
CONTEMPORARY LEGAL THINKING

**BRIEFING NOTE:
CONSUMER WINS AGAINST
DISTRIBUTOR IN NCAT
PROCEEDINGS**

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Background

In early 2019, the Consumer sought to purchase a new, premium quality vehicle for work and also, personal use. As driving to various destinations was a significant part of the Consumer's work, he required a vehicle which had navigation capabilities, as well as bluetooth/CarPlay technology that could be used for telephone calls whilst driving. Unsurprisingly, the prospective vehicle had to be free from defects, safe and durable.

The Kia Stinger (Stinger) appeared to meet all of the Consumer's requirements. After test driving the vehicle at the dealership, the Consumer signed a contract for the purchase of the vehicle. By late April, the Consumer was driving his brand-new Stinger.

At no time was the Consumer informed about any pre-existing issues with the Stinger.

In the first 20 months of ownership, the Consumer made 13 separate visits to Kia dealerships and endured 45 days without proper use of his vehicle. During that period, the Consumer experienced the following issues with his vehicle: brake shuddering; faulty car alarm; audio failure, door unlocking failure; seat heating-cooling function failure; front parking sensor failure; faulty sunroof; CarPlay failure; Mode button failure; touchscreen failure; driver seat squeaking; and interior light (glovebox) failure.



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Application to NCAT

In October 2020, having provided Kia with multiple opportunities to repair the vehicle's faults, the Consumer lodged an application in the Consumer and Commercial Division of the New South Wales Civil and Administrative Tribunal (NCAT) seeking:

- A full refund for the purchase price of the Stinger.
- A full refund of the finance interest and fees paid to date; and
- A full refund of the NCAT application fee.

The Tribunal was satisfied that the matter was a *consumer claim* given that the Consumer was seeking a remedy in relation to the supply of a good (namely, a vehicle).

In most consumer claims, the Tribunal does not have jurisdiction to make an order(s) in excess of \$40,000. However, there is no monetary limit on the Tribunal's jurisdiction to make orders for matters involving the supply of a new motor vehicle used substantially for private purposes. Therefore, the Tribunal had jurisdiction to award a full refund of \$67,611.64 if it saw fit.

The Tribunal was also satisfied that the Consumer commenced his action against Kia within the specified time limit.

The Consumer's Claims

The Consumer made the following claims under the Australian Consumer Laws:

- i. That Kia breached its guarantee to provide a vehicle of acceptable quality.
- ii. That the problems with the vehicle, independently and together, constituted a *major failure* by Kia to comply with the guarantee as to acceptable quality.
- iii. By virtue of Kia's *major failure*, the Consumer was entitled to reject his vehicle and seek a full refund.

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Kia's Position

In response, Kia clarified its position as follows:

- i. After the Consumer's NCAT application was lodged, Kia found issues with the driver's seat heat/cool function and brake shudder.
- ii. Kia could not fault the other problems raised by the Consumer.
- iii. Kia rejected the remedies sought by the Consumer and instead offered to repair the issues identified, at no cost to the Consumer.
- iv. Kia argued the Consumer had not provided an expert report as directed by the Tribunal and was merely relying on written opinions of two independent repairers.

Burden of Proof

The Tribunal stated that the lack of expert evidence did not defeat the Consumer's claim. It confirmed that the test was whether the Tribunal was satisfied, on the civil standard of proof, of the matters before it.

As such, the Consumer was required to establish, on the balance of probabilities, that his evidence was sufficient to support the claim that the vehicle was not of acceptable quality, in breach of the statutory guarantee.

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Evidence

In addition to his oral evidence, the Consumer relied on:

- An Affidavit annexing evidence of inspections carried out by Kia dealerships seeking to diagnose the defects.
- Submissions and USB videos of the Stinger's faults.
- Letters from two independent repairers.
- Service Records.

Kia relied on:

- Oral evidence from Kia's Customer Relations Manager.
- A written response setting out Kia's position.

Legal Test and Tribunal Determination

To obtain a refund, the Consumer had to establish the following:

1. That the vehicle acquired was not fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe or durable.

The Tribunal was satisfied from the Consumer's evidence that the vehicle was not fit for all the purposes for which a vehicle is commonly supplied, not free from defects and not safe.

The Tribunal was satisfied that the brake issue was recurrent and it adversely impacted the vehicle's safety. The Tribunal concluded that Kia failed to comply with its guarantee as to acceptable quality.

2. The vehicle would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure.

The Tribunal was satisfied from the evidence that it was not unreasonable for the Consumer to expect that a premium-priced performance vehicle would be at best, free from defects, and at worst, that any defects which occurred would be remedied. The Tribunal was satisfied that Kia's failure to comply with the guarantee as to acceptable quality was a *major failure*.

3. That the vehicle was rejected by the Consumer in the period within which it would be reasonable to expect the failure to comply with a guarantee to become apparent.

The Tribunal was satisfied with evidence (email correspondence) of the Consumer's rejection of the Stinger in August and October 2020. The Tribunal concluded that the Consumer demonstrated a willingness to allow a reasonable time for Kia to remedy the defects and that the rejection period had not expired when the Consumer rejected the vehicle.

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Tribunal Orders

The Tribunal ordered Kia to refund the invoiced purchase price to the Consumer (excluding registration and third-party insurance costs, of which the Tribunal said the Consumer had enjoyed the benefit).

The Tribunal did not make any orders regarding finance charges claimed by the Consumer on the basis that they were not a matter for Kia.

The Tribunal did not make any orders with respect to the application filing fee on the basis that it was a cost incidental to the Consumer's claim and no special circumstances warranted a costs order.

Key Takeaways for Dealers

1. A Consumer can pursue the distributor directly without involving the Dealer. In some circumstances, this should be encouraged if the distributor is acting unreasonably.
2. There is no monetary limit on a Tribunal's jurisdiction to make orders for matters involving the supply of a new motor vehicle that is used substantially for private purposes. For example, a vehicle purchased for \$200,000 could still be prosecuted via an NCAT claim rather than more expensive Court litigation.
3. Lack of expert evidence does not defeat a Consumer's claim.



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