



14 February 2021

**SUBMISSION ON PRODUCTIVITY COMMISSION ISSUES PAPER  
ON RIGHT TO REPAIR**

**BACKGROUND**

The Queensland Consumers' Association (the Association) is a non-profit organisation established in 1976 to advance the interests of Queensland consumers.

The Association is a member of the Consumers' Federation of Australia, the peak body for Australian consumer groups.

The Association's members work in a voluntary capacity and specialise in particular policy areas.

The Association welcomes the opportunity to make this brief submission on the Issues Paper and to participating later in the year in consultations on the Draft Report.

***The contact person for this submission is: Ian Jarratt.***

**COMMENTS**

We strongly welcome the Commission undertaking an inquiry into this extremely important, complex and many faceted topic.

We wish to emphasise the need for the inquiry to address and propose ways to correct the power imbalance between the seller and the buyer after the purchase of a good. Currently, the power balance is greatly in favour of the seller and the onus is largely on the consumer to justify claims for redress. This needs to change.

We also have concerns about policy making processes, including for right to repair. These are outlined in the attachment.

We wish to emphasise also the extent to which improving the quality and consumer use of consumer guarantees will over time improve the durability of goods, and simplify and reduce the cost of repairing them.

We consider that a very broad approach is needed to the inquiry to ensure that all the important issues, and the linkages between them, are covered,

The Issues Paper tends to focus on consumer goods that are software enabled and on machinery (including motorised vehicles). However, we consider that this approach is too narrow because there are major problems with the life/durability/repair/ replacement/

disposal, etc. of many other types of goods. Examples of these include: small unsophisticated household electrical appliances; furniture; floor coverings, clothes, bedding and other items made from fabric; footwear; kitchenware; camping equipment; taps and other building products; sporting and exercise equipment; bicycles; prams and strollers; travel goods; etc. The inquiry must ensure that these types of goods are adequately covered.

Numerous changes are needed to the Australian Consumer Law and its administration including:

- Prohibition of unfair trade practices.
- Consumer access to improved free external dispute resolution services.
- Improve enforcement of consumer guarantees.
- Mandatory provision at time of purchase of comparable information about the likely minimum life of a good and how long spare parts will be available.
- Increased, and ongoing, consumer education<sup>1</sup> (including for CALD consumers) on the existence of, and how to use, the consumer guarantees.

Any improved rights to repair must not adversely affect ability replacement and refund rights.

Much more needs to be done to increase consumer awareness of the opportunities to make simple repairs to goods themselves<sup>2</sup>. For example, many products have plastic covers, or are made of plastic which often can be easily, cheaply and effectively repaired using one of the very wide range of adhesives now available to household consumers. Similarly, goods made of fabric can often be easily and quickly self-repaired.

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<sup>1</sup> A recent successful example of this approach is a national consumer education campaign aimed at increasing grocery shopper awareness and use of the unit prices provided on shelf labels and the internet by many grocery retailers. The campaign, proposed by the Consumers Federation of Australia, was run by the national and state/territory consumer protection regulators from 21 September to 30 October 2020. It consisted of a social media messages and a 2 page consumer fact sheet translated into 16 languages.

<sup>2</sup> Including with help from institutions such as repair cafes, Men's Sheds, etc..

## Attachment

Contact person: Professor Justin Malbon

# **Proposal for a more effective policy development process**

## **Introduction**

Our concern is about the policy-making process. By and large it does not give sufficient regard to the ‘real world’ likely impacts of proposed legislative and other reforms. For instance, section 54 ACL (consumer guarantees) sets a Rule that provides an excellent staking out of consumer rights. However, the Rule, together with the other provisions of the ACL, when examined in real-world circumstances does not provide sufficient capacity for consumers to gain the benefit of the Rule. The onus is on consumers and under-resourced regulators to take risky and expensive legal action to give effect to the Rule.

## **Proposal**

We suggest the policy development *process* take these steps when considering reform measures relating to consumer-business relationships:

1. Consider where the power lies at various stages of the relationship. This is to be considered in real-world rather than abstract terms (which we explain further below).
2. If a power imbalance is identified as likely to arise, then measures and incentives should be explored that are likely have real-world impacts, to address the imbalance.

Step 1 involves framing the discussion in terms of the relative power of the parties (consumer-seller) at various stages of their relationship. In a lively, well informed and competitive marketplace power lies with the consumer up until the moment of purchase. The consumer has the power to decide whether to buy product A or B or C etc. After purchase, the power balance generally shifts to the seller, particularly if the product is defective and the seller has the real-world power to decide whether to repair or replace the product.

Section 54 ACL sets a Rule that allows a consumer to seek legal redress. This, at first view, rebalances the power dynamics between a seller who sells a defective product and the consumer. However, on real-world examination it can be seen consumers are disincentivised from enjoying the benefit of the Rule because they have to take risky and expensive legal action to rebalance the power relationship. The consumer disincentive in turn incentivises sellers to sell defective products, or at least not to bother too hard about providing quality after-sale service. We can see then, that despite the Rule the locus of power will in many (but not necessarily all) cases reside with the seller in post-sale settings.

Step 2 attempts to mitigate policy planning short-comings by identifying such real-world outcomes, ideally in advance of implementing the Rule. Step 2 involves policy-makers

engaging in thought experiments and role-playing in which real-world impacts are tested before a reform measure is proceeded with.

Scenario testing or role playing would begin with the assumption the proposed reform measure is in fact law. This assumption skips the process of considering if and how a proposal could become law (eg considering who might resist the reform measures, or what lobby groups and political forces could possibly sabotage or weaken a reform measure). Rather, step 2 simply assumes the proposed measure is law.

This allows the scenario testing to focus on the incentives and behaviours that would take place in the real world in response to the measure. The testing could be informed by insights from behavioural economics and those outlined in *Nudge* by Thaler and Sunstein to assess how the parties are likely to make decisions and respond to the reform settings.

A further aspect to be examined is the incentives that drive behaviour. As the authors of *Freakeconomics* observed, if you identify the incentives, you can predict the behaviour. As an example, the introduction of section 52 *Trade Practices Act* – which simply stated a corporation in trade or commerce must not engage in misleading or deceptive conduct – was incredibly effective because (perhaps more as a result of policy accident than design) competitors were incentivised to sue for a breach of the rule. If competitors were not so incentivised, and the section only relied on consumers and regulators to take action, power would have remained with the party engaging in misleading or deceptive conduct in real-world settings.

Scenario testing might reveal gaps and outcomes that had otherwise not been anticipated by policymakers. The initial proposed reform measure would be adjusted in light of that. The revised measure would then be subjected to scenario testing to gauge how players in real world settings would respond. Further gaps might be identified, and the process further re-iterated, and so on.

Returning to step 1; we are familiar with viewing the consumer-seller relationship in terms of power relations. The unfair terms provisions in the ACL, for instance, frame the relationship in terms of ‘party imbalance’. Also, economists and competition lawyers are familiar with concepts of market power. Consumer power is also a familiar concept.

Lina M Khan’s influential paper ‘Amazon’s Antitrust Paradox’ 2017 Yale Law Journal

<https://www.yalelawjournal.org/issue/issue/volume-126-issue-3-january-2017> is

noteworthy on the issue of power. She says the US Congress

enacted antitrust laws to rein in the power of industrial trusts, the large business organizations that had emerged in the late nineteenth century. Responding to a fear of concentrated power, antitrust sought to distribute it. In this sense, antitrust was “guided by principles.” The law was “for diversity and access to markets; it was *against* high concentration and abuses of power.”

She identifies the notion of ‘consumer welfare’ that is now commonly applied to evaluating the competitiveness of markets, ‘is unequipped to capture the architecture of market power in the modern economy’. She says: ‘Protecting these long-term interests requires a much thicker conception of “consumer welfare” than what guides the current approach’. Instead, she argues:

...gauging real competition in the twenty-first century marketplace...requires analyzing the underlying structure and dynamics of markets. Rather than pegging competition to a narrow set of outcomes, this approach would examine the competitive process itself. Animating this framework

is the idea that a company's power and the potential anticompetitive nature of that power cannot be fully understood without looking to the structure of a business and the structural role it plays in markets.

In other words, the power dynamics of the marketplace and the power structures of those markets as they operate in real world settings must first be mapped and understood in order to introduce and apply effective mechanisms for dealing with the negative consequences of those power dynamics.

The two-stepped policy analytical approach we propose ought to encourage policymakers to take more creative and lateral-thinking approaches to exploring policy options. In doing so the chances of effective policy-measures are enhanced.

### **Applications to the right to repair**

The relationship between seller and buyer rarely begins and ends at the time of sale. The initial sale marks the beginning of that relationship. Viewed in terms of the dynamics of the power between the two parties, the consumer has in a competitive market the initial power to decide whether to purchase a particular product or purchase an alternative or competing one. Upon sale, the power relationship reverses - the seller has the power to determine when, if and how the goods are to be maintained, updated, repaired etc - at least in a real world sense.

Viewed as essentially a matter of power dynamics, the question is how, in a real-world practical sense, can the power dynamic be addressed? It is one thing to set the Rule under section 54 that requires the seller to deal with a major or minor breach of a consumer guarantee. However, by requiring the consumer or regulator to take action to enforce the Rule, they are disincentivised to do so because they bear the risks and costs of enforcement. The locus of power therefore remains with the seller, despite the Rule.

How might this identified power imbalance be addressed? That now becomes a central policymaking question.

A further real-world problem can be identified under step 1. Let's assume the following scenario. The consumer wants the product to be repaired and the initial seller either refuses to do so or charges a very high price for doing so. The consumer seeks out another party to undertake the repairs. However, it seems the seller designed the product so that a competitor could not readily make the repairs. Here the seller has the locus of power.

Once this problem is identified, lateral-thinking approaches can be taken for resolving the power imbalance problem. A scenario that could be tested, as an example (and is not necessarily what we are proposing) is to introduce an imaginary law that allows a (potential) competitor to provide sufficient prima facie evidence that the initial seller has rendered competitive repair difficult or impossible. The law then shift the onus onto the initial seller to prove it has not put in place practical or other barriers to competitors to repair the product. In other words, the seller would be required to prove it has not made it practically difficult for a consumer to have the product competently repaired by a third party. If the seller cannot prove this, the court could (under the imaginary law) order the seller to pay the potential competitive repairers who brought the legal action an ongoing percentage of its gross income from its sale of its product until the repair barriers are

removed. This remedy might at first appear to be misplaced because the harmed parties are primarily consumers and not the potential repairers. However, by incentivising potential repairers to bring action, the long-term beneficiaries will be consumers. Having established the imaginary law, role playing could be undertaken to analyse how the various parties would respond to that law. This way assessments could be made as to whether it would likely be effective in addressing the power imbalance, or whether it would create new problems that would need to be addressed.