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Dear Ms Abramson and Mr Lindwall

ACCC Submission to Productivity Commission's Right to Repair – Draft Report

Please find enclosed the ACCC's submission to the Productivity Commission in response to the Right to Repair – Draft Report.

We hope the submission assists the Productivity Commission throughout the course of the inquiry and look forward to continuing to work with the Productivity Commission as it completes this important work.

Should you require any further information, please contact Liam Hedge by phone or by email

Yours sincerely

Rod Sims
Chair
Australian Competition and Consumer Commission



Productivity Commission Inquiry into the Right to Repair in Australia

ACCC submission in response to the
Productivity Commission Draft
Report

July 2021

1. Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to respond to the 'Right to Repair – Draft Report' (Draft Report).

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading, and product safety for the benefit of consumers, businesses, and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading, and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies.

The ACCC supports the Draft Report's objectives of improving the operation of existing consumer guarantees under the Australian Consumer Law (ACL), and helping consumers and small businesses make more informed purchasing decisions. The ACCC also agrees that further consideration should be given to mechanisms that would assist in improving third-party access to repair information.

The ACCC supports many of the findings and recommendations of the Draft Report. In particular:

- that more needs to be done to allow consumers and regulators to better enforce consumer guarantee rights
- draft recommendation 3.2 of the Draft Report, that State/Territory governments should consider introducing further alternative dispute resolution mechanisms that would assist consumers to more effectively secure consumer guarantees remedies
- draft recommendation 4.1 for the Government to review the Motor Vehicle Service and Repair Information Sharing Scheme after three years. The ACCC considers that agricultural machinery may warrant inclusion under the scheme
- draft recommendation 4.2 The Australian Government should amend r. 90 of the Competition and Consumer Regulations 2010, to require manufacturer warranties to include text stating that entitlements to consumer guarantees under the Australian Consumer Law do not require consumers to use authorised repair services or spare parts.

However, the ACCC does not agree with all of the Draft Report's recommendations. In particular the ACCC:

- considers that draft recommendation 3.1 which proposes that the ACCC develop and publish durability guidelines would be unworkable and that other options, such as the labelling of goods by manufacturers, would be more effective
- opposes draft recommendation 3.3 (introducing a 'super complaints' mechanism for consumer groups to complain to the ACCC) as the ACCC already has ongoing processes to capture emerging ACL issues, and such a mechanism would not assist with reducing barriers to repairs or improving compliance with the consumer guarantees.

As noted in the Draft Report, the consumer guarantees provide consumers with strong legal rights in relation to goods and services. However, the practical difficulties in enforcing those consumer rights are considerable.

The ACCC considers that the most effective way to improve the operation of the existing consumer guarantees is to make failure to provide a consumer guarantee remedy and failure for a manufacturer to indemnify a supplier for providing a consumer guarantee remedy, a

breach of the ACL. These reforms are in the early stages of consideration by the Commonwealth and State/Territory governments.

2. Consumer guarantees and the need for reform

As discussed in the Draft Report, the consumer guarantees regime in the ACL sets out minimum standards that must be met by goods and services supplied to consumers.

For goods, this includes that products:

- Are of acceptable quality, which includes that they are as:
 - Fit for all the purposes for which that kind of good is commonly supplied
 - Acceptable in appearance and finish
 - Free from defects
 - Safe
 - Durable

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable

- Match descriptions made by the salesperson, on packaging and labels and in promotions or advertising
- Match any demonstration model or sample on which the consumer made their decision
- Are fit for the purpose the supplier told the consumer it would be fit for and for any purpose that the consumer made known to the supplier before purchasing
- Come with full title and ownership
- Not carry any hidden debts or extra charges
- Come with undisturbed possession
- Meet any promises (warranties) made about performance, condition and quality
- Have spare parts and repair facilities available for a reasonable time after purchase (unless the consumer is told otherwise prior to purchase).

If a good does not comply with one or more of these standards (a 'failure') the ACL provides the consumer with the right to a remedy. If a supplier or manufacturer fails to provide a consumer guarantee remedy that is not a contravention of the ACL. It will be up to the consumer to institute court or tribunal proceedings to enforce their rights.

The remedy a consumer is entitled to depends on whether the failure is 'major' or not. If it is a major failure, the consumer has the right to reject the good within a reasonable time and select a remedy of their choice; refund, replacement or repair. If it is not a major failure, the supplier or manufacturer has the right to select a remedy of their choice.

Suppliers are not able to exclude, restrict or modify the application of the consumer guarantees. The consumer guarantees apply in the same way regardless of whether a good is covered by any express manufacturer warranty, and consumer guarantees may continue to provide protections after warranties have expired.

Suppliers are responsible for providing remedies for most consumer guarantees remedies. A manufacturer is responsible for guarantees relating to spare parts and repair facilities and

express warranties offered by manufacturers. Accordingly, suppliers are liable to provide consumers with remedies, even where fault for a failure may actually lie with a manufacturer (or importer). For example, a supplier is obliged to provide a remedy to a consumer for a product where its failure is caused by a manufacturing fault.

However, in certain circumstances, the ACL provides that the manufacturer is liable to compensate the supplier for any remedies they are obliged to provide to consumers. For example, where a good contains a design flaw that makes it unsafe or doesn't do what the manufacturer claims it does.

The ACL prohibits traders from making false or misleading representations concerning:

- The existence, exclusion or effect of any consumer guarantees or remedy
- A requirement to pay for a contractual right wholly or partly equivalent to a consumer guarantee.

The current consumer guarantee regime has considerable practical enforcement challenges for consumers, suppliers and ACL regulators. As discussed below, the ACCC supports measures that may assist in better informing purchasing decisions and making the consumer guarantees regime work better for consumers, suppliers and manufacturers, including:

- measures to introduce greater certainty for consumers, such as the introduction of a product labelling scheme setting out a minimum trouble-free period
- improving dispute resolution, and
- creating better incentives for suppliers and manufacturers to comply with the consumer guarantees.

Currently, the consumer guarantees provide a private right enforceable by consumers. While small claims courts and tribunals are intended to provide a low cost method for consumers to enforce claims, including consumer guarantee claims, many consumers still face challenges in pursuing such claims through these mechanisms. These challenges include access to expert witnesses or other relevant evidence, the costs of obtaining technical reports or legal advice, inconsistency and errors by tribunals in interpreting the ACL, and voluntary conciliation models that involve compromise on ACL statutory entitlements. All of which makes pursuing consumer guarantees rights difficult, costly and fatiguing for consumers.

The consumer guarantees supplier indemnification obligation also provides a private right enforceable by a supplier against the manufacturer. In practice, most suppliers face similar challenges as those faced by consumers in bringing such actions. They face an additional challenge that manufacturers may threaten to cease a supply relationship, or make the supply terms less favourable, if they attempt to enforce their rights.

In the case of both consumer and supplier rights under the consumer guarantees, the ACCC is only able to take enforcement action where a supplier or manufacturer misleads a consumer or supplier about their entitlement to a remedy or indemnification. A failure by a business to provide a remedy to a consumer or indemnify a supplier is not a contravention of the ACL, even if their failure to do so is clearly unreasonable.

As noted in the ACCC's submission to the Productivity Commission's Issues Paper, there is a policy process underway to consider improvements to the effectiveness of the consumer guarantees and supplier indemnification provisions of the ACL.¹ This includes consideration of potential reforms that would make it a contravention of the ACL which would be subject to a pecuniary penalty for:

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

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

The ACCC strongly supports these proposed reforms and considers that the introduction of these prohibitions would more effectively achieve the objectives set out in the Draft Report of improving the operation of the ACL consumer guarantees regime. Empowering ACL regulators to take court action against suppliers and manufacturers that do not comply with their consumer guarantee obligations, including allowing for pecuniary penalties and redress for affected consumers and suppliers, will increase the incentives for businesses to comply with the consumer guarantees and supplier indemnification obligations. The ACCC considers that such a reform would result in significant improvement in compliance with the ACL consumer guarantee obligations, and result in improved outcomes for consumers compared to the other consumer guarantee related recommendations in the PC's draft report.

3. Better information for consumers on product durability and reparability

The ACCC agrees with the Productivity Commissions' concerns about information asymmetry and the inherent difficulty that consumers have assessing a product's durability and reparability.

However, the ACCC considers that publication of minimum expected durability of products would be unworkable and considers that a more effective option may be a requirement that manufacturers prominently label goods with a minimum trouble-free lifespan of their products.

Rather than broad, indicative and non-binding durability guidance issued by a regulator, consumers, suppliers and manufacturers would find far greater benefit from prominent labelling by manufacturers of minimum trouble-free lifespans. As manufacturers have detailed knowledge of the materials used and methods of construction they are far better placed to provide this information to consumers.

DRAFT RECOMMENDATION 3.1 GUIDANCE ON REASONABLE DURABILITY OF PRODUCTS

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.

The estimates would be a guide only to support application of the acceptable quality consumer guarantee in section 54 of the Australian Consumer Law. It could use ranges to take into account lower and higher value products in each category.

The ACCC guidance should be developed in consultation with State and Territory consumer law regulators, consumer groups and business groups representing product suppliers and manufacturers, and should be updated over time.

State, territory and federal consumer law officials carefully considered whether to develop and publish ACL durability guidance setting out timeframes for common consumer goods following the recommendation to consider the viability of such guidance in the 2017 ACL

Review final report. Officials at the time concluded that the likely costs of developing this guidance outweighed the likely benefits. The ACCC was part of the group of officials who considered this issue. The ACCC's conclusions from the project were:

- The costs of developing and maintaining such guidance would be considerable and ongoing.
- To manage the costs, the guidance would likely provide broad, indicative timeframes, which would provide limited assistance to consumer and suppliers.
- Accessing the necessary information to provide guidance that is more specific and robust on each product category would be impossible without the use of compulsory information gathering powers. These powers are not available to the ACCC or state and territory ACL regulators when producing guidelines.
- Even if compulsory information gathering powers were available, the burden imposed on suppliers and manufacturers to provide detailed, objective information on the durability of particular goods (which would be necessary for useful detailed guidance) would be significant.
- Non-binding regulator guidance, even if it were to be specific and robust, would not meaningfully change behaviours in the market, especially given the ACCC and state and territory ACL regulators have no ability to enforce the consumer guarantees.
- There are more effective and far more efficient ways to increase the transparency of the durability of products.

The ACCC considers that despite draft recommendation 3.1 limiting the proposed guidance to just major categories of common household products, the above issues and conclusions would all still apply.

For example, the ACCC considers that providing guidance as to the lifespan of a subset of 'fridges costing \$1 000 - \$1 500' would be time consuming and difficult. There are a diverse range of fridges in that price range, each of which may have been designed and manufactured with a focus on different features. For example, some of those fridges may be built to be highly durable, whereas others may have been produced with a focus more on desirable extra features such as high energy efficiency or internet connectivity.

Therefore, any durability guidance would either have to be specific enough to account for all types of fridges within the relevant price category or would need to be broad enough to incorporate the least and most durable goods within the category and this could be a huge variation. It is likely that such guidance would not meaningfully assist consumers or suppliers in disputes over a product's durability.

The costs of developing regulator guidance of the type described in the Draft Report is likely to outweigh the benefit to consumers and suppliers. In the ACCC's experience, the majority of consumer guarantee disputes are about:

- The failure of a manufacturer to consider the goods under the consumer guarantees, as many manufacturers will simply rely on the time frame in their manufacturer warranty, which may have expired
- Whether the consumer has misused the product such that the manufacturer or supplier is not responsible for the fault
- The reasonable lifespan of the specific good that has failed.

The ACCC considers that unenforceable and broad guidance published by the ACCC would not assist consumers with the first two types of dispute. Some manufacturers are likely to

continue to only assess goods against their manufacturer warranty and disputes about potential misuse will continue.

While the guidance could assist in disputes about the reasonable lifespan of a good, the practical benefit may be quite limited. As already discussed, the ACCC considers it likely that any guidance would, by necessity, only provide broad indicative lifespans.

Where a product fails at a time within the indicative lifespan (for example at 4 years when the indicative lifespan is 3 - 6 years), it is likely that the consumer and supplier will continue to disagree about how long it is reasonable to expect the specific good to last.

This means the actual cases where guidance would be helpful would be limited to where the consumer, supplier or manufacturer are being clearly unreasonable about the expected lifespan of the product. These cases are limited, and are unlikely to justify the costs involved in developing guidance when other more efficient interventions are available.

Finally, the ACCC is concerned that regulator driven minimum expected durability guidance may act as a disincentive for manufacturers to prioritise durability in their product design, innovation and manufacture.

Information request 6.1 – Manufacturer product labelling scheme

The ACCC considers that some form of manufacturer product labelling scheme is likely to be more beneficial than regulator guidance to increase transparency in relation to the durability of consumer goods. Unlike regulator guidance, we consider that a manufacturer labelling scheme would have the added benefit of increasing competition between manufacturers.

We acknowledge that product labelling is a complex and multi-factorial policy intervention and that further work would need to be undertaken to establish the design, prominence and obligations underpinning any labelling scheme. In particular, any labelling scheme would need thorough consumer testing to ensure it provides useful and appropriate information to consumers, in a form that allows them to effectively utilise that information. The costs to manufacturers of implementing such product labelling would of course also need to be considered.

The ACCC considers that an approach worthy of further consideration is obligating manufacturers to include a prominent label on their products stating an expected period from purchase that the product should function without failing. This label should not limit the consumer guarantees but rather apply as a further warranty alongside the consumer law rights.

If implemented appropriately, a manufacturer product labelling scheme will equip consumers to make better informed purchasing decisions and would be likely to drive greater inter-brand competition between products that do not normally compete on product durability.

The ACCC also notes a recent discussion paper released by the Department of Home Affairs (DoHA) in relation to cyber-security issues in Australia, particularly issues facing consumers. DoHA's discussion paper notes that labelling of products to guarantee a minimum period of security updates may benefit consumers in their purchasing decisions relating to cyber-security products. The ACCC supports further consideration of this policy intervention as a potentially effective way to manage the increased uncertainty facing consumers purchasing increasingly complex interconnected goods. The ACCC notes that the DoHA and Productivity Commission's objectives are broadly similar, and we welcome further policy consideration of these product labelling proposals.

4. Enhance access to consumer rights

The ACCC supports measures to enhance access to consumer rights. The Draft Report highlights two key limitations of the current consumer guarantee regime that the ACCC agrees need to be addressed:

- ACL regulators are currently unable to take enforcement action where a supplier or manufacturer fails to provide a consumer guarantee remedy
- Consumers face considerable barriers when taking their own action to enforce their rights.

The ACCC agrees with the Draft Report that a well-functioning consumer redress system is essential for the effective operation of consumer guarantees.

DRAFT RECOMMENDATION 3.2 POWERS FOR REGULATORS TO ENFORCE GUARANTEES

State and Territory Governments should introduce alternative dispute resolution mechanisms to better resolve complaints about the consumer guarantees, such as compulsory conciliation or direction powers (as are used in South Australia and New South Wales).

To inform the most effective design and use of any alternative dispute resolution mechanism, appropriate cost-benefit analysis and sufficient regulator resourcing would be required prior to implementation.

The ACCC agrees that State and Territory Governments should consider options for introducing new, or improving current, alternative dispute resolution mechanisms to better assist in resolving consumer guarantee disputes.

As already stated in section 2 of this submission, the ACCC also recommends introducing contraventions 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
- manufacturers that fail to indemnify suppliers who provide consumers with a remedy under the consumer guarantees when legally obliged to do so

as both would further reinforce improved alternative dispute resolution mechanisms by State and Territory Governments and significantly enhance access to consumer rights.

DRAFT RECOMMENDATION 3.3 ENABLING A SUPER COMPLAINTS PROCESS

The Australian Government should enable designated consumer groups to lodge 'super complaints' on systemic issues associated with access to consumer guarantees, with the complaints to be fast tracked and responded to by the Australian Competition and Consumer Commission (ACCC).

The Australian Government should design the super complaints system in consultation with the ACCC, relevant State and Territory regulators and consumer groups. The system should be underpinned by sound operational principles — including criteria for the assignment (or removal) of designated consumer bodies, evidentiary requirements to support a complaint, and the process and time period by which the ACCC should respond.

The ACCC opposes draft recommendation 3.3 because:

- The ACCC already has a number of processes to capture emerging ACL issues, so a super-complaints system is unlikely to meaningfully assist with the ACCC's intelligence gathering and decision making.
- In the absence of a civil sanction for failures to remedy consumer guarantees, a super-complaints mechanism would not assist in reducing barriers to repairs or improving compliance with the consumer guarantees.
- The ACCC considers that a super-complaints system would create an unnecessary administrative and resource burden diverting resources away from existing and well established priorities. The ACCC's resources are always fully utilised on key matters identified under the ACCC's Compliance and Enforcement Priorities.

Dealing with a super-complaint, particularly multiple super-complaints in any one period, would have a profound impact on ACCC resourcing and priorities. It would force the ACCC to deprioritise existing projects and priorities to achieve the deadline imposed by a super-complaints process.

In the Draft Report, the Productivity Commission notes that the United Kingdom operates a super-complaints system in which a number of select consumer bodies may submit complaints to the UK Competition and Markets Authority (CMA). The CMA is then required to respond to the complaint within 90 days.

The ACCC's view is that a comparison with the CMA does not recognise a number of distinguishing factors between the CMA and the ACCC. For example, unlike the ACCC, the UK CMA is not set up to receive complaints from the general public. This means that the CMA is not seen by the public as a body to which they should complain, and their intelligence gathering regarding market issues is undertaken in a different way to the ACCC's. By contrast, in the 2020-2021 financial year the ACCC received over 118 000 contacts relating to competition or consumer law issues. All these contacts are reviewed and triaged, and an assessment is made as to whether any raise issues that should be investigated. The ACCC also has dedicated intelligence staff that conduct sophisticated data analysis to identify trends, both in relation to specific traders and broader markets, to help guide investigations and other market interventions.

This data analysis is further augmented by extensive engagement with consumer groups, business groups, and industry associations on a regular basis. The ACCC also runs nine separate consultative committees, including a Consumer Consultation Committee and Small Business Consultative Committee. These Committees include all of the entities likely to be included in the proposed super complainant scheme.

The ACCC is already highly responsive to issues raised by these bodies, as we value the knowledge and experience they contribute.

All of this engagement is in addition to the annual work the ACCC conducts as part of developing our compliance and enforcement priorities. The ACCC conducts extensive stakeholder engagement with key consumer and small business advocacy bodies that heavily influence the ACCC's [Compliance and Enforcement Policy and Priorities](#).

The ACCC's current process allow the agency to identify and react to potential ACL and market issues identified by consumer groups, and gather evidence effectively, both from these organisations and from broader market intelligence. In this respect, we consider the proposed super-complaints process to be duplicative as the purported benefits are already been captured by existing mechanisms.

DRAFT RECOMMENDATION 4.1 EVALUATE MOTOR VEHICLE INFORMATION SHARING (MVIS) SCHEME

The Australian Government should evaluate the Motor Vehicle Service and Repair Information Sharing Scheme that is designed to improve access to repair information, once it has been in operation for three years. The evaluation should focus on compliance with the scheme, the costs imposed on manufacturers, the benefits to independent repairers and consumers, and any implementation issues that require changes to the scheme, including consideration of whether the scheme should continue.

As noted in the Draft Report, the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021 comes into effect on 1 July 2022.

The Government has committed to reviewing the MVIS scheme. In our Agricultural Machinery Market Study, the ACCC recommended that agricultural machinery may benefit from inclusion under the scheme and supported a review to assess the costs and benefits of doing so.²

Information request 4.1 – Consumer harm from limits on access to repair supplies

The ACCC Agricultural Machinery Market Study found that access to, and competition within, after-sales markets can be limited by restrictions on access to the software tools, technical information, service manuals and parts.

The Agricultural Machinery Market Study final report addresses a number of issues relevant to this information request. In particular, the ACCC notes that:

- Stakeholders raised concerns about limited access to independent repairs resulting in lengthy delays and limited access to repairs during peak periods, and such delays potentially leading to significant damage to crops.
- Purchasers can typically access product guides and service manuals. However, the ability to carry out servicing and repair may also depend on a range of specialised tools and software.
- Nearly half of participants in a survey used to inform the market study reported that they (or an independent repairer they had engaged) had limited or no access to such tools and software. Submissions pointed to the high cost where they were available.

² Agricultural machinery market study – final report, ACCC, 4 May 2021.

- Some stakeholders reported that better access to authorised software or telemetry for purchasers or local repairers would reduce thousands of dollars of travel expenses.
- Stakeholders indicated that manufacturers generally place restrictions on the use of 'non-genuine' parts; and that independent repairers and purchasers themselves were often unable to perform minor repairs, such as replacing sensors and lights.

DRAFT RECOMMENDATION 4.2 ADDITIONAL MANDATORY WARRANTY TEXT

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.

Depending on how it is implemented, the ACCC considers this recommendation may be a relatively low cost change that may provide a small improvement to consumer guarantees dispute resolution. In particular, this additional warranty against defects text may help make this point clear to suppliers and manufacturers, especially where a business may be part of a global corporate structure and internal policies are imported from overseas where different warranty rules apply.

The ACCC considers that it could help to decrease barriers to repair and change consumer behaviours in the long run by encouraging consumers to seek third party repairers. However, it would also need to be made clear that if a third party repairer's work on the product results in some form of damage or malfunction, this would be a consumer guarantee issue against the third party repairer. In these circumstances the consumer's recourse would be to seek redress against that repairer for a possible failure to comply with the consumer guarantees that apply to services, rather than any action against the retailer or manufacturer.

However, the ACCC notes that mandatory disclosure of information in warranty documents is unlikely to be an effective measure on its own. Many consumers do not read their warranty documents. This would be most effective alongside reforming the ACL consumer guarantee regime to make the failure to comply with the consumer guarantees a prohibition.

5. Conclusion

The ACCC welcomes the Draft Report and the opportunity to contribute to the Productivity Commission's findings and recommendations. The ACCC agrees with many of the Draft Report's findings and the objectives which underlie the draft recommendations. While the ACCC disagrees with some of the Draft Report's recommendations, we welcome further discussion on how the objectives behind them can be achieved.