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Mandatory Motor Vehicles Scheme
Market Conduct Division
The Treasury
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ACCC submission to The Treasury on the Motor Vehicle Service and Repair Information Sharing Scheme Bill

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to The Treasury on the exposure draft of the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2020 and Explanatory Memorandum (the draft Bill & EM) released on 18 December 2020.

As outlined in the ACCC's [2017](#) report on the new car retailing industry, the ACCC considers that a mandatory scheme for car manufacturers to share technical information should lead to better outcomes for consumers. Access to this information is needed for independent repairers to compete in the aftermarkets for the servicing and repair of cars. Consumers benefit from having a choice of providers and the competitive discipline provided by independent repairers.

This submission identifies issues in the drafting of the Bill that we consider should be more closely considered, including by obtaining further information from stakeholders.

1. Scope of scheme

The draft Bill does not cover:

- diagnostic tools, and
- access to scheme information by other independent operators such as tool and spare part manufacturers and publishers of technical information.

In addition, the Bill may have limited operation in relation to:

- standardised access to the On-board Diagnostic Device (OBD), and
- access to electronic logbooks and ability by an independent repairer to update the logbook to record the service & repair work undertaken.

This can be contrasted to the United States' 2014 [Right to Repair Agreement](#) (R2R Agreement)¹ and European Union [Regulation 2018/858](#)².

Par 1.44 of the draft EM states that tool and part manufacturers will continue to be able to negotiate access on commercial terms, and that mandating access is beyond the objectives of the scheme. However, a key question for stakeholders is whether the scheme can achieve its objectives in practice if the scope is not expanded.

It is important to confirm with stakeholders whether:

- The scheme should mandate standardised OBD access or if vehicles imported to Australia already comply with the US/EU requirements for standardised access to the OBD system,³ so that, in practice, repairers in Australia have the same level of access.
- The scheme should cover single-brand diagnostic tools (noting that the ACCC's [2017](#) report found that diagnostic tools are often required to service or repair a car, and that independent repairers have continuing problems in obtaining these tools)⁴ or if this requirement can be addressed through multi-brand diagnostic tools.⁵
- Multi-brand diagnostic tool and spare part providers require access to the scheme in order to be able to place their products on the Australian market. The [2016](#) EU report recognised the importance of multi-brand tool and part providers to the competitiveness of independent repairers and thus consumer choice and benefits.⁶
- Third party information providers should be covered by the scheme to reduce barriers to independent repairers accessing the information. As discussed in the ACCC's [2017](#) report, third party aggregators play an important role in the market, particularly as Australia has comparatively low car sales spread over a large number of manufacturers and models.⁷
- The scheme covers information in an electronic logbook, and if the scheme should be revised to allow independent repairers to update the logbook. As discussed in the [2014](#) EU report, vehicle manufacturers are shifting from hard copy to digital service records. Incomplete records impact on the residual value of vehicles and warranties, and thus the ability of independent repairers to compete.⁸

2. Penalty provisions

The civil penalty provisions are particularly important as, unlike Parts IIIA and XIC of the *Competition and Consumer Act 2010* (Cth) (CCA), Part IVE will rely on court enforcement rather than administrative determinations as the backstop. The ACCC is concerned that there is a lack of consistency in the penalty provisions:

- Placing offer on internet: Draft section @45(2), which requires the offer to be on the internet, has a maximum \$10 million penalty. However, @45(6), which imposes the

¹¹ See sections 2(b)(i) (diagnostic repair tools), 2(b)(ii) (aftermarket scan tool companies and third party service information providers) & 2(c)(i) (standardised OBD access). See also the US Code of Federal Regulations [Title 40 Chapter 1C Part 86](#) (Control of Emissions from New and In-use Highway Vehicles and Engines) Subpart S.

² See Articles 3(45) (definition of 'independent operators') and 61 (standardised OBD access and diagnostic tools; access to repair & maintenance records and ability to enter information on repair/maintenance performed), and Annex X cl 2.5.2 (service and maintenance records).

³ US R2R Agreement section 2(c)(i) and Regulation (EU) 2018/85 Art 61 & Annex 10.

⁴ Pages 96 & 99.

⁵ The [2014](#) & [2016](#) EU reports found that most repairers are small or medium sized enterprises, and that it may not be economically viable for them to purchase tools from each individual vehicle manufacturer.

⁶ Section 3.

⁷ Page 116.

⁸ [2014](#) report p 42. See also the ACCC's [2017](#) report pp 96 (box 4.1) & 120.

same requirement that the offer be published on the data provider's website, has a maximum penalty of only 600 penalty units.

- Non-price terms & conditions and supply period: @45(4), which sets out the price requirements, has a maximum penalty of \$10 million. In contrast, @45(3) (supply period) and @55(2) (prohibited terms and conditions) are only 600 penalty units. However, non-price terms and conditions and the supply period are as important to access as price.
- Safety & security information: It is not clear why @65 imposes an obligation (with 600 penalty units) on data providers to not provide safety & security information in certain cases. @65 is a defence to complying with @50(2) (for example, a data provider can legitimately refuse to supply scheme information where the repairer did not meet the requirements of @65). There is no requirement to go further in imposing an obligation on the data provider not to supply. This regime is not directed at any failure by vehicle manufacturers to protect properly their own safety & security information.

3. Obligations on a data provider

In consultations with stakeholders, it would be useful to discuss:

- Time period for supplying information: @50(2)(b) requires the data provider to supply the scheme information to a repairer within 2 business days after the request (subject to certain exceptions). This means that if a consumer delivers their car to an independent repairer on a Friday, the repairer may not be able to obtain the information until Tuesday close of business. This would be a particular concern where the competing affiliated dealer has faster access to the information.
- Subsets of information: @45(2) requires the data provider to supply the information in the same form that it supplies the information to another repairer (or, if that form is not practicable/accessible, in an electronic form that is reasonably accessible). It is not clear how the scheme would operate where an independent repairer (e.g. windscreen repairer) only requires a subset of the information provided to an affiliated dealer.

4. Remedies

Civil penalty proceedings are highly time consuming and resource intensive, and are unlikely to provide the quick outcomes needed by repairers to retain customers. The effectiveness of the scheme may be improved by extending infringement notices under @135 to all the civil penalty provisions in Part IVE (although recognising that this would result in infringement notice penalties that are less than 1/5th of the maximum penalty).⁹

It would also be useful to discuss with industry whether industry associations should be able to take action under CCA sections 80 (injunctions – Part 2 item 14) and 82 (damages – Part 2 item 15) on behalf of their members.

5. Pricing provisions

It would assist the policy process to discuss with stakeholders:

- the methodologies that might be used to set prices in accordance with @45(4) (price does not exceed fair market value as determined by reference to matters including those covered by @45(5)), and
- if those methodologies are consistent with the scheme objectives, or if revisions are required to the draft Bill.

⁹ Australian Government, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (2013): Infringement notice penalties should, in general, be 1/5th of the maximum penalty, and not exceed 600 penalty units,

The ACCC would expect that a key benchmark should be the prices charged in overseas jurisdictions such as the US and EU where price is regulated under a motor vehicle service and repair information scheme.¹⁰ The ACCC would have significant concerns if @45 led to:

- marginal cost pricing as this is unlikely to compensate sufficiently data providers;
- average cost pricing using a building block methodology as this would be highly resource intensive to apply in practice, particularly due to complex issues around the asset value of intellectual property and forecasting demand;
- compensation to a data provider for the lost profit from customers that choose to use an independent repairer rather than a data provider's affiliated dealer;¹¹ or
- compensation to a data provider for inflated transfers by the data provider to related entities (such as overseas headquarters) or third party suppliers.

It would also be useful to discuss how proposed pricing structures might operate in practice for registered training organisations (e.g. charges for copying training materials).

6. Identifying data providers & copyright holders

In discussions with vehicle manufacturers, it is important to clarify:

- which legal entity is currently providing the information to affiliated dealers;
- whether this entity would be the data provider under the proposed regime;
- the operation of the regime if the corporate structure changes (e.g. if the vehicle manufacturer ceases its Australian operation or shifts to vertical integration through ownership rather than affiliation);
- whether this entity also owns the copyright; and
- if another entity has a proprietary interest in the information, how this is currently managed.

The responses will assist in understanding how the following provisions may operate in practice, and whether changes are required to the draft Bill:

- The practicality of the ACCC requiring information under CCA s 155 or taking enforcement action under s 76 (Part 2 item 11).
- The pricing provisions including @45(5)(f) (compensation by the data provider to any person who has a proprietary interest in the scheme information) and @60(2) (compensation for third party copyright holders).
- The scope of the exclusions in @25 from the definition of 'scheme information' (trade secrets & intellectual property other than what is covered by the *Copyright Act 1968*). In particular, the Australian scheme appears to have taken a more restrictive approach than the US and EU schemes in relation to intellectual property, trade secrets and proprietary interests. For example, the US R2R Agreement is able to cover diagnostic tools while still protecting 'trade secrets'.¹²

¹⁰ E.g. US R2R Agreement section 2(a) (daily, monthly and yearly subscription basis and upon fair and reasonable terms); US 40 CFR §86.010-38 (fair & reasonable price); Regulation (EU) 2018/858 Art 63 (reasonable and proportionate fees, taking into account the extent to which the independent operator uses the information; hourly, daily, monthly and yearly basis).

¹¹ See the 1992 decision by the High Court of New Zealand in relation to Telecom New Zealand's Baumol-Willig pricing model.

¹² Section 3.

7. Scheme adviser (industry body)

The ACCC supports the proposed role of the scheme adviser, and looks forward to discussions as to how the ACCC should interact with the scheme adviser including in relation to:

- the format of the reports from the scheme adviser to the ACCC under @130(1)(c); and
- ACCC guidance that might assist the scheme adviser in providing information about the scheme under @130(1)(f) and in providing education to industry more broadly.

8. Scheme effectiveness

Other issues that may impact on the effectiveness of the scheme in practice, and which should be discussed with industry stakeholders, include:

- Information misuse: Data providers using information provided by an independent repairer to target the repairer's customers.
- Technical updates, recalls and warranties: Data providers not –
 - notifying independent repairers of recall notices and other notices identifying repairs to be carried out; or
 - where the repair is to be carried out free of charge, not compensating independent repairers for the work on the same basis as affiliated dealers.

The European Commission has also identified the following issues (noting that repair and maintenance represent a very high proportion of total consumer expenditure on motor vehicles, which itself accounts for a significant slice of the average consumer's budget):¹³

- Spare parts & tools: Restrictions on the use by independent repairers of unbranded spare parts and tools which are of matching quality; and restrictions on the supply of branded spare parts & tools to an independent repairer.
- Competing vehicle brands: Restrictions on the independent repairer selling or repairing the brands of competing vehicle suppliers.
- Warranties: Manufacturer's warranty is conditional on the end-user having repair and maintenance work carried out only by affiliated dealers (other than when a manufacturer refuses to honour a warranty claim as the failure was due to a repairer not carrying out a repair in the correct manner or using poor quality spare parts).

Draft section @55(1) allows a data provider to impose terms and conditions that are reasonable. @55(2) also prohibits a data provider from compelling the repairer, as a condition of supplying scheme information, to acquire services or products from the data provider or another person, and allows the Minister to make rules to prohibit particular terms and conditions (see also @155). Par 1.97 of the EM provides the following examples of terms that may be prohibited in the scheme rules:

- prohibiting repairers from operating in a certain area;
- requiring repairers to only service and repair certain scheme vehicles;
- prohibiting repairers from using tools or parts from certain providers; or
- allowing a data provider to retrospectively alter the price of the scheme information.

¹³ European Commission, [Supplementary Guidelines](#) on Vertical Restraints in Agreements for the Sale and Repair of Motor Vehicles and for the Distribution of Spare Parts for Motor Vehicles Official Journal C138, 28.5.2010, p 16.

However, it is unclear whether the scheme rules could be used to impose positive obligations on data providers (e.g. in relation to misuse of scheme information or technical updates, recalls and warranties).

9. Future developments

The ACCC notes that the European Commission is currently [reviewing](#) the motor vehicle block exemption to apply after 31 May 2023, and that submissions were due on 25 January 2021. This review will provide a good guide to future issues to be considered including the exclusions in @25(2) relating to telemetry and automated driving systems.¹⁴

The ACCC also supports the ability of the scheme to be extended to other vehicles such as farm machinery through scheme rules under @10(c) and @155.

Next steps

If you would like to discuss the ACCC's submission, please contact David Salisbury, General Manager, Consumer and Small Business Strategies Branch on [REDACTED] or at [REDACTED].

Yours sincerely



Scott Gregson
Chief Operating Officer

¹⁴ See also the Nov 2020 [ballot measure](#) in Massachusetts, US in relation to telematics.