

Overview

The Productivity Commission's preliminary findings in its Right to Repair Inquiry confirm the issues the ACT Government and its Australian Consumer Law (ACL) regulator, Access Canberra have been observing informally for some time. That is, there are a number of unnecessary barriers that manufacturers of common household goods, and in particular digital and smart goods, have established that prevent consumers from fully realising their right to have a good repaired at a competitive price. This can be seen in the Productivity Commission's draft findings on enhancing consumers rights and its recommendations on addressing barriers to repairs.

The ACT Government agrees with the Productivity Commission that the perspective of manufacturers must be considered and they are an integral part of finding solutions to these issues. In a time when Australia's economies are emerging from COVID-19, governments such as in the ACT must be mindful to not stultify innovation and blur legitimate arguments by manufacturers concerning security and intellectual property protection.

The Productivity Commission's draft report however, indicates there may be justification for governments to consider a stronger policy response where industry has promised to police themselves for a number of years without success. Despite concessions and initiatives, the problem continues, and the evidence seen through the Inquiry shows that some companies prefer to pursue policies of manipulating consumer consumption rather than transforming their practices towards being more transparent and consumer friendly.

To this end and in its final Report, the ACT Government would like the Productivity Commission to consider the types of improvements that Australian Governments could put in place to empower consumers to better understand how the goods and rate at which they are purchasing them, are being manufactured and their impact on environmental sustainability. The ACT Government believes that such strategies may encourage a broader trend already taking place in consumer behaviour and place pressure on manufacturers to foster and embrace processes that could lead to a robust circular and green economy.

Enhancing consumer rights

The ACT Government supports in principle the recommendations made by the Productivity Commission relating to the improved enforcement of consumer guarantees, through the introduction of alternative dispute resolution processes and the concept of 'super complaints' that could be pursued by designated consumer groups.

These new approaches would enable State and Territory Governments as regulators, alongside the Australian Competition and Consumer Commission (ACCC), to add a further tool to our compliance armoury when agencies such as Access Canberra see trends in its complaint data and repetitive poor behaviour regarding the acknowledgement of those guarantees towards consumers by certain industries.

To this end, the ACT Government has legislated to enable the Commissioner for Fair Trading to require a business to attend a binding conciliation with a consumer to resolve their dispute. This new power will commence shortly, and will focus on ACL complaints and more specifically, the enforcement of consumer guarantees relating to goods and services purchased by consumers for personal, domestic, or household use.

In a similar way, the ACT Government is supportive of the ACCC establishing a 'super complaint' mechanism to address major or significant consumer guarantee issues. In particular, this approach

would address one shortcoming with the current consumer guarantees in that they still fall to an individual consumer to enforce, with little in the way of broader mandatory enforcement where businesses fail to engage with a consumer on either consumer protection related issues and consumer conduct issues as well as possible competition issues relating to market structure and firm behaviour.

The 'super complaint' mechanism, appropriately designed and implemented, could go some way to addressing this shortcoming by empowering consumer advocacy groups to pursue issues on behalf of vulnerable and disadvantaged consumers. This mechanism would also provide State and Territory regulators with better visibility of the cause and impact that broader and entrenched issues such as product safety and durability – may be having at a national level. In turn, this could assist regulators to better design compliance approaches across state and territory boundaries. For instance, in 2020 Access Canberra received over 530 ACL complaints, with over 80 complaints alleging a major failure of a good and over 220 alleging a minor failure of a good.

Furthermore, having the ACCC work in collaboration with State and Territory regulators to develop and publish estimates for how long certain products can reasonably be expected to last – in other words, better informing consumers about planned obsolescence - would become a powerful tool for consumers and consumer advocacy groups. When coupled with the introduction of alternative dispute resolution processes, the ACT Government can see increased and informed estimates about a product's durability resulting in more positive outcomes for consumers in the ACT.

In considering this last recommendation further, the ACT Government would like to pose to the Productivity Commission, whether it might identify how Australian-based regulators could develop appropriate and reasonably accurate durability standards for products manufactured overseas. For instance, given the large volume of goods being purchased by consumers from online platforms and imported into Australia, would there be merit in having a process whereby product labelling and durability standards could be informed by Australia's current customs reporting system which requires importers to demonstrate the safety, suitability and manufacture of a product before it can enter the Australian market.

Overcoming barriers to repairs

The Productivity Commission's analysis of the barriers to repairs in its draft report is both informative as well as concerning in the extent to which certain product manufacturers were found to use their much stronger bargaining position in the marketplace to dictate both how a consumer might seek a repair as well as encourage them to take up new products over current versions.

The ACT Government supports, as a matter of principle, that consumers should be able to use an independent repairer or access the resources needed to repair a product themselves. This is central to reducing waste, in particular in circumstances where there is the deliberate shortening of a product's lifespan – planned obsolescence. On this issue, the ACT Government supports the Productivity Commission's recommendation that more work be done by Australian Governments to improve consumers' awareness of their statutory consumer guarantees and to highlight that guarantees are not extinguished when the consumer has a good independently repaired and with the use of third-party parts.

In the ACT and as part of the roll-out of the new binding conciliation power, Access Canberra will look to deliver a dedicated engagement strategy. The strategy will aim to educate business and inform consumers about how the consumer guarantees work, how they might exercise them and for

businesses, how they can put complaint processes in place to proactively address issues raised by consumers about their products.

In the context of improving consumers' awareness of the guarantees, the ACT Government also supports the Productivity Commission's focus on the use of warranties by manufacturers to alter or void their obligation to replace, repair or refund a faulty good. The ACT also advocates strongly that any amendment to commercial warranties ought not to alter, impact upon or otherwise diminish the consumer's statutory guarantee rights.

In response to the Productivity Commission's call for submissions on the costs and benefits of a reform to prohibit warranty voiding clauses, the ACT Government would agree that further work - such as a cost benefit analysis of the impacts to manufacturers, suppliers and consumers - would need to be undertaken across sectors of the community and industries. In particular, the ACT Government recognises the Productivity Commission's observations that such a reform may not necessarily improve consumers' access to repairs or even improve consumers' ability to enforce the consumer guarantees. Rather, manufacturers may look to new and innovative ways of limiting their liability, without the ACL being updated to keep up with those new business models.

From the ACT's perspective, it would not be supportive of any processes that may have an indirect consequence of leaving vulnerable consumers with costly goods and where they are locked out of repairs, forced to purchase new products that may not be ideal for them or where there are no effective protections for this cohort of consumers.

Intellectual property

The ACT Government especially commends the Productivity Commission's considered approach on the challenges posed by the complex framework that currently exists in Australia regarding the protection of intellectual property and copyright laws. To this end, the ACT Government supports in principle, appropriate reforms to Australia's copyright laws that would better facilitate the sharing of repair information and access to repair information behind digital locks, where such use would be 'fair'. It also supports in principle giving further consideration to the introduction of a positive obligation on manufacturers to make repair supplies available to third parties.

Before endorsing any specific reforms however, the ACT Government shares the Productivity Commission's observations that it would need to better understand the broader impact of a positive obligation on manufacturers and across different industries and sectors of the consumer community. In particular, the ACT Government notes the Productivity Commission's comments that such an obligation would not necessarily prevent manufacturers from continuing to apply such protections of software on their products in the future. Indeed, such an approach may have a potentially detrimental effect of leaving consumers further vulnerable, disempowered and with limited options available to them to obtain a repair, particularly for costly goods that are essential to their lives and where they may not be able to afford to replace it.

To this end, it would be useful if the Productivity Commission could develop further analysis indicating how such a reform might adversely impact vulnerable consumers such as those from a lower socio-economic background and across key sectors. For instance, the Productivity Commission might consider the current complaint data held by regulators and whether such data shows any correlations between the nature of complaints made about key essential goods used by Australians nationally (such as whitegoods, mobile phones and motor vehicles), vulnerable consumers impacted by faults arising from these goods and the current behaviour patterns towards the right to repair by key manufacturers for such goods.

As with any reforms, such proposals must also be balanced with enabling manufacturers to protect their proprietary information, especially where such intellectual property is key to continuing innovation that could deliver improved goods to consumers. In particular, the ACT Government would be keen to ensure any reform provides opportunities to creators of new and valuable knowledge to secure sufficient returns and motivate their initial endeavours or investment while encouraging the continued development of innovations that benefit society.

Prior to supporting reforms on these issues for instance, the ACT Government would likely need to undertake economic modelling on how any reforms in this field might impact key sectors of the ACT economy.

For instance, the ACT has a significant IT and digital services sector that derives a significant proportion of its design and research work from projects and new policies developed at both the ACT and broader Federal Government level. Canberra's IT sector comprises more than 1,000 businesses, ranging from multinationals down to micro businesses. In combination, these businesses engage in IT services that span diverse activities as enterprise resource planning, digital identity and documents management, cyber security, data centres and cloud computing, research and development for new government services, IT applications in fields like energy management and automotive and defence services. Many of the world's leading IT firms have significant operations in Canberra (including IBM, HP Enterprise, Microsoft and Oracle Corporation) and a number of local firms are undertaking significant product development activity in Canberra under their guidance (such as Tower Software (which was acquired by HP) and Intelledox (which was acquired by Smart Communications)).

In addition, the combination of Canberra's innovative, knowledge driven economy coupled with its cutting-edge infrastructure, high technology companies and national security organisations has positioned Canberra as Australia's Cyber Security capital. As a result, Canberra has Australia's highest concentration of national security agencies, assets, prime contractors, and small-medium enterprises delivering cyber security capabilities to the public and private sectors.

Furthermore, the ACT Government is also aware of initiatives at the Federal level promoting expanded investment into digital innovation - such as gaming design and digital simulations - that will have flow-on benefits and uses in other fields such as e-health and e-education, defence innovation, new medical patents, and the expansion of agri-tech – all of which could become new and emerging industries for the ACT region.

For these reasons, the ACT Government would want to understand whether reforms to intellectual property protections could result in seeing these industries being required to share and lose their competitive edge with small businesses who may only have the intention of accessing such information for the purposes of undertaking short term repairs to devices such as gaming consoles or mobile phones.

As such, the ACT Government considers that any consideration of reforms in this area would need to strike the right balance and include affording appropriate protection to technological programming and reforms that could bind repairers to appropriate confidentiality obligations to not publicly expose key intellectual information to the wider market.

Product design, obsolescence, and e-waste

The ACT Government would also like to raise an issue that is important to the young and innovative Canberra community that it represents and which it would like to see the Productivity Commission consider as part of its final report deliberations.

In its report, the Productivity Commission makes the point that:

'In weighing up the costs and benefits of potential right to repair reforms, the Commission has been mindful that it is not always preferable or cost effective for consumers to repair their products, or to keep them going for as long as possible. Consumers make choices to repair their products by weighing up the cost and convenience of repair, their preferences for newer products, and concerns about the environmental impacts of their consumption choices.'

In the ACT Government's view, some of the behaviours the Productivity Commission has observed - such as the deliberate shortening of a product's lifespan by manufacturing products using solder that does not allow the product to be repaired, refusing to supply component parts, or discontinuing software updates - need to be countered. It is an important aspect to a consumer's rights to be able to adjust their products as they see fit and as a true owner of those goods – that is, to get them fixed, changed or improved, to manage the good as they want and to make it last for as long as they wish or can.

The ACT Government supports the Productivity Commission's recommendation of improving product labelling to increase consumers' awareness of the components of a good. It also strongly supports changing product stewardship programs to include the counting of recycled and repaired goods in their statistics to foster the embracing of recycling options. Such approaches will all have a combined impact of stemming the creation of product turnover and e-waste by extending product viability and life spans.

However, as was recently discussed at the OECD's Consumers in the Marketplace conference, it is increasingly clear that consumer guarantees – such as the right to repair – are being viewed internationally through the prism of the impact that the manufacture of products are having on environmental degradation. Consumer advocacy groups are becoming increasingly vocal in pursuing the strengthening of consumer rights as a way of fostering a circular and greener economy in their respective countries.

Ideas such as increasing transparency in manufacturing supply chains, increasing access to ADR processes to raise complaints about faulty goods and demand repairs as well as ways of informing consumers about environmentally friendly products – are all causing companies to reflect on their processes and move towards sustainable ways of manufacturing and upcycling products.

In a similar vein and in the context of this Inquiry, the ACT Government views a consumer's right to repair as forming part of a broader role the ACL's consumer guarantees could have in Australia in empowering consumers to drive powerful and real change in reducing mass and unnecessary consumption of goods and the direct links between those trends and environmental degradation and the exportation of waste from Australia to other countries. These trends are having a profound impact on the global economy and the lives of workers in these industries and the ACT Government would like to encourage Australian consumers to consider the impact of the purchases they make, especially where such purchases may not be necessary or even desired by the consumer.

Since the commencement of the Productivity Commission's Inquiry, the Federal Government has passed its *Recycling and Waste Reduction Bill 2020* which aims to establish a framework to regulate the export of waste glass, plastic (including processed engineered fuel), tyres and paper. Under this framework, the ACT Government understands that a specific export ban on sending mixed plastics overseas for recycling came into effect on 1 July 2021.

While such initiatives are positive and encourage industry and governments to work together to address the reduction of overall waste, they are unlikely to have a significant impact and rather, demonstrate the flow on costs to governments (and in turn, communities) who must look to other ways to accommodate the ever-increasing amount of waste being produced as a by-product of manufacturers encouraging increased consumption behaviour. Within this context, the ACT Government believes that large bases of consumers can play a far more responsive and critical role by using their purchasing power to drive significant change in encouraging the recycling of goods, starting with more proactive exercising of their consumer rights such as the right to a repair.

For instance, the Australian Bureau of Statistics' (ABS) *Waste Account*¹ released on 6 November 2020 found that Australia generated 75.8 million tonnes of solid waste in 2018-19, which was a 10% increase since 2016-17. Of this, while over half of all waste was sent for recycling (38.5 million tonnes), 27% was still sent to landfill for disposal (20.5 million tonnes). And most telling, the sectors that generated the most waste were manufacturing at 12.8 million tonnes (16.9%), construction at 12.7 million tonnes (16.8%), households at 12.4 million tonnes (16.3%) and electricity, gas and water services at 10.9 million tonnes (14.4%).

Specifically, households were found to be the largest contributor of plastics waste, supplying 47% of all plastic waste (1.2 million tonnes), with manufacturing at 15% (380,000 tonnes). Of the 539,000 tonnes of e-waste generated, approximately 40% was contributed by households, with half of the waste that was generated, recycled. In addition, categories of waste with the lowest recovery rate (that is, waste materials that were not sent for recycling, used for energy production or exported) were textiles, leather and rubber at 26%, hazardous waste at 27% and plastics at 19%. In fact, all plastic types were reported as having the worst recovery rates of around 15% and of the 2.5 tonnes of waste generated, 84% was sent straight to landfill.

Furthermore, the total expenditure (borne by governments) on waste collection, treatment and disposal services was valued at \$16,989 million with household waste costing \$595 million compared to construction at \$2 billion, manufacturing at \$1.2 billion and agriculture at \$507 million. In effect, this data indicates that households are producing waste in equal quantities to sectors such as the manufacturing and construction sectors. This is often waste arising from increased levels of the private consumption of goods ranging from electronics, clothing and other common household products.

In the face of this data, the ACT Government believes true consumer power could have a very direct and impactful effect on reducing the amount of waste that households are producing (and indirectly reduce waste management costs to government) merely by being more considered in the products households are purchasing and undertaking actions like regular repairs that would see decreased amounts of waste ending in landfill.

¹ <https://www.abs.gov.au/statistics/environment/environmental-management/waste-account-australia-experimental-estimates/latest-release#data-download>, accessed 20 July 2021

Findings in the Federal Department of Agriculture, Water and Environment's *National Waste Report 2020*² released in November 2020 provide further support for these trends, with the report acknowledging that a significant accumulation of plastics is occurring in the built environment, with many longer-lived consumer products contributing to landfill³. In addition, while technological change is changing the types of waste and quantities produced (for instance, the shift from paper to digital communications is leading to less paper wastage), the quantity of e-waste items is growing strongly, albeit while the weight of these wastes is rising more slowly (as items get lighter)⁴. The report also observes that while government policy shapes community expectations and behaviours, community expectations also drive government policy with the report acknowledging that in general, Australians support waste reduction and recycling and want to see more of it, with the policy focus shifting from waste management to a more integrated push to develop a circular economy⁵.

Finally, the OECD's *Environment at a Glance Indicator - Circular economy - Waste and materials*⁶ recently confirmed that at the international level and in the context of managing increasing amounts of waste, 'the use of raw materials from natural resources and the related production and consumption processes have environmental, economic and social consequences in countries and beyond national borders'.

In discussing the challenge that most countries are confronting in generating increasing amounts of waste, the report noted that only a few countries have been successful worldwide in decoupling the rate of total waste generation from its population and economic growth. Rather, the OECD observed that the amounts of waste generated have been rising since the 1990s, in line with private consumption expenditure and a country's corresponding GDP. In particular, the OECD's data shows that the amount and composition of municipal waste varies among OECD countries and can be linked to levels and patterns of consumption, urbanisation rates, income levels, lifestyles and national waste management practices. As a result, the OECD's report calls for a broadening of end-to-end waste-management approaches to better manage waste and its indirect impacts, specifically including consumer-friendly policies such as eco-design, reuse, repair, refurbishment, re-manufacturing and extended producer responsibility schemes.

Conclusion

From the ACT's perspective, the Productivity Commission's Inquiry into the Right to Repair offers Australian Governments an opportunity to consider strengthening and better enforcing the ACL's consumer guarantees – such as enabling consumers to better understand about a product's manufacture and durability – to help them make informed decisions about the products they choose to buy while potentially resisting the manipulation of manufacturers. This can flow into effecting change in supply chains when consumers request a repair of a good that they still enjoy using and have a preference for, above purchasing a new replacement.

Within this context however, the ACT believes it is critically important that the perspectives of manufacturers are not only considered but form a key part of the solutions that can come about if

² <https://www.environment.gov.au/system/files/pages/5a160ae2-d3a9-480e-9344-4eac42ef9001/files/national-waste-report-2020.pdf>, accessed 20 July 2021

³ Ibid at page 45.

⁴ Ibid at page 105.

⁵ Ibid at page 105.

⁶ <https://www.oecd.org/environment/environment-at-a-glance/Circular-economy-waste-and-materials-May-2020.pdf>, accessed 20 July 2021.

we work together to change the current dynamic of high product turnover, product obsolescence and e-waste. This includes working together to ensure increased amounts of recycled materials are used in manufactured products, incorporating recycling and repair methods into the design of products and designing in-house stewardship programs that can enable manufacturers to collect and reuse their goods.

The ACT Government believes these challenges offer many opportunities for governments and manufacturers to use consumer friendly policies that can drive new and evolving innovation, provide consumers with better products and over time, see Australia become a leader of recycling techniques here and globally.