



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Productivity Commission Inquiry into the Right to Repair in Australia

## ACCC submission in response to the Issues Paper

February 2021

# 1. Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on the 'Right to Repair - Issues paper' (**Issues Paper**).

The ACCC promotes competition and fair trading in markets to benefit consumers, businesses, and the Australian community. Our primary responsibility is to ensure that individuals and businesses comply with the Competition and Consumer Act 2010 (Cth) (**the CCA**) which includes the Australian Consumer Law (**ACL**).

As the Issues Paper has identified, the ACCC's role in enforcing compliance with the CCA, in particular the consumer guarantee provisions and prohibitions on misleading or deceptive conduct in the ACL, is highly relevant to the Right to Repair Inquiry (**the Inquiry**). The ACCC has also conducted in-depth studies considering repair issues in the motor vehicle and agricultural machinery markets.

The question of whether Australia should introduce some form of 'right to repair' is a complex and multi-faceted one. A right to repair would intersect many aspects of the law and economy, including intellectual property, international law, competition law and consumer protection and fair trading laws.

For the reasons outlined in this submission, the ACCC considers that reforms to consumer law or specific regulatory intervention will be necessary to address harms relating to consumers' and small businesses' access to repairs or spare parts. Additionally, the ACCC considers that a principles-based prohibition on unfair trading practices would be an invaluable complementary tool for addressing consumer harms related to repairs that may not be directly regulated by future policies.

The ACCC looks forward to continuing to engage with the Productivity Commission as it considers this complex issue.

## 2. The CCA and Right to Repair

As noted in the Issues Paper, the ACL addresses a small number of issues related to consumers' right to repair their products. This is primarily through the consumer guarantees framework and, to a limited degree, the prohibitions on false, misleading or deceptive conduct.

### Consumer Guarantees

Under the ACL, a consumer's purchase of goods and services comes with automatic consumer guarantees. When a consumer product does not meet a consumer guarantee, the consumer is entitled to a remedy from either the supplier or manufacturer. If a consumer seeks a remedy from a supplier and the failure is 'minor', the supplier can elect to provide either a repair, replacement or refund within a reasonable time. If a consumer seeks a remedy from a supplier when a failure is 'major', the consumer has the right to choose between a replacement and refund, but could also choose to get the product repaired.

Consumers can also seek to recover their costs from a manufacturer, as well as compensation for damages or loss. In some instances manufacturers may be able to meet their obligations by repairing the product free of charge. Neither suppliers nor manufacturers can contract out of these guarantees and these rights are additional to any warranties provided by the business.

Section 58 of the ACL provides a guarantee that manufacturers will take reasonable action to ensure repair facilities and access to spare parts are reasonably available for a reasonable period of time. Manufacturers may limit their obligations under this section by ensuring the consumer receives written notice at or prior to purchase stating that facilities for repair or spare parts will not be available after a specified period. In our experience few manufacturers provide such notice.

In the 2019-2020 financial year the ACCC received approximately 98 300 contacts relating to the ACL generally, including a large number of consumer guarantee complaints. In the 2019 and 2020 calendar years, the ACCC received 480 contacts relating specifically to access to repair or spare parts under s 58 of the ACL.

All ACCC contacts are reviewed and triaged and an assessment is made as to whether any raise issues that should be progressed to an investigation. This assessment is based on a number of factors, including the potential for widespread consumer harm. Four matters raised were progressed to an investigation. Three investigations were discontinued and one resulted in three manufacturers agreeing to:

- Make repair facilities and spare parts available in Australia;
- Provide written notice to consumers about the availability of repair facilities or spare parts; or
- If repair facilities and spare parts are not provided and notice is not given, manufacturers agreed to replace broken devices with a working device for the estimated cost of repair.

As a general rule, the low cost of repair relative to other consumer remedies provides a strong incentive for manufacturers to maintain some form of repair facility and make it available to Australian consumers. In many circumstances repairing a good is significantly cheaper than providing a replacement or refund, so many manufacturers provide repair facilities.

### *Practical issues*

The consumer guarantee regime has a number of practical enforcement challenges to both consumers and the ACCC. The ACCC is not able to take legal action to penalise suppliers or manufacturers that refuse to provide consumers with a remedy they are entitled to under the consumer guarantees, even if that refusal is unreasonable.

If a supplier or manufacturer refuses to remedy a failure with their product, or refuses to maintain repair facilities in line with their obligations under the ACL, the consumer harmed by the conduct will need to commence legal proceedings in a local court or Small Claims Tribunal to obtain a remedy. In many cases the costs and effort involved in doing so will be greater than the value of the product in question.

While the ACCC can take action if the supplier or manufacturer misleads a consumer about their entitlement to a remedy, such an action does not directly deal with the core issue of suppliers or manufacturers not providing the remedy consumers are entitled to.

This is a significant issue with the ACL and there is a policy process underway considering options to improve enforcement of the consumer guarantees in the ACL.<sup>1</sup> This includes potential reforms that would make it a contravention of the ACL for:

- suppliers and manufacturers to fail to provide a remedy to consumers when legally obliged to do so under the consumer guarantees; and

---

<sup>1</sup> Legislative and Governance Forum on Consumer Affairs, joint communique, 30 August 2019, p. 2.

- manufacturers to fail to indemnify suppliers who provide consumers with a remedy under the consumer guarantees when legally obliged to do so.

By making this conduct illegal the ACCC and state and territory ACL regulators could take court action against offending businesses, seeking pecuniary penalties as well as redress for affected consumers and suppliers. As such, both suppliers and manufacturers would be incentivised to implement procedures and practices that better promote compliance with consumer and supplier rights under the ACL's consumer guarantees and supplier indemnification regimes.

This policy process will proceed to public consultation in 2021. The ACCC supports amendments to the ACL to address the considerable difference between consumers and supplier rights and their practical experience. Subject to the findings of the forthcoming policy process, this includes support for the introduction of the two prohibitions listed above.

### **False, misleading or deceptive conduct**

The ACL protects consumers against false or misleading representations and misleading or deceptive conduct, including against companies' representations regarding future access to repair facilities or an individual consumer's right to have a faulty device repaired. However, this protection will only apply to representations regarding existing rights and does not provide consumers with any express remedy to have their goods repaired.

A good illustration of this distinction is the ACCC's case against Apple Inc and Apple Australia Pty Ltd (**Apple**) based on false or misleading representations to consumers about their consumer guarantee rights (**the Error 53 case**). This case was brought after a faulty software update from Apple caused a number of consumers' iPhones and iPads to become inoperable (known as 'Error 53' because of the error message that appeared on the consumer's computer during the update). This fault was more likely to affect devices that had been repaired by a third party. Apple admitted that through various means it represented that consumers were not entitled to a remedy at no cost where their device had previously been repaired by a third party repairer. The Federal Court of Australia found that these were false and misleading statements about the availability of the consumer guarantees and about the consumers' rights or remedies under the ACL.<sup>2</sup> Apple was ordered to pay \$9 million in penalties for representations made to at least 275 customers.

The Error 53 case does not stand for the principle that consumers have the right to have their device repaired by a third party, but confirms that suppliers and manufacturers must not tell consumers that they have no ACL rights simply because a third party repairer has been used. As such, the ACCC's ability to bring cases such as the Error 53 Case is highly dependent on the nature of the representations made and evidence gathered during our investigative processes. Even when they can be brought, these actions provide limited protection of consumers' repair rights, and are insufficient to overcome the meaningful practical challenges of enforcement outlined in our discussion of the consumer guarantees above.

### **Some harmful practices remain unregulated**

Australian competition and consumer laws do not directly cover many of the potential consumer harms or issues identified in the Issues Paper, and the ACCC supports further consideration of whether new laws should be introduced to regulate potentially harmful behaviour not prohibited by the existing provisions of the ACL. This is particularly important as newer technologies create new opportunities for businesses to engage in harmful

---

<sup>2</sup> *Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)* [2018] FCA 953 (18 June 2018).

practices in the repair market, particularly in relation to barriers to repair, planned obsolescence or incomplete disclosure of future obsolescence.

### Unreasonable barriers to repairs and spare parts

Repairs of electronic or Internet of Things devices increasingly require specialised knowledge, software or parts. This specialisation can provide manufacturers with the ability to dictate when and how a consumer can have their devices repaired. If a manufacturer chooses not to provide the necessary information, tools and spare parts to third party repair facilities, consumers will not be able to use a third party repairer. In these cases, consumers may be exposed to higher repair costs and limited availability of parts and services as manufacturers may deny access to third parties and insulate themselves from competition.

In many circumstances, neither the ACL nor Australia's competition laws address potential harms from this conduct. It is important for policy makers to carefully consider when specific intervention to overcome market issues is required. This is one of the issues the ACCC explored in some depth in its New Car Retailing market study (see below).

### Planned obsolescence

The growth of 'smart devices' may provide manufacturers with new opportunities to engage in planned obsolescence. To date, the ACCC has seen little evidence of manufacturers designing a product to fail at a certain point to encourage a consumer to buy a new one. Competition limits the incentives for planned obsolescence as consumers are unlikely to buy the same product again if there are competing products with a reputation for lasting longer. Furthermore, third parties that investigate such products are likely to identify obsolescence by design and the reputational cost of being discovered engaging in such practices would be significant. Usually, it is in a manufacturer's interest to try to expand their buyer base rather than try and force existing users to buy a replacement product.

However, the increased computerisation of household goods could, in some cases, change this competitive dynamic. For example, if a consumer has invested significantly in a particular product 'ecosystem' through provision of their data, buying accessories, or purchasing a range of compatible devices, they may not be able to easily switch to a competitor. If these switching costs are high enough, manufacturers may be able to strategically plan future obsolescence knowing the risk of losing a customer is low. Manufacturers may also be less incentivised to create goods that are repairable knowing that a consumer is less likely to switch to a competitor solely because one product in their product 'ecosystem' fails.

In many circumstances, obsolescence in computer software or devices with a software component is an inescapable characteristic of the product. As such, manufacturers may plan ahead for a product to become obsolete at a particular point in time, including by ceasing to provide security updates or updates necessary for continued functionality. This is a form of planned obsolescence, but is not necessarily intended to induce a consumer to purchase a new product. In many circumstances it will not be reasonable or efficient to require a manufacturer to support a product for an indefinite amount of time. At some point it may be cost prohibitive for manufacturers to continue to support older products. What is "reasonable" will be circumstance-specific and depend on a number of factors such as what a reasonable consumer would expect for goods of that kind.

Nonetheless, as more products are computerised, and the information and power imbalances between manufacturers and consumers grow, the incentives for premature planned obsolescence that harms consumers is likely to increase. It is important that

regulators are equipped with an appropriate legislative framework to investigate new emerging practices that may harm consumers.

### *Incomplete disclosure of future obsolescence*

As noted above, in many cases manufacturers plan in advance how long to support a product before releasing that product to market. However, some manufacturers do not disclose the support period to consumers adequately or at all.

If manufacturers do not disclose their anticipated lifespan of a product consumers cannot meaningfully assess the value of two competing products prior to purchase. Additionally, because a lack of continuing security support may compromise consumers' personal data, it is important that consumers are equipped with all necessary information to assess this risk prior to purchase.

Aside from the s 58 consumer guarantee discussed above, the ACL does not impose any express obligation on manufacturers to support a product for a minimum period of time nor does it specifically require manufacturers to tell consumers about the support period. In some cases it may be misleading to fail to disclose that a product will not be supported after a certain point in the near future when the manufacturer has predetermined that point prior to releasing the product. However, whether this is misleading depends on the circumstances of each matter. Typically, there is no positive obligation for a manufacturer to provide that information.

While the ACCC has taken action regarding representations about future support, such as GPS manufacturers advertising 'lifetime support' while maintaining the right to stop updating a device,<sup>3</sup> mere silence about future support is difficult to address under existing ACL provisions.

The ACCC will continue to engage with policy processes that are considering issues relating to future support for products, and recommends the introduction of an unfair trading practices prohibition to address these and other harmful behaviours in the market. The ACCC also encourages the Productivity Commission and other government regulators to consider the introduction of express obligations on manufacturers to continue to support their products for a reasonable period of time, as well as disclose a minimum time that products, including IOT devices, will be supported.

### *Introduction of an unfair trade practices prohibition*

The ACCC considers that introducing an economy-wide prohibition on unfair trading practices would help address harmful conduct in repair markets that is not currently caught by consumer protection and fair trading laws. Such a prohibition would be an effective complement to existing laws. A principles-based prohibition would allow the law to keep up with evolving unfair trading practices, even as technology continues to progress. An unfair trading practices prohibition could address:

- Undisclosed, planned obsolescence that relies on high switching costs to force consumers to regularly purchase additional or replacement products;
- Businesses not disclosing that, as a result of internal decisions on future support, a product will be obsolete in an unreasonably short period of time; and
- A business not providing security updates for smart products for a reasonable amount of time, thereby putting sensitive consumer information at risk.

---

<sup>3</sup> ACCC, 'TomTom, Navman and Garmin remove 'lifetime' claims', Media release, 23 January 2019.

The scope of a prohibition on unfair trading practices should be carefully developed to ensure it is sufficiently defined and targeted, with appropriate legal safeguards and guidance drawn from comparable jurisdictions with existing unfair trade practices laws. This general prohibition should be paired with additional reforms targeting the repair market in instances where the unfair trading practices prohibition may not cover certain harmful repair practices.

On 6 November 2020 the Consumer Affairs Forum, a meeting of state, territory and federal ministers responsible for consumer law, agreed that unregulated unfair practices warrant further exploration through a regulation impact assessment process.<sup>4</sup> The ACCC welcomes this process and will be actively contributing to the work as it progresses. The ACCC encourages both the Productivity Commission and third parties that identify potential unfair practices in the repair market to submit them as part of the regulatory impact assessment process.

### 3. Repair markets in Australia

The ACCC is the regulator responsible for enforcing Part IV of the CCA that relates to restrictive trade practices and includes provisions that protect and enhance competition. The ACCC can also look into particular markets to identify systemic conduct that is affecting consumers, small businesses or the competitive process. Relevant ACCC projects include the ACCC *New Car Retailing* market study and the *Agricultural Machinery: After-sales Markets* research project.

#### Competition law and repair markets

Part IV of the CCA includes prohibitions relating to cartel conduct, exclusive dealing and misuse of market power. Some of these prohibitions could apply to aftermarket repair markets if businesses were to leverage their market power or engage in conduct such as exclusive dealing that has the purpose, effect or likely effect of substantially lessening competition.

However in many instances an individual business' conduct will not substantially lessen competition, meaning Part IV would not apply to their conduct. Nonetheless, a market as a whole may suffer from poor competition because of the individual actions of multiple businesses. In these circumstances the government should consider the potential for these behaviours to harm competition and consider whether specific regulation to facilitate stronger competition is warranted. One example of the government taking such steps is the introduction of a motor vehicle service and repair information sharing scheme.

#### Motor Vehicle Service and Repair Information Sharing Scheme

The ACCC's New Car Retailing Market Study Final Report found that, despite voluntary commitments offered by car manufacturers to provide independent repairers with the necessary technical information to repair and service new cars, there are still problems with the breadth, depth and timeliness of the technical information provided. The Final Report found that car manufacturers and dealers have strong incentives to impede competition in part sales and repair and servicing, including through preventing independent repairers from accessing required technical information about new cars.

The Final Report acknowledged that car manufacturers have legitimate concerns about sharing some safety, security or environmental information. However, the ACCC considers that this information should be made available to independent repairers to support a

---

<sup>4</sup> Legislative and Governance Forum on Consumer Affairs, joint communique, 6 November 2020, p. 3.

competitive car repair and servicing industry due to the benefits to consumers from the competitive discipline imposed by independent repairers on competition in aftermarkets.

Treasury released an exposure draft and explanatory memorandum for the *Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2020* in December 2020. The scheme requires manufacturers to provide third party repairers with access to diagnostic, repair and servicing information for motor vehicles covered by the scheme on fair and reasonable commercial terms. If implemented, repairers would benefit from the provision of accessible and affordable repair information and consumers would benefit from increased choice and price competition.

The ACCC considers this legislation to be an important example of how close analysis of a market can result in specific, targeted regulatory intervention to improve competitive outcomes in a market. The ACCC encourages the Productivity Commission and government to investigate whether other markets may benefit from similar interventions.

### **Agricultural machinery: after sales markets project**

The ACCC released a discussion paper and a survey for purchasers of agricultural machinery in February 2020 to inform and seek the views of stakeholders about issues in the agricultural machinery industry. The ACCC is currently reviewing and analysing the information put forward through the survey and the submissions to the discussion paper. The ACCC expects to publish a document in early 2021 considering the key themes raised in submissions and survey responses, which will provide a further input to the inquiry.

Preliminary analysis of survey results and submissions indicate the following:

- While machines are under warranty, the majority of servicing and most repairs are conducted by the dealer that sold the machinery. These functions tend to be performed more frequently by the owner of the machinery or an independent business once the warranty has run out, although survey results indicate that dealers continue to be heavily utilised.
- Customer service, ease and cost of servicing and brand reputation are more important to survey respondents than price.
- Survey respondents place a high value on the interoperability of potential machinery within their current cache of machinery when deciding between competing products.

The survey results demonstrate that purchasers of agricultural machinery consider a range of factors in their decisions about repairing or purchasing agricultural goods. Therefore, policy responses to repair issues must focus on broader considerations than price to ensure purchasers of agricultural machinery are empowered to seek repair options that best suit their needs.

## **4. 4. Conclusion**

Whether to introduce a right to repair in Australia is a complex and important issue that has the potential to impact many parts of the economy. As discussed in this submission, while the ACL offers some protection to consumers against harmful repair practices through the consumer guarantees and the prohibition on misleading or deceptive conduct, there are still gaps in the law that may allow businesses to unfairly or inefficiently restrict consumers' access to repair.

For reasons discussed above, the ACCC considers that reforms to consumer law or specific regulatory intervention will be necessary to address harms relating to consumers and small



businesses accessing repairs or spare parts. In particular, the ACCC recommends the introduction of an unfair trading practices prohibition to capture harmful conduct that may otherwise fall within the gaps of industry or market specific regulation and complement existing enforcement tools.

The ACCC welcomes the Productivity Commission's Right to Repair Inquiry and looks forward to further consideration of possible policy options as the inquiry progresses.