

Submission regarding The ACCC New Car Retailing Industry Market Study

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The ACCC released a much needed Draft Report into the New Car Retailing Industry Market Study in August 2017. As the current owner of a new vehicle/motorhome (purchased for \$104,998) which has had 4 major failures and a repair duration of 16mths (repairs still to be confirmed) during which time I have only had the vehicle for approx. 3 days in seven months, and to which I am about to settle with Fiat Chrysler Australia, I have first-hand experience of the devastating effects of the current industry processes and the short comings of ACL, regulatory authorities and the Australian Tribunal System.

As per most consumers, the settlement is under terms of duress, with recently introduced commercial terms by the manufacturer/retailer that are in direct conflict with ACL and had they been part of the purchase terms and conditions, I would not have proceeded with the purchase. But it is the ONLY way I will receive a full refund. It was not until I had exhausted all avenues and initiated a social media campaign against both the retailer and manufacturer, and commenced producing a parody commercial for Utube, that they decided to take me seriously (even after the OFT and ACCC were advised). If the ACCC had not started this investigation and recently addressed Holden and Ford, I doubt a full refund under ACL would have been on the table at all.

I cannot thank the ACCC enough for finally making this industry a focal point for review and improvement. This is an industry that effects EVERY family in the country in very significant ways.

The self-regulation of this industry is clearly failing many entities involved in the industry, in particular consumers. The study appears to be comprehensive and the inclusion of all stakeholders certainly gives a clearer idea of the major failures in the current industry standards/regulation, legislation and monitoring/enforcement of consumer rights in regard to new car retailing. Unfortunately, the lack of transparency to the general public of the ACCC's responses to consumer complaints leaves many people disheartened and they do not even register their complaints. This is evidenced by many of the people who advocate on behalf of consumers desperate to get some form of redress for faulty vehicles and within social media forums. There is even less faith in positive outcomes using either the OFT or the tribunal system.

Essentially, with the current legislation and enforcement thereof, it is far more profitable for the industry to 'run the gauntlet' of illegal conduct and risk being fined or taken to court and loosing than it is to actually be compliant towards customers under the intent of ACL.

I thank the ACCC for opening the floor to comments on the study.

INDUSTRY PRACTICES

As the study revealed there are no clear laws that support consumers in Australia. The current ACL is very subjective and the new car retail industry has the means, power and finances to twist the laws to their benefit and operate in direct conflict of the intent of the laws, therefore forcing consumers to forfeit their rights using bullying and scare tactics, many of which are illegal under current legislation. In most circumstances to get any redress on faulty vehicles consumers are forced to new and detrimental commercial terms under duress that are held over and above consumer rights by the manufacturer/retailer under ACL. ie. Paltry amounts offered as compensation for a non-disparagement clause, yet the acceptance of which is tied directly any redress under ACL. Or if a consumer settles for a refund or part thereof, it can only happen if they forfeit their right to pursue other costs incurred as a direct result of the fault as they are entitled to under ACL. If a customer does not accept the new commercial terms, it is unlikely they will be able to gain restitution under ACL in any way.

There is significant evidence that the industry is firmly aware that monitoring and enforcement of ACL is heavily in their favour. They are also aware that the tribunal system heavily skewed in the industries favour. There are many cases where the legal costs by a consumer end up more than the actual cost of the vehicle and there is still no consistency in the rulings of cases to support the risk to consumers. The industry definitely flexes their financial power in this area with the sole aim to make the proceeding so difficult and expensive that the consumer just gives up. There is also a clear trail of manufacturers 'funding' legal cases against the dealership/retailer. Not just reimbursing, but funding..... Odds are heavily stacked against the consumer being able to sustain an extended and costly legal battle and the industry is very aware of this.

My direct experience with FCA confirms that the industry fears negative social media significantly more than they fear regulatory and enforcing bodies. FCA legal department staff has advised me verbally that nobody could do more damage to them than Ashton Wood from Destroy My Jeep has. No mention of the ACCC or regulatory authorities by them in this context. Again from my experience it appears that companies put more manpower and financial resources into finding ways to avoid legislative compliance than they do on actually redressing customers under the law. Their confidence in avoiding penalty by regulatory authorities is sickening.

There is an industry wide process of dealers misleading their customers on vehicles performance, servicing, repairs and consumer rights. Common industry processes ensure that customers have no way of enforcing their rights with dealers/retailers, who are often backed by the manufacturer with financial and legal assistance at no cost to themselves. In the case of unlawful activity by dealerships, manufacturers say they have no control over the individual way dealers behave. This is hard to believe as manufacturers would have a Franchise (or similar) Agreement with their dealers and it would be impossible to believe that within this agreement there are not terms that commit the dealership to acting within Australian Law. It is clear that Manufacturers are not sufficiently educating, monitoring or enforcing terms of this nature with their dealerships. Or it is clearly more profitable to not comply and run the risk of potential penalty.

The industry has an excessively high rate of employee turnover. It is clearly evident that inappropriate or insufficient training is given to staff about ACL from the pre-purchase stage through to servicing, parts and ongoing maintenance. There is also a distinct lack of competent mechanical staff in many dealerships. Clearly, there is a glaring gap between being qualified and being

competent. There appears to be little to no consistency across dealerships within a manufacturer's brand, and call centre staff are more gate keepers than problem solvers when things go wrong.

Manufacturers also claim to have no access to records kept by dealerships on vehicles, except work done under approved warranty, due to privacy legislation. Once again this can be addressed under their Commercial Terms of Agreement and addressed in the Contract of Sale with consumers. Currently, there is little way for a consumer to see the maintenance history of a vehicle to verify whether records of repair are accurate. Records often lack detail for the specific purpose of protection for the manufacturer or dealership in cases of possible negligence, or for use in a claim under ACL. With today's technology surely this can be easy and financially viable to rectify in a way that customers can check that the information is sufficiently detailed and accurate? My own experience with ██████████ left me totally faithless in dealership record keeping – especially when they deleted records after the fact to protect themselves in a possible legal case. Compliance with regulatory authorities can further be extended if all records are kept under a vehicles VIN as the primary identifier, not an owners name.

Resale of faulty vehicles without disclosure is also a common industry practice. With poor or no access to maintenance records by dealers, it is impossible for the public to be able to see if they are about to buy a used 'lemon vehicle' (major failure). A public register for VIN numbers of vehicles either repaired, replaced or refunded would significantly stop dealerships from profiting by reselling vehicles that have undergone major faults, where a consumer has even less rights in the event of another major failure.

Another common industry practice identified by the study is limitations or rejection of warranty if the car is not serviced within the manufactures network (usually at exorbitant prices) and limiting access to technical information/scan tools to those mechanics outside the network. This works against the consumer in many ways, but especially in Australia where it can often be massive distances between dealerships. FCA commercial are a perfect example as approximately half of their service centres have closed within the last few years, leaving existing customers who may have included in their purchase decision making the availability of service centres. In cases of critical faults or major failures, customers need to be able to access local mechanics that have access to manuals and scan tools outside the manufacturers' network.

In the case of a major failure or multiple minor failures, if a customer is to take their vehicle for a secondary independent assessment outside the network, dealerships within the network can then claim that any failure is the result of the independent mechanic 'tampering' with the vehicle. This corners the consumer into only dealing with the dealership (and the problem is further exasperated where information is not shared across network dealerships) and limits their options for redress, essentially locking them into a monopoly.

It is common practice for dealerships to drag out repairs, claim unavailable parts in the country, and conduct repeated repairs etc in order to reduce available warranty or statutory claim time. For example in my Fiat Ducato Motorhome, the engine was repaired in 2 months whereby alternative transport was arranged at my own cost for this time, ██████████ insisted there was no warranty on the new motor as it was 'Goodwill' not repair under ACL. I checked with the OFT and was assured there was cover under the law for the motor. This was later confirmed by FCA head office that there was 20,000km or 12mths warranty. Immediately the car had alarms when I picked it up and ██████ dragged out inspections and repairs (and in the end did not even look at the vehicle

when they had it) for over 6mths, at which stage the vehicle had a further 3 major failures with the transmission (which 2 independent mechanics confirmed after visual inspection that the damage could only have been done at the time of the install of the new motor. Interestingly both mechanics have all the latest scan tools yet could not access information about the motor). Over the next 7months the vehicle remained at [REDACTED] for repeated repair, resulting in my not even being able to use the vehicle during the new engine warranty time. 14mths is not a reasonable time frame for repair or restitution. A vehicle having 4 major failures at only 3yrs old and 77,000km is not a reasonable lifespan for the product. FCA claims it is.

It was only when I made an official complaint to the OFT after 7mths with a vehicle not fit for purpose or safe to drive, that FCA provided a small, cheap and nasty loan car. The vehicle was unfit for my purposes as well, and after 2months I requested to be upgraded to a bigger vehicle – preferably a motorhome. I got a SUV which was essentially still unfit for my purposes (The motorhome had been my primary place of residence) and not a like for like vehicle replacement. I have worn accommodation costs for the last 16mths while this issue is dragged out by FCA. On the side it was confirmed by [REDACTED] (FCA dealership) that [REDACTED] had put the wrong oil in the motor and had therefore fully compromised the motor. The full details of my case, which even FCA admits to as being extremely badly handled (and yet they continue with a problematic and unlawful introduction of commercial terms to a settlement under duress). ACCC reference Number 2169188 and FCA reference No645785. It has been a perfect example of how ACL fails customers in every single way. And sadly this is after a lengthy time of FCA giving an administrative undertaking to the ACCC to improve in this area. Even if they are trying, it is just not good enough and still nowhere near meeting current ACL let alone improved ones.

I have no faith that companies like Holden that give 60 day undertakings will honour them without making it nearly impossible for the customer to utilise this claim. I have little faith that FCA have even attempted to make adequate amends to their practices under the redress order. My example is living proof.

WHERE TO FROM HERE

New Laws:

It is clear that new laws are needed specifically for high end products such as motor vehicles and caravans. The new laws need to be more specific and quantifiable with very clear and objective definitions on:

- what constitutes a major failure
- what constitutes multiple minor failures that equate to a major failure
- what constitutes a reasonable time for repair
- a limit on the number of attempted repairs even across multiple problems
- what constitutes fair and reasonable availability of parts
- if there is a significant number of service centre closures, free access to manuals for mechanics outside a certain distance of the nearest registered service centre,
- access by all mechanics to online live manuals at a reasonable cost – with internet access this should be small.
- access by all mechanics to scan tools at a reasonable cost and in a timely manner

- that in the event of a major failure, or unreasonable time frame for repair of minor failures, the manufacturer is to supply at their own cost a like for like replacement vehicle to the customer until the problem is resolved
- All vehicles that are found to have a major fault be mandatory listed by VIN number on a publically accessible database so they cannot be resold without disclosure. This can be done and still ensure compliance with the Privacy Act.
- That all services, modifications and repairs to a vehicle by a manufacturers' dealership be accurately recorded by VIN number on a dealership network wide database. Access to VIN number related data should be a right of the vehicle owner and NOT be restricted by manufacturers/retailers clauses that access can be denied if the data is to be used against them in a claim. This information could also be used by the owner of the vehicle to assist in a resale of the vehicle at the purchasers request.
- a prohibition on manufacturers and dealerships introducing new commercial terms after purchase (ie non disparagement clauses or refund negates any further claims for costs directly relating to the vehicles problems) in order to limit their liability or blackmail consumers under the law to modify repair, replace or refund a faulty product/service.
- the manufacturers' obligation to ensure that dealerships comply with Australian Consumer Law or new laws relating to such. This should already be standard in their business quality control obligations anyway. It just needs to be monitored and reviewed for compliance regularly.
- a prohibition on manufacturers financing any legal cases on behalf of a dealership or other retailer selling their products and guidelines for a monitorable way for dealerships/retailers to be reimbursed actual legal costs only.

New Practices

- The OFT of NSW has a Complaints Register which the public can assess. This register lists businesses that have had 10 or more complaints registered with the OFT within any given month. This needs to be implemented in each state and also on a national register that is available online to the public. As cars, caravans and motorhomes are major investments they should have their own register by VIN or Chassis numbers.
- The powers of the OFT in Qld need to be reviewed and increased. Staff need to be more helpful and consistent in their advice. Some staff should be able to mediate restitution out of court.
- The tribunals need to have input into any new laws so they can request formats for information they need to start having consistent rulings on failed major purchase products such as motor vehicles, caravans and motorhomes including costs associated directly with the failed product and compensation for manufacturers/retailers who drag the process out or otherwise breach the consumer laws. They could refer to a live register by the OFT perhaps?
- Ultimately, practices need to be established that are uniform across all states.
- The new car retail industry engages, in general, in outdated administrative processes and fails to maintain adequate record keeping. They are essentially in a shambles. It is an industry that needs focused auditing for some years to ensure that they are spending profits on endeavours that will allow regulatory authorities to monitor and review their statistics and for their customers to be allowed access to their own and vehicle records and complaint redress without unreasonable constraints.

Education

- A significant education campaign needs to be established immediately to capitalise on the current efforts of the ACCC and media's spotlight on the motor vehicle industry to educate manufacturers, retailers and consumers on the application of current ACL laws. At the moment the public's general faith in regulatory authorities to enforce the law is very low. It is the belief of many people involved in the lobbying for better compliance and resolution practices that only a small number of consumers who have legitimate claim follow through and register complaints, reveal their problems/duress due to already signed non-disparagement terms or proceed to legal action. Consequently what the study has revealed may only be the tip of the very large iceberg.
- With the advent of new laws specifically to 'lemon vehicles' a comprehensive educational advertising campaign needs to be established and terms included in every sales contract advising of the new laws.

Enforcement

The motor vehicle industry is a very profitable industry. Their claims about lemon vehicle statistics chop and change to suit their purposes. They will claim that there are very few lemon vehicles sold. They will also claim that they cannot afford to cover the ACL to its full intent in regard to repair, replace or refund. If there are truly not many lemon vehicles then it should not really be a problem?

There is ample evidence that the industry is not able to self-regulate within the intent of the current laws and that the problems may lay more in the fact that there are people who are not appropriately skilled and competent to lead a company to lawful conduct in senior positions in these companies than the process and laws themselves being implemented. Many other industries seem to be able to do it on far less profits.

The industry will also claim that to deploy any of the proposed strategies or new laws will put such a financial burden on them or the industry, that they will need to pass implementation and compliance costs onto the consumer. If the industry had been complying all along the costs would be insignificant as it would have been absorbed over a longer period of time. As they appear to be putting significant funding into fighting customers rights and finding ways around their obligations instead, the cost of complying is the result of previous bad business choices, not of unnecessary regulation. With modern technology the costs would be relatively cheap in proportion to their turnover and profits. The introduction of new laws should not provide yet another avenue for car retailers to con customers for higher profits.

Finally, any industry will push the boundaries if there are not obvious and immediate consequences for acting unlawfully. If companies get a warning from the ACCC, make commitments that are not monitored or are not adequate, and to which there are no significant consequences if they breach said commitments or the regulations, they will revert to back to known practices in a very short period of time. Penalty needs to be swift and financially significant and it needs to be sustained. At the moment the financial consequences are so insignificant compared to the profits from not complying that it really does undermine our whole regulatory and legal systems. At the moment consumers are being failed at just about every turn. New and specific 'Lemon Laws' are urgently needed.