proceedings. In fact, competitive pressures and privacy law limitations would likely deny Manufacturers any access to such material.

Consumers can and do service their vehicle in the warranty period with non authorised repairers and/or with different dealerships. In such situations, Manufacturers have no records of repair work carried out and may not even learn of such a situation until the problem has become significant.

In addition to the need to access records, Manufacturers would need to ensure that much more comprehensive records are maintained by their dealers. Manufacturers would also need to capture and collate any other additional information about their vehicles, in case there is a claim made. This will be an additional cost.

Unauthorised parts fitted

Many after market products are designed to enhance vehicle performance and alter the Manufacturer's factory set specifications. Such products by their very nature, affect the overall intended operation of the vehicle and can lead to additional stress on other components.

Customers can also add additional features to the vehicle such as bull bars, roof racks and refrigeration units that change the weight and dimensions of their vehicles. These accessories also have the potential to impact on performance and increase the likelihood of accelerating vehicle wear and tear.

Should after market products be removed prior to claiming a fault with the vehicle, it is almost impossible for a dealer to detect what damage has been caused by the after market product.

This is likely to lead to unjustified claims being accepted which represents an additional cost to Manufacturers, and ultimately, increased vehicle prices to all consumers.

Manufacturers forced to bear the cost of buyers' remorse

Another significant concern for FCAI members is that any legislative amendments may well become a refuge for "buyer's remorse". This refers to the occasional situation where a customer alleges that the vehicle is defective in order to obtain a refund for the vehicle they no longer want or cannot afford. In such circumstances, the relevant defect could be repaired under warranty or the alleged fault falls outside of warranty.

The cost of buying back used vehicles is likely to be very significant for Manufacturers, especially if the law is drafted in such a way that allows such exploitation to occur.

Risks of increased litigation

In all likelihood, any legislation that might be introduced will contain some degree of generality. This means that there will inevitably be disputes and therefore litigation. Given the adverse connotations for a Manufacturer if one of its vehicles is found to be a lemon, it would be reasonable to expect Manufacturers to more vigorously defend these types of proceedings.

5.2 What kind of remedies might assist consumers who buy lemons? Could an alternative dispute resolution process assist those consumers? How might that process operate?

(a) What kind of remedies might assist consumers who buy lemons?

In the FCAI's submission, the remedies that are already available to consumers under the existing regime are more than adequate. The real issue is about making consumers aware of these remedies.

Notwithstanding this, if lemon laws were to be introduced, it would be preferable if, where a vehicle is capable of being repaired within a reasonable period, it is repaired, rather than the customer being given a refund.

Where a vehicle is not capable of being repaired within the required time frame, the Manufacturer should be entitled to choose whether to replace the vehicle with a used vehicle of similar age.

If a vehicle is not capable of being repaired within the required time frame and the customer's vehicle is bought back, there should be a reduction in the amount which is due to the customer, based on the time the vehicle in question has been on the road and the number of kilometres the vehicle has travelled. In this respect, a formula could be worked out to determine the reduction. This generally occurs under the US lemon laws, and is referred to as a "mileage reduction".

(b) Could an alternative dispute resolution process assist those consumers?

As mentioned previously, the optimal and low cost solution is to address consumer awareness of their rights and to raise the standards of the already effective tribunal and court system to that of best practice.

As an alternative to a lemon law, the FCAI would support further discussion on the merits of a national, low cost forum for consumers to seek redress for goods that are not fit for purpose.

A system that is fast, fair and efficient is desirable. This forum should have a strong focus on early informal alternative dispute resolution processes – perhaps along the lines of the Canadian or New Zealand models.

Such a forum need not be limited to motor vehicles – indeed, the evidence does not suggest that there is a need for a dedicated tribunal to deal with motor vehicle claims. However, there could be a specialist "list" for motor vehicle issues, with access to independent experts. An automotive expert could be involved at the early alternative dispute resolution step, either to assist the parties or perhaps to act in the capacity as a mediator.

Given that all Manufacturers operate on a national basis, it is important that any such process operates on a national basis, with a consistent approach across Australia.

For the reasons discussed above, the FCAI is strongly of the view that any such tribunal should be a "no-cost" jurisdiction, as is currently the case in state based forums such as VCAT.