



15 November 2013

By email: andrew.douglas@justice.vic.gov.au

Dr Elizabeth Lanyon
Director, Regulation and Policy
Department of Justice
L17, 121 Exhibition Street
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Dear Dr Lanyon

Submission to the Regulatory Review of the Motor Car Traders Act (MTCa) 1986

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Issue Paper for the regulatory review of the Motor Car Traders Act (MTCa) 1986.

We generally do not agree that the regulatory burden on traders is excessive, although there are some innovations that might streamline some processes. The second hand car market is a significant source of consumer detriment, and much of the casework through our legal practice relates to disputes between consumers, traders and associated service providers. The burden on our court and tribunal system, underpinned by public funds, warrants higher, not lower, standards of compliance, monitoring and enforcement through regulation.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Background to the review

Regulation as a critical consumer protection [refer 2.1 & 2.6]

Regulation is intended to promote a desirable economic and social purpose. That some may do so ineffectively or inefficiently is worth knowing, but the wholesale elimination of regulation in the name of reducing costs on business alone is neither desirable nor feasible.

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Strong regulation can play a potentially positive role in stimulating economic growth and a well-functioning economic system. It can be an aid to competition, by assisting consumers to exercise their free choice in possession of all the relevant information to assess the offer on the table. As the issues paper notes, there is an information asymmetry in the vehicle market, and consumer protections are essential to support those seeking to buy make sensible decisions and be recompensed should the product they buy prove to be unfit for purpose.

Complying with ineffective and unnecessary regulation costs businesses time and money, unnecessarily restrict business activity, and be costly for the community. However, sensible and necessary discussion regarding the impact of regulation and the benefits of consumer protection is at risk of being hijacked by a view that all regulation is “red tape” and must be cut to reduce compliance costs for business.

Business lobby groups and policy makers can be quick to ‘count’ the compliance costs of regulation—the staff hours and input costs required to comply. Assessing the benefits of regulation is more difficult, but no less essential and decision-making by modern government should require equal rigour on the benefit side of the ledger. That’s why we also need to learn to ‘count’ regulatory benefits by ascribing to them a meaningful value.

Changes in the industry [refer 2.4]

Consumer Action is not convinced that a rise in unregulated methods of selling cars (mostly on line), combined with a fairly stable number of licensed traders, makes a compelling case for reducing regulation on the licensed traders. There appears to be a strong case for capturing online car sales within the regulatory framework to ensure consumers enjoy protection from substandard or faulty products and services in the online and offline market place.

Statutory Warranties under the MCTA and the Australian Consumer Law (ACL)

Consumer Action has carefully considered the proposal to remove statutory warranties in the MCTA, and for consumers and traders to operate under the consumer guarantees regime of the ACL. However before warranties could be removed, there is a need for CAV as the regulator to provide extensive consumer and trader education with supporting information to assist consumers and traders achieve clarity on expectations relating to the performance, quality and expected product life span of second hand vehicles categorised by vehicle class and popular brand.

Our Centre has extensive experience in this area, and our casework carries a significant focus on motor vehicle disputes. A common response from Licensed Motor Car Traders (LMCTs) when contacted about defects in a vehicle is that the vehicle is not (or is no longer) covered by a statutory warranty or that consumers have purchased a warranty from a third party company and only that warranty should be relied upon.

There is still significant lack of clarity as to what constitutes a 'minor failure' and a 'major failure' under section 259 of the ACL. This is exacerbated in motor vehicle disputes where the consumer is not able to show exactly what is wrong with the car. There is also a lack of clarity around the responsibility and costs for transporting a defective vehicle to a place where it can be repaired, or when it is returned to a trader. The statutory warranty provides certainty on this point in section

54(2A)(a) and makes it clear that it is the responsibility of the trader to pay for the transport. By contrast, the ACL is silent on who pays for the vehicle to be moved for a failure (although a consumer has a right to pursue all damages flowing from the failure: s 259(4)). If there is a major failure as defined under s 259, then the consumer must 'return the goods to the supplier unless the goods cannot be returned... without significant cost'. What is defined as 'significant cost' is explained in the explanatory memorandum but this definition does not consider cars where there is always a significant cost to the consumer if the car is not able to be driven. To rely solely on the ACL guarantees in motor vehicle disputes, and not on a statutory warranty, would compound the 'information asymmetry' referred to in Part 2 of the Issues Paper.

The power of CAV and Police to take disciplinary action is an important consumer protection that must be retained in cases where the trader fails to comply with an ACL guarantee.

CAV is also well placed to produce industry guidance material about its expectations of the time length of consumer guarantees for particularly types of vehicles, perhaps based on industry data or analysis performed by independent consumer research entities. This guidance should strive to provide the sort of certainty and clarity that comes from the description of cars which are covered by the statutory warranty in section 54(1) and (2B). Statutory warranties provide clear benchmarks for vehicle age and kilometres driven. By comparison, the ACL make only the following vague statement: "...as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable having regard to..." the nature of the goods, price, any statement made about the goods and any other relevant circumstances. CAV guidance in this area should provide consumers and traders with clear lists of defects (and the severity of defects) which must be repaired in cars of a certain age and kilometres driven.

A further complication in Victoria is the difficulty in resolving disputes under either the MTCA or the ACL. Guarantees and warranties are all very well, but where disputes arise, the current arrangements under the Victorian Civil and Administrative Tribunal (VCAT) do not serve the consumer interest. Victoria needs a fit for purpose dispute resolution forum to enable consumers to get access to a remedy that is affordable, quick and fair.

In conclusion, a simple replacement of existing statutory warranties with the consumer guarantees under the ACL will not maintain a strong enforcement presence, nor will it provide certainty about rights and expectations without extensive education and information dissemination.

Consumer Action therefore recommends retaining the Statutory Warranty regime as a complementary measure to provide clarity and certainty for both consumers and traders.

Forms and Notices

Display of Warranty Information

The information on a consumer's rights under a Statutory Warranty is very clearly set out and presented. Our lawyers do not encounter situations where a consumer is confused about their rights under the Statutory Warranty. If the outcome is in favour of retaining statutory warranties, then form 5 should be amended to include the additional information required by the ACL. As forms are standardised, this does not place extra burden on traders.

Including warranty information in the contract of sale may solve the “blind spot” identified in the issues paper, and provide clarity for consumers. We do note, however, that it is the experience of our legal practice for consumers to be more interested in the remedies open to them than knowing their rights. The lack of clarity around remedies for failure of the ACL consumer guarantees is an ongoing problem and relates to our earlier point about providing a fit for purpose dispute resolution forum that is affordable, quick and fair.

In conclusion, at minimum we support option two as proposed in the issues paper.

Layout and Display of Notices and Advertisements

We would agree that it is a challenge to provide clear direction to traders in presenting notices and advertisements that is accessible and promotes important consumer protections such as warnings. The overriding concern should be with the consumer, and the ability to easily assess offers, warnings, key rights and other important features distinct from other text. Changes to advice regarding font style, size, placement, emphasis and other associated features of text materials should be consumer tested in various layouts in order to provide clear evidence of effectiveness before prescribing the requirements in regulation. For example, the ability of consumers to easily identify grocery unit prices is significantly affected by placement, font style, size, format etc.

Citing the unreasonable cost of colour versus monochrome printing does not meet the appropriate test one might apply to a burden on business.

Vague requirements, such as that the text be “legible”, are unhelpful, and do not deliver text and documents that ensure consumers understand the information being presented.

Consumer Action supports prescription, to ensure strong consumer protection, avoid creative interpretation by traders, and to provide clarity and certainty for traders and regulators.

Miscellaneous

Display of price: Consumer Action strongly supports the proposal that traders be required to display drive away price in all advertisements, as per the single pricing law in ACL which was introduced in large part due to the car industry. Consumers don’t like surprises of additional charges, and not listing full price can be anti-competitive if some traders do it to gain custom and thus an advantage over others that list the full price. A breakdown of the total cost can be included in the contract. We can see no instance where consumer protection would be reduced by a requirement to only display the drive away price.

Record keeping: Consumers have six years to bring legal action under contract or under the ACL. Traders should therefore be required to keep relevant documents such as agreements and warranty documents for the same period. Consumer Action strongly supports the regulator in its ability to investigate traders, and would therefore also cite this as a compelling factor in the need for traders to retain the appropriate records. We would support traders being able to satisfy record keeping requirements by electronic storage of documents as a cost effective alternative.

Cooling Off Rights

Inclusion of the cooling off information in the contract of sale would be a useful innovation and reduce the number of forms a trader is required to provide. Similarly, abolishing the right to waive those cooling off rights is also sensible, and further reduces the number of forms required to be filled in.

However these changes in themselves will not enhance consumer protections. Recent research has shown that written notice alone is not enough for cooling off to be effective.¹ Therefore the number or nature of the forms is less irrelevant. What the research shows is that a combination of oral and written notice significantly increases the likelihood that a consumer may choose to exercise their cooling off rights and cancel the contract on reflection after leaving the place of sale. If the desired impact of cooling off is to give the consumer some time away from the pressure sales environment in which to consider a major purchase, this would seem to be a sensible change to the regulatory approach to this aspect of motor vehicle trading. Traders should feel confident that if the vehicle is of acceptable quality, and the consumer is genuinely in a financial position to make this purchase, the “endowment effect”, ie the attachment a consumer develops to an item purchased, will reduce the likelihood of contract cancellation.

The argument may be made that some purchasers want to drive away a vehicle on the day. Given the significance of the purchase, and the burden on the legal aid, courts and tribunal system that arises from shoddy vehicles purchased in haste, it is sensible to remove the impulse factor. Traders and consumers both understand that a motor vehicle purchase is a significant investment, second only in most cases to the purchase of a house, and should rightly require a short period of reflection. The return on this investment to the wider community is likely to be worth the minor inconvenience of the few days to wait to take possession of the vehicle.

Consumer Action therefore supports an enhanced version of option two, with the addition of oral notice of cooling off rights to be provided at the time the contract is entered into.

Eligibility Criteria

Associates

There is no justification for changing the current approach. The Victorian Government, in response to the 2004 Pullen Report, said *“This provision recognises that in some instances, a licensee may be heavily influenced by their associates regarding the way they conduct business or interact with consumers. In some situations, it is even possible that a particular applicant or licensee will merely be a front or ‘puppet’ for one of their associates. In such circumstances, an applicant’s associates may pose as much, or more, of a risk to potential customers as the applicant would if granted a licence. Through this provision, the BLA is able to protect consumers from any risk of harm that they may be exposed to through an applicant’s associates.”*²

¹ Sovern, J (2012) *Cooling-Off Periods*. St John’s School of Law Legal Studies Research Paper Series available at <http://ssrn.com/abstract=2103807>.

² The Victorian Government’s Response to Mr Noel Pullen MP’s Report on the Motor Car Traders Act Consultations (2006)

Consumer Action opposes both options presented in the issues paper on the basis that consumer detriment would be likely to occur should the rules be relaxed.

Financial Check

Licensees must have sufficient financial resources to carry on their business. A licence is, after all, a privilege, not a right, and traders should rightly have to work hard for their licence. Similarly, consumers should be confident that a licensed trader is capable of running the business including having the necessary financial backing and expertise to do so. Consumers who find themselves with a malfunctioning vehicle but find they cannot return it because the trader has gone broke are at an obvious disadvantage, and it may take many months to get even some level of remedy. The issues paper does not describe any ongoing compliance costs for existing traders, so this can only be assumed to be an issue for new entrants to the market. However the issues paper also says that the number of car traders has remained stable despite the proliferation of online sellers. As the case has not been made, but there are concerns allowing traders to self assess or reduce the rigour of the BLA checking process would cause consumer detriment, Consumer Action rejects both options presented, and support the status quo.

Knowledge check

There is no justification to describe the need to complete a knowledge test as a regulatory burden. It is a requirement to receive the right to trade, and to demonstrate knowledge and understanding of the legislative and regulatory environment within which they intend to operate. Indeed, given the number of disputes and problems that arise from trading second hand motor vehicles, there is a strong case to increase the scope of knowledge check to lift the overall standard of this trading sector. Innovations that make use of online and telephone channels are supported, but at some stage it must be verified that the person applying for the licence is in fact the person answering the questions and displaying the knowledge required to hold a trading licence.

Scrap Dealers & Auto Recyclers

We currently have no comments to make in relation to this section of the review.

Customer Service Employees

Given the low number of consumer complaints received by Consumer Affairs since the 2008 amendments to the Act, it appears that they may have been successful. Further, they serve an important purpose, noting the high degree of mobility amongst sales staff in the industry and prevents banned traders being employed as sales staff elsewhere. Consumer Action recommends the current regulations are retained, and that the Victorian Government actively promotes this as a best practice model to other states.

Please contact me on 03 9670 5088 or at deniseb@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'DB', is positioned to the left of the typed name.

Denise Boyd
Director, Policy & Campaigns