



Lemon-aid

Why it's time for Australia to introduce 'lemon laws'



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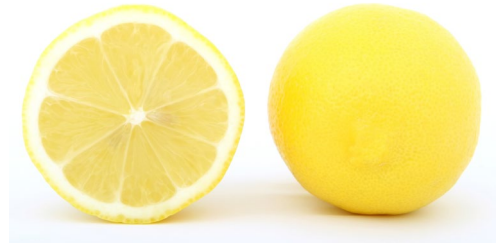


INTRODUCTION



LEMON-AID Why it's time for Australia to introduce 'lemon laws'

The impact of purchasing a faulty product, colloquially referred to as a 'lemon', can be devastating.



Lemons are goods that exhibit signs of failure or defects soon after purchase and often prove virtually impossible to repair. Often a lemon constitutes a culmination of flaws, amounting to a product that is manifestly unfit for ordinary use. No matter how you slice it, lemons leave a sour aftertaste on the palates of everyday Australians.

Unfortunately, the Australian Consumer Law (ACL) has not been able to provide adequate redress to people that have purchased lemon products. The ACL Review Final Report noted there is a strong community expectation that most goods sold in trade or commerce should last longer than a few days or weeks.¹ However, when goods fail soon after purchase, our casework suggests that people face a number of barriers when seeking a refund or replacement, including evidentiary hurdles, complaint fatigue, costly disputes and complex law.

In order to provide better redress, the ACL Review Final Report recommended that people be entitled to a refund or replacement without needing to prove a 'major failure' when goods fail within a short

¹ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017, p.18, available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

period. The 'short period' proposed in the Consultation Regulation Impact Statement (Consultation RIS) was 30 days,² with options for extensions or exemptions for higher value products.

This report reviews the experience of Australians who have purchased lemons and the approach in overseas jurisdictions to consider whether this proposal needs to be strengthened. A strengthened lemon law would entitle purchasers to a refund or replacement without needing to prove a 'major failure' when goods fail within 6 months of purchase. Further, it would introduce a presumption that defects existed at the time of purchase unless the trader could prove otherwise. For goods that fail outside the six-month window, it would also specify the number of failed repair attempts permitted. This report has considered whether this proposal would be more responsive to the problems posed by lemon products to Australians.

1. What are the current options under the ACL?

People who purchase lemons currently receive the same protections as anyone else under the ACL, despite their products showing defects shortly after purchase. There are no concessions and there is no special treatment for having purchased a useless 'lemon' product. If anything, lemon owners are forced to engage with the most burdensome aspects of the ACL, as lemons normally require a remedy of replacement or refund. Indeed, by their very definition, lemon products are often impervious to repairs, so the only way to deal with them is replacement or a refund.

Under the ACL, all products and services purchased for personal or household use come with automatic guarantees known as 'consumer guarantees'. If a product fails to meet one or more of these consumer guarantees, the purchaser has rights to repair, replacement or refund and compensation for damages and loss. The remedies available when goods fail to meet a consumer guarantee depend on whether the failure is major or minor. If a minor failure has occurred, the purchaser is only entitled to have the good repaired. However, if the failure is 'major' they have the right to ask for their choice of a repair, refund or replacement.³

The consumer guarantees are contained in sections 51-59 of the ACL. In the case of defective lemon products, the most relevant consumer guarantee is that products must be of 'acceptable quality', pursuant to section 54.⁴ Goods are of acceptable quality if they are:

- fit for all the purposes for which goods of that kind are commonly supplied;
- acceptable in finish and appearance;
- free from defects;

² The Treasury, *Clarification, simplification and modernisation of the consumer guarantee framework – Consultation Regulation Impact Statement*, 9 March 2018, available at: <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/>.

³ For a summary of consumer guarantees-related calls to our advice lines see Appendix 1.

⁴ *Competition and Consumer Act 2010* (Cth) Schedule 2 Australian Consumer Law, s 54.

- safe; and
- durable.

In determining whether a good is of acceptable quality, the following factors are considered:

- the nature of the product;
- the price;
- any statements made about the goods on packaging or labels;
- any representations made about the goods by the supplier or manufacturer; and
- any other relevant matters.⁵

As noted above, it is more difficult to obtain a refund or replacement than it is to obtain a repair under the ACL, as the purchaser needs to prove that the failure to meet the consumer guarantee amounts to a 'major' failure under section 260. There are various grounds upon which a failure to meet the consumer guarantees constitutes a major failure:

- a reasonable person would not have acquired the good had they been 'fully acquainted with the nature and extent of the failure'⁶;
- the good has departed from the 'supplied description', or by 'reference to a sample or demonstration model';⁷
- the good is 'substantially unfit for a purpose for which goods of the same kind are commonly supplied' or unfit for a 'disclosed purpose' that was made known to the supplier of the goods or person who negotiated or made arrangements for the sale;⁸ or
- the good is unsafe.⁹

If the purchaser of the defective good is unable to prove that there was a 'major failure' but the defect cannot (after a reasonable number of attempts and time) be repaired, the lemon owner can claim that the inability to repair the defect amounts in itself to a 'major failure'. On this basis, the purchaser would

⁵ *Competition and Consumer Act 2010 (Cth) Schedule 2 Australian Consumer Law, s 54(3).*

⁶ This is a far-reaching provision, and upon literal interpretation could essentially be applied to almost any defective product. The ACL Review Final Report noted that because of this unclarified scope, its application has been unpredictable and unclear: Australian Consumer Law Review Final Report, 2017, Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017, p. 21, available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf, p. 21.

⁷ *Competition and Consumer Act 2010 (Cth) Schedule 2 Australian Consumer Law, s 260(b).*

⁸ *Ibid*, s 260(c) and (d).

⁹ *Ibid*, s 260(d).

be entitled to reject the product and seek a refund or replacement.

However, the purchaser still needs to prove that they are not barred from rejecting their lemon owing to one of the exceptions in section 262, which include:

- the passing of the rejection period;
- losing, disposing of or destroying the product;
- the product being damaged after delivery for unrelated reasons; or
- the product having been incorporated into some real or personal property from which it cannot be removed.

The 'rejection period' requirement can pose a real barrier, as the time it takes to repair and negotiate an outcome with a trader, combined with attempts to 'live with' the defect, might mean that the rejection period expires. The rejection period for goods is the period from the time of the supply of the goods within which it would be 'reasonable to expect the relevant failure to comply with a guarantee' to become apparent.¹⁰ Various factors are taken into account including the type of goods, use of the goods and length of time it is reasonable for the goods to be used.

Under the current ACL, it is only after all the above conditions have been met that the lemon owner can seek to recover a refund or replacement. The purpose of this report is to demonstrate how this cumbersome process is failing Australians who purchase lemon goods, and how strengthening the proposed lemon laws would address these deficiencies. Such a reform would lead to a quicker, cheaper, more transparent and equitable path from defect to appropriate remedy.

2. Why the ACL is failing Australians who purchase lemons

Financial impact and complaint fatigue

As outlined above, people face a steep evidentiary burden to establish that their purchased good is subject to a 'major' failure of the consumer guarantees. In the case of motor vehicle disputes where a complaint proceeds to a tribunal, a sworn statement from the consumer is generally 'not enough' to establish a major failure and obtain a refund.¹¹ To obtain a refund, they need to possess expert opinion evidence, demonstrating how the defect amounts to a 'major' failure of a consumer guarantee.¹² These diagnostic reports are often prohibitively expensive, and make little economic sense if required

¹⁰ Ibid, s 262.

¹¹ Stephen Corones, 'Why Australia Needs a Motor Vehicle 'Lemon' Law' (2016) 39(2) University of New South Wales Law Journal, p. 17.

¹² Ibid.



to support a claim for a low value car or product.

The case of *Freestone Auto Sales Pty Ltd v Musulin*¹³ illustrates this point. Mr Musulin, the aggrieved purchaser of a faulty \$31,500 used car, undertook further inspections at the value of \$2,000 to \$3,000 to substantiate his claim, only for the New South Wales Court of Appeal to find that this expensive evidence was not sufficient to find that there was a failure to comply with the guarantee of acceptable quality.¹⁴ In our casework, it is common for the value of our clients' cars to be relatively low, which means that outlaying several thousand dollars for an expert report is not financially viable.

As academics Jeannie Peterson and Kate Tokeley explain in *Consumer Law and Policy in Australia and New Zealand*, people face 'more difficult evidentiary challenges' where the defect only becomes apparent in the weeks after purchase, as it is difficult to prove that this defect was present at the time of purchase, and is not 'attributable to normal wear and tear'.¹⁵ As has already been explained, it is extremely difficult and costly for people to pinpoint when and how defects arise, as this often involves expert analysis of the relevant product, which is beyond the scope of expertise of the ordinary individual.

¹³ *Freestone Auto Sales Pty Ltd v Musulin* [2015] NSWCA 160, [31]– [63] (Simpson J).

¹⁴ Stephen Corones, 'Why Australia Needs a Motor Vehicle 'Lemon' Law' (2016) 39(2) *University of New South Wales Law Journal*, p. 18.

¹⁵ Jeannie Paterson and Kate Tokeley, 'Consumer Guarantees' in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013) 97, sighted cited in Stephen Corones, 'Why Australia Needs a Motor Vehicle 'Lemon' Law' (2016) 39(2) *University of New South Wales Law Journal*, p. 16.

Case Study 1: Suzanne's story¹⁶

Suzanne told us that she bought a bed frame and mattress from a bedding store in January 2017. Suzanne said she paid approximately \$7,500 for both, and had asked for a specific bed frame and mattress. Suzanne told us that the bed frame and mattress were to be delivered in six to eight weeks.

After 13 weeks, Suzanne said the bed frame and mattress were finally delivered but the frame made creaking noises and was installed with legs facing the wrong direction. Suzanne also said the base didn't match the demonstration model or the description. Suzanne said the bed frame was horizontally divided, but that the installers had been unable to connect the two pieces with the brackets provided.

Suzanne said she asked for the mattress and bed frame to be removed, along with a refund from the store. Suzanne told us that the store claimed that the issues were minor, and only offered a repair.

Suzanne applied to VCAT, but before the proceedings in VCAT commenced the trader provided a refund.

¹⁶ Originally published in Consumer Action Law Centre, Submission to the Australian Consumer Law Review – Clarification, simplification and modernisation of the consumer guarantee framework, 23 April 2018, available at: <https://policy.consumeraction.org.au/2018/04/26/submission-acl-consumer-guarantee/>.

For many people, tribunal filing fees are another roadblock in the access to justice. Some people simply cannot afford to get through the doors of the tribunal to argue their case of major failure. For example, Victorians lodging a claim in the Victorian Civil and Administrative Tribunal (VCAT) face a filing fee of \$467.80 for a standard claim between \$15,001 and \$100,000.¹⁷ Assuming that they are able to afford this steep filing fee, cases for complex goods like cars can take longer than one day to resolve, which accumulates additional costs to the individual for each day of conciliations or hearings. Engaging private legal representation only adds to these costs. Even for those who can afford the steep filing fees, and the time it takes to resolve a complaint, this expense works as a disincentive to taking action, as people weigh up the costs of filing and presenting their claim with the value of the expected remedy.

The burden of having to engage in protracted negotiations or legal proceedings about a 'lemon product' has a significant impact on a person's financial and mental welfare. This cost becomes proportionately greater relative to the value of the 'lemon' good, and the number of people in a household dependent on the use of that good. Our case studies reveal that the cost is often greatest and the consequences most disruptive when a family car turns out to be a lemon. Families rely on their car to drive children to school, attend work and run basic errands, meaning the impact of owning a useless lemon car is significant.

While this is an observable outcome of our casework, the real economic disadvantage for families who do not have access to a car is also well documented in social policy research.

¹⁷ Note: Fee waivers and concessions are available in some circumstances. Application fees for claims between \$15,001-\$100,000 are \$467.80 for standard, \$668.30 corporate and \$156.40 health care card. Hearing fees apply for claims between \$15,001 and \$100,000 for days subsequent to the first day of hearing, ranging between \$348.40 and \$1,761.80 standard, \$497.70 and \$2,516.90 corporate and \$156.40 for health care card. It is of note that disputes regarding revocation of an agreement about the sale of a car with a cash price of \$40,000 or less is \$62.70 standard, \$89.60 corporate and \$31.40 health care card.

See: <https://www.vcat.vic.gov.au/resources/goods-and-services-fees>.

What the academic research tells us about transport and poverty

The well-researched 'spatial mismatch and entrapment theory' suggests that 'spatial barriers' perpetuate poverty and disadvantage, as poorer members of the community are restricted from accessing beneficial educational and employment services by these un-traversable 'barriers of space'¹⁸. Often lack of access to a car exacerbates these barriers of space. This sort of entrapment was empirically documented in the United Kingdom through the 2014 University College London 'Transport and Poverty: Review of Evidence' study, which revealed low income earners travelled significantly less distance than high income earners.

The study found that as of 2012 the lowest and second lowest real income quintile travelled 6,382km and 7,768km per person per year, whereas the highest and second highest travelled 16,622km and 12,526km per person per year. This reflected differentiation in the percentage of car ownership, with the 48% of the lowest and 35% of the second lowest income quintile documented as having

¹⁸ Helen Titheridge, Nicola Christie, Roger Mackett, Daniel Oviedo Hernandez, Runing Ye, 'Transport and Poverty: A review of the evidence' (1 July 2014), UCL Transport Institute, University College London, UK, citing Jocoy and Del Casino 2010, pp. 2-3.



no car, whereas only 13% of the second highest and 11% of the highest were documented as having no car¹⁹. Some of the leading proponents of 'spatial mismatch and entrapment theory' also argue that this flow-on disadvantage is most severe in the case of 'mothers with young children who have household responsibilities are constrained and often occupy jobs that do not justify long travel'²⁰. Spatially disadvantaged families who purchase lemons and do not have access to a dependable car often find themselves 'doubly disadvantaged', as not only are they entrapped by 'space', but they cannot attempt to penetrate these barriers owing to the unavailability of a family car.

¹⁹ Ibid, pp. 8-10.
²⁰ Ibid, p. 3.



Case Study 2: Agatha's story

In April 2015, Agatha bought a second-hand car for \$26,395. Within four months Agatha had to return her car to the dealership for its first repair. Since then Agatha has had to have her car repaired six times at five different repairers, with the repairs costing her \$890, \$1,700, \$443, \$330, \$2,400 and \$198 respectively. Despite these multiple attempts at repair, at the time of contacting Consumer Action for advice, Agatha told us that her car had the following remaining problems:

- Severely limited power and acceleration;
- When the car reached 40kmph the engine would cut out; and
- Both brake lights were not working.

We are currently assisting Agatha to resolve her dispute with the car dealership.

Case Study 3: David's story

David told us his brand-new car broke down after having driven it for just 8 kilometres. After that first breakdown, David said that the car started to reveal major manufacturing problems – some of which were acknowledged by the manufacturers themselves – however they were reluctant to offer a refund. David took the car to a specialised mechanic, who confirmed that the problems were a result of defective manufacturing. After 5 months of back and forth, David wrote a letter demanding a refund. When David tried to return the car to the manufacturer, they just parked the car in the yard and stated that nothing was wrong with it. It would be a number of years of attempted repairs and trying to make-do with his lemon before David contacted Consumer Action for advice. Ultimately it took years of complaints, failed attempts at repairs, diagnoses and professional advice before David received a replacement vehicle.



Case Study 4: Pete's story

In late 2016 Pete purchased a caravan for \$65,000. Pete used an insurance payout to purchase the caravan. He was going to use it as his home and for an upcoming trip around Australia. Pete said that the trader assured him it would be fit for this purpose. Pete claimed that the caravan had a serious problem with a core mechanical component but that the trader promised Pete that they would fix it before he took possession, and so he agreed to buy it. Shortly after purchasing his caravan, Pete said he realised that the trader had not repaired the initial issue, and he noticed a number of other defects including a sagging ceiling and a leaking air conditioner. What made this situation even more stressful was that Pete was living in the caravan, and so Pete found himself in a temporary housing crisis. When he noticed these defects, Pete immediately took the caravan back to the trader for repair, but despite multiple attempts the trader failed to fix the problems and refused to take accountability for them. It was only after Consumer Action helped Pete to take his complaint to VCAT that Pete was able to resolve this dispute with the trader on confidential terms.



Added to the inconvenience of not being able to use their purchased good, people who have bought a lemon also suffer a quantifiable economic loss through the hours of labour involved in pursuing an outcome under the ACL. Understanding the law, identifying the relevant provisions, constructing a complaint, liaising with the trader and participating in a dispute resolution process amounts to a large outlay in time and effort, which is magnified by the fact that it often eats into their working hours. The Australian Consumer Survey found that the average personal cost to resolve a motor car dispute amounted to \$842.68, electronic products \$310.92, and non-electrical household goods such as furniture and entertainment \$236.38.²¹ An effective lemon law with a clear, concise, unmitigated right of replacement or refund would significantly reduce these losses through a more efficient complaint process.

Aside from these economic costs, the process of making a complaint about a lemon can also bring with it considerable emotional costs, as people can be subject to bullying and other demeaning behaviour. In some cases, this might be attributable to a 'sales over service' culture, where remuneration is based on sales volume rather than customer satisfaction or resolving consumer complaints. Consumer complaints, especially those that relate to defective 'lemon' products that prove impossible to repair, might appear as a nuisance to sales staff, and these staff members may in turn express their frustration through hostility. One study into the effectiveness of 'performance-based incentives' described sales incentives as amounting to 'offering a menu because it allows employees to determine their compensation'²². If we follow this menu analogy, customer service staff are more likely to choose those items on the menu which offer the highest level of compensation (such as sales) over those which use up their time and provide no possibility of additional compensation (such as resolving a complaint).

Consumer Action has also witnessed incidences of sexism within the context of car repair complaints. We have seen examples of traders embroiled in a dispute resorting to sexist comments in order to intimidate a woman and dismiss her complaint. Sexism and other kinds of profiling in car yards is a well-documented phenomenon, as academic Ian Ayers discovered in his widely cited Harvard Law Review article, 'Fair Driving: Gender and Race Discrimination in Retail Car Negotiations'. Ian Ayers found that 'white women had to pay forty percent higher mark-ups than white men...and black women had to pay more than three times the mark-up of white male testers'²³. Although these prejudices were documented in relation to the sale of cars, our casework experienced suggests that women can experience similar problems in repair disputes with car dealers.

²¹ The Treasury on behalf of Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016*, 18 May 2016, p. 63, available at: <http://consumerlaw.gov.au/files/2016/05/ACL-Consumer-Survey-2016.pdf>.

²² Milgrom, P. and J. Roberts, *Economics, organization and management* (1992) Prentice-Hall, Englewood Cliffs, NJ, p. 157, sighted cited in Rajiv D. Banker, Seok-Young Lee, Gordon S. Potter, 'A Field Study of the Impact of a Performance-Based Incentive Plan' (1996), Cornell University School of Hotel Administration, p. 12.

²³ Ian Ayres, 'Fair Driving: Gender and Race Discrimination in Retail Car Negotiations' (1991) 104(4) Harvard Law Review, p. 819.

Case Study 5: Hayley's story

Hayley bought a VW Jetta for \$5,900 in August 2017. Hayley considered a 'major selling point' to be the dealer's promised 'one-year warranty'. Hayley was given the car before it had received its roadworthy, so Hayley had to return it to the dealer for roadworthy to be arranged. Despite passing roadworthy, within the first two weeks Hayley was complaining to the dealer 'every day' about the car stalling. The dealer would respond to Hayley's complaints by taking the car away for repairs for 1 to 3 weeks at a time, but was never able to fix the car's persistent stalling. Hayley took the complaint up with the roadworthy provider, who responded by yelling and insulting her. After 3 more months of struggling, the engine of Hayley's new VW Jetta finally seized, and after a great deal more complaining and hassling, the dealer directed Hayley to AWN insurance. The AWN mechanic ran the diagnostic on Hayley's car, stated that they would not repair the car, and that a repair would cost Hayley \$2,800. We are assisting Hayley to resolve her dispute.

A culture of repair and warranties

Many people who make a complaint about a failure to meet consumer guarantees find themselves in a recurring cycle of multiple repairs. In the absence of lemon laws, the Australian marketplace has fostered what the Australian Competition and Consumer Commission (ACCC) refers to as a manufacturer 'culture of repair',²⁴ whereby manufacturers exhibit a preference to deal with repairs as they arise rather than addressing fundamental defects in their manufacturing. The consumer experience of being shunted through repairs from the point of purchase would presumably end with the introduction of a lemon law, as it would be at the discretion of the purchaser whether to remedy by repair, replacement, or refund without needing to prove a major failure.

The current consumer guarantees regime indirectly facilitates the 'culture of repair' by not providing for a specific definition of what amounts to a 'reasonable' time and number of repair attempts under section 259(2). The qualifications under this section do not provide any specific guidance on when a 'reasonable' number of repair attempts has occurred, and thus when the individual's right to a remedy or refund is enlivened. This can mean a person must return multiple times to the retailer. The 2016 Australian Consumer Survey results found that the average number of contacts with a business to get a resolution was three, with the average number of contacts in scenarios where there was no resolution as 3.5.²⁵

The United Kingdom also found problems arising from the imprecise meaning of 'reasonable' in its consumer protection laws. The Department for Business Innovation & Skills found that the period during which consumers can reject goods and obtain a full refund, previously defined as a 'reasonable' period for inspection, was 'causing uncertainty about how consumer law operates in practice. This lack of definition is a source of confusion for consumers and retailers, leading to unnecessary disputes and costly litigation.'²⁶ In response, the United Kingdom introduced a 30-day 'right to reject' period to sim-

²⁴ ACCC Australian Competition and Consumer Commission, *New Car Retailing Industry Market Study Final Report*, December 2017, p. 7, available at: <https://www.accc.gov.au/about-us/market-studies/new-car-retailing-industry-market-study/final-report..>

²⁵ The Treasury on behalf of Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016*, 18 May 2016, p. 47, available at: <http://consumerlaw.gov.au/files/2016/05/ACL-Consumer-Survey-2016.pdf>.

²⁶ Department for Business Innovation & Skills, *The supply of goods: The short term right to reject faulty goods impact*



plify the law and remove a 'source of disputes between consumers and retailers'.²⁷

assessment, July 2012, p. 5, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31352/12-956-supply-of-goods-short-term-reject-faulty-impact.pdf.

²⁷ See section X below for further discussion about the United Kingdom's 'right to reject' period.

Case Study 6: John's story²⁸

John told us that he bought a new bicycle from a bicycle retailer in 2016, along with some accessories. Less than two months after purchase, John says that some of the spokes on the back wheel of the bicycle broke. John said he took the bicycle back to the retailer, who repaired the spokes for a fee. John told us that two days after the repair the spokes broke again. The retailer replaced the wheel at no cost to John the following weekend. However, John said that the spokes on the replacement wheel also broke. After yet another repair, the spokes broke for a fourth time. After the fourth time, John says that he requested a full refund, but the retailer would only continue to repair the spokes and said John was not entitled to a refund as he had changed his mind.

John said he made a complaint to Consumer Affairs Victoria, but Consumer Affairs told him that his only avenue for redress is VCAT or the courts. We are unaware of the outcome of John's complaint.

²⁸ Originally published in Consumer Action Law Centre, Submission to the Australian Consumer Law Review – Clarification, simplification and modernisation of the consumer guarantee framework, 23 April 2018, available at: <https://policy.consumeraction.org.au/2018/04/26/submission-acl-consumer-guarantee/>.



Case Study 7: Janet's story

In late 2015, Janet bought a motorised scooter for approximately \$4,000. It was only recently that Janet felt she needed the motorised scooter for transportation, and to help preserve her independence. Unfortunately, in May 2016 the scooter broke down. This was the first red-flag indicating that she had purchased a lemon. Janet contacted the trader only to discover that the Victorian arm of their business had closed down, and they were no longer operating in Victoria. With the assistance of her son and the local regulator, the trader agreed to replace the battery.

However, within six months of the battery being replaced Janet's scooter broke down yet again, but this time round the trader refused to cooperate. The trader refused to fix the scooter or provide a refund. Janet then took her scooter to mechanics in Melbourne, who diagnosed that it was not the fault of the battery, but the fault of the internal workings of the scooter that was preventing the battery from charging. Janet eventually bought herself a replacement scooter. Janet ultimately resolved her dispute by receiving a partial refund from the credit provider that financed the purchase with Consumer Action's assistance. Janet was also released from future payments. Janet was happy with this offer to resolve the dispute.

Case Study 8: Margaret's story

Margaret purchased a brand-new vehicle in December 2016. Within a few weeks of purchase, Margaret's brand-new car began shuddering. Margaret took her car back to the dealer for repair three times, but each time the dealer failed to fix the underlying issue. After a fourth attempt at repair, Margaret noticed the now all-too familiar shuddering and grinding noises after 20 minutes of driving. At this point Margaret decided that she wanted a refund or replacement, but the dealer and manufacturer refused. The manufacturer had a test driver from head office sent out to drive the car and make an assessment, and the test driver immediately noticed the fault. Despite noticing the persistent fault, the manufacturer's head office team still stated that the next move was to try for another repair "to fix it again". Margaret told the manufacturer that if she did not receive a refund or replacement, she would seek legal advice and consider taking the matter to VCAT. The manufacturer finally agreed that Margaret was entitled to a replacement car, which she accepted, after 8 months of difficult negotiations.



Case Study 9: Gavin's story

Gavin, who is on the disability support pension, was excited to take his caravan on the "trip of a lifetime" and in preparation for his trip says he paid \$2,300 to buy and install solar panels on his caravan. Gavin immediately noticed that his solar batteries weren't charging and took the panels back to the retailer three times for repair, which they refused to carry out. Instead, Gavin was advised to buy a battery checker. Gavin bought a battery checker, but the battery checker mistakenly stated that the battery was full when in fact it was not. Gavin was then advised by the retailer to buy a battery charger. As a result, Gavin bought a battery charger for \$300, and started on his trip of a lifetime travelling from Victoria to Darwin. However, by the time he reached Darwin, Gavin couldn't continue as his battery was no longer charging. Gavin contacted the retailer from Darwin, who said he'd need to bring the caravan back to Victoria for repair—an impossibility given the faulty charging—so he went to an electrician in Darwin.

The Darwin-based electrician immediately recognised that the unit was faulty and that it had been incorrectly installed, and put in new parts to fix it. In the meantime, Gavin had spent some \$600 on lost food and accommodation because he couldn't use his caravan. Despite the funds Gavin spent on repair, on the battery checker, the charger, the costs of living when his caravan was out of action, and despite contacting the supplier some 20 times and speaking to the CEO, the most he had been offered was a \$250 reimbursement from the manufacturer for the faulty part, and a \$250 reimbursement from the retailer. Following Consumer Action's assistance in drafting a letter for Gavin, Gavin was offered \$1,000 by the retailer to resolve the matter, which he accepted.



In conjunction with the issues of imprecise wording surrounding the consumer guarantees, the ACCC found that where an issue 'is covered by warranty it is likely to be repaired, sometimes repeatedly until the issue is resolved'²⁹, and this adversely interferes with consumer complaints because 'a consumer may be entitled to a better remedy under these provisions than under the manufacturer's warranty'.³⁰ Warranties that allow traders to repeatedly repair rather than replace or refund are thus contributing to this 'culture of repair'. We consider that a strong lemon law would empower people to make more effective complaints under the ACL that in turn would deliver more refunds or replacements, forcing traders to unlearn this 'cultural' habit.

Often from the very beginning of a complaint, people are encouraged by traders to think about remedies through the lens of a manufacturer or extended warranty. The 2016 Australian Consumer Survey revealed that 27% of businesses (the largest percentile of business respondents) considered their warranty to be the main source of obligations after purchase, and only 29% of businesses had made the effort to obtain information about the ACL.³¹ In relation to car defects, it is arguable that state-based statutory warranties applicable to motor car traders have also contributed to this culture of repair.

29 Australian Competition and Consumer Commission, *New Car Retailing Industry Market Study Final Report*, December 2017, p. 61, available at: <https://www.accc.gov.au/about-us/market-studies/new-car-retailing-industry-market-study/final-report>. ACCC report above n 19, p. 61

30 Ibid.

31 The Treasury on behalf of Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016*, 18 May 2016, pp. 72 and 76, available at: <http://consumerlaw.gov.au/files/2016/05/ACL-Consumer-Survey-2016.pdf>

Statutory warranties under the Motor Car Traders Act 1986 (Vic)

In Victoria, car dealers must provide buyers with a statutory warranty if the car is less than 10 years old and has travelled less than 160,000 kilometres. The statutory warranty does not apply to cars sold at public auction or motorcycles. The warranty also does not apply to tyres, batteries or accessories including radios, in-car telephone kits, clocks and car aerials.³² The warranty lasts for only three months or 5,000 kilometres, whichever occurs first.

Under the statutory warranty, the car dealer must repair any faults or defects found during the warranty period to a 'reasonable condition', taking into account the vehicle's age. The car dealer is not required to provide a replacement or refund. If the car cannot be driven due to a warranty defect, the trader must pay any towing costs. However, the trader or mechanic is not obliged to provide a replacement vehicle while the car is being repaired.

In our casework, a common response from car dealers when contacted about defects in a vehicle is that the vehicle is not (or is no longer) covered by a statutory warranty or that people have purchased a warranty from a third-party company and only that warranty should be relied upon.³³ The Victorian Automobile Chamber of Commerce even fails to mention the ACL in its 'Motorist Tips &

32 Consumer Affairs Victoria, *Motor car trader obligations – used car sales*, accessed 23 May 2018, available at: <https://www.consumer.vic.gov.au/licensing-and-registration/motor-car-traders/running-your-business/obligations-used-car-sales>,

33 Consumer Action Law Centre, *Submission to the Regulatory Review of the Motor Car Traders Act (MCTA) 1986*, 15 November 2013, available at: <https://consumeraction.org.au/wp-content/uploads/2013/11/131118-Submission-Consumer-Action-MCTA-regulatory-review.pdf>.

Advice' for buying used cars, noting only that licensed motor car traders are obliged to guarantee clear title and provide the statutory warranty referred to above.³⁴

While the statutory warranty regime provides some certainty to Victorians following the purchase of a car, the protections are far less comprehensive than those provided under the ACL. If a robust lemon law was introduced that provided certainty to people about their consumer rights, it is likely that state-based statutory warranty regimes could be repealed.

³⁴ Victorian Automobile Chamber of Commerce, *Buying a used vehicle*, access 23 May 2018, available at: <https://www.vacc.com.au/News/Motorist-tips-advice/Buying-a-used-car>

In the case of car dealerships, there are real economic incentives that drive repair negotiations through the context of a warranty, with the ACCC noting that manufacturers sometimes force dealers to wear the cost of their repair jobs if they do not fall within the strict procedural requirements of the warranty.³⁵ In the absence of a clear lemon law, it is hard for people to shift negotiations about repair away from warranties and towards definite legal rights, and so they are more likely to acquiesce to the warranty process.

In order to understand how this strong warranty preference has been allowed to flourish within car dealerships, it is worth briefly looking at how the 'one-sided nature' of dealership and manufacturer agreements influence complaint handling.³⁶ The ACCC recently found that manufacturers can autonomously amend the agreements and have 'absolute discretion' as to whether they renew dealership agreements. Given the 'significant upfront capital investment involved in establishing a new dealership facility', ranging between \$6 million to \$20 million, dealerships are constantly exposed to an enormous level of risk should their renewal be rejected by the manufacturer.³⁷ Adding to this is the fact that many car manufacturers are global suppliers with offices offshore, and have built their compliance models on 'dealership agreements and policies which...may not initially reflect local consumer legislation'.³⁸ With the clear economic incentives to process claims within warranties mentioned above, dealerships seem eager to handle complaints within the confines of their manufacturer agreements and not under the ACL.

Ford's unconscionable conduct in relation to their PowerShift transmission (PST) cars is a pertinent example of this 'culture of repair'. Following the Federal Court handing down a \$10 million penalty, ACCC chairman Rod Sims explained that 'Ford knew that its vehicles had three separate quality issues', but rather than initiating a recall or proactively providing repair information, Mr Sims explained that Ford preferred 'customers to demonstrate them [the defects] on demand in the presence of a dealer in order for repairs to be undertaken'³⁹. Had an effective lemon law existed at the time people began making their complaints to Ford for their failed PST, perhaps Ford wouldn't have been able to so readily dismiss the complaints, blame the purchasers and delay an effective remedy.

³⁵ Australian Competition and Consumer Commission, *New Car Retailing Industry Market Study Final Report*, December 2017, p. 83, available at: <https://www.accc.gov.au/about-us/market-studies/new-car-retailing-industry-market-study/final-report>

³⁶ Ibid, p 78 citing AADA Submission, October 2017, p. 1.

³⁷ Ibid, p. 79 citing IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia, February 2017 and Fennessy's submission, October 2017, p.2.

³⁸ ACCC report above n 19, Ibid p. 81.

³⁹ Australian Competition and Consumer Commission, *ACCC Mmedia Rrelease 71/18 - 'Court orders Ford to pay \$10 million penalty for unconscionable conduct'*, 26 April 2018, available at: <https://www.accc.gov.au/media-release/court-orders-ford-to-pay-10-million-penalty-for-unconscionable-conduct>.



Complexity

The complexity involved with lodging a complaint about consumer guarantees is also deterring people from enforcing their rights under the ACL. This was reflected in the 2016 Australian Consumer Survey, which found that most people (73%) would only make a claim and attempt to vindicate their rights ‘depending on the circumstances’.⁴⁰ Such an expression of consumer ambivalence indicates that Australians are not entirely confident about their legal rights, and feel it needs to be ‘worth the effort’ to examine, articulate and apply their rights. The survey’s findings suggest that this is an economic decision made by individuals, as they evaluate the costs to their time in obtaining advice and pursuing a claim, relative to the expected cost in having to accept a defective ‘lemon product’. This point is illustrated in the finding that the ‘average amount considered to be significant’ enough to warrant seeking advice is \$282.⁴¹

When looking at the convoluted structure of the ACL’s consumer guarantees, it is no surprise that people are hesitant to enforce their rights. They need to pass through four ‘hurdles’ before they are entitled to a replacement or refund. Specifically, this involves establishing that:

- there has been a failure to meet one of the consumer guarantees;
- the failure was not a result of ordinary wear and tear, or abnormal use, or other exemption;
- the failure is ‘major’; and
- if rejecting the good, none of the exclusions under section 262 apply.

An effective lemon law would short-circuit this complex process, because if a good failed to meet the consumer guarantees within a specified period of time, the buyer would be entitled to a refund or replacement without needing to prove a ‘major failure’. Paired with a presumption that the defect existed at the time of purchase, the proposed lemon law would contain only one hurdle in the first six months—proving that there has been a failure to meet the consumer guarantees within the relevant window.

⁴⁰ The Treasury on behalf of Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016*, 18 May 2016, p. 33, available at: <http://consumerlaw.gov.au/files/2016/05/ACL-Consumer-Survey-2016.pdf> Australian Consumer Survey, 2016, p. 33.

⁴¹ *Ibid* p. 31.

Case Study 10: William's story

William told us that he purchased a computer from a website for his daughter, as a gift to her as she started her university studies. William paid about \$1,000 for the computer, but when it arrived the screen was damaged on one corner. William said that the company that sold the computer refused to assist as they claimed it was damaged in transit and would not take responsibility. William approached the manufacturer who was unwilling to help. William is now in the process of making an application to VCAT. William lives in a rural area, has a physical disability and relies on the pension for his income. His daughter has also had to start university without a personal computer.

Consumer behaviour does not reflect the level of knowledge of the ACL which is credited to them in relevant consumer surveys. For example, while the 2016 Australian Consumer Survey found that 90% of Australians are aware that there are basic consumer protection rights, and 71% believe that they have a 'moderate understanding of their rights',⁴² their continued reliance on manufacturer warranties, and their propensity to purchase extended warranties suggests that they do not fully appreciate their ACL rights. It is one thing for people to respond in a survey scenario that they believe they have an adequate understanding of consumer law, but it is another thing entirely to feel confident enough to pursue a claim against a trader.

If Australians really understood and had faith in their consumer rights, they would not feel as much need to protect their interests through manufacturer warranties or extended warranties. At the point of sale, they would feel secure in the knowledge that 'if this product turns out to be a lemon, I can just take it back and say that it's not of acceptable quality'. Instead, our casework suggests that despite a vague awareness of consumer rights, concern about the quality of their purchased goods is in large part assuaged by the presence of manufacturer warranties or extended warranties.

It is possible that manufacturer warranties and extended warranties are also attractive on the basis that they promise a relatively easy process of repair and replacement. People appear to believe that through a warranty they would be able to avoid the complexities of a legal claim. In our experience, some people consider the consumer guarantee complaint process difficult and confusing, particularly when alleging 'major' failures for complex products like cars and potentially having to make a claim in VCAT. A clearer, easier to understand and more accessible lemon law would help to address these concerns and would likely be reflected in consumer behaviour by a quantifiable drop in spending on junk warranties.

42 Ibid p. 21.



3. International comparisons

Several overseas jurisdictions have adopted versions of lemon laws. Below we have explored the lemon laws in the United States, European Union, United Kingdom and Singapore.

United States

The Magnuson-Moss Warranty Act and Uniform Commercial Code

Although there is a federal lemon law in the United States, contained in the Magnuson-Moss Warranty Act (Magnuson-Moss Act), in practice most consumer rights are derived from state legislation.⁴³ The Magnuson-Moss Act governs consumer product warranties, protecting buyers of products that come with a written warranty. The Magnuson-Moss Act requires manufacturers and retailers to provide certain disclosures, but importantly provides rights to compensation where there is a failure to repair goods subject to a warranty. A consumer 'must show there is a valid warranty, the product was presented for repair during the warranty period, and the manufacturer failed to conform the product to the provisions of the warranty within a reasonable amount of time or number of repair attempts.'⁴⁴ The measure of damages is generally calculated by deducting the value of the defective goods from the purchase price.⁴⁵

Further, the Uniform Commercial Code (UCC) provides that people have the right to revoke acceptance of a good where 'non-conformity substantially impairs its value'. The UCC has been adopted in some form by all 50 states and some territories of the United States and is the general source of contract law.⁴⁶ Consumers' revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for revocation and before any substantial change in condition of the goods which is not caused by their own defects.⁴⁷ A non-conformity may include a number of relatively minor defects whose cumulative total adds up to a substantial impairment, or failure to repair the goods under warranty.⁴⁸ Under the UCC, there are also implied warranties of merchantability and fitness for purpose.⁴⁹

In addition to federal lemon laws, there are a patchwork of state laws. State-based legislation is primarily concerned with consumer rights in relation to cars, and so the following discussion is limited to the application of state-based car lemon laws.

43 Robert C. Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case* (1975) 44(2) *Fordham Law Review*, p. 273, see the *Magnuson-Moss Warranty Act* (1975) § 104(a)(4).

44 McBrayer McGinnis Leslie & Kikland PLLC, *Breaking down the Magnuson-Moss Warranty Act*, 15 August 2017, <https://www.lexology.com/library/detail.aspx?g=ac64eb2b-5a4c-4550-87fb-2140def8a68d>.

45 *Ibid.*

46 Justia, *Lemon Law*, accessed 17 May 2018, <https://www.justia.com/consumer/lemon-law/>.

47 Uniform Commercial Code § 2-608.

48 David J Gorberg and Associates, *Uniform Commercial Code*, accessed 17 May 2018, <https://www.mylemon.com/uniform-commercial-code.php>.

49 Uniform Commercial Code § 2-314.

The 'impairment standard'

While there is some variation in protections offered by state-based legislation, Philip Nowicki notes in his article for the Loyola Consumer Law Review that one area where states appear to be in agreement is the use of the term 'impairment', which is also used in the Magnuson-Moss Act.⁵⁰ The elements of 'impairment' vary considerably from state to state but in most states to qualify for relief, a defect or condition must substantially impair the use, value or safety of the vehicle. Often the purchaser only needs to prove one element of impairment. For example, some states like New York only rely on an impairment of value⁵¹.

An extended window

According to Nowicki, lemon law coverage is contingent upon a defect being first reported to the manufacturer or dealer within a prescribed period. This 'defect reporting period' is generally around 1 to 2 years or within the first 18,000 to 24,000 miles of driving⁵². Most state lemon laws afford the manufacturer and dealer 'multiple opportunities to cure the same defect or condition' once notified of a defect, with some states allowing fewer attempts for safety-related defects. If a car is deemed to be a 'lemon', people are generally entitled to compensation or a replacement vehicle.

Only a few states have lemon laws that apply to used cars, and these protections are vastly inferior to those offered to new cars. These used car lemon laws obligate traders to give their customers a warranty for free or reduced repair of certain 'covered parts' (such as engine or transmission), and in some states where repair is not achievable in a 'reasonable period of time' the purchaser is entitled to a refund.⁵³ Warranty periods are much shorter than those offered to new cars, ranging from 15 days or 500 miles in Arizona and New Mexico to 90 days or 5,000 miles in Hawaii.⁵⁴

Multiple repairs of the same defect

Some states stipulate the maximum number of unsuccessful repairs that can be undertaken before the car is deemed a lemon, a provision which directly prevents people from spiralling into the 'repair cycle'. The number of repairs is generally around 3 to 4,⁵⁵ and provides United States consumers with more certainty than Australian consumers, who in similar circumstances must prove that a 'reasonable' number of attempts took place. Consumer Action regularly receives complaints from people who have returned their car for repair many times, and who feel that their only option is to keep surrendering their car for repeated repair attempts.

⁵⁰ Philip R. Nowicki PhD, 'State Lemon Law Coverage Terms: Dissecting the Differences' (1998) 11(1) Loyola Consumer Law Review, p. 42.

⁵¹ Ibid.

⁵² Legal Affairs and Community Safety Committee, Report No. 17 55th Parliament, 'Lemon' Laws – Inquiry into consumer protections and remedies for buyers of new motor vehicles', November 2015, pp. 114-123, <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2015/5515T1704.pdf>.

⁵³ Duke Chen, Connecticut General Assembly Office of Legislative Research, 'Used Car Lemon Laws' (2015), <https://www.cga.ct.gov/2015/rpt/pdf/2015-R-0285.pdf>

⁵⁴ Ibid.

⁵⁵ Philip R. Nowicki PhD, 'State Lemon Law Coverage Terms: Dissecting the Differences' (1998) 11(1) Loyola Consumer Law Review, pp. 49-50.



Case studies

These case studies have been used for promotional purposes on the Lemon Law Experts website. Although these case studies serve as an advertisement for the services of Lemon Law Experts, they nonetheless demonstrate the potential outcomes available to United States' consumers who purchase lemons. While these case studies take place in California's jurisdiction, neither progressed to a third-party dispute resolution body but instead they appear to be the result of direct attorney negotiation.



California Case Study 1⁵⁶

A California consumer purchased a 2015 Nissan Sentra with over 20,000 miles on the odometer, which after about a month began to lag on acceleration – posing a danger to the driver. The consumer took their car to the dealer for repairs, which after being conducted resulted in further transmission problems. Multiple dealership repairs ensued over the following months. The consumer then decided to hire an attorney to make a claim, and within around a month of opening the claim received a settlement from Nissan who 'agreed that the car was a lemon and as a result refunded all money he spent on the car, minus a usage fee, and Nissan even paid for his attorney's fees and costs'.

⁵⁶ Lemon Law Experts, Repurchase settlement reached with Nissan North America for 2015 Nissan Sentra, accessed 23 May 2018, available at: <https://lemonlawexperts.com/case-results/2015-nissan-sentra-repurchase/>.

California Case Study 2⁵⁷

A Los-Angeles consumer purchased a new 2016 Chrysler 200 for her son. After a few months the Chrysler had to be taken back to the dealership due to smoke emitting from the engine, so the car remained in the dealership for a few weeks for repairs. After receiving the car back from the dealer, three months elapsed and the same problem resurfaced, which resulted in the car being returned to the dealer for more repairs over two weeks. The consumer eventually hired an attorney to take over the claim, and received a 'lemon law buyback' which included a refund of down payment, monthly payments, registration, taxes, fees, Uber expenses and the remaining balance on the car loan.

57 Lemon Law Experts, *Fiat Chrysler to repurchase a 2016 Chrysler 200 with engine defects*, accessed 23 May 2018, available at: <https://lemonlawexperts.com/case-results/2016-fiat-chrysler-repurchase/>.

Singapore

Singapore's Sale of Goods Act (SGA) previously insisted that a purchaser had accepted goods in their 'inadequate quality' if they failed to make a claim after the 'lapse of a reasonable time'⁵⁸. However, Singapore remedied this 'time-lag' requirement by introducing a comprehensive set of lemon laws. The legislation responsible for ushering in a new system of consumer-centric lemon laws is the Consumer Protection (Fair Trading) (Amendment) Act (No 7 of 2012) (the 2012 Amendment).

Since the 2012 Amendment, Singaporean consumers have benefitted from a lemon law that provides remedies against goods that 'fail to conform' to the applicable contract at the time of delivery. The goods will fail to conform if there is a breach of the implied condition of 'satisfactory quality'. If a defect is found within six months of delivery, it is assumed that the defect existed at the time of the delivery unless the retailer can prove otherwise.⁵⁹ To put this into the language of Singaporean legislation, 'goods which do not conform to the applicable contract at any time within the period of 6 months starting after the date on which the goods were delivered to the [consumer] must be taken not to have so conformed at that date'.⁶⁰

Where the trader has been unable to rebut presumption, Singaporean consumers are then entitled to make a request for repair or replacement, and in certain circumstances, can ask for a reduction in price or a full refund.

In order to prove non-conformance with the contract, Singaporean consumers simply need to demonstrate the relevant product is not of 'satisfactory quality',⁶¹ as discussed below. Consumers are not entitled to a remedy if they damaged the good, the fault was caused by wear and tear, they knew about the fault before purchase or they simply change their mind.⁶²

58 Alexander F H Loke, *The Lemon Law and the Integrated Enhancement of Consumer Rights in Singapore* (December 2014) Singapore Journal of Legal Studies, p. 291.

59 Beyond the six-month period, the consumers need to show that the defect existed at the time of delivery in order to make a claim under Singapore's lemon laws: Consumers Association of Singapore, *Lemon law & motor vehicles*, accessed 23 May 2018, available at: <https://www.mti.gov.sg/legislation/Documents/CASE%20Motor%20Vehicles%20English.PDF>.

60 Consumer Protection (Fair Trading) Act (Singapore), s 12B(3).

61 Sale of Goods Act (Singapore), s 14(2B).

62 Consumers Association of Singapore, *Lemon law & motor vehicles*, accessed 23 May 2018, available at: <https://www.>



'Satisfactory quality' requirement

Singaporean consumers must prove that the purchased good is not of 'satisfactory quality'—this mirrors Australia's guarantee of 'acceptable quality' to the extent that it is also made up of similar elements such as fitness for purpose of supply, appearance and finish, freedom from minor defects, safety, and durability.⁶³ However, under Singaporean lemon law there is no additional requirement of proving 'major' defect. The inquiry ends once it has been established that the good was not of 'satisfactory quality' within six months of delivery.

The Singaporean model is sometimes referred to as the '2-stage recourse framework'.⁶⁴ Under this framework, the seller must first offer to repair or replace a defective product. If the repair or replacement is not possible or incurs a very high cost, or the seller does not provide the repair or replacement within a reasonable period and without significant inconvenience to the consumer, then the consumer may request a reduction in price or refund. In comparison, Australians would only be able to obtain a replacement under the ACL if they established the good failed to meet the guarantee of 'acceptable quality', that this failure was not a result of ordinary wear and tear or abnormal use (or other exemption), and that the failure was 'major'. It therefore appears relatively easier to obtain a replacement good under the Singaporean model. However, there are relatively similar hurdles in place for consumers seeking repairs or refunds.

Clear applicability to goods

Singapore's lemon laws apply to eligible goods including second-hand goods, discounted goods and perishable goods.⁶⁵ The laws do not apply to rental goods, services or real property.⁶⁶ Whereas United States lemon laws are primarily concerned with cars, and the proposed Australian reforms have considered drawing a distinction between 'high value' and 'low value' consumer goods, Singapore's lemon laws include no such distinctions. While it is accepted that the potential for individual consumer loss is greater in relation to high value goods, on a more macro scale, purchasers of lower value goods need to be protected from 'lemons' to avoid cumulative, economy wide consumer 'rip-offs', depriving countless people of their money and the utility of their purchased good.

Case studies

The following case studies have been drawn from the Consumers Association of Singapore's website (CASE). CASE is a non-profit, non-government organisation that advocates for consumer rights in Singapore⁶⁷.

mti.gov.sg/legislation/Documents/CASE%20Motor%20Vehicles%20English.PDF

⁶³ Consumers Association of Singapore, *Lemon Law FAQs*, accessed 23 May 2018, available at: <https://www.case.org.sg/pdf/Lemon%20Law%20FAQs.pdf>.

⁶⁴ See Appendix 2.

⁶⁵ 'Perishables and consumables are covered, but the presumption that defects reported within six months exists at the point of delivery will only apply up to the normal shelf-life of the perishable/consumable if the shelf-life is less than six months': Ibid.

⁶⁶ Ministry of Trade and Industry Singapore, *General Advisory on Amendments to the Consumer Protection 9Fair 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-\(Fair-Trading\)-Act-and-Hire-Purchase-Act.aspx](https://www.mti.gov.sg/legislation/Pages/General-Advisory-on-Amendments-to-the-Consumer-Protection-(Fair-Trading)-Act-and-Hire-Purchase-Act.aspx).

⁶⁷ Consumer Association of Singapore, *Lemon Laws Case Studies*, accessed 23 May 2018, available at: https://www.case.org.sg/consumer_guides_casestudies.aspx

Singapore Case Study 1

Joseph purchased a backpack for under \$60. Within less than 3 months Joseph was unable to use the backpack's zipper owing to a structural issue with the backpack's adjoining threads and zip seams. Joseph attempted to return the backpack to the store, but was informed that this was an issue for the backpack manufacturer to handle. CASE highlighted to the retailer that under Singapore Lemon Law retailers are obliged to repair or replace a defective product, and Joseph was provided a replacement backpack⁶⁸.

68 Consumers Association of Singapore, *Lemon Law Case studies*, April 2018, available at: https://www.case.org.sg/consumer_guides_casestudies_archive.aspx?month=April&year=2018.



Singapore Case Study 2

Thomas purchased a laptop for \$750, but shortly after purchase noticed that the laptop was slow to start up, so he returned the laptop to an authorised service centre and was promised a replacement motherboard and hard drive pursuant to the one-year warranty. When the laptop was returned after repairs he noticed that the screen was now scratched. CASE pointed out the Lemon Law obligations to the retailer, who provided Thomas with a full refund⁶⁹.

69 Ibid.



European Union

European Union Directive 99/44/EC (the Directive)⁷⁰ provides a minimum level of consumer protection for the sale of most consumer goods. The Directive provides that a seller is liable to the buyer for any 'lack of conformity' which exists when the goods are delivered to the consumer and which arise within a period of two years from delivery. Any lack of conformity apparent within six months of delivery of the goods is presumed to have existed at the time of delivery unless proven otherwise by the seller. The buyer is not required to prove the cause of the lack of conformity or to establish that its origin is attributable to the seller, just that the conformity became apparent within six months of delivery.

When a lack of conformity exists, the buyer is entitled to ask for a repair or replacement within a reasonable time, unless these remedies would be 'impossible' or 'disproportionate'. In certain circumstances, the individual is also entitled to request an appropriate reduction to be made to the price or rescind the contract. However, they are not entitled to have the contract rescinded if the lack of conformity is 'minor'.⁷¹

In addition to the basic protections provided by the Directive, some European jurisdictions have enacted stronger lemon laws. For example, Germany has a 'lemon' law that provides a one-year warranty for used cars. The seller is responsible for defects determined to have been there at the time of sale, not resulting from regular wear and tear or negligence.⁷² If a used car bought from a dealership is defective, the dealer must take the car back or pay for repairs. The law does not apply to private sellers.⁷³

United Kingdom

Under the Consumer Rights Act 2015 (UK) (Consumer Rights Act), people have a right to reject goods that are of unsatisfactory quality, unfit for purpose or not as described and get a full refund. If the need to reject the goods is outside the 30-day right to reject period, the consumer must give the retailer one opportunity to repair or replace the goods. If the attempt at repair is unsuccessful, the consumer can claim a refund or price reduction.⁷⁴

If the fault is discovered within the first six months of having the product, it is presumed to have been there since the time the person took ownership of it unless the retailer can prove otherwise. If a fault develops after the first six months, the evidentiary burden is on the individual to prove the product was faulty at the time they took ownership of it. This generally requires some form of expert report.⁷⁵

70 Official Journal of the European Communities, *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*, July 1999, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0044&from=EN>.

71 Legal Affairs and Community Safety Committee, Report No. 17 55th Parliament, 'Lemon' Laws – Inquiry into consumer protections and remedies for buyers of new motor vehicles', November 2015, available at: <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2015/5515T1704.pdf>.

72 Ibid.

73 Stars and Stripes, *German lemon law sweetens car purchases*, 20 July 2004, available at: <https://www.stripes.com/news/german-lemon-law-sweetens-car-purchases-1.21986>.

74 Which?, *What do I do if I have a faulty product?*, accessed 23 May 2018, available at: <https://www.which.co.uk/consumer-rights/advice/what-do-i-do-if-i-have-a-faulty-product>.

75 Citizens Advice, *Examples of using the new consumer laws*, accessed 23 May 2018, available at: https://www.citizensadvice.org.uk/Global/Migrated_Documents/cra2015-practicalexamples.pdf.

4. ACL Review Final Report – The proposed lemon law

The ACL Review Final Report proposed the introduction of an Australian lemon law whereby people would have the choice of replacement or refund for goods that fail within a 'short period' of time after purchase, without having to prove the existence of a 'major failure'.⁷⁶ The suggested period was 30 days. Although this proposal would mean that an individual would be entitled to a refund or replacement without having to prove a 'major failure' during the short period, they would still need to prove some kind of failure of the consumer guarantees.

The ACL Review Final Report suggested that the proposed 30-day period would be adequate to address the common occurrence whereby faulty goods reveal their problems 'within the first week or month of purchase'⁷⁷. The review emphasised the issue of such immediate failures, highlighting the 2016 Australian Consumer Survey finding that '43% and 41% of problems with electrical products or motor cars were detected within the first week, and another 15% and 16% within the first month, respectively'⁷⁸.

The Consultation RIS issued by Treasury that followed the ACL Review Final Report invited submissions on another option for lemon laws, whereby high value goods (such as whitegoods and cars) would be subject to an extended period (greater than 30 days) in which people would be entitled to a refund or replacement without having to prove 'major failure'. Another option was exempting higher value goods from the lemon law requirements.⁷⁹

Is 30 days long enough?

Given that the clear majority of problems with consumer goods are recognised within six months of purchase (76% according to the Australian Consumer Survey), Consumer Action considers that the proposed 30-day period draws an arbitrary distinction between goods which fail within a month, and those which fail after a month but within six months.

It could be argued that a good which fails within 30-days is more likely to be a 'lemon' than one which fails between one month and six months. However, there appears to be no evidence that goods taking marginally longer to fail (between one and six months) are less likely to be lemons. In our experience, the fact that a good fails within six months is generally a very good indicator that the good is a 'lemon', as the failure has still occurred during the window within which most people would expect goods to last.

In general, goods are purchased under the assumption that they will provide utility for an extended

⁷⁶ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017, p.20, available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.



period of time. With this in mind, a good which fails and reveals itself to be a 'lemon' within six months has a similar negative impact on the buyer as a good which fails within 30 days. Further, a failure within six months is unlikely to meet the community's expectations about the durability of consumer goods. Establishing a 30-day period would also significantly disadvantage the 18% of people who first notice a defect between one and six months.⁸⁰

Lemons detected after six months

Even under the lemon laws proposal in the Consultation RIS - where people would be entitled to a refund or replacement for failures within 30 days for all goods, extended to 6 months on higher value goods - lemon owners' right of recourse after the 30 day/6-month window would remain unclear. People who purchase 'late ripening' lemons, that is, lemon goods that only reveal their deficiencies after the 30 day/six month window would be forced to navigate through the ACL without any added 'lemon law' protection.

Australians are not adequately protected in these circumstances, even where multiple failures under the ACL might amount to a major failure. This argument is made with reference to section 259(2), and the notion that if a minor failure has not been repaired within a 'reasonable time', the individual acquires all the rights as if the good were a 'major failure', and as such is entitled to a 'return or refund' of their purchase as if it were a 'lemon'.

We consider that section 259 is not clear enough to offer the added protections required by people who purchase 'late ripening' lemons. Our criticism of section 259 is that the legislation does not offer a clear definition of what amounts to a 'reasonable' number of repair attempts.

A specific quota of the 'number of repairs' should be adopted under the ACL to clarify what amounts to a 'reasonable' attempt. Under the current formulation, people may be hesitant to enforce their rights, as the onus is on them to prove that a 'reasonable' number of attempts have been made, and so the burden lies on their shoulders. Under a capped repair regime, the individual would be able to point directly to the number of attempts needed to enliven their rights, and would not have to struggle to prove 'reasonableness'. This would reflect the approach taken in some United States jurisdictions.

Our casework also suggests that the ambiguity of section 259 tends to lead to further negotiations that favour the supplier, as suppliers possess more knowledge about the nature and complexities of a given defect. With their specialised knowledge, suppliers often 'explain-away' failed attempts at repair, offering insights as to why previous attempts at repair have failed, and why repair is likely to succeed 'this time'.

The burden of proof

Although the lemon law proposed in the ACL Review Final Report would overcome the hurdle of having to prove a 'major' defect, it would do nothing to overcome this 'time-lapse' accountability obstacle.

80 Ibid.

In the absence of presumption in line with Singapore or the United Kingdom's consumer law, it remains open to traders to argue that damage occurred while the good was in transit, or was caused by a third party, or there was abnormal use, or 'wear and tear', thereby shirking their obligations and adding another party to the consumer complaint. Consumer Action has received complaints which follow this pattern of attempting to 'pass-on' or divert the obligation for the failed goods, as was the case in William's story discussed above - the result being a more complex and lengthy complaint.

5. A stronger lemon law proposal

For the reasons outlined above, we consider that the lemon law proposed in the ACL Review Final Report and Consultation RIS needs to be significantly strengthened.

A restrictive 30-day 'short period' for Australia's lemon laws would not go far enough to provide people with the necessary rights to obtain a replacement or refund for 'lemon' goods. Instead, we recommend that where a good fails to meet the consumer guarantees within six months of purchase, an individual should be entitled to a refund or replacement without needing to prove a 'major failure'.

We also recommend introducing a presumption that, where a defective good is found to fail a consumer guarantee within six months of purchase, the defect existed at the time of purchase. This borrows from Singaporean and United Kingdom law and remedies the scenario where people can prove failure of a consumer guarantee but are unable to prove that this failure was not the result of abnormal use, wear and tear or third-party damage.

For goods that fail outside the six-month window, we support a clearly defined 'reasonable' number of repairs before goods are deemed to have a 'major failure'. We suggest a maximum of three repair attempts. This would better align with the approach in the United States, where many states stipulate the maximum number of unsuccessful repairs that can be undertaken before a car is deemed a lemon. The number of repairs is generally around 3 to 4⁸¹ and helps to avoid United States consumers being caught in an ongoing cycle of repairs.⁸²

Having regard to lemon law protections in other jurisdictions such as Singapore, the European Union, United Kingdom and some US states, we consider that these reforms are common-sense improvements that reflect community expectations and offer much-needed protections for Australians. We have outlined further benefits below.

81 Philip R. Nowicki PhD, 'State Lemon Law Coverage Terms: Dissecting the Differences' (1998) 11(1) *Loyola Consumer Law Review*, pp. 49-50; Legal Affairs and Community Safety Committee, Report No. 17 55th Parliament, 'Lemon' Laws – Inquiry into consumer protections and remedies for buyers of new motor vehicles', November 2015, pp. 114-123, <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2015/5515T1704.pdf>.

82 In our submission to the Consultation RIS, we suggested that further research in the next Australian Consumer Law Survey might also be of assistance in determining the optimum number of failures that should constitute a major failure. We noted that the courts should still have discretion for special cases where consumer detriment is high: Consumer Action Law Centre et. al., *Submission to the Australian Consumer Law Review – Clarification, simplification and modernisation of the consumer guarantee framework*, 23 April 2018, available at: <https://policy.consumeraction.org.au/2018/04/26/submission-acl-consumer-guarantee/>.



The benefits of a strong lemon law

A clearer body of law

The strengthened lemon law proposal would cut through the layers of complexity in the ACL by creating a simple two-step legal process for lemon goods:

- Has there been a failure to meet one of the consumer guarantees?
- Was this failure within six months of purchase?

This model would alleviate the individual from considering all the complex legal provisions surrounding ‘major failure’ and the corresponding limitations in section 262, such as ‘reasonable time’. This much simpler legal framework would empower people in their negotiations with traders, leading to a more active consumer base that keeps traders accountable and shifts reliance away from warranties towards the ACL.⁸³

The benefits of lemon laws were also canvassed in the United Kingdom’s ‘right to reject’ legislation impact statement:

Making consumer rights more accessible and straightforward to understand for both business and consumers should speed up the time taken to resolve disputes, reduce staff training costs and make litigation less likely. A more effective consumer regime would help provide a level playing field for law abiding business by undermining businesses which trade off the opaqueness and complexity of the law to exploit consumers. This will also increase consumer confidence, which should contribute towards increasing competition and innovation, which are key drivers of economic growth.⁸⁴

Reducing the evidentiary burden

The strengthened lemon law proposal would not only reduce legal complexity, but also reduce the need for prohibitively expensive expert reports. We predict this would save people a great deal of time, money, and stress. We expect that Australians would be less likely to be required to provide ‘expert evidence’ to substantiate their claims when taking their case to a tribunal, as the bar would be lowered from ‘major failure’ to any failure to meet the consumer guarantees. An easing of this requirement should save people money as they would no longer have to commission expensive expert diagnostic reports, and as a flow-on consequence it is expected that more people would be willing to pursue complaints, knowing that they would not face these costly evidentiary requirements.

⁸³ The graphic in Appendix 2 demonstrates how clearly defined lemon laws can be communicated reasonably simply to consumers - Consumers Association of Singapore, CPFTA & Lemon Law, accessed 23 May 2018, available at: https://www.case.org.sg/consumer_guides_cpfta.aspx.

⁸⁴ Department for Business Innovation & Skills, *The supply of goods: the short term right to reject faulty goods impact assessment*, July 2012, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31352/12-956-supply-of-goods-short-term-reject-faulty-impact.pdf.

One of the key predictors as to whether a product is a 'lemon' is that it begins to demonstrate its inadequacies shortly after purchase. Lemon laws would place a greater emphasis on proximity to purchase rather than the extent of defect, knowing that proximity to purchase is a strong indicator of a 'lemon'.

Reducing complaint resolution times

With the introduction of lemon laws, people would also benefit from quicker complaint resolution times. This is an inevitable outcome of lessening evidentiary requirements and simplifying the legal framework. We predict that lemon laws would replace the current system of run-arounds and repeated repairs with a more efficient 'discovery-to-remedy' complaint handling process. Armed with a clear, substantive legal right to a refund or replacement, people are likely to receive a more cooperative response from the trader, or clearer path to remedy through a tribunal. We predict that this would also reduce the incidence of consumer dissatisfaction, as a more 'black and white' set of consumer laws would result in less prolonged, frustrating complaints from the perspective of the trader's employees.

A quicker turnaround time also means that people spend less time without access to their products, as within a comparatively shorter amount of time they would receive either the refunded funds necessary to purchase a replacement product, or a replacement product. Aside from costs associated with purchasing replacement products, this is of real economic significance to families and individuals who require access to a functional car to access employment, education or other essentials. The benefits of reduced complaint resolution times were also highlighted in the United Kingdom's 'right to reject' legislation impact statement.⁸⁵

A culture shift

With the existence of a strong lemon law, traders would no longer be able to hijack consumer negotiations and gear them towards warranty agreements. A culmination of the above benefits of simplicity, lessening of evidentiary burden and more empowered people should result in a more assertive consumer base that actively holds traders accountable to ACL standards, rather than simply accepting the terms of the warranty agreement. In turn, we expect that traders would alter their complaint handling procedures to take into account the shift in bargaining power offered by lemon laws, and thus the 'culture of repair' would be largely undone.

We also predict broader benefits to the economy as a result of improved consumer confidence and levelling the playing field across the market. The United Kingdom's impact statement for its 30-day rejection period noted that:

A basic floor of consumer rights makes consumers more prepared to buy unfamiliar or unadvertised products from unknown retailers. A base level of remedies provides a risk/reward ratio that allows new providers to enter the market at a competitive price.⁸⁶

⁸⁵ Ibid.
⁸⁶ Ibid p. 6.



We also expect that improved remedies would encourage manufacturers and retailers to produce and sell higher quality goods that are less likely to attract complaints.

Conclusion

It's important to reflect on the very reason why the term 'lemon' entered the public vernacular. The term 'lemon' is now commonly used in Australia to describe that unique kind of defective product that proves impervious to ordinary attempts at repair. Yet while we acknowledge the existence of lemons through our language we do not appropriately acknowledge them in our laws.

The impact of purchasing a lemon can be devastating for people, particularly if they are unable to access appropriate redress. If an ordinary product exhibits a manufacturing defect, the product can normally be repaired and salvaged. Lemons on the other hand are largely immune to repair. As such, it is imperative that the ACL is reformed to provide improved access to justice for people who purchase lemons. This critical reform will avoid the many flow-on costs to personal time, money and wellbeing which result in trying to obtain redress for the purchase of a lemon through the existing consumer guarantees regime.

In following the lead of the European Union, United Kingdom, Singapore and the United States, it seems clear that the first and best indicator of a potential 'lemon' is the appearance of a defect within six months of the time of purchase. Australians need an Australian lemon law that borrows elements from these overseas jurisdictions and helps them identify a lemon within simple legal parameters. Through its simplicity and ease of application, these lemon laws would empower a greater number of Australians to assert their consumer rights under the ACL.

While the lemon law proposed in the ACL Review Final Report is a step in the right direction, in our view it does not go far enough. Australians need a strong lemon law with three key elements:

1. Where a good fails to meet the consumer guarantees within six months of purchase, the buyer should be entitled to a refund or replacement without needing to prove a 'major failure', with consideration of an extended time period for higher value goods;
2. Where a good fails to meet the consumer guarantees within six months of purchase, there should be a presumption that the failure was present at the point of purchase.
3. For goods that fail outside the six-month window, a presumption that three failed repair attempts means a good is subject to a 'major failure'.

Appendix 1

Between April 2017 and April 2018, Consumer Action had 926 calls to our legal advice line where 'Consumer Guarantees Breach' was flagged as an issue. Of those 926 cases, 476 cases (51 per cent) related to a 'Consumer Good' and 347 (37 per cent) related to a 'Consumer Service'. At least 59 per cent of these callers were recorded as being on low incomes, including Centrelink benefits. The callers were located across 68 local government areas in Victoria.

The range of goods consumers sought assistance about was very broad. Seventy-five types of 'Consumer Goods' have been recorded in 'Consumer Guarantees Breach' calls to our legal advice line over the past 12 months.

Figure 1: Calls relating to 'Consumer Goods' – April 2017 to April 2018

Type of 'Consumer Goods' – Top 5	As % of total 'Consumer Guarantee Breach' calls	As % of total 'Consumer Goods' calls	Number of Consumer Goods calls
Motor vehicle – used	19.44%	37.82%	180
Motor vehicle – new	7.67%	14.92%	71
Electrical goods	7.13%	13.87%	66
Furniture	2.81%	5.46%	26
Solar panels	2.05%	3.99%	19

Eighty-two types of 'Consumer Services' have been recorded in 'Consumer Guarantees Breach' calls over the past 12 months.

Figure 2: Calls relating to 'Consumer Services' – April 2017 to April 2018

Type of 'Consumer Services' – Top 5	Type of 'Consumer Services' – Top 5	As % of total 'Consumer Guarantee Breach' calls	As % of total 'Consumer Services' calls	Number of Consumer Services calls
Tradesperson		10%	27%	95
Motor mechanic		6%	17%	58
Private school/ college		4%	10%	35
Storage or removalist		2%	5%	19
Travel and transport		2%	5%	19



Appendix 2

STORE

What are "Lemon laws"?

- Laws protecting consumers against defective goods that fail to conform to contract or are of unsatisfactory quality or performance standards at the time of purchase
- Such goods are colloquially known as "lemons"

LEMON LAWS

How do consumers benefit from the Lemon law?

2-stage recourse framework

1 Consumer can ask business to:
Repair or replace the defective product.

2 Consumer may keep the defective goods and request a reduction in price, or return the defective goods for a refund if:

- The business did not provide repair or replacement within a reasonable time or without significant inconvenience to the consumer, OR
- Repair or replacement by the business is not possible or incurs a very high cost

Timeframe

If a defect is found within six months of delivery, it is assumed the defect existed at the time of delivery, unless the business can prove otherwise

MONTH 1 MONTH 2 MONTH 3 MONTH 4 MONTH 5 MONTH 6

For assistance/clarification, call CASE at 6100 0315 or visit www.case.org.sg

CASE



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Level 6, 179 Queen Street
Melbourne VIC 3000
AUSTRALIA

consumeraction.org.au