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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPETITION AND CONSUMER AMENDMENT (MOTOR VEHICLE SERVICE AND REPAIR INFORMATION SHARING SCHEME) BILL 2021

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Assistant Treasurer, Minister for Housing, Minister for Homelessness, Social and Community Housing, the Hon Michael Sukkar MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	*Definition*
ACCC	Australian Competition and Consumer Commission
Australian Consumer Law	Schedule 2 to the *Competition and Consumer Act 2010*
Bill	Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021
CCA	*Competition and Consumer Act 2010*
Copyright Act	*Copyright Act 1968*
Data provider	An entity who runs a business that, to any extent, provides scheme information to any repairer or scheme RTO in Australia This could include car manufacturers, owners or licensees of intellectual property, third party providers such as data aggregators and dealerships or workshops affiliated with a car manufacturer
Guide to Framing Commonwealth Offences	Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition
ICCPR	International Covenant on Civil and Political Rights
Market study	The ACCC's 2017 *New Car Retailing Industry Market Study*, accessible at: https://www.accc.gov.au/focus-areas/market-studies/new-car-retailing-industry-market-study
OAIC	Office of the Australian Information Commissioner
Personal information	As defined in section 6(1) of the Privacy Act
Privacy Act	*Privacy Act 1988*
Repairer	A person to the extent they are carrying on, or actively seeking to carry on a business of diagnosing faults with, servicing, repairing, modifying or dismantling motor vehicles in Australia
RTO	A registered training organisation (as defined in the *National Vocational Education and Training Regulator*

Abbreviation	***Definition***
	Act 2011) that provides, or seeks to provide, a course in Australia providing training in diagnosing faults with, servicing, repairing, modifying or dismantling scheme vehicles
SAE	Society of Automotive Engineers
Safety information	Information relating to a hydrogen, high voltage, hybrid, electronic propulsion or other system installed in a scheme vehicle prescribed by the scheme rules
Scheme	The Motor Vehicle Service and Repair Information Sharing Scheme created by the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021
Scheme information	Information about scheme vehicles prepared by or for manufacturers of scheme vehicles for use in conducting diagnostic, servicing or repair activities on, or training relating to, those vehicles
Scheme rules	Disallowable legislative instrument that contains matters that can be prescribed by the Minister
Scheme vehicle	A passenger vehicle (other than an omnibus) or a light goods vehicle within the meaning of a vehicle standard made under the *Road Vehicle Standards Act 2018*, as supplied to market, that was manufactured on or after 1 January 2002 or a later date prescribed by the scheme rules
Security information	Information relating to a scheme vehicle's mechanical and electrical security system installed in a scheme vehicle or another system prescribed by the scheme rules
Sensitive information	As defined in section 6(1) of the Privacy Act

General outline and financial impact

Motor vehicle service and repair information sharing scheme

The Bill amends the CCA to establish a scheme for motor vehicle service and repair information to be shared with all Australian repairers and RTOs.

Date of effect: The amendments will commence on the later of 1 July 2022 or the day after the Bill receives the Royal Assent.

Proposal announced: On 4 May 2018, then Assistant Minister to the Treasurer, the Hon. Michael Sukkar MP, announced that the Government would consider the design of a mandatory scheme and consult with stakeholders. This Bill implements the announcement of 29 October 2019 that the scheme would be implemented through primary legislation.

Financial impact: nil.

Human rights implications: The Bill is compatible with human rights. See *Statement of Compatibility with Human Rights* — Chapter 2.

Compliance cost impact: The Treasury has assessed the annual regulatory burden on businesses to be $1.509 million.

Summary of regulation impact statement

Regulation impact on business

Impact: The Bill will promote competition between Australian motor vehicle repairers and establish a fair playing field by mandating access to diagnostic, service and repair information for motor vehicles covered by the Bill to all repairers and RTOs on fair and reasonable commercial terms. The main regulatory impact will be on parties currently sharing service and repair information, such as motor vehicle manufacturers, as they will be required to expand their systems to provide information to a broader range of recipients. The beneficiaries will be repairers and RTOs who will benefit from the provision of accessible and affordable repair information and consumers both through increased choice and price competition.

Main points:

- The Treasury has certified the Market Study by the ACCC as a process and analysis equivalent to a Regulation Impact

Statement, for the purposes of developing the scheme. This Market Study can be accessed on the ACCC website.[1]

[1] https://www.accc.gov.au/publications/new-car-retailing-industry-market-study-final-report.

Chapter 1
Motor vehicle service and repair information sharing scheme

Outline of chapter

1.1 Schedule 1 to the Bill amends the CCA to establish a scheme that mandates all service and repair information provided to car dealership networks and manufacturer preferred repairers be made available for independent repairers and RTOs to purchase.

1.2 The objectives of the scheme are to:

- promote competition between Australian repairers of passenger and light goods motor vehicles and establish a fair playing field by mandating access to diagnostic, repair and servicing information on fair and reasonable commercial terms;
- enable consumers to have those vehicles attended to by an Australian repairer of their choice who can provide efficient and safe services;
- encourage the provision of accessible and affordable diagnostic, repair and servicing information to Australian repairers, and to RTOs for training purposes;
- protect safety and security information about those vehicles to ensure the safety and security of consumers, information users and the general public; and
- provide a low-cost alternative dispute resolution mechanism.

1.3 All references in this Chapter to legislation are to the CCA unless otherwise stated.

Context of amendments

1.4 A genuinely competitive market for motor vehicle service and repair services relies on all repairers having fair access to the information they require to safely carry out these tasks on their customers' vehicles. This benefits consumers both through increased choice and price competition. However, as motor vehicles become increasingly technologically advanced, the information required to safely undertake these tasks increases. Manufacturers of vehicles generally distribute the

majority of this information exclusively to their dealership networks, unless they choose to make it available to independent repairers.

1.5 To help address this issue, the peak industry associations representing manufacturers and independent repairers signed the *Agreement on Access to Service and Repair Information for Motor Vehicles* in 2014. It set out several principles designed to ensure fair access to repair information and safe and professional repair of vehicles.

1.6 The ACCC published its *New Car Retailing Industry Market Study*[2] final report in December 2017. It found that the voluntary industry agreement was ineffective, creating competition barriers and impacting consumers' choice of repairer. It also found that limited access to this information caused detriment to consumers through increased costs, inconvenience and delays when having their car repaired or serviced by an independent repairer.

1.7 The market study recommended a mandatory scheme be introduced for car manufacturers to share technical information with independent repairers, on commercially fair and reasonable terms. The ACCC highlighted that a mandatory scheme should provide independent repairers with access to the same technical information that car manufacturers make available to their own authorised dealers and preferred repairer networks (including environment, safety and security-related information).

1.8 In May 2018, the Government announced that it was considering the design of a mandatory scheme for access to motor vehicle service and repair information. This scheme would provide a level playing field for all repairers and allow consumers to have their vehicles safely repaired by the repairer of their choice.

1.9 Treasury undertook targeted industry stakeholder meetings and released a consultation paper on the mandatory scheme for public consultation from 12 February 2019 to 11 March 2019. Treasury received 53 submissions as part of the first round of formal public consultations. Overall stakeholders were largely in favour of the scheme and its key elements. In particular, there was general acceptance of a simple and clear requirement that independent repairers should be able to access all information provided to dealerships.

1.10 In October 2019, Treasury released a consultation update which provided a high-level summary of feedback received and key outcomes from the consultation process including that the Government would progress the scheme through primary legislation.

[2] https://www.accc.gov.au/focus-areas/market-studies/new-car-retailing-industry-market-study.

1.11 Treasury has continued ongoing engagement with targeted industry stakeholders throughout 2019 and 2020 as it progressed the design of the scheme.

1.12 Treasury consulted on draft legislation and explanatory material for the Bill from 18 December 2020 to 31 January 2021. Twenty-eight submissions were received, including from the five signatories to the current voluntary agreement.

1.13 Treasury will also consult on the proposed scheme rules, which will provide further details regarding certain requirements for the scheme.

Summary of new law

1.14 The scheme imposes obligations on data providers to:

- offer to supply information used for conducting diagnostic, service or repair activities in relation to certain vehicles to all Australian repairers and RTOs;
- charge no more than the fair market value for the information; and
- supply scheme information (immediately in most circumstances) once the repairer has paid the agreed price.

1.15 Failure to comply with these main obligations can attract a maximum pecuniary penalty of $10 million for a body corporate and $500,000 for other persons. The court will determine the appropriate penalty amount (up to the maximum) based on the circumstances of individual contraventions.

1.16 Data providers also have to:

- publish details of scheme offers on the internet and notify the scheme adviser of certain matters, to provide transparency about the operation of the scheme;
- restrict access to safety and security information to those who meet specified access criteria and keep records regarding access to security information;
- protect sensitive personal information collected under the scheme; and
- pay compensation to any third parties that hold copyright in relation to scheme information for the supply of that information.

1.17 In addition to the penalties attached to the three main obligations, civil penalties can be imposed on persons for contraventions

of other obligations contained in the Scheme and in some circumstances, the ACCC can issue infringement notices for alleged contraventions.

1.18 The scheme also establishes the role of scheme adviser, whose functions include facilitating dispute resolution and sharing of information about the scheme and reporting to the ACCC and the Minister about the operation of the scheme.

1.19 The scheme provides for the making of scheme rules to enable the Minister to prescribe technical details about the coverage of the scheme, update the scheme as necessary to ensure it keeps pace with technology and deal promptly with attempts to frustrate the scheme. These rules will be a disallowable legislative instrument, which is subject to Parliamentary scrutiny.

Detailed explanation of new law

Who has to share information – "Data providers"

1.20 A ***data provider*** is:

- a corporation or a related entity of a corporation that carries on a business that, to any extent and whether directly or indirectly, supplies scheme information to any repairer or RTO in Australia; or
- a person who carries on such a business in the course of, or in relation to, trade or commerce.

1.21 This definition captures the sharing of information within vertically integrated structures and with related bodies corporate. ***[Schedule 1, item 1, sections 57BE and 57BG]***

1.22 A data provider may be a vehicle manufacturer, information owner, or licensee. This could include an Australian subsidiary of an overseas vehicle manufacturer, an affiliated car dealership, or a data aggregator who sells service and repair information in its own right.

1.23 A data provider (for example, a manufacturer) can use an agent, (for example, a data aggregator) to meet its obligations under the scheme. Although the agent is contractually responsible to the data provider to perform functions, the data provider is liable for compliance with the scheme.

Example 1.1

A manufacturer provides scheme information to its affiliated repairer network in Australia. The manufacturer is a data provider.

A corporate entity sells intellectual property rights over a range of service and repair information to a company for the purpose of that company running a business of providing Australian repairers with access to scheme information. The company launches its business website offering its services. Both entities are data providers.

A manufacturer licenses a company to share this information with certain Australian repairers through an online portal. The company may also be licensed to share information obtained from other manufacturers (such a business is commonly known as a data aggregator). The manufacturers and the data aggregator company are all data providers.

Information to be shared – "Scheme information"

1.24 ***Scheme information*** is information in relation to scheme vehicles prepared by or for manufacturers of scheme vehicles or their related bodies corporate for use in conducting diagnostic, servicing or repair activities or training about those activities on those vehicles, as supplied to the market. ***[Schedule 1, item 1, section 57BD(1)]***

1.25 Scheme information captures information about a scheme vehicle supplied to the market and all subsequent amendments and supplements to such information that are available when supplied to a repairer or RTO. It also includes information required to repair a vehicle by fitting or installing a replacement part.

1.26 Scheme information does not include information concerning aftermarket parts (whether supplied by a vehicle manufacturer or an aftermarket provider). This is because information relating to a part, such as its dimensions, strength or relevant warnings are typically supplied with the product at the point of supply or on the product itself. The part is then installed by a repairer using relevant scheme information (such as how to disassemble the engine to replace a part).

1.27 The following are examples of scheme information:

- manuals, technical service bulletins, wiring diagrams, technical specifications for components and lubricants and testing procedures (including in relation to environmental performance);
- information and codes for computerised systems (such as information that may appear on a scheme vehicle's on-board display after being plugged into a computer system);
- information about a voluntary or mandatory recalled component of a vehicle and information needed to rectify the issue; and

- software updates, for example where necessary after replacement parts are installed to ensure the vehicle's electronic systems recognise and accept the new part.

1.28 Scheme information does not include training materials prepared for or on behalf of a manufacturer (or related bodies corporate) to train their own repairers, those in affiliated workshops or enrolled in a course they provide or sponsor. However, if a data provider wishes to make its training materials available for sale it can do so.

1.29 A list of tasks, a service schedule and record of their completion for a particular vehicle (for example, as commonly contained in an electronic or hard copy log book) is not scheme information. However, information such as the steps involved in doing a scheduled service or technical specifications for components and lubricants and testing procedures is scheme information, even where it is contained in a log book.

Excluded information

1.30 The following information is excluded from being scheme information (that is, there is no requirement to share):

- a trade secret;
- any intellectual property other than intellectual property protected by the Copyright Act;
- a source code version of a program (code used to develop a computer program that is readable by natural persons);
- data automatically generated and transmitted by a scheme vehicle while it is being driven regarding driver or vehicle performance (for example, information about fuel efficiency which is automatically generated and sent to the manufacturer while the vehicle is being driven);
- global positioning system data;
- information only provided to a restricted number of selected repairers for the purposes of developing solutions to emerging or unexpected faults;
- commercially sensitive information about an agreement between the data provider and another person (for example, information in an agreement between a manufacturer and dealer about dealership obligations when conducting diagnostic, servicing or repair activities);
- information relating to the automated driving system in an automated vehicle (that is, SAE level of 3 or greater under

the *Surface Vehicle Information Report J3016* as updated from time to time); or

- any other information prescribed in the scheme rules.

[Schedule 1, item 1, section 57BD(2) and (3)]

Emerging or unexpected faults

1.31 Scheme information does not include information only provided to a restricted number of selected repairers for the purposes of developing solutions to emerging or unexpected faults. ***[Schedule 1, item 1, section 57BD(2)(f)]***

1.32 For example, when a manufacturer is still determining how to rectify a vehicle fault that has just been discovered, the manufacturer may work with trusted technicians to test the effectiveness of different repair methods. This process is expected to be completed very quickly as is current industry practice. The tested solution is scheme information when it is shared beyond these restricted repairers, i.e. it must then be offered to all repairers and RTOs.

1.33 It is appropriate to allow data providers to work with a limited number of trusted technicians to finalise repair instructions for emerging or unexpected faults to ensure scheme information has been tested as being safe and effective before being made available to all repairers and RTOs. If the data provider supplies those tested instructions, or information about interim actions that can be performed while a solution is being developed, beyond those technicians, this is scheme information that should be offered to all repairers and RTOs.

1.34 If an emerging or unexpected fault leads to a manufacturer, distributor or supplier initiating a product safety recall, these parties may have obligations under the Australian Consumer Law and the *Road Vehicle Standards Act 2018* (which applies from no later than 1 July 2021), to notify regulators. The Federal Chamber of Automotive Industries also has a *Code of Practice for the Conduct of an Automotive Safety Recall* which outlines expectations regarding safety recalls including notifying customers and the public.

Automated driving systems

1.35 The SAE standard describes six levels of automated driving systems or features that may be engaged when operating a vehicle with an automated driving system – from no automation to full automation. Scheme information includes up to level two which involves drivers continuing to drive the vehicle and constantly supervising the support features. For example, lane departure warnings, adaptive cruise control, and lane centring. ***[Schedule 1, item 1, sections 57BD(2)(h) and (3)]***

1.36 Scheme information does not include automated driving systems or features from level three and above. This is where the driver is no

longer driving the vehicle or required to supervise its operation. Rather, a driver may only be required to drive when the system requests them to do so. An example of this is a traffic jam chauffeur where the vehicle operates entirely autonomously on a freeway by automatically adapting its speed to that of the surrounding traffic and speed limit. It should however be noted that crash avoidance features may be included in vehicles equipped with driving automation systems at any level as any intervention by the system is not sustained and it does not change the role of the driver.

1.37 Although a vehicle may be equipped with an automated driving system that is capable of delivering multiple driving automation systems and/or features that perform at different levels, the level of driving automation exhibited in any given instance is determined by the features that are engaged system by system to assess whether or not information is scheme information. For example, service and repair information relating to a vehicle's traffic jam chauffeur is not included in the scheme but information needed to repair other features (such as a vehicle's windscreen) is (provided those features are not part of the level three or above automated system). ***[Schedule 1, item 1, section 57BD(3)]***

1.38 Repairers and RTOs dealing with automated driving systems are likely to be familiar with the SAE standard. As the standard defines complex concepts that are updated as required to keep pace with technological change within the industry, it is appropriate to refer to the source material as in force from time to time rather than replicate a static version in legislation that cannot be updated quickly.

1.39 SAE International provides access to the standard and the *Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles*. This can be accessed online, free of charge.[3]

Vehicle coverage – "Scheme vehicle"

1.40 A ***scheme vehicle*** is a passenger vehicle (other than an omnibus) or a light goods vehicle within the meaning of a vehicle standard made under the *Road Vehicle Standards Act 2018*, manufactured on or after a specified date, as supplied to market. ***[Schedule 1, item 1, sections 57BA(a) and (b)]***

1.41 From no later than 1 July 2021, the *Road Vehicle Standards Act 2018* will provide that standards made under the *Motor Vehicle Standards Act 1989* continue to be in force.

[3] https://www.sae.org/standards/content/j3016_201806/.

1.42 This captures passenger vehicles (other than omnibuses) and light goods vehicles as defined in clauses 4.3 and 4.5.5 of the *Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005*. It would cover most vehicles manufactured primarily for use on public roads including four wheel drive passenger vehicles, vans and utility vehicles.

1.43 The scheme initially applies to such vehicles manufactured on or after 1 January 2002. This date aligns with similar arrangements in the United States of America (under a 2014 national Memorandum of Understanding), and is intended to reduce the regulatory burden on manufacturers while ensuring the scheme covers most of Australia's vehicle fleet, particularly vehicles produced since the increased take-up of computerisation.

1.44 A later year of manufacture may be prescribed for passenger and light goods vehicles in the scheme rules. This power could be used in the future to help ensure the scheme does not place onerous obligations on data providers to continue to offer scheme information for vehicles that are unlikely to be on the roads due to the passage of time. ***[Schedule 1, item 1, sections 57BA(a)(ii) and (b)(ii)]***

1.45 The definition of scheme vehicle does not capture two or three wheeled vehicles, farm, construction or heavy vehicles, motor homes or buses. This recognises that there may be different issues for different vehicle types and that further consultation would be needed in order to consider including such vehicles. A rule-making power has been included to enable other vehicle types to be brought into the scheme in the future, subject to appropriate consultation and regulatory impact assessment processes being undertaken. ***[Schedule 1, item 1, section 57BA(c)]***

Who can access scheme information – "Australian repairers" and "scheme RTOs"

1.46 Under the scheme, data providers must offer and supply scheme information to repairers and RTOs. However, access to safety and security information is restricted to natural persons who meet prescribed criteria – see *Safety and Security Information*.

1.47 An ***Australian repairer*** is a person to the extent they are carrying on, or actively seeking to carry on, a business of diagnosing faults with, servicing, repairing, modifying or dismantling motor vehicles in Australia. ***[Schedule 1, item 1, section 57BB]***

1.48 In some states, a licence is needed to run such a business, or the relevant person must hold an appropriate vocational, tertiary or professional qualification.

1.49 The definition of repairer includes specialist repairers including auto electricians, transmission, brake, suspension and windscreen technicians and vehicle body or smash repairers.

1.50 Including people that modify scheme vehicles will enable those, for example, fitting a tow-ball to a vehicle or modifying a vehicle to accommodate disabilities of a driver or passenger, to request scheme information. Including people who undertake dismantling services will help reduce the risks of fire or pollution caused if a dismantler is not aware of flammable or hazardous vehicle components.

1.51 People undertaking repairs to their own vehicle or as a hobby are not eligible to access information under this scheme.

1.52 A ***scheme RTO*** is an RTO as defined in the *National Vocational Education and Training Regulator Act 2011*, that provides, or seeks to provide, a course in Australia providing training in diagnosing faults with, servicing, repairing, modifying or dismantling scheme vehicles. ***[Schedule 1, item 1, section 57BC]***

1.53 Access to scheme information is not mandated for vehicle owners, members of the public, data aggregators and tool and part manufacturers under the scheme. Basic service and repair information relevant to vehicle owners and members of the public is supplied in the owner's manual which is typically supplied with the vehicle and/or already available directly from the manufacturer.

1.54 Other parties in the service and repair market, such as data aggregators and tool and part manufacturers will continue to be able to negotiate access to service and repair information on commercial terms. The Government expects these arrangements to continue as they increase convenience and choice for repairers.

1.55 Mandating access for these parties is beyond the objectives of the scheme. Unlike repairers and RTOs, other parties in the service and repair market do not typically use this information to directly diagnose faults with, service or repair scheme vehicles. Rather, they use it to develop and offer products or services that increase the ease of use and convenience of scheme information for repairers.

Main obligation - Requirement to offer to supply information

1.56 If a data provider supplies, or offers to supply, scheme information to one or more repairers or RTOs, the data provider must offer to supply such information to all repairers and RTOs. An offer to supply must continue to be available until the data provider no longer offers that scheme information to any repairer or RTO. ***[Schedule 1, item 1, section 57CA(1)]***

Form and delivery mechanism for scheme information offer

1.57 The information must be offered to all repairers and RTOs:

- in the same forms it is supplied, or offered to be supplied, to one or more repairers or RTOs; or
- if those forms are not practicable or accessible to Australian repairers or RTOs, in an electronic form that is reasonably accessible to them.

[Schedule 1, item 1, section 57CA(2)]

1.58 If a data provider uses a secure gateway to provide information to affiliated repairers, it should allow all repairers to obtain scheme information via its secure gateway provided they meet the other requirements set out in the scheme.

1.59 The scheme aims to provide data providers with the flexibility to use their existing systems to provide scheme information to repairers and RTOs, helping to reduce compliance costs for data providers and information costs for repairers. It is, however, necessary to ensure that the information is offered in a form that repairers and RTOs are able to use.

1.60 All repairers should also be able to enjoy the same functionality as, for example, affiliated repairers. If the information is not able to be provided in the same form as it is supplied or offered to other repairers, the information must be provided in electronic format to help ensure it will be in a form that is accessible. For example, if information is provided to affiliated repairers as a searchable electronic document, this information cannot then be provided to independent repairers as a lengthy, hard copy document as this is neither the same form nor likely to be considered reasonably accessible.

1.61 Where it is not practicable or accessible to offer scheme information to all repairers in the same form as it is offered to one or more repairer, scheme information must be offered in an electronic form that is reasonably accessible to all repairers and RTOs. ***[Schedule 1, item 1, section 57CA(2)(b)]***

1.62 A reasonably accessible electronic form includes using any computer and:

- a non-proprietary vehicle interface which complies with the SAE J2534, ISO 22900 (as updated from time to time) or equivalent generic pass-through device;
- an on-board system integrated and entirely self-contained within the vehicle (including service information systems integrated into an on-board display); or

- a system that provides direct access through a non-proprietary interface such as Ethernet, USB or DVD.

1.63 Scheme information may be supplied or offered in other forms provided they are practicable and accessible. ***[Schedule 1, item 1, sections 57CA(1) and (2)]***

Publication of scheme offer

1.64 A data provider must publish a scheme offer in English on the internet in a form that is accessible free of charge. For example, it is expected that websites would identify that a person is a data provider under the Scheme and provide details of what scheme information they offer. This information cannot only be made available on a subscriber-only website or behind a paywall. ***[Schedule 1, item 1, section 57CA(6)]***

Choice of supply period in scheme offer

1.65 A data provider may choose to offer scheme information to all repairers on a fee-per-request basis, and/or via a time-limited subscription service.

1.66 Where the information is being provided to any repairer through a time-limited subscription service, a data provider must make a scheme offer that includes provision of scheme information:

- for any period requested by a repairer or RTO; or
- on a daily, monthly and annual basis.

[Schedule 1, item 1, section 57CA(3)]

1.67 Providing repairers with flexibility as to the time period they wish to access the information improves the affordability of scheme information, by helping repairers match the financial outlay for scheme information with their expected use. It may also improve the accessibility of the scheme by making it easier for repairers to make decisions on what information to access as they do not have to commit to large outlays without any certainty they will require that information again.

Notifying the scheme adviser about offers

1.68 A data provider is required to notify the scheme adviser of scheme offers and any changes to scheme offers. ***[Schedule 1, item 1, section 57CA(7)]***

1.69 This will help to ensure repairers and RTOs are able to easily access the information they need to identify who they can request scheme information from and on what terms. This may be particularly important for less common vehicles where service and repair information may not be regularly accessed by independent repairers.

1.70 In addition, it will also enable the scheme adviser to provide information online about the availability of scheme information to data providers, repairers and RTOs – see *Scheme Adviser*.

Contravention of these obligations

1.71 Failure to comply with the choice of supply period and publication and notification requirements can result in a civil penalty of up to 600 penalty units for bodies corporate and 120 penalty units for other persons. ***[Schedule 1, items 1, 11 and 12, sections 57CA(3), (6) and (7), 76(1A)(cc) and 76(1B)(aac)]***

1.72 In addition, the ACCC can issue infringement notices for alleged non-compliance. The infringement notice penalty amount for a body corporate is 60 penalty units or 12 penalty units for other persons. ***[Schedule 1, item 1, section 57GB]***

Main obligation – Offered price must not exceed fair market value

1.73 A data provider must offer scheme information at a price that that does not exceed fair market value. ***[Schedule 1, item 1, section 57CA(4)]***

Fair market value

1.74 The scheme mandates access by repairers and RTOs to scheme information that may not otherwise be available, rather than compensates for information already readily available. In this context, the use of fair market value is important to ensure the acquisition of scheme information is on just terms.

1.75 Fair market value allows for cost recovery and a reasonable profit margin.

1.76 'Fair market value' is a recognised concept in both Australian law and in an international context. When undertaking regulatory action, it is established practice to ascertain fair market value by using an objective test.

1.77 The International Valuation Standards 104 cites the OECD Glossary of Tax Terms definition of 'fair market value' as 'the price a willing buyer would pay a willing seller in a transaction on the open market'.

1.78 The case of *MMAL Rentals Pty Ltd v Bruning* [2004] NSWCA 451 (MMAL Rentals) provides the Australian common law position on 'fair market value'. There are two elements to 'fair market value' described in MMAL Rentals.

1.79 The term comprises both 'fair value' and 'market value'. The term 'market value' is established in a statutory and contractual context to invoke the test of what price a willing, but not anxious, purchaser and

vendor, bargaining with each other, would arrive at. Therefore, a determination of fair market value is objective and assumes that there is no impediment to the process of bargaining between the parties. This means the individual characteristics of particular buyers and sellers including factors like unequal negotiating ability and information asymmetry would not be considered. Rather, a court would look at the market as a whole to objectively consider what is 'fair'.

1.80 The scheme requires certain factors to be taken into account in determining fair market value, given the particular circumstances in which scheme information needs to be provided, for example a data provider may need to negotiate a licence with the data owner. These factors aim to balance the obligations and impact on the data provider, while ensuring scheme information is not sold at an excessive price. These factors are explained below.

1.81 The Australian Constitution requires that a law of the Parliament may only effect an acquisition of property on just terms.

1.82 The factors to be taken into account in paying fair market value address this requirement and are explained below.

Factors to be considered in setting fair market value

1.83 The factors are a non-exhaustive list of considerations that must be taken into account in determining fair market value for access to scheme information. ***[Schedule 1, item 1, section 57CA(5)]***

Price charged to other Australian repairers

1.84 Consideration of the price charged to other repairers and RTOs for providing scheme information in relation to a scheme vehicle of a similar make, model and year will be relevant in establishing fair market value. Information supplied outside of the scheme is also relevant, where the commercial supply of that information involves an arm's length transaction. ***[Schedule 1, item 1, section 57CA(5)(a)]***

1.85 The price paid by one repairer for scheme information in relation to a scheme vehicle sets a guide for the value of that information. A data provider's price may vary between different repairers in some circumstances, such as differing terms of access and duration, as set out below.

Terms on which information is offered

1.86 Data providers are able to set reasonable terms on which scheme information is supplied to repairers and RTOs, including as to the permitted use of the information, which is necessary to allow repairers and RTOs to undertake diagnostic, repair or servicing, modifications or dismantling or training activities, the number of permitted users and the

frequency and duration of the use of the information – see *Terms and conditions of supply and use*.

1.87 The fair market value of the scheme information will vary depending on the terms of the offer. Scheme information which is offered to an Australian repairer for a year to be accessed by multiple employees to repair multiple scheme vehicles would be a different value than that offered for a single use term of one day for use by a single employee for a single vehicle. The terms of the offer must be considered along with the price charged to reflect the actual bargain struck between the parties. ***[Schedule 1, item 1, section 57CA(5)(b)]***

Anticipated demand by Australian repairers and RTOs

1.88 The anticipated demand by repairers and RTOs for the supply of scheme information on the basis of the scheme offer is a relevant consideration because it may affect the commercial value of the information. ***[Schedule 1, item 1, section 57CA(5)(c)]***

Reasonable recovery of costs

1.89 Where a data provider incurs costs in creating, producing and providing scheme information in the required form, it is appropriate that the reasonable recovery of these costs be a consideration in determining the fair market value. ***[Schedule 1, item 1, section 57CA(5)(d)]***

Prices for information in overseas markets

1.90 The price paid in overseas markets may be used as a guide for ascertaining a fair market value of that information. ***[Schedule 1, item 1, section 57CA(5)(e)]*** While it is noted that prices in overseas markets may reflect very different market conditions and information supplied, this information may still be relevant in determining a fair market value in Australia.

Any amount payable to a third person with proprietary interest

1.91 Where the data provider does not own the scheme information it is required to provide under the scheme, it is possible that the data provider is licensed to provide data to certain entities, not including independent repairers.

1.92 In order to provide scheme information as required by the scheme, it is expected the data provider may need to renegotiate its contract (such as a licensing agreement it may have entered with a data owner or other licensee governing the data provider's use of intellectual property or copyright material). Such renegotiations are likely to result in payments being made by the data provider to the copyright owner to compensate for the additional copying/sharing of intellectual property. It is therefore appropriate for these costs to be a consideration in determining the fair market value. ***[Schedule 1, item 1, section 57CA(5)(f)]***

Main obligation – Requirement to supply information

1.93 Following a request for scheme information, the data provider must supply the information within the relevant timeframe, depending on the availability of the information requested and whether it involves safety and security information. ***[Schedule 1, item 1, section 57CB]***

1.94 There are three timeframes for the supply of scheme information:

- immediate delivery: if the information has been supplied before, or is readily accessible and able to be provided in the requested form;
- within two business days: if the information being provided includes safety or security information and the data provider needs to consider additional information to assess if an individual is a fit and proper person; and
- if the other two timeframes do not apply: then within five business days, or as agreed between parties.

[Schedule 1, item 1, table to section 57CB(3)]

1.95 The timeframe for supply commences once the repairer or RTO has paid, or offered to pay, the price to the data provider for the information requested. This reflects that data providers may have different business models and payment methods – for example, a data provider may utilise a periodic subscription model, or a pay-on-request model, or may accept payment in arrears after issuing an invoice at the time of supply. ***[Schedule 1, item 1, section 57CB(3)(a)]***

Immediate delivery

1.96 Data providers must provide immediate delivery for any information that is readily accessible. This applies to:

- scheme information which has been supplied previously in that form – whether supplied within their dealership network, or to an Australian repairer or RTO;
- scheme information not previously supplied (in the same or different form) but which is easily able to be (for example, repair manuals); and

- safety and security information where no information is needed to assess if the individual is a fit and proper person – that is, where the information has previously been supplied and the individual has been assessed by that data provider (or their delegate) to be a fit and proper person for that type of information.

[Schedule 1, item 1, item 1 in the table in section 57CB(3)]

Two business days for safety or security information where a fit and proper person assessment is required

1.97 Restrictions on access to safety and security information mean that a data provider may not always be able to supply this information immediately. Where the scheme information requested is, or includes, safety or security information, the data provider may need to assess additional information to determine whether they are permitted to supply the restricted information to the individual requesting it. ***[Schedule 1, item 1, section 57DB]***

1.98 An individual must be a fit and proper person to be able to access safety and security information. Once the individual repairer or individual representing the RTO has provided the requisite information, the data provider will need to assess this information to determine if the individual is a fit and proper person. ***[Schedule 1, item 1, section 57DB]***

1.99 Under these circumstances, the data provider must supply the scheme information within two business days of receipt of the requisite information (where the individual is assessed to be a fit and proper person). It is expected this information will be supplied as soon as practicable within those two business days. ***[Schedule 1, item 1, item 2 in the table in section 57CB(3)]***

1.100 However, it is not necessary for an individual to provide the same information relating to whether they are a fit and proper person each and every time they submit a request for safety or security information.

1.101 If the data provider has previously assessed that individual as being a fit and proper person for that type of information, and that person's circumstances have not changed, the two business days' timeframe will not apply. Under these circumstances, where the information is readily accessible, the data provider must provide immediate delivery of the requested information.

1.102 The two business days timeframe will apply to safety and security information where:

- the individual repairer or individual representing an RTO is requesting this type of information for the first time and the data provider needs to determine if they are a fit and proper person; and

- the data provider needs to reassess if the individual is a fit and proper person for that type of information, either because that person's circumstances have changed or because the interval since the previous assessment was undertaken exceeds any time period that may be prescribed in the scheme rules.

Example 1.2

A repairer asks for safety information from a data provider they have never requested safety information from before. The individual provides all the information needed for the data provider to determine if they are a fit and proper person and pays the price for the scheme information. The data provider has up to two business days to determine if the repairer is a fit and proper person and, if so, to supply the safety information to that person.

If the repairer subsequently requests the same type of safety information from that data provider (with the same access criteria set out in the scheme rules) and they advise the data provider that their circumstances have not changed, the data provider must supply the safety information immediately.

Five business days or as agreed between the parties

1.103 There may be occasions where it will be impracticable for a data provider to supply scheme information immediately or within two business days. This may occur due to the technical complexity or novelty of a request. The relevant information may not be readily accessible by the data provider for such unique requests.

1.104 In those cases, the data provider and individual repairer or individual representing an RTO can agree an alternative timeframe for the information to be provided. In circumstances where they cannot agree, the information must be provided within five business days. It is expected the information will be supplied as soon as practicable within those five business days, or within the agreed timeframe. ***[Schedule 1, item 1, item 3 in the table in section 57CB(3)]***

Example 1.3

A repairer requests information relating to a limited edition vehicle which was supplied to market with several unique features. The data provider has offered to supply service and repair information relating to this vehicle but this scheme information is not readily accessible by the data provider. In this circumstance the repairer and data provider may negotiate a timeframe – e.g. seven business days, where that is the timeframe the data provider would reasonably expect to supply that information to its dealership network. If however the parties cannot agree, then the data provider must supply the requested information within five business days.

Infringement notice for contraventions of timeframe provisions

1.105 The ACCC can also issue infringement notices where data providers allegedly contravene the time period for providing this information. The infringement notice penalty amount is 600 penalty units for a body corporate or 120 penalty units for other persons. ***[Schedule 1, item 1, item 4 in the table in section 57GB(2)]***

1.106 Further information on penalties is outlined below – see *Infringement notices*.

Notification Requirement

1.107 Data providers are required to notify the scheme adviser of terms and conditions of any supply including price within two business days. Failure to comply with this requirements can result in a civil penalty of up to 600 penalty units for a body corporate and 120 penalty units for other persons. ***[Schedule 1, items 1, 11 and 12, sections 57CB(4), 76(1A)(cc) and 76(1B)(aac)]***

1.108 In addition, the ACCC can issue an infringement notice. The infringement notice penalty amount is 60 penalty units for a body corporate or 12 penalty units for other persons. ***[Schedule 1, item 1, item 5 in the table in section 57GB(2)]***

1.109 This will help the scheme adviser to provide information online about the availability of scheme information to data providers, repairers and RTOs – see *Scheme Adviser*.

Compliance with main obligations

1.110 A data provider must comply with obligations under the scheme even if such compliance would be:

- an infringement of copyright by the data provider or any other person;
- a breach of contract in relation to the supply of the scheme information; or
- a breach of an equitable obligation of confidence to which the data provider is subject in relation to the supply of the scheme information.

[Schedule 1, items 1, 3 and 4, sections 57CD(1) and 4M]

1.111 Failure to comply with a main obligation is subject to maximum pecuniary penalty of $10 million for a body corporate or $500,000 for an individual. ***[Schedule 1, items 1 and 10, sections 57CA(2) and (4), 57CB(2) and 76(1)(a)(ic)]***

1.112 See *Enforcement and remedies* for further discussion.

Terms and conditions of supply and use

1.113 The scheme allows data providers to set reasonable terms and conditions for use of scheme information provided that they do not prevent, restrict or limit the access to or use of scheme information. ***[Schedule 1, item 1, section 57CC(1)]***

1.114 Such terms must be consistent with the objectives of the scheme and not act as an unreasonable barrier to access or use of scheme information.

Reasonable terms and conditions

1.115 Data providers are able to set reasonable terms and conditions for the use of scheme information as is currently the case when manufacturers supply service and repair information to repairers.

1.116 Examples of terms and conditions that data providers may apply to repairers and RTOs in a contract for the supply of scheme information include:

- permitted use of scheme information (including any use of copyright protected material) which is necessary to allow repairers and RTOs to provide diagnostic, servicing and repairing or training activities;
  - for repairers this may include copying and use of the information by a number of technicians or on a number of scheme vehicles;
  - for RTOs this may include copying and disseminating to the students enrolled in a course;
- limitations on the use of scheme information for example on selling, sharing with others on an informal basis, or publishing scheme information (noting such activities may also be infringements of the Copyright Act);
- limitation of liability for loss or damage arising out of the use of the information; and
- requiring the repairer to notify the data provider if they carry out work related to a voluntary or mandatory recall to allow for accurate reporting of recall completion rates to regulators.

Prohibited terms and conditions

1.117 Terms and conditions that enable the information to be provided in an inaccessible format are not permitted. ***[Schedule 1, item 1, section 57CC(1)]***

1.118 Such a term or condition would also breach the main obligation which requires scheme information be offered in a reasonably accessible form to all repairers and RTOs and could attract a pecuniary penalty of up to $10 million for bodies corporate – *see Contraventions of main obligations*. ***[Schedule 1, item 1, section 57CA(2)]***

1.119 Data providers are expressly prohibited from requiring that a repairer buy other services or products (for example, tools or spare parts) as a condition of purchasing scheme information. ***[Schedule 1, item 1, section 57CC(2)(a)]***

1.120 They are also expressly prohibited from including a term or condition allowing a price increase after the contract is made. ***[Schedule 1, item 1, section 57CC(2)(b)]***

1.121 Existing protections in the Australian Consumer Law and Part IV of the CCA will also apply to the terms and conditions imposed by data providers. For example, the Australian Consumer Law provides protections against the inclusion of unfair contract terms in standard form contracts with small businesses. The CCA also prohibits exclusive dealing, that is where a supplier refuses to supply goods and services unless the purchaser agrees not to buy from a competitor, if it has the effect of substantially lessening competition in the relevant market.

1.122 Scheme rules may expand the types of terms and conditions that are not allowed to ensure data providers do not use this as a mechanism to frustrate the objectives of the scheme or create a barrier to access. ***[Schedule 1, item 1, section 57CC(2)(c)]***

1.123 Examples of terms that may be prohibited in the scheme rules include:

- prohibiting repairers from operating in a certain area (such as within a certain distance from a dealer);
- requiring repairers to only service, repair, modify or dismantle (or provide training for) certain scheme vehicles (and not others); or
- prohibiting repairers or RTOs from using tools or parts from certain providers.

1.124 Including prohibited terms and conditions can result in a civil penalty of up to 600 penalty units for a body corporate and 120 penalty units for other persons. In addition, the ACCC can issue infringement notices for this conduct. The infringement notice penalty amount is 60 penalty units for a body corporate or 12 penalty units for other persons. ***[Schedule 1, items 1, 11 and 12, sections 57CC(2), 57GB, 76(1A)(cc) and 76(1B)(aac)]***

1.125 Further, a contract term or condition that is not permitted will have no effect. ***[Schedule 1, item 1, section 57CC(3)]***

Safety and security information

1.126 Widespread access to safety and security information would create unacceptable risks to vehicle security or the safety of the vehicle, the public or repairers. As such, data providers must restrict access to safety and security information to natural persons (for example, employees or individual agents of repairers and RTOs) who they reasonably believe require the information and meet the specified criteria. ***[Schedule 1, item 1, section 57DB]***

1.127 Safety information relates to hydrogen, high voltage, hybrid or electric propulsion systems installed in a vehicle. Security information relates to a vehicle's mechanical or electronic security system. ***[Schedule 1, item 1, section 57BF]***

1.128 Other types of safety and security information can be prescribed in the scheme rules if required. The ability to expand the types of safety and security information through the scheme rules is required to ensure that updates which are required due to technological advancements can be made quickly. If this information is not kept up to date, repairers and RTOs would be able to access information which they may not be qualified to handle safely or which may compromise vehicle security. ***[Schedule 1, item 1, sections 57BF(2)(e) and (3)(b)]***

1.129 The details about specific safety and security information may be set out in the scheme rules, which is a disallowable legislative instrument that is subject to parliamentary scrutiny. ***[Schedule 1, item 1, sections 57BF(2) and (3)]***

1.130 It is appropriate that this level of detail is set out in the scheme rules as it will be technical in nature and may need to be updated regularly and quickly to reflect changes in technology. The Minister will consult with industry stakeholders (including representatives of data providers, repairers, RTOs and consumers) and the Scheme Advisor on what scheme information should be considered safety and security information and the corresponding access criteria.

Packaged Information

1.131 A data provider must separate safety and security information from other scheme information where it is reasonable practicable to do so. ***[Schedule 1, item 1, section 57DA]***

1.132 There may, however, be circumstances where it is not reasonably practicable for the data provider to separate this information. Where it is not reasonably practicable to separate the information, the data provider must not supply the information unless they have reasonable grounds to believe that the repairer or RTO meets the requirements to access the packaged safety and/or security information. ***[Schedule 1, item 1, section 57DB]***

Restricting access to safety and security information

1.133 A data provider must not provide safety and security information to an individual unless there are reasonable grounds based on information provided by the individual to believe that:

- the information is solely for use for the purposes of a repairer's business or providing an RTO course; and
- the individual is a fit and proper person to access and use the information.

[Schedule 1, item 1, section 57DB(1) and (2)]

1.134 Additionally, data providers will not be required to provide access to security information unless the individual provides a declaration:

- confirming they are authorised by the owner of the scheme vehicle to access the information; and
- specifying the vehicle identification number for that vehicle.

[Schedule 1, item 1, section 57DB(3)]

1.135 The vehicle owner will not be required to provide any personal information to the data provider.

1.136 Individuals may also be required to provide a declaration that the premises where they are undertaking the activities complies with any standard prescribed in the scheme rules. ***[Schedule 1, item 1, section 57DB(3)(b)]***

1.137 For example, subject to consultation, the scheme rules may be used to prescribe that in order to access some safety information for certain electric vehicles, the repairer will need to verify that the premises they will conduct the work in complies with *AS 5732:2015 Australian Standard – Electric Vehicle Operations – Maintenance and repair*.

Fit and proper person

1.138 The scheme sets out the personal information that may be requested by the data provider so that they can determine if there are reasonable grounds to believe that an individual is a fit and proper person to access and use the particular safety and security information. ***[Schedule 1, item 1, section 57DB(6)]***

1.139 When assessing if individuals who have requested access to safety and security information meet the relevant access criteria, data providers may only request personal information regarding:

- an individual's name and address and relationship to a repairer or RTO;
- an individual's qualifications such as licence, evidence of successfully completing a required training course and proof of employment;

- a criminal record (in circumstances prescribed by the scheme rules); and
- any other information (except sensitive information) prescribed in the scheme rules that is relevant to working out whether the individual is a fit and proper person to access and use the safety and security information.

[Schedule 1, item 1, section 57DB(2)(b), (4) and (6)]

1.140 To be assessed as a fit and proper person to access safety or security information, the individual must meet the criteria prescribed by the scheme rules. Different criteria may be prescribed for safety information and security information. ***[Schedule 1, item 1, sections 57DB(4) and (5)]***

1.141 Treasury will consult stakeholders on the proposed safety and security criteria to be prescribed in scheme rules. This will take into consideration the types of fit and proper person checks that are already used for similar purposes in the motor vehicle industry and relevant licensing arrangements that exist in some states. For example, a criminal records check may also be required to access security information to help prevent vehicle theft and associated crime.

1.142 The scheme rules may also prescribe matters in relation to the circumstances in which personal information used in assessing whether a person is fit and proper to access safety and security information may be sought or given. ***[Schedule 1, item 1, section 57DB(7)]***

1.143 The scheme rules may limit how often a data provider can seek a criminal records check, the types of offences that are relevant to the assessment and the period for which any other personal information provided remains valid before the data provider can ask for updated information. For example, the scheme rules may only allow a criminal records check to be done every two years with the person required to certify that no changes have occurred to information previously provided. If changes have occurred, the data provider may request updated information in order to reassess if the individual is a fit and proper person.

1.144 The scheme rules cannot prescribe any personal information which is sensitive information under the Privacy Act, other than those details pertaining to a criminal records check outlined above (if appropriate). ***[Schedule 1, item 1, section 57DB(6)(e)]***

Failure to restrict access to safety and security information

1.145 Failure to restrict access to safety and security information can result in a civil penalty of up to 600 penalty units for a body corporate and 120 penalty units for other persons. In addition, the ACCC can issue infringement notices with a maximum penalty amount of 60 penalty units

for a body corporate or 12 penalty units for other persons. ***[Schedule 1, items 1, 11 and 12, sections 57DB(1), 57GB, 76(1A)(cc) and 76(1B)(aac)]***

Record keeping for security information

1.146 Where data providers supply security information, they are required to keep the following records for five years:

- time and date of supply;
- the name and contact details of the repairer or RTO;
- personal information used to determine that the individual was fit and proper to access and use the information;
- the vehicle identification number (allocated under the *Road Vehicle Standards Act* 2018) of each vehicle for which the information is supplied; and
- details of the information supplied.

[Schedule 1, item 1, sections 57DE]

1.147 Failure to keep records can result in a civil penalty of up to 600 penalty units for a body corporate and 120 penalty units for other persons. In addition, the ACCC can issue infringement notices. The infringement notice penalty amount is 60 penalty units for a body corporate or 12 penalty units for other persons. ***[Schedule 1, item 1, sections 57DE(2) and 57GB]***

1.148 These records may need to be used by the ACCC to investigate compliance with the scheme. In addition, law enforcement agencies will be able to use their existing powers, for example, related to the search and seizure of evidential material under the *Crimes Act 1914*, to obtain these records. This will help mitigate any security risks caused by increasing access to this information. Five years is not considered too onerous a burden on data providers as these records can be stored electronically, which once generated, involves minimal costs.

Privacy

1.149 When assessing if an individual who has requested access to safety and security information meets the relevant access criteria (as set out in the scheme rules), data providers may request personal information, including information related to an individual's criminal record. This is considered to be 'sensitive information' under the Privacy Act.

Application of the Privacy Act to small businesses handling sensitive information

1.150 Many data providers who will be collecting this information are likely to already be subject to the Privacy Act, meaning they must comply

with obligations under the Privacy Act in relation to any personal information received under the scheme. On the other hand, there may be data providers who are small businesses (that is, have annual turnover under $3 million) and therefore, exempt from obligations in the Privacy Act.

1.151 In these situations, the scheme extends the Privacy Act to these data providers who are small businesses and would otherwise be exempt from the Privacy Act. The Privacy Act applies when sensitive information is disclosed to them for the purposes of determining if an individual is fit and proper to access and use safety and security information. ***[Schedule 1, item 1, section 57DC]***

1.152 Sensitive information is defined in section 6(1) of the Privacy Act and includes an individual's criminal record.

1.153 This information requires protection as the misuse or mishandling could cause financial or reputational loss – for example, it could lead to a loss of trust and considerable harm to an individual's reputation or result in a loss of customers, business partners or revenue. As such it is appropriate and proportionate to apply the Privacy Act in these circumstances to ensure this information is protected from misuse, interference, loss, unauthorised access, modification or disclosure.

1.154 The Office of the Australian Information Commissioner is responsible for the oversight of the application of the Privacy Act to these entities. The OAIC can share protected information with the ACCC in line with authorisations under section 29(1) of the *Australian Information Commissioner Act 2010*. ***[Schedule 1, item 1, subsection 57DC(3)]***

1.155 During consultation, industry indicated there are expected to be fewer than five anticipated information recipients that will not already be covered by the Privacy Act. Therefore, the majority of the recipients will already be covered by the Privacy Act, given that they carry on business in Australia, collect personal information in Australia and are not covered by the Privacy Act's small business exemption.

Sensitive information not be to stored or accessed overseas

1.156 The Privacy Act does not prevent the sending of sensitive personal information overseas. Rather, Australian Privacy Principle 8 requires that, before an entity discloses personal information to an overseas recipient, the entity must take reasonable steps to ensure that the overseas recipient does not breach the Australian Privacy Principles.

1.157 Australian Privacy Principle 8 operates with section 16C of the Privacy Act to require that an entity that discloses personal information to an overseas recipient is accountable for any acts or practices of the

overseas recipient in relation to the information that would breach the Australian Privacy Principles.

1.158 A data provider may need to handle sensitive information (i.e. the criminal record of an individual repairer or RTO lecturer) to assess whether they are a fit and proper person to access and use safety and security information. When handling sensitive information, a person must not do anything that might reasonably enable it to be accessed by any person outside Australia. ***[Schedule 1, item 1, section 57DD(1) and (3)]***

1.159 In addition, if data providers hold sensitive information, it must be stored in Australia (or an external territory). ***[Schedule 1, item 1, section 57DD(2)]***

1.160 These provisions go beyond the requirements of the Privacy Act, and therefore will be administered by the ACCC.

1.161 In some instances, data providers may need to appoint another party (who is based in Australia and subject to the Privacy Act) to handle personal and sensitive information on their behalf. It is anticipated industry may develop a market-based mechanism to make it easier for parties to adhere to these requirements.

1.162 Failure to comply with the obligations relating to the storage of and access to sensitive information can result in civil penalties of up to 1,500 penalty units for bodies corporate and 300 penalty units for individuals. This is consistent with protections for sensitive personal information provided under the *My Health Records Act 2012*. ***[Schedule 1, item 1, sections 57DD(2) and (3)]***

1.163 These additional protections are necessary as data providers are likely to be based overseas. The Privacy Act only provides limited protections for this information where the information is held by an overseas entity, rather than by an Australian entity. Therefore, this safeguard is appropriate to avoid any serious consequences from potential mishandling of information.

Dispute resolution

1.164 The scheme sets out a mechanism for parties to resolve disputes to assist with the operation of the scheme. ***[Schedule 1, item 1, Division 5]***

1.165 Disputes may arise, for example, in relation to whether particular vehicles are scheme vehicles or whether particular information is scheme information. They might also arise regarding whether a person is a data provider or whether an individual has appropriate qualifications to access safety and security information, or in relation to the price for or terms and conditions attached to a scheme offer. ***[Schedule 1, item 1, sections 57EA and 57EB]***

1.166 A party to a dispute may start a resolution process by giving written notice to the other party of the nature and subject matter of the dispute and how the scheme relates to the subject matter, as well as the outcome sought and how the party thinks it will be best achieved. The parties must then try to resolve the dispute. Parties must make genuine efforts to resolve any dispute relating to the scheme, including notifying the other party to a dispute of the nature of the dispute, and what could be done to resolve it. ***[Schedule 1, item 1, sections 57ED(1) and (2)]***

1.167 A party is taken to have tried to resolve a dispute if they have approached resolution of the dispute in a reconciliatory manner, including by attending and participating in meetings at reasonable times and, where mediation is being used, by making their objectives clear and respecting confidentiality if the other party requests that confidentiality be observed.

1.168 Genuine efforts to resolve a dispute include attendance at meetings, clarifying intentions and goals, and observing confidentiality. Responding to communications within a reasonable time, and considering opinions of the technical experts may also indicate that a party has tried to resolve a dispute. ***[Schedule 1, item 1, section 57EE]***

1.169 Where parties are unable to resolve disputes within two business days, either party can refer their matter to an agreed mediator. If they cannot agree on a mediator, they may ask the scheme adviser to appoint a mediator. The scheme adviser must appoint a mediator within two business days. ***[Schedule 1, item 1, sections 57ED(3), (4) and (5)]***

1.170 The mediator may, with the agreement of the parties, appoint a technical expert to assist in resolving the dispute. ***[Schedule 1, item 1, section 57EF(2)]***

1.171 The mediator is responsible for setting the time and place for mediation, which must be held in Australia or using virtual meeting technology. ***[Schedule 1, item 1, section 57EF(1), (3) and (4)]***

1.172 The parties must attend the mediation. Failure to attend can result in a civil penalty of up to 600 penalty units for a body corporate and 120 penalty units for other persons. ***[Schedule 1, item 1, section 57EF(5)]***

1.173 The ACCC will also have administrative powers available, including issuing infringement notices for failure to attend mediation. The infringement notice penalty amount is 60 penalty units for a body corporate or 12 penalty units for individuals. ***[Schedule 1, item 1, sections 57EF(5) and 57GB]***

1.174 The parties are equally liable for the costs of the mediation (such as the cost of the mediator and technical experts) unless they agree otherwise, and must pay their own costs of attending the mediation. ***[Schedule 1, item 1, section 57EH]***

1.175 If the dispute has not been resolved within 30 days after the day the mediation starts:

- the mediator may terminate the mediation at any time unless the mediator is satisfied that a resolution of the dispute is imminent; and
- either party may terminate the mediation through the mediator.

[Schedule 1, item 1, section 57EG(1), (2) and (3)]

1.176 If the mediation is terminated without resolution, the mediator must issue a certificate setting out:

- the nature of the dispute;
- the parties to the dispute and whether they attended mediation; and
- that the mediation has finished with no resolution.

[Schedule 1, item 1, section 57EG(4)]

1.177 The mediator must give the certificate to the scheme adviser and each of the parties to the dispute. ***[Schedule 1, item 1, section 57EG(5)]***

1.178 The purpose of the certificate is to help ensure the scheme adviser is fully informed as to why mediation was not successful to help inform its work about reporting to the ACCC on systemic issues and providing general advice about the operation of the scheme. It may also be helpful for parties if they choose to bring legal proceedings.

1.179 The dispute resolution process outlined in Division 5 does not affect the rights of either party to a dispute to bring legal proceedings. ***[Schedule 1, item 1, section 57EC]***

Scheme adviser

1.180 The scheme establishes the role of scheme adviser, which has the following functions:

- appointing mediators or technical experts in relation to dispute resolution under the scheme;
- reporting to the Minister on:
  - scheme prices, the terms and conditions of scheme offers or the availability of scheme information;
  - whether they consider information is or should be scheme information; and
  - anything else relating to the operation of the scheme;
- reporting to the ACCC on systemic issues;

- providing general advice about the operation of the scheme;
- publishing annual reports on their website about the number and type of inquiries and disputes, the number and types of disputes for which a mediator was appointed, resolution rates for disputes and anything else relating to the operation of the scheme or requested by the Minister; and
  - There is no requirement to table these reports in Parliament; ***[Schedule 1, item 1, section 57FB(4)]***
- providing information online about the availability of scheme information.

[Schedule 1, item 1, section 57FB]

1.181 The Minister may make an instrument appointing a person or organisation to this role. An appointment may be varied or revoked in accordance with section 33(3) of the *Acts Interpretation Act 1901*. ***[Schedule 1, item 1, section 57FA]***

1.182 The scheme adviser is not entitled to remuneration or allowances. ***[Schedule 1, item 1, section 57FA(3)]***

Interaction with the Copyright Act

Protection from civil and criminal liability

Civil action

1.183 Data providers are provided a defence to a civil action brought by a third party claimant for infringing the Copyright Act in Australia where:

- they share information as required by scheme; and
- they pay compensation in accordance with the scheme to a third party that holds copyright in relation to some or all of the scheme information the data provider is required by the scheme to share.

[Schedule 1, item 1, section 57CD]

1.184 A data provider seeking to avoid liability bears the onus of proving that they have complied with the scheme and paid compensation in line with the scheme. The reversal of the onus of the legal burden for these civil actions is appropriate as the data provider would be likely to be in a position to adduce evidence that the information they have supplied or offered to supply was required and supplied in accordance with the scheme, and that they have paid the compensation required. In contrast, the third party claimant would have difficulty gaining access to evidence

about the details of the data provider's compliance with the scheme. ***[Schedule 1, item 1, section 57CD(5)]***

Criminal prosecution

1.185 A data provider is not liable to prosecution under the Copyright Act in Australia in relation to the supply of, or offer to supply, scheme information under the scheme. This is appropriate as the possibility of criminal liability for compliance with the scheme would frustrate the purpose of the scheme by deterring data providers from fulfilling their obligations.

1.186 This policy is given effect by operation of the lawful authority defence in section 10.5 of the Criminal Code. A data provider can rely on this defence by saying the supply of, or offer to supply, scheme information is justified by this Part IVE of the CCA. The data provider defendant would carry an evidential burden in relation to that matter (section 13.3 of the Criminal Code). Evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (section 13.3(6) of the Criminal Code). ***[Schedule 1, item 1, note 2 to section 57CD(1)]***

1.187 The reverse evidential burden of proof is consistent with the Guide to Framing Commonwealth Offences. It is appropriate as the defendant would be better positioned to readily adduce evidence about their involvement in the scheme and that the information was shared in accordance with their obligations under the scheme. In contrast, the prosecution would have to engage in lengthy and costly investigations in relation to the data provider's organisational requirements and obligations and whether they are part of the scheme or not, some of which would be considered to be sensitive information.

Statutory licensing scheme for educational institutions

1.188 The statutory licensing scheme for educational institutions in Division 4 of Part IVA of the Copyright Act does not apply to scheme information. This ensures payment is made under the scheme so that data providers are compensated appropriately. This is given effect by amendments to section 113P(1)(b) of the Copyright Act. ***[Schedule 1, items 26 and 27, sections 113P(1)(b)(iii) and (iv) of the Copyright Act]***

1.189 The factors to be considered when setting fair market price include the terms on which the information is provided, see section 57CA(5)(b). The scheme allows data providers to set terms and conditions for the use of scheme information including the permitted use, see section 57CC. In the case of an RTO, this includes any uses of copyright material which are appropriate for educational purposes, such as copying and communication of the material by the RTO for use by students enrolled in a course. This provides a mechanism that allows

RTOs to use scheme information for training purposes and ensures data providers are compensated fairly.

Enforcement and remedies

Civil penalties

1.190 Failure to comply with the main obligations is subject to a maximum penalty of $10 million for a body corporate and $500,000 for an individual. ***[Schedule 1, items 1 and 10, sections 57CA(2) and (4), 57CB(2) and 76(1)(a)(ic)]***

1.191 In general, the maximum civil penalty amount for contraventions of obligations other than the main obligations is 600 penalty units for a body corporate and 120 penalty units for individuals. ***[Schedule 1, items 1, 11 and 12, sections 57CA(3), (6) and (7), 57CB(3), 57CC(2), 57DB(1), 57DE(2), 57EF(5), 57GA, 76(1A)(cc) and 76(1B)(aac)]***

1.192 However, for breaches of the requirements relating to the storage and access of an individual's sensitive information, there is a penalty of 1,500 penalty units for a body corporate and 300 penalty units for individuals. ***[Schedule 1, items 1, 11 and 12, sections 57DD(2) and (3), 76(1A)(cc) and 76(1B)(aac)]***

1.193 The penalties in the scheme rely on the existing framework for pecuniary penalties in section 76 of the CCA. These penalties are intentionally significant, are in line with the maximum penalties for certain provisions in the CCA (applicable to listed companies), and are targeted to a particular class of persons (data providers) and not the general public.

1.194 It is appropriate to set the penalty units at such a high rate to ensure compliance with the regime, and where appropriate, justify the costs of taking action through the court. In particular, the high penalty for breaches relating to the storage and access of sensitive information acts as a safeguard against the compromise of an individual's personal information.

1.195 A failure to comply with a main obligation of the scheme is subject to a maximum pecuniary penalty of $10 million for a body corporate and $500,000 for an individual. These high penalty amounts are necessary and appropriate as compliance by data providers is critical to the integrity of the scheme and the achievement of its objectives. The maximum civil penalty for a contravention of the main obligations reflects the seriousness of the most egregious instances of non-compliance with the scheme.

1.196 Failure to comply with these obligations would also frustrate achieving the objectives of the scheme. Setting the right penalties in

relation to contraventions of key obligations under the scheme is integral to ensuring its effective operation. It is important that the penalties act as a deterrent and are not merely seen as a cost of doing business.

1.197 In addition, civil courts are experienced in making civil penalty orders at levels within the maximum amount specified in legislation to reflect the individual circumstances of a case.

1.198 In a proceeding, a court will consider all relevant matters, including:

- the nature and extent of the conduct (either the act or omission) which led to the contravention;
- the nature and extent of any loss or damage suffered;
- the relevant circumstances in which the act or omission took place; and
- whether the person in the proceedings been found by a court to have engaged in any similar conduct prohibited under the CCA.

1.199 Further, the Government has provided the ACCC with a statement of expectations about its roles and responsibilities. The statement outlines the Government's expectations of regulators taking a risk-based approach to their compliance obligations, engagement and enforcement. This can be accessed on the ACCC's website.[4]

1.200 This has been taken into account in the ACCC's *Compliance and Enforcement Policy*. The policy outlines the governing principles for the ACCC's compliance and enforcement work and can be accessed on the ACCC website.[5] These principles include:

- proportionality – the ACCC's enforcement responses are proportionate to the conduct and the resulting or potential harm; and
- fairness – in the ACCC's conduct of investigations and other activities, the ACCC seeks to:
  - balance voluntary compliance with enforcement activity, while responding to many competing interests;
  - take into account the Commission's approach in one matter when deciding how to pursue another; and
  - balance fairness to individuals and traders who are subject to ACCC enforcement action. The ACCC seeks to do this

[4] https://www.accc.gov.au/system/files/ACCC_Statement_of_expectations.pdf.
[5] https://www.accc.gov.au/publications/compliance-and-enforcement-policy.

by remaining transparent with the public about the work of the ACCC, as well as the justification for their actions against traders.

Infringement notices

1.201 The ACCC may issue an infringement notice for an alleged contravention of a civil penalty provision, as set out in section 57GB of the Bill. The infringement notice provisions use the framework established in Part IVB of the CCA for industry codes. ***[Schedule 1, item 1, section 57GB]***

1.202 The ability to issue an infringement notice provides the ACCC with flexibility in considering enforcement options the ACCC can use to deter misconduct by data providers, and as an alternative to civil proceedings. It is expected that the ACCC will assess the appropriate avenue for enforcement, depending on the nature of the conduct and the actual or potential harm. This approach to infringement notices is consistent with the Guide to Framing Commonwealth Offences.

1.203 For most infringement notices under the scheme, the penalty is set at 60 penalty units for a body corporate or 12 penalty units for other persons. These amounts are consistent with the Guide to Framing Commonwealth Offences.

1.204 A higher infringement notice penalty amount has been provided where a data provider fails to supply scheme information within the required timeframe (which, in most cases, will be immediately). For an alleged contravention of this obligation, the infringement notice penalty is set at a higher level of 600 penalty units for a body corporate or 120 penalty units for other persons. ***[Schedule 1, item 1, sections 57CB(2)(b) and 57GB]***

1.205 While this is a higher amount than is recommended in the Guide to Framing Commonwealth Offences, we consider that this is appropriate and necessary for the infringement notice to act as an incentive for large companies to comply with the obligations of the scheme.

1.206 It also encourages a competitive market for motor vehicle service and repair as independent repairers will be significantly impacted if data providers do not provide the scheme information quickly as consumers generally expect their vehicles to be returned to them the quickly. Delays caused by repairers waiting for scheme information will not achieve a level playing field as repairers may be at a disadvantage to dealers or preferred networks who may be able to access the information faster.

Other enforcement and redress mechanisms

1.207 Other relevant enforcement provisions and remedies in Part VI of the CCA that apply include:

- If a court orders a pecuniary penalty or imposes a fine, preference must be given to compensation for persons who have suffered loss or damage due to a contravention of the scheme under section 79B.
- The ACCC or any other person is able to seek an injunction under section 80. ***[Schedule 1, item 13, section 80(1)(a)(iic)]***
- A person who suffers loss or damage by the conduct of another person that was done in contravention of the scheme may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention under section 82. ***[Schedule 1, item 14, section 82(1)(a)]***
- A finding of fact made in certain earlier proceedings by a court, or an admission of any fact made by a person, may be relied on by private litigants in later proceedings against that person under section 83. ***[Schedule 1, item 15, section 83(1)(b)(i)]***
- The conduct of a director, employee or agent of a body corporate establishes the 'state or mind' of the body corporate for civil contraventions under section 84. The conduct of an employee or agent may also establish 'state of mind' for a person other than a body corporate. Conduct engaged in by an employee or agent on behalf of a person other than a body corporate shall be deemed to have been engaged in also by that person. ***[Schedule 1, item 16, sections 84(1)(b) and (3)(b)]***
- Jurisdiction is conferred on the Federal Circuit Court, and the courts of the States which are invested with federal jurisdiction, under section 86. A matter for determination in a civil proceeding may, upon application of a party or by the Federal Court's own motion, be transferred to a court of a State or Territory under section 86A. ***[Schedule 1, items 17 and 18, sections 86(1A) and (2) and 86A(1)(b)]***
- The ACCC may apply to the court to make a non-punitive information or advertisement order under section 86C and/or a punitive adverse publicity order under section 86D if the person has been ordered to pay a pecuniary penalty under section 76. ***[Schedule 1, items 19 and 20, sections 86C(2)(a) and (b) and section 86C(4) (paragraph (a) of the definition of contravening conduct)]***

- The ACCC may apply to the court to make an order disqualifying a person from managing corporations for a period that the court considers appropriate under section 86E. ***[Schedule 1, item 21, section 86E(1)(a)]***
- The court may make other compensatory orders under section 87. ***[Schedule 1, items 22 to 24, sections 87(1), 87(1A)(a) and (b), and 87(1C)]***

1.208 The amendment to section 29 of the CCA provides that the Minister cannot direct the ACCC, as an independent regulator, in relation to the enforcement of the scheme. ***[Schedule 1, item 8, section 29(1A)(a)]***

1.209 The ACCC's power to obtain information, documents and evidence under section 155 of the CCA applies to contraventions and suspected contraventions of the scheme.

1.210 The new Part IVE is a 'core statutory provision' under section 155AAA to ensure the protection of information relating to a matter arising under the scheme. Core statutory provisions are protected information. An ACCC official may only disclose protected information in the performance of their duties or functions as an official or when the official or the ACCC is required or permitted by law to disclose the information. The ACCC may disclose protected information to Ministers, Secretaries, Royal Commissions and certain agencies and bodies including the OAIC because it is an agency within the meaning of the *Freedom of Information Act 1982*. The ACCC may also disclose protected information about the affairs of a person with their consent, publicly available information and as authorised by regulations. ***[Schedule 1, item 25, section 155AAA(21), paragraph (a) of the definition of core statutory provision]***

1.211 Under Part VIIA of the CCA, the Minister has the power to give written direction to the Commission to hold a price inquiry or monitor prices, costs and profits of an industry. Encouraging the provision of accessible and affordable scheme information is a key objective of the scheme and a review, whether under Part VIIA or another arrangement, would provide the Minister with information about the scheme's effectiveness.

1.212 State and territory law can operate concurrently unless such a law is directly inconsistent. ***[Schedule 1, item 1, section 57GC]***

Extraterritoriality

1.213 The scheme applies to conduct outside Australia by bodies incorporated, or carrying on business, in Australia, Australian citizens and persons ordinarily resident in Australia. ***[Schedule 1, items 5 and 6, sections 5(1)(ab) and 5(1)(f)]***

1.214 In addition, the exclusive dealing and resale price maintenance provisions of the CCA apply to any person in relation to the supply by that person of goods or services to repairers and RTOs within Australia under this scheme. ***[Schedule 1, item 7, section 5(2)]***

1.215 Extraterritorial application of the scheme is important as scheme information will typically be created and held overseas either by a manufacturer or an entity with which the manufacturer has a contractual or other relationship. This may include an entity within a vertically integrated structure, a related body corporate or an entity which owns or has rights over the service and repair information.

1.216 Manufacturers have consumer guarantee obligations under the Australian Consumer Law and commercial reasons to ensure service and repair information is available to their affiliated dealerships to ensure vehicles can be serviced and repaired, including those under warranty. As a result, manufacturers are likely to be the primary source of service and repair information for vehicles in Australia and therefore data providers under the scheme.

Scheme rules

1.217 The Minister may, by legislative instrument, make rules as enabled by the Bill or where necessary or convenient for the Scheme. ***[Schedule 1, item 1, section 57GE(1)]***

1.218 This is appropriate and necessary as it allows the Minister to prescribe technical details about the coverage of the scheme, update the scheme as necessary to ensure that it keeps pace with advances in technology, as well as allowing administrative flexibility to deal promptly with attempts to frustrate the scheme.

1.219 The Minister's rule-making power is constrained to certain aspects of the regime that are provided for in the Bill. In addition to this, the rules are a legislative instrument, and therefore, are subject to disallowance under section 42 of the *Legislation Act 2003*, and subject to appropriate parliamentary scrutiny and oversight.

1.220 The Bill sets out that the Minister may make rules:

- for scheme vehicles – a manufacturer date later than 2002 and other kinds of scheme vehicles (subject to appropriate consultation and regulatory impact assessment processes); ***[Schedule 1, item 1, section 57BA]***
- excluding further information from the definition of scheme information; ***[Schedule 1, item 1, section 57BD(2)(i)]***
- for safety and security information – types of personal information that may be required to work out whether an individual is a fit and property person; what is classified as

safety and security information and relevant access criteria; and prescribing workshop standards; and ***[Schedule 1, item 1, sections 57BF(2) and (3) and 57DB(3) to (7)]***

- terms and conditions that are not allowed as they would frustrate the objectives of the scheme. ***[Schedule 1, item 1, section 57CC(2)]***

1.221 As is standard practice for subordinate instruments, the scheme rules cannot:

- create an offence or civil penalty;
- provide powers of arrest or detention, or entry, search or seizure;
- impose a tax;
- appropriate an amount from the Consolidated Revenue Fund; or
- directly amend the text of the Bill.

1.222 In addition, the scheme rules cannot authorise or require the disclosure of sensitive information. The only sensitive information an individual may be required to disclose is a criminal records check, which is authorised by section 57DB(6)(d) of the Bill. ***[Schedule 1, item 1, sections 57DB(6)(e) and 57GE(2)(f)]***

Acquisition of property

Compensation for third party copyright holders

1.223 The scheme requires a data provider to compensate a third party claimant when the data provider must supply scheme information to an Australian repairer or RTO under this Part when:

- the third party holds copyright in relation to some or all of the scheme information that the data provider must supply;
- the supply constitutes or results in an infringement of the copyright of the third party; and
- the infringement would otherwise constitute an acquisition of the third party's property otherwise than on just terms (within the meaning of section 51(xxxi) of the Constitution).

[Schedule 1, item 1, section 57CD(2)]

1.224 The data provider must pay the third party an amount that represents compensation on just terms (within the meaning of section 51(xxxi) of the Constitution) for the supply of the scheme information to the repairer or RTO. ***[Schedule 1, item 1, section 57CD(3)]***

1.225 An amount payable by the data provider under this obligation is a debt due by the data provider to the third party, and may be recovered by action in a court of competent jurisdiction. ***[Schedule 1, item 1, section 57CD(4)]***

Severance

1.226 Section 51(xxxi) of the Constitution provides that the Commonwealth Parliament may only legislate with respect to the acquisition of property by the Commonwealth on just terms. The Bill ensures that the amendments relating to the supply of scheme information have no effect to the extent that they would result in the acquisition of property on unjust terms contrary to section 51(xxxi) of the Constitution. ***[Schedule 1, item 1, section 57GD]***

Consequential amendments

1.227 The interpretation provision in section 4(1) of the CCA is amended to insert definitions to reflect the terminology used in the scheme. Most of the definitions inserted at section 4(1) refer to the substantive definitions outlined in the relevant provisions in new Part IVE. Others describe the meaning of a term by reference to the meaning of that term in other legislation. ***[Schedule 1, item 2, section 4(1)]***

Commencement date

1.228 The amendments will commence on the later of 1 July 2022 or the day after the Bill receives the Royal Assent. ***[Clause 2]***

1.229 Parties have until 1 July 2022 to renegotiate any contractual arrangements to enable them to comply with the scheme before it commences if necessary. For example, if a contract between a manufacturer and a local entity limits the distribution of scheme information exclusively to dealers and authorised repairers, the terms of the contract need to be adjusted to allow for a broader group of recipients.

Chapter 2
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021

2.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

2.2 The Bill amends the CCA to establish a mandatory scheme requiring data providers to supply, at a fair market price, information used in conducting diagnostic, servicing or repair activities or related training for certain vehicles to all Australian repairers and RTOs.

2.3 The Bill achieves this by imposing obligations on data providers to:

- offer to supply information used for conducting diagnostic, service or repair activities in relation to certain vehicles to all Australian repairers and RTOs;
- charge no more than the fair market value for the information; and
- supply scheme information (immediately in most circumstances) once the repairer has paid the agreed price.

2.4 Failure to comply with these main obligations can attract a maximum pecuniary penalty of $10 million for a body corporate and $500,000 for other persons.

2.5 Data providers also have to:

- publish details of scheme offers on the internet and notify the scheme adviser of certain matters, to provide transparency about the operation of the scheme;
- restrict access to safety and security information to those who meet specified access criteria and keep records regarding access to security information;

- protect sensitive personal information collected under the scheme; and
- pay compensation to any third parties that hold copyright in relation to scheme information for the supply of that information.

2.6 Civil penalties can be imposed on persons for contravention of these obligations and, in some circumstances, the ACCC can issue infringement notices for alleged contraventions.

2.7 A data provider is defined as a 'corporation carrying on a business that includes supplying, to any extent and whether directly or indirectly, scheme information to one or more Australian repairers or scheme RTOs or any person who carries on such a business in the course of, or in relation to, trade or commerce'. A data provider may be a vehicle manufacturer, information owner, or licensee. This could include an Australian subsidiary of an overseas vehicle manufacturer, an affiliated car dealership, or a data aggregator who sells service and repair information in its own right.

2.8 A repairer is defined as a person to the extent they are carrying on or actively seeking to carry on a business of diagnosing faults with, servicing, repairing, modifying or dismantling scheme vehicles in Australia. RTO is defined in the *National Vocational Education and Training Regulator Act 2011*. For the purposes of the scheme, RTOs must be providing training in relation to diagnosing faults with, servicing, repairing, modifying or dismantling of scheme vehicles to be eligible to access scheme information.

Human rights implications

2.9 This Bill engages the following human rights:

- right to protection from arbitrary interference with privacy;
- right to a fair trial;
- right to work and rights in work; and
- right to health.

Protection from arbitrary or unlawful interference with privacy

2.10 Article 17 of the ICCPR contains the right to protection from arbitrary or unlawful interference with privacy. The UN Human Rights Committee has not defined 'privacy' but it is generally understood to comprise of a freedom from unwanted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual

autonomy. The collection and sharing of information (public or otherwise) may be considered to engage and offend the right to privacy.

2.11 The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

2.12 The Bill restricts access to safety and security information due to risks involved in relation to the safety of the vehicle, the public or repairers or the security of the vehicle being repaired. For example, an unqualified repairer may suffer an electric shock or the information could be used in vehicle theft and associated crime. ***[Schedule 1, item 1, section 57DB(1)]***

2.13 Safety information includes information that relates to hydrogen, high voltage, hybrid or electric propulsion systems or systems prescribed in the scheme rules. Security information relates to a vehicle's mechanical and electronic security systems, for example immobiliser codes that can be used to enable an individual to enter and operate a vehicle, or systems prescribed in the scheme rules. ***[Schedule 1, item 1, section 57BF]***

2.14 Before providing safety or security information, there must be reasonable grounds for a data provider to believe that a person is a fit and proper person to access such information based on the following information:

- the repairer's or RTO representative's name and residential address;
- information about the person's relationship with the repair or RTO business (as the case may be);
- their qualifications for using the information requested;
- a criminal records check; and
- any other information prescribed in the scheme rules relevant to working out whether the individual is a fit and proper person to access and use safety and security information.

[Schedule 1, item 1, section 57DB(6)]

2.15 In addition, for security information, the individual must provide a declaration:

- confirming that they are authorised by the owner of the scheme vehicle to access the information; and

- specifying the vehicle identification number for that vehicle.

[Schedule 1, item 1, section 57DB(3)]

2.16 In addition to the requirements set out in the Bill, there are different access requirements for different types of safety and security information in the scheme rules. Scheme rules are a disallowable legislative instrument that is subject to parliamentary scrutiny. ***[Schedule 1, item 1, section 57GE(1)]***

2.17 To the extent that the information disclosure engages the right to privacy, the limitation is justified.

2.18 The types of information that can be requested to form the view that a person is a fit and proper person is described by law, and requires the person to disclose the information themselves. Additionally, the disclosure requirements ensure that access to the information is restricted to those who require the information. This reduces the risk of misconduct with the vehicle, and misuse of the safety and security information provided.

2.19 The disclosure requirements are also proportionate as the Bill specifies the type of personal information that may be requested by the data provider. This is only the information needed to determine eligibility. For example, the scheme rules cannot mandate the disclosure of sensitive information (as defined by the Privacy Act). ***[Schedule 1, item 1, section 57DB(6)(e)]***

2.20 The Bill also enables the scheme rules to prescribe matters in relation to the circumstances in which personal information may be sought or given. It is expected that the scheme rules will set out how often certain personal information, such as a criminal records check may be requested. ***[Schedule 1, item 1, section 57DB(7)]***

2.21 It is already standard industry practice to provide these types of personal information, including a criminal records check, if a data provider agrees to provide access to safety or security information to ensure the information is accessed and used appropriately and help ensure work is undertaken safely.

2.22 In terms of disclosure of a criminal records check, this is considered necessary, appropriate and proportionate as it is aimed at preventing access to information by those who may intend to engage in criminal activities, for example those who have been convicted of crimes related to vehicle theft. The scheme rules are able to set out which crimes are relevant to determine if a person is fit and proper to access a specific type of safety or security information.

2.23 Since a criminal records check is classified as sensitive information by the Privacy Act, the information is already subject to appropriate privacy protections. This includes requiring collection by

consent, restrictions on its use for a secondary purpose and limitations on how that information may be shared.

2.24 The Bill also provides additional protections to avoid the misuse or mishandling of this information, as this could cause financial harm or harm to an individual's reputation.

2.25 Specifically to protect the privacy of individuals supplying a criminal records check to a data provider, the scheme includes two additional privacy protections:

- small businesses handling sensitive information are subject to the Privacy Act; and
- sensitive information must be kept and handled in Australia.

[Schedule 1, item 1, sections 57DC and 57DD]

2.26 Treasury has also prepared a Privacy Impact Assessment and consulted with the Attorney General's Department and the Office of the Australian Information Commissioner to inform the identification of potential privacy issues and potential ways to address them and assess the adequacy of the privacy protections provided by the Bill and the scheme rules. Coupled with consultation with stakeholders, this ensures that the privacy safeguards are reasonable and proportionate in response to the privacy risks the scheme presents.

Small businesses handling sensitive information will be subject to the Privacy Act

2.27 Given that some recipients of sensitive personal information will be small businesses that are otherwise exempt from the Privacy Act, it is considered reasonable and proportionate to apply the Privacy Act to them when sensitive information is disclosed to them for the purposes of determining if an individual is a fit and proper person to access and use safety and security information.

2.28 This will ensure protections provided by the Privacy Act apply to this information. This provides another safeguard for the privacy of individuals and ensures consistent handling of sensitive information.

Sensitive information must be kept and handled in Australia

2.29 The Bill also goes beyond the requirements in the Privacy Act by requiring that when handling sensitive information (i.e. the criminal record of an individual repairer or RTO representative), the data provider must not do anything that might reasonably enable the information to be accessed by any person outside Australia. In addition, if data providers hold sensitive information, it must be stored in Australia (or an external territory).

2.30 Data providers may be required to appoint another party (who is based in Australia and subject to the Privacy Act) to handle personal and sensitive information on their behalf. Failure to comply with the obligations relating to the storage of, and access to, sensitive information can result in civil penalties of up to 1,500 penalty units for bodies corporate and 300 penalty units for other persons.

2.31 These additional protections are necessary as data providers are likely to be based overseas. The Privacy Act only provides limited protections for this information where the information is held by an overseas entity, rather than by an Australian entity. Therefore, this safeguard is appropriate to avoid any serious consequences from potential mishandling.

2.32 In conclusion, the provisions requiring the disclosure of personal and sensitive information are reasonable, necessary and proportionate to achieve the policy objective of increasing competition in the motor vehicle service and repair market while ensuring the suitability of those accessing the information. The additional privacy protections ensure that the information is protected from mishandling and misuse.

2.33 For the reasons given above, the Bill is consistent with the right to protection from arbitrary or unlawful interference with privacy.

Right to a fair trial

2.34 The Bill introduces an infringement notice regime that may engage Article 14 of the ICCPR which provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. This right is not limited by the Bill.

Infringement Notices

2.35 The Bill contains an infringement notice regime, utilising the framework established in Part IVB of the CCA for industry codes. This allows the ACCC to issue an infringement notice as an alternative to proceedings under section 76 of the CCA, for the payment of a pecuniary penalty in relation to an alleged contravention of a civil penalty provision in the scheme (section 51ACC of the CCA).

2.36 In addition to this, the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide to Framing Commonwealth Offences) suggests that amounts payable under an infringement notice should not exceed 12 penalty units for a natural person or 60 penalty units for a body corporate. Most penalty amounts for the infringement notice provisions in the Bill reflect this guidance.

2.37 However, a higher infringement notice penalty amount applies to failing to supply scheme information within the required timeframe (which, in most cases, will be immediately). This carries an infringement notice penalty amount of 600 penalty units for a body corporate and 120 penalty units for a person, other than a body corporate. ***[Schedule 1, item 1, section 57CB(2)(b) and item 4 in the table in section 57GB(2)]***

2.38 Although these penalty amounts depart from the Guide to Framing Commonwealth Offences, this is appropriate to act as an incentive for large companies to comply with the obligations of the scheme. This is rationally connected to the objective of promoting a fair and competitive market for motor vehicle service and repair, as independent repairers will be significantly impacted if data providers do not provide the scheme information quickly.

2.39 If an infringement notice is complied with, no further action will be taken against the person, and the payment is not considered an admission of guilt (section 51ACG of the CCA).

2.40 However, if the infringement notice is not complied with, the ACCC may take action under section 76 of the CCA in relation to the alleged contravention of the civil penalty provision under which the infringement notice was issued (section 51ACH of the CCA).

2.41 Where an infringement notice has been applied incorrectly, the ACCC may withdraw the notice, and any amount paid must be refunded (section 51ACJ of the CCA).

2.42 Therefore, to the extent that the infringement notice does engage the right to a fair and public hearing by a competent, independent and impartial tribunal, it does not limit the right as the person may still elect to have a matter heard by a court rather than pay the amount specified in the infringement notice.

Civil penalties are not 'criminal' for the purposes of human rights law

2.43 The Bill contains civil penalty provisions of up to a maximum of $10 million dollars for a body corporate and $500,000 for other persons, for failing to comply with the main obligations in the new scheme, specifically to offer scheme information to all Australian repairers and RTOs and to supply it under certain conditions and within certain timeframes (immediately in most cases). ***[Schedule 1, item 1, sections 57CA(2), 57CA(4) and 57CB(2)(b)]***

2.44 It also contains civil penalty provisions of up to a maximum of 600 penalty units for a body corporate or 120 penalty units for a person other than a body corporate for the obligations on a data provider to:

- publish the scheme offer on the internet;
- provide a copy of the scheme offer to the scheme adviser;

- provide a copy of the terms and conditions of supply including price to the scheme adviser;
- not use prohibited terms or conditions;
- not unreasonably combine safety or security information with other scheme information;
- restrict safety and security information from access by those not qualified;
- keep records of security information supplied; and
- attend mediation if a dispute is referred by either party to a mediator.

[Schedule 1, item 1, sections 57CA(6), 57CA(7), 57CB(4), 57CC(2), 57DA, 57DB(1), 57DE(2) and 57EF(5)]

2.45 A civil penalty of 1,500 penalty units for a body corporate and 300 penalty units for a person other than a body corporate applies if a data provider stores sensitive information outside Australia or enables it to be accessed outside Australia. ***[Schedule 1, item 1, sections 57DD(2) and 57DD(3)]***

2.46 Given the civil nature of these penalty provisions, applications to the court for civil penalty orders will be dealt with in accordance with the rules and procedures that apply in relation to civil matters. The penalties in the Bill do not impose a criminal penalty, nor carry a penalty of imprisonment.

2.47 Despite this, the Parliamentary Joint Committee on Human Rights' Guidance Note 2 on offence provisions, civil penalties and human rights observes that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the International Covenant on Civil and Political Rights, regardless of the distinction between criminal and civil penalties in domestic law.

2.48 The penalties contained in the Bill are intended to encourage industry to comply with the scheme. The penalties are directed at members of the motor vehicle service and repair industry in a specific disciplinary context (and not to the public in general), and are considered to be 'disciplinary' or 'regulatory' rather than 'criminal'.

2.49 Having regard to the specific regulatory context and the nature of the industry being regulated, the severity of the civil penalties that may be imposed on individuals is not sufficiently severe to be considered 'criminal'. The purpose of the scheme is to improve the situation for Australian repairers and consumers by forcing vehicle manufacturers and other data providers to provide information to Australian repairers that allows them to compete.

2.50 The ACCC's 2017 *New Car Retailing Industry Market Study* indicated that a voluntary mechanism was not strong enough to achieve the desired policy outcome and a mandatory scheme with accompanying civil penalties for non-compliance was necessary.

2.51 In applying the penalties, the ACCC retains the flexibility to take the most appropriate, and likely to be most effective, administrative action in each individual case. Where the ACCC applies for a civil penalty in relation to a breach, the court will continue to have discretion to apply an appropriate penalty up to the maximum amount. The court would consider the relevant facts of any given case, and impose a penalty that is proportionate to that conduct, making it unlikely that the maximum penalty would be imposed in every instance. In practice, the maximum amount would only be applied in the most egregious instances of non-compliance.

2.52 Imposing the civil penalties on industry participants—who should reasonably be aware of their obligations under the scheme—will enable an effective disciplinary response to non-compliance.

2.53 Based on the above factors, including the cumulative effect of the nature and severity of the civil penalties in the Bill, these penalties are not 'criminal' for the purposes of human rights.

2.54 The Bill contains a reversal of the evidentiary burden for a defence to the civil action, which is not considered to be 'criminal' under human rights law. Therefore, it does not offend an individual's presumption of innocence under Article 14 of the ICCPR.

2.55 For the reasons given above, the Bill is consistent with the right to a fair trial.

Right to work and right to health through environmental protection

2.56 This measure is expected to increase competition in the market for motor vehicle service and repair. Without adequate access to service and repair information, repairers are not be able to provide services in the most efficient and safe manner. This undermines competition as independent repairers can struggle to compete with vehicle dealers and affiliated repairers that are able to readily access service and repair information to meet consumer's needs.

2.57 This anti-competitive behaviour results in poor outcomes for consumers, who may be restricted in their choice of repairer for particular work, face delays in having their vehicle repaired or do not benefit from price competition. This outcome has flow-on adverse impacts on employment and human health through environmental degradation, addressed in turn below.

Right to freely choose and accept work, and be provided the technical and vocational guidance

2.58 Article 6 of the International Covenant on Economic, Social and Cultural Rights recognises the right to work, which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept.

2.59 It also sets out that the steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.

2.60 The Bill advances the right to work by ensuring the availability of up-to-date information that can be used to safely and efficiently service and repair motor vehicles (which are increasingly technologically advanced). It also provides information that can be used for training for the next generation of Australian repairers by RTOs. This removes a key barrier to participation in the vehicle service and repair market.

2.61 The UN Committee on Economic Social and Cultural Rights has stated that the right to work:

> affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.

2.62 Repairers may be deprived of work unfairly without this scheme, as they may not be able to access the information they need to repair a vehicle despite being trained to do so and operating a business with that intent. There is benefit to regional communities as consumers will not have to travel to get their vehicles serviced at an affiliated dealership so there are flow-on effects.

2.63 For these reasons, the Bill is consistent with, and may advance, the right to work and the training that underpins it.

Right to the highest attainable standard of physical and mental health

2.64 Article 12 of the International Covenant on Economic, Social and Cultural Rights sets out that everyone has the right to enjoy the highest attainable standard of physical and mental health, and that parties

to the treaty will take those steps necessary for the improvement of all aspects of environmental and industrial hygiene.

2.65 This Bill would remove a barrier to participation in the vehicle service and repair market, and is expected to increase consumer choice of repairer. This may enable more cars to be serviced and repaired, allowing them to stay on the roads longer and reducing contribution to environmental waste. It would also increase the provision of dismantling services so that more viable parts can be reused and less waste goes to landfill.

2.66 This may improve environmental protection through more efficient resource usage in the end to end car manufacturing supply chain.

2.67 The Bill will also help to protect the safety of repairers performing service and repair activities by ensuring they have access to the information they need to do their job safely. It will also ensure vehicle dismantlers have access to the information they need to safely remove hazardous vehicle components such as computers and flammable substances to improve workplace safety and reduce the risk of fires and environmental contamination.

2.68 For these reasons, the Bill is consistent with, and may advance, the right to the highest attainable standard of physical and mental health.

Conclusion

2.69 To the extent that the Bill engages with human rights, it is compatible as any limitations are reasonable, necessary and proportionate.

2.70 Further, the Bill advances the right to freely choose and accept work, and be provided the technical and vocational guidance and the right to the highest attainable standard of physical and mental health.