8 October 2015

By email: lacsc@parliament.qld.gov.au

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

Dear Sir/Madam

'Lemon' laws – An inquiry into consumer protections and remedies for buyers of new motor vehicles

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the need to improve the consumer protections and remedies for buyers of 'lemon' motor vehicles.

We strongly support the introduction of national 'lemon' laws. 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.

In our view, lemon laws should be extended to used cars, provided certain conditions are met. Consumers who purchase used motor vehicles from car dealerships should have similar protections to consumers purchasing new vehicles in the months following that purchase.

The key benefit of a lemon law is to provide for "bright line" rules as to when consumers are entitled to a remedy, rather than the uncertainty produced by the current regime which can lengthen and exacerbate disputes.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

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Consumer guarantees

Under the Australian Consumer Law, all consumers have a basic set of guarantees when they acquire goods and services that cost less than $40,000. There are nine guarantees that apply to goods, but the most relevant to lemon laws is the guarantee that goods will be of acceptable quality. When a car is not of acceptable quality, consumers have a right to a remedy. However, the remedy to which consumers are entitled depends on whether the failure to comply with the guarantee was minor or major.[1]

If the problem with the car is minor, the consumer is entitled to a free repair. Minor failures can normally be fixed within a reasonable time. If the problem with the car is major, the consumer is entitled to a refund or replacement. The car will have a major problem if it:

- has a problem that would have stopped someone from buying it if they'd known about it;
- is unsafe;
- is significantly different from the sample or description; or
- doesn't do what the business said it would, or what the consumer asked for and can't easily be fixed.

As noted above, we are regularly contacted for advice in relation to defective motor vehicles. Below are a series of case studies that demonstrate some of the difficulties faced by consumers who purchase lemon cars, and why many are reluctant to take their dispute to a tribunal or court.

Jeff's story

In 2014, Jeff saw an advertisement for a used car on the internet being sold at a car dealership. Jeff eventually purchased a 2013 model vehicle. There have been significant and multiple defects with the car since he purchased it. Within the first week of taking possession, the filler hose and tow bar plug fell off. Between April 2014 and August 2015, the car has had approximately 30 different repairs including replacing the gear box, problems with wheel alignment and the car wobbling and veering whilst being driven. Jeff also had to replace tyres that were different sizes, and have repairs completed to fix the engine smoking, the engine pipe and loose bolts in the chassis.

The manufacturer has also issued two recall notices. The second notices related to defects with the front brakes, which the dealership took 6 months to repair.

The defects have been repaired under the 'new car warranty', but no refund or replacement car has been offered. Jeff rarely drives the car as he feels it is unsafe. He is concerned that after the new car warranty expires, he will be left with a vehicle that will require ongoing repairs.

[1] For further information, see http://www.consumerlaw.gov.au/content/the_acl/downloads/consumer_guarantees_guide.pdf and https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees.

Helen's story

Helen receives a Centrelink Carer's Payment as her sole source of income. Helen has no assets other than her vehicle. Helen purchased the vehicle for her caring duties.

Helen purchased a 2004 model vehicle in July 2014 from a car dealership. Six weeks after Helen purchased the car it needed to get a compressor replaced. The car dealership agreed to pay for a compressor but Helen was told she had to pay for the labour to install it. Helen agreed, and the car dealership had the car for three months while the compressor was replaced.

Once Helen got the car back, she took it to her mechanic. Helen's mechanic found a number of problems with the car including oil leaks, issues with the engine and faults with the brakes. Helen also discovered that the vehicle was subject to a recall due to serious brake problems. The car dealership advised Helen that the car was outside of warranty and refused to assist further.

Yasmin's story

Yasmin bought a 2005 vehicle from a car dealership for approximately $13,000 in 2014. It was the first car that she had bought. Within three months she encountered a number of problems with the car, including issues with the transmission, bull bar, air conditioning, and brake lights. The car dealership looked at the car four times in two months, but failed to properly repair the vehicle. The car dealership charged her $1,600 for the repairs. Yasmin eventually had the car repaired by other repairers, which fixed all of the problems except the transmission. The repairers cannot figure out what is wrong with the transmission so have recommended replacing the transmission for $4,500.

Tarek's story

Tarek contacted us in 2015 after purchasing a new vehicle in February 2011. Tarek says that within two days of purchasing the car there were problems, and the car was towed back to the dealership. Three weeks later, the transmission needed to be replaced. In 2013, there were problems with the car batteries. Tarek had finally had enough, and sent a formal letter of demand asking for a refund. The dealership refused, instead offering to swap the car provided Tarek paid the difference in price. After Tarek rejected this offer, he was provided with a limited extended warranty. Since then, there have been faults with warning lights, the engine cooling system and the car turning off. Tarek says he does not feel safe driving the car, and asked the dealership and manufacturer again for a refund. The manufacturer's lawyers eventually responded, agreeing to repair the vehicle but not replace it or provide a refund. Tarek is reluctant to go to VCAT, as he is worried that it will take months to get a hearing date, by which time his extended warranty will have expired. Tarek is also concerned about the time and effort it will take to run the case, particularly if he ends up losing. Tarek's dispute continues.

Problems for drivers

It is often difficult for consumers to enforce their rights under the Australian Consumer Law when they buy a defective vehicle. There is uncertainty with the operation of the consumer guarantees and it can be costly and time consuming for a consumer to have their case heard by a court or tribunal.

The uncertainty of the operation of the consumer guarantees, particularly in relation to vehicles, arises from:

- disputes about 'minor' versus 'major' defects—particularly whether a combination of minor defects can add up to a major defect; and
- questions around damages—some decision-makers want to discount any refund by the benefit received from the use of the car, even if there has been a major defect.

This uncertainty is exacerbated by the fact that consumers must generally take their local small claims court or tribunal if they wish to seek redress for breaches of the consumer guarantees. As noted in the submission from Queensland Association of Independent Legal Services Inc, the Queensland Civil and Administrative Tribunal (**QCAT**) can hear disputes about defective cars, but only minor civil disputes up to a value of $25,000. In their view, the monetary limit of $25,000 is very restrictive in respect of new motor vehicles.

Consumer Action's experience is with the Victorian Civil and Administrative Tribunal (**VCAT**). Our experience is that complaining to VCAT can be a costly and time consuming process, particularly given the significant evidentiary burdens for consumers. The expense of obtaining appropriate evidence means that the tribunal may be basing its decision on inadequate evidence, which can lead to poor outcomes.

The evidentiary burden

To prove that their car has a major defect, consumers generally have to obtain an expert report. In some cases, the expert even has to be available for cross examination. This comes at a significant cost, and together with application fees for the tribunals. For example, in Victoria the application fee is now over $500 for disputes over $10,000.[2] In Queensland, the application fee for similar disputes is $305.[3] This represents a real barrier to justice. Many people choose to simply give up. Those that proceed may achieve a conciliated outcome or determination, but not receive a full remedy.

Inadequate conciliations

Consumers who take complaints to VCAT are often required to attend conciliation. In our experience, the VCAT conciliation process does not always achieve good outcomes for consumers: the conciliator's focus is often getting the parties to agree, rather than considering legal rights. This can means that the consumer agrees to a repair or a part refund only. This

[2] Victorian Civil and Administrative Tribunal, 'VCAT fees effective 1 July 2015, accessed 8 October 2015, available at: https://www.vcat.vic.gov.au/resources/document/vcat-fees-effective-1-july-2015
[3] Queensland Civil and Administrative Tribunal, 'Fees and allowances', accessed 8 October 2015, available at: http://www.qcat.qld.gov.au/applying-to-qcat/fees-and-allowances.

process also disadvantages particularly vulnerable people who may not able to effectively advocate for themselves, or those that are unaware of their legal entitlements. We acknowledge that in any small claims court or tribunal, there is a tension between access to justice and substantive justice—it can be costly and timely to determine exact legal rights, and therefore commonly the goal is simply to get parties to agree. However, particularly when it is compared to industry-based external dispute resolution schemes, we believe substantial improvements to dispute resolution in small claims courts and tribunals are required.

Consumer exhaustion

Very often, consumers will rely on statements from dealers or other traders meaning that they won't even pursue a remedy through a small claims tribunal or court. Not only is there the expense (both cost and time), consumers tend to trust 'experts' such as dealers. Often a dealer will offer a party remedy—a repair or a part refund, when what is required is a full remedy. Consumers often accept such a proposal because of the difficulties in using the justice system. In our experience, it is not uncommon for a consumer to have tried to resolve a car problem more than a dozen times with a dealer before seeking legal advice and pursuing a legal remedy.

Interaction with statutory and manufacturers' warranties

Consumer guarantees apply in addition to other warranties, including statutory warranties provided under motor car trading legislation as well as manufacturer and third party warranties.

Statutory warranties

In Queensland, the statutory warranty applies to cars that are less than 10 years old or that have been driven for less than 160,000 kilometres. The warranty expires after 3 months or the first 5,000km.[4] Under the warranty, the car dealership must repair defects within 14 days.[5] The statutory warranty does not apply to certain vehicles, including motorcycles, caravans and commercial vehicles. Many manufacturer's also offer 'new car' warranties, which provide a longer period of protection.

Manufacturer warranties

Manufacturers and car dealerships often sell warranties to consumers when they purchase vehicles, although these warranties may not necessarily provide any additional protection to that already provided under the Australian Consumer Law. In fact, these 'extended' warranties may provide lesser protection that the consumer guarantees.[6]

Motor vehicle discretionary risk products

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[4] Queensland Government, 'Guarantees and warranties for used cars', accessed 8 October 2015, available at: https://www.qld.gov.au/law/your-rights/consumer-rights-complaints-and-scams/buying-products-and-services/buying-products/buying-a-used-car/warranty-for-used-cars/.

[5] Queensland Government, 'Guarantees and warranties for second hand vehicles', accessed 8 October 2015, available at: https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/regulated-industries-and-licensing/regulated-industries-licensing-and-legislation/motor-industry-regulation/legal-requirements-motor-transaction/guarantees-and-warranties-for-second-hand-vehicles/.

[6] For more information, see https://www.accc.gov.au/consumers/consumer-rights-guarantees/warranties.

Motor vehicle discretionary risk products (DRPs) are a particularly problematic form of 'extended warranty'. DRPs are quasi-insurance products sold with motor vehicles or motor vehicle finance. These products operate like an extended warranty with one exception: the provider has complete discretion over whether to pay a claim or not. Providers say that they are required to consider the merits of claims and exercise their discretion fairly. But we think this can mean little in practice, as the contract terms allow warranty providers to exclude almost any claim.

As well as this general discretion to decline claims, DRP providers can rely on a number of exclusions in their contracts, such strict servicing requirements. As far as we can tell, warranty providers can avoid paying many if not most claims, either by relying on their discretion or on one of the exclusions. We think that makes these products almost completely worthless. In our view, many people buy these products because of tricky sales techniques, and in particular by selling them as an 'add-on' when the customer is buying another product. Those involved in the selling of these products also receive hefty commissions—up to 80 per cent of the premium—which may encourage and exacerbate poor selling practices.[7]

Consumer confusion

Consumers and car dealerships are often understandably confused about the interplay between the consumer guarantees, statutory warranties, manufacturers' warranties and DRPs. Arguably, the consumer guarantees regime could replace statutory warranties. However, we would caution against removing the statutory warranty protections without committing significant resources to investigation and enforcement by local consumer regulators, and educating motor car dealers and consumers about their rights and obligations under the Australian Consumer Law. As outlined above, improvements to the dispute resolution regimes would also be required so that consumer guarantees can be easily enforced.

International lemon laws

United States

In the United States, most states have introduced motor vehicle lemon laws. The laws differ from state to state, but tend to only apply to new cars. Whether a car qualifies as a "lemon" depends on the number of miles driven, the type of defect, the number of repair attempts and time in the mechanic's shop. Most state lemon laws provide that a manufacturer must provide a refund or replacement for a defective new vehicle when:

- a substantial defect cannot be fixed in four attempts;
- a safety defect within two attempts; or
- if the vehicle is out of service for 30 days within the first 12,000 to 18,000 miles or 12 to 24 months.[8]

[7] For further information, see Consumer Action Law Centre's report Motor Vehicle Discretionary Risk Products: http://consumeraction.org.au/almost-completely-worthless-used-car-warranties-catching-out-countless-australians/.
[8] Consumer Affairs, 'The Lemon law – A Guide to State and Federal Consumer Protection Laws', accessed 8 October 2015, available at: https://www.consumeraffairs.com/lemon_law/.

Consumers in the United States are also protected by federal laws. The Magnuson-Moss Warranty Act (**MMW Act**) protects the buyer of any product that costs more than $25 and comes with a written warranty. The MMW Act prohibits deceptive warranty practices, ensuring that warranties when provided by a seller are more easily understood by the buyer and enforceable should a breach of warranty occur. For example, a car dealer cannot refuse to honour a warranty because routine maintenance was performed by someone else, or the repairer used recycled parts.[9]

The federal Uniform Commercial Code (**UCC**) also covers contracts dealing with the sale of products. The UCC gives the consumer the right to a refund or replacement of a lemon product, but does not define a lemon so the relevant court must decide whether the consumer is entitled to a new car or refund.[10]

Singapore

In 2012, Singapore introduced lemon laws that apply to all goods that fail to meet standards of quality and performance, even after repeated repair. Goods include second-hand goods, discounted goods and perishable goods. It does not apply to rental goods, services or real property. If a defect is found within six months of delivery of the goods, it is assumed that the defect existed at the time of delivery, unless the retailer can prove otherwise. The consumer may have the option to request for repair or a replacement, and if that is not possible, ask for a reduction in price, or even a refund. In cases where legal action is required, consumers may seek recourse through the Small Claims Tribunals, which can hear claims of up to $10,000.[11]

Canada

In Canada, while there is no "lemon law", there is a voluntary arbitration program for the resolution of motor vehicle disputes. The Canadian Motor Vehicle Arbitration Plan (**CAMVAP**) is the dispute resolution program for Canadians who have problems with the assembly of their vehicle or with how the manufacturer implements its new vehicle warranty.[12]

CAMVAP does not resolve disputes between consumers and motor vehicle dealers, only manufacturers. CAMVAP covers most domestic and imported passenger cars purchased or leased in Canada, as long as the vehicle is the current model or one of four previous model years. Disputes are resolved through binding arbitration. CAMVAP periodically posts case results on its website or reports publicly on case outcomes.

CAMVAP is free for consumers, and the process normally takes less than 70 days from start to finish. Consumers do not need a lawyer to appear at CAMVAP, but can have a lawyer advising

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[9] US Federal Trade Commission, 'Auto Warranties & Routine Maintenance', accessed 8 October 2015, available at: http://www.consumer.ftc.gov/articles/0138-auto-warranties-routine-maintenance
[10] US National Association of Consumer Advocates, 'Auto Issues', accessed 8 October 2015, available at: http://www.consumeradvocates.org/issues/auto-issues.
[11] Ministry of Trade and Industry Singapore, 'General Advisory on Amendments to the Consumer Protection (Fair Trading) Act and Hire Purchase Act (Lemon Law', 5 May 2012, available at: https://www.mti.gov.sg/legislation/Pages/General-Advisory-on-Amendments-to-the-Consumer-Protection-%28Fair-Trading%29-Act-and-Hire-Purchase-Act.aspx.
[12] Canadian Motor Vehicle Arbitration Plan, 'About CAMVAP', accessed 8 October 2015, available at: http://www.camvap.ca/about/.

them at their own expense if they wish. Consumers also have the option of having a friend or family member to assist them. Manufacturers do not usually bring lawyers to CAMVAP.

New Zealand

New Zealand has established a specialist Motor Vehicles Disputes Tribunal, where the Tribunal can appoint a specialist assessor to determine whether a vehicle has major defects.[13] The Tribunal publishes decisions each month, which also helps to build knowledge about application of the law.

Introducing lemon laws in Australia

To improve outcomes for consumers who purchase lemon vehicles, we strongly recommend introducing national 'lemon laws' under the Australian Consumer Law. We have provided further details below. The key benefit of a lemon law is to provide “bright line” rules as to when consumers are entitled to a remedy, rather than the uncertainty produced by the current regime which lengthens and exacerbates disputes. Without a national lemon law, motor vehicle traders will be able to exploit loopholes in the law by selling ‘lemon’ vehicles in other states and territories.

Types of vehicles

We recommend that lemon laws cover all new road vehicles of a kind ordinarily acquired for personal, domestic or household use.[14] Any application of the preceding criteria would obviously cover new cars, motorcycles/mopeds and passenger vehicles (e.g. passenger minivans) and motor homes. Although not a road vehicle, we believe that purchasers of new motorised wheelchairs should benefit from lemon law protection—users of these vehicles are often particularly vulnerable, and our experience is that complaints are common. Used vehicles should also be covered in certain circumstances (see below for further information).

Definition of a ‘lemon’

A new vehicle should be presumed to be a lemon if the vehicle has been repaired at least three 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.[15] 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.

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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[13] NZ Motor Vehicle Disputes Tribunal, ‘Making a claim’, accessed 8 October 2015, available at: http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal.

[14] This is included in the definition of ‘acquiring goods as a consumer’ in the Australian Consumer Law s3(1).

[15] This is similar to the New Jersey lemon law, where a consumer gives a manufacturer one last chance to repair a defect after two repair attempts have failed to fix the problem, or after the vehicle has been out of service for a cumulative total of 20 days. After the ‘final chance’ letter, the consumer can apply for a Lemon Law hearing. For further information see: http://njpublicsafety.com/ca/brief/lemon.pdf.

A used car should be presumed to be a lemon in the same circumstances so long as the used car is subject to mandatory warranty protection under the relevant state motor car traders legislation.[16] As set out above, in Queensland the mandatory warranty protection for used cars does not apply to cars that are more than 10 years old or that have been driven for more than 160,000 kilometres. The warranty expires after 3 months or the first 5,000km.[17]

Reversing the onus of proof

We recommend that lemon laws reverse the onus of proof where it is alleged there has been a major problem, or the vehicle is a 'lemon' (as defined above). This means the obligation is on the trader to demonstrate that there has been no breach of the consumer guarantees. If the vehicle is a lemon or there has been a major problem, consumers should have the choice of a refund or a replacement vehicle.

We have previously suggested a reverse onus on all goods for a period after purchase (say 3 or 6 months), as in Singapore. This would mean that within this period the trader would be required to prove that they did not breach the consumer guarantees. This is another option. The consumer guarantees would continue to apply beyond that period, but the consumer would be required to prove their case as per usual. In our view this would encourage both parties to reach a resolution early after purchase where a defect has been identified, rather than prolonging the process which sometimes happens now. Applying the rule to all goods, whether new or second hand, would enable a continued 'general law across the economy' approach.

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. Consumer regulators will have to be sufficiently resourced to ensure that lemons are not being re-sold in breach of the lemon laws.

Charge for using the 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 drive 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, the amount the consumer is obligated to pay should be an amount that is capable of objective calculation and not ill-defined.

There can be complication when calculating a charge for use of a vehicle. Consumer Action believes that any amount should be based on a mathematical formula (e.g. based on the purchase price of the vehicle and the amount of time it has been used by the consumer).

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[16] For example, Schedule 1 of the *Motor Dealers and Chattel Auctioneers Act 2014* (Qld).
[17] Queensland Government, 'Guarantees and warranties for used cars', accessed 8 October 2015, available at: https://www.qld.gov.au/law/your-rights/consumer-rights-complaints-and-scams/buying-products-and-services/buying-products/buying-a-used-car/warranty-for-used-cars/

Improving dispute resolution

We strongly recommend improving dispute resolution services in the motor vehicle 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. Canada's voluntary dispute arbitration service, CAMVAP, is an excellent example of how similar services can improve consumer outcomes. Industry-based EDR schemes also exist in many other industries in Australia, 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 the Productivity Commission recently praised the role of these schemes in resolving consumer complaints in its Access to Justice report.[18]

A particular benefit of specialist external dispute resolution schemes is that they can develop expertise around the subject of the dispute; in this case, motor vehicles. Our experience is that while some VCAT members have expertise that assists in identifying whether, for example, defects are 'major' or 'minor', others rely on outside expertise such as expert reports from the parties. As outlined above, the costs and effort in producing expert reports can be a barrier to access to justice.

However, 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 a tribunal 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 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.

Support for 'lemon laws'

Momentum is arguably building for the introduction of lemon laws, particularly in the lead up to the review of the Australian Consumer Law in 2016.[19] We welcomed recent comments by the Queensland Government that 'lemons were a costly concern not adequately covered by existing national and state laws.'[20] There has also been recent media interest in the issue, with one report

[18] Productivity Commission, 'Access to Justice Final Report – Chapter 9 Ombudsmen and other complaint mechanisms', 3 December 2014, available at: http://www.pc.gov.au/inquiries/completed/access-justice/report.
[19] The Terms of Reference for the review can be accessed at: http://www.consumerlaw.gov.au/content/Content.aspx?doc=review_of_the_acl/review_of_the_acl_tor.htm
[20] The Hon Yvette D'Ath, 'Media release – D'Ath puts squeeze on lemons', 17 June 2015, available at: http://statements.qld.gov.au/Statement/2015/6/17/dath-puts-squeeze-on-lemons; ABC News, 'Queensland to push for national lemon laws for when new cars keep going bad', 17 June 2015, available at: http://www.abc.net.au/news/2015-06-17/queensland-to-push-for-national-lemon-laws-when-new-cars-go-bad/6553056.

noting that the Australian Competition and Consumer Commission is investigating vehicle manufacturer conduct in the context of consumer guarantees.[21]

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

Yours sincerely

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[21] News.com.au, 'Official review to protect owners sold dodgy 'lemon' cars, 20 May 2015, available at: http://www.news.com.au/finance/money/official-review-to-protect-owners-sold-dodgy-lemon-cars/story-fnagkbpv-1227362003463.