AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION

SUBMISSION TO CONSULTATION REGULATORY IMPACT STATEMENT - IMPROVING CONSUMER GUARANTEES AND SUPPLIER INDEMNIFICATION PROVISIONS UNDER THE AUSTRALIAN CONSUMER LAW

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FOREWORD

AADA is pleased to respond to this Consultation Regulation Impact Statement on Improving consumer guarantees and supplier indemnification provisions under the Australian Consumer Law.

The AADA is the peak automotive industry advocacy body and is the only industry association which exclusively represents franchised new car Dealers in every Australian state and territory. There are approximately 1,500 new car Dealers in Australia that operate some 3,100 new vehicle dealerships. Franchised new car Dealers employ in excess of 59,000 people directly and generate $59 Billion in turnover and sales with a total economic contribution of more than $14 Billion.

Every day in franchised new car Dealerships across Australia, customers bring their vehicles in to have a fault repaired. If the vehicle is new and within the warranty period, they would usually expect that car to be fixed free of charge first time and in a timely manner which allows them to get back on the road as soon as possible.

They are entitled to this expectation not only due to their new vehicle warranty, but also because of the overarching consumer guarantees and protections they have under the Australian Consumer Law (ACL). The consumer guarantees require products to be of an acceptable quality and fit for purpose. If they are not, the customer is entitled to a remedy under the law which usually means repair, but in some circumstance could mean a refund or a replacement.

Because the Dealer is the supplier under the law, they are required to provide the remedy and are legally entitled to seek indemnification from the manufacturer for the labour, parts, and associated costs of a repair. They are also entitled to be indemnified for the necessary and reasonable costs in circumstances where a refund or replacement has been provided.

While the law is clear and the obligations on the Dealer and the manufacturer are unambiguous, in practice the power imbalance that exists between manufacturer and Dealer distorts the expected behaviour of both parties.

Often manufacturers prefer to look at these issues through the prism of their internal policies, procedures and warranty process. The Franchise Agreements Dealers are required to sign compel them to adhere strictly to the Manufacturers' 'policy' regarding warranty or potential product defect claims. By emphasising the warranty, OEMs play an integral role in approving and managing customer claims.

While Dealers often want this support from the product Manufacturer, it is the Dealer that is obliged to honour the consumers ACL consumer guarantees. It is also the Dealer who is customer facing and has to carefully manage disappointed or frustrated customers with whom they are seeking to maintain a good relationship.

Of great concern is how focussing on the warranty process allows manufacturers to claw back claims from Dealers outside of the intent of the ACL provisions. All too often claims get knocked back based on Dealers not complying with unnecessary and rigid process manuals. Funds are taken back from Dealers for `procedural offences' such using the wrong colour pen, illegible signatures on work orders or the lack of a time stamp on a work order. It matters not that the customer is happy and the fault in the vehicle has been properly repaired, quickly and efficiently.

Section 1

The complex and onerous nature of manufacturer policies also leads to serious employment issues for Dealers. The current industry skills shortage, estimated at 17,509 light vehicle mechanics and growing, is crippling our sector and diminishing our ability to keep motorists on the road[1]. Technicians in the automotive trades are experts at diagnosing and repairing highly technical mechanical and electronic systems. They choose this vocation because they find it interesting, stimulating and rewarding. Being forced to write comprehensive stories, recording and reporting a chronology of every minute step, none of which actually helps them perform the necessary repair, serves as a significant disincentive for technicians, especially when they are pressured and punished by the manufacturers. Dealers report that many quickly tire of the process and leave the industry.

Dealers also experience typically complex time consuming and business disruptive warranty audits and the practice of extrapolating a small sample of claims across a wider period. Dealers can lose hundreds of thousands of dollars in 'technical alleged non-conformance' claims and 'charge backs' annually. Contesting these determinations is generally not an option for Dealers given the power imbalance Dealers face and the fear of retribution, forcing them to settle against their will and for sums of money that can be in the hundreds of thousands. We have long argued that these clawbacks, may constitute a failure to indemnify the Dealer and are a serious breach of the ACL.

The AADA has surveyed its members (Appendix A) on this issue and has heard back from almost 150 Dealers representing hundreds of franchises and we will use this information to try and demonstrate the need for urgent change so that Dealers are fully compensated for the cost of serving their customers, remedying motor vehicle defects under warranty, and complying with the law.

James Voortman

Chief Executive Officer

[1] https://vacc.com.au/News/Publications/2021-Industry-Report

Australia

3,118 Dealerships

Economic Contribution

59,667
Dealer Employees

$5.38 billion
Dealer Wages

$2.74 billion
Tax Contribution

$14.12 billion
Total Economic Contribution

Section 2

AADA KEY POINTS

- Some manufacturers prefer to address ACL issues through the prism of their internal policies, procedures, and warranty process.
- Indemnification of Dealers is obstructed by the complex and administratively burdensome policies and procedures of some manufacturers, many of which fail to uphold the statutory provisions of the ACL.
- Some brands make it very difficult for Dealers seeking assistance with Consumer guarantee claims under the ACL.
- Dealers have no confidence that they are indemnified and remain at risk of warranty clawbacks, many with penalty extrapolation and manufacturer imposed non-commercial imposts.
- Warranty extrapolation leaves Dealers exposed to severe financial loss and hardship.
- The compensation available through warranty cost reimbursement to Dealers fails to consider reasonable and necessary expenses required of the repair process (eg. impossible repair times, inadequate reimbursement rates, no diagnosis or tooling allowance, prescribed test drives which Dealers cannot claim for to road test the repaired vehicle, loan vehicles provided at Dealer expense).
- Dealers do not make cars or the faults they may contain but are often left to fully cover direct costs associated with refunds, replacements, or repairs.

Section 2

AADA KEY RECOMMENDATIONS

CONSUMER GUARANTEES

1 The Government should delay implementing a prohibition and associated penalties for failing to provide a consumer guarantee remedy ahead of the Government's response to the Productivity Commission's report into Right to Repair.

2 The AADA supports the development of an education and awareness campaign.

3 The Government should work with the Automotive Industry to develop a best practice guide to providing Consumer Guarantees.

INDEMNIFICATION

4 The AADA supports a civil prohibition for failing to indemnify suppliers where a consumer guarantee failure falls within the responsibility of a manufacturer or importer.

5 The AADA supports civil prohibition on manufacturers or importers retaliating against suppliers for seeking to enforce their indemnification rights.

6 The AADA supports the development of an education and awareness campaign.

7 The Government should work with the Automotive Industry to develop a best practice guide to Indemnification.

8 The Government should amend Part 5 (New Vehicle Dealership agreements) of the Franchising Code of Conduct to prohibit the process of warranty extrapolation.

Section 3

BACKGROUND ON DEALER – OEM RELATIONS - POWER IMBALANCE

There is a significant structural power imbalance between vehicle Manufacturers and franchised new vehicle Dealers. Many Dealers enjoy good relations with their respective Manufacturers and work in a mutually beneficial, financially sustainable partnership, but there remain instances where Dealers are subjected to unfair treatment resembling a master/servant relationship.

While franchised new car dealerships are sophisticated and often well-resourced highly geared businesses, they are still in relationships with some of the largest corporations in the world, almost all of which are Fortune 100 companies. The culture of the industry is one in which some manufacturers strictly manage the relationship with the Dealer, insisting that their dealers commit to substantial investment, regularly attain sales targets, adhere to high customer service and facility standards and generally operate in accordance with the wishes of the manufacturer.

The reluctance of Dealers to comply with manufacturer directives can have severe consequences for their businesses. Losing access to in demand stock, being denied crucial income linked to sales or customer service targets and being placed on a performance management program or issued with a notice of non-renewal are only some examples of the kind of retribution manufacturers have inflicted on Dealers in the past. This can leave a Dealer in an incredibly vulnerable position when you consider the high levels of investment they have committed, the many people they employ and the low returns enjoyed for the significant financial risk.

In the ACL/Warranty area of the business, Dealer Agreements contain clauses which compel Dealers to adhere strictly to the Manufacturers' 'policy' regarding warranty or potential product defect claims. Manufactures encourage their Dealers to work through the prism of the manufacturer`s warranty process, a process which is incredibly prescriptive and often onerous, and prescribed by the parent company overseas without regard for the Australian Consumer Law. If Dealers are seen to deviate from the manufacturer's strict warranty process, they can experience retribution by not being fairly reimbursed / indemnified – most often this occurs through an audit process which can result in warranty payments being clawed back from the Dealer.

The AADA believes the practice of clawbacks of funds could constitute a breach of section 274 of the ACL statutory reimbursement provisions which cannot be contracted out of. Despite the fact that dealers may have their rights to indemnification denied, very few Dealers formally report to the ACCC or take legal action against a manufacturer on these grounds. The absence of action is attributable to the significant power imbalance which would jeopardise the Dealers business, fears of retribution, their significant investments, their employees and the many other businesses who depend on Dealers.

The existence of this power imbalance has been recognised by a series of Government reviews and inquiries. In its 2017 new car market study, the ACCC determined that the Commercial arrangements between manufacturers and dealers can constrain and influence the behaviour of dealers in responding to complaints. It listed several recommendations to both manufacturers and Government (See Attachment B). The Government in July 2020 and July 2021 introduced specific automotive protections contained in a separate schedule to the Franchising Code of Conduct. While these new laws have provided a degree of balance to the relationships between Dealer and OEMs, the power imbalance remains and some of the issues of concern continue unabated, such as

insecurity of tenure and the existence of unfair contract terms.

On the issue of Consumer Guarantees, the Productivity Commission recently issued a report into Right to Repair which made some significant recommendations. The recommendations include allowing designated consumer groups to lodge 'super complaints' on systemic issues associated with access to consumer guarantees, with the complaints to be fast tracked and responded to by the Australian Competition and Consumer Commission (ACCC).

The PC report also calls on State and Territory Governments to work together and identify opportunities to enhance alternative dispute resolution options in each jurisdiction to better resolve complaints, including the consideration of a national approach to dispute resolution and the consideration of an ombudsman for certain product markets with the automotive industry specifically listed. The Government's final decision on which of the options to follow under Part A should take account of its planned response to the PC.

Section 4

AADA RESPONSE TO POLICY OPTIONS PRESENTED IN THE CONSULTATION RIS

Part A

Option 1

The AADA understands the Government's desire to move beyond the status quo in the national interest. However, we remain doubtful that either Option 2 (which we support) or Option 3 (which we don't support) will overcome the issue whereby Dealers are caught between the claim of a customer, the Dealers ACL and consumer guarantees obligations and the directive of their manufacturer.

Option 2

The AADA would support the development of an education and awareness campaign and would work with regulators to promote the campaign extensively to our members if required. We would expect such a campaign is best applied across the whole economy.

Option 3

Franchised new car and light commercial Dealers understand their consumer guarantee obligations and comply with the ACL to provide their customers with remedies prescribed under the ACL. However, the prospect of a prohibition and associated penalties is concerning due to the often-contestable nature of ACL claims being brought forward by consumers. A recent concerning example was a ruling handed down in the Victorian Civil & Administrative Tribunal (VCAT) in 2019 which found that Mitsubishi Motors Australia Pty Ltd (Mitsubishi) and a Mitsubishi Dealer breached the consumer guarantees by essentially affixing a fuel consumption label – the only reason the label was affixed was that it was required by the Federal Government and it was fully compliant with existing laws.

Furthermore, the imbalance of power described earlier, and the consequences Dealers can face put Dealers in a very difficult position.

Franchised new car Dealers want to do the right thing by their customers and the law, but there is concern that a civil prohibition will fall more heavily on Dealers being the 'supplier' of the good to the consumer.

If the Government pursues this option, it should apply it across the economy.

Section 4

Part B

Option 1

The AADA does not support this option.

Option 2

The AADA would support the development of an education and awareness campaign and is prepared to work with regulators and manufacturers to achieve better indemnification and reimbursement processes. The AADA has no preference whether to apply this across the economy or only in the motor vehicle sector, but we do believe there are unique circumstances in the automotive sector which make an industry-specific approach appropriate.

Option 3

The AADA supports this option. We believe a deterrent is required to prevent recalcitrant manufacturers from fulfilling their duty of indemnification of a reseller or supplier to any end user or consumer. The AADA believes there are unique circumstances in the automotive sector in relation to indemnification. However, in principle all retailers in all sectors are entitled to be indemnified.

Option 4

The AADA supports this option. We believe a deterrent is required to prevent recalcitrant manufacturers from punishing dealers who seek their legal right to be indemnified. The AADA believes there are unique circumstances in the automotive sector in relation to indemnification. However, in principle all retailers in all sectors are entitled to be indemnified.

OVERVIEW OF ACL/WARRANTY PRACTICES IN THE NEW CAR INDUSTRY

This section is an overview of some of the practices which occur in our industry in relation to ACL and warranty processes. We have included quotes from our members throughout this section to help illustrate some of the points made in our submission.

Manufacturer's Warranty and Consumer Guarantees under the ACL

In its advice to new car buyers, the ACCC informs consumers of their right to consumer guarantees and the protections provided by the ACL[2]. The competition regulator explains that the guarantees cannot be restricted, excluded or contracted out of and must be honoured by Dealers and manufacturers, in addition to any manufacturer's warranty that is provided. Most purchasers of new cars return their vehicles to the Dealership for service and repair which they generally do for as long as the vehicle remains within the manufacturer's warranty period[3].

This means that most vehicles that are presented to a Dealer with a defect are still under manufacturer's warranty and given the options available to them, Dealers tend to treat these repairs under manufacturer's warranty repair guidelines which is an obligation under most typical dealer agreements, rather than as a consumer guarantee claim, the handling processes for which are less clearly defined in the case of many brands. Consumers are normally indifferent as to the classification of the claim and are primarily concerned with having their vehicles warranty concern repaired at no cost and with a minimum amount of disruption to their lives.

"... the OEM brushes off customer concerns, always referring to "operating within Manufacture specifications" when clearly there is a genuine concern/issue."

[2] https://www.accc.gov.au/update/just-bought-a-new-car

[3] https://www.choice.com.au/transport/cars/maintenance/articles/car-warranties-and-dealerservicing#:~:text=When%20we%20surveyed%20300%20car,their%20vehicle%20at%20the%20dealer

When Dealers are confronted by consumer guarantee claims they often find themselves in a very difficult position. While manufacturers publicly declare their knowledge of and compliance with their ACL obligations, they often neglect to provide Dealers with clear policies and handling procedures for such claims. Dealers are cognisant of their obligations to respond to requests for repair, replacement or refund but often have no certainty that they will be compensated for the costs, time and materials used in the rectification they perform. Some Dealer Agreements go so far as to stipulate that all customer complaints be reported to the manufacturer, who may choose to intervene and instruct the Dealer on how to respond. In these circumstances, compliance with manufacturer instructions by the Dealer is not optional and failure to do so can have dire consequences for the Dealer, despite the consumer guarantee obligations.

"Some manufacturers have outdated warranty policies that do not align with ACL."

It is important to note that Dealers do not make the cars they sell or cause the inherent design or manufacturing defects they may contain, however unlike the manufacturers, dealers are customer facing and have an obligation to their customers to rectify a defect as quickly and effectively as possible in line with manufacturer directives to 'fix it right first time'. Most commonly, these defects are readily repairable and with the written consent of the customer, able to be repaired. To ensure they are compensated for their rectification work, Dealers understand that they must comply with the manufacturer's directions which are given in the form of prescribed, often cumbersome warranty procedures. Failure to do so can result in a Dealer not being compensated for repair and in the worst case, can result in them being considered in breach of their Dealer Agreement (DA).

"Manufacturer 1, handles ACL exceptionally well. Manufacturer 2, will consistently try and refuse an ACL Claim. Manufacture 3, will only accept an ACL after going through the tribunal. The Dealer is always stuck in the middle trying to negotiate a favourable outcome between the customer and the manufacturer ensuring we are compensated appropriately. This process needs to be taken away from the dealer, maybe an industry wide standard claims process for all vehicles, RV's & Caravans etc, through an independent body to adjudicate the validity of claims with the relevant manufacturer. The Buy back should be done by the manufacturers, as they are ultimately responsible for the product."

Restrictive Warranty Policies and Procedures

The warranty policies and procedures prescribed by some manufacturers are extremely administratively burdensome, the worst examples of which could be argued are purposely designed to make compliance extremely difficult. Warranty procedures and policies are also complex and often span multiple documents which must be read collectively and adhered to. Policies are written into the dealer agreement and operations manuals given to Dealers and are then updated and varied regularly through the issue of Technical Service Bulletins (TSB's) and parts bulletins on an ad-hoc basis. Many are typically not properly cross-referenced back to applicable policies and procedures.

"Making sure that we check all possible bulletins and documentation prior to repair or claim, following the process outlined by the manufacturer in the complex warranty manual, raising technical cases, photos and diagnostic evidence, then submitting PWA prior work authorities. In my opinion, each manufacturer has a different procedure it's frustrating and you feel like they are deliberately trying to trip you up."

In its New Car Retailing Industry Market Study of 2017, a lengthy section is devoted to various concerns identified by the ACCC regarding manufacturer's warranty policies and procedures.

Among them, the ACCC noted (Section 3.4.3):

"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."

Further, the ACCC detailed the following factors which "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".

These factors included:

- Rejecting 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.
- Voiding a dealer's entitlement to repair costs under warranty or goodwill in the event that a repair order does not contain a customer signature.
- Reversing 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.
- Preventing dealers from making a claim for an incomplete or repeated repair or from submitting a second claim for any omissions.

The power imbalance that exists between franchised new car Dealers and manufacturers, inclusive of importers, distributors and agents, gives rise to warranty and ACL Consumer Guarantee arrangements that can lead to harmful consumer and Dealer outcomes. Not all franchisor OEM's employ such aggressive and

unfair policies, but those who do place Dealers in a no-win situation which can result in Dealers losing the franchise, leaving a trail of frustrated and dissatisfied customers and unresolved ACL consumer guarantee liabilities.

"Technicians are required to investigate all parts that may be associated with a repair and if they miss one little bolt, the entire claim is rejected. Different oil must be purchased for warranty work as well, we are not allowed to use the normal recommended oil."

Section 274 of the Competition and Consumer Act (2010) contains a requirement for manufactures to indemnify suppliers (Dealers) for consumer guarantee claims made under the Australian Consumer Law. Despite this requirement, some manufacturers, likely operating under instruction issued by their overseas parent head office, enforce their own warranty policies and procedures in this country without regard to the laws of the Commonwealth of Australia. Dealers regard this as unconscionable and deceptive conduct which creates significant obstacles and cost imposts for Dealers seeking necessary reimbursement for reasonable costs and charges incurred in honouring the statutory consumer law obligations of the manufacturer.

"In most cases it is very hard work in preparing case/s with relevant supporting paperwork to present claims."

Ultimately, many warranty policies contain requirements that prolong the repair process to the detriment of consumers and deny Dealers fair compensation for warranty rectification work performed, rectifying defects not of their making. For Dealers, this creates a situation in which they are left with no practical alternative other than to cover the cost of the repair, sublet work and parts themselves, for fear of losing the franchise or aggravating their customers.

Operation of Manufacturer Warranty Policies

Repair procedures are strictly controlled with each and every repair operation given a Standard Repair Time (SRT), which is the only time that a Dealer is eligible to be compensated for, irrespective of how complex or long the job took to complete. The SRT's in many cases are impossible for a competent technician to achieve and rarely include time for use of special equipment, tooling, diagnosis, or test drives.

"We are expected to comply with procedures that were published after the repair was carried out. 100% re-reimbursement is a fallacy as the Manufacturer will only pay for a notional time that they calculate at a rate they calculate. They do not pay for actual time taken. On paint repairs, that are carried out for the Dealer by a third party panelbeater / spraypainter, the manufacturer only pays the dealer the panelbeater / spray painters invoiced cost. The manufacturer does not pay the dealer for the dealers staff time in dealing with the client to get repair quotes, time to submit quotes and gain approval, time to administer the repair, time to clean the vehicle, time to liaise with the client."

Dealer agreements in Australia typically allow provision for warranty reimbursement based on agreed rates for labour and parts, which are significantly lower than benchmark costs and commercial rates and are financially inadequate. Warranty labour rates are negotiated with manufacturers and are based on a set of financial indicators that a Dealer must provide evidence of. Omitted are all the direct costs of employing a technician and ongoing technicians training, which is mandated by the manufacturer. Dealers agree to these adverse arrangements as taken within the context of the entire franchise agreement, they reasonably expect to be able to make up any deficit in other parts of their business. This results in Dealers being barely able to break even on warranty repairs, even under ideal circumstances and it is not unusual for repairs to be performed at a loss due to significant non-recoverable hours worked.

By contrast, several states in the USA have statutory provisions which stipulate warranty and consumer guarantee work is reimbursed at normal retail rates[4]. This covers the high costs incurred of employing technicians, warranty administration and complying with manufacturer prescribed diagnostic and repair functions.

[4] https://www.seyfarth.com/news-insights/states-adopt-changes-to-warranty-reimbursement-laws-in-first-half-of-2021.html

Warranty Audits, Clawbacks and Prior Work Approvals

Manufacturers retain the right to conduct warranty audits on Dealers. In the case of some manufacturers, a failure to adhere to complex warranty administration procedures can result in a "clawback" by the manufacturer who upon finding examples of non-compliance with their rules will, at their sole discretion, reverse legitimate payments for parts and labour made to a Dealer through warranty and consumer guarantee claims.

Dealers do not deny that an audit process for warranty is necessary. Given the large sums of money involved, legislative obligations under the ACL and reputational damage at stake, manufacturers and Dealers share a strong common interest in protecting the integrity of the warranty process. Equally, Dealers understand the need for clear, concise financially sustainable procedures to be followed, including requirements for all parts replaced as part of a claim to be labelled and kept in a secured location for a specified period, without which claims will not be paid.

"We had $30k taken from us for selling an $11 non genuine wiper blade to client whose car was not over 4 years old. We have yearly audits and claims rejected and then extrapolated over a report not being completed prior job being finished, the work was done and complete but timing of Brand X specific procedure not 100% adhered too, claims being 100% rejected because a second initial from client was not found on job card even when car towed in for major faults. Not sticking to updated repair procedures even when the outcome was the same. Brand X have a very determined process in clawing back every dollar they see possible with no care for how minor the procedure failure according to their own policy is. They have zero regard for ACL in relation to paying for work done. Dealers avoid at times doing certain repair types knowing that Brand X will make it just too hard. Out of all brands I have been associated I have never seen such high level of risk for the dealer when it comes to completing a warranty repair for a client with expectation of getting reimbursed. The process is costly to the business having to employ experts to complete claims that should be a straightforward clerical process. Having to employ extra hands to double check every job card and triple check every part of the process, in summary the dealer network is at risk and knows that an audit will always end up badly as it's an agenda to find fault."

Of concern to Dealers however, is a warranty audit process which finds no evidence of excessive consumer detriment, wrongdoing by the Dealer or incompetent repair, but still determines that a Dealer is not entitled to compensation.

Additionally, certain repairs, depending on their nature and size, are subject to a Prior Work Approval (PWA) process meaning that repairs cannot be completed until the Dealer has diagnosed and provided a detailed written report to the manufacturer for approval, before repairs can commence. If PWA repairs are undertaken without approval, they are liable to be denied, even though Dealers often only do so to help customers get back on the road as soon as possible. For some brands, the threshold at which Dealers are required to obtain a PWA is lowering, meaning that more and more repairs are subject to time consuming prior approval. The PWA process is often long and protracted, requiring back and forth correspondence between the factory and the Dealer, substantially increasing the difficulty for Dealers and prolonging the repair.

Warranty Extrapolation

Further Dealer detriment and substantial financial loss occurs when certain manufacturers employ an unconscionable audit process known as “extrapolation”. Under this audit method, manufacturer warranty auditors, often from an overseas head office or a contracted third party who have no regard for the ACL, will select a small representative batch of warranty claims and determine an error rate which they will then apply to claims across a nominated time period, which could be as long as 24 months or longer. This normally results in significant clawbacks by the manufacturer of tens or hundreds of thousands of dollars even though the errors identified might be for small administrative oversights or minor process conformance mistakes. This practice is grossly unfair on the Dealer and unconscionable.

“We received a large warranty audit bill that was extrapolated over 3 years recently. Some of the items that were rejected we argued were done in good faith and to protect the brand from an ACL claim. Due to us not following the warranty guidelines to the letter, these claims were rejected.”

In the New Car Retailing Industry Market Study, the analysis of the practice of warranty extrapolation led to the ACCC concluding:

“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.”

In the most egregious example of unconscionable behaviour, Dealers from one brand are given the option of receiving an extrapolated audit with manufacturer-imposed penalties or alternatively electing to receive a full audit on the proviso that the Dealer must contribute to the costs of doing so, which can be as much as $38,000.

Manufacturers Track Record with the ACL

In recent years, different manufacturers have been forced to provide Court Enforceable Undertakings to the ACCC following concerns raised by the regulator about their compliance with the Competition and Consumer Act 2010.

In each of these examples, it is the franchised Dealer who has had to deal with the consumer complaints and has represented the brand publicly to customers on the front line, normally working under manufacturer directives. Dealers have no role in designing, engineering or building motor vehicles yet are responsible for upholding the reputations of the brand and their own businesses. For this privilege, Dealers spend millions of dollars in training, tools, equipment and the provision of loan cars and facilities. Unfair, unconscionable and unjust warranty policies issued by some manufacturers are demonstrably weighted in favour of the franchisor and run contrary to the good faith provisions expected between manufacturers and their Dealer franchisees.

For Dealers, redress in these matters is almost impossible under current legislation, with many Dealer Agreements containing clauses that explicitly state that the Dealer has no right of appeal on warranty decisions, unjust warranty claim adjudications / extrapolations or unconscionable prior approvals, even when it is an ACL Consumer Guarantee related obligation.

"99% of the time the OEM will wash their hands of an ACL claim. If a customer mentions a buy back or remedy under the ACL the OEM customer service team will redirect them to the dealer and offer no help. Recently we had a request for a buyback which the OEM would not assist with. The customer bought the vehicle as a demonstrator 5 years previously and had never returned to us to have any repairs or service work completed. We were never given the opportunity to fix or remedy the ongoing issues. Regardless the OEM pushed them back to the selling dealer and remained silent throughout the claims tribunal process."

The ACCC explicitly states on its website that it does not work to resolve individual complaints, instead referring complainants to the state consumer protection agencies and industry ombudsmen or to seek independent legal advice. The ACCC will however offer guidance and use information supplied to identify areas of concern. As the regulator most responsible for ensuring competitive fairness and consumer protection, it is important that the ACCC have enough resources to be able to identify trends in unfair behaviour by franchisors and take the necessary enforceable action.

In the franchised new car and light commercial sector, without the involvement of a regulator, Dealers are left with the unfavourable option of taking individual costly legal action against a manufacturer many times larger in size and who is almost guaranteed to then seek retribution in some way, ultimately by performance managing the Dealer out of the network or through termination or non-renewal of the Dealer agreement.

"When assessing ACL reimbursements, some OEM's extrapolate the apparent loss to the Dealer by adding on to subsequent transactions. An example of this is Brand X, in the event of a buyback of a faulty car and/or replacement, will not reimburse the Dealer until the Dealer has later completed the transaction of a second sale by selling the faulty car (once

rectified) at a retail level. This retail figure is then used as the base price of buyback ACL calculations and the Dealer is forbidden to make a profit from this second transaction. All costs on holding the vehicle, marketing, advertising, on-costs, commissions to staff, rent etc are then borne by the Dealer. Their 'official' stance is that the Dealer has the right to wholesale the vehicle the next day and use this as the base figure to complete ACL transaction. The issue here is two fold. Un-Officially this is frowned upon and Dealers are 'expected' to save Brand X money at their own expense 'or else'. "

KEY QUESTIONS - PART A

Receiving remedies

1. **Please provide any relevant information or data you have to help estimate the extent to which consumers are unable to access consumer guarantee remedies when entitled?**

   N/A

2. **Do you have any information on consumers claiming refunds for new motor vehicles? If so, please provide details on how long after purchase refunds are requested, and the prevalence of such requests.**

   The AADA surveyed franchise new car Dealers representing hundreds of franchises or Dealerships. Some 80% of respondents said that less than 3% of customers request refunds or replacement of new motor vehicles in a given year. Fifteen percent of respondents said the number was less than 10% while around 1.4% of Dealers said it was less than 30%.

   In relation to how long after purchase, almost 12% of respondents say that refunds are requested within three months after purchase. Some 51.47% say that these claims are made within 12 months. A quarter of these requests are made after 12 months while more than 10% of claims are made between 3 and 5 years.

3. **Do you have any information or data to support the view consumers are 'gaming' the system to obtain replacement new motor vehicles or refunds?**

   We have no data.

4. **Do you consider it appropriate for factors such as a depreciation deduction (a reduction in the value of a refund for usage) to be considered relevant in determining a refund amount? In what circumstances do you consider this would be appropriate? How would a reduction work? How should post-purchase increases in value be factored in? Please detail reasons for your position.**

   This very much depends on the circumstances, but the use and utility provided by a vehicle up to the point at which a refund is agreed should be taken into account. It would also be reasonable for refunds to amount to the value of the vehicle were it sold with its current mileage and age and without the major fault at question.

5. **For new motor Dealer representatives, please provide any relevant information or data on how providing remedies has impacted your business.**

   Most Dealers will say providing remedies for ACL claims has benefitted their businesses because it has helped them maintain a good brand and Dealership relationship with the customer which in turn has helped to retain that customer. However, as can be seen in the Dealer quotes provided above, there are many occasions where the processes dictated by some manufacturers has had a detrimental effect on Dealer businesses, including on occasions where customers are required to continuously return to the Dealership for repeated failures which are continually being repaired. Dealers can also be penalised financially when providing a remedy. Almost two-thirds of survey respondents say they have been asked by manufacturers to contribute towards ACL consumer claims, occasionally there may be good reason for this but Dealers don't make or design cars and should therefore have no obligation to cover costs associated with the manufacturing process.

Section 6

6. **Are there any other benefits associated with maintaining the status quo?**

   The status quo serves to minimise the costs and exposure to manufacturers but in the case of many brands, is liable to breach indemnification obligations, good faith provisions and consumer guarantees.

7. **If the status quo was maintained, what other potential costs could there be to industry, consumers and businesses?**

   The cost to consumers of non-compliance with ACL obligations is real, though not something we have data or information on. The cost to Dealers is substantial and AADA regularly receives reports of clawbacks in the tens and hundreds of thousands of dollars.

8. **What do you consider would be an appropriate maximum penalty for a supplier or manufacturer failing to provide a remedy for a failure to comply with a consumer guarantee when required under the ACL? Please detail reasons for your position.**

   Rather than penalties alone, the AADA would prefer to see established and clearly defined frameworks for handling and enforcement of consumer guarantee claims, specifying the manufacturer and Dealer handeling procedures to each other and to consumers. Manufacturers currently hide behind their Dealers when alerted to these claims and then use their unconscionable power advantage to force Dealers to do their bidding while seeking to protect themselves from liability. Statutory obligations would be harder to avoid if all parties new their rights and obligations.

9. **What do you consider would be an appropriate infringement notice amount for an alleged contravention of a requirement to provide a remedy for a failure to comply with a consumer guarantee? Please detail reasons for your position.**

   This would very much depend on the nature of the case, but the decision to issue an infringement should consider the role of the manufacturer in the offence.

10. **What would be the most effective way of implementing a civil prohibition for a failure to provide a consumer guarantee remedy? Should the circumstances in which a penalty applies be limited in any way?**

    Yes – look at the role of manufacturer to prevent any direct or indirect unconscionable or deceptive conduct

Section 6

For consumers:

11. Have you experienced issues with a trader not agreeing to provide your requested remedy for a major failure? If yes, please provide details. For example, what were the circumstances, including the types of goods or services involved, the nature of the problems experienced with the goods or services, and how the trader dealt with your issue?

N/A

12. If you have experienced issues where a trader has offered to repair, rather than refund or replace a good with a major failure:

a. What direct financial costs did you incur during the period the good was being repaired (for example, visiting the retailer, taking the matter to a court or tribunal, or hiring a replacement for the good)?

b. How much time did you spend dropping off the good for repair, collecting the repaired good and/or negotiating with the trader?

c. Have you had different experiences with lower value goods (for example, toaster, kettle) than with higher value goods (for example, a white good or motor vehicles)?

N/A

For businesses:

13. Are there any unintended consequences, risks or challenges that need to be considered with creating such civil prohibitions?

The prospect of a prohibition and associated penalties is concerning to a Dealer due to the often-contestable nature of claims being brought forward by customers and the constraints being placed on Dealers by some manufacturers. The difficult position Dealers find themselves in being caught between the manufacturer and the consumer has been well documented by the ACCC in its new car retail market study. It would be a shame if the unconscionable and unfair power imbalance that Dealers are currently subjected to further disadvantages Australian businesses due to the creation of civil prohibitions.

Section 6

For everyone:

14. Do you think introducing a civil prohibition would deter businesses from failing to provide the applicable consumer guarantee remedy to consumers who are entitled to one?

Dealers have no interest in rejecting consumer guarantee remedies. Dealers live and die by return business both in their sales and aftersales service and parts departments. They are motivated to keep their customers happy and provide them with their statutory consumer guarantees and rights. Unfortunately, through complying with instructions from manufacturers Dealers can on occasion inadvertently come across as unhelpful to customers and potentially breach the ACL.

15. Please provide any relevant information or data on whether non-compliance with the consumer guarantees is a significant problem in the new motor vehicle sector compared to other sectors?

The AADA has no information from other sectors of the economy to form a reliable comparison with the new motor vehicle sector. However, it stands to reason that the new motor vehicle sector is likely to experience a higher number of consumer guarantee issues than many other industries. For one, modern day news cars are incredibly complex machines equipped with state-of-the-art technology. New cars are a high-cost good which are essential to many consumers. These consumers expect their vehicles to run smoothly and last for several years beyond the warranty period and understand that they will regularly have to service and maintain their vehicles over the course of its life.

KEY QUESTIONS - PART B

Supplier indemnification

16. **Suppliers: to what extent are you able to enforce your indemnification rights?**

    Our survey shows that on average 54% of ACL claims are fully reimbursed; 24% are partially reimbursed; 22% are declined.

    Our survey shows that on average 68% of Manufacturer warranty claims are fully reimbursed; 23% are partially reimbursed; 9% are declined.

17. **What are the barriers to seeking indemnification?**

- The power imbalance between manufacturers and their smaller franchised Dealers
- Extremely burdensome prescribed warranty processes and the ensuing pedantry in adjudicating on them
- Extremely complex and cumbersome warranty policies and procedures, spanning multiple documents
- Unachievable repair times
- No allowances in most franchises for time consumptive repair processes like diagnosis, tooling, test drives to verify the fault and quality test after to ensure fault has been successfully repaired
- Requiring a comprehensive technician's story for both simple, complex and difficult repairs and obtaining (PWA's)
- The unconscionable extrapolation and penalty impost process

18. **Has your business been subject to retribution when you have sought indemnification? If yes, what form did it take?**

    Please refer to our earlier description of the warranty process, Dealer quotes and survey results

19. **Please provide any relevant information or data you have that quantifies the extent of manufacturers not indemnifying suppliers, or making it difficult for suppliers to obtain indemnification?**

    Refer to our earlier description of the warranty process, Dealer quotes and survey results

20. **Please provide any relevant information or data you have that quantifies the proportion of suppliers that do not seek indemnification?**

    More than 36% of franchised new car Dealers have avoided seeking compensation for a warranty/ACL claims due to fear of retribution from an OEM.

21. **Please provide any relevant information or data you have that quantifies the proportion of consumer claims that suppliers refuse or do not consider due to the inability or difficulty in obtaining indemnification, or due to fear of retribution?**

    It is important to draw a distinction between consumer guarantees and indemnification. Dealers are aware of their obligations under the ACL and will only push back against providing a remedy if they believe there is compelling grounds to do so. Very often Dealers will ensure the customer is provided with a statutory remedy only to have their warranty claim submission or request for indemnification denied.

Section 7

For suppliers:

22. Have you sought indemnification from manufacturers under the existing law? If not, please provide details.

Every Franchised Dealer has sought indemnification from their manufacturer.

23. Have you experienced difficulties getting indemnified from manufacturers? If so, please provide details.

As above

24. Would your inclination to seek an indemnification change if a civil prohibition was introduced?

It is unlikely that a civil prohibition will affect the inclination to seek indemnification due to high legal cost to do so. Overall, the AADA understands that Dealers do regularly request indemnification in the first instance. If they are met with strong opposition by the manufacturer they may refrain. The real question to ask is would a civil or criminal prohibition change a manufacturers inclination to deny indemnification.

25. Would your approach to providing consumer guarantee remedies to consumers change if a civil prohibition was introduced? If so, how?

This would depend on the extent to which civil enforceable penalties are successful in influencing the behaviour of manufacturers.

For manufacturers:

26. How (if at all) would a civil prohibition change your response to requests for indemnification?

N/A

27. What other issues might a civil prohibition create?

N/A

Section 7

For retailers:

28. Have you experienced retribution from a manufacturer after seeking indemnification? If so, please provide details.

More than 48% of respondents to our survey believe they have experienced retribution from a manufacturer for seeking compensation on a warranty/ACL claim.

29. Would your inclination to seek indemnification change if a civil prohibition on retaliation was introduced?

This is a step in the right direction. While the AADA is strongly supportive on a civil enforceable prohibition on retaliation, we fear there may be difficulties in officially proving that various forms of retribution are specifically linked to a Dealer seeking indemnification.

30. Would your approach to providing consumer guarantees remedies to consumers change if a civil prohibition on retribution was introduced? If so, how?

This would depend on the whether the actions of manufacturers change.

For manufacturers:

31. How (if at all) would a civil prohibition on retribution change your response to requests for indemnification?

N/A

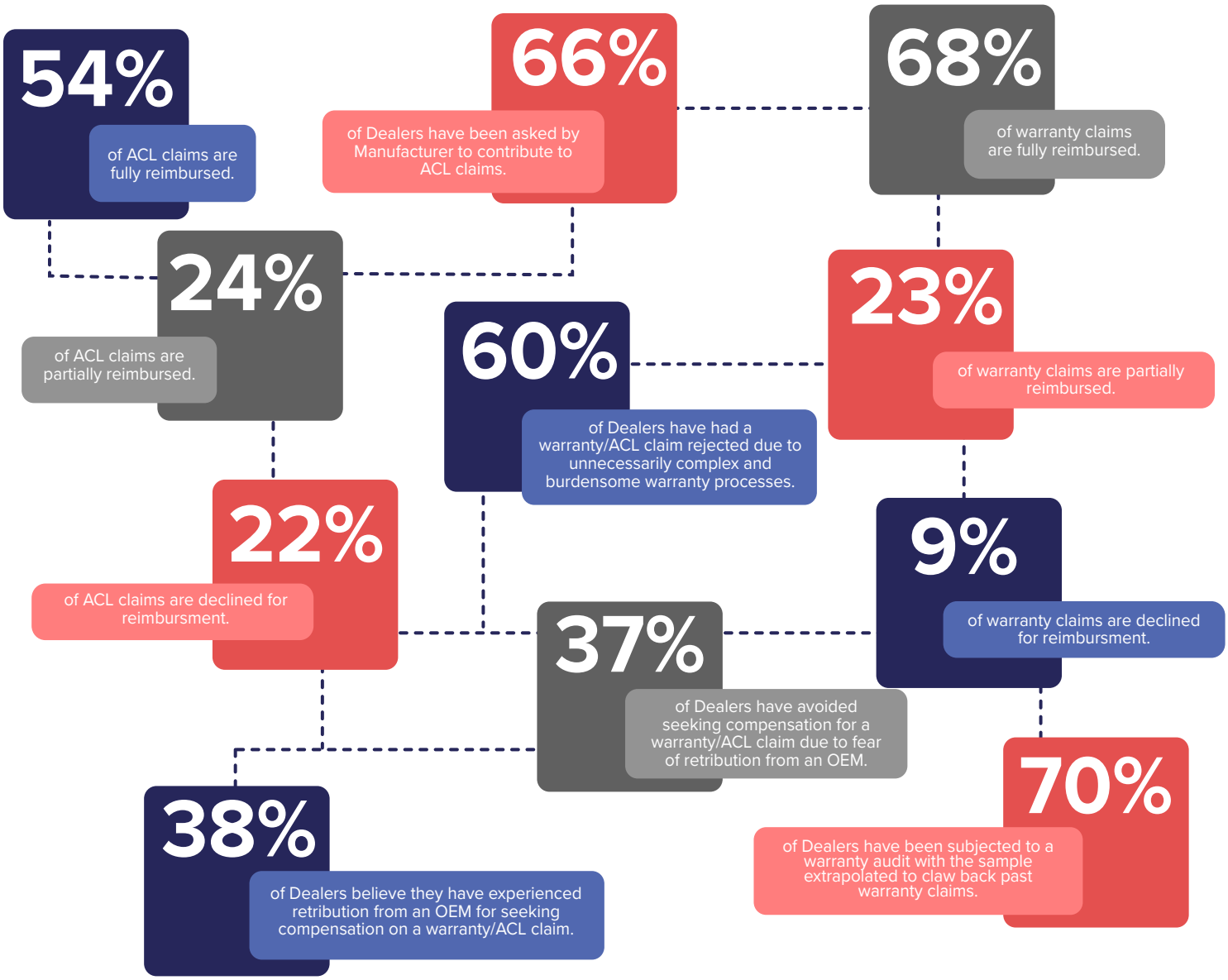
AADA SURVEY RESPONSE

Examples of onerous tasks that a Technician is required to complete for 100% reimbursement of a warranty/ACL claims.

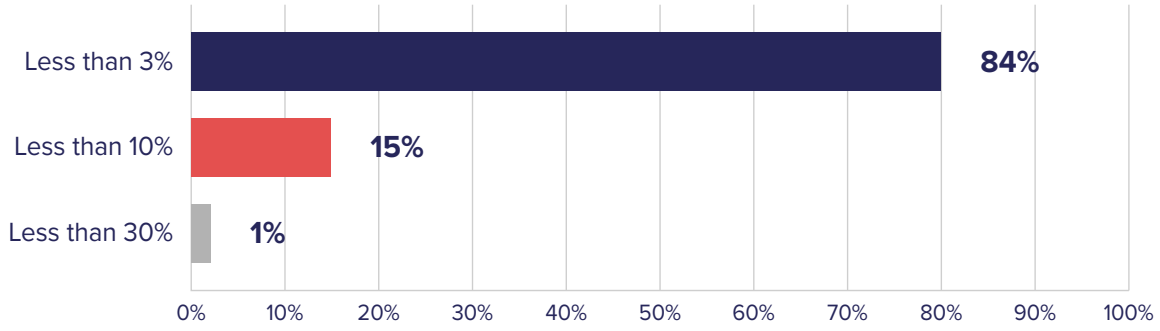
"99% of the time the OEM will wash their hands of an ACL claim. If a customer mentions a buy back or remedy under the ACL the OEM customer service team will redirect them to the Dealer and offer no help."

"We received a large warranty audit bill that was extrapolated over 3 years recently. Some of the items that were rejected however we argued they were done in good faith and to protect the brand from an ACL claim. Due to us not following the warranty guidelines to the letter these claims were rejected."

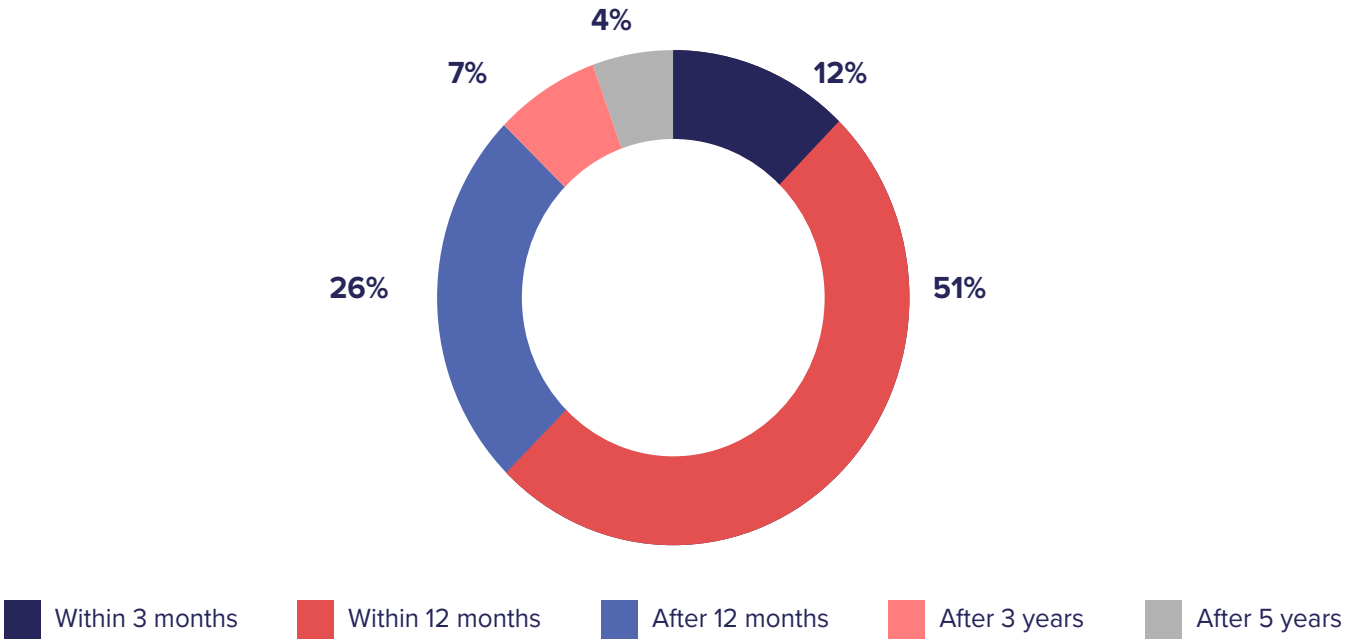
"Often our diagnostic technician knows what the issue is and has the ability to repair it quickly. However, if he doesn't plug it in and wait to be told what to do the claim would be rejected. Many times, we are told to do different things which can delay the repairs by days when we knew all along what the problem is. But if we don't follow the exact procedure the claim is rejected."



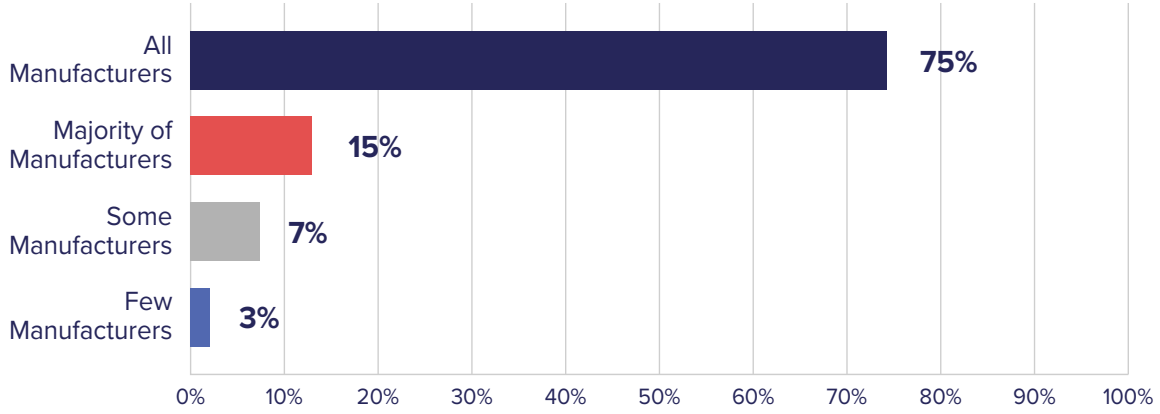
Less than 3% of customers request refunds or replacement of new motor vehicles in a given year.



On average, more than half of claims are made within 12 months of the initial purchase.



75% of Dealers reported that Dealer agreements have specific administrative instructions in relation to warranty claims.



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.

Section 9

CONCLUSION

We would be happy to meet with you to discuss our submission and participate in any meetings or roundtables. If you require further information or clarification in respect of any matters raised, please do not hesitate to contact me on:

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