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Janice Munt MP  
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Consumer Affairs Victoria  
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Dear Ms Munt

### **Victorian motor vehicle lemon laws**

Consumer Action Law Centre (**Consumer Action**) is pleased to have the opportunity to submit its views regarding the proposed introduction of motor vehicle lemon laws in Victoria. We would also like to take this opportunity to thank you for meeting with us on 9 November 2007 to discuss the lemon laws proposal.

### **About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign focused, casework and policy organisation. It was formed by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service in 2006, and builds on the significant strengths of these two centres.

Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. 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.

### **Executive summary**

Consumer Action strongly supports the introduction of lemon laws in Victoria. We outline below a summary of our submission.

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(i) Extent of the problem

Consumer Action has provided advice to a significant number of clients who have bought lemon vehicles. This includes clients who bought new and used motor cars, motorbikes, and motor homes. In many circumstances, the absence of lemon laws meant that the consumer had no satisfactory remedy.

Consumer Action is unable to quantify the extent of the problem with lemon vehicles, but our casework database suggests that the sale of lemon vehicles is a significant problem.

(ii) Types of vehicles that should be given lemon law protection

Lemon laws should cover all new road vehicles that are ordinarily acquired for personal, domestic or household use. Under this definition, Victorian lemon laws should cover new cars, motorcycles/mopeds, motor homes, and passenger minivans. Consideration should be given to whether lemon laws cover motorised wheelchairs. We also believe that Victorian lemon laws should cover used cars, and cars that are leased on long-term leases.

(iii) Defining a lemon

Consumer Action agrees that the easiest way to implement lemon laws is through amending part 2A of the *Fair Trading Act 1999* (Vic) (**FTA**).

This is complicated by the fact that, in order for a lemon law system to work, there must be restrictions on the re-sale of lemon vehicles that have been bought-back. The need to impose restrictions on the re-sale of bought-back lemons means that at least one new section would have to be inserted into the FTA.

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.<sup>1</sup> A new vehicle should also be presumed to be a lemon if it is repaired once for a defect that is a danger to the personal safety of the driver of the vehicle or other road users.

A used car should be presumed to be a lemon in the same circumstances in which a new car is presumed to be a lemon so long as the used car is subject to mandatory warranty protection under section 54 the *Motor Car Traders Act 1985* (Vic) (**MCTA**).

(iv) Alternative dispute resolution requirements

Consumer Action believes that imposing a requirement that consumers participate in alternative dispute resolution (**ADR**) as a mandatory condition precedent before filing an application in the Victorian Civil and Administrative Tribunal (**VCAT**) to exercise rights under lemon laws would be inefficient and contrary to the interests of consumers. Mandatory ADR would increase the difficulty and delay consumers face in bringing an action. This delay and

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<sup>1</sup> New Jersey's lemon law uses a 3-repair-attempts/20-days-out-of-service criteria. New Jersey Motor Vehicle Warranty Act, *The Lemon Law 2006 Annual Report*, page 2.

difficulty would likely cause attrition of claims, leading to many valid consumer claims not being satisfactorily resolved. Rather than place obstacles in front of consumers making complaints about lemon vehicles, the law should ensure there is a seamless dispute resolution process.

(v) Charge to consumers for use of lemon vehicle

As consumers are greatly inconvenienced when their vehicle breaks-down and needs repairs, it is not reasonable to require consumers to pay for the use of the defective vehicle prior to it breaking-down. However, if there is to be a charge to consumers for use of a lemon vehicle, the amount charged for use should be calculated according to an objective mathematical definition that is not ambiguous, and therefore not an encouragement to disagreement and litigation.

(vi) Re-sale of lemon buy-backs

Manufacturers or importers that buy-back vehicles that are lemons should be required to notify all potential purchasers that the vehicle is a lemon if they re-sell it. This notice is best achieved by requiring lemon vehicles that are being re-sold to have a lemon notice physically attached to the driver's side door.<sup>2</sup> Manufacturers or importers and dealers should be required to correct any defect prior to re-sale, should be required to register any buy-back vehicles on a register held by Consumer Affairs Victoria (**CAV**), and should be required to give a mandatory minimum warranty.<sup>3</sup>

**(i) Extent of the problem**

Consumer Action does not have data that shows the percentages of new or used vehicles sold that are lemons.

Our legal advice service has, however, dealt with a number of consumers who have purchased new and used lemon vehicles. A search of our database showed more than 50 consumers have contacted us from 2004 to 2007 complaining that they had purchased a lemon vehicle. In many cases, the fact that they had bought a lemon was the consumer's major complaint, in other cases this was one of several complaints.

The following case-studies from our legal advice service indicate the range of lemon vehicles that consumers purchase.

Case study 1

The consumer purchased a new car in 2004. Immediately upon driving the car out of the dealership, the consumer noticed that the headlights and indicators on the car did not work. The consumer immediately took the vehicle back to the dealer to be repaired. After this, the

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<sup>2</sup> This is similar to the law in California. National Association of Consumer Advocates, Before the Federal Trade Commission, In Re: Vehicle Buybacks – Comment, [FTC File No. P96-4402](http://www.ftc.gov/bcp/lemon/naca.htm) (<http://www.ftc.gov/bcp/lemon/naca.htm>)

<sup>3</sup> In most US states, new lemon cars that are resold have a statutory mandatory warranty. Ohio's law is typical, giving a 12 month 12,000 mile warranty. Mark Dann, Attorney General, State of Ohio, *Ohio's Lemon Law*. ([http://ag.state.oh.us/citizen/pubs/lemon\\_law\\_broch.pdf](http://ag.state.oh.us/citizen/pubs/lemon_law_broch.pdf))

vehicle exhibited a series of defects including the fuel pump needing to be replaced, the ABS system needing to be replaced, and the ABS pump needing to be replaced notwithstanding that the entire ABS system had been recently replaced. The consumer wrote to the importer and asked for the car to be replaced, but the importer refused to do this. The consumer was very concerned about the safety of her vehicle.

#### Case study 2

The consumer bought a new motor home for \$380,000. From the day of possession, the motor home had major problems, including water leaking from the radiator, the batteries failing, and major electrical faults. Despite multiple repairs of the vehicle, problems persisted. The consumer was unable to obtain a refund.

#### Case study 3

The consumer purchased a new motorcycle. Within a year of the purchase, the motorcycle was returned 7 times for repairs for defects that included a fuel leak, oil leak and electrical failure. Finally, the motorcycle's clutch cable snapped on the Western Ring Road. A mechanic who inspected the motorcycle indicated that the vehicle was generally defective. However, although the motorcycle was still under warranty the dealer claimed the warranty was void because the motorcycle had been serviced by a mechanic other than an accredited mechanic.

#### Case study 4

The consumer purchased a new company car and noticed within the first week that there was something wrong with the clutch. It took 3 months before the dealer accepted there was a defect with the car. The dealer told the consumer that the car would be serviced and that this would take 5 days. In fact, the car was kept in shop for more than three weeks while the clutch problem and a number of other defects were repaired. The consumer was only offered a courtesy car after the client threatened to go to CAV. The consumer wanted a replacement car but this was refused.

#### Case study 5

The consumer purchased a used car manufactured in 1998. Thus the vehicle was covered under the mandatory warranty in section 54 of the MCTA. Shortly after driving the vehicle out of the dealership, the consumer filled the vehicle up with petrol. After being filled, the vehicle would not start. The consumer noticed the vehicle was leaking oil, and took it to an independent mechanic. The mechanic noted 17 defects in the vehicle, including a persistent oil leak and a sagging engine mount that had caused the sump to crack. The dealer refused to repair any of the defects, and while the client had a right of action under the mandatory warranty, this did not allow her to get a refund and be rid of the lemon vehicle.

The above case studies demonstrate that the purchase of lemon vehicles is a problem that affects both new and used cars, and other vehicles such as motor homes and motorcycles.

## (ii) Types of vehicles that should be given lemon law protection

An important issue regarding the proposed lemon laws will be to determine which kinds of vehicles the laws cover. Consumer Action believes that if the laws are going to have the most effect for consumers, then they should extend beyond new cars alone.

To get an idea of the range of vehicles that lemon laws have been used to protect, it is useful to look at the different protection offered by different states in the United States. In Texas, lemon laws apply to new purchases and leases of cars, trucks, vans, motorcycles, all terrain vehicles and towable recreational vehicles (the laws exclude boats, farm equipment and non-travel trailers).<sup>4</sup> In New York, lemon law protection extends to purchases and leases of used cars and motorcycles.<sup>5</sup> A number of US states extend lemon law protection to motorised wheelchairs.<sup>6</sup>

The most practicable way of protecting Victorian consumers through lemon laws is to ensure that lemon laws cover all new road vehicles of a kind ordinarily acquired for personal, domestic or household use.<sup>7</sup> Any application of the preceding criteria would obviously cover new cars, motorcycles/mopeds and passenger vehicles (eg. passenger minivans) and motor homes. Although not a road vehicle, we believe that purchasers of new motorised wheelchairs should benefit from lemon law protection. To restrict lemon laws solely to new cars would be arbitrary, and would fail to provide uniform consumer protection. Users of passenger minivans are consumers, as are users of motorcycles/mopeds and motorised wheelchairs. In the case of motorcycle/moped purchasers and motorised wheelchair purchasers, these consumers may be especially vulnerable because they may be low-income consumers (in the case of motorcycle/moped purchasers) and elderly or disabled consumers (in the case of motorised wheelchair purchasers).

We also believe that used cars that are sold by dealers and that fall within the ambit of section 54 of the MCTA should be subject to the proposed Victorian lemon law. We note that the Government's election commitment to introduce lemon laws covered 'motor vehicles and other major product purchases', and this was not limited to new cars.<sup>8</sup> Further, sales of used cars amount to approximately 35% of dealer car sales.<sup>9</sup>

It is Consumer Action's experience that some used cars are sold in a poor state of repair, and often in circumstances where the consumer lacked knowledge about the quality of the car. For example, Consumer Action has received numerous complaints about Motor Finance Wizard during the last 12 months. Motor Finance Wizard sell used cars on instalment contracts to credit-impaired (usually low-income) consumers. The poor quality of

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<sup>4</sup> Texas Department of Transportation, Motor Vehicle Division, *Texas Lemon Law and General Warranty Complaints*, revised January 2004, page 6.

<sup>5</sup> State of New York, Office of the Attorney General, *New York's Used Car Lemon Law: A Guide for Consumers*, April 2006, page 1.

<sup>6</sup> Attorney General of New York State, Andrew M Cuomo, *New York's Motorized Wheelchair Lemon Law*, FAQ, [http://www.oag.state.ny.us/health/wheelchair\\_law.html](http://www.oag.state.ny.us/health/wheelchair_law.html), extracted 19 October 2007.

<sup>7</sup> This is similar to the definition of 'consumer contract' in section 3 of the *Fair Trading Act (Vic) 1999*.

<sup>8</sup> Australian Labor Party, *Addressing disadvantage – investing in a fairer Victoria*, Policy for the 2006 Victorian Election, p 18.

<sup>9</sup> Price Waterhouse Coopers, *Department of Equity & Fair Trading NCP Review of the Auctioneers and Agents Act*, May 2000, page 95.

cars has meant that many consumers have returned cars prior to the completion of the contract (leaving them with an outstanding debt). Often, the car is superficially repaired and re-sold. We are also increasingly seeing problems with roadworthy certificates being issued in relation to used cars, despite the cars not being in a roadworthy state. We are concerned that in many cases repairers that are linked with traders are providing these certificates, and are not undertaking the appropriate safety checks.<sup>10</sup> Consumer Action does not believe purchasers of used cars should be in any worse position as to their legal rights in comparison with purchasers of new cars.

Considering this, for there to be consistent consumer protection it is necessary for lemon laws to cover the sale of used vehicles by dealers. We agree that there should be limits on the applicability of lemon laws to used cars. It would be simplest and easiest to use section 54 of the MCTA to provide the necessary limits. Section 54 does not apply to cars that are more than 10 years old or that have been driven for more than 160,000km. Section 54 could be used as a limiting device, whereby only those cars subject to section 54 are subject to lemon laws.

It is not clear whether it is practicable to extend lemon protection to used vehicles that are not motor cars. Consumer Action takes that view that it would be helpful to consumers to extend lemon law protection to the sale of used motorcycles (as has been done in New York).<sup>11</sup>

### **(iii) Defining a lemon**

#### *New vehicles*

Consumer Action supports the proposal to introduce lemon laws by way of amending the FTA to incorporate a deemed breach of the merchantability implied term. We note that in other jurisdictions, vehicles are deemed to be not of merchantable quality if there have been three repair attempts or the vehicle has been out of service for a cumulative period of 20 or more days within one year from the date of purchase. We would support similar presumptions operating in Victoria.

The laws should ensure, however, that there is no extra requirement is no extra requirement on a consumer to prove that the vehicle has a defect that 'substantially impairs its use, value or safety'. The intent of the presumptions should be to provide a clear statement of circumstances in which consumers will have a remedy, and requiring consumers to prove substantial impairment, or something similar, would create uncertainty in the law that some traders would exploit to the detriment of consumers.

We believe that lemon laws should provide protection to vehicles during the first two years after their sale. This should mean that if a vehicle gets re-sold within that period (perhaps because a consumer is sick of it breaking down), the law still protects a subsequent owner up to two years after the original purchase of the vehicle.

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<sup>10</sup> We acknowledge that a roadworthy certificate relates to the safety of a car, not its mechanical soundness. Many consumers, however, are not aware of this fact.

<sup>11</sup> State of New York, Office of the Attorney General, *New York's Used Car Lemon Law: A Guide for Consumers*, April 2006, page 1.

If the vehicle is a lemon and consumers have a remedy, the remedy should give them a choice of a refund or a replacement vehicle.

### *Used vehicles*

One way of defining a lemon in relation to used vehicles is to use exactly the same formulation as used for new vehicles, but to apply it only where the vehicle is subject to section 54 of the MCTA.

The advantage of this definition is that it is clear and requires minimal legislative change. The disadvantage is that this definition would apply only to used cars, and would exclude other used road vehicles such as motorcycles. We believe that similar protection should apply to used vehicles other than cars.

#### **(iv) Alternative dispute resolution (ADR)**

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.

In practice, VCAT requires parties in the civil list to attend a pre-trial mediation conference.<sup>12</sup> This provides an opportunity for mediation that is less likely to lead to attrition of valid complaints because it happens after filing which is a 'threshold step' for many consumers.

It is our view that the law should empower consumers and make it as easy as possible for them to enforce their rights. Unfamiliarity with the legal processes and lack of information are two significant causes of consumers 'giving up' and dropping their claims. Consumer Action suggests that one way to resolve this is to change the law to require traders to inform consumers of their rights and the legal avenues open to them. In the case of lemon

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<sup>12</sup> *Victorian Civil and Administrative Tribunal Act (Vic) 1998*, section 83.

vehicles, traders should be compelled to give consumers information about their lemon law rights whenever a consumer returns a defective vehicle for servicing.

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. We note that Mr Noel Pullen MP recommended consideration of the establishment of an industry-based EDR scheme for the motor vehicle industry in his independent review of the MCTA.<sup>13</sup> The Victorian Government supported this recommendation.<sup>14</sup>

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.

#### **(v) Charge to consumers for use of lemon vehicle**

Consumer Action does not support the imposition of an obligation on consumers to pay for 'reasonable amount' for use of a lemon vehicle for those periods when the consumer has been able to use the vehicle. However, if consumers are to be required to pay for use of a lemon vehicle they should, at the very least, only be required to pay for the period between purchase and the first occurrence of the vehicle being off-road due to defect and service. Consumer Action believes that if a 'reasonable amount' charge is implemented, as for instance is the case in many US states,<sup>15</sup> the amount the consumer is obligated to pay should be an amount that is capable of objective calculation and not an ill-defined, or defined in a manner not capable of objective mathematical estimation.

There are issues about how to calculate a charge for use of a vehicle. Consumer Action believes that the amount should be based on a mathematical formula (eg. based on the purchase price of the vehicle and the amount of time it has been used by the consumer). Our concern is that if the amount is ill-defined, then traders will use the requirement to pay a 'reasonable amount' as a bargaining tool to put pressure on consumers not to pursue claims.

If manufacturers or dealers are to be allowed to charge consumers a fee for use, the right should be limited to the period from the time when the purchaser or lessee first bought the vehicle until the time that the purchaser or lessee first notifies the manufacturer, importer or

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<sup>13</sup> Noel Pullen MP, *A report on the Motor Car Traders Act consultations*, December 2004, 74.

<sup>14</sup> Consumer Affairs Victoria, *The Victorian Government's response to Mr Noel Pullen MP's Report on the Motor Car Traders Act Consultations*, May 2006, page 31.

<sup>15</sup> For example, in the state of Maine manufacturers or importers can deduct 'a reasonable allowance for use'. Maine Attorney General, *Maine Consumer Law Guide: The Maine Lemon Law and State Arbitration*, revised 3 March 2004, 7 – 3.



dealer of a defect. Consumers should not have to pay for sporadic use of a vehicle between repair efforts.

#### **(vi) Re-sale of lemon buy-backs**

A consequence of having lemon laws is that there will be an economic incentive for manufacturers or importers to re-sell lemon vehicles. The re-sale of lemon vehicles creates the risk that the vehicles problems continue affecting the new purchaser. Therefore, any system that introduces lemon laws will need to introduce laws that regulate the re-sale of lemon vehicles that have been bought-back from consumers.

In the United States, the problem is solved by forcing re-sellers of lemons to disclose that the vehicle has been returned to the manufacturer or importer as a lemon, and requiring re-sold lemons to include mandatory warranties.<sup>16</sup>

In a Victorian context, the disclosure laws in the United States should be replicated. All re-sellers of lemon vehicles should be required to disclose that the vehicle is a lemon buy-back. This notice should feature conspicuously (eg. in bold font) in the contract of sale, and a notice should be physically attached to the vehicle in a prominent place (eg. as a sticker attached to the driver's side door).

Any reseller of lemon vehicles in Victoria should be required to provide a mandatory minimum warranty. In the case of used vehicles, the mandatory warranty in section 54 of the MCTA is a suitable warranty. In relation to the resale of new car lemon buy-backs, it may be that a more extensive mandatory warranty could be introduced, or that the section 54 warranty would apply.

Consumer Action sees the resale of lemon buy-backs as a significant risk in the introduction of the proposed Victorian lemon law scheme. Resale laws are often skirted, such as when there was systemic selling of lemons with out notice in California in 1997<sup>17</sup> and 2002.<sup>18</sup> It has also been noted in the United States that manufacturers and importers can sidestep the lemon laws by reselling lemon vehicles in states with laxer laws.<sup>19</sup>

The regulator, Consumer Affairs Victoria, will have to be sufficiently resourced to ensure that lemons are not being re-sold in breach of the proposed laws. Victorian consumers will view the laws to have failed if there comes to be systemic selling of lemons without notice. We note that if restrictions on resales of lemon vehicles are implemented in Victoria (as is suggested) then there is an incentive for importers and manufacturers to ship the vehicles to other states. All States and Territories have mandatory minimum warranties for used cars

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<sup>16</sup> In North Dakota, the mandatory warranty is the lesser of 1 year or 12000 miles. Office of the Attorney General of North Dakota, Consumer Protection Division, *North Dakota's "Lemon" Law*, page 2.

<sup>17</sup> Siskos, Catherine, *Recycling troubled cars*, Kiplinger's Personal Finance Magazine, Volume 54, Issue 2, February 1997, page 124.

<sup>18</sup> Holt, Janet, *Sellers of 'laundered lemons' forced to come clean (Johnston v Ford Motor Co.)*, Trial, April 2002, page 78.

<sup>19</sup> Ibid.

sold by dealers.<sup>20</sup> These mandatory warranties would provide some protection to purchasers outside Victoria who purchase a car that has been previously bought-back as a lemon.

Unfortunately, Victoria would not be able to enforce disclosure requirements in relation to lemon vehicles bought-back in Victoria, but transported and sold interstate.

This would not affect Victorian consumers. However, until all States and Territories introduce lemon laws, consumers of second-hand cars in these States and Territories may unwittingly purchase vehicles that have underlying defects and that were bought-back in Victoria. For this reason, the issue should be brought to the attention of the Ministerial Council on Consumer Affairs.

### **Conclusion**

Consumer Action is pleased that the Victorian Government has taken the initiative to present proposals for lemon laws to protect Victorian consumers. Consumer Action considers lemon laws a valuable tool for consumer protection.

Should you have any questions about this submission, please contact Neil Ashton on 03 9670 5088.



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<sup>20</sup> The cars to which mandatory warranty protection extends differs state-to-state, but many states and territories impose a mandatory warranty on cars not more than 10 years old that have traveled less than 160,000 kilometres (ie. they use the same wording as section 54 of the *Motor Car Dealers Act (Vic) 1986*).