



VACC's Response to the Productivity Commission's Right to Repair Issues Paper

March 2021

About VACC

VACC is Victoria's peak automotive industry association, representing the interests of more than 5,000 members in over 20 retail automotive sectors, who employ over 50,000 Victorians. VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (e.g. specialist vehicle, parts or component modification and/or manufacture), and automotive dismantlers and recyclers.

Contact:

John Khoury
Industry Policy Advisor, VACC

Table of Contents

1	Introduction.....	3
2	Background of the automotive right to repair movement	3
3	Response to Issues Paper Questions.....	7
4	Conclusion.....	11

1 Introduction

The Victorian Automotive Chamber of Commerce (VACC) welcomes the opportunity to respond to the Productivity Commission's Right to Repair Issues Paper.

It has been VACC's ongoing position that a right to repair law is a positive step for consumers, businesses owners and the broader Australian economy. It provides better consumer choice and enhances competition in a market that is often dominated by large multinational players.

The following submission focuses on the automotive service, repair, and retail aftermarket, and provides context regarding the establishment of an automotive right to repair campaign. It also responds to four questions posed by the Issues Paper:

1. The legislative arrangements that govern repairs of goods and services, and whether regulatory barriers exist that prevent consumers from sourcing competitive repairs.
2. The barriers and enablers to competition in repair markets, including analysing any manufacturer-imposed barriers, and the costs and benefits associated with broader application of regulated approaches to right of repair and facilitating legal access to embedded software in consumer and other goods.
3. The impact of digital rights management on third-party repairers and consumers, and how intellectual property rights or commercially sensitive knowledge would interact with a right to repair.
4. The effectiveness of current arrangements for preventing premature or planned product obsolescence and the proliferation of e-waste, and further means of reducing e-waste through improved access to repairs and increased competition in repair markets.

This submission argues that a right to repair law would strengthen competition between manufacturer and authorised and independent vehicle repair businesses; provide positive gains to the environment through reduced waste and contribute to a safer vehicle fleet on Australian roads.

2 Background of the automotive right to repair movement

For close to a decade, the automotive service and repair sector has been lobbying for more equitable access to manufacturers' repair information. In 2012, a Commonwealth Consumer Affairs Advisory Council (CCAAC) inquiry was established to examine whether there was evidence of consumer or repairer detriment, as a result of low accessibility to repair information¹. In their final report, CCAAC made three key recommendations - that:

1. consumer agencies continue to educate consumers that they are not required to have their vehicle repaired by an 'authorised' repairer to ensure continuation of their manufacturers' warranty;
2. the automotive industry expedites current processes to develop, within a reasonable period, an outcome (such as voluntary industry code of conduct) that ensures there is a process for independent repairers to access repair information. (CCAAC expected there to be significant progress towards such an outcome over the next 12 months.), and;
3. the Government canvass regulatory options to ensure reasonable access to repair information, if industry is unable to arrive at an effective industry outcome, and access to repair information became a barrier to competition in the market for repairs.

¹Improving choice of automotive repairers for consumers. (2013).

The Australian Government supported all three recommendations and requested the then Chairman of CCAAC, Mr Colin Neave AM, to monitor an industry-led process and report back to Assistant Treasurer the Hon David Bradbury MP by mid-2012. This included consideration of an industry-led outcome (voluntary code), designed to ensure there was a process for independent repairers to access repair information, and a clear timeline for the implementation of a voluntary initiative that would ensure independent repairers had access to repair information at a reasonable price.

At this time, the Australian Government supported industry self-regulation as the appropriate mechanism to ensure there was reasonable access; however, if access to repair information became a barrier to competition in the market for repairs, and the automotive industry had not been able to arrive at an effective industry solution, the Government would then consider regulatory options, including a mandatory Code of Conduct (the Code).

On 16 December 2014, the then Federal Minister for Small Business, The Hon Bruce Billson MP, the Federal Chamber of Automotive Industries (FCAI), Australian Automobile Association (AAA), Australian Automotive Aftermarket Association (AAAA), Australian Automotive Dealer Association (AADA), and the Australian Motor Industry Federation (AMIF) signed a Heads of Agreement for Access to Vehicle Service and Repair Information.

Based on 14 principles, the Heads of Agreement was aimed at enhancing the repair information rights of consumers and automotive businesses via a voluntary process. The voluntary Code was proven to be ineffective. Out of 68 car manufacturers selling vehicles in Australia only one, General Motors, fully complied with the Code, while others, such as Toyota, established their own technical information portal with limited information.

On December 2017, the Australian Competition and Consumer Commission (ACCC) concluded its 18-month investigation into the new car retailing industry. The study was in response to a number of concerns raised with the ACCC regarding the automotive industry, including issues relating to, access to technical information for servicing and repairing new cars, consumer guarantees and warranties, and fuel consumption and emissions data. The final report contained several key findings and recommendations for improving consumer protection and promoting competition in the new car retailing and aftermarket sectors.

The ACCC investigation found²:

Chapter 2: New car retailing characteristics

5. Manufacturers and authorised dealers generally earn higher profit margins from aftermarket services than from new car sales. For dealers, although parts sales and repair and service account for 15 per cent of revenue, these aftermarket services contribute to 49 per cent of gross profit. The average net profit margin for dealers is approximately 1.7 to 1.8 per cent.
6. A common pricing strategy for car manufacturers and authorised dealers is to discount new car prices to maximise sales of aftermarket services. This strategy reflects that consumers have more choices available at the time of the new car sale than they do in aftermarkets for repair, service and replacement parts after the sale.

Chapter 3: Consumer guarantees and warranties

7. Consumers are often not receiving adequate information about consumer guarantees at the point of sale of a new car. The information provided is generally very limited and is usually not provided in a form the consumer can retain and refer to later. Consumers face difficulties in understanding the application of consumer guarantees and warranties.

² New Car Retailing Industry: A market study by the ACCC. (2017).
<https://www.accc.gov.au/publications/new-car-retailing-industry-market-study-final-report>

8. An oral explanation is not enough. Consumers need information in a form that can be referred to at any time during their ownership of their car. The ACCC considers that it is best practice for dealers to provide an explanation about consumer guarantees in writing.
9. A balanced provision of written information about consumer guarantees requires not only an explanation of the statutory rights available to consumers, but also an explanation of the statutory obligations of manufacturers and dealers. It also requires an explanation of the potentially complex interaction between consumer guarantees and other consumer rights available under warranty in the event of a problem with the car.
10. Many consumers face difficulties in understanding the application of consumer guarantees to their new car purchase and the distinction between consumer guarantees and warranties. Such difficulties impact the ability of consumers to accurately assess the value of any additional consumer protections offered by extended warranty products compared to the rights they already have under the consumer guarantees or the manufacturer warranty.
11. This appears to be in part the result of a focus by dealers at the point of sale on the manufacturer's warranty and the potential sale of an extended warranty. Dealers have commercial incentives, as the result of commission-based remuneration, to maximise their sales of extended warranties.
12. Most consumers take their new cars to manufacturer authorised dealers for repairs and service. This appears to be, in part, the result of a **mistaken** belief that the manufacturer's warranty requires them to only use an authorised dealer.
13. Contributing to this misunderstanding are direct and implied representations made by several manufacturers in their logbooks and service manuals to the effect that authorised dealers must carry out services or repairs (or that original equipment (OE) parts must be used). Many of these representations are likely to contravene the provisions of the ACL and may also raise competition concerns under the CCA.

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

14. The nature of technical information to repair and service new cars is rapidly changing, with digital files and codes, and proprietary diagnostic tools, now often necessary to complete a car repair or service.
15. Independent repairers have continuing problems accessing technical information for new cars. Few car manufacturers provide equivalent access to the technical information provided to their authorised dealers and preferred repairer networks, and many provide very little or no information at all.
16. Independent repairers may be able to obtain technical information from sources other than the car manufacturer in Australia; however, the information is commonly incomplete, not applicable to Australian models, or offers no security of ongoing supply.
17. Car manufacturers have legitimate concerns about the sharing of some environmental, safety and security-related technical information to repair and service new cars. Regardless, in other jurisdictions this information and data is securely shared with vetted independent repairers, and subject to safeguards to enable it to be shared. Stakeholders provided limited information about whether the sharing of technical information in other jurisdictions has affected the rates of car thefts.
18. Broadly, most car manufacturers in Australia are not fully sharing technical information consistently with the aims and principles of the Heads of Agreement.
19. The Heads of Agreement has several shortcomings which hinder its aims and principles of improving access to technical information from being achieved in a fair and efficient way.

20. The ACCC has concluded that the net effect of the Heads of Agreement, across the industry, in improving access to technical information for new cars has been limited, and that the Heads of Agreement is ineffective in providing access that is consistent with its stated aims and principles.
21. Car manufacturers have an incentive to limit access by independent repairers to technical information to steer service work to authorised dealers and repair work to preferred repairer networks.
22. This is impacting the ability of independent repairers to effectively and efficiently compete in the aftermarket for the repair and servicing of new cars.
23. It is also causing detriment to consumers in the form of increased costs, inconvenience and delays when having their new car repaired or serviced, and thereby reducing the choices available to consumers for the repairing and servicing of new cars.
24. The ACCC's view is that consumers benefit from competitive aftermarket for the repairing and servicing of new cars, and that consumers also benefit from having a choice of providers to repair and service new cars.

It is the view of VACC that many of these findings could be applied more broadly across other automotive fleets such as motorcycles, heavy vehicles, marine and recreational vessels.

ACCC Recommendation 4.1

On 12 February 2019, the Australian Government announced its commitment to supporting appropriate commercial dealings and competition in the automotive sector for the benefit of small businesses and consumers. This included the creation of a mandatory scheme for access to motor vehicle service and repair information aimed at providing a level playing field and to allow consumers to have their vehicles safely repaired by the repairer of their choice. Treasury, on behalf of the then Assistant Minister for Treasury and Finance, Senator the Hon. Zed Seselja released a consultation paper to allow interested parties to provide views on the general principles of a possible model for the scheme. Later that year there would be a cabinet reshuffle and The Hon Michael Sukkar MP was appointed Assistant Treasurer.

On 30 October 2019, the Hon Michael Sukkar MP and Treasury department officials met with stakeholder representatives to announce the government had determined legislation was the best way to address the ACCC's 2017 recommendation for a prescribed and mandated scheme. The ACCC had presented Recommendation 4.1, which stipulates:

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

The mandatory scheme should place an obligation on car manufacturers and other industry participants to achieve the underlying aims and principles of the Heads of Agreement (including those in relation to training and reinforcing existing statutory obligations on independent repairers to ensure repairs and servicing are carried out correctly to car manufacturers' specifications to assure the safety of consumers)³.

³ Ibid. p. 12

After years of industry consultations, submissions, ministerial meetings, and engagement with industry experts, both locally and abroad, it appears Australia is set to receive its first ever legislation that will ensure consumers have a right to have their vehicle serviced and repaired at a repairer of their choice. In November 2020, the Hon Michael Sukkar MP confirmed that the Government has committed to supporting an exposure draft document⁴.

Treasury is now in the process of considering submissions following the release of the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2020 and the Bill is now in its final stages.

3 Response to Issues Paper Questions

3.1 The legislative arrangements that govern repairs of goods and services, and whether regulatory barriers exist that prevent consumers from sourcing competitive repairs.

Australia's national laws for fair trading and consumer protection plays a critical role in providing protections to consumers in the event there is a problem with a purchased good or service. The legislative arrangements that govern repairs of goods and services in Australia include:

25. Competition and Consumer Act 2010, schedule 2 – The Australian Consumer Law
26. Competition and Consumer Regulations 2010, part 6 Australian Consumer Law

Since January 2011, consumer guarantees on products and services under the Australian Consumer Law (ACL) have been effective. It stipulates that businesses must guarantee products and services they sell, hire, or lease for⁵:

27. under \$40,000
28. over \$40,000 that are normally bought for personal or household use.
29. business vehicles and trailers, irrespective of cost provided they are used mainly to transport goods.

Consumer guarantees outlined in Part 3-2 of the Australian Consumer Act, sub division A & B - Guarantees relating to the supply of goods, apply to products and services regardless of any warranty offered usually called "manufacturers warranty or warranty against defects" by a manufacturer/distributor or retailer.

If a business fails to deliver any of these guarantees, a consumer has rights to:

30. repair, replacement or refund
31. cancelling a service
32. compensation for damages and loss.

While these guarantees aim to protect consumers, it is often found that consumer choice is restricted when a good is outside its warranty period and requires maintenance or a repair. Currently, there is no legislative instrument in Australia that requires manufacturers to make available all repair information, specialist tools, access to software upgrades and parts. These restrictions can be associated with a variety of outcomes including, but not limited to:

33. Misleading information or inadequate information provided to consumers at the point of sale.

⁴ Government commits to data sharing laws. (2017).
<https://www.aara.org.au/news-and-events/132-government-commits-to-data-sharing-law>

⁵Consumer Guarantees. (2021)
<https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees>

34. Geographical location, i.e. manufacturer repair facilities not available.
35. Withholding of repair information, software updates, specialised tooling by manufacturers resulting in a substantial lessening of competition.

The Australian Government recently committed to making automotive service and repair information sharing law. While it has been a long and challenging process, this landmark decision would ensure vehicles are repaired safely and in accordance with manufacturers' specifications – regardless of who they choose to maintain their vehicle. Whilst, the proposed legislation is aimed at the passenger, SUV and light commercial vehicle segments, it is expected to provide greater scope for the addition of other vehicle types in the future.

VACC acknowledges that there are no regulatory barriers preventing consumers sourcing competitive repairs. However, with the rapid increase in technology, this paradigm is shifting towards a cradle to grave scenario. The rise of wireless transmission technology and telematic systems further exacerbates this issue as manufacturers gain more control and monitoring of user operability data.

3.2 The barriers and enablers to competition in repair markets, including analysing any manufacturer-imposed barriers, and the costs and benefits associated with broader application of regulated approaches to right of repair and facilitating legal access to embedded software in consumer and other goods

The 2017 ACCC report into the new car retailing market found that in addition to new car sales, manufacturers and authorised dealers earn significant revenues and profits from aftermarket sales (including repairs, service and replacement parts)⁶. VACC's own industry report predicts that repair and maintenance will account for the largest share of the automotive industry (54 per cent), followed by car retailing (8.3 per cent), and car and parts wholesaling (7.6 per cent)⁷ over the coming years.

There is limited information publicly available on sources of profit for car manufacturers and their subsidiary distributors in Australia. A typical stylised business model for car manufacturers is described in international industry literature. The model involves car manufacturers making and selling cars at low margins with the aim of generating ongoing profits from aftermarket sales and the sale of replacement parts. Replacement parts can generate a higher proportion of car manufacturers' profits relative to new car sales due to their higher margins. For example, research on the European and US new car markets indicates that while parts sales may generate only five to ten per cent of a manufacturer's revenues, they can account for 30 to 50 per cent of the manufacturer's overall profits.⁸

Authorised dealers estimated gross profit margins for servicing and repairing cars is 64 per cent⁹, in contrast, gross profit margins from the sale of a new vehicle is only 7 per cent. This creates an incentive for dealers to sell cars at low margins or even a loss to enable profits to be made from the sale of add-on products such as capped price or free servicing, extended warranty, and roadside assist programs. It is therefore, not surprising why manufacturers seek to capitalise on their market dominance to service and repair their products, conversely limiting other aftermarket service providers as much as possible.

Embedded software in consumer products is also on the rise, with new cars now containing in excess of 10 million lines of computer code. It is expected that faults are often attributed to software glitches, bugs, or for protections against viruses and security hacks. Low cost consumer goods are slightly different in that software updates are automatically performed over an internet connection (mobile phones, computers) or by downloading a software patch directly from the manufacturer's website (TV's, printers) – installing it to the device, usually at no cost to the consumer.

⁶ ACCC, 'New Car Retailing Market Study'. (2017), above n 4.

⁷ VACC, 'Directions in Australia's Automotive Industry – An Industry Report.' (2017).

⁸ ACCC, 'New Car Retailing Market Study', above n 5.

⁹ *ibid*

Manufacturers and Big Tech companies often argue against right to repair laws, citing cyber security as a major concern. While cyber security threats should not be ignored, there remains no evidence that aftermarket repairers have utilised repair information in an unauthorised or criminal manner. Appropriate safeguards have already been implemented internationally that could be easily replicated.

3.3 The impact of digital rights management on third-party repairers and consumers, and how intellectual property rights or commercially sensitive knowledge would interact with a right to repair

Right to repair information does not include access to commercially sensitive or intellectual property information; however, this is often cited by manufacturers to argue against reform. VACC is unaware of any evidence suggesting aftermarket repairers have used access to repair information to reverse engineer a product.

VACC also argues that there are adequate provisions under Australian laws (E.g. Copyright Act 1963, patent and trademark laws), that ensure the protection of intellectual property and prevent the misuse of intellectual information. From the moment an idea or creative concept is documented, it is automatically protected by copyright in Australia. Copyrighted software is now essential to the operation of the Internet of Things (IoT) such as refrigerators, farm equipment, mobile phones, and all other electronic devices in the market connected to the internet that collect or share data.

When new software is created in the form of code, it is protected by copyright as an original literary work. Software code does not have to have a literary quality to qualify as a literary work, and therefore obtain copyright protection. The code does not need to be 'original' in the sense that no-one has written similar code. To qualify, authors need to demonstrate that they have used their skill and labour to create the software in question, without copying someone else's work.

Copyright enables the copyright owner to exercise control over what users can and cannot do with the software. This is usually expressed in the terms of the licence agreement with the user of the software.

By way of international example, the US Copyright Office released a report¹⁰ containing elements of right to repair. Their report found that manufacturers were blocking repair information, by incorrectly claiming possible copyright infringement. They concluded that the real issue related to contract law, particularly End User License Agreements (EULA). Therefore, the legislative solution in the U.S for unlocking repair information was with states – who have control over general business law and contracts.¹¹

3.4 The effectiveness of current arrangements for preventing premature or planned product obsolescence and the proliferation of e-waste, and further means of reducing e-waste through improved access to repairs and increased competition in repair markets.

VACC supports the pursuit of a circular economy and a self-sufficient infrastructure to support it. Circular economies have been successfully implemented in countries across Europe and Asia, where the impact of high-quality recycling infrastructure is acknowledged to convert waste into valuable resources. It is often quoted that a circular economy supports innovation, engages communities and can also be a profitable source of new revenue streams.

Extending the life of products and materials also prevents the over-generation of waste and can recover the full value of products. It can also create new business opportunities, while minimising the environmental impact of mining, resource extraction, refining and manufacturing. VACC and its

¹⁰ US Copyright Office. 'Software-Enabled Consumer Products Study'. (2016).

<https://www.copyright.gov/policy/software/>

¹¹ *ibid*

members recognise that raw materials are a finite resource and efforts should be made to recycle and up-cycle where possible.

The current status of geopolitical relations with countries across Asia, and the related uncertainty of our waste export provides further impetus for Australia to pursue a more circular economic policy. VACC research estimates that in 2017, 63,000 tonnes of End-of-Life Vehicle (ELV) scrappage was sent to landfill in Victoria. Nationally, this figure sits at approximately 210,000 tonnes.¹²

The electronic components used in both light and heavy vehicles are the same parts used in thousands of other devices and suffer the same types of failures. They are controlled by the same types of firmware, and are repaired using the same information, parts, and tools. If automakers are required to share repair information, it is argued the same should apply to manufacturers of electronic digital devices.

The 2018 *National Waste Policy* provides the national waste management framework for collective action by businesses, governments communities and individuals until 2030.¹³ The policy aims at better supporting the local economy, protecting the health of local communities and reducing environmental impact by leveraging the value of materials we dispose of and returning them to productive use. It includes five principles for waste management with the aim of supporting a circular economy, included below:

- Avoid waste:
 - Prioritise waste avoidance, encourage efficient use, reuse and repair
 - Design products so waste is minimised, they are made to last and we can more easily recover materials.
- Improve resource recovery:
 - Improve material collection systems and processes for recycling
 - Improve the quality of recycled material we produce
- Increase use of recycled material and build demand and markets for recycled products.
- Better manage material flows to benefit human health, the environment and the economy.
- Improve information to support innovation, guide investment and enable informed consumer decisions.

VACC makes the point that restricting third party repair providers from accessing repair information, along with appropriate quality parts often leads to consumers disposing of their equipment earlier. This is often due to the higher costs involved with a repair supplied by the manufacturer or authorised agent. It is understood this is a substantial issue for low value electronic equipment such as mobile phones and appliances; however, a similar logic can be applied to vehicle repair and servicing.

3.5 The impact on market offerings, should firms have their control over repair removed?

It has long been VACC's position that the de-limiting of access to repair information would have a positive impact on market offerings. By providing a more competitive landscape, a more vibrant, sustainable and equitable repair industry would be able to emerge. It is also the view that consumers would be encouraged to repair electronic devices and appliances rather than discarding them due to the cost of repair.

¹² VACC – Ducere Business School 'End of Life Vehicle Research Final Report. (2017)

¹³ National Waste Policy: Less waste, more resources. (2018).

<https://www.environment.gov.au/system/files/resources/d523f4e9-d958-466b-9fd1-3b7d6283f006/files/national-waste-policy-2018.pdf>

4 Conclusion

The access to repair information debate, whilst long running, has reached a critical juncture. VACC has been active in its advocacy to achieve a more equitable and competitive landscape for its automotive repair members and consumers.

It is important to remember that local repair shops are predominantly family-run, small businesses, who contribute significantly to Australia's economy. They provide an alternative to repair, often saving consumers money, while also creating local jobs and preventing e-waste. VACC calls for consumers and independent repairers to have equal access to repair information, diagnostic tools, replacement parts, and reprogramming codes to ensure products are maintained in a safe and prolonged manner and in accordance with manufacturer guidelines.

In conclusion, VACC maintains a position in line with the findings of the ACCC:

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