



Statement of Reasons

Notification lodged by
Mitsubishi Motors Australia Limited
in respect of
exclusive dealing conduct whereby a 10 year or 200,000 km
warranty is offered to purchasers of new Mitsubishi vehicles who
have their vehicle exclusively serviced with Mitsubishi dealers and
service centres

Notification number: N10000534

18 December 2020

Commissioners: Sims
Keogh
Rickard
Court
Ridgeway

Summary

The Australian Competition and Consumer Commission (the **ACCC**) does not object to the exclusive dealing notification lodged by Mitsubishi Motors Australia Limited (**MMAL**) on 11 September 2020 based on the information available at this time.

Under the notification, MMAL is offering a 10 year or 200 000km (whichever occurs first) warranty (the **Conditional Warranty**) to purchasers of new Mitsubishi vehicles on the condition that those consumers acquire aftermarket servicing for their new vehicle exclusively from a Mitsubishi dealer or service centre (**Notified Conduct**).

Purchasers of new Mitsubishi vehicles will continue to remain entitled to MMAL's standard five-year warranty for their vehicle when they service their vehicle in accordance with MMAL's service schedules and associated documentation (regardless of whether they service their new vehicles with a Mitsubishi dealer or service centre). Similarly, purchasers will remain able to obtain repairs (as distinct from servicing), including repairs undertaken pursuant to the consumer guarantees, from an independent repairer or service centre without affecting the Conditional Warranty.

In response to the notification, the ACCC received around 150 public submissions and a number of confidential submissions. The public submissions consisted of (approximately) 110 from independent mechanics, 10 from aftermarket parts suppliers, 25 from members of the public, five from industry associations, one from a consumer group and one from a government agency. The majority of submissions opposed the notification.

When businesses lodge a notification for exclusive dealing conduct, they receive protection from legal action for that conduct automatically on the day the notification is lodged with the ACCC. The protection continues unless or until the notification is revoked by the ACCC or withdrawn by the notifying party.

The ACCC can only revoke a notification if it is satisfied that the Notified Conduct:

- has the purpose, effect or likely effect of substantially lessening competition, and
- in all the circumstances, will not result in likely public benefit which would outweigh the likely public detriment.

The ACCC is not satisfied, based on the information it has received to date, that the Notified Conduct has the purpose, effect or likely effect of substantially lessening competition in any market.

Independent mechanics are an important source of competitive constraint, including on MMAL, Mitsubishi dealers and service centres. Independent mechanics generally offer highly comparable aftermarket goods and services for Mitsubishi vehicles.

Independent mechanics have raised concerns about losing customers as a result of the Notified Conduct, and the ACCC accepts that it is likely to result in a lower proportion of Mitsubishi vehicles being serviced by independent mechanics. While recognising the effect this will have on those businesses, the ACCC has to consider the likely effect of the Notified Conduct on competition more broadly.

In that context, despite the Notified Conduct, the ACCC considers that independent mechanics will likely continue to provide an important competitive constraint on MMAL (regarding its overall decisions about pricing and services, such as with respect to its capped-price servicing program) and its dealers and service centres (regarding pricing and servicing decisions to the extent allowed by MMAL). While some independent mechanics

may choose not to expand or continue their servicing and repair services for Mitsubishi vehicles as a result of the Notified Conduct, the ACCC considers that a significant portion of independent mechanics are likely to continue to offer, or be able to offer, consumers highly comparable services in terms of price and level of service. Accordingly, the ACCC does not consider the impact of the Notified Conduct on competition is likely to be substantial.

Given the important role of independent mechanics, the ACCC is concerned to ensure that the Notified Conduct does not remove the constraint imposed by independent mechanics on the price and servicing decisions of Mitsubishi dealers and service centres. If appropriate evidence should come to light that the Notified Conduct is adversely affecting the ability of independent mechanics to compete on their merits to a substantial degree, and at that time the ACCC does not consider the public benefits of the Notified Conduct outweigh the public detriments, including from a lessening of competition, the ACCC is able to move to revoke the notification.

To revoke the notification, the types of information the ACCC would consider include:

- the extent of the notification's impact on the ongoing viability of independent mechanics, and the extent to which this substantially reduces the constraint independent mechanics provide on MMAL and its dealers and service centres, and
- the extent to which other vehicle manufacturers seek to engage in similar conduct, and the potential impact on the relevant markets.

Given the ACCC's conclusion that the evidence does not indicate the Notified Conduct has the purpose, effect or likely effect of substantially lessening competition, it is not necessary for the ACCC to form a view on whether the Notified Conduct is likely to result in a benefit to the public, and whether or not that benefit would outweigh any detriment to the public, including detriment resulting from any lessening of competition.

However, given the number of submissions received from interested parties on the likely public benefits and public detriments, the ACCC has provided an overview of the issues raised, some preliminary analysis, and types of evidence that the ACCC would consider if assessing the public benefits and detriments of the Notified Conduct in future.

Submissions from interested parties raised concerns that the Notified Conduct may undermine efforts in the sector to increase access by independent mechanics to the technical information and data required to service and repair motor vehicles. The Australian Government is currently designing a mandatory scheme for manufacturers' motor vehicle service and repair information to be made available to independent mechanics. The ACCC considers it is too early to determine whether and how the Notified Conduct may affect the effectiveness of the upcoming mandatory information scheme.

The ACCC would welcome information from interested parties regarding the impact of the Notified Conduct on the information sharing scheme once it is implemented. The ACCC will also consider whether subsequent policy reviews of the scheme identify extended warranties as significantly impacting competition and the effectiveness of the scheme in delivering its objectives.

MMAL has submitted that the Notified Conduct is likely to result in public benefits, including that the extended warranty period will be attractive to or valued by some consumers and makes Mitsubishi more competitive with other vehicle manufacturers, provides cost savings to consumers and increased opportunities to control the quality of servicing of Mitsubishi vehicles.

The ACCC recognises that the Conditional Warranty, by adding five years to MMAL's standard five-year warranty and by being transferrable to subsequent owners, is an enhanced product offering to consumers.

In the event that a future assessment of the public benefits and detriments is required, the ACCC would consider these public benefits against any anti-competitive detriment arising from the conduct, including the extent to which competitors of MMAL have responded to the Notified Conduct.

1. The notification

- 1.1. Mitsubishi Motors Australia Limited (**MMAL**) is an importer and distributor of Mitsubishi-manufactured vehicles. MMAL distributes Mitsubishi vehicles to a network of franchisee dealers that then sell the vehicles to consumers and offer servicing and repair services. MMAL also licenses standalone service centres to repair and service Mitsubishi vehicles, but not to sell vehicles to consumers.
- 1.2. On 11 September 2020, MMAL lodged exclusive dealing notification N10000534 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.3. Under the notification, MMAL is offering a 10 year or 200 000km (whichever occurs first) warranty (the **Conditional Warranty**) to purchasers of new Mitsubishi vehicles on the condition that those consumers acquire aftermarket servicing for their new vehicle exclusively from a Mitsubishi dealer or service centre (the **Notified Conduct**).
- 1.4. The Conditional Warranty is also conditional upon consumers completing scheduled capped-price services within the time and kilometre limitations set by MMAL's servicing schedules.
- 1.5. The Conditional Warranty does not apply to Mitsubishi vehicles that were purchased before the Conditional Warranty product was launched by MMAL in October 2020. The proportion of Mitsubishi vehicles eligible to be covered by the Conditional Warranty will therefore increase gradually over time.
- 1.6. MMAL submits that, under the Notified Conduct, consumers will:
 - remain entitled to MMAL's standard five-year warranty for new Mitsubishi vehicles when the consumer services the vehicle in accordance with MMAL's service schedules and associated documentation, regardless of whether the consumer services the vehicle with Mitsubishi dealers or service centres or with independent service and repair businesses (including non-Mitsubishi franchised servicing businesses) (hereafter, **independent mechanics**)
 - lose any remaining years of the Conditional Warranty, but retain any remaining years of the standard five-year warranty, if the consumer does not service the vehicle with a Mitsubishi dealer or service centre in accordance with the terms and service schedule for the Conditional Warranty
 - remain able to obtain repairs (as distinct from servicing), including repairs undertaken pursuant to the consumer guarantees under the Australian Consumer Law, from independent mechanics without affecting the Conditional Warranty, and
 - be able to transfer the Conditional Warranty to subsequent owners of their vehicles.
- 1.7. MMAL submits that it does not expect any significant increase in the wholesale prices charged to Mitsubishi dealers arising from the Conditional Warranty. While there are some charges to Mitsubishi dealers that are attributable to the Conditional Warranty, the ACCC notes that consumers will pay for the servicing under the Conditional Warranty in accordance with MMAL's capped-price servicing program.
- 1.8. MMAL submits that the Notified Conduct is not related to access to the technical information and data required to service and repair Mitsubishi vehicles. MMAL submits that the Notified Conduct does not change the ability of independent mechanics to access MMAL's technical information and data.

- 1.9. Legal protection for the Notified Conduct commenced on the day of lodgement and will continue until and unless the notification is revoked by the ACCC or withdrawn.
- 1.10. Further information in relation to the notification is available on the ACCC's [public register](#).

Rationale for the Notified Conduct

- 1.11. MMAL submits its standard five-year manufacturer's warranty for new Mitsubishi vehicles has been met with warranty offerings of comparable and longer lengths by other manufacturers. MMAL's stated reasons for engaging in the Notified Conduct include continuing to differentiate Mitsubishi vehicles and remaining competitive with other motor vehicle manufacturers.¹ MMAL also submits the Notified Conduct will enable it to ensure Mitsubishi vehicles are serviced with a high degree of care and skill, because MMAL is able to exercise significantly greater control over its dealers and service centres than over independent mechanics.
- 1.12. MMAL further submits that a purpose of the Notified Conduct is to increase the attractiveness of new Mitsubishi vehicles to consumers to make MMAL (through its dealers) more competitive in the market for the supply of new vehicles. MMAL submits that its market share in the supply of new vehicles has declined to 6.4 per cent in the 2020 calendar year to date from 7.8 per cent in 2019, and has declined further to 6.1 per cent in the period between April 2020 and October 2020.²

2. The exclusive dealing notification process

- 2.1. In broad terms, exclusive dealing occurs when one person trading with another restricts the other's freedom to choose with whom, in what or where it deals. Exclusive dealing is common in many business arrangements.
- 2.2. Exclusive dealing can take a number of forms and may include:
 - the supply of goods or services on condition that the purchaser will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier, or
 - refusing the supply of goods or services because the purchaser will not agree to any of these conditions.
- 2.3. In this instance, MMAL is offering the Conditional Warranty on condition that the consumer will not acquire aftermarket servicing from independent mechanics that compete with Mitsubishi dealers and service centres. MMAL is also refusing to offer the Conditional Warranty to consumers who do not meet these conditions.
- 2.4. The *Competition and Consumer Act 2010* (the **Act**) allows a business to obtain protection from legal action for exclusive dealing conduct by lodging a notification describing the conduct (under section 93 of the Act) or by obtaining an authorisation for the conduct (under section 90 of the Act).
- 2.5. While a notification is in force, the business is able to engage in the exclusive dealing conduct as described in the notification without the risk of breaching the exclusive dealing provisions of the Act. The legal protection provided by an exclusive dealing notification commences automatically on the day a notification is validly lodged. The legal protection remains unless or until the notification is revoked or withdrawn.

¹ Notification of Exclusive Dealing N10000534, lodged by Mitsubishi Motors Australia Limited, 11 September 2020.

² MMAL letter to ACCC, 16 November 2020, p 3.

- 2.6. Exclusive dealing is only a breach of the Act, and the notification can only be revoked, if the restriction meets the test set out in section 93(3) of the Act, i.e. that it has the purpose, effect or likely effect of substantially lessening competition, and in all the circumstances, will not result in likely public benefit which would outweigh the likely public detriment.

3. Industry background

Motor vehicle servicing and repairs

- 3.1. Most vehicle manufacturers, including MMAL, are active in both the supply of new vehicles and the provision of aftermarket services, such as servicing, repairs and the supply of spare parts. Services are often scheduled by a manufacturer to ensure vehicles are properly maintained, at least for the early years of the vehicle's life, but consumers may also choose to purchase non-scheduled services (for instance, before taking their vehicle for a long drive). Servicing usually involves checks, adjustments and replacement of consumable items such as oil and other fluids. Repairs are typically not included in services and may be required, for instance, when components of the vehicle are damaged (which may then require replacement of the damaged part).
- 3.2. MMAL offers a capped-price servicing program together with the Conditional Warranty. Capped-price servicing sets upper limits on the prices charged by dealers and service centres for each service over the duration of a scheduled servicing program, and these prices typically increase over the length of the program. Fixed-price servicing involves a service at an agreed price that will cover specified checks and adjustments. The capped-price servicing program is not the subject of this notification.
- 3.3. Independent mechanics are not authorised or affiliated with any vehicle manufacturer and are usually standalone businesses or part of a larger franchise network of service centres. As a sector, independent mechanics provide competitive constraints on authorised dealers and service centres by offering consumers highly comparable aftermarket goods and services.

Product warranties

- 3.4. A manufacturer's standard warranty usually sets out minimum service requirements that must be complied with to avoid limiting or voiding the warranty. MMAL's current standard warranty lasts for five years or 100 000km (whichever occurs first). Manufacturers typically include clauses in the warranty terms noting that, to avoid limiting or voiding the warranty, service or repair work must be carried out by qualified staff, according to the manufacturer's specifications and using appropriate quality parts. However, subject to complying with these requirements, consumers are usually not required to have their vehicle serviced and repaired within the manufacturer's authorised dealer network.
- 3.5. Extended warranties offered by manufacturers or third-party providers provide extra coverage (in terms of distance travelled or duration of time) and typically come at an additional cost. Extended warranties, such as the Conditional Warranty, may also contain different requirements to be complied with to avoid limiting or voiding the warranty. All warranties are separate from the consumer guarantee entitlements that consumers have by default under Australian law (discussed further below).

Consumer guarantees under Australian consumer law

- 3.6. The Australian Consumer Law (the **ACL**) contains a number of consumer guarantees that apply automatically to many transactions, including when a consumer purchases a new motor vehicle.³ Relevantly, the consumer guarantees:
- must be provided by businesses regardless of any other warranties they provide or sell to consumers
 - include the guarantee that the good is of acceptable quality,⁴ and
 - provide that, where a manufacturer (such as MMAL) is responsible for a failure to comply with a consumer guarantee (such as that of acceptable quality), suppliers (such as Mitsubishi dealers) have rights to recover the cost of any remedies given to consumers (i.e. repairs, refunds or replacements) from the manufacturer.
- 3.7. In practice, the consumer guarantees provide consumers with a number of entitlements when they purchase a new motor vehicle. For instance, a consumer is entitled to their choice of a repair, replacement vehicle or a refund of the purchase price, if their vehicle is not of an acceptable quality or fit for purpose such that there is a major failure with the vehicle. Where there are issues with a new motor vehicle that do not amount to a major failure, the supplier may choose to provide a refund, or to replace or repair the vehicle.

Other ACL provisions

- 3.8. In addition to the consumer guarantees, the ACL prohibits businesses from engaging in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses,⁵ for example, claims by a manufacturer that misrepresent a vehicle's performance or a consumer's rights under the ACL.

Upcoming mandatory scheme for the sharing of motor vehicle service and repair information

- 3.9. The Australian Government is currently designing a mandatory scheme for manufacturers' motor vehicle service and repair information to be made available to independent mechanics. The aims of the scheme are to provide a level playing field in the sector and allow consumers to have their vehicles safely repaired by the repairer of their choice.
- 3.10. During February and March 2019, Treasury conducted public consultations on the general principles of the scheme.⁶ In October 2019, the Government announced a decision to progress the scheme using primary legislation (rather than a mandatory code of conduct under the Act) as it allows greater flexibility for the scheme's design.⁷ An exposure draft of the Bill was released on 18 December 2020 for public

³ Part 3-2, Division 1 of the ACL.

⁴ ACL s 54.

⁵ ACL s 18; see also ss 29 and 33.

⁶ Treasury, Mandatory Scheme for the Sharing of Motor Vehicle Service and Repair Information: Consultation paper, February 2019, available at: <https://treasury.gov.au/consultation/c2019-t358022>.

⁷ Treasury, Mandatory Scheme for the Sharing of Motor Vehicle Service and Repair Information: Consultation update, October 2019, available at: <https://treasury.gov.au/publication/p2019-30661>.

comment.⁸ The scheme is proposed to involve an enforcement role for the ACCC, with penalties potentially applying after a transition period.

Previous ACCC work

- 3.11. In recent years, the ACCC has considered a number of exclusive dealing notifications lodged by other vehicle manufacturers. In particular, Subaru, Hyundai and Holden have in the past lodged notifications involving exclusive dealing conduct regarding extended warranties, which, to date, the ACCC has allowed to stand.
- 3.12. In December 2017, the ACCC released its final report for the New Car Retailing Industry Market Study (the **Market Study Report**).⁹ Key findings relevant to this notification include:
- the commercial arrangements between manufacturers and dealers can constrain and influence the behaviour of dealers in responding to complaints. Manufacturers such as MMAL usually exercise a high degree of control over their dealers and service centres
 - it may be difficult for consumers to accurately assess the value of any additional consumer protections offered by extended warranty products compared to the rights they already have under the consumer guarantees or the standard manufacturer warranty
 - the majority of consumers take their new vehicles to manufacturer authorised dealers for repairs and servicing. This appears to be, in part, the result of a mistaken belief that the manufacturer's warranty requires them to only use authorised dealers
 - there is a dominant 'culture of repair' underpinning manufacturers' systems and policies for dealing with car defects and failures, even where cars have known and systemic mechanical failures which would entitle a consumer to a replacement or refund under the consumer guarantees
 - access to parts is sometimes restricted. These restrictions may be legitimate but may also occur to steer more repair and service work back to authorised dealers, and
 - the voluntary *Agreement on Access to Service and Repair Information for Motor Vehicles* has been ineffective in providing independent mechanics access to technical information that is required to repair and service new vehicles.

4. Consultation

- 4.1. The ACCC conducted a public consultation process regarding the notification. This section describes submissions from interested parties and MMAL's responses to those submissions. The ACCC's views are then set out in the next section.
- 4.2. The ACCC requested further information from MMAL on 9 October 2020 and again on 21 October 2020. MMAL provided responses to these information requests on 23 October 2020, 16 November and 20 November 2020.

⁸ Exposure draft, Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2020, available at: <https://treasury.gov.au/consultation/c2020-128289>.

⁹ ACCC New Car Retailing Industry Market Study – final report, December 2017, available at: <https://www.accc.gov.au/publications/new-car-retailing-industry-market-study-final-report>.

- 4.3. The ACCC sought submissions from a range of interested parties including independent mechanics, suppliers of spare parts, industry associations, government entities, consumer groups, members of the public and other private businesses.
- 4.4. The ACCC received around 150 public submissions and a number of confidential submissions. The public submissions consist of (approximately) 110 from independent mechanics, 10 from aftermarket parts suppliers, 25 from members of the public, five from industry associations, one from a consumer group and one from a government agency. The majority of submissions oppose the notification. MMAL provided a response to the issues raised in interested party submissions on 16 November 2020.
- 4.5. All public submissions received by the ACCC in relation to the notification and public versions of MMAL's responses to the ACCC's information requests are available on the ACCC's [public register](#).
- 4.6. MMAL submits that the vast majority of submissions are from MMAL's competitors, who have an interest in opposing the notification irrespective of any benefits to consumers that may result from the Notified Conduct. MMAL notes that a number of submissions appear to be based on a template response prepared by an industry lobby group, tying in with a broader lobbying campaign. MMAL further notes several submissions supported the Notified Conduct.
- 4.7. The submissions by interested parties, and MMAL's responses, are summarised broadly below.

Submissions in support of the Notified Conduct

- 4.8. Several submissions, mainly from members of the public, support the Notified Conduct. These submissions note the benefits of the Conditional Warranty to consumers and, in particular, the additional value that the Conditional Warranty may represent to consumers who service their vehicle with a Mitsubishi dealer or service centre.
- 4.9. The Australian Automotive Dealer Association (the **AADA**) also provided a submission in support of the notification. The AADA notes that the Notified Conduct will not influence the ACL rights of Mitsubishi consumers, and consumers will retain MMAL's standard five-year warranty irrespective of their choice of repairer. The AADA submits that the Australian automotive industry is one of the most competitive in the world and the Notified Conduct will not reduce competition in the repair sector.

Competitive impact on independent mechanics

- 4.10. Several submissions, from independent mechanics in particular, note that a high proportion of consumers currently stay with their dealer for servicing while their car is under warranty and, if 10 years becomes the standard warranty period, this may seriously jeopardise the financial viability and profitability of independent mechanics, which may result in their exit from the market. In this regard, many independent mechanics (in particular) submit that:
 - consumers often service their vehicle with an authorised dealer for the warranty period because they consider it is required to maintain the warranty, even if the terms of their warranty allow consumers to use independent mechanics without affecting their warranty (provided the vehicle is serviced in accordance with the manufacturers' specifications)

- if the Conditional Warranty is on condition that consumers must service their vehicle exclusively with Mitsubishi, this may effectively 'lock out' independent mechanics for the full 10-year period, and
 - servicing forms a large portion of revenue for many independent mechanics, and therefore the Notified Conduct may substantially impact businesses that focus on servicing and repairing Mitsubishi vehicles.
- 4.11. MMAL submits that only an insubstantial percentage of Mitsubishi vehicles continue to be serviced with Mitsubishi dealers or service centres five years after purchase, and only a small fraction of the total number of all new vehicles are Mitsubishi branded vehicles. MMAL submits that, while it expects the percentage of retention will increase to some degree as a result of the Notified Conduct, a significant proportion of Mitsubishi vehicles will still be able to be serviced by independent mechanics, and the expected retention percentage will decrease significantly by the tenth year of the Conditional Warranty.
- 4.12. MMAL submits that even if the submissions in relation to independent mechanics being 'locked out' of servicing Mitsubishi vehicles were correct (which MMAL rejects), the effect of MMAL's limited share of the market for the supply of new vehicles, as outlined at paragraph 1.12 above, is that:
- independent mechanics would continue to be able to service new vehicles supplied to the market by other manufacturers (i.e. the other 93.6 per cent of new vehicles supplied to the market each year), and
 - independent mechanics would continue to be able to service Mitsubishi vehicles over 10 years of age (comprising 42.5 per cent of Mitsubishi vehicles currently registered).
- 4.13. MMAL submits that opposing submissions are made on the basis that consumers mistakenly believe that they must service their vehicles with a manufacturer's authorised dealer or service centre, even where there is no contractual obligation to do so. MMAL submits this position is incorrect, and has provided confidential data in support of this view. MMAL submits that consumers are aware of their rights under the ACL and that, if consumers acquire services from Mitsubishi dealers or service centres, it is because they have chosen to acquire those services.

Repair work

- 4.14. Several submissions from independent mechanics and parts suppliers note that, despite the distinction made in the notification between repairs and servicing, a significant proportion of repair work is identified through routine servicing. This may mean that, in practice, the Notified Conduct will result in less repair work as well as servicing work for independent mechanics in relation to Mitsubishi vehicles. A number of interested parties also note that many consumers do not understand the difference between servicing and repairing a vehicle, which may increase the possibility of a consumer unintentionally voiding the Conditional Warranty.
- 4.15. MMAL submits that this position is not consistent with the wide variety of scenarios in which repair work is ordinarily identified and carried out. MMAL provides a table of scenarios, which is summarised below.¹⁰

¹⁰ MMAL letter to ACCC, 16 November 2020, pp 4-6.

- Consumer damages their vehicle or identifies an issue and takes the vehicle to a smash repairer or service centre—the consumer or (where relevant) insurer chooses the repairer.
- Consumer presents their vehicle for a service (scheduled or non-scheduled) and potential repair work is identified—the choice of repairer will depend on:
 - Whether the vehicle is insured—the consumer may need to use the repairer approved by the insurer.
 - Whether the consumer is entitled to the repairs under the consumer guarantees—the consumer may freely choose the repairer where the repairs are required due to a failure to comply with the consumer guarantees.
 - Whether the repairs are covered by a warranty—the consumer will service the vehicle in accordance with the terms of the warranty.
 - Where none of the above apply—the choice of repairer is likely to be influenced by the cost and timeframe for the repair work. Low-cost repairs may be commissioned at the same time as the service, whereas consumers are much more likely to explore alternative options for high-cost repairs or repairs that will take a longer period of time.

Spare parts

- 4.16. Several interested parties, particularly suppliers of spare parts and independent mechanics, submit the Notified Conduct will limit the potential for competition by suppliers of Mitsubishi compatible parts because owners must use Mitsubishi dealers and service centres, which use Mitsubishi branded parts. Some interested parties note that alternative and re-conditioned parts provide price competition and assist with the affordability of vehicle maintenance. Several interested parties submit that genuine parts are usually more expensive than non-genuine parts, which increases the cost to consumers who do not have the choice to use non-genuine parts.
- 4.17. MMAL submits that it does not consider the Notified Conduct will result in increased prices for non-genuine spare parts. MMAL anticipates that the Notified Conduct will only result in a small increase in customer service retention. This small increase is unlikely to impact economies of scale associated with the manufacture or supply of aftermarket parts. MMAL submits that this is particularly the case for generic aftermarket parts that can be used across a range of Original Equipment Manufacturer (OEM)¹¹ brands or vehicle models (for example, tyres, oil filters, windscreen wipers, fan belts and brake pads), or for parts that require only minor modifications between OEM brands.

Consumer choice of repairer

- 4.18. A significant proportion of submissions from independent mechanics, parts suppliers, industry associations and members of the public argue the Notified Conduct will remove or reduce consumers' choice regarding where they acquire aftermarket servicing, repairs and/or parts. A number of interested parties submit the Notified Conduct will undermine consumer choice by making consumers feel they have no choice of service provider and by increasing their fear of losing their warranty.

¹¹ OEM parts are parts produced by the manufacturer of the vehicle.

- 4.19. MMAL submits that the Notified Conduct does not reduce consumer choice, but enhances it by offering consumers the option of a longer warranty in exchange for exclusivity in relation to scheduled services (but not repairs or other forms of servicing). MMAL emphasises that MMAL's standard five-year warranty is unaffected by the Notified Conduct, and remains extremely competitive. MMAL notes that, of the 47 OEM brands that offer contractual warranties in Australia, only four offer warranties of longer than five years.
- 4.20. Several interested parties also note that, because the Conditional Warranty may be transferred to subsequent owners, any reduction in choice would also be passed on to subsequent owners of second-hand Mitsubishi vehicles where the Conditional Warranty remains valid.
- 4.21. MMAL submits that, particularly for subsequent purchasers of second-hand vehicles, the Notified Conduct only enhances consumer choice. If a Mitsubishi vehicle is not supplied to a subsequent purchaser in trade or commerce (for example, if the subsequent purchaser acquires the vehicle through a private sale), it may be more difficult for that purchaser to rely on the consumer guarantee as to acceptable quality. MMAL submits that the existence of the Conditional Warranty significantly increases the rights available to this category of purchaser.

Confusion and misunderstandings about consumer rights

- 4.22. A number of independent mechanics submit the Notified Conduct will contribute to existing consumer confusion and misconceptions about manufacturers' standard warranties, optional extended warranties and the automatic statutory consumer guarantees. A number of interested parties submit that, when purchasing new Mitsubishi vehicles, consumers will not be provided with full and accurate information about the Conditional Warranty and their existing rights under consumer law, which are available outside of any warranties offered by manufacturers, whether they are standard warranties or extended warranties.
- 4.23. MMAL submits that, based on its own experiences, consumers are well aware of their consumer guarantee rights, and often use those rights in preference to (or in parallel with) any rights they may have under a contractual warranty. MMAL submits it regularly engages external specialists to provide ACL compliance training to its own staff and has also provided ACL training to its dealers and service centres.

Technical information barriers

- 4.24. Independent mechanics, industry associations and members of the public in particular submit the Notified Conduct would undermine efforts in the sector to increase access by independent mechanics to vehicle manufacturers' technical information and data required to service and repair vehicles. These interested parties refer to existing impediments to competition that are created by barriers to technical information and data. Interested parties note that any improvements in access to this information and data in relation to Mitsubishi vehicles (for example, through government initiatives to increase access) would be made irrelevant to the extent that Mitsubishi vehicles are not available for independent servicing and repair.
- 4.25. MMAL submits that the Notified Conduct is not related to access to the technical information and data required to service and repair Mitsubishi vehicles. MMAL submits the Notified Conduct does not in any way hinder the ability of independent mechanics to gain access to technical information and data.

Terms and conditions of the Conditional Warranty

- 4.26. A number of independent mechanics and members of the public query whether the terms and conditions of the Conditional Warranty would result in a positive outcome for consumers. These interested parties note the lack of clarity in the terms and conditions of the Conditional Warranty and the discretionary nature of MMAL's obligations to conduct repairs and replace parts. Several interested parties refer to the exclusions in the terms and conditions of the Conditional Warranty, such as the exclusion regarding 'any component subject to regular servicing'. These interested parties query whether such exclusions will result in the Notified Conduct having any clear benefits for consumers.
- 4.27. Several interested parties argue that the lack of certainty provided by the terms and conditions of the Conditional Warranty would result in consumers choosing to take their vehicle to Mitsubishi dealers and service centres out of fear of losing the warranty. Some interested parties also note that consumers may be disappointed and surprised when they are required to pay for components that are not covered by the Conditional Warranty, despite servicing their vehicle exclusively with Mitsubishi for a number of years.
- 4.28. MMAL submits that the terms and conditions for the Conditional Warranty are clear and capable of being understood by consumers. MMAL notes in its letter dated 23 October 2020 that the exclusions referred to in submissions predate the current Conditional Warranty because they are the same for MMAL's standard five-year warranty.
- 4.29. MMAL further submits that its advertising material also makes it clear to consumers what they must do to maintain the Conditional Warranty (in addition to emphasising that consumers remain entitled to the five-year warranty if they do not wish to exclusively service their Mitsubishi vehicles with a Mitsubishi dealer or service centre).
- 4.30. MMAL submits that manufacturers' warranties are a mature product, and consumers are well versed with typical items that may be excluded by a manufacturer's warranty. MMAL submits its Conditional Warranty terms are consistent with industry standards.

Quality and price of servicing

- 4.31. A number of interested parties argue Mitsubishi consumers do not benefit from the Notified Conduct because they are locked in to sub-optimal servicing whereby, for example, the level and quality of service may be lower than that provided by independent mechanics even though the price is the same or higher. These interested parties argue that independent servicing is of an equivalent or higher standard, provides better customer service and at comparatively lower prices than servicing provided by dealerships. Several submissions provided examples of poor customer experiences with dealer servicing, including in relation to Mitsubishi dealers.
- 4.32. MMAL submits that it does not suggest that all independent mechanics provide inferior quality servicing to Mitsubishi dealers or service centres. Instead, MMAL observes that it is self-evident that the quality of servicing provided by independent mechanics will vary from service centre to service centre. While MMAL is able to exert control over the quality of servicing provided by its own dealers or service centres, it cannot exert any control over independent mechanics. MMAL submits that this means it cannot ensure that independent mechanics provide any minimum level of service quality, but can ensure such a minimum level of quality within its own network. In circumstances where MMAL proposes to provide a 10-year warranty,

MMAL considers it is critical that it be able to control the quality of servicing provided in relation to Mitsubishi vehicles covered by that warranty.

- 4.33. Several interested parties argue that in some cases dealers reduce the price to consumers of servicing by reducing the quality and standards of servicing in comparison to independent mechanics, which can have negative impacts on a vehicle over time. Some interested parties also note that consumers would be unlikely to save money by servicing exclusively with a Mitsubishi dealer because they end up paying more for genuine components that need replacing.
- 4.34. MMAL rejects any suggestion that its dealers or service centres provide servicing of a lower quality than independent mechanics. MMAL notes that Roy Morgan survey data indicates broadly identical consumer satisfaction between independent mechanics and dealers.¹²
- 4.35. MMAL notes it has published 10 years of capped-price servicing information on its website for new Mitsubishi vehicles. This capped-price servicing is available whenever a consumer services their Mitsubishi vehicle with a Mitsubishi dealer or service centre, regardless of whether the consumer does so on an exclusive basis. MMAL submits that the capped-price servicing program allows consumers to be confident of the price of their service prior to presenting their Mitsubishi vehicle for servicing, and also allows consumers to easily compare the price of their MMAL dealer or service centre to the price of an equivalent service offered by an independent mechanic (if that independent mechanic discloses prices).
- 4.36. MMAL further rejects the assertion that Mitsubishi dealers or service centres reduce the cost of their services for consumers by deliberately reducing the quality and standard of servicing in comparison to independent mechanics.
- 4.37. MMAL submits that it publishes periodic maintenance and inspection tables on its website for each model of Mitsubishi vehicle that it supplies. These schedules set out the actions that must be undertaken at each scheduled service.

Consumers and businesses in remote and regional locations

- 4.38. A number of interested parties note that in some regional areas there may be only one Mitsubishi service centre or none at all. These interested parties argue that choice of service provider for consumers in these areas may be severely limited and raised concerns that this may result in some consumers having to travel long distances to have their vehicles serviced, or having to void the Conditional Warranty. Several interested parties also raise concerns about the impact of the Notified Conduct on regional and remote economies, noting that independent mechanics and other local businesses may lose work to geographically distant Mitsubishi service centres.
- 4.39. MMAL submits 94% of purchasers of new Mitsubishi vehicles within the past year lived within 40 kilometres of a Mitsubishi dealer or service centre. The proportion of consumers that are not close to a Mitsubishi dealer or service centre is therefore slight. Notwithstanding the above, MMAL acknowledges that, on the basis that there is no Mitsubishi dealer or service centre located near them, a very small proportion of rural or regional consumers may void the Conditional Warranty.

¹² Roy Morgan, Competition Heats Up in Vehicle Servicing as National Fleet Becomes More Reliable (Finding No 7757, 21 November 2018), available at: <http://www.roymorgan.com/findings/7757-competition-heats-up-in-vehicle-servicing-as-national-fleet-becomes-more-reliable-201811212241>.

Similar conduct by other manufacturers

- 4.40. A number of independent mechanics, parts suppliers, industry associations and members of the public note it is highly likely other vehicle manufacturers will seek to implement arrangements similar to the Notified Conduct, which would then significantly magnify the negative consequences of the Notified Conduct for independent mechanics.
- 4.41. MMAL notes no other manufacturer has announced that they will introduce a similar program (whether subject to the success of the notification or otherwise).

5. ACCC assessment

- 5.1. The ACCC assesses an exclusive dealing notification by applying the test in section 93(3) of the Act. The test requires that in order for the ACCC to revoke a notification, it must be satisfied that the notified conduct:
- has the purpose, effect or likely effect of substantially lessening competition, and
 - in all the circumstances, will not result in likely public benefit which would outweigh the likely public detriment.

Future with or without the Notified Conduct

- 5.2. To assist in its assessment of the Notified Conduct, the ACCC compares both the effect on competition and the public benefits and detriments likely to arise in the future with the Notified Conduct against the likely future without the Notified Conduct.
- 5.3. The ACCC considers that in the future without the Notified Conduct, it is likely that the status quo would continue. This is likely to involve MMAL continuing to offer the standard Mitsubishi manufacturer's five-year warranty.

Areas of competition

- 5.4. Defining the areas of competition likely to be affected by the Notified Conduct enables the ACCC to assess whether the Notified Conduct would have the purpose, effect or likely effect of substantially lessening competition in a market.
- 5.5. MMAL submits the Notified Conduct may affect the markets for the supply of:
- (a) new motor vehicles
 - (b) contractual warranties attaching to new vehicles, and
 - (c) aftermarket servicing to owners of new vehicles.
- 5.6. The ACCC considers that the areas of competition relevant to assessing the impact of the Notified Conduct include those in which the following are supplied in Australia:
- servicing and repair of Mitsubishi vehicles
 - new motor vehicles
 - parts that are suitable for Mitsubishi vehicles, and
 - extended warranty products for new motor vehicles.

- 5.7. The ACCC has not sought to precisely define the boundaries of each of these relevant areas of competition as the ACCC's findings are not sensitive to where the precise boundaries lie. The ACCC considers that there are likely to be local and national elements to competition within the markets outlined below. At their narrowest, the relevant markets in which:
- Mitsubishi vehicles are serviced and repaired in Australia encompasses rivalry between Mitsubishi dealers and service centres and independent mechanics capable of servicing and repairing Mitsubishi vehicles
 - new motor vehicles are supplied includes rival manufacturers with extensive dealership networks in Australia
 - parts suitable for Mitsubishi vehicles are supplied in Australia includes OEM parts and non-genuine parts, and
 - extended warranty products are supplied in Australia includes vehicle manufacturers that offer extended warranties as well as a number of third party providers.

Purpose, effect or likely effect of substantially lessening competition

- 5.8. In assessing the purpose, effect and likely effect of the Notified Conduct, the ACCC received information from a range of market participants and inspected confidential and internal documents of MMAL.
- 5.9. For the reasons set out below and based on the information available to it, the ACCC is not satisfied that the Notified Conduct has the purpose, effect or likely effect of substantially lessening competition in any of the narrowly defined areas of competition mentioned above. Consequently, the ACCC considers the Notified Conduct is also unlikely to substantially lessen competition in any more broadly defined market.
- 5.10. However, the ACCC may form a different view in future if there is evidence indicating that the Notified Conduct contributes to a substantial weakening of the competitive constraint that independent mechanics currently exert on Mitsubishi dealers and service centres and this results in a substantial lessening of competition.

Effect on competition

Competition for service and repair of Mitsubishi vehicles

Impact on competitive constraint from independent mechanics

- 5.11. MMAL submits that, for each area of competition, MMAL's small market share in the supply of new vehicles and the existence of strong competition from other suppliers of new vehicles have the effect of severely limiting the ability of any market participant, including MMAL, to raise prices or reduce quality, choice or innovation.
- 5.12. MMAL submits that independent mechanics will continue to exert price pressure on Mitsubishi dealers and service centres, despite the Conditional Warranty. MMAL notes that the Conditional Warranty does not prevent consumers from choosing to acquire aftermarket servicing from an independent mechanic and independent mechanics will continue to be able to service vehicles supplied by other manufacturers and Mitsubishi vehicles over 10 years of age.

- 5.13. The ACCC recognises that independent mechanics are an important source of competitive constraint on Mitsubishi dealers and service centres with respect to their servicing of Mitsubishi vehicles. Independent mechanics generally offer highly comparable aftermarket goods and services to Mitsubishi dealers and service centres with respect to Mitsubishi vehicles. This offering, or threat of offering by independent mechanics constrains MMAL and its dealers and service centres from significantly increasing prices or decreasing quality of its goods and service. The ACCC would have serious concerns if the Notified Conduct was to materially weaken the ability of independent mechanics to constrain the price and service decisions of Mitsubishi dealers and service centres.
- 5.14. The ACCC notes that consumers may choose to have their vehicle serviced at a Mitsubishi dealer or service centre for a variety of reasons and the Conditional Warranty represents one further reason for consumers to consider this option.
- 5.15. The ACCC also understands that independent mechanics are likely to incur at least some fixed costs to maintain or expand their capability to service and repair Mitsubishi vehicles. MMAL has considerable influence on the extent of these costs as sole supplier of some of the training, software, equipment and tools needed to service Mitsubishi vehicles.
- 5.16. While the ACCC recognises that independent mechanics may lose some business of customers who wish to take up the Conditional Warranty offer (or preserve the option to do so in the future) under the Notified Conduct; a further competition concern is that the Notified Conduct may cause many independent mechanics to lose scale to a degree that forces them to downsize, limit the range of services they offer, or cease servicing new Mitsubishi vehicles. Any of these scenarios, if widespread, would be likely to significantly weaken the degree of competitive constraint that independent mechanics exert on Mitsubishi dealers and service centres. It would provide opportunity for Mitsubishi dealers and service centres to raise price and/or reduce service levels for the duration of the Notified Conduct.
- 5.17. The ACCC recognises that the impact of the Notified Conduct will likely vary amongst independent mechanics depending on various factors, including:
- the degree to which an individual mechanic specialises in servicing and repairing Mitsubishi vehicles as opposed to other brands of vehicles
 - the extent to which they have had time to recoup the fixed costs of their investments in Mitsubishi-specific training, assets, tools and marketing
 - the additional fixed costs they face to maintain the full range of their service offering and upgrade to meet the requirements of new models, and
 - the extent to which consumers regard their service offering as comparable or better than that offered by Mitsubishi dealers and service centres.
- 5.18. At the margin, the Notified Conduct may undermine some independent mechanics' confidence and willingness to invest further in specialised training, equipment, tools and marketing required to service Mitsubishi vehicles where this involves a significant additional fixed cost. Some independent mechanics who may have been considering expanding their service offering in relation to Mitsubishi vehicles may decide not to do so as a result of the Notified Conduct. In time, some independent mechanics may potentially become unable or unwilling to continue to offer servicing and repair services for Mitsubishi vehicles as a result of the Notified Conduct.

- 5.19. While independent mechanics have raised concerns about losing customer volumes, the ACCC considers that there is unlikely to be substantial exit of independent mechanics that service Mitsubishi vehicles. The ACCC considers that independent mechanics will likely continue to provide an important competitive constraint on MMAL (regarding its overall decisions about pricing and services, such as with respect to its capped-price servicing program) and its dealers and service centres (regarding pricing and servicing decisions to the extent allowed by MMAL).
- 5.20. While some independent mechanics may choose not to expand or continue their servicing and repair service for Mitsubishi vehicles as a result of the Notified Conduct, the ACCC considers that a significant portion of independent mechanics are likely to continue to offer, or be able to offer, consumers highly comparable services in terms of price and level of service. As a result of this competitive pressure, MMAL, Mitsubishi dealers and service centres are likely to continue to have a strong incentive to offer consumers competitive prices and level of service to avoid consumers switching to independent mechanics, notwithstanding that this means opting out of the Conditional Warranty.

Rivalry among Mitsubishi dealers and service centres

- 5.21. Authorised dealers have commercial incentives to provide servicing work because they generally earn higher profit margins from aftermarket services than from the sale of new vehicles.¹³
- 5.22. MMAL submits that Mitsubishi dealers and service centres compete with other Mitsubishi dealers and service centres (and independent mechanics) in the following ways:
- Price—While MMAL offers capped-price servicing for new Mitsubishi vehicles, nothing prevents Mitsubishi dealers or service centres from offering lower prices to consumers (for example, in response to price competition from other Mitsubishi dealers or service centres or independent mechanics).
 - Geography—Geography is an important factor in servicing competition. Consumers often 'shop around' for the best price for their new Mitsubishi vehicle, and the Mitsubishi dealer that they ultimately purchase their vehicle from is not necessarily their closest dealer.
 - Non-scheduled servicing—In addition to scheduled services, dealers and service centres also offer (and advertise) non-scheduled services. For example, dealers may advertise 'Holiday Services' that allow consumers to service their vehicles prior to commencing a driving holiday. In addition to resulting in competition for any given service, this form of advertising also promotes competition for scheduled servicing more broadly (insofar as a consumer may be more likely to refer future scheduled services to a dealer or service centre that provides excellent service in relation to a non-scheduled service).
 - Quality—In addition to the above, dealers also compete generally on service quality and customer service. MMAL tracks service customer satisfaction by dealer, and encourages underperforming dealers or service centres to improve their performance.
- 5.23. While independent mechanics provide the main source of competitive constraint, the ACCC recognises that Mitsubishi dealers and service centres may also provide a

¹³ ACCC New Car Retailing Industry Market Study – final report, December 2017, p 45.

degree of competitive constraint on each other, particularly when located in close proximity. The ACCC has found that consumers generally consider the geographical convenience and the distance they have to travel when deciding where to service their vehicle.¹⁴ The ACCC considers this constraint is unlikely to be impacted substantially as a result of the Notified Conduct.

Spillover consequences for new car sales as a source of competitive constraint on pricing of aftermarket services

- 5.24. MMAL submits increases in servicing prices under the Notified Conduct would be unprofitable because consumers would cease purchasing new Mitsubishi vehicles. MMAL submits that at least a proportion of consumers consider ‘whole of life’ costs when purchasing a vehicle, and that it advertises its capped price servicing to purchasers of new Mitsubishi vehicles. MMAL submits that these consumers are more likely to purchase non-Mitsubishi vehicles in response to an increase in the servicing costs of Mitsubishi vehicles.
- 5.25. The ACCC has previously found that many consumers face difficulties at the point of sale of a new vehicle in working out what value to place on alternative warranty offers, taking into account the additional costs and benefits they might derive over and above their rights under the ACL (such as the consumer guarantees), which are not negated or diminished by any warranty product. The ACCC considers these difficulties may make it challenging for consumers, at the point of sale, to accurately assess the additional cost and potential benefits offered to them under the Conditional Warranty, and for consumers to accurately assess and compare whole of life costs when purchasing a new vehicle.¹⁵ The ACCC notes there may be a proportion of consumers who may still attempt to consider whole of life costs when purchasing a new vehicle.¹⁶
- 5.26. The ACCC considers that the need to increase loyalty to encourage repeat purchases of new Mitsubishi vehicles provides an incentive for dealers to ensure their service offering is sufficient in terms of price and quality, for consumers to return and potentially purchase a new Mitsubishi vehicle.
- 5.27. The ACCC recognises that the threat of lost new motor vehicle sales may provide a degree of constraint on the price and service decisions of MMAL and its dealers and service centres with respect to aftermarket servicing of Mitsubishi vehicles under the Conditional Warranty. The ACCC considers this constraint is unlikely to be impacted substantially as a result of the Notified Conduct.

Competition in supply of spare parts for Mitsubishi vehicles

- 5.28. A number of interested parties note the need for spare parts is typically realised during routine servicing. If a greater proportion of consumers acquire aftermarket servicing from Mitsubishi dealers and service centres, these consumers may potentially also be more likely to acquire OEM parts for any necessary repairs or replacements. In turn, this may affect the availability and price of non-OEM parts.
- 5.29. The ACCC considers that, in the future with the Notified Conduct, one of the ways that independent mechanics can continue to differentiate their service offering is by offering customers choice of using OEM or non-OEM parts. The Notified Conduct is unlikely to result in a reduction in the supply of OEM parts or affect the supply of

¹⁴ ACCC New Car Retailing Industry Market Study – final report, December 2017, p 41.

¹⁵ ACCC New Car Retailing Industry Market Study – final report, December 2017, p 54.

¹⁶ ACCC New Car Retailing Industry Market Study – final report, December 2017, p 36.

non-OEM parts that are not specific to Mitsubishi vehicle. The only scenario where the Notified Conduct might materially affect the availability and price of non-OEM parts suitable for Mitsubishi vehicles is if there is large-scale downsizing and exit of independent mechanics who specialise in service and repair of Mitsubishi vehicles. As explained above, the ACCC does not consider this likely based on current information.

Does the Notified Conduct have the purpose of substantially lessening competition?

- 5.30. A corporation will have the purpose of substantially lessening competition if that is its actual purpose for engaging in the conduct.¹⁷ This will be ascertained from direct and indirect evidence as to the actual intentions and purposes of the corporation. The Act provides that the relevant purpose must be a substantial purpose but not necessarily the sole purpose.
- 5.31. Many interested parties argue the Notified Conduct is, amongst other things:
- driven by commercial incentives rather than protection of consumers or the vehicles, and
 - a marketing tool for MMAL to lock-in consumers for the warranty period and in doing so prevent competition from independent mechanics.
- 5.32. MMAL submits that, given the significant potential duration of the Conditional Warranty, the Notified Conduct is necessary for MMAL to ensure it is able to control servicing quality in order to be able to offer the Conditional Warranty.
- 5.33. The ACCC requested from MMAL, and reviewed, internal documents relevant to the ACCC's assessment and found no evidence that the Notified Conduct has a purpose of substantially lessening competition in any market.
- 5.34. The ACCC considers, on the information available to it, the Notified Conduct does not have a purpose of substantially lessening competition in any market.

Conclusions regarding substantial lessening of competition

- 5.35. The ACCC considers there is no basis at present to conclude that the Notified Conduct has the purpose or likely effect of substantially lessening competition in any relevant market.
- 5.36. The ACCC considers a significant portion of independent mechanics are likely to continue to offer, or be able to offer, consumers highly comparable goods and services in the supply of servicing and repairs of Mitsubishi vehicles. This will maintain the competitive pressure on MMAL and its dealers and service centres, and will continue to constrain their pricing and quality decisions relating to servicing and repair of Mitsubishi vehicles.
- 5.37. The ACCC recognises that Mitsubishi dealers and service centres may provide a degree of competitive constraint on each other, particularly when located in close proximity, and this is unlikely to be impacted substantially as a result of the Notified Conduct.
- 5.38. Similarly, the ACCC recognises that the threat of lost new motor vehicle sales may provide a degree of competitive constraint on the price and service decisions of

¹⁷ *Universal Music Pty Ltd v Australian Competition and Consumer Commission* (2003) 201 ALR 636, at 693.

MMAL and its dealers and service centres with respect to aftermarket servicing and repair of Mitsubishi vehicles under the Conditional Warranty. This constraint is also unlikely to be impacted substantially as a result of the Notified Conduct.

- 5.39. The ACCC is concerned to ensure the Notified Conduct does not substantially undermine independent mechanics' ability to constrain the price and service decisions of Mitsubishi dealers and service centres. If evidence should come to light that the Notified Conduct is substantially affecting the ability of independent mechanics to compete on their merits, the ACCC is able to revoke the notification.
- 5.40. The ACCC may revoke the notification at any time if it forms the view that the Notified Conduct is likely to substantially lessen competition and the public benefits do not outweigh the public detriments.
- 5.41. To revoke the notification the types of information the ACCC would consider include:
 - the extent of the Notified Conduct's impact on the ongoing viability of independent mechanics, and the extent to which this substantially reduces the constraint independent mechanics provide on MMAL and its dealers and service centres, and
 - the extent to which other vehicle manufacturers seek to engage in similar conduct, and the potential impact on the relevant markets.

Public benefits and detriments

- 5.42. The ACCC has assessed the Notified Conduct by applying the test in section 93(3) of the Act, which requires that in order for the ACCC to revoke a notification, it must be satisfied that the notified conduct has the purpose, effect or likely effect of substantially lessening competition, **and** will not result in likely public benefit which would outweigh the likely public detriment.
- 5.43. As the ACCC does not consider that the Notified Conduct has the purpose, effect or likely effect of substantially lessening competition, the test to revoke the notification is not met at this time.
- 5.44. Given this assessment, it is not necessary for the ACCC to form a view on whether the conduct is likely to result in a benefit to the public, and whether or not that benefit would outweigh any detriment to the public including detriment resulting from any lessening of competition.
- 5.45. Nonetheless, the ACCC has had regard to submissions from a range of interested parties and MMAL regarding the likely public benefits and detriments from the Notified Conduct, and considers that, in light of public interest in the notification expressed through these submissions, it is appropriate for the ACCC to provide an overview of the issues raised, some preliminary analysis, and types of evidence the ACCC would consider in assessing the public benefits and detriments of the Notified Conduct in the future.

Public detriments

- 5.46. The views of MMAL, interested parties and the ACCC in relation to the likely impact of the Notified Conduct on competition are discussed above in paragraphs 5.11 to 5.29.

Consumer choice

- 5.47. The ACCC received several submissions from consumers and independent mechanics raising concerns that the Notified Conduct removes or negatively impacts the ability of consumers to freely choose where they service their Mitsubishi vehicle. Some of these submissions suggested the Notified Conduct may increase the cost (or the apparent cost) for a consumer to exercise their choice to acquire aftermarket servicing from an independent mechanic. To the extent consumers believe they have paid some amount for the Conditional Warranty in the up-front price of the vehicle, they may also consider that they would forfeit this amount if they acquire aftermarket servicing from an independent mechanic.
- 5.48. The ACCC accepts the Notified Conduct is likely to have some impact on consumers' behaviour regarding their choice of where they acquire aftermarket servicing. Particularly for consumers who are undecided about where they will acquire aftermarket servicing, the Conditional Warranty represents an option that likely would not have been available without the Notified Conduct, and this may increase the likelihood that the consumer chooses to service their vehicle with a Mitsubishi dealer or service centre instead of an independent mechanic.
- 5.49. However, the ACCC notes the Notified Conduct does not prevent consumers from choosing to acquire aftermarket servicing from an independent mechanic or limit their choice of repairer. The ACCC further considers it is likely that MMAL would not offer a 10-year warranty to consumers without the Notified Conduct.¹⁸ Without the Notified Conduct, consumers would have the benefit of MMAL's standard five-year warranty and therefore the Conditional Warranty may provide a five-year extension of the standard warranty. The ACCC recognises that the Conditional Warranty is likely to have value to consumers who would prefer to acquire aftermarket servicing from a Mitsubishi dealer or service centre irrespective of the availability of the Conditional Warranty.

Access to technical information and data

- 5.50. Interested parties raise concerns that the Notified Conduct may have the potential to undermine efforts in the sector to increase access by independent mechanics to the technical information and data required to service and repair motor vehicles. Some interested parties raise concerns around MMAL's record of providing access to technical information to independent mechanics, and argued the availability of technical information to independent mechanics will be redundant if no consumers acquire aftermarket servicing from those mechanics.
- 5.51. MMAL submits that it provides workshop service manuals, which can be purchased through Mitsubishi dealers, and periodic maintenance and inspection tables, which are available free of charge. MMAL submits that no other technical information or training is required for an independent mechanic to service Mitsubishi vehicles (as distinct from other vehicles), and MMAL does not impose any other charges in relation to servicing Mitsubishi vehicles. MMAL notes that these arrangements will remain the same under the Notified Conduct.
- 5.52. The ACCC notes MMAL's notification does not override any requirements of the law, including any proposed requirements of the upcoming mandatory scheme as outlined in the Government's consultation update released in October 2019 and exposure

¹⁸ See Notification of Exclusive Dealing N10000534, lodged by Mitsubishi Motors Australia Limited, 11 September 2020, paragraph 5.1(b)(i).

draft of 18 December 2020.¹⁹ The ACCC further notes MMAL's commitment to make the technical information required to service Mitsubishi vehicles available to independent mechanics through Mitsubishi dealers.

- 5.53. The ACCC considers it is too early to determine whether and how the Notified Conduct may affect the effectiveness of the upcoming mandatory information sharing scheme.²⁰
- 5.54. The ACCC would welcome any information from interested parties regarding the impact of the Notified Conduct on the information sharing scheme once it is implemented, including evidence of the extent to which MMAL makes information available to independent mechanics, as it has committed to do. The ACCC will also consider whether subsequent policy reviews of the scheme identify extended warranties as significantly impacting competition and the effectiveness of the scheme in delivering its objectives.

Public benefits

- 5.55. MMAL submits the Notified Conduct will result in public benefits. These claims, and interested party responses, are discussed in the sections that follow.

Enhanced offer that may trigger competitive response from other manufacturers

- 5.56. MMAL submits that the purpose of the Notified Conduct includes increasing the attractiveness of new Mitsubishi vehicles to consumers, thereby making MMAL more competitive with other new vehicle manufacturers.
- 5.57. The ACCC recognises that the Conditional Warranty, by adding additional years to MMAL's standard five-year warranty, is an enhancement of the warranty product, which some consumers may value. The Conditional Warranty provides consumers with an additional avenue to pursue repairs or replacements of warrantable items, which may, in some circumstances, be simpler than pursuing those claims using the consumer guarantees. The ability of consumers to transfer the Conditional Warranty when they sell their vehicle is a further enhancement to this product.
- 5.58. The ACCC considers the Notified Conduct is likely to trigger competitive responses from other vehicle manufacturers in the market for the supply of new motor vehicles.
- 5.59. MMAL notes that the Notified Conduct will be transferable to subsequent owners. MMAL submits that this would:
- improve the resale value of Mitsubishi vehicles, which would provide savings to purchasers and stimulate competition in the supply of second-hand vehicles, and
 - increase rights available to purchasers of second-hand vehicles who would not otherwise be entitled to the consumer guarantee regarding acceptable quality.
- 5.60. A number of submissions from interested parties noted there is a likelihood of subsequent owners losing the benefits of the Conditional Warranty if the vehicle

¹⁹ Treasury, Mandatory Scheme for the Sharing of Motor Vehicle Service and Repair Information: Consultation update, October 2019, available at: <https://treasury.gov.au/publication/p2019-30661>; Exposure draft, Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2020, 18 December 2020, available at: <https://treasury.gov.au/consultation/c2020-128289>.

²⁰ The European Commission's [Regulation \(EU\) No 461/2010](#) exempts certain agreements between vehicle manufacturers and their authorised networks from Article 101(1) of the Treaty on the Functioning of the European Union. An agreement outside the block exemption may contravene Article 101(1) where the agreement reserves repairs to the network (for example, through warranties conditional on only using the network). The European Commission considers that it is doubtful that such agreements could bring benefits to consumers: [Notice](#) pars 60 and 69.

undergoes routine maintenance at a second-hand dealer or auction company. However, MMAL notes the Conditional Warranty merely requires that all scheduled services (and not repairs) be completed with a Mitsubishi dealer or service centre. Accordingly, a used car dealer conducting repairs would not void the Conditional Warranty. MMAL further submits that the fact the Conditional Warranty may be voided prior to the conclusion of the full 10-year period does not mean that no public benefit has been provided in relation to the Notified Conduct. Moreover, if the Conditional Warranty is voided, it will cease having any impact on competition.

- 5.61. The ACCC notes that, to the extent any benefits of the Conditional Warranty may be transferred to subsequent owners, any detriments resulting from the warranty would also be transferred and prolonged. Nonetheless, the ACCC considers that the Conditional Warranty, to the extent it is transferred to subsequent owners, is likely to result in public benefit because it may be of value to some consumers who buy a second-hand Mitsubishi vehicle. The extent of this benefit would depend on whether the Notified Conduct provides consumers who have purchased a second-hand Mitsubishi vehicle with the benefits of the enhanced warranty product, and evidence of this would be relevant to any future assessment.
- 5.62. The ACCC notes MMAL's obligations under the consumer guarantees, and the rights afforded to consumers by the consumer guarantees, are not diminished by the Conditional Warranty. To the extent the Notified Conduct results in MMAL or its dealers and service centres inappropriately handling consumer complaints, including by treating consumer guarantee issues as warranty complaints, the ACCC considers this would reduce the public benefits likely to result from the Notified Conduct.

Cost savings to purchasers of extended warranty products

- 5.63. MMAL submits the Notified Conduct will result in cost savings to purchasers of new Mitsubishi vehicles who might otherwise purchase costly extended warranties from third parties.
- 5.64. Some interested parties, particularly independent mechanics, submitted that the Notified Conduct may result in consumers paying more for servicing and genuine spare parts under the Conditional Warranty than they would have if they had acquired aftermarket servicing and parts from an independent mechanic. Several submissions argued that the Conditional Warranty may not represent significant value to many consumers due to its unclear terms and extensive cover exclusions. MMAL submits the terms of the Conditional Warranty are substantially the same as its standard five-year warranty.
- 5.65. The ACCC considers the Notified Conduct is likely to result in some limited cost savings for consumers who would otherwise have purchased extended warranty products from third-party providers, but the extent of this benefit will depend upon how these extended warranty offers occur in practice, and evidence of this would be relevant to any future assessment.

Increased opportunities to improve quality of servicing of Mitsubishi vehicles

- 5.66. MMAL submits the Notified Conduct will enable it to ensure Mitsubishi vehicles are serviced with a high degree of care and skill, because MMAL is able to exercise significantly greater control over its dealers and service centres than over independent mechanics.
- 5.67. Several interested parties submitted Mitsubishi consumers do not benefit from the Notified Conduct because they are locked-in to sub-optimal servicing. A number of

submissions argued that independent mechanics offer servicing at equivalent or higher standards and often at comparatively lower prices than Mitsubishi dealers and service centres.

- 5.68. The ACCC recognises that, despite the fact that independent mechanics generally are likely to provide a highly comparable standard of servicing and repairs, the Notified Conduct would provide MMAL with increased opportunities to control the standards of servicing in relation to a greater volume of Mitsubishi vehicles. The ACCC notes that consumers remain able to choose to acquire aftermarket servicing from an independent mechanic under MMAL's standard five-year warranty if they are unsatisfied with their service, although they would void the Conditional Warranty.
- 5.69. The ACCC therefore considers the Notified Conduct may potentially result in some limited public benefits by providing MMAL with increased opportunities to control servicing of Mitsubishi vehicles. However, this would only be a public benefit, if at all, where the relevant parameters of servicing are lower among some independent mechanics.

Consumers and businesses in regional and remote locations

- 5.70. Interested parties raised concerns about consumers in regional and remote locations, and queried whether such consumers would be able to meet the conditions of the Conditional Warranty, noting that some consumers may have to travel long distances to service their vehicle at a Mitsubishi dealer or service centre. MMAL submits that no special arrangements will be made to accommodate consumers in regional or remote areas.
- 5.71. MMAL provided an analysis of the distances that consumers may need to travel to have their vehicle serviced at a Mitsubishi dealer or service centre, and submits that in most cases consumers will not need to travel long distances. In the past year, MMAL submits 86 per cent of purchasers of new Mitsubishi vehicles lived within 20km (and 94 per cent within 40km) of a Mitsubishi dealer or service centre.
- 5.72. The ACCC accepts that many purchasers of new Mitsubishi vehicles may be located within a reasonable distance of a Mitsubishi dealer or service centre. However, the ACCC also recognises that some consumers would face increased difficulties acquiring aftermarket servicing and repair services under the Conditional Warranty.
- 5.73. The Conditional Warranty may be of less or no value to consumers in regional and remote locations to the extent they face difficulties accessing a Mitsubishi dealer or service centre. Although these consumers will retain MMAL's standard five-year warranty, the ACCC considers this is a limitation on the benefits that may result from the Notified Conduct (however, it does not of itself constitute a public detriment).
- 5.74. The ACCC further considers that, for consumers who do not value the Conditional Warranty, including those consumers in regional and remote locations who have difficulty accessing a Mitsubishi dealer or service centre, the Notified Conduct has potential to result in public detriment. Consumers who do not value the Conditional Warranty, but who pay for it in the price of their new Mitsubishi vehicle, would be subsidising those consumers who value the Conditional Warranty, and this may potentially amount to a public detriment. However, this would only occur to the extent that Mitsubishi dealers include any wholesale charges for the Conditional Warranty in the price of a new Mitsubishi vehicle (as opposed to the price of servicing), and the extent to which this will occur is unclear. Evidence on this point would be relevant to any future assessment of public benefits and detriments.

6. Conclusion

- 6.1. Based on the available information, the ACCC considers the Notified Conduct is unlikely to have the purpose, effect or likely effect of substantially lessening competition.
- 6.2. The ACCC therefore does not object to the notification at this time and the immunity for exclusive dealing provided by the notification is allowed to stand at this time.
- 6.3. However, the ACCC may revoke the notification at any time if it forms the view that the Notified Conduct is likely to substantially lessen competition and the public benefits do not outweigh the public detriments. To revoke the notification the types of information the ACCC would consider include:
 - the extent of the notification's impact on the ongoing viability of independent mechanics, and the extent to which this substantially reduces the constraint independent mechanics provide on MMAL and its dealers and service centres, and
 - the extent to which other vehicle manufacturers seek to engage in similar conduct, and the potential impact on the relevant markets.