

Productivity Commission
Right to Repair Inquiry
4 National Circuit
Barton ACT 2600
Australia

23 July 2021

Re: Submission to the Productivity Commission's Draft Report on the Right to Repair Inquiry June 2021

Thank you for the opportunity to make a submission in response to the Draft Report of the Productivity Commission's on the Right to Repair.

We commend the Productivity Commission on the depth and breadth of the issues examined in their Right to Repair Inquiry and in their Draft Report and we fully support all of the recommendations made. We provide this submission to assist the Commission by addressing some of the requests for information identified in the Draft Report.

We are Intellectual Property Law academics at Griffith University with a strong interest in the International Right to Repair movement. We are researching the intersection between Intellectual Property law, consumer and competition law and the international Right to Repair movement. We were also guest editors of the special edition of the 2020 *Australian Intellectual Property Journal*: entitled: '*Unlocking the Interface between IP and the Right to Repair*'¹, which includes a series of journal articles that provide an in-depth analysis of Australian IP laws, as both barriers and enablers, of the Right to Repair. It includes contributions on the US and EU regulatory responses to the Right to Repair.

Please feel free to contact us for further discussion.

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¹ <http://sites.thomsonreuters.com.au/journals/2020/12/29/australian-intellectual-property-journal-update-vol-31-pt-2/>

Existing consumer rights under consumer law

We agree, in particular, with draft **Recommendation 3.1** that there is scope to enhance consumers' awareness and understanding of consumer guarantees and their ability to exercise their rights when their product breaks or is faulty — by providing guidance on the expected length of product durability and better processes for resolving claims. We also agree that the Australian Competition and Consumer Commission (ACCC) should develop and publish estimates of the minimum expected durability for products within major categories of common household products to support application of the acceptable quality consumer guarantee in section 54 of the *Australian Consumer Law*.

In relation to draft **Recommendation 3.2**, we agree that there should be scope for State and Territory Governments to introduce *alternative dispute resolution mechanisms* to better resolve complaints about the consumer guarantees. **Any system of ADR for consumer complaints about repair should prohibit the presence of legal representatives, as to allow legal representation would place an unfair advantage on the manufacturers who are usually in more powerful position than consumers with respect access to legal representation, thus placing consumers at a distinct disadvantage.** We agree that consumer peak bodies and organisation are better placed to provide advice on their experiences with ADR processes to ensure that any process adopted provides fair and reasonable access and outcomes and that further research and funding is needed to fully investigate options.

We believe that **state based Consumer Ombudsman** or equivalent could be a useful addition to the regulatory response to complaints about ACL consumer guarantees. Similar schemes exist in the UK. Given the current prohibitive costs of bringing legal action under the ACL, a state based Consumer Ombudsman or equivalent, that could provide a first point of call for consumers to pursue breaches of the ACL, could also serve as a point of data collection for the proposed super complaints process.

We strongly support draft **Recommendation 3.3** which enables a Super complaints process on systematic issues associated with access to ACL consumer guarantees.

Competition in repair markets

We note draft **finding 4.2** that the Productivity Commission has found that limits to repair supplies could be leading to consumer harm in some markets. We refer to our earlier submission with respect to the harm that is present in agricultural markets. We suggest that the harm is far more widespread than just agricultural, mobile phone and tablet markets. Without a clear collection point for data collection of the type of restrictions that consumers are facing when purchasing consumables, it is difficult to present evidence of the extent to which consumers are locked into using authorised repairers. We suggest that, again either a Consumer Ombudsman or consumer peak bodies, are well placed to collect this information going forward. Given the inability to repair is only gaining wide-spread awareness and understanding within the broader community, it is not surprising that other industries where repairability presents challenges have not fully engaged with this debate. As these are early days in terms of awareness raising of the Right to Repair movement in Australia, it is likely that other industries such as mining, military, engineering/computer engineering, medical equipment/biomedical engineering and construction have repair experiences and challenges

that should be explored and shared as these experiences will inform policy development going forward.

We fully support draft **Recommendation 4.1** which mandates an evaluation of the Motor Vehicle Service and Repair Information sharing scheme once it has been in operation for 3 years.

We full support **draft recommendation 4.2** that the Australian Government should amend r. 90 of the Competition and Consumer Regulations 2010, to require manufacturer warranties ('warranties against defect') on goods to include text (located in a prominent position in the warranty) stating that entitlements to consumer guarantees under the Australian Consumer Law do not require consumers to use authorised repair services or spare parts.

A Positive Obligation to provide access to repair supplies

In response to information request 4.2A, we believe it is important for original equipment manufacturers (OEMs) to have a general positive obligation to disclose information about their products, particularly where the terms of sale contain restrictions that consumers would not normally expect. More specifically, relevant to this Inquiry, we believe that original equipment manufacturers should be obliged to provide access to repair, spare parts and repair information and supplies to third-party repairers. **The OEMs who manufacture products (and their lawyers who draft the terms which regulate the use of their products) should fully disclose any restrictions on physical ownership (that most consumers would fully expect) of those goods.** For example, if a light is sold, where a bulb, which a consumer would normally expect should be able to be replaced, is not able to be replaced, then this information should be disclosed at the point of sale. As this is a fact that only the manufacturer would know, full disclosure should be mandated as the would enable consumers to make informed choices as to particular products they may wish to purchase.

We believe that manufacturers should be obliged to supply, not only information at the point of sale, about repairability but also about the availability of spare parts (and for what particular period of time) and what the approximate costs of those spare parts and repair services are for their products. Along the same lines as is provided in the credit/finance sector (to provide explanation of complex documents such as a mortgage -where a one page explainer is required), a simple one page or equivalent that sets out any special terms about repairability or durability should be required from manufacturers to inform consumers at the point of sale.

As we have previously suggested, it is fundamentally important for regulators recognise the general inequity of the ACL's approach of placing the onus (and significant costs) onto individual consumers to instigate legal actions to pursue a remedy. Instead, we suggest that regulators should examine policy response that place positive obligations on manufacturers to make their commercial dealings with their customers more transparent and equitable. This shift in onus would make positive inroads to ensuring consumers are adequately informed when making choices about product choice.

An individual consumer, when considering the purchase of software enabled goods (such as everyday appliances, large and small) is at a distant disadvantage when purchasing those goods, as they have little to no knowledge of the restrictions on the use or the longevity of those goods, unless the OEMs are required to disclose this information. The licences, that are embedded/accompany smart or digital goods are often difficult to access and understand and thus

the obligation should be placed upon the OEMs who manufacture these goods to fully explain the conditions upon which the goods are purchased – prior to purchase.

When thinking about the level of disclosure that manufacturers should be obliged to make, we suggest that it would be useful, by way of analogy, to consider the approach that is taken by the courts to interpretation of clauses that companies often draft that effectively reduce consumers' right when it comes to suing for breaches of contracts against manufacturers. The genesis of the so-called *red hand rule* is to be found in *Spurling v Bradshaw Ltd*², where Lord Denning said: *[T]he more unreasonable a clause is, the greater the notice which must be given of it. Some clauses would need to be printed in red ink with a red hand pointing to it before the notice could be held to be sufficient.* As has been observed, "it is trite law that a party attempting to exclude or limit legal liability, by incorporating an exemption clause into an unsigned contract, must take reasonably sufficient steps (at or before the time of contracting) to give notice of the clause to the other party. **The more unreasonable or unusual the clause, the greater the insistence by some judges that the clause be drawn to the attention of the other party in an explicit way, such as being printed in red ink with a red hand pointing to it.**"³ The principle behind this rule is that the more unreasonable or unusual the terms, the more responsibility is placed on the party attempting to rely upon that term to bring that term to the attention of the contracting party. If we consider the sale of a consumer good that contains restrictions on the use of those goods in a way that is inconsistent with physical ownership, it could be argued that manufacturers should take additional steps to bring those restrictions to the attention of the potential purchaser otherwise, they should not be able to enforce those terms.

Manufacturer warranties and their influence on repair

We agree that provisions similar to the *Magnuson-Moss Warranty Act* in the United States, which prohibit manufacturer warranties from containing terms that require consumers to use authorised repair services or parts to keep their warranty coverage should be introduced into ACL. Terms within end-user license agreements that purport to restrict repair related activities (discouraging third-party repair) should definitely also be prohibited. We would suggest that a legislative prohibition is required along the lines of s 64 of the ACL, which prohibits the contracting out of certain consumer guarantees provides a good example of the type of legislative prohibition.

Intellectual property protections and repair

We urge the Productivity Commission to take into account much broader recognition of the range of IP regimes that can be used to introduce barriers to repair. It is not only copyright and TPMs over the embedded software that are being used to prevent access and repair but also contributing to the problem are the copyright end use licence agreements (EULAs) that restrict access to the technology and the repair information in service manuals. Patents, trademarks, designs, and confidentiality in the hardware, software, spare parts and repair manuals are also being used to control the aftermarket of spare parts, repairs and servicing. Intellectual Property

² [1956 1 WLR 461, 466

³ S. Kapnoullas, B Clark 'Incorporation of unusual or unreasonable terms into contracts: the Red Hand Rule and Signed Documents' (2006)11:2 *Deakin Law Review* 95

law is one of the key ways used by manufacturers to restrict access to not only repair and service information but also diagnostic programs and spare parts.⁴

As Professor Rimmer has highlighted in his detailed submission, ‘there is a strong body of evidence that intellectual Property restrictions do impact upon the right to repair.’⁵ The regimes of Patent and Design Law have recently been the subject of judicial determination with respect to issues concerning repairability; there is ongoing policy concerns about the breadth and operation of the scheme of TPMS as well as the area of trade secret or confidential information. We suggest that it is essential that all of the IP regimes be examined for their potential to inhibit repair. This would require further examination of each of the IP regimes.

In line with draft **finding 5.2**, we agree that there is scope within the defence in Copyright Law to incorporate a repair defence. We suggest that the adoption of the broad fair use defence would be the most appropriate option. However it is recognised that several prior reviews of Copyright and competition law have recommended the adoption of fair use in Australia.

An alternative would be the adoption of a repair-specific fair dealing exception as is foreshadowed. However, given the narrowness applied to the existing fair dealing provisions, such a defence would need to be carefully considered and drafted to ensure it achieves its objective of allowing use of copyright materials for the purposes of repair.

We recommend that to improve access to repair and service information that repairers should be given legal grounds upon which they can procure tools that are required to access information protected by TPMs. We commend the academic work of Professor Graeme Austin and Anthony Rosborough on the scope and operation of TPMs and of the anti-circumvention provisions.⁶ We also agree that it would be necessary to introduce amendments to the *Copyright Act* to prohibit the use of contract terms, such a confidentiality agreements, that restrict repair-related activities otherwise permitted under copyright law, similar to s 64 in the ACL which prohibits the contracting out of consumer guarantees.

Intellectual Property laws should not be operating to prevent a smart consumer product or good from working or from being repaired. Examination of each of the Intellectual Property laws should be considered in light of their potential to support the with-holding or non-disclosure of crucial repair and service information that would ensure that the products remain in use for longer and that they do not end up in landfill. For example, under the *Mandatory Scheme for Sharing of Motor Vehicle Service and Repair Information*,⁷ repair and service information

⁴ See Leanne Wiseman and Kanchana Kariyawasam (eds), ‘Unlocking the Interface between IP and the Right to Repair’ Special Edition, (2020) 31:2 *Australian Intellectual Property Journal* Special Edition. <http://sites.thomsonreuters.com.au/journals/2020/12/29/australian-intellectual-property-journal-update-vol-31-pt-2/>

⁵ Matthew Rimmer, A Submission on the Right to Repair to the Productivity Commission, Right to Repair Inquiry, July 2021.

⁶ Graeme W Austin, Anti-circumvention Prohibitions and the Function of the Work in Leanne Wiseman and Kanchana Kariyawasam (eds), ‘Unlocking the Interface between IP and the Right to Repair’ Special Edition, (2020) 31:2 *Australian Intellectual Property Journal* Special Edition. <http://sites.thomsonreuters.com.au/journals/2020/12/29/australian-intellectual-property-journal-update-vol-31-pt-2/>; Anthony Rosborough, Submission to the Productivity Commission, July 2021.

⁷ Available at <https://treasury.gov.au/consultation/c2020-128289>

protected by copyright are the subject of the mandatory sharing scheme. This approach could be adopted for broader categories of goods, other than motor vehicles.

It is necessary to consider more broadly whether there should be a repair defence within each of the IP regimes eg within Patent Law, Designs Law and Trade Mark Law. However, the complexities around the scope of operation of each of these IP regimes requires further research. Even though it has been argued by some IP advocates that Australia's membership of international treaties and bilateral trade agreements prevent such developments, there is little or no scholarship on this particular issue. Accordingly, a full and detailed understanding of Australia's international commitments and our national IP laws is necessary to understand how a right to repair could interact with Australia's intellectual property laws.

Product obsolescence and e-waste

In response to information request 6.1, we support the introduction of a repairability index into Australian regulatory framework. The recent introduction of the *French Repairability Index*, while not without weaknesses, shows that by placing more responsibility on manufacturers to be honest about the quality and expected lifespan of their products, will in turn, enable consumers to make more informed choices.

We suggest that the French Repairability Index provides a good starting point for a regulatory examination of what a repairability index would look like in Australia. Obviously, it is very early days for this Index and there are many lessons to be learned that can be implemented into any such system to be adopted in Australia. There have been some concerns expressed that the voluntary, self-regulating nature of the *French Repairability Index* may be problematic⁸, however working in consultation with Industry when developing such a labelling system could potentially overcome any concerns. Concerns have also been identified of way in which manufacturers could potentially game the system. There would need to be close oversight of any voluntary system to ensure that there is full disclosure and there is no potential for confusion or misleading claims to be made.⁹

By way of conclusion, we congratulate the Productivity Commission on its comprehensive Inquiry and its strong recommendations. We are pleased with the level of engagement that the Commissioners have had with a wide range of repair and industry stakeholders, including from those countries who are on a similar path of developing regulator responses to the inability of consumers to repair their goods. We believe good lessons for Australia can be taken from the Canadian, US, South African and EU regulators as this is increasingly a problem on an international scale with international stakeholders, and regulatory responses in Australia that take into account an international dimension is what is needed here.

⁸ Maddie Stone, [Why France's new 'repairability index' is a big deal](https://grist.org/climate/why-frances-new-repairability-index-is-a-big-deal/) <https://grist.org/climate/why-frances-new-repairability-index-is-a-big-deal/>, Feb 8, 2021

⁹ Mike Woods, [France launches anti-waste 'repairability' rating for smartphones, laptops](https://www.rfi.fr/en/france/20210211-france-launches-worlds-first-repair-index-for-smartphones-laptops-consumer-products-environment-waste-durability-europe), <https://www.rfi.fr/en/france/20210211-france-launches-worlds-first-repair-index-for-smartphones-laptops-consumer-products-environment-waste-durability-europe>

