

28 November 2018

Committee Secretary
Transport and Public Works Committee
Parliament House
George Street
Brisbane QLD 4000

By email only: tpwc@parliament.qld.gov.au

Dear Committee,

Queensland Civil and Administrative Tribunal and Other Legislation Amendment Bill

Community Legal Centres Queensland welcomes the introduction of the *Queensland Civil and Administrative Tribunal and Other Legislation Amendment Bill 2018 (the Bill)*, and appreciates the opportunity to make this submission to the Transport and Public Works Committee (**Committee**).

We commend the Government for the introduction of the Bill, while expressing the need for such amendments to form part of a broader national approach to improve consumer protections for purchasers of motor vehicles. We support the Bill in its current form, and propose some improvements to the Bill, including:

- Reversing the onus of proof
- Expanding the definition of a 'motor vehicle' to include motorised scooters
- Introducing a 'Lemon' buy-back register
- Continued advocacy for national reforms of consumer protections

Increasing QCAT's monetary jurisdiction

Community Legal Centres Queensland, at that time called Queensland Association of Independent Legal Services Inc (**QAILS**), made a submission in October 2015 to the inquiry by the Legal Affairs and Community Safety Committee into 'Lemon' laws in Queensland (**our 2015 submission**) (**attached**). In our 2015 submission, we recommended that the Queensland Government increase the Queensland Civil and Administrative Tribunal's (**QCAT**) monetary jurisdiction to assist consumers in accessing external dispute resolution, and advocate for specific 'lemon laws' under the Australian Consumer Law (**ACL**).

As such, we support the Bill's implementation of recommendation 7 from the 2015 Parliamentary Inquiry. Increasing the monetary jurisdiction of QCAT to \$100,000 for actions relating to motor vehicles under certain provisions of the ACL, including the guarantee that goods will be of acceptable quality, is consistent with our original recommendations. As highlighted in our 2015 submission, QCAT's current \$25,000 limit forces consumers to take their matter to the Magistrates

Court or District Court, which are more costly and intimidating than comparatively informal Tribunal proceedings. This amendment constitutes the removal of a practical barrier to justice by allowing consumers to more readily enforce their rights. We also support the application of the amendments beyond new cars as, per our 2015 submission, such a restriction would be arbitrary and would fail to provide uniform consumer protection.

Onus of Proof

We reiterate the call of our 2015 submission to reverse the onus of proof, requiring a manufacturer to prove the vehicle does not have the defect alleged by the consumer. This amendment would remove the need for consumers to obtain costly expert reports to substantiate their claims, which can be a practical barrier to consumers seeking remedies under the ACL.

Definition of 'Motor Vehicle'

The Bill adopts the definition of 'motor vehicle' from s12 *Motor Dealers and Chattel Auctioneers Act 2014*, which expressly excludes motorised scooters and wheelchairs. As stated in our 2015 submission, we recommend the Bill be amended to broaden the definition, as consumers purchasing such vehicles may be especially vulnerable due to age or disability.

Register for 'Lemon' Buy-Backs

Our 2015 submission highlighted the need for potential purchasers to be notified that a buy-back vehicle has had a major fault, and that such vehicles be placed on a register. The Bill fails to address this consumer issue, and it is recommended it be amended in line with the suggestions in our 2015 submission.

Continuing Uncertainties under the ACL

As outlined in our 2015 submissions, uncertainty arises from the operation of consumer guarantees under the ACL particularly regarding the distinction between 'minor' and 'major' defects. This distinction will determine the remedy available to the affected consumer; a free repair if a minor defect or a refund or replacement if the defect is major. While the Bill increases access to external dispute resolution in a Tribunal setting by increasing QCAT's monetary jurisdiction, the uncertainty and inadequacies of the ACL will continue to affect the practical remedies available to consumers. This highlights the need for the amendments in this Bill to be partnered with national reform of consumer protections. We reiterate the call made in our 2015 submission for the Queensland Government to advocate for specific 'lemon laws' under the ACL, which would allow the purchaser of a such a vehicle to automatically access the remedies available for major faults under the ACL.

Thank you for the opportunity to provide feedback on the Bill.

Yours sincerely


James Farrell OAM
Director

Community Legal Centres Queensland Inc.



Queensland Association of Independent Legal Services Inc

10 October 2015

Research Director
Legal Affairs and Community Safety Committee
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By email only: lacsc@parliament.qld.gov.au

Dear Committee members,

Queensland motor vehicle lemon laws

The Queensland Association of Independent Legal Services Inc (**QAILS**) is pleased to submit its views regarding consumer protections and remedies for buyers of new motor vehicles, the subject of this inquiry by the Legal Affairs and Community Safety Committee (**Committee**).¹

QAILS understands that at least 60 individuals have provided case studies to the Department of Justice and Attorney-General,² which can provide valuable data to the Committee in response to the first term of reference, regarding consumers' experiences. For that reason, this submission addresses the other terms of reference.

In summary, QAILS recommends that the Committee:

1. acknowledges that existing consumer protections under the Australian Consumer Law (**ACL**) are inadequate and uncertain;
2. finds that QCAT's monetary jurisdiction (under \$25,000) restricts consumer's ability to seek external dispute resolution, meaning consumers must launch formal court proceedings to recover under the ACL;
3. recommend that the Queensland Government advocates for specific 'lemon laws' under the ACL, that:
 - a. provide consumers with the right to a refund if their vehicle meets the definition of a 'lemon'. A vehicle will be a 'lemon' if:
 - i. it has been repaired at least three times by the manufacturer or importer and the vehicle still has a defect; or
 - ii. if the vehicle is out of service for 20 or more days in total due to a defect; and
 - b. reverse the onus of proof where it is alleged there has been a major problem, or the vehicle is a 'lemon';
 - c. apply to 'all new road vehicles of a kind ordinarily acquired for personal, domestic or household use';

¹ QAILS gratefully acknowledges the contribution of student volunteer Jordan Mathas-Carleton to this submission, and acknowledges the support and information provided by Consumer Action Law Centre, which helped develop this submission. For more information, see Consumer Action Law Centre, *Lemon Laws – Background Brief* (July 2015).

² Queensland lemon laws website attracts dozens of cases, <http://www.abc.net.au/news/2015-06-25/dozens-of-submissions-to-queensland-lemon-law-inquiry-website-/6573442>

- d. establishes a compulsory industry-based external dispute resolution scheme;
4. recommends an increase to QCAT's jurisdiction for disputes under these lemon laws;
5. recommends a limit on charges for the use of the defective vehicle prior to it breaking-down; and
6. recommends that manufacturers or importers that buy-back vehicles that are lemons:
 - a. notify all potential purchasers that the vehicle is a lemon if they re-sell it; and
 - b. correct any defect prior to re-sale;
 - c. register any buy-back vehicles on a register; and
 - d. give a mandatory minimum warranty.

About QAILS

Queensland Association of Independent Legal Services Inc (**QAILS**) is the peak body representing the 33 funded and unfunded community legal centres across Queensland. Community legal centres are independently operating not-for-profit, community-based organisations that provide free legal services to the public, focusing on the disadvantaged and people with special needs. More information is available at www.qails.org.au.

Partly because of the lack of financial counselling services in Queensland (the only state in Australia where the State Government does not fund a dedicated program for generalist financial counselling), community lawyers are often asked to provide advice and assistance to Queenslanders with consumer and money problems. It is difficult to say how often community lawyers provide advice in relation to the purchase of cars, given then they could be counted in any of the following categories under applicable counting rules:³

“Major problem type”	Total services provided by Queensland CLCs (2014-15)		
	Information	Legal Advice	New cases opened
Credit and debt	2368	3595	599
Consumer and complaints	2073	2537	348
Motor Vehicle	1427	1270	112

Existing legislative protections

Under the Australian Consumer Law (contained in a schedule to the *Competition and Consumer Act 2010* (Cth)), all consumers have a basic set of guarantees when they acquire goods and services that cost less than \$40 000. There are nine guarantees that apply to goods, but the most relevant to lemon laws is the guarantee that goods will be of acceptable quality. When a car is not of acceptable quality, consumers have a right to a remedy. However, the remedy to which consumers are entitled depends on whether the failure to comply with the guarantee was minor or major.⁴

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

- it has a problem that would have stopped someone from buying it if they had known about it;
- it is unsafe;
- it is significantly different from the sample or description; or
- it does not do what the business said it would, or what was asked for, and cannot easily be fixed.

³ Community Legal Services Information System (CLSIS) Report CA4 Activities by High-Level Problem Type (accessed 30 September 2015).

⁴ For further information, see http://www.consumerlaw.gov.au/content/the_acl/downloads/consumer_guarantees_guide.pdf and <https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees>

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

- disputes about 'minor' versus 'major' defects - particularly when a combination of minor defects may mean a major defect; and
- questions around damages - some decision-makers want to discount any refund by the benefit received from the use of good, even if there has been a major defect.

This uncertainty is exacerbated by the fact that consumers must take their case to the Queensland Civil and Administrative Tribunal (**QCAT**) or the appropriate court if they wish to seek redress for breaches of the consumer guarantees. This can be a costly and time consuming process, particularly given the significant evidentiary burdens for consumers. The expense of obtaining appropriate evidence means that the decision-maker is often basing its decision on inadequate evidence, which can lead to poor outcomes.

Proceedings in QCAT are more informal than a court and the parties typically bear their own costs. For those reasons, consumers might generally prefer QCAT over courts court in hearing consumer disputes, but QCAT can only hear minor civil disputes up to a value of \$25,000. The monetary limit of \$25,000 is very restrictive in respect of new motor vehicles.

The evidentiary burden

To prove that their car has a major defect, consumers generally have to obtain an expert report. In some cases, the expert even has to be available for cross examination. This comes at a significant cost, and together with the fees for the tribunal or court. For example, the application fee in QCAT is over \$300 for disputes over \$10,000⁵ and the filing fee in the Magistrates Court is over \$230 for a claim between \$10,000 and \$50,000.⁶ This represents a real barrier to justice. Many people just give up. Those that proceed may achieve a conciliated outcome or determination, but not receive a full remedy.

Different jurisdictions

If the value of the vehicle in dispute is more than \$25,000, the consumer will have to take their matter to either the Magistrates Court or the District Court, rather than QCAT. While proceedings in QCAT are more informal and parties bear their own costs, many consumers may be forced to take their case to court or again just give up.

Improved protection – “lemon laws”

To improve outcomes for consumers who purchase lemon vehicles, we recommend introducing 'lemon laws'. These laws would:

- provide consumers with the right to a refund if their vehicle meets the definition of a 'lemon'. A vehicle will be a 'lemon' if:
 - it has been repaired at least three times by the manufacturer or importer and the vehicle still has a defect; or
 - if the vehicle is out of service for 20 or more days in total due to a defect; and
- reverse the onus of proof where it is alleged there has been a major problem, or the vehicle is a 'lemon' (as defined above). This means the obligation is on the trader to demonstrate that there has been no breach of the consumer guarantees.

⁵ <http://www.qcat.qld.gov.au/using-qcat/fees-and-allowances>

⁶ *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) sch 2

Introduce new 'lemon laws'

QAILS recommends introducing lemon laws by amending the Australian Consumer Law to incorporate a deemed breach of the merchantability implied term. In other jurisdictions, vehicles are deemed to be not of merchantable quality if there have been three repair attempts or the vehicle has been out of service for a cumulative period of 20 or more days within one year from the date of purchase. A vehicle is also deemed to be not of merchantable quality if there has been one repair attempt for a serious safety defect that endangers the driver or other road users. We support similar presumptions operating in Queensland.

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

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

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

Application of 'lemon' laws

To get an idea of the range of vehicles that lemon laws have been used to protect, it is useful to look at the different protection offered by different states in the United States. In Texas, lemon laws apply to new purchases and leases of cars, trucks, vans, motorcycles, all-terrain vehicles and towable recreational vehicles (the laws exclude boats, farm equipment and non-travel trailers).⁷ In New York, lemon law protection extends to purchases and leases of used cars and motorcycles.⁸ A number of US states extend lemon law protection to motorised wheelchairs.⁹

The most practicable way of protecting Queensland consumers through lemon laws is to ensure that lemon laws cover all road vehicles of a kind ordinarily acquired for personal, domestic or household use.¹⁰ Any application of these criteria would obviously cover new cars, motorcycles/mopeds and passenger vehicles (eg. passenger minivans) and motor homes. Although not a road vehicle, we believe that purchasers of motorised wheelchairs should benefit from lemon law protection. Users of passenger minivans are consumers, as are users of motorcycles/mopeds and motorised wheelchairs. In the case of motorcycle/moped purchasers and motorised wheelchair purchasers, these consumers may be especially vulnerable because they may be low-income consumers (in the case of motorcycle/moped purchasers) and elderly or disabled consumers (in the case of motorised wheelchair purchasers).

⁷ Texas Department of Transportation, Motor Vehicle Division, *Texas Lemon Law and General Warranty Complaints*, revised January 2004, page 6.

⁸ State of New York, Office of the Attorney General, *New York's Used Car Lemon Law: A Guide for Consumers*, April 2006, page 1.

⁹ Attorney General of New York State, Andrew M Cuomo, *New York's Motorized Wheelchair Lemon Law*, FAQ, http://www.oag.state.ny.us/health/wheelchair_law.html, extracted 19 October 2007

¹⁰ This is similar to the definition of 'consumer contract' in section 3 of the *Fair Trading Act (Vic)* 1999.

To restrict lemon laws solely to new cars would be arbitrary, and would fail to provide uniform consumer protection, so the Committee should consider if proposed changes to the ACL should apply to used cars.

Dispute resolution

More could be done to improve dispute resolution in the motor car industry. In particular, we support Consumer Action's call for the introduction of a compulsory industry-based external dispute resolution (**EDR**) scheme. Industry-based EDR schemes exist in many other industries, including energy, water, telecommunications and financial services. Generally, such schemes are supported by consumers and industry alike, as they provide cheap, fair and accessible dispute resolution.

The Queensland Government could introduce an industry-based EDR in the motor vehicle industry by making membership of such a scheme a condition of holding a licence to trade in motor vehicles. If such a scheme were introduced, consumers would have access to a cost free dispute resolution service (all costs being paid by industry), that is independent, and that can make decisions binding on the industry member.

Compelling consumers to participate in alternative dispute resolution (**ADR**) before filing an application in the QCAT to exercise rights under lemon laws would be inefficient and contrary to the interests of consumers. Mandatory ADR would increase the difficulty and delay consumers face in bringing an action. This delay and difficulty would likely cause attrition of claims, leading to many valid consumer claims not being satisfactorily resolved. Rather than place obstacles in front of consumers making complaints about lemon vehicles, the law should ensure there is a seamless dispute resolution process.

Where matters cannot be resolved through EDR processes, we recommend that these disputes should be brought before QCAT, with an increased monetary jurisdictional limit for new vehicles. QCAT already has some expertise in the regulation of car sales, under part 7 of the *Motor Dealers and Chattel Auctioneers Act 2014* (Qld). QCAT should be given similar powers to New Zealand's specialist Motor Vehicles Disputes Tribunal, to appoint a specialist assessor to determine whether a vehicle has major defects.¹¹ Like the New Zealand tribunal, QCAT should be encouraged to publish decisions to build knowledge about application of the law.

Other issues

Charge to consumers for use of lemon vehicle

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

Re-sale of lemon buy-backs

Manufacturers or importers that buy-back vehicles that are lemons should be required to notify all potential purchasers that the vehicle is a lemon if they re-sell it. This notice is best achieved by requiring lemon vehicles that are being re-sold to have a lemon notice

¹¹ <http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal>

physically attached to the driver's side door.¹² Manufacturers or importers and dealers should be required to correct any defect prior to re-sale, should be required to register any buy-back vehicles on a register, similar to the written-off vehicles register established under the *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010*, and should be required to give a mandatory minimum warranty.¹³

Thank you for the opportunity to provide QAILS's views on consumer protections and remedies for buyers of new motor vehicles; please contact me if you would like to discuss these issues further.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'James Farrell', written over a horizontal line.

James Farrell OAM
QAILS Director

¹² This is similar to the law in California. National Association of Consumer Advocates, Before the Federal Trade Commission, In Re: Vehicle Buybacks – Comment, *FTC File No. P96-4402* (<http://www.ftc.gov/bcp/lemon/naca.htm>)

¹³ In most US states, new lemon cars that are resold have a statutory mandatory warranty. Ohio's law is typical, giving a 12 month 12,000 mile warranty. Mark Dann, Attorney General, State of Ohio, *Ohio's Lemon Law*. (http://ag.state.oh.us/citizen/pubs/lemon_law_broch.pdf)