

Submission to the Productivity Commission

Draft Report Right to Repair

July 2021



Status of this Submission

This Submission has been prepared through the Municipal Waste Advisory Council (MWAC) for the Western Australian Local Government Association (WALGA). MWAC is a standing committee of WALGA, with delegated authority to represent the Association in all matters relating to solid waste management. MWAC's membership includes the major Regional Councils (waste management) as well as a number of Local Government representatives. This makes MWAC a unique forum through which all the major Local Government waste management organisations cooperate.

This Submission therefore represents the consolidated view of Western Australia Local Government. However, individual Local Governments and Regional Councils may have views that differ from the positions taken here.

Due to the timeframe for Submissions, this Submission has not yet been considered by MWAC. It will be put before the Council at the upcoming meeting on Wednesday, 25 August. The Productivity Commission will be informed of any changes to this Submission following consideration by MWAC.

Introduction

The Western Australian Local Government Association (Association) welcomes the opportunity to comment on the *Productivity Commission Draft Report: Right to Repair* which seeks to improve the consumer's ability to repair faulty goods, or access repair services, at a fair price. By examining the range of issues including the barriers and enablers impacting the Australian repair market the outcomes of the Inquiry will be an important step in accelerating a nationwide shift towards a sustainable circular economy.

Manufacturers of any physical product should allow for the 'right to repair' as a priority and in doing so original equipment manufacturers (OEMs) should provide clear information on repair options when products are purchased. The benefits of repairing include decreasing the amount of waste sent for disposal to landfill, reducing collection and processing costs associated with products, supports a circular economy model where items or parts of a product are reused and recirculated thus conserving natural resources, maintains the resale value of a product.

This Submission comments on some of the Information Requests included in the Draft Report. Some of the matters included in the Draft Report are outside the scope of Local Government expertise and experience.

Information Request 3.1 Repair facilities, spare parts and software parts

To better understand whether consumers have reasonable access to repair facilities, spare parts and software updates, the Commission is seeking further information on:

- whether consumers have faced difficulties accessing spare parts or repair facilities under guarantees when their product breaks or develops a fault, including specific examples of the type and age of the product, and the costs incurred by the consumer
- costs and benefits of businesses being required to hold physical spare parts or operate repair facilities for fixed periods of time
- whether consumers are experiencing problems using their products due to a software fault or lack of software updates, including specific examples where manufacturers have not addressed the problem because of claims that it is not covered by consumer guarantees
- the costs and benefits of requiring that software updates be provided by manufacturers for a reasonable period of time after the product has been purchased.

WALGA does not have access to specific details on the costs and benefits associated with requiring businesses to hold physical spare parts or operate repair facilities for fixed periods of time or requiring software updates to be provided by manufacturers. However WALGA has knowledge of the costs incurred

by local governments in relation to the National TV and Computer Recycling Scheme (NCRS). The NCRS was designed with a requirement that collection sites accept TVs and Computers free of charge. This has proved to be a significant impost on Local Government, with some funding the operation of collection points, in addition to contributing to the cost of recycling material collected under the NCRS. Others are funding the management of material collected outside of the NCRS, as a result of the limited scope of the Scheme and challenges negotiating equitable agreements with Arrangements. This includes material that is in scope – such as TV and computers, as well as material that is out of scope – such as TV peripherals. Local Governments should be able to recover the costs of providing/operating collection sites, and providing/facilitating the transport of materials to market - from manufacturers, importers, distributors and Arrangements.

WALGA, with funding from the State Government through the New Industries Fund that is managed by the Department of Jobs, Tourism, Science and Innovation, has been working with Local Governments to collect electronic waste outside the metropolitan area. At a recent event, the community dropped off approximately 1.5 tonne of electronic waste, of this material approximately 500kg was described by the community as 'still working'. WorkPower the Social Enterprise delivering the collection event took this material for 'testing and tagging' and approximately 250kg was assessed as working and suitable for resale. A number of residents indicated when dropping off their e-waste that the product was still working, but just needed a minor repair that they were unable to do.

Subsequently the State and Territory Local Government Associations in conjunction with the Australian Local Government Association sought Local Government feedback on the Scheme to determine the current costs to Local Government and the community to inform the sectors input into the review of the NCRS and this Submission.

Thirty three Local Governments responded with twenty nine Local Governments (88%) offering e-waste drop-off/collection to their residents and four Local Governments not offering e-waste collection services. The four Local Governments not offering an e-waste service stated that they were too expensive, Local Government could not afford it, no suitable location was available for drop off and their Department of Water and Environmental Regulation licence needed amendment before they could collect e-waste.

Of the twenty nine Local Governments which offer e-waste collection services to the community. Each Local Government provides staffing, infrastructure and sites which contribute to the in kind costs of recycling e-waste. The amount of financial in kind costs varies from \$1,000 - \$150,000 per year per Local Government.

For 2021/22 many Local Governments are now faced with additional financial burden due to the provider charging a rate per tonne for a service that was previously free. The anticipated costs per tonne for NCRS and non-NCRS e-waste are varied. For NCRS e-waste the cost varies from \$200 to \$1,000 per tonne and for non-NCRS e-waste the cost varies from \$500 to \$1,000 per tonne. This is a significant financial impost on the community which makes it difficult for Local Governments to accurately budget, as the amount and type of e-waste that may be collected is demand driven and changes year to year.

Information Request 4.1 Consumer harm from limits on access to repair supplies

The Commission is seeking feedback and evidence on its preliminary assessment of consumer harm (chapter 4) in repair markets for agricultural machinery, mobile phones and tablets. In particular:

- is there any evidence of systematic differences in quality, safety or security between authorised and third-party repairers? If so, what is the cost to manufacturers (for example, damaged brand reputation, determining the cause of a fault, or other liability issues)?
- what is the size of the repair market compared to the primary market? What proportion of repairs are conducted by authorised repairers?
- how difficult is it for consumers to estimate the lifecycle costs of these products at the time of purchase?
- to what extent are consumers locked in to using authorised repairers (for example, can consumers easily switch to other products or non-manufacturer repair supplies)?
- is competition in the primary market sufficient to compensate consumers for any harm in the repair market (as indicated by low concentration and/or barriers to entry)?
- to what extent are consumers harmed by less choice, high transportation or travel costs, delays, and inconvenience, particularly in regional and remote locations?

The Commission is also interested in evidence of where there is substantial consumer harm in other repair markets, including but not limited to medical equipment and high-end watches (which were raised as areas of concern by participants to this inquiry) as well as construction machinery.

WALGA does not have any evidence that consumers are being harmed by limits on access to repair supplies. However, the ACCC in its recent market study found that weak competition in agricultural machinery repairs reduced purchaser access to genuine choice and may result in higher prices charged by authorised repairers, lower levels of consumer service and unnecessary delays in accessing repairs and servicing. Consumers can potentially become locked in to a certain product because other products are often not easily compatible with brand specific (i.e. Apple products). Consumers are faced by less choice particularly in regional areas as service providers are lacking in regional/remote areas and in most circumstances the cost of sending goods away to be repaired far outweighs the cost to repair products.

Information Request 4.2 Positive obligation to provide access to repair supplies

The Commission is seeking feedback and evidence on the costs and benefits of different approaches to designing and implementing a positive obligation on original equipment manufacturers to provide access to repair supplies to third-party repairers. In particular:

- evidence on the effectiveness of positive obligation schemes overseas (such as motor vehicle repair information schemes in the United States and Europe, and spare parts requirements in Europe)
- should a positive obligation be applied across all product markets or targeted towards particular product markets? If so, which product markets, and why?
- should a positive obligation mandate access to all repair supplies or a subset of repair supplies such as repair information, spare parts, or diagnostic tools)?
- how should a positive obligation be implemented and enforced in practice?

A positive obligation on manufactures to provide greater access to repair supplies similar to that in existence in Europe would be beneficial to Australian consumers. In Europe household appliances are required to have spare parts available to professional repairers for up to ten years as well as repair and maintenance information. This could potentially influence a consumer's decision when purchasing a particular product.

Information Request 4.3 Prohibition on warranty void terms

The Commission is considering recommending 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. We are seeking feedback and evidence on the costs and benefits of this approach. In particular:

- would manufacturers respond by increasing product prices or making their warranties less generous? Would this latter change have any practical impact on consumers given they are also covered for defects under consumer guarantees?

Manufactures could potentially increase their costs as they would now be required to determine the underlying cause of product defects and failures. For example, this is currently the case with Sony Playstations (PS). The trophies on PS4 require an internal clock system (which cannot be seen and changed) in order to function. The internal clock runs on a battery and all batteries have a finite lifespan. Inevitably the battery will cease to function, the clock will stop working and the PS will become unusable. This is simply known as planned obsolescence. To avoid this issue Sony would have to do a major update to reprogram the trophy system. This is highly unlikely as Sony will focus their efforts on a newer model PS.

Costs may also increase as manufactures would now be required to provide independent repairers access to physical tools and equipment which would likely generate ongoing production, storage and distribution costs. Even if the manufactures made their warranty less generous the consumer is still covered for defects under the Australian Consumer Law customer guarantee and as such would not have a major impact on the consumer.

- how could such a prohibition be designed and communicated to ensure that consumers are aware that voiding terms are now prohibited?

Currently many warranties use language that is difficult to understand and can lead consumers to incorrectly interpret that the warranty would be void if they sought independent or self-repair services. If manufacturer

warranties were prohibited from containing warranty void terms and the language simplified this could potentially facilitate consumer's access to independent repairs. Consumers should also be made aware that voiding warranty terms and 'warranty void if removed' stickers does not prevent them from obtaining a remedy for a fault under the consumer guarantee which they are entitled to under the Australian Consumer Law. WALGA agrees with the draft recommendation that the Australian Government should amend r.90 of the Competition and Consumer Regulations 2010, to require all manufacture warranties to contain information about consumer guarantees under the Australian Consumer Law. The information should be placed in a prominent place on the warranty. Public communication from the ACCC could also help to ensure that consumers are aware of and understand the changes.

- how could the prohibition be designed to limit manufacturer liability for damage beyond their control? For example, the Magnuson-Moss Warranty Act permits warranty terms that limit manufacturer liability for damage caused by unauthorised repairs or parts, if they can demonstrate third-party fault.

Many manufactures have legitimate concerns about being held liable for poor quality repair work by unauthorised repairers or of safety issues for authorised staff conducting subsequent repairs. However repairs of some high risk goods are already governed by mandatory occupational licencing requirements (electrical licence, gas fitting/plumbing licence) but this is dependent on the skills and knowledge of the person carrying out the repair. Manufactures could potentially reduce their liability by providing independent repairer's access to specialised tools, repair manuals, spare parts and training to carry out repairs correctly. This in turn would lead to upskilling of unauthorised repairers.

- In a similar vein, should terms within end-user license agreements that purport to restrict repair related activities (discouraging third-party repair) also be prohibited? Is a disclosure as proposed under draft recommendation 4.2 sufficient or is a legislative prohibition required?

Draft Recommendation 4.2 states 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 legislative prohibition is required as such restrictions can adversely affect the cost and availability of repair services by reducing the ability of independent repairers to compete with authorised repairers.

Information Request 5.1 Improving access to repair information

The Commission is considering recommending amendments to intellectual property laws to improve access to repair information through the options outlined in draft finding 5.2. It is seeking views on each option, in particular:

- whether the proposed reform options will assist repairers in accessing repair information, and therefore facilitate third-party repair
- what types of contractual arrangements that could override such reforms are most likely to be of concern
- the costs, benefits and risks of pursuing each option.

The options outlined in the draft finding are:

- a) Amend the *Copyright Act 1968* to allow for the reproduction and sharing of repair information, through the introduction of a *fair use* exception or a repair-specific *fair dealing* exception

Amending the Copyright Act 1968 would improve access to allow repairers to share copyrighted information with other repairers, however manufactures would need to be willing to share the information in the first place. If the manufacturer does not share or refuses to share the information this reform will have limited effect. The government could potentially amend the copyright laws through the introduction of an 'exception' which is a non-infringing breach of the copyright holders' exclusive rights. Presently in Australia the Australian copyright regime provides for a range of 'fair dealing exceptions' which allow for the use of copyright material without permission from the copyright owner so long as it falls within one of the following defined categories:

- Research or study
- Criticism or review
- Parody or satire
- Reporting news.

However, none of these categories cover repair related issues and the addition and application of a fair use repair category means that there would be a high degree of discretion in how Australian courts interpreted whether repair related uses of copyright material are considered ‘fair’, which may result in repairers avoiding undertaking repair activities that risk infringing manufacturer’s copyrights.

The introduction of a ‘fair dealing exception’ category specifically for repair would provide greater scope for government to clarify the particular circumstances under which third parties may/may not use and share copyright information. However one drawback is that the law’s ability to adapt and evolve over time is restricted particularly in relation to the speed of technological advancement.

The most advantageous option for the consumer would be to include a prohibition exception in the Copyright Act on the use of contractual agreements. Manufactures can potentially use other means such as contractual agreements including confidentiality agreements or EULAs (End User Licence Agreements) to prevent access to repair information in the first place. A prohibition with respect to certain computer programs already exists in the Copyright Act so this could potentially be expanded to incorporate exceptions relating to the right to repair.

b) Amend the *Copyright Act 1968* to allow repairers to legally procure tools required to access repair information protected by technological protection measures (TPMs) such as digital locks. This may also require the Australian Government to clarify the scope and intent of the existing (related) exception for circumventing TPMs for the purpose of repair.

Manufactures may use TPMs (password protection, file permissions, encryption, copy controls) and contractual arrangements to protect their creations. This makes it very difficult for third parties to carry out repairs to products and can adversely affect the cost and availability of repairers. Under Australian copyright law it is lawful for a manufacturer to use TPMs to protect copyright from unauthorised access such as software and computer code. Copyright law generally prohibits the circumvention (or bypassing) of TPMs unless there is an explicit exception. Regulation 40 (2)(d)(ii) of the 2017 Copyright Regulations permits the circumvention of TPMs to access protected copyright information for the purposes of repair in limited circumstances. However the intent and scope of this exception is ambiguous and greater clarity is required. WALGA supports amended the Copyright Act.

Information Request 6.1 Product labelling scheme

The Commission is seeking further evidence on the significance of information gaps that might contribute to premature obsolescence, including:

- the specific type of information gaps (such as on product repairability, durability, or the environmental impacts of products) that prevent consumers from making informed purchase decisions
- the significance of these information gaps (for example, the cost to consumers from obtaining information independently)
- evidence that these gaps are undermining the efficient operation of the market (for example, evidence that consumers are systematically overestimating product durability and repairability when making purchase decisions)
- whether these information gaps affect specific types of products more than others.

The Commission is also seeking input on how government and industry might work together to design a product labelling scheme to maximise the net benefits to consumers and the community.

Providing information to consumers on product repairability through labelling is an important step in allowing consumers make informed decisions on the products they purchase. Currently in Australia there are no laws mandating information on product repairability but there are a range of regulations and government funded programs relating to other products qualities such as product safety, energy and water efficiency labelling. However, a product labelling scheme on product repairability may not necessarily influence a consumers purchasing habits as many consumers may choose to replace their products with newer ones rather than the product actually breaking or replacing a product with a product that better meets their needs. Also product labelling may increase the cost of the product which in turn may inhibit a consumer on the lower socio economic scale from purchasing the product.

To date, product stewardship schemes have tried to effect change using loosely defined market development activities, community/industry engagement, voluntary commitments to dispose of materials in an environmentally sound manner, or change which party contributes financially to collection, processing, recycling or disposal costs at end-of-life. These activities have been viewed by industry and regulators as a way to begin addressing the lifecycle impacts of various products, as these approaches do not require a fundamental rethink to manufacturing and consumption. Unfortunately, the current approach has not addressed, or resolved, the complexities of the market forces and costs experienced by the waste management industry. Future Schemes must be designed in such a way that manufacturers, importers and distributors, and organisations tasked with delivering schemes, such as Arrangements, are financially or physically responsible for providing repair options and managing actual end-of-life impacts, as opposed to projected end-of-life impacts.

Alternatively, an approach could be taken where manufacturers, importers and distributors are prohibited from selling or distributing new products, where there is no clear pathway to manage end-of-life impacts in an environmentally sound manner. Reframing Product Stewardship in such a light, would encourage those producing or selling products to consider the lifecycle impacts of their products, and assist with a transition to a circular economy.

Conclusions

Effective Right to Repair legislation has the potential to benefit Local Government and the community by:

- Ensuring the community has access to repairers and the parts needed for repairs
- Reducing the cost of repair – currently it is frequently cheaper to buy a new product than to have it repaired
- Reduce built in or planned obsolescence for electronic products and any associated accessories – one example given was games consoles, when a new console is released the games from the previous model do not fit into the new model
- Ensure effective product stewardship is in place, so that that producers are taking financial or physical responsibility for their products at end of life
- Ensuring the warranty issues are well addressed in any changes.