PATTEN | ROBINS *Lawyers*

ACN 600 043 347
Your Ref:Nick Hague
Our Ref:JG:15/2834/JG

16 November 2015

by email: towtruckreview@esc.vic.gov.au; Nick.Hague@esc.vic.gov.au; Dominic.LHuillier@esc.vic.gov.au

Mr N Hague & Mr D L'Huillier
Essential Services Commission
2 Lonsdale Street
MELBOURNE VIC 3000

Dear Nick & Dominic,

Re: Submissions in Response to Draft Report - Accident Towing Regulation

Patten Robins Lawyers welcomes the opportunity to respond to the Essential Services Commission ("the ESC") Draft Report on Accident Towing Regulation, published in September 2015.

The enclosed submissions reflects the views of a broad cross-section of the industry, as conveyed to the drafters both directly and indirectly, via a small committee established for this purpose. Specifically, the submission is made on behalf of the following accident towing operators, who have jointly funded its preparation:

- Sheengroup Towing Pty Ltd;
- Karlay Pty Ltd (t/a Goumas Smash Repairs);
- Code 12 Towing Pty Ltd;
- BTS Towing Pty Ltd;
- Yarra Valley Towing Pty Ltd;
- Bulleen Towing Services Pty Ltd;
- Bacchus Marsh Towing;
- Pansino Property Investments Pty Ltd (t/a Melville Body Works);
- Vicwide Towing;
- Auz National Towing & Transport Pty Ltd;
- Jolevski Pty Ltd (t/a Spot on Panels);
- Mill Park Towing;
- Warragul Towing Pty Ltd;
- Accident Towing Pty Ltd;
- Geelong Accident Repair Centre Pty Ltd;
- Geelong Towing Services Pty Ltd;
- Winter and Taylor Motor Group Pty Ltd;

- Fyans Street Panels Pty Ltd;
- Torquay Towing Pty Ltd;
- Time Nominees Pty Ltd (t/a Allcar Towing);
- Fixwell Smash Repairs & Melton Towing Pty Ltd;
- Burchell Panels;
- Deer Park Motors/Auto Care Towing; and
- Local Towing & Salvage.

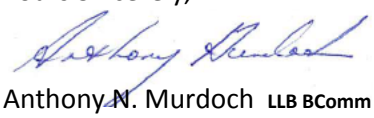
The submissions were drafted by Rex Deighton-Smith (Principal, Jaguar Consulting), Mary Anne Hartley QC, and Anthony Murdoch (Principal, Patten Robins Lawyers). The authors of these submissions would like to request the opportunity to meet with ESC staff to clarify and expand on the views presented in it.

Please also kindly find attached USB containing an audio file of the interview of Mr Tony Murdaca, Director of IVIC, by Tom Elliot (3AW) (see footnote 18) and the interview of Mr Reuben Aitchison, AAMI Corporate Affairs Manager, by Mr Tom Elliot (3AW) (see footnote 25).

Patten Robins Lawyers have formed a strong and impassioned view with respect the current draft report. The draft report contains some conclusions which are not substantiated, are anti-competitive and which failed to consider the industry with an entirely informed view. Given this, I have advocated to a large sector of the Accident Towing Industry to come together to have this substantial and sophisticated submission put to the ESC. In accordance with the ESC's statutory duties, I would respectfully urge the ESC to give this entire submission the time and merit that it deserves.

If you have any questions in relation to the submissions please do not hesitate to contact me by telephone or email.

Yours Sincerely,



Anthony N. Murdoch **LLB BComm GDLP LLM(Global Business)**
PRINCIPAL

Submission in response to the Essential Services Commission

Draft Report on the Accident Towing Industry

Prepared on behalf of a group of members of the Accident Towing Industry

16 November 2015

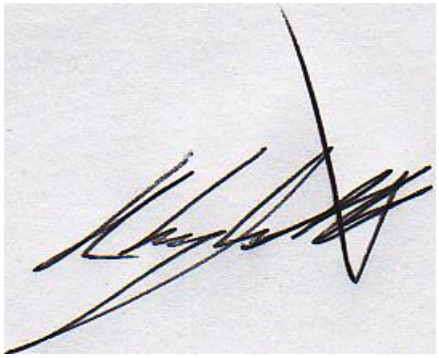
Introduction

This submission is made on behalf of a large number of accident towing operators, who have jointly funded its preparation. These operators consist of all the operators in the Self-Managed Area, the majority of the operators in the Controlled Area and a number of operators in the Uncontrolled Area. It responds to the draft report of the Essential Services Commission (ESC) Inquiry into Accident Towing Regulation, published in September 2015. The submission reflects the views of a broad cross-section of the industry, as conveyed to the drafters both directly and indirectly, via a small committee established for this purpose. References to the Accident Towing Industry (ATI) in the submission should be understood in this context: the submission reflects widely held views in the industry but, for practical reasons, cannot claim to have been reviewed and approved by all significant industry participants.

The submission was drafted by Rex Deighton-Smith (Principal, Jaguar Consulting), Mary Anne Hartley QC, and Anthony Murdoch (Principal, Patten Robins Lawyers). The authors of this report have also consulted thoroughly with Lynden Kenyon of Kenyon and Ahmet Lawyers. The authors of the submission would like to request the opportunity to meet with ESC staff to clarify and expand on the views presented in it.

The primary contact for questions in relation to this submission is Mr Anthony Murdoch (Patten Robins Lawyers, P.O. Box 49 Balwyn North VIC 3104, melbourne@pattenrobins.com.au, 03 9859 5455).

Anthony N Murdoch



Rex Deighton-Smith

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Summary

The Accident Towing Industry (ATI) supports the ESC's position that the accident allocation scheme should continue to operate in the Controlled Area and the Self-Managed Area (SMA), while accident towing allocations in the Uncontrolled Area should continue to be unregulated. However, the two substantial changes proposed in respect of the Controlled Area – that there should be a move over time toward a proximity-based allocation scheme and that there should be a limitation on the destinations to which a damaged vehicle can be towed – are not supported, as they are likely to impose significant net costs. The ATI believes that a number of important costs that would be associated with the implementation of the changes proposed in recommendations 2 and 7 of the draft report have either not been recognised by the ESC or have not been given due weight.

Recommendation 7

The analysis contained in the draft report extends well beyond the issues identified in the Commission's issues paper as forming the scope of the inquiry. In particular, the incorporation of an analysis of two related markets – vehicle insurance and accident repair – within the scope of the inquiry was not foreshadowed in the issues paper, which solely addressed matters relating to the Accident Towing Industry *per se*. As a result, these issues were not addressed in the previous submission from the VACC on behalf of the ATI. The ESC has apparently informed itself on these matters largely via submissions from the insurance industry. These insurance industry submissions appear to have been accepted without adequate critical analysis. Such analysis is essential, having regard to the strong commercial interest that insurers have in gaining control over the accident repair market and the significant detriment to consumers that would likely result.

This submission highlights some key dynamics of these related industries, which have substantial bearing on the issues addressed in Recommendation 7. In particular, the insurance industry should not be seen as simply the benign agent of consumer interests, as is implied in the draft report. Rather, it vigorously pursues its own interests, including through the increasingly widespread use of the market power that it wields as an oligopolistic industry confronting the atomistic accident towing and accident repair industries. Insurance companies' attempts to dominate the accident repair industry through preferred repairer schemes, and the market conduct surrounding them, have increasingly led to problems in relation to the quality of repair work, with consequences for community safety and consumer satisfaction, as well as efficiency costs due to the increasing incidence of reworking to rectify identified problems.

In this context, insurer submissions alleging substantial cost increases and consumer harms as a result of accident repair work being undertaken outside the control of the insurance industry must be considered critically. Where higher prices exist, these frequently reflect work being completed to appropriate quality standards, rather than being compromised due to pressure applied by insurance companies. Moreover, the data provided by the insurance industry is of poor quality, providing widely differing estimates of the size of the supposed increase in average repair costs and providing no real information on the aggregate extent of the alleged problem.

Similarly, the draft report's analysis of allocation area accident towing licence prices, which is apparently intended to support Recommendation 7 by demonstrating that the ability to capture super-normal profits via the accident repair industry partially underpins licence values, is materially deficient. In particular, it fails to take account of key external factors driving the major increases seen between 2009 and 2012 and fails to weigh fully the significant declines in licence values evident since 2012.

In light of these factors, the ATI does not believe that a strong case has been made for the necessity or desirability of imposing limitations on consumers' right to choose the locations to which their vehicles will be towed. Adopting Recommendation 7 would involve a significant limitation of consumers' freedom to contract which is unjustifiable given both the failure of the draft report to demonstrate objectively that there is a substantial problem to be rectified and the existence of feasible and less interventionist alternatives.

Recommendations 5 and 6

Recommendations 5 and 6 involve adding a page of warnings to the current Authority to Tow document, improving the current VicRoads accident towing fact sheet and adopting an education campaign aimed at consumers. These measures could be expected to address any concerns in this area. Given this, the ATI submits that recommendations 5 and 6 should be implemented and the outcome assessed before any decision is made to adopt other, more intrusive measures. The ATI seeks to co-operate with the regulator in the implementation of recommendations 5 and 6, to assist in ensuring that an effective outcome is achieved.

Recommendations 2 and 3

The ESC proposal to move to a proximity-based allocation system would be likely to yield limited benefits (e.g. the estimated 7 km reduction in the length of the average tow would lead to a consumer saving of only $23.10) and to impose substantial costs, many of which have not been identified in the draft report. It would also cause significant disruption to the ATI. Moreover, the context is one in which the size of the problem that it seeks to address is clearly limited: The draft report recognises that current service levels generally meet the standards set and that there are very few complaints about accident towing.

The draft report anticipates that the implementation of recommendations 2 and 3 (the latter being to remove the requirement for the regulator to approve relocations of depots and licences) would give rise to economic incentives that would encourage a major reallocation of both licences and depots, as industry participants rationally sought to maximise their accident allocations under the new arrangements. This would have substantial direct costs, in terms of the establishment of new depots and closure of existing ones. It would also be likely to lead to the reversal of the substantial consolidation of depots that has occurred over the last decade and the loss of the economies of scale and scope derived from this consolidation. It would also lead to an increase in the number of "attached" licences, thus reversing previous cost savings achieved by conducting the towing task with fewer vehicles. Finally, as noted by the ESC itself, there is a substantial risk that these changes would lead to a further decline in service standards in the outer metropolitan area, which already receives lower service quality on average than in urban areas.

That said, there is some doubt as to the extent to which these market dynamics would be able to play out in practice. In particular, the draft report fails to acknowledge that there has been a low incidence of depot relocations in recent times and that the use of planning legislation by municipal

authorities constitutes a major impediment to such relocations. To the extent that market adjustments are prevented from occurring, the associated costs would be reduced. However, the practical potential for a proximity based allocation mechanism to be established effectively and maintained over time would also be substantially reduced.

The ATI submits that there is scope to achieve the benefits which recommendations 2 and 3 seek to achieve without incurring the costs, and giving rise to the uncertainties, described above. The simplest means of achieving reductions in clearance times is to ensure drivers are more aware of how to contact the Accident Allocation Centre, thus ensuring the despatch of the tow truck occurs more rapidly. Second, clearance times could be improved by removing the current regulatory prohibition on "double-lifts", so that these could be undertaken in circumstances where they would not disadvantage consumers. A related benefit could also be achieved by enabling tow trucks to remove vehicles from the immediate vicinity of the accident location before the Authority to Tow is signed, in circumstances where this is necessary to avoid risks to other motorists and address congestion issues.

Improvements in the existing allocation system can also be achieved by rationalising allocation zones and reducing the level of overlap between them, while facilitating the relocation of depots (rather than removing the requirement for VicRoads to approve depot and licence relocations, as recommended), having regard to the planning-related impediments noted above. In both cases, the focus should be on establishing explicit assessment criteria which ensure a clear focus on the public benefit. Any moves in this area should be undertaken in close consultation with the industry.

Self-Managed Area

The ATI supports the draft report's recommendations that the allocation scheme should continue in the Self-Managed Area (SMA) and that the current boundaries of the SMA remain appropriate. However, it does not support the adoption of fee regulation in the SMA. The analysis presented in the draft report suggesting the existence of excess profits among operators in the SMA contains significant errors and does not therefore provide strong support for this proposition. Moreover, the task of setting and maintaining appropriate regulated fees is a demanding and resource-intensive one, giving rise to significant risks that a poor outcome will be achieved, with fees not being maintained at appropriate levels over time. In light of the lack of evidence of consumer complaints regarding the fees currently charged in the SMA, the ATI does not believe that adopting fee regulation is likely to improve economic outcomes.

Uncontrolled Area

Similarly, the ATI does not believe that a move to fee notification in the Uncontrolled Area would be likely to yield positive outcomes. The draft report itself notes the potential for such a move to lead to a "levelling up" of fees which would increase their average size and potentially give rise to calls for the adoption of price regulation – a task that would in practical terms be almost impossible to achieve effectively. Given this and the lack of evidence of excessive fees or consumer dissatisfaction, the ATI recommends that the current arrangements, based on a requirement that fees charged be set at a "reasonable" level, should be maintained.

1. Scope of the review

The Terms of Reference for the ESC's review relate to the accident towing industry as a whole. Consistent with this, the Issues Paper published by the ESC in October 2014 identifies the "*three key regulation matters the review will be considering*" as:

- the regulation of fees;
- the necessity for, and location of, boundaries which set up different regulatory approaches (e.g. the Melbourne controlled and Geelong self-management areas); and
- the allocation of accident towing jobs (i.e. whether jobs are allocated or whether operators are free to complete for towing jobs).

Given these indications of the scope of the ESC review, the major industry submission to the inquiry, provided by the VACC, focused exclusively on these and other issues directly relating to the regulation of the accident towing industry. However, the draft report includes substantial analysis of the related industries of accident repair and vehicle insurance which appears to underpin, or at least substantially influence, key conclusions and recommendations relating to the regulation of accident towing. The ATI is concerned that, in choosing to address these issues in its draft report, the ESC appears to have gone beyond the Terms of Reference for this inquiry and that the recommendations that flow from this consideration of broader issues may consequently be of questionable validity.

In making this comment, we note that the recent draft report of the NSW Independent Pricing and Regulatory Tribunal (IPART) Review of Tow Truck Fees and Licensing (October 2014) did not find it necessary to incorporate any equivalent discussion of the accident repair or insurance industries into its analysis, despite IPART's stated intent to conduct a "*broad review of accident towing regulation*" (p 1)[1]. We also note the ESC Chair's recent public comment[2] refuting suggestions that the report goes beyond the Terms of Reference provided on the basis that its recommendations do not deal with these related industries. The ATI believes that the analysis of the dynamics of the related industries presented in the draft report clearly forms the basis for key recommendations, most notably Recommendation 7, but also Recommendations 5 and 6. This is discussed further below.

This concern regarding the scope of the review is reinforced by significant deficiency in the inquiry process. As the issues paper raised only a limited range of matters relating directly to the regulation of the ATI, the industry was not on notice that broader issues would be considered and thus they were not given opportunity for input into the ESC's consideration of them. Significantly, the ESC appears to have consulted extensively with the insurance industry on these broader issues, including receiving written submissions from the industry over a period of months, and appears to have accepted the industry's viewpoints, largely uncritically.

Conversely, it did not undertake concurrent consultation with the ATI, or indeed other stakeholders such as the accident repair industry, on these issues. In light of the material received from the insurance industry and the ESC's decision to rely heavily on it in undertaking its analysis and formulating its conclusions and recommendations, this failure to raise the relevant material with other key stakeholders represents a serious deficiency in the inquiry process.

[1] IPART (2014). ***Review of Tow Truck Fees and Licensing: Draft Report.*** The IPART Final Report, while complete, has yet to be published.
[2] ESC Consultation Forum, Rydges Hotel, 5 November 2015.

This is of particular concern given that the insurance industry clearly seeks to gain commercial advantage through its inputs – a fact highlighted in a recent New South Wales Parliamentary inquiry report, which documents substantial concerns with the conduct of the motor vehicle insurance industry and the negative outcomes of this conduct for safety, consumers and competition. The conclusions and recommendations of the ESC's Draft Report are weakened by the fact that it demonstrates no awareness of the content, or even the existence, of this report[3].

Notwithstanding the ATI's view that the draft report's analysis of related industries falls outside its terms of reference, this submission addresses the issues raised in relation to the accident repair and insurance industries in detail. This includes analysis of the role of the insurance industry in influencing substantially the structure, conduct and performance of the accident repair industry and responds to the ATI's view that the ESC's analysis of the insurance and accident repair industries has clearly formed an important part of it deliberations and underpinned key recommendations. The ATI believes it is essential that the final report be informed by adequate analysis of the relevant industry dynamics if it is to meet the ESC's obligation to give primacy to promoting the long-term interests of Victorian consumers, having regard to the price, quality and reliability of accident towing services.

[3]Parliament of New South Wales (2014). ***Report of the Select Committee on the Motor Vehicle Repair Industry.*** Report 1/55, July 2014.
http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/01db1dac97b03766ca257d09002247fc/$FILE/Report%20on%20the%20Motor%20Vehicle%20Repair%20Industry.pdf

2. Industry dynamics: insurance and accident repair

2.1. Overview

A key distinction between the motor vehicle insurance and accident repair industries is that the former exhibits oligopolistic characteristics, in that it is dominated by a very small number of large players[4] who have increasingly adopted similar strategies, while the latter is essentially atomistic in nature. The result of this fundamental difference in industry structure is that the motor vehicle insurance industry is able to exercise market power in relation to the accident repair industry. Significant evidence indicates that it has done so increasingly in recent years and that the manner in which it has done so has led to significant and ongoing consumer detriment. The evidence presented below suggests that the consumer detriment arising from this dynamic is likely to far outweigh the problems of inflated repair costs and difficulties obtaining cost recovery that have been identified by the insurance industry and discussed in the draft report.

Insurers have strong incentives to minimise accident repair costs as this minimises the cost of meeting claims. Such a dynamic, in which the industry arguably uses its superior position in the market to act as the agent of the consumer,[5] clearly has the potential to promote economic efficiency. However, where cost pressure on the accident repair industry becomes sufficiently intense as to compromise the quality of repairs, and potentially vehicle safety, the effects on economic efficiency may instead be negative. This dynamic is able to operate in large part because of the limited ability of consumers to detect poor-quality repairs and, even where problems are identified, their limited ability to obtain redress when dealing with one of a small number of large companies operating in an oligopolistic market. Moreover, even where redress can be obtained, an increased incidence of "reworking" necessarily has negative implications for economic efficiency.

Strong evidence, discussed below, indicates that insurers are exerting pricing pressure to an extent that frequently leads the quality of repairs undertaken to be compromised. This misuse of market power operates to the detriment of both consumers and the accident repair industry, while the wider society is also affected to the extent that poor-quality repair work gives rise to safety concerns. Other issues relate to impacts on competition in the accident repair industry and on consumer choice. The following section summarises the conclusions of the recent New South Wales Parliamentary inquiry as they relate to these issues. Section 2.3 highlights areas of concern with respect to the conduct of the insurance industry in relation to both the accident repair industry and to consumers. Section 2.4 addresses the quality of the evidence submitted by the insurance industry, and reproduced in the draft report, concerning the cost of repairs undertaken outside the control of the insurance industry. The ATI believes that there are three significant concerns in

[4] The report of the recent NSW Parliamentary Inquiry into the accident repair industry stated that the two largest insurers account for more than 60 per cent of the vehicle insurance market. Other estimates suggest that the market share of these two players is as high as 70% and that the market can be characterised as a duopoloy. Two other major players jointly account for a further 15% of the market.
See: Parliament of New South Wales (2014), op. cit., p. vi.
http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/01db1dac97b03766ca257d09002247fc/$FILE/Report%20on%20the%20Motor%20Vehicle%20Repair%20Industry.pdf
http://www.slideshare.net/ullyully/australian-car-insurance-market-analysis

[5] This will be the case to the extent that competitive conditions in the market lead to consumers reaping the benefit of reduced repair costs via lower premiums. However, insurers are able to exercise market power, they may capture a significant proportion of the cost reductions as increased profit. In such circumstances they cannot reasonably be described as acting primarily as the agents of the consumer – i.e. their customers.

relation to the draft report's analysis of the relevant interactions between the insurance and accident repair industries which, taken together, mean that it cannot be relied upon to provide adequate support for the conclusions apparently drawn by the ESC. These are that:

- in considering the performance of different segments of the accident repair industry it is necessary to consider both price and quality dimensions, whereas the draft report confines itself to the price dimension;
- the draft report's estimates of the size of the alleged problem of inflated repair costs are provided by parties with strong vested interests in this issue and should therefore be assessed with a critical eye; and
- the quantitative material provided contains widely divergent estimates of the size of the alleged problem, which necessarily detract from their credibility.

Taken together, the material provided in Section 2 casts substantial doubt on the propositions apparently underpinning Recommendation 7. That is, given the poor evidence of supposedly inflated repair costs undertaken outside insurance company control and the significant concerns regarding insurance company conduct, the case for limiting the driver's right to determine where their vehicle is towed is far from compelling.

2.2. The New South Wales Parliamentary Inquiry

As noted in Section 1, the draft report's discussion of the dynamics of the interaction between the insurance and accident repair industries appears to be informed wholly or largely by submissions from the former industry, with little critical analysis having been applied despite the evident commercial incentives involved. This is particularly unsatisfactory given that this major, independent report addressing these issues was published in Australia as recently as 2014. The ATI submits that the ESC's final report should have due regard to the analysis contained in this report and the conclusions drawn from it.

The NSW Parliament's Select Committee on the Motor Vehicle Repair Industry undertook an extensive inquiry process and consulted with a wide range of stakeholders, with 77 written submissions being received and 24 witnesses being heard at public hearings. The Inquiry's report raises several related concerns regarding the extent to which the current and emerging business practices of the insurance industry appear to be operating contrary to the public interest, as well as contrary to the consumer interests of their policy holders. Key observations made in the NSW Parliamentary Inquiry report include:

(a) the Committee was concerned by the rectification rates of leading insurers and considered that the rates indicate that many vehicles that had had repairs directed and managed by these insurers are subject to poor repair work and are being returned to the road, potentially increasing safety risks to road users[6];

(b) the matters in (a) are of great concern given that the rates reflect only the defects that have been detected and there may well be numerous other defects that remain undetected, given a lack of consumer ability to detect them;[7]

[6] Paragraph 3.38.
[7] Paragraph 3.39.

(c) the two quote system used by insurers[8] and tendering done by particular insurers[9] encourages repairers to submit unrealistic quotes which leads to sub-standard repairs;

(d) insurers are able to use their market dominance in the repair industry to exert pressure on repairers which may have flow on effects for the quality of repairs[10]. Reforms are needed to protect repair operators from unfair contractual terms imposed by insurers;[11] and

(e) vertical integration (concurrent ownership of insurance businesses, repair shops and wreckers' yards) raises conflicts of interest and limits consumer choice.[12]

In sum, the inquiry report clearly suggests that the industry is increasingly using its market power to drive down repair costs at the expense of safety, quality and consumer freedom of choice. The ATI is concerned that the draft report does not address any of these issues, which are clearly relevant to the ESC's overall objective of promoting the long term interests of Victorian consumers.

2.3. Key insurance industry conduct issues

All major insurers operate "preferred repairer" schemes, which require accident repairers to conform to various requirements in order to have preferential access to repair work on vehicles insured by them. Given the dominance of insurance funded work in the total turnover of the accident repair industry, this dynamic provides motor vehicle insurance companies with a significant degree of control over the operations of accident repairers.

Two significant issues of concern can be identified in respect of these schemes. The first is their anti-competitive impact, in that the ability of accident repairers who are excluded from such schemes or who choose to remain outside them to survive in the industry can be cast into doubt, while consumers' freedom to choose among service providers is also substantially reduced, particularly when preferred repairer schemes are reinforced via the use of "steering" behaviours. The latter are strategies adopted by insurers to maximise the likelihood that an insured motorist will agree to have their vehicle repaired by one of the company's preferred repairers and include:

- Promoting the use of insurer "apps" on mobile smart phones, that encourage drivers to contact the insurance company immediately when an accident occurs, thus maximising their ability to take control of all aspects of the process;
- Providing misleading information to the consumer as to whether they have the right to choose their repairer under the terms of their contract, or providing inducements to consumers to agree to having their vehicles repaired by a preferred repairer[13];
- Manipulating claims assessment processes in ways that enable them to suggest that the use of a preferred insurer will result in substantially shorter timeframes to finalise repairs; and
- Providing "scripts" to call centre workers and paying bonuses to them if they convince policy-holders who have had an accident to use a preferred repairer[14].

[8] Paragraph 3.47.
[9] Paragraph 3.49.
[10] Paragraph 3.80.
[11] Paragraph 3.87.
[12] Paragraphs 3.96 – 3.98.
[13] The NSW Inquiry indicated that it had received anecdotal evidence of these practices. See paragraphs 6.27 & 6.28.
[14] Paragraphs 6.27 – 6.32.

These behaviours are a widely documented aspect of motor vehicle insurance industry conduct internationally and have resulted in legislative action being taken to address their anti-competitive effects and negative impact on consumer choice. For example, over 30 states in the United States have adopted "anti-steering" legislation. Within Australia, the recent New South Wales Parliamentary Inquiry has recommended similar legislation, in the form of amendments to the Australian Consumer Law to make it an offence for insurers to seek to prevent insured drivers from exercising their choice of repairer, where their contracts provide for this right[15].

From a consumer perspective, strong insurance company pressure to use a particular preferred repairer not only limits personal choice, but may also yield significant practical difficulties, particularly if the repairer's location is remote from the driver's home and they face consequent costs and difficulties in obtaining access to the repairer and the vehicle during the process.

The strong incentive for accident repairers to obtain and retain preferred repairer status in order to ensure an economic throughput of repair work for their business provides insurance companies with significant leverage. This leverage is frequently exercised in ways that have the potential to compromise the quality of accident repair work undertaken. For example, repairers can be required to use non-genuine and even second-hand parts where these are available, while assessors may be reluctant to authorise certain repairs where these cannot be seen as clearly and unambiguously necessary[16].

At least one major insurer requires preferred repairers to win at least 50% of the repair jobs for which they tender on an ongoing basis, on pain of being removed as a preferred tender. This approach creates strong pressure on preferred repairers to submit very low-priced bids in order to maintain their access to the market and is necessarily likely to contribute to an increased incidence of repairs not being carried out to appropriate quality standards, particularly in the less obvious areas of structural or mechanical work, with potential safety implications.

Consistent anecdotal evidence from accident repairers indicates that the approaches taken in recent years by major insurance companies have led to a substantial and growing incidence of sub-standard repair work being carried out, resulting in increasing rectification rates. While comparative data that would conclusively demonstrate that this a problem of significantly increasing magnitude are not available, the evidence provided below sets out a strong case that this is so, based on a combination of the dynamics of industry behaviours, the associated incentives and the views of a wide range of affected parties.

From a consumer perspective, the widespread use of "lifetime guarantee" provisions in insurance policies means that, where they become aware of repair work being sub-standard, they will potentially be able to have it rectified, usually by the initial repairer, at no direct cost. However, this first requires insurance company agreement that rectification is required, which can frequently be difficult to obtain. Evidence provided to the New South Wales Parliamentary Inquiry indicated a high incidence of consumers needing to seek legal advice in order to attempt to have rectification work undertaken. A submission from the Insurance Legal Service of the Consumer Credit Legal Centre stated that it had dealt with 40 to 50 such complaints in 2012 and stated that:

[15] New South Wales Parliament (2014), op. cit., Chapter 6.

[16] For example, in the case of relatively minor chassis misalignments, there may be dispute as to whether misaligned outer panels would result if these are uncorrected, or if performance would be materially adversely affected.

"Overall, complaints to the ILS about quality of car repairs is an ongoing issue. The process for getting poor repairs fixed is difficult and may involve the cost to the consumer of getting independent assessors."[17]

Further evidence of the size of this issue is provided by the fact that a former accident repairer has, for the past eight years, operated a business (now in both Melbourne and Sydney) which specialises in assessing repairs in circumstances in which consumers believe them to be sub-standard and providing supporting material to assist them in obtaining rectification[18].

Even where rectification work is approved, consumers will typically incur large indirect costs. These include:

- the costs of employing independent assessors to provide expert evidence of the need for rectification and pursue the matter with insurance companies on the consumer's behalf;
- the transactions costs involved, such as those of making and pursuing a claim for further repair work to be undertaken, delivering the vehicle to the repairer and subsequent pickup;
- loss of convenience due to again being without the use of the vehicle while poor initial work is rectified; and
- loss of income, if the unavailability of the vehicle for a further period prevents the driver working, or travelling to work.

In addition, increasing rectification rates necessarily impose economic efficiency costs, since the total resource input required to complete the repair to an appropriate standard in such circumstances is necessarily greater than would have been required to complete the repair correctly in the first instance.

Where sub-standard repairs are not detected, or rectification work is not approved, safety concerns will often arise. While consumers are well-placed to identify quality issues in relation to cosmetic factors, they will have more limited ability to detect structural and mechanical problems of the kind that may compromise the vehicle's safety performance. Finally, poor repair work that is not addressed is likely to reduce the resale value of the vehicle, to the extent that they become evident, or increasingly evident over time.

The issue of whether the insurance company practices highlighted above are compromising repair quality was considered at length by the recent NSW Parliamentary Inquiry, which concluded that:

"The rectification figures indicated to the Committee that many vehicles are subject to poor quality repair and are being returned to the road, potentially increasing safety risks to road users."

The most detailed data on rectification rates was provided to the inquiry by one of the two major insurers[19], which stated that its overall rectification rate totalled 4.0%, of which 0.8% comprised major, safety related items and a further 1.4% were rated as issues of medium importance. The Committee commented that, given the number of vehicles repaired under the auspices of this insurer, this rectification rate implied that over 1,000 poorly repaired vehicles with safety related issues were being returned to New South Wales roads annually by this one insurer[20]. Across the

[17] Parliament of NSW, op. cit., p10.
[18] See www.ivic.com.au. The business' principal is Mr Tony Murdaca. See interview with Tom Elliot, Source: 3AW.
[19] Note that the two insurers that jointly account for up to 70% of the market operate through numerous brands, thus giving the appearance of greater diversity in the market place than actually exists. For example, IAG operates the brands NRMA, RACV, SGIC, SGIO CGU and the Buzz.
[20] Parliament of NSW, op. cit., p13.

entire industry, such safety-related issues would be likely to affect several thousand vehicles per year. Moreover, these estimated rectification rates, by definition, relate only to those cases in which:

- the consumer has been able to identify the fault or faults in the initial repair work; and
- has been successful in convincing their insurance company to undertake rectification action.

The true incidence of faulty, and potentially dangerous, repair work is almost certainly much higher than these estimates imply, for two reasons. First, as noted above, while consumers may be relatively well-equipped to identify poor quality in relation to cosmetic issues, many safety-related issues are more difficult to detect. Thus, a proportion of sub-standard repair work will not be detected, at least in a timely manner. Second, anecdotal evidence[21] suggests that insurance companies frequently settle claims relating to defective repairs via cash payments provided on condition that a confidentiality agreement is signed, with the vehicles in question subsequently destroyed. These vehicles will not be counted in the reworking statistics provided above.

In a similar vein, the final report of the New South Wales Parliamentary Inquiry cites the submission of the Motor Traders Association:

> *The Motor Traders' Association of NSW (the MTA) indicated to the Committee that consumers in NSW are affected by low quality motor vehicle repair works and lowered value of vehicles as a result of poor quality repairs. The MTA argued that low quality repairs generally result from a lack of transparency in the motor vehicle repair process, and the preference of insurance companies to encourage repairers to repair vehicles to a specific price, rather than a quality standard.*

The New South Wales Inquiry found repair quality issues, and their safety implications, to be of sufficient magnitude to require substantive regulatory changes and went so far as to canvass the option of requiring assessors to operate independently of insurance companies. While it concluded that practical difficulties militated against such an approach, it did recommend a return to government licensing of assessors as a means of providing greater accountability in their conduct[22]. Recent press coverage also indicates that the industry dynamics highlighted above are also of concern internationally[23].

The above material supports the consistent anecdotal evidence received from members of the accident repair industry that insurance company practices are increasingly compromising the quality of accident repair work. This implies that the material provided by the insurance industry (and published in chapter 4 of the draft report) in support of the proposition that the costs of accident repair work are being significantly inflated as a result of substantial work undertaken outside the control of the insurance industry should be treated with considerable caution. To the extent that average prices are in fact higher in such circumstances, it is highly likely that a substantial part of the difference will reflect higher quality repair work – i.e. work which meets appropriate standards – being undertaken in the absence of sometimes excessive pressures from insurers to minimise costs. Moreover, as discussed in Section 2.4, there are questions as to the incidence of these issues, as well as the actual size of any real cost increases.

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[21] Given that it is clearly the insurers' intention in entering into such agreements is evidently to conceal the issue of poor repair quality, there is little prospect of obtaining other than anecdotal evidence of this issue and, hence, any direct evidence of its size.

[22] See New South Wales Parliament (2014), op. cit., Chapter 5, recommendations 5 and 6.

[23] See, for example: http://edition.cnn.com/2015/02/11/us/auto-repair-investigation/

Anti-competitive impacts

Preferred repairer schemes have substantial anti-competitive impacts, in that they have the potential to exclude accident repair businesses who are unwilling or unable to meet insurance company requirements from the market. For consumers whose policies do not guarantee them a choice of repairer, there is effectively no prospect of having their vehicle repaired by a repairer of their choosing if that repairer is not a "preferred repairer" of their insurance company. However, even where a choice of repairer is provided for in the insurance contract, steering behaviours, as described above, are used to reduce the probability that a "non-preferred" repairer will be chosen in practice. Also significant is a tendency for insurers to require the consumer to pay the difference between the price quoted by the preferred repairer and that quoted by the consumer's choice of repairer as an "out of pocket" cost. As noted above, a significant part of this difference may be the result of higher quality work being undertaken outside the "preferred repairer" scheme.

A relevant consideration in this regard is whether the behaviours described above contravene Section 47 of the *Competition and Consumer Act 2010.* This section establishes a broad, although not total, prohibition on exclusive dealing. At least one of the two largest motor vehicle insurance companies has made notifications of exclusive dealing to the ACCC in respect of their use of preferred repairer schemes[24]. The notification process is one in which a market participant admits that it is engaged in anti-competitive conduct that is *a priori* prohibited by the Competition and Consumer Act, but argues that this conduct should be accepted by the ACCC on the basis that the conduct gives rise to net benefits to the public, presumably, through the asserted downward pressure on repair costs.

To date, the ACCC has not objected to the conduct notified, effectively accepting the public benefit argument advanced. However, this position is both subject to change and predicated on a commitment to full disclosure of the relevant terms and conditions in relation to preferred repairers, as set out by the ACCC in its letter of 1 July 2013 to the notifier:

> *"As with any notification, please note that the ACCC may act to remove the legal protection provided by either of the notifications at a later stage if it is satisfied that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct. This assessment has been made on the basis that AAI Limited, APIA Pty Ltd and any Recommended Repairer will disclose all relevant terms and conditions to prospective customers."*[25]

Having regard to the specific behaviours highlighted above and their practical impacts, the ATI believes that a more detailed investigation would suggest that the disclosure requirements identified are not being fully met and that net costs are, in fact, the result of this admittedly anti-competitive behaviour.

A further competitive issue in relation to insurance industry conduct is also emerging. This is the apparent move from the current model of exercising market power in respect of independent accident repairers toward one where the insurance industry becomes vertically integrated by taking ownership interests in a number of repairers and wrecking yards[26]. This emerging behaviour has the potential to further constrain consumer choice of repairer, both by leading to an increase in the

[24] See notifications N96828 & N96829. Details at: http://registers.accc.gov.au/content/index.phtml/itemId/1119809/fromItemId/1107038.
[25] http://registers.accc.gov.au/content/index.phtml/itemId/1119809/fromItemId/1107038/display/acccCorrespondence.
[26] See, for example, the interview of Reuben Aitchison, AAMI Corporate Affairs Manager, by Tom Elliott (3AW), attached to this submission.

pressure applied by insurers to use their preferred repairers and by threatening the continued existence of independent repairers.

Other conduct issues

Other conduct issues also arise as a result of the insurance companies' business model of seeking to control all aspects of the accident repair process. A common concern is that the vehicles of not at fault third parties are frequently removed from the accident towing depot without the knowledge of the vehicle owner. These removals are often initiated by the insurer of the at fault party and are intended to ensure that the vehicle repairs, for which they have accepted liability and are undertaken within their own preferred repairer system, rather than through a repairer chosen by the not at fault party. A number of concerns arise from this conduct.

First, owners frequently experience significant difficulty in obtaining access to their vehicles and to whatever personal effects they may contain. Simply determining where their vehicle has been taken can be a time-consuming and difficult process, with an uncertain outcome. Moreover, the vehicle will in many cases have been taken to a distant location, which the owner may find difficult to reach, particularly in circumstances in which the damaged vehicle may be their only source of private transport.

Second, frequent complaints from vehicle owners would suggest that vehicles that have been removed in this way are often subject to further damage due. This is due to unprofessional handling practices such as vehicles are being moved around storage facilities using forklift trucks.

The ATI submits that these issues are of sufficient concern as to justify consideration being given to a change to the accident towing legislation that would prohibit a vehicle being removed from the place to which it had initially been towed without the written authorisation of the vehicle owner, or the owner's appointed agent.

2.4. Nature and extent of the problem

A key principle of good regulation is that, prior to regulatory action being undertaken, the size of the policy problem should be assessed and that it should be demonstrated to be sufficiently large as to justify regulatory intervention. A second, related principle is that of proportionality: the regulatory intervention proposed should be proportionate to the extent of the identified problem. The ATI believes that the material presented in the draft report is insufficient to demonstrate consistency with these principles in relation to Recommendation 7.

Data on the allegedly higher costs of accident repair work that is not managed by the insurance industry are presented on pp 105-6 of the draft report. Figure 4.1 presents monthly data from Suncorp Insurance covering calendar 2014. An unweighted average of these data points suggests that accident repair work not managed by the insurance industry is 120% more expensive than that which is. However, on p. 106 the ESC reports that "the other major motor vehicle insurer in Victoria", IAG, estimates this excess cost as only 40%, or one third the proportionate amount estimated by Suncorp. Neither of these estimates – nor any other material found in the draft report – appears to support the statement made by the ESC itself in the Overview and Draft Recommendations section of the report, that:

> *"Information from insurers indicates that repair and related costs (e.g. rental cars) from these smash repairers can be 100 to 400 per cent higher than insurer managed claims."*

Thus, different parts of the draft report provide estimates of the allegedly greater costs of accident repair activity not managed by insurance companies which vary in size by an order of magnitude, while no specific citation appears to be provided anywhere in the report to support the above statement made by the ESC itself in the overview section.

Further, there is little evidence of the aggregate size of the alleged problem. The only comment made in this regard in the draft report is the following comment (p. 105):

> *"Figure 4.1 illustrates that repair costs are approximately doubled when handled by these third party networks. Suncorp states that this represents tens of millions of dollars in claims per year."*

Having reviewed the original submission from Suncorp which the ESC cites in support of the comment[27], several points can be made:

- First, the graph accompanying this statement purports to show a significant increase in the dollar value of "demands received from third party recovery agents", but covers a very short period of approximately 22 months. This inevitably raises the question as to whether a real, medium-term trend can be identified or if the very short time-period covered has been chosen with a view to creating an impression that is not supported by longer-term data;
- Second, the graph reports demands received in percentage terms, against an unidentified base date. This inevitably casts doubt on its meaningfulness in supporting Suncorp's statements, particularly given that the company has apparently deliberately chosen not to report actual dollar values;
- Third, in a context in which actual dollar values are clearly known to the company, the use of a deliberately vague general statement such as "*These costs now run into the tens of millions per year*" inevitably calls into question its *bona fides* on this point.

Similarly, given the data analysis required to compile Figure 4.1[28], it would necessarily have been open to Suncorp to state the actual incremental cost incurred by it during 2014. The fact that Suncorp have not stated the actual incremental cost incurred during 2014, necessarily casts the size of the identified problem into significant doubt.

More fundamentally, the above comment from the draft report appears to misrepresent the comments made in the Suncorp submission. Suncorp states that:

> *"The chart clearly demonstrates significant growth in costs associated with claims managed by third-party repairers, solicitors and recovery agents associated with the practice of capturing cars. These costs now run into the tens of millions per year…"*

This statement indicates that the *total* cost of claims managed by third party repairers, solicitors and recovery agents run into the tens of millions. However, the above comment from the draft report clearly suggests that the *incremental costs* associated with third party management of claims runs

[27] Suncorp submission of 28 November 2014, p 4. Note that the draft report mistakenly cites this statement as coming from the Suncorp supplementary submission of 5 May 2015, p 2.
[28] Figure 1 in the Suncorp Supplementary Submission of May 2015.

into the tens of millions. The difference is clearly significant and further undermines the value of the evidence presented.

There has also been no attempt made to place the claimed total incremental cost of "overpriced" repairs within the context of the overall level of turnover of the industry. Given industry turnover is in the vicinity of $1.3 billion annually in Victoria, even a figure of "tens of millions" of dollars, as suggested by Suncorp, would represent a very small percentage increase. For example, if Suncorp had received claims from third parties totalling, say $30 million over 2014 and these claims involved repairs that were twice as costly as insurer managed claims, this would imply an incremental cost of $15 million, or a little over 1% of aggregate accident repair costs. Importantly, the repair quality issues raised above necessarily suggest that much of this modest increase in repair costs would be the result of these repairs having been carried out to a higher (i.e. appropriate) quality standard.

It is also important to note that consumers having had an at fault accident are able to undertake their own assessments of these vehicles. In contrast to the assumption that appears to underlie the draft report, insurance company assessors do have access to all damaged vehicles owned by their insured drivers or being repaired at their expense. In practice, insurance company assessors carefully scrutinise and audit all repairs which insurers are, or are likely to be, liable to fund. Thus, the distinction highlighted by the insurance companies is, in effect, between repairs that their assessors scrutinise and audit and those carried out completely within their control, using either the preferred repairer system or, as is increasingly the case, the joint-venture repairers which are at least in part, owned by the insurance companies themselves.

Finally, a vehicle insurance and accident repair industry Code of Conduct has been in place for most of the past decade, having been adopted in response to the 2005 report of the Productivity Commission's inquiry into the relationship between the vehicle insurance and accident repair industries[29]. The Code[30] is widely followed within the ATI and is updated from time to time to respond to emerging issues. To the extent that the insurance industry or the ESC believes that there are conduct issues within the industry, including those discussed in the draft report, it is open to them to engage with the ATI through the Code Administration Committee. As the insurance industry is represented on the Code Administration Committee, these issues could then be addressed explicitly in an updated edition of the Code of Conduct. Despite the concerns apparently expressed to the ESC by the insurance industry, we are not aware of any recent attempts by insurers to engage constructively with the accident repair industry in seeking revisions to the Code of Conduct.

2.5. Analysis

The material contained in Chapter 4 of the draft report, and analysed above, provides very limited support for the proposition that significant consumer harms are occurring as a result of the repair of vehicles being carried out in contexts that are not fully under the control of the insurance industry. Two insurance companies have provided widely differing estimates of the extent to which repairs managed by third parties allegedly inflate costs, while neither has provided data on the number of claims received, the total cost of such claims or the (alleged) total incremental costs said to be

[29] http://www.pc.gov.au/inquiries/completed/smash-repair/report/smashrepair.pdf
[30] For a copy of the Code, as well as significant detail on it, including the results of independent reviews, see: http://www.abrcode.com.au/

incurred. Moreover, this very limited and unsatisfactory evidence must be set against the significant evidence presented in Sections 2.1 – 2.3 above of a major incidence of compromised repair quality due to the conduct of the insurance companies. While there is also significant uncertainty as to the extent of the specific harms identified, the ATI believes that this conduct is likely to be contributing to substantially larger consumer harms than those identified by the insurance industry and discussed in Section 2.4.

Taken together, these factors do not provide support the Commission's recommendation to limit the range of locations to which an accident damaged vehicle can be towed. Moreover, the context suggests that it is essential that the ESC also weigh the potential for the adoption of Recommendation 7. Recommendation 7 will contribute to a further strengthening of the insurance industry's ability to exercise market power in ways that cause significant consumer detriment.

Given the significant limitation on consumer choice that the adoption of Recommendation 7 would entail, as acknowledged by the ESC Chair publicly[31], the principle of proportionality requires that strong evidence of the existence of a substantial problem that cannot be effectively addressed via less intrusive measures be demonstrated. The ATI does not believe that this test has been met, particularly given that the draft report specifically identifies two less intrusive measures which seek to address the same issue, via Recommendations 5 and 6. This issue of concern is discussed further in Section 4.

[31]ESC Consultation Forum, Rydges Hotel, 5 November 2015.

3. Licence values

3.1. Relevance of accident towing licence values

Chapter 2.5.1 of the draft report presents an analysis of accident towing licence values, purportedly undertaken as a proxy for industry profitability. The analysis concludes that recently observed accident towing licence values are larger than would appear to be warranted given estimates of the capitalised value of the expected flow of revenues from accident towing activities alone. On this basis, it concludes that these figures suggest "*that traded values for accident towing licences are influenced by more than just accident towing profits*." It goes on to state that tow truck operators with whom it has consulted "*have indicated that the value of owning an accident towing licence is largely in the smash repair work at it brings in (rather than the accident towing work itself*)." (p. 57).

No explicit policy implications are drawn from this analysis. However, when read in the context of other elements of the draft report, notably that contained in Chapter 4, it appears that the ESC has concluded that the observed licence values imply both the existence of excess profits in the accident repair industry and the transfer of some proportion of these profits to accident towing operators, suggesting that they contribute to their generation. By implication, the ESC appears to have used this part of its analysis to support its view that Recommendation 7, limiting accident towing destinations, should be adopted. The ATI believes that the analysis provided in Chapter 2.5.1 is incomplete and that a full analysis of this issue does not support the conclusions apparently drawn by the ESC.

The ATI does not dispute the asserted linkage between the accident towing and accident repair industries. However, available evidence suggests that the extent of this linkage is substantially smaller than is often suggested, particularly by insurance companies. One significant ATI operator who also operates an accident repair business has provided the following data, which are presented as an indicator of the typical extent of the linkage between accident towing and accident repair businesses where an operator engages in both.

Table 3.1: Accident tows and vehicles repaired: Year to September 2015

Vehicles	Number	% of total	% of retained
Total towed	1,297	100%	
- Insured	851	65.6%	
- Uninsured	446	34.4%	
Retained by repairer	104	8.0%	
- Repaired	68	5.2%	65.4%
- Written off	15	1.2%	14.4%
- To other repairers	4	0.3%	3.8%
- Carried forward	17	1.3%	16.4%

Table 3.1 shows around two thirds of the vehicles towed by this operator were insured and one third uninsured. Only 8% of the vehicles towed were initially retained by the accident repair business also operated by this accident towing operator. Fewer than two thirds of this number, representing around 5.2% of the total number of vehicles towed, or 68 vehicles over a 12 month period, were

ultimately repaired by this related accident towing business. This data clearly suggests that the ability of accident towing businesses to use these businesses to generate additional turnover for associated accident repair businesses is quite limited in practice. By implication, suggestions that improper behaviour associated with this dynamic constitutes a major source of consumer harm and significantly increases the average cost of accident repairs are difficult to sustain.

Moreover, to the extent that there are linkages between accident towing and accident repair businesses, these are arguably most likely to have an overall pro-competitive impact in the context of the market structure and conduct described above. The draft report highlights the fact that some 89% of the value of accident repair work is funded through insurance companies and that 68% of the value of all accident repair work is carried out by the insurance companies' "preferred repairers" (p. 60). In this context, the ability of accident towing to perform a "marketing function" for accident repair businesses which are excluded from, or choose to remain outside, these preferred insurer arrangements is likely to be highly important to the survival of these businesses.

By implication, it is also likely to be a key means of preventing insurance companies arriving at a position in which they are able to exercise almost complete market power over the accident repair industry. Thus, provided that the "marketing function" of the accident towing licence is carried out in accordance with the legislation (e.g. that touting does not occur) it may well have a positive effect on the market and does not obviously constitute a problem to be addressed by policy. That is, its key impact in terms of business viability is likely to be in terms of ensuring that minimum efficient scale is reached and in enabling some of the cost sharing opportunities identified in the draft report to be captured, rather than in enabling above-normal profits to be generated through unduly high prices being charged on individual repair jobs.

Finally, even if good evidence were available of the existence of above-normal profits being earned in the accident repair industry due to misleading or deceptive practices, the principles of good policy would indicate that any regulatory response should directly address the industry of concern – i.e. accident repair – rather than seeking to address the problem indirectly through changes to the regulation of the accident towing industry.

3.2. Analysis of the value of accident towing licences

The historical data on the value of Controlled Area accident towing licences presented on pages 45 and 46 of the draft report is subject to only limited analysis, while additional conclusions can and should be drawn from it. In particular, the Commission's discussion of the licence value data for the period 2002 – 2015[32] highlights the rapid growth in licence values through much of this period, but fails to address the apparently substantial decline in values since 2012.

Analysis of Figure 2.6 shows that the average traded value of a licence in the four years to 2012 was around $380,000[33]. However, by 2014, the average traded value had fallen to around $312,500, a decline of around 18% in nominal terms and more than 20% in real terms. Moreover, while the data for the early months of 2015 include only a small number of observations, the reported average value of approximately $245,000 is more than 35% below the average for the four years to 2012,

[32] See figure 2.6 and table 2.9.

[33] Average values cited are approximate only, given that they are calculated based on visual inspection of figure 2.6, rather than the data upon which it was based.

and suggests a continuation – and possible acceleration – of this apparent trend of declining licence values.

While there are risks in inferring the existence of real trends from relatively short-term data, key industry dynamics discussed in the draft report and in this submission clearly provide a conceptual basis for expecting such a decline. In particular:

- the increasing use of preferred repairer schemes – and increasingly joint venture repairers – by insurance companies, supported by pressure applied to insured drivers by insurers to agree to the use of preferred repairers, reduces the potential for accident towing to generate additional accident repair work for businesses operating outside such schemes; and,
- the overall context is one of declining accident repair industry revenue, as noted on page 59 of the draft report and elsewhere. For example, Deloitte Access Economics reports that turnover in the industry fell from 0.19% of GDP to 0.15% of GDP in the decade to 2010-11[34].

Table 2.9 of the draft report indicates that there has been a very large increase in the number of licences traded within the allocation area, with 39 trades in the first five months of 2015, compared with 21 in the whole of 2014 and only 10 in 2013. The observation of rapid turnover at a time of significantly declining licence prices could be seen as an indicator of widespread concern as to the future profitability of the industry and also tends to support the above analysis[35].

The ESC provides little discussion of the reason for the increases in licence values observed in the period to 2012, but appears implicitly to assume[36] that they reflect an increasing ability on the part of licence owners to generate additional revenues from the accident repair industry. However, the progressively increasing degree of control over the industry exercised by insurance companies over much of this period discussed above, casts doubt on such a conclusion.

A reasonable alternative hypothesis is available. Review of Figure 2.6 indicates clearly that the substantial majority of the observed increase in licence values occurred between 2009 and 2012. This period coincided with the onset of the global financial crisis and the associated substantial reduction in official interest rates. This meant that expected rates of return on relatively low risk assets (e.g. bonds) fell substantially. Given the broadly stable nature of the expected revenues from an accident towing licence, it is unsurprising that the price of the licence was bid up over this period. That is, in a lower interest rate environment, investors are willing to pay a higher price for the given revenue stream associated with the licence. The average transfer value of a licence rose around 77%, from $215,000 to $380,000, between 2008 and 2012, while the official Reserve Bank cash rate fell from around 7.25% to 3.5% over the same period[37], a change of broadly similar magnitude. This factor may constitute a large part of the explanation for the observed increase in licence values.

A comparison of the average traded value of an accident towing licence in 2008, immediately prior to the onset of the GFC, and that reported by the Commission for early 2015 also underlines the plausibility of this alternative hypothesis: adjusting the 2008 average value of around $215,000 by the Melbourne CPI[38] yields an equivalent value in current dollars of approximately $240,000. This is almost identical with the average traded value of $245,000 reported by the Commission for early

[34] Deloitte Access Economics (2011), op. cit., p. i.
[35] Note that a large proportion of the licences transferred during 2015 were purchased by the Sheengroup Towing.
[36] Given, in particular, the subsequent attempt to estimate the "fair value" of licences.
[37] Mid-2012 cash rate compared with mid-2008 cash rate.
[38] Melbourne all groups CPI June 2015/June 2008 = 107.1/91.8 = 1.117, or an 11.7% increase.

2015. That is, the current value of an accident towing licence is essentially unchanged, in real terms, from its pre-GFC value of seven years ago.

Licence values and towing fees

While the current inquiry does not specifically address the size of the regulated fees set in the control area, the ATI notes that the above evidence of declining licence values does have implications for future fee-setting. In its 2013 fee review, the ESC indicated that it had moved away from the cost-based approach to fee setting used by it in earlier reviews, in favour of a benchmarking approach. Moreover, it notes that:

> *"The Commission has analysed various aspects of industry performance in order to assess the need for any fee change. Key issues included licence values and changes in industry productivity."*[39]

This approach apparently views licence values as a proxy for industry profitability, with the high licence values observed in the period to 2012 having contributed to the ESC's view that "current fee levels are reasonable".

In this context, the above evidence of significant declines in licence values presumably suggest to the ESC that there is a need to consider the case for increased licence fees in the short term.

[39] Essential Services Commission (2013). ***Periodic Review of Accident Towing and Storage Fees: Final Report***, p. 4**.** July 2013.

4. Critical assessment of the proposal to limit towing destinations

4.1. Evidence of consumer harms

The importance of the above discussion of accident towing licence values lies in its apparent influence on the ESC's conclusions, particularly as reflected in Recommendation 7 of the draft report, which would limit the locations to which a driver could have a vehicle towed following an accident. The recommended limitation on the destinations to which a damaged vehicle can be towed appears to derive from a concern to enhance consumer protection. The draft report indicates that the ESC has taken the view that rising licence values, together with evidence provided by the insurance industry regarding the supposedly high cost of accident repairs not controlled by the insurance industry, are indicative of the existence of excess profits in parts of the accident repair industry and, consequently, of significant consumer harms which could justify substantial regulatory change. The above discussion, which provides additional evidence and alternative views on both of these issues, should encourage reconsideration of the appropriateness of Recommendation 7.

Three additional factors should be weighed in this context. First, the VACC stated, in its submission in response to the ESC Issues Paper, that "*…most smash vehicles return to the licensed accident tow truck operator's depot, with almost 100% returning to the depot after business hours…*". This suggests that the adoption of Recommendation 7 may affect a relatively limited proportion of accident tows, as towing to the operator's depot would remain permissible in this case.

Second, the alleged market dynamic giving rise to this recommendation appears to be one in which drivers – and particularly not at fault drivers – are pressured, at a vulnerable time, into signing authorities to repair nominating repairers who operate outside insurance companies' preferred repairer arrangements. However, the potential extent of this dynamic is limited by the fact that Section 154 of the *Accident Towing Services Act 2007* provides the vehicle owner with a three-day "cooling off" period, during which the agreement to repair the vehicle may be terminated. This provides an important measure of consumer protection. Significantly, no prosecutions are known to have been undertaken due to complaints that the cooling off requirements have not been respected. Moreover, no complaints are known to have been made to any regulating body, in relation to these requirements. The adequacy of this cooling off period can also be assessed having regard to the fact that its length is the same as that applying to real estate transactions, which typically involve much larger financial commitments[40]. The existence of this alternative form of consumer protection necessarily raises a question as to the necessity for the adoption of additional provisions such as those envisaged under Recommendation 7.

Third, consistent with this observation of the existence of important consumer protections, the overall number of complaints regarding participants in the Accident Towing Industry received by VicRoads is very small in relative terms. The draft report notes that, between 2011 and 2014, VicRoads received between 80 and 108 complaints per annum. Given the ESC's estimate that approximately 60,800 accident tows are undertaken within Victoria annually (draft report, p. 92), this is equivalent to a state-wide complaint rate in the vicinity of 0.15%.

[40] Section 154(2) provides that the cooling off period can be truncated where the driver signs an explicit waiver to this effect. However, such a waiver can only be signed after one *business* day has elapsed since the original authority to repair was signed – a period that could account for up to three calendar days. Overall, this provision does not seem greatly to limit the degree of consumer protection afforded by Section 154.

It is clear, therefore, that the Accident Towing Industry is characterised by a very low complaints rate, which is particularly impressive in a context in which interactions between consumers and the industry invariably occur in a stressful context.

Moreover, the complaint numbers for the Accident Towing Industry cited above cover complaints about all aspects of accident towing services, while anecdotal information suggests that only a small minority of this total relates to touting related issues. Indeed, a former VicRoads official consulted in the preparation of this submission suggests that only around 10 touting related complaints are received annually and that only around half of these result in substantive investigations being undertaken. The ESC may wish to verify this statement directly with VicRoads.

By way of comparison, the Financial Ombudsman Service (FOS) reports that 38% of domestic insurance-related complaints received in 2014-15 related to motor vehicle insurance[41]. This is equivalent to approximately 2,433 complaints received nationally about motor vehicle insurers. While no state-by-state breakdown is available, it can be inferred that around one quarter of this total, or over 600 complaints, were made about the conduct of motor vehicle insurers in Victoria – or more than six times the number made about the Accident Towing Industry. Moreover, these numbers would substantially underestimate the incidence of complaints against motor vehicle insurers, in that they necessarily exclude both:

- complaints resolved via the internal complaints review process in which the FOS legislation requires complainants to participate before they are able to lodge a complaint with the FOS; and,
- complaints that are brought directly before the court system, without prior reference to the FOS.

In sum, the available complaints data does not support the proposition that consumers are experiencing significant problems as a result of abuse of the authority to tow/repair mechanism by participants in the Accident Towing Industry. Again, this suggests the need to reconsider the case for adopting Recommendation 7.

4.2. Practicability of Recommendation 7

A further issue in relation to Recommendation 7 is that of whether it would be practicable to implement it. One potential area of concern is that owners of damaged vehicles may wish to have their vehicle towed to a destination other than one of the limited destinations available under the recommendation, and thus they could refuse to sign the authority to tow and instead attempt to make their own arrangements to move their vehicles from the accident scene. In such circumstances, there is a clear likelihood that an accident scene which remains uncleared would give rise to risk to other road users and/or congestion over an extended period. Moreover, private attempts to clear the scene could themselves give rise to further risks. Alternatively, it would potentially be necessary for the police or other authorities to be able to compel the owner to accept the services of the accident tow truck.

A second potential response on the part of vehicle owners who wished to have their vehicle delivered to a location other than that allowed under Recommendation 7 would be to sign an

[41] Financial Ombudsman Service Australia (2015). ***Annual Review 2014-15.*** See p. 64. http://fos.org.au/publications/flipbooks/annual-review/2014-2015/index.htm

authority to tow the vehicle to the permitted destination and, at the same time, to arrange a subsequent trade tow to take the vehicle from the initial destination to the one which they preferred. Indeed, given that most accident towing businesses also operate in the trade towing market, there would appear to be little to prevent both of these notionally separate tows being carried out by the same truck. That is, it is conceivable that the only impact of adopting this recommendation would be to require the vehicle to pass by one of the approved tow destinations on its way to the preferred final destination. To the extent that this dynamic plays out in practice, the only impact on the consumer would be to increase the total price of having their vehicle delivered to their preferred destination. The principles of good regulation suggest that largely unenforceable measures should not be included in regulation. Moreover, in this context, good regulation should aim to limit total impact and cost to consumers, not increase it.

4.3. Freedom to contract

A significant concern in relation to the adoption of Recommendation 7 is that it would imply a significant limitation on the freedom to contract of the owners of accident damaged vehicles. That is, they would no longer be able to choose freely where their vehicles would be taken from the site of the accident, instead being limited to the narrow range of options proposed in the draft report. Such a limitation can be regarded as particularly significant given that the motor vehicle is, for the majority of people, the second most valuable asset in their ownership.

As a general proposition, good regulatory policy suggests that governments should be reluctant to limit freedom to contract, since such limitations necessarily entail a substantial risk of reducing economic welfare. That is, freedom for individuals and companies to make economic choices is generally considered to be a prerequisite for economic welfare maximisation, while the circumstances in which limitations on such freedoms are likely to yield net benefits are relatively limited in number and scope.

Given this presumption, relatively high thresholds should be met in justifying the need for this type of intervention. In particular, these should entail:

- consideration of the issue of proportionality. It should be demonstrated that the size of the problem being addressed is sufficiently large as to justify such a significant policy intervention. This issue is explicitly acknowledged by the Commission in the draft report (p. 95); and,
- consideration of alternative policy options. It should be demonstrated that no alternative policy option is available which could achieve the underlying objective whilst being less restrictive of economic freedom of action.

The ATI believes that the draft report fails to demonstrate that either of these threshold tests has been met. The above discussion casts significant doubt on the proposition that accident repairs undertaken outside insurance company control impose significant net costs on consumers, while the draft report itself proposes alternative policy options which are less restrictive of consumer freedoms and potentially capable of addressing any concerns over consumer welfare. Specifically, Recommendation 5 proposes that VicRoads should amend the *Authority to Tow* document to include a new page of warnings and revise the VicRoads accident towing fact sheet, while

Recommendation 6 proposes that VicRoads should work with insurers to encourage and support the development of an education campaign about what to do at an accident scene.

These two recommendations can both be considered to constitute light handed regulation, in that they are oriented toward ensuring (and mandating, via regulation, in the case of the former recommendation) the provision of information to the relevant consumers. A general principle of good regulation is that less interventionist approaches should be favoured where there is evidence that they are likely to be able to achieve the underlying regulatory objective. Given that the Commission has recommended both of these interventions in its draft report, we infer that it believes that they are capable of addressing concerns over consumer welfare in this area. Thus, it would appear preferable to implement these two recommendations and assess their practical effectiveness before determining whether more substantial interventions, such as those proposed in Recommendation 7, are required. Section 4.4, below, addresses the merits of Recommendations 5 and 6.

4.4. Amended Authority to Tow and Public Education campaign

The draft report appears to envisage the adoption of Recommendations 5 and 6 as complements to Recommendation 7, in that they are oriented toward the achievement of the same consumer protection objectives. However, these two recommendations can and should instead be seen as alternative and less interventionist means of achieving the identified objectives.

The ATI generally supports Recommendations 5 and 6. While the proposition that significant consumer harms are currently resulting from poor practices in the accident repair industry is doubtful, the ATI supports the principle that consumers should be in a position to make informed decisions at all times and, consequently, supports mechanisms that will improve the information available to them. The inclusion of a page of warnings with the *Authority to Tow* and the modification of the existing accident fact sheet constitutes a proportionate approach, in that it can be implemented at limited cost, while the education campaign proposed in Recommendation 6 would apparently be funded by VicRoads, potentially with support from the insurance industry.

However, we believe that it is essential that the accident towing industry be closely involved in the design of the relevant initiatives. This will ensure that the warning page, the fact sheet, and any educational campaign, are informed by a sound understanding of key industry dynamics and that there is industry support for the resulting materials.

The proposed *Authority to Tow* warning page found on page 116 of the draft report illustrates some of the ATI's concerns in this regard. It is common ground among stakeholders and an implicit element of the objectives of the *Accident Towing Services Act 2007* that a key consideration in relation to accident towing is to ensure timely clearance of the accident scene. ATI participants report that they frequently come under strong pressure from police and other emergency services personnel to remove damaged vehicles while attempting to comply with existing requirements by securing the necessary *Authority to Tow*. In this context, it is essential that the proposed warnings page be concise and clear, so that they do not become a source of significant delay to the accident clearance process.

The proposals contained in Box 4.3 of the draft report clearly risk such an outcome. They are lengthy, occupying a full page, and address a number of technical issues of potential legal liability.

Significantly, the tone of the material, particularly when combined with the extensive use of CAPITALISATION, **BOLD TEXT** and **UNDERLINING** risks creating a strong sense of disturbance in a driver likely already to be in a stressed state due to having just been involved in a collision. Drivers faced with such material could, in many cases, find the detail provided difficult to comprehend on initial reading and, due to the tone and presentation of the material, be reluctant to sign either the warning page or the *Authority to Tow*.

While it is not the purpose of this submission to provide detailed input on the implementation of Recommendation 5, there is a strong argument that the warning page should be limited to the following key elements:

- You are required to sign an Authority to Tow before your vehicle can be moved from the accident scene, however, such an authority is separate from an authority to repair your vehicle;
- Given the high cost of accident repairs and potential questions as to who will ultimately be liable for those costs, you should avoid signing an authority for your vehicle to be repaired until you have taken advice;
- Some insurers require you to notify them of the accident prior to authorising repairs and may dispute their liability to fund repairs if this is not done; and
- If you do sign an authority for your vehicle to be repaired, you may rescind this Authority at any time within the 3 day "cooling off" period which the law allows.

The ATI seeks to be involved in the development of the warnings page and the revised VicRoads fact sheet, should Recommendation 5 be implemented.

5. Accident allocation

5.1. Overview

Recommendation 2 of the draft report is that:

> *"In the Controlled Area, VicRoads should at least every three years analyse allocations and adjust allocation zone boundaries to more closely match a proximity-based allocation scheme. The long term aim should be to allocate accident tows based on proximity — that is, the tow would be allocated to the depot nearest to the accident with a licensed tow truck ready for dispatch."*

Recommendation 3 is that it should no longer be necessary for VicRoads to approve applications for the relocation of depots or of accident towing licences and that accident towing licences should no longer be required to be associated with any particular depot. These two recommendations are closely linked and, consequently, are considered together below.

The ATI opposes these recommendations on two grounds. First, even if adopted successfully, with market responses to the regulatory change that were broadly in line with the ESC expectations set out in the draft report, these changes would give rise to significant costs which have not been identified or weighed. As a result, there would be a strong probability that implementing the recommendations would yield net economic costs, rather than the net benefits suggested. Second, the discussion of the expected impact of adopting these recommendations takes no account of the substantial impediments to depot relocation that arise from urban planning processes.

These issues are discussed in turn below. However, when weighing the merits of a potential move toward proximity-based allocations, it is important to highlight the fact that the draft report finds that current industry performance is generally good, with a high level of service reliability and a strong and generally improving performance in terms of the timeliness of accident clearance. This generally strong current performance necessarily limits the likely extent of the benefits obtainable via the implementation of these recommendations.

5.2. Impact of implementing Recommendations 2 and 3

5.2.1. Expected market response

The draft report sets out some detail on the ESC's view of the likely industry response to the adoption of these recommendations. However, the statements made appear to imply contradictory views as to the size of the expected market response. The draft report acknowledges that depot relocations will occur as industry participants seek to maintain or improve their position in the context of a move toward a proximity-based allocation system. At some points, it suggests that the extent of this relocation will be limited, for example stating on page 85 that:

> *"…the transitional costs (associated with depot relocation) of introducing proximity-based allocations may be low."*

However, elsewhere the report highlights the extent of the potential disruption to the industry by arguing the need for a phased approach to minimise this issue. At page 23 it states that:

> "…*phased introduction may reduce the disruption that could be caused by the sudden introduction of this approach*" (p 23).

In fact, Recommendation 2 implicitly calls for this phased introduction to occur over a period of a decade or more[42], suggesting that the ESC envisages the prospect of this disruption being substantial.

A key issue is the potential for relocation of both depots and licences. The draft report suggests (page 85) that the number of depot relocations would likely be low as inner urban areas that have higher accident numbers also currently have large numbers of depots and licences located in them. This implies a view that current depot locations are reasonably consistent with the adoption of a proximity based approach and that there would be little economic pressure for change. However, this appears to be an unduly optimistic view, which is contradicted by data contained both in the draft report itself and in VicRoads publications.

Page 207 of the draft report highlights the current wide variation between depots in the average number of tows allocated per licence per month, with the average number of tows varying by a factor of more than 2:1. VicRoads data for 2015, presented in Table 5.1 (below), indicates that, when all depots are taken into account, the ratio between most and least tows per licence in any given month is generally between 3:1 and 4:1. Given the removal of regulatory impediments to the movement of licences and depots, significant movement in pursuit of higher numbers of allocations might be expected.

Table 3.2 of the draft report shows that 13 of the 46 depots located within the Controlled Area would suffer a loss of allocations of at least 30% under a proximity-based system. At a minimum, it could reasonably be assumed that most or all of this group would seek to relocate their operations. Such relocations could also be expected to have "knock on" effects under a proximity-based scheme, as depots negatively affected by the opening of new or relocated depots in the vicinity sought to respond strategically. In sum, it seems likely that there would be wholesale relocations were a proximity-based allocation system to be adopted.

5.2.2. Expected costs

This would necessarily give rise to significant costs, including the costs of equipping premises to meet the operational and legislative requirements for depots and the transitional costs of relocating an existing business to new premises, embracing both operational disruption and the costs associated with ending and establishing property and other leases. The ESC has acknowledged many of these costs on page 84 of the draft report.

[42] That is, the recommendation envisages a number of three-yearly reviews and revisions to the current allocation zones being conducted by VicRoads, albeit that the likely number of these cycles of transitional change is not identified.

The number of depots in the Controlled Area fell by 23, or 33%, in the 10 years to 2014 (draft report, table 1.3). Thus, there is currently an average of 9.2 licences per depot, compared with 6.3 in 2004. However, ATI participants have indicated that a strategic response to a move toward proximity-based allocation would likely be for each operator to maximise the number of depots across which their licences are allocated, in order to attempt to maximise the number of accident allocations received. If Recommendation 3 were also to be adopted, so that VicRoads was no longer required to approve the movement of depots or licences, there would be no regulatory impediment to such wholesale changes in depot or licence location.

Thus, most existing depots and licences could potentially be relocated and the number of depots could rise significantly, possibly to a number significantly higher than the 69 that operated in 2004. While Table C3 in the draft report indicates that most licence holders currently operate from one, or at most two, depots, the change to proximity-based allocations will provide them with strong incentives to increase the number of depots that they use.

This has two important cost implications. First, the quantum of the relocation costs identified above could be very much larger than anticipated. Second, it is likely that the significant consolidation of depots that has occurred over the past decade was undertaken largely in pursuit of efficiency gains from economies of scale and/or scope. These gains will be lost if the market response predicted above is realised. Indeed, if depot numbers were to expand to a point that significantly exceeds the number in place in 2004, the efficiency losses would presumably be greater than the gains which have resulted from the consolidation occurring over the last decade.

Another implication of this dynamic is that an outcome in which there was a proliferation of depots, each with only a small number of licences attached to it, would presumably give rise to a situation in which the closest depot would be unable to respond in a significant proportion of cases, thus requiring reallocation to the next closest depot. To the extent that this occurs, the logic of the move toward proximity-based allocation is arguably undermined.

From the perspective of individual operators, there will be an incentive to undertake depot relocations as long as the gains from additional towing allocations (including any flow-on benefits in terms of accident repair revenues) exceed the sum of the transitional costs of relocation and the expected loss of scale/scope economies. However, from the perspective of the ATI as a whole, this dynamic of individually rational responses to the incentives created by the change in allocation method is clearly a negative-sum game[43].

Unattached licences

A further source of potential costs relates to unattached licences. The draft report notes (p. 139) that around 40% of accident towing licences in the Controlled Area are currently unattached. That is, while there are 421 licences, there are only 252 licences attached to accident towing vehicles. The

[43] It is acknowledged that, in the medium term, the failure of relocations to result in the allocation outcomes initially predicted, due to competitive relocations by competitors, would reduce the expected benefits of further depot relocations, hence their number and the extent of the net cost. However, it is likely that significant net costs would be incurred before such an equilibrium was approached.

practice of having unattached licences, which the draft report notes is still more widely adopted in the Self-Managed Area, has been adopted to improve resource utilisation. That is, it has been determined that it is feasible to provide services at the required quality level (i.e. attendance within 30 minutes) whilst employing a smaller number of vehicles than would be required if each licence were "attached" to a vehicle. Significant cost savings arise, in this circumstance, as a result of having a smaller number of trucks in service than towing licences.

A move to proximity based allocation system could lead to these cost savings being lost. While allocation arrangements currently include unattached licences, there is concern that the logic of proximity based allocations is such that allocations may only be made to "attached" licences. If this were to occur, however, it could be predicted that unattached licences would very quickly be attached to vehicles, as they would otherwise be without value.

Even if this approach were not taken, there would remain a strong dynamic favouring the attachment of currently unattached licences to vehicles. If operators seek to maximise the number of depots which they run in order to in turn maximise their number of allocations under a proximity-based system, most or all of the currently unattached licences would likely be attached to vehicles in order to achieve this outcome. This would be a necessary response if, as seems likely, the proximity-based system were to be implemented in a way that required a vehicle to be available at the closest depot in order for an allocation to be made. Thus, a move to proximity-based allocations could lead to a significant increase in the total capital costs of running the accident towing fleet. A review of the fixed costs of an accident tow truck, as estimated by the ESC in the context of its 2009 – 10 review of accident towing fees[44] suggests that these are of the order of $30,000 per annum per vehicle. Thus, if all 169 currently unattached licences were to be attached to vehicles, this would imply additional costs to the industry of the order of $5.1 million per annum. As these estimates were given in 2009 prices, an estimate of closer to $6 million in 2015 dollars is likely to be more accurate.

The scale of these potential costs, unidentified in the draft report, can be seen to be substantial when compared with the estimated $1.1 million maximum benefit to consumers of shorter average towing distance, which appears to have been an important consideration leading toward the ESC's adoption of Recommendation 2.

Allocation mechanism

The draft report highlights the fact that software costs would be incurred in changing the current allocation arrangements to reflect a more proximity based alternative:

> *"Introducing a proximity-based scheme would require the Controlled Area allocation body to amend the current computer system for allocating accident tows. Therefore, costs would be incurred in amending the system, testing and validating the system, and training staff. Given the simplicity of proximity-based allocations, these costs are not expected to be high." (p 84)*

[44] Essential Services Commission (2010). ***Review of Accident Towing and Storage Fees: Draft Report, Volume 1 – Overview of Recommendations and Findings.*** See p 9. The approximate figure of $30,000 relates only to fixed costs such as capital and financing costs, vehicle registration and TAC premiums, given that variable costs are unlikely to be greatly affected by an increase in fleet size.

The conclusion that these costs would not be "high" apparently overlooks the fact that Recommendation 2 is for a staged move toward proximity based allocations. This implies that the required amendments to the computer system would need to be undertaken several times during the transition process. When the impact of Recommendation 3 is also taken into account, this issue is underlined: If there is no impediment to the relocation of either depots or licences and substantial and frequent movement occurs, as predicted above, the need to account for these changes by more frequently updating the allocation algorithm will presumably arise. Any attempt to account for the locations at which tow trucks are garaged out of hours (see next section) would add further complication and cost.

5.2.3. Expected benefits

When measured against the significant expected costs identified above, the potential benefits highlighted in the draft report in relation to these recommendations appear small. The draft report states on page 23 that *"Our analysis indicates that a proximity-based approach would cut accident towing distances travelled in half***".** However, the discussion of this modelling presented later in the report (pp 86-88) shows that the actual reduction would be less than 39%, with the average distance towed falling from 18 kilometres to 11 kilometres.

Given the current regulated pricing structure, this would result in an average consumer saving of $23.10 (i.e. $3.30/km x 7 kilometres). This is equivalent to around a saving of only around 5% on the average towing cost, which itself comprises only a very small proportion of the cost of the accident repair process. Considered in aggregate terms, the maximum benefit of this change in terms of reduced towing costs would be less than $1.06 million per annum[45]. On the assumption that the regulated towing fees have been set efficiently, it can be assumed that this cost saving to the consumer also approximates the reduction in economic cost that would be experienced from the perspective of society as a whole.

The second, related source of benefit highlighted by the ESC is that of more rapid clearance times. Given a current average of around 70 minutes (draft report, Table 2.12), there does appear *a priori* to be some potential for more significant gains to accrue in this area. However, it is not clear how much of an average reduction in the distance travelled from the depot to the accident scene would result from the mooted change to the allocation system: while the ESC estimates a 7 km reduction in the length of the average tow, the reduction in the distance travelled from the depot to the accident scene is likely to be somewhat less[46]. As an indicative estimate, if a 4 km reduction in distance travelled from the depot is assumed, together with a 30 km/h average urban speed, this would imply an eight minute reduction in average clearance times: an improvement of around 11% on current performance. While not insignificant, the ATI submits that improvements of at least this order of

[45] The theoretical maximum benefit is equal to $23.10 multiplied by 46,000 accident tows. However, no consumer saving occurs where the length of the accident tows is already below the 8 km threshold above which the per kilometre rate is charged.

[46] That is, in a significant proportion of the cases in which insurance companies require the damaged vehicle to be sent to their preferred repairer, this repairer is likely to be located outside the allocation area, in some cases a substantial distance away. Thus, average towing distances are likely to significantly exceed the average distance travelled from the depot to the accident scene.

magnitude could be attained via measures that are much less costly and disruptive than would be the adoption of Recommendations 2 and 3, as discussed below.

The above indicative estimate of potential reductions in clearance times is predicated on the assumption that the starting point for an allocated tow is the depot to which the licence is attached. In practice, however, this is valid for only a proportion of allocations. Figure 1.4 in the draft report indicates that around 20,000 accidents occurred out of hours during 2013, compared with 27,500 during business hours[47]. In addition, it can be noted that the Figure does not distinguish between days of the week. Hence, a proportion of those accidents that appear to occur during "business hours" in fact occurred during the day on weekends. Accounting for this fact suggests that more than half of all accidents occur outside business hours.

The significance of this statistic lies in the fact that a substantial proportion of accident towing vehicles are garaged at the residences of their drivers outside business hours. While this practice is contrary to the regulations, operators must balance this non-compliance against the risk of being non-compliant with the core regulatory requirement for a 30 minute response time. That is, if an out of hours call is received and the truck is garaged at the depot, the driver on call must make two journeys – firstly to the depot to pick up the tow truck and secondly from the depot to the accident scene. The average elapsed time taken to complete these two journeys will clearly be greater than in the alternative case in which the truck is parked at his home and he makes only one journey, directly from there to the accident scene. Thus, the practice of garaging tow trucks at drivers' houses is efficient in itself and reduces the likely extent of non-compliance with the 30 minute response time.

However, the implication of this practice is that, for a high proportion of out of hours allocations, the location of the depot differs from the location of the tow truck. Thus, allocating the tow to the depot nearest the accident will not necessarily minimise the distance travelled to make the pick-up. Indeed, it is not clear that there would be any significant global reduction in kilometres travelled to reach the accident scene as a result of the adoption of proximity based towing. Thus, improvements in clearance times would be significantly smaller than suggested above – and potentially near zero – at least in respect of the approximately 50% or more of total allocations that occur outside business hours. As improved clearance times appear to constitute one of the most important sources of benefit attributed to proximity-based allocations in the draft report, this observation significantly weakens the case for this recommendation.

The above analysis suggests that a move to proximity-based towing would be likely to yield quite small, though not insignificant, benefits. Conversely, a foreseeable outcome of the likely substantial reduction in the number of licences per depot resulting from market responses to the change is that the nearest depot may often be unable to accept the allocation as the tow truck is unavailable. To the extent that this occurs, the predicted benefits of moving toward the allocation scheme will be diminished.

[47] i.e. 8am to 5pm. Estimates are approximate only, as they are derived directly from the graph, rather than source data.

Equity in service standards

A further issue in relation to the recommended move toward proximity-based allocation is that of the potential impact on service quality in the generally less well served outer areas of Melbourne. The ESC has itself noted (draft report, p. 84) that:

> *"…some operators may choose to relocate their depots closer to areas with more accidents (e.g. Melbourne CBD and inner suburbs), resulting in longer response times in outer suburbs. This may increase clearance times and road congestion costs in these areas."*

However, the draft report contains no further analysis of this issue. The probable industry response to any move toward a proximity-based allocation system, described above, suggests this impact on service levels in the outer urban area may be substantial. As these areas already receive a generally lower level of service, this is potentially a highly significant equity issue, which should be weighed further by the ESC in considering the merits of Recommendation 2.

5.2.4. Planning considerations

The above analysis is predicated on an expected market response from the ATI which implies a substantial number of depot relocations. This is broadly consistent with the assumptions underlying the analysis of this issue in much of the draft report, albeit that parts of the report suggest that more modest numbers of relocations might occur. However, there are major practical impediments to this form of market response. These derive from the approach to planning applications for accident towing depots taken by many metropolitan councils. Councils are often reluctant to approve such applications, presumably in response to actual or perceived hostility to these activities from nearby residents.

Anecdotal advice from ATI participants is that it is effectively impossible to establish a new accident towing depot in many municipalities within the Controlled Area[48], with those depots that are currently in operation benefiting from "existing use" rights that exempt them from planning restrictions that would otherwise prevent them from operating. In at least one case, an attempt to re-establish a depot that had been unused for a number of years at its existing location was unsuccessful as a result of planning restrictions in place and the inability of the depot to profit as before from existing use exemptions.

As a result of this dynamic few, if any, new depots are known to have been undertaken in recent decades, with the consolidation of depots highlighted above instead involving the movement of licences to other existing depots, rather than the establishment of new, larger depots.

These observations have a number of implications for the above analysis and the logic of Recommendations 2 and 3. Fundamentally, it raises the question of whether the recommendation could reasonably be adopted in the absence of changes to planning rules, or their application, to enable market adjustments to occur. In the absence of such changes, the following issues arise:

[48] A commonly cited example is the City of Stonnington and City of Port Phillip.

Market adjustment

If there is a very low level of mobility of towing depots, the ability of the industry to respond to changes in the geographical distribution of accident sites across the Controlled Area is clearly limited. Over time, this would necessarily reduce the extent to which a proximity-based allocation system could be maintained, thus undercutting the logic of the ESC's proposed approach.

Equity among depots/licence-holders

While the draft report questions the extent to which equity among licence-holders should be accepted as an objective to be weighed in determining allocations, there would necessarily be substantial concerns should a change in allocation mechanism lead to large changes in revenues to which accident towing businesses were unable effectively to respond. The modelling presented in the draft report (p 88) shows that, if a move to a pure proximity-based allocation system were adopted in the short term, one depot would lose 2,480 allocations per year, or 79% of its current total, and revenue of $1.1 million, plus any consequent loss of revenue accruing to a related accident repair business. A total of 13 depots would suffer losses of allocations of at least 30%, as noted above. The draft report notes (p 88) that the median loss of towing income by depots that would receive fewer allocations under a proximity-based system would be $157,000 per annum in towing revenue alone.

If depot relocations to preferred sites are not possible, the only response open to licence-holders facing substantial losses in allocations would appear to be to sell their licences to operators who have fared better under the changed allocation system. However, given that a high proportion of licences are held by owners of accident repair businesses, this response would not address the consequent losses in throughput for those businesses that would be expected to result.

5.2.5. Conclusion

Section 5.2 indicates that key benefits identified in the draft report in relation to a move to proximity-based allocations are likely to be significantly smaller than suggested by the ESC. Specifically, the benefit to consumers of reduced towing distances will have an almost negligible impact on overall towing costs, which in any case represent a small proportion of total accident costs, while the extent of any reductions in clearance times will be limited due to the widespread practice of garaging tow trucks at the driver's residence outside business hours. Conversely, the draft report has not identified, or has underestimated, a number of potential costs involved in changing allocation processes.

The specific nature of these costs will be dependent on the practical ability of the industry to adopt rational market responses to the change. If depot relocations are reasonably feasible, substantial costs are likely to arise due both to the cost of relocations *per se* and to the expected loss of economies of scale and scope due to licence reallocations. Conversely, if planning restrictions continue to hinder substantially the ability of the industry to relocate depots, the major impact of change is likely to be a significant, and largely unpredictable, reallocation of allocations and revenues among industry participants in the short term. This clearly raises important equity issues and is likely to give rise to economic hardship for a number of businesses and individuals.

Advice from one large accident repair industry participant suggests that their response to a move toward proximity-based allocations would likely be to redistribute their licences, which are currently clustered in a small number of depots, across most or all of their accident repair facilities. It is considered that approval for this type of relocation should have to be obtained from the regulator, currently VicRoads, and possibly via review to VCAT. This would be necessary, given the similarity between the activities undertaken at accident repair facilities and accident towing depots[49]. Conversely, the establishment of "greenfield" depots is considered to be extremely difficult in much of the Controlled Area. If this view is broadly accurate, it seems likely that a significant, but highly constrained, degree of depot and licence relocation could occur in response to the adoption of Recommendations 2 and 3. The cost of adopting these regulations would therefore be a combination of those identified for the two scenarios identified above.

The context for these observations is one in which the draft report accepts that the current performance of the industry is generally good, with attendance and clearance standards largely being met and low levels of complaints from consumers. In this context, it is difficult to justify the adoption of changes which will cause substantial disruption to the industry, including significant losses to many participants, while achieving only small and uncertain benefits for consumers.

5.3. Alternative approaches to ensuring enhanced accident clearance performance

While the ESC's recommendation for a move to proximity-based allocation is not supported, for the reasons outlined above, we do believe that potential exists to improve existing allocation processes. Several issues are highlighted below which merit the consideration of the ESC as alternative means of improving timeliness and efficiency. The ATI believes that they have the potential to achieve benefits of at least the same magnitude as those identified by the ESC as following from the adoption of Recommendations 2 and 3, while being able to avoid substantial disruption to the industry and the associated costs and implementation risks.

5.3.1. Improving knowledge of the allocation system

Drivers and consumers generally have a low level of knowledge of the existence of the accident allocation system and how to contact the accident allocation centre. This constitutes a significant problem in terms of the minimisation of accident clearance times. An experiment conducted during the preparation of this submission involved placing a call to the Sensis directory service, requesting a phone number for the accident allocation centre. The directory service was unable to provide the relevant number. Another experiment was conducted whereby a call was placed to a major insurance company, with the caller seeking the number of the accident allocation centre. This insurance company not only refused to even acknowledge there was a number for the allocation centre, but advised that the only way to have a tow truck allocated to an accident, was to be transferred through their own claims department.

[49] That is, there is significant traffic of tow trucks and accident vehicles in both cases, suggesting that local authorities could have difficulty making planning-based objections to the establishment of a depot in an existing accident repair facility. That said, a key difference lies in the need for a depot to have 24 hour access, whereas an accident repair shop operates only during business hours.

Similarly, an internet search using the term "tow truck" does not yield the information, instead giving details of a range of individual towing businesses. While the phone number for the accident allocation centre is available on the VicRoads website, it is not prominently displayed and would potentially be difficult for many drivers to find following an accident[50]. Even the VicRoads fact sheet "Towing from an Accident Scene: Your Rights" does not include the number.

VicRoads previously printed the relevant number inside registration labels, making it accessible to all drivers, albeit that it appears that there was a low level of awareness of it, perhaps in part due to its lack of prominence[51]. However, since the abolition of registration stickers, this readily accessible source of information has been removed.

The time taken to clear the accident scene includes both the time elapsing between the accident and the despatch of the tow truck and the time from despatch of a tow truck to commencement of the tow. If there are significant delays in having a truck despatched, due to difficulties faced by drivers in contacting the accident allocation centre, the overall clearance time will be much greater. Thus, increasing awareness of the accident allocation centre and how to contact it could significantly reduce average clearance times, which would support the objectives of the legislation.

The ESC argues, in support of its recommendation of a move toward proximity based allocations, that a reduction in average tows of 7km is likely. As discussed above, even if this translates to an equivalent reduction in distance travelled from dispatch to the accident – which we have demonstrated is unlikely – this would yield a reduction in clearance time of around 14 minutes. It is entirely feasible that better knowledge of how to contact the accident allocation centre ("the AAC") could yield benefits of similar magnitude, at very limited cost[52].

Further consideration of options for addressing this informational issue is necessarily required. However, potential solutions could include:

- Provision of an information sheet and sticker with registration renewals. By specifically drawing attention to the AAC, VicRoads would be likely to be more successful in raising driver awareness than simply including the number on the reverse side of the registration sticker, as was previously done. By providing a stand-alone sticker which drivers could consciously decide to apply to their windows and which was more legible than the previous text giving the AAC number, this consciousness of the AAC contact details would be reinforced;
- Development of an "accident app" to be provided free of charge by VicRoads would represent an electronic solution to the same problem and could involve provision of a range of useful information (e.g. the accident towing rights fact sheet and the warnings page) in addition to the AAC contact details; and,
- Creating a website which would highlight the AAC contact number and contain a range of other relevant information, similar to that suggested above in respect of the "accident app".

[50] https://www.vicroads.vic.gov.au/traffic-and-road-use/using-tow-trucks/i-need-a-tow-truck

[51] The number was included along with a number of other pieces of information printed on white text, while the tendency to place registration stickers in an unobtrusive location which will not impede vision necessarily makes all of this text difficult to read.

[52] Advice from ATI sources suggests that calls to the allocation centre are currently very often made by attending police, who are likely to reach the scene substantially after the accident has occurred.

5.3.2. Double lifts

Regulation 32(8) of the *Accident Towing Services Regulations 2008* currently prevents the towing of more than one vehicle by a single accident tow truck. This prohibition appears to derive from concerns as to the safety of towing more than one vehicle at a time and to reflect the nature of tow trucks previously employed in the industry. However, the ATI does not believe there is any technical or other reason to prevent "double lifts" being allowed in the current industry environment. Conversely, allowing such arrangements clearly has the potential to yield significant productivity benefits, as the number of tow trucks deployed to lift a given number of damaged vehicles can be substantially reduced. Where two vehicles are to be towed to the same destination, there is a substantial reduction in the number of towed kilometres, giving rise to cost savings.

In addition, allowing double lifts would also mean that accidents can be cleared more quickly in some circumstances, in which it would otherwise be necessary to dispatch a tow truck from a more distant depot to pick up the second vehicle.

Given these advantages, the ATI recommends that the ESC give consideration to recommending the removal of the current regulatory prohibition on double lifts as an alternative means of achieving many of the objectives underlying Recommendations 2 and 3 which is likely to be more effective, less disruptive and more acceptable to the ATI. Any change should, however, be framed in such a way as to avoid any possibility of consumer detriment arising from the practice.

5.3.3. Immediate removal of vehicles from the immediate accident vicinity

A common observation among ATI participants is that significant delays frequently occur between the arrival of the tow truck and the removal of a damaged vehicle from the accident scene. These delays, which can span 20 to 30 minutes or longer, arise particularly in circumstances in which drivers have contacted insurance companies, who immediately commence claims processes, or where these drivers take time to read and consider the warnings provided.

The continued presence of damaged vehicles at the accident scene can give rise to significant dangers for other motorists, as well as contributing to congestion at peak hours. However, the regulatory requirement to obtain an *Authority to Tow* in all circumstances before moving a damaged vehicle, together with the significant penalties for non-compliance, mean that tow truck drivers will rarely be willing to move a vehicle without this authority.

In this context, significant benefits could be obtained via limited changes to the current regulatory requirements that would enable a tow truck to move a vehicle from the scene immediately on arrival. This would imply a regulatory provision that would enable the vehicle to be moved the shortest distance possible in order to eliminate danger and/or congestion arising from the position of the damaged vehicle (e.g. from a busy road into an adjacent side-street). The *Authority to Tow* would still be required to be completed before the vehicle could be taken from the vicinity of the accident scene.

Such a change would appear to have very limited potential to give rise to problems. Given the existence of the accident allocation scheme[53], there is little or no question as to which truck will

[53] Note that this change is proposed primarily in the context of the allocation area, where these issues are most significant, although its adoption could also be appropriate in the Self-Managed Area.

ultimately receive the *Authority to Tow*, so that the initial short move of the vehicle in advance of the written authority being completed does not seem likely to give rise to any significant potential for consumer harms.

While the adoption of this approach would perhaps have little or no impact on clearance time statistics, its impact on the key underlying concerns of ensuring safety and minimising congestion issues would be likely to be significant.

5.3.4. Addressing disparities in average allocation numbers

There is an extremely wide range in the number of accident allocations per licence under the current allocation arrangements. Table 5.1, below, sets out the maximum and minimum number of accident tows per licence allocated to each depot by VicRoads in each of the first nine months of 2015.

Table 5.1: Accident tows per licence, by depot, 2015.

Month	Minimum	Maximum	Ratio (Max: Min)
January	5.37	12.83	2.39
February	2.55	15.78	6.19
March	6.00	17.82	2.97
April	4.14	16.36	3.95
May	5.00	18.09	3.62
June	6.00	18.82	3.14
July	7.38	22.55	3.06
August	5.00	20.73	4.15
September	5.00	19.45	3.89

Source: VicRoads[54]

Table 5.1 shows that there is typically a ratio of accident tows per licence of between 3 to 1 and 4 to 1 between the busiest and least busy depots in each month. While we accept the view put by the ESC in the draft report (p. 69) that the primary purpose of the accident allocation scheme is to provide a quality service to consumers who are typically in a vulnerable state, it does not follow that equity among licence holders is not a relevant consideration: given the substantial cost of an accident towing licence and the very substantial control over the revenue derived from it that is exercised by VicRoads as the regulator, it is apparent that the organisation must give due consideration to this issue.

More importantly, while allocations must be made having regard to the 30 minute standard for the arrival of the total, it is *a priori* unlikely that the current wide disparity in average allocation numbers is consistent with a minimisation in average response times. To the extent that this is so, two possible explanations arise. These are:

- A sub-optimal process for revising allocation zone boundaries; and,

[54] https://www.vicroads.vic.gov.au/business-and-industry/tow-truck-industry/tow-truck-accident-allocations.

- Practical difficulties in relocating depots and/or licences in response to changing accident incidence.

Revising allocation zone boundaries

No explicit criteria for determining how to revise allocation zone boundaries have been established in regulation and none are known to exist in other formal policies or internal documents. Discussion with former VicRoads staff indicates that boundary changes are typically made by VicRoads staff without reference to any specific criteria and, in fact, simply reflect subjective judgements, often exercised by individuals with little or no consultation.

This suggests the potential for a policy process which sought to identify objectives and operational principles to be used in considering revisions to allocation zones to facilitate the achievement of significantly improved outcomes. Adoption of key principles in a regulatory context, along with the identification of a formal process to be followed would ensure that stakeholders had an opportunity to be heard on this issue. This would improve both accountability and, consequently, consistency in decision-making.

Depot & licence moves

As noted above, the wide disparity in allocation numbers could also be partially due to difficulties experience in reallocating licences and depots. Again, there are deficiencies in the way that approvals for changes in these areas are managed. This suggests the need for reconsideration of these mechanisms, a matter that is discussed in Section 5.4, below.

5.4. Potential alternatives to recommendation 3

5.4.1. Assessment of recommendation 3

Recommendation 3 is that VicRoads should no longer be required to approve relocations of depots or licences and that licences should no longer be required to be allocated to particular depots. The draft report indicates that this recommendation is intended to facilitate the implementation of Recommendation 2, stating (p. 90) that:

> *"To complement the move towards proximity-based allocations, restrictions imposed by VicRoads on relocating depots and assigning licences to a specific depot should be removed."*

However, as the above discussion has suggested, we believe that the adoption of this recommendation would be likely to significantly increase the net costs associated with the implementation of Recommendation 2. Specifically, we have highlighted:

- the incentives that will exist toward a fragmentation of the existing depot structure and the associated loss of the economies of scale and scope achieved via depot consolidation over the past decade; and,
- the likelihood, also acknowledged by the ESC in the draft report, that relocation of depots and licences will increase differences in service quality levels between inner and outer metropolitan areas.

Adopting Recommendation 3 can be expected to exacerbate both of these negative impacts of implementing Recommendation 2, since it would imply that VicRoads would have no role in managing the extent or direction of either depot or licence relocations. Indeed, unless some feasible reporting requirement could be formulated, VicRoads would not even be aware of the location of accident towing licences. This would seem to entail significant risks for the organisation's future ability to effectively monitor and manage the provision of accident towing services.

The draft report also fails to provide any explicit rationale in support of Recommendation 3. Removing an existing approval requirement may be seen as "complementary", or facilitative, if a high level of relocation activity is anticipated in response to the implementation of Recommendation 2. However, as noted above, the draft report suggests that the ESC does not believe that substantial change is likely. Thus, it is not clear what significant benefit the ESC sees this recommendation as likely to achieve.

Conversely, the recommendation necessarily involves abandoning an existing legislative requirement that seeks to ensure the rational allocation of accident towing licences across the allocation area. Regulation 13B of the *Accident Towing Regulations 2008* effectively establishes a public interest test, by requiring that the applicant explain how existing accident towing services in the area to which it is proposed to move the licence are inadequate and what will be the benefits to the public of the relocation (Reg. 13B(3)(v) and (vi)). The draft report does not provide any critical analysis of the operation of this requirement in practice, nor does it suggest that VicRoads has failed to effectively adopt a public interest approach in its administration of these provisions. In the circumstances, it is difficult to see why an established public interest protection should be abandoned.

The silence of the draft report on this point may in part reflect limited awareness on the part of the ESC of the role played in practice by local government in limiting opportunities for depot relocations. As discussed earlier in this section, the application of local planning provisions has been a major contributor to the fact that few, if any, new depot locations have been established in recent years. ATI members indicate that it is effectively impossible to establish towing depots in large parts of the Controlled Area, including the whole of the City of Stonnington and City of Port Phillip, as a result of the operation of council planning schemes.

It could be anticipated that, if local authorities became aware that VicRoads no longer has an approval function in respect of relocations of depots or licences, they would seek to take a more active role, to the extent that their concerns about local amenity were increased by the removal of this existing approval function. Such a development could yield negative outcomes by placing further barriers in the way of depot or licence relocations, given the likelihood that local governments would focus more strongly on local opinions and concerns, at the expense of the larger, area-wide considerations to which VicRoads is required to have regard.

5.4.2. Alternative approach to licence and depot relocations

While the proposed removal of the requirement for VicRoads to approve licence and depot relocations is not supported, potential improvements to the current arrangements are feasible. In particular, this would involve establishing more explicitly the basis upon which VicRoads is required to assess applications and streamlining these criteria. At present, Regulation 13B sets out the information that must be provided to VicRoads in the context of the application to move a licence, but does not establish explicit criteria which VicRoads should adopt in assessing the application. The Regulations[55] do not, however, provide for any formal application to move or create a depot.

As suggested above, consideration of the standard of existing services within the relevant area and the potential benefit to the public of an additional licence (or licences) being made available – both issues required to be addressed in applications – are consistent with public interest justifications. However, the regulation could provide that the consideration of these issues should be carried out in comparative terms – i.e. that the standard of the services in the relevant area should be assessed against that being achieved in other like areas. Currently, the only comparison effectively required is between the impact on services in the area of the depot to which the licence is currently attached and that in the area of the depot to which it is intended to move the licence.

Secondly, consideration of the impact of the proposed licence movement on existing licence-holders is not consistent with a public interest test and is likely to contribute to sub-optimal outcomes in many cases: that is, increasing the number of licences serving a particular area will necessarily reduce the number of allocations made to licence-holders currently serving that area, yet this may well be a positive outcome if current response times are above the average for like areas and if the number of allocations to the depot to which the licence is currently attached is significantly below average.

Third, the current requirement under Regulation 13B(3)(b)(ii), that the proposal for licence relocation be supported by the local authority, should be removed. Such a provision is also potentially inconsistent with a public interest approach to this issue, as local authorities may seek to restrict accident towing operations due to the concerns of immediately affected residents, despite a potential need to improve accident towing services in the wider allocation area.

[55] *Accident Towing Services Regulations 2008.*

6. The Self-Managed Area and the Uncontrolled Area

6.1. The Self-Managed Area

Recommendations 11 to 13 in the draft report deal with the Self-Managed Area (SMA). Towing operators within the SMA are opposed to the adoption of significant elements of these recommendations, for the reasons set out below.

Recommendation 11

The ATI supports the first part of recommendation 11, which is that the accident allocation scheme should continue to operate in this area. It also supports, in general terms, the recommendation that operators in the Self-Managed Area should seek to identify and implement improvements to the scheme. We note that the relevant operators have adopted a continuous improvement approach to the management of this area in the past and continue to do so. Recent improvements identified include the following:

Protection of the privacy of personal information

Concerns regarding the privacy of the personal information of consumers who have had vehicles towed have arisen both in relation to the use of the allocation system by insurance companies to obtain personal data on not at fault consumers without authorisation and in relation to family members or other parties seeking access to damaged vehicles without the consent of the owner. This issue has been addressed through implementation of a process whereby the allocation centre will now pass on information or access requests to the tow operator, who will contact the vehicle owner to seek their consent to disclose the information or provide access to the vehicle.

Victoria Police Authority to Tow books

From early 2015, Geelong allocation centre members have co-operated in implementing a trial instigated by Victoria Police which involves all vehicles carrying "Victoria Police Authority to Tow Report Books". These books are used to record all relevant particulars and instructions relating to damaged vehicles that are towed subject to an authority issued by Victoria Police members. This includes, for example, instructions on when and to whom a vehicle that has been involved in a fatality or some criminal investigation can be released. The adoption of this system has led to significant time savings for both operators and police in seeking and obtaining instructions regarding damaged vehicles and ensured appropriate outcomes are more reliably achieved. The trial has been judged successful and is now being adopted throughout Victoria.

Implementation of a process for clarification of area boundary

Following incidents in which a phone operator had refused to despatch a tow truck due to a belief that the accident scene was outside the boundary of the Self-Managed Area, a process has been implemented to ensure that a truck will be despatched in all circumstances. This involves a requirement that, where the operator is in doubt as to whether the accident scene is within the boundary, they must call the Allocation Manager, who will determine the question and either authorise despatch of a SMA vehicle or call an operator in the adjacent Uncontrolled Area to arrange for a truck to be despatched.

While the above provides evidence of a commitment to continuous improvement among SMA operators, the proposal made as part of Recommendation 11 that a move toward proximity-based allocation should form the basis of future improvements is not supported, for three reasons. Firstly, it is noted that the current average clearance time within the SMA is only 22 minutes. This is significantly less than that achieved in the Controlled Area and indicates that current arrangements are working well. In such a circumstance, there is little potential benefit in moving toward proximity-based allocation, and significant potential costs.

Second, as discussed above in the context of the Controlled Area, trucks are most commonly garaged at the driver's home, rather than the depot, after hours. This may be some distance from the depot and implies significant doubt as to whether a move to proximity based allocation which, as a matter of practicality, would necessarily be based on depot locations, would reduce average distances travelled in practice. Again, this factor suggests that the size of any benefits derived from a move to proximity-based allocations would be both small and uncertain.

Third, as indicated in the discussion of the potential impact of adopting proximity based allocations in the Controlled Area, the costs that could arise as a result of operators responding to the incentives to move depots to maximise allocations under such an arrangement could also be substantial in the SMA. The size of these costs could, therefore, easily outweigh the probably small consumer benefits that would be derived from such a change.

Recommendation 12

Recommendation 12 is that the Minister for Roads should set fees for accident towing and storage in the SMA. While operators within the SMA acknowledge that the operation of an accident allocation system prevents competition operating at accident scenes and, as such, is not in principle opposed to the adoption of price regulation, they believe that substantial practical difficulties would be encountered in adopting price regulation in this context. Given this, and the generally good performance of the ATI in the SMA, it does not believe there is a strong case for the adoption or price regulation at the present time.

Recommendation 12 is based on the ESC's analysis of the ATI as it operates in the SMA and the average fees charged. However, the ATI submits that this analysis contains a number of errors which, if addressed, should lead the ESC to modify some of the conclusions drawn. In the first instance, Table 7.3 (p. 171) suggests that the average number of tows per truck in the SMA is approximately 250, compared with around 185 in the Controlled Area. This estimate was apparently derived by dividing the total number of tows performed in the SMA by seven trucks. In reality, there are nine trucks currently operating in the SMA. Dividing the total number of tows by nine trucks yields an average of 194 tows per truck, a figure which is very similar to the calculated number of 185 tows per truck in the Controlled Area.

This difference is significant in that the ESC argues, on the basis of its calculated number of tows per truck, that the ATI in the SMA operates on a "larger scale" which is inconsistent with its average towing fees being higher than in the Controlled Area. The correct figures indicate that operators in the SMA do not, in fact, operate at a larger scale than those in the Controlled Area. Applying the corrected number of tows per truck to the average towing fee figure contained in the draft report yields an average revenue of approximately $115,000 per truck, rather than the figure of $150,000 per truck cited. While this remains higher than the quoted figure of $79,000 per truck in the Controlled Area, the difference is far smaller. Moreover, it is important to note that operators in the

SMA fund and manage their own allocation system, in contrast to the position in the Controlled Area. This is estimated to cost around $68,000 per annum, or more than $7,500 per truck. Operators also report that they are unable to recover towing fees in respect of a large proportion of accident tows, with one operator citing a figure of 11% of unpaid tows in respect of his business. This high level of bad debts, which is believed to significantly exceed that experienced in the Controlled Area also yields upward pressures on fees, as towing costs are necessarily recovered from a smaller number of paid tows.

The ESC states on page 172, that it has not been able to undertake a comparison of average costs per tow in the SMA and the Controlled Area. In light of the data presented above, notably including the correction of the data on average tows per truck presented in the draft report, there is no compelling evidence that the net revenue per truck earned in the SMA is significantly higher than in the Controlled Area. This being the case, it appears unlikely that the fees currently being charged in the SMA are giving rise to excess profits. Thus, the scope for consumer benefits arise as the result of the implementation of fee regulation is limited.

Conversely, the task of determining an appropriate regulated fee structure, and updating the fee structure from time to time, is complex and costly. The ATI believes that it would be essential for any regulated fees to be arrived at following a detailed process of research on operator cost structures and the nature of the accident towing market in the SMA, equivalent to that undertaken by the ESC in respect of the Controlled Area in earlier fee reviews in relation to the Controlled Area. Such a process would be essential in order to ensure that any regulated fees were set at appropriate levels, given the potential for poorly set fees to yield net economic costs when measured against the current market outcome. We note that the ESC Chair appears to be of a similar view, having stated publicly that he does not believe it appropriate to simply apply the regulated fees from the Controlled Area in the SMA.

While the size of the accident towing market in the SMA is substantially smaller than that in the Controlled Area, this does not imply that the process of arriving at an appropriate regulated fee structure would be any less complex or costly. It would, in common with fee regulation in the Controlled Area, also be necessary to regularly revisit and update any regulated fees set in the SMA. Given this, and the potential costs of poorly executed fee regulation, it would be essential to ensure that the ESC is adequately resourced to undertake this substantial additional regulatory task, should Recommendation 12 be adopted by the government.

In sum, while there can be no in principle objection to the setting of regulated fees in the SMA, given the “local monopoly” conferred by the existence of the accident allocation system, the ATI does not believe that such regulation is necessary or appropriate in the current context. It suggests, instead, that the ESC should continue to monitor the performance of the industry in this respect as part of its future review processes. Alternatively, a preferred approach would be the option, also advanced by the ESC in the draft report, of having the various operators in the SMA cooperatively setting an agreed fee, pursuant to an authorisation issued by the ACCC.

Recommendation 13

The ATI supports the ESC’s view, reflected in Recommendation 13, that the current boundary of the SMA remains appropriate.

6.2. The Uncontrolled Area

Recommendation 4 states that accident allocations in the Controlled Area should continue to be unregulated. The ATI supports this recommendation. The remaining recommendation specifically addressing the Uncontrolled Area is Recommendation 9. This is that a fee notification requirement should be implemented in the Uncontrolled Area. The ATI does not support this recommendation.

The draft report highlights the potential for a fee notification requirement to lead to convergence in fees, at least within the geographical areas that are, or potentially could be, served by the same operators. The ATI believes that such an outcome is relatively likely, as would be a tendency for fees to "level up", rather than to be reduced overall. As the ESC notes, such an outcome would not be beneficial to consumers. Moreover, the foreshadowed response to such an outcome, of implementing fee regulation in the Uncontrolled Area, is unlikely to be feasible given the likelihood that cost functions would differ widely across the different parts of the Uncontrolled Area, and for different operators.

We note, also, that the draft report acknowledges that the ESC had had little information on current fees in the area available to it. The ATI believes that, in the absence of either any significant evidence of consumer concerns regarding the fees charged in the Uncontrolled Area (e.g. significant numbers of complaints) or any direct evidence that the fees charged are likely to be excessive, there is little or no basis for the adoption of Recommendation 9.

7. Conclusion and recommendations

7.1. Conclusion

The ESC's Draft Report recognises that the Accident Towing Industry is currently providing a high level of service which generally meets the performance standards established by government and is the subject of a very small proportionate number of complaints from consumers and other sources. In light of this, there are evident risks in adopting major changes to current arrangements in areas such as accident allocations and the right of consumers to have damaged vehicles towed to the location of their choice and a need for the case for such changes to be supported by strong evidence.

The ATI believes that a sufficient case for these changes is not made in the draft report. It has identified, in the submission, a number of significant costs that would be expected to arise were these recommendations implemented, which appear not to have been taken into account in formulating the recommendations. The ATI believes that, if these additional costs are taken fully into account, the impact of adopting the draft report's recommendations in these areas would be a strongly negative one.

This conclusion is reinforced by the observation that the key rationale behind these major recommendations (i.e. 2, 3, 5, 6 and 7) appears to be to address behaviours largely occurring within the accident repair industry, rather than the accident towing industry. The principles of good regulation clearly indicate that policy responses should address identified issues directly, rather than indirectly. This implies that approaches that address the accident repair industry directly should be adopted in preference to those entailed in Recommendations 2 and 7 in particular. The case for action in this area requires separate consideration by government. However, it is open to the ESC to draw attention to this issue in the context of its final report.

That said, this submission has presented strong evidence suggesting that the problems identified in these areas may be somewhat smaller than suggested in the draft report. Conversely, this submission has documented very significant concerns in relation to the operation of the motor vehicle insurance industry, while we understand that the VACC is currently seeking the establishment of a Federal parliamentary inquiry into the motor vehicle insurance industry, in recognition of the scale and scope of these concerns. The ATI therefore, believes that it would also be appropriate for the ESC's final report to comment on these concerns and to recommend that government investigate the need for regulatory action in this field, including potentially supporting the establishment of such a parliamentary inquiry at Federal level.

Notwithstanding the above comments, there are opportunities to improve the regulation of the industry, both through reforms to the accident allocation scheme and through improvements to consumer protection arrangements, as detailed in this submission. The ATI believes, however, that ensuring that it is fully engaged in designing and implementing changes in these areas will be essential in achieving the best possible outcome. The industry therefore stands ready to engage with regulators in working in these areas.

7.2. Recommendations

The ATI recommends that:

1. Any discussion of accident repair industry issues in the ESC's Final Report should incorporate a critical analysis of insurance industry conduct in these areas, as outlined in this submission, in order to ensure a balanced analysis of issues relating to consumer welfare is achieved.
2. Recommendation 7 should not proceed, due to its impact in restricting consumer choice, the lack of evidence of a problem of sufficient size as to justify such a restriction and the availability of other, more proportionate approaches to address any identified concerns in this area.
3. Recommendations 5 and 6 should be implemented and their practical impact should subsequently be assessed before any further consideration of the need to adopt additional measures, potentially including Recommendation 7, in the future.
4. Recommendation 2 should not proceed, as it would be likely to entail substantial disruption to the accident towing industry, while achieving few and uncertain consumer benefits.
5. Alternative measures to ensure more rapid attendance of tow trucks at accidents and more rapid clearance of damaged vehicles should, instead, be adopted and assessed. In particular, these should include:
    i. measures that aim to increase awareness of the accident allocation centre phone number among drivers;
    ii. regulatory changes to enable vehicles to be moved immediately to a position which ensures that dangers to other vehicles and congestion issues are avoided;
    iii. regulatory changes to allow "double lifts" to take place in certain circumstances; and,
    iv. changes to establish a transparent and accountable process for assessing applications for movement of depots and licences.
6. Price regulation should not be adopted in the SMA, given the lack of evidence of excess profits being earned by operators in the SMA, the substantial regulatory costs that would be involved and the risks to industry viability that would arise from a poorly conducted price regulation process. The ESC should instead monitor price levels and costs in the SMA in order to satisfy itself that price levels are not excessive.
7. Price notification should not be adopted in the Uncontrolled Area, given the risks, acknowledged in the draft report, that this step could lead to a convergence of prices at higher levels than the current average, with resulting detriment to consumers.
8. That the Final Report should highlight the consumer and competition issues arising from the conduct of the insurance companies, as discussed in this submission, and recommend to government that a further inquiry into these issues be undertaken with a view to determining whether regulatory or other action is required to address these issues.