



Mandatory scheme for the sharing of motor vehicle service and repair information

ACCC submission

March 2019

1. Introduction

The Australian Competition and Consumer Commission (**ACCC**) appreciates the opportunity to make a submission to Treasury's consultation paper about a proposed mandatory scheme for the sharing of motor vehicle service and repair information (**Consultation Paper**).

The ACCC is an independent Commonwealth statutory authority whose role is to enforce the *Competition and Consumer Act 2010* (Cth) (**CCA**) and a range of additional legislation, promoting competition and fair trading for the benefit of all Australians.

The ACCC is also responsible for monitoring compliance with, and investigating alleged contraventions of, mandatory industry codes that are prescribed under the CCA. As noted in the Consultation Paper,¹ this means the ACCC would be the regulator responsible for enforcing the proposed mandatory industry code, which would specify minimum standards of conduct for sharing and accessing vehicle service and repair information (**Proposed Code**).

2. Summary

The ACCC supports a mandatory scheme for car manufacturers to share technical information with independent repairers. This will support a competitive car repair and service industry for the benefit of small businesses and consumers.

To ensure the enforceability of such a scheme, the ACCC recommends that the Proposed Code:

- includes clearly defined obligations for market participants upon commencement, and
- allows the courts to impose financial penalties for contraventions of the Proposed Code.

The ACCC also recommends that:

- the Proposed Code should apply to vehicles made available for sale both before and after the code comes into effect,
- the definitions of safety, security, or environmental (**SSE**) information, and any safeguards for the supply of this and information still under development, should be as precise and limited as possible,
- the eligibility criteria for accessing SSE information should be defined so that they do not operate as a barrier to independent repairers providing aftermarket services,
- the Proposed Code should include a practical, timely, and accessible dispute resolution process, enabling matters to be resolved by persons with relevant technical expertise within strict timelines, and
- the Advisory Committee should have an independent chair, tasked with facilitating productive discussion between committee members, providing consensus advice to the Minister where possible, and assisting committee members to provide the Minister with dissenting advice where appropriate.

The ACCC also notes that industry-led solutions, for example, developing systems that allow access to information as suggested in the Consultation Paper,² must not contravene the competition provisions of the CCA.

¹ Consultation Paper, at 3.40.

² For example, Consultation Paper, at 3.28.

3. Background

The ACCC supports a mandatory scheme for car manufacturers to share technical information with independent repairers. The establishment of such a scheme was a recommendation of the ACCC's [final report](#) for its market study into the new car retailing industry (**Final Report**), released in December 2017.

3.1. ACCC's new car retailing market study

As noted in the Consultation Paper,³ the Final Report found that, despite voluntary commitments offered by car manufacturers to provide independent repairers with the necessary technical information to repair and service new cars, there are still problems with the breadth, depth and timeliness of the technical information provided. The Final Report found that car manufacturers and dealers have strong incentives to impede competition in part sales and repair and servicing, including through preventing independent repairers from accessing required technical information about new cars.

The Final Report also acknowledged that car manufacturers have legitimate concerns about sharing some SSE information. However, the ACCC was of the view that this information should be made available to independent repairers and recommended that:

A mandatory scheme should be introduced for car manufacturers to share technical information with independent repairers, on commercially fair and reasonable terms. The mandatory scheme should provide independent repairers with access to the same technical information which car manufacturers make available to their authorised dealers and preferred repairer networks, including environmental, safety and security-related information (if it is made available to dealers).⁴

The ACCC concluded that this regulatory intervention was needed to “support a competitive car repair and servicing industry,”⁵ since “the competitive discipline imposed by independent repairers on competition in aftermarkets [is] valuable and of benefit to consumers.”⁶

3.2. Industry codes and the ACCC

The ACCC has a range of tools available when enforcing or encouraging compliance with codes. For example, where a corporation is required to keep, generate, or publish information under a mandatory industry code, the ACCC can conduct compliance checks or audits by requiring that corporation to provide that information or those documents to the ACCC.

The ACCC can also take a range of actions for potential contraventions of a mandatory industry code, including issuing infringement notices,⁷ seeking injunctions,⁸ or non-party redress orders,⁹ or accepting statutory undertakings¹⁰ or administrative resolutions.

The ACCC also publishes guidelines and information to assist industry participants to understand their rights and obligations under industry codes.

³ Consultation Paper, at 2.4.

⁴ Final Report, p.133.

⁵ Final Report, p.92.

⁶ Final Report, p.128.

⁷ CCA s 51ACD.

⁸ CCA s 80(1)(a)(ii).

⁹ CCA s 51ADB.

¹⁰ CCA s 87B

The ACCC does not decide whether a party has contravened an industry code. The ACCC can take enforcement action, but ultimately that decision is made by a court.

The effectiveness of a code, including the ACCC's ability to encourage compliance and take enforcement action, depends on the code setting out sufficiently clear expectations and obligations on each industry participant. The effectiveness also depends on the code being backed by financial penalties that provide meaningful deterrence against contraventions.

4. Consultation Paper questions

4.1. Appropriateness and effectiveness of Proposed Code elements

5.1 Treasury is interested in stakeholders' views on whether the possible elements of a mandatory code of conduct and a Service and Repair Information Sharing Advisory Committee set out in this paper:

- a. are appropriate as a starting point for developing and consulting on detailed provisions;
- b. would provide significant improvement on the current voluntary scheme; and
- c. are a suitable alternative to a legislated scheme, which would enable the creation of an industry-funded body to advise on the scheme but would be slower to implement and update.

The Consultation Paper states that upon commencement of the Proposed Code, core provisions would include:

- a principled definition of the information that manufacturers must make available including, at a minimum, specific types of repair and servicing information and materials, and
- a principled definition of SSE information to which manufacturers would be able to restrict access, including, at a minimum, specific types of SSE information.

In addition, the Proposed Code would include a more detailed list of included and excluded information which would be reviewed regularly and would require manufacturers to allow those who meet certain criteria to purchase access to SSE information, and that this list of information and criteria will be reviewed regularly.

The Consultation Paper envisages that a Service and Repair Advisory Committee (**Advisory Committee**), comprised of key industry associations, will be formed to advise the Minister on technical aspects of the Proposed Code.¹¹ These technical aspects may include definitions of the information covered by the Proposed Code, what is considered SSE information, and the access principles for information covered by the Proposed Code.¹²

While we have some reservations about the practical operation of the Advisory Committee (discussed at 5.2 below), we support the development of a code that is based on industry experiences. If properly constituted and structured, the Advisory Committee could be an effective way to ensure the Proposed Code has practical rules and mechanisms and is updated to reflect technology and other industry developments.

¹¹ Consultation Paper, at 4.5.

¹² Consultation Paper, at 4.5.

However, the ACCC considers that to provide regulatory certainty to industry, and the appropriate compliance and enforcement provisions, it is important that the Code contain clear and precise rights and obligations, which are underpinned by specific rules and mechanisms, from its commencement.

In this regard the ACCC notes that the Consultation Paper proposes that the first meeting of the Committee would be after the Code has commenced.¹³

The ACCC is concerned that, prior to receiving technical input from the Advisory Committee, the details of the obligations under the Proposed Code may be unclear. This is likely to result in the Proposed Code containing broad, unenforceable obligations for a period of time following commencement.

The ACCC considers that if the Proposed Code contains only broad principled terms on its introduction, which are unclear in terms of content and coverage, it will be unenforceable and likely to generate industry confusion. This would undermine confidence in the effectiveness of the code. In addition, market participants may understand the general sentiment of what the Proposed Code aims to achieve, and then expect the ACCC to enforce its provisions in circumstances where meaningful obligations have not been placed on the parties.

Accordingly, the ACCC considers that “developing and consulting on detailed provisions” of the Proposed Code should occur before the code commences.

Recommendation

The ACCC supports the creation of a mandatory scheme to specify minimum standards of conduct for parties sharing and accessing vehicle service and repair information, but recommends that the Proposed Code only be implemented once consultation with industry has resulted in a set of clear and precise rights and obligations.

The Government may find it useful to consider the existing definitions and obligations in European Union and United States laws mandating information sharing by car manufacturers, to facilitate the timely development of the detail for the initial phase of the Proposed Code.¹⁴

¹³ Consultation Paper paragraph 4.8

¹⁴ See Appendix G to the Final Report.

4.2. Scope of the Proposed Code

5.2. Treasury is also interested in feedback on the following possible elements of the Code in particular:

- a. whether vehicles made available for sale in Australia prior to the Code taking effect should be covered by the scheme, and if so, how;

...

The ACCC considers it important that the Proposed Code is applicable at the outset to vehicles typically serviced by the independent repair sector. The ACCC understands that the majority of vehicles which tend to be repaired and serviced by the independent repair sector are vehicles which are not new and which may no longer be covered by the manufacturer's warranty, or are near warranty expiry.

It is also important that any criteria for a vehicle to be covered by the Proposed Code are clear to both manufacturers and independent repairers. In the ACCC's view, the most appropriate criteria for a vehicle to be covered would be by reference to the build date or year. The chosen build date or year from which the Proposed Code would apply to vehicles made available for sale in Australia should capture most vehicles typically serviced by the independent repair sector at the time of commencement of the Proposed Code.

Recommendation

The ACCC recommends including vehicles made available for sale in Australia prior to the Proposed Code taking effect, with the objective of capturing most vehicles typically serviced by the independent repair sector.

The ACCC recommends that the scope of the Proposed Code be determined by reference to easily identifiable criteria, such as the build date or year. In setting the appropriate build date or year, the Government may find it useful to consider the approach taken in the European Union and the United States.¹⁵

The ACCC also recommends that, at the first review of the Proposed Code, the Government consider expanding the scope of the code to include two- or three-wheeled vehicles, farm, construction, and heavy vehicles, and motorhomes and buses.¹⁶

¹⁵ See Appendix G to the Final Report.

¹⁶ Consultation Paper, at 3.6.

4.3. Principled definitions of information

5.2. Treasury is also interested in feedback on the following possible elements of the Code in particular:

...

b. the principled definitions of:

- i.** information manufacturers must make available under the scheme; and
- ii.** SSE information;

The ACCC's Final Report noted that car manufacturers have incentives to deny or delay access to technical information by independent repairers.¹⁷ In circumstances where the Proposed Code would grant safeguards against the disclosure of SSE information,¹⁸ or information still under development,¹⁹ the ACCC considers that these safeguards should be precise and limited, keeping in mind these incentives and the difficulties experienced in this area under the current voluntary scheme.

Recommendation

The ACCC recommends that the safeguards for SSE information, or information still under development, are precise and limited to ensure that as much relevant information as possible is accessible by independent repairers, and that manufacturers' obligations are as unambiguous as possible as to the information that must be provided.

4.4. Training and access to SSE information

5.2. Treasury is also interested in feedback on the following possible elements of the Code in particular:

...

d. the principles guiding access to SSE information.

The Consultation Paper proposes a system whereby manufacturers would only have to provide SSE information if a repairer has both a genuine reason for accessing the information and sufficient skill, training, or equipment.²⁰ The Consultation Paper indicates different methods by which the sufficiency of that skill or training could be assessed.

The ACCC supports safeguards being put in place to ensure that SSE information can only be accessed by suitable repairers. Our Final Report recommended that "the mandatory scheme should also set out a process for vetting end users accessing environmental, safety

¹⁷ See, for example, Final Report, p.132.

¹⁸ Consultation Paper, at 3.17-3.19.

¹⁹ Consultation Paper, at 3.15.

²⁰ Consultation Paper, at 3.21-3.26.

and security-related technical information and for tracing the use of that information”.²¹ The ACCC continues to consider that such vetting and tracing is appropriate.

However, the ACCC is concerned that unreasonable eligibility criteria, such as prohibitive requirements for training and investment in the maintenance of tools and equipment, could create overly restrictive barriers to accessing SSE information. The Proposed Code should ensure that, if training or equipment requirements are set, these are at a level or price that is commercially fair and reasonable.

The improvements in competition generated by a mandatory scheme would be undermined if eligibility criteria could be used by manufacturers to create artificial barriers to entry for independent repairers.

Recommendation

The ACCC recommends that the eligibility criteria for accessing SSE information be defined so that they do not operate as a barrier to independent repairers providing aftermarket services.

4.5. Suitability of dispute resolution and mediation processes

5.2. Treasury is also interested in feedback on the following possible elements of the Code in particular:

...

f. the suitability of the dispute resolution and mediation process.

The Consultation Paper outlines a proposed dispute resolution process under which parties would be able to request assistance from an independent mediator to negotiate resolutions to their disputes.²²

In its Final Report, the ACCC found that timely access to service and repair information is critically important for independent repairers. This means that a dispute resolution process will have to be both timely and accessible. As noted in the Final Report, dispute resolution under the current voluntary arrangements cannot be directly accessed by an independent repairer. As disputes are dealt with at the level of the signatory parties, and without binding obligations, the current process is both lengthy and ineffective for resolving disputes.²³

Mediation is often useful for addressing detailed and complex disputes, as well as those that involve multiple parties or systemic issues. However, a mediation process alone may not be sufficient to encourage compliance with the code and also may not offer a practical avenue for independent repairers to resolve issues quickly.

In addition to mediation, the ACCC supports a complaint handling process which provides for the resolution of day-to-day disputes raised by independent repairers within commercially acceptable timeframes. The ACCC understands that timely access to service and repair information is paramount for independent repairers and that an effective complaints handling process must be easily-accessible and relatively fast. The escalation of complaints to a

²¹ Final Report, p.134.

²² Consultation Paper, at 3.34-3.39.

²³ Final Report, p.126.

technical expert with strict deadlines for resolution or an interim decision may provide a more suitable process for day-to-day disputes.

Further, the ACCC supports the development of a framework that may prevent similar disputes from repeatedly going through the dispute resolution process. This could be achieved by the Advisory Committee maintaining a public register of how disputes were resolved under the Proposed Code for independent repairers who are experiencing similar issues. This register could record the nature of the dispute and how it was resolved, while maintaining confidentiality over the identity of the parties.

In addition, at regular intervals, the Advisory Committee could reflect on any systemic issues raised and settled through the dispute resolution processes, and consider whether to recommend to the Minister that the types of information arising from these should be incorporated into the Proposed Code.

Recommendation

The ACCC considers that, in addition to mediation, a complaints handling process is necessary to promptly respond to day-to-day disputes raised by independent repairers with respect to sharing of service and repair information. The timely escalation of matters to a technical expert with strict deadlines for resolution or an interim decision may provide a suitable process for resolving day-to-day disputes in a timely manner. Mediation may be a more appropriate approach for resolving more complex or systemic issues.

The ACCC also recommends that the Government consider requiring the independent technical expert to report back to the Advisory Committee on decisions made for the purposes of maintaining a public register of how disputes are resolved. This would provide transparency and facilitate consistency, and allow the Advisory Committee to consider whether to recommend to the Minister that solutions to systemic issues be incorporated into the Proposed Code.

5. Other ACCC comments

5.1. Financial penalties for contraventions

The Consultation Paper states that the Government is considering not attaching any penalties to the Proposed Code on commencement, and that penalties will be considered as part of a broader review of the code after commencement.²⁴ The ACCC recognises that penalties are only appropriate if the rights and obligations in any law or regulation are settled and the parties have a clear understanding of how to comply.

Nonetheless, a code will only effectively promote compliance and deter contraventions when there are consequences for contravening it.

The ACCC's experience with codes that do not have a penalty regime, such as the Food and Grocery Code, has been that the absence of penalties means there is little incentive for businesses to comply, and limits the ACCC's ability to effectively deter contraventions through enforcement actions.

Recommendation

As discussed above, the ACCC recommends that the Proposed Code be implemented once a clear set of rights and obligations have been developed that will bind all industry participants. Once these rights and obligations have been determined, the ACCC strongly

²⁴ Consultation Paper, at 3.41.

recommends that the Proposed Code include adequate penalties to encourage compliance and improve the ACCC's ability to enforce it. The ACCC's view is that civil pecuniary penalties and infringement notices should be made available for all contraventions of the Proposed Code.

5.2. Operation of the Advisory Committee

The Consultation Paper notes that "the Government is considering having the Advisory Committee adopt a consensus approach to making recommendations to the responsible Minister".²⁵ However, it also flags the possibility that "for the purposes of the Advisory Committee, consensus could mean the majority of members agree, with the remainder content to give way, if necessary with a mention of any dissenting views in the advice to the Minister".²⁶

The ACCC considers that the difference in opinion and approach within the automotive industry with regards to sharing information is a key reason why the current voluntary scheme, which has the same membership as the proposed Advisory Committee, is ineffective.²⁷ While undertaking its market study into new car retailing, the submissions received by the ACCC provided very different perspectives on the effectiveness of the existing voluntary scheme. This reflected each industry participants' views on the appropriate amount of information that should be shared and the mechanisms for doing so. The Advisory Committee will reflect the same differences in opinion, which will make it difficult to reach a consensus view on the appropriate rules and mechanisms.

Those differences ought not to weaken the effectiveness of a mandatory scheme by undermining the Advisory Committee's advisory process. If the Advisory Committee is required to reach consensus, it could result in a long, drawn-out negotiation that delays the introduction of clear rules and mechanisms for information sharing.

Recommendation

The ACCC recommends that any governance mechanisms for the Advisory Committee take into account that reaching consensus between members on a number of the issues likely to be considered by the Committee is unlikely.

As such, the ACCC recommends that the Advisory Committee have an independent chair, who is tasked with facilitating productive discussion between committee members, providing consensus advice to the Minister where possible, and assisting committee members to provide the Minister with dissenting advice where appropriate.

5.3. Industry-led solutions

The Consultation Paper notes the possibility that "industry could opt to work together on a unified access approach" to how manufacturers provide access to information covered by the Code.²⁸ The Consultation Paper also notes that the Proposed Code "would aim to ensure that purchasing access to information or tools occurred in a consistent manner and on fair and reasonable commercial terms".²⁹

The ACCC accepts that industry input into how access to information is provided is important, and supports such access occurring in a consistent manner and on fair and

²⁵ Consultation Paper, at 4.6.

²⁶ Consultation Paper, at 4.6.

²⁷ See, for example, Final Report, p.92.

²⁸ Consultation Paper, at 3.28.

²⁹ Consultation Paper, at 3.29.

reasonable commercial terms. The ACCC's new car retailing market study recommended that any mandatory scheme operated along these lines.³⁰

However, the ACCC notes that industry-led approaches that involve competitors working together on industry solutions may risk contravening the competition provisions of the CCA. This is particularly the case where there is a risk that discussions between market participants may include pricing information or pricing intentions.

6. Conclusion

The ACCC supports a mandatory scheme for car manufacturers to share technical information with independent repairers, and appreciates the opportunity to make this submission.

As detailed above, a mandatory scheme such as the Proposed Code, can promote competition in vehicle repairs and servicing if it contains relevant and clearly defined eligibility criteria and obligations for the sharing of technical information, supported by timely and accessible dispute resolution and penalties for non-compliance.

³⁰ See, for example, Final Report, p.12.