

# **Australian Productivity Commission – Right to Repair Issues Paper**

**Submission by Legal Aid Queensland**

## Australian Productivity Commission – Right to Repair Issues Paper

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Australian Productivity Commission’s Right to Repair Issues Paper.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Civil Justice Services Unit lawyers have extensive experience providing specialist advice and representation to clients in banking and finance, credit and debt, insurance and consumer law. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to insurance, mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

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### **INFORMATION REQUEST 1**

#### ***What would a ‘right to repair’ entail in an Australian context? How should it be defined?***

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LAQ supports a definition of the right to repair that combines the best elements of the European and USA approaches to right to repair.

LAQ supports a focus in product design to ensure that when products are designed products:

- (a) Can be repaired for a reasonable cost;
- (b) Fixed within a reasonable time;
- (c) Have easy access to the parts and the technical data available to all repairers that would allow products to be fixed.

However, in LAQ’s submission, it is important to recognise that any definition of a right to repair must also focus on competition and consumer issues.

In LAQ's experience helping clients with faulty goods, particularly faulty motor vehicles and telecommunications equipment, who want their products fixed, will often have a very poor experience when they seek to enforce the consumer guarantees contained in the Australian Consumer Law (ACL).

Typical experiences of consumers for these products include:

- (a) Being told there is no fault with the vehicle/telecommunication products, or a fault not covered by the guarantee;
- (b) Being told the problem is with the telecommunications service provider and not the product and vice versa
- (c) Sellers delaying and refusing to accept a fault and subsequently claiming the period to seek a remedy under the guarantee has expired;
- (d) Having to return a car/ telecommunications product for repairs multiple times to a repairer before the problem is fixed;
- (e) Repairs taking a long time, in some cases, consumers being without their goods for months;
- (f) Consumers are fatigued by the process of getting goods repaired and not pursuing rights they may have against the manufacturer of the car or product or the repairer in QCAT;
- (g) Where a vehicle has had multiple faults, manufacturers and sellers are not acknowledging that a series of minor faults with a car should be viewed as a major fault with the car entitling the consumer to a refund or a replacement of the goods.
- (h) The cost of parts and repair are exorbitant when compared to the cost of the product. For example the cost of replacing phone screens particularly for new products can be close to 50% of the cost of the purchase price of the phone.
- (i) The difficulty in determining who has responsibility for repair when consumers have financed the purchase of the product through a third party, for example when a person has purchased a faulty vehicle but continues to have an obligation to pay the lender in circumstances where the seller of the vehicle is refusing to repair.
- (j) The difficulty in obtaining evidence from experts to identify what the problems are with the faulty product because of
  - a. the cost of obtaining the evidence;
  - b. the difficulty in finding suitably qualified experts to ascertain the actual fault
  - c. the reluctance of experts to provide a report if they are required to give evidence in a tribunal or a court

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**INFORMATION REQUEST 2**

- a) What types of products and repair markets should the Commission focus on?***
- b) Are there common characteristics that these products share (such as embedded technology and software or a high/low degree of product durability), and which characteristics would allow policy issues to be considered more broadly?***
- c) If there are particular products that the Commission should focus on, what are the unique issues in those product repair markets that support such a focus?***
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Question 2(a)

In LAQ's submission, the Commission should focus on:

- (a) The new and second hand car markets;
- (b) The sale of products that require other services to function e.g. mobile devices, smart televisions ;
- (c) The repair markets for the products.

Question 2(b) and (c)

In LAQ's experience, most new and second hand cars and telecommunications devices share embedded technology and data that would be needed by repairers.

In principle LAQ supports the Federal Government's proposal to introduce a motor vehicle service and repair information sharing scheme because it is likely to improve competition in repair markets and improve consumer outcomes.

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**INFORMATION REQUEST 3**

- a) Do the consumer guarantees under the ACL provide adequate access to repair remedies for defective goods? If not, what changes could be made to improve access to repair remedies? Are there barriers to repairing products purchased using new forms of payment technologies, such as 'buy now pay later'?**
- b) Is the guarantee of available repair facilities and spare parts effective in providing access to repair services and parts? Or is the opt-out clause being widely used, making the guarantee ineffective?**
- c) Should consumer guarantees seek to balance the broader societal costs of remedy choices (such as the environmental impacts of replacements) with consumer rights, and if so how? For example, should repairs be favoured as a remedy?**
- d) Are consumers sufficiently aware of the remedies that are available to them, including the option to repair faulty products, under the ACL's consumer guarantees?**
- If not, would more information and education be a cost-effective measure to assist consumers understand and enforce guarantees? What would be the best way to deliver this information? What other measures would be more effective?***
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Question 3(a)

In LAQ's experience, the consumer guarantees contained in the ACL are very important rights. However, consumers routinely find it very difficult to enforce these rights for a number of reasons:

- (a) Consumers are not aware of their rights under the ACL. Consumers are often more aware of paid vehicles warranties which in some cases provide a lesser protection than the protection offered by the Australian Consumer Law. Consumers often delay seeking legal advice. Often, the delay occurs as a result of conduct of the seller, for example, suggesting the consumer return after a period if the problem persists. This delay inevitably results in greater difficulty in the consumer proving the facts necessary to obtain a remedy under the ACL if the supplier does not cooperate.
- (b) Consumers find enforcing their rights under the ACL in a court or QCAT difficult. The risk of legal costs and applicability of procedural rules and the rules of evidence mean that consumers would very rarely be advised to commence proceedings in court for a remedy under the ACL as a self-represented litigant. However, LAQ notes that the expansion of QCAT's jurisdiction to hear motor vehicle disputes from \$25,000 to \$100,000 has in part improved the access of consumers to low cost dispute resolution of their motor vehicle claims.
- (c) Consumers can find it difficult to obtain independent evidence of the faults with vehicles/ telecommunications products necessary to prove fault on the part of the manufacturer and pursue their claims in court or QCAT. The cost of obtaining a report is initially borne by the consumer, and it can be difficult to find a mechanic/expert who is willing to attend and give evidence at a hearing.
- (d) There is very limited free legal advice and representation available in QLD and other states to assist consumers with this type of dispute.

- (e) Consumers do not have access to an Ombudsman scheme unless it's a telecommunications product that is purchased through the telecommunications provider.

With respect to Buy Now Pay Later (BNPL) technology, LAQ has not seen any cases where BNPL has interacted with the repair of vehicles or goods. However, in LAQ's experience, where there are multiple businesses or parties involved in a transaction, consumers can find it difficult to identify who they should exercise their rights against and how.

### **Question 3(b)**

LAQ has not seen any clients attempting to rely on the guarantee of available repair facilities and space parts.

### **Question 3(c)**

In LAQ's submission, consumer guarantees should not seek to balance societal costs of remedy choices with consumer rights.

Repairs should not be favoured as a remedy. In our experience, the evidence of the consumer experience in having minor faults in vehicles repaired has been a very poor one and has led to consumers being without their vehicles for months.

The remedies relating to guarantees under the ACL provide that if the failure is not a major failure, the consumer is required to give the supplier an opportunity to remedy or repair the fault. It is only if the supplier refuses to remedy the failure, or the failure was a major failure to begin with, that the consumer is entitled to a refund, compensation for a reduction in the value of the goods, or a replacement.

If the consumer elects for a replacement or refund, ownership of the goods goes back to the supplier. If the goods are capable of being returned to the supplier without undue cost, then there is an obligation on the consumer to do so. If this is not achievable, then the obligation is on the supplier to collect the goods. If policy intervention is necessary to reduce waste accumulating as a result of remedies, it should occur at a point either before the supply of the goods or once the goods have been returned to the supplier. The purpose of a remedy is to right a wrong so far as possible. Focusing on repairs and making it more difficult for consumers to obtain a refund in circumstances where they would not have purchased the goods had they known about the fault, or the supplier is not cooperating, defeats the purpose and incentivises poor behaviour on the part of the supplier. Rather than the focus being on repairs, the focus of consumer guarantees should be on providing a remedy that solves the consumers' problem.

### **Question 3(d)**

In LAQ's experience, a significant number of consumers are not aware of the rights under the ACL's consumer guarantees.

In LAQ's submission, more education and information may benefit consumers if information is provided at the right time. In LAQ's experience, providing more information at the time of sale will not necessarily improve consumer awareness of their ACL rights. Consumers do not generally consider what they would need to do if the event something goes wrong until it has gone wrong. As a result, highly detailed information being provided at the point of sale is unlikely to improve consumers' knowledge of ACL consumer guarantees.

In LAQ's experience, particularly for more vulnerable groups such as CALD clients and consumers with a disability, in addition to a simple, easy English factsheet, short videos about how to get assistance and solve a problem when something goes wrong can be very effective in improving the knowledge of consumers.

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**INFORMATION REQUEST 4**

**a) The Commission is seeking information on the nature of repair markets in Australia, including detailed data on the repair markets for specific products, covering:**

**market size — by employment, revenue, number of businesses, profit margins**

**market composition — such as market share between authorised, independent and DIY repairers.**

**b) Is there any evidence of a difference in quality, safety or data security between authorised repair networks and independent repairers? Are there ways to address concerns around quality, safety or data security while promoting a vibrant independent repair market?**

**c) Are there available examples of the contracts between OEMs and authorised repairers? Do these contracts limit effective competition in repair markets (such as by limiting the number and reach of authorised repairers or requiring authorised repairers to not be authorised by a competing brand)?**

**What is the process to become authorised? Is it open and competitive?**

**d) Are there specific examples or other evidence of practices by OEMs or their authorised repairers that create barriers to competition in repair markets?**

**Do other factors also create barriers to competition in repair markets, such as short-sighted consumer behaviours, switching costs, poor information availability or consumer lock-in?**

**e) What is the relationship between the intensity of competition in the primary product market and the risk of consumer harm from a lack of competition in repair markets? Can competitive primary markets compensate for non-competitive repair markets?**

**Is an absence of effective competition in the primary market a necessary condition for consumer harm from non-competitive repair markets?**

**To what extent would measures that enhance competition in the primary market address concerns about a lack of competition in repair markets?**

**f) Are the restrictive trade practices provisions of the CCA (such as the provisions on misuse of market power, exclusive dealing or anti-competitive contracts) sufficient to deal with any anti-competitive behaviours in repair markets?**

**g) What policy changes could be introduced if there is a need to increase competition in repair markets and improve consumer access to, and affordability of, repairs?**

**What are the costs and benefits of any such proposal to the community as a whole? How does it balance the rights of manufacturers and suppliers, with those of consumers and repairers?**

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**Question 4(d)**

In LAQ's experience, poor information availability about the quality and availability of alternatives to manufacturer's repairers create barriers to increasing competition.

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**INFORMATION REQUEST 5**

- a) To what extent do current IP laws already facilitate repairs by consumers or independent third parties (e.g. the spare parts defence under the Design Act)?*
- b) Are there any aspects of IP laws where consumers' rights with respect to repairs are uncertain?*
- c) Do current IP protections (e.g. intellectual property rights, technological protection measures, end-user licencing agreements) pose a significant barrier to repair in Australia? If yes, please comment on any or all of the following:*
- the specific IP protections that prevent consumers from sourcing competitive repairs and/or inhibit competition in repair markets*
  - the types of products or repair markets these barriers mainly affect*
  - the prevalence of these barriers*
  - the impacts of these barriers on third party repairers and consumers (e.g. financial cost, poorer quality repairs)*
  - options for reducing these barriers and their associated benefits, costs and risks (including potential impact on market offerings).*
- d) In what ways might government facilitate legal access to embedded software in consumer and other goods for the purpose of repairs? What are the pros and cons of these approaches?*
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LAQ has no submissions to make in response to this request.

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**INFORMATION REQUEST 6**

- a) What evidence is there of planned obsolescence in Australian product markets? Do concerns about planned obsolescence principally relate to premature failure of devices or in them being discarded still working when more attractive products enter the market?*
- b) How can the Commission distinguish between planned product obsolescence and the natural evolution of products due to technological change and consumer demand?*
- c) How does planned obsolescence affect repairers, consumers and the broader community in Australia?*
- d) What measures do governments currently use to prevent planned obsolescence or mitigate its effects (in Australia and overseas)? How effective are these measures?*
- e) What are the benefits, costs and risks of Australia adopting measures similar to those currently used overseas, such as product design standards and reparability ratings?*
- f) Do consumers have access to good information about durability and reparability when making purchases? If not, how could access to information be improved?*
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LAQ has no submissions to make in response to this request.

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**INFORMATION REQUEST 7**

**a) What data are available on the amount of e-waste generated in Australia?**

*What data is there on the composition of e-waste in terms of particular materials (such as hazardous materials) by product type?*

*How does hazardous e-waste compare to hazardous general waste in its prevalence and risks? Is there merit in distinguishing between hazardous e-waste and non-hazardous e-waste? And if so, how could this be done in practice?*

**b) What estimates are available on the costs of e-waste disposal on the environment, human health and social amenity, in Australia and internationally?**

*How do the impacts differ by disposal type, or by the type of product or hazardous material?*

**c) How much of Australia's e-waste is shipped overseas for recycling? Is there evidence of circumstances where this creates problems for recipient countries?**

*Are there barriers to the expansion of domestic recycling facilities or the adoption of new recycling technologies in Australia (such as plasma arc incinerators)?*

**d) What are Australia's current policy settings for managing the potential environmental and health effects of e-waste (such as landfill bans, the National Television and Computer Recycling Scheme or Mobile Muster)? Are these policy settings broadly right — that is, are they proportional to the impacts of e-waste on the community?**

**e) How can a right to repair policy further reduce the net costs of e-waste in Australia, and would such an approach be an effective and efficient means of addressing the costs of e-waste to the community?**

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LAQ has no submissions to make in response to this request.

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**INFORMATION REQUEST 8**

**a) What policy reforms or suite of policies (if any) are necessary to facilitate a 'right to repair' in Australia?**

**b) Are there any other barriers to repair and/or policy responses that the Commission should consider?**

**c) What are the costs and the benefits of the various policy responses that have been proposed to facilitate repair (such as those outlined in table 1)?**

**d) Are there other international policy measures or proposals that the Commission should consider as part of this inquiry?**

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Question 8(a)

It is important that as part of any policy responses to the question of the right to repair the interests of the consumer remain paramount. Consumer guarantees and the rest of the ACL have at its core:

- (a) a desire to protect consumers if manufacturers and firms act inappropriately; and
- (b) to protect consumers if something goes wrong or is faulty.

In LAQ's submission for consumers to successfully exercise their rights under the ACL consumer guarantees or under any right to repair the following conditions are needed:

- (a) The circumstances where a consumer needs to prove fault by the manufacturer or repairer should be reduced. LAQ supports the introduction of extended guarantee periods and longer periods where the burden of proof lies with the firm or manufacturer. In LAQ's experience consumers often lack the money and/or expertise to successfully show fault on behalf of a manufacturer when a vehicle or good is faulty.
- (b) It may assist consumers and business to have some indication of minimum warranty periods. Whilst it is acknowledged that minimum warranty periods should not be legislated, perhaps the ACCC could develop guidance material as to what appropriate warranty periods may be for particular products
- (c) Where fault must be proved consumers need access to low cost expert reports about the faulty good. Reports of this type will either strengthen or disprove fairly quickly the merits of any claim a consumer is trying to bring against a manufacturer or firm.
- (d) Consumers should not be forced to get a faulty product constantly repaired. If it has to be repaired more than twice in the first six months after purchase, a refund of the price or replacement should be provided.
- (e) Consumers need assistance enforcing their rights for faulty products. To solve this problem, consumers need greater access to free legal advice and representation. Jurisdictional limits for motor vehicle claims in State tribunals should be expanded.

### **Question 8(b)**

In LAQ's submission the Issues Paper has covered the relevant barriers to repair and policy responses that the Commission should consider.

### **Question 8(c) and (d)**

LAQ has no submission to make in response to these questions.