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RESPONSE TO RIGHT TO REPAIR INQUIRY DRAFT REPORT

Submission to the Productivity
Commission

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Introduction

1. Consumer Action Law Centre (**Consumer Action**) is pleased to provide this submission to the Productivity Commission in response to the Inquiry on the Right to Repair Draft Report (**draft report**).
2. The structure of our response aligns with the organisation of **Table 1 on page 25** of the draft report, as this best reflects our key priority in responding to this consultation – possible reforms to reduce barriers to repair.
3. As we stated during the Melbourne public hearing, we strongly support recommendations to address the main barriers to accessing to repairs and other remedies through the consumer guarantees. These barriers would be reduced through the introduction of alternative dispute resolution (**ADR**) mechanisms across the states and territories, particularly in relation to specialty ADR for motor vehicle matters, which would improve access to justice. The opportunities to exercise rights to repairs under the consumer guarantees are, in reality, often currently unavailable to people facing financial disadvantage and other vulnerabilities.
4. At a systemic level, super complaints processes would complement improved individual access to consumer guarantee rights through ADR. A super complaints process would enhance regulator intelligence on systemic poor practices and better enable regulators to take enforcement action through more effective and transparent complaints processes.
5. Furthermore, it is integral that warranties do not impede independent repair. Warranties should offer benefits over and above rights enshrined in the Australian Consumer Law, and should not be considered to replace these rights.
6. Finally, product durability and repairability information would be helpful for improving consumer choice. However, without improved access to dispute resolution forums, this information will not in itself improve access to the right to repair in Australia.

A summary of recommendations is available at **Appendix A**.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

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Enhance access to consumer rights (Existing consumer rights under consumer law)

Powers for regulators to enforce guarantees (Recommendation 3.2)

1. We strongly support **draft recommendation 3.2** for states and territories to introduce ADR schemes to better resolve consumer guarantee complaints. We support powers such as compulsory conciliation or consumer guarantee directions powers.
2. However, these reforms alone would not improve access to dispute resolution for the consumer goods we see most in legal advice calls about consumer guarantee breaches: motor vehicles. Motor vehicle dispute resolution needs a tailored and fit-for-purpose ADR scheme given the unique complexities of these disputes.

Specialist ADR scheme for motor vehicles

3. In addition to draft recommendation 3.2, we recommend improved speciality no- or low-cost ADR for motor vehicle disputes. Specialty ADR schemes for cars should be timely, affordable and accessible. This was supported by the Victorian Access to Justice Review in 2016, which recommended compulsory conciliation of motor vehicle disputes by Consumer Affairs Victoria and funding for technical assessments to assist in dispute resolution.¹
4. It is essential for any specialist motor vehicle ADR scheme to be funded to offer access to free expert technical assessments.
5. General ADR schemes will not solve this issue as they do not offer the specialist expertise required and, often, their maximum claim amounts would exclude the majority of motor vehicle complaints in any case.²
6. The costs of bringing a used car matter to a court or tribunal can be significant – expert reports cost in excess of \$1000, plus additional towing costs for people in regional areas and VCAT filing fees. Our administrative tribunal system is subject to lengthy delays, where a

Case Study – Mary’s story

Mary (name changed) is an Aboriginal woman living in regional Victoria, more than 150km out of Melbourne. She is also a victim survivor of family violence and is a single mother of four children. Mary receives Centrelink payments and said she hardly had any money left after paying for petrol and food for her children.

Mary told our lawyers the following about her experience.

In September 2020 Mary’s family helped her purchase a 2004 model second-hand car from a dealership in Melbourne for about \$6,500. A tow truck delivered the car to her but left before she had a chance to do a test drive.

She started noticing issues with the car within 2-3 days, as the car was shaking and making clanking and banging sounds. There were also issues with the brakes and the doors coming off.

After 2 weeks, Mary sent the car back to the dealership with a list of items to be fixed. Mary paid part of the cost to tow her car back to her, but when it was returned to her the repairs Mary requested to have done were not completed.

Mary has since received a quote for repairs from another mechanic for approximately \$2,000 but she can’t get the car fixed herself as she’s struggling as it is.

Mary still has the car and it is getting worse. She worries the car is becoming unsafe to drive; however, she needs to get her kids to school so is forced to use it. She said she is feeling depressed about the car.

She wants it to be repaired but she didn’t think she could go through with VCAT as she is not able to read or write very well. She also would be unlikely to be able to afford an expert report.

We are attempting to assist Mary with a referral for further advocacy support.

¹ Access to Justice Review Victoria (2016), Recommendation 5.8, <https://engage.vic.gov.au/accesstojustice>.

² For example, the NSW Fair Trading directions power is limited to claims of a maximum of \$3,000.

person may be in the midst of the dispute for 6 to 18 months, without a working vehicle during this time. Often, people are continuing to make loan repayments on a car they cannot drive. The legal arguments can also be complex for a layperson to present to a court or tribunal that does not have specific expertise in vehicle disputes.

7. Retailers and, in particular, car dealers are not oblivious to these difficulties. In our case work, inadequate access to justice has contributed to a culture of stonewalling and refusal to provide redress in accordance with the consumer guarantees.
8. Our own data from Consumer Action's legal advice lines show motor vehicles to account for approximately 30 percent of our legal advice calls about consumer guarantees. State and territory regulator data, printed on p 94 of the Draft Report, indicates motor vehicles sales are the top complaint across Australia.
9. Additional issues at administrative tribunals compound the burden for consumers, such as those discussed in Amanda's story – including difficulty accessing hearings, lengthy delays and the need for further hearings due to administrative errors, evidence expectations, and complexities around expected submissions and pleadings. Even if a consumer wins their case, they can have problems enforcing the judgment, as shown by Amanda's story.
10. The effect on consumers experiencing financial disadvantage and other vulnerabilities is staggering – we have seen clients forced into debt to pay storage costs to a dealer that has their lemon car and refuses to fix it or replace it. Without their vehicles, people often pay additional costs for transportation or are just unable to get to work, school, or medical appointments. Furthermore, it may result in continued deterioration of their vehicle that might be unsafe to drive, combined with the additional burdens of insurance and registration fees and ongoing car payment obligations for a vehicle that is unusable.

Case Study – Amanda's story

Amanda (name changed) is a mother on a Disability Support Pension who recently called our legal advice line.

She told our lawyers the following about her experience in VCAT.

Amanda was involved in a car accident and took her van to a mechanic for repair. The mechanic held her van and took her money but refused to return her van.

Amanda initiated proceedings in VCAT, which resulted in more than five hearings being held over the course of 3 years. At one point, a decision overturning a previous order was made against her while she was not in the hearing because she had been provided multiple numbers with which to dial in, including an incorrect one that sent her into the wrong hearing.

Amanda also told our lawyers that a VCAT member told her to engage a lawyer to prepare a chronology, despite Amanda already providing her own documentation with the facts. Amanda told us she did not think the VCAT member had read the documents she had provided.

Amanda couldn't get help from Victoria Legal Aid, so she approached private lawyers to help her with her VCAT documents. Eventually, VCAT ordered the mechanic to pay Amanda more than \$15,000 in exchange for keeping her car. However, this has not been paid. Amanda is now left without her van and as well as the money she had paid to the mechanic for repairs of over \$6,000.

In addition, Amanda has since received a bill for thousands of dollars that she didn't understand she would be charged from the private lawyers. She is now being pursued for this amount plus interest in court.

During this time, Amanda was going through some very difficult circumstances, including illness in both of her parents and the eventual passing of her father.

11. Without motor vehicle ADR schemes that are accessible, affordable and timely, people will continue to miss out on access to repairs, replacements and refunds that they are entitled to under the Australian Consumer Law (ACL) for their faulty cars, which has significant hidden costs and impacts on their ability to participate in society and the economy.
12. While any motor vehicle ADR scheme must be accessible for consumers successfully representing themselves, Consumer Action does not recommend that access to legal representation be banned from any motor vehicle ADR scheme entirely, as is the case in the New Zealand model. This would have a detrimental impact on people experiencing vulnerability, especially people who may not have the capacity to advocate for themselves or who may not be able to understand complex information. The ADR scheme should have the discretion to allow legal representation when appropriate.
13. The independent resolution of complaints should be the primary focus of any such ADR scheme, rather than being embedded within a state or territory regulator. This is because regulators' main priority, quite rightly, is compliance and enforcement. While enforceable dispute resolution services within regulators would be helpful for other smaller-value disputes, we consider that a separate robust, specialist scheme is required for motor vehicle disputes.
14. Ombudsman schemes have been effective specialist dispute resolution schemes in other specialty sectors in Australia, including in relation to credit and financial services, superannuation, telecommunications, energy and water. Our organisation has supported and represented many consumers in disputes with these firms in ADR over many years. One of the greatest advances in consumer protection in the past 20 years is the establishment of mandatory ADR schemes in many industry sectors. These schemes have provided access to justice for hundreds of thousands of consumers that would have been unable to resolve disputes if they had to rely on existing courts and tribunals, which can be complex, time consuming and costly.
15. These schemes are often industry funded, which creates an incentive to resolve disputes effectively. Ombudsman schemes are transparent and independent, with governance frameworks consisting of consumer representatives, industry representatives and independents. Unlike tribunals or courts, they also incorporate a systemic issues function that is important to understanding overarching themes in complaints. Ombudsman schemes can share their findings in published reports and are an important intel source for regulators about systemic issues. Ombudsman schemes operate under clear benchmarks³ and also are subject to regular independent reviews. The benchmarks relate to accessibility, independence, fairness, accountability, efficiency and effectiveness.
16. Industry ombudsman schemes provide services at no cost to consumers, and focus on informal and timely resolution of disputes which reduces barriers to accessing justice for consumers. This design may be best suited for motor vehicle disputes as it would cater for improved access and the specialist knowledge required for any such scheme to be effective.
17. Any ADR scheme for motor vehicles must require mandatory participation by car dealers. The UK Reforming Competition and Consumer Policy consultation paper describes a reason for this as 'because there is a high incidence of high value disputes combined with one off purchases'.⁴ Generally, membership

³ See Government Benchmarks for Industry-Based Customer Dispute Resolution (2015), available at: <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution>.

⁴ Department for Business, Energy and Industrial Strategy, "Reforming competition and consumer policy: driving growth and delivery competitive markets that work for consumers" (July 2021), p 23, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf.

to an industry-funded ombudsman is required as a condition of licencing or registration. This could be achieved through motor car trader licensing regimes in each state.

ADR for other consumer goods

18. In relation to the general ADR, such as compulsory conciliation or directions powers discussed in recommendation 3.2, these should provide effective and timely resolution for many consumer guarantee complaints. As canvassed in our initial submission, enforcement of consumer guarantees continues to be inaccessible and unaffordable for many people in the community, especially people experiencing financial disadvantage and other vulnerabilities. This was also discussed in the ACCC's submission, in which the ACCC stated its '*support [for] amendments to the ACL to address the considerable difference between consumers and supplier rights and their practical experience*'.⁵ Often the costs of pursuing a complaint through a court or tribunal far exceed the value of the good or service, meaning people just bear the cost themselves and walk away from the dispute.
19. The voluntary ADR schemes that are in place in other states and territories, such as the conciliation available through Consumer Affairs Victoria, cannot be directly enforced. This makes it impossible for consumers to enforce noncompliance with any conciliated decision. Moreover, a trader can just opt to not participate in this form of dispute resolution. Enforceable conciliation or directions powers would help to improve conduct in relation to the consumer guarantees across the state, as we understand has been the case in New South Wales since the implementation of the directions power.
20. We strongly support these ADR systems even where there may be the chance of crossover with other dispute resolution options, such as ombudsman schemes. There has always been crossover between schemes and with administrative tribunals. For example, the Telecommunications Information Ombudsman (TIO) cannot currently consider complaints about mobile phone devices purchased separate to a service contract with a provider – which is an increasingly frequent means for purchasing a mobile phone. The ADR schemes available are important to provide affordable access to dispute resolution for people who happen to purchase a particular good through a different means than that addressed by the ombudsman service. We note the recently announced UK consultation on reforming competition and consumer policy describes its starting point as a 'strong foundation', with 'multiple routes for consumers to receive advice and enforce their rights'.⁶
21. An important aspect of new ADR systems should be their transparency and public accountability. As the draft Report acknowledges, there is currently little publicly available information about the use of such powers in New South Wales. This would be improved by any directions or orders made being readily available to the public – not only would this increase public trust in the system, it would also lead to improved compliance with the Australian Consumer Law obligations when brand reputation is at stake. We note that existing industry ombudsman schemes report final determinations and are accessible to the public, consumer advocates and industry.
22. Any cost-benefit analysis undertaken to inform the design and use of ADR mechanisms (general or specialty motor vehicle schemes) as per recommendation 3.2 should ensure it includes the financial loss to consumers who are not able to engage or continue their complaints through current processes, and the financial and non-financial losses incurred due to the faulty good. For example, costs associated with having a lemon car such as loss of an ability to get to work due to an unsafe car or money spent for alternative arrangements.

⁵ ACCC Submission in response to the Issues Paper, Productivity Commission Inquiry into the Right to Repair (February 2021), p 2 – 3, available at: https://www.pc.gov.au/_data/assets/pdf_file/0007/272662/sub106-repair.pdf.

⁶ See <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy>.

23. Most importantly, when addressing competitive repair of products due to wear and tear or breakage, the Productivity Commission should ensure its recommendations improve, rather than diminish, access to consumer rights for faulty products. Consumer guarantee protections (including the right to repair) under the ACL are often difficult and expensive for individual consumers to enforce – this means a person’s right to repair or reject a faulty good is undermined by inaccessible dispute resolution. Furthermore, some of our clients have reported feeling pressured into thinking they have no other remedy to a faulty good than an endless series of repairs (the repair cycle) or no remedy at all.⁷ Any move to require repairs as opposed to replacements or refunds will undermine the purpose of the Australian Consumer Law and will disproportionately have a negative impact on people facing financial disadvantage and/or other vulnerabilities who are stuck in a repair cycle with no ‘back up’ at their disposal.

RECOMMENDATION 1. The Productivity Commission should recommend specialist no- or low-cost ADR for motor vehicles that provides accessible, affordable and timely dispute resolution services for people to access repairs and other remedies in relation to the consumer guarantees to address this urgent gap that continues to lead to consumer detriment.

RECOMMENDATION 2. Confirm recommendation 3.2 in the final report.

Enabling a super complaints process (Recommendation 3.3)

24. We strongly support **draft recommendation 3.3** for the Australian Government to enable designated consumer groups to lodge super complaints on systemic issues in relation to the consumer guarantees.
25. Super complaints provide a systematic, rigorous and highly evidenced means for regulators to gather insight on conduct within their remit and consumer protection focus. Super complaints would also lead to more informed and proactive public action on behalf of consumers in relation to the ACL, which would help to address the power asymmetry that exists in the markets reviewed in this inquiry (such as motor vehicles and technology). The UK experience has been successful, leading to meaningful consumer protection action, reforms and, at times, redress for consumers who have been wronged.⁸
26. We support the need for criteria for the assignment or removal of designated consumer bodies, through a clear and transparent framework. For example, the Financial Conduct Authority in the UK publishes Guidance for bodies seeking designation as super-complainants to the Financial Conduct Authority.⁹ This criteria will protect the integrity of the super complaints system while being fair and accessible to consumer groups, as well as available to the public.
27. According to the UK Competition and Markets Authority guidance, super-complainants are not expected to provide the level of evidence necessary for the recipient to decide that immediate action is appropriate. However, they should present a reasoned case for further investigation. Clear evidentiary requirements will provide a framework for consumer groups to adhere to, which will remove uncertainty about whether or when to submit a super complaint for investigation. Such requirements also ensure that there is a substantial problem that needs addressing.
28. Super complaints should be fast tracked and responded to in a substantial way by the regulator within a designated amount of time (e.g. 90 days, which is utilised in the UK). This may then lead to enforcement

⁷ Consumer Action Law Centre, “Lemon-Aid” (June 2018) p 22, available at: <https://consumeraction.org.au/lemon-aid/>.

⁸ For example: <https://www.itpro.co.uk/security/antivirus/359674/mcafee-to-refund-customers-following-cma-investigation>

⁹ Financial Conduct Authority, ‘Guidance for bodies seeking designation as super-complainants to the Financial Conduct Authority (publishing.service.gov.uk)’, (March 2013) available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/200454/guidance_for_super_complainants_120313.pdf

action, a market study or a full investigation, for example. The timely nature of responses to super complaints is one of the clearest benefits of this system. We note that any further action is ultimately the decision of the regulator based on the evidence available and existing policies for determining what, if any, enforcement action should be pursued. This is not a matter for consumer groups.

29. Regulator responses to super complaints should be publicly available through transparent reporting. This would reflect the past Productivity Commission recommendation on ensuring the data on consumer complaints published by ACL regulators are meaningful and improving the transparency of the resourcing and performance of ACL regulators.¹⁰
30. Consumer Action has long called for improved mechanisms for reporting to the public and consumer organisations.¹¹ A super complaints scheme similar to those operating in the UK would improve transparency and increase community, consumer advocate and industry awareness of regulator activities, leading to an improved and encouraged culture of compliance.
31. Consumer organisations currently submit complaints to regulators, however we consider that a super-complaints process is still necessary. While consumer regulators generally do respond to issues identified by consumer organisations under the current process, a super-complaints process can institutionalise this and provide transparency around these investigations and consequent remedies. This can help address situations where the investigation of complaints are delayed, inevitably resulting in a continuation of the harm complained about.
32. Feedback from the UK also suggests that the public nature of super complaints is significant and that the process provides an important additional layer of strategic market analysis to regulators. This is consistent with the Australian National Audit Office recommendation in its recent review of the ACCC that the regulator focus on trends and patterns in market intelligence, identifying high levels of widespread consumer detriment.¹²
33. Super complaints should also require a Government response, as is the case in the UK. This is crucial for encouraging a culture of compliance with Australian law and to ensure any need for regulatory reform related to the complaints is considered without delay.
34. Consumer Action is strongly supports the concept of super complaints. Enabling consumer advocacy organisations to act on behalf of consumers in this manner could provide an important counter-weight to the asymmetries that exist in many markets, would provide useful intel to regulators and would better leverage Australia's consumer protection regime for the benefit of consumers.

RECOMMENDATION 3. Carry recommendation 3.3 forward to the final report and consider recommending a government response as part of the super consumer complaints process.

¹⁰ Australian Consumer Law Enforcement and Administration Study Report, Productivity Commission (2017), p 2.

¹¹ For example, Consumer Action submission to the Productivity Commission Inquiry on Consumer Law Enforcement and Administration, 2018 p 2.

¹² Australian National Audit Office (2016), *Managing Compliance with Fair Trading Obligations*, <http://www.anao.gov.au/Publications/Audit-Reports/2015-2016/Managing-Compliance-with-Fair-Trading-Obligations>

Enable access to repair supplies (Competition in repair markets)

Evaluate the motor vehicle mandatory information sharing scheme (Recommendation 4.1)

Consumer Action supports the review of the Motor Vehicle Service and Repair scheme. This review should be conducted independently and transparently.

Repair facilities, spare parts and software updates (Info request 3.1)

To better understand whether consumers have reasonable access to repair facilities, spare parts and software updates, the Commission is seeking further information on:

Question 1. *whether consumers have faced difficulties accessing spare parts or repair facilities under guarantees when their product breaks or develops a fault, including specific examples of the type and age of the product, and the costs incurred by the consumer.*

35. While we have not seen many inquiries of this nature, it has arisen in the context of recalls for older vehicles (manufactured prior to 2001). We assisted a number of clients in 2019 and 2020 whose older vehicles had been recalled due to a Takata airbag fault, separate to the ACCC Takata airbag mandatory recall. These recalls were operated by the manufacturers themselves. One manufacturer initially demanded the cars be returned, offering a 'buy back' payment for their calculation of the average current value of the old vehicles (approximately \$2,000 - \$3,000) and a small payment to assist with immediate transport requirements in exchange for its delivery to the manufacturer. It was claimed they were unable to be fixed due to a lack of appropriate spare parts.
36. However, the issue was that these vehicles, which suddenly had a major fault under the consumer guarantees as they were considered unsafe and could result in 'serious injury and death', had a current value that was far lower than the true value of the vehicle to their owners. The owners we assisted were experiencing financial disadvantage and other vulnerabilities, for example, one owner lived in a regional area of Victoria and required her vehicle to get to necessary medical appointments. She, and the other owners, would likely not have been able to purchase a replacement vehicle of a similar age for the offered amount. These owners were hamstrung and struggled to negotiate with the manufacturer on their own. Some of them eventually accepted the manufacturer's offer, which put them in a worse position at no fault of their own.

Ensure warranties do not impede independent repair (Manufacturer warranties and their influence on repair)

Require additional text in warranties to inform consumers that consumer guarantees do not require authorised repair or spare parts (Recommendation 4.2)

7. In relation to warranties, we support Draft Finding 4.1 and Draft Recommendation 4.2 to require text stating the consumer guarantees are not negated by independent repairs, and to take action on terms within manufacturer warranties that automatically void the warranty if non-authorised repairs are undertaken.
8. However, rather than focussing on *disclosure* to consumers of these protections, the Commission should also consider *consequences* for manufacturers and retailers for breaching any requirements. The power imbalance in car yards and retail stores cannot be overcome by mere communication in a wordy label which may or may not align with what is verbally communicated at the point of sale.

A prohibition on warranty void terms (Info request 4.3)

The Commission is considering recommending provisions similar to the Magnuson-Moss Warranty Act in the United States, which prohibit manufacturer warranties from containing terms that require consumers to use authorised repair services or parts to keep their warranty coverage. We are seeking feedback and evidence on the costs and benefits of this approach. In particular:

Question 2. *would manufacturers respond by increasing product prices or making their warranties less generous? Would this latter change have any practical impact on consumers given they are also covered for defects under consumer guarantees?*

37. Consumer Action supports a recommendation to prohibit warranties from containing terms that require consumers to use authorised repair services or parts to keep their warranty coverage, such as that in the Magnuson-Moss Warranty Act in the United States.

38. Should manufacturers respond by increasing their product prices or reducing the coverage in their warranties, people would still have their rights under consumer guarantees. It is critical that access to enforcing consumer guarantee rights is improved through directly enforceable ADR schemes, including specialty motor vehicle schemes with free access to expert reports. Once access to dispute resolution has been improved, any reduction of warranty coverage would not have much a practical impact on consumers.

Question 3. *how could such a prohibition be designed and communicated to ensure that consumers are aware that voiding terms are now prohibited?*

39. The important question here is how the prohibition could be designed to be most effective rather than focusing on consumer awareness. An effective prohibition would be achieved through systemic compliance and enforcement rather than through communication to consumers or consumer education attempts that may be thwarted at the point of sale in any case.

Question 4. *how could the prohibition be designed to limit manufacturer liability for damage beyond their control? For example, the Magnuson-Moss Warranty Act permits warranty terms that limit manufacturer liability for damage caused by unauthorised repairs or parts, if they can demonstrate third-party fault.*

40. Australian law already includes concepts of causation which are relevant to the analysis of manufacturer liability in the case of damage caused or potentially caused by unauthorised repairs or parts. Furthermore, any sharing of liability needs to be simple for the consumer—i.e., consumers should not be required to lodge separate complaints between manufacturers and repairers, the system should enable allocation of liability between them.

Question 5. *In a similar vein, should terms within end-user license agreements that purport to restrict repair related activities (discouraging third-party repair) also be prohibited?*

41. We support prohibiting terms within end-user license agreements that purport to restrict repair related activities, such as discouraging third-party repair. These terms discourage competitive repair services, and unnecessarily restrict consumers' contractual rights. Arguably, some of these terms could be considered unfair contract terms under the ACL.

Question 6. *Is a disclosure as proposed under draft recommendation 4.2 sufficient or is a legislative prohibition required?*

42. Disclosure as proposed under draft recommendation 4.2 is not at all sufficient to effect change or compliance with this recommendation. Rather, a legislative prohibition that enables civil penalties for its breach will be required to implement this change effectively. Time and time again, we have been shown

that businesses do not always do the right thing simply because they should. If that were the case, there would have been no need for the Financial Services Royal Commission.

43. The age of disclosure as the primary consumer protection mechanism is over. The Productivity Commission should carefully consider the lessons from ASIC's excellent joint report with Dutch Authority for Financial Markets, 'Disclosure: Why it shouldn't be the default.'¹³ The report:

*'...focuses on the real-world context in which disclosure operates. It shows that, and explains why, disclosure and warnings can be less effective than expected, or even ineffective, in influencing consumer behaviour. In some instances it shows that disclosure and warnings can backfire, contributing to consumer harm.'*¹⁴

Extended warranties

44. Any recommendations about warranties should apply to both manufacturer warranties and extended warranties offered or sold by retailers. The draft report has mentioned proposals and reforms to extended warranties that are not yet in effect or that have since been abandoned. We recommend further reforms to fix the ongoing harm caused by extended warranties – both in the retail and caryard settings.
45. Since the start of this Inquiry, the proposed ASIC product intervention order for caryard extended warranties has been abandoned. There will be no robust consumer protection for extended warranties in caryards. Yet these extended warranties, along with extended warranties sold by retailers, are often sold using high pressure sales tactics, sometimes with misleading representations about what they will cover or what would already be covered by consumer guarantees, while also limiting the purchaser's right to competitive repair. They are also sometimes used by retailers and dealers to deflect complaints about faulty products under the consumer guarantees. If access to consumer guarantee dispute resolution was improved, there would be less need to focus on manufacturer and extended warranties.
46. The Commission's view at page 120 of the Draft Report that the tied servicing issues with extended warranties are 'less pressing' than those with manufacturer's warranties does not fairly capture the ongoing consumer harm. ASIC has abandoned its proposed product intervention order for caryard extended warranties despite its findings of claims ratio of 23 cents in the dollar, with premiums of \$94.7 million against claims of \$21.7 million.¹⁵ There will be no robust consumer protection for extended warranties in caryards, with the regulator hoping that providers will voluntarily comply with the deferred sales model that applies to add-on insurance despite there being no consequences for failing to do so.
47. ASIC found consumer harm caused by onerous servicing requirements, stating that:

ASIC's review of car warranties has identified two practices in relation to servicing requirements that can lead to poor consumer outcomes.

The first is where the consumer is required to service their vehicles more frequently than is specified under the manufacturer's warranty. We consider that the manufacturer is the party best able to determine what is a reasonable level of frequency for their vehicles to be serviced. It is therefore not apparent to us why consumers should have to service their vehicle more often.

¹³ ASIC, REP 632 Disclosure: Why it shouldn't be the default, 14 October 2019: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>.

¹⁴ Ibid 4.

¹⁵ ASIC, CP324: Product intervention: The sale of add-on financial products through caryard intermediaries, October 2019, p 9, available at: <https://asic.gov.au/media/5286418/cp324-published-1-october-2019.pdf>.

Further, under some warranties, after the manufacturer's warranty has expired, the contract requires the consumer to increase the frequency with which their car has to be serviced. A consumer who has become used to having their car serviced according to the timetable under the manufacturer's warranty may not realise that they now have to service their car more often. The unexpected change in their contractual obligations creates a risk that they may breach the terms of their warranty, and lose their right to have a claim paid.

...

However, there is also a detriment to consumers where the warranty provides that the provider does not have to meet a claim if the consumer has had their car serviced, but not at that particular dealer. This approach can operate in an inflexible way to the disadvantage of a consumer, including where, for example, the consumer moves away and is no longer able to service the car at the selling dealer.¹⁶

48. We disagree with the Commission's implication that there is meaningful 'choice or negotiation'¹⁷ on extended warranties in car yards, given the regular use of high-pressure sales tactics and misleading representations about what the warranty will cover. Our clients on low or fixed incomes are often only able to afford second-hand cars. Too often, these cars are lemons, with high-cost finance and a mis-sold junk extended warranty to boot. Their experiences, and the harm caused, should not be overlooked by this Inquiry simply because they can't afford to buy newer cars covered by manufacturer's warranties.
49. Our online tool, DemandARefund, has now seen more than \$32 million demanded in refunds on junk insurance and extended warranties since it was launched in March 2016, with at least \$11 million of that attributed to sales through car dealers. At least \$2.88 million has been demanded in relation to extended warranties specifically. We know the harm continues because, of the 18 demands for a refund on extended warranties made through DemandaRefund between 14 May and 8 July 2021, two of the warranties were sold in 2020, and six were sold in 2019. We expect many more to follow as people attempt to claim on the warranty only to be denied due to an exclusion. There is often a lag time between the sale of a warranty, and when a person makes a claim for a refund through DemandaRefund.
50. The survey questions asked by DemandaRefund when a person generates a letter of demand for an extended warranty are concerning, and reveal the extend of mis-selling and pressure in caryards. The following table refers to demands generated as at 13 May 2021:

¹⁶ Ibid p 55.

¹⁷ Draft Report, Productivity Commission Inquiry on the Right to Repair, p 120.

Question	Yes	No	Yes (%)	No (%)
Did the salesperson explain the full cost of the warranty?	587	1260	31.78%	68.22%
Did the salesperson explain your 'cooling off' rights?	258	1589	13.97%	86.03%
Did the salesperson give you information that was misleading?	1201	646	65.02%	34.98%
Did the salesperson pressure you into buying the insurance?	1246	601	67.46%	32.54%
Did the salesperson suggest that the warranty would be the only protection you'd get if something went wrong with the car?	1324	523	71.68%	28.32%
Did the salesperson tell you that you had to buy the warranty?	922	925	49.92%	50.08%
Did the salesperson use other unfair sales tactics?	819	1028	44.34%	55.66%
Did this information or lack of information influence your decision to buy the warranty?	1571	173	89.36%	9.84%
Did you know the warranty was optional?	826	1021	44.72%	55.28%
Did you know you had bought the warranty?	1479	368	80.08%	19.92%
Did you receive a product disclosure statement (PDS)?	771	1076	41.74%	58.26%
Do you think the salesperson explained all the important exclusions and limitations?	56	1791	3.03%	96.97%
If you had known what you know now, would you have decided to buy the warranty?	0	1847	0.00%	100.00%
Overall, do you think the sales process was fair?	244	1603	13.21%	86.79%
Were you given an opportunity to review the documents before agreeing to the purchase?	671	1176	36.33%	63.67%

51. The problems are not just in car yards. While DemandaRefund does not capture specific data on extended warranties offered in settings other than car yards, we think the following findings are relevant to the sale of extended warranties generally. Notably, 100% of DemandaRefund users said that they would not buy the extended warranty again, knowing what they now know. 60% of users reported pressure from the salesperson, 42% reported unfair sales tactics and 90% thought the sales process was unfair.
52. Indeed, to the extent that extended warranties are seen to offer value, it is because our dispute resolution processes for enforcing the consumer guarantees are so poor. It's hard to see a market for these add-on products if our consumer laws and dispute resolution forums were working properly.
53. Further, we know that the proposed cooling off periods and oral disclosure of cancellation rights referred to at page 96 of the Draft Report will not stop this harm. Indeed, the types of "reforms" can often backfire, being used by clever salespeople to give comfort to the consumer and close the deal on a junk warranty, knowing that people rarely cool off. Our 2016 research with Dr Paul Harrison from Deakin University found that when customers are offered a "cooling off" period, they don't change their minds, even when the alternative is considered subjectively better.¹⁸ As mentioned above, ASIC's excellent joint report with the Dutch regulator AFM compiled the overwhelming evidence that disclosure alone does not promote good consumer outcomes, and can 'backfire, contributing to consumer harm'.¹⁹ The age of disclosure as the primary consumer protection is over.
54. Between their low value and the way in which they are pressure sold, extended warranties that limit repair choice are costly and harmful to consumers without providing benefits of improved prospects of repair.
55. Specifically, Consumer Action does not agree that extended warranty arrangements benefit vehicle owners through more certainty, often because they are sold to people who are not eligible to claim on them or have so many exclusions that they do not provide the benefits advertised.

¹⁸ Consumer Action and Dr Paul Harrison, Deakin University, *Cooling-off periods for consumers don't work: study*, 29 November 2016: <https://consumeraction.org.au/cooling-off-periods-consumers-dont-work-study/>.

¹⁹ ASIC, REP 632 Disclosure: Why it shouldn't be the default, 14 October 2019: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>.

What was ASIC going to do?²⁰

56. ASIC proposed to fix the harm caused by sales practices and design features in the caryard extended warranties market by introducing a number of helpful obligations through a proposed product intervention, which has now been abandoned. Consumer advocates strongly supported these proposals, which included:

- **Implementing a 4-day deferred sales model:** This would have put a useful 4-day pause in the sales process, meaning people had time, outside of the high-pressure sales context of the caryard, to consider whether they wanted or needed the extended warranty. The sales representative would have been prevented from completing the sale of an extended warranty during a 4-day 'deferral period'. This reform will, however, apply to other add-on products, such as consumer credit and GAP insurances following a recommendation of the Financial Service Royal Commission.
- **Banning overlap with manufacturer's warranty:** Ban the sale of extended warranties on new cars where the manufacturer's warranty still has more than 12 months' cover. This was to address 'the existing problem for consumers in being asked to make a purchasing decision when they cannot be reasonably expected to predict their future needs'.²¹
- **Banning tied servicing requirements:** ban sale of warranties that require servicing the car:
 - i. more frequently than recommended by the manufacturer of the car; or
 - ii. by the dealer who sold them the product.

This was to respond to the 'consumer harm arising where consumers pay for warranties but require flexibility in servicing, placing them in breach of their requirements under the contract, and so at risk of having any future claim denied.'²²

- **Banning extended warranties with low claims limits:** Introducing a ban on the sale of mechanical risk products with maximum claims limits of \$2,000 or less.
- **Pro-rata refund rights:** Allowing a 30-day cooling off period and then pro-rata refund rights after that time when a consumer cancels an extended warranty. This would address unfair refund practices that can disadvantage consumers (e.g. where a warranty provider can retain the entire premium even though they are no longer on risk).
- **Complementary obligations:** Requiring that warranty providers:
 - iii. develop criteria to restrict sales so that consumers are not offered products that are unlikely to provide them with a significant benefit;
 - iv. be prohibited from using sales tactics that either represent to consumers that they may have to make payments from their own resources if they do not buy the add-on products; or require the consumer to justify why they are not buying a product.
- **Data:** Provide recurrent data to ASIC.

57. We urge the Commission to consider making recommendations on the additional protections for extended warranties based on the findings and proposals of ASIC.

RECOMMENDATION 4. Require text stating the consumer guarantees are not negated by independent repairs.

²⁰ See ASIC CP324 (Oct 2020) page 56 on extended warranties, and page 25 on complementary obligations: <https://asic.gov.au/media/5286418/cp324-published-1-october-2019.pdf>

Subsequent draft order (Aug 2020) extended these proposals to dealer-issued warranties: <https://asic.gov.au/media/527514/20-179mr-attachment-1-summary-of-changes.pdf>

²¹ ASIC CP324 (Oct 2020) page 57: <https://asic.gov.au/media/5286418/cp324-published-1-october-2019.pdf>

²² ASIC CP324 (Oct 2020) page 58: <https://asic.gov.au/media/5286418/cp324-published-1-october-2019.pdf>

RECOMMENDATION 5. The Productivity Commission should recommend ASIC's proposals listed at para 56 be revisited and implemented in order to help address the stifling of competitive repair choice and harm caused by extended warranties.

RECOMMENDATION 6. Prohibit warranties from containing terms that require consumers to use authorised repair services or parts to keep their warranty coverage.

Better information for consumers on product durability and repairability

Publish guidance on durability expected under consumer guarantees for common household items (Recommendation 3.1)

58. We support **draft recommendation 3.1**.
59. We support the Productivity Commission draft recommendation (3.1) on guidance on reasonable durability of products.
60. The lack of clear information on product durability and reparability has contributed to the current situation where retailers and car dealers refer only to their own warranties in relation to how long a good should last. However, these warranties do not reflect the realities of costs, reputation, age or community expectations.
61. Guidance on the minimum expected durability of products, including specific and robust minimum time periods, would help re-focus durability claims and evidentiary burdens on the Australian Consumer Law rather than on individual business decisions about the over-and-above warranties mentioned previously. This guidance should be developed in conjunction with consumer representatives and be evidence based – not just relying on the expectations of industry.
62. While Consumer Action has not seen a significant number of matters related to the unavailability of spare parts, we have seen the Takata airbag issue discussed on pages 11-12 of this submission. Further guidance in relation to durability and availability of spare parts would be useful.

RECOMMENDATION 7. In addition to supporting recommendation 3.1, we recommend further guidance in relation to durability and availability of spare parts.

Product labelling scheme (Information request 6.1)

63. While Consumer Action supports durability advice as above, we also note that disclosure approaches will never offer a complete solution to barriers to repair, as discussed previously in this submission. Should manufacturers be participating in premature obsolescence of their products, disclosure and information statements will not address this on their own.

Other

64. Finally, it is important to provide information on leasing of products, as the implication on page 54 of the draft report is that consumer leases are beneficial due to potentially being more environmentally friendly.
65. Consumer leases are rental arrangements for goods hired for domestic or household purposes, that typically last for a fixed period of between 12 to 48 months (though some last longer than this). They include products such as laptops, mobile phones, whitegoods, cars or furniture. Consumer leases are a form of credit product under the *National Consumer Credit Protection Act 2009* (**NCCP Act**), however unlike all other forms of regulated credit, there is absolutely no cap on the amount that can be charged for a consumer lease. A report by ASIC on the cost of consumer leases for household goods found a clothes

dryer cost a Centrelink recipient the equivalent of an 884% interest rate.²³ The lack of a cost cap for consumer leases means that despite being regulated by the NCCP Act, leasing arrangements often see consumer end up paying multiple times the recommended retail price for items that they don't own at the end. Often consumer lease providers advertise that repairs and servicing are included in these exorbitant costs, despite consumers having rights to repair, refund or replacement already under the ACL.

66. It is also notable that both Telstra and Optus have ended their phone leasing plans, which were poor value and arguably did not result in less e-waste as by definition they resulted in the need to acquire a new phone after the lease term (which were generally 24 months).

Conclusion

67. The right to repair in Australia would be greatly improved by better access to accessible, affordable and timely dispute resolution for consumers to be able to enforce their rights enshrined in the ACL. This is the first step to increasing access to the right to repair for faulty goods, which is currently lacking across most states and territories for low-value goods and motor vehicles. This will be complemented by a culture of compliance, which would be strengthened by the implementation of a super complaints process through the ACCC. Improvements to competitive repair can then follow, as the focus for faulty goods will relate to the consumer guarantees rather than over and above warranties, many of which restrict consumer choice in repair.

²³ ASIC, REP 447: Cost of consumer leases for household goods (2016), <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-447-cost-of-consumer-leases-for-household-goods/>

APPENDIX A – SUMMARY OF RECOMMENDATIONS

- RECOMMENDATION 1.** The Productivity Commission should recommend specialist no- or low-cost ADR for motor vehicles that provides accessible, affordable and timely dispute resolution services for people to access repairs and other remedies in relation to the consumer guarantees to address this urgent gap that continues to lead to consumer detriment.
- RECOMMENDATION 2.** Confirm recommendation 3.2 in the final report.
- RECOMMENDATION 3.** Carry recommendation 3.3 forward to the final report and consider recommending a government response as part of the super consumer complaints process.
- RECOMMENDATION 4.** Require text stating the consumer guarantees are not negated by independent repairs.
- RECOMMENDATION 5.** The Productivity Commission should recommend ASIC's proposals listed at para 56 be revisited and implemented in order to help address the stifling of competitive repair choice and harm caused by extended warranties.
- RECOMMENDATION 6.** Prohibit warranties from containing terms that require consumers to use authorised repair services or parts to keep their warranty coverage.
- RECOMMENDATION 7.** In addition to supporting recommendation 3.1, we recommend further guidance in relation to durability and availability of spare parts.

Please contact Senior Policy Officer **Brigette Rose** at **Consumer Action Law Centre** on 03 9670 5088 or at brigette@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

Gerard Brody | CEO

CONSUMER ACTION LAW CENTRE