

9 October 2020

Ms Susie Black
Director
Adjudication Branch
Australian Competition and Consumer Commission
Email: adudication@acc.gov.au

Dear Ms Black,

**AAAA Submission:
Mitsubishi Motors Australian Limited (MMAL) Exclusive Dealing Notification**

On behalf of the membership of the Australian Automotive Aftermarket Association, I wish to lodge our objection to the Mitsubishi Motors Australian Limited (MMAL) Exclusive Dealing notification. We request the ACCC revoke this notification on the basis of this conduct having the purpose of substantially lessening competition and therefore will result in consumer detriment.

Extended warranties promised by car manufacturers are designed to encourage consumers to purchase a vehicle with 'peace of mind'. The fact that car companies feel that they can use conflict-free warranty repairs as a marketing tool is very concerning. The consumer already has the right to a repair, refund, or remedy for a vehicle sold with defects, or if the vehicle is not fit for purpose and the ACL statutory guarantees are non-conditional. The reality is that most car owners are unsure or unaware of their consumer rights and fear legitimate warranty claims will not be honoured. They are inappropriately misled and feel they need to accept the conditions of an extended warranty, just to ensure they have a safety net should their new vehicle fail.

And past experience demonstrates that consumers have good reason to fear the car industry. In fact, the ACCC in its New Car Retailing Market study was scathing of car company behaviour in relation to warranties and consumer guarantees with Rod Sims stating, 'The ACCC is deeply concerned about the level of non-compliance with the Australian Consumer Law in the new car industry'. Amongst other issues, the ACCC study found:

- that car manufacturers' focus on warranty obligations to the exclusion of their consumer guarantee obligations

- there is a dominant 'culture of repair' underpinning car manufacturers' systems and policies for dealing with car defects and failures
- widespread use of non-disclosure agreements by car manufacturers when resolving complaints
- the lack of effective independent dispute resolution options for consumers

Mitsubishi's new 10-year conditional warranty scheme essentially encourages consumers to trade away their statutory rights to avoid any potential future issues with one of the most valuable assets they own. It is a blatant attempt to reinforce the myth promulgated by car companies and dealers that the only protection a consumer has on their vehicle is under the manufacturer's warranty.

In addition, Mitsubishi is the first car company to attempt to include conditions on their extended warranty that mandates dealership-only servicing which, due to the contractual agreements between dealers and manufacturers, will result the fitment of so called 'genuine' parts to the exclusion of all alternatives. There are very good reasons for car owners to choose superior aftermarket components to upgrade and equip their vehicle for conditions that generic car company branded components are not capable of enduring.

The car industry often promotes that they are protecting their customers, which is why they insist that dealerships fit 'genuine' parts - inferring that independent high-quality parts are 'non-genuine' and therefore, unsafe. It is important to remember that car manufacturers do not make most of these parts; they are generally made by a third-party component supplier and put in a box with the manufacturer branding. It is common for these car company suppliers (many of whom are AAAA members) to also sell parts under their own brand - same part, same factory, different box. And while it is true that not every part sold in the aftermarket is manufactured by a car company supplier, every part manufacturer and every distributor has the same obligations under Australian Consumer Law.

In addition, our concern is that if the MMAL Exclusive Dealing notification is not revoked, it will establish a precedent that other car companies will follow, and we will likely result in 10-year conditional warranties being offered by many of the car companies operating in Australia. Given the average age of registered vehicles in Australia is just over 10 years, the widespread adoption of these conditional warranties would have a detrimental impact on the 30,000 predominately family-owned mechanical repair businesses in Australia as well as the globally recognised \$5 billion Australian automotive parts manufacturing sector. This will result in a significant lessening of competition which will reduce competition and choice and drive up the cost of vehicle ownership for all Australians.

In our view this application by Mitsubishi constitutes a deliberate attempt to exclude Australian owned businesses from supplying safe and legitimate products and services to consumers and should be revoked. Please see attached our formal submission prepared by Industry Legal Group (ILG) to support our position.

Please contact me if you have any queries or require further information.

Yours Sincerely,



Stuart Charity
Chief Executive Officer
Australian Automotive Aftermarket Association

Our Reference: ED:20488

9 October 2020

Ms Susie Black
Director, Adjudication
c/- Andrew Mahony
Australian Competition and Consumer Commission

EMAIL adjudication@accc.gov.au

Dear Ms Black,

Australian Automotive Aftermarket Association Limited Submissions - Mitsubishi Motors Australia Limited Exclusive Dealing Notification RN10000433

We refer to Mitsubishi Motors Australia Limited (**MMAL**) Exclusive Dealing Notification RN10000433 (**Notification**) under which MMAL proposes to offer a 10 year (or 200,000 km, whichever occurs first) warranty to purchasers of new Mitsubishi vehicles on the condition that the purchaser exclusively acquires aftermarket servicing from an MMAL dealer or service centre (**Notified Conduct**).

We act for the Australian Automotive Aftermarket Association Limited (**AAAA**), the national industry association representing independent manufacturers, distributors, wholesalers, importers and retailers of automotive parts and accessories, tools and equipment, and providers of vehicle service and repair, and modification services in Australia (**Independent Aftermarket**). AAAA is an interested party to the Notification.

AAAA is concerned that the Notified Conduct has the purpose or likely effect of substantially lessening competition, particularly in relation to the Independent Aftermarket, and in all the circumstances will not result in likely public benefit which would outweigh the likely public detriment. Accordingly, the Notification should be revoked.

AAAA's submissions in response to the Notified Conduct are summarised below. AAAA is available to discuss these concerns in more detail.

1. Definitions

ACCC means the Australian Competition and Consumer Commission.

ACCC Consumer Survey means the ACCC Consumer Survey, Consumer experiences of buying, servicing and repairing new cars, Colmar Brunton, May 2017.

ACCC Market Study means the ‘New Car Retailing Industry’ market study by the ACCC including the final report dated December 2017.

ACL means the Australian Consumer Law.

Warranty means the warranty being proposed by MMAL in the Notification and set out in Annexure 1 of the Notification, being a 10 year (or 200,000 km, whichever occurs first) warranty to purchasers of new Mitsubishi vehicles on the condition that the purchaser exclusively acquires aftermarket servicing from an MMAL dealer or service centre.

2. Background

- 2.1. Recent market studies and surveys conducted in relation to the new vehicle industry’s history of non-compliance with ACL and the existing competition and consumer issues in the market (referred to throughout this submission) will provide further context to this submission and why the Notified Conduct is likely to have the effect of substantially lessening competition and be a public detriment.
- 2.2. For example, a range of issues that AAAA considers relevant to the matters raised in the Notification were considered in the ACCC Market Study including:
- (a) vehicle manufacturers and dealers focus on warranty obligations to the exclusion of their consumer guarantee obligations;¹
 - (b) vehicle manufacturers and dealers making false or misleading representations to consumers about their rights under the ACL in relation to:
 - (i) the circumstances in which the consumer guarantees apply;
 - (ii) the remedies available to consumers when a vehicle does not meet the consumer guarantees; and
 - (iii) the interaction between consumer guarantees and warranties,²
 - (c) the dominant ‘culture of repair’ underpinning vehicle manufacturers’ systems and policies for dealing with vehicle defects and failures³ (it was noted that the largest obstacle to consumers receiving the remedies they are entitled to under the ACL was due to the conduct of manufacturers in managing consumer guarantee claims and the manufacturer’s

¹ ACCC Market Study, page 61-66.

² ACCC Market Study, page 54-66.

³ ACCC Market Study, page 65-66.

related policies, systems and process failing to sufficiently take the consumer guarantees into account);⁴

- (d) not all information regarding warranties may be brought to the attention of the consumer, it was noted that this was the case in relation to extended warranties;⁵
- (e) the widespread use of non-disclosure agreements by vehicle manufacturers and dealers when resolving complaints;⁶
- (f) the lack of effective independent dispute resolution options for consumers;⁷
- (g) the negative effect for consumers of not providing independent service providers with access to repair and servicing data and information;⁸ and
- (h) particular features of the commercial arrangements between vehicle manufacturers and dealers that have a negative impact on consumers,⁹

(ACL Compliance and Conduct Issues).¹⁰

2.3. The ACCC Market Study provides examples of ACL Compliance and Conduct Issues based on consumer reports to the ACCC.¹¹

2.4. Due to the ACL Compliance and Conduct Issues some manufacturers were required to provide undertakings to the ACCC.¹²

2.5. Regarding competition within the aftermarket:

- (a) it was found that manufacturers and dealers generally earn higher profit margins from

⁴ ACCC Market Study, page 2.

⁵ ACCC Market Study, page 52.

⁶ ACCC Market Study, page 70.

⁷ ACCC Market Study, page 71.

⁸ ACCC Market Study, page 2, 30, 42 and 45.

⁹ ACCC Market Study, page 74-90.

¹⁰ ACCC Market Study; ACCC Media Release 'New car industry put on notice', <https://www.accc.gov.au/media-release/new-car-industry-put-on-notice>, accessed 6 October 2020.

¹¹ ACCC Market Study, page 60.

¹² Ford Motor Company of Australia Limited, s 87B undertaking, dated 26 April 2018; GM Holden Ltd, s 87B undertaking RN. D17/106088, dated 2 August 2017; Hyundai Motor Company Australia Pty Ltd, s 87B undertaking, 6 February 2018; Volkswagen Group Australian Pty Ltd, s 87B undertaking, dated 6 September 2018.

aftermarket services, including vehicle servicing, repairs and supply of parts and tools, compared to new vehicle sales;¹³

- (b) it was found that competition in markets for the “supply of aftermarket services is less competitive as a result of factors including:
 - (i) the ability and incentives of vehicle manufacturers to impede competition in profitable aftermarkets by controlling access to necessary inputs such as the technical information needed to repair and service a new vehicle;
 - (ii) consumer misunderstanding about warranty and servicing requirements...”;¹⁴ and
- (c) it was observed that around one in ten new vehicle owners have their vehicle repaired or serviced by an independent service provider, and:
 - (i) a significant part of the reason one in ten new vehicle owners choose to service their vehicle with an independent service provider was that it was cheaper than the dealer;¹⁵ and
 - (ii) the ACCC formed the view that the “competitive discipline imposed by independent service providers on the aftermarkets for the repair and servicing of new vehicles remains valuable and of benefit to consumers, and that consumers also benefit from having a choice of providers to repair and service new vehicles”.¹⁶

2.6. Regarding consumer preferences, experiences and behaviours:

- (a) while consumers have the right to choose who services and repairs their new vehicle, the ACCC Consumer Survey indicated that almost nine out of ten new vehicle owners serviced their vehicle with authorised dealer service centres while their vehicle is under warranty;¹⁷
- (b) a significant reason why almost nine in ten new vehicle owners have their vehicle serviced

¹³ ACCC Market Study, page 30 and 143; Refer to paragraph 5.1(a)(i) of this submission for details.

¹⁴ ACCC Market Study, page 4 and 45.

¹⁵ ACCC Consumer Survey page 52 (multiple answers allowed for the relevant question, ‘Cheaper than the dealer, 54%, ‘Close by and convenient’: 50%); The Klein Partnership, ‘Consumer Insights Research Report’ (prepared on behalf of the AAAA), May 2018, page 39, Table C reproduced in Annexure 2 to this submission.

¹⁶ ACCC Market Study, page 2-3.

¹⁷ ACCC Market Study, page 42; The ACCC Consumer Survey found that 86 per cent of respondents reported taking their new car to the dealer where they purchased it or another dealership in the same network for routine services (ACCC Consumer Survey, page 46).

with dealers is due to the perception that servicing with dealers was mandatory under the warranty, was mandatory according to the logbook or because they were worried about voiding the warranty;¹⁸

- (c) the preference for vehicle owners to service their new or near-new vehicle with the dealers shifts to independent service providers as the vehicle ages. The preference change is most pronounced at the five-year mark when warranties or leasehold agreements expire,¹⁹

(Consumer Behaviour).

2.7. Further regarding warranties:

- (a) the ACCC Consumer Survey found:
 - (i) two thirds of new vehicle owners who required repairs had their vehicle repaired at the dealer under the manufacturer's warranty, while only one in twelve had repairs under an extended warranty;²⁰
 - (ii) only 10% of new vehicle owners indicated that they would choose an extended warranty if they were to buy a new vehicle again;²¹ and
 - (iii) more than half of new vehicle owners who opted for independent servicing indicating that they did so as it was cheaper than the dealers and half did so as the independent service centre was close and convenient,²²

which AAAA believes indicates that there are limited benefits to be obtained from extended

¹⁸ ACCC Consumer Survey, page 49 (multiple answers where allowed for the relevant question, 'Mandatory under warranty': 23%, 'Worried about voiding the warranty': 22%, and 'Mandatory according to logbook': 9%); ACCC Market Study, page 42.

¹⁹ AAAA Response to ACCC New Car Retailing Industry Market Study, page 11; Roy Morgan, 'Competition heats up in vehicle servicing as national fleet becomes more reliable' <http://www.roymorgan.com/findings/7757-competition-heats-up-in-vehicle-servicing-as-national-fleet-becomes-more-reliable-201811212241>, accessed 8 October 2020 (Annexure 1 to this submission reproduces Table A from this website page for convenience); The Klein Partnership, 'Consumer Insights Research Report' (prepared on behalf of the AAAA), May 2018, page 39, Table B reproduced in Annexure 1 of this submission.

²⁰ ACCC Consumer Survey, page 64.

²¹ ACCC Consumer Survey, page 71.

²² ACCC Consumer Survey, page 52 (multiple answers allowed for the relevant question, 'Cheaper than the dealer, 54%, 'Close by and convenient': 50%); The Klein Partnership, 'Consumer Insights Research Report' (prepared on behalf of the AAAA), May 2018, page 39, Table C reproduced in Annexure 2 to this submission.

warranties especially in light of available statutory rights and that consumers benefit from having a choice of providers to repair and service their new vehicle; and

- (b) when consumers do choose independent service providers and/or non-manufacturer branded parts there is a real risk that manufacturer warranty claims may be refused without a clear link being established between the defect and the use of the independent service provider or spare part.²³

3. Notified Conduct

- 3.1. MMAL is attempting to restrict Mitsubishi vehicle owner's freedom to choose to deal with the Independent Aftermarket (and vice versa i.e. by restricting the Independent Aftermarket's access to Mitsubishi vehicle owners) by requiring purchasers to exclusively acquire aftermarket servicing for their vehicle from an MMAL dealer and/or service centre for substantial part of the life of a vehicle. While MMAL states that there is no contractual obligation on the purchaser to service their vehicle with an MMAL dealer or service centre, the ACL Compliance and Conduct Issues and Consumer Behaviour dictate that the Notified Conduct will have the likely effect of substantially lessening competition for the reasons set out in this submission.

4. Classes of Affected Persons

- 4.1. MMAL acknowledge in the Notification that as a result of the Notified Conduct independent service providers may service fewer Mitsubishi vehicles.
- 4.2. AAAA agree that the ability of independent service centers to compete will be affected. However, further state the effects are likely to be more significant than a mere reduction in the number of Mitsubishi vehicles being serviced by independent service providers if the Notification is not revoked. This is because:
 - (a) it is likely, in light of the market for new vehicle warranties and history of competition between vehicle manufacturers,²⁴ that other vehicle manufacturers will follow suit in offering extended warranties similar to the Notified Conduct; and
 - (b) as a result, independent service providers' access to consumers will be restricted

²³ ACCC Market Study, page 56.

²⁴ Warranty timeline - https://www.caradvice.com.au/884298/mitsubishi-launches-10-year-warranty-but-theres-a-catch/?q=/884298/mitsubishi-launches-10-year-warranty-but-theres-a-catch/photos/szke5fpm76qbtj9qu8h7&&ca_rd=route, accessed 6 October 2020.

substantially lessening competition in the market.

- 4.3. MMAL state that it is open to independent service providers applying to become an “MMAL Service Centre”, including a standalone service centre.²⁵ In relation to this claim there is little information on what it means to be a standalone service centre, including on the MMAL website. Without more information it is likely that standalone service centres may be subject to a level of control by MMAL,²⁶ and the likely effect for consumers would be the same (e.g. loss of access to an independent service provider that is able to provide fair and impartial service and advice), which is identified as detrimental to the public.
- 4.4. Other than independent service providers, MMAL has not acknowledged the other parties in the Independent Aftermarket that will likely be negatively affected by the Notified Conduct including:
- (a) Independent Aftermarket manufacturers, distributors, wholesalers, importers and retailers of automotive parts and accessories, tools and equipment who will not have access, for approximately 10 years, to new Mitsubishi vehicle owners who (as well as consumers of other vehicle manufacturers who follow suit), take their vehicle:
 - (i) to be serviced with MMAL dealers or service centres in order to maintain the Warranty, as they will be supplied manufacturer branded parts²⁷ and accessories;
 - (ii) to MMAL dealers or service centres for repairs because:
 - (A) they are confused about the terms of the Warranty or misled in relation to their consumer rights;²⁸ and
 - (B) of concerns around voiding their Warranty,²⁹as they will be supplied manufacturer branded parts³⁰ and accessories.

²⁵ Notification, paragraph 3.2(c).

²⁶ Refer to paragraph 5.2(b) of this submission for details.

²⁷ Mitsubishi Manufacturer’s Warranties ‘10 Year New Car Warranty Terms and Conditions’ and ‘5 year New Car Warranty Terms and Conditions’, <https://www.mitsubishi-motors.com.au/shopping-tools/warranty>, accessed 7 October 2020; Mitsubishi Australia, ‘Genuine Parts and Accessories’, <https://www.mitsubishi-motors.com.au/customer-assistance/genuine-parts-accessories> accessed on 7 October 2020.

²⁸ Refer to paragraph 2.2(b), 2.2(c) and 5.2(b)(iv) of this submission for details.

²⁹ Refer to paragraphs 2.6 of this submission for details.

³⁰ Mitsubishi Manufacturer’s Warranties ‘10 Year New Car Warranty Terms and Conditions’ and ‘5 year New Car Warranty Terms and Conditions’, <https://www.mitsubishi-motors.com.au/shopping-tools/warranty>,

- (b) Independent Aftermarket providers of modification services who will not have access, for approximately 10 years, to new Mitsubishi vehicle owners (as well as consumers of other vehicle manufacturers who follow suit), who:
 - (i) have their vehicle modified by a MMAL dealer or service centre with manufacturer branded parts and accessories because:
 - (A) they are confused about the terms of the Warranty or misled in relation to their consumer rights;³¹ and
 - (B) of concerns around voiding their Warranty.³²

4.5. The Notification also notes that repairs may still be undertaken by independent service providers without effecting the Warranty.³³ However, the Independent Aftermarket's access to repairs is limited by the following:

- (a) if there is a manufacturing defect the vehicle is likely to be returned to the supplier (dealer) of the vehicle for repair, pursuant to the obligation of suppliers and manufacturers under the ACL and/or manufacturer warranties. The ACCC Consumer Survey noted that 39% of repairs on new vehicles were due to a defect in the manufacturing,³⁴
- (b) in relation to crash repairs, insurers have preferred repairers (depending on the terms and conditions of the insurance agreement), which may include manufacturer authorised repair network repairers who are likely to be required to use authorised parts provided through authorised distribution networks which are likely to exclude new independent aftermarket parts,³⁵ and
- (c) Consumer Behaviour.³⁶

5. Response to Alleged Public Benefits

5.1. To the extent that the Notified Conduct does provide for any cost saving for consumers who may

accessed 7 October 2020; Mitsubishi Australia, 'Genuine Parts and Accessories', <https://www.mitsubishi-motors.com.au/customer-assistance/genuine-parts-accessories> accessed on 7 October 2020.

³¹ Refer to paragraph 2.2(b), 2.2(c) and 5.2(b)(iv) of this submission for details.

³² Refer to paragraph 2.6 of this submission for details.

³³ Notification, paragraph 1.7(d).

³⁴ ACCC Consumer Survey, page 58.

³⁵ ACCC Market Study, page 42-43.

³⁶ Refer to paragraph 2.6 of this submission for details.

otherwise choose to purchase an extended warranty from a third party, AAAA submits that:

- (a) the Notified Conduct is likely to result in consumers incurring additional and unnecessary costs due to the following:
 - (i) the use of manufacturer branded parts for services conducted at a dealers,³⁷ which is likely to result in consumers purchasing manufacturer branded parts at a high profit margin for the manufacturer and dealers to the detriment of the consumer for the following reasons:
 - (A) manufacturers are incentivised to use manufacturer branded parts as the profits margins for after sale services, including the use of parts in those services, are higher than the profit margins for the sale of new vehicles³⁸, for example:
 - (I) the profit margin for manufacturers on the sale of parts is significant and disproportionate, parts have been found to consist of 5% of revenue and 50% of the manufacturer's profit,³⁹ and
 - (II) it has been found that building a vehicle from parts at retail prices will cost between 2.4 and 5.4 times the price of the new vehicle,⁴⁰ in another example, the research has indicated that rebuilding a medium sized hatch valued at \$21,000 may cost \$114,081 (being more than five times the purchase price).⁴¹
 - (B) the profit margins made by manufacturers operates as a disincentive for manufacturers and dealers to use cheaper suitable independent aftermarket parts, the Notified Conduct is likely to reduce competition in the aftermarket for a prolonged period;

³⁷ Mitsubishi Manufacturer's Warranties '10 Year New Car Warranty Terms and Conditions' and '5 year New Car Warranty Terms and Conditions', <https://www.mitsubishi-motors.com.au/shopping-tools/warranty>, accessed 7 October 2020; Mitsubishi Australia, 'Genuine Parts and Accessories', <https://www.mitsubishi-motors.com.au/customer-assistance/genuine-parts-accessories> accessed on 7 October 2020.

³⁸ ACCC Market Study, pages 30 and 142.

³⁹ ACCC Market Study, page 143.

⁴⁰ ACCC Market Study, page 143.

⁴¹ Suncorp submission to the New car retailing industry market study issues paper, page 1; ACCC Market Study, page 140.

- (C) the use of manufacturer branded parts within the dealer network may decrease pricing transparency which raises concerns that competition may be further restricted due to consumers not being in a position to make price comparisons.⁴² Enabling price comparisons provides consumers with the opportunity to make informed choices and is likely to stimulate competition;⁴³
 - (D) although the manufacturer profit margin for the sale of new vehicles is lower in comparison with aftermarket servicing and parts supply, it is indicated that consumers do not easily switch vehicles due to the high cost of purchasing a new vehicle, as a result it may be difficult for consumers to avoid expensive aftermarket servicing and parts.⁴⁴ The difficulty for consumers in switching vehicles indicates the importance of a having a competitive parts market (and servicing market), to prevent potential public detriment; and
 - (E) it was observed in the ACCC Market Study that “in light of the concerns raised about high parts prices, it is particularly important that competition between aftermarket parts suppliers is not unduly restricted”.⁴⁵
- (ii) the Notified Conduct is likely to result in reduced independent service provider and aftermarket parts supplier participation in the market, which is likely to hinder downward pressure on the price of servicing and parts that is stimulated by competition, in relation to this it has been noted:
- (A) that competition for spare parts increases as the vehicle’s age increases and their value decreases;⁴⁶

⁴² ACCC Market Study, page 141, 144.

⁴³ ACCC Market Study, page 144.

⁴⁴ ACCC Market Study, page 141, 143.

⁴⁵ ACCC Market Study, page 144.

⁴⁶ ACCC Market Study, page 142.

- (B) that most consumers with vehicles under warranty (86%), take their vehicle to an authorised dealer for servicing rather than independent service providers;⁴⁷ and
 - (C) the provision of aftermarket services and repairs and the sale of parts account for 15% of revenue for dealers, while they contribute to 49% of the dealer's profits.⁴⁸
- (iii) given that the Notified Conduct will continue for a prolonged period, competition for servicing and spare parts is likely to be reduced for a substantial part of the life of a vehicle at the cost of, and to the detriment of, the consumer;
 - (iv) when manufacturer warranties are available remedies available under the ACL may be overlooked by manufacturers and dealers, vehicles are likely to be repeatedly repaired, even where better remedies are available under the ACL, for example, the ACCC has noted a "dominant 'culture of repair'" embedded in manufacturer vehicle defect policies and systems⁴⁹ under which dealers may continue to repair a vehicle even where there is a 'major failure' entitling the consumer to refund or replacement⁵⁰ or, if the warranty document does not provide damages for reasonably foreseeable loss and the ACL is overlooked, the consumer may incur unnecessary costs.⁵¹ Additionally, remedies may be denied once the warranty period has ended, or provided as a 'goodwill' gesture (even where the ACL may still apply in the circumstances);⁵²
 - (v) a potential lack of access to MMAL dealers and service centres.⁵³ Consumers who feel compelled to have their vehicle serviced or repaired with an MMAL dealers or service centres to maintain the Warranty or because they are confused about the

⁴⁷ ACCC Market Study, page 39; ACCC Consumer Survey page 46; Refer to paragraph 2.6 of this submission for details.

⁴⁸ ACCC Market Study, page 4 and 45.

⁴⁹ ACCC Market Study, page 65.

⁵⁰ ACCC Market Study, page 65; ACL section 263; Small Business Development Corporation, 'Submission to ACCC New Car Retailing Study', pages 1-3.

⁵¹ Small Business Development Corporation, 'Submission to ACCC New Car Retailing Study', page 1.

⁵² ACCC Market Study pages 61-64; Small Business Development Corporation, 'Submission to ACCC New Car Retailing Study', pages 1-3.

⁵³ 198 in total in Australia. Notification paragraph 3.2(b).

distinction between consumer guarantees and warranties⁵⁴ or worried about voiding the Warranty,⁵⁵ may need to drive hundreds of kilometers to the nearest MMAL dealer or service centre. This expense coupled with the cost of the service, repair and parts (as applicable), may outweigh the cost of an equivalent service or repair from a more accessible independent service centre;

- (b) unlike other extended warranties, the consumer does not exercise any choice or discretion to purchase the Warranty. In these circumstances there is greater potential for a lack of transparency, for the consumer to be confused about the terms of the Warranty or misled in relation to their rights;⁵⁶ and
- (c) consumers have a statutory right to purchase a vehicle free from defects. As such, there should be no cost to the consumer. It is the consumer's lack of awareness of their statutory rights which drive demand for extended warranties.⁵⁷ Vehicle manufacturers and dealers contribute to this lack of awareness by failing to provide consumers with adequate information about consumer guarantees at the point of purchasing the new vehicle.⁵⁸

5.2. In respect of the public benefit claim relating to ensuring that vehicles serviced under the Warranty are serviced with a "high degree of care and skill":⁵⁹

- (a) AAAA submits that the Notified Conduct does not provide a public benefit:
 - (i) of ensuring a "high degree of care and skill" in servicing as this benefit already exists under the consumer guarantee to provide services with due care and skill; and
 - (ii) beyond the high degree of care and skill already provided by independent service providers.

⁵⁴ Refer to paragraph 2.2(b), 2.2(c), 2.6 and 5.2(b)(iv) of this submission for details.

⁵⁵ Refer to paragraph 2.6 of this submission for details.

⁵⁶ Refer to paragraphs 2.2(b), 2.2(c) and 5.2(b)(iv) of this submission for details.

⁵⁷ A study of the former Trade Practices Act 1974 found that a lack of awareness of statutory rights was driving the demand for extended warranties (National Education and Information Taskforce, National Baseline Study for Statutory Warranties and Refunds, Research Paper No 2, October 2009.). Where consumers are not aware of their statutory rights under the ACL, including the consumer guarantees, they may be more inclined to consider that they should purchase an extended warranty, and may be more susceptible to purchasing an extended warranty that offers no real benefit above the ACL.

⁵⁸ ACCC Market Study, page 52-57.

⁵⁹ Notification paragraph 5.1(b).

- (b) to the extent that the Notified Conduct results in any public benefit, it is unlikely that the public benefit will outweigh the public detriment, for the following reasons:
- (i) MMAL admits that it is “able to exercise significantly greater control over its dealers and services centres”;⁶⁰
 - (ii) the commercial relationship between the manufacturer and the dealers is vulnerable to the dealer being influenced by the manufacturer and an abuse of the power the manufacturer has in the relationship. It may influence and impact upon whether the dealer will focus only on the warranty to the exclusion of consumer guarantees, in particular as the dealer has an indemnity against the manufacturer that the relationship may constraint the dealers providing a remedy under the consumer guarantees and quell the exercise of that indemnity against the manufacture for the provision of the remedy and may also constrain the provision of a remedy under the warranty;⁶¹
 - (iii) the ACCC have previously found the following clear public detriments in relation to the commercial arrangements between manufacturers and dealers:⁶²
 - (A) disincentive for dealers to promptly and reasonably respond to consumer guarantee and warranty claims;
 - (B) dealers denying or making it difficult for consumers to access remedies to which they are entitled;
 - (C) dealers responding to consumer guarantee or warranty claims within a framework of policies and procedures set by the manufacturer which give the manufacturer broad discretion to adversely influence the response of dealers to customer complaints and prevent dealers from satisfying their ACL obligations;
 - (D) commercial pressure on dealers to comply with manufacturer requirements in order to ensure their dealer agreements will be renewed which may have

⁶⁰ Notification paragraph 5.1(b)

⁶¹ ACCC Market Study, page 74-75 and 77-90.

⁶² ACCC Market Study, page 88-89 (for summary) and 77-90 (for details).

- consequences for how consumer claims are dealt which aren't adequately covered by the manufacturer's policies and procedures;
- (E) undermining consideration of statutory rights by handling consumer guarantee claims under manufacturer's goodwill policy and requirements for dealers to seek prior approval for goodwill contribution;
 - (F) complaint handling processes which focus on manufacturer's warranty without consideration of consumer's statutory rights;
 - (G) complex warranty claim processes which include arbitrary requirements resulting in dealers being inadequately indemnified for remedies provided in compliance with the warranty or statutory provisions; and
 - (H) agreements containing no certainty that the manufacturer will indemnify the dealer if there is a manufacturing defect which could lead to dealers being reluctant to offer remedies to which the consumers are entitled.
- (iv) there is a higher risk of the ACL Compliance and Conduct Issues including the risk of MMAL dealers and service centres making false or misleading representations to consumers about their rights under the ACL leading to consumer confusion regarding their statutory rights. Not limited to:
- (A) failing to inform consumers that they have a right to a remedy under the consumer guarantees including the right to reject vehicles due to major failures due to a culture of repair;⁶³
 - (B) direct and implied misrepresentations in service manuals and logbooks, for example that authorised dealers must carry out services, strongly recommending against the use of non-manufacturer branded parts and statements regarding resale value.⁶⁴ In relation to this, the Warranty is subject to the terms and conditions detailed in the 'Service and Warranty Booklet' and the 'Owner/Operator Responsibilities' documents, which have not been provided.⁶⁵

⁶³ ACCC Market Study, page 65-66; Refer to paragraph 2.2(c) of this submission for details.

⁶⁴ ACCC Market Study, page 6 and 54-57.

⁶⁵ Notification, Annexure 1.

(v) The significantly high profit margins for manufacturer branded parts (refer to paragraph 5.1(a)(i) of this submission for details).

(c) independent service providers are more impartial when it comes to diagnosing a defect in materials or factory workmanship and the loss of access to independent service providers created by the Notified Conduct is likely to be a public detriment. For example:

(i) if the consumer exclusively takes their vehicle to dealers, dealers may not be able to provide such impartial remedy offerings due to the commercial relationship that exists between the dealer and vehicle manufacturer that may prevent the proper remedy being provided;⁶⁶ and

(ii) despite the practice being common due to the commercial relationship between manufacturers and dealers, it is inappropriate for the dealer to seek the approval of the vehicle manufacturer to provide a remedy or to otherwise defer to the manufacturers requirements regarding the provision of remedies,⁶⁷ as this negatively impacts on dealers complying with their obligations under the ACL and being able to effectively exercise their right of indemnity against the manufacturer under the ACL.

5.3. In respect of the public benefit claim relating to the transfer of the Warranty to subsequent vehicle owners:⁶⁸

(a) most purchasers of second-hand vehicles have rights under the ACL regardless of the Warranty;⁶⁹

(b) to the extent that the Notified Conduct results in any public benefit, it is unlikely the public benefit will outweigh the public detriment, for the following reasons:

(i) the manufacturer carries obligations in respect of that vehicle pursuant to the ACL and the consumer guarantees which the manufacturer should be providing regardless of the Warranty, as follows:

⁶⁶ ACCC Market Study, page 74-90; Small Business Development Corporation – Submission to the New car Retailing Study, page 5-6; Refer to paragraph 5.2(b) of this submission for details.

⁶⁷ ACCC Market Study, page 64 and 74; Refer to paragraph 5.2(b)(iii)(G) and 5.2(b)(iii)(H) of this submission for details.

⁶⁸ Notification, paragraph 5.1(c)(ii).

⁶⁹ Refer to paragraph 5.3(b) of this submission for details.

- (A) where a second-hand vehicle is purchased by way of private sale from a person who purchased the vehicle in trade and commerce, the purchaser, as an *affected person*, can make a claim against the vehicle manufacturer for the failure to comply with several consumer guarantees, including the consumer guarantee as to acceptable quality, within three years after the day the *affected person* first becomes aware, or ought reasonably become aware, of the consumer guarantee not being complied with;⁷⁰
 - (B) the consumer guarantees are also applicable to the sale of second-hand vehicles in trade and commerce, enabling the consumer to make a claim for the failure to meet the guarantee as to acceptable quality against either the supplier or the manufacturer,⁷¹ where a claim is made against a supplier the indemnification of suppliers by manufacturers would also be applicable;⁷²
 - (C) the limitations and exclusions set out in the Warranty,⁷³ may result in a more limited remedy being provided than would be available under the consumer guarantees and, given the findings on dealers and manufacturers focusing on providing a remedy under warranties, a remedy the consumer may have been entitled to under the consumer guarantees may not be provided;⁷⁴
- (ii) given the limited scope of the public benefit offered by the Warranty transfer to a new owner, in light of the concerns raised in regard to the Warranty, including consumer confusion with regard to warranties and consumer guarantees,⁷⁵ the focus on providing a remedy under the warranty over consumer guarantees⁷⁶ and the restriction of price comparison which support a competitive market, due to the requirement of the Warranty to have the vehicle serviced with the dealer,⁷⁷ it is

⁷⁰ ACL sections 2, 54, 271, 272 and 273.

⁷¹ ACL sections 54, 259 and 271; Consumer Affairs Australia and New Zealand (CAANZ) 'Australian Consumer Law Review', March 2017, page 30-31.

⁷² ACL section 274; Consumer Affairs Australia and New Zealand (CAANZ) 'Australian Consumer Law Review', March 2017, page 30.

⁷³ Notification Annexure 1.

⁷⁴ Refer to paragraph 2.2(a) and 2.2(c) of this submission for details.

⁷⁵ Refer to paragraph 2.2(b), 5.1(a)(iv) and 5.2(b)(iv) of this submission for details.

⁷⁶ Refer to paragraph 2.2(a) of this submission for details.

⁷⁷ Refer to paragraph 5.1(a) in particular 5.1(a)(i)(C) and 5.1(a)(i)(E) of this submission for details.

unlikely the public benefit of being able to transfer the Warranty will outweigh the public detriment of authorising the Warranty.

6. Lessening Competition

- 6.1. AAAA submits that for the reasons given in this submission, the Notified Conduct will substantially lessen competition in the aftermarket adversely affecting the Independent Aftermarket and consumers who benefit from a competitive market, especially in the context of the systemic ACL Compliance and Conduct Issues. Further, it is likely the Notified Conduct will prolong the Consumer Behaviour impeding competition in the aftermarket.
- 6.2. Competitive markets should enhance the welfare of Australian's through ensuring that goods and services that consumers want are developed and supplied at the lowest cost possible. The Independent Aftermarket promotes and enhances the welfare of Australians through ensuring that the goods and services that consumers want are developed and supplied at the lowest possible cost. If MMAL (and the other vehicle manufacturers who will inevitably follow suit) has a monopoly over the servicing and parts used in vehicles for 10 years, there will be significantly reduced pressure from the Independent Aftermarket or incentive for them to consider the welfare of Australians.

7. Public Detriments

- 7.1. AAAA submits that for the reasons given in these submissions, the Notified Conduct will cause public detriment and to the extent that the Notified Conduct results in any public benefits such benefits are outweighed by the public detriments (or likely public detriments).
- 7.2. Below are excerpts from a speech recently provided by Rod Sims Chair ACCC Committee for Economic Development Australia regarding the ACCC compliance and enforcement priorities for 2020. AAAA considers that the Notified Conduct is not consistent with the ACCC compliance and enforcement priorities. As outlined in these submissions, many of the issues existing in the new vehicle industry and driving consumer complaints are a result of conduct by manufacturers and dealers in relation to manufacturer and extended warranties as outlined in this submission.

“Firms with market power have the ability and incentive to ‘give less and charge more’, and to engage in behaviour that restricts competition. Other firms will be attracted to using cartels to deprive customers of the benefits of competitive rivalry. There are also incentives to mislead consumers about a good or service. Firms that ‘cut corners’ and supply unsafe products put the health of consumers at risk.

...

Cartel behaviour, anticompetitive mergers or conduct, and misleading and deceptive conduct do great harm to consumers and the economy. Incentives to engage in such behaviour are strong.

...

*As I said last year, consumer guarantees remain the number one issue that the ACCC and the Australian Consumer Law regulators have to deal with. Over the last year, we've received 25 000 reports from consumers who want help trying to resolve a **dispute involving a motor vehicle** or white goods; these two are the most complained about sectors to the ACCC.*

...

The ACCC has matters before the courts involving motor vehicles manufacturers. Last year, we instituted court proceedings against Mazda. This is on the back of other court cases involving Jayco and Ford, with other enforcement proceedings involving Holden, Hyundai and Volkswagen.

It is clear from the high number of complaints received about this sector that consumers are still having problems enforcing their right to a consumer guarantee for these products. If consumers purchase a high-value product and are unable to obtain an appropriate remedy if that product turns out to be broken or does not work as it is supposed to, this can have a significant detrimental impact on consumers and households.”⁷⁸

Please let us know if you require any further information or have any questions concerning the above.

Yours sincerely,



Emma Dalley, Principal Lawyer

Industry Legal Group

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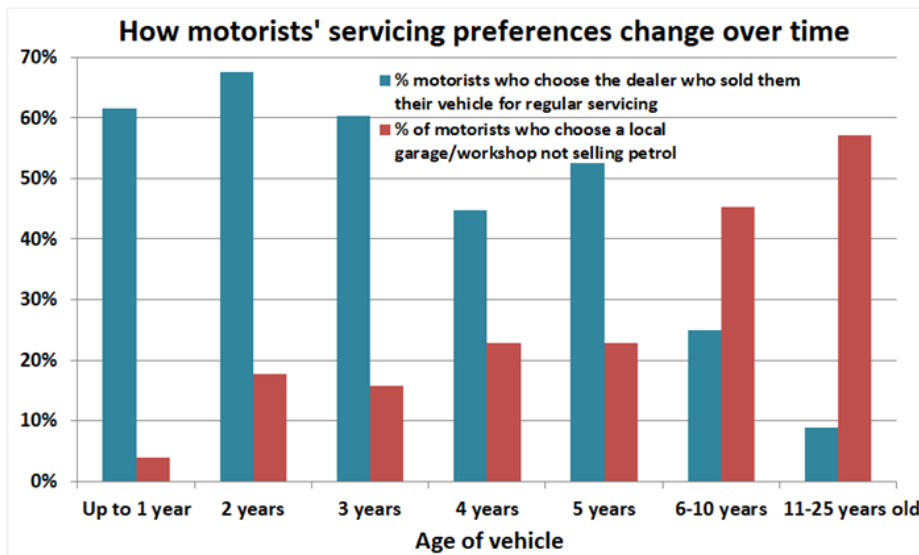


⁷⁸ ACCC Media Speeches, 'ACCC 2020 Compliance and Enforcement Priorities', Committee for Economic Development Australia Conference, 25 February 2020, <https://www.accc.gov.au/speech/accc-2020-compliance-and-enforcement-priorities>, accessed 9 October 2020

Annexure 1

Table A and Table B

Motorists continue to show a preference for dealer-run service centres when their vehicle is new or near-new, with a tendency to shift to local garage service centres as the vehicle ages. This transition is most pronounced at the five-year mark, when many factory warranties or lease-hold agreements expire.

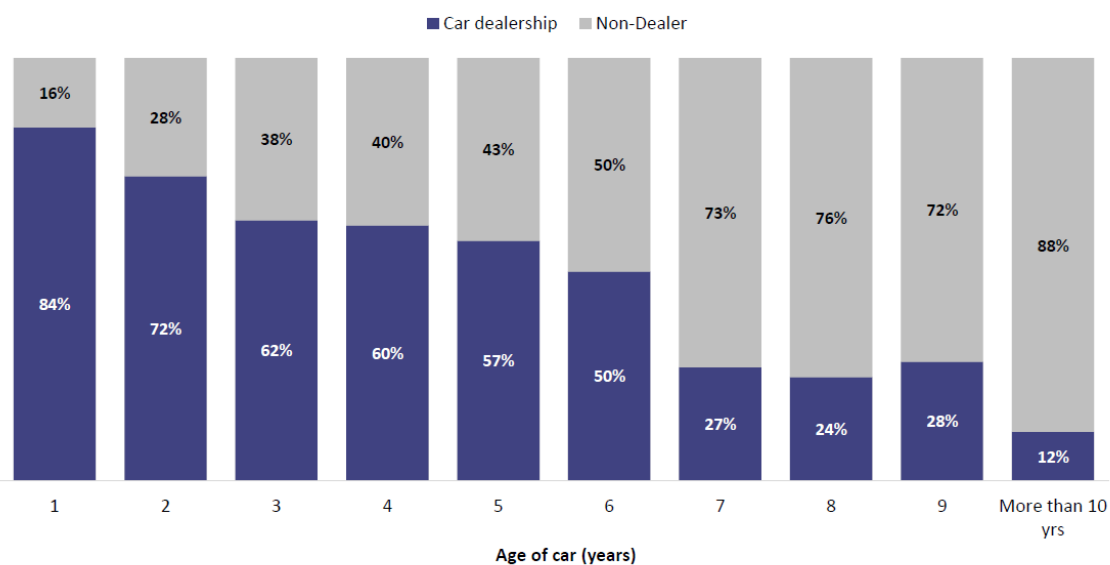


Source: Roy Morgan Single Source; Base: Australians who are drivers, Oct 2017 to Sept 2018, n=12,295. Chart shows 'Garages/workshop not selling petrol' vs 'Dealer who sold me my vehicle' only, and excludes other kinds of service centres.

Last Service

Service Provider Used by Age of Car

People with cars aged 5 years or less were more likely to get their car serviced at a dealership.



Base: Had Service in L12M n=1,390; Q3 – Age of car; S5 – At what type of workshop did you last get your car serviced?

Annexure 2

Table C

Satisfaction with Most Recent Service

Satisfaction With Aspects of Service



% Rated Excellent	Service Provider Used				
	Chain workshop	Independent workshop	Car dealership	Mobile Mechanic*	
The cost	35%	42%	24%	34%	
The expertise of the technician	51%	66%	43%	60%	
All elements of the service completed first time	52%	63%	49%	60%	
The service done within expected timeframe	53%	65%	54%	51%	
The cleanliness of the car after the service	39%	49%	50%	45%	
How clearly they explained the work they did on your car	54%	64%	47%	48%	
How quickly you could book the service	51%	58%	46%	43%	
The quality of replacement parts or consumables used	46%	53%	42%	45%	
Convenient location	56%	58%	33%	54%	
Open at convenient times	48%	49%	40%	41%	
The business being neat and tidy	40%	44%	53%	42%	
Access to alternative transport	32%	29%	29%	42%	
Value for money	42%	49%	25%	43%	
Seeking authorization before doing additional work	58%	63%	50%	51%	
Treated with respect	56%	69%	47%	62%	
Open and honest	52%	66%	38%	62%	
Eager to help	40%	55%	31%	48%	
Flexible	40%	49%	30%	50%	
	n=	117	318	313	28

Higher overall satisfaction shown by Independent Workshop users was consistent across individual measures, with the exception of the cleanliness of the car, the business being neat and tidy and access to alternative transport.

* Small Sample

Base: DIFM n=as above; Q53. Thinking of your last service, how would you rate the workshop on the following...; S5. At what type of workshop did you last get your car serviced?