



Customer  
Service

# **Statutory Review –**

## ***Motor Dealers and Repairers Act 2013***

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**November 2020**



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# 1. Executive Summary

The *Motor Dealers and Repairers Act 2013* and the *Motor Dealers and Repairers Regulation 2014* provides the regulatory framework for the buying, selling and repair of motor vehicles in NSW. The primary objective of the Act is to provide consumer protections, avenues for redress and ensure appropriate levels of standards and conduct by motor dealers, repairers, repair tradespersons and recyclers in NSW.

The Act is administered by the Minister for Better Regulation and Innovation (the Minister). Section 191 of the Act requires that the Act be reviewed to assess whether its policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives. The outcome of the review is due to be tabled in both Houses of Parliament by 1 December 2020.

To assist in conducting the review, the Department released a Discussion Paper in July 2020, receiving 74 submissions. These submissions have been analysed and have made a valuable contribution to the review. We thank those in the industry who took time amid the COVID-19 pandemic to provide the review with their feedback.

The Review finds that the objectives of the Act remain valid, and the regulatory framework continues to be largely appropriate. As noted in the recent Green Paper from the NSW Productivity Commission, regulators need to respond by providing flexible, outcomes-focused regulation.

Feedback from consultation raised various issues including; the impact on the industry of the burdensome nature of some of the record keeping obligations, the classes of repair work, the relationship between insurers and repairers, rapid improvements in technology, and regulatory gaps around the conduct of some motor vehicle recyclers. There are opportunities to ease the regulatory burden while maintaining the standards of conduct and consumer protection and continuing to meet the objectives of the Act.

Following consideration of stakeholder feedback to the public consultation in July and August 2020, and an analysis of the issues identified, the Review makes 17 recommendations. The recommendations seek to strengthen the Act's effectiveness and maintain existing provisions where they remain appropriate.

## 2. Recommendations

### **Motor dealer licensing (Section 5.2.1)**

1. That the legislation be amended to accommodate online business models and other emerging business models. Remove the blanket requirement for the sale of vehicles at notified premises and make consequential amendments so that authorised officers, including the NSW Police, can continue to ensure compliance with the legislation.

### **Motor vehicle repairer licensing (section 5.2.2)**

2. That the existing regime of licensing motor vehicle repair businesses and tradespersons be retained in the Act.

### **Motor vehicle recycling licensing (section 5.2.3)**

3. Amend the Act to address inconsistencies between the regulatory regime under the *Scrap Metal Dealers Act 2016* and the motor vehicle recycling provisions in the Act.
4. Introduce cashless transactions for recyclers in line with the requirements in the *Scrap Metal Dealers Act 2016* and make any other amendments necessary as a result of the outcomes of the statutory review of that Act.

### **Prescribed parts register (section 5.3)**

5. Remove the requirement to maintain physical registers and instead move to a requirement to ensure the particulars required by the Regulation are captured in a system that can meet the needs of authorised officers in ensuring compliance with the legislation.
6. Remove the prescribed parts list from the Regulation and move to a list approved by Ministerial Order (and maintained on the NSW Fair Trading website).

### **Insurers and motor vehicle repairers (section 5.4)**

7. Make any necessary amendments to the *Fair Trading Act 1987* to help improve compliance with the Motor Vehicle Insurance and Repair Code of Conduct. This could include a negative licensing regime or imposing sanctions or penalties for non-compliance.

### **Motor dealer protections (section 5.5)**

8. Make any consequential amendments necessary to strengthen the unfair contract term protections in Part 6 of the Act by the end of 2021.

### **Consumer protections (section 5.6)**

9. Remove the option for dealers to provide the inspection report after the auction sale.

10. Remove the requirement to maintain a hard copy folder and instead insert an overarching requirement that dealer notices must be produced when requested by an authorised officer and are in a form unable to be amended.

#### **Dealer guarantees (section 5.6.2)**

11. Pending agreement by Consumer Affairs Forum Ministers on options to enhance the consumer guarantees framework, which is anticipated to be reached in mid-2021, amend the Act to remove any duplication with the Australian Consumer Law (ACL). If CAF agreement is not reached by mid-2021, NSW will unilaterally pursue options to remove dealer guarantees in favour of consumer guarantees.

#### **Motor Dealer and Repairs Compensation Fund (section 5.6.3)**

12. That an audit of the Fund's sustainability be undertaken to assess the impact of the following:
  - a) Extending the time limit for lodging a claim with Fund from the current 12 months to 18 months or 12 months once a consumer has obtained a judgement or order that remains unpaid.
  - b) Refining the criteria of persons/vehicles eligible to make a claim
  - c) Removing the exemption from the dealer guarantees for trailers/towable recreation vehicles under clause 59 of the Regulation.
  - d) Increasing the maximum amount payable out of the Fund for a single claim.

#### **Classes of repair work (section 5.7)**

13. That the current repair classes and qualifications be retained. The Department of Customer Service is to establish an ongoing six-monthly check in with industry stakeholders to ensure classes of repair work reflect the current working environment.
14. Continue to embed qualification requirements in the regulatory framework. However, in order to adapt to rapid changes in the industry and consequential changes to training packages, remove the qualification requirements from the Regulation and instead insert a power in the Act to allow them to be approved by Ministerial Order.
15. Undertake a cost-benefit analysis of motor vehicle tradespersons being required to undertake specified further training in order to renew their tradesperson certificate.

#### **Enforcement and compliance (section 5.8)**

16. Amend the penalty offence amounts after undertaking further work by the end of 2020 to review their deterrence and application.

#### **Gas and electrical work in caravans and recreational vehicles (section 5.9.1)**

17. To not proceed with creating an additional class of licence for gas and electrical work on caravans and recreational vehicles at this time. Instead, NSW Fair Trading should develop

educational material for industry to raise awareness of appropriate qualifications for electrical and gas fitting work on caravans/recreational vehicles.

## 3. Introduction

### 3.1 Overview of the Act and objectives

The *Motor Dealers and Repairers Act 2013* (the Act) was introduced to the NSW Parliament in 2013 following a comprehensive consultation and review of the previous legislation. It combined the *Motor Dealers Act 1974* and the *Motor Vehicle Repairs Act 1980* into a single piece of legislation. Amalgamating these statutes recognises the connections which exist between these two important sectors of the industry.

The Act provides for the protection of consumers and of industry, balancing necessary safety and protective measures with flexible and modern regulatory practices. It does this by establishing a scheme for the licensing and regulation of motor dealers, motor vehicle repairers and tradespersons and motor vehicle recyclers. The Act applies penalties and deterrents to ensure compliance and to minimise unlawful conduct and behaviour within the automotive industry.

The objectives of the Act are:

1. to **provide consumer protections and remedies** for consumers who purchase motor vehicles from motor dealers or obtain motor vehicle repair services,
2. to **establish appropriate standards of conduct** and transparency for motor dealers, motor vehicle repairers and motor vehicle recyclers,
3. to **provide enforcement mechanisms** to prevent misleading or dishonest conduct and illegal dealings with motor vehicles and parts,
4. to **provide protection for motor dealers** against unfair contract dealings by motor vehicle manufacturers.

### 3.2 Requirement for the review

The Act and supporting Regulation are administered by the Minister for Better Regulation and Innovation. Section 191 of the Act requires the Minister to undertake a review as soon as possible after the period of 5 years from the commencement of this Act. The review is to determine whether the Act's policy objectives remain valid, and its terms are appropriate for securing those objectives. A report on the outcome of the review must be tabled in both Houses of the NSW Parliament within 12 months of the commencement of the review, that is, by 1 December 2020.

### 3.3 Consultation

On 3 July 2020, a Discussion Paper on the statutory review of the Act was publicly released for feedback on the regulation of the motor industry in NSW. The Discussion Paper explored all parts of the current regulatory framework established by the Act and

Regulation and welcomed comments on other general matters that are relevant to improving regulation.

The consultation was held for six weeks, during which the Department received 74 submissions. Some of these submissions were confidential. During the consultation period, two round table consultations were held with key industry associations and with small businesses operating in the industry.

All the submissions made during the consultation were reviewed and considered as part of the statutory review of the Act and Regulation.

A list of submissions to the review are at Appendix A. Submissions are also available on the NSW Fair Trading website.



## 4. Snapshot of the motor vehicle industry in NSW

Of Australia's 19.5 million registered motor vehicles, there are nearly 7 million registered vehicles in NSW and approximately 1.7 motor vehicles per private dwelling. With the consumer profile of the motor vehicle industry so large, the protection of consumers is a fundamental aspect of the legislative scheme.

In NSW, individuals and organisations are required to hold a licence if their business involves carrying out repair work on motor vehicles. In addition, repair work can only be carried out by an individual holding a tradesperson's certificate for the particular class of repair work, for example, panel beater, motor mechanic and vehicle painter. Minor, or low scope, repair work that is not specifically regulated and which does not affect the safety of a vehicle, is not regulated by the Act and does not require a tradesperson certificate or licence.

At present, the Department of Customer Service licences over 5,200 individuals and over 6,100 organisations as repair businesses, and over 45,000 repair tradespersons under the Act.

Additionally, more than 980 individuals and 2,500 organisations are licensed as motor dealers and motor vehicle recyclers under the Act. The majority of these are motor dealer licences with a small number of licences for motor vehicle recyclers. Licence holders can have more than one licence under the Act, and there are licence holders who have both a motor vehicle recycler and motor dealers' licence.

In 2019, Fair Trading received more than 6,300 complaints, most commonly about vehicle quality. Complaints were made to Fair Trading mostly for used motor cars followed by new motor cars. More common complaints were for misrepresentation of quality, issues with warranties, cooling off periods and cancellations, rights and remedies, product safety and delay in supply. Of these 6,300 complaints over 1,900 were related to issue with repair work on cars, motorcycles or trailers.

There were 32 complaints about unsafe products and services in the motor industry. However, some of these complaints were related to issues outside the scope of the Act such as issues with vehicles affected by the recall of Takata airbags.

## 5. Findings of the review

### 5.1 Objectives of the Act

As outlined above, the Act has four key objectives. Each objective is underpinned by the relevant sections of the Act.

Overall, most submissions were supportive of the four key objectives listed in section 3 of the Act. There was one submission that suggested the safety and protection of NSW motorists and fostering competition of the repair industry should be an additional objective of the Act.

The review considers that the objects of the Act are still valid and that overall, the terms of the Act remain appropriate for securing those objects. However, each section of the report, provides findings about how the terms of the Act can be improved to support the objects of the Act further.

The Discussion Paper to the review sought feedback on whether the Act should also have the additional objects. Stakeholder feedback suggested that additional objects could include protecting NSW motorists and fostering competition. The Review found that this is not warranted. The Act already ensures the safety and protection of NSW motorists under objectives one and two by ensuring that dealers are acting transparently when selling vehicles and repairers are appropriately qualified for the repairs they are carrying out. In addition, the remit for safety and protection of NSW motorists already sits within the objects of the *Road Transport Act 2013* (NSW). Finally, fostering competition is an objective of the *Competition and Consumer Act 2010* (Cth) and not the role of the industry regulator.

### 5.2 The licensing framework

The licensing framework is a key mechanism to help achieve the objectives of the Act. The Act sets out eligibility requirements and assessment criteria for those entities who can be granted a licence. It also sets out the fees for those licences and requirements for payments to the Compensation Fund.

The types of licences under the Act are:

- motor dealers' licence
- motor vehicle recyclers' licence
- motor vehicle repairers' licence
- tradesperson's certificate.

The licensing framework seeks to ensure protection for consumers and confidence in the industry that motor vehicle repair work is correctly undertaken, and roadworthiness assured. It also impacts on unlawful activities that may be conducted by motor dealers,

repairers and recyclers, such as the sale of stolen motor vehicles and parts, and the rebirthing of stolen or written off motor vehicles.

A number of stakeholders have raised the issue of expanding the licensing regime by licensing insurance assessors, and this is addressed in section 5.4 of this report. The majority of submissions received were supportive of the existing licensing framework and agreed that it was an essential mechanism to help ensure appropriate standards of conduct, transparency and consumer protection.

### **5.2.1. Motor dealer licences**

#### **Context**

In NSW, individuals or corporations are required to hold a motor dealer's licence if their business involves buying, selling or exchanging motor vehicles as a retailer or a wholesaler. The Act does not require that a financier or a motor vehicle broker hold a licence. In addition, a manufacturer or assembler of motor vehicles is not required to be licensed if they sell motor vehicles to a motor dealer or financier.

New business models for motor dealers have emerged since the Act was first enacted, often as a result of technology, primarily online selling. The review received feedback that the requirement for motor dealers to maintain a physical premise as part of the licence conditions was a potential barrier to innovation in this market.

#### **Stakeholder views**

Feedback was received about the friction between the requirement for dealers to provide a physical location to be licensed and the emergence of online selling. Submissions from dealer associations noted that technology is changing the way motor dealers conduct sales. Some of the trends include:

- Departure from traditional concentrated in high street dealership locations and on traditional motor vehicle dealership 'lots',
- Pressure from increasing property costs, council land rezoning and low margins.
- Innovative technology allowing for the entire purchase transaction of a motor vehicle to occur remotely and online, and for the vehicle to be delivered to the consumer at their home or workplace.

In the face of these pressures, motor dealers and distributors are looking for new, innovative ways to sell motor vehicles.

Another submission noted that a requirement for a physical address was not necessary for wholesalers as they buy and sell via phone and online, often out of home offices

NSW Police submitted that a requirement for a physical premise is essential for enforcement and compliance reasons. A physical address that has an appropriate Development Application from the Local Council allows for site inspections to ensure there is enough space to display cars and that consumers can inspect cars prior to purchase.

Agency compliance and enforcement officers also emphasised the advantage of a physical premise in terms of compliance. Having a physical location means authorised officers can request to see records and ensure that proper standards of conduct are being upheld.

The importance of proper zoning by local councils was raised by Coffs Harbour Motorworld. This submission listed potential issues with residential dealers who operate outside of the approved industrial and commercial zones including:

- Increase traffic and noise in residential streets from potential buyers coming to inspect and test drive cars.
- Potential environmental impacts around the preparation of motor vehicles for sale, including detailing and paint work.
- Dealers pretending to be private sellers to mislead consumers out of statutory and consumer law obligations.

## Analysis

As noted in the stakeholder submissions, the traditional model is starting to shift. The impact of online only selling and other potential innovative models requires some further consideration by regulators. However, it is clear that the requirement for motor dealers to operate from a notified premise is a barrier to innovation.

The August 2020 NSW Productivity Commission Green Paper noted the importance of legislation being ‘forward looking’, supporting competition and innovation.

Online selling may benefit consumers by providing them with a greater range of choice of suppliers and motor vehicles. In 2017, a Roy Morgan research paper<sup>1</sup> found that one-third of Australians are ready to buy a car sight-unseen online, including almost half (42%) of Australian men. It would also benefit suppliers by reducing the cost of maintaining a physical premise.

While noting the benefits of flexible and innovation supporting legislation, it is also worth considering the benefits of an appropriate physical location. These include:

- providing authorised officers with a centralised point to request records when investigating claims of poor conduct or enforcing compliance.
- ensuring that dealers are operating in appropriately zoned areas to avoid ‘backyard dealers’ which are detrimental to surrounding residents’ quality of living.
- providing consumers with confidence in a safe place to inspect a vehicle prior to purchase.

Any change to the licensing requirements of motor dealers to allow new and innovative motor dealer models needs to balance the benefits to the industry against any unintended reductions in consumer protections.

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<sup>1</sup> State of the Nation 27: Australian Automotive Industry accelerates towards ‘Decade of Upheaval’ – Roy Morgan 2017

## Findings

That the regulatory framework for motor dealing licensing is generally appropriate. There are however opportunities to refine and future proof the existing requirements.

### Recommendation

1. That the legislation be amended to accommodate online business models, and other emerging business models. Remove the blanket requirement for the sale of vehicles at notified premises and make consequential amendments so that authorised officers, including the NSW Police, can continue to ensure compliance with the legislation

## 5.2.2. Motor vehicle repairers and tradesperson's licences

### Context

The Discussion Paper sought feedback about the current licensing regime for motor vehicle repairer businesses and tradespersons in NSW. That is, should the current regime be retained, are there other options for regulating the motor vehicle repair industry and should a supervisor certificate be introduced for motor vehicle repairers.

Under the Act, any person who carries on a business of carrying out repair work must have a motor vehicle repairer licence. Repair work means work of a class or classes prescribed in the Regulation, for example automotive electrician, motor mechanic, exhaust repair work and panel beater. In addition, any person who performs repair work on a motor vehicle must hold a tradesperson's certificate (i.e. a licence) for all classes of repair work that they do. An apprentice or trainee does not need to hold a tradesperson's certificate if they are doing the repair work under the supervision of a person who holds a tradesperson's certificate for that work.

The Act does allow a person to make repairs to their own vehicle, without holding a licence or tradesperson certificate. It should be noted however, that vehicles are still required to meet certain standards to be driven on NSW roads. Transport for NSW maintains inspection and certification schemes to ensure that all vehicles meet minimum safety requirements. For example, most vehicles require a safety check before they can renew registration.

This section will discuss the licencing regime for repairers and tradespersons. Section 5.5 will discuss the scope of repair work under the Act, that is classes of repair work and the prescribed qualifications.

### Stakeholder views

There was strong stakeholder support from industry associations, repair businesses, a member of the public and a NSW government agency to retain the existing licensing regime for repairers and tradespersons. The reasons provided in the submissions are consistent with the objectives of the Act and the purpose of licensing repair businesses

and tradespersons. Additional reasons in support include that it protects against faulty and unnecessary services, provides recourse to consumers for poor quality services and that removal could lead to unethical and illegal activities in the industry.

However, a few submissions from repair businesses and an insurer submitted that the licensing of tradespersons be removed. The reasons provided include that it would: be a simpler regulation model, reduce red tape, bring NSW in line with other states and territories, reduce labour mobility and create an artificial barrier for people to relocate interstate. It should be the responsibility of the business to ensure tradespersons have the qualifications and skills to do the repair work. Also, the industry is largely self regulated, and members of the Motor Traders Association are required to comply with a code of ethics.

The Discussion Paper sought feedback on whether the licensing framework should be amended to introduce a supervisor certificate licence category. There was minimal support for this. Some of the reasons provided against introducing a supervisor certificate include increased complexity, increased compliance costs, that it is not the industry preference and that the Act already provides for trainees/apprentices to be supervised by a tradesperson.

Lastly, other submissions from industry associations and repair businesses provided feedback about introducing other categories of licences for repairers and tradespersons. They include:

- that all business owners and those appointed in positions of authority by owners are licensed to provide further layers of protection for consumers, the public and employees.
- a temporary licence for a business or individual who is engaged to perform glazing work during a State/Territory disaster or emergency.
- that apprentices should be allowed to work unsupervised to address labour shortages.
- that businesses who provide repair advice, such as how to change brake pads, should be licensed.

## **Analysis**

The repairer and tradesperson licensing regime has existed in NSW since 1980. Its purpose is to:

- protect the safety of consumers and the public by ensuring that repair work is carried out by appropriately qualified tradespersons.
- protect consumers in their dealings with repairers by establishing standards of conduct and transparency for repairers and ensuring that repairers are fit and proper persons.
- prevent criminals from establishing repair businesses.

- improve industry standards including standards of repair work.
- signals to an employer and consumer that a person has the appropriate qualifications and skills to carry out repair work.

Conversely, the review notes that licensing also imposes a regulatory burden on business, with compliance costs likely to be passed on to consumers. Licensing schemes can also limit competition by restricting entry into the market. This can reduce choice for consumers and impact on labour mobility.

NSW, WA and the ACT are the only States/Territories that licence motor vehicle repair businesses. Also, NSW and WA (since 2013) are the only states that licence motor vehicle repair tradespersons with WA also requiring a person to have a certificate if they supervise the repair work of others.

## Findings

The review considers that the current licensing regime of repairers and tradespersons be retained and that an additional supervisor licence category is not warranted, for the reasons outlined below.

First, the benefits of the licensing regime of consumer protection, road safety and crime prevention outweigh the costs of licensing and low-level regulatory burden on repairers and tradespersons. The 2019 fees for a new, one-year repairer licence starts from \$762, increasing with a compensation fund component and fixed component for each additional place of business. Fees for a new, one-year tradesperson's certificate starts from \$32 and tradespersons may incur course costs if they need to obtain the prescribed qualification.

Repairers have obligations under the Act to ensure repair work is completed by tradespersons holding the relevant certificate, record keeping of parts, odometer tampering, suspicious goods, signage and providing quality repairs. Also, by licensing tradespersons, the burden on repairers is reduced as they simply need to check that the tradesperson has a certificate for the class of repair work.

Second, the industry is generally in favour of retaining the current licensing regime. Third, licensing fees contribute to the Compensation Fund, which provides additional protections for consumers who experience a loss as a result of dealing with a repairer. In 2018 and 2019, repair work was one of the top four reasons for consumers seeking compensation from the Fund.

A supervisor licence category is a feature of the *Home Building Act 1989*. The certificate allows the person to supervise, and do the work described on the trade certificate. This is similar to the repairer licence regime in WA, which requires a person to have a certificate if they supervise the repair work of others.

The Review considers that introducing a supervisor category is duplicative and unnecessary. Under the Act, tradespersons with a certificate can already supervise trainees and apprentices if they are doing repair work in the same class for which they are qualified. The Act ensures that a person can only do repair work if they have a tradesperson's certificate or they are an apprentice/trainee being supervised by a person



with a tradesperson certificate. In addition, there was no support from submissions to introduce an additional category. The current regime already meets the objects of the Act, and it would likely add further regulatory burden on businesses.

Some submissions made a number of other proposals for the licensing regime. The review considered all proposals made. However, the review concluded that, on balance, the costs either outweighed any benefit, or they were contrary to the objects of the Act. This was primarily because they risk repair work being performed by an unqualified, under-qualified or inexperienced tradesperson.

#### **Recommendation**

2. That the existing regime of licensing motor vehicle repair businesses and tradespersons be retained in the Act.

### **5.2.3. Motor vehicle recycler licences**

#### **Context**

In NSW, motor vehicle recyclers are required to hold a licence if their business involves:

- buying or obtaining, and demolishing or dismantling motor vehicles or parts or accessories of motor vehicles
- buying and selling major body and mechanical components of motor vehicles, major car accessories, and prescribed parts or accessories of motor vehicles.

Motor recyclers serve an important role in the motor vehicle industry. They recycle parts by dismantling motor vehicles and selling them on to repairers for reuse. Motor vehicle recyclers are licensed to limit backyard recycling and to ensure records are kept for vehicles, parts and accessories that are recycled. Similarly, persons who carry on a business dealing in scrap metal are regulated in NSW by the NSW Police under the *Scrap Metal Industry Act 2016*.

#### **Stakeholder views**

Stakeholders noted in feedback that a new operating model had emerged seeking to take advantage of the difference between the regulation of motor recyclers under the Act and scrap metal dealers under the *Scrap Metal Industry Act*. Stakeholders in the motor recycling industry described an emerging trend of “car breakers”

The car breaker model uses a motor recycler licence to avoid the requirements such as cashless transactions that exist under the *Scrap Metal Industry Act*. These operators hold a licence to recycle motor parts for reuse, but instead will strip a car into scrap and sell it, primarily through export. They are essentially scrap metal dealers who wish to pay cash for the vehicles they intend on scrapping, avoiding the requirements under the *Scrap Metal Industry Act* about cashless transactions.



This issue was also raised by the NSW Police Force in their submission to the review.

## Analysis

The emergence of the car breaker model raises broader questions regarding the licensing of motor recyclers. The obligations the Act places on recyclers are primarily concerned with preventing theft and providing a traceable and auditable record keeping trail to identify the acquisition and disposal of recycled parts, scrapped parts and dismantled vehicles. This differs from the obligations on motor dealers and repairers (and tradespersons) in the Act which are more concerned with consumer protection, standards of conduct and appropriate qualifications to ensure consumer safety.

The *Scrap Metal Industry Act* commenced in 2016, three years after the commencement of the Act. It provides similar obligations to the Act, with a focus on preventing the theft and disposal of stolen motor vehicles, copper and other metal at scrap metal yards. There may be synergies between the two regulatory schemes which could be explored for more effective regulation of this sector of the industry.

Recycler associations indicated support for the introduction of cashless transactions in the *Scrap Metal Industry Act*. It appears to have increased the traceability and ability to audit scrap metal dealers, preventing the cash payments that can be used to avoid the tracing of acquisition or disposal of stolen motor vehicles. This objective is consistent with the intent of this Act.

## Findings

As the regulator of motor recyclers, NSW Fair Trading will need to consult further with NSW Police, as the regulator of scrap metal dealers, to fully assess the nature and scope of the issue of car breakers in the industry.

The requirement to licence motor recyclers under this Act should be reviewed in light of the introduction of the *Scrap Metal Industry Act* as there is an overlap in purpose behind the two regulatory schemes. The Review notes that a statutory review of the *Scrap Metal Industry Act* is being conducted by the Police which is also examining the car breaker business model. Introducing cashless transactions for motor vehicle recyclers would go some way to addressing some of the inconsistencies between the Acts.

### Recommendation

3. Amend the Act to address inconsistencies between the regulatory regime under the *Scrap Metal Dealers Act 2016* and the motor vehicle recycling provisions in the Act.
4. Introduce cashless transactions for recyclers in line with the requirements in the *Scrap Metal Dealers Act 2016* and make any other amendments necessary as a result of the outcomes of the statutory review of that Act.

## 5.3 Record keeping obligations (prescribed parts register)

### Overview

Record keeping, including registers relating to the operation of a business, is a key obligation for licence holders and a mechanism through which appropriate standards of conduct and transparency are achieved.

Section 100 of the Act requires that records relating to the purchase and disposal of second-hand motor vehicle parts by licensed motor vehicle repairers and recyclers need to be recorded in a register.

Clause 46(2) and 47(1) of the Regulation sets out the list of prescribed parts which motor vehicle repairers and motor vehicle recyclers must be recorded in a register. The purpose of this list is to provide law enforcement to trace recycled parts back to the donor vehicle. Schedule 2 of the Regulation contains the forms in which the information about the prescribed parts must be recorded

### Stakeholder views

Most stakeholders agreed that the recordkeeping obligations including the linking of prescribed parts to the donor vehicle is important to ensure the traceability of sourced parts. However, many stakeholders in the recycling and repair industry have indicated that maintaining the registers for the following forms are duplicative and an unnecessary costly administrative burden:

- Form 2 Motor Vehicle Repairers' Register
- Form 3 Motor Vehicle Recycler's Register
- Form 3A Motor Vehicle Recycler's Register (Whole Vehicle)
- Form 4 Motor Vehicle Repairer's Register (Trailers and Towable Recreation Vehicles)

Many submissions noted that the majority of businesses use receipt/invoicing systems to buy and sell second-hand parts. These systems keep the required particulars set out in the legislation.

### Analysis

In order to meet the objective, traders could be required to identify prescribed parts acquisition and disposal through their own record keeping systems instead of being required to maintain a prescribed parts register. The information required by the Form 2 or 3 could be the prescribed information required to be produced if requested by authorised officers (NSW Police or NSW Fair Trading investigators). These systems would also need to be auditable and ensure that prescribed parts are traceable to the "donor" vehicle.

Regarding the current prescribed parts list in the Regulation, some stakeholders raised strong arguments as to why airbags should not be on the prescribed parts list. Other stakeholders, including the NSW Police, argued for retaining them on the prescribed list.

With the rapid changes in motor vehicle technology, there will be a need for legislation to keep up with these advancements and accommodate parts that may need records kept, or others that are no longer at risk of theft. Moving the list from the Regulation to a list that is approved by the Secretary will allow the regulator to update the list in a more agile and responsive manner.

## Findings

The Review found that there was stakeholder and regulator support for moving away from a requirement to maintain the prescribed parts register, while still including a requirement to ensure that second-hand parts are traceable. This would appear to benefit both the industry in terms of reducing regulatory burden and the Government in ensuring that the legislation is 'future proof'.

Any change would still require that appropriate penalties are attached to non-compliance with the legislation.

### Recommendations

5. Remove the requirement to maintain physical registers and instead move to a requirement to ensure the particulars required by the Regulation are captured in a system that can meet the needs of authorised officers in ensuring compliance with the legislation.
6. Remove prescribed parts list from the Regulation and move to a list approved by Ministerial Order (and maintained on the NSW Fair Trading website).

## 5.4 Insurance assessors and the Code of Conduct

### Context

Motor vehicle insurance loss assessors (assessors) are not licensed in NSW or any other Australian jurisdiction. While assessors were previously licensed in NSW, this was removed in the mid-1990s as it was considered an unnecessary regulatory burden that provided no tangible benefits to consumers or the industry.

The report published by the Select Committee on the Motor Vehicle Repair Industry in July 2014 recommended the reintroduction of licensing for assessors in the Act. However, following consultation with the Small Business Commissioner and other key stakeholders about the proposal, it was determined that the regulation of assessors could be more effectively achieved through the enhancement of the Motor Vehicle Insurance and Repair Code of Conduct (MVIR Code) mandated in NSW by Division 4 of the *Fair Trading Act 1987*.

The updated MVIR Code that commenced 1 May 2017, requires insurers to use a 'Code Approved Assessor', who by no later than 12 months after commencing employment has:

- a trade qualification and minimum five years of post-apprenticeship experience in their profession as a panel beater, spray painter or motor mechanic; **or**
- more than five years' experience as an assessor; **or**
- completed the Code Administration Committee approved units of the Certificate IV Vehicle Loss Assessing Course or their equivalent in the AUR Training Package.

Insurers must also ensure their assessors are provided with ongoing training and/or development. Further, the MVIR Code imposes obligations on insurers and repairers to ensure estimates are provided and repairs are carried out in accordance with: manufacturers' technical specifications, any lawful mandatory standards, the warranty and current industry practice, while having regard to the age and condition of the vehicle.

The MVIR Code also stipulates that insurers will:

- use a 'Code Approved Estimator', who is appropriately experienced and qualified.
- document criteria for membership of their network smash repairer (NSR) schemes and disclose key information about these schemes to its repairers.
- acknowledge ongoing changes in the industry in relation to the development of realistic times and rates and state clearly the estimation methodology to be applied.
- provide details of warranties in writing to repairers, including the insurer's responsibilities under any lifetime warranty.
- pay agreed repair costs no more than 30 days from settlement of the insurance claim or receipt of the final repair invoice.
- refer clearly to their Choice of Repairer Policy in their Product Disclosure Statement.

Dispute resolution processes in the MVIR Code apply to all of these requirements as well as contractual disputes. The MVIR Code requires each insurer to establish an internal dispute resolution (IDR) mechanism that provides for the prompt, transparent and fair resolution of disputes. These disputes must first be lodged with the Code Advisory Committee (CAC) who is to immediately advise the relevant insurer to seek IDR. If the repairer disagrees with the outcome of the IDR they can escalate to mediation via the CAC, noting that mediation does not affect the right of either party to take legal action or commence another form of external dispute resolution (EDR).

### **Stakeholder views**

There were divergent views between repairers and insurers on the regulation of insurance assessors and the conduct of the insurance industry as it pertains motor vehicle repairs. The Financial Legal Rights Centre submits that there are issues with both insurer directed

repairs and independent repairers, which are leading to some detrimental outcomes for NSW consumers. However, there was no significant push for assessor licensing to be re-introduced in NSW, rather that regulators and insurers ensure all assessors are appropriately trained, qualified and experienced (as per the requirements provided for in the MVIR Code).

Motor Traders' Association of NSW (MTA) and repairers generally submitted that the relationship with insurers has become worse since the MVIR Code was mandated, while insurers generally submitted that there had been little to no difference in their relationship with repairers. The most prominent issues with insurers commonly referred to by the MTA and repairers were:

- Assessors not being appropriately qualified and/or experienced.
- Choice of repairer being dissuaded, refused or not disclosed to customers.
- NSR schemes stifling competition and causing delays in repairs being completed.
- Fixed hourly rates and times are often too low, not based on current guides and vary considerably between the insurers, which impacts significantly on the quality of repairs and safety of repaired vehicles.

Insurers generally rebutted these issues by noting that these practices are prohibited or mitigated effectively by the MVIR Code and that the effectiveness of this framework is indicated by the comparatively low level of disputes lodged by repairers. The MTA provided that for the reporting year ending 31 August 2019 - 237 IDRs, 3 EDRs, and 3 determinations were made in NSW. However, the MTA also contend that repairers often do not lodge disputes due to the poor treatment by insurers and the high costs involved.

## **Analysis**

Consultation with key stakeholders has indicated that the content and purpose of the MVIR Code are appropriate. However, while the MVIR Code is mandated in NSW, submissions expressed concerns that the MVIR Code may not be being adhered to by all insurers. It was submitted that this is resulting in some assessors who may not be appropriately experienced or qualified. Some submissions were also concerned about the conduct by certain insurers operating in the NSW motor vehicle repair industry.

While contraventions of the MVIR Code can be actioned by the general enforcement provisions under Part 6 of the *Fair Trading Act 1987*, this can only be used once the dispute resolution procedures under the MVIR Code have been followed and the dispute is still not resolved. Some submissions argued that the low number of disputes are not necessarily an indication of a good relationship between repairers and insurers. That in fact, they show that repairers generally consider the resolution process to be too onerous or costly to resolve issues.

## **Findings**

The requirements provided for in the MVIR Code are generally considered to be appropriate and mandating it under the *Fair Trading Act 1987* the proportionate regulatory

response. However, there are concerns that the MVIR Code is not operating as intended and that some insurers and repairers may not be consistently adhering to its requirements. There are indications that this may be due to an inability to effectively deter non-compliance with the MVIR Code through current compliance and enforcement measures.

As the MVIR Code has only been mandated in NSW since 1 May 2017, in response to the Select Committee on the Motor Vehicle Repair Industry in July 2014, it is considered premature to implement other regulatory approaches, such as licensing assessors. However, some options such as a negative licensing regime and imposing sanctions or penalties for non-compliance could be considered to deter breaches of the MVIR Code as described by some stakeholders.

Therefore, amendments to the *Fair Trading Act 1987* will be made where appropriate to improve compliance by all parties with the mandated MVIR Code.

#### **Recommendation**

7. Make any necessary amendments to the *Fair Trading Act 1987* to help improve compliance with the Motor Vehicle Insurance and Repair Code of Conduct. This could include a negative licensing regime or imposing sanctions or penalties for non-compliance.

## **5.5 Motor dealer protections**

### **Context**

Part 6 of the Act details measures designed to protect motor dealers against unfair contract dealings and unjust conduct by motor vehicle manufacturers. Section 142(1) prescribes the situation in which a term of a contract will be considered unfair.

If a dealer has a dispute with the vehicle manufacturer about unfair contracts and unjust conduct, a motor dealer can engage with the NSW Small Business Commissioner for assistance in resolving disputes via mediation. All parties, including the Small Business Commissioner, can also apply to the NSW Civil and Administrative Tribunal (NCAT) for a declaration that a contract is unfair, or conduct is unjust. A motor industry group may also challenge a contract or class of contracts on behalf of dealers under sections 144(1) and 145(1) of the Act.

Motor dealers and manufacturers are also party to the Commonwealth Franchising Code of Conduct (the Franchising Code) that regulates the conduct of franchising between participants across Australia.

### **Stakeholder views**

There was a general consensus from motor dealers and motor dealer industry groups that greater protections from manufacturers for motor dealers are needed, especially considering this is one of the objects of the Act. Submissions detailed how the power imbalance between dealers and manufacturers was recently showcased through Holden's

withdrawal from the Australian market. They stated that General Motors negated agreements valid through to 2022 unilaterally without compensation to dealers. The submission from the Australian Automotive Dealer Association (AADA) noted the requirement for specific contract terms in manufacturer to dealer contracts in some American jurisdictions and called for similar requirements.

Dealers and industry groups raised several other issues, including:

- the significant pressure on motor dealers to sell faulty or unwanted models or cars,
- dealers tenuous contracts with manufacturers prevent them from raising disputes for fear of reprisal
- a lack of utility with the current dispute resolution system via the Small Business Commissioner, and
- narrow margins on car sales for dealerships, as well as the long-term investment necessary to achieve those margins, make dealers vulnerable to influence/reprisal from manufacturers.

## **Analysis**

The imbalance of bargaining power for contracts between manufacturers and dealers is addressed in the Act through the protection against unfair contract terms. Some of the terms and conduct described in submissions would fall within these protections currently. Where a dealer cannot challenge a contract term or manufacturer conduct for fear of reprisal, they do have the ability for their dispute to be raised by a motor industry group in their stead.

However, even with these protections and the national level protections in the Franchising Code and Australian Consumer Law (ACL), there remains an imbalance of power in the relationships between dealers and vehicle manufacturers. Part 6 of the Act could be strengthened to better protect dealers from the effects of this imbalance. There are several processes underway at the national level that could also impact the balance in dealer-manufacturer relationships. Therefore, any changes to part 6 should be mindful of these national-level processes in order to prevent duplication and ensure their effectiveness.

Some of the processes underway include changes to the ACL to strengthen the unfair contract terms protections and to protect suppliers against reprisal. In March 2020, the Australian Government finalised consultation over enhancements to unfair contract terms protections. Potential enhancements include extending the protections to larger businesses and introducing a penalty for the use of unfair contract terms. Evaluation of these enhancements and the consultation feedback is still ongoing.

The unfair contract protections in part 6 of the Act are modelled off these provisions within the ACL. Their inclusion in the Act extends the protections to all licensed motor dealers in NSW, as some dealers would not have qualified for the protections under the ACL due to their size. As the protections in the Act are extending those of the ACL, it is important that they remain consistent with any changes.



Additionally, issues with indemnification of and reprisal against suppliers were considered at the 2019 Consumer Affairs Forum (CAF). CAF endorsed actions to help ensure suppliers are supported by manufacturers, including support for a regulatory impact assessment. This process would consider prohibiting manufacturers from failing to indemnify suppliers and prohibiting retribution by manufacturers against suppliers who seek compensation.

The Commonwealth has also recently amended the Franchising Code to improve interactions between new vehicle dealerships and vehicle manufacturers. From 1 June 2020, end of term obligations for manufacturers will require them to give at least 12 months notice when not renewing a dealer agreement if the original agreement was 12 months or longer. Other changes include allowing franchisees who have entered into a new vehicle dealership agreement, and whom each have a dispute 'of the same nature' with their franchisor, to ask the franchisor to deal with the franchisees together about the dispute.

The ongoing evaluations and the outcome of amendments to the Franchising Code will affect the protections afforded to motor dealers under the ACL.

## Findings

The Review found that there is an imbalance in market power between vehicle dealers and manufacturers that is not fully addressed by the existing legislative protections, and there is scope to strengthen the protections in the Act. In order to support dealers, this change should be made by the end of 2021.

However, the above three types of reforms to unfair contract terms, supplier indemnification and to the Franchising Code will also influence the protections afforded to NSW motor dealers. Therefore, any changes made should be mindful of these processes.

### Recommendation

8. Make any consequential amendments necessary to strengthen the unfair contract term protections in part 6 of the Act by the end of 2021.

## 5.6 Consumer protection

### 5.6.1. Disclosure requirements

#### Context

Dealer notices are detailed in sections 60-66 of the Act. They are the approved form through which motor dealers disclose facts about a motor vehicle, especially facts relating to the condition of the vehicle.



All second-hand vehicles are required to have a dealer's notice attached. It includes information on any major modifications or repairs, water damage, and whether the vehicle was previously written-off. It also includes information on the odometer reading and recent inspection report. New vehicles that have been damaged and demonstrator vehicles are also required to have a dealer's notice attached.

In addition to dealer notices, sections 55-59 detail the requirements for dealers to provide inspection reports when selling a vehicle, with section 57 addressing the sale of a vehicle with number plates at auction. It requires that a current inspection report is attached to the vehicle at the time of sale, unless the dealer instead attaches a dealer notice and provides the inspection report within 7 days of sale. In this case, the purchaser is not required to pay any cost for repairs needed to obtain the inspection report.

Clause 28B of the Regulation describes how dealer's notice must be stored in a loose-leaf folder.

### **Stakeholder views**

There were a few submissions that touched on the requirement to supply inspection reports. This included comment from the MTA that inspection reports should not be required for used cars under the age of 5 years. Some submissions from motor dealers and dealer industry groups stated that cars sold by auction should require an inspection report to be available prior to the sale of the vehicle.

There were also submissions which commented on the definition of new vehicle demonstrators and damaged motor vehicles. Both demonstrators and damaged new vehicles require the use of a dealer's notice for sale of the vehicle. MTA suggested redefining demonstrators so that they do not require a dealer's notice. Collision Safety Consultants (CSC) recommended broadening the definition of a damaged motor vehicle with relation to new vehicles. The Institute of Automotive Engineers (IAME) indicated support for the disclosure requirements as they are currently.

MTA raised issues with storage and filing of dealer notices. They stated that storage of dealer notices should be modernised and should not require they be stored in a manual folder.

### **Analysis**

For auctions, currently requirements do oblige the dealer to provide an inspection report, though this does not have to occur prior to the sale if certain conditions are met. If the inspection report is obtained after the sale, it may be more difficult for the consumer to have the dealer pay for repairs necessary to get the report. For vehicles sold at auction, where dealer guarantees and consumer guarantees are limited, disclosure of the condition of the vehicle is especially important.

The requirement to disclose facts that would affect a consumer's decision to purchase a vehicle is a key protection for NSW motorists. This includes the requirement for an inspection report and, for any demonstrators, used vehicles or damaged new vehicles, also requires the display of a dealer's notice. The notice imparts to the consumer important

facts that may affect the future registration, insurance or performance of the vehicle. Non-disclosure of material facts is already one of the most common complaints consumers bring to Fair Trading about vehicles they have purchased, and so reducing disclosure requirements in this area may increase consumer harm.

Dealers' notices are currently required to be stored in a physical folder. Most motor dealers use electronic systems such as a Dealer Management System which can both produce and store notices, and so the requirement to store notices within a physical folder may lead to unnecessary duplication.

## Findings

Sales by auction have differing levels of consumer protection across a range of regulatory regimes. In the motor vehicle space, vehicles sold by auction do not come with the same level of guarantees as those bought from a dealership. In light of this, the inspection report is especially important as it provides information about the state of the vehicle and greatly influences whether a consumer would choose to purchase it. The Review found that the requirements to provide the inspection report for vehicles sold at auction should be strengthened to ensure consumers can make an informed decision on the safety and quality of the vehicle. Additionally, the Review found that the current requirement for a dealer's notice and inspection report for all second-hand vehicles, including demonstrators, is appropriate.

The Review also found that the current requirements for retention of dealer notices should be modernised. There is scope to move away from a requirement to maintain a physical folder, while still requiring that notices are able to be produced for an authorised officer and are unable to be amended.

### Recommendations

9. Remove the option for dealers to provide the inspection report after the auction sale.
10. Remove the requirement to maintain a hard copy folder and instead insert an overarching requirement that notices are able to be produced for an authorised officer and are unable to be amended.

## 5.6.2. Dealer guarantees and the Australian Consumer Law

### Context

Dealer guarantees and their application are established in sections 67-77 of the Act. The dealer guarantees were introduced in the Act to modernise vehicle statutory warranties originally contained in the *Motor Dealers Act 1974*. The aim was to make those warranties consistent with the ACL.

Dealer guarantees are mostly consistent with the consumer guarantees outlined in the ACL, however there are some points of difference. For example, dealer guarantees have a

clear limitation period for which the guarantee applies (restricted by either a period of time or distance travelled by the vehicle). Consumer guarantees do not apply for a fixed period but instead, apply for what is considered a 'reasonable' amount of time.

There are some instances where both dealer guarantees and consumer guarantees are limited, including the sale of vehicles at a bona fide auction. Dealer guarantees do not apply if the car is sold at auction and the dealer specifies that they do not apply in advance of the auction (through a notice attached to the vehicle).

### **Stakeholder views**

Some submissions from dealers raised issues with the lack of guarantees applying to auction sales. They stated these issues had been exacerbated by the COVID-19 environment, where restrictions hamper inspection of vehicles and the move to online auctions does not afford an opportunity to physically inspect vehicles.

This includes consignment sales that are sold by auction. The submissions state that what is represented about the product at auctions is not accurate and without the application of dealer guarantees there is no recourse afforded to the purchaser.

There were also suggestions for changes to the limitation period from consumer advocacy groups as well as dealers and dealer industry groups. However, views conflicted over whether limitation periods should be increased or removed for certain types of vehicles.

Overall, the majority of submissions found the establishment of the dealer guarantees in addition to the consumer guarantees to be a duplication that created confusion for consumers and dealers. Legal Aid NSW supported the dealer guarantees in their current form, due to their clarity.

### **Analysis**

The dealer guarantees were part of the NSW Government's commitment to move towards a model consistent with the national consumer protection regime. Since the commencement of the Act, the consumer guarantees under the ACL have become more widely known and understood by consumers. However, there are some gaps in the ACL protections that are being considered at a national level by CAF.

In 2018, CAF discussed the application of consumer guarantees to online auctions. Auctions were originally exempted from the consumer guarantees because in-person inspections of goods were available prior to bidding.

Since the advent of the COVID-19 pandemic, Fair Trading has received several complaints about the sale of motor vehicles by auction where the purchaser was not able to inspect the goods due to COVID-19 restrictions. The 2018 CAF meeting noted that New Zealand was reviewing changes to the application of consumer guarantees to online auctions. Following the outcomes of the New Zealand review, CAF will re-examine the application of consumer guarantees to auctions in Australia.

Other gaps in ACL consumer guarantees protections have been considered by CAF. In 2019, CAF endorsed a regulatory impact assessment of options to increase protections

where consumers need repairs performed, especially in relation to new motor vehicles. Of particular concern were consumers who were becoming ‘trapped’ in cycles of unsuccessful repairs on vehicles. CAF also discussed the need for further work on reversing the onus of proof for major failures in relation to motor vehicles. These bodies of work may lead to tightened protections for motor vehicles under the consumer guarantees.

## Findings

The Review found that it would be appropriate to consider the removal of the dealer guarantees in favour of consumer guarantees. Current work underway to address gaps in the consumer guarantees will affect the protections afforded to consumers if such a change goes ahead. Therefore, some time should be allowed for the outcome of this assessment to be reached at CAF. If no outcome is reached by mid-2021, the Review recommends NSW moves forward with options to remove the dealer guarantees in favour of the consumer guarantees.

Any impacts on access to the Compensation Fund and rectification power will be considered and mitigated.

### Recommendation

11. Pending agreement by CAF Ministers on options to enhance the consumer guarantees framework, which is anticipated to be reached in mid-2021, amend the Act to remove any duplication with the ACL. If CAF agreement is not reached by mid-2021, NSW will unilaterally pursue options to remove dealer guarantees in favour of consumer guarantees.

## 5.6.3. The Motor Dealers and Repairers Compensation Fund

### Context

The Motor Dealers and Repairers Compensation Fund (the Fund) protects consumers who purchase a vehicle through a licensed motor dealer or when a licensed motor vehicle repairer is doing repair work. Dealers and repairers finance the fund through licensing fees. The Department is responsible for managing the Fund and assessing all claims.

A claim against the Fund must be made within 12 months after the loss is incurred or the consumer becoming aware of the loss. The maximum payment under the Fund is currently \$40,000.

### Stakeholder views

Legal Aid have suggested that the time limit for lodging a claim with the Fund is too short at 12 months. The time limit needs to take into account that consumers are only eligible for compensation after they have exhausted all other means of redress.

Legal Aid proposed extending the time period to two years or providing an additional 12 months once a consumer has obtained a judgement or order that remains unpaid.

The second issue was raised by the Fund's administrators who noted that the current drafting of the legislation means there is a lack of clarity about who is exempt from making claims to the Fund under clause 53 of the Regulation (as allowed by section 168(3) of the Act).

Trying to make these determinations of claims lodged to the Fund is making the process longer and more complex than under the previous *Motor Dealers Act 1974*, often requiring legal advice to make a proper determination.

The third issue noted by the Review relates to a case where a claim to the Fund was rejected despite an NSW Civil and Administrative Tribunal finding that a licenced dealer sold the consumer a defective/poor quality camper trailer. The claim was refused because the dealer guarantees do not apply to trailers or towable recreational vehicles (including a camper trailer).

This case raised the inconsistency in how trailer/towable recreation vehicles are treated despite the requirement to be sold by a licensed motor dealer. A component of the motor dealer licence fees is paid into the Fund, so the argument can be made that the Fund should be accessible by a consumer when there is a breach of the dealer guarantees regardless of the type of motor vehicle sold.

Lastly, a submission was received suggesting that the maximum amount payable from the Fund (set under clause 53A of the Regulation<sup>2</sup>) be increased from \$40,000 to \$100,000

## Analysis

Regarding the 12-month time limit, there is a provision under section 169(3)(a) which provides the Secretary with discretionary powers for a claim to be considered outside of the 12-month period. Section 169(3)(b) provides the Secretary with a discretion to extend the time for the lodgement of a claim beyond that set out in section 169(3)(a). It is for the Secretary, or delegate, according to section 169(3)(b), to determine if a further period is allowed within which to accept a claim. While the Act does not set out criteria for the Secretary, factors that are likely to be considered by the Secretary would include:

- providing a written explanation for the delay in the lodgement of the claim.
- whether a written complaint about the same matter was lodged with Fair Trading within 12 months from either the date of the loss or the date the claimant becomes aware of the loss.
- whether the claimant has taken all reasonable steps to exercise the legal rights against the licensee to recover the loss – such as obtaining an order from NCAT, then the local court for enforcement by the Sheriff.

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<sup>2</sup> At the time of drafting this report, a Bill to move the maximum payable amount under the Fund from the Act (Section 171(2)) to the Regulation (Clause 53A) was expected to pass Parliament.

- was the claimant trying to recover their loss from any other means?

There are also difficulties in being able to properly assess claims as more time has passed. This is particularly the case in when considering issues with repairs as consumers are likely to continue using the vehicle which may add further wear and tear to the vehicle adding complexity to an assessment about damage caused by incorrect or poor quality repairs.

While there were no claims rejected in the past 12 months by the Fund on the basis of being late, it should be noted that many consumers who are aware of the time limitations, may not seek to lodge a claim at all if they are out of time. The number of these potential claims cannot therefore be assessed. However, the submission from Legal Aid would indicate that this is a real issue for some consumers.

Regarding the second issue related to the issue of defining “substantial private purpose”, clause 53 states that:

### **53 Motor Dealers and Repairers Compensation Fund**

*For the purposes of section 168(3) of the Act, a claim for compensation may not be made under Part 8 of the Act in respect of the following—...*

*(g) loss or damage to a motor vehicle that is not a motor vehicle used substantially for private purposes within the meaning of the Motor Vehicles Taxation Act 1988.*

According to the *Motor Vehicles Taxation Act 1988*, section 3(2) lists scenarios where a motor vehicle is not deemed to be used for substantial private use unless certain criteria is present. Section 3(2)(f) states "in any other case—it is used for social or domestic purposes or for pleasure, and, in the opinion of the Authority, its use for any other purpose is minimal."

According to Section 3(3) Unless the Authority otherwise determines in a particular case or class of cases, a motor vehicle is not a motor vehicle used substantially for private purposes if it is registered otherwise than in the name of a natural person or natural persons.

Section 3(1) defines Authority as meaning Roads and Maritime Services constituted under the *Transport Administration Act 1988*. When cars are registered, the consumer generally determines whether to register the vehicle under a natural or other name, not the "Authority".

The introduction of clause 53(g) under the 2014 Regulation, specifically the use of the terms "substantial private purpose" or "minimal use for other purpose", has enabled commercially owned vehicles to be eligible for claims from the Fund. This change has shifted the definition of consumer to include commercial vehicles that are partial used for private purposes.

While the intent of the Fund is to protect consumers, there are two potential avenues for addressing this issue. The first would be to create specific exemptions about certain persons/motor vehicles to make it clear for the Fund to determine who is exempt (for

example, commercial vehicles). This would address the issue of the complexity in making determination of the funds.

The second option could be to take a broader definition of who is a consumer. Under the Australian Consumer Law, businesses have consumer rights if the goods or services they purchase are:

- under \$40,000 (the Review notes that from 1 July 2021 this figure will increase to \$100,000)
- over \$40,000 and normally bought for personal, domestic or household use
- vehicles or trailers that are mainly used for transporting goods

For example, a business van to deliver products to customers.

This would potentially widen the scope of entities eligibility to make claims to the Fund and would require further investigation to ensure that changes would not impact the sustainability of the Fund.

Regarding the third issue, the exemption of trailers and towable recreation vehicles from the dealer guarantees, the current Regulation is unambiguous. Clause 53(f) of the Regulation specifically prohibits payments being made from the Fund for vehicles which the dealer guarantees under section 72 of the Act do not apply. Clause 59 provides that the dealer guarantees do not apply to towable recreation vehicles.

Clause 59 was inserted into the Regulation in 2017. It was inserted because repairs to the major components of a towable recreation vehicle; for example, electrical, plumbing or cabinetry work, fall outside the scope of what is considered repair work under the motor dealer and repairer legislation. Therefore, a dealer cannot comply with the specific dealer guarantees under the Act. The appropriate mechanism for redress for consumers as a result of a major failure with these vehicles is therefore via the consumer guarantees under the ACL.

There is work progressing at the national level to review the application of the consumer guarantees, particularly in relation to motor vehicles. Under the ACL, the onus to repair a faulty product falls on the supplier regardless of the supplier's capacity to repair the product themselves. While the repairs to the living area of a caravan would fall outside the classes of repair in this legislation, the intent of the dealer guarantees and the Fund is to protect consumers who have made a substantial purchase.

Lastly, changing the maximum payable amount under the Fund, under the previous legislation the cap on the maximum amount payable from the Fund was \$30,000. When the Act was introduced this was raised to \$40,000. Since this time this figure has remained unchanged despite a 1.7 per cent average annual inflation increase in the CPI<sup>3</sup>.

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<sup>3</sup> Based on total change in cost from 2014 to 2019 being 8.5 per cent, over 5 years, at an average annual inflation rate of 1.7 per cent. <https://www.rba.gov.au/calculator/annualDecimal.html>



Since 2018, 34 claims made to the Fund exceed the cap.

When considering change to this figure, it is worth noting that from 1 July 2021 the definition of who is a consumer under the ACL will change from goods or service bought for less than \$40,000 to \$100,000. This increase was introduced as the monetary threshold of \$40,000 in the definition of 'consumer' has not changed since the threshold was increased from \$15,000 in 1986.

Similarly, as of 1 September 2019, Queensland has increased the Queensland Civil and Administrative Tribunal's jurisdictional limit from \$25,000 to \$100,000 for motor vehicle disputes.

An increase from \$40,000 to \$100,000 would represent a substantial increase and could result in some financial strain on the Fund. Any amendment to the maximum amount payable under the Act would require an audit of the fund to assess any impact on the sustainability of the Fund.

## Findings

The strong advocacy of consumer representatives for an extension of the time limit for claims is significant. As a result, the Review found that it may be appropriate to further investigate the benefits and costs of extending the time limit. The Review also found that the scope of what matters can be considered for a claim on the fund is also worthy of further investigation.

The Review notes the inconsistency between the requirement for a motor dealer to hold a licence to sell a caravan, but then exempt a consumer from making a claim to the Fund, which is funded by the licence fees. This exemption should be reviewed in light of this inconsistency.

Finally, given the changes in other jurisdictions and related claim caps, the Review found that it is appropriate to examine the impact an increase in the maximum amount claimable may have. As part of the examination, an assessment of the costs and benefits of raising the cap should also be explored. Potential consumer detriment resulting from the current cap would need to be considered as part of this assessment.

## Recommendation

12. That an audit of the Fund's sustainability be undertaken to assess the impact of the following:

- a) Extending the time limit for lodging a claim with Fund from the current 12 months to 18 months or 12 months once a consumer has obtained a judgement or order that remains unpaid.
- b) Refining the criteria of persons/vehicles eligible to make a claim.
- c) Removing the exemption from the dealer guarantees for trailers/towable recreation vehicles under clause 59 of the Regulation.



d) Increasing the maximum amount payable out of the Fund for a single claim.

## 5.7 Classes of repair work and qualifications

### Context

Under the Act, a tradesperson who carries out repair work on a motor vehicle is required to hold a tradesperson's certificate for all classes of repair work that they do. The classes of repair work are prescribed in the Regulation.

To obtain a certificate for a class, or classes, of repair work the tradesperson must have the prescribed Certificate II or Certificate III qualification for each class of repair work that they do.

Not all repair work on a motor vehicle requires a tradesperson to be licensed. For example, repairs that do not affect the mechanical operation, structure or safety features of the vehicle is not repair work. Emergency breakdown repairs are also not repair work.

The Discussion Paper sought feedback about the classes of repair work and qualifications prescribed in the Regulation. That is, are the existing classes supported, should there be more or less classes, should classes be amalgamated, should the qualifications continue to be prescribed in the Regulation and what changes are needed to address upskilling in response to changes to technology.

### Stakeholder views

Many submissions from industry associations, repair businesses and a NSW government agency recommended to expand the scope of repair work to be licensed. The reasons include to keep up with changes in technology, the repair work is currently unregulated and affects the vehicle's safety/functioning, it will allow tradesperson to specialise in repair work or it will result in more tradespersons being licensed under the Act. A few submissions propose that all tradespersons who perform repair work on a motor vehicle should be licensed, there should be no exceptions.

Examples of the types of repair work that have been recommended to be licensed are summarised below.

- Automotive locksmiths because the repairs impact the security and integrity of the vehicle, poor repair work may result in risk to the occupants and other road users.
- Repair work on heavy vehicles should be separated from light vehicle repair work. Panel beating work on heavy vehicles is also distinct from light vehicle panel beating.
- Work on electric vehicles, hybrid vehicles, hydrogen vehicles and autonomous vehicle repair. If worked on incorrectly it may injure the tradesperson, the consumer or other motorists.

- Repair work involving Advanced Driver Assistance Systems (ADAS), intelligent headlamp systems, vehicle to vehicle communication and accumulation/storage of data.
- Specialised classes of repair work such as transmission specialist, brake specialist, service lubrication technician, tyre fitting light vehicle, tyre fitting heavy vehicle, underbody specialist, air-conditioning, paint less dent repair, engine reconditioners, transmission and gearbox reconditions. Some submissions opposed the introduction of specialised repair classes because it may exacerbate the skills shortage by limiting the pool of tradespersons currently working across existing classes and because Certificate II tradespersons dilute the industry.
- Repair work on trailers and caravans as they are carrying out services on brakes, suspension and chassis and post-accident repairs. Requiring a motor mechanic licence would ensure safety of the consumer and the public. Some submissions go further to say that plumbing, electrical and panel beating work on caravans should also be licensed.
- Conversion of vehicle air conditioning and refrigeration systems to a flammable refrigerant must be undertaken by a competent person with the appropriate qualifications.

There were also a few submissions which supported repair classes being amalgamated and removed. An industry association recommended to amalgamate the compressed natural gas (CNG), liquefied natural gas (LNG) and liquefied petroleum gas (LPG) mechanic repair classes as the fundamental skills required for working with these fossil fuels and the behaviour of gasses are reasonably similar. Another industry association recommended removing LNG class altogether as there are low numbers of LNG vehicles and no uptake of the courses.

However, a few submissions cautioned against expanding the type of repair work to be licensed. Expanding the range of classes and accordingly the qualifications, can reduce adaptability and flexibility in the industry. It also increases costs, increases complexities and there are potential losses in efficiencies. The industry currently fills gaps in training through on the job training and manufacturer technical documentation.

Lastly, most submissions were supportive of prescribing qualifications.

To keep up with changes in technology, some submissions said that the regime should go further by requiring tradespersons to complete training regularly such as on renewal of a licence. Other submissions offered alternatives to keep up with changes in technology. That is, rather than adding new repair classes, training modules could be added to existing qualifications. One submission noted that although it is critical to continue to use nationally accredited qualifications, it might be prudent to consider skills sets (which are becoming increasingly more common within training packages) or additional non-accredited industry training to allow for upskilling.

Other issues raised about the prescribed qualifications include that some are not offered by Registered Training Organisations, regional small businesses struggle to comply with

the Regulation because of limited course delivery options, that more qualifications be added to some repair classes, that qualifications need to be updated to keep up with changes to training packages, and it does not recognise overseas equivalent qualifications.

## **Analysis**

The requirement to hold a tradesperson certificate is dependent on the scope of repair classes prescribed in the Regulation. Any changes to the classes of repair work are likely to result in more tradespersons being required to hold a certificate or tradespersons being required to complete a qualification. Therefore, any changes to the classes of repair work need to consider how the Act can continue to meet its objectives whilst considering the impact on the repair industry.

A key theme highlighted by the submissions is that the current scope of repair classes and qualifications have not kept up with changes to technology. Other than the recent introduction of specialised repair classes, there have been no changes to the list of repair classes or their description since 2013. In addition, the national training packages are slow to respond to emerging technology and often there are limited units, skill sets or training packages available to upskill tradespersons in these new technologies.

There are various options to respond to these changes in technology and ensure tradespersons are appropriately skilled to carry out repair work. One option could be to add new repair classes and hence, new qualifications. Another option could be to expand the current scope of repair classes and/or recognise other skills training other than the completion of a Certificate II/III qualification. For example, in WA, a third-party skills assessment from a third-party assessor or in-house training with an employer can be accepted by the Director General if a tradesperson does not hold the prescribed qualification. Lastly, there could be an option to require tradespersons to undertake Continuing Professional Development (CPD).

Finally, if the Minister prescribed the qualifications, rather than the qualifications being prescribed through the Regulation, the Minister can adapt more quickly to changes in the industry and consequential changes to the training packages.

## **Findings**

In response to the feedback provided and with the recent introduction of specialised repair classes from 1 September 2020, the Review considers that it is appropriate to monitor the outcomes of those reforms before making any immediate changes to the list of repair classes and qualifications. However, the list will be regularly reviewed with industry stakeholders to ensure classes of repair work reflect the current working environment.

Also, by allowing the Minister to prescribe qualifications, the Minister will be able to respond promptly to changes in the industry such as changes to training packages, emerging technologies and any skill shortages. This system of prescribing qualifications has the added benefit of being able to assess and potentially accept equivalent overseas qualifications, fully or with some caveats/conditions.

Lastly, the review will undertake a cost benefit analysis of tradesperson's being required to complete further training (known as CPD), in order to renew their tradesperson certificate. This is based on a draft recommendation from the NSW Productivity Commission's Green Paper that recommends removing mandatory CPD requirements where costs exceed the benefits.

### **Recommendations**

13. That the current repair classes and qualifications be retained. The Department of Customer Service is to establish an ongoing six-monthly check in with industry stakeholders to ensure classes of repair work reflect the current working environment.
14. Continue to embed qualification requirements in the regulatory framework. However, in order to adapt to rapid changes in the industry and consequential changes to training packages, remove the qualification requirements from the Regulation and instead insert a power in the Act to allow them to be approved by Ministerial Order.
15. Undertake a cost benefit analysis of motor vehicle tradespersons being required to undertake specified further training in order to renew their tradesperson certificate.

## **5.8 Offences and penalties**

### **Context**

The Discussion Paper sought stakeholders' views as to the appropriateness of existing penalty and offences in the Act. It is in the public interest for the Act to have adequate compliance and enforcement powers to discourage illegal activity.

### **Stakeholder views**

NSW Police recommended increasing penalty amounts to reflect CPI increases since the Act was introduced. The reasoning for the increase was to continue to ensure that the penalty amounts effectively provide deterrence for non-compliance.

There was limited commentary from the submissions on the specifics of penalties, nor any suggestions to add any further or explicit penalties to the existing regulatory framework. The consistent viewpoint provided was that greater compliance and enforcement action was needed to impose the existing requirements on those that are in breach of the Act. This suggests that among industry and the public there is a broad acceptance of the current penalties and their amounts.

However, some industry stakeholders suggested it may be more appropriate for the deterrents to be consistent with the scale of the offence rather than be adjusted based on CPI, ensuring the offence provisions are appropriately applied. Generally, stakeholders support the need for financial penalties to be at a level high enough to deter any misconduct, or other behaviours that impact the industry or consumers.

## Analysis

It is a matter of regulatory maintenance that penalties are periodically reviewed to ensure consistency and that the deterrent outweighs the perceived benefit, such as the financial gain of committing an offence.

Since the Act commenced on 1 December 2014, the penalty amounts in Schedule 3 of the Regulation have remained the same.

## Findings

Although the submissions received suggests there is a broad acceptance of the current penalties, others such as the NSW Police, supported an adjustment to the penalty amounts. Therefore, the Review recommends that the penalty offence amounts be amended to ensure they remain an appropriate deterrent after undertaking further work by end of 2020 to review their deterrence and application.

### Recommendation

16. Amend the penalty offence amounts after undertaking further work by end of 2020 to review their deterrence and application.

## 5.9 Other matters considered in the review

### 5.9.1. Gas and electrical work in caravans and recreational vehicles

#### Context

As part of the Better Business Reforms package, the NSW Government considered a proposal to introduce a specialised licence class for electrical and liquefied petroleum gas (LPG) repair work on caravans and other recreational vehicles.

Further feedback on this proposal was sought as part of the statutory review. Specifically, should there be a new category of licence for electrical and LPG installation on caravans and recreational vehicles or should work be completed by a fully qualified licence holder.

#### Stakeholder views

There were only a few submissions from stakeholders about gas and electrical work on caravans and recreational vehicles.

In their submission, the Caravan, Camping & Touring Industry & Manufactured Housing Industry Association of NSW (CCIA) strongly supported a new category of licence for LPG and electrical installations and repair work on recreational vehicles. The CCIA submitted that a new restricted licence category would help improve the sector by increasing the supply of qualified tradespersons and providing an additional employment pathway for tradespersons. In their view, this would allow persons to work on recreational vehicles without having to become fully qualified in a trade where only some of the areas in which

they are trained is relevant to the work they would do on caravans and recreational vehicles. They argued this would save these workers time and money. However, the CCIA noted that it would be necessary to put in place appropriate training to ensure the unique safety issues of working on these vehicles are addressed.

One industry association supported the introduction of a new category of licence for those that perform electrical and LPG work on caravans and recreational vehicles as it is needed to ensure consumer safety. This was based on the misapprehension that that no qualifications are needed to work on any part of a caravan, including the electrical and gas systems of the caravan. Another industry association proposed forming a committee of electrical and LPG installers to review work and skills levels required to safely perform the work.

## **Analysis**

Currently any electrical installation or repair work on caravans and RVs must be completed by a fully qualified electrician under the *Home Building Regulation 2014*. Similarly, any LPG installation or repair work on caravans and RVs must be completed by a fully qualified gasfitter.

In all other jurisdictions, Certificate III qualifications are required for persons doing electrical and gas work on caravans and recreational vehicles. In Queensland there is a restricted licence category that limits holders to servicing, testing and repairing a Type A gas device (carry an approval badge from the Australian Gas Association) and certifying a Type A gas system installed in a caravan only. It does not include installing an appliance (new or replacement) or any part of a gas system and does not include carrying out gas work or modifications to the system or supply (pipes, regulator, cylinders, meter). The licence also does not cover work done in the manufacturing of the caravan.

In their submission, the CCIA submitted that the Queensland restricted licence is an incomplete solution and does not cover the scope of work for the envisaged licence category.

It is imperative that electrical and gas work is done properly. Caravans can be used as both a recreational vehicle and as a home and are subject to wear and tear due to vibrations with movement on and off roads. This makes them even more vulnerable to issues if the work is not performed by a fully qualified electrician or gas fitter. Any qualification that would meet the requirements for safety would not likely be a significant reduction to what is currently required to perform this work.

## **Findings**

Overall, there is minimal support from submissions for the introduction of a specialised licence class for electrical and LPG repair work on caravans and recreational vehicles. In addition, any electrical or LPG installation or repair work on caravans and recreational vehicles must already be carried out by a fully qualified electrician or gasfitter.

Given the above, and potential risks to consumer safety, the review recommends not to proceed with creating an additional class of licence at this time. Feedback from industry

indicates that there may be some confusion about the qualifications required to work on caravans and recreational vehicles. Further education from NSW Fair Trading on the requirement to hold relevant electrical and gas fitting qualifications under the *Home Building Regulation 2014* would likely address this confusion.

#### **Recommendation**

17. To not proceed with creating an additional class of licence for gas and electrical work in caravans and recreational vehicles at this time. Instead, NSW Fair Trading should develop educational material for the industry to raise awareness of appropriate qualifications for electrical and gas fitting work on caravans/recreation vehicles.

## 6. Appendix A – Stakeholder submissions received

Submission Number	Name / Organisation	Type
1	Peter McAuley - Peter Mac's Mechanical	Industry - Repairer
2	Anonymous	Industry - Repairer
3	Anonymous	Industry - Repairer
4	NSW Automotive Training Board	Industry Group
5	Anonymous	Industry - Repairer
6	Anonymous	Public
7	Garry Maher - L&M Smash Repairs	Industry - Repairer
8	Anonymous	Public
9	Office of Small Business Commissioner	NSW Government
10	Denis Lesslie - True Blue Trailers	Industry – Motor Dealer
11	Sean Ryan - Nowra Holden	Industry – Motor Dealer
12	Concerned Panel beater and Spray Painter	Industry - Repairer
13	James Follett - Coffs Harbour Motor World	Industry – Motor Dealer
14	A2B Trailers	Industry – Motor Dealer
15	Anonymous	Public
16	Bike Part Out	Industry – Motor Dealer
17	Anonymous	Public
18	Matthew Booth - Tiger Maintenance and Repairs	Industry - Repairer
19	Pete Howe - Narooma Motors	Industry – Motor Dealer
20	Terry Hewitt	Industry - Repairer



21	Anonymous	Industry – Motor Dealer
22	Anonymous	Public
23	Anonymous	Public
24	Insurance Council of Australia	Industry Group - Insurer
25	TH Auto Repairs Centre	Industry - Repairer
26	Ian Henry - South Nowra Auto Group	Industry – Motor Dealer
28	Anonymous	Industry - Repairer
29	Greg Preston - Australian Association of Progressive Repairers	Industry Group
30	Warwick Reynolds	Public
31	Kylie Farelley - Refrigerant Reclaim Australia	Industry
32	Anonymous	Industry - Repairer
33	Anonymous	Public
34	Federal Chamber of Automotive Industries	Industry Group
35	N&K Transmissions	Industry - Repairer
36	Kings Smash Repairs	Industry - Repairer
37	Illawarra Automotive Specialists	Industry - Repairer
38	O'Brien	Industry - Repairer
39	Insurance Australia Group	Industry - Group - Insurer
40	Financial Rights Legal Centre	Other
41	Liverpool Auto Dismantlers	Industry – Repairer (Recycler)
42	Margaret Thompson	Public
43	Institute of Automotive Engineers (IAME)	Industry Group
44	Sell & Parker	Industry – Repairer (Recycler)
45	Australian Automotive Aftermarket Association (AAAA)	Industry Group

46	Australian Automotive Dealer Association (AADA)	Industry Group
47	Motor Traders' Association of NSW (MTA)	Industry Group
48	National Windscreens	Industry Group
49	Prizm Automotive	Industry – Repairer
50	Suttons Motor Management	Industry – Motor Dealer
51	Driveway Mobile Mechanics	Industry – Repairer
52	Sims Metal Management	Industry – Repairer (Recycler)
53	Auto Glass Association (AGA)	Industry Group
54	Bosch Automotive Service Solutions	Industry – Repairer
55	National Waste Recycling Industry Council	Industry Group
56	Caravan, Camping & Touring Industry Manufactured Housing Industry Association	Industry Group
57	Locksmith 24 Hours	Industry - Locksmiths
58	Leon Bradford	Public
59	Graham Judge - Collision Safety Consultants	Other
60	Office of Small Business Commissioner	NSW Government
61	Anonymous	Industry - Locksmiths
62	Anonymous	Industry – Repairer
63	Anonymous	Industry – Repairer
64	Tony Salafia	Public
65	Anonymous	Industry – Repairer
66	Anonymous	Industry - Locksmiths
67	Waste Contractors & Recyclers Association of NSW	Industry Group
68	Joseph Musico	Industry – Repairer
69	Kim Donovan	Public
70	Loz D	Public

71	NSW Police	NSW Government
72	Legal Aid NSW	Other
73	Nixons Wagga	Industry – Dealer/ Repairer
74	Allianz Australia Insurance	Industry Group - Insurer

