# Australian Consumer Law Review

Motor Trade Association of WA

Submission | May 2016

MTA WA

## About MTA WA

The Motor Trade Association of Western Australia (MTA WA) is the State's peak automotive representative association with in excess of 1700 member businesses who in turn employ approximately 30,000 employees.

The MTA WA operates 20 industry sector divisions ranging from new and used vehicle dealerships, parts recyclers, automotive repairers, body repairers, limousine operators, farm machinery retailers, tyre retailers and the heavy transport sector.

The MTA WA is also a member of the Motor Trades Association of Australia (MTAA) and works closely with our state sister industry associations.

## Australia's Automotive Industry

The Australian automotive retail, service and repair industry is Australia's largest small business sector with approximately 65,000 businesses nationally who employ in excess of 360,000 employees. The automotive industry accounts for 2.5% of Australia's gross domestic product or $38 billion p.a.

The Australian automotive retail service and repair industry is a highly competitive sector but is also subject to considerable pressure due to a multiple number of factors. The industry is witnessing unprecedented consolidation from larger groups. The rapid and continued introduction of new technologies is having a twofold impact in that newer products require less maintenance resulting in a decline in available business; and this technology requires a higher skill level from employees which comes at a higher cost to the business. The closure of vehicle manufacturing in 2017 will see approximately 18% of the total automotive industry disappear with thousands of jobs lost.

The Western Australian automotive industry is arguably the most heavily regulated sector in the country. This regulation is strongly supported by those within the industry as it provides very clear operating standards that both assist the business and provide increased confidence for the consumer. The level of disputation between retailer/repairer and consumer is amongst the lowest in the country and this is again attributed to the high level of regulation ensuring that businesses understand their obligations.

The introduction of the Australian Consumer Law (ACL) in 2011 was met with an extensive education program for members conducted by the MTA WA. The Association also spends considerable time in assisting members to understand their obligations under the ACL to reduce and prevent undue legal action being taken.

## The Australian Consumer Law

The Commonwealth's Australian Consumer Law came into operation on 1 January 2011.

To allow for the operation of the ACL in concert with the existing State legislation the Fair Trading Act 2010 (WA) was introduced with the following three key outcomes:

- it implemented the new, nationally uniform Australian Consumer Law in Western Australia as the Australian Consumer Law (WA);
- it replaced the Consumer Affairs Act 1971 (WA), the Door to Door Trading Act 1987 (WA) and the Fair Trading Act 1987 (WA); and
- importantly it allowed for the continuation of the role of Commissioner for Consumer Protection, however it did make a number of changes to the powers of the Commissioner.

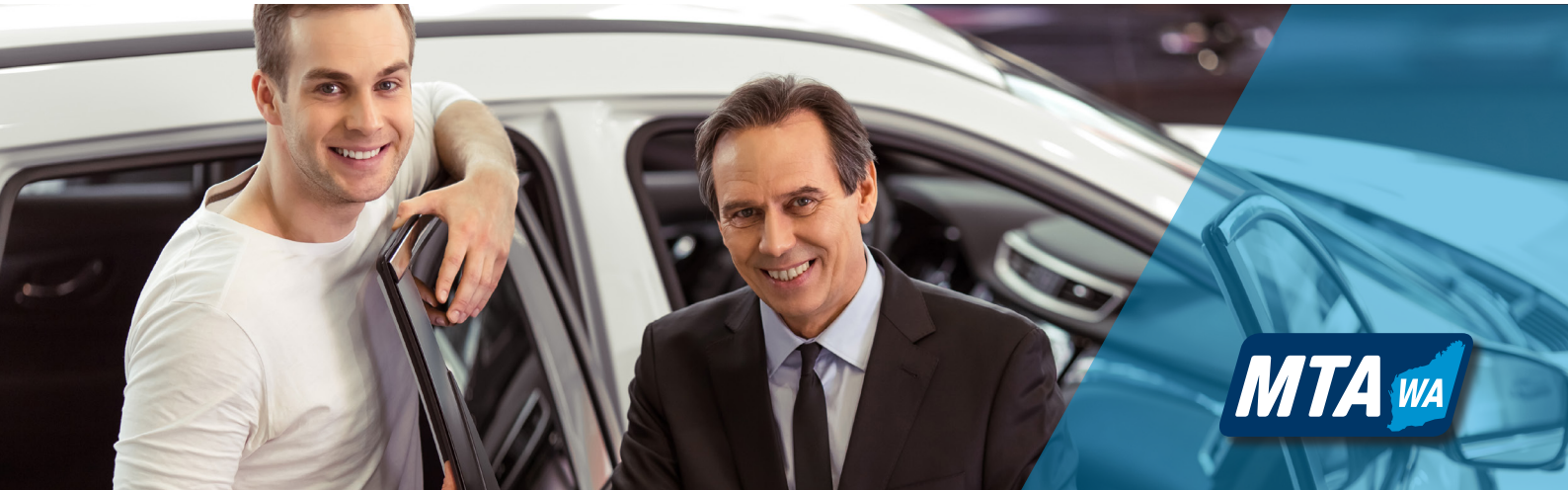
The Australian Consumer Law (WA) effectively replaced the consumer protection laws contained in the Fair Trading Act 1987 (WA) and the Door to Door Trading Act 1987 (WA) and the product safety laws that were contained in both the Consumer Affairs Act 1971 (WA) and the Fair Trading Act 1987 (WA).

The Fair Trading Act 2010 (WA) preserved the power to make State specific codes of practice, and continue the role of Commissioner for Consumer Protection; however changes were made to the powers of the Commissioner.

The most important of these was that the Commissioner would have a new power to institute or defend legal proceedings on behalf of a business where a matter of public interest was involved. Maximum penalties were increased and there were a range of new remedies and enforcement actions provided for, including civil pecuniary penalties and substantiation notices.

With the implementation of the Fair Trading Act 2010 (WA), much of the existing law was retained. However, there are a number of important new or revised provisions in the Australian Consumer Law. Issues relevant to the automotive industry included:

1. Entirely new provisions relating to unfair contract terms.
2. New provisions in relation to "consumer guarantees", which replace, with enhancements, existing provisions relating to implied conditions and statutory warranties.
3. New obligations in relation to accepting payment in advance for goods and services.
4. When a supplier fixes a problem that is not their fault (manufacturer's indemnity).
5. Changes to the unconscionable conduct provisions.
6. Specific new provisions regulating false and misleading representations in relation to testimonials and statutory consumer guarantees.
7. Where goods have more than one displayed price, traders will be under a new obligation to sell the goods at the lowest price or withdraw the item from sale.
8. New obligations for traders in relation to the advertising of goods or services to include a single price, including taxes and other charges.
9. A new right for consumers to require traders to provide an itemised bill for any services.



## Executive Summary

The MTA WA welcomes the Commonwealth's review of the Australian Consumer Law as it provides for an opportunity to have meaningful input into possible amendments that will both maintain the protections for consumers whilst at the same time provide for greater certainty for business owners.

There is broad based support for the Australian Consumer Law from the automotive industry in Western Australia and since inception it has worked well.

The MTA WA surveyed its member base and asked ten questions to ascertain the views of our members both in relation to the application of the Act and the responsibilities of the business when dealing with issues from consumers.

In summary, the survey identified a very good level of understanding in relation to the application of the ACL and how businesses deal with consumers. However there are a number of areas within the Act that require review in order to provide greater clarity and certainty for both the consumer and business owner.

These include:

1. There remains concerns over what constitutes a major and minor failure and at what point a business needs to determine a finding on each.
2. The existing legislation is too heavily weighted to the benefit of the consumer and appears to work on the assumption that businesses are at fault in the first instance.
3. There is a disproportionate relationship between manufacturers, dealers and consumers with the dealer holding the majority of the liability to successfully resolve the issue for the consumer and then seek redress from the manufacturer.
4. There are limited options for business to pursue retailing or supplying businesses when a product fails to perform at the required level resulting in the affected business having to seek redress through the courts.
5. The ACL provide a substantial set of options by which a consumer can be dealt with and the proposal to introduce "lemon laws" are not required.
6. There is a lack of consistency across jurisdictions in the determination of outcomes under the ACL.

Based on the above, the MTA WA makes the following.

## Recommendations

**1.** Provide greater clarity on what constitutes a major and minor fault so that both consumers and businesses better understand their rights and obligations.

**2.** Provide a broad guideline, such as those contained within the statutory warranty system within the Western Australian Motor Vehicle Dealers Act 1973, to establish the parameters under which a claim can be lodged.

**3.** Provide for stronger remedies for dealers to be able to seek redress from manufacturers in the case of claims under warranty.

**4.** Vehicles that are personally imported by individuals under the Federal Government's amendments to importation laws be excluded from coverage by the ACL.

**5.** That "lemon laws" and cooling off periods are not required as the protections afforded by the ACL adequately cover consumers.

**6.** Greater emphasis needs to be placed by the Courts on the determinations of State Consumer Affairs agencies when hearing cases brought before them by consumers who, often, are seeking their day in court.

## Industry Consultation

The MTA WA undertook an initial survey of all members to ascertain the overall views of members in relation to a core set of questions.

The questions were as follows:

**Question 1**

*How many people are employed in your business?*

**Question 2**

*What is the primary nature of your business?*

**Question 3**

*We are seeking your views on any of the above or on any other issues concerning the ACL as they relate to your business. Please provide comments below with specific examples where possible.*

**Question 4**

*Do you understand the ACL consumer guarantees on motor vehicles in regards to the following:*

- *A major failure*
- *A minor failure that cannot be fixed*
- *A minor failure that can be fixed but not within a reasonable time*

**Question 5**

*In your experience, do you believe that the ACL consumer guarantees relating to major failures, minor failures, etc are adequately understood by the following groups:*

- *Consumers*
- *Businesses*
- *Regulators (eg: Consumer Protection, ACCC etc.)*
- *Courts of arbitration (eg: Magistrates Court)*

**Question 6**

*Have you been subjected to an ACL claim?*

**Question 7**

*If yes, what was the outcome of the claim?*

**Question 8**

*In your experience, how does the ACL treat businesses and consumers in relation to second hand goods eg: vehicles and parts? Please explain with examples.*

**Question 9**

*In your experience, what level of support is given by manufacturers/OEMs and parts suppliers when automotive business are faced with an ACL claim?*

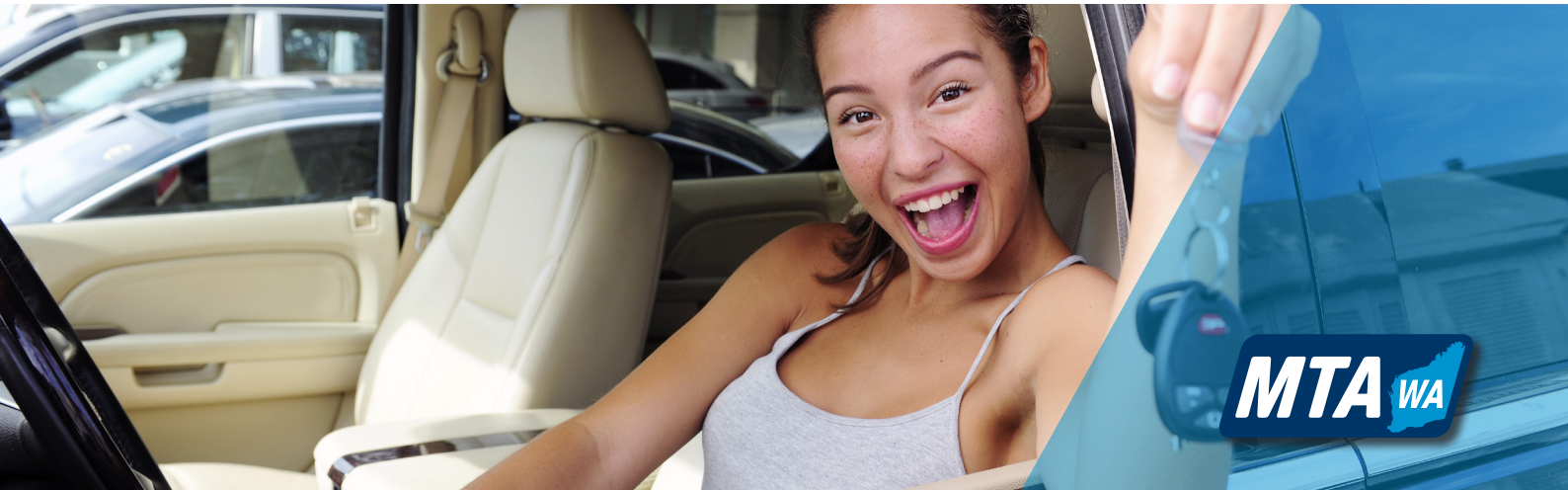
**Question 10**

*Are claims that were once determined solely under the Motor Vehicle Dealers Act 1973 and/or Motor Vehicle Repairers Act 2003, including statutory warranty, now being bypassed to be heard under the ACL?*

In addition to the survey, members were also liaised with through the Divisional meeting program.

Overall there appears to be general satisfaction with the purpose of the ACL, albeit with a number of areas that have been identified where amendments could lead to greater clarity for both consumers and businesses alike.

The majority of members of the MTA WA, in excess of 85%, are small businesses who are already facing significant challenges from a slowing economy, reduced business opportunities and increased costs of doing business, particularly in the regulatory area. The removal of some regulatory burden through greater clarity of obligations under the ACL will in part reduce pressure on these businesses and provide for a more effective management of consumer claims under the ACL.



## Clarity in Fault Definition

In particular the need to provide greater clarity in relation to what is deemed as a major fault as opposed to a minor fault will benefit all parties. Currently the determination of a fault is largely subjective and relies on existing case law, of which there are few cases.

A template citing examples would be of value to both consumers and businesses to assist them in reaching a successful outcome.

## The Value of Established Standards

The ACL takes precedent over any state consumer laws however in Western Australia, the determination of claims has been aided by the existence of the statutory warranty provisions of the Motor Vehicle Dealers Act 1973.

The provisions provide an excellent template for determining issues such as acceptable age and kilometres of vehicles. As an example, Section 34A, part 1 refers to a second hand vehicle that (a) is sold by a dealer to a person who does not by reason of the sale become a trade owner of the vehicle; and (b) is sold at a cash price of over ……. (i) in the case of a motor cycle, $3,500 or such other amount as prescribed; or (ii) in the case of any other vehicle, $4,000 or such other amount as is prescribed; and (c) on the day of the sale is within the limits specified in subsection (2).

Subsection (2) then provides for, in the case of any other vehicle that is not more than 12 years old and has not travelled more than 180,000 kms. These parameters provide a very clear guideline for businesses when dealing with consumer complaints and it is a fair assessment to state that the existence of these parameters has had a positive effect on the number of claims proceeding through to the court system.

It is the position of the MTA WA that the ACL would benefit from the inclusion of similar standards when referring to motor vehicles.

## Dealers vs Manufacturers

The ACL requires the consumer seek a remedy from the retailer, regardless of if the fault was as a result of a manufacturing issue or not. This is a reasonable proposition and would work well if the retailer could rely on the manufacturer providing acceptable levels of support.

The current state of play sees dealers placed at a considerable disadvantage, and being exposed to high levels of liability if they are to deal with a consumer complaint in accordance of the intent of the ACL.

As an example, the ACL requires that the retailer/dealer, repairs the consumer's vehicle and then the retailer/dealer claims reimbursement for costs from the manufacturer. The Act requires that the consumer can claim for out of pocket and additional expenses arising from the fault. This includes the use of  a hire car, loss of earnings etc. The first issue impacting on dealers is that manufacturers will effectively penalise the dealer by limiting the amount that can be claimed for any repair. This is most commonly done by restricting the amount of time that the dealer can take to repair the vehicle and it is not uncommon for manufacturers to allow for half of the actual time that it takes to affect a repair. The second issue for dealers is that manufacturers will either not accept claims for out of pocket expenses or place limitations on these. An example of this can be seen with the provision of loan cars which cost the dealer but which the manufacturer will not compensate for.

The review therefore must place far greater and stringent compliance requirements on manufacturers to fully cover claims made against their product.  If this were to be done the time taken to successfully resolve consumer complaint would be reduced as the dealer will have greater confidence that they will receive fair compensation for their time from the manufacturer.

## Personally Imported Vehicles

The Federal Government has introduced a bill that, once passed, will allow for the personal importation of new vehicles from 2018.

The automotive industry has raised its concerns with Government in relation to the differing standards that apply to vehicles manufactured for Australia to those manufactured for other market and the potential for consumer detriment.

Key to these concerns is the perception by individuals accessing this opportunity, that because the vehicle is new, it will automatically be covered by the manufacturer's warranty. This is not the case.

Dealers cannot be held accountable for issues such as warranty work or manufacturer recalls and on that basis the MTA WA strongly recommends that the ACL specifically excludes this type of vehicle.

## Lemon Laws and Cooling Off Periods

MTA WA does not support the introduction of lemon laws or cooling off periods.

The MTA WA has consulted extensively with the industry in relation to the introduction of lemon laws and cooling off periods. The first comment that the MTA WA would make is that there does not appear to be a recurring issue at a warranted level in the market to justify the introduction of either lemon laws or a cooling off period.

The issue of a cooling off period is not as simple as the consumer changing their mind and the contract being torn up. Vehicle transactions can be complex and most commonly involve a vehicle trade-in and financing. All factors of the transaction must be considered when looking at the potential introduction of a cooling off period. There are also the additional costs incurred by the dealer such as marketing costs, fees to web based sales sites, costs associated with holding stock.

Currently contracts to purchase a vehicle do contain the ability for the dealer to charge up to 15% of the purchase price of the vehicle as a penalty, should the contract be cancelled outside of the conditions provided for in the contract. In practice it is very rare for any dealer to charge the full 15% of the purchase price, with dealers preferring to maintain a relationship with the consumer that results in further business into the future.

In other words, dealers do not burn consumers.

There is a suggestion that the introduction of lemon laws or cooling off periods will provide a safeguard for consumers however it should be noted that there are already a range of remedies that provide safeguards for the consumer, non the least of these being the existing provisions within the ACL.

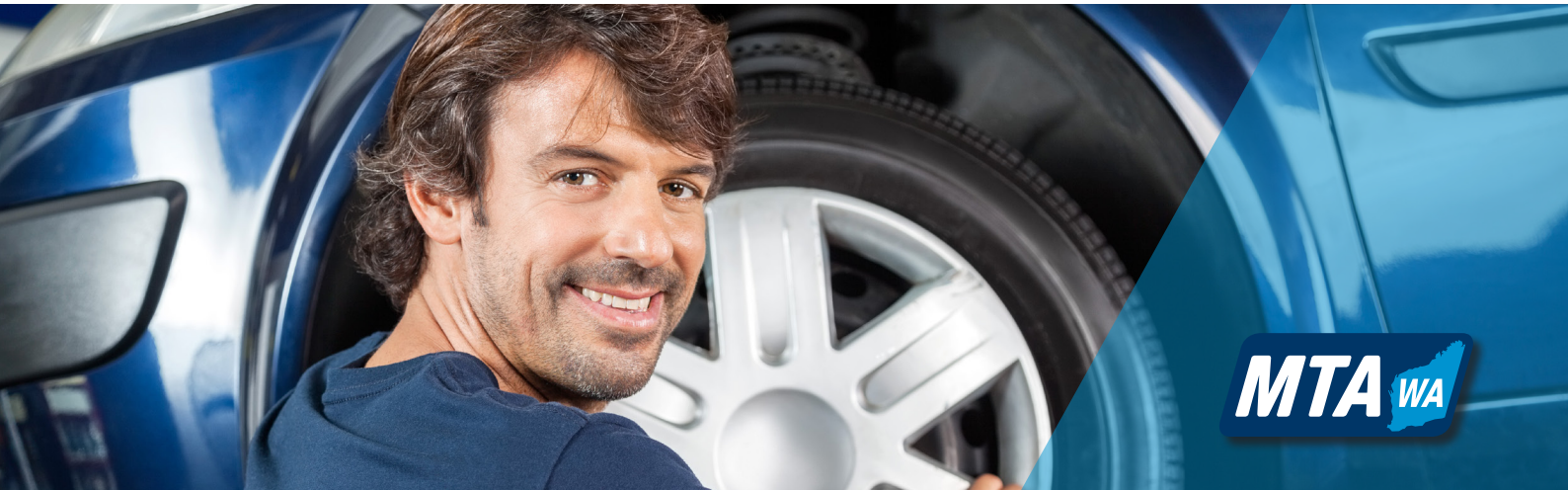
The purchase of a vehicle is not an impulse buy which can leave consumers exposed to pressure tactics. The reality is that, with the strong presence of internet based sites, the gestation period for the purchase of a vehicle can be as much as a month. What has changed is the amount of time consumers now spend in the dealership, finalising their selection of vehicle and negotiating the transaction which is considerably less than in pre-internet times.

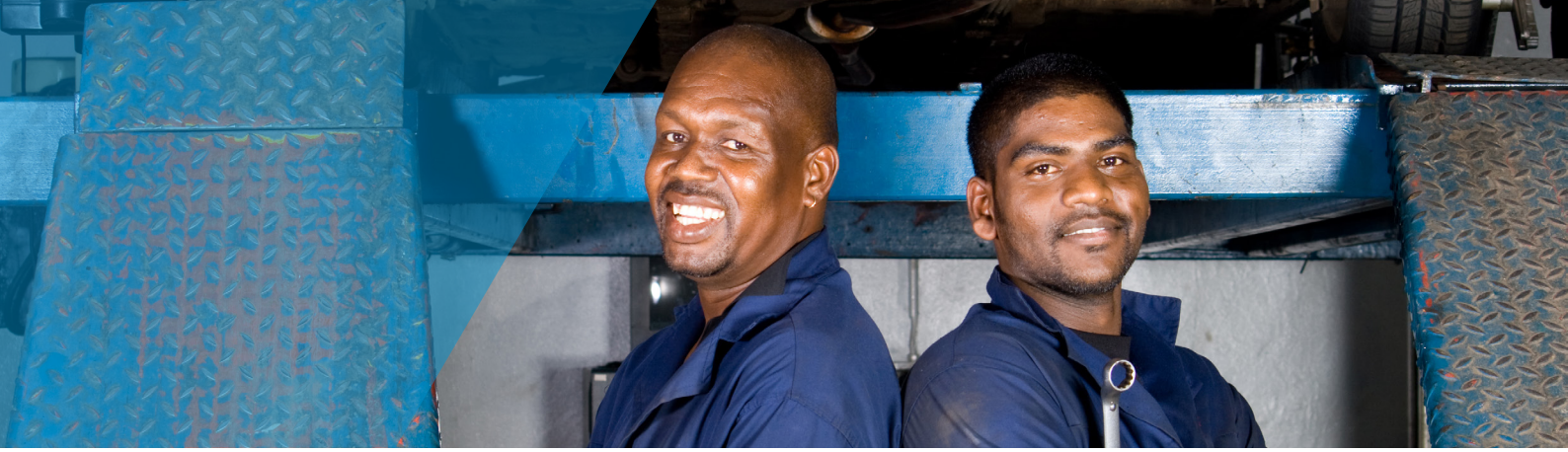
In today's marketplace consumers are far better informed in relation to the vehicle they wish to purchase, the performance and features of the vehicle and their rights under consumer laws.

The automotive industry invests heavily in training so that salespeople behave in a professional and transparent manner. The MTA WA acknowledges that there will always be individuals who will employ pressure tactics but would also contend that these are the minority and again this does not justify the imposition of cooling off periods.

The MTA WA notes that in total 33 formal complaints were received by the Department of Commerce in relation to change of mind or cooling off periods. When one considers that over the 43 months that these complaints were received the industry sold approximately 350,000 new cars alone, a complaint rate of 0.009% does not demonstrate a significant failure in the market. It also must be remembered that this figure refers to new car sales alone and does not include the several hundred thousand used vehicles traded in the same period.

The MTA WA would also submit that should lemon laws be introduced, the incidence of consumers negotiating a deal with one dealer and then shopping this deal around in an attempt to better it would increase substantially, leaving the original dealer wearing a cost.





Industry research clearly shows that the key reasons for consumers wanting to withdraw from a contract are buyer's remorse or that they had found a similar vehicle at a better price. Neither of these reasons would be considered a valid reason to withdraw from a signed contract.

Therefore, the MTA WA does not support the introduction of either a cooling off period or lemon laws for the automotive sector based on the lack of demonstrable evidence to show that there is a problem in the market place.

## The Legal Process in Relation to the ACL

The existing process for the majority of consumer complaints is that if the consumer cannot get a satisfactory response from the service provider, then they will generally take their complaint to the Consumer Protection at the Department of Commerce.

The Department is well versed in the handling of consumer complaints and manages this process extremely well. It is not uncommon for the Department to provide advice to a consumer that the service provider has done everything that is required of them under the ACL and that, in their opinion, there is nothing more the Department can do.

In general terms that should bring the matter to a close however, every individual has a right to take a matter to Court and the majority of complaints end up in the Magistrates Court as a small claim meaning that the consumer does not require legal representation.

The issue with this is that the Magistrates Court appear to place little balance on the fact that the matter may have already been dealt with by the Department who have dismissed the complaint and despite this there have been a number of cases where the court has ruled in favour of the consumer.

The inconsistency between the applications of the ACL across magistrates does create a degree of uncertainty for business and this is a matter that needs to be reviewed.

## Conclusion

The MTA WA reaffirms its support for the retention of the ACL but would also be supportive of introducing amendments that provide greater clarity on rights and obligations for both consumers and business.

The MTA WA reiterates that the following recommendations should be considered as part of the review.

## Recommendations

1. Provide greater clarity on what constitutes a major and minor fault so that both consumers and businesses better understand their rights and obligations.

2. Provide a broad guideline, such as those contained within the statutory warranty system within the Western Australian Motor Vehicle Dealers Act 1973, to establish the parameters under which a claim can be lodged.

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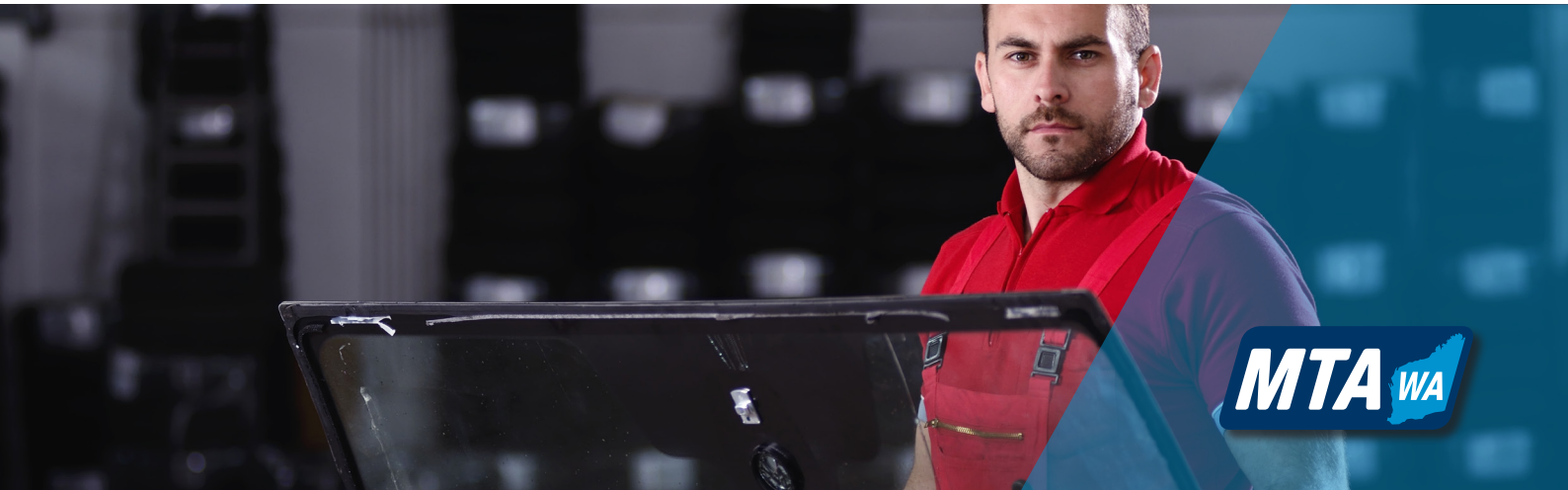

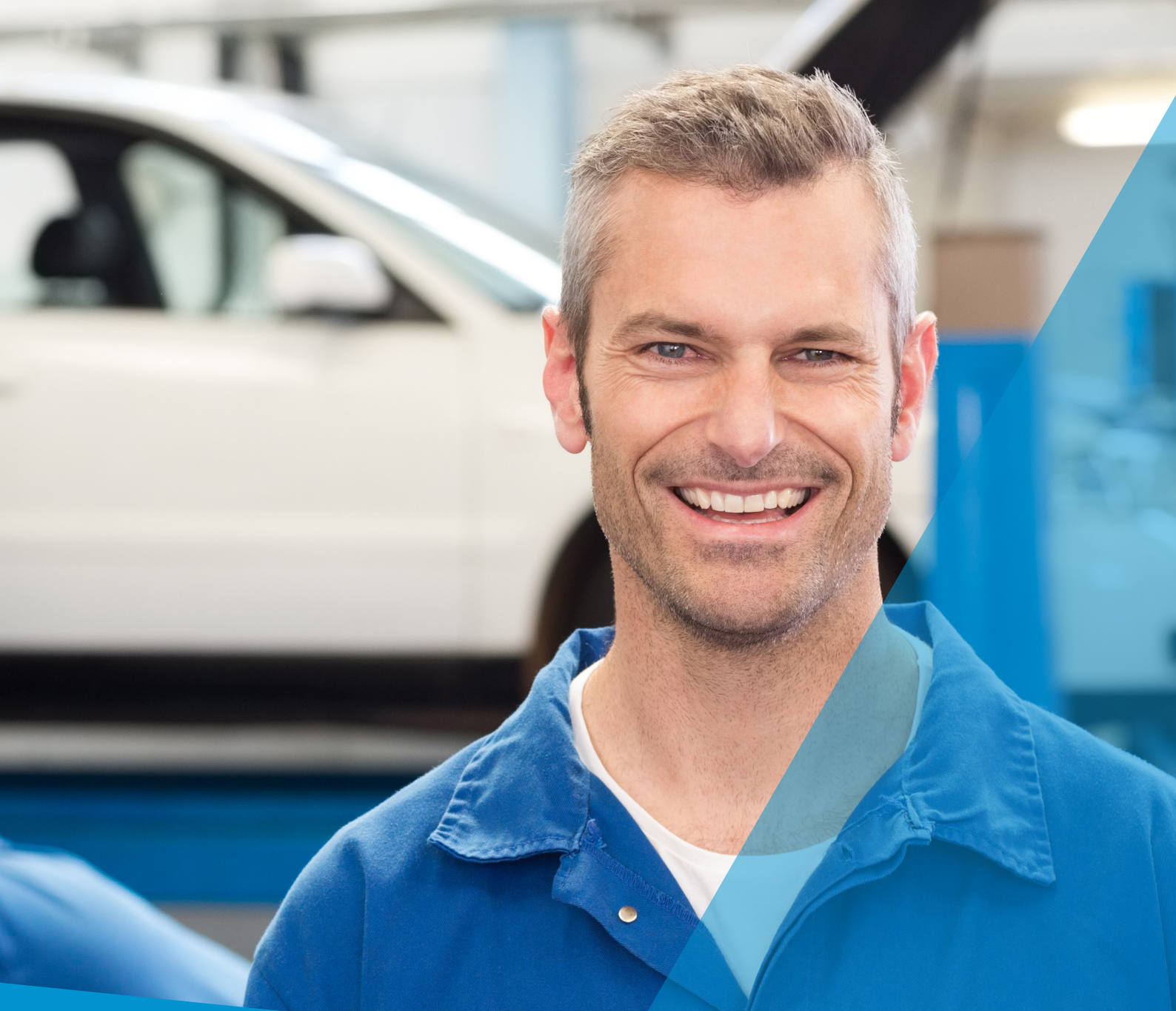

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