

12 August 2021

Our ref: KS-CCL&IPC

Right to Repair Inquiry
Productivity Commission
Locked Bag 2
Collins Street East
Melbourne VIC 8003

By email: repair@pc.gov.au

Dear Madam/Sir

Productivity Commission – Right to Repair Draft Report (June 2021)

Thank you for the opportunity to provide feedback on the Productivity Commission's (**the Commission**) draft report on the Right to Repair (**the draft report**) which was released on 11 June 2021 as part of the Commission's Right to Repair Inquiry.

Queensland Law Society is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of members of the Competition and Consumer Law Committee and Technology and Intellectual Property Committee, whose members have substantial expertise in this area. In preparing this submission, we have also had the benefit of reviewing the submission of the Law Council of Australia's Business Law Section.

Introductory comments

From the outset, we acknowledge that there may be diverging views on these issues. Whilst we recognise the existing rights for consumers to have products repaired, replaced or refunded under guarantees in the Australian Consumer Law (**ACL**), our members agree with the Commission that more needs to be done to support consumers to understand and enforce their rights. We also recognise that the 'right to repair' may facilitate more sustainable practices by both manufacturers and consumers.

Our members have reported that barriers to enforcement of consumer rights may include:

- Consumers being unaware of their rights under the ACL; and

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- Reluctance to pursue repair rights due to the time and effort it can take to access these rights.¹

Whilst it may not be efficient or cost effective for consumers to always repair products nor for manufacturers to support a product indefinitely, QLS submits that there is scope to better understand opportunities to improve repair services, design issues and retailer/manufacture practices.

Consultation to date

In preparing the Draft Report, we note the Commission consulted with a range of stakeholders and that the draft sets out its preliminary analysis and recommendations.

We acknowledge that there remains areas in which further consultation and evidence has been sought including the extent to which original equipment manufacturers are limiting independent repairs in certain repair markets (such as the agricultural machinery and mobile phone/tablet markets) and the use of warranty terms that discourage independent repair'.²

Whilst the Draft Report states that the 'evidence on the extent to which intellectual property protections restrict repair is patchy and largely anecdotal'³, we also note the Commission's findings that 'copyright laws that prevent third-party repairers from accessing repair information (such as repair manuals and diagnostic data) appear to be one of the more significant intellectual property-related barriers to repair'.⁴

QLS generally supports the Commission's proposals to amend the *Copyright Act 1968 (Cth)* to adopt a general fair use defence in relation to copyright. Our members would welcome the opportunity to consider any draft proposals in this regard.

We would also support the Commission in consultation with Federal, State and Territory regulatory bodies undertaking further in-depth analysis to determine the extent to which these issues, including those which have been reported as anecdotal, are causing consumer harm.

In the absence of such research, our initial responses to some of the proposed recommendations and information requests are as follows:

Information Request 4.2 A positive obligation to provide access to repair supplies

QLS considers that there is insufficient evidence to support a positive obligation on original equipment manufacturers to provide access to repair supplies to third-party repairers. Our members are concerned that such interventions, without the appropriate research to support them, may have unintended consequences.

There may be a number of reasons manufacturers limit access to repair information.⁵ For example, manufacturers may have safety and security concerns about whether independent repairers have the requisite skill or training to carry out repairs. Repair liability may also operate as a disincentive to independent repairers from entering the market.

¹ See draft report page 7.

² Ibid, p 107.

³ Ibid, p 31.

⁴ Ibid, p 175.

⁵ Ibid, p 116.

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The Draft Report states that the evidence submitted to the inquiry of manufacturers restricting third party access to repair supplies was limited, largely anecdotal and did not point to any systemic competition issues in repair markets.⁶ Some of our members have noted that although a positive obligation to provide access to third party repairers may have the potential effect of reducing a manufacturer's incentive to innovate, this has not been the case in the motor vehicle industries of the United States or the European Union.

As noted above, QLS would support further research into whether there are systemic issues and how these might be best addressed in particular product markets.

Information Request 4.3 A prohibition on warranty void terms

QLS does not support a prohibition on manufacturer warranties containing terms that require consumers to use authorised repair services or parts to keep their warranty coverage. The current position is that manufacturers are not permitted to state that a repair by a non-authorised repairer will breach any contractual warranties which overlap with the ACL guarantees. This is appropriate.

QLS supports manufacturers being able to set their own contractual terms for warranties outside what is provided for in the ACL. A prohibition would disregard the legitimate reasons why a manufacturer may choose to require the use of authorised repair services and parts. Our members have suggested that manufacturers are well placed to recommend authorised/preferred outlets and that consumers generally understand this approach.

Draft Rec 3.1 Guidance on reasonable durability of products

QLS supports the publication of estimates of minimum expected durability for products by the ACCC in principle. However, our members have some reservations as to how this might be applied in practice given the variability in cost, quality and design in particular product categories. We note the concerns raised by the Law Council in this regard.

QLS is similarly supportive of a more detailed cost/benefit analysis before this Draft Recommendation is accepted. It may also be preferable for existing regulatory guidance to be supplemented by practical case studies which provide further guidance to business and consumers about how they can estimate product durability depending on the circumstances.

Further, QLS notes that manufacturer warranties provide consumers with additional rights beyond the consumer guarantees in the Australian Consumer Law. However, feedback from our members suggests that for consumers, these warranties are often confused with the statutory guarantees. QLS believes that ongoing consumer education from the ACCC is appropriate in this area.

Draft Rec 3.2 – Powers for Regulators to enforce guarantees

QLS supports the recommendation to implement alternative dispute resolution (ADR) mechanisms to better resolve complaints about consumer guarantees. QLS submits that it may also be useful to consider the operation and effectiveness of the South Australian and New

⁶ Draft Report, pp. 9-11, 28.

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South Wales schemes to understand how these powers could be implemented most effectively in other States and Territories. Consideration might also be given to how consumer complaints regimes which operate independently within Commonwealth and State and Territory regulatory bodies can be better integrated to provide greater clarity for consumers about the kinds of processes and potential remedies which are available.

Draft Rec 3.3 – Enabling a super complaints process

QLS is generally supportive of this recommendation. The feedback from our members is that such a process may allow systemic issues to be addressed and potentially discourage predatory behaviours. It will also support improved consumer access to address systemic issues.

Much of the ACCC's enforcement action in respect of systemic breaches of consumer laws tend to be in response to first alerts from consumer bodies. The proposed process would formalise a more streamlined process for responding to these issues. However, we submit that any new process must be supported by additional resourcing to the ACCC to ensure the Commission can continue to carry out and balance its existing functions.

In addition, QLS supports further consultation on appropriate thresholds/criteria to underpin the complaints process (for example, the number of consumers affected and/or the total value of potential harm).

We also support consultation and publication of guidance as to the process and procedures for assessing 'super complaints' which would assist our members in advising their clients on progressing and/or responding to such complaints.

Draft Rec 4.1 – Evaluate motor vehicle information sharing scheme

Our members generally support the recommendation that the mandatory service and repair information sharing scheme for motor vehicles be reviewed after 3 years, given that it is the first of its kind in this area and the impacts on the industry, consumers and intellectual property right (namely, copyright) have yet to be fully experienced.

QLS support such a review and submits that it might also include consideration of the appropriateness and method of extending such a regime to other industries.

Draft Rec 4.2 – Additional mandatory warranty text

QLS is generally supportive of the Additional Mandatory Warranty Text⁷. QLS also supports the insertion of additional text to address the complexities which may arise for example where unauthorised repairers/parts may impact remedies under the consumer guarantees. This should include circumstances in which using 'unauthorised' repairers or parts may be inadvisable for the consumer.

⁷ *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.*

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As noted previously, QLS supports further consumer education to increase awareness of the consumer guarantees regime as an overarching tool to improving retailer and manufacturer processes.

Information Request 5.1 and Draft Findings 5.1 of the Draft Report

QLS supports the Law Council's submissions in response to Information Request 5.1 and Draft Finding 5.2 of the Draft Report.

Further research and industry focus

Whilst the introduction of consumer guarantees has gone some way to assisting consumers, our members report that in some instances an imbalance remains between the significant market power of the manufacturer and retailer industries and consumers.⁸

QLS would support further review into whether specific industries require additional regulatory responses. For example, repair and design processes in the digital industry. In this regard, we note the draft report refers to developments in some US states who have proposed broader right to repair legislation in relation to digital products. Our members have also raised concerns with the adequacy of section 58 of the ACL and in particular, the extent to which 'parts for the goods' encompasses application software upgrades or patches.⁹

We recognise that regulatory frameworks should reflect a careful balancing exercise. QLS supports the Commission seeking further information and evidence to inform any proposed additional reforms to assist consumers to obtain repairs and make informed purchase choices. Any changes should be evidence-based and include an understanding of current retailer, manufacturer and consumer practices.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Elizabeth Shearer
President

⁸ See comments by the ACCC in their submission to the draft report, p. 3-5 and 8, <https://www.pc.gov.au/data/assets/pdf_file/0009/279342/subdr214-repair.pdf>.

⁹ See pp 132 to 133 of Mathews Hunt, Kathleen, 2017, *Doctoral thesis, consumeR-IOT: where every thing collides Promoting consumer internet of things protection in Australia*, available at <https://pure.bond.edu.au/ws/portalfiles/portal/36082428/Kate_Mathews_Hunt_Thesis.pdf>.