



# Submission to the Australian Productivity Commission on the Right to Repair

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## Introduction

We thank the Commission for the opportunity to make a submission on this issue, as it is something which is part of our core platform. We believe that a permissive attitude towards intellectual property (construed broadly) has the dual benefits of increased economic activity and improved public good, making it a rare example of public policy which meets two often competing goals.

The Commission may note we have made submissions on prior occasions, and that our submissions typically align with the recommendations of the Commission<sup>1</sup> or other such expert groups. With disappointment we have frequently observed our and the Commission's recommendations to be sidelined or disregarded by government.<sup>2 3</sup>

We are grateful for the opportunity to provide input and wish to highlight a core principle of our party is to adopt evidence based policies, in line with the recommendations of expert groups.

## About Pirate Party Australia

Pirate Party Australia is a political party based around the core tenets of freedom of information and culture, civil and digital liberties, privacy and anonymity, government transparency, and participatory democracy. It formed in 2008, and is part of an international movement that began in Sweden in 2006. Pirate Parties have been elected to all levels of government worldwide.

## 1 Information Request 1: Defining a right to repair

Globally, we note a trend in the technology and mechanical industries since the 2000s towards a "walled garden" style ecosystem<sup>4</sup> in which companies attempt to maximise sales by locking in consumers to their own suite of software and hardware products while also restricting self- or third party repairs through regulatory, legal and technical measures. To understand the concept of a right to repair, it is convenient to consider it as a counter movement advocating for greater openness and platform interoperability in response to this.

The name "walled garden" originates from the horticultural practice of erecting high walls around a garden to keep out unwanted individuals or views, and keep

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<sup>1</sup><https://www.pc.gov.au/inquiries/completed/intellectual-property/report>

<sup>2</sup><https://www.minister.industry.gov.au/ministers/sinodinos/media-releases/improving-intellectual-property-arrangements>

<sup>3</sup>[https://pirateparty.org.au/w/images/2/2e/Ppau\\_copyinfo\\_B.png](https://pirateparty.org.au/w/images/2/2e/Ppau_copyinfo_B.png)

<sup>4</sup><https://www.techopedia.com/definition/2541/walled-garden-technology>

in animals, guests or children. Similarly building a “walled garden” technology ecosystem could be considered part of a horizontal integration strategy, by combining a suite of services to obtain consumer and business benefits via an economy of scope which entails the benefits of consumer security, user experience consistency and boost in sales<sup>5</sup>. If the strategy is successful it often implies an economy of scale as well bringing further business and consumer benefits.<sup>6</sup>

A prominent example of a contemporary walled garden technology ecosystem is that of Apple Inc. which is explored in a 2016 article by Thomas Ricker in The Verge which defends Apple’s combined design and business philosophy with the statement “a device is only the starting point of an experience that will ultimately be ruled by the ecosystem in which it was spawned”. Ricker’s article was a response to criticism of Apple Inc’s alleged lack of innovation, stating also that “We may long for the excitement of revolution, but what we really want is the comfort that comes with harmony.”<sup>7</sup> The words “ecosystem” and “harmony” thematically echo back to the historically horticultural concept of a walled garden, but so too is the more sinister concept of “security” which aims to keep out unwanted guests.

However Pirate Party Australia considers the greater overall issue with a walled garden technology ecosystem to be the monopoly<sup>8</sup> it exerts as well as the loss to public good from the restrictions on technical decomposition (including right to repair). A brief summary of the negative impacts of a monopoly include:

- Higher prices for consumers.
- Higher barriers to market entry resulting in an anti-competitive market

“Technical decomposition” will be expanded on in later sections.

Pirate Party Australia would thus define the right to repair as a legal right protecting both platform interoperability and third party (including self) repairs. This legal right would need to prevent both legal restrictions typically employed through a End User Licence Agreement (EULA) also known as Terms of Service (TOS) and technical restrictions typically employed through Digital Rights Management (DRM) also known as Technological Prevention Measures (TPM).<sup>9</sup>

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<sup>5</sup><https://www.investopedia.com/terms/e/economiesofscope.asp>

<sup>6</sup><https://www.investopedia.com/terms/e/economiesofscale.asp>

<sup>7</sup><https://www.theverge.com/2016/9/7/12828846/apple-s-greatest-product-is-its-ecosystem>

<sup>8</sup><https://www.investopedia.com/terms/m/monopoly.asp>

<sup>9</sup><https://computer.howstuffworks.com/drm1.htm>

## **1.1 Information Request 1: Defining a right to repair in an Australian context**

The Pirate Party movement is inherently international as we are a product of the internet era. Over our two decade history as a global movement, we have collaborated across dozens of borders and time-zones in criticising or opposing international agreements which go against our platform. Most notably in an Australian context this includes the Trans-Pacific Partnership<sup>10</sup> which would have detrimentally expanded copyright protections while signing away our national sovereignty to international corporations.

It is with regret that we recognise that Australia is signatory to the Anti-Counterfeiting Trade Agreement 2011 which we consider may interfere with a comprehensively implemented right to repair. Article 27 of the ACTA treaty states:<sup>11</sup>

"[Australia] shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights in, and that restrict acts in respect of, their works, performances, and phonograms, which are not authorised by the authors, the performers or the producers of phonograms concerned or permitted by law."

This Treaty was ratified into Australian law and integrated into the Copyright Act 1968 (Cth) predominantly Part V Division 2A. We draw to the attention of the Commission to subsection 116AN "Circumventing an access control technological protection measure" p205 which states:<sup>12</sup>

1. An owner or exclusive licensee of the copyright in a work or other subject-matter may bring an action against a person if:
  - (a) the work or other subject-matter is protected by an access control technological protection measure; and
  - (b) the person does an act that results in the circumvention of the access control technological protection measure; and
  - (c) the person knows, or ought reasonably to know, that the act would have that result.

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<sup>10</sup><https://www.freezenet.ca/tpp-no-economic-benefit-australian-pirate-party/>

<sup>11</sup><http://www.austlii.edu.au/au/other/dfat/treaties/ATNIF/2011/22.html>

<sup>12</sup><https://www.legislation.gov.au/Details/C2019C00042>

One possible interpretation of the Treaty and Act snippets given above is that this permits a rights holder to seek civil and criminal penalties for a third party repairer who circumvents technological measures by the manufacturer to prevent third party repairs.

Pirate Party Australia advises that independent legal advice be sought by the Commission to determine whether the ACTA Treaty 2011, Copyright Act 1968 (Cth), and/or the excerpts identified above will be in conflict with a given definition of a legal "right to repair".

## **1.2 Technical decomposition and overlap with the issue of copyright**

We consider the right to repair to be closely related to the issue of copyright. Pirate Party Australia recognises that a commercial monopoly grants valuable remuneration to a creator, however we seek to balance that with the public good of open access. Pirate Party Australia advocates for a reduction in the copyright term to 15 years from the date of publication, and that legal rights granted by copyright be restricted to commercial uses of the work.<sup>13</sup> We do so on the basis of research which suggests that there is a rapid falloff in economic return from a novel creative work, however the "public good" increase from a novel creative work remains steady over a similar period.<sup>14</sup> Our cited research suggests that 10-20 years presents an optimal midpoint between the diminishing returns of an economic monopoly, while still having appreciable public good outcomes.

A traditional view of copyright will contextually apply to creative works, typically performance or audiovisual based, but also including works of literature. With the advent of radio, television and later digital platforms consumers have found that "copying" content could be done easily and cheaply, and could not be considered theft as the original copy is unchanged and still in possession of the rights holder. This led to a scramble by world governments, driven by large international corporations, to criminalise the act of "copying" which they characterised as "piracy" in an attempt to delegitimise it. Internet culture adopted the term proudly however and a nascent pirate movement began in the early 2000s which promoted free access to information, recognising that sharing (or copying) what we have leads to economic innovation and public good through greater access to culture.

There was a large overlap with "hacker" culture, which contrary to popular culture actually self identifies a hacker as "An expert computer programmer" or "A person who enjoys exploring the details of programmable systems and how to stretch

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<sup>13</sup>[https://pirateparty.org.au/wiki/platform#Culture\\_and\\_creative\\_works](https://pirateparty.org.au/wiki/platform#Culture_and_creative_works)

<sup>14</sup>[https://rufuspollock.com/papers/optimal\\_copyright.pdf](https://rufuspollock.com/papers/optimal_copyright.pdf)

their capabilities, as opposed to most users, who prefer to learn only the minimum necessary.”<sup>15</sup>. In contemporary hacker culture, this has been expanded beyond computer software to include electronic hardware and all form of DIY and physical hardware including woodwork, metalwork, crafts and more via the “hackerspace” sub-movement. A hackerspace can be here defined as a creative, community and technical hub for engaging in all aspects of DIY culture including the areas mentioned above (electronic software and hardware, woodwork, metalwork, crafts etc). In 2019 the Queensland Minister for State Development, Manufacturing, Infrastructure and Planning The Honourable Cameron Dick announced a state government grant for “Hackerspace funding to help harness ideas of manufacturing creatives”,<sup>16</sup> stating that “the grants would lead to the design and manufacturing of more new products in Queensland.”

An example of a successful hackerspace (also known as makerspace) is Hackerspace Brisbane (HSBNE) which has been active since approximately 2009 and is one of the largest and most active community run hackerspaces in the world.

The hacker ethos of “taking things apart to see how they work” is a layman’s approach towards the computer science concept of “technical decomposition”. As validated by the popularity of makerspaces in Australia as well as the emphasis that hacker culture places on taking things apart, we can see positive outcomes for both recreation and skills training by supporting the restriction of DRM and TPMs, as opposed to supporting DRM and TPMs to prevent taking a product apart.

Pirate Party Australia thus holds that open access to information and technology has a strong benefit to public good.

## **2 Information Request 2**

Pirate Party Australia holds a technology neutral approach and will not make a detailed representation on specific products or product markets as being of greater or lesser importance. However based on our member engagement we recognise that two physical product groups experiencing high amounts of lockdown due to DRM/TPMs are commercial farm equipment and personal motor vehicles.

We also note claims made by remote farmers, that a piece of equipment out of action during harvest can have significant economic impact if it is held out of use for weeks or even days through the need to arrange for authorised repair. Nevertheless, the impact of difficulties in repair will of course make a broader

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<sup>15</sup><http://www.mithral.com/beberg/hacker.html>

<sup>16</sup><https://statements.qld.gov.au/statements/88642>

impact.

### **3 Information Request 3**

Australian consumer law is outside of our focus areas so we will not provide a detailed comment on IR3.

Based on our member engagement, we note a business trend towards "replacing" an item rather than "repairing" an item when it is returned under warranty. This results in additional impact on the environment, while it may be an unfortunately sensible economic decision for the manufacturer.

Pirate Party Australia supports public policy which results in improved outcomes for consumers on the basis of public good as well as greater consumer trust in business. Where this is not possible, we would encourage a market neutral and regulation light approach.

### **4 Information Request 4**

Analysis of current market conditions are outside the scope of Pirate Party Australia.

However we refer to our response on IR2 with respect to our member engagement identifying motor vehicles and commercial farm equipment as being notably prone to lockdown due to DRM/TPMs.

We observe that while safety and the immunity of the manufacturer from liability for mistakes made by others are legitimate concerns, it is our suspicion that such claims by manufacturers are in fact an attempt to abuse the situation to gain market control. Such claims should not be taken at face value, and should be independently scrutinised with the interests of the consumer in mind.

### **5 Information Request 5**

In order to properly repair an item, there needs to be an understanding of how it works. In limited contexts, a manufacturer can provide an itemised guide for repair, but this is normally outside of the scope for most manufactured items.

Being able to access the embedded code might be important in repairing an item, as there can be subtle interactions between software, hardware and environment that can only be nussed out with an appreciation of how the code works, and indeed, small modifications to the code to provide additional debugging information and make small changes to the approach to see how they work.



The issue is with the availability of information for repair. One issue is where this information is available to those authorised by the manufacturer, and not others. In this case, there should be an obligation to share that information.

One qualifier is that the act of repair can go dramatically wrong, and the manufacturer should not be responsible for such mistakes, so long as they have made a good-faith attempt to make the information available.

## **6 Information Request 6**

Speaking anecdotally, Pirate Party Australia is aware of light fittings which are manufactured in such a way that the light bulb cannot be replaced by the purchaser. Quite apart from how long the light bulb will actually last, this is a clear barrier to extending the life of the light fitting based on the used of spare light bulbs available in the market.

Planned obsolescence is much more about devices failing before you would expect them to, as compared to new more attractive items being purchased when they become available. Such behaviour is consumer choice, but it should be identified as a diminution in the productivity of the economy.

Better labelling and indicators of product life would at least help here.

## **7 Information Request 7**

Pirate Party Australia does not have a detailed understanding of the issues around e-waste in Australia.

However, we make the general point that the repair of equipment means there is less waste - e-waste in particular, less environmental impact, and more economic activity for the environmental impact generally speaking.

It is worth appreciating that some business' profits may be reliant on increased consumption, regardless of the details and motivation behind that consumption. In this case, the costs of waste should become a constraint for those businesses.

Analysis of current market conditions are outside the scope of Pirate Party Australia.

## **8 Information Request 8: Policy reforms to support a right to repair in Australia**

Pirate Party Australia advocates for a repeal of the Copyright Act 1968 (Cth) and the implementation of a Creative Works Act (Cth) which will include provisions to,

among other things:<sup>17</sup>

- Institute a creative right that lasts for 15 years from date of publication
- Institute a uniform duration for creative rights regardless of the type of work
- Replace the current limited free-use fair dealing exceptions with an open-ended fair use exception
- Introduce criminal penalties for abusing 'takedown' procedures
- Afford no protection for materials produced by or as a function of government, as they belong to the public
- Restrict creative rights to commercial uses of a work
- Provide that use for private entertainment will always be non-commercial.

And with regard to the specific issues discussed within this submission:

- Make distributors liable for technological protection measures that interfere with the exercise of free-use exceptions and exemptions.
- Require products sold with technological protection measures to be accompanied by information on the nature of the restrictions and any tracking or data collection imposed.
- Give consumers a statutory right to return for refund any products that include technological protection measures within 30 days of their receipt.
- Exclude penalties for circumventing technological protection measures and geoblocking.
- Provide educational materials to Australian consumers and businesses as to how to circumvent geoblocking.
- Amend the Australian Consumer Law so that contracts or terms of service that attempt to enforce geoblocking are considered void.

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<sup>17</sup>[https://pirateparty.org.au/wiki/platform#Culture\\_and\\_creative\\_works](https://pirateparty.org.au/wiki/platform#Culture_and_creative_works)

- Introduce an explicit first sale doctrine (right of resale) which will apply to both physical and digital sales.
- Investigate options to restrict vendors' abilities to lock digital content into particular ecosystems.
- Require Open Access provisions for all publicly-financed scientific and academic research, including the resulting works and raw data which must be stored in an open and searchable format.

## **9 Information Request 8: International policy proposals**

Pirate Party Australia notes Bernie Sanders' 2019/2020 campaign for Democratic Party presidential nominee included provisions for a right to repair, stating:<sup>18</sup>

"In rural America today, farmers can't even repair their own tractors or other equipment because of the greed of companies like John Deere. As noted in Wired Magazine, "Farmers can't change engine settings, can't retrofit old equipment with new features, and can't modify their tractors to meet new environmental standards on their own" without going through an authorized repair agent."

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<sup>18</sup><https://berniesanders.com/issues/revitalizing-rural-america/>