COMPETITION AND CONSUMER AMENDMENT (MOTOR VEHICLE SERVICE AND REPAIR INFORMATION SHARING SCHEME) BILL 2020

EXPOSURE DRAFT EXPLANATORY MEMORANDUM

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Glossary

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

Abbreviation	*Definition*
ACCC	Australian Competition and Consumer Commission
Bill	Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2020
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
Market study	ACCC's *New Car Retailing Industry Market Study*
Personal information	As defined in section 6(1) of the Privacy Act
Privacy Act	*Privacy Act 1988*
Repairer	A person carrying on, or actively seeking to carry on to any extent, a business of diagnosing faults with, servicing or repairing motor vehicles in Australia
RTO	A registered training organisation as defined in the *National Vocational Education and Training Regulator Act 2011* to the extent the organisation provides, or seeks to provide, a course relating to diagnosing faults with, servicing or repairing scheme vehicles in Australia
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

Abbreviation	***Definition***
	Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2020
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 prescribe 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 *Motor Vehicle Standards Act 1989*, 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 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.

Proposal announced: This Bill implements the announcement by the Minister for Housing and Assistant Treasurer on 29 October 2019 that a scheme for the mandatory sharing of information would be implemented through primary legislation.

Financial impact: nil

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, repair and servicing information for motor vehicles covered by the Bill to all repairers and Registered Training Organisations 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 repairers. The beneficiaries will be repairers 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 at: 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 repaired 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 registered training organisations 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 for the resolution of disputes about the terms of supply or proposed supply of diagnostic, repair and servicing information for those vehicles and other matters relevant to the requirements of this Part.

Context of amendments

1.3 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 repair 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 repair a vehicle 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.

1.4 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* (Heads of Agreement) in 2014. It set out several principles designed to ensure fair access to repair information and safe and professional repair of vehicles.

1.5 The ACCC published its *New Car Retailing Industry Market Study*[1] final report in December 2017. It found that the Heads of Agreement was ineffective, creating competition barriers and impacting consumers' choice of repairer. It also found that limited access to this information currently causes detriment to consumers through increased costs, inconvenience and delays when having their car repaired or serviced by an independent repairer.

1.6 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).

1.7 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.

1.8 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.

1.9 In October 2019, Treasury released a consultation update which provided a high-level summary of feedback received and key outcomes

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

from the consultation process including that the Government would progress the scheme through primary legislation.

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

Summary of new law

1.11 The scheme imposes obligations on data providers to:

- publicly 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 within two business days of the repairer having paid the agreed price.

1.12 Failure to comply with these obligations can attract a maximum pecuniary penalty of $10 million for a body corporate.

1.13 Data providers also have to:

- restrict access to safety and security information to those who meet specified access criteria and keep records of access;
- 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.

1.14 The scheme also establishes the role of scheme adviser, who facilitates dispute resolution and sharing of information about the scheme.

1.15 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 are subject to Parliamentary scrutiny.

Detailed explanation of new law

Who has to share information – "Data providers"

1.16 A data provider is:

- 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.

1.17 This definition captures the sharing of information within vertically integrated structures and with related bodies corporate. ***[Schedule 1, item 1, sections @30 and @40]***

1.18 A data provider may be a vehicle manufacturer, data 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.

1.19 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.

Examples

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"

1.20 Scheme information is information in relation to scheme vehicles prepared by or for manufacturers of scheme vehicles for use in

conducting diagnostic, servicing or repair activities or training on those vehicles, as supplied to the market. ***[Schedule 1, item 1, section @25(1)]***

1.21 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 new part.

1.22 Scheme information does not include information concerning aftermarket parts (whether supplied by a vehicle manufacturer or other aftermarket provider). This is because any vital 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). ***[Schedule 1, item 1, section @25(1)]***

1.23 The following are examples of scheme information:

- manuals and procedures, including repair 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 board a scheme vehicle after being plugged into a computer system, for example, an error code);
- the electronic log book or specific service and repair information about a particular scheme vehicle.

Excluded information

1.24 Scheme information does not include (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);
- telemetry (an automatic transmission of data from a remote source to a control centre, for example, a vehicle automatically sending engine performance information to the vehicle's manufacturer);

- 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); or
- 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).

[Schedule 1, item 1, section @ 30(2) and 30(3)]

Emerging or unexpected faults

1.25 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 @ 25(2)(f)]*** 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 should be completed very quickly. The tested solution must then be offered to all repairers and RTOs as it is then scheme information. ***[Schedule 1, item 1, section 25(1)]***

1.26 It is appropriate to allow data providers to work with a limited number of trusted technicians for a short period of time to finalise repair instructions for emerging or unexpected faults to ensure scheme information has been tested as being safe and effective at rectifying the fault before being made available to all repairers and RTOs.

1.27 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 is expected to apply from 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

1.28 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. ***[Schedule 1, item 1, section @ 25(2)(h) and 25(3)]*** For example, lane departure warnings, adaptive cruise control, and lane centring.

1.29 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. A driver may be required to drive when the system requests. For example, 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.

1.30 Although a vehicle may be equipped with an automated driving system that is capable of delivering multiple driving automation systems/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 its windscreen) is (provided those features are not part of the level three or above automated system). ***[Schedule 1, item 1, section 25(3)]***

1.31 Repairers and RTOs interested in 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, it is clearer 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.

1.32 SAE International provides access to this standard free of charge at https://www.sae.org/standards/content/j3016_201806/.

Vehicle coverage – "Scheme vehicle"

1.33 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 *Motor Vehicle Standards Act 1989*, as supplied to market. ***[Schedule 1, item 1, section @10(a) and (b)]***

1.34 From not 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 under the *Road Vehicle Standards Act 2018*. ***[Schedule 1, items 1 and 29, sections @10(a) and (b)]***

1.35 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.

1.36 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 that the scheme covers most of Australia's vehicle fleet, particularly vehicles produced since the spread of computerisation.

1.37 Scheme rules will allow for a later year of manufacture to be prescribed for passenger and light goods vehicles. 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 @10(a)(ii) and (b)(ii)]***

1.38 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 @10(c)]***

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

1.39 Under the scheme, data providers must offer and supply scheme information to repairers and RTOs. However, access to certain information is restricted to natural persons, on behalf of a repairer or RTO, who meets prescribed criteria – see section @65.

1.40 An ***Australian repairer*** is a person who carries on, or actively seeks to carry on, a business in Australia of diagnosing faults with, servicing or repairing scheme vehicles. ***[Schedule 1, item 1, section @15]*** In some jurisdictions, this would require a licence to run such a business, or for the relevant person to hold an appropriate vocational tertiary or professional qualification.

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

1.42 A ***scheme RTO*** is an RTO as defined in the *National Vocational Education and Training Regulator Act 2011*, to the extent it provides, or

seeks to provide, a course relating to diagnosing faults with, servicing or repairing scheme vehicles in Australia. ***[Schedule 1, item 1, section @20]***

1.43 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.

1.44 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. Mandating access for these parties, however, 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 for repairers doing so.

Main obligation - Requirement to offer to supply information

1.45 If a data provider supplies, or offers to supply, scheme information to one or more repairer or RTO, the data provider must offer to supply such information to all repairers and RTOs. ***[Schedule 1, item 1, section @45(1)]*** An offer to supply must continue to be available until the data provider no longer offers that scheme information.

1.46 The offer must be published on the internet in English and be freely accessible. For example, it is expected that the website of a data provider would identify that the Scheme applies to it, and that if a repairer searched for repair information about a particular vehicle make, model and year using an internet search engine, the data provider's website would appear in the search results. The offer should not be only available on a subscriber-only website or behind a paywall. The offer must comply with the terms, conditions, permissions and restrictions set out in the scheme (see discussion of this at *Terms and conditions of supply and use*). ***[Schedule 1, item 1, section @45(2)]***

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

- in the same forms it is supplied, or offered to be supplied, to the particular repairer or RTO; or
- if those forms are not practicable or accessible to Australian repairers or RTOs – an electronic form that is reasonably accessible. ***[Schedule 1, item 1, section @45(2)(a) an (b)]***

1.48 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 the form the information is offered in is such that repairers and RTOs are able to use it. 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 1,000 page hard copy as this is not similarly reasonably accessible.

Choice of time period

1.49 Where the information is being provided in a form that allows for variability in the time the information is available for, for example, through access to an online database where access can be removed after a set period, 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 45(3)]

1.50 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.

Publication and notification requirements

1.51 A data providers is required to:

- publish scheme offers on its website; ***[Schedule 1, item 1, section @45(6)]***

- notify the scheme adviser of scheme offers and any changes to scheme offers. ***[Schedule 1, item 1, section @45(7)]***

1.52 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.

1.53 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 section @130(1)(f).

Contravention of these obligations

1.54 Failure to comply with the choice of time 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, item 1, sections @45(3), (6) and (7)]***

1.55 In addition, the ACCC can issue infringement notices. 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 @140]***

Main obligation - Offered price must not exceed fair market value

1.56 A data provider must offer scheme information at a price that that does not exceed fair market value. ***[Schedule 1, item 1, section @45(4)]***

Fair market value

1.57 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 is on just terms.

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

1.59 '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.

1.60 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'.

1.61 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.

1.62 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'.

1.63 The scheme requires certain factors to be taken into account, 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.

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

1.65 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

1.66 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 @45(5)]***

Price charged to other Australian repairers

1.67 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 45(5)(a)]***

1.68 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

1.69 Data providers are able to set reasonable terms on which scheme information is supplied to repairers and RTOs, including as to permitted use of the information, which are necessary to allow repairers and RTOs to undertake diagnostic, repair or services 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*.

1.70 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 45(5)(b)]***

Anticipated demand by Australian repairers and RTOs

1.71 The anticipated demand by repairers and RTOs for supply of the 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 45(5)(c)]***

Reasonable recovery of costs

1.72 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 45(5)(d)]***

Prices for information in overseas markets

1.73 The price paid in overseas markets may be a guide on the fair market value of that information. ***[Schedule 1, item 1, section 45(5)(e)]***

Any amount payable to a third person with proprietary interest

1.74 Where the data provider does not own the scheme information it is required to provide under the scheme, it is likely that the data provider is licensed to provide data to a specified set of entities, not including independent repairers.

1.75 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. It is therefore appropriate

for these costs to be a consideration in determining the fair market value. ***[Schedule 1, item 1, section 45(5)(f)]***

Main obligation - Requirement to supply information

1.76 Once the repairer or RTO has paid, or offered to pay, the agreed price, and provided any evidence required by the data provider to assess whether the individual meets the relevant safety and security access criteria (if applicable), a data provider must supply the scheme information within the time agreed or two business days. ***[Schedule 1, item 1, section @50(1) and (2)]***

1.77 Refusal to provide safety and security information to an individual who meets the prescribed criteria is a breach of this obligation – see section @65 for restrictions on access.

Notification Requirement

1.78 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 bodies corporate and 120 penalty units for other persons. ***[Schedule 1, item 1, section @50(3)]***

1.79 In addition, the ACCC can issue infringement notices. 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 @140]***

1.80 This will help the scheme adviser to provide information online about the availability of scheme information to data providers, repairers and RTOs – see section @130(1)(f).

Compliance with main obligations

1.81 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, item 1, section @60(1) and items 3 and 4]

1.82 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, item 1, sections @45(2) and (4) and @50(2) and item 11]***

1.83 This is consistent with the maximum penalties applicable under section 76 to a range of other serious contraventions of the CCA.

1.84 Compliance by data providers with their main obligations under the scheme is critical to the integrity of the scheme and the achievement of its objectives. The maximum civil penalty reflects the seriousness of the most egregious instances of non-compliance with the scheme. Flexibility in the penalty amount is provided to enable the ACCC to seek penalties proportionate to the conduct. Minor breaches are not expected to attract significant penalties under the scheme.

1.85 Failure to comply with the key obligations would frustrate 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.

1.86 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. Factors typically considered include:

- the nature and extent of the conduct which led to the contraventions;
- the nature and extent of any resulting loss or damage;
- the relevant circumstances;
- the size of the organisation involved;
- whether or not the contraventions were deliberate; and
- the need for deterrence.

1.87 When the data provider is a vehicle manufacturer, it will typically be a large global corporation that would only be deterred by a large maximum amount. For data providers that are smaller bodies corporate, it would be expected that a court would not impose a maximum penalty.

1.88 The maximum penalty for persons other than a body corporate is $500,000 reflecting the deterrent effect can be achieved by imposing a lower penalty on a smaller organisation.

Terms and conditions of supply and use

1.89 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 @55(1)]***

1.90 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

1.91 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 with repairers.

1.92 Examples of terms and conditions that data providers may apply to repairers and RTOs in a contract governing 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); and
- limitation of liability for loss or damage arising out of the use of the information.

Prohibited terms and conditions

1.93 Terms and conditions that enable the information to be provided in an inaccessible format are not permitted. ***[Schedule 1, item 1, section @55]*** 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 @45]***

1.94 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 @55(2)(a)]***

1.95 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.

1.96 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 @55(2)(b)]***

1.97 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 and repair (or provide training for) certain scheme vehicles (and not others);
- prohibiting repairers or RTOs from using tools or parts from certain providers; or
- allowing a data provider to retrospectively alter the price of the scheme information.

1.98 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 for a body corporate is 60 penalty units or 12 penalty units for other persons. ***[Schedule 1, item 1, sections @55(2) and @140]***

1.99 Further, a contract term or condition that is not permitted will have no effect. ***[Schedule 1, item 1, section @55(3)]***

Safety and security information

1.100 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 agents of repairers and RTOs) who they reasonably believe require the information and meet the specified criteria. ***[Schedule 1, item 1, section @65(1)]***

1.101 Types of information are:

- safety: relating to hydrogen, high voltage, hybrid or electric propulsion systems; and
- security: relating to a vehicle's mechanical or electronic security system.

[Schedule 1, item 1, section @35]

1.102 Other types of safety and security information can be prescribed in the scheme rules if required. ***[Schedule 1, item 1, sections @35(2)(e) and (3)(b)]*** The ability to expand the scheme 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.

1.103 The details about specific safety and security information will be set out in the scheme rules, which is a disallowable legislative instrument that is subject to parliamentary scrutiny. ***[Schedule 1, item 1, sections @35(2) and (3)]***

1.104 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 take advice from industry stakeholders (including representatives of data providers, repairers and RTOs) on what scheme information should be considered safety and security information and the corresponding access criteria.

1.105 The scheme also sets out types of 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 @65(1)]***

1.106 This will limit what personal information may be requested and ensure that privacy safeguards for this information set out in the legislation are reasonable and proportionate.

1.107 When assessing if individuals who have requested access to safety and security information meet the relevant access criteria, data providers may 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;

- information relating to whether a person is a fit and proper person to access safety and security information, including a criminal record in circumstances (if any) prescribed by the scheme rules; and
- any other 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 @65(4)]***

1.108 Different access criteria may be prescribed for safety information and security information. ***[Schedule 1, item 1, sections @65(2), (3) and (4)]***

1.109 Other than criminal record (if appropriate), the scheme rules will not prescribe any personal information which is sensitive information under the Privacy Act.

1.110 There may be a range of information that may be relevant for determining if an individual is a fit and proper person. It is likely a criminal record will be required to access security information to help prevent vehicle theft and associated crime. Any other criteria will be identified in consultation with industry but may consider existing fit and proper person checks in the motor vehicle industry. For example, it may consider repairer licensing arrangements that exist in some State and Territory jurisdictions.

Failure to restrict access to safety and security information

1.111 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 notice penalty amount for a body corporate of 60 penalty units or 12 penalty units for other persons. ***[Schedule 1, item 1, sections @65(1) and @140]***

Record keeping

1.112 Where data providers supply safety and 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;
- details of the make, model and year of the vehicle and vehicle identification number of each vehicle for which the information is supplied;

- details of the information supplied. ***[Schedule 1, item 1, sections @80(1) and (2)]***

1.113 The vehicle identification number for a vehicle is the number allocated to the vehicle in accordance with the national road vehicle standards under the *Road Vehicle Standards Act 2018*. ***[Schedule 1, item 1, section @80(3)]***

1.114 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 for a body corporate is 60 penalty units or 12 penalty units for other persons. ***[Schedule 1, item 1, sections @80(2) and @140]***

1.115 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 safety or 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

1.116 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 receive information related to an individual's criminal record – see section @65. This is sensitive information under the Privacy Act.

Application of the Privacy Act to sensitive information

1.117 It is likely that many data providers will already be subject to the Privacy Act and they must comply with their obligations under that Act in relation to personal information received under the scheme. However, some data providers may be small businesses (that is, have annual turnover of under $3 million) and are therefore exempt from the Privacy Act.

1.118 The scheme applies the Privacy Act to data providers who are small businesses that are otherwise exempt from the Privacy Act 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 @70]***

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

1.120 This information requires protection as misuse or mishandling of this sensitive information could cause financial or reputational loss, 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, and from unauthorised access, modification or disclosure.

Sensitive information not be to stored or accessed overseas

1.121 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.

1.122 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.

1.123 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 @75(1) and (3)]***

1.124 In addition, if data providers hold sensitive information, it must be stored in Australia (or an external territory). ***[Schedule 1, item 1, section @75(2)]***

1.125 Data providers may choose to appoint another party (who is based in Australia and subject to the Privacy Act) to handle personal and sensitive information on their behalf.

1.126 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. ***[Schedule 1, item 1, sections 75(2) and (3)]***

1.127 This is consistent with protections for sensitive personal information provided under the *My Health Records Act 2012*.

1.128 This additional protection is necessary as the scheme rules are likely to require individuals provide information about their criminal record to access security information from data providers, many of whom are likely to be based overseas.

1.129 Treasury is undertaking a Privacy Impact Assessment to analyse the adequacy of the privacy protections provided by the scheme. Coupled with consultation with stakeholders on the Bill, this will help to ensure privacy safeguards are reasonable and proportionate in response to the privacy risks the scheme presents.

Dispute resolution

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

1.131 Disputes may arise as 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 as 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 85 and 90]***

1.132 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 100(1) and (2)]***

1.133 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.

1.134 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 @105]***

1.135 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 100(3), (4) and (5)]***

1.136 The mediator is responsible for setting the time and place for mediation, which must be held in Australia or using virtual meeting technology.

1.137 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, sections @110(5)]***

1.138 The ACCC will also have administrative powers available, including issuing infringement notices. The infringement notice penalty amount for a body corporate is 60 penalty units or 12 penalty units for individuals. ***[Schedule 1, item 1, sections @110(5) and 140]***

1.139 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 @120]***

1.140 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.

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

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

1.142 The mediator must give the certificate to the scheme adviser and each of the parties to the dispute. ***[Schedule 1, item 1, section 115]***

1.143 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.

Scheme adviser

1.144 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 about whether information 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 inquires 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 @130(4)]***
- providing information online about the availability of scheme information.

[Schedule 1, item 1, section @130]

1.145 The Minister may make an instrument appointing a person or organisation to this role.

1.146 An appointment may be varied or revoked in accordance with section 33(3) of the *Acts Interpretation Act 1901*. ***[Schedule 1, item 1, section @125]***

1.147 The scheme adviser is not entitled to remuneration or allowances. ***[Schedule 1, item 1, section @125(3)]***

Interaction with the Copyright Act

Protection from civil and criminal liability

Civil action

1.148 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 @60]

1.149 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 @60(5)]***

Criminal prosecution

1.150 A data provider is not liable to prosecution under the Copyright Act in Australia in relation to the supply, or offer to supply, of 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.

1.151 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 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 @60]***

1.152 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

1.153 The statutory licensing scheme for educational institutions in Division 4 of Part IVA of the Copyright Act will not apply to scheme information. This will ensure payment is made under the scheme so that data providers are compensated appropriately. This will be given effect by an amendment to section 113P(1)(b)(iv) of the Copyright Act. ***[Schedule 1, items 27 and 28]***

1.154 The factors to be considered when setting fair market price include the terms on which the information is provided, see section @40(5)(b). The scheme allows data providers to set terms and conditions for the use of scheme information including the permitted use, see section 50. In the case of an RTO, this includes any uses of copyright material which is appropriate for educational purposes, such as copying and communication of the material by the RTO for use by students enrolled in a course. This will provide a mechanism that will allow RTOs to use scheme information for training purposes and to ensure Data Providers are compensated fairly.

Enforcement and remedies

1.155 Failure to comply with the main obligations is subject to maximum pecuniary penalty of $10 million for a body corporate and $500,000 for an individual. ***[item 1, sections @45(2) and (4), 50(2) and 135 and item 11]*** These are discussed above – see *Compliance with main obligations.*

Civil penalties

1.156 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, item 1, sections @45(3), 45(6), 45(7), 50(3), 55(2), 65(1), 80(2) and 110(5) and @135]***

1.157 However, for breaches of the storage and access requirements for sensitive information, there is a larger penalty of 1,500 penalty units for bodies corporates and 300 for individuals. ***[Schedule 1, item 1, sections @75(2) and (3)]*** This is appropriate as these requirements protects individuals from their sensitive information being compromised. Therefore, it is appropriate to set the penalty units at a higher rate to ensure compliance with the regime, and where appropriate, justify the costs of taking action through the court.

1.158 Although the penalties for other scheme obligations are set at a lower rate than the penalties for breaching the main obligations, they are still intended to provide a deterrent from this kind of conduct, appropriate to the size of the data provider.

Infringement notices

1.159 The ACCC may issue an infringement notice for a contravention of the civil penalty provisions with a maximum penalty of 600 penalty units for a body corporate and 120 penalty units for individuals, as set out in section @140 of the Bill. This provides the ACCC with flexibility in

considering enforcement options depending on the severity of the prohibited conduct.

1.160 Infringement notices are an administrative tool that the ACCC can use to deter and punish misconduct by data providers. Infringement notices may be used as an alternative to civil proceedings. If an infringement notice is complied with, including payment of the penalty, no further action will be taken against the person and the payment is not considered an admission of guilt. However, if the infringement notice is not complied with, the ACCC may pursue civil penalties.

1.161 The infringement notice provisions use the framework established in Part IVB of the CCA for industry codes. 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 @140]***

1.162 The approach to infringement notices is consistent with the Guide to Framing Commonwealth Offences.

Other enforcement and redress mechanisms

1.163 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. ***[item 14]***
- 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. ***[item 15]***
- 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 a later proceedings against that person under section 83. ***[item 16]***
- 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. ***[item 17]***

- 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. ***[items 18 and 19]***
- 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. ***[items 20 and 21]***
- 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. ***[item 22]***
- The court may make other compensatory orders under section 87. ***[item 23 - 25]***

1.164 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 9]***

1.165 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.

1.166 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. 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 26]***

1.167 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.

1.168 State and territory law can operate concurrently unless such a law is directly inconsistent. ***[Schedule 1, item 1, section 145]***

Extraterritoriality

1.169 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)]***

1.170 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, items 7 and 8, section 5(2)]***

1.171 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.

1.172 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

1.173 The Minister may, by legislative instrument, make rules relevant to the Scheme. ***[Schedule 1, item 1, section @155(1)]***

1.174 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.

1.175 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, and subject to appropriate parliamentary scrutiny and oversight.

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

- for scheme vehicles - a later manufacturer date than 2002 and other kids of scheme vehicles (subject to appropriate

consultation and regulatory impact assessment processes) ***[Schedule 1, item 1, section @10(c)]***;

- 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 ***[Schedule 1, item 1, sections @35(2), 35(3), @65(1)(b), 65(2)]***
- terms and conditions that are not allowed as they would frustrate the objectives of the scheme ***[Schedule 1, item 1, section @55(2)(b)]***;
- types of disputes that are covered by dispute resolution processes ***[Schedule 1, item 1, section @85]***.

1.177 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;
- directly amend the text of the Bill; or
- authorise or require the disclosure of sensitive information beyond what is required by section 65.

[Schedule 1, item 1, section @155(2)]

Acquisition of property

Compensation for third party copyright holders

1.178 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 @60(2)]

1.179 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 60(3)]***

1.180 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 60(4)]***

Severance

1.181 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 @150]***

Commencement date

1.182 The amendments will commence on the later of 1 July 2022 or the day after the Bill receives the Royal Assent. ***[table item 2 in clause ^2(1)]***

1.183 By not later than 1 July 2021, the *Motor Vehicle Standards Act 1989* be repealed and replaced with the *Road Vehicle Standards Act 2018*. This item ensures that when this occurs, the reference to the Act in the definition of ***scheme vehicle*** will be updated. ***[table item 3 in clause ^2(1) and Schedule 1, items 1 and 29, sections @10(a) and (b)]***