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9 October 2020



Motor Trades Association of Australia Submission

Mitsubishi Motors Australian Limited (MMAL) Exclusive Dealing Notification N10000433.

<p>Attention:</p> <ul style="list-style-type: none"> • Mr Daniel McCracken-Hewson Acting General Manager, Adjudication Australian Competition and Consumer Commission <p>adjudication@accc.gov.au</p>	<p>Contact:</p> <p>Richard Dudley CEO Motor Trades Association of Australia</p> <p>_____</p> <p>_____</p> <p>_____</p>
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Context:

- On 11 September 2020, Mitsubishi Motors Australia Limited (**MMAL**) lodged an exclusive dealing notification with the Australian Competition and Consumer Commission (ACCC).
- The notification involves MMAL offering a 10-year or 200,000km (whichever occurs first) warranty to purchasers of new Mitsubishi vehicles on condition that the purchaser exclusively acquires aftermarket servicing from an MMAL dealer or service centre.
- The ACCC currently seeks submissions about the notification by 9 October 2020 as part of its legislated requirements to decide either:
 - Issue a draft notice to revoke the notification, or
 - Take no further action and allow the notification to stand.
- This submission to the ACCC investigation is prepared by the Motor Trades Association of Australia Limited (MTAA) on behalf of State and Territory Motor Trades Associations and Automobile Chambers of Commerce Members and their constituents.

MTAA Recommendation:

- MTAA generally supports MMAL extension of warranty coverage but **does not support** the inclusion of exclusive dealing conditions.
- MTAA has concerns there is a lack of transparency and clarity that may give rise to consumer confusion and subsequent complaint, MTAA respectfully suggests the notification as presented and without modification to address these concerns:
 - 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.
- MTAA recommends that ACCC make conditions that address identified issues of transparency and clarity identified in this submission but if this cannot be achieved then the ACCC issue a draft notice to revoke the notification.

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Executive Summary:

- MTAA understands that MMAL is afforded protection from legal action arising from potential breach of s47 of the *Competition and Consumer Act (Cth) 2010 (Act)*. This enables MMAL to engage in conduct described in the notification, without the risk of breaching the exclusive dealing provisions of the Act and that this protection will continue unless or until the notification is revoked or withdrawn.
- MTAA further notes that MMAL has exercised its rights to engage in the conduct as described in the notification with a public announcement and supporting marketing campaign to inform Australian consumers of an offer for a 10-year or 200,000km (whichever occurs first) warranty to purchasers of new Mitsubishi vehicles. While the notification process permits such conduct, MTAA suggests it was premature, given the ACCC considerations and outcomes may create consumer uncertainty.
- MTAA and Members generally support any car manufacturer or their distributors/importers providing improved warranty coverage or length of warranty coverage for Australian consumers. However, this support is conditional that any action to improve warranty coverage or length of warranty coverage is in accordance with Australian Consumer Law (ACL), the Competition and Consumer Act (CCA), and there is no potential detriment to consumers or other market participants including dealers, service and repair service providers.
- MTAA remains concerned about a long-standing issue that forms part of the recognised power imbalance between car manufacturers and their distributors/importers and their dealer networks. This issue is the failure of some car manufacturers and their distributors/importers to provide fair, reasonable and equitable warranty claim reimbursement or compensation to their dealers in the performance of warranty repairs. MTAA notes there is no reference in the submitted notification that deals with consequential matters including the potential for increased claims for warranty repairs over ten years.
- The MMAL offer of a 10-year warranty may appear at first glance to be of significant consumer benefit, and MTAA notes the announcement has already generated considerable and generally positive exposure. It has created a point of difference in the volatile and highly competitive Australian new car market. The MMAL offer of a 10-year warranty will be the longest available for any brand with the nearest competitor offering a manufacture backed warranty period of seven years and unlimited kilometres.
- Given the average age of the Australian passenger vehicle fleet is currently 10.2 years, the MMAL offer arguably provides warranty protection for almost the entire anticipated practical life of a Mitsubishi vehicle, noting that cars can and do last considerably longer.

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- MTAA notes that the submitted notification raises four previous notifications of 'similar conduct' accepted by the ACCC.
- MTAA respectfully suggests these previous notifications are quantifiably different from the MMAL notification as they each contain subtle variances such as links to existing 'Loyalty Programs' or 'Roadside assistance' programs [Subaru (Aust) Pty Ltd (N41001) and GM Holden Ltd (N41012)]. MTAA also notes that most of these notifications are more than a decade old and submitted before significant structural adjustment and change to the new car retailing market including significant consolidation and concentration that has occurred since acceptance.
- MTAA's concerns centre on inconsistency with consumer protections in the Act, competition provisions in the Act, previous ACCC findings and actions in the new vehicle retail market resulting from a comprehensive market study, and potential consequential impacts on other market participants that are not readily apparent within the notified conduct. Specifically:
 - A lack of transparency on the terms and conditions of the 10-year offer, which in the view of MTAA, has the potential to give rise to consumer confusion and unintended consequences for consumers.
 - A lack of transparency and clarity on the terms and conditions for Mitsubishi Dealers on the processes and requirements to ensure fair, reasonable, and equitable reimbursement and/or compensation for warranty service repairs undertaken on behalf of the manufacturer over a longer period.
 - The intent of the MMAL exclusive dealing notification is to restrict consumer choice by making a condition that owners who purchase a Mitsubishi vehicle covered by the offer must only use MMAL dealers or service agents from the outset. MTAA respectfully suggests such a condition may cause consumer confusion and potential conflict in relation to:
 - Consumer protections provided for in the ACL.
 - Competition provisions in the CCA.
 - Additional specific jurisdiction legislation and regulations governing product warranties and consumer protections.
 - Many of the ACCC's own findings and recommendations contained in the 2017 'ACCC New Car Market Study'.
 - The Federal Government's announced commitment to legislate during this Term of Parliament 'Access to Motor Vehicle Service and Repair Information' which addresses a significant recommendation of the 'New Car Market Study'. MTAA respectfully suggests the ACCC should not confine considerations to just the impact of the notification on Mitsubishi's 7.8% share of the Australian market, but the real potential for other car manufacturers and their representatives to make similar exclusive dealing notifications which may undermine the intent of the legislation and competition matters it seeks to address.

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Considerations:

Transparency and Clarity

- MTAA is of the view that the MMAL notification lacks transparency and clarity. It may create consumer confusion due to inconsistencies on consumer obligations and requirements specified under the Standard New Car Warranty (5 years or 100,000 km) and the Extended New Car Warranty (10 years or 200,000 Km).
- For example, MTAA is of the view there are inconsistencies between the five-year Standard New Car Warranty and the 10-year Extended New Car Warranty.
- It is understood the intent is to 'reward' loyalty to the Mitsubishi brand by the utilisation of Mitsubishi dealers and service agents. However, the obligations and conditions to access the extended warranty period contain cross-references to the 'standard new car warranty, which MTAA respectfully suggests are likely to cause confusion and become a source of eventual dispute.
- There are conditions and requirements on the consumer to take advantage of the 10-year extended warranty that influences consumer behaviours and requirements during the first five years of the standard new car warranty. These requirements may not be readily apparent to the consumer, particularly at the time of purchase. There may also be issues of confusion in transferability
 - The Standard New Car Warranty Terms and Conditions, contained in a document titled '*Mitsubishi Diamond Care Advantage full terms and conditions*', does not refer to any condition or requirement that an MMAL Dealer or Service Agent must service the vehicle. The wording accords with ACL provisions and issued guidance material.
 - However, under the heading of 'Extended New Car Warranty', specific conditions are detailed which impact the consumer and any freedom of choice they may wish to exercise during the first five years or 100,000km period. The inclusion of the word 'ALL' as a condition effectively locks a consumer into using MMAL dealers or service agents from the outset.

'Any defect must appear, and any claim under this warranty must be made, before the first to occur of either the time or distance limitations. To be eligible for the Extended New Car Warranty, BOTH of the below conditions must be complied with.

- *The vehicle must have had ALL scheduled services performed within the authorised Mitsubishi Dealer Network (from the first service onwards) (PHEV vehicles must be serviced at an authorised PHEV Mitsubishi Dealer); AND*
- *The vehicle must be serviced in accordance with the service schedule (please visit our website mitsubishi-motors.com.au/maintenance-schedule or contact 1300 13 12 11 for more details) at the specified servicing intervals for the duration of the New Car Warranty.*

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If EITHER of the above conditions are not complied with, the Extended New Car Warranty will immediately expire on and from the date the conditions are not complied with.

For example, if you service your vehicle within the Mitsubishi Dealer Network in accordance with the service schedule for the first 4 Regular Services, but the 5th Regular Service is not performed by the required time or distance (whichever occurs first), or occurs outside the Mitsubishi Dealer Network, the Extended New Car Warranty will expire on and from the date that the 5th Regular Service should have been performed within the Mitsubishi Dealer Network.

Each Regular Service must be performed within 2,000 km or 2 months from the scheduled distance or time (whichever occurs first).

- o MTAA respectfully suggests the example provided illustrates potential sources of confusion. Elsewhere in the notification it mentions Mitsubishi Dealer Network AND authorised Service Agents, but in this example, it says only the Mitsubishi Dealer Network. The linking of the fifth scheduled service (and the previous four service requirements) under the Standard New Car Warranty is conditional on the application of the extended further 5-year warranty. This statement appears at odds with consumer choice provisions of the standard new car warranty, and MTAA respectfully suggests is another point source of potential consumer confusion.
- It is the view of MTAA that the MMAL notification has not taken into proper account the need for improved clarity and information for consumers as outlined by the ACCC in its investigations as part of the 2017 ACCC New Car Market Study.
- MTAA's concerns about potential consumer confusion and potential for intended or unintended consequences arising from the MMAL notification are supported by the ACCC's observations and findings in the final report of that study including:

3. Consumer Guarantees and Warranties

Key Points

'In addition, consumers are not receiving adequate information about consumer guarantees at the point of sale of a new car. This impacts the ability of 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 manufacturer's warranty'.

Page 46, ACCC New Car Market Study Final Report 2017

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3.2.1. Key sources of consumer misunderstanding or confusion at the point of sale

'Many consumers generally feel that they understand their consumer rights and there is information available to consumers who would like to know more. However, submissions to this study indicated that consumers purchasing a new car may be confused by the distinction between consumer guarantees, manufacturer warranties and extended warranties at the point of sale.

There appear to be three main reasons for this:

- consumer fatigue at time of purchase
- focus on warranty protections at time of purchase, and
- limited information about consumer guarantees at time of purchase.

Page 47, ACCC New Car Market Study Final Report 2017

Findings on consumer understanding about consumer guarantees at the point of sale of a new car

'Many consumers face difficulties at the point of sale of a new car in understanding the application of the consumer guarantees to their new car purchase and the distinction between consumer guarantees and warranties. Such difficulties impact the ability of 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 manufacturer warranty'.

Page 54, ACCC New Car Market Study Final Report 2017

3.2.2. Key sources of consumer misunderstanding or confusion about their consumer rights in relation to servicing and repairs

'Consumer guarantee rights cannot be excluded by contract. The consumer guarantees apply regardless of any other warranty offered by a manufacturer and there is no requirement under the ACL for a car to be serviced by an authorised dealer for the consumer guarantees to apply. Accordingly, an independent repairer can service a car without affecting the consumer guarantees.

Accordingly, the ACCC understands that manufacturer warranties in Australia for new cars (in most if not all cases) do not require that a new car must be serviced by authorised dealers during the warranty period to maintain the warranty. Therefore, consumers may choose who carries out repairs and service on their cars under the manufacturer's warranty, subject to the work being performed in accordance with the manufacturer's standards'.

Page 55, ACCC New Car Market Study Final Report 2017



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- MTAA suggests, as outlined on the previous page in 3.2.2 from the ACCC New Car Market Study, the MMAL notification may give rise to potential confusion. On the one hand, the ACL and guidance material issued by the ACCC, ASIC and others contained in 'A guide to Australian consumer law —Motor vehicle sales and repairs' makes it clear that consumers have certain rights including freedom of choice in servicing and repair. Regarding the MMAL notification, these rights and freedoms are not contested in the Standard New Car Warranty. Still, they become challenged as a result of the exclusive dealing condition outlined in the extended warranty, which states a condition that must be adhered to in the first five years of ownership.
- The Australian new car retailing market is undergoing significant change. Some manufacturers have vacated the Australian market while others are consolidating their dealer networks or changing sales, distribution, service, and repair business models. These changes are altering the landscape of new car retailing and in some circumstances, particularly in regional and rural Australia, changing access to dedicated manufacturer dealer networks.
- It is the view of MTAA that further changes to the retail new car market are likely over the short to medium term, placing additional pressure on market participants and consumers. This consolidation and restructuring are both a competition opportunity but also a risk of substantially reducing competition. MTAA would argue that with a national fleet of more than 20 million passenger vehicles and the nation's continuing reliance on road transport, no manufacturer can rely solely on its dealer networks or service agents to service and repair the national fleet.
- MTAA suggests some regional and rural consumers are already facing detriment from being able to access qualified professional service and repair because the dealer for their vehicle has been forced to vacate the market. Many owners living in regional areas are already driving hundreds of km's to the nearest service agents while passing many professional vehicle repairers along the way due to the impacts of market consolidation and warranty requirements.
- This is placing greater reliance on independent or franchised service and repair alternatives who in turn sometime face considerable difficulty in accessing manufacturer service and repair information to properly service vehicles in these locations.
- MTAA is concerned that by restricting Mitsubishi owners to only use Mitsubishi Dealers or service agents then this consumer detriment will be exacerbated.

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- MTAA is also concerned that the notification of MMAL will lead to a 'spike' in similar notifications from other car manufacturers. While MTAA understands the ACCC must consider the impacts and implications of the MMAL notification on the merits of the notification, the Federation respectfully suggests the ACCC should also consider the effects on competition and consumer detriment if other manufacturers were to follow suit.
- MTAA notes the MMAL notification recognises a potential impact on independent mechanical service providers but does not consider the notification will substantially impact the market or cause more significant consumer detriment than consumer benefit.
- MTAA also notes that MMAL offers the potential for independent or third-party service and repair providers to apply to be an authorised Mitsubishi service agent as a mitigator for any impact on the market or consumer access. However, there is no detail on the process, requirements or other information. MTAA also cautions that this may be an artificially imposed consolidation on other participants in the market.
- Other areas of transparency concern are on costs to consumers. There is no information other than generalities that prices will be less. Also, current Terms and Conditions wording appears to continue the ambiguity that caused concerns to the ACCC as outlined in the Market Study report.

*Regularly maintaining your Mitsubishi vehicle in accordance with the recommended service schedule at a Mitsubishi Dealer is the best way to protect your new car. By having your vehicle maintained by a Mitsubishi Dealer, it is understood that your vehicle is being serviced by Mitsubishi experts and will be fitted with Mitsubishi Genuine Parts. Doing this maintains your Mitsubishi vehicle and your warranty in the best condition. **Non-genuine parts are not covered by your New Car Warranty.** If a non-genuine part is fitted to your vehicle, and the part causes any damage, the damage will not be covered by your New Car Warranty. MMAL does not approve the fitment of aftermarket performance enhancing products such as (but not limited to) power chips, force induction products, suspension components, exhaust modifications etc.*

- The MMAL notification and others considered by the ACCC would not be possible in other international jurisdictions. At **Attachment A** are excerpts of some of the requirements of different jurisdictions concerning the conduct described in the MMAL notification.

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The purpose, effect, or likely effect of substantially lessening competition

- MTAA is of the view that the notified conduct by MMAL, as presented, may have the purpose, effect, or likely effect of substantially lessening competition over time.
- MTAA recognises it is ultimately the consumers choice whether to accept the condition of use of a Mitsubishi Dealer or Service Agent in accessing the extended warranty offer or to exercise freedom of choice in utilising an alternative provider. However, MTAA argues the offer of a 10-year warranty is a powerful enticement for consumers, combined with pre-existing confusion over consumer guarantees and choice, and lack of transparency and clarity in the MMAL notification, may impact an ability to make an informed decision resulting in a likely effect of lessening competition.
- While recognising Mitsubishi's current market share is 7.8 per cent and not all Mitsubishi customers may take up the option of the extended warranty offer, MTAA nonetheless believes if a sizeable percentage of 7.8 % of market combined with other brands who currently have similar conditions or plan to offer similar extended warranties in the future, - then the competitive process may be damaged in a meaningful way because smaller market participants, including independent service and repair providers, will be deterred, hindered or prevented from competing.

Public benefit / Public Detriment

- MTAA does not agree with all the substantiation provided in the MMAL notification regarding Public Benefit / Public Detriment again largely due to an absence of transparency or clarity.
 - (a) First, the notified conduct will provide cost savings to purchasers of new Mitsubishi Vehicles who might otherwise purchase costly extended warranties from third parties.
- There is no evidence or substantiation to support the above statement.
 - (b) Second, the notified conduct enables MMAL to ensure that Mitsubishi Vehicles that benefit from the ten year Warranty are serviced with a high degree of care and skill (as MMAL is able to exercise significantly greater control over its Dealers and Service Centres than it is able to exercise over independent service centres).
- The above statement perpetuates by inference that other market participants are not as qualified or professional or skilled to perform service and this statement could in some circumstances be regarded as misleading.

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(ii) Purchasers who do not place importance on the ten year Warranty, or who would prefer to service their vehicles with independent service centres, may still take advantage of the five year Warranty.

- MTAA refers to previous observations of the lack of transparency between obligations and requirements of both the Standard New Car Warranty and the Extended New Car Warranty.

MTAA remains available to provide any additional information or clarity regarding this submission.

MTAA Secretariat
October 2020

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Attachment A

- There are similar consumer protections to the Australian Consumer Law around the world that prohibits the conduct outlined in the MMAL Notification.

United States of America

The Magnuson Moss Warranty ACT - <https://www.ftc.gov/enforcement/statutes/magnuson-moss-warranty-federal-trade-commission-improvements-act>

There are three prohibitions under the Magnuson Moss Warranty Act: Disclaimer or Modification of Implied Warranties, "Tie-in Sales" Provisions, and Deceptive or Misleading Warranty Terms

"Tie-In Sales" Provisions | Provisions that state or imply that a consumer must buy or use an item or service from a particular company to keep the warranty coverage, such as being required to use original equipment manufacturer (OEM) parts.

European Commission

Antitrust Rules in the Motor Vehicle Sector

WARRANTIES: The Supplementary Guidelines set out the general principle that, for qualitative selective distribution agreements to benefit from an exemption under the EU competition rules, the vehicle manufacturer's warranty must not be made conditional on the end user having repair and maintenance work that is not covered by the warranty carried out within the vehicle manufacturer's authorised repair networks. Similarly, warranty conditions must not require the use of the vehicle manufacturer's brand of spare parts in respect of replacements not covered by the warranty terms.

Does the assessment of servicing or parts restrictions differ if they are set out in an extended warranty issued by the authorised network at the sale of the vehicle or shortly after?

No. The fact that the servicing or parts restrictions are not set out in the vehicle supplier's warranty but are instead found in an extended warranty issued by the authorised network at the moment of the sale of the vehicle (or shortly thereafter) will not generally alter the assessment of the said restrictions.

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Just like vehicle manufacturers or their importers, the dealers and authorised repairers within a selective distribution system are parties to a network of agreements. If these parties agree to offer a warranty scheme and the warranties in question contain a servicing or parts restriction, this is likely to foreclose independent repairers or shut off alternative spare parts' distribution channels. The warranty scheme is therefore likely to cause or strengthen the anti-competitive effects of the agreements between the vehicle supplier and its authorised repairers and spare parts distributors.

Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles

(60) When assessing the competitive impact of vertical agreements on the motor vehicle aftermarkets, the parties should therefore be aware of the Commission's determination to preserve competition both between the members of authorised repair networks and between those members and independent repairers. To this end, particular attention should be paid to three specific types of conduct which may restrict such competition, namely preventing access of independent repairers to technical information, misusing the legal and/or extended warranties to exclude independent repairers, or making access to authorised repairer networks conditional upon non-qualitative criteria.

Misuse of warranties

(69) Qualitative selective distribution agreements may also be caught by Article 101(1) of the Treaty if the supplier and the members of its authorised network explicitly or implicitly reserve repairs on certain categories of motor vehicles to the members of the authorised network. This might happen, for instance, if the manufacturer's warranty vis-à-vis the buyer, whether legal or extended, is made conditional on the end user having repair and maintenance work that is not covered by warranty carried out only within the authorised repair networks. The same applies to warranty conditions which require the use of the manufacturer's brand of spare parts in respect of replacements not covered by the warranty terms. It also seems doubtful that selective distribution agreements containing such practices could bring benefits to consumers in such a way as to allow the agreements in question to benefit from the exception in Article 101(3) of the Treaty. However, if a supplier legitimately refuses to honour a warranty claim on the grounds that the situation leading to the claim in question is causally linked to a failure on the part of a repairer to carry out a particular repair or maintenance operation in the correct manner or to the use of poor quality spare parts, this will have no bearing on the compatibility of the supplier's repair agreements with the competition rules.

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