FCAI Submission to Treasury

Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2020

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INTRODUCTION

This submission is made by the Federal Chamber of Automotive Industries **(FCAI**) in response to Exposure Draft of the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2020 (**Bill**) released by Treasury on the 18th December 2020.

The FCAI is the peak industry organisation representing the importers of passenger vehicles, light commercial vehicles, and motorcycles in Australia. (**Distributors**).

The FCAI Board is publicly on record as supporting the sharing of Service and Repair information with all repairers on sensible and commercially equitable terms.

BACKGROUND

The FCAI is the peak industry organisation representing Distributors in Australia. The FCAI welcomes the opportunity to make this submission to the **Treasury** concerning the new **Bill.**

FCAI represents 60 brands offering 380 models, sold, and serviced by almost 3,600 dealers, Australia's automotive sector is a large employer and contributor to our economy, lifestyle, and communities big and small. In this submission, FCAI calculates that there will be 52 of our member distributors affected by this legislation.

FCAI member organisations are at the cutting edge of innovation, according to Boston Consulting Group 2019 Most Innovative Companies Report[1], 6 vehicle manufacturers are in the Top 50 most innovative companies worldwide. Vehicle manufacturers are expending extraordinary amounts of money on research and development to commercialise and introduce the latest technologies with advances that will bring quantum changes to the way in which Australians access and operate motor vehicles providing cutting edge technology increasingly providing safer and more environmentally friendly vehicles meeting the requirements of Australian consumers.
A snapshot from a sample of publicly available 2019 financial reports from global automakers:

Brand	**R&D Expenditure**	**R&D Expenditure $AUD**
VW Group	14.3 Billion €	$22.4 Billion
Toyota	1048.8 Billion ¥	$12.9 Billion
Ford	7.4 Billion US$	$9.5 Billion

[1] https://www.bcg.com/en-au/publications/2019/most-innovative-companies-innovation.aspx

Australia represented 1.06 million sales out of an estimated global sales volume of 91 million vehicles in 2019 equating to around 1%, and the largest selling vehicle in the Australian market has sales of only 50,000 annually. It is important to recognise the extremely small size of the Australian market in comparison to other international markets, in terms of overall population and numbers of automotive repairers. This is important when considering the costs in providing service and repair information and the potential cost recovery from the Australian market with an aftermarket service and repair sector estimated[2] at around 22,500 service and repair businesses and 11,000 crash repair businesses.

The average age of the Australian vehicle fleet has been increasing and is now estimated at 10.1 years[3]. The Australian new vehicle market has been consistently in decline since 2017 and FCAI has seen several manufacturers exit the Australian market in the face of considerable economic, regulatory and confidence factors that has made Australia's small market (by world standards) increasingly more difficult to operate in. Further regulation could potentially result in some Distributors deciding not to compete in the Australian market in the future resulting in a less consumer choice and a less competitive new vehicle market.

Finally, FCAI members provide and have provided service, repair, and diagnostic information to dealers with whom they have / had a detailed contractual and business relationship. This provides context to the information and a limited risk of liability for the distributor. This is not necessarily the case with 3rd party repairers and training providers with consequent increased business risks.

KEY POINTS

1. This submission addresses several issues that go to the necessity for the scheme and its overall design. It then comments on a number of aspects of the scheme as proposed in the Bill.

2. The key points made in the submission concerning the necessity for the scheme and its overall design are:

    a. It has not been demonstrated that the scheme is justified. The ACCC's Market Study which has been certified as being equivalent to a Regulatory Impact Statements is out of date and deficient. In addition, the cost burden imposed on the industry as estimated by Treasury is vastly understated.

[2] ACCC New car retailing final report

[3] National Road Safety Strategy https://www.roadsafety.gov.au/performance/measures

b. According to the Explanatory Memorandum, the Bill is designed to benefit repairers and consumers through increased choice and competition[4]. However, the Bill excludes a significant part of the repair market – aftermarket parts and accessories. If the Bill is to achieve its stated aim, the manufacturers of aftermarket parts and accessories should also be subject to the Bill.

c. All stakeholders agree that access to safety and security information should be subject to appropriate safeguards – that is the information should only be able to be accessed by appropriate people. The Bill proposes that the safeguards will be the responsibility of the data providers. This is completely unacceptable. Data providers do not have any expertise, and this is an appropriate function for governments who can readily provide the necessary safeguards through a registration scheme.

d. The penalties proposed in the Bill are completely out of proportion to the seriousness of the contravention. Proposed penalties of up to $10 million are appropriate when the consequences of the breach are significant and far-reaching. Cartel conduct is an example where such a penalty is considered appropriate. A data provider failing to provide some information to a repairer is not the this category. The penalties should be substantially reduced.

3. The submission makes the following specific points about the Bill:

    a. The central concept of the Bill – 'scheme information' is problematic:

        i. In many instances it will not be feasible to make 'training information' available and when it is, there is a real danger that it will be misinterpreted.

        ii. Requiring information to be made available for vehicles up to 20 years old will impose substantial costs on distributors, and for some current independent Distributors will not be possible.

        iii. The meaning of 'manufacturers of scheme vehicles' should be clarified'

        iv. The exclusion about information relating to 'emerging or unexpected faults' should be clarified.

        v. Electronic logbooks should be excluded.

    b. 'Fair market value' should specifically refer to a reasonable profit and take account of the size of the Australia market.

[4] At page 3 of the EM

c. A data provider should not have to provide information it has received prior to the Bill passing into law if to do so would put it in breach of copyright or a breach of contract.

d. The time limits in the dispute resolution process are completely unrealistic.

e. The Scheme Rules need to be provided in ample time to allow them to be properly reviewed and for all responses to be considered.

f. The proposed implementation date of July 2022 is extremely ambitious given the size and scope of the IT development required not to mention the retrospective volume of documents involved.

A PROPER RIS HAS NOT BEEN COMPLETED.

4. To justify any significant piece of legislation, such as the Bill, a comprehensive and detailed Regulatory Impact Statement is required which demonstrates that the benefits of the legislation outweigh the costs. Treasury has certified that the Market Study by the ACCC is equivalent to a Regulation Impact Statement, for the purposes of the Bill.

5. The ACCC's Market Strategy cannot and should not be relied on. To be fair, the ACCC agrees with this. It says[5]:

> '*The ACCC has not sought to specify what particular form of regulation should be adopted. This will require careful consideration of the costs and benefits of alternative approaches and is beyond the scope of this study.*'

6. Looking at the Market Study, it is understandable that the ACCC was of this view.

- The market study was completed in December 2017 meaning that most of the data relied on is at least three years old.

- The size of the repair market which is allegedly constrained by lack of access to repair information and parts is not properly defined. The relevant market should not include:

    - repairs done on behalf of the Distributors (either under their warranty, consumer guarantees, or on a goodwill basis) because the consumer is not paying for this – the Distributor is and accordingly is entitled to select the repairer who will carry out the work;

[5] At page 131

- routine servicing and repairs which clearly any repairer could carry out – for example changing oil, replacing brake pads and other routine servicing. Minimal technical information is required to carry out these repairs, or routine servicing.

- repairs carried out on aftermarket parts and accessories. Although the FCAI contends that this sector should be included (see below) the Bill only refers to vehicle manufacturers, not the manufacturers of aftermarket parts and accessories

The only segment of the repair market that is impacted by an inability to access information is the repairs that require technical, specialised information or diagnostic tools.

- The extent of the inability to access information is, with respect, not comprehensively analyzed. For example, in the Market Study the ACCC summarized a response from the FCAI to a request for its members to identify whether they would provide information requested in 22 specific examples[6]. The response noted that Audi, Honda, Ford, Nissan and Subaru would have refused to provide the information, for various reasons. Putting to one side the fact that this is now more than 3 years old (and the FCAI understands that at least one of these distributors, if asked the question now, would respond positively), these distributors represent just 19% of the full year 2020 market.

- Treasury has assessed the annual regulatory burden on businesses to be $1.509 million. This is a vast under-estimation.

  Treasury suggests that all that will have to be undertaken by Distributors is to expand their existing systems. This is simply not true. Most Distributors' communication systems operate behind firewalls or on closed direct access private networks which are not used exclusively for service or repair information. This means stand-alone systems will need to be developed or modified and will need to be made to include payment gateways which do not currently exist. New public access level security systems and monitoring will also need to be incorporated as well as segregation with corporate IT systems to guard against cybersecurity risks which are increasingly prevalent. A major Australian brand had their IT systems compromised and offline for over a week in 2020 following a cyberattack.

  The FCAI has estimated what the actual costs are more likely to be. These are set out in Attachment 1. It shows that the estimated establishment costs for the industry are $43.4 million with the annual costs being an additional $28.7 million. Note that these costs do not include the costs for aftermarket parts and accessories suppliers. As discussed later, FCAI believes that they should be included.

[6] At page 115 of the Market Study

Because of the limited time available, these figures are estimates only but when you consider the proposed maximum fines faced by Distributors if they breach the Bill (more of which will be said later), these costs are likely to be an under-estimation.

AFTERMARKET PARTS AND ACCESSORIES SHOULD BE INCLUDED

7. According to the Explanatory Memorandum, the Bill will benefit repairers and '*consumers both through increased choice and competition*'[7]. However, the Bill excludes a significant part of the repair market - aftermarket parts and accessories. Aftermarket parts and accessories often have unique service, diagnostic and repair requirements that need to be diagnosed and repaired during the vehicle's in-service life. Some examples are:

    a. aftermarket entertainment and navigation systems which are integrated with electrical systems;

    b. vehicle performance improvements which are integrated with a vehicle's powertrain control systems;

    c. vehicle chassis and suspension products, many of which require unique settings and alignment specifications;

    d. specialised towing equipment which is integrated into vehicle electrical systems;

    e. Light commercial vehicles (but not exclusively) are commonly fitted with specialised equipment such as:
        i. Rear tray bodies
        ii. Refrigeration units
        iii. Vehicle protection and recovery systems; Bull Bars and Winches
        iv. Aftermarket suspension systems with specific in-service requirements including wheel alignment settings
        v. Differential locking systems
        vi. Lighting systems
        vii. Aftermarket alarm systems
        viii. Aftermarket Dash Cams
        ix. Additional Fuel Tanks
        x. Radio Communication systems, UHF, CB, HF
        xi. Dual Battery and Charging systems
        xii. Air Compressors with some linked to air assisted suspension systems
        xiii. Integrated Invertor systems to power 230v AC equipment.
        xiv. Tyre pressure monitoring systems
        xv. Occupational Health and Safety equipment – for example, when vehicles are being used in mining operations.

[7] P 3 of the EM

8. Many of these accessories are fully integrated into vehicles both mechanically and electronically. As they become increasingly complex and integrated, diagnostic, service and repair information about the accessories is essential in order to maintain, service, diagnose and repair vehicles which have the accessories fitted.

9. For the Bill to properly benefit consumers through increased choice and competition, it should extend to the manufacturers of aftermarket parts and accessories.

ACCESS TO SAFETY AND SECURITY INFORMATION

10. As the ACCC said it its Market Study:

> '*Stakeholders agree that environmental, safety and security-related technical information should be subject to safeguards*' [8]

11. Safety and security information is extremely important and if it is accessed by the wrong parties (either because they are not sufficiently skilled to use the information or are seeking to use it for unlawful proposes) the consequences for technicians and consumers can be grave. The safety of their vehicle could be compromised and their vehicle could be subject to data breaches or theft.

12. The Bill makes it an offence for a data provider to provide safety and security information for a scheme vehicle to a person:

    a. who is not an Australian repairer or a scheme RTO;

    b. unless the data provider has reasonable grounds to believe that:

        i. the safety and security information is solely for use by the persons in diagnosing faults with, servicing or repairing that kind of vehicle:
            1. in the case of an Australian repairer—for the purposes of the Australian repairer's business; or

            2. in the case of a scheme RTO—for the purposes of providing an RTO course; and

    c. the individual is a fit and proper person to access and use the safety and security information.

13. How is a data provider meant to verify that the person seeking the safety and security information is a 'fit and proper person' or will use the information <u>solely</u> for use in diagnosing faults, or proving an RTO course? Distributors do not have the resources or expertise to do so. Presumably, Treasury has taken the view that the' stick' of significant fines will force the data providers to act as quasi-

[8] At p 109

regulators. This is however, a cynical, irresponsible and unfair outsourcing of a function that should be performed by Government.

14. The solution is easy: Government, either through the Scheme Advisor or some other entity, should implement a registration process. People who satisfy the requirements of the Bill (i.e., being 'fit and proper' etc) are registered on an annual basis.

15. Data providers are required to provide security information to their approved people, provided they can establish that they require the information for an appropriate reason and that they have the consent of the owner.

16. In the case of safety information, the provision of the information should be based on individual qualification as distinct from a business, therefore two levels of registration would be required based on the Bill. Additionally, for safety information there should only be an obligation to provision based on qualification, there should be no record keeping requirements as would be required with security information.

17. Given that the access regime will be Australia-wide, the registration scheme should be administered by the Commonwealth so that there is a consistency of approach.

18. The FCAI believes that the costs of a central registration scheme will be significantly less than the costs that will have to be borne by the data providers in verifying that people making requests of safety and security information satisfy the requirements set out in the Bill. This is because the process will be centralized (with consequent economies of scale) and the Commonwealth has expertise in running registration schemes - data providers do not.

19. There is a further practical constraint that relates to electronic repair manuals. The integrated nature of electronic repair manuals means that segregating certain sections of the manual to exclude safety information would be extremely difficult to achieve. Modern repair manuals have numerous embedded links which would need to be replaced, requiring the manual to be completely revised. In addition, repair manuals are designed after the vehicle has been engineered, meaning that some systems are linked to safety systems even though they are not intrinsically safety systems. Electrical wiring diagrams cannot just remove the safety systems - you get the whole diagram or nothing. Our estimates in Attachment A, do not attempt to address this cost, which are likely to be substantial for manufacturers introducing these advanced technologies.

PENALTIES ARE EXCESSIVE

20. FCAI is extremely concerned about the quantum of the maximum penalties in the Bill.

21. Penalties should be proportional to the seriousness of the contravention[9] and '*a higher maximum penalty will be justified where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging*.' [10]

22. While the FCAI accepts that there should be some consequence for failing to provide scheme information, a possible fine of $10million is completely out of proportion.

23. The *Competition and Consumer Act 2010* has penalties of $10 million for what is considered to be the most egregious breaches of the Act, such as cartel conduct. The impact of cartel conduct on the community can be substantial and far reaching and, as such, a substantial maximum penalty is justified. On the other hand, a failure by a data provider to provide scheme information has an extremely limited impact – it means that one repairer cannot repair one, or a small number of vehicles, or an RTO cannot complete some training materials - hardly in the same league as the impact of cartel conduct.

24. To compound the disproportionality, each time a data provider breaches the obligation to supply scheme information, a new offence is committed, exposing the data provider to yet another fine of $10million.

25. The Explanatory Memorandum is, with respect, somewhat glib about this. It says:

> *'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'*
>
> *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'.*

26. This is cold comfort for the Distributors. The ACCC does not impose the penalties – Courts do and they will be influenced by the maximum penalties specified in the legislation. Not all data providers are 'large global corporations' and Courts will not take into account the size of the data provider in assessing a penalty (as indeed they should not).

27. The consequence of having such large penalties is that data providers will have to be extremely careful to ensure that they face no risk of being prosecuted. This

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[9] Australian Law Reform Commission - Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation, para 18.15

[10] A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers

will require them to devote substantial amounts of resources to be absolutely sure that they comply with the requirements of the Bill. This will not only mean that significant unwarranted costs are incurred (which will inevitably be passed onto consumers) but will also mean that the process of accessing information will be more complex than necessary.

28. These excessive penalties which will drive significant compliance costs are likely to mean that some of the smaller Distributors will have to consider the impact of the legislation in respect of their capacity to remain in the Australian market, leading to a reduction in competition.

'SCHEME INFORMATION'

'Training Information'

29. The obligation to provide:

'*information in relation to scheme vehicles … for .. training in conducting diagnostic, servicing or repair activities….*'

while on the surface may seem reasonable is, in fact, very problematic. This is for a number of reasons including:

a. Distributors utilize a wide variety of systems to provide training. These systems can include in-house e-learning, videos, self-paced learning, documents and links to virtual classrooms, to name but a few. It is simply not feasible for independent repairers to gain access to these systems, and it would be a substantial and unnecessary expense to migrate these training materials into an alternative platform.

b. Invariably, the training modules developed by Distributors include some face-to-face training as a necessary component. Surely, it is not envisaged that Distributors are required to provide face-to-face training to independent repairers. If they are not, then the training materials will be incomplete and potentially open to misinterpretation and misapplication.

c. Distributors prepare their training modules for their dealer network – a known audience in respect of which they have a contractually relationship. Distributors can therefore expect the dealers to have a basic level of competency and knowledge about the vehicles in question and the training materials are prepared on this basis. Someone other than a dealer may well not have this same level of basic competency and familiarity meaning that they misinterpret and misapply the materials.

30. Training materials are a "value-add" which the Distributors provide to their dealers. The materials are based on the primary repair information but contain

intellectual property belonging to the Distributors. This is what an RTO does – it interprets and expands on primary information to develop training packages. It seems inherently unfair to require a Distributor to provide its intellectual property to an RTO which can simply repackage this and sell it. Because of the definition of 'fair market price' (which is discussed later), Distributors will not be able to be properly paid for providing their intellectual property, thereby compounding the unfairness.

Retrospective nature

31. To require a data provider to provide information for vehicles up to 20 years old is unrealistic and extremely onerous. As far as the FCAI is aware, it is much more onerous than any similar regime anywhere in the world at its initiation (and certainly more onerous than the EU or US requirements).

32. Bulletins and technical information provided to dealers up to 20 years ago in many cases will not be relevant, in numerous instances the information corrects repair manual information which has long since been corrected in the repair manual.

33. A number of Australian distributors are independent – that is, they are not subsidiaries of the overseas manufacturer – and have not been the distributor for the previous 20 years. Indeed, during the 20-year period there may have been a number of Australian distributors. This means that the current distributor will not necessarily have access to, or be able to get access to, scheme information for vehicles that were imported and sold by the predecessor distributor(s). Where does this leave the current distributor, when they are potentially facing maximum fines of $10 million?

34. The retrospective nature of the Bill also raises problems in relation to the requirement to provide training information. As previously mentioned, the training information is invariably prepared by distributors in the knowledge that the audience – their dealers - have an understanding of the vehicle's attributes. This is further exacerbated when the training materials may have been prepared up to 20 years ago. They will have been drafted in the context of the dealers' knowledge and the tools and equipment available at the time. Expecting an unskilled person to be able to interpret and apply this information is unrealistic and again, raises a significant risk of the material being misinterpreted and misapplied.

35. There might well be practical issues to consider. Software such as internet browsers, as well as programs to manage delivery of the material[11] required are usually only supported for a period of time. When the support ceases functionality and usability is often compromised.

36. FCAI suggests the following, which would be more reasonable:

[11] for example Adobe and the various plugins

a. Where electronic repair manuals including wiring diagrams, service specifications, service schedules, lubricants and testing procedures are available to the Distributor, these could be made available back for vehicles sold after 2012.

b. all other scheme information (Bulletins, technical advice etc.) should only have to be made available from the date the Bill comes into effect.

Information relating to repairs done on behalf of the Distributor

37. Some repairs are conducted on behalf of Distributors by dealers. These include repairs under warranty, recall campaigns, goodwill repairs and repairs under the ACL. It should not be a requirement for Distributors to make available information relating to these sorts of repairs. As no other repairer would be, or should be, carrying out these repairs, there is no need for the information that relates to them, to be made available.

38. In the case of safety recall information, provision of specific repair information "Scheme information" would most likely result in some independent repairers attempting repairs; with no obligations within this bill placed on aftermarket repairers at all, this would result in lower recall completion and issues in relation to accounting of the proportion of the fleet that has had the recall addressed.

'Manufacturers of scheme vehicles'

39. Scheme information is defined as:

' ...information in relation to scheme vehicles prepared by or for manufacturers of scheme vehicles.'

40. It is not clear what is meant by 'manufacturers of scheme vehicles'. The FCAI assumes that 'manufacturers' has the same meaning as in the ACL but this should be clarified. For the avoidance of any doubt it should be made clear that Australian distributors will not be responsible for the provision of scheme information for:
    a. Grey Market Imports;
    b. Specialist and Enthusiast Scheme Vehicles (SEVS);
    c. Used vehicle imports from other countries; or
    d. Privately imported vehicles.

41. Where vehicles are imported commercially under concessional arrangements, the business undertaking this activity should take on the responsibility of making scheme information available for the vehicles that they choose to import, this needs to be made clear in the legislation.

Form in which the scheme information is to be made available.

42. The Bill provides that scheme information is to be made available:

> *'(a) in the same form in which it is supplied or offered for supply under subsection (1); or*
>
> *(b) if supply in that form is not practicable or accessible—in an electronic form that is reasonably accessible to all Australian repairers and scheme RTOs'*.

43. Distributors provide information to their dealer often through integrated systems meaning that the information would not necessarily be in a form that is practicable or accessible by other people. This means that the Distributors would have to reconfigure the information, which adds yet another layer of cost to this process.

44. It should be noted that where an electronic version is not available, to provide in such a format will incur significant resourcing and cost that that will need to be borne by users of such service (some members have advised that electronic records do not go back to 2002).

Electronic Logbooks should be excluded

45. Some car manufacturers have replaced traditional manual based logbooks with online logbooks operated in a secure database through their authorised dealer network. When a consumer brings their vehicle into an authorised service provider for servicing, the authorised service provider can log into the database and bring up the vehicle's records contained in the online logbook. Once the authorised service provider has completed the service, they will update the online logbook and provide a printout of the service for the consumer.

46. Unlike manual logbooks, the online logbook provides a complete service history for vehicles serviced within the authorised dealer network. Manual logbooks typically only contain very limited details on services, and usually only involves a stamp from the service provider certifying the service was completed.

47. Consumers are able to access the information contained in online logbooks either through logging in on a personalised online account, or through requesting a copy of the service information through an authorised dealer and can in many cases update their details.

48. The provision of online logbooks is a means through which authorised dealers can provide a differentiated and qualitatively superior record keeping service to customers.

49. While independent repairers may not be able to access online logbooks, there is absolutely no attempt to limit service and repair markets and exclude independent repairers. This is because consumers still have the freedom to choose servicing from independent repairers if they wish to do so and can

provide independent repairers with access to the information contained in an online logbook.

50. While independent repairers are not able to update an online logbook, it also does not preclude a consumer from maintaining their own manual logbook of servicing.

51. There is therefore no need for electronic logbooks to be made available to independent repairers on the basis that all of the necessary service and repair information necessary is provided separately.

Emerging or unexpected faults

52. The FCAI agrees that scheme information should not include information provided to a restricted number of repairers for the purposes of developing solutions for emerging or unexpected faults.

53. Developing solutions for faults can take a significant amount of time and involve a lot of interactions between the manufacturer and the restricted number of dealers. This information should be excluded from 'scheme information' and it should be made clear that the data provider's obligation to provide information only commences when the fault has been rectified and be limited to the material provided to the dealer network about the rectification of the fault.

PROHIBITED TERMS

54. The prohibition on 'bundling' has the potential to cause problems as some of the information simply will not be of any use without specialized tools or software. In the case of software, this may require the person seeking access to purchase a software license. That is, it 'will be a requirement for the '*Australian repairer or scheme RTO to acquire one or more services or products from the data provider or any other person'*.

55. This should be clarified.

FAIR MARKET VALUE

56. The FCAI agrees that if a data provider is required to provide repair information it should receive a fair price in return. However:

    a. the price should include a reasonable profit. While this is possibly implied by some of the criteria spelt out in the Bill, it should be specifically mentioned.

    b. the price charged for the supply of information similar to scheme information in overseas markets is likely to be unhelpful at best and misleading at worst. The Australian automotive market is extremely small by world standards and is one of the most competitive in the

world. There are around 52 brands competing for approximately 1 million vehicle sales which means many of the Distributors in Australia are very small: in fact, in 2020 there were 20 brands which sold less than 1,000 units and 28 brands which sold less than 5,000 units. For these Distributors in particular (but all of the Australian Distributors to varying extents) the cost of the repair information, when amortized over the number of vehicles per year per model is likely to be substantially more than would be the case for overseas markets.

DATA PROVIDER MUST COMPLY WITH SUPPLY OBLIGATIONS DESPITE EXISTENCE OF OTHER RIGHTS AND OBLIGATIONS

57. The FCAI is particularly concerned about the requirement for a data provider to provide scheme information even if this would mean:

- 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.

58. If this requirement only applied to scheme information that was acquired by the data provider on or after the date the scheme comes into force, then the FCAI would be less concerned. This is because the data provider could ensure that it acquired the information considering the scheme requirements. However, when, as is currently envisaged, information is required to be provided that was acquired by the data provider many years before, it raises particularly difficult and unfair matters. It also goes against the principle that legislation should only, in very exceptional circumstances, have a retrospect effect.

59. For example, an independent distributor might well have been provided with scheme information from the overseas manufacturer on the express basis that the scheme information only be distributed on a limited basis – i.e. to dealers under obligations of confidentiality. If an independent repairer subsequently asks for this information, the distributor is placed in an unenviable position – either it complies with the scheme and provides the information, risking the wrath of the overseas manufacturer (which might include being terminated), or it refuses to supply the information and face the prospect of a maximum penalty of $10 million.

60. What if the owner of the information issues proceedings against the distributor seeking an injunction? Presumably, the distributor will have to defend the proceedings, or face being in breach of the scheme. It will have to pay its legal costs and probably those of the owner, even though it is completely innocent of any wrongdoing.

61. Clearly, this is completely inequitable.

62. This section should, in effect be reversed. That is, a data provider should not have to provide information it obtained prior to the scheme being introduced if to do so 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.

DISPUTE RESOLUTION

63. The FCAI is supportive of the dispute resolution process. However, the time frames allocated for resolution appear to be extraordinarily short and do not consider differing cultures, holiday periods or time zones which, given the international nature of the automotive industry they should. For example, some technical information required to resolve a dispute may only exist overseas, in time zones that are significantly different to Australia. To obtain this information within 2-days is completely unrealistic.

64. The FCAI suggests that the dispute resolution process as provide for in the Franchising Code of Conduct should form the basis of the dispute resolution process in the Bill.

SCHEME RULES

65. The Bill makes extensive reference to the Scheme Rules and it appears likely that the Rules will expose the data providers to additional obligations. A copy of the Scheme Rules needs to be provided well before the Bill comes into effect so that they can be properly reviewed and considered in plenty of time for any necessary amendments to be made.

PROPOSED IMPLEMENTATION DATE

66. The Bill proposes an introduction date of July 2022, this is extremely ambitious given the level of IT development that will need to be undertaken by a large number of participants. The substantial retrospective nature of the Bill increases the implementation timing considerably.

LEGISLATION APPLICABILITY

67. In 2020 there were 20 brands which sold less than 1,000 units and 28 brands which sold less than 5,000 units. For these Distributors in particular (but all of the Australian Distributors to varying extents) the cost of the providing repair information, when considering the likely aftermarket repairer demand will mean that there is no possibility of covering the costs let alone make any minimal profits. For this reason, FCAI recommends that this Bill should not apply to brands retailing less that 1,000 units per year averaged over reasonable period time.