



18 December 2015

Consumer Protection  
Department of Commerce  
Level 2, 140 William Street  
PERTH WA 6000

By email: [consultations@commerce.wa.gov.au](mailto:consultations@commerce.wa.gov.au)

Dear Sir/Madam

**Consultation Regulatory Impact Statement  
Review of laws affecting motor vehicle dealers and repairers in Western  
Australia**

Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) is a not-for-profit community legal centre based in metropolitan Perth that provides:

- Legal advice and assistance to and advocacy on behalf of consumers with issues arising out of their credit and debt related problems, or out of the Australian Consumer Law disputes. CCLSWA operates a daily Telephone Advice Line service which consumers use to request for legal advice and information.
- A resource for financial counsellors and other advocates working with low-income people for the resolution of their credit-related problems, or out of the Australian Consumer Law disputes; and
- Community education programmes in matters relating to credit and debt law and the legal system.

CCLSWA also engages in relevant social policy and law reform initiatives, including contributing to such initiatives spearheaded by other organisations.

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CCLSWA makes the following submissions in relation to the Department's Consultation Regulatory Impact Statement and review of the *Motor Vehicle Dealers Act 1973* (the **MVDA**).

CCLSWA reiterates that the current provisions of the MVDA, whilst providing consumer protection, are difficult for consumers to enforce.

We make the following submissions to advocate for better means for redress for consumers.

### **Compensation fund under the MVDA**

In line with our submission in response to the August 2013 Consultation Discussion Paper, we do not support the establishment of a compensation fund as a fund of last resort.

Instead we propose a fund be created based on the Victorian model. Most importantly this is not a fund of last resort, meaning aggrieved consumers are not required to exhaust all reasonable avenues of recovery in order to make a claim, thus relieving them of extra time and monetary expenses.

Further the Victorian model has the most detailed provisions for describing when a claim may be made of the four models existing in other jurisdictions, meaning certainty for consumers and dealers, and have also paid out the most, of the funds established in Australia. This indicates its effectiveness.

### **Cooling-off periods and motor vehicle purchases**

We strongly advocate for the inclusion of a cooling-off period in the MVDA.

We receive many calls from consumers seeking legal advice in relation to contracts for the purchase of vehicles from car dealers. These consumers invariably signed the contracts as a result of the dealership salespersons' high pressure sales tactics, the consumers' own ignorance they were signing contractual documents, or a combination of both factors.

We also receive many calls from consumers who complain they unknowingly signed up for a higher level of debt than they intended or were led to believe.

These consumers say they thought they had signed up for particular debt amounts, only to discover later they had in fact signed up for debts that included not merely the costs of the vehicles, but also additional extras (such as insurance or warranties as well as physical extras) that either they were unlikely to benefit from, and/or they did not know they had signed up for.

Below is a series of case studies to illustrate the above problems. These case studies are gathered from our advice and advocacy work. Our clients' identities have been altered to protect their confidentiality.

### **Case study 1**

*Archie was in the market for a car and went to a local dealership. A salesperson asked for Archie's keys to his current car so they could assess the trade-in value. Archie did not want to trade in his car, but the salesperson persisted, saying if Archie found out its value, he might want to trade it in.*

*The salesperson then asked Archie to sign a document, saying that if the dealership found a car with suitable finance then Archie could buy the new car. Archie refused to sign it as he wanted to arrange his own finance, but the salesperson again persisted with aggressive tactics and refused to return Archie's keys until he signed it. Archie felt pressured and signed the document.*

*Now Archie wants to get out of the deal and is suffering anxiety over it. But the dealership tells him that he had signed a contract to buy a car and he cannot get out of it without paying the 15% liquidated damages. Archie feels trapped.*

### **Case study 2**

*Ben went to a car dealership to take a car he was interested in for a test drive. After the test drive the salesperson asked Ben to sign a document which Ben was told would give the dealership access to his credit file.*

*Ben went home with a copy of the document he had signed and then realised it was a contract to buy the car. The next day the dealership called Ben asking for a \$2500 deposit. Ben told them that he couldn't afford the deposit and didn't want to buy the car.*

*The dealership demands Ben pay the 15% liquidated damages to terminate the contract.*

### **Case study 3**

*Cao purchased a car for from a car dealership. The next day the dealer rang Cao and said Cameron's finance for the car will cost \$62 000, being \$40 000 principal and \$22 000 interest, and the contract needed to be signed.*

*Cao thought \$62 000 was too much for him and told the dealer that he did not want to go through with the contract. The dealer refused to accept Cao's reasons and continued to call Cao over the next two weeks. Finally, Cao felt pressured to sign.*

*Cao has now found out that the car actually costs \$62 000 and the loan will actually cost him \$91 000. He cannot afford the amounts.*

### **Case study 4**

*Deng speaks and reads very limited English. Deng goes to a car dealership to buy a car for \$16 000. He asks for a towbar to be added to the car. The salesperson then begins ticking several boxes on a sheet of paper.*

*Deng becomes worried the salesperson is adding more than just the towbar. Deng tells the salesperson he does not want to pay for anything more than the towbar. The salesperson tells Deng not to worry. As Deng does not understand the language, process or documents, he puts his trust on the salesperson to do the right thing.*

*When Deng gets home, his friend reads the contract and explains it to him. Deng discovers he has signed a contract which includes over \$7000 worth of extras that he does not want and which he never asked for. Deng tells the dealer that he no longer wants the car. The dealership refuses to accept Deng's position.*

### **Case study 5**

*Eve visits a car dealership to browse available second-hand vehicles. Eve notices a car she quite likes, which is for sale at \$11,000. She tells the salesperson she is*

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*interested but does not want to buy it that day, but might come back the next day. The salesperson asks Eve to pay a \$100 deposit that day and he would knock \$1000 off the price, then Eve could have it for \$10,000. Eve wants to think over.*

*The salesperson notices Eve's hesitation and asks Eve to sign a document to reserve the car. He says Eve could later pay \$10,000 later when she makes up her mind, and that he would tear up the document if Eve changes her mind. Eve signs the document and pays \$100 to the salesperson.*

*After sleeping on it and discussing with her family, Eve decides not to buy the car. She tells the dealership so. However the dealership says Eve had signed a contract to buy a vehicle and she is bound to buy the car.*

*The dealership says Eve could cancel the contract by paying the 15% liquidated damages. Eve is very stressed and upset and does not want to go through with the purchase. She says she feels the dealership has cheated her.*

The inclusion of a reasonable cooling-off period will substantially reduce, or even eliminate altogether, the majority of the motor vehicle sales complaints that CCLSWA receives.

We propose that the cooling-off period:

- Apply to all transactions, regardless of whether there is linked finance. Such a cooling-off period will be consistent with section 134 of the National Credit Code which provides for the termination of sale contracts which are conditional on obtaining credit;
- Be for a period of at least three (3) clear business days; and
- Exists with a condition that no payment be payable by the purchaser to the dealer should the purchaser elect to rescind the agreement within the cooling-off period.

We acknowledge that the standard form "Contract to Buy a Motor Vehicle" allows parties to include "special conditions" that add to or over-ride the standard conditions on the contracts to purchase motor vehicles. However, we maintain that it is

unreasonable to expect most ordinary consumers to be savvy enough to insert special conditions such as a cooling-off period into the contracts.<sup>1</sup>

### Reduction of 'pre-estimated liquidated damages'

Alternatively, it may not be necessary for a cooling-off period if the amount of pre-estimated liquidated damages payable to dealers upon termination of a contract is reduced from the current 15% of the purchase price of the motor vehicle to 5% of the purchase price.

We submit that the contractual 15% pre-estimated liquidated damages amount is an over-estimate, and does not represent the loss suffered by the dealer upon a purchaser's decision not to proceed with the contract. We believe that the 15% amount is extreme, arbitrary and over-compensates the dealer.

This view is consistent with the positions in various other Australian jurisdictions. The positions in these other jurisdictions suggest that the 15% amount available to dealers in Western Australia is arbitrary and punitive.

Whilst the standard contract term states the dealer may charge 'up to' 15% of the purchase price of the vehicle we have found in almost all cases dealers charge the full 15% upon termination of a contract, even if they have not actually suffered this amount of loss. This is evident in the case studies above.

We believe that 5% of the purchase price more accurately represents the dealer's true loss when the buyer decides not to proceed with the contract.

### **Other issues**

#### Lemon laws

We also wish to take this opportunity to draw attention to the inadequacies of the Australian Consumer Law (**ACL**) to protect consumers who have bought defective cars. We propose introducing lemons Australia-wide to address the inequities that arise when consumers end up with purchasing defective vehicles, colloquially labelled as "lemons". Lemon laws would bring clarity to consumers' rights, as

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<sup>1</sup> In fact, CCLSWA has discovered that buyers of motor vehicles often do not insert the special condition that the contract is 'subject to finance', even if that was openly discussed and agreed to with the dealers before the buyers signed the contracts.

opposed to the current status, where there is much uncertainty and prohibitive costs to consumers who consider enforcing their rights.

Under the ACL, consumers are guaranteed that the goods they purchase are of an acceptable quality. If the goods are not of an acceptable quality, the consumer has rights against the supplier. The extent of the consumer rights depends on whether the defect is minor or major.

If the defect is minor then the consumer is merely entitled to a free repair at the expense of the supplier. If the defect is major the consumer can reject the goods and be entitled to a refund.

Several problems arise with this current framework. Firstly there are often disputes over whether a defect is minor or major. Often a supplier will claim that a defect is only minor and can be repaired and will refuse to pay a refund. In the context of car dealers, consumers are then forced to return the cars to the dealership and be without their cars whilst the vehicles are repaired, putting the consumers through considerable inconvenience and expense. This problem becomes even more exasperating when the same or other different defects appear after the initial repairs have been performed, extending the period consumers are without their vehicles.

We regularly refer complaints we receive from consumers about lemon cars to the Department's complaints service for the Department to investigate. Conversely the Department regularly refers consumers to CCLSWA where there is no negotiated resolution between the parties about lemon cars.

Where a dealer refuses to conduct the necessary repairs or provide a refund for a lemon, the consumer is left with the option of pursuing the dealer for a remedy at the Magistrates' Court. The consumer would incur expenses, including the high cost of attaining expert evidence, and probably legal advice, in order to prosecute a claim.

Below are more case studies based on our experiences with consumers, to illustrate the above problems and the need for lemon laws to adequately protect consumers.

Again, our clients' identities have been altered to protect their confidentiality.



### **Case study 6**

*Fong bought a car from a dealership four months ago. Since then, the car has broken down four times.*

*Fong lives two hours away from the dealer so he has had to pay the local mechanic to perform repairs on the defects. After the most recent breakdown Fong contacted the dealership who offered a free repair.*

*Fong feels taking the car to the dealer will be difficult as he is busy with work and he also worries the car would not make the trip without breaking down again. From speaking to the local mechanic about the state of the car Fong believes he is entitled to a refund.*

*Fong has not been successful in getting a refund through negotiations.*

### **Case study 7**

*Gai buys a car for \$7000 from a car dealership. As she drives the car home from the dealership it breaks down.*

*Gai immediately calls the dealership and tells them what has happened. The dealership denies it is liable and refuses to take the car back from Gai, or to fix it.*

*Gai spends another \$4800 on the towage and repairs on the car. She is very unhappy and feels let down by the dealership.*

### **Case study 8**

*Hayley buys a new car from the dealer with funds she saved over a number of years. Within 12 months, Hayley experiences constant problems with the car. It often fails to start; the immobiliser would turn on without reason; and the warning lights on the dashboard would flash without reason. Twice, whilst Hayley is driving it, the car turns itself off. She has to wait for 15 minutes before the car would start again.*

*Hayley rejects the car three times. Each time, the dealer refuses to refund Hayley any portion of the purchase price. The dealer continually denies liability.*

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*Hayley is at her wits' end. She would like to take the dealer to the Magistrates Court to claim breaches of the ACL. But she would need to spend a substantial amount to locate expert evidence to support her claim. She is a working single parent and simply cannot afford the huge amount of time and expense that a court claim would exact on her. Hayley's dispute continues.*

We also note that the Legal Affairs and Community Safety Committee recently published its report on lemon laws for the Queensland Government in preparation for the ACL Review in 2016.<sup>2</sup>

We propose the following changes, among others, to the law concerning lemon cars in order to improve consumer protection<sup>3</sup>:

- The consumer shall be entitled to a refund if their vehicle has been repaired at least three times by the manufacturer or importer and the vehicle still has a defect;
- The consumer shall be entitled to a refund if their vehicle is out of service for 20 or more days in total due to a defect;
- The consumer shall be entitled to a refund if their vehicle was repaired once for a defect that posed a danger to the personal safety to the driver or other road users; and
- Reverse the onus of proof where it is alleged there has been a major problem, or the vehicle is a lemon. This means the obligation is on the supplier to demonstrate that there has been no breach of the consumer guarantees.

We also submit that the New Zealand approach be considered. New Zealand has established a specialist Motor Vehicles Disputes Tribunal, with its own mechanical experts. Such a tribunal is likely to reduce costs and increase efficiency in resolving disputes with lemon vehicles.

We support the submissions by the Consumer Action Law Centre made to the Queensland inquiry into lemon laws<sup>4</sup>.

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<sup>2</sup> Which can be found at: <http://www.parliament.qld.gov.au/documents/committees/LACSC/2015/04-Lemons/04-rpt-017-30Nov2015.pdf>.

<sup>3</sup> See the Consumer Action Law Centre's submission to the Queensland inquiry into lemon laws: <http://consumeraction.org.au/wp-content/uploads/2015/10/Submission-Consumer-Action-FINAL-08102015.pdf>

<sup>4</sup> Ibid.

### Community legal education

We further suggest more targeted education initiatives for dealers and consumers about the provisions of the MVDA including all future amendments and revisions to it.

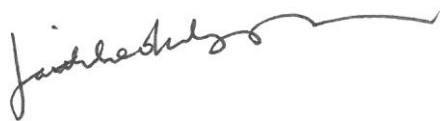
CCLSWA takes an active role in educating the community groups about the rights and obligations that pertain to the contracts for the purchase of motor vehicles, as well as the issues that arise from finance contracts for those purchases.

CCLSWA is grateful for the opportunity to make further submissions on the Department's review.

Please contact our office to speak to Faith Cheok if you have any questions or comment.

Yours sincerely

**Consumer Credit Legal Service (WA) Inc.**



Per  
Faith Cheok  
Principal Solicitor