



New Car Retailing Industry

A market study by the ACCC

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acc.gov.au

Australian Competition and Consumer Commission
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Foreword

Market studies are used by the Australian Competition and Consumer Commission (ACCC) to help promote effective competition in markets. Studies are normally undertaken where a number of concerns about market conduct have been raised, and a detailed examination of market characteristics could help to determine whether market intervention, including new policy proposals, regulatory solutions or enforcement action is warranted.

The ACCC's market study into the new car retailing industry was initiated in response to a number of concerns raised with the ACCC and other fair trading agencies related to the industry, including issues about consumer guarantees and warranties, access to technical information for servicing and repairing new cars, and fuel consumption and emissions representations. The purpose of this study was to gain a better understanding of how the new car retailing industry operates, while focusing on key issues that have come to the ACCC's attention.

This report presents the ACCC's findings from almost 18 months of investigation, consultation and research, and is based on a wide range of evidence. The report contains a number of key findings and recommendations for improving consumer protection and promoting competition in new car retailing and associated markets.

The ACCC, and this study, benefited from the contributions of a range of stakeholders, including consumers, industry participants and their representative bodies, advocacy groups and government. We are grateful to all those stakeholders who participated in this study through meetings, attendance at the ACCC's stakeholder forum and round table, and by providing written submissions. A full list of market study participants are listed in **Appendix A**.

Rod Sims
ACCC Chairman

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Executive summary

The new car retailing industry

Buying a new car is a significant purchase for a consumer. The purchase of a car and its ongoing maintenance account for around five per cent of total average household expenditure annually, typically making it second only to housing expenditure in importance. Well-informed consumers and competitive new car retailing markets are therefore likely to deliver considerable benefits.

New car retailing activities cover more than just the sale of new cars at a car dealership. They extend to:

- activities that occur **prior to the sale**, such as the advertising of new cars and representations made about car performance or emissions
- activities that occur at the **time of the sale**, including the sale of finance and insurance products, representations on standard manufacturer warranties, and the sale of additional warranties
- **post-sale** activities which are closely linked to the new car sale, such as regular maintenance and the cost of spare parts for the new car.

The sale of a new car also triggers consumer guarantees under the ACL which relate to post-sale activities. These statutory rights cover what consumers can expect from a good or service and the remedies available to them if something goes wrong.

The new car retailing supply chain

A number of entities are involved in the new car retailing supply chain, including:

- **car manufacturers**, usually large multi-national firms that produce cars, parts and tools, and distribute their products through new car dealers
- **new car authorised dealers** are usually in franchise agreements with car manufacturers to supply as well as repair and service new cars
- **independent businesses** that repair and service new cars, or produce or supply parts and tools.

New car retailing is a significant sector of the Australian economy:

- Around 1.1 million new cars were sold during 2016–17, including at more than 1500 new car dealers operating more than 3500 retail outlets. Car dealer revenues in 2016–17 are estimated at \$64 billion.
- New car sales also have flow on effects for car servicing and repairs, crash repairs and replacement parts. Around 22 500 manufacturer-authorised and independent car repair and service businesses will earn revenues of around \$18 billion in 2016–17 and close to 11 000 crash repair businesses are expected to earn revenues of \$6.8 billion.

The ACCC's key market observations

Analysis for this study has revealed a number of problems that are harming consumers and hindering effective competition in the new car retailing industry.

Three key observations arising from this study are:

The law offers protections for consumers when purchasing new cars, but there are material deficiencies in the way that consumers are able to enforce their rights, and the way these rights are represented to them by manufacturers and dealers.

The ACL provides protections to consumers through the consumer guarantees. Despite these protections, there are a number of systemic problems in the new car industry preventing consumers from obtaining the remedies to which they are entitled when their car experiences a problem. The biggest obstacle to consumers not receiving the remedies to which they are entitled under the ACL is the conduct of manufacturers in the handling of consumer guarantee claims. Manufacturers' complaint handling systems, policies and procedures across the new car industry fail to adequately take consumer guarantees into account. Commercial arrangements between manufacturers and dealers which focus on warranty rights to the exclusion of consumer guarantees can also constrain and adversely influence the response of dealers to customer complaints.

ACCC response: The ACCC considers that ACL compliance issues can be readily addressed by manufacturers updating their complaint handling systems and transforming their approach to consumer guarantee claims, as well as reviewing their commercial arrangements with dealers to ensure that these provide for due consideration of consumer guarantee rights. The ACCC will continue, through its compliance and enforcement work, to target manufacturers' complaint handling systems, policies and procedures that do not comply with the ACL.

The ACCC has recently instituted proceedings in the Federal Court against Ford, and has accepted a court enforceable undertaking from Holden in relation to its concerns about alleged ACL non-compliance issues. Other investigations are continuing, and the ACCC will continue to actively monitor complaints and emerging issues in the sector, and take further compliance and enforcement action where necessary.

The ACCC will also work with other ACL regulators and the industry to publish guidance for consumers on their rights in the event there is a problem with their new car, including guidance for dealers to distribute to consumers at the point of sale.

The ACCC also supports the amendments to the ACL proposed in the ACL Review which are aimed at providing greater clarity to the application of consumer guarantees. The ACCC recommends that further consultation on the ACL proposals relating to major failure occur on key issues raised by manufacturers and dealers.

In addition, in the course of this study the ACCC has become aware of certain issues raised by dealers relating to the imbalance of power in their commercial arrangements with manufacturers. These issues go beyond the impacts on ACL compliance, which has been the focus of the ACCC's review of these commercial arrangements and may require further examination. One option for consideration of these issues is the next review of the Franchising Code of Conduct.

Concerns remain about the effect of limited access to information and data required to repair and service new cars.

The repair and service of new cars is increasingly reliant on access to electronic information and data produced by car manufacturers. Independent repairers, which are not authorised or affiliated with car manufacturers, are reliant on car manufacturers voluntarily sharing information and data. Around one in ten new car buyers have their car repaired or serviced

with an independent repairer. The ACCC is of the view that the competitive discipline imposed by independent repairers on the aftermarkets for the repair and servicing of new cars remains valuable and of benefit to consumers, and that consumers also benefit from having a choice of providers to repair and service new cars.

While voluntary commitments have been offered by car manufacturers to provide independent repairers with the same technical information to repair and service new cars that they provide to their dealers, problems with the breadth, depth and timeliness of the technical information offered appear to be enduring.

The ACCC has found that some car manufacturers provide independent repairers with access to most of the technical information they need to repair and service new cars. However, many of these car manufacturers do not provide technical information they deem as being environmental, safety or security-related, due to the perceived risks of increased car thefts and unauthorised modifications arising from the release of these types of information. Despite some car manufacturers providing a good level of access to technical information, the ACCC is concerned that most car manufacturers do not provide independent repairers with the same level of access to technical information to repair and service new cars as they do to their dealer and preferred repairer networks.

ACCC response: The ACCC considers that consumers benefit from competitive aftermarkets and by having a choice of providers to repair and service new cars, and that voluntary commitments to share technical information have not been successful in meeting their aims. As there has been only a limited improvement in access, the ACCC recommends regulatory intervention to mandate the sharing of technical information with independent repairers on 'commercially fair and reasonable terms', subject to appropriate safeguards to enable the sharing of environmental, safety and security-related technical information.

Consumers are not receiving accurate information about the fuel consumption or emissions performance of new cars.

Current fuel consumption and emissions testing procedures rely on laboratory testing rather than testing in real-world driving conditions. Manufacturers may therefore claim results for fuel consumption and emissions based on laboratory tests that are significantly better than can be achieved in real-world driving conditions. This is unlikely to meet consumer expectations and has the potential to be misleading.

Research from the Australian Automobile Association (AAA) indicates that real-world fuel consumption is on average 23 per cent higher than official laboratory test results. The size of the gap between laboratory and real-world fuel consumption tests is not consistent across car types or brands, and has been increasing in recent years, casting doubt on the comparative value of fuel consumption figures currently displayed in fuel consumption labelling. The ACCC notes the AAA's proposal for the Government to introduce independent real world fuel consumption and emissions testing in Australia.

Consumer detriment may also occur when manufacturers fail to appropriately qualify fuel consumption claims. While the information supplied through mandatory fuel consumption labelling is primarily designed to help consumers make comparisons between different cars, the use of absolute values for fuel consumption and emissions may contribute to consumer misunderstanding.

ACCC response: The ACCC supports moves to enhance the quality of information supplied to consumers currently being considered by the Ministerial Forum into Vehicle Emissions, including the introduction of a more realistic laboratory test and real driving emissions testing. The ACCC also considers there may be additional benefits to consumers from an Australian real driving emissions test, and recommends that the Ministerial Forum consider the costs and benefits of an Australian real driving emissions testing program as proposed by the AAA.

Key findings and recommendations

Chapter 2: New car retailing industry characteristics

- Car manufacturers and authorised dealers are typically active in both the manufacture and supply of new cars and in the supply of aftermarket services, including car servicing, repairs and supply of parts and tools.
- Manufacturers and authorised dealers generally earn higher profit margins from aftermarket services than from new car sales. For dealers, although parts sales and repair and service account for 15 per cent of revenue, these aftermarket services contribute to 49 per cent of gross profit. The average net profit margin for dealers is approximately 1.7 to 1.8 per cent.
- A common pricing strategy for car manufacturers and authorised dealers is to discount new car prices to maximise sales of aftermarket services. This strategy reflects that consumers have more choices available at the time of the new car sale than they do in aftermarkets for repair, service and replacement parts after the sale.
- Retail markets for the supply of new cars in Australia are generally competitive, primarily indicated by low market concentration of car brands and dealers.
- Competition in markets for the supply of aftermarket services is less competitive as a result of factors including:
 - the ability and incentives of car manufacturers and their dealers to impede competition in profitable aftermarkets by controlling access to necessary inputs such as the technical information needed to repair and service a new car
 - consumer misunderstanding about warranty and servicing requirements (including the misconception that manufacturer warranties require new cars to be serviced at a dealership)
 - high switching costs once consumers have purchased a particular brand or make of car.

Chapter 3: Consumer guarantees and warranties

The ACL provides statutory protections for consumers

- The ACL is Australia's national law for fair trading and consumer protection and plays a critical role in providing protections to consumers in their dealings with business and in the event that there is a problem with a good or service, including new cars. The consumer guarantees provided by the ACL cannot be displaced.
- Manufacturer warranties provided with the purchase of a new car, and extended warranties offered by the dealer or a third party, provide additional protection to consumers in some circumstances.
- Together, the ACL and state and territory legislation, along with manufacturers' warranties, collectively provide consumers with an extensive suite of consumer rights to remedies or other forms of redress in the event that a new car is defective or fails to perform as promised.

Recommendations on proposed amendments to enhance the ACL

Recommendation 3.1

The ACCC supports the amendments proposed by Consumer Affairs Australia and New Zealand (CAANZ) in the recent ACL Review to enhance the ACL and address any uncertainties about the application of consumer guarantees. Of particular relevance to issues arising in this study, the ACCC supports proposals 1, 2 and 3 in the final report on the ACL Review:

Proposal 1: Where a good fails to meet the consumer guarantees within a short specified period of time, a consumer is entitled to a refund or replacement without needing to prove a 'major failure'.

Proposal 2: Clarify that multiple non-major failures can amount to a major failure.

Proposal 3: Enhance disclosure in relation to extended warranties by requiring:

- agreements for extended warranties to be clear and in writing
- additional information in writing about what the ACL offers in comparison to the extended warranties
- a cooling-off period of ten working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed and in writing

Relevant stakeholders, including manufacturers, dealers and consumer representative bodies, are encouraged to participate in the further consultation process on the ACL reform proposals to be conducted by CAANZ to express their views on issues which may arise in the application of the ACL to a car related complaint.

Consumers are not receiving balanced information about their rights

- Consumers are not receiving adequate information about consumer guarantees at the point of sale of a new car. The information provided is generally very limited and is usually not provided in a form consumers can retain, and refer to later.
- An oral explanation is not sufficient. Consumers need information in a form that can be referred to at any time during their ownership of their car. The ACCC considers that it is best practice for dealers to provide an explanation about consumer guarantees in writing.
- A balanced provision of written information about consumer guarantees requires not only an explanation of the statutory rights available to consumers, but also an explanation of the statutory obligations of manufacturers and dealers. It also requires an explanation of the potentially complex interaction between consumer guarantees and other consumer rights available under warranty in the event of a problem with the car.

ACCC action on consumer understanding of their rights

ACCC action 3.1

The ACCC will work with manufacturers and dealers to develop a concise and simple explanation of consumer guarantees and their interaction with warranties, which should, as industry best practice, be provided to consumers at the point of sale of a new car.

- Most consumers have a reasonable level of awareness of their consumer rights when they purchase goods or services in Australia. There are a variety of sources of information for consumers seeking to improve their understanding of their rights with respect to the purchase of a new car.
- This study has found that many consumers face difficulties 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.

- This appears to be in part the result of a focus by dealers at the point of sale on the manufacturer's warranty and the potential sale of an extended warranty. Dealers have commercial incentives, as the result of commission-based remuneration, to maximise their sales of extended warranties.
- The majority of consumers take their new cars to manufacturer authorised dealers for repairs and service. This appears to be, in part, the result of a mistaken belief that the manufacturer's warranty requires them to only use an authorised dealer.
- Contributing to this misunderstanding are direct and implied representations made by a number of manufacturers in their logbooks and service manuals to the effect that authorised dealers must carry out services or repairs (or that original equipment (OE) parts must be used). Many of these representations are likely to contravene the provisions of the ACL, and may also raise competition concerns under the CCA.

ACCC action on consumer understanding of their rights

ACCC action 3.2

To assist consumers better understand their rights when it comes to new car defects and failures, the ACCC will work with other ACL regulators to publish an updated version of *Motor vehicle sales & repairs – an industry guide to the Australian Consumer Law* (August 2013)¹ to ensure that this publication addresses the issues identified in this study, including specific guidance on criteria for determining a 'major failure'. Guidance may also be designed for use by businesses, including dealers, regarding their rights and obligations under the ACL.

ACCC action 3.3

Instances of misleading or deceptive conduct, or misrepresentations, in relation to the use of independent repairers or non-OE spare parts will be targeted through action by the ACCC, including enforcement action where appropriate.

Consumers face significant obstacles to enforce their ACL rights

- A significant body of evidence suggests systemic failures in the ability of consumers to enforce their consumer guarantee rights after the purchase of a new car. The ACCC has seen many examples of practices by manufacturers in dealing with consumer complaints that raise concerns under the ACL provisions, including the failure of manufacturers' complaint handling systems to adequately take consumers' ACL rights into account.
- The recent review of the ACL has proposed a number of amendments to enhance the law and provide greater clarity to the application of consumer guarantees. The proposed amendments include reforms aimed at assisting consumers understand and choose a remedy if things go wrong with a good or when a good, including a new car, has multiple and ongoing issues.
- While the proposed ACL reforms would strengthen and provide greater clarity about the application of consumer guarantees, the existing law already provides remedies for faulty cars.

The ACCC has identified five key issues contributing to the difficulties experienced by consumers in enforcing their consumer guarantees:

- manufacturers' focus on warranty obligations to the exclusion of their consumer guarantee obligations
- manufacturers' responses to 'major failures'
- the widespread use of non-disclosure agreements by manufacturers when resolving complaints

¹ ACCC, [Motor vehicle sales and repairs: a guide for industry to the Australian Consumer Law](#), 2013.

- the lack of effective independent dispute resolution options for consumers, and
 - particular features of the commercial arrangements between manufacturers and dealers.
- Manufacturers' complaint handling systems require dealers to check whether a car is under warranty before decisions are made as to an appropriate response to the customer's complaint. This means interactions with the consumer take place within the manufacturer's warranty framework to the exclusion of the consumer guarantees.
 - 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.
 - The widespread use of non-disclosure agreements when resolving consumer complaints suggests that consumers are not entitled to their consumer guarantee and warranty rights unless a non-disclosure agreement is signed when this is not the case. Non-disclosure agreements also substantially reduce information in the marketplace for new buyers about defects and safety issues that are common to a particular car.
 - Independent dispute resolution options are providing little incentive for manufacturers to improve their ACL compliance. These options do not effectively enable consumers to obtain the remedies they are entitled to under the consumer guarantees. This creates little incentive for a manufacturer or dealer to offer these remedies at an earlier stage in a dispute.

ACCC action on the consumer experience of enforcing their rights

The ACCC has recently instituted proceedings in the Federal Court against Ford, and it has also accepted a court enforceable undertaking from Holden, in relation to its concerns about alleged ACL non-compliance issues.

ACCC action 3.4

The ACCC will continue to actively monitor complaints and emerging issues in the sector, and take further compliance and enforcement action where necessary.

Manufacturers' complaint handling systems, policies and practices that do not comply with the consumer guarantee requirements of the ACL will continue to be targeted through action by the ACCC and fair trading agencies, including enforcement action where appropriate.

Such action may also address any instances of non-compliance by dealers. The ACCC is particularly concerned about manufacturers and dealers engaging in conduct that may be misleading or unconscionable.

Commercial arrangements between manufacturers and dealers can constrain and influence the behaviour of dealers in responding to complaints

- Dealers, as retailers of new cars, have direct responsibility to provide remedies to consumers under the ACL. Dealers also have a right to recover the costs of remedies from manufacturers, where the manufacturer is responsible for the failure.
- Given the nature of commercial relationships between manufacturers and dealers, dealers are frequently in the challenging position of balancing their ACL obligations to customers, safeguarding their own financial interests and maintaining a long term commercial relationship with their manufacturer. These commercial arrangements can have the effect of denying or making it difficult for consumers to readily access the remedies to which they are entitled.
- Dealers respond to consumer guarantee or warranty claims within the framework of the policies and procedures set by the manufacturer. Dealer agreements, policies and procedures commonly provide manufacturers with broad discretion to direct a dealer's handling and resolution of customer complaints. This can further constrain and adversely influence the response of dealers to customer complaints and have the potential to prevent dealers from satisfying their ACL responsibilities.
- Dealers are often under commercial pressure to comply with manufacturer requirements in order to maximise the likelihood that their dealer agreement will be renewed. This may have consequences for how a dealer responds to consumer guarantee claims that are not adequately covered by a manufacturer's systems, policies and procedures.
- Manufacturers' complaint handling policies and procedures primarily focus on handling claims within the manufacturer's warranty framework, without due consideration of a consumer's statutory rights under the ACL.
- Similarly, the handling of consumer guarantee claims within the parameters of a manufacturer's goodwill policy appears likely to undermine the consideration of the statutory rights to which a customer is entitled to under the ACL. The common requirement for dealers to seek prior approval to make a goodwill contribution may also limit a dealer's ability to comply with the ACL.
- Unnecessarily complex warranty claim processes, including arbitrary or immaterial administrative and technical requirements, have the potential to result in dealers being inadequately indemnified for remedies they have provided in compliance with the manufacturer's warranty or the ACL.
- Dealer agreements reviewed by the ACCC rarely contain provisions that would provide a dealer with the certainty they will be indemnified by the manufacturer in the event that a new car has a manufacturing defect. Where dealers have structural disincentives or insufficient confidence in obtaining reimbursement from manufacturers, this may result in reluctance by dealers to offer remedies to which consumers are entitled.

Recommendations on commercial arrangements between manufacturers and dealers

Recommendation 3.2

Car manufacturers (the Australian or foreign distributor of the car brand) should transform their approach to the handling of consumer guarantee claims or risk action for non-compliance with the ACL. The ACCC recommends that car manufacturers:

- update their complaint handling systems to ensure that consideration of consumer guarantee rights are embedded in all relevant systems, policies and procedures with the objective of ensuring that a consumer's statutory rights under the ACL are given due consideration at the outset of responding to a claim
- update their dealer agreements and policies to expressly state that obligations under the manufacturer's warranty are in addition to, and do not exclude or limit, the manufacturer's obligations to indemnify the dealer under section 274 of the ACL
- review their dealer agreements, policies and procedures to ensure that these commercial arrangements:
 - do not contain unfair contract terms that go beyond what is reasonably necessary to protect their legitimate interests
 - place appropriate limits on any terms which enable manufacturers to unilaterally vary the agreement and/or operations manuals.

Recommendation 3.3

Certain issues raised by dealers in relation to the imbalance of power in their commercial arrangements with manufacturers may require further examination.

Dealer agreements for the sale of motor vehicles are deemed by the Franchising Code of Conduct to be franchise agreements. One option for consideration of these issues is the next review of the Franchising Code of Conduct to occur from 2020.

Issues which may be further considered include:

Minimum tenure and capital investment requirements

- a required minimum term for dealer agreements with the objective of allowing dealers a sufficient period in which to recoup capital investment required by the manufacturer
- limitations on the level of capital investment that a manufacturer can require of a dealer based on the tenure of the dealer agreement offered
- enhancing a dealer's rights to be compensated for capital investment required by the manufacturer in the event of non-renewal of the agreement

Reasons for non-renewal

- providing dealers with reasons for non-renewal of a dealer agreement to enable an assessment of whether non-renewal has been exercised by a manufacturer in good faith

Changes to commercial arrangements

- providing national dealer councils and/or dealers with a minimum period of prior notice of proposed amendments to dealer agreements, policies and procedures and the ability for national dealer councils and/or dealers to challenge proposed amendments
- exempting certain aspects of the commercial arrangements between manufacturers and dealers from unilateral variation by either party

Reimbursement for remedies

- enhancing a dealer's right to reimbursement to recover the costs of providing remedies where the manufacturer is responsible for the failure
- strengthening the accountabilities of manufacturers and dealers when providing remedies to consumers.

Chapter 4: Accessing technical information to repair and service new cars

Technical information for servicing and repairing new cars is not widely available

- The nature of technical information to repair and service new cars is rapidly changing, with digital files and codes, and appropriate diagnostic tools, now often necessary to complete a car repair or service.
- Independent repairers have continuing problems accessing technical information for new cars. Few car manufacturers provide equivalent access to the technical information provided to their authorised dealers and preferred repairer networks, and many provide very little or no information at all.
- Independent repairers may be able to obtain technical information from sources other than the car manufacturer in Australia; however, the information is commonly incomplete, not applicable to Australian models, or offers no security of ongoing supply.
- Car manufacturers have legitimate concerns about the sharing of some environmental, safety and security-related technical information to repair and service new cars. Regardless, in other jurisdictions this information and data is securely shared with vetted independent repairers, and subject to safeguards to enable it to be shared. Stakeholders provided limited information about whether the sharing of technical information in other jurisdictions has affected the rates of car thefts.
- The ACCC has informed itself on these issues through consideration of a range of evidence including submissions from stakeholders, site visits, consultations with car manufacturers, and the reports of an automotive technical expert engaged by the ACCC to further examine the submitted claims of stakeholders, which found that access to technical information for independent repairers is inconsistent.

Existing voluntary methods of information sharing are not effective

- Key industry associations, including the Federal Chamber of Automotive Industries (FCAI), have voluntarily agreed to a set of aims and principles to ensure there is 'a fair and reasonable competitive market within the car repair and service industry.' The principles of the Heads of Agreement place voluntary obligations on car manufacturers to, in general, share with independent repairers the technical information they provide to their dealers, on 'commercially fair and reasonable' terms.
- Broadly, most car manufacturers in Australia are not fully sharing technical information consistently with the aims and principles of the Heads of Agreement.
- The Heads of Agreement has several shortcomings which hinder its aims and principles of improving access to technical information from being achieved in a fair and efficient way.
- The Heads of Agreement also acknowledges the importance of ongoing repairer training and statutory obligations on independent repairers to ensure repairs and servicing are carried out correctly to car manufacturers' specifications to assure the safety of consumers. The ACCC notes that the Australian Automotive Aftermarket Association (AAAA), the Motor Trades Association of Australia (MTAA) and other organisations have a role to play in facilitating access to training and technical information for independent repairers, including that supplied by car manufacturers if offered.
- The ACCC has concluded that the net effect of the Heads of Agreement, across the industry, in improving access to technical information for new cars has been limited, and that the Heads of Agreement is ineffective in providing access that is consistent with its stated aims and principles.

Effective information sharing would enhance competition and improve consumer outcomes

- As discussed in Chapter 2, car manufacturers have an incentive to limit access by independent repairers to technical information to steer service work to authorised dealers and repair work to preferred repairer networks.
- This is impacting the ability of independent repairers to effectively and efficiently compete in the aftermarket for the repair and servicing of new cars.
- It is also causing detriment to consumers in the form of increased costs, inconvenience and delays when having their new car repaired or serviced, and thereby reducing the choices available to consumers for the repairing and servicing of new cars.
- Consumer switching in the new car market is unlikely to provide strong competitive discipline on manufacturers and dealers in aftermarkets, and any benefit of competition in the sale of new cars to consumers does not offset the impact of less competitive aftermarkets. The ACCC's view is that consumers benefit from competitive aftermarkets for the repairing and servicing of new cars, and that consumers also benefit from having a choice of providers to repair and service new cars.

Developments in other jurisdictions offer pathways for reforms in Australia

- In foreign jurisdictions, regulatory interventions have made the technical information necessary for independent repairers to repair and service new cars more widely available.
- EU regulations requiring independent repairers to have 'easy, restriction-free and standardised access' to information and data to repair and service new cars have generally been successful in meeting those aims. In the US recent state legislation has stimulated further voluntary national changes to improve access.
- The EU and the US models are specific to their regulatory environments and geographically distinct markets. However, specific features of these models should be adopted in Australia. These include a process for vetting users who access environmental, safety and security-related information, and for tracing its use, as well as providing access to technical information by intermediaries to develop informational products and diagnostic tools. However, the outright replication of other models may not be appropriate.
- A number of regulatory options for sharing technical information are possible in Australia. The ACCC has not sought to specify what particular form of regulation should be adopted. This will require careful consideration of the costs and benefits of alternative approaches and is beyond the scope of this study.

Recommendations on access to technical information for new cars

Recommendation 4.1

A mandatory scheme should be introduced for car manufacturers to share technical information with independent repairers, on commercially fair and reasonable terms. The mandatory scheme should provide independent repairers with access to the same technical information which car manufacturers make available to their authorised dealers and preferred repairer networks, including environmental, safety and security-related information (if it is made available to dealers).

The mandatory scheme should place an obligation on car manufacturers and other industry participants to achieve the underlying aims and principles of the Heads of Agreement (including those in relation to training and reinforcing existing statutory obligations on independent repairers to ensure repairs and servicing are carried out correctly to car manufacturers' specifications to assure the safety of consumers).

The mandatory scheme should, subject to the type of regulation used, address the following operational matters:

Real time access

- Car manufacturers should make available to independent repairers, in real time, the same digital files and codes, such as software updates and reinitialisation codes, made available to dealers to repair or service new cars.

Coverage

- Obligations on sharing technical information should apply to all car manufacturers in Australia.
- Relevant intermediaries should have options to access technical information from car manufacturers on commercially fair and reasonable terms.

Definitions

- All relevant terms, conditions and exclusions should be defined in the regulation, for instance, defining diagnostic tools and their relevance to facilitating access to technical information, as well as defining environmental, safety and security-related information.

Dispute resolution

- Any dispute resolution processes should be timely and accessible by all relevant stakeholders.
- Any dispute resolution processes should be subject to compulsory mediation and binding arbitration by an independent external party.

Governance/consultation

- Key stakeholders should meet regularly to discuss the rapidly changing nature of repair and service information.

Security-related information and data

- Similar to the EU or US models, a process for the secure release of environmental, safety and security-related technical information should be established or authorised under the mandatory scheme.
- The mandatory scheme should also set out a process for vetting end users accessing environmental, safety and security-related technical information and for tracing the use of that information.

Enforcement

- If appropriate, options to enforce the terms of any regulation should be included (e.g. penalties).

Chapter 5: Parts needed to repair and service new cars

Access to parts is sometimes restricted

- Car manufacturers and dealers sometimes restrict access to certain parts for legitimate reasons that may benefit consumers. This includes parts which can compromise car security and encourage theft. However, a further motive for restricting access may be to steer more repair and service work back to authorised dealers and preferred repairer networks. This can reduce competition for servicing or repair work and raise prices.
- The lack of transparency and consistency across manufacturers about what are security-related parts means that access restrictions can be arbitrary, increasing uncertainty and cost for independent repairers. It could also undermine the intent of reforms to promote access to technical information needed to repair and service cars.

Recommendations and actions on parts

Recommendation 5.1

OE manufacturer-branded parts and accessories should be generally available to independent repairers on commercially fair and reasonable terms.

Car manufacturers should develop policies which clearly outline any parts subject to restricted access on security-related grounds. These policies should be publicly available.

There may be benefits to industry developing a standard definition and detailed classification system for 'security-related' parts to provide certainty to parts customers.

ACCC action 5.1

Refusals by car manufacturers to supply security-related parts for repair and service will be monitored and addressed through action by the ACCC, including enforcement action where appropriate.

High margins are earned on supply of spare parts

- Anecdotal evidence and submissions to this study suggest that parts prices in Australia are rising relative to the cost of new cars, and that Australia has high parts prices relative to some overseas jurisdictions.
- Detriments from high parts prices could include distortions in decisions about repairing cars; for example, high parts prices might cause cars to be 'written off' when it may otherwise be more efficient to repair them.
- There is limited competition to supply certain spare parts for repair and service. In addition, consumers have a limited ability to switch to alternative suppliers of parts in many instances and these factors may lead to high prices.
- Parts prices should be considered within a broader context of supply of new cars and other aftermarket services. However, the ACCC has no evidence that competition in the primary market eliminates the potential detriment to consumers from higher parts prices.

Chapter 6: Fuel consumption, emissions and the ACL

Consumers are not well informed about fuel consumption and emissions tests

- Fuel consumption is a significant factor for consumers when buying a car, second only to price and model. The environmental impact of new cars is also important to one in five consumers. For this reason, new car buyers need to be able to rely on the accuracy of claims made by manufacturers and dealers about the fuel consumption and emissions of particular car models.
- Representations to consumers about fuel consumption and emissions are made by

manufacturers and dealers in a variety of ways. While they have no discretion about displaying mandatory labels, they do control claims made in promotional and advertising materials or at the point of sale. ACCC research for this study indicates that manufacturers are not always appropriately qualifying these claims, and that many consumers believe that advertised fuel consumption and emissions figures are likely to be attained in real-world driving conditions, when this is not the case.

- In addition, some consumers may not understand that fuel consumption and emissions values are intended for comparative purposes only. Even when representations are qualified, these consumers may still believe that the advertised figures will be attained.

Recommendations on fuel consumption and CO₂ emissions claims

Recommendation 6.1

Changes to the fuel consumption label affixed to new cars should be considered to improve the comparative use of the information supplied. Introducing a star-rating system or annual operating costs may minimise the extent to which consumers interpret an 'absolute' fuel consumption/emissions value as equivalent to what they would achieve in real-world driving conditions.

There are material discrepancies between fuel consumption and emissions test and real-world results

- Current fuel consumption and emissions testing procedures rely on laboratory testing rather than testing in real-world driving conditions. Manufacturers may therefore claim results for fuel consumption and emissions based on laboratory tests that are significantly better than can be achieved in real-world driving conditions. This is unlikely to meet consumer expectations and has the potential to be misleading.
- Research from the Australian Automobile Association (AAA) and consulting engineers, ABMARC, indicates that real-world fuel consumption is on average 23 per cent higher than official laboratory test results. The gap between laboratory and real-world fuel consumption tests is not consistent across car types or brands, and has been increasing in recent years. This casts significant doubt on the comparative value of absolute fuel consumption figures currently displayed in fuel consumption labelling.
- The Australian Government is currently reviewing possible new measures to address vehicle emissions under the Ministerial Forum on Vehicle Emissions. The Forum is considering a number of measures to improve the integrity of vehicle emissions testing, including the introduction of a more realistic laboratory test for fuel consumption and emissions, and for vehicle emissions, on road testing.
- Consumers may benefit from an Australian real driving emissions testing program; however, these benefits would need to be assessed against the Government's overall policy objectives in relation to vehicle emissions.

Recommendations on the fuel consumption and emissions discrepancy

Recommendation 6.2

The ACCC considers that real world testing of fuel consumption and emissions would significantly improve the quality of information provided to consumers.

The ACCC supports measures to enhance the quality of information supplied to consumers currently being considered by the Ministerial Forum into Vehicle Emissions, including the replacement of the current fuel consumption and emissions testing regime with the new Worldwide Harmonised Light Vehicles Test Procedure, a more realistic laboratory test, and the introduction of an on-road 'real driving emissions' test.

The ACCC also considers there may be additional benefits to consumers from an Australian real driving emissions test. The ACCC recommends that the Ministerial Forum consider the costs and benefits of an Australian real driving emissions testing program as proposed by the AAA.

Chapter 7: Other issues

This study considered a number of additional issues, including telematics in cars, car performance and representations about the advertised year of a new car.

Findings on telematics

- The impact of telematics on competition and consumers is likely to become more acute as telematics technology becomes more prevalent. The ACCC will continue to monitor emerging issues in this area.
- The voluntary Heads of Agreement and codes of practice governing information-sharing in relation to technical information provides a process, as yet unused, for the signatories to discuss issues associated with access and ownership of data generated by telematics technology.
- The PC's final report on Data Availability and Use recommended that consumers gain certain rights to access and use digital data. On 26 November 2017, the Australian Government announced a policy to introduce a Consumer Data Right, sector-by-sector, with the stated aim of ensuring that customers own their own data. If the Australian Government's Consumer Data Right policy was applied to the new car retailing industry, it could give consumers the right to access their telematics data, and the right to direct the data custodian, which would likely include manufacturers and/or dealers, to copy that data to nominated independent repairers.

Recommendation on telematics

Recommendation 7.1

The ACCC supports the Australian Government's intention to legislate a Consumer Data Right sector-by-sector. If a Consumer Data Right was introduced into the new car retailing industry, it could address some of the concerns that were raised about the impacts of telematics technology on new car purchasers. For example, a Consumer Data Right could give consumers the right to access digitally held data about themselves, including the right to direct data custodians to copy that data to a nominated third party.

Findings on car performance

- Submissions to this study have pointed to a few examples of misleading claims in relation to car performance. However, submissions have not provided evidence that this issue is systemic.
- The current laws prohibiting false, misleading and deceptive conduct under the ACL provide adequate consumer protection in relation to this issue.

Findings on the advertised year of a new car

- Submissions to this study have provided limited evidence of systemic misleading behaviour by manufacturers or dealers in relation to the advertised year of new cars.
- The current laws prohibiting false, misleading and deceptive conduct under the ACL provide adequate consumer protection in relation to this issue.

Shortened terms

2012 CCAAC Report	Report from the Commonwealth Consumer Affairs Advisory Council, <i>Sharing of repair information in the automotive industry: Final report</i> , November 2012
AAA	Australian Automobile Association
AAAA	Australian Automotive Aftermarket Association
AADA	Australian Automotive Dealer Association
ACCC	Australian Competition and Consumer Commission
ACCC Consumer Survey	ACCC Consumer Survey, <i>Consumer experiences of buying, servicing and repairing new cars</i> , Colmar Brunton, May 2017
ACL	Australian Consumer Law
ACL Review	The review of the Australian Consumer Law conducted by CAANZ, concluded in March 2017
ADRs	Australian Design Rules
ADS	Automotive Dealer Services
AMIF	Australian Motor Industry Federation
ANCAP	Australasian New Car Assessment Program
ASIC	Australian Securities and Investments Commission
CAANZ	Consumer Affairs Australia and New Zealand
CALC	Consumer Action Law Centre
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CCAAC	Commonwealth Consumer Affairs Advisory Council
DIRD	Department of Infrastructure and Regional Development
ECUs	Electronic control units
EU	European Union
Euro 5 Regulation	Regulation (EC) No. 715/2007
FCAI	Federal Chamber of Automotive Industries
FCAI Code	<i>Voluntary Code of Practice – Access to Service and Repair Information for Motor Vehicles</i>
Heads of Agreement	Agreement on Access to Service and Repair Information for Motor Vehicles
IAG	Insurance Australia Group Limited
ICA	Insurance Council of Australia
IPRN	Insurer preferred repair network
KTAS	Kmart Tyre and Auto Service
MARN	Manufacturer authorised repair network
MoU	Memorandum of Understanding
MTAA	Motor Trades Association of Australia
MTA NSW	Motor Traders' Association of NSW
MTAQ	Motor Trade Association Queensland

MTASA	Motor Trade Association of South Australia
MVSA	<i>Motor Vehicle Standards Act 1989 (Cth)</i>
NASTF	National Automotive Service Task Force
NEDC	New European Driving Cycle
NMVTRC	National Motor Vehicle Theft Reduction Council
NTC	National Transport Commission
OE	Original equipment
OEM	Original equipment manufacturer
OSBC	Office of the NSW Small Business Commissioner
PC	Productivity Commission
Queensland Lemon Law Report	Report from the Legal Affairs and Community Safety Committee, Parliament of Queensland, <i>'Lemon' Laws – Inquiry into Consumer Protections and Remedies for Buyers of New Motor Vehicles</i> , November 2015
SBDC	Small Business Development Corporation
SDRM	Secure data release model
SERMI	Security-related Repair and Maintenance
Suncorp	Suncorp Group
UN	United Nations
VACC	Victorian Automobile Chamber of Commerce
VIN	Vehicle Identification Number

1. Introduction

1.1. The ACCC's role

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory authority whose role is to administer and enforce the *Competition and Consumer Act 2010* (Cth) (CCA) and a range of additional legislation, promoting competition, fair trading and regulating national infrastructure for the benefit of all Australians.

The ACCC's role is to protect and strengthen the way competition works in Australian markets, to improve the efficiency of the economy and to increase the welfare of Australians. This means the ACCC will take action where this improves consumer welfare, protects competition or stops conduct that is anti-competitive or harmful to consumers, and promotes the proper functioning of Australian markets.

1.2. ACCC market studies

The ACCC undertakes in-depth market, sector or industry reviews with the aim of improving its understanding of industry practices and dynamics in those sectors. Market studies enable the identification of competition issues, market problems, and possible solutions. Alternately, a market study may confirm competition in the relevant markets is functioning effectively and that no action is needed. The ACCC publishes market study findings to help inform consumers and industry, to encourage public debate over competition and consumer matters, and to inform policy consideration.

Consumer issues in new car retailing, including responses by retailers and manufacturers to consumer guarantee claims, are a current priority area for the ACCC.²

The new car retailing industry is growing and the ACCC and other Australian Consumer Law (ACL) agencies continue to receive a high volume of complaints from consumers about defects with cars, covering a broad spectrum of manufacturers. These matters have prompted the ACCC to examine the dynamics of the new car retailing industry in depth.

This market study has been self-initiated by the ACCC under s.28(1)(c) of the CCA, which gives the ACCC the power to 'conduct research in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws.' Under this provision, the ACCC does not have the power to compel information and documents from market participants.

Market studies and inquiries sometimes provide the ACCC with information that can lead to investigations of potential breaches of the CCA. These investigations are undertaken separately to the market study itself. When the ACCC conducts investigations it has the power in certain circumstances to compel people and businesses to provide information and documents under s.155 of the CCA. Investigations can lead to a number of outcomes including court cases, court enforceable undertakings and infringement notices.

² ACCC, Compliance and Enforcement Policy, 2017.

1.3. Outline of market study process

This study sought to consider the extent to which there may be industry characteristics or business practices (including those resulting from market and regulatory failures, see Box 1.1) which are impeding the efficient operation of new car retailing industry markets³ and which may be:

- limiting competition
- causing consumer harm
- resulting in non-compliance with the CCA/ACL or other regulatory requirements.

Box 1.1: Potential market failures in the new car retailing industry

Competitive markets are important because they enhance economic efficiency and thereby promote the interests of consumers.

Economic efficiency refers to how well markets allocate resources to their various uses (allocative efficiency), drive firms to produce at lowest-cost (productive efficiency) and result in ongoing changes in how firms improve their offerings over time in response to consumer preferences (dynamic efficiency).

In some instances, markets do not produce desirable efficiency and consumer outcomes, and these markets are said to be subject to market failure.

Two sources of market failure which may be present with respect to new car retailing are informational problems and the existence of potentially 'captive' customers in the aftermarket for repair and service.

- **Informational problems** largely stem from transaction costs associated with acquiring useful information that is relevant to consumer decisions. For example, relevant to this study, consumers are readily able to acquire information about the upfront costs of a new car but it is more difficult to get information about the cost and quality of servicing and parts options. This can mean that consumers do not make the choices that they would have made if they were better informed.
- **The existence of consumers who are 'captive'** can also be a source of market failure. A particular question for this study was whether consumers may be 'captive' in relation to the supply of aftermarket services and goods for new cars, including repair, servicing and replacement parts. If consumers are captive in these aftermarkets it may result in them paying higher prices than they would if the aftermarkets were effectively competitive.

To inform our analysis, this study has drawn on information from various sources including public consultations (written submissions, consumer and small business questionnaire, targeted information requests and stakeholder forums), the published literature, an ACCC commissioned consumer survey and other research, contact data and ACCC enforcement investigations.

For further information in relation to the consultation and research undertaken in this study see **Appendix A**.

³ For the purpose of this report, the word 'market' is used in its general or colloquial sense, to refer to the exchange of goods or services between sellers and buyers within the broader Australian automotive industry. Use of the word 'market' for the purpose of this report should not be confused with the more specific meaning which the word 'market' typically has for the purpose of the CCA; which is a specific product and geographic space in which rivalry and competition take place, as defined in s.4E of the CCA.

1.4. Market study scope

This study has sought to examine the new car supply chain, with a particular focus on matters related to:

- consumer guarantees and warranties
- access to technical information to repair and service new cars
- fuel consumption and emissions.

This study has also considered aftermarket services and goods for new cars, including servicing, repair and replacement parts. Aftermarket services are important to consider in the context of this study given the ongoing maintenance costs borne by purchasers of new cars and the role of aftermarkets which may influence competition and practices in the retailing of new cars.

Box 1.2: Definition of a new car

For the purposes of this study, a new car is defined as a car purchased by an Australian consumer, and which has not previously been registered.⁴ This definition includes passenger vehicles, four wheel drive vehicles and vans.⁵

While this study has focused on new cars, it has not considered:

- direct or parallel imports of new cars by individuals
- car financing and insurance products
- product safety⁶
- demonstrator vehicles
- capped price servicing.⁷

Chapter 7 of this report discusses issues outside the scope of this study further.

1.5. The ACL and the CCA

All relationships within the Australian new car retailing industry are governed by the statutory protections offered to consumers by the CCA, including the ACL. These include relationships between consumers, dealers and manufacturers. Competition laws also govern relationships between industry participants and prohibit restrictive trade practices.

Key provisions of the ACL and CCA that are discussed in this report are outlined below.⁸

⁴ The thresholds for defining a 'consumer' in s. 3(1) of the ACL were used to determine what new cars are included in this study. Small businesses that employ fewer than 20 people are a consumer for the purposes of this study.

⁵ This means that the study has excluded vehicle types such as motorcycles, trucks, buses, plant and equipment, unpowered vehicles, trailers, farm equipment (e.g. tractors), limousines, demonstrator cars, and parallel imported cars (e.g. cars bought by consumers overseas and imported into Australia) as well as new cars purchased for the purpose of re-supply, and new cars purchased for using them or transforming them in trade or commerce.

⁶ Product safety in cars is regulated under the *Motor Vehicle Standards Act 1989*, the *Motor Vehicle Standards Regulations 1989* and the CCA. The Department of Infrastructure and Regional Development (DIRD) and the ACCC cooperatively administer the provisions relating to car safety, including recalls and consumer guarantees. DIRD retains officers with the necessary technical expertise to investigate complaints about car safety and the need for recall.

⁷ The ACCC has undertaken prior projects related to this issue. For more information about the ACCC's work in relation to capped price servicing see section 7.4.2 – Capped Price Servicing.

⁸ Relevant provisions of the CCA and ACL have not been reproduced, and have only been summarised in this section to facilitate understanding.

1.5.1. ACL protections for consumers and prohibitions against certain conduct by traders

Consumer guarantees

When consumers buy a product or service, they come with automatic statutory guarantees under the ACL. For example, that a product will work and do what was asked for, and that services are supplied with due care and skill.⁹ These are known as the consumer guarantees.¹⁰ Businesses must provide consumer guarantees regardless of any other warranties they provide or sell to a consumer. The consumer guarantees include that goods are of acceptable quality,¹¹ and that parts for the repair of goods are reasonably available for a reasonable period after the goods are supplied.¹²

The consumer guarantee provisions also provide that, in circumstances where manufacturers are responsible for a good that is supplied in breach of relevant consumer guarantee provisions, including the guarantee as to acceptable quality, manufacturers are liable to indemnify suppliers for damages that suppliers may pay to consumers.¹³

Misleading or deceptive conduct

Businesses are prohibited from engaging in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses.¹⁴ There are also specific prohibitions against businesses making false or misleading representations,¹⁵ and against businesses engaging in conduct that may mislead the public as to the specific nature, characteristics, or suitability for purpose of a good.¹⁶

Unconscionable conduct

Businesses must not engage in unconscionable conduct, when dealing with other businesses or their customers.¹⁷ Unconscionable conduct is generally understood to mean conduct which is so harsh that it goes against good conscience.

Requirements for repairers

Repairers of consumer goods must give consumers a prescribed form of notice if:

- it is the practice of the repairer to use refurbished parts in the repair of the consumer's defective goods, or
- the goods being repaired are capable of retaining user-generated data.¹⁸

Franchising Code of Conduct

Franchisors and franchisees are required to comply with the Franchising Code of Conduct, which introduces a range of mandatory obligations on the parties, including to act in good

⁹ Part 3-2, Division 1 of the ACL.

¹⁰ Consumers can assert their consumer guarantee rights throughout the supply chain, including in relation to manufacturers, dealers and independent repairers.

¹¹ Section 54 of the ACL.

¹² Section 58 of the ACL.

¹³ Section 274 of the ACL.

¹⁴ Section 18 of the ACL.

¹⁵ Section 29 of the ACL.

¹⁶ Section 33 of the ACL.

¹⁷ Part 2-2 of the ACL.

¹⁸ Section 103 of the ACL (prescribed under Regulation 91 of the Competition and Consumer Regulations 2010).

faith in their dealings with one another,¹⁹ and introduces financial penalties and infringement notices for serious breaches of the Code.

The Franchising Code of Conduct applies to conduct occurring on or after 1 January 2015 in relation to all franchise agreements entered into, transferred, renewed or extended on or after 1 October 1998. A franchise agreement is an agreement, written, verbal or implied, under which:

- 1) one party (the franchisor) grants another party (the franchisee) the right to carry on a business supplying goods or services under a specific system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor, or
- 2) the business is associated with a particular trademark, advertising or a commercial symbol owned, used, licensed or specified by the franchisor or its associate.

Dealer agreements for the sale of motor vehicles are deemed by the Franchising Code of Conduct to be franchise agreements.²⁰

1.5.2. CCA prohibitions against anti-competitive conduct

Misuse of market power

A corporation with a substantial degree of power in a market is not allowed to take advantage of this power by engaging in conduct that has the purpose, effect, or likely effect of substantially lessening competition in a market.²¹

Exclusive dealing

Broadly speaking, exclusive dealing occurs when one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal, and where the restriction has the purpose, effect, or likely effect of substantially lessening competition.²²

¹⁹ Although the Franchising Code does not define exactly what good faith means, it does state that the obligation of good faith is to reflect historical judge-made law (known as the 'common law'). Under common law, certain conduct may lack good faith if one party acts dishonestly, or fails to have regard to the legitimate interests of the other party. Australian courts have found business dealings to be not in good faith when they involve one party acting for some ulterior motive, or in a way that undermines or denies the other party the benefits of a contract.

²⁰ Competition and Consumer (Industry Codes – Franchising) Regulation 2014, s. 5(2)(c).

²¹ Section 46 of the CCA.

²² Section 47 of the CCA.

1.6. Government reviews relevant to this report

The ACCC is aware of a number of recent and ongoing Australian government reviews and other developments in relation to new cars, and has taken the findings or outcomes of these reviews into consideration where relevant to this study. Two of these reviews and their relevance to this report are discussed below.

The Productivity Commission's inquiry into Data Availability and Use

In 2016–17, the Productivity Commission (PC) conducted a broad ranging investigation into the benefits and costs of options for improving availability and use of private and public sector data.²³ As part of the inquiry, the PC was directed to identify options to improve individuals' access to public and private sector data, particularly data about themselves, and to identify ways consumers can use and benefit from access to data.²⁴

On 31 March 2017 the PC sent its final report to the Australian Government, recommending a legislated comprehensive right for consumers to direct how data about them or generated by their internet-connected activity is handled by data holders. The PC's earlier draft report also noted that a potential broader consumer right to data may have competition benefits for the automotive sector.²⁵ On 26 November 2017, [the Australian Government announced](#) that it would introduce legislation in 2018 for a national *Consumer Data Right*, giving consumers access to their banking, energy, phone and internet transactions data.²⁶

Chapter 7 of this report, which addresses matters including telematics in new cars, discusses the findings and recommendations of the PC inquiry further.

Ministerial Forum on Vehicle Emissions

In October 2015, the Australian Government established a Ministerial Forum to coordinate a whole-of-government approach to addressing emissions from motor vehicles. The terms of reference for the Ministerial Forum cover a number of options to reduce fuel consumption and greenhouse gas emissions and pollution from cars, including:

- implementation of more stringent noxious emissions standards for new vehicles
- emissions testing arrangements for vehicles in conjunction with international regulatory agencies to ensure robust testing, and
- introducing fuel efficiency (CO₂) measures for new light vehicles.²⁷

The Ministerial Forum intends to provide a draft implementation plan on potential measures for consideration by Government.

Chapter 6 of this report, which addresses issues around fuel consumption and emissions, discusses the measures being considered by the Ministerial Forum further.

Other reviews

A more comprehensive list of the other relevant government reviews also considered by the ACCC can be found at **Appendix B**.

²³ PC, [Data availability and use: Final report](#), 31 March 2017.

²⁴ PC, [Data availability and use: Final report](#), 31 March 2017, p. 15.

²⁵ PC, [Data availability and use: Draft report](#), 3 November 2016, pp. 170–171.

²⁶ The Hon. Angus Taylor MP, [Australians to own their own banking, energy, phone and internet data](#), 26 November 2017.

²⁷ DIRD, [Ministerial Forum on Vehicle Emissions](#), accessed 20 June 2017.

2. New car retailing industry characteristics

Key points

- Buying a new car is one of the most significant purchases for a consumer, typically second only to the purchase of a home. Data indicates that buying a car and its ongoing maintenance accounts for around five per cent of average annual household expenditure.
- In 2016–17, approximately 1.1 million new vehicles were sold across Australia, including at more than 1500 new car dealers with revenues estimated at approximately \$64 billion. Households and small businesses made up more than half of these purchases.
- New car sales have flow on effects for car servicing and repairs, and crash repair businesses. Around 22 500 repair and service businesses are expected to earn revenues of \$18 billion in 2016–17, while approximately 11 000 crash repair businesses are expected to earn revenues of \$6.8 billion.
- An important feature of the industry is the vertically connected ‘manufacturer authorised’ supply chains organised around car manufacturer brands. Businesses in these supply chains are vertically connected through commercial mechanisms such as manufacturer ownership of car and parts distributors, authorised dealer franchise agreements, and informal preferential business arrangements.
- In addition to new car sales, manufacturers and authorised dealers earn significant revenues and profits from aftermarket sales including repairs and service and replacement parts. While data on the Australian market is limited, it is generally recognised that manufacturers and authorised dealers earn higher profit margins from the sale of replacement parts and (for dealers) from the repair and service of new cars than from new car sales themselves.
- Indeed, authorised dealers earn a significant proportion of their overall profit from new car repairs and service (about the same contribution to overall profit as the sale of new cars themselves), and international literature suggests manufacturers similarly earn a significant proportion of their overall profit from the sale of new car replacement parts.
- The relationship between new car sales and the service, repair and parts aftermarkets means that manufacturers and authorised dealers compete for new car sales in part to maximise revenue streams from these profitable aftermarkets. The relationship also drives manufacturer and dealer behaviours designed to ‘lock-in’ consumers to manufacturer authorised supply chains.
- Independent repairers operate outside manufacturer authorised supply chains and in competition with authorised dealer service centres, parts suppliers and vertically aligned crash repairers. These independent repairers are dependent on being able to trade with authorised businesses and to access the information, data, tools and parts required to repair and service modern cars.
- The vertical relationships in the authorised supply chains and manufacturers’ ownership of critical data, tools and information, mean manufacturers and their dealer networks have the ability and incentive to impede competition in aftermarkets. For example by limiting access to the information and data required by independent repairers to repair and service new cars.

2.1. The new car retailing industry

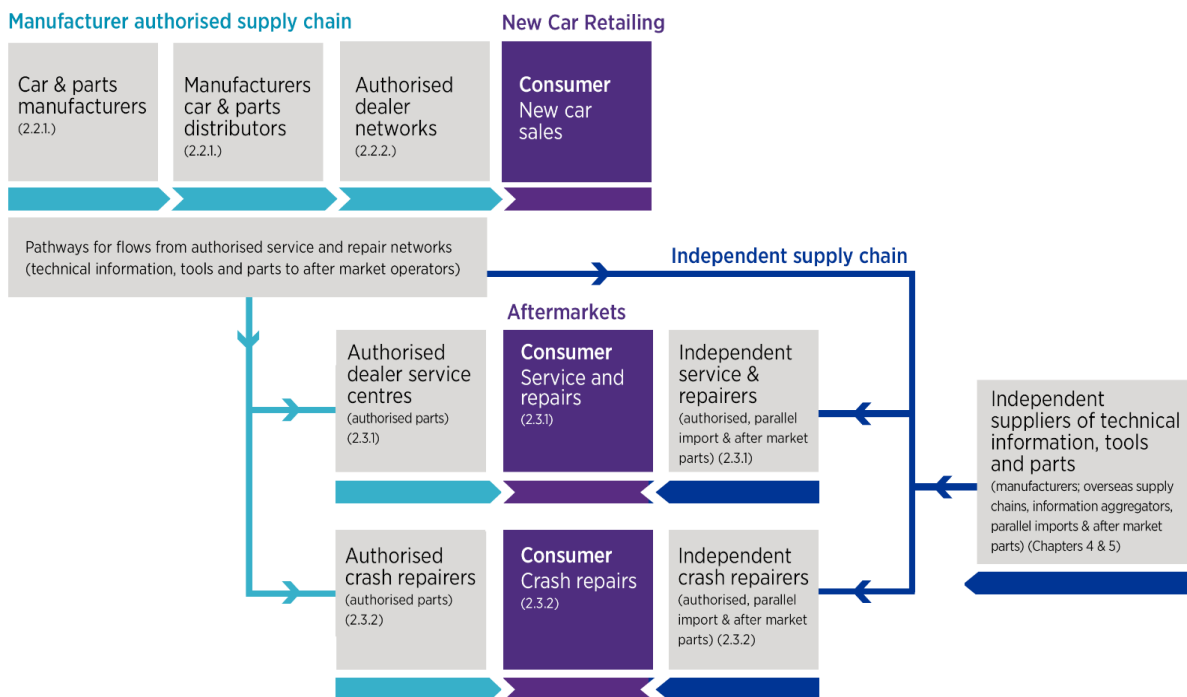
The new car retailing industry in Australia incorporates the following sectors:

- car and parts manufacturing, distribution and retailing
- aftermarket services, including:
 - car repairs and servicing (covering scheduled car service and maintenance, ad-hoc repairs of faults resulting from normal use and any parts used in this work)
 - crash repairs (covering work undertaken to repair damage to a car resulting from accidents and any parts used in this work).

Figure 2.1 gives an overview of the new car retailing industry. It highlights the key contact points for consumers: new car sales where consumers buy cars from authorised dealers, and aftermarkets, including repairs and service and crash repairs, where authorised businesses compete with independent repairers. It also highlights the flow of repair and service information, tools and parts to authorised and independent repairers.

‘Authorised’ means a manufacturer has authorised the supply of a good or service to the Australian market under their brand name, while ‘independent’ means supply into the Australian market which has not been authorised by a manufacturer.

Figure 2.1: New car retailing industry overview



— — — — Car manufacturers and their authorised agents supply car repair and service information, tools and parts to aftermarket operators in their authorised supply chains under the terms of dealer agreements and other licencing arrangements.

— — — — Independent repairers in the aftermarket rely on authorised and independent supply chains for access to repair and service tools, information and parts. Independent suppliers can include car manufacturers' overseas information, tools and parts supply chains (parallel imports), third party car information aggregators, aftermarket parts suppliers and informal networks.

2.2. The new car market

In 2016, around 1.1 million new cars were sold in Australia, including more than 210 car models produced by car manufacturers representing 67 brands.²⁸

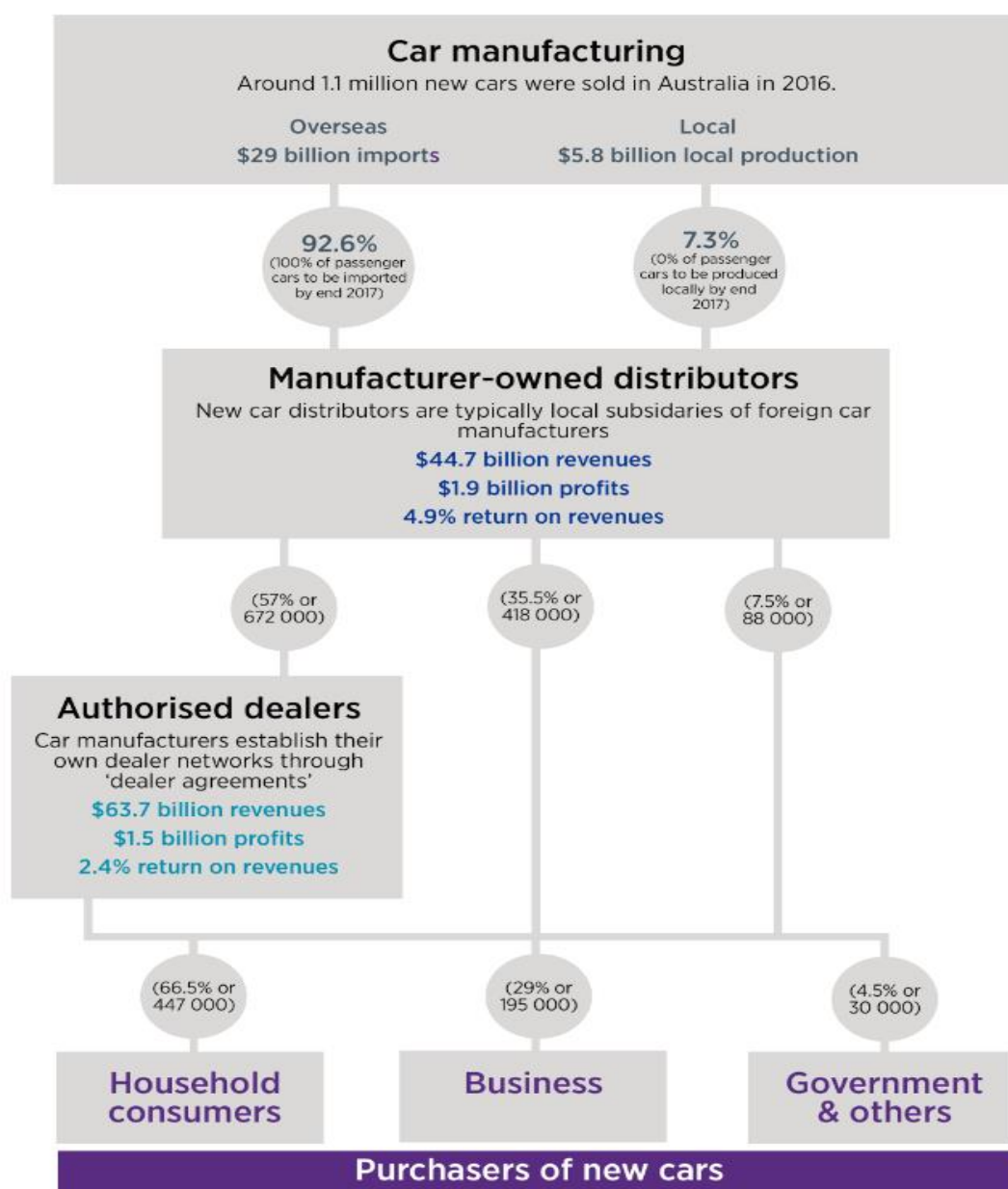
Figure 2.2 gives an overview of the estimated size of each sector of the new car supply chain and the flows of cars from manufacturers to purchasers. Broadly, the data analysed in Figure 2.2 shows that over 90 per cent of new cars sold in Australia are manufactured overseas. Approximately 43 per cent (just over 500 000 cars in 2016) are sold by manufacturers and their distributors in wholesale markets to commercial and government fleet buyers. The remaining 57 per cent (approximately 670 000 cars in 2016) are retailed by authorised dealers, with households accounting for two thirds of purchases (approximately 447 000 in 2016), businesses around 29 per cent (195 000) and governments around five per cent (30 000).

Following the recent closure of passenger car manufacturing in Australia, it is estimated that automotive repair and maintenance will account for the largest share of the industry (54 per cent), followed by car retailing (8.3 per cent), car and parts wholesaling (7.6 per cent).²⁹

²⁸ FCAI, *VFACTS National Report - New Vehicle Sales*, December 2016. The total number of motor vehicles sold in Australia in 2016 was 1.178 million, which includes vehicle types outside of the scope of 'new cars' for the purposes of this study.

²⁹ VACC, *Directions in Australia's Automotive Industry – An Industry Report 2017*, p. 6.

Figure 2.2: Australian new car supply chain



Note: As evidence to this study indicates that a very small number of new cars are currently purchased in Australia through car brokers and direct from the manufacturer these retail avenues are not shown here.

Source: ACCC calculations based on FCAI (VFACTS) motor vehicle sales data (as at December 2016); *IBISWorld Industry Report C2311 Motor Vehicle Manufacturing in Australia*, October 2016; *IBISWorld Industry Report F3501 Motor Vehicle Wholesaling in Australia*, August 2016; *IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia*, February 2017).

Buying a new car is one of the most significant financial decisions consumers make, typically second only to the purchase of a home. While the upfront purchase price of a new car may range from less than \$20 000 to well over \$100 000 depending on the model, many consumers buy new cars on finance and pay a weekly amount over the life of a car loan. Consumers also face ongoing costs to repair and service a new car.

Table 2.1 below lists some of the costs associated with buying a car. It shows that, on average, households spend around \$50 per week (or \$2633 a year) buying a motor vehicle and approximately \$26 per week (or \$1367 a year) on car parts and servicing. Overall, households spend around \$77 a week (or \$4000 a year) to buy and maintain a car, accounting for approximately five per cent of total average household expenditure.

Table 2.1: Motor vehicle costs – purchase, repair and service, 2015–16

Type of expenditure	\$/week	\$/year	% of total household expenditure
Purchase of motor vehicle	50.5	2633.5	3.5
Motor vehicle parts and accessories (purchased separately)	10.3	534.8	0.7
Vehicle servicing (including parts and labour)	15.9	831.7	1.1
Total	76.7	4000.0	5.3

Note: Includes new and used cars. Ongoing expenditure excludes fuel, registration and insurance costs.

Source: ACCC calculations based on ABS data (6530.0 Household Expenditure Survey, Australia: Summary of Results, 2015–16 – States and Territories, Table 13.9A), accessed 17 November 2017.

2.2.1. Car manufacturing and wholesale distribution

The new car industry is global, consisting of international supply chains organised around more than 100 car manufacturer brands. The Australian new car industry is fully integrated into these global supply chains as an importer of cars manufactured overseas and through foreign ownership of Australian car distributors. While the Australian industry has historically had a car and parts manufacturing sector, by the end of 2017 all new cars on sale in Australia will be manufactured overseas and imported, although some local parts manufacture will continue to service local and export markets.³⁰

Imports account for a significant proportion of new cars sold in Australia

Of the 1.1 million new cars sold in Australia in 2016–17, approximately seven per cent were locally manufactured while the remaining 93 per cent were manufactured overseas and imported.³¹ Just over three quarters of imports (77 per cent) originated from just five countries – Japan (28 per cent), Thailand (24 per cent), South Korea (14 per cent), Germany (seven per cent) and the USA (five per cent). In future, these shares will shift following the recent closure of car manufacturing in Australia.

Total motor vehicle imports in 2016 are estimated to be valued at approximately \$29 billion, while local motor vehicle manufacturing is valued at around \$7.7 billion (approximately \$5.8 billion of which was sold locally and \$1.9 billion in exports).³²

Distribution of new cars

Practically all Australian new car distributors are subsidiaries of foreign car manufacturers and act as links between foreign manufacturers and their Australian authorised dealer networks.³³ Australian car distributors (and in some cases manufacturers) wholesale new cars direct to end users such as larger fleet buyers from business and government. A car manufacturer's distributor also typically acts as the authorised distributor for manufacturer branded original equipment (OE) replacement parts (authorised parts³⁴), and to varying

³⁰ IBISWorld, *IBISWorld Industry Report C2311 Motor Vehicle Manufacturing in Australia*, October 2016.

³¹ FCAI, *VFACTS National Report – New Vehicle Sales*, December 2016. Motor vehicle figures are broader than the definition of new cars used in this study, including passenger, SUV, light commercial and heavy commercial motor vehicles.

³² IBISWorld, *IBISWorld Industry Report C2311 Motor Vehicle Manufacturing in Australia*, October 2016.

³³ IBISWorld, *IBISWorld Industry Report F3501 Motor Vehicle Wholesaling in Australia*, August 2016.

³⁴ For the purposes of this study, an authorised part is a replacement part which is authorised for supply to the Australian market by a car manufacturer. It does not include parallel imports or aftermarket parts.

degrees, wholesales services such as car finance, extended warranties and other insurance products to their authorised dealer network.

The wholesale market exhibits low market concentration with a relatively large number of distributors. In 2016–17, the top ten car distributors by market share are expected to account for around 57 per cent of wholesale market sales. All of these distributors are subsidiaries of foreign car manufacturers.³⁵ In 2017–18, the Australian motor vehicle wholesaling sector is expected to earn around \$44.7 billion in revenue from the wholesale of new and used vehicles.³⁶ Over this period, wholesaler profits are estimated to be \$1.9 billion.

Over the same period, car distributors are expected to sell around 50 per cent of their motor vehicles to dealerships networks, approximately 41 per cent to larger company commercial fleet buyers and the remaining nine per cent to governments and other buyers.³⁷

Competition in the wholesale market

Competition in the new car wholesale market is segmented into sales between manufacturers and their dealer networks within vertically integrated supply chains, and sales outside these supply chains to large government and commercial fleet buyers. Sales between manufacturers and dealer networks are made under exclusivity arrangements and the terms and conditions set out in manufacturer-dealer agreements. Government and commercial fleet buyers in the wholesale market (almost half of new car sales in 2016–17) can shop across all models sold in Australia. As a result, manufacturers compete strongly when selling to government and commercial fleet buyers.

Sources of profit for car manufacturers

Car manufacturers, through their own activities and those of their subsidiary distributors in Australia, earn revenues and profits from a range of activities including the manufacture and sale of new cars, the wholesale of car finance and other financial services, and the manufacture and sale of replacement parts.

There is limited information publicly available on sources of profit for car manufacturers and their subsidiary distributors in Australia. A typical stylised business model for car manufacturers is described in the international industry literature.³⁸ The model involves car manufacturers making and selling cars at low margins with the aim of generating ongoing profits from aftermarket sales, in particular the sale of replacement parts. Replacement parts can generate a higher proportion of car manufacturers' profits relative to new car sales due to their higher margins.³⁹ For example, research on the European and US new car markets indicates that while parts sales may generate only five to ten per cent of a manufacturer's revenues they can account for 30 to 50 per cent of the manufacturer's overall profits.⁴⁰

³⁵ IBISWorld, *IBISWorld Industry Report F3501 Motor Vehicle Wholesaling in Australia*, August 2017.

³⁶ IBISWorld, *IBISWorld Industry Report F3501 Motor Vehicle Wholesaling in Australia*, August 2017. The wholesale of motor vehicles is broader than the definition of new cars for the purposes of this study, including passenger, SUV, light commercial and heavy commercial motor vehicles. Used vehicles comprise only a small proportion of wholesale revenues.

³⁷ IBISWorld, *IBISWorld Industry Report F3501 Motor Vehicle Wholesaling in Australia*, August 2017.

³⁸ Autorité de la Concurrence, *Opinion no. 12-A-21 of 8 October 2012 on competition in the vehicle repair and maintenance sector and the spare parts manufacturing and distribution sector*, EU, 2012; IBM Institute for Business Value, IBM Global Business Services, *Performance in reserve, Protecting and extending automotive spare parts profitability by managing complexity*, 2008, p.1–2; Capgemini Consulting, *The Aftermarket in the Automotive Industry*, University of St. Gallen, Institute of Technology Management, 2010, p. 5–7; London Economics, *Developments in Car Retailing and Aftermarket Sales Under Regulation N 1400/2002*, Final Report to European Commission DG Competition, June 2006, p. 7.

³⁹ Capgemini Consulting, *The Aftermarket in the Automotive Industry*, University of St. Gallen, Institute of Technology Management, 2010, pp. 5–7.

⁴⁰ Autorité de la Concurrence, *Opinion no. 12-A-21 of 8 October 2012 on competition in the vehicle repair and maintenance sector and the spare parts manufacturing and distribution sector*, EU, 2010; IBM Institute for Business Value, IBM Global Business Services, *Performance in reserve, Protecting and extending automotive spare parts profitability by managing complexity*, 2008, pp. 1–2.

These features of manufacturer profitability create incentives for manufacturers to compete strongly on new car sales in order to generate revenue and high returns from the sale of replacement parts. This issue is discussed in further in Chapter 5. The relationship between new car sales and the service, repair and parts aftermarkets is discussed in Box 2.1.

Box 2.1: The relationship between new cars and aftermarket services

A significant feature of the new car retailing industry is the relationship between sales of new cars and sales in aftermarkets, such as car servicing and repair and replacement parts. As is discussed later in this chapter, high margins from the sale of replacement parts contribute significantly to manufacturers' and dealers' overall profitability. Similarly, authorised car dealers earn a significant proportion of their overall profit from the servicing of new cars—about the same contribution to overall profit as the sale of new cars themselves.

The demand for goods and services in these profitable 'secondary' aftermarkets depends on demand for new cars in the 'primary' retail market. As manufacturers and authorised dealers can usually capture a significant share of aftermarket sales, it creates strong incentives to maximise the sale of new cars.

The strong incentives to increase new car sales in order to maximise aftermarket sales affects the conduct of both car manufacturers and authorised dealers:

- Manufacturers produce and earn profits from both new cars and the replacement parts for those cars.⁴¹ Manufacturers set the (wholesale) prices of cars and parts so as to maximise overall profits; this means manufacturers may set lower prices for new cars than if they only sold new cars.⁴²
- Authorised dealers earn profits from selling new cars as well as a range of complementary goods and services (including car repairs and service, parts, car finance and insurance). This may create incentives for dealers to sell cars at low margins or even a loss to enable profits to be made from the sale of add-on products in aftermarkets (see section 2.2.2).

The relationship between new car and aftermarket sales also highlights the importance of consumers having access to information, at the point of sale, on the 'whole of life' costs and benefits of buying and operating a particular car (see Box 2.4). The decision to purchase a car can have significant and ongoing financial consequences for consumers over the life of car ownership (see Table 2.1). To make an informed choice about which car to buy, consumers need to be able to access, understand and use accurate information about the cars they are considering and related aftermarkets.⁴³

A further consequence of the new car sales and aftermarkets relationship is that it provides an incentive to car manufacturers and authorised aftermarket suppliers to limit competition in aftermarkets. A pricing strategy of low new car prices can only be profitable overall if sufficient profits can be earned in aftermarkets, and competition may undermine this.

The incentive to create obstacles to aftermarket competition plays out in a number of areas examined in this study, including in relation to:

- information provision to consumers about warranties and consumer guarantees
- access to data and information needed to repair and service cars
- parts pricing and access to parts and tools.

⁴¹ Car replacement parts built to the car manufacturer's specifications may be produced by the original car manufacturer, by a company licenced by the car manufacturer or by an independent company with no legal authorisation from the car manufacturer. Chapter 4 has a fuller description of the different types of car replacement parts.

⁴² The result is that a single firm will take into account the impact of lower prices for one good on the sales of the complement, whereas two separate firms would not.

⁴³ The risk of information related market failures increase where consumers may not adequately consider whole of life costs and benefits of owning a given car. Some evidence indicates that consumers are significantly more responsive to the price of a new car than to the prices of parts, servicing and other aftermarket services. This is borne out in the ACCC Consumer Survey: a key finding was that fewer than 1 in 5 consumers consider the cost of parts when buying a new car compared with 3 in 4 that consider the price of a new car (ACCC Consumer Survey, p. 6).

2.2.2. New car retailing

An authorised dealership is a business which has a franchise or 'dealer agreement' with a car manufacturer giving it the right to act, within a defined geographical area, as the primary seller of the manufacturer's cars and authorised replacement parts, and provider of authorised car servicing and repairs (see Box 2.2).⁴⁴

There are approximately 1500 new car dealers operating 3500 outlets across Australia.⁴⁵ Authorised dealers sell the majority of their cars to household consumers. It is estimated that households account for approximately 66 per cent of dealer retail sales (approximately 447 000 cars in 2016), general businesses, car-rental companies and taxi operators 29 per cent (approximately 195 000 cars), and government and other customers five per cent (approximately 30 000 cars).⁴⁶ The Australian Automotive Dealer Association (AADA) notes that salary packaging companies, novated leasing companies and fleet lessor companies account for a significant proportion of dealer sales to both private and fleet buyers.⁴⁷

⁴⁴ Some car manufacturers (typically higher end makes) also authorise dealers to act as authorised crash repairers for their brand (see section 2.3.2).

⁴⁵ AADA submission, November 2016, p. 2.

⁴⁶ FCAI, *VFACTS National Report – New Vehicle Sales*, December 2016; IBISWorld, *IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia*, February 2017.

⁴⁷ AADA submission, November 2016, p. 3.

Box 2.2: Dealer agreements

A dealer agreement is typically required to sell a car manufacturer's models in Australia. The agreement is a legal contract which establishes the terms and conditions the manufacturer and authorised dealer are required to meet for the period of the contract. Dealer agreements typically have a duration of one to five years and expire unless a new agreement is reached. Holden describes the purpose of the dealer agreement as being: '... to outline and define how the manufacturer... and the Dealer... do business together and the standards and processes that are expected of them in representing the brand and details the area of primary representation that they are responsible for.'⁴⁸

The terms and conditions in dealer agreements vary across the industry. Key areas prescribed in agreements include:

- specifications of the dealer's facilities (i.e. car showrooms and service facilities)
- dealership ownership arrangements
- dealer management and performance criteria/indicators (i.e. car sales, servicing and customer satisfaction targets)
- dealer obligations relating to car sales, service and authorised parts
- expectations for customer service and support (including how manufacturer warranty claims are dealt with and costs are shared)
- conditions relating to multi-franchising and change of use of premises/facilities
- the geographical area (postcodes) where the dealer has primary rights to represent the brand and sales targets for that area (while a manufacturer/distributor determines the number and location of dealers required to achieve their overall sales targets, a dealer contract does not attempt to establish an exclusive area of operation/sales)
- any other special conditions that may apply to a given dealer.

Authorised dealers generate revenue from a range of activities outlined in their dealer agreement at the point of sale, post-sale and otherwise.

- Point of sale revenues can come from selling new and used cars, add on features and car accessories (such as window tinting, sports wheels and upgraded entertainment systems), insurance products (including extended warranties, consumer credit and life insurance), and by providing car finance.
- Post sale revenues can come from servicing cars and the sale of authorised replacement parts to their own customers (for services and repair) and to independent repair and service operators.
- Other revenues in the form of payments from car manufacturers (and financial penalties) can be triggered when dealers meet (or fail to meet) other performance indicators set out in an agreement (such as new car sales and servicing targets and minimum customer satisfaction ratings benchmarks).

Holden notes that car manufacturers are able to manage potential revenues available to a given authorised dealer by balancing the terms and conditions in the dealership contract noting that: 'Volume throughput (sales and service) needs to be carefully managed for the appointed dealers to ensure they get an acceptable return on the investment and the business is sustainable. This is to ensure dealers can generate enough profitability to reinvest in facilities, people and services to meet changing customer expectations. This can take a fine balance due to the highly competitive nature of the automotive industry.'⁴⁹

⁴⁸ GM Holden submission, November 2016, p. 3.

⁴⁹ GM Holden submission, November 2016, p. 4.

The commercial arrangements between manufacturers and dealers, including dealer agreements, policies and procedures are further discussed at section 3.4.

Emerging trends in Australia and overseas impacting on the traditional business models for new car retailing include retail market consolidation and the growth of car sharing services as an alternative to buying a new car (see Box 2.3).

Box 2.3: Trends in car retailing

Consolidation amongst dealerships

Industry analysts have reported some consolidation in the new car retailing market in recent years with the number of dealers decreasing, and the average size of dealerships and revenue per dealership increasing. It has been reported that sector consolidation has been driven, in part, by larger, multi-dealership businesses acquiring dealerships, allowing them to maintain or increase their market share at the expense of the remaining operators.⁵⁰ While market share concentration has remained relatively steady in recent years, it is expected to increase as these types of acquisitions continue. This acquisition strategy has enabled multi-dealership businesses to achieve greater economies of scale as they share costs across a greater number of dealerships and car sales. This should assist the generation of higher profits per sale and/or lower retail prices for new cars in markets where they operate.

Disruptive technology forces including electric and autonomous cars

Innovations relating to electric and autonomous cars are predicted to impact on the automotive industry over the next decade. Electric vehicles are considered to be a disruptive force over the longer term rather than the short to medium term. Based on current purchasing trends, petrol and diesel cars are expected to continue to comprise the majority (at least 95 per cent or more) of the Australian car fleet in 2020.⁵¹ In contrast, fully autonomous (driverless) cars are expected to be commonly available within a few years. Autonomous cars are predicted to result in cost savings associated with lower collision rates and are considered likely to be highly disruptive in sectors such as crash repairs.

Changing patterns in car ownership and growth in car sharing services

Australian consumers are increasingly being offered access to car sharing services which allow them to use a car without buying and maintaining their own vehicle. Car sharing services offer an alternative model to traditional car ownership whereby consumers pay (through a combination of flat membership fees and usage charges) to access cars stationed near to where they live. The car sharing service owns, insures, services and maintains fleets of cars, typically in densely populated urban areas. Industry analysts estimated there are currently 18 car sharing services operating Australia and generating an estimated \$84 million in revenues over 2016–17 with average annual growth rates of more than 20 per cent over the last five years. It is estimated that global revenue from car sharing will increase from \$30 billion in 2017 to \$1.5 trillion by 2030.⁵²

Sources of profit for car dealers

The AADA estimates current new car dealer revenues from all sources to be in excess of \$66 billion annually.⁵³ Other measures estimate dealer revenues from the sale of new and used cars and the provision of after-sale services at \$62.8 billion for 2017–18 (excluding revenues from the sale of parts and accessories). Over the same period, dealers are

⁵⁰ IBISWorld, *IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia*, February 2017.

⁵¹ VACC, *Directions in Australia's Automotive Industry – An Industry Report 2017*, p. 42.

⁵² *IBISWorld Industry Report OD5063 Car Sharing Providers in Australia*, December 2016; Choice Car Share Services April 2015, see: <https://www.choice.com.au/transport/cars/general/articles/car-sharing-vs-car-buying>, accessed May 2017; McKinsey, *Automotive revolution – perspective towards 2030*, January 2016.

⁵³ AADA submission, November 2016, p. 3.

expected to earn \$1.5 billion in profits.⁵⁴

Industry benchmarks for new car dealer profit margins have been segmented into three categories – volume cars, prestige cars and luxury cars. Table 2.2 compares the benchmark net profit margins, which is based on the top 30 per cent of dealers, against the average net profit margins estimated across all dealers.⁵⁵ Based on industry benchmarks, the net profit margin experienced by high performing dealers (3.2 to 4 per cent) is approximately double the industry average net profit margin (1.7 to 1.8 per cent).

Table 2.2: Estimated net profit margins for car dealers in Australia

	Benchmark net profit margins (top 30 per cent of dealers)	Average net profit margin (across all dealers)
Volume cars	3.2 – 3.5%	1.8%
Prestige car	3.2 – 3.8%	1.7%
Luxury cars	3.7 – 4.0%	1.8%

Note: Net profit is expressed as a percentage of sales

Source: Deloitte Motor Industry Services Dealership Benchmarks (2017), pp. 4, 14, 24.

A typical industry pricing model for authorised dealerships in Australia has been highlighted by the AADA.⁵⁶ The stylised model describes lower margins on new car sales and higher margins on complementary products, such as the various add-ons often sold with cars (e.g. car accessories, finance, extended warranties and consumer credit and life insurance) and aftermarket services (e.g. repair and service work and authorised replacement parts). Table 2.3 provides an indicative summary of average dealer gross profit margins across some of these product lines, highlighting the material differences in revenues and margins for different categories of goods and services typically sold by car dealerships.

Table 2.3: Estimated sources of gross profit for car dealers in Australia

	Revenue share	Gross profit margin	Contribution to gross profits
New vehicles	65%	7%	38%
Used vehicles	20%	10%	13%
Parts	8%	21%	13%
Service	7%	64%	36%
Total / average	100%	12%	100%

Note: Excludes other sources of revenue including car finance and consumer credit and life insurance

Source: AADA submission, November 2016, p. 11.

⁵⁴ IBISWorld, *IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia*, October 2017.

⁵⁵ The Deloitte Motor Industry Benchmarks Report reports net profit margins for the top 30 per cent of dealers in the eProfitFocus database of more than 850 dealers.

⁵⁶ AADA submission, November 2016, pp. 9–10. The AADA notes at para 4.2.5: 'While the finance and insurance and parts and service departments will generally operate at a net profit they would not do so without sufficient volume in vehicle sales which generates a significant proportion of the throughput of those departments'.

Competition in the retail market

Retail markets for the supply of new cars in Australia are generally competitive, as a result of a number of factors:

- As of 2016, there were around 67 car brands and over 210 models on sale in Australia with no car manufacturer capturing more than 18 per cent of total new car sales.⁵⁷
- There are typically multiple car makes and models to choose from within any segment of the new car market (i.e. micro, light, small, medium, large, people mover, sports).⁵⁸
- There is a large number of new car dealers (approximately 1500) dispersed throughout population centres competing for sales and market share.⁵⁹
- There is intra-brand competition between authorised dealers within a manufacturer's network and inter-brand competition between dealers in local markets.⁶⁰ While dealer agreements give dealers primary rights to represent a brand within a geographical area, they typically do not establish exclusive areas for sales.
- Generally, ownership of authorised dealers is fragmented, with the four largest firms (owning multiple dealerships) accounting for around 15 per cent of new car sales. The remaining 85 per cent is shared amongst a range of dealership types including many smaller businesses operating single dealerships selling one brand of car.⁶¹
- The used car market and the growth of car sharing services may also provide competitive pressure and a degree of substitution to purchasing a new car (see Box 2.3).

However, competition varies across the country depending on a range of factors including the buyer, the car being sought and the number of dealers in an area. For example:

- Larger buyers (such as fleet buyers) may have more bargaining power, be less restricted to dealers in a given area and may have the option of buying in the wholesale market.
- Single car buyers (typically small businesses or households) are likely to have less bargaining power and be limited to a smaller geographic area with fewer dealers and models to choose from.
- Buyers seeking a car type with more brands and models (i.e. medium sized passenger cars) will have more choice compared with buyers seeking a car type with fewer brands and models (i.e. luxury sports).

Consumers and the retail market

As already noted, for many consumers, buying a new car is a significant purchase. It can also be a complex decision that typically locks consumers into significant ongoing costs to operate, service, maintain and repair the car. Box 2.4 outlines some of the key costs and benefits a consumer may weigh up when choosing a car.

⁵⁷ FCAI, *VFACTS National Report – New Vehicle Sales*, December 2016. The top 5 car manufacturers by sales in 2016 in Australia accounted for 51.3 per cent of all new cars sold that year: Toyota (17.8 per cent), Mazda (10.0 per cent), Hyundai (8.6 per cent), Holden (8.0 per cent) and Ford (6.9 per cent).

⁵⁸ FCAI, *VFACTS National Report – New Vehicle Sales*, December 2016.

⁵⁹ AADA submission, November 2016, p. 2.

⁶⁰ AADA submission, November 2016, p. 8.

⁶¹ IBISWorld, *IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia*, February 2017.

Box 2.4: The ‘whole of life’ costs and benefits of owning a new car

A consumer may consider a range of costs and benefits associated with buying and owning a car when making the upfront purchase decision of which car to buy.

The cost to a consumer of owning a car includes purchase, running and depreciation costs. A consumer can face trade-offs between these costs. For example, a given model may be relatively cheaper to buy but have higher repair and service costs, or may be more expensive to buy but come with lower fuel costs.

Purchase costs include the price of the car and any physical or service add-ons.

Running costs include:

- the ongoing costs of scheduled services and ad-hoc repairs, which can vary depending on whether the car is under warranty or not
- other recurring costs such as fuel, car insurance and registration
- the costs of ad-hoc crash repairs.

Depreciation costs are the loss of capital value as the car ages, reflected in the eventual resale or trade in value of the car.

The benefits derived by a consumer from owning a given car will depend on a range of factors including:

- the features of a given model (such as safety, reliability, security, fuel consumption, environmental impact)
- the level of protection offered under the manufacturer’s warranty
- the add-ons purchased or granted at the point of sale (capped-price or free servicing, extended warranty, road side assist)
- the costs, convenience, safety and reliability of ongoing post-sale services and support.

Consumers looking to buy a new car can be faced with volumes of technical, legal and financial information about the car itself, the purchase process and post-sale care arrangements, with this information spread across many sources. The degree to which consumers are interested in and can locate and effectively use this information will vary from buyer to buyer. How well-informed a consumer is about their car purchase will also depend on the practices of car manufacturers, dealers and other participants in the retail market.

Some key steps and types of information sought by consumers in the new car buying process are outlined in Box 2.5.

Box 2.5: Informing consumers' car purchase decisions

The ACCC commissioned a consumer survey of 1500 new car buyers across Australia which detailed a number of key findings on how consumers inform themselves about their new car purchase (the ACCC Consumer Survey).⁶²

New car buyers are generally well-informed prior to purchase

- 55 per cent of new car buyers surveyed reported that they typically spent from one week to a month researching their purchase, while 31 per cent spent more than a month.
- New car buyers indicated that they most commonly used information on manufacturers' websites to inform their decisions (65 per cent) followed by in-person consultation with car sales-persons (54 per cent). They also indicated that they visited a median of two dealers and considered a median of two car models.

Information is generally easy to find and use

- Most new car buyers reported little difficulty in sourcing the information they required to inform their purchases. The types of information reported to be hardest to find related to:
 - the cost of spare parts (26 per cent)
 - reliability (16 per cent)
 - the environmental impact of the car (15 per cent)
 - post-sale servicing options and costs (14 per cent), and
 - the level of comfort offered by the car (ten per cent).
- More than half of new car buyers perceived that it was 'easy' or 'very easy' to compare different brands of cars (57 per cent). However those in regional areas were less likely to describe comparisons as 'easy' or 'very easy' than those living in metropolitan areas (50 per cent vs. 58 per cent).

Consumers are influenced at the point of sale

Three quarters of new car buyers reported that they received information from the sales-person before purchasing their car. Of these, two thirds felt that the information had some influence on their purchase decision.

In 2016, the Australian Securities and Investments Commission (ASIC) also conducted consumer research in relation to new car buyers (focussed on motor vehicle add-on insurance), which identified the following factors that may inhibit good decision-making by new car buyers:

- **decision fatigue**, the result of making a series of decisions, which can end in later decisions not being of the same quality as early decisions
- **information overload** when faced with complex decisions or lots of information—that is, the amount of information consumers have to process can adversely affect how they process that information and weaken the use of their critical decision-making.⁶³

Post-sale, consumers continue to seek and be provided with a range of information about their car as they make ongoing decisions about car maintenance, servicing and repairs. The processes consumers go through to make car servicing and repair decisions are discussed in section 2.3 below.

⁶² ACCC Consumer Survey, *Consumer experiences of buying, servicing and repairing new cars*, Colmar Brunton, May 2017.

⁶³ ASIC submission, November 2016, pp. 7–8.

2.3. Aftermarket: car servicing and crash repairs

Once a consumer buys a new car they require a range of ongoing aftermarket services and parts to ensure the car is maintained and repaired where necessary. Under the ACL, manufacturers or importers also guarantee that they will make repair facilities and spare parts reasonably available. Car servicing and repairs, crash repairs and the replacement parts used in this work are supplied by a mix of manufacturer authorised and independent businesses in Australia.

2.3.1. Car servicing and repairs

Manufacturer car servicing requirements, including the replacement of certain high wear service parts, are set out in the log book and service manual. A consumer may choose to have their new car serviced at an authorised dealership service centre or by an independent repairer outside the authorised supply chain (see Figure 2.1).⁶⁴

There are approximately 22 500 manufacturer authorised and independent car repair and service centres operating across 39 000 outlets in Australia.⁶⁵ Authorised new car dealerships across the country typically operate a repair and service centre which aims to service their manufacturer's cars within the geographical area defined in their dealer agreements. The majority of these dealership service centres, as with the dealership business of which they are a part, are family-owned, partnership, or sole trader businesses, while a minority are operated by large multi-dealership businesses.

Independent repair and service businesses are equally diverse. Most independent repairers are small businesses operating as sole proprietors, partnerships or family businesses servicing cars in their local area. While there is a small number of large chain and franchise-based businesses operating national networks of independent service centres, these control a small share of the overall national repair and service market (see Table 2.3).

Table 2.4: Largest independent suppliers in repair and service markets, 2016–17

Business	Description	% of total revenue
Kmart Tyre & Auto Service	A subsidiary of Kmart with over 240 company owned service centres across Australia	2.0
Ultra Tune Australia Pty Ltd	A national franchise company with over 270 franchised service centres across Australia	1.8
Midas Australia Pty Ltd	More than 88 company-owned and franchised service centres across Australia.	1.0

Source: IBISWorld Industry Report S9419 Motor Vehicle Engine and Parts Repair and Maintenance in Australia.

Repair and service businesses (excluding crash repairs) were estimated to earn around \$16.1 billion in 2016–17, generating approximately \$900 million in profits.⁶⁶ Electrical servicing, repairs and installations businesses, a related type of car repair and service work, are expected to generate an additional \$2 billion in revenues over 2016–17, approximately \$207 million in profits and a rate of return on revenues of 10.4 per cent.⁶⁷

⁶⁴ Aspects of new car servicing and repairs may also be undertaken by car owners themselves, although this is increasingly difficult to do as cars become more complex.

⁶⁵ IBISWorld Industry Report S9419 Motor Vehicle Engine and Parts Repair and Maintenance in Australia, March 2017.

⁶⁶ IBISWorld, *IBISWorld Industry Report S9419 Motor Vehicle Engine and Parts Repair and Maintenance in Australia*, March 2017. Motor vehicle engine and parts repair and maintenance businesses primarily repair motor vehicle engines and parts, and perform the regular maintenance and servicing of vehicles.

⁶⁷ IBISWorld, *IBISWorld Industry Report S9411 Motor Vehicle Electrical Services in Australia*, September 2016.

There is limited information publicly available on profit margins specific to independent car repair and service centres in Australia, which is a highly fragmented sector. Similarly, there is limited data on the percentage of revenues or market shares from new car repairs and service accruing to each of authorised dealerships and independent repairers. However, the ACCC Consumer Survey indicates that authorised service centres perform the majority of repair and service work on new cars still under warranty.⁶⁸

A number of trends in car servicing and repairs are impacting the sector in Australia, including the growth of free and capped price servicing, the continued spread of technology in car manufacture and ongoing consolidation amongst operators (see Box 2.6).

Box 2.6: Trends in car servicing⁶⁹

Consolidation of service providers

Industry analysts have noted a small increase in the number of repair and service operators overall in recent years due predominantly to an increase in small-scale businesses servicing the growing number of registered vehicles. There has been some consolidation amongst larger operators in the sector driven, in part, by consolidation amongst dealerships: as the number of dealers has decreased, so too has the number of dealership service centres. This consolidation has been driven by larger, multi-dealership businesses acquiring dealerships as a means of increasing market share and achieving economies of scale (see Box 2.3).

Reports indicate that larger operators have been able to improve profitability through this consolidation, and through greater economies of scale and their ability to invest heavily in the new tools, equipment and skills needed to repair increasingly complex and differentiated car models. However, smaller operators have faced increased costs and profit pressures from a range of sources including increased price competition from the spread of free or capped price servicing offers (see below), and the increased investment required in the tools, equipment, information systems and staff training needed to repair newer cars entering the market. Some smaller operators who could not make needed capital investments have exited the sector.

Rise of free or capped price servicing

Free or capped price servicing arrangements typically allow new car buyers to have their car serviced at authorised dealer service centres (within a certain time frame or distance travelled) for free or at a pre-agreed price. These agreements aim to provide servicing at a low price arranged at the time of sale and encourage consumers to return to the dealership network. These agreements (which typically only cover basic scheduled servicing) may also allow dealers to earn additional revenue through add-on sales (for example, parts) over the life of the agreement. Industry analysts have noted that these agreements have reduced sector revenues in recent years and driven greater competition between authorised dealerships and independent repairers servicing new cars.

Consumers sourcing car parts online

Reports indicate that consumers are increasingly purchasing car parts from online retailers and taking these parts to repair and service operators for replacement and installation. It has also been reported that customers are relying on the price transparency of parts available through online retailers to negotiate with repair and service operators. Industry bodies representing the independent repair sector have noted that consumers sourcing parts can raise issues for the liability of independent repairers, particularly where difficulties arise in confirming whether the part is genuine or counterfeit.

⁶⁸ The ACCC Consumer Survey found that 86 per cent of new car buyers reported taking their new car to the dealership where they purchased it or another dealership in the same network for routine services (ACCC Consumer Survey, p. 46).

⁶⁹ IBISWorld, IBISWorld Industry Report S9419 Motor Vehicle Engine and Parts Repair and Maintenance in Australia, March 2017; IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia, February 2017; Car Advice, <http://www.caradvice.com.au/299662/capped-price-servicing-faq-whats-offered-whats-covered-and-the-limitations/>.

Access to repair and service tools, information and parts

In order to repair and service a new car to manufacturer specifications, access is needed to a range of diagnostic tools, information and parts. These can include:

- *Diagnostic tools and information:* the tools, including complementary software, updates and codes needed to scan a car system and identify the condition of the car and faults needing service
- *Car repair information:* the technical specifications of car components, repair and service methods used to perform services and repairs as well as other information needed to reinitialise car systems once work is completed
- *Car parts and associated data and codes:* authorised replacement parts are supplied by manufacturer authorised parts distributors while non-authorised parts (including parallel imports and aftermarket parts) are supplied through non-authorised parts distributors.

Authorised dealers typically have access to diagnostic tools, software updates, codes, technical specifications and other information needed to repair and service their manufacturer's cars. Dealers are typically required to use authorised parts accessed through manufacturer distribution networks.

Independent repairers generally do not have the same level of access to this data and information, and instead gain access through a variety of sources including:

- car manufacturers, authorised dealers or other authorised agents
- third party car information aggregators
- the manufacturer's overseas information sharing networks (in the US or EU)
- informal networks (such as informal information sharing website or contacts with businesses inside authorised supply chains).

Submissions to this study argued that independent repairers are experiencing a range of barriers to accessing some of the tools, information and parts needed to repair and service new cars in Australia, and that these barriers are limiting competition and imposing a range of costs on consumers. These issues are discussed further in Chapter 4.

Other submissions raised concerns about the high cost of authorised repair parts through manufacturers' authorised distribution networks, and possible barriers experienced by independent repairers in accessing these parts. These issues are discussed in Chapter 5.

Consumer choice of repairer

The type and timing of servicing required for a new car is based on the service protocols recommended by the manufacturer. Consumers are informed of these servicing requirements in various ways:

- New car logbooks and service manuals detail the car manufacturer's service requirements typically up to the first 200 000km. The log book tells the consumer when a service is required and what needs to be done. Authorised dealers and independent repairers use a range of methods to inform consumers of scheduled services (for example, windscreen stickers, reminder phone calls, text messages and emails).
- The manufacturer's warranty sets out minimum service requirements that consumers must comply with to avoid limiting or voiding a new car warranty. A manufacturer typically includes clauses noting that to avoid voiding or limiting the warranty, service or repair work must be carried out by qualified staff, according to the manufacturer's specification and using appropriate quality parts. However, subject to complying with these requirements, consumers are not required to have their new car serviced and

repaired within the authorised dealer network.

- Consumers receive information on car servicing requirements pre-sale, at the point of sale and post-sale from other sources including statements made by car dealers and information on manufacturer and industry websites.

Consumers may consider a range of factors when choosing where to get their new car serviced.⁷⁰ The price consumers pay for scheduled services varies significantly depending on a range of factors including the car model, the type of service and replacement parts used and the age and condition of the car. Authorised dealers and independent repairers often advertise fixed prices for different types of services covering a defined scope of work and types of parts, including minor, major, new car and log book services. In recent years, manufacturers and authorised dealers have been offering new car buyers free and fixed price servicing for periods of time from a few years up to the 'lifetime' of the car, to help provide consumers with certainty on the future cost of scheduled services (see Box 2.6). Consumers may also consider the geographical convenience, the distance they have to travel and the likely time they expect to leave their car with the service centre.

Submissions to this study and ACCC research have identified some aspects of the information provided to consumers by manufacturers and dealers which may impact the ability of consumers to make informed choices about where to have their new car repair and service work carried out. This includes explicit or implicit misrepresentations made in logbooks and service manuals that authorised dealers must carry out services or repairs.

Key sources of consumer misunderstanding or confusion about their rights in relation to servicing and repairs are further discussed in Chapter 3 (see section 3.2.2).

Competition in repair and service markets

Evidence gathered for this study indicates that markets for the repair and service of new cars still under warranty are less competitive than markets for the sale of new cars. Various factors facilitate competition in this sector:

- Authorised dealer service centres and independent repairers compete on a range of factors including the price of servicing, repairs and replacement parts, the quality and speed of their work, geographical convenience for consumers, the provision of loan cars, guarantees and other complementary services.⁷¹
- Owners of new cars still under warranty, particularly in urban areas, can typically choose between an authorised dealer and an independent repairer with the capability to perform new car or log book servicing that meets manufacturer and warranty requirements.⁷²
- There is some degree of intra-dealer competition for repair and service work. Dealer agreements, giving a dealer the right to act as the primary repairer of their model within a geographical area, are typically 'non-exclusive' allowing one dealer to service cars sold by other dealers in the same network.⁷³
- The trend of offering free or capped price servicing to new car buyers at the point of sale is putting downward pressure on prices in the sector and intensifying competition between dealers with these agreements and independent repairers.⁷⁴

⁷⁰ ACCC Consumer Survey, pp. 49–52.

⁷¹ ACCC Consumer Survey, pp. 49–52.

⁷² For example, the manufacturer warranty may state that to avoid voiding or limiting the warranty, any servicing or repairs must be carried out by qualified staff, according to the manufacturer's specification and using appropriate quality parts.

⁷³ The ACCC Consumer Survey found that 18 per cent of respondents reported taking their new car to a dealership in the same network other than the dealership where they bought their car (ACCC Consumer Survey, p. 46).

⁷⁴ The ACCC Consumer Survey found that 37 per cent of respondents reported taking their new car to a dealership due to free/reduced price servicing (ACCC Consumer Survey, p. 46).

While consumers have the right to choose who services and repairs their new car, the ACCC Consumer Survey indicates that almost nine out of ten consumers go to authorised dealer service centres while their cars are under warranty.⁷⁵ Consumers gave a range of reasons for this—many related to benefits of dealership servicing such as free/reduced price servicing (37 per cent); dealerships being more likely to service to manufacturer specifications (29 per cent) and cars being safe at dealerships (25 per cent). However, other reasons related to consumer misunderstanding of warranty and servicing requirements, such as views that dealership servicing is mandatory, either under warranty or according to the logbook (32 per cent).⁷⁶

This study has identified a number of factors impeding competition in repair and service markets including:

- consumer beliefs that manufacturer warranties require new cars to be serviced at a dealership to avoid voiding the warranty (Chapter 3)
- barriers to independent repairers accessing technical information needed to repair and service new cars (Chapter 4)
- high switching costs once consumers have purchased a particular brand or make of car.

2.3.2. Crash repairs

Many owners of new cars hold comprehensive car insurance. As a result, a significant proportion of crash repair work performed on new cars in Australia is paid for in whole or part by car insurers on behalf of their policy holders. Car insurers play a major role in the crash repair market alongside car owners, car manufacturers, and authorised and independent parts suppliers and crash repair businesses.

Unlike car servicing and repairs, most authorised dealers in Australia do not provide crash repair services. These are predominantly supplied by small and medium size businesses with varying degrees of commercial affiliation with car manufacturers and insurers.⁷⁷

Manufacturer authorised repair networks

Some car manufacturers, typically higher end brands, licence a limited number of authorised dealers and crash repair businesses to act as manufacturer authorised repair networks (MARNs).⁷⁸ Toyota Australia also operates and has announced plans to expand a national network of authorised and certified crash repairers.⁷⁹

Under the terms of a MARN licencing agreement, authorised crash repairers typically gain access to the manufacturer's diagnostic tools, data, software, codes and other information needed to repair the manufacturer's cars. Repairers also agree to use authorised parts sourced through manufacturer authorised Australian distribution channels (excluding the use of manufacturer branded parallel imports and new aftermarket parts).

Crash repairers which are not members of a MARN rely on a variety of sources to access diagnostic and repair tools, parts, codes, software and other repair information (such as technical specifications and repair methods) including:

- car manufacturers, authorised dealers or other authorised agents

⁷⁵ The ACCC Consumer Survey found that 86 per cent of respondents reported taking their new car to the dealership where they purchased it or another dealership in the same network for routine services (ACCC Consumer Survey, p. 46).

⁷⁶ The ACCC Consumer Survey, p.49.

⁷⁷ IBISWorld, *IBISWorld Industry Report S9412 Motor Vehicle Body, Paint and Interior Repair in Australia*, December 2016. There are also a small number of chain crash repair companies such as AMA Group and Capital S.M.A.R.T Repairs.

⁷⁸ Mercedes Benz Melbourne. See: <http://www.mbmelbourne.com.au/en/desktop/home.html>, accessed May 2017.

⁷⁹ Australasian Paint and Panel, <http://www.paintandpanel.com.au/news/news/toyota-s-repair-network>, accessed May 2017.

- third party car information aggregators
- manufacturers' overseas information sharing networks (typically in the US or EU)
- informal networks (such as information sharing website and contacts with businesses inside authorised supply chains).

Insurer preferred provider networks

All car insurance companies in Australia operate their own insurer preferred repair networks (IPRNs). These are networks of independent repair businesses which have entered into agreements with a given insurer. IPRNs in Australia can vary in size from approximately 100 to 1000 crash repairers.⁸⁰ Under these agreements, insurers refer crash repair work to their preferred repairers in return for the repairers agreeing to various criteria relating to pricing schedules and technical, training and service standards.⁸¹ Insurers also actively assist their IPRN repairers in gaining access to needed repair tools, information and parts.

Car insurance policies typically specify that new authorised replacement parts will be used in crash repairs for cars still under warranty.⁸² Evidence presented to this study indicates that in most instances, insurers and crash repairers use authorised parts sourced through the manufacturer's authorised distribution channels. However, in some cases, manufacturer branded parallel imports and new aftermarket parts are also used where they are lower cost.

Once the car manufacturer warranty period expires, car insurance policies commonly allow for the use of new parts or parts consistent with the condition of the car. These can include manufacturer branded parallel imports, aftermarket parts, and recycled and reconditioned second hand parts. Insurers typically state that all parts must meet manufacturer specifications and/or the relevant Australian Design Rules (ADRs).⁸³

Membership of a manufacturer and insurer authorised/preferred network is not mutually exclusive or a pre-requisite for a given repairer working on a make of car or doing insurance repairs. A given crash repair business may be in a MARN and one or more IPRN. Some repairers may not be a member of any network but may still perform insurance repairs and repair certain manufacturers' models.

There are various trends in crash repairs in Australia impacting on the sector, including the growth of insurer repair networks, the continued spread of technology in car manufacture and ongoing consolidation amongst crash repairers (see Box 2.6).

Consumer choice of crash repairer

Consumers have the right to choose who repairs their new car (although this right may be impacted by the terms and conditions of car insurer policies and extended warranties).

Insurers are able to influence how crash repairs are undertaken where the new car owner holds comprehensive car insurance. For example, insurers typically have the right to decide whether to repair or write off a car.⁸⁴ Where repairs are undertaken, the consumer (policy holder) may agree to have the car fixed by a repairer in the insurer's IPRN, which may be a lower cost option for the car owner. Where the consumer prefers to use a repairer outside the IPRN, the insurer will typically agree to pay an amount up to the cost of repair quoted by

⁸⁰ IBISWorld, *IBISWorld Industry Report S9412 Motor Vehicle Body, Paint and Interior Repair in Australia*, December 2016.

⁸¹ Standards can relate to capacity and equipment levels (capability, response times, value added services); need for a repairer in a geographic area (claim volumes, potential growth, types of services offered); repair quality and customer service; use of management technology and software; accreditation and shop presentation and customer facilities.

⁸² See [AAMI Comprehensive Car Insurance Product Disclosure Statement](#), p. 37, accessed May 2017.

⁸³ AAMI Comprehensive Car Insurance Product Disclosure Statement, p. 37.

⁸⁴ In case of a write off, insurers may choose to replace the car, or pay the owner an agreed or a determined 'market value'.

one of their IPRN repairers, or make a cash payment to the owner for that amount leaving the consumer to have their car repaired outside the IPRN and cover any gap in costs.

Consumer choice of repairer can also be influenced by requirements in manufacturer and extended warranties which set out the requirements that consumers must comply with to avoid limiting or voiding a warranty.

Crash repair industry market structure

There are approximately 11 000 crash repair (or motor vehicle body, paint and interior repair) businesses operating across the country. These businesses are estimated to earn approximately \$6.8 billion in revenues over 2016–17, generating \$573 million in profits.⁸⁵

Crash repair revenues are estimated to primarily come from car body repairs (52 per cent), with vehicle painting accounting for around 19 per cent, glass repair and replacement 11 per cent, car wash and cleaning eight per cent and upholstery and interior work six per cent.

It is estimated that car insurers account for over three quarters of all crash repair spending in Australia – with approximately 68 per cent of sector revenues from insurer spending within IPRNs and a further nine per cent from insurer spending with repairers outside these networks. Households make up around 19 per cent of sector revenue (paying for their own repairs outside of insurance claims), while commercial and government fleet operators and dealers account for an estimated four per cent. There is no data available on the number of repairers in MARNs or the market shares of MARNs.⁸⁶

The crash repair sector exhibits a relatively low level of market concentration, although this finding is complicated by the fact that not all repairers can repair each kind of vehicle. The majority of crash repair businesses in Australia are small independent family-owned, partnership, or sole trader businesses. There are a small number of larger businesses operating multiple repair shops and a few national businesses operating chains of crash repair outlets. However, the three largest chain operators account for less than eight per cent of the Australian crash repair market.⁸⁷

Access to crash repair information and equipment

Crash repairers need access to a range of information and equipment from car manufacturers, dealers and other authorised agents to repair a given car model to the manufacturer's specifications. The ability of independent crash repairers to access tools, information and parts raise similar issues as discussed in section 2.3.1 above.

⁸⁵ IBISWorld, *IBISWorld Industry Report S9412 Motor Vehicle Body, Paint and Interior Repair in Australia*, December 2016. Motor vehicle body, paint and interior repairs include repairing, panel beating or spray painting smashed or damaged motor vehicles, replacing, repairing or tinting automotive glass, and interior repairs, car wash or cleaning services. See: http://www.mtaa.com.au/images/docs/Motor_Vehicle_Body_Paint_and_Interior_repair.pdf, accessed May 2017.

⁸⁶ IBISWorld, *IBISWorld Industry Report S9412 Motor Vehicle Body, Paint and Interior Repair in Australia*, December 2016.

⁸⁷ IBISWorld, *IBISWorld Industry Report S9412 Motor Vehicle Body, Paint and Interior Repair in Australia*, December 2016.

Competition in crash repair markets

Evidence gathered for this study indicates that markets for crash repairs of new cars are less competitive than for sales of new cars. Various factors facilitate competition in markets for crash repairs of new cars:

- crash repairers (in MARNs, IPRNs and operating independently) compete on a range of factors including the price of repairs and replacement parts, the quality and speed of work, geographical convenience for customers, the provision of loan cars, guarantees and other complementary services
- new car owners, particularly in urban areas, can typically choose between a number of crash repairers (in manufacturer networks, insurer networks and independents) who are able to repair their car to manufacturer specifications
- the expansion of IPRNs is driving competition between independent crash repairers who wish to gain access to these networks, and between crash repairers in IPRNs and repairers outside insurer networks who quote for insurance work generally.

Key obstacles to greater competition in crash repair markets include:

- barriers experienced by crash repairers outside MARNs in accessing the car data, information, tools and training needed to repair and service new cars (Chapter 4)
- search costs and complexity faced by consumers in locating and understanding the information necessary to select an appropriately trained and qualified crash repairer.

Findings

- Car manufacturers and authorised dealers are typically active in both the manufacture and supply of new cars and in the supply of aftermarket services, including car servicing, repairs and supply of parts and tools.
- Authorised dealers generally earn higher profit margins from aftermarket services than from new car sales. For dealers, although parts sales and repair and service account for 15 per cent of revenue, these aftermarket services contribute to 49 per cent of gross profit. The average net profit margin for dealers is approximately 1.7 to 1.8 per cent.
- A common pricing strategy for car manufacturers and authorised dealers is to offer lower new car prices to maximise sales of aftermarket services. This strategy reflects that consumers have more choices available at the time of the new car sale than they do in aftermarkets for repair, service and replacement parts after the sale.
- Retail markets for the supply of new cars in Australia are generally competitive, primarily indicated by low market concentration of car brands and dealers.
- Competition in markets for the supply of aftermarket services is less competitive as a result of factors including:
 - the ability and incentives of car manufacturers and their dealers to impede competition in profitable aftermarkets by controlling access to necessary inputs such as the technical information needed to repair and service a new car
 - consumer misunderstanding about warranty and servicing requirements (including the misconception that manufacturer warranties require new cars to be serviced at a dealership)
 - high switching costs once consumers have purchased a particular brand or make of car.

3. Consumer guarantees and warranties

Key points

- Consumers are having difficulty enforcing consumer guarantees when problems occur with new cars. A significant body of evidence suggests systemic failure in consumers enforcing consumer guarantees after the purchase of a new car.
- This study has identified five key issues contributing to the difficulties experienced by consumers in enforcing their consumer rights:
 - manufacturers' focus on warranty obligations to the exclusion of their consumer guarantee obligations
 - manufacturers' responses to 'major failures'
 - the widespread use of non-disclosure agreements by manufacturers when resolving complaints
 - the lack of effective independent dispute resolution options for consumers, and
 - particular features of the commercial arrangements between manufacturers and dealers.
- The ACCC is also concerned by what appears to be 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.
- The ACCC has seen many examples of practices by manufacturers in dealing with consumer complaints that would raise concerns under the ACL provisions.
- The ACCC recently instituted proceedings in the Federal Court against Ford, and has accepted a court enforceable undertaking from Holden in relation to its concerns about alleged ACL non-compliance issues. Other investigations are continuing, and the ACCC will continue to actively monitor complaints and emerging issues in the sector, and take further compliance and enforcement action where necessary.
- The ACCC views that ACL compliance issues can be addressed by manufacturers transforming their approach to the handling of consumer guarantee claims.
- Manufacturers need to update their complaint handling systems to ensure that consideration of consumer guarantee rights are embedded in all relevant systems, policies and procedures with the objective of ensuring that a consumer's statutory rights under the ACL are given due consideration at the outset of responding to a claim.
- 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.
- Dealers, as retailers of new cars, have direct responsibility to provide remedies to consumers under the ACL. Dealers also have a right to recover the costs of remedies from manufacturers, where the manufacturer is responsible for the failure.
- Manufacturer complaint handling systems, policies and procedures that do not comply with the consumer guarantee requirements of the ACL can constrain and adversely influence the behaviour of a dealer in responding to consumers, which puts dealers at risk of breaching the ACL.

3.1. Consumer rights and business obligations under the ACL

The ACL provides consumers with a set of statutory protections when buying a new car (as well as other types of goods and services), as outlined in Chapter 1.⁸⁸ These are known as **consumer guarantees**. For example, new cars must be of acceptable quality and fit for purpose. Car dealers and manufacturers are legally obliged to comply with the requirements of the consumer guarantees. For example, they must ensure the car they supply matches the manufacturer's descriptions. In addition, most car retailers provide a **manufacturer's warranty** with the sale of a new car. This means that if the car is found to be defective, consumers may be entitled to seek redress under the terms of the manufacturer's warranty or another type of warranty sold by the dealer or a third party. Warranties are voluntary promises about what the consumer can expect from a good or service in terms of its quality and characteristics, or the remedies available to the consumer if they experience a problem.

The ACL requires that any 'warranty against defects', including a manufacturer's warranty, must include mandatory text to ensure consumers are aware that the warranty operates in addition to the consumer guarantees under the ACL.⁸⁹ This mandatory text is:

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

Some car retailers also sell consumers **extended warranties**. An extended warranty differs from a manufacturer's warranty in that, while a manufacturer's warranty is usually included in the price of the car, a consumer may choose to pay extra for an extended warranty that, for example, runs for a number of years after the manufacturer's warranty has expired.

Importantly, manufacturers' warranties and extended warranties do not displace the consumer guarantees or statutory rights under state and territory legislation. Even if a consumer is not entitled to a remedy under the terms of a warranty provided by the manufacturer, dealer or a third party, they may be entitled to a statutory remedy under the ACL or state or territory legislation.

If a new car is defective or fails to perform as promised, a consumer may have recourse under one or more of these legal avenues (that is, under the consumer guarantees, state or territory legislation, the manufacturer warranty or an extended warranty).

If a new car fails to meet a consumer guarantee, the remedy available to the consumer will depend on whether the failure is 'major' or not. In broad terms, a **major failure** includes a circumstance where a consumer would not have purchased the car had they been fully aware of the nature and extent of the failure. If a new car suffers a major failure the consumer is entitled to elect the remedy of a refund, repair or replacement.

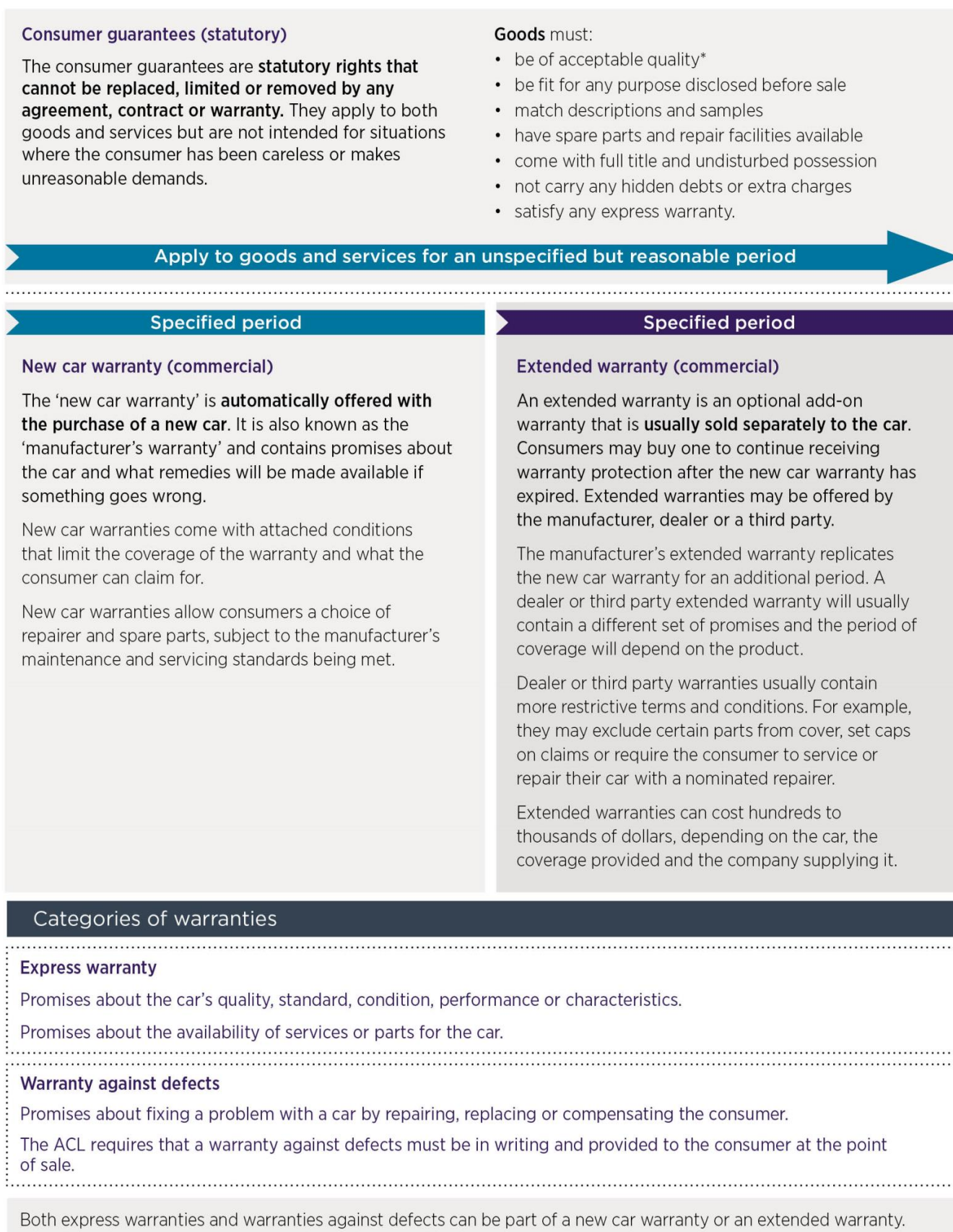
Figure 3.1 (below) provides a description of the consumer guarantees and the different types of new car warranties available to consumers.

Figure 3.2 (below) summarises the ACL remedies available to consumers for major and non-major failures.

⁸⁸ Further statutory protections for consumers may be available under state or territory legislation. Appendix C contains a list of relevant legislation.

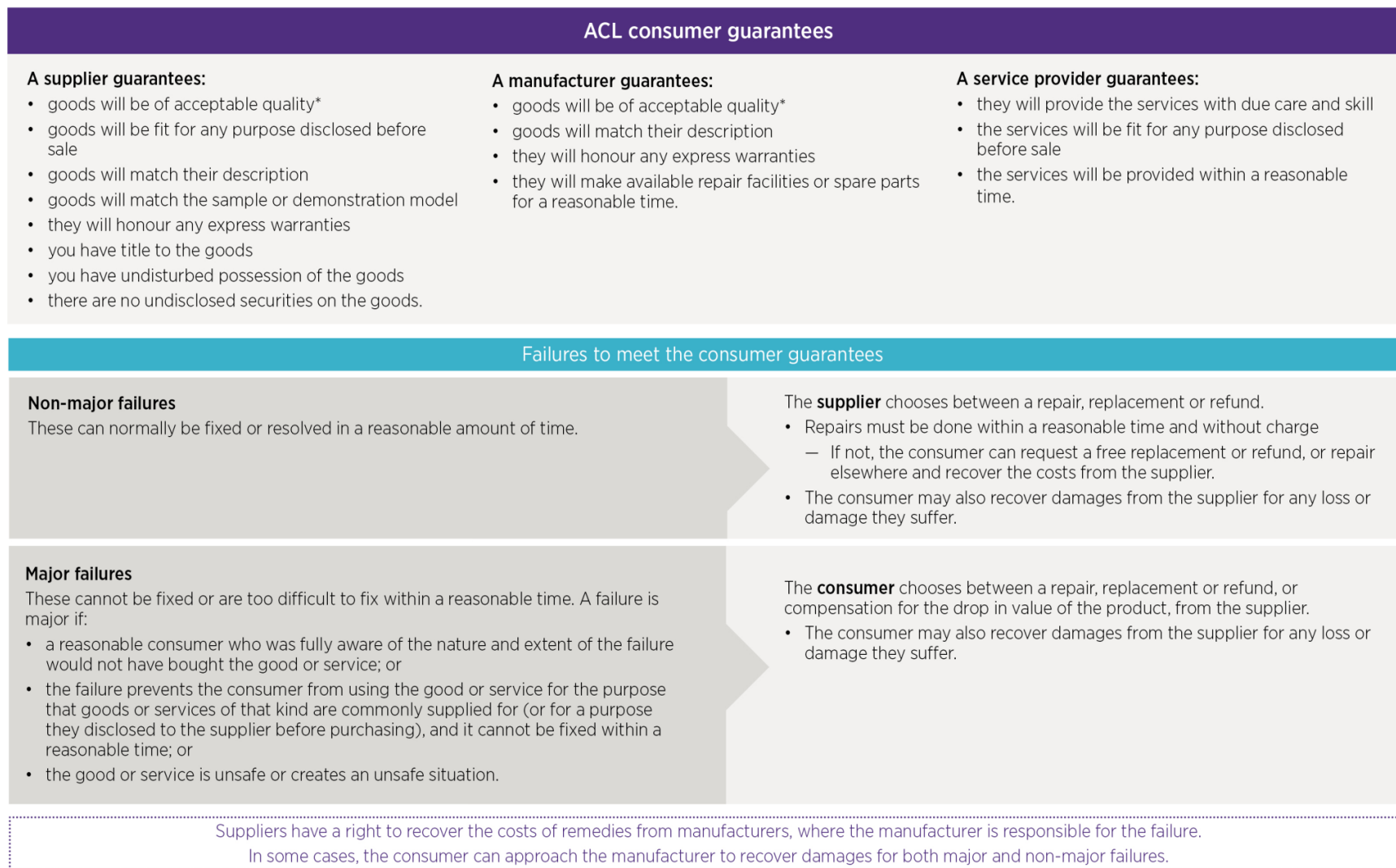
⁸⁹ Regulation 90, Competition and Consumer Regulations.

Figure 3.1: Consumer guarantees and new car warranties



* Goods are of acceptable quality if they are safe, durable and free from defects, are acceptable in appearance and finish and do everything that they are commonly used for.

Figure 3.2: Statutory remedies available to consumers for cars which experience a failure



* Goods are of acceptable quality if they are safe, durable and free from defects, are acceptable in appearance and finish and do everything that they are commonly used for.

Findings on consumer rights and business obligations under the ACL

- The ACL is Australia's national law for fair trading and consumer protection and plays a critical role in providing protections to consumers in their dealings with business and in the event that there is a problem with a good or service, including new cars. The consumer guarantees provided by the ACL cannot be displaced.
- Manufacturer warranties provided with the purchase of a new car, and extended warranties offered by the dealer or a third party, provide additional protection to consumers in some circumstances.
- Together, the ACL and state and territory legislation, along with manufacturers' warranties, collectively provide consumers with an extensive suite of consumer rights to remedies or other forms of redress in the event that a new car is defective or fails to perform as promised.

3.2. Consumers' understanding of their rights

A new car is a significant purchase for most consumers and households. It is a relatively expensive and complex product that is usually purchased to safely meet their day to day transport needs for a number of years.

A good understanding of consumer guarantees and warranty rights will therefore help consumers to make informed decisions during and long after their purchase of a new car. For example:

- At the time of purchase, an understanding of consumer guarantee and warranty rights can assist consumers to make informed assessments of the value they may derive from additional warranty products such as an extended warranty offered by the dealer or a third party.
- When the car requires service or repair, an understanding of consumer guarantee and warranty rights can assist consumers to make informed decisions about the value they may derive from a particular choice of repairer or spare parts.
- In the event that the car is defective or fails to perform as promised, an understanding of consumer guarantee and warranty rights can assist consumers to enforce their rights and pursue available remedies, even when the warranty period has expired.

The 2016 Australian Consumer Survey indicates that 90 per cent of consumers are aware that laws exist to protect consumer rights when they purchase goods or services in Australia. A high proportion of survey respondents (71 per cent) also believed they have at least a moderate understanding of their rights.⁹⁰

For consumers who would like to know more about consumer guarantees, there are a variety of sources of information. The ACL website (consumerlaw.gov.au) publishes several guides on consumer rights and business obligations under the ACL. In 2013, ACL regulators published an industry specific guide on consumer rights in the car industry.⁹¹ State-based fair trading agencies often provide information about consumer rights tailored to their jurisdiction. Some of this publicly available guidance also explains commercial warranty products in broad terms (for example, providing tips on what to look out for or what to avoid).

The ACCC website (accc.gov.au) also provides information to consumers about their consumer rights.

⁹⁰ Australian Consumer Survey, 2016, pp. 21–22.

⁹¹ ACCC, [Motor vehicle sales and repairs: a guide for industry to the Australian Consumer Law](#), 2013.

Manufacturers typically publish information about their warranties on their websites. They also provide this information in a handbook to new car owners. At the point of sale, dealers may also provide oral advice to assist consumers understand the manufacturer's warranty, as well as other available extended warranty products.

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.⁹²

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.

Consumer fatigue

The purchase of a new car is often time-consuming and complicated for consumers. Consumers gather extensive information and make a number of assessments in order to select between different car models and options. There may be differences of view between household members to be reconciled in finalising their choice. The transaction itself requires forms to be completed and contracts signed. If finance is arranged through the dealer, this also adds to the time and information demands on the consumer at the point of sale.

The consumer's main focus at the point of sale is on the selection of their preferred new car and extras and the negotiation of a good price and finance terms, where applicable.

By the time a consumer has navigated this process, it may be difficult for them to also absorb and understand information about consumer guarantees, manufacturer warranties and extended warranties. For example, a consumer in this circumstance is unlikely to have the motivation or incentive to consider in detail, the features of an extended warranty product offered to them, and compare these to the rights they already have under the consumer guarantees and manufacturer warranty.

Both ASIC and the Consumer Action Law Centre (CALC) have recently published reports that discuss the effect of consumer fatigue on decisions about extended warranty products, at the point of sale.⁹³ They state that by the time a consumer has purchased a car, they may be fatigued from having made a series of decisions, and unable to properly assess the information provided to them at the point of sale about the complex range of extended warranty products available. This can lead to the purchase of an extended warranty product which, in many circumstances, is unlikely to add any additional protections to consumers' existing rights under the consumer guarantees.

⁹² Destroy My Jeep submission, November 2016, p. 3; CALC submission, November 2016, p. 3; MTA NSW submission, November 2016, pp. 2–4; AAA submission, November 2016, p. 20; AAAA submission, November 2016, pp. 20–23; ASIC submission, November 2016, pp. 6–12.

⁹³ Donating Your Money to a Warranty Company', August 2015: <http://consumeraction.org.au/wp-content/uploads/2015/08/DonatingYourMoneyToAWarrantyCompany.pdf>, accessed May 2017; ASIC Report 492: 'A market that is failing consumers: The sale of add-on insurance through car dealers', September 2016: <http://download.asic.gov.au/media/4042960/rep-492-published-12-september-2016-a.pdf>, accessed May 2017.

Focus on warranty protections

To the extent that consumers do consider the prospect that the new car may have a defect or fail to perform as promised, submissions to this study, and other recent surveys, suggest that discussions between the consumer and dealer at the point of sale are often limited to the protections offered by the manufacturer's warranty and/or an extended warranty product sold by the dealer.⁹⁴ There are commercial incentives for this focus.

First, manufacturers compete on their warranty offerings and warranty coverage is a strong feature of new car advertising. A focus on warranty rights at the point of sale reinforces the value of the product that the manufacturer has offered and the consumer has chosen.

Second, dealers can earn substantial commissions on the sale of extended warranty products. It is in the commercial interest of dealers and third party suppliers of warranty products for consumers to overestimate the value of these products in order to increase sales. Consumers who are experiencing information overload and decision fatigue may be more vulnerable to persistent sales techniques and methods driven by commission-based remuneration.

The ACCC has been told, in response to the consumer and small business questionnaire conducted for this study, that some dealers and third party suppliers of extended warranties do not disclose important details about the extended warranty that would allow the consumer to assess its value to them, including the full cost of the product and any cover exclusions.⁹⁵ This makes it even more difficult for consumers to make informed purchasing decisions.

In submissions to this study, the Australian Automobile Association (AAA) and the Motor Traders' Association of NSW (MTA NSW) advocated for increased transparency and clarity of information at the point of sale of a car about extended warranties. They also suggested education or guidance to consumers and dealers to encourage more informed decision-making and better sales practices.⁹⁶ The Australian Automotive Aftermarket Association (AAAA) submitted that any rewards to dealers should be disclosed to the consumer in product disclosure statements.⁹⁷

In March 2017, Consumer Affairs Australia and New Zealand (CAANZ) provided consumer affairs ministers with the ACL Review Final Report. The ACL Review Final Report proposed a set of new requirements for the sale of extended warranties to assist consumers make informed purchasing decisions, which are outlined in Box 3.1 below.⁹⁸

Box 3.1: ACL Review – Proposal 3: Enhance disclosure in relation to extended warranties

The ACL Review proposed that the following new requirements regarding the sale of extended warranties be inserted into the ACL:

- agreements for extended warranties to be clear and in writing
- additional information in writing about what the ACL offers in comparison to extended warranties
- a cooling-off period of ten working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed and in writing.

⁹⁴ Destroy my Jeep submission, November 2016, p. 3; Consumer Market Study Questionnaire responses; ACCC Survey 'Consumer experiences of buying, servicing and repairing new cars', pp. 26–27.

⁹⁵ Consumer questionnaire responses, November 2016.

⁹⁶ AAA submission, November 2016, p. 20; MTA NSW submission, November 2016, pp. 2–4.

⁹⁷ AAAA submission, November 2016, p. 21.

⁹⁸ ACL Review, Final Report, March 2017, pp. 23–26.

Limited information about consumer guarantees at point of sale

Submissions to this study and ACCC research suggest that, given the focus on the manufacturer's warranty and the potential sale of an extended warranty discussed above, consumers are often not provided with sufficient information at the point of sale about the consumer guarantees.

In response to the consumer and small business questionnaire conducted for this study, many consumers said there was limited or no direct oral communication about warranties or consumer guarantees when they purchased a car (with more reports regarding the absence of consumer guarantees information).⁹⁹ Respondents also said that while information about warranties and consumer guarantees is contained in the car owner's handbook, the information about consumer guarantees is limited.

Destroy My Jeep, CALC, Lemon Vehicles in Aus, the AAA, the AAAA, ASIC, MTA NSW, the Motor Trade Association Queensland (MTAQ) and Ultra Tune Australia all raised concerns about the way in which consumer guarantees are described or not discussed at all at the point of sale.¹⁰⁰ These parties considered that as a consequence of this (and the focus on warranty rights), consumers can form the impression that they need to purchase warranties in order to have rights that in fact already exist under the consumer guarantees.

On the other hand, Automotive Dealer Services (ADS), the Federal Chamber of Automotive Industries (FCAI), the AADA and manufacturers Mazda, Subaru, Holden and Toyota advised that their written statements about warranties against defects are worded in accordance with the requirements of the ACL; that is, they disclose that the manufacturer's warranty does not limit or otherwise impact consumers' statutory rights.¹⁰¹ These statements sometimes extend beyond the mandatory wording for warranties against defects.

FCAI and AADA further submitted that manufacturers require their dealers to orally explain to consumers their rights and the interaction between warranties and the consumer guarantees. ADS also submitted that dealers provide oral information about consumer guarantees.

While these written and oral statements by manufacturers and dealers are important, the submissions received from consumer groups and consumer responses to this study broadly suggest that consumer guarantees are not a prominent part of the information given to consumers at point of sale.¹⁰²

Given the volume and complexity of information provided to consumers at the point of sale, oral explanations about consumer guarantees may not be enough to adequately inform them of their rights. As an example of improvements in this area, the ACCC notes Holden's August 2017 court enforceable undertaking to provide all new customers a letter, within 30 days of purchase, advising them of their statutory consumer guarantees.

⁹⁹ The questionnaire did not ask about consumers' general awareness of their rights, in the absence of which only a limited number of consumers explicitly said that they were unsure about their rights or what is covered by warranties.

¹⁰⁰ Destroy My Jeep submission, November 2016, p. 3; CALC submission, November 2016, p. 3; AAA submission, November 2016, p. 20; ASIC submission, November 2016, pp. 6–12; AAAA submission, November 2016, pp. 11 and 20–23; Ultra Tune submission, November 2016, p. 1; MTAQ submission, November 2016, pp. 2–4; Lemon Vehicles in Aus submission, November 2016, p. 2.

¹⁰¹ Mazda submission, November 2016, p. 3; Subaru submission, November 2016, pp. 3–4; Holden submission, November 2016, pp. 8–10; Toyota submission, November 2016, pp. 2–5; FCAI submission, November 2016, pp. 11 and 14; AADA submission, November 2016, pp. 20–21 and 25–26.

¹⁰² CALC submission, November 2016, p. 3; AAA submission, November 2016, p. 20.

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

- Consumers are not receiving adequate information about consumer guarantees at the point of sale of a new car. The information provided is generally very limited, and is usually not provided in a form consumers can retain and refer to later.
- 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.
- This appears to be in part the result of a focus by dealers at the point of sale on the manufacturer's warranty and the potential sale of an extended warranty. Dealers have commercial incentives as a result of commission-based remuneration to maximise their sales of extended warranties.
- An oral explanation of consumer guarantees at the point of sale of a new car is not sufficient. Consumers need information in a form that can be referred to at any time during their ownership of their car. The ACCC considers that it is best practice for dealers to provide an explanation about consumer guarantees in writing.
- A balanced provision of written information about consumer guarantees requires not only an explanation of the statutory rights available to consumers, but also an explanation of the statutory obligations of manufacturers and dealers. It also requires an explanation of the potentially complex interaction between consumer guarantees and other consumer rights available under warranty in the event of a problem with the car.

ACCC action on consumer understanding of their rights

ACCC action 3.1

The ACCC will work with manufacturers and dealers to develop a concise and simple explanation of consumer guarantees and their interaction with warranties which should, as industry best practice, be provided to consumers at the point of sale of a new car.

ACCC action 3.2

To assist consumers better understand their rights when it comes to new car defects and failures, the ACCC will work with other ACL regulators to publish an updated version of *Motor vehicle sales & repairs – an industry guide to the Australian Consumer Law* (August 2013)¹⁰³ to ensure that this publication addresses the issues identified in this study, including specific guidance on criteria for determining a 'major failure'. Guidance may also be designed for use by businesses, including dealers, regarding their rights and obligations under the ACL.

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

At the point of sale, consumers are provided with a range of information which influences their future decisions about where to get their new car serviced and repaired, and what spare parts to use. This information is generally provided in warranty booklets, logbooks and service manuals.

If this information is not clear, this can result in consumers choosing not to use independent

¹⁰³ ACCC, [Motor vehicle sales and repairs: a guide for industry to the Australian Consumer Law](#), 2013.

repairers to repair and service their cars so as not to risk voiding either their consumer guarantee rights under the ACL or their rights under the manufacturer's warranty.

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.

In the case of manufacturer warranties, whether a consumer is required to have their car serviced by an authorised dealer during the period of the warranty will depend on the specific terms and conditions of the relevant manufacturer warranty.

Submissions from the FCAI, VACC, Mazda, Holden and Toyota confirmed that manufacturer warranties do not require cars to be serviced by dealers only or for OE parts to be used.¹⁰⁴ They indicated that warranty claims are only denied in situations where an independent repairer or a non-OE part directly causes the damage or defect the subject of the claim.¹⁰⁵ Toyota noted that there are significant practical difficulties in establishing whether an independent repairer has used appropriate quality parts for vehicle servicing or repair, or whether repairs have been carried out according to manufacturer specifications.¹⁰⁶

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.

VACC noted there is growing awareness among consumers that they have a choice of repairer under the manufacturer's warranty. The AAA and MTA NSW referred to public campaigns to increase consumer awareness, and Destroy My Jeep noted that independent repairers are directly informing consumers. MTA NSW submitted that manufacturers' warranty documents also advise of this right. VACC submitted there is 'little evidence' that consumers are told they will lose their warranty if they service at an independent repairer.¹⁰⁷

However, despite these views, the ACCC Consumer Survey found that around 30 per cent of survey respondents take their vehicle to a dealership for service or a repair because they believe it is compulsory according to their logbook or warranty, and around 30 per cent do it because they are worried about voiding their warranty.¹⁰⁸

Submissions from Autopolis, Lemon Vehicles in Aus, Bapcor, Ultra Tune and the AAAA raised similar concerns about the following types of misinformation to consumers in relation to servicing and repairs:¹⁰⁹

- Explicit misrepresentations by dealers at the point of sale of a new car or in manufacturer-prepared documents that the consumer must use OE parts or authorised dealers for servicing/repairs during the manufacturer's warranty.

¹⁰⁴ A description of terminology for types of car parts, including original equipment parts is provided at Box 5.1.

¹⁰⁵ Mazda submission, November 2016, p. 3; GM Holden submission, November 2016, pp. 9 and 12; FCAI submission, November 2016, pp. 11–12; Toyota submission, November 2016, pp. 1–6; VACC submission, November 2016, p. 8.

¹⁰⁶ Toyota submission, November 2016, p. 2.

¹⁰⁷ VACC submission, November 2016, p. 8; MTA NSW submission, November 2016, p. 4; AAA submission, November 2016, p. 21; Destroy My Jeep submission, November 2016, p. 4.

¹⁰⁸ The ACCC Consumer Survey found that 90 per cent of respondents who chose to have their car repaired for their most recently experienced problem went to a dealer to undertake that repair. 86 per cent of respondents who did routine servicing on their car went to a dealer to do it (ACCC Consumer Survey, pp. 46, 49, 60 and 63.).

¹⁰⁹ Autopolis submission, November 2016, p.4; Lemon Vehicles in Aus submission, November 2016, p.2; Bapcor submission, November 2016, pp. 7 and 13; Ultra Tune submission, November 2016, p.1; AAAA submission, November 2016, pp. 11, 16, 18, 21 and 24–25.

- Implicit statements in manufacturer-prepared documents leading consumers to form the impression that the consumer must use OE parts or authorised dealers for servicing/repairs during the manufacturer's warranty.
- Strong recommendations against the use of non-OE parts or independent repairers on the basis of claims of their lower quality or capabilities as compared to OE parts or authorised dealers.

When consumers do choose to use independent repairers and/or non-OE parts, Destroy My Jeep, the AAAA and TJM Products, an aftermarket parts supplier, submitted that there is a real risk that warranty claims may be refused without a clear link being established between the defect and the use of the independent repairer or spare part.¹¹⁰

The ACCC has received complaints that misleading representations have been made to consumers that they must have their new car serviced at an authorised dealer or they will void their warranty rights.

Given the competing submissions on these issues the ACCC conducted its own review of a number of manufacturers' logbooks and service manuals to analyse the statements made to consumers about the impact that their choice of service and repairer, and replacement parts, may have on their manufacturer warranty. The ACCC's findings are set out in Box 3.2 below.

Box 3.2: Logbooks and service manuals – what do they say?

The ACCC reviewed logbooks and service manuals for 26 cars from nine manufacturers – Honda, Volkswagen, Mazda, Holden, Subaru, Peugeot, Toyota, Hyundai and Ford.

The ACCC found:

1. Explicit statements that authorised dealers must carry out services and repairs.
2. Statements to the effect that an 'authorised' dealer should stamp or otherwise confirm a routine service had been undertaken during the manufacturer's warranty.
3. Statements strongly recommending dealers for maintenance or repair work, for example on the basis of expertise or a greater likelihood of undertaking work in accordance with warranty requirements. Only a limited number of these statements explicitly disclaimed that though dealers were recommended, it was not required.
4. References to dealers (instead of repairers generally) in the context of information about servicing or repairs.
5. Statements linking servicing at a dealer to a better chance of long-term reliability and performance of the car, or its resale value.
6. Statements recommending against the use of non-'genuine' parts because, for example, of claims that such parts are less likely to be suitable to the car and therefore may impact its functionality or safety, or result in the manufacturer's warranty being voided.
7. Requests for the repairer to confirm that they had fitted 'genuine' parts as part of repair or servicing work.

Examples:

"A Duly Authorised Dealer must carry out any service or repairs and the service record in this booklet must be completed and stamped each time the vehicle is serviced."

"Your dealer will complete a record of your vehicle's services in this booklet."

"To keep your vehicle in proper operating condition and to assure peak performance at all times, the recommended maintenance services listed in the "Warranty and Service Booklet"

¹¹⁰ Destroy My Jeep submission, November 2016, p. 4; AAAA submission, November 2016, p. 16; TJM Products submission, November 2016, p. 1.

should be performed by an authorised dealer.”

“Copy Parts. These are essentially cheaper copies of genuine parts or panels. Costs may be reduced by cutting parts of the production process or using thinner or lower quality metals. These products do not have to adhere to the Australian Design Rules (ADR’s) and may affect the vehicles warranty and compromise the safety and design of your vehicle.”

The ACCC is concerned that despite manufacturers indicating that manufacturers’ warranties do not contain an explicit requirement that a new car is to be serviced by an authorised dealer, a false impression that this is the case may be created by information contained in materials supplied by manufacturers (such as in logbooks and service manuals, and in some cases, verbal representations made by dealers).

The ACCC is concerned with many of the statements made in the logbooks and service manuals that it reviewed. Some statements are directly false – for example, the express statement that authorised dealers must carry out services and repairs, when this is not a requirement of the manufacturer’s warranty. The ACCC considers that certain statements make representations that are likely to contravene the ACL, and may also raise competition concerns under the CCA.

Findings on consumers’ understanding of their rights in relation to servicing and repairs

- The majority of consumers take their new cars to manufacturer authorised dealers for repairs and service. This appears to be, in part, the result of a mistaken belief that the manufacturer’s warranty requires them to only use an authorised dealer.
- Contributing to this misunderstanding are direct and implied representations made by a number of manufacturers in their logbooks and service manuals to the effect that authorised dealers must carry out services or repairs (or that OE parts must be used). Many of these representations are likely to contravene the provisions of the ACL, and may also raise competition concerns under the CCA.

ACCC action on consumers’ understanding of their rights in relation to servicing and repairs

ACCC action 3.3

Instances of misleading or deceptive conduct, or misrepresentations, in relation to the use of independent repairers or non-OE spare parts will be targeted through action by the ACCC, including enforcement action where appropriate.

3.3. The consumer experience of enforcing their rights

An awareness of consumer rights is important at all stages of car ownership, but is perhaps most crucial when a new car experiences a problem. In this circumstance a consumer needs to both be aware of their rights, including those remedies provided by the consumer guarantees, and able to readily enforce those rights.

The impact on consumers from a problem with their new car can be substantial.¹¹¹ Many consumers are heavily reliant on their cars in their daily lives and this is disrupted when a problem occurs. If the car is not useable it can be expensive to rent or loan a replacement car. If the problem poses a safety risk to occupants or other road users, the costs to society of inadequate or delayed resolution can be substantial. For these reasons, it is important for manufacturers and dealers to meet their obligations under the ACL in a responsible and timely manner.

¹¹¹ Lemon Laws 4 Aus submission, November 2016, p. 2.

Over the last two years, the ACCC has observed an upward trend in the number of consumers contacting the ACCC in relation to issues with cars, and has received over 10 000 contacts in total. New car retailers have featured in the ACCC's top ten most complained about traders for 24 out of the last 25 months preceding September 2017. In 2017, nearly 20 per cent of contacts received by the ACCC about consumer guarantee issues have concerned motor vehicles, the second largest industry category of such contacts received.

The ACCC's regulatory experience informs it that the number of contacts received on a particular subject can often represent only a small proportion of a more widespread issue. The consistency in the nature and volume of contacts received by the ACCC suggests that resolving consumer guarantee issues with new car retailers has been an issue for many consumers for some time. Contacts received by the ACCC in relation to issues with cars are also disproportionately high relative to other industries which generate a significant volume of contacts. While the ACCC does not verify the circumstances of the majority of reports it receives, and taking into account that there will often be a different side to the matters reported, our experience remains that the volume, consistency and nature of the reports received point to broad areas of concern and that the matters reported to the ACCC are just a proportion of those experienced.

The FCAI and the Motor Trades Association of Australia (MTAA) submitted to this study that only a small proportion of new car purchases are the subject of consumer complaints.¹¹² Similarly, submissions from the AADA and manufacturers including Mazda and Holden asserted that consumer complaint levels are low or that customer satisfaction is high when compared to the large number of new car purchases.¹¹³

The ACCC notes the views of industry bodies and stakeholders that the volume of contacts received by the ACCC represents only a small proportion of the total number of cars sold in Australia.¹¹⁴ The ACCC considers that this overlooks two matters:

- The relevant issue from the ACCC's perspective is whether consumers that do experience problems after purchase of a new car are having their complaints appropriately dealt with in accordance with the ACL obligations of dealers and manufacturers, rather than the proportion of total new cars sold that have experienced failures.¹¹⁵
- The level of contacts to the ACCC, as an economy wide regulator (rather than a car industry regulator) that jointly administers the ACL with other state and territory regulators, would likely not be a useful metric in isolation for the industry to measure the exact number of issues that are experienced by all Australian consumers in their purchase of a new car.

The ACCC considers that a variety of measures suggest that resolving consumer guarantee issues in the new car retailing industry has been an issue for many consumers for some time. The new car industry generates a substantial volume of ACCC contacts and consumer guarantee issues relating to cars consistently feature as a significant issue. Approximately two thirds of contacts to the ACCC about the new car retailing industry relate to consumer guarantees.

The Australian Consumer Survey conducted in 2015–16 found that eight per cent of consumers that purchased a car in the last two years experienced a problem, and that in

¹¹² FCAI submission, November 2016, p. 10; MTAA submission, November 2016, p. 16.

¹¹³ Mazda submission, November 2016, pp. 1–2; GM Holden submission, November 2016, p. 1; AADA submission, September 2017, pp. 4–5.

¹¹⁴ FCAI submission, September 2017, p.6; AADA submission, September 2017, pp. 4–5.

¹¹⁵ Further to this point, the ACL Review also found that the impact of a 'lemon vehicle' is very significant for affected individuals (see ACL Review Final Report, p. 29).

54 per cent of cases, consumers problems had either not been resolved or were resolved but not to their satisfaction.¹¹⁶ Recent research undertaken by consumer organisations such as CHOICE has also raised a range of issues relating to the enforcement of consumer guarantee and warranty rights in the new car sector.¹¹⁷ CHOICE's 2016 survey of car owners found that about two thirds of them had experienced problems in the first five years after purchasing a car and that 15 per cent had been unable to resolve those problems.¹¹⁸

The evidence gathered by the ACCC in the course of this study supports a similar conclusion. Consumer responses to the market study questionnaire, submissions to the market study and information gathered by the ACCC during its investigations indicate that there are a number of systemic problems in the new car industry preventing consumers from obtaining the remedies they are entitled to under the consumer guarantees when their car experiences a problem.

The ACCC has seen evidence of manufacturers and some dealers not responding to consumer complaints about defective cars with sufficient regard to their ACL obligations. This leaves both manufacturers and dealers at risk of non-compliance with ACL requirements.

This issue is exacerbated by complaint handling systems that do not facilitate timely consumer redress. Reports to the ACCC suggest that many consumers are frustrated or fatigued by long delays in having their complaints resolved, and this may contribute to them giving up or settling for a remedy that is less than their legal entitlement.¹¹⁹

The ACCC notes that a variety of issues are raised in consumer complaints in relation to new cars, not all of which are mechanical in nature. For example, CHOICE has submitted that it has received a number of complaints from consumers that have struggled to enforce their consumer guarantee rights in relation to poor quality car interiors being sold as premium 'leather' products.¹²⁰

Some of the issues raised with the ACCC about the way in which manufacturers or dealers deal with complaints are:

- drivers being blamed for vehicle failures in the first instance
- a lack of transparency, with decisions to refuse a remedy not being put in writing and reasons not being provided
- consumer complaints and requests for remedies being ignored
- denial of consumer requests for remedy under warranty due to the expiry of the warranty, in circumstances where the consumer received incorrect or unclear information about the warranty start date.

Each of these circumstances, outlined in further detail in Box 3.3 below, has the potential to raise issues of non-compliance with the ACL.

¹¹⁶ Australian Consumer Survey, 2016, pp. 40 and 50. The Australian Consumer Survey was introduced as part of the implementation of the ACL. The first survey was conducted in 2010–11, shortly before the law came into effect and the second survey was conducted after five years to assess its impact.

¹¹⁷ CHOICE, Lemon Car Report, pp. 9–13; [Donating Your Money to a Warranty Company](#), August 2015, accessed May 2017.

¹¹⁸ CHOICE, [Lemons on wheels](#), 11 March 2016, accessed August 2016.

¹¹⁹ AAA submission, November 2016, pp. 15–18; Lemon Laws 4 Aus submission, November 2016, p. 2.

¹²⁰ CHOICE submission, October 2017, pp. 1–4.

Box 3.3: Consumer reports to the ACCC

Blaming the driver

Shortly after purchasing a new car, a consumer began experiencing problems with the car's transmission which resulted in excessive jerking and shuddering while accelerating. The consumer took the car back to the dealer. The dealer diagnosed that the problem was due to the consumer's style of driving and advised the consumer to drive the car 'more like a man'. This advice was provided even though the car model owned by the consumer had a known defect with its transmission.

Lack of transparency

A consumer experienced significant problems with their new car and took it back to the dealer. The dealer referred the consumer to the manufacturer to request a refund or replacement car. The manufacturer always communicated with the consumer by phone, never in writing, and refused the consumer's request for a refund or a replacement car. The consumer requested that the manufacturer put its decision in writing and include written reasons for its refusal. The manufacturer refused to do this.

Ignoring a consumer's clear request for a remedy

A consumer experienced significant problems with their new car and took it back to the dealer several times. The problems could not be repaired, and the consumer requested a replacement car, stating that they believed the car had a major defect. The dealer referred the consumer's request to the manufacturer. The manufacturer ignored the request. Instead, the consumer was offered a trade-in on a goodwill basis, on condition that they sign a non-disclosure agreement. The consumer initially refused the offer and stated they were entitled to a free replacement. The manufacturer did not respond. Eventually, the consumer felt they had no choice but to accept the manufacturer's offer.

Denial of warranty due to discrepancy in commencement date

A consumer purchased a new car from a dealership, believing it came with a five year manufacturer warranty. The sales contract listed the car as a 'New Vehicle'. The consumer attempted to have a defective seatbelt repaired four years and 11 months after purchase, but was advised by the dealer that the new vehicle warranty had expired one month earlier. The dealer stated that the warranty commenced when the car was entered into their computer system as a 'Demo', two months prior to the consumer taking possession of the car. The dealer refused to provide a remedy under warranty and said that it was the consumer's fault for not ensuring the warranty period was detailed in the sales contract.

Based on submissions to this study and investigations by the ACCC in a range of matters, there appear to be five main issues contributing to the difficulties faced by consumers in enforcing consumer guarantees:

- manufacturers' focus on warranty obligations to the exclusion of their consumer guarantee obligations
- manufacturers' responses to 'major failures'
- the widespread use of non-disclosure agreements by manufacturers when resolving complaints
- the lack of effective independent dispute resolution options for consumers, and
- particular features of the commercial arrangements between manufacturers and dealers.

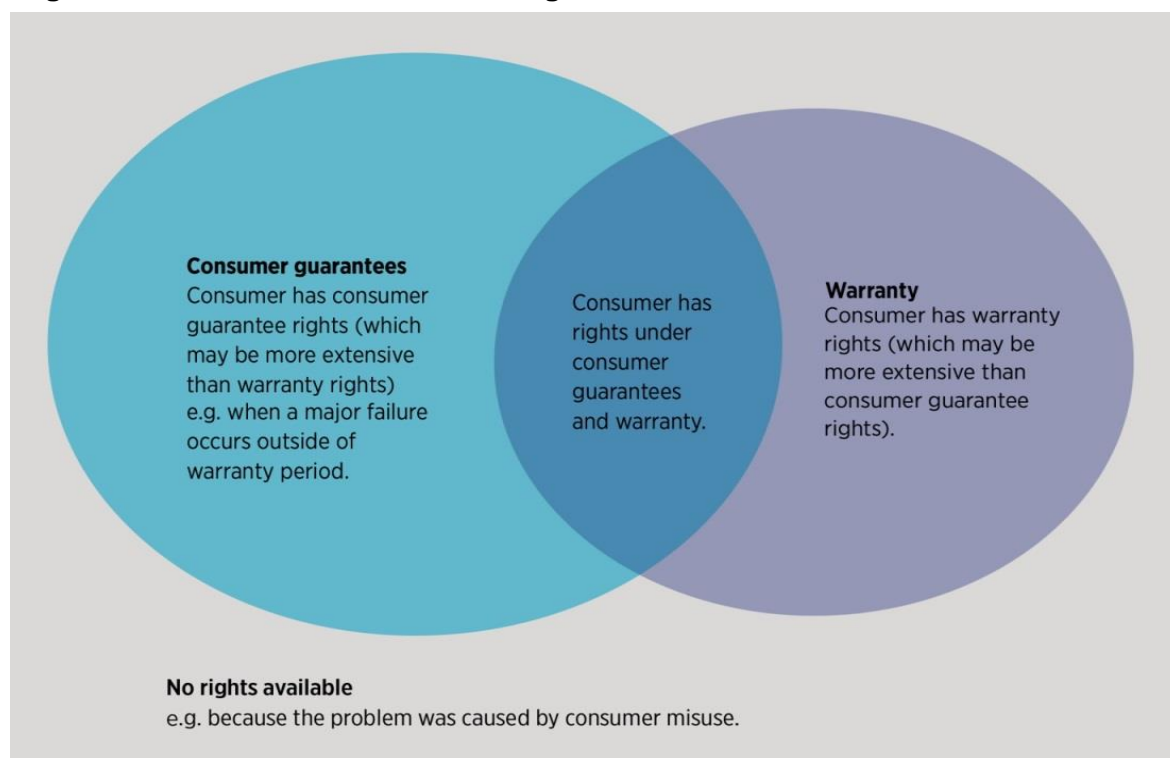
3.3.1. Manufacturers' focus on their warranty obligations to the exclusion of their consumer guarantee obligations

Consumer experiences suggest that manufacturers' complaint handling policies will generally require dealers to check whether the car is under warranty, and whether the issue the subject of the consumer's complaint is covered by that warranty.

If the issue is covered by warranty, it is likely to be repaired, sometimes repeatedly, until the issue is resolved (unless there is a dispute about the use of an independent repairer or spare parts). If the issue is not covered by warranty, the manufacturer or its dealer network may offer a remedy (for example, an offer to repair) on what is asserted to be a discretionary and 'goodwill' basis.

Regardless of whether a problem with a new car is covered by warranty, or resolved under a manufacturer's 'goodwill' policy, the consumer may have entitlements under the consumer guarantee provisions. Indeed, a consumer may be entitled to a better remedy under these provisions than under the manufacturer's warranty or goodwill policies.

Figure 3.3: Remedies from consumer guarantees and warranties



Holden, Mazda, the FCAI and AADA submitted that manufacturers and dealers are aware of their ACL obligations and comply with these obligations. They noted that consumers may make warranty or consumer guarantee claims that are not always justified or clear in their merit. In these circumstances, the manufacturer or dealer may offer a goodwill remedy on a discretionary basis.¹²¹

Against this, a number of submissions to this study raised serious concerns about consumers not receiving appropriate remedies outside of warranty, even where they may be covered by the ACL.¹²² For example, Destroy My Jeep and Lemon Vehicles in Aus submitted

¹²¹ Mazda submission, November 2016, p. 4; Holden submission, November 2016, pp. 9–10; FCAI submission, November 2016, pp. 12–13; AADA submission, November 2016, pp. 23–24.

¹²² Destroy My Jeep submission, November 2016, p. 4; Lemon Vehicles in Aus submission, November 2016, p. 2; CHOICE submission, November 2016, p. 5; ADS submission, November 2016, pp. 4–7; SBDC submission, November 2016, pp. 1–3; MTAQ submission, November 2016, p. 2; AAA submission, November 2016, pp. 6.

that dealers and manufacturers ask consumers to cover the cost of repairs outside the warranty period. ADS submitted that manufacturers or dealers may provide discretionary assistance outside of warranty that links to their own specific policies rather than their ACL obligations.¹²³ According to the AAA and the AAAA manufacturers may also offer extra discretionary support where a warranty is applicable depending on factors such as whether the consumer completed past servicing with an authorised dealer.¹²⁴

The MTAQ noted:

It is challenging...for commercially oriented entities in a highly competitive marketing environment to understand and appreciate that 'new cars' are sold under the aegis of a statutory guarantee that has a 'reasonable' time span and that take precedence over the commercial treaties/agreements provided by the manufacturer's warranty and subsequently by the extended warranty [sic]¹²⁵

Questionnaire responses from consumers also raised concerns about the availability of remedies outside of warranty terms and the provision of alternative remedies to what the consumer may have been entitled to under the ACL.

Similarly, the ACL Review Report noted a level of concern that traders may approach consumer claims for remedies not from the perspective of whether a reasonable consumer would have bought the good if they had known of the full nature and extent of the failure at the time of purchase (that is use the 'reasonable consumer test' for remedies in the consumer guarantee provisions in the ACL), but according to the trader's own specifications for failure.¹²⁶

The ACCC is concerned that manufacturers' interactions with consumers when a complaint is received usually take place within the manufacturer's warranty framework to the exclusion of the consumer guarantees.

ACCC investigations confirm that in dealing with consumer complaints or enquiries about cars that have experienced a failure, manufacturers and dealers predominantly refer to their warranty or 'goodwill' policies, much as they did prior to the introduction of the ACL in 2011. However, warranty obligations and goodwill policies are voluntary in nature and subject to terms and conditions, and are generally not closely aligned with the ACL framework.

The ACCC has seen many examples of practices by some manufacturers in dealing with consumer complaints that raise concerns under the ACL provisions, including the failure of manufacturers' complaint handling systems to adequately take consumers' ACL rights into account.

Major manufacturers have been the subject of recent ACCC investigations into alleged ACL non-compliance issues, with the following outcomes:

- **ACCC instituted proceedings against Ford:** In July 2017, the ACCC instituted proceedings in the Federal Court against Ford for alleged contraventions of the ACL as outlined in Box 3.4.
- **ACCC accepted court enforceable undertaking from Holden:** In August 2017, the ACCC accepted a court enforceable undertaking offered by Holden in relation to its concerns as outlined in Box 3.5.
- **ACCC instituted proceedings against Volkswagen:** In September 2016, the ACCC instituted proceedings in the Federal Court against Volkswagen alleging that it engaged

¹²³ ADS submission, November 2016, pp. 4–7.

¹²⁴ AAA submission, November 2016, p. 21, AAAA submission, November 2016, p.18.

¹²⁵ MTAQ submission, November 2016, p. 2.

¹²⁶ ACL Review, Final Report, March 2017, p 17.

in misleading or deceptive conduct and made false or misleading representations in relation to certain diesel vehicle emission claims.¹²⁷ In March 2017, the ACCC also instituted proceedings against Volkswagen's subsidiary Audi, for similar alleged conduct.¹²⁸

- **ACCC accepted administrative undertaking from Fiat Chrysler:** In September 2015, the ACCC accepted an administrative undertaking from Fiat Chrysler Australia following an investigation into consumer guarantee complaints concerning vehicle faults and Fiat Chrysler's handling of those faults. Fiat Chrysler committed to establishing a consumer redress program and to review its handling of previous complaints. Fiat Chrysler also committed to implementing an ACL compliance program involving its complaint handling system.¹²⁹

Box 3.4: Case study – ACCC institutes proceedings against Ford¹³⁰

On 26 July 2017, the ACCC instituted proceedings against Ford Motor Company of Australia Limited (Ford) alleging that it engaged in unconscionable and misleading or deceptive conduct, and made false or misleading representations in its response to customer complaints.

The customer complaints were about Ford's Focus, Fiesta and EcoSport vehicles supplied in Australia between 2011 and 2016, which featured a type of transmission known as PowerShift Transmission (PST).

The ACCC alleges that about half of the 70 000 vehicles sold had at least one repair relating to the PST. Customers made complaints to Ford and its dealers about their car's excessive shuddering and jerking when accelerating, loss of gear selection and sudden loss of power and/or excessive noisiness from the PST.

From 2011 to May 2015, Ford allegedly refused to provide a refund or replacement vehicle to consumers, even after vehicles had undergone multiple repairs that had not fixed the issue. In most cases, Ford only provided replacement vehicles in accordance with its "PowerShift Ownership Loyalty Program", which required consumers to make a significant payment towards a replacement vehicle.

The ACCC alleges that Ford misrepresented to customers who made complaints that the issues with their vehicles were caused by the way the driver handled the vehicle, even though Ford was aware of systemic issues with the vehicles from at least 2013.

It is also alleged that in most cases Ford refused to provide a refund or a replacement vehicle unless customers participated in the PowerShift Ownership Loyalty Program by making a substantial payment for a replacement vehicle, which was on average \$7000. As a result, customers who could not afford to make these payments felt that they had no option but to continue to use their vehicles.

The ACCC alleges that Ford's conduct towards customers who had complained of issues with their vehicles was unconscionable. It is also alleged that Ford then on-sold vehicles surrendered as part of the PowerShift Ownership Loyalty Program to wholesalers and customers, without disclosing the systemic or specific issues experienced with those vehicles.

The ACCC is seeking declarations, injunctions, pecuniary penalties, consumer redress orders, corrective advertising, and compliance program obligations. Ford rejects the ACCC's claims and has stated its intention to defend these proceedings in court.

¹²⁷ ACCC media release, [ACCC takes action against Volkswagen over diesel emission claims](#), 1 September 2016

¹²⁸ ACCC media release, [ACCC takes action against Audi over diesel emission claims](#), 8 March 2017

¹²⁹ ACCC media release, [Chrysler undertakes to remedy customer service complaints following ACCC investigation](#), 11 September 2017.

¹³⁰ ACCC media release, [ACCC takes action against Ford](#), 26 July 2017.

Box 3.5: Case study – Holden’s court enforceable undertaking to address the ACCC’s ACL non-compliance concerns

On 2 August 2017 the ACCC accepted a court enforceable undertaking from Holden in relation to alleged misrepresentations to consumers and Holden dealers about their rights and obligations under the consumer guarantee provisions of the ACL.

Holden designs, manufactures and distributes motor vehicles in Australia through its network of authorised dealers.

The ACCC was concerned that Holden:

- misrepresented to consumers about their entitlements to remedies under the consumer guarantees in circumstances where Holden’s manufacturer’s warranty did not apply or provided for a remedy that was less extensive than that provided by the consumer guarantees
- misrepresented to its dealers that Holden had discretion to determine whether a remedy would be granted after the expiration of the manufacturer’s warranty, and whether Holden would indemnify dealers for providing remedies to consumers for faults.

The ACCC considered that this conduct was likely to contravene sections 18 and 29(m) of the ACL.

The ACCC has accepted a section 87B undertaking from Holden in which, until 31 December 2020, Holden will:

- refrain from making representations of the kind investigated by the ACCC
- upgrade its consumer law compliance program, including by engaging an independent third party to conduct an external review
- upgrade its complaint handling system
- reiterate to all Holden staff and Holden dealers that they are required to comply with the ACL and require them to undertake training
- publish on its website a customer service charter
- notify all new customers by letter of their statutory consumer guarantee rights
- provide consumers with the ability to obtain information about any issues with their vehicle by contacting Holden and providing their vehicle identification number
- amend its dealer policies and procedures to ensure they comply with the ACL
- appoint a compliance officer to monitor the implementation of the consumer law compliance program and complaint handling system and conduct annual external reviews of these programs
- undertake a mystery shopping program
- engage an external reviewer to conduct a review of past complaints, and where appropriate provide a remedy
- implement a policy whereby a consumer is entitled to a remedy if they experience a defect within 60 days of purchasing their new vehicle that causes it to become immobile and no longer driveable.

3.3.2. Manufacturers' responses to 'major failures'

The consumer guarantee provisions of the ACL entitle consumers to a clear set of remedies when a major failure occurs. Importantly, the ACL does not require an involved process of diagnosis to determine whether a failure is 'major'. Rather, it only requires establishing a reasonable consumer would not have bought the good had they been fully aware of the nature and extent of the failure ('reasonable consumer test').

The ACCC has carefully considered submissions from the FCAI and manufacturers to the effect that there are low numbers of consumer complaints relative to the numbers of new cars sold each year, and that manufacturers and dealers are aware of and properly respond to claims made under the consumer guarantee provisions.

Against this, Destroy My Jeep, Lemon Laws 4 Aus, ADS and SBDC submitted that they are aware of many examples of consumers being denied a refund or replacement in response to major failures. AAA and CHOICE noted that the dealer or manufacturer may continue attempting repairs in response to a major failure, or minor failures that are recurring or multiple in number. Other submissions also raised difficulties in consumers' ability to receive an appropriate remedy in response to major failures, or the provision of lesser, alternative remedies instead.¹³¹ ACCC investigations and the reports it receives from consumers raise similar concerns.

Based on previous investigations and the evidence and submissions to this study, the ACCC is concerned by what appears to be a dominant 'culture of repair' underpinning manufacturers' systems and policies for dealing with car defects and failures.

The FCAI submitted that given the technical complexity and expense of a new car, it is not surprising or inappropriate that a culture of repair might have emerged in the automotive industry as this is an appropriate and economical way of resolving vehicle faults.¹³²

The ACCC recognises that new cars are increasingly complex and that examination will be required to identify the nature of a fault. The ACCC's concern is that where manufacturers and dealers focus on warranty obligations to the exclusion of their consumer guarantee obligations, this can result in a culture of repair from the outset without reference to a consumer's ACL rights to a replacement or refund where there has been a major failure.

The ACCC is especially concerned where cars have known major systemic mechanical failures and consumers are asked to come in for repeated unsuccessful repairs under warranty. Under the consumer guarantees, these consumers are entitled to a replacement or refund. If manufacturers or dealers provide alternative remedies in response to a major failure, they are at risk of non-compliance with the ACL.

Calls for further clarification of key ACL terms when applied to cars

A number of parties made submissions to this study about practical difficulties in identifying and dealing with a major failure, with some parties calling for clarification of the meaning of 'major failure' for motor vehicles under the ACL.¹³³

A common theme of submissions in response to the Draft Report for this market study was that key ACL terms require greater clarity and definition when applied to car related

¹³¹ Destroy My Jeep submission, November 2016, pp. 3–4 and 8; Lemon Laws 4 Aus submission, November 2016, pp. 1 and 3; ADS submission, November 2016, pp. 4–7; SBDC submission, November 2016, pp. 1–3; CALC submission, November 2016, p. 2; CHOICE submission, November 2016, p. 5; AAA submission, November 2016, pp. 6 and 15–18.

¹³² FCAI submission, September 2017, p. 17; MTAA submission, September 2017, p. 9.

¹³³ Mazda submission, November 2016, p. 4; FCAI submission, November 2016, p. 12; MTAA submission, November 2016, p. 18; AAA submission, November 2016, p. 19; CALC submission, November 2016, p. 2; SBDC submission, November 2016, p. 3; Lemon Vehicles in Aus submission, November 2016, p. 1.

complaints. The need for further clarification of key ACL terms in the context of a consumer guarantee claim being applied to a car has been raised in submissions by consumer and industry bodies, as well as directly by individuals, dealers and manufacturers.

The FCAI has submitted that the current definition of ‘major failure’ is problematic and may lead to significant uncertainty for consumers, dealers and manufacturers. The FCAI considers that the application of the ACL to a car requires greater flexibility and nuance which is reflective of the complexity and technical sophistication of new cars, completely remote from those of a simple consumer item such as a toaster.¹³⁴

Proposed reforms to the ACL relating to major failure

The ACL Review Final Report makes two proposals to address uncertainties in the application of the law regarding ‘major failure’ (Proposals 1 and 2, see Box 3.6 below) as it applies to goods and services generally.¹³⁵ These reforms are aimed at addressing uncertainties that create barriers to parties resolving disputes earlier, quickly and economically. These proposals are intended to enhance and provide greater clarity to existing ACL rights, not replace them.

Box 3.6: ACL Review – Proposals relating to major failure

The ACL Review proposes that the ACL be amended to specify that where a good fails to meet the consumer guarantees within a short specified period of time, a consumer is entitled to the remedies of a refund or replacement without needing to prove a ‘major failure’ (**Proposal 1**).

Proposal 1 would create a time-limited right for a consumer to choose a refund or replacement or opt for a repair without the need to demonstrate a major failure. This reform is aimed at providing increased certainty for consumers in asserting their rights to a refund, replacement or repair and to avoid cycles of failed repairs.

It also proposes that the ACL be amended to clarify that multiple non-major failures can amount to a major failure (**Proposal 2**).

Proposal 2 is intended to clarify that a consumer may establish a major failure where, for example, there are multiple issues with a new car that would be sufficient to deter a reasonable consumer from buying it.

With the exception of the FCAI and the MTAA, stakeholders have generally supported the proposed amendments to the ACL relating to major failure. However, while many stakeholders supported amendments to the ACL, it was submitted that the definition of key ACL terms, including ‘major failure’ must be formalised and clearly defined or referenced in legislation.¹³⁶

The FCAI considers that the proposed amendments are unnecessary and will not provide any greater clarity to consumers.¹³⁷ While the MTAA has strongly advocated for greater clarity regarding major versus minor failure in the context of the ACL and cars, it submits that the proposed amendments to the ACL represent significant challenges and potential significant economic detriment if implemented without careful consideration of unintended consequences.¹³⁸ The MTAA is concerned that thousands of cars could be returned for refunds that have had multiple minor faults and that these cars would be effectively written off as they will be ‘tagged’ a major fault vehicle thereby restricting resale.

¹³⁴ FCAI submission, September 2017, p. 12.

¹³⁵ ACL Review, Final Report, March 2017, pp. 18–22.

¹³⁶ AAA submission, September 2017, p. 5; RACQ submission, September 2017, p. 3; SBDC (WA) submission, September 2017, p. 2.

¹³⁷ FCAI submission, September 2017, p. 10.

¹³⁸ MTAA submission, September 2017, p. 11.

The ACCC notes that despite these concerns raised by industry representative bodies, a major manufacturer, Holden, has recently committed to go beyond ensuring compliance with the current consumer guarantee obligations. The ACCC has recently accepted a court enforceable undertaking from Holden which includes a commitment to introduce a policy which creates a time-limited right, in line with recommended changes to the ACL.

Holden has committed to allow consumers to claim a vehicle refund or replacement without the need to demonstrate a major failure, if a defect causes the vehicle to become immobile and no longer driveable, within 60 days. Holden's '60 day policy' provides increased certainty for consumers in asserting their rights and allows for disputes to be resolved earlier, quickly and economically, avoiding the potential for consumers to become trapped in a cycle of failed repairs. The ACCC welcomes this development and notes that Holden's policy will provide an immediate remedy for consumers in these circumstances.

The ACCC notes that in reference to the 60 day period, the FCAI submits that there is no evidence that customers are having a disproportionate number of problems shortly after they have purchased their vehicles. Consumer representatives have recommended that a six or 12 month period is more appropriate to apply as the 'short specified period of time' under Proposal 1. Holden's 60 day policy was inserted in anticipation of the proposed reform to the ACL (Proposal 1), although the ACL Review did not specify what the specific timeframe for this amendment should be at this stage.

Holden's court enforceable undertaking also provides that, for the purpose of the undertaking, multiple minor failures can constitute a major failure. Pursuant to the undertaking, Holden will:

- Enable owners of new Holden vehicles who experience a problem with their car that causes it to become immobile and no longer driveable within 60 days of its purchase, to claim a refund or replacement vehicle without the need to demonstrate a major failure.
- Improve and supplement Holden's existing Consumer Law Compliance Training Program, for dealers and relevant staff, by ensuring that it includes further guidance/clarification about the fact that multiple failures of a vehicle may constitute a major failure entitling the customer to a refund or replacement rather than a repair.
- Further discussion of Holden's commitments provided by way of a court enforceable undertaking to the ACCC is provided in Box 3.6.

The ACL Review also proposes working with stakeholders to provide more specific guidance on the application of the ACL consumer guarantees, including exploring how durable a good should be in order to meet the reasonable consumer test.¹³⁹

The ACCC is involved in this project as a member of CAANZ. While it is not focussed on new cars, general observations from this project may assist industry and tribunals in the application of the ACL, including an assessment of the reasonable durability of goods and what constitutes a 'major failure' of the consumer guarantee when goods are not of acceptable quality.

Key issues raised by manufacturers and dealers for further consideration

In response to the Draft Report for this market study, and during the industry roundtable discussion facilitated by the ACCC, manufacturers, dealers and their representative bodies have raised issues which arise in the application of the ACL to a car related complaint.

The ACL Review Final Report noted that CAANZ will continue to monitor issues relating to the motor vehicle sector to assess the effectiveness of the ACL and that such monitoring will

¹³⁹ ACL Review, Final Report, March 2017, pp. 16–23.

be informed by this ACCC market study into new car retailing.

In August 2017, Ministers responsible for fair trading and consumer protection discussed the outcomes of the ACL Review completed by CAANZ. Ministers supported public regulatory impact assessment of certain proposals to amend the consumer law, such as additional work and further consultation on ACL reform proposals relating to major failure, including in response to addressing particular concerns about new motor vehicles.¹⁴⁰ This regulatory assessment, which will involve stakeholder consultation, will be conducted by CAANZ which will report back to Ministers in August 2018 for a decision.

The ACCC has not formed a view on the following issues raised by manufacturers and dealers. Stakeholders are encouraged to participate and express their views on these issues in the further consultation process on ACL reform proposals to occur during 2018.

Allowance for the prior use of a car

The FCAI and manufacturers have submitted that the current provisions of the ACL make no allowance for the use a consumer has had of a car. Submissions from the MTAQ, Motor Trade Association of South Australia (MTASA), the AADA and MTAA made similar comments.¹⁴¹ The FCAI contends that any refund required as a result of a major failure should make appropriate allowance for the uninterrupted use and depreciation of the car to prevent consumers receiving unfair windfall gains at significant cost to manufacturers.¹⁴²

The ACCC understands that in some overseas jurisdictions, the discounted market value of a car is taken into account when determining its refund or replacement value. In the US, where so called ‘lemon law’ legislation has been enacted both nationally and in individual states, it appears that several states allow the quantum of any refund (or value of any replacement car) to be reduced, to offset a consumer’s use of a car prior to making a claim.¹⁴³ This offset is usually made by reference to the car’s mileage, but may also be made by reference to the length of time the car performed without a defect.¹⁴⁴ The ability to reduce the amount of any refund or replacement by reference to a car’s mileage or length of time since purchase appears to be aimed at accounting for the depreciated market value of the car in providing a remedy.

The FCAI has submitted that by not making an allowance for the prior use of a car, an “all or nothing” approach to dispute settlement is fostered. In the event that allowance was made for the prior use of a car, the FCAI considers that disputes as to the interpretation of the ACL and whether a fault is a major or minor failure may dissipate.

The ACCC acknowledges that there are some complexities in determining appropriate consumer guarantee remedies in circumstances of significant prior use. Where defects constitute a major failure then a refund or replacement are the appropriate remedies to be made available to the consumer and the law does not envisage adjustments for prior use.

Prior use though may be a relevant consideration in determining whether a defect is major or minor. A consumer that has had uninterrupted use of a car for a considerable period of time prior to experiencing any problems, and where repair will address any defect, this may well be the appropriate remedy. However, where problems with a car occurred shortly after purchase and persisted, such as when multiple unsuccessful repair attempts have occurred, then this is more likely to constitute a major failure and full refunds would be appropriate.

¹⁴⁰ Joint Communique, Meeting of Ministers for Consumer Affairs, 31 August 2017.

¹⁴¹ MTAQ submission, November 2016, p. 3; MTASA submission, November 2016, p. 15; AADA submission, November 2016, pp. 21 and 23–24; MTAA submission, November 2016, pp. 17–21 and 23.

¹⁴² FCAI submission, September 2017, pp. 12–13.

¹⁴³ A detailed description of lemon law in the US, including the different threshold levels for each of the states, is provided in the Queensland Lemon Law Report, November 2015, Appendix F.

¹⁴⁴ Queensland Lemon Law Report, November 2015, p. 66.

Contrary to some suggestions, this is not a windfall gain for the consumer who has often incurred considerable cost in addressing defects and would not be returned to the same position by receiving the market value of a car. A number of costs of purchase are experienced by a consumer of a new car such as the immediate depreciation that follows new car purchase and the costs of re-purchasing.

Faults which can be readily corrected

The FCAI and individual manufacturers have submitted that the application of the reasonable consumer test does not adequately allow for minor issues which can easily be rectified in a new car, but which a 'reasonable consumer' would invariably be opposed to if they had prior knowledge of, for example, a small dent in a bumper bar.¹⁴⁵

Manufacturers have also raised concerns that in some cases, a new car may experience a minor fault yet it is most efficient and cost effective to replace a more significant component of the car. Concerns have been raised that in such instances, the fact that the car has had a significant component replaced can be used against the manufacturer or dealer, to demonstrate that the defect was a major failure whereas the underlying fault may have been relatively minor, for example, a blown fuse.

Mazda considers that a distinction should be made between immobilisation which impacts the ability of the car to properly drive (as its primary purpose) versus a defect which may be rectified readily and efficiently with minimal customer inconvenience. Mazda also considers a distinction should be made between non-major failures that can be repaired without inconvenience versus something which cannot be repaired without inconvenience to the consumer.¹⁴⁶

Refunds of statutory charges

The ACCC understands that various statutory charges are required to be paid by manufacturers or dealers, such as stamp duties, luxury car taxes, registration fees and compulsory third-party insurance, when selling a new car. It has been raised that such statutory charges are unrecoverable where a new car is required to be refunded or replaced following a major failure and that a dealer or manufacturer should be able to obtain a refund for such statutory charges, in particular stamp duties, in these circumstances.

Further consultation on the proposed reforms to the ACL relating to major failure should consider such costs borne by the new car retailing industry which can arise in the application of the ACL.

Recommendations on proposed amendments to enhance the ACL

Recommendation 3.1

The ACCC supports the amendments proposed by CAANZ in the recent ACL Review to enhance the ACL and address any uncertainties about the application of consumer guarantees. Of particular relevance to issues arising in this study, the ACCC supports proposals 1, 2 (see Box 3.1) and 3 (enhanced disclosure in relation to extended warranties – see Box 3.2) as outlined in the final report on the ACL review.

Relevant stakeholders, including manufacturers, dealers and consumer representative bodies, are encouraged to participate in the further consultation process on the ACL reform proposals to be conducted by CAANZ to express their views on issues which may arise in the application of the ACL to a car related complaint.

¹⁴⁵ FCAI submission, September 2017, p. 12.

¹⁴⁶ Mazda submission, September 2017, p. 2

3.3.3. Widespread use of non-disclosure agreements when resolving complaints

A non-disclosure or confidentiality agreement is an agreement between a consumer, and one or both of a manufacturer and a dealer, that the consumer will not disclose details of a settlement that has been reached to resolve a problem with their car.

The CHOICE Lemon Car Report 2016 noted that 16 per cent of survey respondents were asked to sign a non-disclosure agreement to receive a remedy.¹⁴⁷ ACCC investigations confirm that the use of non-disclosure agreements is widespread.

The FCAI and AADA made submissions to this study suggesting that the ACCC should not be concerned with settlements being entered into on a confidential basis.¹⁴⁸ The FCAI has submitted that it is normal practice for resolution of disputes of any type to be subject to a non-disclosure agreement and they are often used to deliver consumer benefits over and above what they might otherwise be entitled to at law.¹⁴⁹

In contrast, in light of the concerns raised by the ACCC in relation to non-disclosure agreements in its Draft Report, Mazda submits that it has formed the view that a confidentiality provision is no longer required in any release form which records the details of a settlement.¹⁵⁰

The ACCC considers that the wide use and observance of non-disclosure agreements is concerning because they:

- deny other consumers the opportunity to learn from others who have experienced a similar failure when enforcing their own rights, substantially reducing information in the market for new buyers about defects that are common to a particular make or model of car, and about the performance of the manufacturer or dealer in resolving problems
- suppress incentives for manufacturers to compete on the basis of vehicle quality and the post-sales customer services they offer through their dealer network
- suggest that consumers are not entitled to their consumer guarantee and manufacturer warranty rights unless a non-disclosure agreement is signed, when this is not the case – consumer guarantees cannot be displaced or made subject to conditions.

As a consequence, some consumers may end up buying a car that they would not have purchased had they known more about common defects or failures and the manufacturer's track record in offering ACL-compliant remedies.

The use and observance of confidentiality agreements is particularly concerning where they suppress dissemination of safety risks with the potential to adversely impact all road users.

Consumers are legally entitled to rely on consumer guarantees irrespective of whether they agree to sign confidentiality agreements. Dealers and manufacturers who insist that consumers sign a confidentiality agreement before providing a remedy may be at risk under the provisions of the ACL which prohibit misrepresentations. The ACL voids any contractual terms that purport to exclude, modify or restrict the consumer guarantees.

¹⁴⁷ CHOICE, [Turning lemons into lemonade: consumer experiences in the new car market](#), 15 March 2016.

¹⁴⁸ AADA submission, November 2016, p. 27; FCAI submission, November 2016, pp. 14–15.

¹⁴⁹ FCAI submission, September 2017, p. 19.

¹⁵⁰ Mazda submission, September 2017, p. 7.

Box 3.8: ACL Review – Non-disclosure agreements

The ACL Review discussed the use of non-disclosure agreements and noted that there are sufficient concerns about their wider impacts to warrant close monitoring to determine whether future legislative change is required. It noted that consumers may be persuaded to sign such agreements where the process to obtain a remedy would otherwise be too onerous or difficult.¹⁵¹

3.3.4. Lack of effective independent dispute resolution options

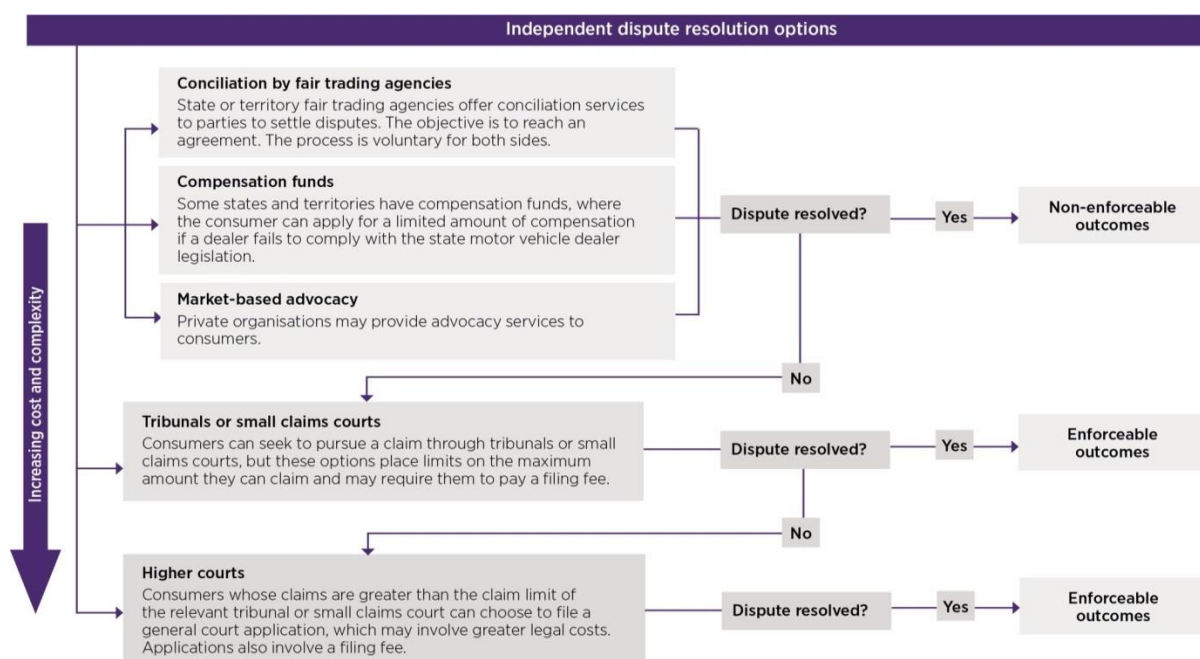
When a manufacturer's own complaint handling systems and policies cannot resolve a dispute about a new car's defects or failures, the consumer, manufacturer or dealer may turn to independent dispute resolution. Figure 3.4 summarises the current dispute resolution options available to businesses and consumers in Australia.

When independent dispute resolution options are effective in ensuring consumers receive the remedies they are entitled to under the ACL, they create an incentive for manufacturers and dealers to review and adapt their own complaint handling systems and policies to ensure that they are fully ACL-compliant.

Conversely, if independent dispute resolution options are not fully effective in requiring the provision of remedies in accordance with consumer rights under the ACL, there is little incentive for a manufacturer or dealer to offer ACL-complaint remedies at an earlier stage in a dispute. This greatly undermines the application of the ACL to the new car retailing industry.

Stakeholder submissions to this study and information received during ACCC investigations suggest that consumers currently lack the independent dispute resolution options they need to enforce their ACL rights. This has the potential to result in substantial detriment to consumers and other road users when manufacturers fail to provide an appropriate remedy in a timely manner.

Figure 3.4 Independent dispute resolution options in Australia



¹⁵¹ ACL Review, Final Report, March 2017, pp. 84–85 and 97.

Submissions to this study and information received during ACCC investigations suggest the following serious shortcomings with the currently available independent dispute resolution options.

Voluntary conciliation models involve compromise on ACL entitlements

The AAA and CALC raised concerns that the voluntary conciliation model adopted by state or territory fair trading agencies encourages consumers to compromise with the dealer or manufacturer rather than to pursue their legal rights.¹⁵² As a result, conciliation may not provide the full remedy that the consumer is entitled to under the ACL.

Some consumers have also reported to the ACCC that tribunal members discounted the refund owed to them for major failures based on concessions for the age of the car or the number of kilometres it had travelled, though the ACL entitles a consumer to a full refund if the criteria for a 'major failure' is met.

Box 3.9: Case study – Conciliation by Western Australian Department of Commerce

The Western Australian Department of Commerce conducts voluntary non-binding conciliations between consumers and car dealers or repairers.

The Department of Commerce employs four conciliators and two technical officers to conduct conciliations. Technical officers are trained mechanics and their function is to clarify the facts of the case. Technical officers may physically examine cars and deliver written reports to conciliators as well as conciliating disputes themselves. Conciliators contact each party separately and try to guide them towards a mutually acceptable settlement that accords with each party's legal rights and responsibilities. Conciliation has been successfully employed to deal with complaints about accessing repairs within warranty periods, vehicle emission performance, systemic manufacturing defects, quality of repairs, contractual disputes and consumer rights under the ACL.

Around half of the disputes which commence the conciliation process reach an agreed settlement. The remaining half of the disputes are unable to be resolved, referred elsewhere or do not proceed due to, for example, insufficient evidence.

Low claim limits

New car disputes may be for amounts higher than the jurisdictional limits for a tribunal or small claims court.¹⁵³ Lemon Laws 4 Aus and the AAA submitted that consumers whose claims exceed the relevant limit must reduce the value of their claim in order to access simplified procedures.¹⁵⁴ The only way to pursue the full amount is to engage in more costly and complex court proceedings.

Inconsistencies and errors in interpreting ACL concepts

Courts and tribunals across different jurisdictions do not always interpret or apply the law consistently in disputes involving cars. The ACCC is aware of examples of independent dispute resolution decisions that involve inconsistencies in interpreting ACL concepts.

¹⁵² AAA submission, November 2016, p. 15; CALC submission, Queensland Inquiry into 'Lemon' Laws - Inquiry into consumer protections and remedies for buyers of new motor vehicles, p. 3: <http://consumeraction.org.au/lemon-laws-an-inquiry-into-consumer-protections-and-remedies-for-buyers-of-new-motor-vehicles/>.

¹⁵³ Refer to Table D1 in Appendix D for a list of jurisdictional claim limits for consumer guarantee disputes for tribunals and small claims courts in each jurisdiction.

¹⁵⁴ Lemon Laws 4 Aus submission, November 2016, pp. 1–3; AAA submission, November 2016, p. 16 (Case Study 2).

Consumers may experience resource challenges

Despite the 'reasonable consumer test', dispute resolution bodies often judge whether a defect amounts to a major failure through a detailed technical assessment of the defect. Courts and tribunals appear reluctant to award a remedy to the consumer without expert evidence by a qualified mechanic to support their claim.¹⁵⁵

CALC, SBDC and the AAA noted obtaining expert reports can be expensive, sometimes exceeding the value of the repair in dispute.¹⁵⁶ Consumers have also indicated that it is difficult to find appropriately qualified experts who are willing to provide a report in a case against a manufacturer.¹⁵⁷ The cost and effort involved in obtaining expert evidence causes some consumers to abandon their case or to proceed with insufficient evidence.¹⁵⁸ In contrast, manufacturers have ready access to staff with expertise to prepare evidence in support of their claims.¹⁵⁹

CALC submitted that all jurisdictions should provide consumers with access to qualified independent vehicle assessors during conciliation. This was recommended in the Victorian Government's recent Access to Justice Review and already takes place in NSW and WA.¹⁶⁰ See Box 3.10 below for an example of independent assessors being employed by a state regulator for conciliation.

Dealers and manufacturers may be able to run their case more effectively than consumers because they are more experienced and better resourced. For example, consumers have reported difficulties accessing records of previous tribunal decisions regarding similar faults. In contrast, manufacturers have ready access to information about any relevant litigation they have previously been involved in.

The ACCC notes that the ACL Review proposed an expanded 'follow-on' provision in the ACL that will enable private litigants to rely on admissions by the defendant in earlier court or tribunal proceedings in supporting their ACL claim (Proposal 17).¹⁶¹ If implemented, this provision may ease some of the evidentiary difficulties experienced by consumers.

Consumers may be deterred due to complexity or fatigue

AAA submitted that consumers are often deterred from engaging in tribunal and court proceedings by the complexity and length of the process.¹⁶² CALC submitted that consumers are intimidated by manufacturers' lawyers as well as the legal process.¹⁶³ Consumer reports to the ACCC suggest that consumers may have difficulties preparing the forms required to lodge proceedings.

Matters can take years to resolve and require a high level of commitment. Consumer reports to the ACCC suggest that consumers decide not to take tribunal or court action due to their work, family or other commitments or because they believe the process will be too stressful or take too long. This decision often follows a significant investment of time and energy into an unsuccessful attempt to resolve the dispute directly with the dealer or manufacturer.¹⁶⁴

¹⁵⁵ Stephen Corones, [Why Australia Needs a Motor Vehicle Lemon Law](#), p. 643, accessed May 2017.

¹⁵⁶ CALC submission, November 2016, p.4; SBDC submission, November 2016, p. 2; AAA submission, November 2016, p. 15.

¹⁵⁷ Information provided to the ACCC in the course of enforcement investigations; AAA submission, November 2016, p. 15.

¹⁵⁸ *Hereford v Automobile Direct Wholesale Pty Ltd* [2015] NSWCATCD 58 (10 April 2015).

¹⁵⁹ AAA submission, November 2016, p. 15.

¹⁶⁰ CALC submission, November 2016, p. 4; Victorian Department of Justice and Regulation, *Access to Justice Review: Volume 1 Report and Recommendations*, August 2016, p. 287.

¹⁶¹ ACL Review, Final Report, March 2017, pp. 80–82.

¹⁶² AAA submission, November 2016, p. 15.

¹⁶³ CALC submission, November 2016, p. 3.

¹⁶⁴ CHOICE, 'Turning lemons into lemonade: consumer experiences in the new car market', 15 March 2016, p. 13.

Consumers who do engage in tribunal or court proceedings must be prepared to spend significant time preparing for and attending meetings or hearings, sometimes incurring lost wages. Several submissions noted that car disputes impose costs by impacting on consumers' daily activities, wellbeing and access to services.¹⁶⁵

Over time, the direct and indirect costs consumers incur to participate in dispute resolution mount up. Some consumers may withdraw or agree to settle on terms that are less than they might otherwise have achieved because the cost to continue is too high relative to the perceived benefits.

Box 3.10: Complexity and length of tribunal proceedings¹⁶⁶

Three years after purchasing a new car, following a lengthy dispute with the dealer and manufacturer, a consumer filed a tribunal application. The consumer alleged the car was of unacceptable quality and sought a payment of \$25 000 (the tribunal's jurisdictional limit) from the manufacturer. The consumer had no legal representation and the manufacturer was represented by a barrister.

The tribunal proceeding lasted more than two years from October 2010 to April 2013, including mediation, a compulsory conference, nine directions hearings, a non-compliance application, an application to dismiss, two sets of tribunal orders with detailed reasons, and an application by the manufacturer to strike out the proceedings.

Days before the final hearing, the consumer sought to withdraw their initial application and did not attend the final hearing. As a result, the proceeding was dismissed.

As noted in section 3.3.2 above, the ACL Review has proposed that specific guidance be provided to stakeholders, including tribunals, about the 'reasonable durability' of goods.¹⁶⁷

3.3.5. Particular features of the commercial arrangements between manufacturers and dealers

Dealers, as retailers of new cars, have direct responsibility to provide remedies to consumers under the ACL. Consumers are entitled to claim a remedy directly from a dealer if their new car (or any other goods or services they purchase from a dealer) does not meet one or more of the relevant consumer guarantees. When a consumer experiences a problem with their new car, their first point of contact is generally the dealer. According to CHOICE, a majority of consumers do not escalate their complaint beyond the dealer, which makes it important for dealers to resolve complaints satisfactorily.¹⁶⁸

The ACL provides dealers with a statutory indemnity in relation to any loss or damage incurred by the dealer in meeting the consumer's rights, which entitles the dealers to reimbursement from the manufacturer where the manufacturer is responsible for the failure.¹⁶⁹

Several stakeholders have raised concerns about constraints on the ability of dealers to provide ACL or warranty remedies to consumers due to the nature of their relationships with manufacturers.¹⁷⁰ Concerns have also been raised with the ACCC that manufacturers leave dealers exposed to the cost of undertaking remedial work and dealers are reluctant to seek

¹⁶⁵ Lemon Laws 4 Aus submission, November 2016, p. 2; CALC submission, November 2016, p. 3–4; AAA submission, November 2016, p. 15.

¹⁶⁶ *Rae v Volkswagen Group Australia Pty Ltd* [2013] QCAT 290 (23 May 2013).

¹⁶⁷ ACL Review, Final Report, March 2017, p. 22.

¹⁶⁸ CHOICE, 'Turning lemons into lemonade: consumer experiences in the new car market', 15 March 2016, pp. 9 and 11.

¹⁶⁹ *Competition and Consumer Act 2010* (Cth) Schedule 2 Australian Consumer Law, section 274.

¹⁷⁰ SBDC submission, November 2016, pp. 5–6; MTASA submission, November 2016, p. 15; MTAQ submission, November 2016, p. 3; MTAA submission, November 2016, pp. 4, 9–11, 15, 17 and 21–22; OSBC submission, November 2016, pp. 1–4; ADA submission, November 2016, pp. 7–9 and 24–25.

redress from manufacturers out of fear of damaging their commercial relationship.

Dealers as franchisees have contractual obligations to comply with the policies and procedures set by their franchisor, the manufacturer. The ACCC understands that dealers respond to consumer guarantee or warranty claims within the framework of the policies and procedures set by the manufacturer.

Under these commercial arrangements, the ACCC acknowledges that dealers may find it challenging to simultaneously meet their ACL obligations, safeguard their own financial interests and maintain a long term commercial relationship with the manufacturer. Notwithstanding these challenges, it remains the responsibility of dealers to meet their legal obligations, and for manufacturers in turn to meet theirs by not adopting commercial arrangements that stifle this.

The ACCC's analysis of the commercial arrangements between manufacturers and authorised dealers and the features of these arrangements which may impact on ACL compliance is detailed in section 3.4 below.

Findings on the consumer experience of enforcing their rights

- A significant body of evidence suggests systemic failures in the ability of consumers to enforce their consumer guarantee rights after the purchase of a new car. The ACCC has seen many examples of practices by manufacturers in dealing with consumer complaints that raise concerns under the ACL provisions, including the failure of manufacturers' complaint handling systems to adequately take consumers' ACL rights into account.
- The recent review of the ACL has proposed a number of amendments to enhance the law and provide greater clarity to the application of consumer guarantees. The proposed amendments include reforms aimed at assisting consumers understand and choose a remedy if things go wrong with a good or when a good, including a new car, has multiple and ongoing issues.
- While the proposed ACL reforms would strengthen and provide greater clarity about the application of consumer guarantees, the existing law already provides remedies for faulty cars.
- The ACCC has identified five key issues contributing to the difficulties experienced by consumers in enforcing their consumer guarantees:
 - manufacturers' focus on warranty obligations to the exclusion of their consumer guarantee obligations
 - manufacturers' responses to 'major failures'
 - the widespread use of non-disclosure agreements by manufacturers when resolving complaints
 - the lack of effective independent dispute resolution options for consumers, and
 - particular features of the commercial arrangements between manufacturers and dealers.
- Manufacturers' complaint handling systems require dealers to check whether a car is under warranty before decisions are made as to an appropriate response to the customer's complaint. This means interactions with the consumer take place within the manufacturer's warranty framework to the exclusion of the consumer guarantees.
- 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.
- The widespread use of non-disclosure agreements when resolving consumer complaints suggests that consumers are not entitled to their consumer guarantee and warranty rights unless a non-disclosure agreement is signed, when this is not the case. Non-disclosure agreements also substantially reduce information in the marketplace for new buyers about defects and safety issues that are common to a particular car.
- Independent dispute resolution options are providing little incentive for manufacturers to improve their ACL compliance. These options do not effectively enable consumers to obtain the remedies they are entitled to under the consumer guarantees. This creates little incentive for a manufacturer or dealer to offer these remedies at an earlier stage in a dispute.

ACCC action on the consumer experience of enforcing their rights

The ACCC has recently instituted proceedings in the Federal Court against Ford, and it has also accepted a court enforceable undertaking from Holden, in relation to its concerns about alleged ACL non-compliance issues.

ACCC action 3.4

The ACCC will continue to actively monitor complaints and emerging issues in the sector, and take further compliance and enforcement action where necessary.

Manufacturers' complaint handling systems, policies and practices that do not comply with the consumer guarantee requirements of the ACL will continue to be targeted through action by the ACCC and fair trading agencies, including enforcement action where appropriate.

Such action may also address any instances of non-compliance by dealers. The ACCC is particularly concerned about manufacturers and dealers engaging in conduct that may be misleading or unconscionable.

3.4. Commercial arrangements between manufacturers and dealers

In response to the Draft Report for this market study, several stakeholders, including key industry bodies that represent dealers, called for the ACCC to undertake further analysis of the commercial arrangements between manufacturers and dealers, including to assess whether these arrangements may influence the approach of dealers to consumer guarantee and warranty claims.¹⁷¹ These submissions generally claimed that manufacturers exert a substantial level of control over dealers in the handling of consumer guarantee and warranty claims which can constrain the ability of dealers to provide a remedy or discourage dealers from raising claims with manufacturers.¹⁷²

The dealer agreement is the core contract between the manufacturer and authorised dealer which establishes the obligations of each party in relation to sales, parts and service facilities. The dealer agreement is supported by more detailed policies and procedure manuals which are deemed to be part of the contract, but which can be changed during the course of the agreement.¹⁷³ The ACCC understands that manufacturer policies and procedures often cover a wide variety of matters, including the process for performing warranty work, the process for claiming reimbursement for warranty work and warranty audit processes. An overview of dealer agreements is provided in Chapter 2 (see Box 2.2).

Review of dealer agreements, policies and procedures

The ACCC has considered a range of dealer agreements and manufacturers' policies and procedure manuals which have been provided by the AADA and manufacturers, as well as information obtained in the course of investigations. The dealer agreements reviewed by the ACCC encompass brands representing approximately 75 per cent of new car sales in Australia.¹⁷⁴ The ACCC considers that the range of dealer agreements it reviewed constitute a representative sample of the agreements currently in the industry.

The agreements vary between manufacturers. Given their confidential nature, the ACCC's observations in this report are necessarily general in nature and focus on the more common features of the agreements reviewed. For the purpose of this report the ACCC has focussed on those features of the agreements which may impact on ACL compliance, in particular the ability of consumers to exercise their consumer guarantee and warranty rights.

¹⁷¹ MTAA submission, September 2017, p. 3; MTAQ submission, September 2017, p. 3.

¹⁷² AADA submission, September 2017, pp. 5–6; Kevin Redfern submission, September 2017, p. 2.

¹⁷³ Mazda submission, November 2016, p. 3.

¹⁷⁴ Based on FCAI, *VFACTS National Report – New Vehicle Sales*, December 2016.

3.4.1. Balance of power between manufacturers and dealers

Industry bodies representing dealers have raised concerns for several years that there is a structural power imbalance in the relationship between a manufacturer and a dealer. The NSW Small Business Commissioner submitted that the relationship between manufacturers and dealers is characterised by an imbalance in bargaining power in favour of the manufacturer, with dealers offered contracts on a 'take it or leave it' basis.¹⁷⁵

Most manufacturers have an elected national dealer council which manages the relationship between the manufacturer and the network of dealerships representing the brand. The AADA notes that while the mechanics of these relationships are specific to each brand, a number of themes dealers experience in their commercial arrangements with manufacturers are common across the industry, including the imbalance of power in favour of the manufacturer when negotiating contract terms and dealership expectations.¹⁷⁶

Dealer agreements for the sale of motor vehicles are deemed by the Franchising Code of Conduct to be franchise agreements.¹⁷⁷ The Franchising Code requires, among other things, that manufacturers (the Australian or foreign distributor of the car brand) and dealers to act in good faith in their dealings with one another. Franchisors must also provide a disclosure document to the franchisee (the party seeking to operate the new car dealership) setting out key business and legal information in relation to the franchisor. Disclosure obligations vary depending on whether a new agreement is being entered into, or an existing agreement is being renewed or extended. Information provided in a disclosure document is intended to assist the party seeking to operate the new car dealership to make an informed decision about whether to proceed with the dealer franchise agreement.

The MTAA and the AADA have suggested that an industry specific automotive code of conduct, or alternately reforms to the Franchising Code, be introduced to strengthen the accountabilities between manufacturers and dealers.¹⁷⁸ The MTAA, the MTASA and SBDC suggested that the ACL be reformed to make it easier to hold manufacturers to account for consumer guarantee failures they are liable for.¹⁷⁹

Terms of dealer agreements are set by the manufacturer

The ACCC understands that many dealers when entering into or renewing dealership agreements have concerns as to the one-sided nature of the agreements, and the lack of negotiation that occurs.¹⁸⁰ It has been submitted that some dealers enter into dealership agreements despite holding strong concerns as to the imbalance in the bargaining power between a manufacturer and dealer.¹⁸¹

The MTAA noted:

In reality the new car dealer has no choice but to agree, despite personal views or professional financial or legal advice. The dealer is rarely able to alter the agreement. If the dealer does not sign the agreement, then simply the dealer does not have access to the brand. If the dealer signs the agreement then the dealership will be

¹⁷⁵ NSW Small Business Commission submission, November 2016, p. 2.

¹⁷⁶ AADA, [Dealer Councils United Under One National Organisation](#), viewed 26 October 2017.

¹⁷⁷ Competition and Consumer (Industry Codes – Franchising) Regulation 2014, s. 5(2)(c).

¹⁷⁸ MTAA submission, September 2017, p. 8; AADA submission, October 2017, p. 4.

¹⁷⁹ SBDC submission, November 2016, p. 6; MTASA submission, November 2016, p. 15; MTAA submission, November 2016, pp. 11, 15 and 17.

¹⁸⁰ AADA submission, October 2017, p. 1.

¹⁸¹ AADA submission, October 2017, p. 1.

*granted access, but only subject to the agreement terms and any policy changes that are made during the period of that agreement.*¹⁸²

Submissions to this study have provided the following key reasons for the imbalance in bargaining position between manufacturers and dealers:

- Significant upfront capital investment is involved in establishing new dealership facilities, with estimates provided in the range of \$6 to \$20 million,¹⁸³ depending on the metropolitan or regional location of the dealership.
- The length of the initial and subsequent tenure of dealership agreements is typically of relatively short duration, in most cases one to five years, and often does not enable the dealer to recoup the capital investment before the end of the relevant term.
- Dealers do not have security of tenure and in most cases renewal of the agreement is at the absolute discretion of the manufacturer.

Dealer representative bodies submitted that given these features, dealers are financially vulnerable and beholden to manufacturers.¹⁸⁴ The combination of large upfront investment costs, short duration of tenure, and the absence of security of tenure, places dealers under commercial pressure to accede to and obey the instructions of manufacturers in order to maximise their prospects of renewal.

The AADA submitted that conduct by dealers which runs contrary to the instructions or express wishes of manufacturers risks a dealer's investment in their franchise business. The MTAA submitted that dealer agreements restrict the independence of dealers, and that the imbalance in power between manufacturers and dealers can negatively impact consumers, but not necessarily at the fault of dealers.¹⁸⁵

Risk of non-renewal of dealer agreement

It is a common feature of most of the agreements the ACCC reviewed that renewal of the agreement is at the absolute discretion of the manufacturer. In some agreements, dealers have a right to negotiate for a renewal period or particular criteria for consideration are specified, but even in such cases, the discretion to renew remains with the manufacturer.

There are also some limited examples of agreements which include an obligation on the manufacturer to offer the dealer a renewal, subject to the dealer having complied with all requirements of the agreement and the manufacturer's standards and manuals. The ACCC notes submissions that dealer agreements, policies and procedures are highly prescriptive and often seek to codify the standards for operation of every aspect of a dealer's business, including the setting of aggressive sales targets.¹⁸⁶

Dealer agreements have been described by some stakeholders as essentially an instruction manual coupled with copious policies and procedures manuals.¹⁸⁷ Where an obligation to renew a dealer agreement is subject to such a broad array of requirements, the manufacturer may have such significant scope to refuse renewal that it effectively retains its discretion irrespective of the purported obligation.

It is similarly a common feature of dealer agreements that the term of any renewal period is

¹⁸² MTAA submission, November 2016, p. 9.

¹⁸³ *IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia*, February 2017; Fennessys submission, October 2017, p.2.

¹⁸⁴ MTA NSW submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Franchising Code of Conduct, July 2008, p. 13.

¹⁸⁵ MTAA submission, November 2016, pp. 4 and 9.

¹⁸⁶ AADA submission, October 2017, p. 1.

¹⁸⁷ MTAA submission, November 2016, p. 10.

at the discretion of the manufacturer. Subject to the manufacturer's discretion, some agreements automatically renew for a one year period. In other cases, the renewal period may differ from the initial period. It has been submitted that the tenure offered by manufacturers for their dealer agreements has eroded over time.¹⁸⁸ The ACCC is also aware of exceptions where a manufacturer has offered dealer agreements for an initial period of five years with an option to renew for a further five years, subject to certain conditions.¹⁸⁹

The ACCC considers that in circumstances where a dealer has made a significant capital investment in their dealership facility, it is likely that it will take many years to recoup a return on this investment. In the event of non-renewal, a dealer may have limited options available to continue using the dealership facilities for the purposes of new car retailing. Where a dealer considers that it has slim prospects of recovering its investment in the absence of the dealer agreement being extended, it is likely that a primary focus of the dealer will be to maximise its prospects of renewal.

The AADA noted:

*Dealers that breach the terms of their franchise agreements risk loss of franchise. It is a self-evident corollary therefore that a dealer, acting rationally, will do all in its power to satisfy a customer's concerns, but may, in the final analysis be specifically proscribed by the manufacturers' policies as to what may be undertaken on the customer's behalf.*¹⁹⁰

The AADA submits that there is an increasing trend of manufacturers issuing non-renewal notices to dealers that have met or exceeded their performance targets and are not in breach of the dealer agreement.¹⁹¹ Unlike termination for breach, a manufacturer is not required by the Franchising Code to provide a dealer with reasons for issuing a non-renewal notice. This makes it difficult for a dealer to assess whether the manufacturer has exercised its right to issue a non-renewal notice in good faith, as required by the Franchising Code.

In most instances, dealer agreements will contain a general provision that the dealer must comply with the manufacturer's warranty policy and procedures. Some dealer agreements provide that a breach of the policies and procedures will be treated as a breach of the dealer agreement. Dealers may believe that if they do not comply with manufacturer requirements, their dealer agreement will be put at risk of non-renewal.

Given these issues, the ACCC considers that the commercial arrangements between manufacturers and dealers may have consequences for how a dealer responds to consumer guarantee claims that are not adequately covered by the manufacturer's systems, policies and procedures.

3.4.2. Dealer obligations when handling customer complaints

The ACCC understands that an assessment of a claim, whether made in respect of the manufacturer's warranty or consumer guarantees, generally involves both the dealer and the manufacturer.¹⁹² The AADA and an individual dealer have submitted that manufacturers set the rules of engagement and exert a high degree of control over how dealers resolve consumer complaints.¹⁹³

¹⁸⁸ AADA submission, October 2017, p. 1.

¹⁸⁹ Wein Review of the Franchising Code of Conduct, Final Report, 30 April 2013, p. 153.

¹⁹⁰ AADA submission, November 2016, pp. 5–6.

¹⁹¹ AADA submission, October 2017, p. 2.

¹⁹² FCAI submission, November 2016, pp. 13–14; Honda submission, November 2016, pp. 9–10; Mazda submission, November 2016, p. 4.

¹⁹³ AADA submission, October 2017, p. 2; Fennessy's submission, October 2017, p. 2.

Dealer agreements examined by the ACCC commonly require dealers to take reasonable steps to resolve requests and complaints by customers. In the event that a dealer is unable to resolve a complaint, the dealer is generally obliged to notify the manufacturer. The manufacturer will then decide, usually at its discretion, whether to assist the dealer in resolving the complaint. This may involve the manufacturer providing the dealer with directions as to the manner in which the dealer should resolve the complaint, or the manufacturer assuming control of the complaint. It is a common feature of dealer agreements that the dealer must comply with the directions of the manufacturer in relation to a complaint.

In the event that a legal action or claim is made or threatened by a consumer, it is a common feature of dealer agreements that the dealer must notify the manufacturer. The dealer can request that the manufacturer assume the responsibility for the claim, in which case the manufacturer may exercise its discretion whether to assume the negotiation, settlement and defence of the claim. In some instances, dealers are prohibited by their dealer agreements from making any admission of liability or agreeing to settlement of a claim without prior approval from the manufacturer.

The ACCC is concerned that the broad discretion of manufacturers to direct a dealer's handling and resolution of customer complaints can prevent or deter dealers from satisfying their responsibilities under the ACL with respect to consumer guarantee claims.

Manufacturer policies do not include claim handling processes specific to the ACL

Dealer agreements examined by the ACCC commonly contained no express references to the ACL, although in some limited instances there was reference to the ACL as a specific law which dealers must comply with. The ACCC notes that the absence of references to the ACL or specific considerations that apply to the handling of consumer guarantee claims extended to manufacturers manuals, policies and procedures.

Manufacturers' complaint handling systems which have been previously considered by the ACCC require dealers to check whether a car is under warranty before decisions are made as to an appropriate response to the customer's complaint. This means interactions with the consumer take place within the manufacturer's warranty framework. Where a manufacturer's customer handling policies and procedures primarily focus on handling claims within the warranty framework, this may influence the manner in which consumer complaints are dealt with by dealers at the outset and not adequately account for the ACL remedies which may be available. This has the potential for both the dealer and manufacturer to place a narrow focus on the consumer's contractual rights under the manufacturer's warranty, without proper consideration of the consumer's statutory rights.

The ACCC understands that many car manufacturers, as global suppliers with head offices offshore, have dealer agreements and policies which may have been drafted by or influenced by these offices and therefore may not initially reflect local consumer legislation. Notwithstanding this, the ACCC considers that references to the ACL and consideration of consumer guarantee claims should be embedded into all manufacturers' complaint handling systems with the objective of ensuring that consumers are not denied remedies they are entitled to.

Consumer guarantee claim handling on a 'goodwill' basis

The ACCC understands that when a dealer is seeking to provide a remedy in response to a claim which falls 'out of warranty' the dealer will often, relying upon the manufacturer's warranty policies and procedures, handle the claim under the manufacturer's 'goodwill' policy. Goodwill contributions may be made by a manufacturer and/or the dealer where it is

decided that a customer's claim should be remedied even though the claim is not covered by the manufacturer's warranty.

Manufacturers typically have a policy that a dealer must seek prior approval from the manufacturer where they are seeking to provide a remedy on a goodwill basis. Holden submitted that for 'out of warranty' repairs, the dealer requests authorisation prior to undertaking the work. In these circumstances, Holden Warranty and/or Holden Customer Care works closely with the dealer to assess a particular customer issue and subsequently determine an appropriate response that meets the ACL requirements.¹⁹⁴ Mazda submitted that where a dealer seeks its assistance with an issue involving a consumer guarantee claim, Mazda and the dealer will frequently manage the claim jointly.¹⁹⁵ The ACCC is also aware of certain manufacturers that do not require that dealers seek prior approval for 'out of warranty' claims.

The ACCC is concerned that in at least some circumstances, reference by manufacturers or dealers to claims being dealt with on a 'goodwill' basis suggests to consumers that the remedy being offered is discretionary, in circumstances where the consumer guarantees may apply. This means that consumers may accept a less optimal resolution of their claim, and are less likely to press for their consumer guarantee rights. In addition, goodwill payments are often made to increase consumer satisfaction and repurchase intention, and are not linked to the discharge of statutory obligations. The treatment of consumer guarantee claims from this perspective appears likely to undermine the consideration of the statutory rights to which a consumer is entitled to under the ACL, and may raise misleading and deceptive conduct concerns.

3.4.3. Dealers are required to follow stringent warranty policies to substantiate a claim for reimbursement

The dealer agreements reviewed by the ACCC generally require that any claims by the dealer for reimbursement must be submitted in accordance with the manufacturer's warranty policy and procedures. The ACCC understands dealers generally respond to customer complaints within the framework of the warranty policies and procedures set by manufacturers, irrespective of whether the claim is covered by the manufacturer's warranty or is a consumer guarantee claim.

Complex and onerous warranty claim processes

Industry bodies representing dealers have raised concerns as to the 'maladroit and ponderous administration' of manufacturer's warranty claim policies and procedures.¹⁹⁶ Dealers have raised concerns with the ACCC that manufacturers' warranty claim policies contain stringent requirements that must be satisfied to establish a remedy is warranted before a manufacturer will approve reimbursement.

¹⁹⁴ Holden submission, November 2016, p.10.

¹⁹⁵ Mazda submission, November 2016, p.4.

¹⁹⁶ AADA submission, October 2017, p. 6.

Box 3.11: Review of warranty compliance manuals

In reviewing the warranty compliance policies and procedures of a number of manufacturers, the ACCC found features of policies that may restrict a dealer's ability to satisfy its consumer responsibilities in compliance with the ACL, or that otherwise prevent a dealer from being appropriately reimbursed for the cost of providing a remedy.

The ACCC found warranty compliance policies that:

- Reject claims by dealers for reimbursement for consumer repair that are submitted outside of the claim submission period – sometimes within 10 days from the repair date – without a right of appeal.
- Void a dealer's entitlement to repair costs under warranty or goodwill in the event that a repair order does not contain a customer signature.
- Reverse a claim during an audit if it is found that 'white out' has been used in any part of the technician's story detailing the repair order.
- Prevent dealers from making a claim for an incomplete or repeated repair or from submitting a second claim for any omissions.

The ACCC is also concerned by warranty compliance policies that direct dealers in the course of undertaking warranty repairs to not undertake any precautionary or preventative repairs that were not raised by the customer.

Example: Repairs carried out preventively

The handling of precautionary carried out repairs without a concrete customer complaint/concern within warranty or goodwill is not permitted.

The MTAA has provided an example of a dealer network that was advised by a manufacturer of revised requirements to substantiate a dealer claim for warranty work.¹⁹⁷ The changed policy indicates that any warranty claim will be rejected if it fails to meet 12 mandatory steps required by the manufacturer. Failure to meet one of the 12 mandatory steps will trigger rejection of the claim by a dealer with no right of appeal. The 12 mandatory steps, along with other requirements, require a total of 31 different processes to support a single warranty claim.

The ACCC considers that unnecessarily complex warranty claim processes, including the ability to reject claims for reimbursement for the repair of a new car on the basis of minor, arbitrary or immaterial administrative or technical requirements, have the potential to result in dealers being inadequately indemnified for remedies that have been provided in compliance with the manufacturer's warranty or in compliance with the ACL.

Prior approval may be required before repairs can be undertaken

Industry representatives have indicated that dealers are generally required to seek prior approval from a manufacturer before providing a consumer with certain remedies under the manufacturer's warranty.¹⁹⁸

Stakeholders indicated that manufacturers each have their own predetermined maximum amounts that dealers are permitted to spend on warranty repairs without prior approval.¹⁹⁹ Where the estimated cost of the remedy is above the predetermined threshold, a dealer will be required to submit a request for prior authorisation to the manufacturer. Prior authorisation is generally required for major repairs, such as the replacement of engines, transmission units, and assemblies but can also apply to other remedies, such as the

¹⁹⁷ MTAA submission, September 2017, p. 6.

¹⁹⁸ ADS submission, pp. 4–5 and 7.

¹⁹⁹ Car Solutions submission, November 2016, p. 3.

provision of loan cars. The AADA noted that manufacturers have progressively relaxed prior authorisation limits over the last decade, but dealers still need to operate within the confines of their dealer agreement.²⁰⁰ The FCAI submitted that most manufacturers pay for warranty repairs upon submission of the claim by the dealer and do not require prior approval before carrying out warranty repairs except for very high cost repairs.²⁰¹ Some manufacturers also exercise their discretion to place a dealer on a more extensive prior approval program.

The ACCC understands that even where a dealer has received prior approval from the manufacturer to provide a certain remedy, such as repair or replacement, manufacturers may still be entitled to subsequently reverse the claim on the basis of a failure to follow set claim procedures. It is a common feature of the warranty policies reviewed by the ACCC that the manufacturer reserves the right to reverse a warranty claim, for example, up to 3 years following approval.

The ACCC is also concerned that warranty compliance policies requiring dealers to seek prior approval for 'out of warranty' and consumer guarantee claims may:

- result in delays to consumers receiving timely access to consumer guarantee remedies
- mislead dealers into believing that their ACL right to be indemnified by the manufacturer is conditional on obtaining the prior approval of the manufacturer.

Manufacturers' commercial arrangements with dealers should not inhibit the ability of dealers to fulfil their consumer guarantee responsibilities and provide timely remedies. Dealers have a right of indemnification to recover the costs of consumer guarantee remedies from manufacturers where the manufacturer is responsible for the failure, irrespective of any prior approval requirements contained in a manufacturer's warranty policy.

Potential for unfair contract terms in warranty policies

Unfair contract term protections in the ACL apply to standard form business-to-business contracts entered into or renewed on or after 12 November 2016. The business-to-business unfair contract term provisions apply to contracts where:

- at least one of the parties is a 'small business' (i.e. employs less than 20 people), and
- the upfront price payable under the contract is no more than \$1 million and the contract is for more than 12 months.

In NSW, dealers can access remedies for unfair terms in contracts and unjust conduct under Part 6 of the *Motor Dealers and Repairers Act 2013* (NSW). This legislation is unique to NSW and only covers dealers who reside in NSW.

An unfair contract term is one that:

- causes a significant imbalance in the parties' rights and obligations, and
- is not reasonably necessary to protect the legitimate interests of the party seeking to rely on it, and
- causes detriment to a party if relied on.

²⁰⁰ AADA submission, November 2016, p. 24.

²⁰¹ FCAI submission, November 2017, p. 7.

Unilateral variation rights of the manufacturer

A common feature of the dealer agreements reviewed by the ACCC is that the manufacturer has the ability to vary the terms of the agreement in a unilateral manner. Unilateral variation rights generally extend to manufacturer policies and procedures which may be changed by the manufacturer at will and without consultation with the dealer.

The ACCC is of the view that contract terms that allow one party to unilaterally vary any provisions of a franchise agreement or its related policies and procedures in an unconstrained manner may raise concerns under the unfair contract terms law. This is particularly so if the policies and procedures manuals include substantive rights and obligations, or if there are detrimental consequences for the franchisee if the manual is not complied with.

The ACCC is also aware of manufacturer policies that provide for bulletins to be issued to dealers where there is a change, addition or deletion of a warranty policy or procedure, such that the manufacturer is not required to provide prior notice to the dealer.

Unilateral variations to the terms of a dealer agreement or its related policies which cause a significant imbalance to the rights and obligations between manufacturers and dealers may amount to unfair contract terms where the variation is not reasonably necessary to protect the legitimate interests of the manufacturer and will cause detriment to the dealer.

Warranty audits

Dealers are subject to strict warranty audits requirements, and it is a common feature of warranty compliance policies that the manufacturers are able to conduct an audit and review process to verify a dealer's compliance with the manufacturer's warranty policy requirements.

Manufacturers generally audit dealers on a rolling basis. The ACCC understands warranty audits may be conducted following warranty claim data analysis by the manufacturer. The ACCC is concerned by the perception amongst some dealers that manufacturer warranty audits may be targeted based on the volume of warranty or consumer guarantee claims made by a dealer. Such perceptions have the potential to discourage a dealer from raising valid claims and may impact dealers' responses to consumer guarantee and warranty claims.

Warranty audits are generally conducted on a sample of randomly or specifically selected warranty claims paid, including prior authorised repairs, during the audit period. Where a discrepancy with the warranty compliance policy and procedures is identified, in some instances manufacturers reserve the right to 'claw back' the charge paid to the dealer for a warranty claim, either in full or in part. On the other hand, the ACCC is aware of some manufacturers that have improved their approach to audits and which do not charge back dealers for non-compliance, but rather focus on educating dealers to improve compliance.

Warranty policies that enable a manufacturer to claw back amounts previously paid to a dealer in connection with an otherwise valid warranty or consumer guarantee claim on the basis of minor, arbitrary or immaterial administrative or technical indiscretions, have the potential to amount to unfair contract terms. They also provide an incentive for dealers to minimise their exposure to the risk of future claw backs by minimising claims for consumer guarantee or warranty work.

Warranty extrapolation processes

Dealers and their industry bodies have raised strong concerns in relation to warranty policies which include the extrapolation of warranty audit results. This involves a manufacturer

determining the percentage of errors or non-conforming claims in an audited sample of claims, and extrapolating this percentage to the total warranty spend of the dealer for the period from which the audited sample was taken.

Box 3.12: Extrapolation of warranty audit results example

A random sample of 100 claims submitted to the manufacturer from a 12 month period is audited.

At the completion of the audit, 12 warranty claims are found not to comply with policies and procedures. The dollar value of the non-confirming claims is found to equal ten per cent of the value of the 100 claims audited.

The dealer will be required to reimburse the manufacturer ten per cent of the claim amount paid to the dealer for the 12 month period.

Warranty policies that permit extrapolation on warranty audits and enable a manufacturer to charge back to the dealer excessive amounts have the potential to be unfair contract terms, given the potential for the extrapolation process to result in a significant imbalance and detriment to a dealer and the apparent lack of necessity to protect the legitimate interests of the manufacturer.

The ACCC understands that not all dealer agreements include these provisions, and that others have removed extrapolation processes from their warranty compliance policies following the introduction of the ACL.

3.4.4. Dealer reluctance to provide remedies without certainty of reimbursement by the manufacturer

Where the commercial arrangements between a manufacturer and a dealer do not provide the dealer with sufficient clarity that they will be reimbursed for claims where the manufacturer is responsible for the fault, a dealer may be dissuaded from offering appropriate remedies to the detriment of consumers.

Dealers and their industry bodies have raised concerns that manufacturers leave dealers exposed to the cost of undertaking remedial work arising from ACL issues and, as discussed above, dealers may be reluctant to seek redress from manufacturers out of fear of damaging their commercial relationship.

The Small Business Development Corporation (SBDC) told the ACCC that dealers may not be adequately reimbursed by the manufacturer for remedies they provide to consumers in circumstances where the manufacturer is liable for the defect. The dealer may be reluctant to offer remedies without certainty of being indemnified, which may reduce consumers' access to appropriate or timely remedies.²⁰² The MTAA similarly submitted that dealers are often left with considerable unrecoverable costs as a result of manufacturer imposed requirements on dealing with consumer guarantee and warranty issues.²⁰³

Dealer indemnification rights

It is a common feature of dealer agreements that the manufacturer warrants the new car to the dealer on the terms set out in written warranties. In many instances, the terms on which the manufacturer warrants the new car to the dealer may be changed by the manufacturer at any time.

²⁰² SBDC submission, November 2016, pp. 5–6.

²⁰³ MTAA submission, September 2017, p.12.

Section 274 of the ACL provides dealers with a statutory right to recover the costs of remedies from manufacturers where the manufacturer is responsible for the failure.

However, the ACCC's review of dealer agreements identified that the agreements rarely contain provisions that would provide a dealer with the certainty that they would be indemnified in the event that a new car has a manufacturing defect. In some instances, dealer agreements reviewed by the ACCC provided that:

- Other than the manufacturer's written warranties, the manufacturer makes no express warranties to the dealer or the dealer's customers with respect to the new car product or parts.
- In the event that a customer threatens or commenced legal proceedings against the dealer, the manufacturer retains full discretion whether to indemnify the dealer, even where the manufacturer has assumed responsibility for the defence of the claim.

Based on the ACCC's review of dealer agreements, the right of dealers to be indemnified by the manufacturer for liability of the dealer pursuant to section 274 may not be clear. The ACCC has observed that dealer agreements in some cases contain provisions which appear to exclude or limit manufacturers' obligations.

The AADA submits that the statutory indemnity against manufacturers available to dealers under the ACL is of limited practical value as it can only be exercised if there is an actual finding of liability against a manufacturer which rarely occurs as most claims are settled.²⁰⁴

The ACCC understands that dealers are reluctant to commence legal proceedings against a manufacturer to recover costs due to the potential for irreparable damage to their commercial relationship, which is the paramount concern for the dealer. The NSW Small Business Commissioner submitted that fear of reprisal deters most dealers from exercising their legal rights in relation to unjust conduct or the imposition of unfair contract terms by manufacturers.²⁰⁵

The ACCC considers that manufacturers should update their dealer agreements to expressly make clear that obligations under the manufacturer's warranty are in addition to, and do not exclude or limit, the manufacturer's obligations to indemnify the dealer under section 274 of the ACL.

Representations that a dealer's ACL right to be indemnified by a manufacturer is conditional on obtaining prior approval from the manufacturer also may raise misleading and deceptive conduct concerns.

Structural disincentives in warranty policies

Dealers have raised concerns with the ACCC that manufacturers' warranty claim policies often leave dealers conflicted, compromised and financially disadvantaged when providing a remedy or undertaking repair work for consumers as the full cost to the dealer is not recognised or reimbursed by the manufacturer.

Labour charge out rates

It is a common feature of warranty policies that the manufacturer sets the labour charge out rate that the dealer is able to claim for any repair. The ACCC understands that manufacturers generally set a lower charge out rate for warranty work as compared with a dealer's labour charge out rate for retail servicing and repairs.

²⁰⁴ AADA submission, October 2017, p. 4.

²⁰⁵ NSW Small Business Commissioner submission, November 2016, p.1.

Diagnosis times

Dealers and their industry bodies have also raised concerns that dealers are not appropriately reimbursed for the time that is involved in identifying or diagnosing a fault. The ACCC understands that repair work can often entail a lengthy diagnosis time in identifying the fault.

The ACCC is aware of manufacturer warranty policies that preclude diagnosis time from being claimed and which only reimburse dealers for removal and replacement of parts. In other instances diagnosis time is limited, for example, 'basic diagnosis' time may be included in the standard repair time but otherwise excluded.

Standard repair times

Manufacturers' warranty policies and procedures generally provide standard repair times that cap the time which a dealer is able to claim with respect to a particular category of remedial work. Dealers and their industry bodies have raised concerns that manufacturers' standard repair times are often capped at unreasonably short durations and do not accurately reflect the time needed to complete increasingly complex repairs.

The MTAA provided an example where the most highly qualified master technician at a dealer was unable to achieve standard repair times, even in circumstances where all necessary tools to undertake the repair were prepared in advance to be readily available.

Where a manufacturer does not appropriately recognise the costs incurred by a dealer when reimbursing valid warranty and consumer guarantee claims, this creates a structural disincentive for a dealer to offer remedies to the detriment of consumers.

Findings on commercial arrangements between manufacturers and dealers

- Dealers, as retailers of new cars, have direct responsibility to provide remedies to consumers under the ACL. Dealers also have a right to recover the costs of remedies from manufacturers, where the manufacturer is responsible for the failure.
- Given the nature of commercial relationships between manufacturers and dealers, dealers are frequently in the challenging position of balancing their ACL obligations to customers, safeguarding their own financial interests and maintaining a long term commercial relationship with their manufacturer. These commercial arrangements provide a disincentive for dealers to promptly and reasonably respond to consumer guarantee and warranty claims, and can have the effect of denying or making it difficult for consumers to readily access the remedies to which they are entitled.
- Dealers respond to consumer guarantee or warranty claims within the framework of the policies and procedures set by the manufacturer. Dealer agreements, policies and procedures commonly provide manufacturers with broad discretion to direct a dealer's handling and resolution of customer complaints. This can further constrain and adversely influence the response of dealers to customer complaints and have the potential to prevent dealers from satisfying their ACL responsibilities.
- Dealers are often under commercial pressure to comply with manufacturer requirements in order to maximise the likelihood that their dealer agreement will be renewed. This may have consequences for how a dealer responds to consumer guarantee claims that are not adequately covered by a manufacturer's systems, policies and procedures.
- Manufacturers' complaint handling policies and procedures primarily focus on handling claims within the manufacturer's warranty framework, without due consideration of a consumer's statutory rights under the ACL.

- Similarly, the handling of consumer guarantee claims within the parameters of a manufacturer's goodwill policy appears likely to undermine consideration of the statutory rights to which a customer is entitled to under the ACL. The common requirement for dealers to seek prior approval to make a goodwill contribution may also limit a dealer's ability to comply with the ACL.
- Unnecessarily complex warranty claim processes, including arbitrary or immaterial administrative and technical requirements, have the potential to result in dealers being inadequately indemnified for remedies they have provided in compliance with the manufacturer's warranty or the ACL.
- Dealer agreements reviewed by the ACCC rarely contain provisions that would provide a dealer with the certainty they will be indemnified by the manufacturer in the event that a new car has a manufacturing defect. Where dealers have structural disincentives or insufficient confidence in obtaining reimbursement from manufacturers, this may result in reluctance by dealers to offer remedies to which consumers are entitled.

For the purposes of this market study, the ACCC's review of dealer agreements, policies and procedures has focussed on the features of these commercial arrangements which may impact ACL compliance.

The ACCC considers that ACL compliance issues can be addressed by manufacturers and dealers transforming their approach to the handling of consumer guarantee claims. The ACCC recommends that manufacturers update their complaint handling systems and commercial arrangements with dealers to ensure that these provide for due consideration of consumer's statutory consumer guarantee rights.

The ACCC will continue, through its compliance and enforcement work, to target those manufacturers' complaint handling systems, policies and procedures that do not comply with the consumer guarantee requirements of the ACL.

The ACCC has also become aware of certain issues raised by dealers relating to the imbalance of power in their commercial arrangements with manufacturers. These issues go beyond the impacts on ACL compliance, which has been the focus of the ACCC's review of these commercial arrangements, and may require further examination.

The ACCC has considered suggestions by dealers and their representative bodies that a separate franchising code of conduct for the automotive sector should be established or alternatively that automotive industry specific provisions should be inserted into the existing code. Dealers submit that these reforms would provide enhanced protections for dealers and by extension, consumers. The ACCC recognises that dealer representative bodies have advocated for an automotive industry code of conduct for many years, primarily to ensure that the relationship between manufacturers and dealers is fair and balanced.

The Government's policy guidelines on prescribing industry codes of conduct state that as a general principle, markets should be free to operate without excessive regulation. Prescribed industry codes can be used to guard against unfair and opportunistic conduct which can distort markets and stifle business growth. However, codes are only prescribed in very limited circumstances, where there is a compelling case for intervention supported by robust evidence, and where self-regulation has been attempted and failed to address the problem.²⁰⁶

The 2013 Wein Review is the most recent review of the Franchising Code of Conduct. It recommended deferring any further review of the Code for a minimum of five years after any

²⁰⁶ Treasury, Industry Codes of Conduct – Policy Framework, November 2017, pp. 1–2.

amendments have taken effect. The current Franchising Code of Conduct took effect on 1 January 2015 and accordingly the next review is expected to occur in or after 2020.

The Wein Review recommended that an analysis of the impact of the minimum term and standard contractual terms for motor vehicle agreements should be undertaken prior to a future review of the Franchising Code.²⁰⁷ Accordingly, given the issues identified by the ACCC's review of a number of dealer agreements, the ACCC considers there may be merit in further analysis of issues relating to the imbalance of power in commercial arrangements between manufacturers and dealers prior to the next review of the Franchising Code.

The ACCC has also considered various provisions within dealer agreements in the context of the new unfair contract terms regime. Under the current thresholds, unfair contract term protections are provided to a wide variety of smaller businesses. However, in many industries, including new car retailing, many businesses in an inferior bargaining position fall outside the current thresholds for unfair contract term protections. In the case of new car retailing this is influenced by the high value of the products sold and not necessarily the size or reality of the dealer.

While the ACCC has not formed a concluded view, we consider that further consideration should be given to the current unfair contract terms thresholds and whether they are adequately providing protection to small businesses with a significant imbalance of bargaining power to those businesses they enter commercial agreements with. This reflection may be informed by similar experiences in other sectors and other challenges emerging in relation to the application of the thresholds.

Recommendations on commercial arrangements between manufacturers and dealers

Recommendation 3.2

Car manufacturers (the Australian or foreign distributor of the car brand) should transform their approach to the handling of consumer guarantee claims or risk action for non-compliance with the ACL. The ACCC recommends that car manufacturers:

- update their complaint handling systems to ensure that consideration of consumer guarantee rights are embedded in all relevant systems, policies and procedures with the objective of ensuring that a consumer's statutory rights under the ACL are given due consideration at the outset of responding to a claim
- update their dealer agreements and policies to expressly state that obligations under the manufacturer's warranty are in addition to, and do not exclude or limit, the manufacturer's obligations to indemnify the dealer under section 274 of the ACL
- review their dealer agreements, policies and procedures to ensure that these commercial arrangements:
 - do not contain unfair contract terms that go beyond what is reasonably necessary to protect their legitimate interests
 - place appropriate limits on any terms which enable manufacturers to unilaterally vary the agreement and/or operations manuals.

Recommendation 3.3

Certain issues raised by dealers in relation to the imbalance of power in their commercial arrangements with manufacturers may require further examination.

Dealer agreements for the sale of motor vehicles are deemed by the Franchising Code of Conduct to be franchise agreements. One option for consideration of these issues is the next review of the Franchising Code of Conduct to occur from 2020.

²⁰⁷ Review of the Franchising Code of Conduct, Mr Alan Wein, 30 April 2013, Recommendation 16.

Issues which may be further considered include:

Minimum tenure and capital investment requirements

- a required minimum term for dealer agreements with the objective of allowing dealers a sufficient period in which to recoup capital investment required by the manufacturer
- limitations on the level of capital investment that a manufacturer can require of a dealer based on the tenure of the dealer agreement offered
- enhancing a dealers rights to be compensated for capital investment required by the manufacturer in the event of non-renewal of the agreement

Reasons for non-renewal

- providing dealers with reasons for non-renewal of a dealer agreement to enable an assessment whether non-renewal has been exercised by a manufacturer in good faith

Changes to commercial arrangements

- providing national dealer councils and/or dealers with a minimum period of prior notice of proposed amendments to dealer agreements, policies and procedures and the ability for national dealer councils and/or dealers to challenge proposed amendments
- exempting certain aspects of the commercial arrangements between manufacturers and dealers from unilateral variation by either party

Reimbursement for remedies

- enhancing a dealers right to reimbursement to recover the costs of providing remedies where the manufacturer is responsible for the failure
- strengthening the accountabilities of manufacturers and dealers when providing remedies to consumers.

4. Accessing technical information to repair or service new cars

Key points

- Traditionally, information to repair and service cars was provided in paper workshop manuals. Today, real-time access to digital files and codes, which vary from car to car, is needed to complete many aspects of a repair or service. Car manufacturers generally own and control this technical information and in many cases are the only source.
- As discussed in Chapter 2, in general, car manufacturers have an incentive to deny or delay access by independent repairers to the technical information necessary for them to effectively compete with authorised dealers and preferred repairer networks.
- Evidence to this study suggested consumers may be unaware that repair and service work cannot, at times, be completed by independent repairers for want of technical information or access to the diagnostic tools necessary to access or use that technical information. Consumers realise costs—inconvenience, delays, unexpected expenses, and a reduction in choice—when their car must be taken to a dealer, who does have access to the technical information or proprietary diagnostic tool required.
- In an attempt to address some of these issues, in 2014, key industry associations agreed to a set of aims and principles to ensure ‘a fair and reasonable competitive market within the car service and repair industry.’ The *Agreement on Access to Service and Repair Information for Motor Vehicles* (Heads of Agreement) placed voluntary obligations on car manufacturers to, in general, share with independent repairers, on commercially fair and reasonable terms, the same technical information they provide to their dealers.
- Despite the Heads of Agreement, many stakeholders in the independent sector submitted that independent repairers remained unable to readily access technical information and diagnostic tools from car manufacturers to repair and service new cars. Against this, the FCAI submitted that technical information is available to independent repairers, often directly from car manufacturers, and that only two independent repairers had lodged complaints with it about an inability to access technical information.
- To assess this issue, the ACCC considered submissions, undertook site visits, held consultations, and commissioned an independent expert to review several examples where stakeholders had claimed that technical information was not available to independent repairers. The independent expert found that in several examples, the technical information required to repair a car was not available from car manufacturers. The ACCC has also found that most car manufacturers are not sharing technical information they deem as being environmental, safety or security-related, even where it may be necessary for the repair or service of a new car.
- The ACCC has concluded that, broadly, most car manufacturers in Australia are not fully sharing technical information with independent repairers consistently with the Heads of Agreement. The ACCC found that the net effect of the Heads of Agreement in improving access to technical information for independent repairers has been limited.
- In other jurisdictions, recent regulatory interventions have made the technical information and diagnostic tools necessary for independent repairers to repair and service new cars more widely available, including environmental, safety and security-related information.
- Due to the limited effect of the Heads of Agreement to achieve its objectives, the continuing difficulties independent repairers experience in accessing the technical information they need to repair and service new cars, and consistent with developments in other jurisdictions, the ACCC considers that regulatory intervention is needed to ensure technical information is made available on commercially fair and reasonable terms to support a competitive car repair and servicing industry, subject to safeguards to enable the sharing of environmental, safety and security-related information.

The issue of access to technical information by independent repairers has been contentious for many years. The ACCC has received many submissions from participants in the independent automotive repair and maintenance sector (referred to in this chapter as the 'independent sector'), which includes independent repairers, manufacturers and suppliers of aftermarket parts and tools, aftermarket diagnostic tool manufacturers and commercial publishers of technical information. The ACCC also received submissions from industry associations representing interests in the independent sector, and insurers. These submissions generally claimed that car manufacturers are imposing barriers on access to the technical information needed to repair and service new cars.

Car manufacturers and the industry association representing their interests, as well as the industry association representing dealers, contended that technical information is available, and that access to technical information has been facilitated through a voluntary agreement negotiated within the industry in 2014 (the Heads of Agreement).²⁰⁸ The Heads of Agreement is further discussed at section 4.1.2.

The ACCC's focus in this study was to investigate these competing views and to assess whether, and to what extent, barriers exist and if so whether they:

- influence competition between independent repairers and authorised dealers or preferred repairer networks
- impose any additional costs on consumers.

As part of this focus, the ACCC also examined the effect of the Heads of Agreement in facilitating access to technical information for independent repairers. The Hon. Michael McCormack, MP, Minister for Small Business, has indicated the ACCC's findings about access to technical information will 'help the Government and industry determine what actions, if any, are needed in the future.'²⁰⁹

This chapter is primarily focused on access to technical information by independent repairers; however, it also discusses issues associated with access to proprietary diagnostic tools, or access by aftermarket diagnostic tool manufacturers or commercial publishers to technical information, as necessary, due to their ability to reduce barriers for independent repairers to access technical information. This chapter is structured as follows:

- summary of the background and regulatory framework to this issue
- overview of the problems, and associated impacts, as reported by the independent sector and consumers in independent repairers accessing technical information
- the responses of car manufacturers and authorised dealers
- review of concerns about access to environmental, safety and security related technical information
- the industry's views on the effect of the Heads of Agreement
- the ACCC's further research, analysis and evaluation of the issues and potential impacts raised by stakeholders, and the ACCC's recommendations for change.

²⁰⁸ FCAI, AAA, AAAA, AADA, MTAA/AMIF, [Agreement on access to service and repair Information for motor vehicles](#), December 2014.

²⁰⁹ The Hon. Michael McCormack, MP, [Wheels fall off Leigh's logic](#), 11 November 2016, accessed 17 July 2017.

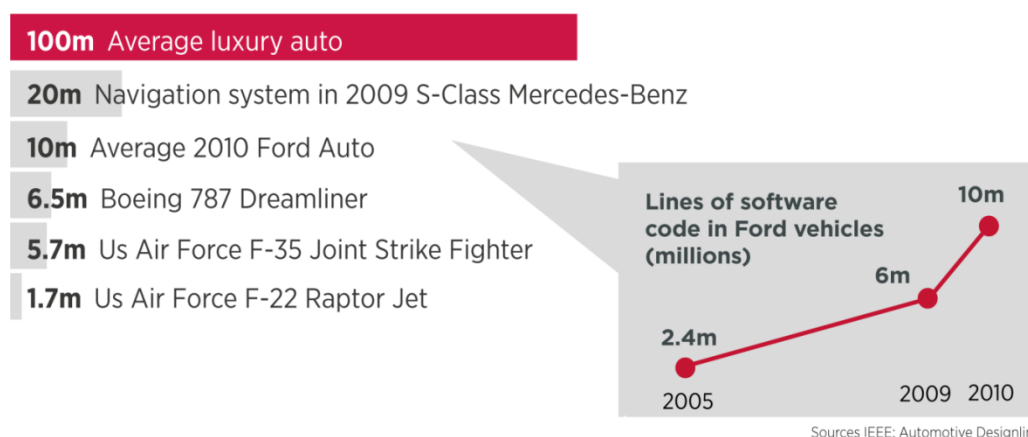
4.1. The changing nature of technical information

New cars require regular servicing to maintain the efficient functioning of their electronic and mechanical parts. New cars may also require repairs when an electronic, mechanical or computerised component no longer performs the function it was designed to do.

Repairing or servicing a car is no longer just about a car's mechanical components: today's new cars contain in excess of 10 million lines of computer code—more code than is used to operate the avionics and on-board support systems of modern airliners. New cars are now effectively 'computers on wheels' and require sophisticated software to work.²¹⁰

Figure 4.1 compares the lines of code needed to operate various types of aircraft and new cars.

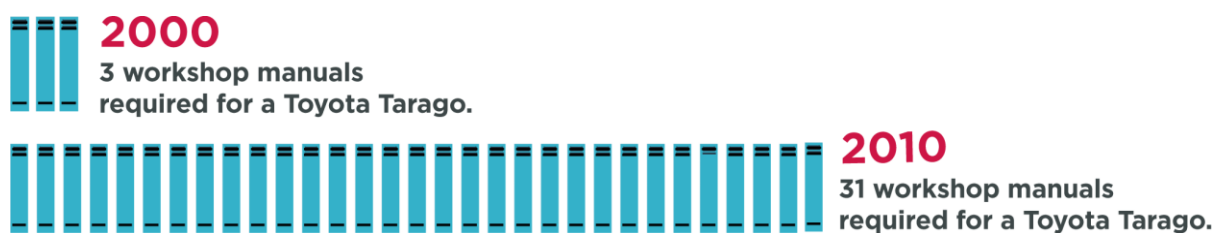
Figure 4.1: Millions of lines of code in modern aircraft and new cars compared



Source: John Paul MacDuffie and Takahiro Fujimoto, [Why dinosaurs will keep ruling the auto industry](#), Harvard Business Review, June 2010.

It is not only the complexity of the information required to repair and service a new car that has increased. The volume of information required has also increased. Figure 4.2 is based on a picture provided by the VACC showing that in 2000 the workshop manual for a Toyota Tarago, a typical family car, consisted of three volumes. The VACC reported that by 2010 this had increased to 31 volumes.

Figure 4.2: Toyota Tarago workshop manual volumes—2000 versus 2010



Source: VACC supplementary submission (April 2017), p. 8.

²¹⁰ Robert N. Charette, This Car Runs on Code, [IEEE Spectrum](#), 1 February 2009; David Sedgwick, [Cars become computers on wheels](#), Automotive News, 21 April 2014, accessed 17 July 2017.

While workshop manuals explain to a mechanic how to complete a physical process—such as to repair or replace a malfunctioning part—car manufacturers now also issue digital files, such as software or electronic control unit (ECU) updates, to fix problems that may arise from the operation of the car's software. These are used in conjunction with diagnostic tools, which assist in determining problems and finding solutions to repair a car. Car manufacturers also issue recalibration and other codes, which are generally used to secure the car's systems, and are often required in the final stage of putting the car back on the road. Box 4.1 below outlines the types of technical information needed to repair and service a new car.

The increasing computerisation of cars is also changing car manufacturers' distribution networks for technical information. Where workshop manuals were once sold in printed volumes (see Figure 4.2, above), they may now be available solely in digital form through a car manufacturer's website or on CDs, DVDs or flash drives. Similarly, the digital files required for repairing and servicing cars are also distributed in a machine readable form. In many instances, new cars can now be directly connected to the car manufacturer's web servers through their proprietary diagnostic tool (or a generic pass-through device), which assists with diagnosing problems, installing software updates and the verification and resetting of a new car's security systems.

Due to the increasing technological sophistication of new cars, with computers and software monitoring and controlling car components that were previously purely mechanical, the ability to access comprehensive technical information to repair and service new cars, particularly digital files and codes, and appropriate diagnostic tools, becomes critical to ensure cars are properly repaired and serviced

Box 4.1: Technical information needed to repair and service a new car

Technical information

Technical information is all the data and information needed to repair and service a new car. Consistent with the PC's description of the distinction between data and information, data refers to 'representations of facts that are stored or transmitted as qualified or quantified symbols' and may have no inherent meaning.²¹¹ Information is the 'meaning resulting from the interpretation of facts conveyed through data (and other sources)' and can be derived from data after it has been 'presented in context and interpreted.'²¹² Technical information to repair and service a new car includes, but is not limited to:²¹³

- information or data outputs, including from on-board diagnostic sources,²¹⁴ for diagnosis, body repair, servicing, inspection, periodic monitoring, re-programming and reinitialisation of the car or its components
- dimensions and tolerances for mechanical parts
- calibration files for ECUs, and initialisation and reset codes for computerised systems
- specifications for oils and lubricants
- repair manuals, body repair manuals and wiring diagrams, including component voltages
- electronic logbooks or service histories
- supplements or updates, including software updates, to any of the above.

Technical information for a particular make and model of car may change over time as new materials are used to produce mechanical parts or as the appropriateness of certain repair and servicing techniques are tested. The relative importance of any particular type of technical information to repair or service a new car may differ between makes and models; for instance, the significance of recalibration codes to put a car back on the road may be more prominent for some car brands than others. Technical information is not usually substitutable between different makes and models of cars.

Diagnostic tools

Many of the types of technical information outlined above require the use of a diagnostic tool to retrieve data from the car and display the information to the repairer, or the diagnostic tool is used to manipulate the electronic components of a car, either by entering a code, uploading new software or connecting the car directly to the car manufacturers' web servers. Diagnostic tools may be generic (made by an aftermarket diagnostic tool manufacturer) or proprietary (made or authorised by the car manufacturer, or with its branding).

Proprietary diagnostic tools may only work with a specific manufacturer's cars, and may include features not available in generic diagnostic tools due to the manufacturer's control over technical information about their own cars. However, generic diagnostic tools may work across different car makes. Diagnostic tools also require periodic software updates to work with new models of cars (see **Appendix E** for an example of a diagnostic tool).

A full outline of the types of technical information to repair and service new cars the ACCC is aware of can be found in **Appendix E**.

²¹¹ PC, [Data availability and use: Final report](#), 31 March 2017, pp. 54–55.

²¹² PC, [Data availability and use: Final report](#), 31 March 2017, pp. 54–55.

²¹³ CCAAC, [Sharing of repair information in the automotive industry: Final report](#), 27 November 2012, p. iv; European Commission, [Study on the operation of the system of access to vehicle repair and maintenance information](#), Directorate-General for Enterprise and Industry, October 2014, p. 29; AAA, AAAA, AADA, FCAI, MTAA/AMIF, [Agreement on access to service and repair information for motor vehicles](#), December 2014.

²¹⁴ CCAAC, [Sharing of repair information in the automotive industry: Final report](#), 27 November 2012, p. iv; European Commission, [Study on the operation of the system of access to vehicle repair and maintenance information](#), Directorate-General for Enterprise and Industry, October 2014, p. 29; AAA, AAAA, AADA, FCAI, MTAA/AMIF, [Agreement on access to service and repair information for motor vehicles](#), December 2014.

4.1.1. The sharing of technical information is not specifically regulated

As outlined in Chapter 1, the CCA and ACL contain general prohibitions against particular types of harmful conduct in trade and commerce, including prohibitions against anti-competitive conduct, exclusive dealing and acting unconscionably. However, at present, there are no Australian laws that specifically regulate the sharing of technical information held by car manufacturers, nor do laws create a positive obligation for such information and data to be shared or address whether a consumer or business owns data and information generated by the technology in a new car.²¹⁵

General statutory protections in the CCA and the *Privacy Act 1988* (Cth) may apply in some circumstances when trying to access certain types of information and data, or proprietary diagnostic tools. Further, state and territory laws require cars to meet the standards for registration, which in most cases are the ADRs.²¹⁶ If a new car is to be resold, it may also require a certificate of roadworthiness.²¹⁷ Both the standards for registration and roadworthiness certification may refer to the car manufacturer's original specifications.²¹⁸

4.1.2. Stakeholder and government engagement has been increasing

The ACCC and other ACL regulators have received increasing reports in relation to this issue. Reports have related to a variety of types of technical information, including access to proprietary diagnostic tools, workshop manuals and reset codes, and updating and reading electronic logbooks. In addition to the reports the ACCC has received, stakeholders and the Australian Government have used other processes, outlined below, to examine issues around accessing technical information, and attempts have been made to resolve problems.

2012 Commonwealth Consumer Affairs Advisory Council review

In March 2011, the Hon. David Bradbury, MP, then Parliamentary Assistant to the Treasurer, requested the Commonwealth Consumer Affairs Advisory Council (CCAAC) report on a number of matters including the evidence of a lack of access to repair information and evidence of consumer detriment from this practice, if any, as well as the nature and effectiveness of international approaches and the views of stakeholders.²¹⁹

In its final report (2012 CCAAC report), published in 2012, CCAAC found that:

*...the need to access specialised repair information has the potential to become a barrier to entry in the market for repairs. While it is not currently preventing competition in this market, policy makers should closely monitor the ease with which vehicle repairers can access such information and be prepared to act if necessary.*²²⁰

CCAAC made a number of recommendations, including that industry should develop processes within a reasonable period of time to ensure a mechanism for independent repairers to access repair information.²²¹ CCAAC also recommended that if industry was unable to arrive at an effective outcome, and access to repair information became a barrier to competition in the market for repairs, then the Government should consider regulatory intervention.²²² The Government supported these recommendations.²²³

²¹⁵ For further discussion about data ownership see: PC, [Data availability and use: Inquiry report](#), 31 March 2017, pp. 53, 65.

²¹⁶ For example: *Road Safety Act 1986* (Vic), ss 5 and 10; VicRoads, Vehicle Information Standards; *Road Safety (Vehicles) Regulations 2009* (Vic), Schedule 2.

²¹⁷ For example: *Road Safety (Vehicles) Regulations 2009* (Vic), rr 220 and 266.

²¹⁸ For example: VicRoads, [Vehicle Standards Information: Roadworthiness Requirements](#), December 2012.

²¹⁹ CCAAC, [Sharing of repair information in the automotive industry: Final report](#), 27 November 2012, p. 36.

²²⁰ CCAAC, [Sharing of repair information in the automotive industry: Final report](#), 27 November 2012, p. iii.

²²¹ CCAAC, [Sharing of repair information in the automotive industry: Final report](#), 27 November 2012, p. vi.

²²² CCAAC, [Sharing of repair information in the automotive industry: Final report](#), 27 November 2012, pp. vi–vii.

2014 Heads of Agreement

In 2014, the Hon. Bruce Billson, MP, then Minister for Small Business, worked with key industry associations to develop a voluntary agreement for the sharing of repair information.²²⁴ In December 2014, the AAA, AAAA, AADA, FCAI and MTAA signed the Heads of Agreement to facilitate the sharing of technical information.

The Heads of Agreement aims to provide a safeguard ensuring that repair and service information is available in a timely manner to the consumer's repairer of choice. The Heads of Agreement further outlined the obligations of the signatories to develop separate enabling documents—known as codes of practice—with their members to enact the principles of the agreement.²²⁵

2015 codes of practice

Accordingly, in February 2015 the FCAI established its own voluntary code of practice to cover its own members—car manufacturers.²²⁶ Other signatories to the Heads of Agreement, representing other stakeholders in the industry, also established voluntary codes of practice;²²⁷ however, the *Voluntary Code of Practice – Access to Service and Repair Information for Motor Vehicles* (FCAI Code) is the sole instrument directly outlining a process for independent repairers to access the technical information controlled by manufacturers.

FCAI Code's objectives include the provision of an information pathway and a means of access to technical information that may be used by parties outside the dealer network.²²⁸

²²³ The Hon. David Bradbury MP, [Improving Choice of Automotive Repairers for Consumers](#), 10 June 2013.

²²⁴ The Hon. Bruce Billson, MP, [Signing of the historic right to repair Heads of Agreement](#), 15 December 2014.

²²⁵ AAA, AAAA, AADA, FCAI, MTAA/AMIF, [Agreement on access to service and repair Information for motor vehicles](#), December 2014, p. 2; p. 7, clause g.

²²⁶ FCAI, [The Voluntary Code of Practice for Access to Service and Repair Information for Motor Vehicles](#), February 2015.

²²⁷ AAA, [AAA Code Of Practice For Access To Service And Repair Information For Motor Vehicles](#), May 2015; AAAA, [Vehicle Data Sharing Code of Practice](#), April 2015; AADA, [Access to Service and Repair Information for Motor Vehicles—Voluntary Code of Practice](#); MTAA/AMIF, [Access to Service and Repair Information—Code of Conduct](#), April 2015.

²²⁸ FCAI, [The Voluntary Code of Practice for Access to Service and Repair Information for Motor Vehicles](#), February 2015, clause 1.2.

4.2. There are competing claims about independent repairers' access to technical information

Technical information to repair and service new cars is generally shared by car manufacturers with their dealer networks. A usual term in a franchise agreement between a car manufacturer and a dealer is that the manufacturer agrees to provide the dealer with access to such technical information and diagnostic tools, including training, as is reasonably needed to assist the dealer in carrying out their obligations under the agreement. Dealer obligations typically include making ongoing investments in equipment, training and special tools to be able to service cars,²²⁹ and to complete warranty, recall and other work, in accordance with the policies and procedures of the car manufacturer.

Independent repairers have reported a different process and experience for obtaining access to technical information. A diverse range of stakeholders from the independent sector made submissions to this study. Many reported that independent repairers have experienced one or more of the following barriers when trying to access technical information (or diagnostic tools) from car manufacturers, including:²³⁰

- being denied access to specific types of technical information or proprietary diagnostic tools to repair or service new cars, that is, the information or diagnostic tool exists, but access is restricted by the car manufacturer who refuses to provide it (in full or in part)
- experiencing delays when a car manufacturer releases technical information about a new car to independent repairers, for example, car manufacturers releasing information to independent repairers months or years after the model is first sold in the Australian market while dealers get immediate access
- experiencing administrative, resourcing or other costs, such as delays, in obtaining the information, for example, the car manufacturer requires communications through email addresses with delayed response times
- independent repairers and consumers being denied access by car manufacturers to view or update electronic logbooks.

The FCAI submitted that technical information is available, as evidenced by the high proportion of the total car fleet that is repaired or serviced by independent repairers.²³¹ The AADA and the FCAI stated that it could also be obtained from elsewhere, such as commercial publishers and special-interest forums.²³² The FCAI, however, submitted that, 'highly sensitive information', which the ACCC understands to be environmental, safety and security-related technical information,²³³ should not be provided to independent repairers.²³⁴

Some car manufacturers submitted that they make available technical information to independent repairers through their websites, dealer network or an email address.²³⁵ Independent repairers and commercial publishers of technical information stated that despite sources of information other than car manufacturers, they continued to encounter gaps in

²²⁹ AADA submission, November 2016, pp. 32, 36.

²³⁰ AAAA submission, November 2016; AAAA submission 1, February 2017; Bapcor submission, November 2016; Bapcor submission, March 2017; GPC Asia Pacific submission, November 2016; GPC Asia Pacific submission, April 2017; KTAS submission 1, March 2017; Repco (Auto Care Ocean Grove – Emma Harper) submission, March 2017; Repco (Drysdale Motors – Noel Harper) submission, March 2017; Repco (Gejay Automotive – Gary Pinner) submission, March 2017; Repco (Highton Automotive Services – Mark Awramenko) submission, March 2017; Repco (Woodward's Auto Repairs Alan Woodward) submission, March 2017; Ultra Tune submissions 1, 2 and 3, February, March, April 2017; VACC submission 1, February 2017.

²³¹ FCAI submission, November 2016, p. 26.

²³² AADA submission, November 2016, p. 32; FCAI submission, November 2016, pp. 26, 28.

²³³ Hyundai submission, November 2017, p. 2.

²³⁴ FCAI submission, September 2017, p. 24.

²³⁵ FCAI letter and attachment to the ACCC, December 2016; GM Holden submission, November 2016, p. 15; Toyota submission, November 2016, p. 7.

accessing the technical information required to repair and service new cars.²³⁶

4.2.1. Independent repairers' reported position: technical information availability from official sources is inconsistent

The AAAA submitted that, as a general rule, the responsibility for the supply of technical information sits with the relevant car manufacturer,²³⁷ and that information should be provided directly by the car manufacturer, as in other markets.²³⁸ The MTAA submitted that consumers can only exercise their right to choose a repairer if they can reasonably expect their chosen repairer has access to the technical information needed to complete the repair or servicing.²³⁹ The VACC submitted that, for the purposes of its OurAuto Tech Centre, a commercial publisher of technical information, it would be 'ideal' to source technical information from the car manufacturer in Australia.²⁴⁰

A number of consumers and small businesses also provided their views and examples of difficulties accessing technical information to the ACCC's consumer and small business questionnaire response to the Issues Paper. Of the respondents, 28 of 85 consumers (33 per cent) and 186 of 229 small businesses (81 per cent) reported dissatisfaction with accessing technical information.²⁴¹ In addition, 12 of 85 consumers (14 per cent) and 114 of 229 small businesses (50 per cent) reported dissatisfaction with accessing or updating electronic logbooks or servicing records.²⁴² A further ten industry participants reported concerns with accessing technical information in comments responding to the draft report.²⁴³

On the basis of materials submitted to the ACCC, Box 4.2, below, outlines the types of technical information stakeholders predominantly reported problems accessing and their uses. Many of these materials now tend to be digital files rather than printed and are in general not predominantly procedural documents, such as repair and service manuals.

²³⁶ See, for example: Repco (Auto Care Ocean Grove – Emma Harper) supplementary submission, pp. 2–3; Repco (Woodward's Auto Repairs – Alan Woodward) supplementary submission, p. 2 and Attachment 2; VACC supplementary submission 2, April 2017, p. 4.

²³⁷ AAAA submission 1, February 2017, p. 4.

²³⁸ AAAA submission, September 2017, p. 11.

²³⁹ MTAA submission, April 2017, p. 3.

²⁴⁰ VACC submission 2, April 2017, p. 4.

²⁴¹ Small business questionnaire responses – Part 1 and Part 2, November 2016; Consumer questionnaire responses, November 2016.

²⁴² Small business questionnaire responses – Part 1 and Part 2, November 2016; Consumer questionnaire responses, November 2016.

²⁴³ Industry participants' comments on the draft report, September 2017.

Box 4.2: Common types of technical information stakeholders reported problems accessing and their uses

Defined below are common types of technical information that stakeholders have reported problems accessing, and their uses. Further information can be found in **Appendix F**.

Electrical circuit and wiring diagrams:²⁴⁴ a schematic layout of a car's wiring and components, with specifications showing voltages for electronic components.²⁴⁵ This type of technical information is used to diagnose and repair problems with a car's electronics.

Electronic logbooks:²⁴⁶ digitally stored information about the car, such as the car manufacturer's specifications for servicing and its service history. It may be stored in the car's on-board diagnostic system, in the cloud, in the car's key or in another electronic form.

Lubricant specifications:²⁴⁷ a description of the type—synthetic, part synthetic or mineral—and viscosity of oil recommended by a car manufacturer for use in lubricating different car components (e.g. crankcase, automatic transmission, differential, 4WD transfer, 4WD differential or power steering).²⁴⁸

Pass-through information:²⁴⁹ allows the reprogramming of ECUs, insertion of reinitialisation codes, and uploading of software updates to be carried out using a generic pass-through enabled diagnostic tool via a car's on-board diagnostic port in conjunction with a personal computer in real time by connecting the car to the manufacturer's web server.²⁵⁰ It, or a car manufacturer's equivalent proprietary diagnostic tool, is required for updating the computerised systems in new cars.

Reinitialisation codes:²⁵¹ where an ECU loses power or a battery is disconnected and reconnected, a car's systems may need to be reset, potentially with the use of a PIN.²⁵²

Service campaign information and technical service bulletins:²⁵³ notifications to consumers to address technical issues with a car unrelated to safety or compliance, but may include emissions issues.²⁵⁴ Technical service bulletins are instructions issued by car manufacturers to dealers on procedures to service/repair cars where unanticipated problems have regularly arisen on a particular model of car in order to avoid future problems.²⁵⁵

Software updates or calibration files for new cars and their components:²⁵⁶ new instructions for various car systems to improve their operation or remedy an existing software-based problem, for instance, a car manufacturer may release a software update for a car's automatic transmission to improve its shifting performance.²⁵⁷ The software updates may be

²⁴⁴ See: AAAA submission, November 2016, p. 57; GPC Asia Pacific submission, November 2016, p. 4; MTAA submission, November 2016, pp. 39–43; MTAA submission, April 2017, p. 4.

²⁴⁵ AAA submission, November 2016, p. 29; AAAA submission, November 2016, p. 51.

²⁴⁶ See: AAAA submission, November 2016, p. 45; Carsales submission, November 2016, p. 9.

²⁴⁷ See: AAA submission, November 2016, p. 27; AAAA submission, November 2016, p. 58; AAAA submission, December 2016, p. 16; Bapcor submission, November 2016, p. 13; MTAA submission, November 2016, p. 28.

²⁴⁸ Castrol (AU), [Engine oil](#), 2017; Caltex (AU), [Oil & Product Finder](#), 2017.

²⁴⁹ For example: Anonymous business 1 submission, November 2016, pp. 1–2; MTAA submission, November 2016, p. 39; MTAA submission, April 2017, p. 4; VACC submission 1, February 2017, p. 4.

²⁵⁰ European Commission, [Study on the operation of the system of access to vehicle repair and maintenance information](#), Directorate-General for Enterprise and Industry, October 2014.

²⁵¹ AAA submission, November 2016, p. 27; AAAA submission, November 2016, p. 57; AAAA submission, December 2016, p. 16; AAAA submission 1, February 2017, p. 11; MTAA submission, April 2017, p. 4; MTAA submission, November 2016, pp. 39–43; VACC submission 1, February 2017, p. 4; VACC submission, November 2016, p. 11.

²⁵² AAAA submission, November 2016, p. 57.

²⁵³ AAAA submission, November 2016, p.56; AAAA submission, December 2016, p.16; AAAA submission 1, February 2017, p. 11; MTAA submission, April 2017, p.4; VACC submission 1, February 2017, p.4.

²⁵⁴ Volkswagen, [Recall/Service Campaign lookup](#), 21 March 2017; VACC supplementary submission 1, February 2017, p. 4.

²⁵⁵ AAAA submission, November 2016, p.56 ; VACC submission 1, February 2017, p. 4.

²⁵⁶ See: AAA submission, November 2016, p. 27; AAAA submission, November 2016, pp. 57–58; AAAA supplementary submission, December 2016, p. 16; AAAA submission 1, February 2017, p. 11; Andrew Taylor submission, August 2017, p. 1; Bapcor submission, November 2016, p. 14; KTAS, submission 1, March 2017, pp. 1–4; Steve Sorensen Mechanical submission, November 2016, p. 2; VACC submission 1, February 2017, p. 4.

²⁵⁷ AAAA submission, November 2016, p. 58; AAAA submission 1, February 2017, Appendix 8, p. 9.

in the form of codes and files required to recalibrate ECUs (e.g. powertrain, engine, emissions, transmission, and advanced driver assistance systems).²⁵⁸ These materials can be uploaded to the car using a car manufacturer's proprietary diagnostic tools, and increasingly using generic pass-through enabled tools (see above).

Vehicle security/programming information: the data, protocols or processes associated with the effective operation of a car's immobiliser systems or the coding and replacement of keys and immobiliser transponders.²⁵⁹

Independent repairers also raised concerns with access to the diagnostic tools needed to read fault codes from the on-board diagnostic system of a car and to upload software updates and enter reinitialisation codes, particularly where the tool was of a proprietary nature.²⁶⁰ Independent repairers and an aftermarket diagnostic tool manufacturer also raised concerns about car manufacturers restricting third party diagnostic tools from being used with new cars, particularly by denying access to car manufacturers' approved data servers.²⁶¹

The VACC submitted that the breadth, depth and availability of different types of technical information vary considerably between car manufacturers.²⁶² Stakeholders' experience of the issue also differed based on the type of technical information needed to remedy the distinct problem encountered with the new car.

A number of stakeholders noted that some car manufacturers with a presence in Australia have an entry on the FCAI website to indicate how technical information can be obtained electronically by independent repairers.²⁶³ Some car manufacturers, such as Holden, were reported as providing most of the repair, service and vehicle security/programming information and data independent repairers need to repair and service cars through a website (or web-based servers in the case of pass-through information).²⁶⁴ However, some stakeholders reported that gaps remained.²⁶⁵ Other car manufacturers were reported as providing inadequate or no access to technical information to repair and service new cars to independent repairers.²⁶⁶

Further, stakeholders submitted that when many car manufacturers' Australian, EU and US internet presences were compared for the same technical information about equivalent makes, models and year models of cars sold in Australia, there was a significant difference in the technical information provided by car manufacturers across these jurisdictions.²⁶⁷

²⁵⁸ Bosch Diagnostics, [J2534 FAQ](#), 2017; AAAA submission, November 2016, p. 57.

²⁵⁹ National Motor Vehicle Theft Reduction Council submission, November 2016, p. 1.

²⁶⁰ For example: AAAA submission, November 2016, p. 41; GPC Asia Pacific submission, November 2016, p. 8; Ultra Tune submission 2, March 2017; Ultra Tune submission 3, April 2017, p. 2.

²⁶¹ For example: Anonymous business 1 submission, November 2016; VACC submission 1 and Attachment A, February 2017; and several independent repairers who use Autologic's aftermarket diagnostic tools emailed examples where they had been unable to upload software updates, such as calibration files for ECUs, or enter reinitialisation codes in new cars.

²⁶² VACC submission 2, April 2017, p. 3.

²⁶³ AAAA submission, November 2016, p.44; SBDC submission, November 2016, p.5; VACC submission, November 2016, p.13.

²⁶⁴ AAAA submission 1, February 2017, p. 8; MTAA submission, March 2017, p. 5.

²⁶⁵ For example: Repco (Auto Care Ocean Grove – Emma Harper) submission, March 2017, pp. 2–3; Repco (Woodward's Auto Repairs – Alan Woodward) submission, March 2017, p. 2 and Attachment 2.

²⁶⁶ AAAA submission 1, February 2017, p. 8; KTAS submission 2, March 2017, Attachment 1G.

²⁶⁷ KTAS, submission 2, March 2017, Attachment 1G; MTAA submission, March 2017, p. 5; ICA submission, pp. 1–2; VACC submission 2, April 2017, p. 3.

Submissions from the MTAA and Kmart Tyre and Auto Service (KTAS) reported that few car manufacturers offered both Australian model information and pass-through access (defined in Box 4.2) to independent repairers in Australia.²⁶⁸ In many instances, these submissions reported that web-based access to Australian-based technical information for independent repairers by car manufacturers was not available at all. A table summarising this information is provided in **Appendix F**.

The MTAA submitted that while many car manufacturers are providing improved access to technical information since the Heads of Agreement (see below), there remained 'a lack of consistency, commonality and significant blockages with key areas including some data'.²⁶⁹

Table 4.1 summarises information provided in submissions and the ACCC's commissioned research on the availability of different types of technical information from the manufacturers of the top ten car makes in Australia (based on their Australian internet presence) for Australian model cars. Table 4.1 compares the availability of pass-through information (or access to proprietary diagnostic tools with similar capabilities), technical service bulletins, reinitialisation codes, software updates, and vehicle security/programming information (these are defined in Box 4.2). Access to repair manuals and wiring diagrams are not compared in Table 4.1 as those car manufacturers with Australian technical information sharing websites generally provide such materials (however, as outlined below, there may be issues with user experience/usability).

²⁶⁸ As reported in MTAA submission, April 2017, pp. 5–6 and KTAS submission, April 2017.

²⁶⁹ MTAA submission, April 2017, p. 4.

Table 4.1: Aggregated reported comparison of the availability of technical information from car manufacturers' Australian-model websites, by top ten makes (2016)

Make	Australian technical information sharing website	Proprietary diagnostic tool or pass-through	Technical service bulletins	Reinitialisation codes	Software updates	Vehicle security/programming information
Toyota	Yes	No	Yes	Yes	No	No
Mazda	Yes	Yes	No	Yes ²⁷⁰	Yes ²⁷¹	No
GM Holden	Yes	Yes	Yes	Yes ²⁷²	Yes	Yes
Hyundai	Yes	Yes	No	No, but dealers are also subject to security and authentication processes before gaining access	Yes	No, but dealers are also subject to security and authentication processes before gaining access
Mitsubishi	No	No	No	No	No	No
Ford	Yes	No	No	No	No	No
Nissan	No	No	No	No	No	No
Volkswagen	Yes	Yes	Yes	Yes	Yes	No
Honda	No	No	No	No	No	No
Subaru	No ²⁷³	No	No	No	No	No

Sources: AAAA submission 1, February 2017, Appendix 8; Cartech report 3 July 2017; Cartech supplementary report, 12 July 2017; GM Holden submission, November 2016, p. 14; GM Holden submission, November 2017; Hyundai submission, November 2017; KTAS submission, April 2017; Mazda submission, October 2017, p. 1; MTAA submission, April 2017, pp. 5–6; Subaru submission, November 2016, p. 6; Toyota submission, November 2017.

Notes: This table is a simplified representation of a sample of the information provided by different car manufacturers. Some car manufacturers have advised, for instance, that reinitialisation codes are rarely used with their cars. Others have indicated that reinitialisation codes are not used; rather, the car must interface with the car manufacturer's online servers for reinitialisation and programming. Table reflects available information and submissions as at the date of publication.

²⁷⁰ When the Mazda proprietary diagnostic tool (M-MDS) and an Integrated Diagnostic Software (IDS) subscription are used, which Mazda submitted is available to independent repairers.

²⁷¹ When the Mazda proprietary diagnostic tool (M-MDS) and an Integrated Diagnostic Software (IDS) subscription are used, which Mazda submitted is available to independent repairers.

²⁷² Holden advises these are not generally needed for cars from MY10 onwards when using their proprietary diagnostic tool and a subscription to acdelcotds.com, which is available to independent repairers for a fee — see GM Holden submission, October 2017, pp. 1–3.

²⁷³ Subaru does, however, make body repair methods available to crash repairers through the VACC call centre – Subaru submission, November 2016, p. 6.

In supplementary submissions, the AAAA, Bapcor, GPC Asia Pacific, KTAS, Ultra Tune and the VACC, as well as a number of individual independent repairers, each submitted specific examples of problems they had experienced or complaints received from their members about trying to access technical information for certain makes and models of cars.²⁷⁴ The total number of examples submitted was in excess of 500 cases. These examples, as well as the reported problems from initial submissions from the independent sector, can broadly be categorised as reporting that independent repairers experience problems with:²⁷⁵

- being denied access to specific technical information or proprietary diagnostic tools
- experiencing a delay in when a car manufacturer releases technical information about a new car to independent repairers as compared to dealers
- experiencing unreasonable administrative, resourcing or other costs, such as delays, in seeking the technical information
- being denied access to view or update electronic logbooks.

4.2.2. The car manufacturers' position: technical information is generally available

Initial submissions from the AADA, the FCAI and car manufacturers indicated that technical information was available to independent repairers. In further submissions additional information was provided which nuanced some of these statements. Key responses were:

- The FCAI submitted that technical information is available and that over 60 per cent of the 17 million cars in Australia are being serviced by independent repairers, with 'very few requests' for information from independent repairers being made to the FCAI.²⁷⁶
- The AADA and the FCAI also referred to commercial publishers of technical information, such as the MTAA/VACC's Tech-on-Line tool, as sources of information available to independent repairers,²⁷⁷ and the AADA and FCAI stated information could also be obtained from special interest forums.²⁷⁸
- The MTASA submitted that market forces are addressing shortfalls in technical information, for instance, through paid subscription services and commercial publishers of technical information.²⁷⁹
- Holden submitted that consumers and independent repairers can access the same repair, service and programming information as dealers through its website and that it was reviewing third-party requests for a licence to its data feeds.²⁸⁰

²⁷⁴ AAAA submission 1, February 2017; Bapcor submission, March 2017; GPC Asia Pacific submission, April 2017; KTAS submission 1, March 2017; Repco (Auto Care Ocean Grove - Emma Harper) submission, March 2017; Repco (Drysdale Motors - Noel Harper) submission, March 2017; Repco (Gejay Automotive – Gary Pinner) submission, March 2017; Repco (Highton Automotive Services - Mark Awramenko) submission, March 2017; Repco (Woodward's Automotive Repairs - Alan Woodward) submission, March 2017; Ultra Tune submissions 1, 2 and 3, February, March, April 2017; VACC submission 1, February 2017.

²⁷⁵ AAAA submission, November 2016; AAAA submission 1, February 2017; Bapcor submission, November 2016; Bapcor submission, March 2017; GPC Asia Pacific submission, November 2016; GPC Asia Pacific submission, April 2017; KTAS submission 1, March 2017; Repco (Auto Care Ocean Grove - Emma Harper) submission, March 2017; Repco (Drysdale Motors - Noel Harper) submission, March 2017; Repco (Gejay Automotive - Gary Pinner) submission, March 2017; Repco (Highton Automotive Services - Mark Awramenko) submission, March 2017; Repco (Woodward's Automotive Repairs) submission, March 2017; Ultra Tune submission 1 and 3, February, April 2017; VACC submission 1, February 2017.

²⁷⁶ FCAI submission, November 2016, p. 26.

²⁷⁷ AADA submission, September 2017, p. 13; FCAI submission, November 2016, p. 28; FCAI submission, September 2017, p. 25.

²⁷⁸ AADA submission, November 2016, p. 32; FCAI submission, November 2016, p. 26.

²⁷⁹ MTASA submission, November 2016, p. 18.

²⁸⁰ GM Holden submission, November 2016, pp. 14–15.

- GM Holden, Hyundai, Mazda, Subaru and Toyota submitted they made a range of materials available to independent repairers.²⁸¹
- In relation to diagnostic tools, the FCAI submitted that many proprietary diagnostic tools are available, however, independent repairers can also use aftermarket diagnostic tools.²⁸²

In a further submission, the FCAI presented a document which responded to 45 complaints made by the AAAA about difficulties experienced by its independent repairer members in accessing technical information from a variety of car manufacturers.²⁸³ The FCAI maintained that in most instances the information was available to independent repairers, in accordance with the Heads of Agreement (see 4.2.4, below). However, in a number of instances, such as those related to technical information deemed ‘security-related’ and technical service bulletins, some car manufacturers and the FCAI acknowledged they did not provide the information to independent repairers. In other instances, some car manufacturers stated that responding to inquiries for technical information through an email address, as well as providing that material on CDs or DVDs, was adequate.

As part of this study, the ACCC requested the FCAI respond to 22 specific examples of problems, relating to 19 different cars from 12 manufacturers, some stakeholders reported independent repairers had experienced in accessing technical information (or problems with accessing diagnostic or special tools).²⁸⁴ The FCAI was asked to indicate if information, data or the diagnostic tool could be accessed in Australia from the relevant car manufacturer, as well as how it could be accessed (and if it could not be accessed, why), and whether it could be accessed in the US or EU.²⁸⁵ Car manufacturers’ responses, collated by the FCAI,²⁸⁶ ranged from the specific to the general and can be summarised as:

- Two manufacturers (Holden and Volkswagen) said they made repair and servicing information and diagnostic software, including programming (digital) files, available on their technical websites to independent repairers, which is the same or mostly the same material they make available to dealers, and had done so for some time.²⁸⁷
- One manufacturer (Hyundai) said it had recently made repair and servicing information and other digital files available to independent repairers through their European technical website (since October 2016).²⁸⁸
- One manufacturer (Mazda) stated it had recently (since November 2016) made available to independent repairers, on a website, access to repair and service manuals.²⁸⁹
- One manufacturer (Kia) stated that it would make available to independent repairers a website giving access to technical information by the third quarter of 2017.²⁹⁰
- Four manufacturers (Audi, Honda, Ford and Subaru) refused to supply the information

²⁸¹ GM Holden submission, November 2017, pp. 1–3; Hyundai submission, pp. 1–5; Mazda submission, November 2016, p.5; Mazda submission, November 2017, pp. 1–2; Subaru submission, November 2016, p.5 (in relation to body repair manuals for collision repair); Toyota submission, November 2016, p.7; Toyota submission, November 2017, pp. 4, 6–9.

²⁸² FCAI submission, November 2016, p. 23.

²⁸³ FCAI letter and attachment to the ACCC, December 2016.

²⁸⁴ It was not possible to verify each of the 500 examples of problems accessing technical information submitted by stakeholders to test whether the information was available from manufacturers in Australia. However, 22 examples were selected and provided to FCAI for response based on common complaint types.

²⁸⁵ The letter to FCAI and examples provided to FCAI and the technical expert are available at www.accc.gov.au/newcars.

²⁸⁶ FCAI submission, May 2017.

²⁸⁷ FCAI submission, May 2017, Attachment 2; FCAI submission, May 2017, Attachment 9; GM Holden submission, November 2016, p. 15.

²⁸⁸ FCAI submission, May 2017, Attachment 4, since October 2016. Hyundai confirmed to the ACCC that this information became available to Australian independent repairers in October 2016.

²⁸⁹ FCAI submission, May 2017, Attachment 3, since November 2016.

²⁹⁰ FCAI submission, May 2017, Attachment 8, due in the third quarter of 2017.

requested in the examples provided by the ACCC on security-related grounds, or on the basis of claimed exemptions in the FCAI Code (see below).²⁹¹

- Three manufacturers (Nissan, Chery and Mitsubishi) stated that the technical information could be obtained by sending an email to a specified address or contacting a dealer.²⁹²
- One manufacturer (Holden) stated that proprietary diagnostic tools could be obtained from a dealer.²⁹³
- Four manufacturers (Ford, Nissan, Honda and Subaru), stated that proprietary diagnostic tools were not made available outside their respective dealer networks.²⁹⁴

These responses from the car manufacturers clearly indicate that access to the technical information required to remedy the 22 examples provided to the FCAI was not uniformly available from the car manufacturers. The ACCC notes that, in addition to these responses, Toyota stated that it has made available to independent repairers, on a website for a number of years, access to repair and service manuals.²⁹⁵ Hyundai and Mazda submitted that they each make their proprietary diagnostic tool available to independent repairers through their dealer network.²⁹⁶

Further, the ACCC notes that no car manufacturer who refused to provide access to the requested information or proprietary diagnostic tool explained whether the same or equivalent technical information or diagnostic tool could be accessed in other jurisdictions and the reasons for the difference in treatment, which was requested by the ACCC. The FCAI did not clarify why some manufacturers offered the required technical information and diagnostic tools, while others did not.

The ACCC made an additional information request to several car manufacturers requesting an outline of the information they provide on their Australian technical websites.²⁹⁷ This is incorporated into Table 4.1, above. The ACCC also asked these car manufacturers to outline why they provided some information in other jurisdictions that was not made available in Australia. GM Holden outlined that security codes are available for purchase in the EU and the US with strict controls and governance.²⁹⁸ Hyundai submitted that its Australian technical website was the same as used in the EU and the same information was available, however, its US website was different and provided access to key codes, ECU software and technical service bulletins for cars manufactured in and imported specifically for the US market.²⁹⁹ Mazda submitted that security information (key code and immobiliser coding) was made available in the US, but not in the EU.³⁰⁰ Toyota submitted its technical website was made for the Australian market and it was not aware of the extent of technical information made available to independent repairers in the EU or the US.³⁰¹

²⁹¹ FCAI submission, May 2017, Attachments 1, 10, 11, 13, 16.

²⁹² FCAI submission, May 2017, Attachments 5, 6, 7.

²⁹³ FCAI submission, May 2017, Attachment 2.

²⁹⁴ FCAI submission, May 2017, Attachments 5, 10, 13 and 16.

²⁹⁵ Toyota submission, November 2016, p. 7.

²⁹⁶ Hyundai submission, November 2017, p. 3; Mazda submission, November 2016, p. 3.

²⁹⁷ GM Holden submission, November 2017; Hyundai submission, November 2017; Mazda submission, November 2017; Toyota submission, November 2017.

²⁹⁸ GM Holden submission, November 2017, p. 3.

²⁹⁹ Hyundai submission, November 2017, p. 4.

³⁰⁰ Mazda submission, November 2017, p. 2.

³⁰¹ Toyota submission, November 2017, p. 9.

4.2.3. Independent repairers' reported response: unofficial sources are unreliable or transitory

Several stakeholders from the independent sector acknowledged that independent repairers can periodically obtain technical information from sources other than manufacturers, including from commercial publishers of technical information and internet forums, as well as personal relationships with dealers. However, they suggested the information could be incomplete and transitory. Commercial publishers of technical information have stated they had difficulty obtaining comprehensive technical information from manufacturers in Australia, or licencing such material.³⁰² The ACCC is also aware that Autologic, an aftermarket diagnostic tool manufacturer, has been able to obtain licences for certain car brands in other jurisdictions, but these arrangements do not extend to Australia.³⁰³

Independent repairers and others also noted obtaining information from informal unverified sources, such as internet forums or through personal relationships with a dealer, were time consuming and potentially unreliable.³⁰⁴ The AAA submitted that independent repairers should not have to rely on the goodwill of a friendly dealer or scroll through internet forums to diagnose and repair cars.³⁰⁵ The AAAA submitted that independent repairers do not want to source information from dealers, and respect that dealers' service departments are not comfortable 'playing the role as the de facto "front door" for the car makers' digital service and repair information'.³⁰⁶

Some independent repairers reported they had tried to access car manufacturers' technical websites based in the EU or the US. In many instances they were prevented from doing so when entering the car's vehicle identification number, or using an Australian address or credit card number.³⁰⁷ In one instance, an independent repairer submitted his paid access to Volvo's European website was suspended after seeking assistance from Volvo Australia.³⁰⁸ MTANSW submitted that while repairers can often gain access to car manufacturer's technical websites in other jurisdictions, the information is usually specific to those other regions and not Australia.³⁰⁹ Mitsubishi confirmed that the online technical information it provides in the EU and US is not relevant in Australia as the information is for left-hand drive markets.³¹⁰

In relation to diagnostic tools, some independent repairers reported that the generic diagnostic tool could not perform the same functions as the proprietary diagnostic tool.³¹¹ An aftermarket diagnostic tool manufacturer submitted that its product may not be able to fill the void when it comes to programming and updates for new cars, as to do so requires a connection to the car manufacturer's data servers.³¹²

³⁰² Anonymous business 1 submission, pp. 1–2; Autodata Australia submission, November 2017, pp. 1–2; VACC submission 2, April 2017, pp. 3–4.

³⁰³ Autologic, [Autologic Enters Into Licensing Agreement With Volvo For Diagnostic Data](#), 1 December 2016.

³⁰⁴ GPC Asia Pacific submission, November 2016, p. 4; Repco (Auto Care Ocean Grove - Emma Harper) submission, March 2017, p. 2; Repco (Drsydale Motors - Noel Harper) submission, March 2017, p.1; VACC submission, November 2016, p. 13.

³⁰⁵ AAA submission, September 2017, p. 9.

³⁰⁶ AAAA submission, September 2017, p. 11.

³⁰⁷ AAAA submission, November 2016, p. 53; Repco (Woodward's Auto Repairs - Alan Woodward) supplementary submission, March 2017, p. 1.

³⁰⁸ Wayne Horton (Euroworld) submission, February 2017, p. 1.

³⁰⁹ MTANSW submission, November 2016, p. 6.

³¹⁰ FCAI supplementary submission, May 2017, Attachment 6.

³¹¹ AAAA submission, November 2016, pp. 39 and 55; MTAA submission, November 2016, p. 44.

³¹² Anonymous business 1, November 2016, p. 1.

4.2.4. Stakeholders agree that environmental, safety and security-related technical information should be subject to safeguards

The National Motor Vehicle Theft Reduction Council (NMVTRC) submitted that vehicle security information, related to keys and immobiliser systems, should be protected,³¹³ and Holden was also concerned that some technical information it made available could be misused.³¹⁴ This concern was echoed by Hyundai.³¹⁵

The FCAI submitted that it is of the view certain information should not be generally available, such as security and safety information, consistent with its interpretation of the Heads of Agreement, as well as information embedded in a car's operational system, as making it available will lead to 'increased risk' and the potential unregulated modification of cars with subsequent safety and security impacts on the public.³¹⁶ The FCAI considered it would be 'reckless' to share environmental, safety and security-related technical information without first addressing the need for appropriate arrangements to ensure its integrity.³¹⁷

Submissions from the independent sector agreed that environmental, safety and security-related technical information should be safeguarded.³¹⁸ However, they submitted that there are other options available to allay concerns about the misuse of such technical information, rather than prohibiting all access by independent repairers, and that restricting access may cause unsafe situations to arise. Further, stakeholders from the independent sector submitted that definitions around what constitutes environmental, safety and security-related information should be established by an independent body (such as a government agency) and based on definitions used in international markets.³¹⁹

The MTAA suggested an accreditation process be established to access technical information deemed to be environmental, safety and security-related,³²⁰ and that any Australian process for accessing environmental, safety and security-related technical information should be easier to use than the equivalent EU or US processes.³²¹ Hyundai and Toyota also supported an accreditation and authorisation process to ameliorate the risks associated with sharing security-related technical information, with Fennessy's submitting that a licensing regime would be more appropriate.³²²

The AAA submitted that car manufacturers' concerns about protecting security-related information and intellectual property appears to be manageable in other countries, but that such information should only be released using a secure data release framework.³²³ The AAAA submitted similarly, suggesting that the risk could be managed by improving traceability and by vetting users of the information, as had been done overseas.³²⁴ Processes alternative to a denial of access used in other jurisdictions, are discussed below.

³¹³ NMVTRC submission, November 2016, pp. 2–3.

³¹⁴ GM Holden submission, November 2016, p. 16; GM Holden submission, November 2017.

³¹⁵ Hyundai submission, November 2017, p. 2.

³¹⁶ FCAI submission, September 2017, p. 27, 31.

³¹⁷ FCAI submission, September 2017, p. 26.

³¹⁸ AAA submission, September 2017, p. 9; AAAA submission, September 2017, pp. 10–12; MTAA submission, September 2017, pp. 16–18.

³¹⁹ AAAA submission, September 2017, pp. 10–11; MTAA submission, September 2017, pp. 16–18.

³²⁰ MTAA submission, September 2017, pp. 16–18; MTAA submission, October 2017, p. 2.

³²¹ MTAA submission, September 2017, p. 17.

³²² Fennessy's submission, September 2017, pp. 3–4; Hyundai submission, November 2017, p. 2; Toyota submission, September 2017, p. 3.

³²³ AAA submission, September 2017, p. 9.

³²⁴ AAAA submission, September 2017, pp. 10–11.

4.2.5. Mixed views on the effect and operation of the Heads of Agreement

Several stakeholders submitted that the Heads of Agreement has had little, or no, effect on access to technical information.³²⁵ The FCAI submitted the Heads of Agreement was in the early stages of implementation, and that the amount of information being made available to independent repairers continues to increase.³²⁶ The AADA submitted the Heads of Agreement had put in place an opportunity for independent repairers to access information and data.³²⁷ Holden and the MTAA perceived it had increased access to varying degrees.³²⁸

Purpose of the Heads of Agreement

The Heads of Agreement was intended to provide a pathway for independent repairers to access technical information from car manufacturers. The Heads of Agreement states that its aim is for the signatory parties to 'endeavour to work collaboratively to ensure there continues to be a fair and reasonable competitive market within the vehicle service and repair industry'.³²⁹

The Heads of Agreement outlines the principles agreed to by industry associations in relation to the sharing of technical information, which includes:

...The repairer should be able to access all information required for the diagnosis, body repair, servicing, inspection, periodic monitoring, and reinitialising of the vehicle, in line with the service and repair information manufacturers provide their authorised dealers and repairers.

That motor vehicle component manufacturers and Original Equipment Manufacturers [OEMs] have a right to protect intellectual property and should be able to obtain a return on product development and capital investment in unique or proprietary technologies...

...Service and repair information will be made available on commercially fair and reasonable terms...

...The automotive industry, as a whole, is committed to improve accessibility to service and repair information for the benefit of Australian consumers; acknowledges the nation's ongoing reliance on road-based transportation and mobility systems; and recognises the inability of any one part of the sector alone to meet consumer demand for such services in current market conditions.

The aftermarket component and repair industries acknowledge the importance of obtaining and using the service and repair information that is provided by OEM's to ensure that repairs are carried out correctly to assure the safety of consumers and will advocate and encourage the use of the information consistent with OEM specifications...³³⁰

³²⁵ AAA submission, November 2016, p. 35; AAAA submission, November 2016, p. 69; AAAA submission 1, February 2017, p. 4; Anonymous business 1 submission, November 2016, p. 2; Autopolis submission, November 2016, p. 5; Bapcor submission, November 2016, p. 17; GPC Asia Pacific submission, November 2016, p. 3; Repco (Auto Care Ocean Grove - Emma Harper) submission, March 2017, p. 3; Repco (Drysdale Motors - Noel Harper) submission, March 2017, p. 2; Repco (Highton Automotive Services - Mark Awramenko) submission, March 2017, p. 3; Repco (J&F Motors - Steven Grocl) submission, March 2017, p. 4; Repco (Woodward's Auto Repairs - Alan Woodward) submission, March 2017, p. 3.

³²⁶ FCAI submission, September 2017, p. 24, 30.

³²⁷ AADA submission, November 2016, p. 35.

³²⁸ GM Holden submission, November 2016, p. 16; MTAA submission, November 2016, p. 34.

³²⁹ AAA, AAAA, AADA, FCAI, MTAA/AMIF, [Agreement on access to service and repair information for motor vehicles](#), December 2014, p. 3.

³³⁰ AAA, AAAA, AADA, FCAI, MTAA/AMIF, [Agreement on access to service and repair information for motor vehicles](#), December 2014, pp. 4–5, clauses 1, 4, 5, 8, 10 and 11.

Stakeholders' views on the effect of the Heads of Agreement on accessing technical information

The ACCC has received complaints from stakeholders about the effectiveness of the Heads of Agreement and voluntary codes of practice before the commencement of this study. It also received a number of submissions on this issue.

The AAA submitted that the Heads of Agreement has not been able to resolve disagreements between the signatory parties and has not produced measurable outcomes for independent repairers and consumers.³³¹ The AAA stated they were not aware of any examples where the agreement had a direct effect on access to technical information, and that it had not resolved disagreements about access to technical information.³³²

The AAAA submitted that the Heads of Agreement has failed as, in particular, the FCAI's subsidiary code does not comply with the Heads of Agreement; further there is no measurement or monitoring of compliance with the Heads of Agreement, there is no dispute resolution mechanism or steering committee infrastructure, no ability to resolve issues in real time and no government oversight of the process.³³³ GPC Asia Pacific submitted the Heads of Agreement is not functioning to ensure independent repairers can access technical information.³³⁴ A number of smaller independent repairers were of the view that the Heads of Agreement had made it harder for them to obtain technical information from both official and informal channels.³³⁵

The VACC submitted that while a number of car manufacturers in Australia provide access to technical information, certain types of information continue to be restricted—such as technical service bulletins and software updates, but that overall the Heads of Agreement had 'marginally' improved access.³³⁶ The MTAA initially submitted the Heads of Agreement should be enhanced,³³⁷ and that many types of technical information were not addressed in the Heads of Agreement.³³⁸ However, subsequently, the MTAA submitted that it supported a mandatory code to replace the Heads of Agreement.³³⁹

The AADA and the FCAI submitted that there had been very low take up rates for technical information provided by car manufacturers under the Heads of Agreement.³⁴⁰ The FCAI stated that there have been no substantive allegations of systemic activity by the FCAI's members to deny access and the isolated examples of problems raised under the Heads of Agreement process had been resolved.³⁴¹ The AADA submitted that there is no evidence or substantiated claims that independent repairers cannot access the technical information required under the Heads of Agreement,³⁴² and that automotive chains actively advertise about their expertise.³⁴³ The MTASA also submitted that there is no evidence of a need for further action beyond the Heads of Agreement.³⁴⁴

³³¹ AAA submission, November 2016, pp. 7, 32, 33.

³³² AAA submission, November 2017, p. 9.

³³³ AAAA submission, November 2016, p. 69.

³³⁴ GPC Asia Pacific submission, November 2016, p. 6.

³³⁵ Repco (J&F Motors - Steve Grocl) submission, March 2017, p. 4.

³³⁶ VACC submission, November 2016, pp. 13–14.

³³⁷ MTAA submission, November 2016, p. 48.

³³⁸ MTAA submission, April 2017, p. 4.

³³⁹ MTAA submission, September 2017, pp. 16–18.

³⁴⁰ AADA submission, November 2016, p. 35; FCAI submission, November 2016, p. 29; FCAI submission, September 2017, pp. 24–25.

³⁴¹ FCAI submission, November 2016, p. 29.

³⁴² AADA submission, November 2016, p. 35.

³⁴³ AADA submission, November 2017, p. 12.

³⁴⁴ MTASA submission, November 2016, p. 5.

Holden and Mazda submitted the Heads of Agreement has assisted consumers and independent repairers with accessing technical information.³⁴⁵ Mazda, Toyota and Subaru each submitted they comply with the Heads of Agreement or the FCAI Code.³⁴⁶ Hyundai submitted it is committed to its responsibilities under the Heads of Agreement.³⁴⁷

The FCAI submitted that the portal it maintains on its website—with links to the technical websites and email addresses of some car manufacturers—is not the sole source of technical information in Australia.³⁴⁸ The AAAA submitted that, as part of a meeting of the Steering Committee under the Heads of Agreement, the FCAI informed signatory industry associations that the website links would enable subscription to car manufacturers' technical information.³⁴⁹

An outline of the ACCC's review of links to car manufacturers' technical websites from the FCAI's website and the changing availability of technical information over the course of this study is further discussed in section 4.5.

Stakeholders' concerns about the operation of the Heads of Agreement

Some stakeholders suggested that the way the exclusions and the dispute resolution and governance mechanisms operate under the Heads of Agreement are unclear and that the lack of a formalised and binding dispute resolution mechanism impedes the resolution of disputes. It was also submitted that many terms within the Heads of Agreement are not defined.

Exemptions

Evidence from stakeholders suggested there is a lack of clarity among the five signatory industry associations as to how the Heads of Agreement should operate, and how the exemptions and dispute resolution mechanisms under the agreement should work. In relation to exemptions, it is unclear what types of technical information these apply to—the FCAI submitted that technical service bulletins are exempt from the agreement—and it appears to be for the signatory industry association to decide what is exempted based on their own voluntary code of practice.³⁵⁰ The FCAI submitted that all parties to the Heads of Agreement had agreed to the exemptions in the Heads of Agreement.³⁵¹ The AAAA submitted that it did not agree to any exemptions to the principle in the Heads of Agreement that information made available to dealers should also be made available to independent repairers, particularly in relation to technical service bulletins.³⁵²

The VACC submitted that generally most participants only provide certain types of technical information and excluded access to technical service bulletins or software updates, and that this has been a grey area in the Heads of Agreement.³⁵³ The VACC suggested that principle 4 of the Heads of Agreement, relating to the information an independent repairer should be able to access from a car manufacturer, may permit this practice.³⁵⁴

The FCAI submitted that information and data sharing should not contravene intellectual

³⁴⁵ GM Holden submission, November 2016, p. 16; Mazda submission, November 2016, p. 5.

³⁴⁶ Mazda submission, September 2017, p. 4; Toyota submission, November 2016, p. 7; Toyota submission, September 2017, p. 3; Toyota submission, November 2017, p. 2; Subaru submission, November 2016, p. 5.

³⁴⁷ Hyundai submission, November 2017, p. 2.

³⁴⁸ FCAI submission, November 2016, p. 28.

³⁴⁹ AAAA submission 1, February 2017, p. 8.

³⁵⁰ FCAI submission, November 2016, p. 27.

³⁵¹ FCAI submission, November 2016, p. 29.

³⁵² AAAA submission, November 2017, p. 9.

³⁵³ VACC submission, November 2016, p. 13.

³⁵⁴ VACC submission, November 2016, p. 14.

property rights.³⁵⁵ The AAAA submitted that the sharing of information should not contravene the intellectual property rights of car manufacturers and that this is protected in information and data sharing arrangements in other jurisdictions.³⁵⁶ The AAAA also submitted that certain security-related and other information may need additional protections when being shared; however, this issue has been resolved in the US through the secure data release model (SDRM),³⁵⁷ a process through which independent repairers can undergo vetting and obtain a licence to access security-related and other information held by car manufacturers.

Dispute resolution mechanisms, monitoring and feedback

Stakeholders have also raised concerns about dispute resolution and monitoring under the Heads of Agreement. The 2015 Senate report on the Future of Australia's Automotive Industry noted industry concerns about the effectiveness of this voluntary instrument and concerns that continuous monitoring of access to information and data is needed.³⁵⁸

The AAA submitted that disputes under the Heads of Agreement are difficult to resolve and are characterised by claims and counterclaims and it cannot readily resolve disagreements.³⁵⁹ The AAAA submitted that compliance with the Heads of Agreement is not monitored or measured; there is no steering committee infrastructure, no mechanism to resolve problems in real time and no government oversight.³⁶⁰ The AAAA also submitted there is no mechanism for independent repairers to provide feedback to car manufacturers about the content and value of their technical websites.³⁶¹ In addition, the ACCC understands that the FCAI offered to the AAAA a dedicated officer to assist in resolving disputes related to accessing technical information under the Heads of Agreement.³⁶² The FCAI also submitted that open and robust feedback and regular periodic meetings of the signatories would improve the operation of the Heads of Agreement.³⁶³

Stakeholders' concerns about the operation of the FCAI Code

As outlined above, each signatory industry association developed separate enabling documents—known as codes of practice—to give effect to the Heads of Agreement and to place voluntary obligations on their own members. The FCAI Code is the sole instrument creating a process directly outlining how independent repairers can access technical information from car manufacturers.

The AAAA submitted that the FCAI Code does not comply with the Heads of Agreement.³⁶⁴ The AAAA submitted that the FCAI Code is non-compliant as it: makes participation by the FCAI's members in the FCAI Code voluntary, the FCAI has used its own definitions for a number of concepts in the Heads of Agreement (e.g. the meaning of 'commercially reasonable prices' and 'repair information') and introduces a dispute resolution mechanism that does not appear capable of obtaining commercially viable outcomes for complainants in a reasonable amount of time.³⁶⁵ The AAAA is also concerned that the FCAI Code may limit the scope and coverage of the voluntary obligations to a greater extent than under the Heads of Agreement. The FCAI submitted that only two independent repairers had lodged a

³⁵⁵ FCAI submission, November 2016, p. 27; FCAI submission, September 2017, p. 27.

³⁵⁶ AAAA submission, November 2016, p. 63.

³⁵⁷ AAAA submission, November 2016, p. 63.

³⁵⁸ Australian Senate Economic References Committee, [Future of Australia's automotive industry: Driving jobs and investment](#), December 2015.

³⁵⁹ AAA submission, November 2016, p. 32.

³⁶⁰ AAAA submission, November 2016, p. 69; AAAA submission 1, February 2017, p. 6.

³⁶¹ AAAA submission, November 2016, p. 70.

³⁶² FCAI submission, September 2017, p. 25.

³⁶³ FCAI submission, November 2017, p. 6.

³⁶⁴ AAAA submission, November 2016, p. 69.

³⁶⁵ AAAA submission 1, February 2017, p. 5.

complaint with it under the FCAI Code about an inability to access technical information.³⁶⁶

The ACCC notes that the application of the principles of the Heads of Agreement and the provisions of the FCAI Code appear to be inconsistent. As outlined above, in response to a request from the ACCC providing specific examples of information independent repairers had reported as inaccessible from car manufacturers, Ford stated it was not required to make available the technical information requested by the ACCC because of the operation of the FCAI Code.³⁶⁷ However, Ford appeared to make this information available in other jurisdictions, and other car manufacturers in Australia appeared to make similar information available consistent with the Heads of Agreement. Ford did not give a reason for the difference in approach.

4.3. Claims about impacts on competition and consumers

Several stakeholders submitted that barriers to accessing technical information are having the following impacts:³⁶⁸

- a reduction in competition in car repair and servicing markets because independent repairers cannot compete with authorised dealers and preferred repairer networks on an even playing field
- a reduction in competition in the car repair and servicing markets because commercial publishers of technical information and aftermarket diagnostic tool manufacturers cannot obtain technical information to develop products to compete with car manufacturers or to facilitate access to car manufacturers' technical information by independent repairers
- additional costs (time and monetary) being incurred by independent repairers, including from absorbing the labour and other costs of searching for information
- a loss of customers from independent repairers, with flow on effects to the wider independent sector
- reduced service quality.

Stakeholders also submitted that impacts on competition may lead to consumer detriment, such as higher prices, decreased road safety, and inconvenience where a car cannot be serviced or repaired by the consumer's preferred mechanic.³⁶⁹ However, both the AADA and the FCAI submitted that if independent repairers cannot compete with dealers, it is for reasons other than access to technical information.³⁷⁰

4.3.1. Impacts on independent repairers

The AAAA is an industry association representing independent manufacturers, distributors, wholesalers, importers and retailers of automotive parts and accessories, tools and equipment, as well as providers of vehicle service, repair and modification services in Australia. In a survey of its members, respondents stated they generally found the information they needed from an industry contact, a dealer, trial and error or the internet.³⁷¹ Respondents to the AAAA survey estimated that problems accessing technical information resulted in an additional 24 hours of labour per week per workshop, which was generally not

³⁶⁶ FCAI submission, November 2016, p. 26.

³⁶⁷ FCAI submission, May 2017, Attachments 11 and 13.

³⁶⁸ For example: AAA submission, November 2016, pp. 12, 27; Bapcor submission, November 2016, p. 16; Bapcor submission, March 2017; KTAS submission 1, March 2017, p. 4; MTAA submission, April 2017, pp. 3–4.

³⁶⁹ For example: AAA submission, November 2016, p. 27; AAAA submission, November 2016, pp. 49–50; AAAA submission, December 2016, p. 30; GPC Asia Pacific submission, November 2016, p. 4.

³⁷⁰ AADA submission, November 2016, p. 35; FCAI submission, November 2016, p. 29.

³⁷¹ AAAA submission, December 2016, p. 24.

passed on to the customer, and that this led to lower profit margins.³⁷²

The AAAA submitted that up to 11 per cent of cars are affected by problems with accessing technical information and that the problem, and its impact, is getting worse.³⁷³ The AAAA's members reported that a workshop experiences issues relating to lack of access to technical information at least six times a week and that 23 per cent of the cars experiencing problems were reported as being within their new car warranty period.³⁷⁴

The AAAA also submitted that problems accessing technical information act as a barrier to entry into the sector.³⁷⁵ The AAA submitted that if car manufacturers restrict access to technical information independent repairers may be unable to repair and service new cars, putting their viability at risk.³⁷⁶ The MTAA submitted that in a survey of independent repairers conducted by the VACC, over 57 per cent of respondents had experienced significant or moderate disruption to their business from the process of trying to access technical information.³⁷⁷ Ammstar Motors submitted that that if it cannot access technical information in Australia, it accesses it from off-shore; however, this can be costly in terms of time.³⁷⁸ The MTAA claimed this is adding costs, reducing service levels and causing consumer detriment, while causing independent repairers to lose customers.³⁷⁹

The ACCC Consumer Survey found that 14 per cent of new car buyers elected to have their car serviced by an independent repairer, and ten per cent had their cars repaired by an independent repairer.³⁸⁰ Of those that used an independent repairer to repair their car, about one-third of respondents reported that their mechanic indicated they had problems with accessing technical information to repair the car.³⁸¹ A smaller proportion of respondents (five per cent) who had their car serviced by an independent repairer reported that their mechanic indicated experiencing similar problems.³⁸²

Some independent repairers submitted they were concerned that when they were unable to obtain technical information from a car manufacturer, and were required to tell a customer to take their car to a dealer, they would lose future business as customers would no longer have confidence in them to repair or service their car.³⁸³ Where a lack of access to technical information prevented the car from being repaired or serviced, respondents to the AAAA survey stated they would return the car to the customer in most cases (66 per cent), but in many cases they would have the car towed to a dealer to complete the repair (29 per cent).³⁸⁴ Independent repairers submitted that they often absorbed the costs of taking a car to a dealer for fear of harming the reputation of their workshops.³⁸⁵

GPC Asia Pacific submitted that independent repairers using its Repco branding had reported a lack of access to technical information impacted them by increasing costs and

³⁷² AAAA submission, November 2016, p. 12.

³⁷³ AAAA submission 1, February 2017, p. 4.

³⁷⁴ AAAA submission, November 2016, pp. 61–62.

³⁷⁵ AAAA submission, November 2016, p. 63.

³⁷⁶ AAA submission, November 2016, p. 27.

³⁷⁷ MTAA submission, April 2017, p.3.

³⁷⁸ Ammstar Motors submission, September 2017, p. 8.

³⁷⁹ MTAA submission, April 2017, pp.3–4.

³⁸⁰ ACCC Consumer Survey, p. iv.

³⁸¹ The ACCC Consumer Survey notes that the base size (n=30) is small for this measure, which may impact the ability to detect significant differences or to make comparisons across groups (p.66).

³⁸² ACCC Consumer Survey notes that the base size (n=167) is small for this measure, which may impact the ability to detect significant differences or to make comparisons across groups (p. 53).

³⁸³ Bapcor submission, March 2017; KTAS submission 1, March 2017, p. 4.

³⁸⁴ AAAA submission, December 2016, p. 25.

³⁸⁵ KTAS submission 2, March 2017, p. 2; KTAS site visit.

had prevented them from serving customers.³⁸⁶ Bapcor submitted that if information and data are not shared, the independent repairer network will be ‘destroyed’ over time.³⁸⁷ Autopolis submitted that ordinarily car manufacturers should support independent repairers and accept that dealers cannot service the whole market; however, this consideration is subsumed by the need to increase revenues.³⁸⁸

Think Software submitted that poor information sharing by car manufacturers has safety impacts on auto wreckers.³⁸⁹ Think Software stated that it can be unclear what types of new metals are used in cars, and when high heat is applied, it may change the composition of the metal, rendering it dangerous.³⁹⁰

Box 4.3 outlines some issues independent repairers may experience when they cannot access technical information or appropriate diagnostic tools.

Box 4.3: Case study – insufficient substitutes for the supply of technical information or proprietary diagnostic tools from the car manufacturer

In February 2017, ACCC staff visited an independent repairer based in Melbourne to better understand how access to technical information problems affects small businesses.

Workshop technicians discussed with the ACCC how several new aftermarket diagnostic tools were unable to communicate with different new cars. The workshop had attempted to purchase car manufacturers’ diagnostic tools; however, neither the relevant car manufacturers nor their dealers were willing to sell it to them. The workshop owner explained that where the aftermarket diagnostic tools were unable to communicate with a new car, it must be taken to a dealer to be able to complete the service or repair, or the customer informed that the workshop cannot service or repair the car.

The workshop had attempted other methods to update their equipment to communicate with new cars. The workshop purchased a pass-through device overseas. It is an industry standard device which plugs into the car and can connect to a car manufacturer’s web server to download reprogramming files, reinitialisation codes and software updates (see Box 4.2). However, car manufacturers in Australia have refused to provide the workshop with access to these materials. While these materials are available in the US and EU, the workshop reported it was geo-blocked from accessing them from the car manufacturers’ foreign web servers.

4.3.2. Impacts on commercial publishers of technical information and aftermarket diagnostic tool manufacturers

The VACC, who operate the VACC OurAuto Tech Centre—a subscription based commercial publisher of technical information, submitted that third party aggregators play an important role in the market, particularly as Australia is a complex market for cars, with comparatively low car sales spread over ‘50 different manufacturers and 365 different models.’³⁹¹ The FCAI submitted that competition between commercial publishers of technical information means the quality of information being provided is of a high standard.³⁹²

However, a commercial publisher of technical information and an aftermarket diagnostic tool manufacturer stated that they have difficulties obtaining technical information from car manufacturers and this can affect the services they provide to customers. The VACC

³⁸⁶ GPC Asia Pacific submission, November 2016, p. 7.

³⁸⁷ Bapcor submission, November 2016, p. 16.

³⁸⁸ Autopolis submission, November 2016, p. 5.

³⁸⁹ Think Software Consulting submission, November 2016, p. 4.

³⁹⁰ Think Software Consulting submission, November 2016, p. 4.

³⁹¹ VACC submission 2, April 2017, p. 4.

³⁹² FCAI submission, November 2016, p. 28.

submitted that it would be 'ideal' to source information from manufacturers in Australia that is pertinent to the local market. However, it is able to source information that it is confident about from third party providers of content based abroad.³⁹³ An aftermarket diagnostic tool manufacturer submitted that the complexity of new cars requires programming files to be validated and securely delivered, which can only be done with the assistance of the car manufacturer.³⁹⁴ Box 4.4 details the experience of VACC's OurAuto Tech Centre in attempting to obtain technical information for Australian models of cars from overseas.

Box 4.4: Case study – the international search for technical information about local cars

In March 2017, the ACCC conducted a site visit to the VACC's Tech Centre in Melbourne. The Tech Centre is akin to a library, staffed by trained automotive technicians instead of librarians, who find technical information for their members. The Tech Centre contains a vast volume of paper-based manuals and relevant technical publications that have been obtained from various sources, such as car manufacturers in Australia and abroad.

The VACC outlined that, with the move to digitisation, many of the workshop manuals and wiring diagrams they needed were becoming more difficult to obtain. In this environment, VACC has engaged with providers of online content from abroad, some of which have arrangements with car manufacturers' distributors in other jurisdictions, to try to obtain the materials they need to keep their resources current. Additional value is added by work from the Tech Centre's staff to adapt the material to local conditions to ensure they can provide relevant and standardised local content.

The VACC reported that due to encountering restrictions from car manufacturers on the release of technical service bulletins, software updates and service campaign information, they are unable to provide this type of information via their technical offering.

The AAAA, Autodata Australia, Boyce Automotive Data, and the MTAA submitted that due to the impacts on commercial publishers and aftermarket diagnostic tool manufacturers, and as the products of these intermediaries reduce barriers for independent repairers to access technical information, that they too should be included in any reforms to the sharing of technical information.³⁹⁵ At present, they are not provided with access rights under the Heads of Agreement. The AAAA, Autodata Australia and the MTAA also noted that intermediaries have rights of access to technical information under legislative arrangements in the EU and the US.³⁹⁶

Holden submitted that there may be issues around accuracy and relevance to Australian specifications of some material provided by commercial publishers of technical information.³⁹⁷ Holden also stated that, from its perspective, the level of internal support needed to facilitate contracts/licences, physical data transfers, interpretation and issues with data completeness and accuracy in relation to commercial publishers of technical information were challenges.³⁹⁸

³⁹³ VACC submission 2, April 2017, p. 4.

³⁹⁴ Anonymous business 1, November 2016, p. 1.

³⁹⁵ AAAA submission, September 2017, pp. 12–13; Autodata Australia submission, September 2017, pp. 1–2; Boyce Automotive Data, September 2017, p. 1; MTAA submission, September 2017, pp. 16, 18.

³⁹⁶ AAAA submission, September 2017, pp. 12–13; Autodata Australia submission, September 2017, pp. 1–2; MTAA submission, September 2017, pp. 16, 18.

³⁹⁷ GM Holden submission, November 2016, p. 15.

³⁹⁸ GM Holden submission, November 2016, p. 15.

4.3.3. Impacts on consumers

The AAA, the AAAA and GPC Asia Pacific submitted that barriers to accessing technical information by independent repairers restrict choice and increase costs for consumers.³⁹⁹ A survey by the AAA, and the ACCC Consumer Survey, found that cost was an important factor for consumers in deciding where to service their car.⁴⁰⁰ The AAA submitted that there must be strong competition in the aftermarket sector to ensure the costs of owning and maintaining a car are as low as possible, and that increased costs may put pressure on household budgets.⁴⁰¹ The AAA also submitted that consumers suffer detriment when roadside assistance providers are unable to access timely technical information, which may require a car to be towed, resulting in monetary and time costs to consumers.⁴⁰²

The AAAA submitted that, in addition to potentially increased labour costs, the average consumer pays a further \$46 in non-labour costs where independent repairers do not have access to the relevant technical information from a car manufacturer.⁴⁰³ The Auto Care Association submitted that right to repair laws in the US, which they claim increased the sharing of technical information, have saved US consumers \$US26 billion per year.⁴⁰⁴

KTAS submitted that a lack of access to technical information has led to additional labour hours in identifying problems and finding a solution, which increases the time a consumer does not have access to their car.⁴⁰⁵ A number of small businesses made similar claims.⁴⁰⁶ GPC Asia Pacific submitted that consumer detriment is experienced when extra time, cost or inconvenience arises due to an independent repairer being unable to commence or complete a repair where it cannot access relevant technical information.⁴⁰⁷ This is generally realised when a car must be taken to a dealer, who has access to the required technical information.⁴⁰⁸

The MTAA submitted that consumers can be disadvantaged if they cannot use an independent repairer in their area due to the repairer's problems accessing technical information.⁴⁰⁹ GPC Asia Pacific and the MTAA submitted this may particularly disadvantage regional and rural consumers who may need to drive long distances to the nearest dealer.⁴¹⁰ The MTASA submitted independent repairers' access to technical information does not restrict or influence purchasing decisions in the new car market; however, regional and rural consumers may face additional difficulties in accessing servicing and warranty services.⁴¹¹

The AAAA submitted that withholding technical information impacts household expenditure, safety on the roads, and the Australian economy.⁴¹² The AAA stated that any increase in repair and service costs due to a reduction in competition (such as through limiting access to

³⁹⁹ AAA submission, November 2016, p. 27; AAAA submission, November 2016, p. 50; GPC Asia Pacific submission, November 2016, p. 4.

⁴⁰⁰ AAA submission, November 2016, p. 27; ACCC Consumer Survey, pp. 49, 52.

⁴⁰¹ AAA submission, September 2017, p. 4, 9.

⁴⁰² AAA submission, October 2017, p. 1.

⁴⁰³ AAAA submission, December 2016, p. 30.

⁴⁰⁴ Auto Care Association submission, November 2016, p. 2.

⁴⁰⁵ KTAS submission 1, March 2017, p. 4.

⁴⁰⁶ Ammstar Motors submission, September 2017, p. 8; Repco (Auto Care Ocean Grove - Emma Harper) submission, March 2017; Repco (Drysdale Motors - Noel Harper) submission; March 2017; Repco (Highton Automotive Services - Mark Awramenko) submission, March 2017; Repco (J&F Motors - Steven Grocl) submission, March 2017; Repco (Woodward's Auto Repairs - Alan Woodward) submission, March 2017; Ultra Tune submissions 1 and 2, February and March 2017.

⁴⁰⁷ GPC Asia Pacific submission, November 2016, p. 5.

⁴⁰⁸ GPC Asia Pacific submission, November 2016, p. 5.

⁴⁰⁹ MTAA submission, November 2016, p. 31.

⁴¹⁰ GPC Asia Pacific submission, November 2016, p. 4; MTAA submission, November 2016, p. 31.

⁴¹¹ MTASA submission, November 2016, pp. 18–19.

⁴¹² AAAA submission, November 2016, p. 49.

technical information) can have serious implications for affordability and safety.⁴¹³ GPC Asia Pacific submitted that safety may be compromised if costs for consumers become too high.⁴¹⁴ Bapcor submitted that problems accessing technical information from car manufacturers would also restrict consumers from undertaking routine maintenance activities.⁴¹⁵ The Insurance Council of Australia (ICA) submitted the availability of information and data is critical for consumer safety.⁴¹⁶ Andrew Taylor submitted that access to software updates is required to ensure new cars operate reliably and cost effectively.⁴¹⁷ CHOICE submitted that these issues will have significant impact on consumers' rights and also the costs of car repair and maintenance.⁴¹⁸ The NTC submitted that some of these competitive and consumer risks, particularly related to safety, may increase as automated vehicles become more prevalent.⁴¹⁹ Box 4.5 outlines some of the unexpected costs consumers and independent repairers may face when an independent repairer is unable to access technical information.

Box 4.5: Case study – unexpected costs for independent repairers and consumers

In March 2017, the ACCC visited a KTAS workshop in Melbourne to better understand the flow on effects to consumers when independent repairers cannot access technical information.

Workshop technicians demonstrated the problems they had with accessing technical information for a Volkswagen Polo. They understood it had a problem with the alternator. The aftermarket diagnostic tool could report the actual output voltage of the alternator. However, the technician needed to compare the actual voltage to the manufacturer's specifications to determine if the alternator was not performing as it should be. This information could not be obtained from Volkswagen. The workshop reported it had three options: replace the alternator and compare before and after values, keep searching for the information from other sources, or take the car to a dealer. Each of these options involved additional costs for KTAS and would create unexpected costs for the consumer— inconvenience, delays in getting their car back, additional expenses in taking the car to a dealer, or potential expenses in paying for a new part, even where some expenses may be absorbed by KTAS.

In another example, a Nissan X-Trail was experiencing unknown problems. Generally, for safety, the battery and other systems would be disconnected. In this model car, however, disconnecting these components would have unintended consequences. As the car uses a 'fly-by-wire' acceleration system, rather than a cable connected pedal, the disconnection of these systems could cause the car to forget the pedal settings, requiring recalibration.

The workshop's technicians demonstrated to the ACCC that the recalibration information could not be obtained from the car manufacturer's website, rather, the process for completing the recalibration could be found on the website of an aftermarket manufacturer of engine and fuel system cleaning products.

As this example shows, as cars become more technologically advanced, basic procedures like disconnecting the battery and other systems may cause unknown consequences. Information about those consequences and their remedies are often controlled by car manufacturers. Not being aware of these consequences may create unexpected costs for consumers when they complete basic maintenance on their own cars, as well as additional costs for independent repairers.

⁴¹³ AAA submission, November 2016, pp. 6, 27.

⁴¹⁴ GPC Asia Pacific submission, November 2016, p. 4.

⁴¹⁵ Bapcor submission, November 2016, p. 15.

⁴¹⁶ ICA submission, November 2016, p. 2.

⁴¹⁷ Andrew Taylor submission, August 2017, p. 1.

⁴¹⁸ CHOICE submission, November 2016, p. 10.

⁴¹⁹ NTC submission. September 2017, pp. 1, 3.

In relation to electronic logbooks, the AAA submitted that access is crucial for warranty requirements.⁴²⁰ The AAAA submitted that consumers rely on logbooks to prove a car has been serviced in accordance with the manufacturer's specifications. The AAAA, the MTAA and Car Solutions submitted that an incomplete logbook may affect the car's resale value.⁴²¹ The VACC submitted that electronic logbooks may be stored on a car's key, requiring the use of a specialised car manufacturer's tool, which may limit access to the information by independent repairers.⁴²² Bapcor submitted only dealers have access to electronic logbooks, and that independent repairers should have equal access.⁴²³ The MTAQ submitted storage and ownership of logbook data was likely to become an issue needing future resolution.⁴²⁴

The FCAI submitted the current voluntary system protects consumers and intellectual property owners by preventing the sharing of certain information.⁴²⁵ The AADA and the FCAI submitted that consumers can access electronic logbooks through a personalised online account or a dealer.⁴²⁶ A number of manufacturers stated they do not use,⁴²⁷ or do not intend to introduce, electronic logbooks as a primary record of the car's maintenance history.⁴²⁸

4.4. Analysis: Access to technical information from car manufacturers varies in consistency

As part of this study, the ACCC sought to inform itself about reported problems with accessing technical information in several ways. As illustrated above, many aspects of the submissions engaged in claim and counter claim. The ACCC conducted a number of site visits to better understand the way independent repairers and commercial publishers of technical information experience problems with accessing technical information and its impact on them. The ACCC also requested stakeholders provide specific examples of problems with accessing technical information, and asked the FCAI to comment on 22 examples based on common complaint types (outlined at 4.2.2, above). Further, the ACCC held consultations with and reviewed the technical websites of several car manufacturers.

In addition to these activities, the ACCC engaged Cartech, a technical expert, to review 12 of the examples provided to the FCAI. The ACCC also asked the technical expert to comment on the responses collated by the FCAI from car manufacturers to the examples. The findings of the technical expert are provided in Box 4.6.

Box 4.6: Case study – the findings of the technical expert engaged by the ACCC

Cartech, a technical expert in the automotive sector, simulated what a competent and well-resourced independent repairer with appropriate qualifications might experience in trying to access technical information or proprietary diagnostic tools from car manufacturers. It did this by trying to access information on 12 particular issues in specific car makes/models that were reported to the ACCC by independent repairers as being subject to restricted technical information access.

⁴²⁰ AAA submission, November 2016, p. 29.

⁴²¹ AAAA submission, November 2016, p. 42; Car Solutions submission, November 2016, p. 4; MTAA submission, November 2016, p. 30.

⁴²² VACC submission, November 2016, p. 12.

⁴²³ Bapcor submission, November 2016, p. 15.

⁴²⁴ MTAQ submission, November 2016, p. 4.

⁴²⁵ FCAI submission, November 2016, pp. 29–30.

⁴²⁶ AADA submission, November 2016, p. 32; FCAI submission, November 2016, p. 24.

⁴²⁷ Mazda submission, November 2016, p. 5; Subaru submission, November 2016, p. 4.

⁴²⁸ GM Holden submission, November 2016, p. 13–14.

Cartech produced two reports: one without receiving car manufacturers' responses to the reported issues,⁴²⁹ and one after being able to consider car manufacturers' responses.⁴³⁰

Cartech's initial report (3 July 2017)—without car manufacturers' responses

Cartech found in its initial report that in only two of the 12 examples could it obtain the technical information required without significant delay. In relation to the remaining 10 examples Cartech found:

- In seven examples, it was unable to access sufficient technical information from the manufacturer through its official channels (e.g., dealers' parts or servicing departments, websites or email addresses) to facilitate a repair of the reported issue in the car.
- In two examples, it was able to access sufficient information from the manufacturer's official channels to facilitate a repair of the reported issue in the car; however, there was a delay of over two weeks in gaining access.
- In a further example, Cartech could have gained access to sufficient information if it had purchased a proprietary diagnostic tool (which was not cost effective for the purposes of the investigation).

Cartech's supplementary report (12 July 2017)—with car manufacturers' responses

In the supplementary report, Cartech considered manufacturers' responses as to the availability of the technical information required to repair the 12 examples, and whether it would facilitate repair of the car. Cartech found:

- In three examples, Cartech confirmed the manufacturers' responses as facilitating access to technical information without significant delay. In one example, Cartech changed its initial assessment that it was unable to gain timely access to the required information as the assessment was undertaken of a different model variant (which then changed the availability of information).
- In four examples, Cartech followed the same or a similar process as outlined by the manufacturer; however, access to the technical information was subject to delays (ranging from five days to more than two weeks). Cartech noted that in one example the manufacturer's source, as provided in the FCAI supplementary submission, was not broadly advertised (on the FCAI website or otherwise).
- In two examples, Cartech confirmed the manufacturers' responses that the requested technical information was not available on security-related grounds, confirming Cartech's findings in its first report.
- In three examples, Cartech followed the same or a similar process as outlined by the relevant manufacturer in an attempt to obtain the information, but was unable to access it (for example, the relevant manufacturer had claimed the technical information or diagnostic tool could be obtained from a dealer; however, the dealers contacted did not supply the requested material to Cartech).

*Car manufacturers' further responses*⁴³¹

Five manufacturers responded to the findings of the Cartech reports in the FCAI's September 2017 submission. Some confirmed Cartech's findings, in particular in relation to difficulties with the usability of websites (e.g. requirements to use Internet Explorer 11) and restricted access to security-related technical information. One stated that a dealer would be able to assist, despite Cartech's finding that a dealer had reported it was unable to help. A further car manufacturer stated that access to a workshop manual was unnecessary to complete the repair.

⁴²⁹ See Cartech report, 3 July 2017 for further information about Cartech's qualifications and details of the report.

⁴³⁰ Cartech supplementary report, 12 July 2017.

⁴³¹ FCAI submission, September 2017, pp. 28–30.

4.4.1. Independent repairers continue to experience problems accessing technical information for new cars

The ACCC is satisfied, on the basis of the evidence provided by stakeholders and the findings of the technical expert that problems continue to be experienced by independent repairers in accessing technical information, and to some degree proprietary diagnostic tools, for the repair and servicing of new cars. This is impacting competition in the affected aftermarket, particularly as the nature of technical information to repair and service new cars is rapidly changing, with access to digital files and codes, and appropriate diagnostic tools, now often necessary to complete a car repair or service.

As observed, car manufacturers generally own and control the technical information required to repair and service new cars, and in many instances are the only source of the technical information. As outlined in Chapter 2, car manufacturers have an incentive to steer consumers to their authorised dealers and preferred repairer networks, which generate revenues from the sale of aftermarket services, including repairs, servicing and parts.

Based on submissions to this study, and the ACCC's own research, it appears that few car manufacturers provide the access required to repair or service new cars in the same or similar form as that provided to their authorised dealers and preferred repairers. The ACCC notes that the responses of manufacturers to example problems provided by the ACCC also indicate that the supply of technical information from manufacturers to independent repairers is inconsistent. Cartech's findings add further weight that, in many instances, independent repairers are denied access or experience delays in trying to access technical information from car manufacturers. In some instances, no other appropriate sources of technical information exist.

Some car manufacturers have submitted that uptake rates by independent repairers to their Australian technical information sharing websites, where available, are low.⁴³² The ACCC understands that, in general, the trend is that subscription rates are increasing,⁴³³ and that car manufacturers' technical information sharing websites in other jurisdictions have higher levels of subscriptions.

As noted earlier, in some cases, the relevant technical information may be available through a car manufacturer's website or email address, but may not be well publicised. In other cases it may be that some independent repairers are unaware of how to access or use these materials—and industry associations such as the AAAA and the MTAA have a role to play in educating independent repairers about accessing technical information and working with car manufacturers to publicise the process to access these materials. In some instances it has also been stated by car manufacturers that their websites can only be accessed with certain older web browsers, such as Internet Explorer 11,⁴³⁴ which may be out of date and no longer supported by newer computers. This may potentially frustrate attempts at accessing information. The ACCC is also aware of an instance where a car manufacturer's policy was to sell proprietary diagnostic tools to independent repairers; however, this was not effectively implemented at the dealer level. The manufacturer has since reiterated its policy to dealers.

The evidence before the ACCC supports that, in the Australian context, most car manufacturers have generally not made the same or similar technical information available to independent repairers, with real-time digital access, as they have to dealers.

Intermediaries, such as commercial publishers of technical information, have also indicated they cannot obtain all the technical information demanded by independent repairers. Further, access to the proprietary diagnostic tools needed to repair and service cars is inconsistent,

⁴³² FCAI submission, September 2017, pp. 24–25.

⁴³³ See, for example, Toyota submission, November 2017, p. 12.

⁴³⁴ FCAI submission, September 2017, pp. 28–30.

and aftermarket diagnostic tool manufacturers encounter barriers in accessing technical information from car manufacturers to develop their own products. The ACCC understands that products produced by intermediaries can reduce the barriers independent repairers experience in accessing technical information. In addition, informal sources of technical information, such as car manufacturers' overseas websites, internet forums or personal relationships are unreliable, incomplete, often not applicable to Australian models, or offer no security of ongoing supply. Accordingly, other sources of technical information may be partly available; however, most are at present poor substitutes for supply of comprehensive technical information from the car manufacturer.

The ACCC acknowledges that car manufacturers, the NMVTRC, the FCAI and the AADA have legitimate concerns about the sharing of some environmental, safety and security-related technical information and the risk this may pose for car thefts. These concerns are shared by other stakeholders in the industry. However, the ACCC considers that these risks can be mitigated by establishing appropriate systems and frameworks to enable the sharing of environmental, safety and security-related technical information, such as by vetting end users, and by tracing the use of this information — as has occurred in other jurisdictions.

The FCAI submitted that certain information should not be generally available as it can enable or assist in enabling the theft of cars.⁴³⁵ To better understand the nature of the security concerns raised by the FCAI, the ACCC requested the FCAI provide information about whether technical information sharing in other jurisdictions has increased rates of car thefts. The FCAI submitted that, according to the United Kingdom's (UK) Royal Automotive Club (RAC), car thefts increased in the UK by 30 per cent between 2013 and 2016.⁴³⁶ The FCAI also quoted material from the RAC stating that car thieves are becoming better equipped with technology capable of defeating car manufacturers' anti-theft systems.⁴³⁷ However, while the RAC noted that car thieves are becoming better equipped with technology, no link was drawn with the EU's technical information sharing regime.⁴³⁸ The ACCC is also aware that in other EU member-states car thefts have decreased. For example, car thefts in the Netherlands continued a decade long downward trend and declined by nine percent between 2015 and 2016.⁴³⁹ Further, in Sweden, reported car thefts have declined by 62 per cent from 2007 to 2016, with a decrease of 7.8 per cent between 2015 and 2016.⁴⁴⁰ It is noted that this material does not confirm whether the sharing of technical information in other jurisdictions has affected the rates of car thefts, particularly as the causes of car thefts are complex.⁴⁴¹

In relation to Australia, data collected by the NMVTRC indicates that, in relation to electronic theft/hacking, where a car is stolen using solely software and specialised hardware without the car's key, there 'remains no evidence of electronic devices being used to defeat the security systems of vehicles stolen for short term purposes'.⁴⁴² The main way new cars are stolen is through the theft of the car key from the owner,⁴⁴³ as other methods have been made more difficult through the use of immobilisers and anti-theft systems. The ACCC understands that because electronic theft generally requires access to a car's on-board

⁴³⁵ FCAI submission, September 2017, p. 27.

⁴³⁶ FCAI submission, November 2017, p. 1; the UK is subject to the EU technical information sharing scheme.

⁴³⁷ FCAI submission, November 2017, p. 2.

⁴³⁸ Royal Automotive Club (UK), [Sharp rise in car theft as thieves bypass modern security systems](#), 27 September 2017, accessed 10 November 2017.

⁴³⁹ Stichting Aanpak Voertuigcriminaliteit (Dutch Foundation For Tackling Vehicle Crime), [Statistiek Voertuigdiefstal 2016 \(Vehicle Theft Statistics 2016\)](#), January 2017, p. 4, accessed 9 November 2017; the Netherlands is subject to the EU technical information sharing scheme.

⁴⁴⁰ Brottsförebyggande rådet (Swedish National Council for Crime Prevention), Car crimes statistics, 2017, accessed 9 November 2017; Sweden is subject to the EU technical information sharing scheme.

⁴⁴¹ Dr Sharon Casey, Research Report: The Motivations of Motor Vehicle Theft Offenders, June 2007, as published by the National Comprehensive Auto-theft Research System Project (Australia), accessed 9 November 2017.

⁴⁴² NMVTRC, [Strategic Plan 2017–2019](#), pp. 9, 13.

⁴⁴³ NMVTRC, [Strategic Plan 2017–2019](#), p. 9.

diagnostic systems for a period of time, and specialised equipment and software, environmental, safety and security-related technical information has a minimal role to play in short-term or opportunistic car thefts, which make up the majority of car theft in Australia.⁴⁴⁴ The ACCC also understands that the overwhelming majority of profit-motivated car thefts are of cars older than five years old, generally facilitated by access to the key and transponder (often following a burglary).⁴⁴⁵ Accordingly, the implementation of appropriate systems and a framework to enable the sharing of environmental, safety and security-related technical information, as has occurred in other jurisdictions, is likely to ameliorate the risks that such technical information could be used to assist in the theft of new cars.

The ACCC notes that environmental, safety and security-related technical information is regularly shared in other jurisdictions with vetted independent repairers (see 4.7, below), subject to safeguards, and stakeholders provided limited information to confirm whether the sharing of technical information in other jurisdictions has affected the rates of car thefts.

Findings on problems with accessing technical information for new cars

- The nature of technical information to repair and service new cars is rapidly changing, with digital files and codes and appropriate diagnostic tools now often necessary to complete a car repair or service.
- Independent repairers have continuing problems accessing technical information for new cars. Few car manufacturers provide equivalent access to the technical information provided to their authorised dealers and preferred repairer networks, and many provide very little or no information at all.
- Independent repairers may be able to obtain technical information from sources other than the car manufacturer in Australia; however, the information is commonly incomplete, not applicable to Australian models, or offers no security of ongoing supply.
- Car manufacturers have legitimate concerns about the sharing of some environmental, safety and security-related technical information to repair and service new cars. Regardless, in other jurisdictions this information and data is securely shared with vetted independent repairers, and subject to safeguards to enable it to be shared. Stakeholders provided limited information about whether the sharing of technical information in other jurisdictions has affected the rates of car thefts.

4.5. Analysis: The Heads of Agreement is not a suitable instrument to facilitate the sharing of technical information

The existing Heads of Agreement and codes of practice governing technical information sharing are, in general, ineffective in providing access that is consistent with their stated aims and principles. Key industry associations, including the FCAI, voluntarily agreed to these aims and principles to ensure there continues to be 'a fair and reasonable competitive market within the car service and repair industry.'⁴⁴⁶ Accordingly, the aims and principles of the Heads of Agreement are an appropriate standard against which to assess the progress of technical information sharing in the new car retailing industry.

The principles of the Heads of Agreement place voluntary obligations on car manufacturers to, in general, share with independent repairers, on commercially fair and reasonable terms, the same technical information to repair and service cars they provide to their dealers. The key principle underpinning this provides:

⁴⁴⁴ NMVTRC, [Strategic Plan 2017–2019](#), pp. 8, 12.

⁴⁴⁵ NMVTRC, [Strategic Plan 2017–2019](#), pp. 12–13.

⁴⁴⁶ AAA, AAAA, AADA, FCAI, MTAA/AMIF, [Agreement on access to service and repair Information for motor vehicles](#), December 2014, p. 3.

*The repairer should be able to access all information required for the diagnosis, body repair, servicing, inspection, periodic monitoring, and reinitialising of the vehicle, in line with the service and repair information manufacturers provide their authorised dealers and repairers*⁴⁴⁷

The Heads of Agreement also acknowledges the importance of ongoing training and of using information from the car manufacturer to ensure repairs are carried out correctly to assure the safety of consumers. The ACCC understands that no car manufacturer in Australia supplies independent repairers with access to training. However, Hyundai submitted it would consider offering training on commercially fair and reasonable terms if approached by independent repairers.⁴⁴⁸ The AAAA, MTAA and other organisations have a role to play in facilitating access to training for independent repairers, including that supplied by car manufacturers, if offered. As stated above, these organisations also have a role to play in educating independent repairers about accessing technical information and working with car manufacturers to publicise the process to access these materials. The requirement to use manufacturers' specifications is also reflected in state and territory laws for certifying cars for registration and their roadworthiness. Further, the ACL contains protections for consumers who use independent repairers, including in relation to the quality of work performed, misleading or deceptive conduct, misrepresentations, and unconscionable conduct.

The FCAI website contains links to car manufacturers' technical websites.⁴⁴⁹ This was an initiative launched by the FCAI following the Heads of Agreement. The links to these technical websites indicate which car manufacturers are providing access to at least some types of technical information required by independent repairers. However, an ACCC review of the FCAI website found that not all car manufacturers are listed.⁴⁵⁰ Further, a link on the FCAI's website does not, in and of itself, necessarily indicate the manufacturer is behaving consistently with the principles of the Heads of Agreement, or providing the same access to technical information as they do to their authorised dealers or preferred repairer networks.

The ACCC notes that:

- 18 car manufacturers have a presence on the FCAI's website, in the form of a website or email address, with an additional three linking to a generic customer service form.
- Those car manufacturers who had a website listed, rather than an email address, represented about 75 per cent of the market share for new passenger cars and about 55 per cent of market share for new sports utility vehicles.⁴⁵¹ This suggested that some types of technical information for new cars are available to independent repairers through a car manufacturer's technical website.
- However, for almost 25 per cent of new passenger cars and over 45 per cent of new SUVs, including for many of the most popular brands, website based access was not available.⁴⁵²
- Further, submissions and ACCC commissioned research indicated that many of these websites may not provide access to digital files and codes, such as reinitialisation codes and software updates, needed to repair and service new cars (see 4.2, above).⁴⁵³
- A website presence is preferable for independent repairers as it is less likely to cause

⁴⁴⁷ AAA, AAAA, AADA, FCAI, MTAA/AMIF, [Agreement on access to service and repair Information for motor vehicles](#), December 2014, p. 4, clause 4.

⁴⁴⁸ See also GM Holden submission, October 2017, p. 3; Hyundai submission, November 2017, p. 5.

⁴⁴⁹ FCAI, [FCAI member service and repair information](#), accessed 17 July 2017.

⁴⁵⁰ See Appendix F.

⁴⁵¹ Tables detailing this information can be found in Appendix F.

⁴⁵² Tables detailing this information can be found in Appendix F.

⁴⁵³ See, for instance: AAAA submission 1, February 2017, Appendix 8; Cartech report, 3 July 2017; Cartech supplementary report, 12 July 2017; KTAS submission, April 2017; MTAA submission, April 2017, pp. 5–6.

delays in accessing technical information and is generally consistent with the online access provided to authorised dealers and preferred repairer networks.⁴⁵⁴

The ACCC also notes that a number of car manufacturers, over the course of this study, have made some additional technical information available online. For instance, Mazda has made its repair manuals available online since November 2016.⁴⁵⁵ Kia indicated in correspondence to the ACCC it would make a website available in the third quarter of 2017.⁴⁵⁶ Hyundai now makes available access by Australian independent repairers to its European website.⁴⁵⁷ Hyundai stated that this website has been accessible by Australian independent repairers since October 2016.

While these recent developments are welcome, it is evident that most car manufacturers in Australia are still not fully sharing technical information consistently with the aims and principles of the Heads of Agreement, despite it being in operation since late 2014. As outlined above, only Holden, and to a large extent Hyundai, Mazda, Toyota and Volkswagen, appear to be providing access to a significant proportion of the types of technical information independent repairers need to repair and service new cars. Access to digital files and codes remains a particular problem.

4.5.1. The Heads of Agreement has several shortcomings

The ACCC considers that the Heads of Agreement has several shortcomings which hinder its aims and principles from being achieved in a fair and efficient way:

- It is not directly binding on car manufacturers and other industry participants (e.g. coverage of car manufacturers is established through FCAI membership and voluntary agreement to be bound by the FCAI Code and not all car manufacturers are members).
- Definitions and exclusions are open to wide interpretation by the signatory parties (e.g. the FCAI Code defines repair and service information to exclude a number of types of information and data).
- Dispute resolution under the Heads of Agreement cannot be accessed directly by an independent repairer.
- There is no binding dispute resolution mechanism between the signatory industry associations, for instance compulsory and binding mediation and arbitration by an independent third party.
- There is no clear process or secretariat for the governance of the Heads of Agreement.
- Treatment of environmental, safety and security-related information, which could be addressed in a less restrictive way, such as by establishing a process to release the information and data securely to vetted end users.
- There is no enforcement mechanism, such as penalties, to require signatory industry associations to behave consistently with the principles of the Heads of Agreement (and in turn to put pressure on their members through processes in their own codes of practice).
- Access for intermediaries was not contemplated, unlike in other jurisdictions.
- Further, the formalisation of the Heads of Agreement may have reduced the flow of information and data from car manufacturers to independent repairers.

⁴⁵⁴ For example: MTAA supplementary submission (April 2017), pp. 5–6; Cartech report, 3 July 2017, p. 69.

⁴⁵⁵ FCAI supplementary submission, May 2017, Attachment 3.

⁴⁵⁶ FCAI supplementary submission, May 2017, Attachment 8.

⁴⁵⁷ FCAI supplementary submission, May 2017, Attachment 4.

It is also unclear the extent to which the Heads of Agreement was intended to facilitate access to proprietary diagnostic tools, even though in many instances these are required to be able to use the technical information obtained from the car manufacturer. The FCAI submitted that:

Pursuant to the Code, each participating member agrees to make repair information available to independent repairers at commercially reasonable prices and provide access to special tools, such as diagnostic tools and equipment.⁴⁵⁸

However, the ACCC notes that notes that the FCAI Code,⁴⁵⁹ which was developed to enact the aims and principles of the Heads of Agreement on car manufacturers, treats diagnostic tools differently to technical information.

Taking into consideration all of the submissions and material provided by stakeholders, the technical expert's report and the ACCC's site visits, as well as consultations with car manufacturers, the ACCC has concluded that the net effect of the Heads of Agreement, across the industry, in improving access to technical information has been limited, and that the Heads of Agreement is ineffective in providing access that is consistent with its stated aims and principles.

Findings on the Heads of Agreement and codes of practice

- Key industry associations, including the FCAI, have voluntarily agreed to a set of aims and principles to ensure there is 'a fair and reasonable competitive market within the car repair and service industry.' The principles of the Heads of Agreement place voluntary obligations on car manufacturers to, in general, share with independent repairers the technical information they provide to their dealers, on 'commercially fair and reasonable' terms.
- Broadly, most car manufacturers in Australia are not fully sharing technical information consistently with the aims and principles of the Heads of Agreement.
- The Heads of Agreement has several shortcomings which hinder its aims and principles of improving access to technical information from being achieved in a fair and efficient way.
- The Heads of Agreement also acknowledges the importance of ongoing repairer training and statutory obligations on independent repairers to ensure repairs and servicing are carried out correctly to car manufacturers' specifications to assure the safety of consumers. The ACCC notes that the AAAA, the MTAA and other organisations have a role to play in facilitating access to training and technical information for independent repairers, including that supplied by car manufacturers if offered.
- The ACCC has concluded that the net effect of the Heads of Agreement, across the industry, in improving access to technical information for new cars has been limited, and that the Heads of Agreement is ineffective in providing access that is consistent with its stated aims and principles.

4.6. Analysis: Consumers benefit from competitive aftermarkets for the repair and servicing of new cars

The ACCC has sought to understand the impacts of restricted access to technical information on consumers and, in particular, whether it leads to higher prices for repairing and servicing new cars or has any other flow on effects.

⁴⁵⁸ FCAI submission, November 2016, p. 26.

⁴⁵⁹ FCAI, [The Voluntary Code of Practice for Access to Service and Repair Information for Motor Vehicles](#), February 2015.

As discussed in Chapter 2, competition between car manufacturers, through their authorised dealers, tends to focus on lowering new car prices to drive demand and capture aftermarket sales. This business model will only tend to be profitable overall if higher prices can be achieved in aftermarkets for the repair and servicing of new cars, including as a result of restricted competition. Car manufacturers therefore face incentives to deny or delay access to technical information by independent repairers to steer repair and service work to dealerships and preferred repairer networks. Box 4.7, below, provides the ACCC's view on the potential short and long term effects restricted access to technical information may have on competition in the aftermarket.

Box 4.7: Potential short and long term impacts on competition of independent repairers' restricted access to technical information

The ACCC has considered whether competition between car manufacturers in the sale of new cars may, in the longer run, undermine strategies that different manufacturers could adopt to restrict independent repairers' access to technical information. The ACCC has also considered whether competition will reduce the harm that consumers experience.

Consumer switching may act as a disincentive for car manufacturers to restrict independent repairers' access to technical information. This may occur if consumers become aware of increased costs in aftermarkets as a result of independent repairers' restricted access to technical information, and switch their future new car purchases to manufacturers which do not engage in this practice.

In the short term, such discipline is not likely to be effective as consumers who would like to switch to a manufacturer that does share technical information with independent repairers would experience high switching costs, particularly if they had recently bought a new car. New cars are expensive and it is costly, in this context, for consumers to avoid high prices in aftermarkets. In the longer term, however, consumers may become more aware of later aftermarket costs and purchase new cars which can be less expensively-serviced and repaired. Consumer research suggests that the discipline imposed by switching is relatively weak: the ACCC Consumer Survey found that consumers are far more aware of new car prices than those for repairs and servicing. For instance, the 18 per cent of respondents who considered the cost of spare parts when buying a new car reported that information about those costs were hard to find.⁴⁶⁰

A second consideration is whether, even in the absence of switching, competition for new car sales may reduce consumer detriment caused by car manufacturers not sharing technical information with independent repairers. To the extent that aftermarket prices are high, manufacturers may lower the upfront price of new cars or offer commitments regarding the longer term costs of car ownership (such as longer warranties or commitments on service pricing). The issue then becomes one of a consumer choosing a bundle involving the car and related services from a single supplier. The ACCC's view is that the competitive discipline imposed by independent repairers on competition in aftermarkets therefore remains valuable and of benefit to consumers. Otherwise consumers might be locked into a price structure favouring high prices for repairs and servicing. Consumers are likely to benefit when they can use a competitive aftermarket to observe the costs of repairs and servicing separately to a bundled purchase of the car and related post-sale services.

Stakeholders have provided quantitative estimates of some of the costs or impacts of restricted access to technical information on competition and consumers. In addition, the ACCC has received anecdotal evidence of consumers and independent repairers experiencing significant detriment in the form of increased costs and inconvenience due to these practices, including consumers not being able to use their preferred independent repairer. Regional and rural consumers face additional difficulties where local repairing and servicing providers are already limited.

⁴⁶⁰ ACCC Consumer Survey, May 2017, pp. 11, 13.

Evidence suggests awareness of the problem among consumers is probably low. The number of consumers who reported in the ACCC Consumer Survey that their independent repairer experienced problems with accessing technical information was limited; however, this may be a result of industry-wide practices where independent repairers do not explain to customers the problems they have experienced in accessing technical information. In general, the kinds of detriments experienced by consumers when they choose an independent repairer who cannot access the technical information needed include inconvenience and reduced choice. These are realised when the consumer must take the car to a dealer who has access to the technical information (and potentially incurs additional monetary costs by paying both the independent repairer and the dealer) or experiences delays in having their car repaired or serviced.

Findings on impacts on competition and consumers

- As discussed in Chapter 2, car manufacturers have an incentive to limit access by independent repairers to technical information to steer service work to authorised dealers and repair work to preferred repairer networks.
- This is impacting the ability of independent repairers to effectively and efficiently compete in the aftermarkets for the repair and servicing of new cars.
- It is also causing detriment to consumers in the form of increased costs, inconvenience and delays when having their new car repaired or serviced, and thereby reducing the choices available to consumers for the repairing and servicing of new cars.
- Consumer switching in the new car market is unlikely to provide strong competitive discipline on manufacturers and dealers in aftermarkets, and any benefit of competition in the sale of new cars to consumers does not offset the impact of less competitive aftermarkets. The ACCC's view is that consumers benefit from competitive aftermarkets for the repairing and servicing of new cars, and that consumers also benefit from having a choice of providers to repair and service new cars.

4.7. Analysis: Options to improve the sharing of technical information

There are a number of options that may improve the sharing of technical information. The ACCC is aware of mandatory approaches used in other jurisdictions to improve the sharing of technical information, discussed below. A brief review of options for sharing technical information in Australia is also provided.

4.7.1. International approaches to sharing technical information

The problems experienced in Australia are not unique. In response to similar problems in the EU and the US, authorities have taken regulatory action to encourage competition in markets for the repair and servicing of cars. Governments in Brazil, China, South Korea and South Africa have also recently considered or enacted regulation to mandate the sharing of technical information.⁴⁶¹ The AAA submitted that in other countries independent repairers do not have major issues with accessing technical information, and their relationship with car manufacturers appears to be constructive.⁴⁶² An outline of the EU and US models can be found in **Appendix G**.

Regulatory interventions in other jurisdictions have made technical information for repairing and servicing new cars more widely available. EU regulations requiring independent repairers to have 'easy, restriction-free and standardised access' to information and data to

⁴⁶¹ Mavis Cournane, 'Repair and Maintenance Information (RMI) legislation in China', Cognitran, 2016; AAAA supplementary submission 2, February 2017, p. 4; Competition Commission South Africa, [Automotive Advocacy and Code of Conduct](#), November 2017.

⁴⁶² AAA submission, September 2017, p. 9.

repair and service new cars have generally been successful in meeting those aims, according to a study commissioned by the European Commission.⁴⁶³ The US voluntary National Automotive Service Task Force (NASTF) model has recently been supplemented with state legislation and further voluntary national changes to improve access.⁴⁶⁴

The EU and the US models are specific to their regulatory environments and geographically distinct markets. However, both have several common features, which should be considered in the Australian context. Both require manufacturers, at a fair and reasonable price, to make available to independent repairers the same technical information they make available to their dealers. The EU and the US regulations also recognise the role of intermediaries, such as commercial publishers of technical information and aftermarket diagnostic tool manufacturers, in reducing barriers for independent repairers to access technical information. Both models achieve this by providing intermediaries with options to access the technical information necessary to develop their products, on commercially fair and reasonable terms. Further, the EU and the US have established accreditation and authorisation processes to ameliorate the perceived risks associated with sharing environmental, safety and security-related technical information. These operate by vetting end users of the technical information, and by tracing the use of that information. However, outright adoption of foreign technical information sharing models may not be appropriate.

4.7.2. Regulatory options for sharing technical information

A number of stakeholders supported, or supported in-principle, a mandatory scheme, including the AAA, the AAAA, Bapcor, the BCCM, GPC Asia Pacific, the MTAA, the MTAQ, the NRMA, NSW's OSBC, and WA's SBDC, with many stating a preference that industry be heavily involved in its development, or lead its development.⁴⁶⁵ Hyundai and Toyota submitted that they conditionally supported a mandatory scheme, subject to the introduction of an accreditation and authorisation process to check the identity and qualifications of end users, the parts they use and to check and trace their use of the technical information supplied.⁴⁶⁶ Insurance Australia Group Limited (IAG) submitted that access to technical information should take place through an open platform that allows fair competition between service providers, and that a proprietary model under the control of a single stakeholder would be detrimental to consumers and limit innovation and potential productivity gains.⁴⁶⁷

Most of the signatory industry associations to the Heads of Agreement do not believe the industry alone can resolve the issues associated with access to technical information, and are generally of the view that a voluntary solution is not suitable.⁴⁶⁸ However, the FCAI submitted that a mandatory scheme is unnecessary as the amount of information being made continues to increase, and because the 2012 CCAAC report did not find any systemic consumer detriment arising from a lack of independent repairers' access to technical information.⁴⁶⁹ The AADA and Fennessey's also did not support a mandatory scheme.⁴⁷⁰ The

⁴⁶³ European Commission, [Study on the operation of the system of access to vehicle repair and maintenance information](#), Directorate-General for Enterprise and Industry, October 2014.

⁴⁶⁴ *An Act Relative to Automotive Repair*, Mass Gen Laws, ch 93K (2013). (Mass Gen Laws, ch 93K); AAIA, CARE, Alliance and Global Automakers, [Memorandum of Understanding](#), 15 January 2014.

⁴⁶⁵ AAAA submission, November 2016, p. 69; GPC Asia Pacific submission, November 2016, p. 8; AAAA submission, September 2017, pp. 4, 11; MTAA submission, September 2017, p. 3; Toyota submission, September 2017, p. 3; AAA submission, September 2017, p. 9; Auto Care submission, September 2017, p. 1; Bapcor submission, September 2017, p. 1; BCCM submission, September 2017, p. 1; OSBC submission, September 2017, p. 3; SBDC submission, September 2017, p. 2; NRMA submission, September 2017, p. 2; Ammstar Motors submission, September 2017, p. 8; Lemon Vehicles in Aus submission, September 2017, p. 2; MTAQ supplementary submission, October 2017, p. 1; Ammstar Motors submission, September 2017, p. 8; Hyundai submission, November 2017, p. 2.

⁴⁶⁶ Toyota submission, September 2017, p. 3; Hyundai submission, November 2017, p. 2.

⁴⁶⁷ IAG submission, November 2016, p. 8.

⁴⁶⁸ AAA submission, September 2017, pp. 9–10; AAAA submission, September 2017, pp. 4, 11–12; MTAA submission, September 2017, p. 5, 16. Autologic submission, September 2017, p. 1;

⁴⁶⁹ FCAI submission, September 2017, p. 24.

⁴⁷⁰ AADA submission, September 2017, p. 17. Fennessey's submission, September 2017, p. 3–5.

ACCC notes that the 2012 CCAAC report found:

At present, there appears to be a relatively low level of detriment associated with the level of accessibility of repair information. Importantly, there does not appear to be any systemic evidence of consumer detriment at present.

However, the level and nature of consumer detriment could change if the accessibility of repair information at a reasonable cost and in a timely manner becomes a barrier to entry in the market for supply of automotive repair services.⁴⁷¹

As outlined above, following extensive investigation, research and consultation, the ACCC has found that in 2017 independent repairers have continuing problems accessing technical information for new cars. This is because few car manufacturers provide equivalent access to the technical information provided to their authorised dealers and preferred repairer networks, and some provide very little or no information at all. The ACCC has also found that this is impacting the ability of independent repairers to effectively and efficiently compete in the aftermarkets for the repair and servicing of new cars. This is causing detriment to consumers in the form of increased costs, inconvenience and delays when having their new car repaired or serviced, thereby reducing consumer choice. The FCAI also raised other concerns about a mandatory scheme, which are addressed elsewhere in this report.

Accordingly, the ACCC is of the view that there is merit in a mandatory scheme and that there are at least three potential regulatory options through which a technical information sharing scheme could be established to resolve the underlying problems with the Heads of Agreement. The options include:

- a change to the existing regulations applying to new cars supplied to the Australian market (e.g. the MVSA or ADRs)
- a mandatory industry code under the CCA
- new stand-alone legislation administered either by an Australian Government agency or jointly with the states and territories.

In addition, a number of stakeholders submitted that any regulatory option should be augmented and supported by an industry-funded body, potentially referred to in any resulting regulation.⁴⁷² Among other matters, this body would provide feedback to car manufacturers and assist independent repairers find information, with industry associations and other stakeholders, including relevant government agencies, participating.

A preliminary overview of these options, as well as additional features of any regulation as suggested by stakeholders, is provided in **Appendix H**. The ACCC has not sought to specify what particular form of regulation should be adopted. This will require careful consideration of the costs and benefits of alternative approaches and is beyond the scope of this study.

⁴⁷¹ CCAAC, [Sharing of repair information in the automotive industry: Final report](#), 27 November 2012, p. 21.

⁴⁷² AAAA submission, September 2017, p.12; BCCM submission, September 2017, p.1; MTAA submission, September 2017, p.18.

Findings on options to improve the sharing of technical information

- In foreign jurisdictions, regulatory interventions have made the technical information necessary for independent repairers to repair and service new cars more widely available.
- EU regulations requiring independent repairers to have 'easy, restriction-free and standardised access' to information and data to repair and service new cars have generally been successful in meeting those aims. In the US recent state legislation has stimulated further voluntary national changes to improve access.
- The EU and the US models are specific to their regulatory environments and geographically distinct markets. However, specific features of these models should be adopted in Australia. These include a process for vetting users who access environmental, safety and security-related information, and for tracing its use, as well as providing access to technical information by intermediaries to develop informational products and diagnostic tools. However, the outright replication of other models may not be appropriate.
- A number of regulatory options for sharing technical information are possible in Australia. The ACCC has not sought to specify what particular form of regulation should be adopted. This will require careful consideration of the costs and benefits of alternative approaches and is beyond the scope of this study.

4.8. Recommendations for change

Independent repairers continue to encounter problems accessing technical information, and at times proprietary diagnostic tools, from car manufacturers. These problems are becoming acute as access to digital files and codes, and diagnostic tools, is required to repair and service new cars. As observed, car manufacturers are generally the owners and only source of most types of technical information. They also have the incentive to steer consumers to authorised dealers and preferred repairer networks, which generate revenues from the sale of aftermarket services, including repairs, servicing and parts. This situation contributes to the outcome that few car manufacturers provide the kind of access required to repair or service new cars that would facilitate effective competition between affiliated entities and independent repairers. Taking into account the many reports of the impacts of this behaviour on independent repairers and consumers, the ACCC's view is that consumers benefit from competitive aftermarkets for the repair and servicing of new cars, and they also benefit from having a choice of providers to repair and service new cars.

While industry has made some attempts to improve the sharing of technical information with independent repairers, the Heads of Agreement has not been an effective instrument through which to do this. The Heads of Agreement has a number of shortcomings which do not address the incentives for car manufacturers to deny or delay access to technical information. The ACCC notes that while a number of car manufacturers have begun supplying technical information to independent repairers during the course of this market study, as the risk of regulatory intervention has increased, the underlying incentives for car manufacturers to deny or delay the supply of technical information remain. Without regulatory intervention there is a risk that car manufacturers will not supply (or for those that currently supply some information — continue to supply) independent repairers with the same technical information needed to repair and service new cars that they provide to their dealer and preferred repairer networks. Further, the Heads of Agreement has not been an appropriate instrument through which to address the sharing of environmental, safety and security-related technical information, nor for establishing a secure process to do so, in circumstances where that information is also made available to dealers or preferred repairer networks. These issues have arisen in overseas jurisdictions and regulatory interventions

have made technical information in those jurisdictions more widely available.

Accordingly, the ACCC recommends (Recommendation 4.1) that a mandatory scheme be introduced to facilitate the sharing of technical information by car manufacturers in Australia. This mandatory scheme should address the shortcomings of the Heads of Agreement and adopt features of regulatory interventions in other jurisdictions, such as a process for the secure and traceable release of environmental, safety and security-related technical information to vetted end users and access for intermediaries. The ACCC notes that several car manufacturers have established technical information sharing websites in Australia (however, as stated above, the content and usability of these websites vary). Where possible, any regulation should take into account the existing technologies and systems of these car manufacturers, as well as the potential for the car manufacturers who are not sharing technical information in Australia to leverage their existing EU or US-based platforms. The ACCC has not sought to specify what particular form of mandatory scheme should be adopted. This will require careful consideration of the costs and benefits of alternative approaches and is beyond the scope of this study.

Recommendations on access to technical information for new cars

Recommendation 4.1

A mandatory scheme should be introduced for car manufacturers to share technical information with independent repairers, on commercially fair and reasonable terms. The mandatory scheme should provide independent repairers with access to the same technical information which car manufacturers make available to their authorised dealers and preferred repairer networks, including environmental, safety and security-related information (if it is made available to dealers).

The mandatory scheme should place an obligation on car manufacturers and other industry participants to achieve the underlying aims and principles of the Heads of Agreement (including those in relation to training and reinforcing existing statutory obligations on independent repairers to ensure repairs and servicing are carried out correctly to car manufacturers' specifications to assure the safety of consumers).

The mandatory scheme should, subject to the type of regulation used, address the following operational matters:

Real time access

- Car manufacturers should make available to independent repairers, in real time, the same digital files and codes, such as software updates and reinitialisation codes, made available to dealers to repair or service new cars.

Coverage

- Obligations on sharing technical information should apply to all car manufacturers in Australia.
- Relevant intermediaries should have options to access technical information from car manufacturers on commercially fair and reasonable terms.

Definitions

- All relevant terms, conditions and exclusions should be defined in the regulation, for instance, defining diagnostic tools and their relevance to facilitating access to technical information, as well as defining environmental, safety and security-related information.

Dispute resolution

- Any dispute resolution processes should be timely and accessible by all relevant stakeholders.
- Any dispute resolution processes should be subject to compulsory mediation and binding arbitration by an independent external party.

Governance/consultation

- Key stakeholders should meet regularly to discuss the rapidly changing nature of repair and service information.

Security-related information and data

- Similar to the EU or US models, a process for the secure release of environmental, safety and security-related technical information should be established or authorised under the mandatory scheme.
- The mandatory scheme should also set out a process for vetting end users accessing environmental, safety and security-related technical information and for tracing the use of that information.

Enforcement

- If appropriate, options to enforce the terms of any regulation should be included (e.g. penalties).

5. Parts needed to repair and service new cars

Key points

- Parts to repair and service new cars are supplied by car manufacturers and dealers, authorised resellers (usually dealers) and other independent parts suppliers. Manufacturer-authorised branded parts can typically be accessed through authorised channels, as supply is generally very profitable.
- Access to certain kinds of parts is sometimes restricted on security or safety grounds, for example to reduce risk of theft, or to protect intellectual property. However manufacturers and dealers may have incentives to steer more service or repair work back to authorised suppliers by denying access to parts. This may reduce competition and raise prices.
- The ACCC has also considered claims of high pricing of parts supplied through authorised channels. Competition at both manufacturer and dealer levels leads to lower new car prices and higher prices for parts. Once a new car is purchased, consumers are encouraged and sometimes contractually required to source parts through the authorised channel. This pattern of pricing could result in some market distortions, although the ACCC did not receive evidence from stakeholders that it creates material consumer detriment across the pricing of new cars and parts considered together.

New cars may require repairs, and generally require regular servicing to maintain the efficient functioning of their electronic and mechanical parts. Repairs and servicing will at times involve replacing parts, under either a warranty or an insurance policy, or paid for directly by the consumer. Car parts include physical parts and accessories that are added to the interior or exterior of the car. Table 5.1 below lists common types of parts needed for servicing and repairs.

Table 5.1: Common types of car parts needed for servicing and repairs

Parts needed for servicing	Parts needed for repairs
Engine oil	Body parts (e.g. bumpers and fenders)
Brake pads	Headlamps and globes
Oil and air filters	Windscreens
Brake fluid	Branding nameplates
Engine coolant	Mirrors

The ACCC is aware of concerns relating to practices in the markets for spare parts which may raise competition issues or otherwise adversely affect consumers.

This chapter will:

- outline the different types of parts used to service and repair cars
- discuss issues relating to access to the parts for independent repairers
- discuss issues raised by stakeholders in relation to parts pricing.

5.1. Car parts needed for repair and service

Car parts for a particular car brand may be sourced from manufacturer-authorized suppliers, or other suppliers, and the issue of how parts are labelled or described is an ongoing source of contention within the industry. Stakeholder submissions indicated that there is no common agreement about the labelling of different kinds of parts – particularly about the use of the word ‘genuine’. Box 5.1 below describes the ACCC’s understanding of the different parts types, although other categorisations are possible.

Box 5.1: Types of car parts

Original equipment (OE)

Car manufacturer branded parts

OE car-manufacturer branded parts are the parts that are used by the car manufacturer in assembling the new car, and are generally made by the car manufacturer or by ‘Tier 1’ suppliers—companies that supply directly to the car manufacturer for installation in new cars in the car manufacturer’s brand.⁴⁷³ They are sold for the domestic Australian market and typically have the car manufacturer’s branding for the Australian market. These parts are generally only available to purchase through an authorised source, such as a dealer, and are commonly referred to as ‘genuine’ parts.

Parts described by manufacturers as ‘genuine’ are OE manufacturer parts supplied through manufacturer-authorized Australian distributors and sold by authorised dealers and resellers.⁴⁷⁴ Dealers will use these parts in servicing and repairing vehicles, and also sell parts at retail (directly to consumers) and wholesale (to other repairers).

Automotive component supplier branded parts

OE parts may also be automotive component supplier branded.⁴⁷⁵ Automotive component suppliers sell parts to car manufacturers for installation in new cars, and may also be active on the aftermarket in their own right, selling the same part in their own branding. This may occur for car parts that are not related to internal safety and security systems, such as headlamps. These products may be sold by independent suppliers. Car manufacturers and automotive component suppliers may have licensing arrangements about the selling of automotive component supplier branded car parts being limited for a period of time with preference given to the selling of the car manufacturer’s packaged spare part.

Parallel import—car manufacturer branded

Parallel import parts are OE car manufacturer branded parts that are sold through an authorised channel in a market other than Australia, and are subsequently imported by an entity other than the car manufacturer for sale in Australia. In many instances, these parts will be functionally the same as the original equipment car manufacturer branded parts for domestic sale in Australia. These products may be sold by independent suppliers.

Recycled/reconditioned/salvaged

Recycled, reconditioned or salvaged parts are parts that have been recovered from another car, which may have been declared a total economic loss and written off by an insurer.

Evidence from insurers and independent repairers suggests these parts are only used in non-safety or non-security critical applications, such as replacing the panels of older cars following a collision or internal trim components.

⁴⁷³ For example, Takata is a Japanese automotive parts company which makes car safety equipment, such as airbags. It is a Tier 1 supplier who supplies its products to a number of manufacturers including Toyota. When Toyota replacement parts are sold, they will be in Toyota’s branding, but the product inside will be manufactured by the Tier 1 supplier.

⁴⁷⁴ As the AAAA notes, ‘genuine’ can also mean ‘not fake’, and therefore applied to aftermarket parts as well. – AAAA submission, November 2016, p. 19.

⁴⁷⁵ For example, Hella is an automotive parts supplier based in Germany. It is an automotive component supplier of headlamps and lighting to manufacturers. Hella may sell headlamps to Ford, for instance, which would be sold by Ford dealers in Ford branding. The same headlamps may also be available on the market in Hella packaging and perform the same function and work the same way in the model of car that uses the headlamps.

Aftermarket

Aftermarket parts are developed and made by an entity other than the OE manufacturer or car manufacturer. They generally meet the car manufacturer's specifications, but may be designed for different price points to differentiate on quality.

For instance, an aftermarket parts company may make car radios or speakers designed for different car makes and models. The speakers may meet or exceed the specifications of the car manufacturer.

Counterfeit

Counterfeit or fake parts are parts of unknown origin which appear to bear the branding of the car manufacturer, the Tier 1 supplier or other aftermarket suppliers. They may look similar to the relevant car parts, but do not necessarily meet the car manufacturer's design specifications and may differ in terms of the strength and durability of the metal or alloy used or in some other property necessary for the reliability and usability of the part.

As discussed in Chapter 3, the ACL provides protections to consumers in their dealings with business and requires businesses to provide consumer guarantees for consumer goods and services they sell, including car parts for service or repair. Businesses that sell car parts to consumers must provide consumer guarantees that those parts match their description, are fit for purpose and are of acceptable quality.

The ACL also prohibits businesses from making certain false or misleading claims, including claims about the quality of goods or services, or otherwise engaging in misleading or deceptive conduct.

5.2. Access to parts needed to repair and service cars

A number of stakeholders indicated that some manufacturers limit access to specific car parts. For example, the MTAA submission indicated that some European manufacturers are restricting parts sales to independent repairers for 'security reasons', including locking sets and emergency keys, radio controls, electronic steering locks and electronic ignition switches. The ACCC understands that these security-related parts are generally lower-volume parts, and as such, are generally sold through authorised dealers or distributors.

Broader concerns about access to parts not related to car security were also raised:

- The AAAA submitted it had received complaints from independent repairers who were unable to access certain types of parts from dealers. It also provided a number of case studies reported by independent repairers where parts were available from dealers but the part would not work without corollary repair and service information, meaning that the part itself was useless.⁴⁷⁶
- Claims were made that non-price barriers were used to make it more difficult for independent repairers. This included imposing time barriers, such as failing to respond within a reasonable period of time to requests for parts, and selling oil blends and air conditioning refrigerants in sizes that are uneconomical for small and medium sized independent repairers.⁴⁷⁷

Some of these concerns also relate to limits on access to technical information needed for repair and service discussed in Chapter 4. As noted by the MTAA, restricted access to parts imposes limitations on the ability of independent repairers to repair and service cars.⁴⁷⁸

⁴⁷⁶ AAAA submission, November 2016, pp. 38–39. VACC also stated its members had difficulty in accessing and repairing security-related car components. VACC supplementary submission, February 2017, p. 5.

⁴⁷⁷ Bapcor submission, November 2016, p. 13.

⁴⁷⁸ MTAA submission, November 2016, p. 46.

5.2.1. Stakeholder views

Some manufacturers submitted that denying access to security-related parts to anyone outside the authorised network was necessary to safeguard cars from criminal attack and to reduce incidence of car thefts. However, the AAAA noted that some parts deemed by manufacturers to be 'security-related' in Australia (e.g. engine control units) that are denied to independent repairers are 'routinely bought, fitted and initialised' by independent repairers in North America and Europe.⁴⁷⁹

The FCAI's submission stated that no independent repairers have reported any issues with accessing appropriate parts. However, they noted that access to security-related parts 'may be subject to tighter controls.'⁴⁸⁰ Toyota and Holden indicated they were unaware of problems with access to parts, but the FCAI, Mazda and Toyota indicated there are issues related to counterfeit parts.⁴⁸¹ Stakeholders have also indicated that the practice of restricting access to parts appears to be limited to a small number of 'European' manufacturers.⁴⁸²

5.2.2. Reasons for limiting access to certain parts

The ACCC understands that OE manufacturer-branded parts are usually only made available through authorised sources (including dealers). The supply of parts is highly profitable to manufacturers, and the ACCC understands that manufacturers have strong incentives to increase, rather than restrict, parts sales. However, manufacturers may have an incentive to limit the sales of certain parts in order to drive consumers to their preferred repairers. This is particularly likely when manufacturers have arrangements with their preferred repairers which require that they only use OE car manufacturer branded parts.

Manufacturers and dealers may also restrict access to parts due to concerns relating to car theft or protection of intellectual property. The ACCC recognises the legitimate concerns of manufacturers and dealers relating to supply of certain parts. However, it does not appear necessary to limit access to certain parts to independent repairers to address security or intellectual property concerns. The AAAA has noted that some security-related parts are supplied to independent repairers in other jurisdictions, and that it appears relatively easy in Australia to claim that access is being denied due to security concerns.⁴⁸³

A policy of restricting access to parts without consideration of whether security or intellectual property issues could be addressed in less restrictive ways is not desirable, and raises potential issues of compliance with the CCA. In particular, section 46 of the CCA prohibits a corporation with a substantial degree of market power from engaging in conduct with the 'purpose, effect or likely effect' of substantially lessening competition.

The ACCC also notes that issues have arisen in other jurisdictions regarding access to parts. Codes of conduct including provision of access are being developed or have been developed in South Africa and Russia⁴⁸⁴, while the Competition Commission of India has taken enforcement action regarding the denial of access of parts to independent repairers.⁴⁸⁵ The European Commission has also noted that while unilateral decisions by authorised resellers not to supply parts are unlikely to breach their competition rules, agreements between car manufacturers and authorised suppliers to not sell 'captive' parts to

⁴⁷⁹ AAAA submission, November 2016, p. 40.

⁴⁸⁰ FCAI submission, November 2016, p. 22.

⁴⁸¹ FCAI submission, November 2016; Mazda submission, November 2016, p. 5.

⁴⁸² ACCC, Summary of stakeholder round table, 25 September 2017, p. 3.

⁴⁸³ AAAA submission, November 2016, p. 40.

⁴⁸⁴ OECD, [Competition issues in aftermarkets – Summaries of contributions](#), DAF/COMP/WD (2017) 1, pp. 17–19. Further, Chinese Taipei requires automobile manufacturers to disclose lists of parts with sales restrictions, methods by which the parts may be acquired, and the reasons for the restriction. See p. 22.

⁴⁸⁵ OECD, Competition issues in aftermarkets – Summaries of contributions, DAF/COMP/WD (2017) 1, p. 9.

independent repairers, would likely be anticompetitive.⁴⁸⁶

5.2.3. Conclusion on access to parts

Reasonable access to parts required to repair and service cars is necessary for the efficient and competitive operation of independent repairers. The ACCC also considers that reforms to facilitate access to technical information (discussed in Chapter 4) may be made less effective if the parts required to complete repairs or servicing are not made available.

Submissions to this study did not provide any agreed industry wide definition of which car parts are generally agreed to be 'security-related' (or requiring intellectual property protection) as distinct from other parts. The lack of transparency and consistency across manufacturers about what are security-related parts means that access restrictions can be arbitrary, increasing uncertainty and cost for independent repairers.

Stakeholder submissions to this study did not indicate that the practice of restricting access to parts is widespread; however, the ACCC considers that the CCA provides protections for independent repairers from manufacturers or dealers engaging in this conduct. Car manufacturers should ensure there is transparency of the circumstances in which access may be restricted and of the steps independent repairers must take to access parts in these circumstances. Parts customers may also benefit from the development of a standard definition and detailed classification system for 'security-related' parts.

The ACCC acknowledges stakeholder concerns about the definition of 'security-related' parts being left to manufacturers, and understands that the industry has had difficulty in reaching consensus on a number of issues in the past. The ACCC is open to sharing its experience and views on this issue to support industry initiatives to define security-related parts, if industry participants would consider this helpful in reaching an agreement.

Findings on access to parts

- Car manufacturers and dealers sometimes restrict access to certain parts for legitimate reasons that may benefit consumers. This includes parts which can compromise car security and encourage theft. However, a further motive for restricting access may be to steer more repair and service work back to authorised dealers and preferred repairer networks. This can reduce competition for repair or servicing work and raise prices.
- The lack of transparency and consistency across manufacturers about what are security-related parts means that access restrictions can be arbitrary, increasing uncertainty and cost for independent repairers. It could also undermine the intent of reforms to promote access to the technical information needed to repair and service cars discussed in Chapter 4.

⁴⁸⁶ Question 10 in the "Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector" published by the European Commission on 27 August 2012. 'Captive' parts as defined would include security-related parts as well as other parts that can only be obtained through the authorised distribution system.

Recommendations and actions on parts

Recommendation 5.1

OE manufacturer-branded parts and accessories should be generally available to independent repairers on commercially fair and reasonable terms.

Car manufacturers should develop policies which clearly outline any parts subject to restricted access on security-related grounds. These policies should be publicly available.

There may be benefits to industry developing a standard definition and detailed classification system for 'security-related' parts to provide certainty to parts customers.

ACCC action 5.1

Refusals by car manufacturers to supply 'security-related' parts for repair and service will be monitored and addressed through action by the ACCC, including enforcement action where appropriate.

5.3. The pricing of parts

The prices for spare parts set by manufacturers and/or dealers were raised as a particular issue by insurers, including Suncorp. Suncorp is a major buyer of replacement parts that are used in repairing cars subject to collisions.

Suncorp suggested that its research had found significant imbalances and a lack of transparency in the parts supply chain in Australia, leading to low non-original equipment usage, supply chain inefficiencies and higher prices, which are ultimately borne by consumers. Suncorp argued that (as an example) the total cost of replacement parts in Australia for a \$21 000 medium-sized hatch may be \$114 081 – more than five times the car's purchase price. This cost is said to be ultimately reflected in repair costs, and therefore consumers' premiums.⁴⁸⁷

In response to the ACCC's Issues Paper⁴⁸⁸, which noted that (in contrast to new car prices) repair and parts costs have been increasing in recent years, Mazda noted that it was necessary to take into account the relative contribution made by labour costs. Mazda suggested that increases in labour costs contribute around 53 per cent to the cost of repairs and maintenance (equivalent to 6.4 per cent of the 11 per cent increase in repair and maintenance costs referred to in the Issues Paper).⁴⁸⁹ The ACCC notes, however, that this is less applicable to prices for parts as these do not have a labour component.

The AADA's submission suggested that there was 'significant competition' between dealers and independent parts distributors, particularly in the trade component of a dealership's parts business. The main drivers of this competition are said to be the availability of 'non-genuine' parts either produced in Australia or imported, and large insurers instigating arrangements with organisations who stock recycled parts which they make available to the insurers at low cost.⁴⁹⁰

⁴⁸⁷ Suncorp submission, November 2016, p. 1. See also AAAA submission, November 2016, p. 10.

⁴⁸⁸ New car retailing industry market study [Issues Paper](#), p. 6.

⁴⁸⁹ Mazda submission, November 2016, p. 4.

⁴⁹⁰ AADA submission, November 2016, p. 14.

5.3.1. Are parts prices excessive?

Submissions to the ACCC presented starkly differing views on the competitiveness of spare parts supply. On the one hand, manufacturers and dealers claimed strong competition from independent suppliers, including importers. On the other, independent repairers and car insurers claimed that prices are excessive and this harms consumers either directly, or through higher insurance premiums.

Links between competition in markets for new cars and in parts aftermarkets

As discussed in Chapter 2, the demand for goods and services in aftermarkets, including the market for spare parts, depends on demand for new cars in the primary retail market. Manufacturers and authorised dealers earn significant profits from the sale of spare parts and related services. Car manufacturers recognise that increased new car sales will increase spare parts sales, meaning that manufacturers will set lower prices for new cars than if only new cars were sold.

Dealers face similar incentives to manufacturers in their pricing of new cars and parts, because manufacturers sell both new cars and parts through dealers. Dealers also sell a range of further complementary services, including servicing, finance and insurance.

A second pertinent feature of the new car and parts sales relationship is that consumers tend to be more responsive to the price of a new car than to the price of parts.⁴⁹¹ Consumer lack of responsiveness to parts pricing is primarily caused by a 'lock in' effect caused by high switching costs once a car has been purchased. Once consumers have purchased a car, they are then 'locked in' to purchasing parts that are designed for that car (or similar cars), and cannot readily substitute parts from other manufacturers or dealers.

The ability of consumers to exercise choice over parts supply is further complicated by:

- Perceptions of quality advantages with OE-branded parts and warranty considerations (as discussed in Chapter 3).
- A lack of transparency in, or inability to comprehend, parts pricing compared to new car pricing. Consumers can readily compare the prices of new cars prior to purchase,⁴⁹² but not the price of parts and servicing due to a combination of unavailability,⁴⁹³ complexity and uncertainty about which parts will be required when. The ACCC Consumer Survey indicated that less than one in five consumers consider the cost of parts when buying a new car compared with three in four that consider the price of the new car.⁴⁹⁴
- In cases of car repair, spare parts are purchased by insurers on behalf of consumers, and consumers only indirectly pay for higher prices through higher insurance premiums. This means that to the extent consumers exercise choice of over the use of parts, they have little incentive to choose cheaper parts of equivalent quality.⁴⁹⁵

⁴⁹¹ The purchase price of a vehicle (new and used) was the most considered factor in the purchase of a motor vehicle in a 2012 Australian Bureau of Statistics survey. See Figure 1 in the ACCC's *Issues Paper*, October 2016, p. 16.

⁴⁹² The ACCC Consumer Survey found that 91 per cent of respondents found acquiring price information to be 'very easy' or 'easy' (ACCC Consumer Survey, p. 12).

⁴⁹³ Responses to the ACCC Consumer Survey identified parts costs as the most difficult type of information to find (p.12).

⁴⁹⁴ ACCC Consumer Survey, p. 6.

⁴⁹⁵ Suncorp submission, November 2016, p. 1. Suncorp's submission states that it commissions: 'the repair of hundreds of thousands of cars each year and spent approximately \$500 million on replacement automotive parts.'

Implications for pricing strategies of manufacturers and new car dealers

The combination of the relationship between new cars and parts, together with differences in consumer responsiveness to prices means that:

- manufacturers will be willing to sell new cars with relatively low mark-ups on the manufacturing cost⁴⁹⁶ if this enables them to sell more parts with a higher mark-up
- dealers will be willing to sell some goods and services with a lower mark-up (including new cars) if this means they can sell more high mark-up services (such as parts, insurance and finance).

As discussed in Chapter 2, these relationships are borne out in data on the sources of profits for manufacturers and their authorised dealers.

As noted in submissions to this study, there is some evidence of competition relating to the supply of spare parts which limits the ability of manufacturers and dealers to sell parts at higher mark-ups. This can occur through supply of automotive component supplier branded parts, parallel imports of OE branded parts, aftermarket or recycled parts. Exemptions in the *Designs Act 2003* (Cth) provide some protection for aftermarket suppliers of parts that replicate OE designs.⁴⁹⁷ Furthermore, competition for spare parts tends to increase as cars age and decline in value, as consumers are more willing to substitute to other kinds of parts.

To maximise their profits, manufacturers and dealers of new cars use contractual and other means to encourage consumers to purchase OE parts from the dealer. However, incentives to lower the upfront price of a new car will depend on the ability of dealers to also sell complementary services. The strength of the link or complementary relationship between different goods and services therefore relies on manufacturers and dealers being able to require or otherwise entice consumers to purchase genuine parts supplied by the dealer. This can be pursued in a number of ways, including:

- by recommending the use of 'genuine' parts and advising consumers of the purported safety or quality advantages of using 'genuine' parts supplied by the dealer, including that it provides further assurances that manufacturer warranties will not be voided through use of inappropriate parts
- through offering longer or extended car warranties and capped-priced servicing, which encourage consumers to maintain dealer relationships for longer.

Evidence of consumer detriment

There seems to be broad agreement that the manufacturer and dealer margins associated with parts are much higher than for sales of new cars. For certain kinds of parts, there is limited or no competition as aftermarket parts will not be effective substitutes – for example, parts deemed 'security-related'. Anecdotal evidence supports that where there is minimal possibility of aftermarket substitution, parts prices can appear unreasonable.⁴⁹⁸

⁴⁹⁶ Mark-up means the ratio of price to the (marginal) cost of the good sold.

⁴⁹⁷ Section 72 of the *Designs Act 2003* (Cth) provides that certain repairs do not infringe registered designs, and means that the Act cannot be used to prevent manufacture of spare parts or undertaking repairs with such parts.

⁴⁹⁸ See for example the evidence cited in David McCowen, 'The real cost of repairing your car', available at: <http://www.drive.com.au/motor-news/the-real-cost-of-repairing-your-car-20140414-36gk6>, accessed April 2017.

The ACCC notes that evidence from the Australian Bureau of Statistics indicates that, over time, parts prices are rising faster than prices of new car prices (which are falling)⁴⁹⁹ and comparisons were presented to the ACCC indicating that:

- the contribution of aftermarket parts to manufacturers' revenues and profits is highly disproportionate, with parts contributing five per cent to revenues but 50 per cent to manufacturers' profits⁵⁰⁰
- list prices for certain parts in Australia are sometimes considerably higher than (exchange-rate adjusted) prices for equivalent parts in the United States⁵⁰¹
- repairers paying retail prices for parts pay much higher prices for parts than do car assemblers, with a car built from retail parts in Australia costing between 2.4 and 5.4 times as much as the new car price.⁵⁰²

Academic work on aftermarket pricing suggests that harm to consumers is more likely where: there is weak competition in the primary market (in this case, for new cars); switching in the primary market is costly; there are large numbers of consumers uninformed about aftermarket prices; or where the aftermarket is large relative to the primary market.⁵⁰³

On the issue of competition in the primary market, if prices for parts are found to be high or excessive, a further consideration is whether these high prices are offset by lower prices elsewhere. This is because competition between manufacturers may reduce detriment for consumers because they will pay less for new cars (upfront) despite paying more for the parts used to repair and service them. This model results in manufacturers and dealers making more profit in supplying parts, and less in supplying new cars.⁵⁰⁴

Other plausible arguments indicating harm to consumers include:

- Consumers generally do not appear well informed about prices for parts, prices are not transparent,⁵⁰⁵ and it is difficult for consumers to contractually avoid paying inflated prices for parts prior to purchase of a car. It may therefore lead to poor decisions about the purchase of new cars.
- New cars are expensive and switching costs for consumers to change vehicles are high, meaning that it is very costly to avoid high prices in aftermarkets.
- Excessive prices for parts reduce incentives to repair cars, and can induce sales of new cars earlier than would occur if parts were sold at lower prices (parts are around 45–50 per cent of the costs of repairing cars).⁵⁰⁶

⁴⁹⁹ Australian Bureau of Statistics, Consumer Price Index, Australia, Sep 2017, Cat. no. 6401, Table 9, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6401.0>, accessed on 27 November 2017. Note that this CPI data refers to all motor vehicles, not specifically new cars.

⁵⁰⁰ Suncorp submission, attachment, citing IBM Global Business Services (2008), *Performance in reserve*, available at https://www-935.ibm.com/services/us/gbs/bus/pdf/gbe03042-usen_autospareparts.pdf, accessed June 2017.

⁵⁰¹ Suncorp supplementary submission, Appendixes 1 and 2:

- Appendix 1 provides a comparative price analysis by CCC information systems (for US prices) and Australian list prices. A basket of common crash repair parts is compared. Prices in Australia are said to be as much as 3.5 times higher than the equivalent basket if purchased in the US.
- Appendix 2 provides a selection of 24 parts which shows systemic markups in Australia across a wide range of parts types, including bumpers, panels, light bulbs and nameplates. These comparisons indicate differences of up to 10 times even after adjusting for exchange rates.

⁵⁰² Suncorp submission, confidential attachment citing data from Delta-V experts. See also London Economics, *Developments in car retailing and after-sales markets under Regulation No. 1400/2002*, June 2006, p. 200.

⁵⁰³ See, for example, Lorenzo Coppi, 'Aftermarket monopolisation: the emerging consensus in economics', *The Antitrust Bulletin*, Vol 52., No. 1, Spring 2007.

⁵⁰⁴ This kind of pricing structure is not uncommon in real-world markets. For example, consumers pay relatively low prices for razors but higher prices for razorblades, and the same holds for printers and printer toner.

⁵⁰⁵ For example, price lists for parts are not widely available on manufacturer or dealer websites.

⁵⁰⁶ ICA submission, November 2016, p. 3.

Given these submissions, the ACCC accepts that there is anecdotal evidence of consumer detriment as a result of high part prices. The margin comparisons between new car sales and parts sales are also indicative of a pricing model that favours lower new car prices and higher prices for parts. Consumers may obtain some indirect benefit from this pricing model, in that some of the benefit for manufacturers of higher parts prices may be competed away in lower prices for new car sales. However, the ACCC has no evidence that competition in the primary market eliminates the potential detriment to consumers from higher parts prices.

5.3.2. Pricing transparency

Although not raised in the ACCC's Issues Paper, the ACCC received submissions on the issue of price transparency in relation to automotive parts. The Insurance Council of Australia (the representative body for the general insurance industry in Australia) noted that as the cost of replacement parts on average comprises 45–55 per cent of the total cost of repairing a car, the level of competition in this sector has a significant impact on the cost of repairs for consumers. It stated that to ensure competition in the parts market there must be a high level of price transparency whereby repairers and consumers are able to easily assess what is a fair and reasonable price to pay for particular parts.⁵⁰⁷

Further information was provided by the ICA as a supplementary submission on the withdrawal of a recommended parts price list by Holden.⁵⁰⁸ This included a letter from Holden explaining that the withdrawal was limited to parts used in collision repair, which are not retailed directly to end users but sold to repairers. Holden further explained that the withdrawal was designed to remove distortions in the process of quoting collision repairs, and would provide repairers with the best conditions to quote for genuine Holden parts.⁵⁰⁹

The ICA noted that parts price lists are used extensively by insurers and repairers to quote on repairs and determine whether cars should be repaired or written off (where the value of repairs would exceed the market value of the car). The ICA suggested that in the absence of a retail price list, the automotive industry no longer has a transparent reference point for what is a fair and reasonable price for Holden replacement parts.⁵¹⁰

Price transparency can benefit consumers

In light of the concerns raised about high parts prices, it is particularly important that competition between aftermarket parts suppliers is not unduly restricted. Reduced pricing transparency was raised as an example of an issue that could be restricting competition.

Pricing transparency (for example, through the publication of price lists) can sometimes increase competition by increasing consumer knowledge of prices and making it easier to compare repair estimates. In its submission to the draft report, the NSW Small Business Commissioner raised concerns that the removal of parts pricing lists may make it more difficult for small independent repairers to offer competitive quotes, potentially impairing their ability to compete with larger repairer or repairers within an insurer's preferred repairer network.⁵¹¹

In the instance raised by insurers, the primary concern seems to be that it makes it more difficult for repairers to compare the price of manufacturer OE branded parts with prices of potential substitutes, including parallel imports or recycled parts. It is claimed that this may ultimately lead to higher repair costs and upward pressure on insurance premiums. The response of Holden indicates that its motivation is to ensure 'genuine' parts are used in

⁵⁰⁷ ICA, supplementary submission, February 2017, p. 2.

⁵⁰⁸ ICA letter to the ACCC, May 2017.

⁵⁰⁹ ICA, Attachment B to letter to the ACCC (GM Holden's letter to ICA), March 2017.

⁵¹⁰ ICA, Attachment A to letter to the ACCC (ICA's letter to GM Holden), February 2017.

⁵¹¹ NSW Small business Commissioner submission, September 2017, p. 3.

repairs; however, it is unclear whether this will be through providing more flexibility for authorised part sellers to lower prices, or by reducing repairers' and insurers' ability to compare prices of substitutes.

Given that this issue was not raised with the ACCC until after initial submission rounds, the ACCC sought further information on the impacts of reduced pricing transparency in its draft report. As the ACCC received few stakeholder submissions in response to this issue, no recommendations or further action are proposed at this stage. However, the ACCC will continue to monitor the impact of pricing transparency on competition in the repair sector, and will take action where appropriate.

Findings on the pricing of parts

- Anecdotal evidence and submissions to this study suggest that parts prices in Australia are rising relative to the cost of new cars, and that Australia has high parts prices relative to some overseas jurisdictions.
- Detriments from high parts prices could include distortions in decisions about repairing cars; for example, high parts prices might cause cars to be 'written off' when it may otherwise be more efficient to repair them.
- There is limited competition to supply certain spare parts for repair and service. In addition, consumers have a limited ability to switch to alternative suppliers of parts in many instances and these factors may lead to high prices.
- Parts prices should be considered within a broader context of supply of new cars and other aftermarket services. However, the ACCC has no evidence that competition in the primary market eliminates the potential detriment to consumers from higher parts prices.

6. Fuel consumption and emissions

Key points

- Fuel consumption is a significant factor for consumers when buying a car, second only to price and model. The environmental impact of new cars is also important to one in five consumers. For this reason, new car buyers need to be able to rely on the accuracy of claims made by manufacturers and dealers about the fuel consumption and emissions of particular car models.
- Current fuel consumption and emissions testing procedures rely on laboratory testing rather than testing in real-world driving conditions. Manufacturers may therefore claim results for fuel consumption and emissions based on laboratory tests that are significantly better than can be achieved in real-world driving conditions. This is unlikely to meet consumer expectations and has the potential to be misleading.
- Research from the Australian Automobile Association and consulting engineers, ABMARC, indicates that real-world fuel consumption is on average 25 per cent higher than official laboratory test results. The size of the gap between laboratory and real-world fuel consumption is not consistent across car types or brands, and has been increasing in recent years. This casts significant doubt on the comparative value of absolute fuel consumption figures currently displayed in fuel consumption labelling.
- Representations to consumers about fuel consumption and emissions are made by manufacturers in a variety of ways, including on mandatory labels and in promotional and advertising materials. ACCC research for this study indicates that manufacturers are not always appropriately qualifying these claims, and many consumers believe that advertised fuel consumption and emissions figures are likely to be attained in real-world driving conditions, when this is not the case.
- The Ministerial Forum into Vehicle Emissions is considering a number of measures to improve the integrity of vehicle emissions testing, including the introduction of a more realistic laboratory test for fuel consumption and emissions, and on road testing for vehicle emissions. The ACCC supports moves to enhance the quality of information supplied to consumers.

The ACCC and other ACL regulators have received a number of complaints from consumers in relation to fuel consumption.⁵¹² The ACCC is also aware that fuel prices continue to be a critical concern for consumers.⁵¹³ In addition, recent Australian and international media coverage has highlighted consumer experiences of higher than expected fuel consumption, and concerns about manufacturer compliance with emissions standards.⁵¹⁴

⁵¹² The majority of these complaints largely related to consumers not achieving the level of fuel consumption indicated.

⁵¹³ The ACCC has conducted a number of [Petrol market studies](#). The aim of these studies generally includes explaining why petrol prices are higher in certain regional locations and where the profits are being made along the petrol supply chain.

⁵¹⁴ For example: B. Leach, 'Lobbyists Claim Fuel Consumption Stickers Are Lying And Regular Unleaded May Be Axed,' *The Motor Report*, 30 March 2017, accessed 8 May 2017, <http://www.themotorreport.com.au/64929/lobbyists-claim-fuel-consumption-stickers-are-lying-and-regular-unleaded-may-be-axed>; D. McCowan, 'ACCC takes Audi to court over diesel emissions,' *Drive*, 8 March 2017, accessed 8 May 2017, <http://www.drive.com.au/motor-news/accc-takes-audi-to-court-over-diesel-emissions-20170308-gut8oc.html>; N. Tajitsu, 'Can Mitsubishi survive fuel economy scandal?' *Drive*, 2 May 2016, accessed 8 May 2017.

Box 6.1: Fuel consumption, CO₂ emissions and noxious emissions

What is fuel consumption?

Nearly all new cars in Australia use petroleum or diesel fuel to generate power. For the purpose of this study, fuel consumption refers to litres of fuel consumed per 100km (L/100km).⁵¹⁵

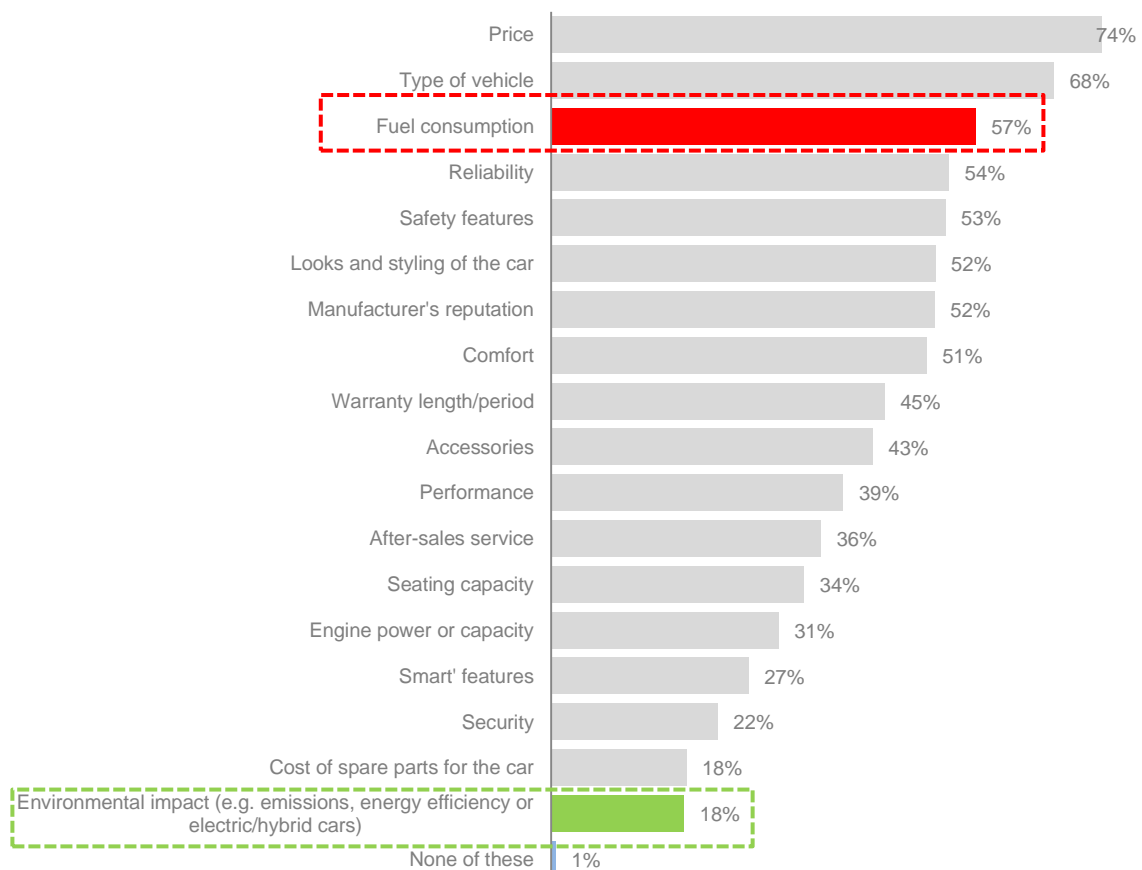
What are CO₂ emissions and noxious emissions?

Cars emit **carbon dioxide**, which is measured in grams per kilometre (g/km). A car's CO₂ emissions are very closely linked with its fuel consumption, however some fuels, such as diesel, have higher energy content and may go farther in terms of kilometres per litre of fuel, but also produce more CO₂ per litre of fuel consumed.

Noxious emissions from cars include carbon monoxide, hydrocarbons, oxides of nitrogen and particulate matter. These emissions are generally the result of imperfect engine combustion, and have an impact on air quality.⁵¹⁶

After the cost of a new car, the cost of fuel is likely to be the second most important cost faced by new car buyers. This is borne out by the ACCC Consumer Survey, which found that fuel consumption was ranked as the third most important factor when purchasing a new car after the price and type of vehicle, with almost 60 per cent of consumers surveyed factoring it into their purchasing decisions (see Figure 6.1 below).

Figure 6.1: Factors considered when buying a new car



Source: ACCC Consumer Survey, Table 2, p.10

Figure 6.1 also shows that nearly one in five new car buyers factored environmental impact

⁵¹⁵ This is the same terminology used by DIRD. See DIRD, [Fuel Consumption Label](#), accessed on 23 March 2017.

⁵¹⁶ DIRD, [Vehicle Emissions Discussion Paper](#), February 2016, p. 3, accessed on 6 June 2017.

into their purchasing decisions. While it is relatively easy for consumers to measure or observe their car's fuel consumption, the same is not true for emissions – CO₂ and more than 99 per cent of other (noxious) emissions are invisible.⁵¹⁷ This means that consumers who place value on the low emissions of their new car must be able to rely on representations made by manufacturers or dealers as they may have no other direct source for this information.

More broadly, well-informed consumers can play a role in promoting efficient and competitive markets by seeking out the goods and services that offer the best value, leading to lower prices or improved product quality overall. It is therefore important that consumers receive accurate information, including information about fuel consumption and emissions, when buying a new car.

This chapter, in relation to fuel consumption and emissions, will:

- outline the relevant regulatory framework
- identify the cause(s) of issues faced by consumers and discuss any impact these issues may have on competition, consumers and the market
- discuss potential outcomes of government reviews which address the issues identified, and options for regulatory reform.

6.1. Fuel consumption and emissions regulations

As noted in Chapter 1, the ACL includes provisions prohibiting misleading or deceptive conduct which apply to the sale of new cars. In addition, the sale of new cars is regulated by the ADRs, which are administered by the Australian Government under the *Motor Vehicle Standards Act 1989* (Cth) (MVSA).

The ADRs set national standards for vehicle safety, anti-theft and emissions which apply to new cars manufactured in Australia or imported, and supplied to the Australian market.⁵¹⁸ The Department of Infrastructure and Regional Development (DIRD) is responsible for the development and review of the ADRs.

The following ADRs set standards relating to fuel consumption and emissions for new cars:

- ADR 81/02 – Fuel Consumption Labelling for Light Vehicles.
- ADR 79/04 – Emission Control for Light Vehicles

These standards are discussed further below.

ADR certification process

Before a car can be registered for the first time in Australia it must meet the requirements of the MVSA, which requires cars to meet the standards in the ADRs. The certification system for new cars is a type approval system. This means that a car representing the design of that make-model (the 'type' of vehicle) is tested to demonstrate compliance with the safety and emissions standard. If the car that was tested is compliant, then all others of the same design (or 'type') are also deemed to comply.⁵¹⁹

DIRD does not test cars to ensure compliance with the ADRs. Rather, the certification process allows manufacturers to conduct tests, provided mandated test procedures are followed. Manufacturers must then provide test evidence of compliance. In this case, the

⁵¹⁷ Department of Transport and Main Roads (QLD), [Motor Vehicle Pollution](#), accessed 10 May 2017.

⁵¹⁸ DIRD, [Australian Design Rules](#), accessed on 23 March 2017.

⁵¹⁹ DIRD, [Vehicle Certification in Australia](#), accessed on 9 June 2017.

evidence provided is subject to scrutiny by DIRD, including review of test results and quality assurance audits of the test and design facilities that are used in the ADR tests. Alternatively, they can provide confirmation that the test evidence and process has been undertaken by a recognised test service and approved by a Contracting Party to the United Nations 1958 Agreement on vehicle standards development and testing.⁵²⁰

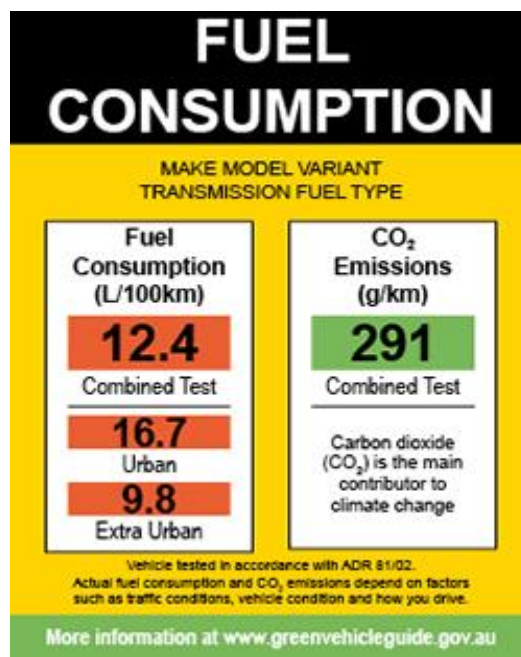
6.1.1. The fuel consumption label

Since 1 January 2001, new cars sold in Australia are required to display a fuel consumption label on the front windscreen.⁵²¹ ADR 81/02 prescribes the requirements for the design and application of fuel consumption labels and for the measurement of fuel consumption, CO₂ emissions, energy consumption and range (for electric cars).⁵²²

The fuel consumption label was a key element of the *Environmental Strategy for the Motor Vehicle Industry*, which aimed to limit greenhouse emissions from transport.⁵²³ It was introduced to address a lack of easily accessible, model-specific information about fuel consumption and CO₂ emissions for new car buyers.⁵²⁴ The label is designed to help consumers make informed choices about the running costs and environmental impact of their new car.⁵²⁵

The fuel consumption label indicates a car's fuel consumption (L/100km) and CO₂ emissions (g/km). Electric cars are also required to display an energy consumption label, which shows the energy consumption in Watt hours/km and expected range when fully charged, in addition to fuel consumption and CO₂ emissions. The label includes measures for urban (city) and extra-urban (highway) driving conditions, as well as a combined figure.

The figures appearing on the label are based on a standard laboratory test procedure, with the aim of allowing consumers to compare the performance of different models under the same test conditions. This test is described further below.



Source: Green Vehicle Guide, [Fuel consumption label](#), accessed 27 June 2017

⁵²⁰ DIRD, Circular 0–1–2, [A guide to the Certification of New Vehicles—Type Approval](#), p. 3, accessed on 7 June 2017.

⁵²¹ Australian Design Rule (ADR) 81/00 *Fuel Consumption Labelling for Light Vehicles* required that all new vehicles up to 2.7 tonnes gross vehicle mass (GVM) must carry a fuel consumption label on the windscreen at the point of sale.

⁵²² Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008.

⁵²³ Australian Greenhouse Office, 1998, [The National Greenhouse Strategy: Strategic Framework for Advancing Australia's Greenhouse Response](#), p. 62.

⁵²⁴ Explanatory statement, [Vehicle Standard \(Australian Design Rule 81/10—Fuel Consumption Labelling for Light Vehicles\) 2005](#), para. 6.

⁵²⁵ Green Vehicle Guide, [Fuel consumption label](#), accessed on 11 December 2017.

6.1.2. Noxious emissions standards

Australia has had noxious emissions standards for new cars since the early 1970s.⁵²⁶ These standards have been progressively strengthened over the past 40 years, with the overall objective being to improve urban air quality and reduce the adverse impacts of air pollution on human health.⁵²⁷ ADR 79/04 prescribes the current noxious emissions limits for light vehicles,⁵²⁸ as well as the test standards for measuring those emissions.

Noxious emissions standards in Australia reflect Australia's commitment as a signatory to the United Nations (UN) 1958 Agreement on vehicle standards development and testing, which provides for mutual recognition where UN Regulations are applied or accepted.⁵²⁹ The Australian Government's policy is to harmonise national vehicle safety standards (the ADRs) with the international regulations of the UN Economic Commission for Europe.⁵³⁰

The current UN regulations for noxious emissions for light and heavy vehicles are based on the 'Euro' standards adopted in the European Union (EU). For light vehicles, Australia has mandated Euro 5 noxious emissions standards (through ADR 79/04) for newly approved models first manufactured from 1 November 2013, and for all light vehicles manufactured from 1 November 2016.⁵³¹

6.1.3. Fuel consumption labelling and emissions testing

ADR 79/04 outlines the single testing procedure for noxious emissions, as well as CO₂ emissions and fuel consumption. The current testing procedure is called the New European Driving Cycle (NEDC).

Under the NEDC, fuel consumption and emissions testing is conducted in an environmentally-controlled room or laboratory, where the car is driven through a specified 'drive cycle', which is a sequence of defined acceleration and braking processes designed to simulate typical driving conditions on the road.⁵³² The test is designed to be standardised and repeatable, such that the emissions and fuel consumption of different car models can be compared.⁵³³

However, no laboratory test can simulate all possible combinations of conditions experienced on the road: a number of variables can affect fuel consumption and emissions including traffic conditions, driver behaviour (e.g. harsh acceleration or braking) or car usage (e.g. loading, entertainment systems and air conditioner use).⁵³⁴

Fuel consumption testing is discussed further in section 6.3.1.

⁵²⁶ DIRD, [Summary of Emission Standards for Light Petrol Vehicles in Australia \(1972–Present\)](#), accessed on 27 June 2017.

⁵²⁷ DIRD, [Vehicle Emissions Discussion Paper](#), February 2016, p. 6, accessed on 6 June 2017; Department of Infrastructure and Transport (now DIRD), [Final Regulation Impact Statement for Review of Euro 5/6 Light Vehicle Emissions Standards](#), p. 6, accessed on 7 June 2017.

⁵²⁸ Light vehicles include cars, sports utility vehicles, people movers, small buses, and light commercial vehicles such as vans and utes/light trucks, but do not include motorcycles.

⁵²⁹ DIRD, [Vehicle Emissions Discussion Paper](#), February 2016, p. 7, accessed on 6 June 2017.

⁵³⁰ DIRD, ADRs, <https://infrastructure.gov.au/roads/motor/design/>, accessed on 27 June 2017.

⁵³¹ DIRD, [Vehicle Emissions Discussion Paper](#), February 2016, p. 7, accessed on 6 June 2017.

⁵³² Clean Fleets (EU), [Vehicle Test Cycles](#), July 2014, p. 1, accessed on 9 June 2017. The drive cycle is a simulated flat road, conducted in a laboratory, on a chassis dynamometer or 'rolling road', with the car on rollers so that the wheels rotate during the test, but the car itself remains stationary.

⁵³³ MTASA submission, November 2016, p. 18.

⁵³⁴ Green Vehicle Guide, [Fuel consumption label](#), accessed on 8 June 2017.

6.2. Claims about fuel consumption and emissions

As previously mentioned, official fuel consumption and emissions figures reported for new cars are often not reflective of what a motorist is able to achieve. As a result, the fuel consumption and emissions in real-world driving conditions will likely differ from those advertised. In the absence of appropriate qualification, consumers are likely to expect that they will achieve the fuel consumption and emissions figures represented by the manufacturer or dealer in normal driving conditions.

The ACCC has identified the following issues in relation to fuel consumption and emissions in new cars: potentially false and misleading fuel consumption and emissions claims by dealers or manufacturers, insufficiently qualified claims about fuel consumption and emissions, and a lack of consumer understanding that fuel consumption and emissions values based on laboratory tests are intended for comparative purposes only.

6.2.1. False or misleading claims about fuel consumption and emissions

Fuel consumption and CO₂ emissions values for new cars are communicated to consumers in a number of ways, including through the mandatory label, by car dealers at the point of sale, on manufacturers' websites and in other general promotional material or documentation provided to consumers.⁵³⁵

Manufacturers and dealers do not generally promote a new car's low noxious emissions to the same degree as fuel consumption or CO₂ emissions.⁵³⁶ However, manufacturers may make claims about the 'environmentally friendly' nature of their cars (see the Volkswagen and Audi case study in Box 6.2 below, for example). To avoid misleading consumers, businesses making these claims must be able to substantiate them.

Box 6.2: Case study – Claims against Audi and Volkswagen

On 1 September 2016, the ACCC instituted proceedings against German company Volkswagen Aktiengesellschaft (VWAG) and its Australian subsidiary, Volkswagen Group Australia Pty Ltd (VGA). Following this, on 8 March 2017, the ACCC instituted proceedings against Audi Aktiengesellschaft (Audi AG), its Australian subsidiary Audi Australia Pty Ltd (Audi Australia), and VWAG as knowingly concerned in the conduct of Audi AG and Audi Australia. These cases are being heard together in the Federal Court of Australia.

The ACCC alleges that VWAG, VGA, Audi AG and Audi Australia engaged in misleading or deceptive conduct, made false or misleading representations and engaged in conduct liable to mislead the public in relation to certain diesel vehicle emission claims.

The ACCC alleges that between 2011 and 2015:

- VWAG and Audi AG engaged in misleading conduct by not disclosing the existence and operation of 'defeat' software in certain Volkswagen and Audi-branded vehicles. The software caused the vehicles to produce lower nitrogen oxide (NOx) emissions when subject to test conditions in a laboratory, but switched to a different mode under normal on-road driving conditions resulting in significantly higher NOx emissions.
- VWAG and VGA engaged in misleading conduct by representing that the vehicles complied with all applicable regulatory requirements for road vehicles in Australia when, because of the defeat software, that was not the case. Similar allegations were made against Audi AG and Audi Australia.
- Using information provided by VWAG, VGA marketed the vehicles in Australia as being environmentally friendly, clean burning, low emission and complying with stringent European standards when this was not the case under normal driving conditions. Similar

⁵³⁵ FCAI submission, November 2016, p.17; Mazda submission, November 2016, p.4; VACC submission, November 2016, p. 9.

⁵³⁶ There is also no regulatory requirement to include noxious emissions on the fuel consumption label.

allegations were made with respect to Audi AG and Audi Australia.

- VWAG designed and supplied the engines and defeat software to Audi AG for installation in the affected vehicles.

The ACCC is seeking declarations, pecuniary penalties, corrective advertising, orders relating to the future use of findings of fact and costs.

Skoda-branded cars are also affected by the Volkswagen diesel emissions issue. The ACCC has decided not to pursue further action against Volkswagen (which owns the Skoda brand in Australia) at this time in relation to these Skoda vehicles, given the lower volume of sales in Australia.

In addition to the ACCC's action, private litigants have commenced class actions against Volkswagen in Australia. Five proceedings were initiated in late 2015, under the direction of two law firms and including claims against the Australian and overseas parent companies related to Volkswagen, Audi and Skoda.

Volkswagen's alleged conduct is also the subject of legal action around the world. In the United States, Volkswagen has already paid over USD\$20 billion as part of a settlement reached with regulators and consumers.⁵³⁷ Australian laws and emissions standards are different from those in the United States.

Volkswagen and Audi reject the ACCC's claims and are defending these proceedings in court.

Both manufacturers and dealers need to appropriately qualify claims

The ACCC is concerned that manufacturers and dealers are not always appropriately qualifying fuel consumption and emissions claims made to consumers.

As discussed in section 6.1, manufacturers are generally responsible for conducting fuel consumption and emissions testing to certify vehicle compliance with the relevant ADRs. Manufacturers may then provide this information to their dealers for use in general promotional material and marketing, or at the point of sale.⁵³⁸ The ACCC Consumer Survey indicates that 65 per cent of new car buyers used manufacturer's websites to inform their purchase, while 54 per cent of new car buyers spoke to a car dealer prior to their purchase.⁵³⁹ It is therefore important that both manufacturers and dealers ensure that the information they provide to consumers on these issues is accurate.

In submissions to this study, stakeholders have stated that manufacturers have processes in place to train or educate dealership staff about fuel consumption and emissions.⁵⁴⁰ The FCAI and individual manufacturers also submitted that references to fuel consumption and emissions are commonly qualified by a statement explaining that the values quoted are comparative and may vary depending on a number of factors, including those described above.⁵⁴¹ However, ACCC research suggests that representations made by manufacturers on their websites are not always sufficiently or consistently qualified (see Box 6.3 below).

⁵³⁷ This includes USD\$4.3 billion in civil and criminal fines, nearly USD\$15 billion as part of a civil settlement with US environmental authorities and VW car owners, and USD\$1.2 billion in a settlement with VW authorised dealers. See: D. Sheppardson, 'EPA official says Volkswagen diesel scandal deterrent to auto industry,' *Reuters*, 25 January 2017, accessed 10 May 2017; N.E. Boudette, 'VW to Pay \$1.2 billion to U.S. Dealers Hurt by Diesel Scandal', *The New York Times*, 25 August 2016, accessed 10 May 2017.

⁵³⁸ AADA submission, November 2016, p. 29; VACC submission, November 2016, p. 9.

⁵³⁹ ACCC Consumer Survey, Figure 5: Sources used to research car purchase, p. 14.

⁵⁴⁰ AADA submission, November 2016, p. 28; FCAI submission, November 2016, p. 18; Toyota submission, November 2016, p. 3; VACC submission, November 2016, p. 9.

⁵⁴¹ FCAI submission, November 2016, p.17; Mazda submission, November 2016, p.4; Toyota submission, November 2016, p.3.

If manufacturers or dealers use the NEDC figures for purposes other than the mandatory label under ADR81/02, they should qualify the figures by explaining to consumers:

- how the displayed figures are calculated
- that they will not necessarily achieve those figures in real-world driving
- that the figures should only be used for comparison.

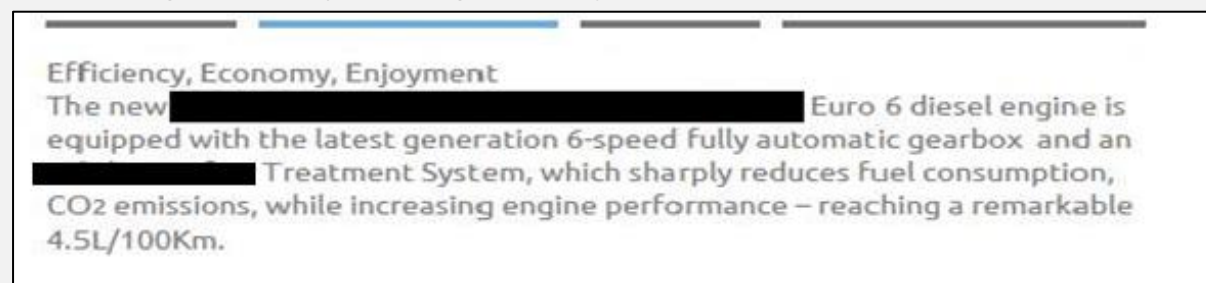
Box 6.3: Case study – Second ACCC review of manufacturer and importer fuel consumption communications

In March 2016, following a number of complaints received from consumers about cars failing to achieve advertised fuel consumption levels, the ACCC reviewed communications relating to fuel consumption by manufacturers, importers and dealers.

This was because the ACCC was concerned that if manufacturers or dealers used unqualified NEDC figures more broadly in advertising and marketing, they may mislead consumers into believing that the car would achieve fuel consumption levels that it would not.

The ACCC wrote to a range of car manufacturers and importers explaining its concerns and informing them that in order to avoid misleading consumers they should qualify any use of the fuel consumption figures derived from the NEDC testing by explaining how NEDC testing operates, that these figures are unlikely to be achieved in real-world driving conditions and should be used for comparative purposes only.

In February 2017, the ACCC completed a second review of communications relating to fuel consumption by manufacturers, importers and dealers. The ACCC found an improvement in a number of fuel consumption representations being adequately qualified, with references to real-world driving conditions and their comparative purpose. However, a number of manufacturers continued to represent fuel consumption figures with inconsistent or insufficient qualification (see examples below).



Fuel (as per ADR 81/02)	
Fuel Type	Diesel
Consumption (l/100km Extra Urban)	6.8
Consumption (l/100km Combined)	7.8
Consumption (l/100km Urban)	9.9
CO2 Emissions (l/100km Combined)	205

The ACCC will continue to monitor representations about fuel consumption made by manufacturers and dealers, and may take further action if it identifies businesses engaging in conduct that contravenes the ACL.

Many consumers do not understand existing qualifications

Submissions and complaints to the ACCC suggest that consumers are not sufficiently made aware that fuel consumption and emissions values are not intended to represent what consumers will actually attain in real-world driving.

Box 6.4 below presents a sample of responses to an online ACCC questionnaire from consumers and small businesses.⁵⁴² These examples indicate that some consumers and small businesses are unaware that the advertised fuel consumption values are intended for comparative purposes only. As some of these consumers and small businesses also indicated that they received information from the fuel consumption label,⁵⁴³ it appears that even where fuel consumption and emissions values are accompanied by a qualification, the use of any absolute fuel consumption figure may lead some consumers to believe that they will achieve similar results when driving.

The ACCC accepts that no laboratory test is likely to perfectly predict a consumer's actual fuel consumption or emissions. However, unless the level of discrepancy between laboratory and real-world results is low (see section 6.3), absolute fuel consumption representations may mislead consumers, even when qualified.

Box 6.4: Sample of responses to ACCC Consumer and Small Business Online questionnaire

*Question 5: Were there differences between what you were told about your new car's fuel consumption...and its actual fuel consumption?*⁵⁴⁴

Consumer 19 – Yes, not getting the fuel consumption they say can be achieved

Consumer 34 – Claimed 7.7 Urban, 5.2 Extra Urban, 6.1 Combined. We don't do much urban driving but Extra Urban is over 7.2.

Consumer 44 – Fuel consumption tends to always be more that [sic] stated on new cars. I feel that this is deceptive

Consumer 54 – Yes. The published figures are consistently below real word fuel consumption. I understand this is pretty standard across all makes and models.

Consumer 64 – Fuel economy is not even close to the documented figures despite best efforts. Our actual numbers are approaching 50 per cent or more.

Consumer 80 – Yes, I received better fuel consumption figures than what I was told to expect

Small Business 150 – Yes a big difference have never been able to match it

Small Business 190 – Yes, the [fuel consumption] stickers are incorrect.

Small Business 199 – yes it uses more fuel than I was told

⁵⁴² As part of its consultation process for this study, the ACCC conducted an [online questionnaire](#). The online questionnaire was a streamlined process designed for consumers and small businesses to make a submission.

⁵⁴³ ACCC [Consumer questionnaire responses](#). Consumers 19 and 54, Small Businesses 150, 190 and 199.

⁵⁴⁴ Question 5 asked 'Were there differences between what you were told about your new car's fuel consumption, emissions and performance and its actual fuel consumption, emissions and performance?' However, most responses to this question related to fuel consumption.

6.2.2. Options for regulatory reform

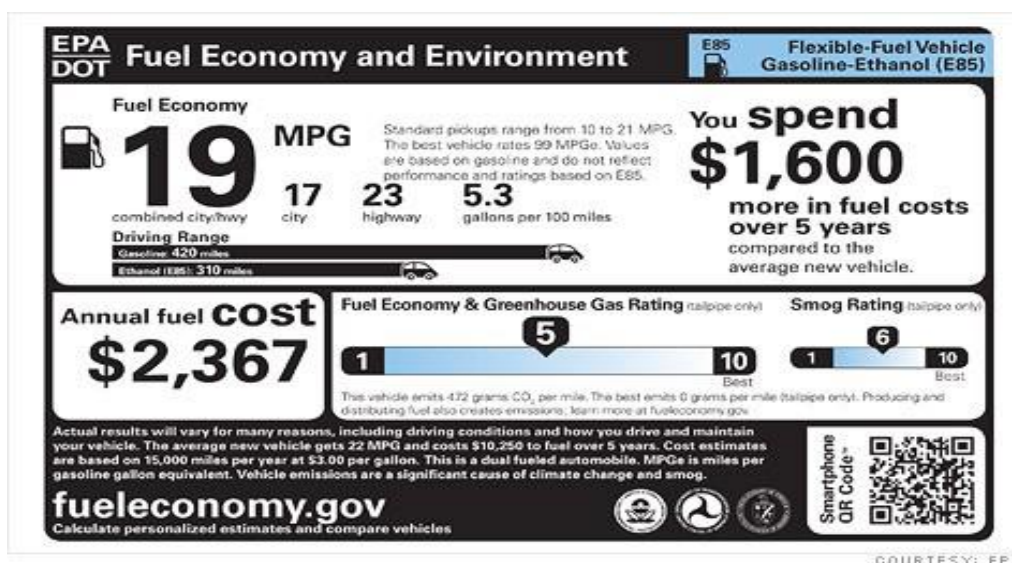
As discussed, fuel consumption and emissions figures are intended for comparative purposes. However, this information is based on standard laboratory tests and does not necessarily reflect real-world driving conditions. As noted in stakeholder submissions to the market study, fuel consumption and emissions values may even be of little *comparative* use to consumers when they differ significantly from consumers' driving experience.⁵⁴⁵

In their submission to the issues paper, the AAA recommended that information on the fuel consumption label be presented in a way that is more readily digestible for consumers, for example by including a star rating system or annual operating costs.⁵⁴⁶ This has been implemented in some overseas jurisdictions (see figures 6.2 and 6.3 for example).

Introducing a star rating or similar system, and/or annual operating costs, may minimise the extent to which consumers interpret an 'absolute' fuel consumption/emissions value as equivalent to what they would achieve in real-world driving conditions, as well as more readily allowing them to compare fuel consumption and emissions across models. The ACCC notes Toyota's submission to the draft report, which states that the efficacy of a star rating system may be limited if it is based on a test that does not represent consumers' driving habits.⁵⁴⁷

The ACCC also notes that the Australian Government has established a Ministerial Forum to coordinate a whole-of-government approach to addressing vehicle emissions, and is considering measures to encourage the uptake of low emissions vehicles (see section 6.3.2).

Figure 6.2: US Fuel consumption label



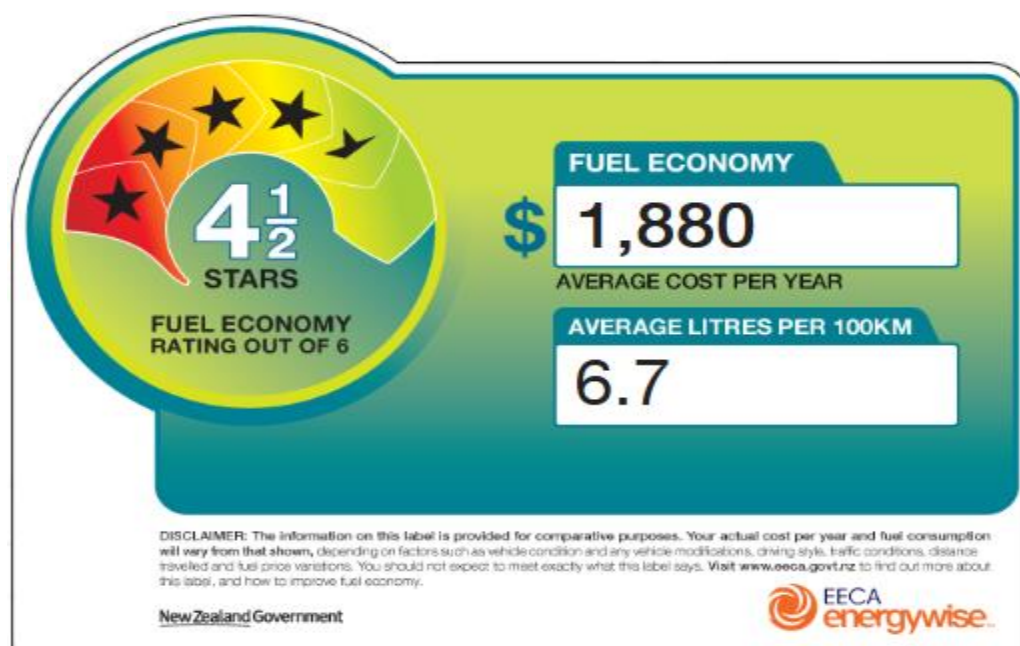
Source: AAA submission, November 2016, p. 24

⁵⁴⁵ ABMARC submission, November 2016, p. 10; CHOICE submission, November 2016, p. 7.

⁵⁴⁶ AAA submission, November 2016, p. 24.

⁵⁴⁷ Toyota submission, September 2017, p. 5.

Figure 6.3: New Zealand fuel consumption label



Source: Energy Efficiency and Conservation Authority (New Zealand), [Vehicle fuel economy labels](#), accessed 27 June 2017.

Findings on fuel consumption and emissions claims

- Fuel consumption is a significant factor for consumers when buying a car, second only to price and model. The environmental impact of new cars is also important to one in five consumers. For this reason, new car buyers need to be able to rely on the accuracy of claims made by manufacturers and dealers about the fuel consumption and emissions of particular car models.
- Representations to consumers about fuel consumption and emissions are made by manufacturers and dealers in a variety of ways. While they have no discretion about displaying mandatory labels, they do control claims made in promotional and advertising materials or at the point of sale. ACCC research for this study indicates that manufacturers are not always appropriately qualifying these claims, and that many consumers believe that advertised fuel consumption and emissions figures are likely to be attained in real-world driving conditions, when this is not the case.
- In addition, some consumers may not understand that fuel consumption and emissions values are intended for comparative purposes only. Even when representations are qualified, these consumers may still believe that the advertised figures will be attained.

Recommendations on fuel consumption and CO₂ emissions claims

Recommendation 6.1

Changes to the fuel consumption label affixed to new cars should be considered to improve the comparative use of the information supplied. Introducing a star-rating system or annual operating costs may minimise the extent to which consumers interpret an 'absolute' fuel consumption/emissions value as equivalent to what they would achieve in real-world driving conditions.

6.3. Addressing the gap between test and real-world outcomes

Submissions to this study raised concerns about the gap between officially-reported (NEDC) and real-world fuel consumption, CO₂ emissions and noxious emissions, with the latter significantly exceeding legislated limits in some cases.⁵⁴⁸ This issue has also received significant media interest, particularly following the revelations in relation to Volkswagen.⁵⁴⁹

As already noted, official fuel consumption and emissions figures reported for new cars are often not reflective of what an individual motorist is able to achieve, as these measures depend on the specific conditions under which the car is driven. However, stakeholder submissions point to evidence of a systemic fuel consumption and emissions discrepancy.⁵⁵⁰ This discrepancy is said to be inconsistent across car models, and be increasing in recent years.⁵⁵¹

This section considers the causes of the fuel consumption and emissions gap and options for regulatory reform.

Box 6.5: Case study – AAA real-world driving research shows significant fuel consumption gap

In October 2017, the AAA and ABMARC released a report detailing the results of their Australian real driving emissions testing program.⁵⁵² The program measured the fuel consumption and emissions produced by 30 cars when driven on Australian roads, and comparing these results with those produced under laboratory conditions.

The program's final report indicates that discrepancies between the real-world and laboratory test values for emissions and fuel consumption occur across a range of fuel types and vehicle technology levels. In particular, the report finds that:

- on average, the real-world fuel consumption of cars tested was 23 per cent higher than the official NEDC results. The lowest petrol fuel consumption recorded was three per cent below the official results, while the highest was 55 per cent above the official results. Similarly, the lowest diesel fuel consumption recorded was four per cent below the official results, while the highest was 59 per cent above the official results.
- on average, CO emissions were five per cent below statutory limits for petrol cars tested in the real world, while diesel cars were 80 per cent below the statutory limit
- NOx exceeded statutory limits by 370 per cent in diesel cars tested in the real world, while petrol vehicles were 57 per cent below the statutory limit. Of the 12 diesel cars tested, 11 did not achieve the regulated NOx limit.

The AAA's report thus concludes that the discrepancy between the real-world and laboratory test values for emissions and fuel consumption is not due to any single vehicle attribute, and is not uniform or able to be determined or inferred by a simple equation.

⁵⁴⁸ ABMARC submission, November 2016, p. 8; CHOICE submission, November 2016, p. 7.

⁵⁴⁹ See: R. Blackburn, '[We need to change fuel consumption testing](#),' *CarsGuide*, 26 December 2015, accessed 12 December 2017; E. Han, '[Volkswagen scandal: Choice car test points to other fuel guzzlers](#),' *Sydney Morning Herald*, 1 October 2015, accessed 12 December 2017.

⁵⁵⁰ For example, CHOICE's submission, November 2016, p. 5 notes data published by UK consumer group Which? in April 2015 showed that 98 per cent of 200 vehicles tested over the preceding two years could not match or exceed their advertised fuel consumption.

⁵⁵¹ ABMARC submission, November 2016, p.8; CHOICE submission, November 2016, p. 7; International Council on Clean Transport (ICCT), '[From laboratory to road: A 2015 update of official and "real-world" fuel consumption and CO 2 values for passenger cars in Europe](#)', pp. 8–17, 25 September 2014, accessed 10 December 2017.

⁵⁵² AAA, supplementary submission 1, October 2017.

6.3.1. Limitations of the NEDC drive-cycle test

The NEDC was developed in the 1970s as a tool to measure nitrogen dioxide emissions from cars: it was not originally designed to measure fuel consumption or CO₂ emissions. Although the NEDC has since been amended to measure fuel consumption and CO₂ emissions, it has not been modified to reflect changes in modern driving behaviour and the technological advances made in the automobile sector.⁵⁵³ Stakeholder submissions to this study identified the NEDC laboratory test as the cause of the fuel consumption and emissions discrepancy.⁵⁵⁴

Critics of the NEDC argue that its results are often not reflective of what the motorist is able to achieve, due in part to the drive cycle not being reflective of driving conditions today.⁵⁵⁵ For example, the test is conducted with the air conditioning, lighting, and electrical accessories all switched off, and with a specified 'reference fuel' (rather than the most common fuel type).⁵⁵⁶

Driving and driving styles have also changed in the years since the NEDC was developed, particularly in cities where increased traffic congestion results in more inefficient driving. The NEDC is criticised for having accelerations that are very soft, a lot of constant speed cruises and a lot of idle events, as these do not correspond to modern driving conditions.⁵⁵⁷

The discrepancy is not uniform across car brands or types, and has been increasing over time

In submissions to this study, stakeholders also noted that the magnitude of the fuel consumption and emissions discrepancy has been gradually increasing in recent years and is not uniform across brands or car types.⁵⁵⁸ ABMARC submitted that in Europe, the discrepancy has grown from an estimated ten per cent in 2010 to 35 per cent in 2014 and that 'it is not possible to provide a generalisation, at the individual vehicle level, of a difference between real-world and official fuel consumption or CO₂ results'.⁵⁵⁹ A number of studies into the fuel consumption gap have found similar results.⁵⁶⁰

These factors do not entirely explain increases and variation in the fuel consumption discrepancy. Other contributing factors may include:

- Manufacturers exploiting 'flexibilities'⁵⁶¹ in the NEDC procedure, resulting in better fuel consumption and CO₂ emissions test results than drivers can typically achieve. These flexibilities occur when procedural steps are not defined precisely and allow for some freedom of interpretation. For example:
 - the specifications of tyres used in the test could be different from tyres typically available to consumers, or the tyre pressure applied during the test could be

⁵⁵³ ABMARC submission, November 2016, p. 5; ABMARC, [Analysis of the Australian 2015 New Light Vehicle Fleet and Review of Technology to Improve Light Vehicle Efficiency: Study for Department of Infrastructure and Regional Development](#), December 2016, p. 50.

⁵⁵⁴ AAA submission, November 2016, p. 25; ABMARC submission, November 2016, p. 5.

⁵⁵⁵ ABMARC submission, November 2016, p. 5.

⁵⁵⁶ AAA submission, November 2016, p.23; GreenCarGuide.co.uk, [How does the new European driving cycle \(NEDC\) fuel economy test work?](#), 29 April 2014.

⁵⁵⁷ ABMARC submission, November 2016, p. 5; Car Engineer, [European driving cycles](#), 1 May 2015, accessed 8 June 2017.

⁵⁵⁸ ABMARC submission, November 2016, p. 8; CHOICE submission, November 2016, p. 7.

⁵⁵⁹ ABMARC submission, November 2016, pp. 8, 10.

⁵⁶⁰ G. Fontaras, N.-G. Zacharof, B. Ciuffo, [Fuel consumption and CO₂ emissions from passenger cars in Europe – laboratory versus real-world emissions](#), Progress in Energy and Combustion Science, 60 (2017), p. 102.

⁵⁶¹ The term flexibility refers to a specific provision or interpretation of the certification procedure or an absence of such a provision or clear interpretation that, if applied, results in the measurement of lower FC or emissions. See G. Fontaras, N.-G. Zacharof, B. Ciuffo, [Fuel consumption and CO₂ emissions from passenger cars in Europe – laboratory versus real-world emissions](#), Progress in Energy and Combustion Science, 60 (2017), p. 120.

- higher than typically observed for vehicles at the point of sale.⁵⁶²
- engine parts may be lubricated using ‘super-lubricants’ that are not supplied at the point of sale or are prohibitively expensive for most consumers.⁵⁶³
 - Manufacturers using specific fuel-saving technologies that improve fuel consumption and CO₂ emissions performance during the NEDC. These technologies include start/stop, hybrid drive and downsized engines.⁵⁶⁴

Given the wide range of conditions under which cars are driven, it is unlikely that any single test could accurately predict fuel consumption and emissions for individual motorists. However, for consumers to reliably use fuel consumption and emissions results to inform their purchasing decisions, testing procedures must meet consumer expectations and reflect real-world driving conditions. Further, for test results to be reliable and consistent, flexibilities and tolerances in the test procedure should be limited.

6.3.2. Options for regulatory reform

The ADR 81/02 fuel consumption label was introduced to allow consumers to make more informed decisions about the running costs and environmental impact of new cars. However, the label may be of limited use where the values represented are not reflective of real-world driving conditions. The fuel consumption and emissions discrepancy diminishes the effectiveness of the fuel consumption label in assisting car buyers to make informed purchasing decisions, particularly where the discrepancy is inconsistent across car models.⁵⁶⁵ In particular, the presence of a non-uniform discrepancy means that consumers cannot rely on NEDC figures to compare fuel consumption or emissions between one model and another.

Similar concerns apply to the discrepancy for noxious emissions. ADR 79/04 was introduced in recognition of the fact that noxious emissions are an externality which can lead to significant health impacts, particularly in urban areas, and which is not effectively addressed by the operation of market forces.⁵⁶⁶ Where the testing discrepancy results in real-world noxious emissions exceeding legislated limits, this will undermine the broader policy objectives sought to be achieved by introducing noxious emissions standards, resulting in lower than expected improvements in measures such as air quality and health outcomes.

Stakeholder submissions have recommended that an independent testing process be introduced to ensure that cars meet relevant standards, and that fuel consumption and emissions are measured in real-world driving conditions.⁵⁶⁷ Further, the Australian Government’s Ministerial Forum on Vehicle Emissions is exploring a range of possible measures to address vehicle emissions.⁵⁶⁸ These options are discussed further below.

⁵⁶² ICCT, [From laboratory to road: A comparison of official and real-world fuel consumption and CO₂ values for cars in Europe and the United States](#), May 2013, accessed 8 June 2017, p. 60.

⁵⁶³ ICCT, [From laboratory to road: A comparison of official and real-world fuel consumption and CO₂ values for cars in Europe and the United States](#), May 2013, accessed 8 June 2017, p. 60; G. Fontaras, N.-G. Zacharof, B. Ciuffo, [Fuel consumption and CO₂ emissions from passenger cars in Europe – laboratory versus real-world emissions](#), *Progress in Energy and Combustion Science*, 60 (2017), p. 120.

⁵⁶⁴ ABMARC submission, November 2016, p. 8; ICCT, [From laboratory to road: A comparison of official and real-world fuel consumption and CO₂ values for cars in Europe and the United States](#), May 2013, accessed 12 December 2017, p. 59.

⁵⁶⁵ Worse, the discrepancy may be causing consumers to lose faith in the value of the label as a source of information. See for example, ACCC [Consumer questionnaire responses](#), Consumer 12.

⁵⁶⁶ DIRD (then the Department of Infrastructure and Transport), [Final Regulation Impact Statement for Review of Euro 5/6 Light Vehicle Emissions Standard](#), p. 21, November 2010, accessed on 6 December 2017.

⁵⁶⁷ AAA submission, November 2016, p. 23; CHOICE submission, November 2016, p.9; ABMARC submission, November 2016, p. 7.

⁵⁶⁸ DIRD, [Ministerial Forum on Vehicle Emissions](#), accessed on 6 December 2017.

Ministerial Forum on Vehicle Emissions

In October 2015, a Ministerial Forum was established to coordinate a whole-of-government approach to addressing motor vehicles emissions. The terms of reference for the Ministerial Forum cover a number of options to reduce fuel consumption and greenhouse gas emissions and pollution from cars, including:

- introducing fuel efficiency (CO₂) measures for new light vehicles as well as tighter noxious emissions standards under Euro 6
- new emissions testing arrangements for vehicles in conjunction with international regulatory agencies to ensure robust testing.⁵⁶⁹

The Ministerial Forum is also considering measures to encourage the uptake of low emissions vehicles.

Euro 6

As previously discussed, the Australian Government's policy is to harmonise national vehicle safety standards with international regulations.⁵⁷⁰ The current emissions standards for new light vehicles in Australia are based on the Euro 5 standards. The more stringent Euro 6 standards commenced in the EU from September 2014, with the current phase of these standards ('Euro 6d') applying to new cars sold in the EU from September 2017.⁵⁷¹ These standards are expected to improve the correlation between laboratory tested and on-road emissions and fuel consumption levels.⁵⁷²

Euro 6d introduced changes to improve the integrity of the testing regime, with the key change being the replacement of the current drive cycle testing regime (the NEDC) with the new Worldwide Harmonised Light Vehicles Test Procedure (WLTP), a more robust laboratory test. The WLTP defines test procedures for fuel consumption and emissions which are more representative of real-world driving conditions; for example, it includes more robust testing parameters, such as a longer drive cycle, and higher maximum and average speeds than the current NEDC test.⁵⁷³

Euro 6d also introduced an on-road 'real driving emissions' test to complement the WLTP laboratory test.⁵⁷⁴ Currently, this test only applies to noxious emissions⁵⁷⁵; however, the EU is exploring other options to collect better on-road fuel consumption and CO₂ data such as mandating the fitment of fuel consumption measurement devices of new vehicles.⁵⁷⁶

Real driving emissions testing

In submissions to this study, some stakeholders have recommended that fuel consumption and emissions be measured in real-world driving conditions, as opposed to the current mandated laboratory test.⁵⁷⁷ Real-world measurement of fuel consumption and emissions is likely to produce more accurate results than laboratory testing. Real-world testing may also

⁵⁶⁹ DIRD, [Ministerial Forum on Vehicle Emissions](#).

⁵⁷⁰ DIRD, ADRs, <https://infrastructure.gov.au/roads/motor/design/>, accessed on 12 December 2017.

⁵⁷¹ DIRD, [Vehicle emissions standards for cleaner air –Draft Regulation Impact Statement](#), December 2016, p. 3.

⁵⁷² DIRD, [Vehicle emissions standards for cleaner air –Draft Regulation Impact Statement](#), December 2016, p. 4.

⁵⁷³ ICCT, [The WLTP: How a new test procedure for cars will affect fuel consumption values in the EU, Working Paper 2014-9, October 2014](#), p. 7.

⁵⁷⁴ ICCT, [Real-Driving Emissions test procedure for exhaust gas pollutant emissions of cars and light commercial vehicles in Europe](#), January 2017, p. 1.

⁵⁷⁵ AAA submission to the draft report, September 2017, p.14.

⁵⁷⁶ European Commission, [FAQ - Proposal for post-2020 CO₂ targets for cars and vans](#), November 2017

⁵⁷⁷ AAA submission, November 2016, p. 23; CHOICE submission, November 2016, p.9; ABMARC submission, November 2016, p. 7.

limit the ability of manufacturers to implement defeat devices, or other emissions reduction technologies that are more effective on the test drive cycle than in real-world use.⁵⁷⁸

The ACCC acknowledges the reservations to real driving emissions testing expressed in stakeholder submissions to this study. The MTA SA submitted that *'real world testing poses a number of challenges; principally how to reliably replicate results for the numerous 'real world' driving conditions and styles that could conceivably be measured'*.⁵⁷⁹ Similarly, the FCAI submitted that without a standardised test for fuel consumption and emissions, the variation between test results would be significant.⁵⁸⁰ Given the wide range of conditions under which cars are driven, it is unlikely that any single test could accurately predict fuel consumption and emissions for individual motorists. However, the ACCC understands that real driving emissions testing is intended to complement, not replace, laboratory testing (as is the case in the EU).

Real driving emissions testing in Australia

Stakeholder submissions have also indicated support for a real driving emissions testing program in Australia. The AAA submitted that developments in vehicle testing in the EU, including the introduction of the WLTP and real-world testing under the Euro 6 standards, do not remove the need for an Australian-based real driving emissions testing program.⁵⁸¹

The ACCC notes the AAA's proposal in October 2017 for the Government to introduce real world fuel consumption and emissions testing for 60 new car models in Australia, with the results being published on the Government's Green Vehicle Guide Website, alongside laboratory test results.⁵⁸² In support of this view, the AAA notes that driving conditions are different from Europe: for example, Australia has higher urban speed limits, lower highway speeds and a warmer climate.⁵⁸³ Similarly, the AAAA submitted that *'the idiosyncrasies of Australian driving conditions and the characteristics of local fuels provide a compelling argument for a real-world driving emissions test program in Australia'*.⁵⁸⁴ Real world testing in Australia may therefore provide consumers with more directly relevant information and help minimise the fuel consumption and emissions discrepancy.

In general, the ACCC is supportive of any measures which improve the accuracy of information used to inform consumer purchasing decisions. Fuel consumption and emissions performance are important factors for prospective new car buyers, and the ACCC considers that there may be benefits to consumers from an Australian real driving emissions test as proposed by the AAA. In particular, the ACCC considers that consumers would benefit from real world testing of fuel consumption, which is not currently a feature of Euro 6d. However, these benefits would need to be assessed against the Government's overall policy objectives in this area.

In particular, consideration may also need to be given to how the AAA's proposal would fit within the overall regulatory framework. If the Government chooses to adopt the Euro 6 standards, an Australian real driving emissions test would likely place additional regulatory burden upon manufacturers, in which case an assessment of the additional benefits provided to consumers under an Australian-specific real driving emissions testing program would be required. Nonetheless, the ACCC encourages the Ministerial Forum to take into account the findings from the AAA's real driving emissions testing program as it prepares its draft implementation plan for consideration by the Government.

⁵⁷⁸ AAA supplementary submission, March 2017, p. 4.

⁵⁷⁹ MTASA submission, November 2016, p. 18.

⁵⁸⁰ FCAI submission, November 2016, p. 17.

⁵⁸¹ AAA submission to the draft report, September 2017, p.14.

⁵⁸² AAA supplementary submission 2, October 2017, p. 2.

⁵⁸³ AAA supplementary submission 2, October 2017, p. 3.

⁵⁸⁴ AAAA submission, September 2017, p.14.

Independent testing

In submissions to this study, CHOICE and the AAA recommend that an independent testing process be introduced to ensure that cars on Australian roads meet relevant standards, rather than rely on manufacturers' own testing.⁵⁸⁵ The MTA Queensland similarly recommended that fuel consumption information be audited by an independent agency.⁵⁸⁶ However, as DIRD has the ability to conduct audits and inspections on a manufacturer's testing facilities, the ACCC considers that current regulations should be sufficient to ensure compliance if effectively enforced.

Findings on the fuel consumption and emissions discrepancy

- Current fuel consumption and emissions testing procedures rely on laboratory testing rather than testing in real-world driving conditions. Manufacturers may therefore claim results for fuel consumption and emissions based on laboratory tests that are significantly better than can be achieved in real-world driving conditions. This is unlikely to meet consumer expectations and has the potential to be misleading.
- Research from the AAA and ABMARC indicates that real-world fuel consumption is on average 23 per cent higher than official laboratory test results. The gap between laboratory and real-world fuel consumption tests is not consistent across car types or brands, and has been increasing in recent years. This casts significant doubt on the comparative value of absolute fuel consumption figures currently displayed in fuel consumption labelling.
- The Australian Government is currently reviewing possible new measures to address vehicle emissions under the Ministerial Forum on Vehicle Emissions. The Forum is considering a number of measures to improve the integrity of vehicle emissions testing, including the introduction of a more realistic laboratory test for fuel consumption and emissions, and for vehicle emissions, on road testing.
- Consumers may benefit from an Australian real driving emissions testing program; however, these benefits would need to be balanced against the Government's overall policy objectives in relation to vehicle emissions.

Recommendations on the fuel consumption and emissions discrepancy

Recommendation 6.2

The ACCC considers that real world testing of fuel consumption and emissions would significantly improve the quality of information provided to consumers.

The ACCC supports measures to enhance the quality of information supplied to consumers currently being considered by the Ministerial Forum into Vehicle Emissions, including the replacement of the current fuel consumption and emissions testing regime with the new Worldwide Harmonised Light Vehicles Test Procedure, a more realistic laboratory test, and the introduction of an on-road 'real driving emissions' test.

The ACCC also considers there may be additional benefits to consumers from an Australian real driving emissions test. The ACCC recommends that the Ministerial Forum consider the costs and benefits of an Australian real driving emissions testing program as proposed by the AAA.

⁵⁸⁵ AAA submission, November 2016, p. 23; CHOICE submission, November 2016, p. 9.

⁵⁸⁶ MTAQ submission to the draft report, September 2017, p.4.

7. Other issues

Key points

- This study considered a number of additional issues, including telematics in cars, car performance and the advertised year of a new car.
- The impact of access to telematics may become more acute as the technology to gather data becomes more prevalent in new cars. The ACCC supports moves for a comprehensive right for consumers to access digitally held data about themselves, including to direct data custodians (such as car manufacturers) to copy that data to a nominated third party.
- In relation to misleading claims about car performance, submissions to this study have not provided evidence that this issue is systemic. The ACCC's initial view is that current laws prohibiting false, misleading and deceptive conduct provide adequate consumer protection in relation to this issue.
- The issue of how the advertised year of a new car is communicated to consumers is within the scope of this study, and the ACCC has considered whether misrepresentations are causing detriment to consumers. The ACCC's initial view is that detriment is not widespread and that instances of misleading or deceptive conduct can be addressed through action by the ACCC and fair trading agencies.
- The ACCC has also received submissions on a number of issues outside the scope of this study. These issues are noted in this chapter. In addition, other issues that are subject to enforcement action are referred to in this chapter.

This chapter looks at other issues that stakeholders have raised as part of submissions to this study.

As outlined in Chapter 1, this market study has not considered direct or parallel imports of new cars by individuals, car financing and insurance products, product safety, demonstrator cars and capped price servicing.

This chapter outlines and addresses:

- emerging issues associated with telematics in new cars
- issues faced by consumers in relation to new car performance representations
- issues faced by consumers in relation to the advertised year of a new car
- stakeholders' submissions on issues additional to those outlined in the Issues Paper.

7.1. Telematics – an emerging issue

Telematics is an emerging technology in passenger cars that can record data both within the car and remotely, including data related to location, acceleration, deceleration and travel speed.⁵⁸⁷ Telematics technology will likely allow the car to interpret data and indicate whether the driver needs to take action.⁵⁸⁸ For example, the car's on-board diagnostics may identify a fault, combine this with information about the car's location, and suggest through the infotainment unit that the driver should take the car to the nearest dealer for repairs.⁵⁸⁹

⁵⁸⁷ NTC, Compliance and enforcement framework for heavy vehicle telematics, November 2014; PC, Data Availability and Use: Inquiry Report, March 2017.

⁵⁸⁸ For a further explanation about telematics and the nature of 'connected cars', see AAA, *My Car My Data*, accessed on 29 June 2017, <https://mycarmydata.com.au/>.

⁵⁸⁹ Adapted from: AAA submission, November 2016, p. 28; AAAA submission, November 2016, p. 73; Anonymous business 1, November 2016, p. 2.

The ACCC understands that at present telematics is not widely used in passenger cars.⁵⁹⁰ However, this technology is becoming more prevalent in heavy vehicles and road freight, to the extent the National Transport Commission (NTC) has developed a framework for the use of telematics in these types of vehicles.⁵⁹¹

The ACCC received a small number of submissions about telematics:

- The AAA submitted that telematics allow the manufacturer to communicate directly with the car owner, perhaps scheduling a service or repair for the car at a dealer, bypassing the independent sector, which may raise competition concerns.⁵⁹² The AAA submitted that consumers should be able to access and control the data generated by their use of the car.
- The AAAA submitted that data generated by the use of a car should also belong to the car owner.⁵⁹³
- Bapcor submitted that telematics is a method for manufacturers to restrict customer service options.⁵⁹⁴
- CHOICE submitted that data collected by a car should only be exported with the car owner's consent.⁵⁹⁵
- Holden submitted that in relation to new features, such as telematics, the industry must ensure the sharing of information and data does not compromise the security and safety of the car.⁵⁹⁶

The AAA, AAAA and MTAA all submitted that the Heads of Agreement (discussed in Chapter 4) contemplated the implications of telematics, and indicated that the signatories may develop protocols relating to consumer access and ownership of car generated data; however, this has not yet occurred.⁵⁹⁷

The PC's Data Availability and Use Inquiry Report considered issues around consumer access to digitally held data about themselves, which could include data collected by telematics devices.⁵⁹⁸ The PC has proposed a comprehensive consumer right to share and receive a machine readable form of data held about them, including data created from consumers' use of internet-connected digital devices,⁵⁹⁹ such as telematics.

On 26 November 2017, [the Australian Government announced](#) that it would introduce legislation in 2018 for a national *Consumer Data Right*. The proposed Consumer Data Right would give consumers access to their data, starting with banking, energy, phone and internet transactions data.⁶⁰⁰ The Australian Government also announced that the Consumer Data Right would thereafter be established sector-by-sector.

The impact of access to technical information and personal data related to telematics is likely to become more acute as the technology to gather data becomes more prevalent in new cars. The ACCC therefore supports the PC's recommendations in its final report on Data

⁵⁹⁰ AAA, My Car My Data, viewed on 30 June 2017, <https://mycarmydata.com.au/>.

⁵⁹¹ NTC, Compliance and enforcement framework for heavy vehicle telematics, November 2014.

⁵⁹² AAA submission, November 2016, p. 28.

⁵⁹³ AAAA submission, November 2016, pp. 44, 73.

⁵⁹⁴ Bapcor submission, November 2016, p. 4.

⁵⁹⁵ CHOICE submission, November 2016, p. 10.

⁵⁹⁶ GM Holden submission, November 2016, p. 15.

⁵⁹⁷ AAA submission, November 2016, p. 32; AAAA submission, November 2016, p. 74; MTAA supplementary submission, November 2016, p. 7.

⁵⁹⁸ PC, Data Availability and Use: Inquiry Report, March 2017, p. 203.

⁵⁹⁹ PC, Data Availability and Use: Inquiry Report, March 2017, pp. 35–36.

⁶⁰⁰ The Hon. Angus Taylor MP, [Australians to own their own banking, energy, phone and internet data](#), 26 November 2017.

Availability and Use, and notes the Australian Government's policy to introduce a Consumer Data Right, sector-by-sector.

The ACCC considers that if a Consumer Data Right was introduced into the new car retailing industry, it could give consumers the right to access their telematics data and facilitate more consumer choice and more competition between service providers, thereby helping ameliorate the potentially detrimental impact of telematics technology.⁶⁰¹

Findings on telematics

- The impact of telematics on competition and consumers is likely to become more acute as telematics technology becomes more prevalent. The ACCC will continue to monitor emerging issues in this area.
- The voluntary Heads of Agreement and codes of practice governing information-sharing in relation to technical information provides a process, as yet unused, for the signatories to discuss issues associated with access and ownership of data generated by telematics technology.
- The PC's final report on Data Availability and Use recommended that consumers gain certain rights to access and use digital data. On 26 November 2017, the Australian Government announced a policy to introduce a Consumer Data Right, sector-by-sector, with the stated aim of ensuring that customers own their own data. If the Australian Government's Consumer Data Right policy was applied to the new car retailing industry, it could give consumers the right to access their telematics data, and the right to direct the data custodian, which would likely include manufacturers and/or dealers, to copy that data to nominated independent repairers.

Recommendation on telematics

Recommendation 7.1

The ACCC supports the Australian Government's intention to legislate a Consumer Data Right sector-by-sector. If a Consumer Data Right was introduced into the new car retailing industry, it could address some of the concerns that were raised about the impacts of telematics technology on new car purchasers. For example, a Consumer Data Right could give consumers the right to access digitally held data about themselves, including the right to direct data custodians to copy that data to a nominated third party.

7.2. Car performance

The ACCC has considered the issue of false or misleading claims about car performance

Box 7.1: Definition of car performance

There is no standard definition for **car performance**.

Car performance refers broadly to a range of objective operational performance measures, such as engine capacity or power, or towing and carrying capacity. However, car performance may also refer to more subjective measures, such as the way a car drives, in terms of its handling and precision, or a car's reliability and quality.⁶⁰²

The ACCC received a small number of submissions to the Issues Paper in relation to car performance. These submissions raised concerns about potentially misleading claims, at the point of sale or in advertising, in relation to the performance of new cars.⁶⁰³ The following

⁶⁰¹ ACCC, Submission to the PC's Data Availability and Use Inquiry, 11 January 2017.

⁶⁰² FCAI submission, November 2016, p. 18.

⁶⁰³ Carsales submission, November 2016, p.8; Destroy My Jeep submission, November 2016, p.5; AAAA submission, November 2016, p.28; SBDC submission, November 2016, p. 4.

were given as examples:

- A dealer or manufacturer refers to the towing capacity of a car which may not correspond correctly to all models in that particular range of cars, with the highest or ‘top of the line’ towing capacity generally quoted.⁶⁰⁴
- Advertising depicts a car being driven off-road or through water while the car itself is designated a passenger vehicle, such that any off-road use could void certain warranty cover.⁶⁰⁵

As previously discussed, the ACL prohibits businesses from engaging in conduct that is false, misleading or deceptive. Businesses must not make statements or representations that are incorrect or likely to create a false impression.⁶⁰⁶

As new cars are a significant medium to long-term investment for many consumers, any false or misleading claims which influence consumer purchasing decisions are likely to cause consumer detriment. Research indicates that 39 per cent of consumers considered car performance when buying their new car; while the car’s reliability and safety features were considered by 54 per cent and 53 per cent of new car buyers respectively.⁶⁰⁷

Submissions to this study did not suggest that misleading claims about car performance are widespread or systemic. Notwithstanding this, as consumer purchasing decisions may be influenced by representations relating to a car’s performance, the ACCC will continue to monitor complaints about these issues.

Findings on car performance

- Submissions to this study have pointed to a few examples of misleading claims in relation to car performance. However, submissions have not provided evidence that this issue is systemic.
- The current laws prohibiting false, misleading and deceptive conduct under the ACL provide adequate consumer protection in relation to this issue.

7.3. Representations about the advertised year of a new car

The ACCC and some state and territory consumer agencies have received complaints regarding manufacturers and dealers using different reference dates to describe the advertised year of a new car for sale. When a new car is advertised, the seller may reference the car’s build date or compliance date. Manufacturers and dealers may also refer to the new car’s model year. These terms are defined in Box 7.2 below.

Box 7.2: New car year

The **build date** or year refers to when the car was manufactured. The build date contains the VIN and the year of manufacture by months and year. This date is typically used to determine the age of a car (including second hand cars).

The **compliance date** is the date the car is fitted with a compliance plate. The compliance plate shows the date when the car was deemed to comply with the ADRs and was approved for sale in Australia.

The **model year** is a marketing term, indicating the model cycle or edition of the car. Model years are not aligned with calendar years, so that (for example) 2018 model vehicles will be released for sale in 2017. Further, a car model manufactured at the start of 2017 and mid 2017 may have different specifications, thus different model years.

⁶⁰⁴ AAAA submission, November 2016, p. 28; SBDC submission, November 2016, p. 4.

⁶⁰⁵ Destroy My Jeep submission, November 2016, p. 5.

⁶⁰⁶ CCA, Part 2-1, s.18 and 29.

⁶⁰⁷ ACCC Consumer Survey, Appendix 1, Table 1, p. 5.

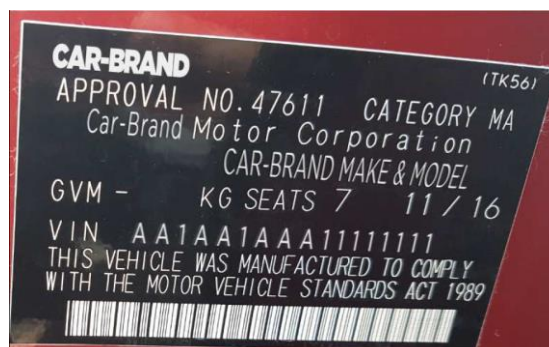
A pictorial example of a 'build plate' and 'compliance plate' is provided below for reference (these images have been created by the ACCC for illustrative purposes):

Figure 7.1: Pictorial examples of a 'build plate' and 'compliance plate'

Example build plate



Example compliance plate



ACCC created images

The build date and compliance plate date can be significantly different as cars take time to travel from the point of manufacture to the point of sale. The date of compliance plates and build plates typically vary by three to six months, as compliance plates are fitted in Australia rather than at the earlier point of manufacture.⁶⁰⁸ For example, a car advertised as a 2016 model may have been deemed compliant in Australia in 2016 but may actually have been manufactured in 2015.

Consumers who are unaware of differences in marketing terms used by dealers or manufacturers may be misled or misunderstand the build date of the new car. This may result in consumers paying more for a new car than they otherwise would have, or experience an unexpected financial loss later if they resell the car.

7.3.1. Submissions received on the advertised year of new cars

A small number of submissions were received on the advertised year of new cars.

Carsales⁶⁰⁹ and the AAA⁶¹⁰ submitted that consumers do not have a strong understanding of the difference between model year, build date and compliance plate dates for new cars. However, the FCAI, AADA and VACC all submitted that consumers are aware of the meanings of the different new car dates.⁶¹¹

Carsales and the AAA submitted that as there is no requirement or regulation that car sellers must refer to a specific reference date, different dates are used by different sellers.⁶¹² Carsales submitted that it has attempted to address the inconsistency of information on its website by making it mandatory to state the build date for all dealer cars and also include the ability for dealers to show other dates relevant to the car.⁶¹³

The AAA submitted that the practice of advertising using a car's compliance date is an attempt to divert attention away from when the car was built. The AAA further submitted that the compliance date represents only an administrative function that a car importer is obliged by law to fulfil.⁶¹⁴

⁶⁰⁸ Carsales submission, November 2016, p. 9, AAA submission, November 2016, p. 37.

⁶⁰⁹ Carsales submission, November 2016, pp. 9–10.

⁶¹⁰ AAA submission, November 2016, pp. 37–38.

⁶¹¹ FCAI submission, November 2016, p. 31, VACC submission, November 2016, p. 15.

⁶¹² Carsales submission, November 2016, pp. 9–10, AAA submission, November 2016, pp. 37–38.

⁶¹³ Carsales submission, November 2016, p. 10.

⁶¹⁴ AAA submission, November 2016, p. 37.

The AAA submitted that one of its members, Royal Automobile Club of Queensland, has received a number of complaints on this issue.⁶¹⁵ A stakeholder submitted that consumers are regularly misled about the build date, compliance plate date and registration dates of cars.⁶¹⁶

Carsales, which uses the vehicle build date in its advertising, advocated for the adoption of a single, consistent designation for the advertised year of a vehicle being adopted.⁶¹⁷ The AAA advocated that it should be mandatory for sellers to use the build date in advertising new cars,⁶¹⁸ and that build dates should be used in all transactions and promotions of new car sales and disclosed to potential buyers.⁶¹⁹ Further, the AAA submitted that using anything other than the build date has the potential to benefit the new car seller and disadvantage the consumers at resale time.⁶²⁰

Carsales also advocated for the use of VIN numbers as an identifier and for there to be a database of cars in Australia searchable by VIN, which would provide consumers with all relevant dates and car specifications.⁶²¹ Carsales submitted that consumers can obtain the VIN from the car itself as the VIN remains the same for the life of the car.

7.3.2. Consumer impact

The ACCC accepts that, in principle, using dates other than the build date to describe the age of a new car could mislead consumers. The advertising of compliance dates has the potential to mislead consumers, because few consumers would consider this date to be reflective of the age of the vehicle. However, advertising a model year may be a legitimate marketing practice to differentiate between different models produced in the same calendar year – as long as it does not mislead consumers.

Consumers potentially may face two types of financial losses as a result of these practices if they are misled about or unaware of a significant difference between the build, compliance date and model year for a car.

- At the point of sale: they may pay more for the new car than they would otherwise have paid had they known the car had an earlier build date.
- At the point of resale: they may receive a lower than expected resale price as the car will be one year older than they had understood at purchase.

These issues reflect the kinds of complaints that the ACCC and state and territory regulators have received in the past, although these have been relatively few in number.

Submissions to this study have not provided any further evidence on the frequency and magnitude of the problems experienced by consumers in relation to this issue. The ACCC notes, however, that the potential loss to individual consumers is potentially significant.

Findings on the advertised year of new cars

- Submissions to this study have provided limited evidence of systemic misleading behaviour by manufacturers or dealers in relation to the advertised year of new cars.
- The current laws prohibiting false, misleading and deceptive conduct under the ACL provide adequate consumer protection in relation to this issue.

⁶¹⁵ AAA submission, November 2016, p. 38.

⁶¹⁶ Destroy My Jeep, November 2016, p. 7.

⁶¹⁷ Carsales submission, November 2016, pp. 9–10.

⁶¹⁸ AAA submission, November 2016, pp. 37–38.

⁶¹⁹ AAA submission, November 2016, p. 37.

⁶²⁰ AAA submission, November 2016, p. 38.

⁶²¹ Carsales submission, November 2016, p. 10.

7.4. Other issues identified by stakeholders

This section outlines issues raised by stakeholders that are outside the scope of this study.

7.4.1. Insurance and financial products

Insurance and financial products typically fall under ASIC's jurisdiction. Pursuant to s.131A, the ACL does not apply to financial services or products.⁶²²

CHOICE, Bapcor and the MTASA submitted that the provision of insurance products and cars should be included in this study.⁶²³ CHOICE noted that access to car data, including data collected via telematics (discussed about at 7.1), could be used to calculate the level of risk associated with insuring the driver of the car, while Bapcor submitted that dealer sold insurance products are linked to the issue of service bundling that occurs at the point of sale – to maximise the use of 'genuine' parts in repair works.

The ACCC notes ASIC's ongoing work and regulatory role in this area. ASIC's submission to this study detailed that it has been conducting a review of the sale of add-on insurance products by car dealers, with its key findings set out in three recent reports.⁶²⁴

ASIC's review of these products is ongoing. ASIC will be undertaking further work into this issue, including potential enforcement action, to ensure that this market delivers acceptable outcomes for consumers.⁶²⁵ ASIC has also notified insurers that they need to improve consumer outcomes by making substantial changes to the pricing, design and sale of add-on insurance products or face additional ASIC regulatory action.

7.4.2. Capped price servicing

Capped price servicing offers can be attractive to consumers because they are a means for consumers to lock in the price of servicing their cars for a set period. However, concerns have been expressed by a number of small businesses in response to the ACCC's online questionnaire that capped price servicing is not necessarily 'capped' or 'free' and may not cover critical service items specified in manufacturers' recommended service schedules.

Bapcor, Ultra Tune and a number of small business online questionnaire responses submitted that capped price servicing should be included as part of this study.⁶²⁶ Bapcor submitted that capped price servicing is linked to the issue of service bundling that occurs at point of sale for manufacturers in order to maintain control over the servicing of cars.

The ACCC looked at issues associated with capped price servicing in 2014.⁶²⁷ The ACCC reviewed representations made by manufacturers, including in brochures and advertising, that scheduled service prices were capped at a maximum price, whereas their terms and conditions allowed for these prices to be changed at any time. Following the ACCC's engagement with the industry, a number of manufacturers amended their terms and conditions for capped price service offers and their advertising.

⁶²² Section 131A of the CCA, '...this Division does not apply...to the supply, or possible supply, of services that are financial services, or financial products.'

⁶²³ CHOICE submission, November 2016, p.10, Bapcor submission, November 2016, p.18, MTASA submission, November 2016, p.4; OSBC submission, November 2016, p. 3.

⁶²⁴ ASIC submission, November 2016, p. 1. The three reports are: (1) [Report 470](#) Buying add-on insurance in car yards: Why it can be hard to say no; (2) [Report 471](#) The sale of life insurance through car dealers: Taking consumers for a ride; and (3) [Report 492](#) A market that is failing consumers: The sale of add-on insurance through car dealers.

⁶²⁵ ASIC, 'ASIC puts insurers on notice to address serious failures in the sale of add-on insurance through car dealers', 12 September 2016, available at: <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-301mr-asic-puts-insurers-on-notice-to-address-serious-failures-in-the-sale-of-add-on-insurance-through-car-dealers/>.

⁶²⁶ Bapcor submission, November 2016, p.18; Ultra tune submission, November 2016, p. 2.

⁶²⁷ ACCC media release, '[ACCC takes action on Kia capped price servicing](#)', 23 February 2015.

7.4.3. Parallel importation

Parallel importation by individuals was excluded in this study.

Toyota and the MTASA submitted that parallel importation, which would allow vehicles to be imported into Australia outside formal or authorised channels, should be included as part of this study.⁶²⁸ Both Toyota and the MTASA submitted that they oppose the parallel importation of cars. Few submissions supported this study's expansion to explore these issues.

The ACCC notes that on 19 August 2017, the Australian Government announced that it would not allow personal imports of new cars from countries with comparable vehicle standards, such as the United Kingdom and Japan.⁶²⁹

7.4.4. Car safety ratings

The Australasian New Car Assessment Program (ANCAP) and the AAA both submitted that product safety and car safety ratings should be included as part of this study.⁶³⁰ ANCAP submitted that car safety rating information is a key element in the new car buying process. ANCAP submitted that there is misinformation about car safety ratings provided to consumers at point of sale. The AAA submitted that the provision of ANCAP safety information should be increased and improved at the point of sale.⁶³¹

Product safety in cars is regulated under the MVSA, the *Motor Vehicle Standards Regulations 1989* and the CCA. DIRD and the ACCC jointly administer the provisions relating to car safety, including recalls and consumer guarantees. DIRD retains officers with the necessary technical expertise to investigate complaints about car safety and the need for recall. The ACCC largely relies on DIRD for information to assist recalls. The ACCC has also developed a formal Memorandum of Understanding (MoU) with DIRD. The MoU, among other things, provides clarity for third parties about the respective regulatory responsibilities where joint action on product safety issues is warranted.

Reforms to the MVSA will expand DIRD's role in car safety and transfer the recall powers for road transport vehicles from the consumer portfolio to the Minister with administrative responsibility for the MVSA, which means they will apply to all vehicles regardless of whether they are 'consumer' or commercial vehicles.⁶³²

Given these administrative arrangements, and because the ACCC has not received a significant number of complaints in relation to car safety ratings, these issues have not been examined in this study.

7.4.5. Online reviews

The MTAA and Toyota both submitted that due to the growth of the internet as a source of information and increasing consumer reliance on online reviews when making purchasing decisions, the role of third party websites is important.⁶³³ The MTAA further submitted that businesses should be protected from misleading consumer reviews that negatively impact them by amending the ACL to include protections for businesses that are similar to the existing protections for consumers.

⁶²⁸ MTASA submission, November 2016, pp. 4, 11–12; Toyota submission, November 2016, p. 8.

⁶²⁹ The Hon. Paul Fletcher MP, [New Road Vehicle Standards Act to Better Protect Consumers and Provide More Choice](#), 16 August 2017.

⁶³⁰ ANCAP submission, November 2016; AAA submission, November 2016, p. 40.

⁶³¹ AAA submission, November 2016, p. 40.

⁶³² Productivity Commission Research Report, [Consumer Law Enforcement and Administration](#), March 2017, pp. 181–182.

⁶³³ MTAA submission, November 2016, pp.50–52; Toyota submission, November 2016, p. 8.

The ACCC has issued a number of guidance documents for online reviews, testimonials and comparator websites for both businesses and consumers on their rights and obligations under the ACL,⁶³⁴ and has not included these issues in this study.

7.4.6. Smash repairs

The MTAA's submission in response to the draft report was critical that the ACCC did not engage in further detail with respect to insurers and crash repairers, and submitted that the motor vehicle insurance industry is highly concentrated, with two insurers accounting for more than 60 per cent of the automotive repair market.⁶³⁵ The MTAA was also concerned that the level of vertical integration and preferred provider arrangements reduce choice and raise barriers to expansion for many independent smash repairers; the MTAA submitted that 'the smash repair industry is in dire need of an ACCC investigation in its own right'.

The issues raised by the MTAA were not examined in depth in this market study. While the MTAA's concerns appeared to raise significant issues related to the insurance sector, they did not appear to be directly related to the range of practices outlined in the ACCC's October 2016 Issues Paper,⁶³⁶ which have formed the focus of this report.

7.4.7. Recreational vehicles

Lemon Caravans & RVs in Australia (LCRVA) submitted that Recreational Vehicle (RV) retailing has significant parallels with new car retailing, particularly in the area of consumer guarantees and the difficulties faced by consumers enforcing their rights.⁶³⁷ LCRVA submitted that the ACCC's relevant findings and recommendations about the new car retailing industry could be equally applied to the RV retailing industry.

This market study's focus has been on new cars, which for the purpose of this study were defined to include passenger vehicles, four wheel drive vehicles and vans; and which excluded a range of vehicle types and associated products (e.g. trucks, buses, trailers, farm equipment, limousines, etc.).⁶³⁸ Data and evidence gathered throughout this study (presented in our August 2017 [draft report](#)) has thus focussed on these vehicle types and associated supply chains. The issues raised by the LCRVA, were raised comparatively late in the market study and the ACCC has not tested whether the findings and recommendations in this report can be directly applied to the market for RVs.

⁶³⁴ Outlined below are the resources the ACCC has developed:

- ACCC publication: [What you need to know about: Online reviews – a guide for business and review platforms](#), 3 December 2013. Guidance for businesses and review platforms, including 'guiding principles' to follow in order to prevent consumers from being misled.
- ACCC publication: [Comparator websites: A guide for comparator website operators and suppliers](#), August 2015. The ACCC has released consumer and industry guidance on the operation and use of comparator websites. The industry guidance is targeted at the operators of comparator websites and businesses whose products are listed on them. The guidance sets out how industry can comply with competition and consumer protection laws when operating/utilising comparator websites.
- ACCC publication: [The comparator website industry in Australia](#), November 2014. This report provides industry, consumer groups and regulators with a better understanding of the comparator website industry in Australia and its potential impact on competition and consumer welfare.
- ACCC publication: [Advertising and selling guide](#), 17 April 2014. This guide contains a section on testimonials and review platforms (page 12 and 13). Consumers expect reviews to be independent and genuine to help them make more informed purchasing decisions and any testimonial should reflect the genuine views and opinions of the person that is represented to have made it.

⁶³⁵ MTAA submission in response to the draft report, September 2017, p. 20.

⁶³⁶ New car retailing industry market study Issues Paper, p. 1. The ACCC's Issues Paper indicated the market study would examine a range of industry practices, specifically including consumer guarantees, fuel consumption and post-sale service arrangements and access to repair and service information.

⁶³⁷ Lemon Caravans & RVs in Australia, October 2017, p.1.

⁶³⁸ New car retailing industry market study [Issues Paper](#), p. 4.

However, the ACCC notes that litigation was recently initiated against Jayco Corporation Pty Ltd (Jayco), Australia's largest caravan and RV manufacturer, in relation to consumer guarantees.⁶³⁹ On 29 November 2017, the ACCC instituted proceedings in the Federal Court against Jayco alleging that Jayco had acted unconscionably towards four customers by obstructing them from obtaining redress, such as a refund or replacement for their defective caravan, and also made false or misleading representations to the four affected customers about their rights to obtain a refund or replacement for their defective caravan.

⁶³⁹ ACCC media release, [ACCC takes action against Jayco](#), 29 November 2017.

Appendix A – Consultation

The ACCC has consulted with a wide range of stakeholders and commissioned research as discussed below.

The ACCC would like to thank stakeholders, consumers, and small businesses, for their time in providing submissions and responses to the ACCC's consultation and research.

A.1 List of non-confidential submissions to the new car retailing industry market study

<p>A</p> <p>ABMARC</p> <p>Ammstar Motors</p> <p>Andrew Forsyth (Dymocks)</p> <p>Andrew Taylor (German Auto Service & Repairs)</p> <p>Anthony Barford</p> <p>Australasian New Car Assessment Program</p> <p>Australian Automobile Association</p> <p>Australian Automotive Aftermarket Association</p> <p>Australian Automotive Dealer Association</p> <p>Australian Securities and Investments Commission</p> <p>Australian Small Business and Family Enterprise Ombudsman</p> <p>Auto Care Association</p> <p>Autodata Australia</p> <p>Autologic Diagnostics</p> <p>Automotive Dealers Service</p> <p>Autopolis</p> <p>B</p> <p>Bapcor</p> <p>Boyce Automotive Data</p> <p>Business Council of Cooperatives and Mutuals</p> <p>C</p> <p>Carsales.com</p> <p>Car Solutions Motor Vehicle Consultants</p> <p>CHOICE</p> <p>Clint Hogan</p> <p>Commercial Asset Finance Brokers Association of Australia</p> <p>Consumer Action Law Centre</p> <p>D</p> <p>Destroy My Jeep</p> <p>F</p>	<p>Federal Chamber of Automotive Industries</p> <p>Fennessy's</p> <p>G</p> <p>Gas Energy Australia</p> <p>Global Auto Parts</p> <p>GM Holden Australia</p> <p>GPC Asia Pacific</p> <p>H</p> <p>Hyundai Motor Company Australia</p> <p>I</p> <p>Insurance Australia Group</p> <p>Insurance Council of Australia</p> <p>K</p> <p>Kmart Tyre and Auto Service</p> <p>L</p> <p>Lemon Caravans and RVs in Australia</p> <p>Lemon Laws for Australia</p> <p>Lemon Vehicles in Australia</p> <p>M</p> <p>Mazda Australia</p> <p>Motor Trade Association of South Australia</p> <p>Motor Trade Association Queensland</p> <p>Motor Traders' Association of NSW</p> <p>Motor Trades Association of Australia</p> <p>N</p> <p>National Motor Vehicle Theft Reduction Council</p> <p>National Roads and Motorists Association</p> <p>National Transport Commission</p> <p>Northside Motorcycles</p> <p>O</p> <p>Office of the NSW Small Business Commissioner</p>
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<p>R</p> <p>Repco (Drysdale Motors–Noel Harper)</p> <p>Repco (Auto Care Ocean Grove–Emma Harper)</p> <p>Repco (Gejay Automotive–Gary Pinner)</p> <p>Repco (Highton Automotive Services–Mark Awramenko)</p> <p>Repco (J&F Motors Pty Ltd–Steven Grocl)</p> <p>Repco (Woodward’s Auto Repairs–Alan Woodward)</p> <p>Ron Glanville</p> <p>Royal Automobile Club of Queensland</p> <p>Ryco Group</p> <p>S</p> <p>Samuel Lim</p> <p>Small Business Development Corporation WA</p> <p>SSS Auto Parts</p> <p>Steve Sorensen Mechanical</p> <p>Subaru Australia</p>	<p>Suncorp Group</p> <p>Swedish Car Company</p> <p>T</p> <p>Tammy Neal</p> <p>Think Software Consulting</p> <p>TJM Products</p> <p>Tony Carter (Brokerage WA)</p> <p>Toyota Motor Corporation Australia</p> <p>TR Flanagan Smash Repairs</p> <p>U</p> <p>Ultra Tune Australia</p> <p>V</p> <p>Victorian Automobile Chamber of Commerce</p> <p>W</p> <p>Wayne Horton (EuroWorld)</p>
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A.2 Stakeholder forum, round table and other consultation

During the course of this study, the ACCC met with a number of key stakeholders, including representatives from industry associations, consumer groups, government agencies, automotive brands, repairers, dealerships and industry experts. The ACCC also held a forum and a round table with invited stakeholders to inform the draft report and final report.

A list of these stakeholders is provided below.

<p>A</p> <p>ABMARC</p> <p>AP Eagers</p> <p>Australian Automobile Association</p> <p>Australian Automotive Aftermarket Association</p> <p>Australian Automotive Dealer Association</p> <p>Australian Securities and Investments Commission</p> <p>Australian Small Business and Family Enterprise Ombudsman</p> <p>Autodata</p> <p>Autoteam Australia</p> <p>B</p> <p>Bapcor</p> <p>Bob Aldons</p> <p>Boyce Automotive Data</p> <p>C</p> <p>CHOICE</p> <p>Consumer Affairs Victoria</p> <p>Consumer Action Law Centre</p>	<p>D</p> <p>Department of Industry, Innovation and Science (Cth)</p> <p>Department of Infrastructure and Regional Development (Cth)</p> <p>Destroy My Jeep</p> <p>F</p> <p>Federal Chamber of Automotive Industries</p> <p>Fennessy’s</p> <p>Fiat Chrysler Automobiles</p> <p>Ford Motor Company of Australia</p> <p>Ford National Dealers Council</p> <p>G</p> <p>GM Holden Australia</p> <p>GPC Asia Pacific</p> <p>H</p> <p>Hyundai Motor Company Australia</p> <p>I</p> <p>Insurance Australia Group</p> <p>Insurance Council of Australia</p>
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<p>J</p> <p>J&F Motors JMC Automotive</p> <p>K</p> <p>Kmart Tyre and Auto Service</p> <p>L</p> <p>Lemon Laws for Australia Lemon Vehicles in Australia</p> <p>M</p> <p>Mazda Australia Mercedes-Benz Australia-Pacific Motor Trade Association of South Australia Motor Trade Association Queensland Motor Traders' Association of NSW Motor Traders' Association of WA Motor Trades Association of Australia</p> <p>N</p> <p>National Motor Vehicle Theft Reduction Council National Transport Commission Nissan Motor Co. (Australia)</p>	<p>NSW Fair Trading</p> <p>O</p> <p>Office of Fair Trading Queensland Office of the NSW Small Business Commissioner Office of the SA Small Business Commissioner</p> <p>S</p> <p>Small Business Development Corporation WA Suncorp Group</p> <p>T</p> <p>Toyota Motor Corporation Australia Treasury (Cth)</p> <p>U</p> <p>Ultra Tune Australia</p> <p>V</p> <p>Victorian Automobile Chamber of Commerce Victorian Small Business Commissioner Volvo Car Australia</p> <p>W</p> <p>Wayne Horton (EuroWorld)</p>
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The ACCC also:

- received 85 consumer responses and 229 small business responses to the online questionnaire, in respect of the October 2016 issues paper
- received 19 consumer responses and 27 small business responses to the online consultation hub, in respect of the August 2017 draft report
- attended a number of workshop site visits.

A.3 ACCC commissioned research

The report uses data and information from commissioned research including consumer research commissioned by the ACCC and undertaken by Colmar Brunton (ACCC Consumer Survey) as well as technical advice on new car repair by Cartech Pty Ltd.

The ACCC Consumer Survey contains findings from an online stratified consumer survey of 1500 new car buyers across Australia. The research explored consumer preferences, experiences and behaviours related to the purchase, repair and service of their new cars.

Two reports by Cartech Pty Ltd contain the findings of analysis undertaken by Cartech Pty Ltd into stakeholder given examples of restrictions to repair and service data and information for new cars. The Colmar Brunton report of survey findings and reports by Cartech Pty Ltd are published on the ACCC website at www.accc.gov.au/newcars.

Appendix B – Government reviews relating to cars

There are a number of recent and ongoing Australian government reviews that relate to cars. These are listed below for reference.

B.1 Australian Consumer Law: warranties and Servicing

- Consumer Affairs Australia and New Zealand (CAANZ) recently undertook a review of the ACL. The review assessed the effectiveness of the provisions of the ACL and the flexibility of the ACL to respond to new and emerging issues. CAANZ released an [Interim Report](#) in October 2016. A final report was released in March 2017, containing 19 legislative proposals, four non-legislative actions and seven priority areas. The report recommends a number of changes to the operation of consumer guarantees, manufacturer's warranties and extended warranties. The [final report](#) also considered industry-specific regulation for motor vehicles and recommended a 'generic and flexible approach' to consumer guarantees in preference of an 'industry-specific approach'. Whether to adopt an opt-in requirement for extended warranties, whether to exempt second-hand vehicles from the consumer guarantee regime was considered but not recommended by CAANZ.

On 31 August 2017, Australia and New Zealand's consumer affairs ministers discussed the outcomes of the ACL review. Ministers directed CAANZ to undertake public regulatory impact for a number of the ACL review proposals, including the proposals discussed in Recommendation 3.1 of this report. Ministers directed CAANZ to report back at the August 2018 CAF meeting for decision.

B.2 Legislation reviews

- DIRD recently reviewed the *Motor Vehicle Standards Act 1989* (Cth), culminating in a [number of regulatory reforms](#), announced by the Government on 10 February 2016. DIRD is also reviewing possible new measures to address vehicle emissions (CO₂ and noxious emissions) for the Ministerial Forum on Vehicle Emissions. The Ministerial Forum released a [Vehicle Emissions Discussion Paper](#) for public comment in February 2016 to explore a range of possible options to address vehicle emissions. In December 2016, the Ministerial Forum released [draft regulation impact statements](#) on improving noxious emissions standards and introducing fuel efficiency standards for light vehicles, which sought views on design elements and timing for their adoption.⁶⁴⁰ A fuel quality [discussion paper](#) was also released in December 2016. The Ministerial Forum is expected to report to Government on a draft implementation plan for these new measures.
- The WA Department of Commerce's Consumer Protection Division undertook a review of the *Motor Vehicle Dealers Act 1973* and *Motor Vehicle Repairers Act 2003* and released a consultation [Discussion Paper](#) in August 2013. The second stage of the review resulted in the release of a subsequent [Consultation Paper](#) in November 2015, which discussed the earlier paper and sought feedback from stakeholders on options for reform. A Decision Regulatory Impact Statement will be prepared in the third stage of the review addressing the outcome of consultation and making recommendations for reform.
- In 2014–15, the Australian Government undertook a comprehensive review of Australia's competition policy (the 'Harper Review'). The Harper Review's Terms of Reference required an assessment of Australia's competition policies, laws and institutions to determine whether they remain fit for purpose, especially in light of the opportunities and challenges facing Australia into the foreseeable future. The Harper Review's [Final Report](#) was released on 31 March 2015 and contained 56 recommendations for reform.⁶⁴⁰

⁶⁴⁰ Competition Policy Review, [Final Report](#), 31 March 2015.

Two important legislative amendments to Australian competition law have passed Parliament, following recommendations from the Harper Review:

- the Competition and Consumer Amendment (Misuse of Market Power) Bill 2017 (Cth) which was passed on 23 August 2017.
- the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, which was passed on 18 October 2017

The Competition Policy Review legislation contains a broad range of amendments to the Competition and Consumer Act 2010, including:

- amending the misuse of market power provision to introduce a substantial lessening of competition test to determine whether a business with a substantial degree of market power has engaged in anti-competitive conduct
- introducing a prohibition against concerted practices that substantially lessen competition.

The Competition Policy Review legislation came into effect on 6 November 2017.

B.3 Future of the automotive industry: automated vehicles and data availability

- On 22 September 2016, the Parliament of New South Wales Joint Standing Committee on Road Safety (Staysafe) released a [final report](#) into *Driverless Vehicles and Road Safety in NSW*. The report contained nine findings and three recommendations including the development and implementation of an automated vehicle regulatory framework by the National Transport Commission (NTC), the development of guidelines or a code of practice regulating the trials and introduction of automated vehicles in NSW and the identification of potential social and economic impacts. On 22 September 2016, the NSW Government tabled a [response](#) to the report supporting the Staysafe recommendations.
- On 30 November 2016, the Standing Committee on Industry, Innovation, Science and Resources commenced an [inquiry](#) into ‘the social issues relating to land-based driverless vehicles in Australia.’ Following the consultation process, the Committee is expected to report to Government by September 2017.
- In 2016–17, the Productivity Commission (PC) conducted a broad ranging investigation into the benefits and costs of options for improving availability and use of private and public sector data. On 31 March 2017 the PC sent its [final report to the Australian Government](#), recommending a legislated comprehensive right for consumers to direct how data about them or generated by their internet-connected activity is handled by data holders. On 26 November 2017, [the Australian Government announced](#) that it would introduce legislation in 2018 for a national *Consumer Data Right*, giving consumers access to their banking, energy, phone and internet transactions data. In March 2014 the PC also released a [report](#) on public support for Australia’s automotive manufacturing industry.
- In November 2015 the COAG Transport and Infrastructure Council tasked the National Transport Commission with investigating regulatory barriers to automated vehicles. The NTC undertook a review of the regulatory options for automated vehicles, and released a [Discussion Paper](#) in May 2016. The NTC also released an [Issues Paper](#) on regulatory barriers to automated vehicles in February 2016. In November 2016 the Transport and Infrastructure Council approved the NTC’s policy findings and recommendations, which are outlined in a policy paper titled [Regulatory reforms for automated road vehicles](#).
- On 25 November 2014, the Australian Senate referred an inquiry into the future of Australia’s automotive industry to the Senate Economics References Committee. The inquiry was established to develop a policy framework and identify areas where the

government could act to assist all sectors of the industry. A [final report](#) was published in December 2015.

B.4 Other reviews

- In February 2016, ASIC released a [report](#) about the experience of consumers who bought add on insurance products through car yards and a [report](#) into the sale of life insurance through car dealers. ASIC found that consumers can pay up to 18 times more for life insurance sold through a car dealer compared to the cost of simple life insurance products sold directly to the consumer by these insurers. ASIC also released an [app](#) in August 2016 aimed at educating people about the full costs of buying and running a car. In September 2016 ASIC released a further [report](#) on the sale of add-on insurance through car dealers, reviewing data on five common general insurance products. This report found that these products are very poor value; they are sold in circumstances where they provide very little to no benefit to consumers; and that the sales environment where consumers are required to make multiple complex decisions on the basis of limited information (such as the dollar cost of the premium) and where insurers do not properly manage the risk of unfair sales attributable to very high commissions and conflicts of interest.
- On 21 February 2017, ASIC accepted an [Enforceable Undertaking](#) by Inhouse Finance Group (Sydney) Pty Ltd (**Inhouse Finance Group**). Inhouse Finance Group provides loans for cars purchased from Best Buy Autos in Sydney. The undertaking required Inhouse Finance Group to refund more than \$400 000 to consumers who had been charged a higher interest rate on car loans than the maximum rate permissible under s. 322(1) of the *National Consumer Credit Protection Act 2009* (Cth).
- In 2013 the Australian Government released a [report reviewing the Franchising Code of Conduct](#). The report recommended that an analysis be conducted of the impact of a minimum term and standard contractual agreements for motor vehicle agreements before a future review of the Franchising Code of Conduct.
- On 19 November 2013 the NSW Legislative Assembly voted to establish a Select Committee on the Motor Vehicle Repair Industry. The terms of reference for this committee was 'to inquire into and report on the contractual relationships between insurers and motor vehicle repairers, the quality of smash repair work in NSW, consumer choice in the marketplace, and whether the industry works competitively.' The Committee published a [report](#) in July 2014, containing 21 recommendations. The NSW Government published a [Response to the report of the Select Committee on the Motor Vehicle Repair Industry](#) in December 2014. The response supported a number of recommendations including compelling manufacturers to make repair specifications readily available to repairers and assessors in addition to a mandatory code of conduct for the repair and insurance industry. As a result of the recommendations made by the Committee on 31 March 2017 the NSW Government announced the implementation of a mandatory code of conduct between the motor vehicle insurance and repair industries. The code came into effect on 1 May 2017.

Appendix C – Motor vehicle regulations and codes

There are a number of Commonwealth and state and territory regulations affecting the sale of new cars in Australia. There are also a number of applicable industry codes and agreements.

Table C1 lists the specialised legislation that may be relevant to the sale of new cars in certain Australian jurisdictions.

Table C1 – Relevant motor vehicle regulation

Name of regulation	Who enforces the regulation	Type of regulation
ACL (Sections 18, 29, Part 3-2 Division 1 Consumer guarantees)	ACCC	Australian consumer law
CCA Part IV: restrictive trade practices	ACCC	Australian competition law
Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Franchising Code of Conduct).	ACCC	Mandatory industry code
Motor Vehicle Standards Act 1989 Australian Design Rules	DIRD	Commonwealth
Fuel Quality Standards Act 2000	Department of the Environment and Energy	Commonwealth
Sale of Motor Vehicles Act 1977* Fair Trading (Motor Vehicle Repair Industry) Act 2010	ACT Government	State and territory – car dealers and repairers
Motor car trader obligations (Motor Car Traders Act 1986*; Motor Car Traders Regulations 2008)	Consumer Affairs Victoria	State and territory – car dealers
Motor Dealers and Repairers Act 2013*	NSW Fair Trading	State and territory – car dealers and repairers
Consumer Affairs and Fair Trading Act* (Consumer Affairs and Fair Trading (Motor Vehicle Dealers) Regulations)	NT Government	State and territory – consumer law
Motor Vehicle Dealers and Chattel Auctioneers Act 2014 (Motor Dealers and Chattel Auctioneers Regulation 2014)	Queensland Government	State and territory – car dealers
Motor Vehicle Traders Act 2011*	Tasmanian Government	State and territory – car dealers
Motor Vehicle Dealers Act 1973 (Motor Vehicle Dealers (Prescribed Vehicles) Regulations 1974; Motor Vehicle Dealers (Licensing)	WA Department of Commerce	State and territory – car dealers and repairers

Regulations 1974; Motor Vehicle Dealers (Sales) Regulations 1974; Motor Vehicle Dealers (Infringements) Regulations 2002)

[Motor Vehicle Repairers Act 2003](#)
(Motor Vehicle Repairers Regulations 2007)

* This refers to specialised legislation that may be relevant to the sale of new vehicles in addition to the Australian Consumer Law. Note that Queensland, South Australia and Western Australia do not have laws for the sale of new vehicles that extend beyond the Australian Consumer Law as applied in each jurisdiction.

Table C2 lists a number of industry codes and agreements relevant to new cars sold in Australia.

Table C2 – Industry codes and agreements applying to motor vehicles

Industry agreements and codes of practice:	Parties	Type of code/agreement
Industry Agreement on Access to Service and Repair Information	FCAI, AADA, AAA, AMIF, AAAA	Voluntary Industry code – service and repair information
The Voluntary Code of Practice for Access to Service and Repair Information for Motor Vehicles	FCAI	Voluntary Industry code – service and repair information
Choice of Repairer – Code of Practice	AAAA	Voluntary Industry code – service and repair information
Access to Service and Repair Information for Motor Vehicles	AADA	Voluntary Industry code – service and repair information
Code of practice for access to service and repair information for motor vehicles	AAA	Voluntary Industry code – service and repair information
New Vehicle Receiving and Inspection Procedures	FCAI	Voluntary Industry code – receiving and inspection procedure
Voluntary code of practice for motor vehicle advertising	FCAI	Industry code – car advertising
Motor Vehicle Insurance and Repair Industry Code of Conduct	Code Administration Committee (Representatives from both the ICA and MTAA)	Mandatory Industry code for NSW from May 1 2017, Voluntary Industry Code elsewhere – repair and insurance dispute resolution

Appendix D – Claim limits in tribunals and small claims courts

Table D1 lists the jurisdictional limits for motor vehicle consumer guarantee disputes for tribunals and small claims courts in each jurisdiction.

Table D1: Jurisdictional limits for motor vehicle claims – 2017

Tribunal or court	Maximum amount consumers can claim
ACT Civil and Administrative Tribunal ⁶⁴¹	\$25 000 (increased from \$10 000 in 2016)
Northern Territory Civil and Administrative Tribunal ⁶⁴²	\$25 000
NSW Civil and Administrative Tribunal ⁶⁴³	Where the vehicle is new and is substantially for private use: unlimited For other motor vehicle consumer claims: \$40 000
Queensland Civil and Administrative Tribunal ⁶⁴⁴	\$25 000
South Australian Magistrates Court: minor claim ⁶⁴⁵	\$12 000
Tasmanian Magistrates Court: minor civil claim ⁶⁴⁶	\$5000
Victorian Civil and Administrative Tribunal ⁶⁴⁷	Unlimited
Western Australian Magistrates Court: minor case claim ⁶⁴⁸	\$10 000

Consumers whose claims are greater than the jurisdictional limit of the relevant tribunal or small claims court can choose to file a general court application. The appropriate court is usually the Magistrates Court or equivalent. However, for some claims it could be the Supreme Court.

⁶⁴¹ ACAT, Civil Dispute Applications – Guide to Applicants, http://www.acat.act.gov.au/application-type/civil_disputes_and_common_boundaries/civil_dispute_applications_-_guide_to_applicants#Jurisdiction, accessed 17 July 2017.

⁶⁴² NTCAT, Matter types/Jurisdiction, <http://www.ntcat.nt.gov.au/jurisdiction.shtml>, accessed 17 July 2017.

⁶⁴³ NCAT, Motor vehicle consumer claims, http://www.ncat.nsw.gov.au/Pages/cc/Divisions/Motor_vehicles/Motor_vehicles.page.aspx, accessed 17 July 2017.

⁶⁴⁴ QCAT, Consumer and trader disputes, <http://www.qcat.qld.gov.au/matter-types/consumer-and-trader-disputes>, accessed 17 July 2017.

⁶⁴⁵ Courts Administration Authority of South Australia, Civil Claims, <http://www.courts.sa.gov.au/RepresentYourself/CivilClaims/Pages/default.aspx>, accessed 17 July 2017.

⁶⁴⁶ Magistrates Court of Tasmania, Minor civil claims (\$5000 or less), http://www.magistratescourt.tas.gov.au/about_us/civil/minor_civil_claims, accessed 17 July 2017.


⁶⁴⁷ VCAT, Goods and Services – Cases VCAT can hear, <https://www.vcat.vic.gov.au/case-types/goods-and-services>, accessed 17 July 2017.

⁶⁴⁸ Magistrates Court of Western Australia, Civil Matters, http://www.magistratescourt.wa.gov.au/C/civil_matters.aspx, accessed 17 July 2017.

Appendix E – Types of technical information to repair and service new cars

Table E1 provides a non-exhaustive list of the types of technical information that may be needed to repair or service a new car, of which the ACCC is currently aware.

Table E1: Types of information and data to repair to repair and service new cars

Information or data	Description
Body/collision repair methods and dimensions	The manufacturer's recommended methods for welding and completing structural and non-structural repairs to a car. ⁶⁴⁹
Component overhaul procedures	Instructions for completing a refurbishment of car components, for example, instructions for tuning-up car engines to the manufacturer's specifications, including for in-chassis and major overhauls of the car's engine and its components. ⁶⁵⁰
Component specifications	The design requirements of car parts made by component level suppliers, which may include specifications such as suspension roll gradients to determine front and rear roll stiffness. ⁶⁵¹
Diagnostic and testing procedures	The practices for accessing the on-board diagnostic system of a car to identify the problems a car may have. ⁶⁵²
Diagnostic, testing and scanning tools	<p>Tools that are connected to a car to download and display fault codes, generally can also be used to upload software updates and reinitialisation codes.</p> <p>The picture on the right illustrates a typical proprietary diagnostic tool with an OBD II connector, which is designed to plug into the car.</p> 
Electrical circuit and wiring diagrams and voltages for electronic components	Schematic layout of a car's wiring and components and specifications. ⁶⁵³
Electronic logbooks	An electronic logbook includes information about the car, such as manufacturer specifications regarding servicing, and provides a record of the service history of the car. It may be stored in the car's on-board diagnostic system, in the cloud, in the car's keys or in another electronic medium.
Lubricant specifications	Description of the type (synthetic, part synthetic or mineral) and viscosity of oil recommended by a manufacturer for use in lubricating different car components e.g. crankcase, automatic transmission, differential, 4WD transfer, 4WD differential or power steering, may be contained in repair and service manuals or logbooks. ⁶⁵⁴

⁶⁴⁹ Toyota (US), [Collision Repair Information](#), December 2013, accessed 17 July 2017.

⁶⁵⁰ Supertune.com.au, [What is a car engine overhaul?](#), 2016, accessed 17 July 2017.

⁶⁵¹ Cai Z., Chan S., Tang X., Xin J. (2013) The Process of Vehicle Dynamics Development. In: SAE-China, FISITA (eds) Proceedings of the FISITA 2012 World Automotive Congress. Lecture Notes in Electrical Engineering, vol 195. Springer, Berlin, Heidelberg.

⁶⁵² AAA (US), [Automobile Computer Diagnosis – AAA Experts Explain How Repair Shops Find Problems](#), 17 September 2012, accessed 17 July 2017.

⁶⁵³ AAA submission, November 2016, p. 29; AAA submission, November 2016.

⁶⁵⁴ Castrol (AU), [Engine oil](#), 2017, accessed 17 July 2017; Caltex (AU), [Oil & Product Finder](#), 2017, accessed 17 July 2017.

Maintenance and service schedules	Instructions issued by manufacturers on how often a car should be serviced and what components should be replaced or inspected at each service. May be contained in repair and service manuals. ⁶⁵⁵
Maintenance specifications and adjustment procedures	Car servicing and maintenance requirements as specified by the manufacturer to be conducted on a periodic basis, may be contained in repair and service manuals. ⁶⁵⁶
Meanings of fault codes	Many diagnostic trouble codes reported by a car's on-board diagnostic systems are standardised, ⁶⁵⁷ however, some manufacturers may use non-standard codes.
Pass-through information	Pass-through allows the reprogramming of ECUs (e.g. using software updates) to be carried out using a pass-through-enabled tool via a car's on-board diagnostic port in conjunction with a computer. ⁶⁵⁸
Recommended manufacturer repair times	A guide issued by the manufacturer as to how long a service or repair should take to complete by a qualified technician. ⁶⁵⁹
Reinitialisation codes	Where an ECU is disconnected/loses power and is reconnected to a car, systems may need to be reset with the use of a PIN. ⁶⁶⁰
Safety and emergency services instructions	Detailed procedures outlining precautions for handling a car during repairs/servicing or an incident. ⁶⁶¹
Service campaigns	Notifications to customers to address issues with a product not related to safety or compliance. ⁶⁶² Toyota (US) defines two types of service campaigns: Special Service Campaigns where customers are notified about specific product or technical issues for which a remedy is being offered without an expiration date for free; and Limited Service Campaigns, which are similar to above but only offered for a specified period of time. ⁶⁶³
Software update (car)	New instructions for various car systems to improve their operation, for instance, a manufacturer may release a software update for a car's automatic transmission to improve its shifting performance. These may be in the form of codes, procedures and files required to recalibrate ECUs in cars (e.g. powertrain, engine, emissions, transmission, and advanced driver assistance systems). ⁶⁶⁴
Software update (diagnostic tool)	New instructions for a manufacturer branded or aftermarket diagnostic tool to communicate with new car models and to improve their operation, for instance, where a new model is released a diagnostic tool will need to be updated to understand fault codes occurring from new car systems.
Technical service bulletins	Instructions issued by manufacturers to dealers on procedures to service/repair cars where unanticipated problems have regularly arisen on a particular make and model of car in order to avoid future problems. ⁶⁶⁵

⁶⁵⁵ VACC submission, February 2017, p. 4.

⁶⁵⁶ Toyota (US), [Basic Car Maintenance Tips & Services Checklist](#), 2017, accessed 17 July 2017.

⁶⁵⁷ SAE International, [Diagnostic Trouble Code Definitions](#), SAE J2012 DEC2016, December 2016, accessed 17 July 2017.

⁶⁵⁸ European Commission, [Study on the operation of the system of access to vehicle repair and maintenance information](#), Directorate-General for Enterprise and Industry, October 2014, accessed 17 July 2017.

⁶⁵⁹ VACC submission, February 2017, p. 4.

⁶⁶⁰ AAAA submission, November 2016, p. 57.

⁶⁶¹ Toyota (EU), [Euro 5—Emergency Responders Guides](#), 2017, accessed 17 July 2017; Australasian Road Rescue Organisation, [Rescuers Technical Library](#), 2017, accessed 17 July 2017.

⁶⁶² Volkswagen (US), [Recall/Service Campaign lookup](#), accessed 21 March 2017; VACC submission, February 2017, p. 4.

⁶⁶³ Toyota (US), [Lookup Safety Recalls & Service Campaigns by VIN](#), 2017, accessed 17 July 2017.

⁶⁶⁴ AAAA submission 1, February 2017, Appendix 8, p. 9; Bosch Diagnostics, [J2534 FAQ](#), 2017, accessed 17 July 2017; AAAA submission, November 2016, p. 57.

⁶⁶⁵ AAAA submission, November 2016; VACC submission, February 2017, p. 4.

Appendix F – Supporting information on access to technical information

Table F1 collates reports from stakeholders about access to Australian model technical information for independent repairers for the top ten makes in Australia in 2016.

Table F1: Reported differences in the online provision to independent repairers of technical information (aggregated), by top ten makes in Australia (2016)

Make	Technical information web address	Origin	Website accessible in Australia	Pass Through	Country model information available
Toyota	www.toyotamanuals.com.au	AU	Yes	No	AU models
Mazda	www.mazdamanuals.com.au	AU	Yes	No	AU models
	www.mazdaserviceinfo.com	US	Blocked	Yes	
	mapps.mazdaeur.com/cas/login	EU	Blocked	Yes	
Holden	www.acedelcodts.com	AU	Yes	Yes	AU models
Hyundai	technical@hyundai.com.au	AU	Email service	No	
	www.hyundaitechnicalinfo.com	US	Yes (OS)	No	OS models only
	service.hyundai-motor.com:444/euro5/login.tiles	EU	Accessible since October 2016 ⁶⁶⁶	Yes ⁶⁶⁷	
Mitsubishi	No Australian email or web site	—	—	No	
	www.mitsubishitechinfo.eu	EU	Yes (OS)	Yes	OS models only
	mitsubishitechinfo.com/epacarb/	US	Blocked	Yes	
Ford	www.motorcraftservice.com (AU option)	AU	Yes	No	AU models
	www.motorcraftservice.com (US option)	US	Blocked	Yes	
	etis.ford.com	EU	Blocked	Yes	
Nissan	techdata@nissan.com.au	AU	Email service	No	
	www.nissan-techinfo.com	US	Blocked ⁶⁶⁸	Yes	
	eu.nissan.biz	EU	Blocked	Yes	
Volkswagen	erwin.volkswagen.de	AU/US /EU	Yes	Yes (US/EU)	AU has less information ⁶⁶⁹

⁶⁶⁶ FCAI submission, May 2017, Attachment 4, states that access is available to Australian independent repairers. Hyundai confirmed to the ACCC that this information became available to Australian independent repairers in October 2016.

⁶⁶⁷ Further review of the website indicates pass-through access is available to Australian independent repairers for a subscription fee; however, it is unclear whether this is fully applicable to all Australian model cars.

⁶⁶⁸ Note – available to AU Nissan dealers only

⁶⁶⁹ AAAA supplementary submission 1, February 2017, p. 8.

Honda	No Australian email or website	AU	—	No	
	techinfo.honda.com	US	Blocked	Yes	
	techinfo.honda-eu.com	EU	Blocked	Yes	
Subaru	www.subaru.com.au/service/service-and-repair-manuals	AU	Order form for repair and service manuals on DVD	No	
	VACC call centre ⁶⁷⁰	AU	Yes - Body repair methods for smash repairers only	No	
	techinfo.subaru.com	US	Yes (OS)	Yes	OS model only
	www.subaru-repairinfo.com	EU	Yes (OS)	Yes	OS model only

Source: MTAA submission (April 2017), pp. 5–6; KTAS submission (April 2017); Cartech report and supplementary report, July 2017.

Note: Top ten based on VFACTs data for the year ending 2016.

Table F2 shows the number of FCAI members producing passenger cars who currently have a link to a technical website on FCAI's portal to facilitate independent repairers' access to technical information from manufacturers.⁶⁷¹

Table F2: FCAI members (passenger cars) with and without links to their technical websites on FCAI's website (and market shares in the Australian market, 2016)

With	% market share	Without (*or email/order form only)	% market share
1. Audi	2.90	1. Alfa Romeo	0.15
2. BMW	2.80	2. Aston Martin	0.02
3. Citroen	0.10	3. Bentley	0.03
4. Ford	4.80	4. Caterham	0.00
5. GM Holden	10.00	5. Chery	0.00
6. Hyundai	14.00	6. Chrysler	0.10
7. Jaguar	0.45	7. Ferrari	0.04
8. Lexus	0.72	8. Fiat	0.28
9. Mazda	11.50	9. Honda*	4.21
10. MINI (via BMW)	0.67	10. Infiniti	0.10
11. Peugeot	0.42	11. Kia	5.67
12. Renault	0.70	12. Lamborghini	0.03
13. Skoda	0.81	13. LDV	0.12
14. Toyota	18.01	14. Lotus	0.01
15. Volkswagen	7.09	15. Maserati	0.10
16. Volvo Car	0.44	17. McLaren	0.02
		18. Mercedes-Benz	4.78
		19. Mitsubishi	2.16
		20. Morgan	0.00
		21. Nissan*	1.79

⁶⁷⁰ Subaru submission, November 2017, p. 6.

⁶⁷¹ For the purpose of these tables, the ACCC considered that links to email addresses or generic customer service websites are not links to technical websites.

		22. Porsche	0.19
		23. Proton	0.04
		24. Rolls-Royce	0.01
		25. Smart	0.00
		26. Ssangyong	0.03
		27. Subaru*	2.70
		28. Suzuki*	2.16
Total (%)	75.41%	Total (%)	24.74%

Source: VFACTs data for 2016 calendar year; MTAA submission, February 2017, p. 34–38. As at 1 November 2017.

Note: Percentages may not add up to 100 due to rounding.

Table F3 provides the same information as reported in table F2, but for Sports Utility Vehicles (SUVs), which are included in this study, but reported differently in the VFACTS statistical dataset.

Table F3: FCAI members (SUVs) with and without links to their technical websites on FCAI's website (and market shares in the Australian market, 2016)

With	% market share	Without (*or email/order form only)	% market share
1. Audi	2.30	1. Bentley	0.01
2. BMW	3.27	2. Chery	0.00
3. Citroen	0.05	3. Dodge	0.08
4. Ford	3.81	4. Fiat	0.24
5. GM Holden	5.11	5. Great Wall	0.00
6. Hyundai	6.36	6. Haval	0.07
7. Jaguar	0.19	7. Honda*	4.62
8. Land Rover	3.08	8. Infiniti	0.08
9. Lexus	1.25	9. Isuzu Ute	1.59
10. Mazda	10.90	10. Jeep	2.86
11. MINI (via BMW)	0.12	11. Kia	3.43
12. Peugeot	0.24	12. Maserati	0.00
13. Renault	0.70	13. Mercedes-Benz	3.03
14. Skoda	0.19	14. Mitsubishi	9.29
15. Toyota	14.31	15. Nissan*	9.32
16. Volkswagen	2.19	16. Porsche	0.80
17. Volvo Car	0.85	18. Ssangyong	0.05
		19. Subaru*	7.69
		20. Suzuki*	1.94
Total (%)	54.92%	Total (%)	45.10%

Source: VFACTs data for 2016 calendar year; MTAA submission, February 2017, p. 34–38. As at 1 November 2017.

Note: Percentages may not add up to 100 due to rounding.

Appendix G – EU and US models of technical information sharing

G.1 European Union

The primary legislation regulating the sharing of information and data to repair and service cars in the EU is Regulation (EC) No. 715/2007 (Euro 5 Regulation). A number of associated regulations implement aspects of the Euro 5 Regulation. The Euro 5 Regulation, which has been in effect in the EU since March 2010, goes beyond requiring access to repair and service manuals and includes diagnostic protocols, security-related repair and service information and enables diagnostic tool manufacturers to create non-proprietary tools.⁶⁷²

Background to European Regulation

The predecessor legislation to the Euro 5 Regulation was directed at dealing with emissions, however, expanded to require manufacturers to provide all operators—both independent and those within the manufacturer’s distribution and dealer networks—access to the technical information necessary to repair and service their cars.⁶⁷³

The current tranche of legislation also includes provision for a Security-related Repair and Maintenance (SERMI) scheme allowing independent repairers to be vetted and gain access to security and safety related repair and maintenance information.⁶⁷⁴

Operation of the Euro 5 Regulation

The Euro 5 Regulation works on the principle that manufacturers must provide independent repairers exactly the same repair and maintenance information to the same level and content as they provide to dealers or authorised repairers. As part of the Euro 5 Regulations, the requirement to give access to repair and maintenance information is an obligation on manufacturers in order to meet the criteria for vehicle type approval.⁶⁷⁵ This means that manufacturers must only provide access for those cars subject to the Euro 5 Regulation, and not older cars (in practice there is no benefit in restricting access to older cars). However, non-compliance with the obligations may render a vehicle type non-compliant—meaning the car cannot be sold in the EU.⁶⁷⁶

Secure Repair and Maintenance Information (SERMI)

To enable independent repairers to access security-related repair and maintenance information in the EU, an organisation called SERMI was established in 2009 to operate a scheme and a process to approve, authorise and accredit independent repairers to access this information and data.⁶⁷⁷ The process involves vetting independent repairers and the use of hardware-based security keys and a PIN to access a manufacturer’s security-related portion of their technical website.⁶⁷⁸

⁶⁷² Mavis Cournane, ‘Repair and Maintenance Information (RMI) legislation in Europe’, Cognitran, 2016.

⁶⁷³ Mavis Cournane, ‘Background to Repair and Maintenance (RMI) for Cars’, Cognitran, 2016; European Commission, ‘Mandate to the European Standardisation Organisations for Standardisation in the Field of Vehicle OBD, Repair and Maintenance Information’, M/421 EN, 21 January 2008.

⁶⁷⁴ Mavis Cournane, ‘Background to Repair and Maintenance (RMI) for Cars’, Cognitran, 2016.

⁶⁷⁵ Mavis Cournane, ‘Background to Repair and Maintenance (RMI) for Cars’, Cognitran, 2016.

⁶⁷⁶ Mavis Cournane, ‘Background to Repair and Maintenance (RMI) for Cars’, Cognitran, 2016.

⁶⁷⁷ SERMI, About SERMI, Retrieved from: <http://www.vehiclesermi.eu>,

⁶⁷⁸ SERMI, Background, Retrieved from: <http://www.vehiclesermi.eu/about-sermi/background/>.

Submissions and further evidence on the EU model

AAAA submitted that the EU model recognises that access to information, data, training and tools is a prerequisite for effective competition in the automotive aftermarket.⁶⁷⁹ MTAA submitted a secure release mechanism, like SERMI, could be adopted in Australia.⁶⁸⁰ In 2014 the European Commission released a report it commissioned on the effectiveness of the EU laws on sharing repair and maintenance information. The report concluded that:

*In general, it appears that levels of compliance are high, and it is important to recognise that the situation has improved over the past few years. OEMs have invested significant effort into their systems to ensure that the required information is provided in compliance with the Regulations.*⁶⁸¹

Further key findings on the operation of the market from the report found that.⁶⁸²

- Better vehicle build quality and parts durability have led to longer service intervals, but technological progress and an ageing vehicle fleet have added to higher costs per visit.
- Repairers (both authorised and independent) are reliant on the functioning of information flows between OE manufacturers to other intermediate actors in the aftermarket.
- However, the report noted that the longer-term implications on competition and consumers of the Euro 5 Regulation were not clear, as most cars affected by Euro 5 at the time of the report were still within their warranty periods, and therefore serviced mostly by dealers.

G.2 United States

There are two key elements that operate in the US system to facilitate the sharing of technical information:

- A law that operates in the US State of Massachusetts (since 2012 and updated in 2013) that regulates the sharing of technical information.⁶⁸³ Following the passing of this Massachusetts law, in 2014 a voluntary MoU was agreed between the Automotive Aftermarket Industry Association (AAIA), Coalition for Auto Repair Equality (CARE), Alliance of Automobile Manufacturers (Alliance) and Association of Global Automakers (Global Automakers) to extend the substantive provisions of the law to all 50 states across the US and to the District of Columbia.
- The National Automotive Service Task Force (NASTF), a not-for-profit organisation representing major stakeholder groups in the motor vehicle industry which facilitates the technical aspects of sharing of repair and service information in the US. NASTF also administers a secure-data release model (SDRM) and an associated 'Vehicle Security Professional Registry' (VSP Registry), which is a secure internet-based system that vetted mechanics and locksmiths in the US can use to access security-related repair and service information and files directly from manufacturers of motor vehicles. NASTF has described that the SDRM responds to concerns about 'protecting the integrity of vehicle security systems, the intellectual property of auto manufacturers, the privacy and property of consumers and the insurability of vehicles at affordable rates.'⁶⁸⁴ Access to the SDRM is referenced in the Massachusetts law and MOU.

⁶⁷⁹ AAAA submission, November 2016, p. 70.

⁶⁸⁰ MTAA submission, November 2016, p. 49.

⁶⁸¹ European Commission, [Study on the operation of the system of access to vehicle repair and maintenance information](#), Directorate-General for Enterprise and Industry, October 2014, p. 5.

⁶⁸² European Commission, Study on the operation of the system of access to vehicle repair and maintenance information, Directorate-General for Enterprise and Industry, October 2014, pp. 73, 117, 123.

⁶⁸³ *An Act Relative to Automotive Repair*, Mass Gen Laws, ch 93K (2013). (Mass Gen Laws, ch 93K).

⁶⁸⁴ Mary Hutchinson, [NASTF Releases Secure Data Release Model \(SDRM\)](#), NASTF, 7 February 2008.

Background to Massachusetts Law and the MoU

In 2012 the Massachusetts legislature passed a 'right to repair' bill and voters in Massachusetts approved a right to repair law in a state referendum. In 2013 the Massachusetts legislature passed a bill reconciling the earlier legislation and the law approved in the state referendum as they differed slightly.⁶⁸⁵ In 2014 various national motor vehicle industry stakeholders responded to the Massachusetts law by signing an industry MoU voluntarily extending the substantive provisions of the state law nationwide.⁶⁸⁶

Operation of the Massachusetts law and the MoU

The substantive provisions of the Massachusetts law and the voluntary MoU provide:

- For model year 2002 motor vehicles⁶⁸⁷ and later, manufacturers of motor vehicles⁶⁸⁸ in the US must, on fair and reasonable terms:
 - make available for purchase by owners and independent repair facilities the same diagnostic and repair information, including software updates, in the same form and manner as it makes it available to dealers⁶⁸⁹
 - make available for purchase by owners and independent repair facilities the same diagnostic repair tools, incorporating the same diagnostic, repair and wireless capabilities, as it makes available to dealers⁶⁹⁰
 - provide diagnostic repair information to each aftermarket diagnostic tool company for the purpose of building aftermarket diagnostic tools and their service information publications and systems.⁶⁹¹
- Manufacturers may exclude diagnostic and repair information necessary to reset an immobiliser system or security-related electronic modules, but must provide the information to owners and independent repair facilities through the SDRM administered by NASTF (or other known, reliable and accepted systems).⁶⁹²

Obligations on manufacturers under the Massachusetts law and MoU from model year 2018

From model year 2018, manufacturers must, in general, make on-board diagnostic data and repair information accessible using an off-the-shelf personal computer and a standardised non-proprietary vehicle interface.⁶⁹³ This requires the establishment of websites or 'clouds' by manufacturers that contain the same information and software dealers have access to as part of their proprietary tools to be, in general, accessible by the independent repair and service sector using an off-the-shelf personal computer and a standardised vehicle

⁶⁸⁵ *An Act Relative to Automotive Repair*, H.3757 [House Bill], 188th General Court of the Commonwealth of Massachusetts (2013).

⁶⁸⁶ Including AAIA, CARE, Alliance and Global Automakers. See [Memorandum of Understanding](#), 15 January 2014.

⁶⁸⁷ [Memorandum of Understanding](#), 15 January 2014, s. 1, 'motor vehicle' is defined as: *any vehicle that is designed for transporting persons or property on a street or highway and that is certified by the manufacturer under all applicable federal safety and emissions standards and requirements for distribution and sale in the United States, but excluding (i) a motorcycle; (ii) a vehicle with a gross vehicle weight over 14 000 pounds; or (iii) a recreational vehicle or an auto home equipped for habitation.*

⁶⁸⁸ [Memorandum of Understanding](#), 15 January 2014, s. 1, 'manufacturer' is defined as: *any person or business engaged in the business of manufacturing or assembling new motor vehicles.*

⁶⁸⁹ Mass Gen Laws, ch 93K, s. 2(a) and [Memorandum of Understanding](#), 15 January 2014, s. 2(a).

⁶⁹⁰ Mass Gen laws, ch 93K, s. 2(b) and [Memorandum of Understanding](#), 15 January 2014, s. 2(b)(i).

⁶⁹¹ Mass Gen Laws, ch 93K, s.2(c)(3) and [Memorandum of Understanding](#), 15 January 2014, s. 2(b)(ii).

⁶⁹² Mass Gen Laws, ch 93K, s. 2(e) and [Memorandum of Understanding](#), 15 January 2014, s. 2(d).

⁶⁹³ Mass Gen Laws, ch 93K, s. 2(d) and [Memorandum of Understanding](#), 15 January 2014, s. 2(c).

interface.⁶⁹⁴

Owners and independent repair facilities will still need to subscribe to different manufacturers' websites to obtain repair and service information for different brands of motor vehicles, however, they will be able to connect to the motor vehicle's on-board diagnostics and the manufacturer's internet server using one off-the-shelf personal computer and one standardised device.

Submissions and further evidence on the US model

VACC stated in its research that the EU and US models are working well and appear to be an improvement on the Australian system.⁶⁹⁵ The Auto Care Association submitted that as a result of the Massachusetts law and the MoU, manufacturers are now 'maintaining websites that contain all of their repair information affordably available to independent shops.'⁶⁹⁶ The Auto Care Association submitted that in the US, 'repairs in the new car dealer network cost about 42 per cent more than repairs performed at independent shops' and that the result of the right to repair changes is a \$USD26 billion saving per year to consumers.⁶⁹⁷

GPC Asia Pacific stated that in its experience the EU and US models had been effective and it had used the regulatory framework in those jurisdictions to obtain repair and service information for its own Repco Autopedia product in Australia.⁶⁹⁸ GPC Asia Pacific noted, however, that in many instances licencing arrangements in those jurisdictions prohibited the dissemination of that repair and service information elsewhere.⁶⁹⁹

⁶⁹⁴ Frequently Asked Questions about the Right to Repair National Memorandum of Understanding, provided in a [submission by GPC to the ACCC](#), 16 March 2017.

⁶⁹⁵ VACC submission, November 2016, p. 14.

⁶⁹⁶ Auto Care Association submission, November 2016, p. 1.

⁶⁹⁷ Auto Care Association submission, November 2016, p. 2.

⁶⁹⁸ GPC Asia Pacific submission, November 2016, p. 8.

⁶⁹⁹ GPC Asia Pacific submission, November 2016, p. 8.

Appendix H – Regulatory options for sharing technical information

This appendix provides a preliminary overview of the options for regulation in Australia to reform the sharing of technical information and a discussion of the additional features some stakeholders have requested form part of any mandatory scheme.

H.1 Regulatory options

As outlined in Chapter 4, the ACCC considers that there are three potential regulatory options through which a technical information sharing scheme could be established:

- A change to the existing regulation applying to new cars supplied to the Australian market (e.g. the MVSA or ADRs)
- A mandatory industry code under the CCA
- New stand-alone legislation administered either by an Australian Government agency or jointly with the states and territories

A change to the existing regulation applying to new cars supplied to the Australian market

In this option, the Government could use the existing regulatory framework applying to new cars supplied to the Australian market to mandate the sharing of technical information. This could operate either by a legislative amendment to the MVSA, or through a determination under the MVSA amending vehicle standards in Australia to require technical information about new cars to be shared as part of the certification process.⁷⁰⁰ In effect, either mechanism would require that the technical information to repair and service cars is available to independent repairers at the same time the car is first sold on the Australian market, or soon thereafter. The terms and conditions, as well as the obligations and rights of car manufacturers and independent repairers, would be detailed in these regulations.

Both processes would involve consultation, particularly in determining the key definitions for the scheme and in developing a framework to release environmental, safety and security-related technical information securely to vetted end users.

A legislative amendment could require broad consultation as is usual in the parliamentary process.⁷⁰¹

The relevant regulator under this option would likely be DIRD, with appropriate technical knowledge and enforcement powers, obviating the need for alternative dispute resolution processes as between independent repairers and car manufacturers as access would be a regulated right. The ACCC is aware that in the EU the responsibility for type-approval and auditing of car manufacturers' compliance with the requirements for certification (including those related to the regulated sharing of technical information) rests with the relevant member-states' transport regulators.⁷⁰²

⁷⁰⁰ Dependent on the design and purpose of any proposed regulation, consideration may also need to be given to amending facilitating and objects provisions of the MVSA.

⁷⁰¹ Alternatively, in making a determination under the MVSA, the Minister may consult with relevant State/Territory agencies, organisations or persons involved in the road transport industry or organisations representing road users. *Motor Vehicle Standards Act 1989* (Cth), s 8.

⁷⁰² European Commission, *Automotive industry – Approval Authorities of the Member States*, <http://ec.europa.eu/DocsRoom/documents/25545>, accessed 27 October 2017.

A mandatory code under the CCA

The Government could use the existing regulatory framework under the CCA to prescribe a mandatory code to cover the industry, with the ACCC as the relevant regulator.⁷⁰³ Prescribed mandatory codes are binding on all industry participants.⁷⁰⁴ The AAAA, MTAA and MTAQ supported the use of a mandatory code for the sharing of technical information.⁷⁰⁵ Before introducing an industry code, the Australian Government's 'Industry Codes of Conduct Policy Framework' indicates that the relevant Minister must be satisfied there is a 'compelling case for intervention, supported by robust evidence'.⁷⁰⁶ The Government has stated that intervention will only be considered where 'there is a demonstrable problem affecting industry participants or consumers which the market cannot or will not overcome, and where such intervention is likely to result in a net public benefit'.⁷⁰⁷ Factors taken into consideration would include whether there is an identifiable problem in the industry, whether the problem can be addressed using existing laws or regulation, whether self-regulation has been attempted, whether other options would be more appropriate, and whether a code would provide net public benefits outweighing the costs associated with regulation.⁷⁰⁸

The ACCC is not aware of other jurisdictions where the regulation of the sharing of technical information for cars is the responsibility of the competition regulator. To facilitate enforcement of a code, the ACCC would likely need to develop extensive in-house technical expertise about cars to determine disputes arising under the mandatory code. While this is possible, it may be a less efficient approach than an industry-specific regulator in this case.

The ACCC is aware that in the EU the policy responsibility for the technical harmonisation of 'repair and maintenance information' rests with the Directorate-General (DG) for Internal Market, Industry, Entrepreneurship and Small and Medium-sized Enterprises (known as 'DG GROW').⁷⁰⁹ However, DG GROW's functions in terms of providing advocacy and assistance to independent repairers are closer in function and scope to those provided by ASBFEO than to that of the ACCC.⁷¹⁰ As stated above, the responsibility for enforcing the regulations on the sharing of technical information lies with the member-states' transport regulators.⁷¹¹

New stand-alone legislation

Alternatively, the Australian Parliament could introduce legislation to mandate the sharing of technical information. This may be on the basis that policy and enforcement responsibility would be given to an appropriate existing or new Australian Government agency. This would, as detailed above, require a high level of consultation with stakeholders.

The Australian Government may seek the cooperation of the States and Territories in developing new legislation and regulating the sharing of technical information, as the States and Territories have a number of regulators, such as roads and traffic authorities, with the appropriate technical expertise to determine disputes and conduct investigations in relation to this issue. The MTAA submitted that it does not support a legislative approach, but rather a mandatory code.⁷¹²

⁷⁰³ Competition and Consumer Act 2010, s. 51AE.

⁷⁰⁴ The Treasury, Industry Codes of Conduct Policy Framework, November 2017, p. 4.

⁷⁰⁵ AAAA submission, September 2017, pp. 11–12; MTAA submission, September 2017, p. 16; MTAQ supplementary submission, October 2017, p. 1.

⁷⁰⁶ The Treasury, Industry Codes of Conduct Policy Framework, November 2017, p. iv.

⁷⁰⁷ The Treasury, Industry Codes of Conduct Policy Framework, November 2017, p. 8.

⁷⁰⁸ The Treasury, Industry Codes of Conduct Policy Framework, November 2017, pp. 11–13.

⁷⁰⁹ European Commission, [Access to vehicle repair and service information](#), accessed 27 October 2017.

⁷¹⁰ European Commission, *SME Support*, https://ec.europa.eu/growth/smes/support_en, accessed 27 October 2017; ASBFEO, *What we do*, <http://www.asbfeo.gov.au/about/our-role>, accessed 27 October 2017.

⁷¹¹ European Commission, [Automotive industry – Approval Authorities of the Member States](#), accessed 27 October 2017.

⁷¹² MTAA submission, September 2017, p. 18.

H.2 Additional submissions about features to improve the sharing of technical information

Stakeholders made a number of submissions outlining features or considerations they view as desirable in any reforms to improve the sharing of technical information, in addition to those identified earlier in this report. These principally relate to whether independent repairers should be subject to either licensing processes, including minimum training and qualifications,⁷¹³ to be able to operate,⁷¹⁴ or accreditation and authorisation processes to access environmental, safety and security-related technical information.⁷¹⁵

In addition, the FCAI, the MTAA and the MTAQ submitted that any reforms should minimise administrative and compliance burdens and unnecessary costs for the businesses affected by it.⁷¹⁶ Toyota submitted that any mandatory system to provide this information would increase car manufacturers' costs, which would be passed on to consumers.⁷¹⁷ The ACCC understands that, depending on the car manufacturers' systems, they can either enable access to their existing EU or US-based information sharing platforms, updated with Australian model information, or can establish a new Australian information sharing website. The ACCC understands that the upfront and ongoing costs of these solutions vary according to which approach is taken. Any mandatory scheme should take into account the existing systems and platforms used by those car manufacturers who provide access to technical information to independent repairers in Australia.

The ACCC notes that the AADA, Fennessy's and the FCAI oppose a regulatory solution; however, they each outline that if one were established it should require independent repairers to match the investments made by dealers under their obligations to car manufacturers.⁷¹⁸ Hyundai and Toyota submitted that each conditionally supported a mandatory scheme to share technical information, subject to mandatory requirements about the qualifications of independent repairers, the parts they use and their use of technical information supplied under the scheme.⁷¹⁹

Hyundai and Toyota also submitted that an accreditation and authorisation process should be included in any reforms to ameliorate the risks associated with sharing security-related technical information.⁷²⁰ The AAA and AAAA submitted that a framework for the secure release of technical information should be established to vet end users and trace the use of technical information.⁷²¹ The MTAA submitted an accreditation scheme should be used.⁷²²

As outlined above, stakeholders generally agreed that environmental, safety and security-related technical information should be safeguarded. The process for doing so is subject to contention between stakeholders. Some prefer a licensing regime for independent repairers, while others advocate for an accreditation and authorisation process to ameliorate the risks associated with sharing environmental, safety and security-related technical information. The ACCC is of the view that there are trade-offs associated with a licensing regime, and that the licensing of independent repairers is a matter for the States and Territories (as has been done in NSW and WA). However, in terms of accessing environmental, safety and security-

⁷¹³ MTAA submission, September 2017, p. 16.

⁷¹⁴ AADA submission, September 2017, p. 15; Fennessy's submission, September 2017, p. 4–5.

⁷¹⁵ MTAA submission, September 2017, pp. 16–18.

⁷¹⁶ FCAI submission, September 2017, p. 24; MTAA submission, September 2017, pp. 17–18; MTAQ submission, September 2017, pp. 3–4.

⁷¹⁷ Toyota submission, September 2017, p. 8.

⁷¹⁸ AADA submission, September 2017, p. 14; Fennessy's submission, September 2017, pp. 3–5; FCAI submission, September 2017, p. 25–26.

⁷¹⁹ Toyota submission, September 2017, p. 3; Hyundai submission, November 2017, p. 2.

⁷²⁰ Toyota submission, September 2017, p. 3; Hyundai submission, November 2017, p. 2.

⁷²¹ AAA submission, September 2017, p. 10.

⁷²² MTAA submission, April 2017, p. 7.

related information, there is merit in appropriately vetting end users and tracing the use of the information through an accreditation process.

A further issue raised was whether independent repairers make appropriate investments in training and gaining qualifications.⁷²³ The MTAA submitted the mandatory scheme should place an emphasis on the importance of training.⁷²⁴ The ACCC understands that car manufacturers in Australia do not generally make available training courses to independent repairers; however, Hyundai stated it would consider offering training to independent repairers on commercially fair and reasonable terms if approached.⁷²⁵ The ACCC is of the view that training and qualifications are a matter for the industry, however, as stated above, industry associations such as the AAAA and MTAA have a significant role to play in informing independent repairers about car manufacturers' technical information sharing websites and in helping independent repairers access appropriate training.

The ACCC also notes that a number of stakeholders raised concerns about the protection of car manufacturers' intellectual property.⁷²⁶ The ACCC understands that car manufacturers are covered by existing intellectual property protections in the law, however, this should be considered in the establishment of any regulatory approach.

⁷²³ FCAI submission, September 2017, pp. 25–16, 31; Toyota submission, September 2017, p. 3; Hyundai submission, November 2017, p. 2; Fennessy's submission, September 2017, pp. 3–4; AADA submission, September 2017, p. 16.

⁷²⁴ MTAA submission, September 2017, pp. 16–17.

⁷²⁵ Hyundai submission, November 2017, p. 5.

⁷²⁶ Toyota submission, September 2017, p. 3.