



**FEDERAL CHAMBER  
OF AUTOMOTIVE  
INDUSTRIES**

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Dear Mr Salisbury

*David*

I refer to your letter of 11 October 2017 requesting further information from the FCAI in relation to the ongoing ACCC New Car Retailing Industry Market Study. The FCAI has now considered the questions raised in the attachment to your letter and provide the following responses.

***Access to technical information to repair and service new cars***

**Question 1**

**Could the FCAI please provide research and other related materials related to:**

- The rates of car theft in the EU when compared with Australia. In particular, any data or information that shows the rates in the EU are currently increasing and have increased since the introduction of technical information sharing arrangements.**
- Any research or materials that have substantiated or been able to establish a causal relationship between the increased sharing of technical information in the EU and increased rates of car thefts in the EU.**

According to the UK RAC Motoring Services, the number of stolen vehicles in the UK has risen by nearly 30 per cent in the past three years. A Freedom of Information request to 40 police forces in England and Wales found that 85,688 vehicles were stolen in 2016 – up from 65,783 in 2013.

In an RAC press release, RAC insurance director Mark Godfrey said: "Technology advances in immobilisers, keys and car alarms had caused the number of vehicle thefts to decrease significantly from more than 300,000 in 2002 but sadly they have now increased after bottoming out in 2013 and 2014.

"We fear thieves are now becoming more and more well equipped with technology capable of defeating car manufacturers' anti-theft systems.<sup>1,2</sup>

By comparison, motor vehicle theft rates (all vehicles) in Australia have increased by 1 per cent from 2012/13.<sup>3</sup> There were 45,666 thefts valued at \$541.3 million in the financial year 2016/17. The average value was \$11,854 and the median was \$6,200.<sup>4</sup> FCAI strongly recommend that the ACCC contact the National Motor Vehicle Theft Reduction Council and the Victorian Police to discuss the topic of motor vehicle security.

## Question 2

**Could the FCAI please provide information on research that quantifies the extent to which:**

- New cars' security, safety and environmental systems would be undermined if independent repairers gained access to relevant technical information and**
- Technical information sharing in other jurisdictions has facilitated an increase in unauthorised car modifications, and how it has undermined the maintenance of new cars to relevant safety, security or environmental standards**

The FCAI is aware that the tools and software which enable module reprogramming/replacement can be used to steal late model vehicles without a cut key and without access to security codes and may also facilitate re-birthing of stolen vehicles. We understand that FCAI members have confidentially communicated this to the ACCC.

At a more general level, the FCAI remains very concerned that allowing unrestricted aftermarket access to security information would quickly come to the attention of criminal organisations and be exploited to the detriment of consumers and public safety. Permitting uncontrolled access to security data would effectively undo the collaborative work by OEMs, the National Motor Vehicle Theft Reduction Council and Australian police forces to significantly reduce vehicle theft rates over the last 20 years.

Components in vehicle safety systems are designed to work in parallel within extremely tight tolerances and use highly complex software to manage the many different levels of interconnectedness. Any attempts to tamper with individual components without undertaking extensive compatibility testing could result in systems failures and potentially place occupants at risk. An example is the sensitivity of Electronic Stability Control systems to changes in wheels, tyres and suspension components – all modifications being promoted today by aftermarket suppliers.

Similarly, aftermarket companies specialising in engine performance enhancements could be tempted to thwart or disable environmental controls in the pursuit of maximising engine outputs. There are numerous examples of aftermarket suppliers selling replacement engine management "chips" that negate OEM emissions settings.

<sup>1</sup> <http://www.autoexpress.co.uk/car-news/consumer-news/100213/vehicle-thefts-jump-30-per-cent-in-three-years>

<sup>2</sup> <https://www.rac.co.uk/drive/news/motoring-news/sharp-rise-in-car-theft-as-thieves-bypass-modern-security-systems/>

<sup>3</sup> <https://carsafe.com.au/quick>

<sup>4</sup> <https://carsafe.com.au/market>

### Question 3

Can the FCAI please list the car manufacturers in Australia that currently:

- Provide in-house or manufacturers-supported training to independent repairers (equivalent to that provided to dealers)
- Sell the same diagnostic tools and equipment to independent repairers that are made available to dealers (eg Mazda has stated that it sells its M-MDS module to independent repairers)

Each car manufacturer undertakes their business activities differently. As a general proposition, car manufacturers do make available to independent repairers for purchase relevant diagnostic tools and equipment, including by third party manufacturers. Specific questions are best addressed to individual OEMs. FCAI also recalls that the aftermarket repair industry has confirmed on numerous occasions that they have all the necessary tools to service and repair vehicles. In particular, this point has been made on several previous occasions by the Chief Executive of the Australian Automotive Aftermarket Association, Stuart Charity, including at a press event on 29 June 2016 where he said publicly:

*"...not tell customers they can't service cars because as we all know, we do find ways to get through, and we 'don't want to shoot ourselves in the foot".*

### Question 4

Can the FCAI please provide copies of the key terms and conditions under which the car manufacturers referred to in response to question 3, above, provide training, diagnostic tools and/or equipment to independent repairers?

These questions are best addressed to individual OEMs.

### Question 5

A key feature of the mandatory technical information sharing systems in other jurisdictions is that information is shared with data aggregators or third-party intermediaries (such as aftermarket diagnostic tool manufacturers). It has been indicated to the ACCC that many independent repairers and dealers use these systems. To what extent do car manufacturers currently have agreements with intermediaries in Australia? What information is shared/excluded?

Each car manufacturer undertakes their business activities differently. Some manufacturers have formal licensing agreements with a single company covering maintenance information including oil specifications, parts information, service and diagnostics information, and standard labour times. Other manufacturers do not share information with data aggregators or third-party intermediaries, but retain such information on manufacturer-specific databases (eg: the VW Group's Erwin system). Still other manufacturers note that sharing information with aggregators is a decision made by their global head office having regard to intellectual property considerations. Further detail is best addressed by individual OEMs.

## Question 6

It was indicated at the 25 September 2017 round table and the 5 October 2017 meeting that a mandatory scheme would not be appropriate in Australia as the features of the Australian market are different to other jurisdictions. In its submission to the draft report, the FCAI also stated that the existing FCAI Voluntary Code of Practice for Access to Service and Repair Information for Motor Vehicles considers the 'particularities of the Australian market and has considered relevant aspects of other countries' activities in this area.'

Can the FCAI please identify what particularities of the Australian new car retailing industry were considered in the development of the FCAI Code?

Further, can the FCAI please identify the specific features of Australia's new car retailing industry that would make it not appropriate for Australia to create a mandatory scheme for the sharing of technical information? In particular, as part of your response, can the FCAI please identify how these factors are not applicable in the EUs or US new car retailing industry markets?

The high level of competition in the Australian new motor vehicle market means that the sales volumes are often a fraction of other markets, making the business case for dedicated Australian market websites difficult. This is reflected by the fact that 24 brands in 2016 each had sales of fewer than 1000 vehicles. This level of competition is a direct outcome of long-term government support to liberalise the Australian economy over several decades. The ACCC noted that the level of intense competition in the Australian market means that no single brand has 18 per cent of new car sales.<sup>5</sup>

This level of competition is far greater than in both Europe and the United States, which both have significantly larger sales per brand.<sup>6</sup>

	Australia	Canada	UK	USA
No. brands in market	67	49	53	51
Sales	1,112,032	1,620,221	2,249,483	13,040,632
Market size per brand	16,597	33,066	42,443	255,699

<sup>5</sup> ACCC draft report, p. 16

<sup>6</sup> Australian Government, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, March 2013 Automotive Update.

### **Question 7**

**At the roundtable on 25 September and at the meeting on 5 October it was raised that independent repairers may not be sufficiently qualified to service and repair new cars. Can the FCAI please provide a source or any information that evidences the extent to which poor quality service and repair of new cars:**

- Is currently being completed by independent repairers in Australia**
- Is currently being completed by unqualified independent repairers in Australia and/or**
- Has increased in jurisdictions with mandatory information sharing schemes**

The FCAI believes this question has not accurately characterised the comments, which the FCAI understands were more along the lines of the inability of independent repairers (and for that matter authorised dealers) to repair all makes and models of the modern motor vehicle. The FCAI recalls that the discussion was around the technological complexity of modern motor vehicles and the investment in specialist tools, equipment and brand or model specific training necessary to repair all vehicles. FCAI is not sure that this comment is attributable to the FCAI, despite the fact that we recognise this perspective.

We refer to the Australian Automotive Dealers Association submission that notes the licensing and accreditation requirements for mechanics 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>7</sup>

Individual FCAI members indicate that authorised dealerships frequently report vehicles presented to them where previous repairs attempted by independent repairers have been unsuccessful.

As motor vehicles become more advanced, including the broader introduction of hybrid engines and battery technology, the level of knowledge and specialisation will need to increase by investing in the necessary training and tooling. The FCAI is concerned that vehicles with such technology being repaired by untrained independent technicians put at risk the personal safety to the technicians, vehicle users and other road users, as well as the overall integrity of the vehicle. In a fiercely competitive market where 67 brands are available for purchase, it will be commercially unrealistic to expect aftermarket repairers to invest in the training and tooling required to properly repair a large range of brands, resulting in sub-standard repairs with potentially adverse safety and environmental outcomes.

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<sup>7</sup> <https://www.accc.gov.au/system/files/Australian%20Automotive%20Dealer%20Association%20-%20September%202017.pdf>, p.15

### **Question 8**

**At the roundtable on 25 September it was indicated there were improvements that could be made to the current Heads of Agreement. If this is FCAI's view, what improvements does the FCAI suggest these could be?**

**Would these improvements be to the Agreement as well as the FCAI Code?**

The FCAI has demonstrated through more than 60 responses to unfounded allegations made against FCAI members, and again in response to the ACCC's independent investigator, that information is available to independent repairers. To suggest otherwise is not accurate.

The FCAI remains extremely disappointed that the industry body representing the independent repairers is presenting objections to the current process without promoting to its members the information that is available from individual manufacturers. These actions serve only to reinforce the fact that the AAAA continues to actively undermine the intent and goodwill of FCAI members. The FCAI recommends that the ACCC require the AAAA to recommit to the terms of the voluntary agreement and work through that system.

The Heads of Agreement would be improved if the association representing the aftermarket started to comply with its obligations under the Agreement to ensure its members inform consumers whenever non genuine parts are being proposed for service or repair work.

The FCAI's view is that the application of the Agreement and open and robust feedback within the industry should occur prior to any consideration of a fundamental re-write. To this end, the FCAI would consider more regular periodic meetings of the signatories, and propose that these take place quarterly. This would enable relevant parties to more readily raise concerns and seek redress with an ongoing review of the operation and enforcement of the Agreement.

## ***Consumer guarantees and warranties***

### **Question 9**

**At the meeting on 5 October 2017 it was raised that there may have previously been instances of fraudulent warranty claims by authorised dealers. Over the past three years, can the FCAI provide data on how many instances of fraudulent warranty claims in Australia were identified by car manufacturers (or any members which may have this data)? What proportion of overall claims made to car manufacturers do these represent? What action was taken?**

FCAI did not raise this matter and does not have the data to respond to the question. The FCAI's recollection of the discussion is that the statement was made in response to the ACCC suggestion that dealers are unnecessarily impeded from efficiently conducting repair work under either the warranty or the ACL due to complexity of the warranty claims systems put in place by manufacturers. The driver for the warranty claims system is not to impede efficient processing by dealers. In fact, most manufacturers pay for warranty repairs upon submission of the claim by the dealer and do not require the dealer to obtain any prior approval before carrying out warranty repairs except for very high cost repairs. These warranty claims are then generally subject to the possibility of later being audited as they are initially paid without review or question by the manufacturer. This ensures consumers receive their repairs efficiently.

It is worth noting that, as mentioned in the response to question 10 below, this work is carried out by the dealers on behalf of the manufacturers. As a general comment, it is appropriate business practice to audit claims made and from time to time to ensure that the claims are genuine and from time to time there will be corrections and amendments to claims made.

## ***Dealership agreements, policies and procedures***

### **Question 10**

**At the round table on 25 September 2017 and in submissions by dealer representatives in response to the ACCC's draft report, dealership agreements and related policies and procedures stipulated by car manufacturers have been raised as impacting on ACL compliance by dealers. The ACCC welcomes the FCAI's views on the concerns raised by dealer representatives that car manufacturers' policies and procedures for dealing with customer complaints can hinder dealers from complying with the ACL.**

The FCAI agrees with the submission of the Australian Automotive Dealer Association where it says, in the context of consumers' ability to enforce their rights against manufacturers and dealers:

*'Generalisations in this matter are risky, and cases must be taken on their specific facts'.<sup>8</sup>*

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<sup>8</sup> Australian Automotive Dealer Association Response To ACCC New Car Retailing Industry Market Study 19 September 2017, page 7

Manufacturers engage their dealers to carry out work under the express warranty provided by manufacturers to customers, as well as repairing or replacing defects in accordance with the consumer guarantees. The dealers are carrying out this work on behalf of the manufacturers and the manufacturers have a business responsibility to verify that the claims made by dealers for the reimbursement of their costs are legitimate. This does not impede repair of consumer vehicles as this verification occurs after the repair has been carried out at no cost to the consumer.

The FCAI is not suggesting that all dealers make unfounded warranty claims. However, during discussions at the meetings with the ACCC it was raised that there have been a number of instances of dealers making unjustified claims for reimbursement, either knowingly or unknowingly. Further, it is important to understand that there is a distinction between a manufacturer clawing back a warranty payment following an audit and a dealer's right to indemnity under the ACL where there is a breach of the guarantee of acceptable quality. Manufacturers are entitled to establish conditions which dealers must meet in order to qualify for payment of a warranty claim and then recover those payments if the conditions are not met. As an example if a dealer unsuccessfully attempted a warranty repair for which they were paid and subsequently claimed for rectification of that earlier repair under the warranty agreement with the manufacturer the manufacturer would have the right to claw back. This does not impact consumer or selling dealer rights under any subsequent ACL claim.

Consumers have statutory rights under the ACL which exist in addition to the contractual rights they have under the terms of the express manufacturer's warranty. Dealers also have rights under the ACL to recover from the manufacturer the damage the dealer has suffered as a result of a consumer enforcing their rights under the ACL. We are not aware of the terms of any manufacturer's dealer agreements which might affect these rights, but we note that such terms would be unenforceable to the extent they are inconsistent with the law.

The Motor Trades Association of Australia in its submission suggest that the relationship between manufacturer and dealer is one-sided in favour of the manufacturer, and that they exercise this power by providing dealer agreements on a 'take it or leave it basis', and by unilaterally varying the contractual arrangements with dealers. The FCAI has made a number of previous submissions which refutes this. It is simply not correct to say that there is an endemic imbalance of power between manufacturers and dealers. In addition dealers already have significant protections against manufacturers acting in this way: for example the Disclosure Document requirements and cooling off periods under the Franchising Code of Conduct, and Part 2-2 of the ACL which deals with unconscionable conduct and, for those dealerships that are "small businesses" Part 2-3 of the ACL that deals with unfair contracts.

The important role played by the national dealer councils (which most dealers have) is not considered in these claims. The dealers, through their councils, have the opportunity to provide input into not only the dealership agreements but also the operational matters that are arising in the day-to-day operation of the dealerships. As the FCAI has said on numerous occasions, a key element in the success of a manufacturers brand is for there to be positive and constructive relationships between the manufacturer and the dealer networks.



**Question 11**

**At the round table on 25 September 2017, it was acknowledged by a car manufacturer that car manufacturers' systems, policies and procedures are generally premised around warranty terms and conditions and could be updated to reflect the ACL. This appears to contrast with the FCAI's submission that car manufacturers' complaints handling systems are appropriate. Please confirm whether car manufacturers have updated their dealership agreements, policies and procedures to reflect ACL obligations to consumers and indemnification to dealers? If so, provide arrangements between car manufacturers and dealers.**

The FCAI's view is that policy terms would be unenforceable to the extent that they are inconsistent with the law. The FCAI noted at the roundtable that in the overwhelming majority of cases, the remedy available to a consumer under a manufacturer's express warranty is the same as under the consumer guarantees in the ACL. In those few instances when a consumer has greater rights under one than the other, manufacturers recognise that they are obliged to provide the consumer with the remedy that gives them the greater rights. (On this point, there seems to be an assumption that this will always be the rights under the ACL, but this is not necessarily the case.)

As explained in our submission, manufacturers' complaint handling systems not only comply with the manufacturer's legal obligations, they are also part of the whole marketing focus of manufacturers to look after, satisfy and hopefully retain their customers in an extremely competitive market.

On the matter of whether the car manufacturers have updated their agreements, policies and procedures to reflect ACL obligations to consumers and dealers; the FCAI believes this is best addressed to the individual manufacturers. As a general comment, manufacturers and dealers are required to comply with the ACL, independent of what is provided for in the agreement between the parties.

**Question 12**

**As discussed at the meeting on 5 October 2017, can the FCAI please provide electronic copies of a representative sample of dealership agreements currently held between car manufacturers/distributors and dealers in Australia, including car manufacturers' policies, standards and guidelines as referenced in these dealership agreements which relate to warranty/indemnification claims.**

The FCAI does not have copies of manufacturer's dealer agreements, or policies, standards or guidelines which might be referred to in those agreements.

As a general observation, the FCAI understands that as with most significant business contract undertakings, such agreements are closely scrutinised by national dealer councils, individual dealers and their legal and financial representatives before they are entered into. Combined with the

disclosure requirements set out in the Franchising Code of Conduct, the FCAI does not believe there is any justification for any dealer alleging that they were unaware of any of the terms contained in the agreement or any policies.

If you have any other questions please contact me on 02 6229 8212.

Yours sincerely



Tony Weber  
Chief Executive

6 November 2017