



## AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION LTD.

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19 September 2017

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Dear David

**AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION (AADA)  
RESPONSE TO ACCC DAFT REPORT: NEW CAR RETAILING INDUSTRY – A  
MARKET STUDY BY THE ACCC AUGUST 2017**

Thank you for the opportunity to respond to the above draft report.

We attach for your review our submission regarding certain aspects of the study.

We would be pleased to expand further on any of the issues raised, at your convenience.

In the meantime, we look forward to participating in the Stakeholder Roundtable on 25 September 2017.

Yours sincerely

David Blackhall  
Chief Executive Officer

**Attached – AADA Submission**

## **AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION (AADA) RESPONSE TO ACCC NEW CAR RETAILING INDUSTRY MARKET STUDY**

### **BACKGROUND**

AADA is responding to the ACCC's New Car Industry Market Study Discussion Draft (August 2017). We note that this market study is being undertaken under section 28(1)(c) of *the Competition and Consumer Act 2010*.

In our earlier submission (November 21, 2016), we provided extensive background on AADA's role as the peak industry body representing franchised new car dealers in Australia. We also outlined the significance of the contributions made by AADA members to the economic well-being of Australia, and to Australian consumers.

In the interests of brevity, we have not repeated this information in this second submission. Detailed information on AADA's role and relationship with its members can be provided at your request.

### **MAJOR THEMES IN THE DRAFT**

We note that the draft covers three major areas of focus that may be broadly characterised as follows:

1. **ACL Guarantees:** in particular, the inter-relationship between ACL consumer guarantees, manufacturers' new car warranties and dealer-sold extended warranties; emphasis on perceived issues surrounding the effective communication of consumers' ACL rights in new car dealerships.
2. **Access to repair and service information:** with a particular focus on perceived systemic issues with the present Industry Agreement on Access to Service and Repair information; an associated concern around perceived manufacturer restrictions on the availability of certain service parts.
3. **Vehicle labels:** focused on concerns about the accuracy and utility of data on vehicle labels; associated concerns around perceived issues with the way dealers might represent this information to consumers.

In this submission, we will comment in detail on each area. We begin however with some general observations on the Draft Executive Summary:

### **COMMENTS ON THE DRAFT EXECUTIVE SUMMARY (with page references)**

#### **Executive Summary - Preamble**

The preamble to the draft includes statements (*see p iii para 3*) about the incidence and severity of consumer complaints in relation to motor vehicles, and these

statements are reiterated throughout the paper.

Generally, the draft fails to support these broad assertions with publicly available facts that stand up to appropriate scrutiny. In fact, these broad assertions raise a number of important questions that go to the fundamental issue of what exactly is the appropriate focus for the study, or at least, what should it be in the context of new car sales?

Examples of the types of questions that need to be answered in relation to data integrity include:

- Do the alleged complaint levels relate to new cars, used cars or all cars?
- Over what period have the complaint incident levels been measured?
- Are the measures statistically relevant in the context of the annual sales volumes of new cars (approx. 1.1 million p.a. for the last 5 years)?

This last point has been repeatedly and consistently brushed aside by the ACCC as irrelevant to the matters under study – but the facts cannot be ignored.

Last year, the ACCC published an Issues Paper in connection with this study.<sup>1</sup> Page 10 of that paper highlights ACCC concerns about “persistent high levels” of complaints received by the ACCC and others from dissatisfied new car buyers – a position reiterated in the present draft.

The position paper included the statement that ‘two thirds’ of new car buyers experienced problems ‘within five years’ of purchasing their new car.

These assertions were based on a study entitled (pejoratively), “Lemons on Wheels” conducted by Choice Magazine. Choice surveyed 1505 consumers who said they purchased a new car between January 2011 and January 2016 – a period during which consumers purchased about 5 million new cars.

This is a sample rate of 0.03% of all new car sales – or 0.06% if commercial transactions involving fleet buyers are excluded as being irrelevant (although many fleet purchases are made by consumer user-choosers via novated leases).

The Choice survey found that 66% of these 1505 consumers (about 990 owners) had experienced a problem with their cars *in the last five years*.

The ACCC assertion that two thirds of new car buyers experience problems in their first five years of ownership was based on this unverified information from about 990 new car buyers, 90 of whom might have had something ‘major’ go wrong (although we can’t actually know what ‘major’ is in the context of the Choice study as it is never defined).

This calculation was used by ACCC to make a broad assertion, widely reported in the media, that ‘two thirds’ of new car buyers experienced problems with their cars.

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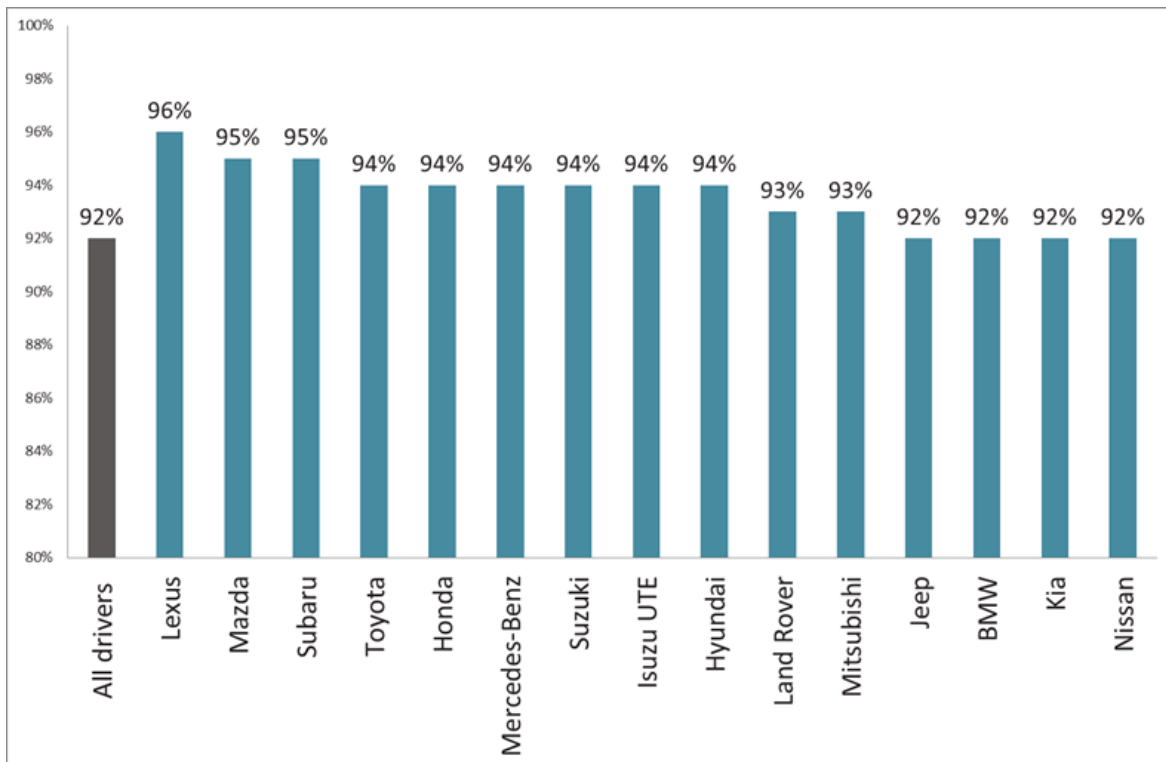
<sup>1</sup> <https://www.accc.gov.au/media-release/accc-releases-issues-paper-for-new-car-retailing-industry-market-study>

Such an assertion is patently absurd on the basis of the statistical analysis provided.

In fact, it might be convincingly argued that pertinent contradictory evidence of improving, and sustained high levels of new car buyer satisfaction, which is readily and freely available, has been ignored to the detriment of balanced discussion.

The chart below is a case in point. It shows satisfaction levels for new car purchasers based on responses from over 42 thousand consumers over a two-year period – a statistically robust sample.

**Fig 1. New car buyers' product satisfaction by brand<sup>2</sup>**



These Roy Morgan results align with the private and proprietary measurements of customer satisfaction scores used by all manufacturers in Australia to hold dealers to account for their overall franchise performance, margin management, facility compliance and a myriad of other important KPIs. Dealers that fail to score top-box CSI ratings or high-level net promoter numbers are inevitably exited by the OEMs. This process of culling is inconsistent with the alleged high and persistent levels of customer dissatisfaction that underpin much of the work being undertaken by ACCC in this study.

<sup>2</sup> 2 Source: Roy Morgan Single Source (Australia), October 2015 – September 2016, sample n=42,123 Australian drivers. Car manufacturers with fewer than 100 drivers in sample have been excluded

In August 2017, the ACCC published a further research study<sup>3</sup> into the purchase, servicing and repair of new cars. Again, the research was based on 1500 consumers who said they had purchased a new car in the last five years. This survey therefore is subject to the same statistical compromises as the Choice study – it is not statistically significant and conclusions drawn from it must rightly be questioned as to their validity and value.<sup>4</sup>

One conclusion of this research stated ...

*“One-third of new car buyers reported that they had issue/s with their new car post purchase (34%).<sup>7</sup> The most commonly reported issues related to technology in the car (8%), interior (such as upholstery), and unexpectedly high fuel consumption (7% each).”*

Again, this conclusion is completely at odds with other well publicised measures of sustained high levels of customer satisfaction in the industry.

We therefore take issue and dispute, on the basis of verifiable fact, the draft paper’s assertions of continuing and wide-spread customer dissatisfaction levels in the sale and servicing of new cars.

### **Key Market Observations** (p.iv)

We note the ACCC’s key market observations and make detailed responses in the relevant sections below.

As a general principle, AADA supports any actions, amendments or proposals that will assist to clarify the interaction between the ACL, manufacturers warranties and franchised new car dealers’ responsibilities.

Later in this section the draft states (at p.iv) that...

*“...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**...”*

### **AADA Response:**

#### **As regards the first part of this statement:**

Dealers hold their franchises at the discretion of the manufacturers, and subject always to the terms and conditions incorporated into the dealer franchise agreement. All franchise agreements are specific, to varying degrees, as to performance requirements including stipulating compliance with policies effecting warranty payments, prior approval levels and authorities to repair or replace components and vehicles.

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<sup>3</sup> Colmar Brunton, Consumer Experiences of Buying, Servicing and Repairing New Cars

<sup>4</sup> Ibid - p iv

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.

Generalisations in this matter are risky, and cases must be taken on their specific facts. Often however, what may appear to be reluctance on the part of a dealer to assist a customer may in fact be the result of maladroitness or ponderous administration of the manufacturer's policies and procedures.

### **As regards the second part of the statement:**

Dealers generally clearly understand their obligations under the Australian Consumer Law. Dealer documentation invariably includes words that are readily understood by the average consumer, pointing out the protections available under the law. In most cases, the form of words used aligns with the ACCC's recommended template.

The more challenging issue that is touched on later in this section concerns consumer comprehension and understanding of the rights so communicated. We take the view, upheld by research and by common sense, that it is difficult if not indeed practically impossible to render a process that infallibly guarantees perfect comprehension by all or even a reasonably robust majority of consumers.

In fact, it is reasonably arguable that such a standard has never been achieved in any jurisdiction dealing with the sale of complex consumer goods. We have refrained from offering suggestions in our response to this challenge as to how digital or other more contemporary tools might advance the effectiveness of communications as such solutions are beyond our expertise.

## **Chapter 3: Consumer guarantees and warranties**

### **Comments on Draft recommendations And proposed amendments to enhance the ACL**

#### **Draft recommendation 3.1 (p. vii)**

*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

#### **AADA Response:**

##### **As regards proposal 1:**

For this proposal to have any practical application, detailed work needs to be undertaken as to the definition of 'short specified period of time'. Depending on the definition arrived at, and bearing in mind the need to avoid doubt as to what constitutes a 'failure', the adoption of this proposal would create significant risks for retailers, particularly as opportunistic consumers might be motivated to indulge in 'serial' behaviors resulting in numerous vehicle returns or refunds based on trivial or non-consequential product issues.

**As regards proposal 2:**

We support any proposal that results in clear, precise and practical delineation of minor and major failures. Today, dealers and manufacturers are often unable to secure clarity as to the relationship between a specific failure and the ACL obligations in particular circumstances.

AADA strongly supports the concept of the ACCC providing written guidance in this matter via the establishment of a working group of stakeholders

**As regards proposal 3:**

AADA holds the view, demonstrably verifiable by reference to relevant warranty documentation, that extended warranties generally are already presented to consumers in clear and readily understandable language. Dealers routinely point out the ACL guarantees in language that mirrors the ACCC guidelines in this matter.

However, definitional challenges do arise around the idea of 'additional information'. Extended warranties differ widely in coverage and scope. Arriving at a 'generic' extended warranty for use as a template to guide dealers as to language and communications processes to achieve this proposal is again an opportunity for the ACCC to lead a working group that might deliver workable recommendations.

AADA does not support a 10-day cooling off period as it is inconsistent with other already existing cooling off periods to which the dealer sales process is subjected. Dealers have no in-principle aversion to cooling off periods but we seek ACCC's oversight to ensure dealers do not have a multiplicity of different compliance challenges as under:

**Table 1: Cooling-off period for buying new and used cars in various jurisdictions<sup>5</sup>**

| <b>State</b> | <b>New Vehicle</b> | <b>Used Vehicle</b> |
|--------------|--------------------|---------------------|
| NSW          | Nil                | 1 day               |
| VIC          | 3 days             | 3 days              |
| QLD          | Nil                | 1 day               |
| SA           | Nil                | 2 days              |
| WA           | Nil                | Nil                 |

ASIC is also presently introducing a deferral period for the sale of certain insurance

<sup>5</sup> AADA



products. Alignment of these requirements is urgently needed to ensure the consumer benefits envisaged when the regulations were imposed actually are delivered.

The creation of unique cooling off and deferral periods is inconsistent with the red tape reduction objectives of the government and regulators.

We strongly recommend harmonisation and alignment in the interests of efficient process and consumer benefit.

### **ACCC action on consumer understanding of their rights**

#### **ACCC action 3.2** (p. viii)

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)<sup>1</sup> 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.

#### **AADA Response:**

The AADA strongly supports the proposal for the ACCC to publish an updated and contemporary version of the ACL guide. AADA recommends the establishment of an industry working group to support the ACCC in the development of the guide.

The formation of such a group is essential if the publication is to afford maximum value to both consumers and business operators. Only by developing the revised guide in this way, rather than in isolation from the market participants, will the final product truly reflect the real-world challenges of the complex modern vehicle and the likely problems that will occur.

#### **ACCC action 3.3** (p. viii)

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.

#### **AADA Response:**

AADA supports the action where appropriate and based on credible evidence.

#### **ACCC action on the consumer experience of enforcing their rights** (p. ix)

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** (p. xi)

Manufacturers' complaints 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.

### ***AADA Response:***

AADA supports the action where appropriate and based on credible evidence.

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

### *ACCC media statements*

AADA has a number of concerns surrounding media statements by the ACCC in respect of the market study which are potentially misleading to the public and resulting in unwarranted legal threats against authorised dealers by the ACCC.<sup>6</sup> Also, statements by the ACCC that ‘dealers have an average 64 per cent profit margin on new cars they service.’ is without merit, portrays dealers in a prejudicial and unfavourable light and demonstrates a lack of understanding or selective manipulation of the dealership business model data.<sup>7</sup>

### *Unwarranted legal action threat response*

AADA considers the unwarranted legal threats by the ACCC against authorised dealers in the Sun Herald on 25 August 2017 requires formal response and is addressed in Attachment A.

The statement by ACCC Chairman, Rod Sims and accompanying graphics in the Australian Financial Review on 10 August 2017 criticising the new car retailing industry for fostering a system where profit margins from car servicing have reached a ‘whopping’ 64 per cent and was ‘an unbelievably high number’ is emotive and without substance. Also, Mr Sims indicated that independent car servicing chains such as Ultra-Tune and K Mart Tyre and Auto were not able to access complex technical information which had dramatically pushed up the cost of car servicing.

### *Profit margin response*

According to the ACCC there are approximately 40,000 manufacturer authorised and independent car repair and service centres in Australia.<sup>8</sup> These centres 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.<sup>9</sup> Dealership workshops

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<sup>6</sup> <http://www.news.com.au/technology/innovation/motoring/capped-price-car-servicing-plans-arent-all-they-seem/news-story/7698872ba30fcaa837f84674587434af>

<sup>7</sup> <http://www.afr.com/business/transport/automobile/accc-says-new-car-buyers-fleeced-on-servicing-20170809-gxs8x7>

<sup>8</sup> ACCC p 19

<sup>9</sup> ACCC p7

estimated to be around 4,000 compete with 25,000 independent workshops where there is a high number of non-employing backyard operators and where over 99 per cent have fewer than 20 employees.<sup>10</sup>

The 'whopping' 64 per cent profit margin referred to by the ACCC was gross profit and not net profit. Net profits earned by independent repairers is 2.33 times better than the average dealership.

Clearly, a more appropriate metric on which to measure the financial performance of an enterprise is by reference to the return on the investment relative to the risk of that investment. A detailed comparison of the motor industry to the independent repairers, while possible, would be complex and potentially subjective so for those reasons we have not, for this submission, made specific comparison. However, it should be obvious to even a casual observer that the investment and the risk relative to a motor dealership is significantly higher than that of an independent repairer which operates under a different business model.

Accepting that the return on investment comparison is complex, an acceptable metric for the purpose of comparison is net profit as a percentage of revenue (sales). For a motor dealership, as per AADA's initial submission the net profit as a percentage of sales is 2.4%. AADA refers you again to the table in the initial submission which illustrated the gross profit profiles of the various operating departments (new, used, parts and service) which combine to achieve a whole of business gross profit of 12.4%. It is worth noting that the net profit profiles of each department in most dealerships are that a net loss will be generated in the new and used departments and a net profit in the parts and service departments.

### *Industry reports*

We also refer you to the following two tables which have been sourced from IBISWorld Industry reports published in February 2017:

G3911 Motor Vehicle Dealers in Australia – industry definition includes new and used motor dealerships; and S9419 Motor Vehicle Engine and Parts Repair and Maintenance in Australia – industry definition includes independent repairers, service departments of dealerships and service and repair chains such as Midas, Kmart Tyre & Auto Service and Ultra Tune.

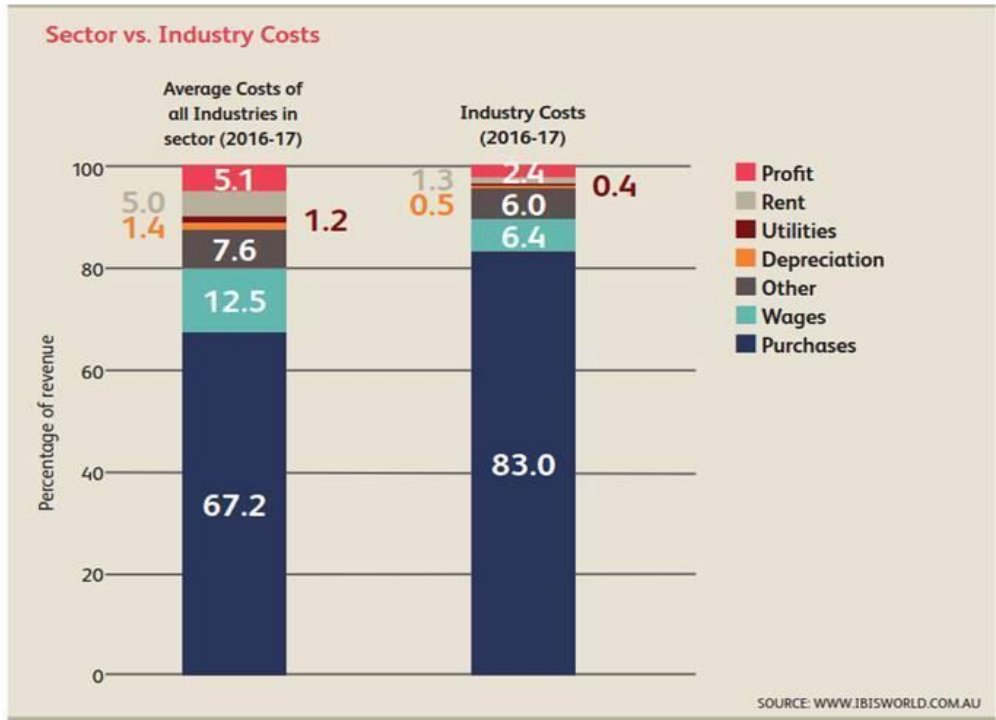
We make the following observations of the IBIS reports.

### *IBISWorld Report G3911- Motor Vehicle Dealers in Australia (new and used)*

Motor vehicle dealers net profit is 2.4% of revenue (sales) which is consistent with the net profit benchmark of BDO, as disclosed in AADA's initial submission to the ACCC. Given that the data of each organisation would have been sourced from different data sets it is reassuring that there is consistency in the key metrics quoted. However, we note that BDO's net profit to sales metric is a benchmark, rather than an average. BDO estimate that the average net profit to sales of franchised new car dealers in Australia is less than 2%. Note also that the gross profit per AADA's initial submission was 12.4%

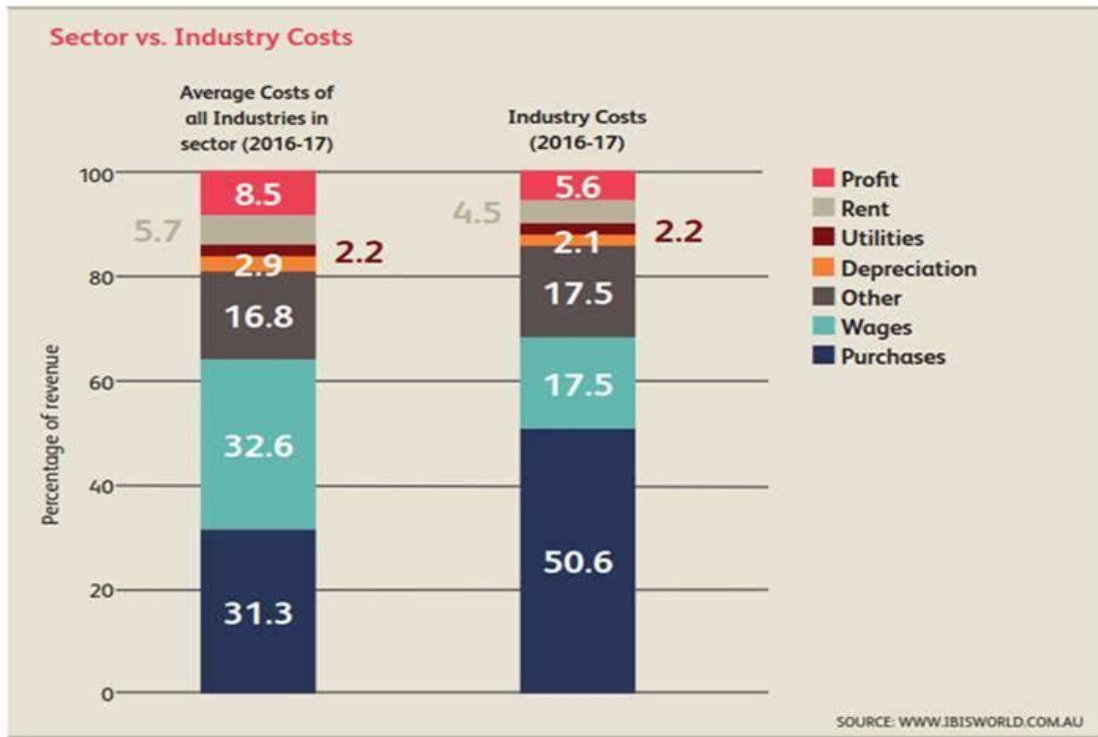
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<sup>10</sup> IBIS S9419 p 18



*IBISWorld Report S9419 – Motor Vehicle Engine and Parts Repair and Maintenance in Australia*

The net profit is 5.6% of revenue (sales) in the repair and maintenance industry or 2.33 times better than that of motor dealerships.



It is unfortunate that these statements are seized upon by the media, consumer groups and private commercial interests through industry associations. This inappropriate portrayal fails to recognise the consumer benefits of the franchised dealer system which has served the Australian motoring public since the first Australian built Ford Model T came off an improvised production line in a disused Geelong wool store in July 1925.

AADA is also of the view that the ACCC New Car Retailing Market Study should have addressed key trends – evolutionary, revolutionary and disruptive – in the automotive value chain to provide a framework to enable all participants to meet the challenges ahead. Battery electric vehicles (BEVs) is considered to be the #1 key trend with data security and privacy likely to be the #1 purchasing criterion.<sup>11</sup> Also the House of Representatives Standing Committee on Industry, Innovation, Science and Resources recently made 10 recommendations concerning social issues relating to land-based automated vehicles in Australia.<sup>12</sup>

The franchised dealer network recognises and understands the investment required to position itself to service a motor vehicle with the next generation of technology including associated data management and cyber security issues.

One of the ACCC's key observations arising from its market study was concerns about the effect of limited access to information and data required to repair and service new cars. While the AADA agrees with the ACCC that consumers benefit from competitive markets it does not fully accept the basis behind the ACCC conclusion that voluntary commitments to share technical information have not been successful in meeting their aims and there has been only a limited improvement in access.

There are examples of leading automotive service chains advertising formidable expertise in industry know-how together with established excellent relationships with vehicle and component manufacturers. Another service chain advertises its expertise in servicing and repairing a wide range of car makes. Other automotive workshops advertise that 'we service and repair all makes and models.'

The Victorian Automobile Chamber of Commerce (VACC) which operates the VACC OurAuto Tech-Centre a subscription based provider of technical information provides an online resource offering comprehensive and relevant repair information for the top vehicle makes and models on Australian roads. This service is available around the clock with over 50,000 pages of information updated daily. The Tech-Centre library is the largest automotive library in the Southern Hemisphere. 'With a wealth of information and a 98% resolution rate just a phone call away, why would you use any other technical advisory service?'<sup>13</sup>

We do not question the veracity of the above and other similar advertisements which suggests that access to service and repair information is available.

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<sup>11</sup> <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/01/global-automotive-executive-survey-2017.pdf>

<sup>12</sup> House of Representatives Standing Committee on Industry, Innovation, Science and Resources, Report 'Social issues relating to land-based automated vehicles in Australia', August 2017

<sup>13</sup> OurAuto website- <https://www.tech-centre.com.au>

Accordingly, AADA does not support the ACCC's Draft Recommendation 4.1 of regulatory intervention to mandate the sharing of technical information with independent repairers on 'commercially fair and reasonable terms' unless the ACCC, or an independent Government agency accepts responsibility for the implementation, administration and enforcement of a mandatory scheme.

The type of regulation to be used is unclear but any mandatory scheme adopted by Government towards enhancing a perceived less than competitive market should entail Government resourcing which matches the significant investment by OEMs in the development of and ongoing operating costs of OEM websites/portals; and significant investment in facilities, diagnostic tools and training of qualified technicians by authorised dealers.

We agree with the ACCC observation that car manufacturers generally own and control the technical information required to service and repair new cars and in many instances are the only source of the technical information. That technical information is made available to franchised dealers under a dealership agreement which sets out, among other things, the investment required in facilities, diagnostic tools and training of technicians all of which has to be factored into a sustainable dealership business model.

It should also be noted that franchised dealers themselves do not have all the codes all the time. For example, to re-set a vehicle's emissions compliance systems, dealers need to approach the OEM to secure the code, which is only made available under very strictly controlled conditions.

The high standard of service required of dealers to maintain a brand franchise is measured by achievement of high customer satisfaction scores for sales and service.

The elements required to maintain a high standard of service and repair - investment in facilities and diagnostic tools, training of qualified technicians – must be enshrined in any proposed mandatory scheme.

#### *Benefits of franchised dealer system*

The franchised dealer network in metropolitan and regional areas of Australia has served the motoring public well for close to 100 years. People located in rural and regional areas or when travelling in those areas are able to have their car serviced or repaired according to manufacturer specifications. Authorised dealers also undertake warranty and recall repairs regardless of where the car was purchased.

A franchised dealer is required to make a significant investment in facilities, stock levels, diagnostic tools and training of qualified technicians. This ensures that warranty work and recalls can be undertaken to consumer, manufacturer and/or ACCC satisfaction.

It is estimated that the franchised dealer network in Australia has invested around \$17 billion in facilities and equipment. The investment in training is also significant. As an example, one large listed AADA member company has estimated that service training costs amount to \$235 per vehicle, which excludes the opportunity cost forgone as a

result of these employer absences due to off-site training. Other examples from dealers of both training and equipment costs have been provided at Attachment B.

In light of this significant investment and resourcing, franchised dealers are justified in their expectation that any action taken on access to service and repair information should aim to develop a level playing field.

*Licensing requirements for mechanics in Australia*

The significant investment in training of skilled technicians by franchised dealers to service and repair their customers' vehicles should be required of other automotive workshops if a mandatory scheme were to be introduced. This is currently recognised in principle 14 of the Heads of Agreement.

The licensing/accreditation requirement for a mechanic is not consistent across states and territories. Only two states, NSW and WA, require mechanics to be qualified. This means 57 per cent of registered mechanics are operating in jurisdictions which do not require licences or trade qualifications.<sup>14</sup> While we do not assert that 57% of repairs are actually carried out by unqualified persons, we seek to make the important point that this might potentially be the case, based on the clear lack of alignment on requirements from state to state.

| <b>State or Territory</b> | <b>Licensing requirements for mechanics<sup>15</sup></b>   |
|---------------------------|--|
| NSW                       | Licence required to conduct a repair business but proprietor does not need to be a qualified mechanic but must 'employ' as appropriate |
| Victoria                  | There is no requirement to be licensed or trade qualified  |
| Queensland                | There is no requirement to be licensed or trade qualified  |
| South Australia           | There is no requirement to be licensed or trade qualified  |
| WA                        | Similar to NSW   |
| Tasmania                  | There is no requirement to be licensed or trade qualified  |
| ACT                       | There is no requirement to be licensed or trade qualified  |
| NT                        | There is no requirement to be licensed or trade qualified  |

With a key trend towards towards BEVs and electric vehicles with high voltage electrical systems we submit that the ACCC should examine the clear risks both to consumers and workplace safety arising from any shortcomings in the current licensing arrangements for mechanics.

<sup>14</sup> Ibis Report, March 2017

<sup>15</sup> AADA

### *Warranty and recall work*

Franchised dealers are authorised to carry out warranty and recall work as the OEMs reimburse the dealers for the cost of carrying out such work.

Since 2009, more than 2.3 million vehicles in Australia have become subject to the recall of airbags made by Takata.<sup>16</sup> In response to the scale of, and technical expertise required in respect of the product safety recall, the ACCC advised consumers to contact a dealership or a vehicle manufacturer to get their airbag replaced.

In NSW it was proposed to introduce a temporary amendment to the Motor Dealers and Repairers Regulation 2014 to exempt the requirement to hold a Certificate III qualification for motor vehicle repairers replacing Takata airbags as part of the recall.

On 30 August 2017, the NSW Minister for Innovation and Better Regulation agreed not to pursue the proposed Regulation on the basis it may introduce safety risks for consumers or repairers and be unlikely to significantly assist in the management of the recall. Again, a recognition of the benefit of using a franchised dealer which has the service facilities and trained technicians to perform recall and warranty work.

Dealers do compete with each other and independent repairers for the service and repair of motor vehicles. Dealers co-exist with and also have relationships with independent repairers with regard to the sharing of technical information and the supply of spare parts.

### *Diagnostic tools*

Dealer agreements typically specify the special tools and diagnostic equipment that a dealer must purchase. Diagnostic tools, supplied by the manufacturer, can cost tens of thousands of dollars. For a luxury brand such costs can exceed \$50,000 per annum. (See attachment B). Conversely, aftermarket diagnostic and scan tools are available for thousands of dollars less, yet are able to offer repairers “OEM level access to Australia, USA, European, Asia and China Exports Vehicle Applications for module programming, resets, relearn; Key programming and normal diagnostic functions; 12 graphs of live data per page.” The features offered by this one tool, which covers a multitude of makes and models, cannot be matched by the more expensive, single make scan tool that the dealer is obliged to purchase.<sup>17</sup>

Manufacturer supplied diagnostic tools purchased by dealers, are strictly maintained and kept up to date through regular mandatory software updates. With no obligation to update the tool, aftermarket scan tools are liable to become obsolete and may not contain the relevant information to ensure that vehicles perform optimally and within fuel consumption and emissions specifications. Equally, as aftermarket tools used by independent repairers cover a range of brands, it would be virtually impossible for OEM's to provide software updates compatible with whatever tool independent repairers might be using, putting aside the distribution and infrastructure challenges

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<sup>16</sup> <https://infrastructure.gov.au/vehicles/recalls/files/report-on-takata-airbag-recall.pdf>

<sup>17</sup> <http://www.launchtech.com.au/products/X-431-PRO-3>



that such a task would create.

The ACCC draft recommendation 4.1 states 'A mandatory scheme should be introduced for car manufacturers to share with independent repairers technical information, **on commercially fair and reasonable terms.**' (our emphasis) This recommendation mirrors principle 8 of the Heads of Agreement. AADA does not support a mandatory scheme for a number of reasons including the increased compliance burden and red tape on all businesses in the automotive value chain.

Commercially fair and reasonable terms for an independent repairer should not be less than that would apply to an authorised dealer.

### **ACCC Draft recommendation 4.1: Mandatory scheme**

A mandatory scheme should be introduced for car manufacturers to share with independent repairers technical information, 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.

The mandatory scheme should place an obligation on car manufacturers and other industry participants to achieve the aims and principles set out in 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 draft report goes on to state that a mandatory scheme should, subject to the type of regulation used, address the following operational matters:

- Real time access
- Coverage
- Definitions
- Dispute resolution
- Governance/consultation
- Security-related information and data
- Enforcement.<sup>18</sup>

The ACCC draft recommendation suggests that the 14 principles contained in the Heads of Agreement should be carried over to a mandatory scheme and address a number of operational matters. The operational matters listed by the ACCC are not dissimilar to those addressed in the Heads of Agreement.

Principle 3 in the Heads of Agreement specifies that consumers must be made aware by their nominated repairer of whether the part/s to be used in the mechanical and/or body repair and/or maintenance of their motor vehicle is genuine (OEM recommended) or non-genuine (sourced from an independent manufacturer/supplier); fit for purpose; compatible with the operating systems of the recipient vehicle; and compliant with all regulatory requirements, including provisions of the Australian Consumer Law. Any

regulatory scheme should maintain this principal.

While the ACCC recommends that car manufacturers should make available to independent repairers, in real time, the same digital files and codes, such as software updates and initialisation codes, made available to dealers to repair and service new cars it fails to recognise the significant investment in digital infrastructure required of OEMs.

Some of the challenges for real time access and coverage are not dissimilar to the rollout of the NBN broadband network in terms of potential customers, access speeds, website interfaces, software compatibility and file sizes. Granting of access to an independent repairer without appropriate protocols could give rise to intellectual property protection jurisdictional issues as well as under trade agreements.

AADA agrees that any regulation will require a comprehensive list of definitions and exclusions.

A dispute resolution mechanism was contained in the Heads of Agreement but was never tested. We agree that stakeholders should meet regularly to discuss the rapidly changing nature of service and repair information. Protocols for Intellectual property protection of information used by independent repairers will need to be developed by the regulator. An access regime to security related information, vehicle data and customer data will need to be developed.

## **Chapter 6: Fuel consumption and emissions**

AADA agrees that information regarding fuel consumption and emissions testing results should be readily available to consumers. This information, including whatever data is provided on stickers adhered to the vehicle, should be indicative of how a vehicle will perform in the real world and should enable consumers to make informed purchasing decisions.

As all new vehicles sold in Australia will soon be imported, it is important that Australia does not adopt a bespoke emissions and fuel consumption test regime. Doing so would potentially restrict the wide range of makes and models that are available to consumers in the Australian market. Providing it meets the requirements of being a real world test, AADA recommends harmonising any newly adopted Australian testing regime with that of a standard that has or is being introduced in a large volume overseas market. As noted in the ACCC Market Study, the Worldwide Harmonised Light Vehicle Test Procedure (WLTP), currently being introduced in the EU and UK, is a testing standard that meets all of the criteria discussed above, and as such it represents a logical candidate for a test procedure that is suitable for the Australian market.

## ATTACHMENT A TO THE AADA SUBMISSION



## AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION LTD.

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13 September 2017

Mr Rod Sims  
Chairman  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601  
Email: [rodsims@accc.gov.au](mailto:rodsims@accc.gov.au)

Dear Mr Sims

### **AT WHOSE SERVICE? HERALD SUN, MELBOURNE 25 AUGUST 2017 MOTOR VEHICLE WARRANTIES AND CONSUMER GUARANTEES UNDER THE AUSTRALIAN CONSUMER LAW (ACL)**

I write to seek clarification of your statements in the Herald Sun concerning motor vehicle warranties and consumer guarantees under the ACL, in particular, your statement that: "We [the ACCC] will take action against car companies and dealers to get that point across if they mislead consumers."

Your statement was made in the context of a paragraph in the article which says:

1. "You can legally have you new car serviced by any licensed workshop **without affecting your factory warranty entitlements**, as long as the work is done to the maker's specification, by qualified mechanics using quality parts." (our emphasis); and
2. "Car companies and dealers cannot claim that **your factory warranty**, or your rights under the Australian Consumer Law, will remain valid only if you get your car serviced at a dealer." (our emphasis)

A copy of the article containing these statements is enclosed.

We do not know whether this paragraph of the article contains your words, or statements by the author of the article. However, we are concerned that the two statements specified above fundamentally misrepresent the law in respect of factory warranties, and hence have the potential to mislead the public and render your statement an unwarranted legal threat against dealers.

Accordingly, we request that you clarify whether or not you endorse those statements. If you do endorse those statements, please explain the legal basis for doing so. We are concerned to ensure that the public is not misled - particularly given the likelihood that any statements of this kind will be seized upon by persons with private commercial interests, such as independent repairers. It is also important that dealers know where they stand.

Our concerns are explained in more detail below.

A manufacturer's warranty is a voluntary private contract involving three parties – manufacturer, consumer and authorised dealer – under which a manufacturer can set out conditions upon which the manufacturer's warranty will be honoured.

The statements in the Herald Sun fail to explain why it is unlawful for a manufacturer or dealer to maintain that a consumer's rights under a manufacturer's warranty will remain valid only if:

1. a consumer has their car serviced at a franchised dealership; and
2. the mandatory text requirements under the ACL consumer guarantee requirements are otherwise complied with.

The Australian Automotive Dealer Association (AADA) is not aware of any statements being made by manufacturers or dealers that a consumer's rights under the ACL are invalidated unless the consumer has the vehicle serviced at an authorised dealer. Any such statement in a contract would be misleading and any such provision in a warranty agreement would be deemed void under sections 64 and 276 of the ACL.

We agree with the ACCC statement that consumer guarantees apply regardless of any warranty offered by a manufacturer or dealer and are not limited to the terms and conditions or the period of the manufacturer's warranty or dealer's extended warranty.<sup>19</sup> That is the effect of the mandatory text prescribed by Regulation 90(2) of the Competition and Consumer Regulations, which states:

“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.”<sup>20</sup>

Further, Regulation 90(1) of the Competition and Consumer Regulations relevantly requires that a warranty against defects must:

- (a) be in a document that is transparent;
- (b) concisely state:
  - (i) what the person who gives the warranty must do so that the warranty may be honoured; and
  - (ii) *what the consumer must do to entitle the consumer to claim the warranty* (our emphasis)

In other words, the Regulations require that a manufacturer's warranty specify what terms the consumer must comply with to be entitled to relief under the manufacturer's warranty. The Regulations do not specify that there are any terms of conditions that a manufacturer must not include.

Consequently, there is nothing in the Australian Consumer Law or the Competition and Consumer Regulations which stipulates that a warranty against defects must not provide that a consumer must have their vehicle served at an authorised dealer to be entitled to claim the manufacturer's warranty.

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<sup>19</sup> ACCC, New Car Retailing Industry – a market study by the ACCC, Issues Paper, October 2016, p.9.

<sup>20</sup> ACCC, Motor vehicles sales and repairs: An industry guide to the Australian Consumer Law, August 2013, p.8.

Having regard to the matters set out above, we are at a loss to understand the legal basis for the statement in the article that a new car can be serviced by any licenced workshop without affecting a consumer's manufacturer's (as opposed to ACL) warranty entitlements, as long as the work is done to the maker's specification, by qualified mechanics using quality parts.

The statement in the article is also inconsistent with the ACCC's own Industry Guide<sup>21</sup>, which provides:

“Warranties against defects may set out requirements that consumers must comply with. For example, a warranty against defects on a motor vehicle may require the consumer to ensure any servicing is carried out:

- By qualified staff
- According to the manufacturer's specification
- Using appropriate quality parts where required.”

The ACCC also implicitly acknowledges that there is no legal impediment to setting absolute conditions on a voluntary manufacturer's warranty that genuine parts and authorised repairers must be used where it states in its industry guide:

“Choice of repairer under the consumer guarantees

Consumers are sometimes confused about the differences between the consumer guarantees, warranties against defects and extended warranties. This is especially the case when dealers and manufacturers make broad statements that consumers will ‘void their warranties’ or similar if they go to an independent repairer (for example, a repairer who is not affiliated with the manufacturer or part of the manufacturer's network).

Any suggestion by car manufacturers or dealers that motor vehicles need to be serviced at a licensed dealer to maintain the owner's consumer guarantee rights is not correct.”<sup>22</sup> (our emphasis).

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<sup>21</sup> *ibid.*, pp. 8-9.

<sup>22</sup> *ibid.*, p. 14

We would be happy to meet with you to discuss this matter. Please do not hesitate to contact me on mobile 0413 007 813, email [dblackhall@aada.asn.au](mailto:dblackhall@aada.asn.au) or our Policy Director Michael Deed on mobile 0417 742 956, email [mdeed@aada.asn.au](mailto:mdeed@aada.asn.au)

Yours sincerely

A handwritten signature in black ink, appearing to read 'D. Blackhall', written in a cursive style.

David Blackhall  
Chief Executive Officer

## **ATTACHMENT B TO THE AADA SUBMISSION**

Attachment B – Examples of training and equipment costs incurred by franchised dealers

### **Jaguar Land Rover Dealership – Technical Training (3 businesses)**

- Total costs for training for last 12 months was \$518,000
- Compulsory training days per calendar year for a technician is 34 consisting of 17 two day modules
- Approximate cost per module is \$1350 and usually over 2 days (Total cost \$23,000)
- Lost revenue while on technical training is estimated to be \$50,000 per technician and in excess of \$1 million. This does not include technical E learning which consists of 6-9 modules per quarter @ 1.5 hours per module carried out during work time

### **Porsche Dealership Tooling and Diagnostics**

#### **OEM tooling**

- Estimated cost on special tooling to keep up with new models and specific method of repairs \$50,000k per annum

#### **OEM diagnostics**

- Porsche PIWIS tester (diagnostic tool) – last year's investment was \$70,000
- PIWIS licence \$30,000 annually
- Porsche online training and diagnostic support \$25,000 annually
- Updating CI every 5 years \$800,000 investment
- Uniforms \$8,000 annually
- Porsche loan vehicles \$11,000 to cover write backs and fuel



### Ford Dealership – Training and Equipment

- Total costs for training for last 12 months was \$518,000
- Tech training charged back \$19 per car sold ( Retail and Fleet – non gov )  
492 cars sold 16/17 = \$9300
- 504 hours of onsite tech training for 3rd years/ techs - \$12877.20 for 16/17  
( actual cost)
- Off-site training = \$4569 for 2016/17
- IDS diagnostic licensing fee = \$1100 per license p/a ( Nuford has 3 ) =  
\$3300
- Ford tech line/ IT assist = \$12827 p/a
- Foreman training/ conference = \$1200
- Master tech accreditation/ testing = \$3600
- Service manager conference (covering latest tech info ) =\$1700 p /a
- Ford licensing / Rotunda (Ford specialist tools ) = \$3000 p/a
- Diagnostic laptops and necessary equipment VCMII ( 3 lap tops / 3 VCMs  
) = \$15,000 one off and usually require replacing every 3-4 years.
- Dealer technical subscription - \$2747.25 p/a

### **Toyota Dealership –**

#### **OEM tooling**

- GTS scan tool \$25,000, yearly fee of \$7500 to maintain, special tools = \$500 - \$2,000 ea on release

#### **OEM diagnostics**

- 1 x full time foreman/technical advisor, not paid for but expected by Toyota \$75,000pa
- Apprentice, tech and advisor training, minimum of \$80,000pa
- Diagnostic hours not paid for by Toyota and the guest could reach 5 hours per day, at average charge rate is \$156,000 pa
- Regular mandatory meetings with staff and programs TSM, TFL, Kaizen all = \$'s spent, hard to quantify at the moment but at least \$25,000 pa would be spent
- Spent \$23,000 on setting up Toyota Express Maintenance Bays