



interactive games & entertainment association

## **Submission to the Productivity Commission**

Right to Repair Issues Paper

**February 2021**



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## Background

### Who is IGEA?

The Interactive Games & Entertainment Association (IGEA) is the industry association representing and advocating for the video games industry in Australia, including the developers, publishers and distributors of video games. IGEA also manage The Arcade in South Melbourne, Australia's first, not-for-profit, collaborative workspace created for game developers and creative companies that use game design and technologies. We are also known for organising the Game Connect Asia Pacific (GCAP) conference for Australian game developers, and the Australian Game Developer Awards (AGDAs) celebrating the best Australian games of each year.

IGEA's membership includes the makers of the three most popular video game consoles in Australia: Microsoft (*Xbox*), Nintendo (*Switch*) and Sony (*PlayStation*). These companies also make hand-held controllers and other accessories for these consoles, while Microsoft and Sony also make a range of other consumer electronic products. Other IGEA members who are relevant to this consultation include Google and the Australian manufacturers and distributors of various game-related devices and accessories.

You can find a list of IGEA's members on our website: <https://igea.net/about/members>.

### Video game: a snapshot of the players and the industry

Video games are enjoyed by over a third of the world's population. Estimated to have been worth around \$250 billion in 2020, our sector is one of the largest and fastest-growing creative and entertainment industries in the world. The video games sector has recently become even more critical, as globally it has remained a resilient segment of many countries' economy and workforce despite the broader disruptions caused by COVID-19 and related social lockdown measures. Most importantly, video games have unexpectedly become a vital tool during COVID-19 for:

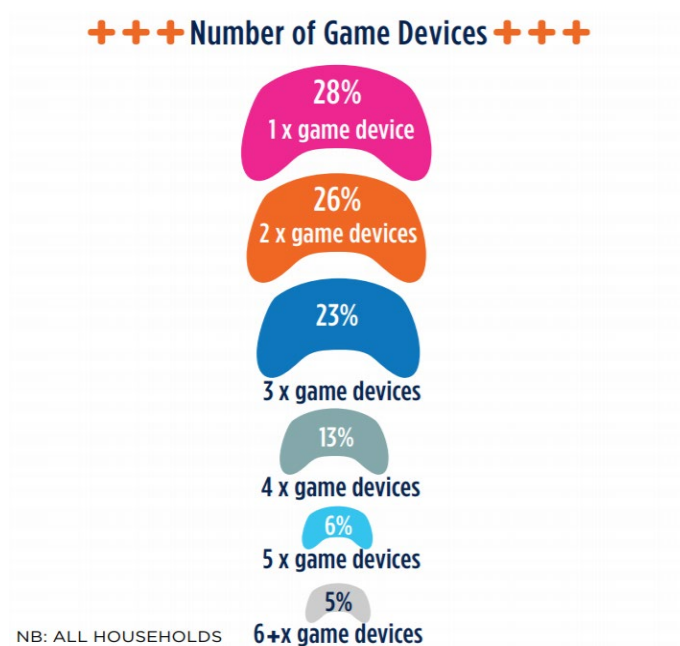
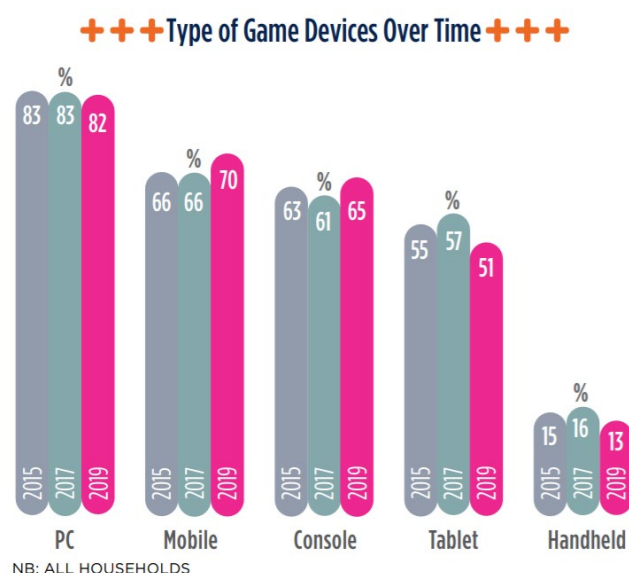
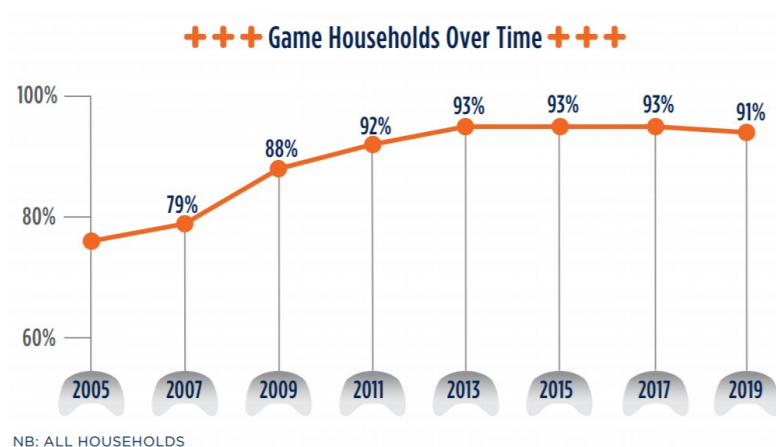
- encouraging and helping people to comply with social distancing and to self-isolate at home
- keeping people positive and occupied at home while they self-isolate
- enabling people to stay active via consoles and games that facilitate exercise, such as fitness, simulated sport, dancing and virtual reality games and apps, and
- allowing people to stay connected to their family and friends via the social and community-interaction features of consoles, devices and games.

Video gaming is one of the most popular ways for Australians to unwind and enjoy their time. According to our Digital Australia 2020 research, conducted by Bond University, approximately two-thirds of all Australians play video games.<sup>1</sup> Our research also tells us that nine out of ten Australian households have at least one device on which video games are played and almost three-quarters have more than one such device. Three-quarters of households have at least one video game console, while altogether the most common devices that Australians play games on are (in descending order) PC, mobile, consoles, tablets and handheld.

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<sup>1</sup> <https://igea.net/wp-content/uploads/2019/08/DA20-Report-FINAL-Aug19.pdf>

## Proportion of Australian households with video game devices



Source: IGEA, Digital Australia 2020

## Video game consoles: a unique and competitive ecosystem

While some of our members make or distribute a wide range of products, which may include both gaming and non-gaming products, our submission focuses on video game consoles (collectively referred to in this submission as “consoles”). Consoles are physical electronic devices that must be connected to a screen (such as a TV) and are primarily used for playing video games using a game controller, which are also typically manufactured by the console maker.<sup>2</sup> Video games for playing on these consoles are commonly developed by third-party developers (although all three console makers also develop their own games) and are downloaded directly onto the console, accessed from physical media such as an optical disc or cartridge, or sometimes even streamed. All three consoles are, to varying degrees, not just gaming devices but multimedia centres too, with added functionality such as playing physical media or streaming online videos.

At the outset, it is important for this consultation that the Productivity Commission (the “Commission”) understand the unique characteristics of the video game console ecosystem, which is different to most, if not all, other consumer product sectors in Australia and the world. The Commission’s Issues Paper at page 12 recognises that consumer harm, such as from repair prices that are higher than they would be in a competitive market, is likely to be limited if the market for the primary product is highly competitive. As we believe that video game consoles are one of the most competitive kinds of consumer products of any kind, we argue that any questions about competition in repair markets as they relate to our sector must be seen in the context of the overall competitiveness of the primary console market.

There are three primary consoles that are currently the most played in Australia and worldwide, the Microsoft *Xbox* series of consoles, the Nintendo *Switch*, and the Sony *PlayStation* series of consoles. Consoles are loosely categorised into ‘generations’. The current generation of the Microsoft *Xbox* is the *Xbox Series S / X*, while the current generation of the Sony *PlayStation* is the *PlayStation 5*, with both consoles having recently been launched in November 2020. Their predecessors, the *Xbox One* and the *PlayStation 4*, were both launched in 2013 but remain popular and continue to be well-supported by their makers. The Nintendo *Switch*, which was released in 2017, is a unique hybrid console that can be connected to a screen or played as a standalone handheld device.

The console ecosystem is an open, transparent and highly-competitive environment. Microsoft, Nintendo and Sony (collectively referred to in this submission as “console makers” or “console manufacturers”) invest heavily into ensuring that it is easy for game developers and publishers, most of whom are unrelated parties, to release games on their consoles. It is commonplace for popular video games to be available across multiple consoles (with the exception of the small number of games that are exclusive to certain consoles) as well as on other platforms like PC or mobile. Given that customers often have many choices in terms of what console to play a game on, and the fact that games are also commonly played on other devices like PC, tablet and mobile, competition for customers is fierce between the console makers. Console makers are therefore heavily

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<sup>2</sup> ‘OEM’ controllers and other accessories made by the manufacturer are treated as part of the console for the purposes of this submission.

incentivised to keep the cost of their devices low and to offer high-quality after-purchase care, such as in-warranty and out-of-warranty repair and replacement services.

Consoles are typically priced in the hundreds of dollars, inclusive of at least one controller and sometimes bundled with other products like games. Considering the hundreds of millions of dollars or more of investment that is needed to design and create a console (which is far more R&D than is put into most other kinds of consumer products of a similar price point), the fact that consoles often have specifications that resemble or exceed those of much more expensive high-end computers, the versatile multimedia uses of consoles, and the potentially thousands of hours of use that a typical family will enjoy with a console over many years, the relative purchase cost of consoles is very low.

Due to the low cost of consoles and their high resale or trade-in values, even after many years, the switching cost to consumers is low. In fact, video game consoles arguably have the highest resale value as a proportion of their original cost of any everyday consumer product in Australia. Further, unlike many other products, video game consoles have few, if any, consumables or regular maintenance costs, with the exception of the purchase of new games or gaming services. The low cost (and low switching cost) of consoles and other gaming devices means that it is easy and common for Australian households to own multiple gaming devices.

*A Nintendo Switch console (bottom left) being demonstrated in Parliament House*



Source: IGEA, Launch of the Parliamentary Friends of Video Games, Canberra, December 2020

Finally, while it is not within the scope of this inquiry, the video games sector also prioritises the digital repair and enhancement of all video game software, including those with faults. For example, video game developers and publishers regularly release updates or patches that repair or improve their games to ensure they are of high quality, to maintain player engagement, to add content, and to improve the playing experience.



## Summary of key points of this submission

Our submission responds to each of the Information Requests in the Issues Paper, with a focus on the console market. For the Commission's ease of reference, we have summarised the key themes of our responses in this section of our submission.

**The video games sector is already focused on making sure players own robust and problem-free consoles, including by providing repair or replacement services to their customers that are offered 'at-cost' or 'near-cost' by all three console makers.**

Consoles do not follow the business model of most other kinds of products since (some would say unusually) it is not in the interest of their manufacturers for consoles to need to be replaced or repaired. The sale of consoles themselves are not major profit-generating activities, with consoles typically sold at – or only slightly above – the cost of making them. It has also been widely reported that at least some consoles may be sold at a loss on a per-unit basis during at least the early phase of their release. As revenues are primarily generated through the sale of games and services, rather than the sale of consoles or their servicing, it is instead in the vested interest of console manufacturers to design reliable devices and to provide extensive and affordable servicing, repairs and replacements to customers. Unlike the vehicle servicing industry, for instance, which the Issues Paper notes is a key component of the business model of car manufacturers, the servicing and repair of video game consoles is not a key source of revenue for their manufacturers, and repair and/or replacement costs are priced with cost-recovery as their goal, with at least some repairs and/or replacement services provided at below cost.

**The Commission must take an evidence-driven approach in its inquiry, including on the risks of right to repair, and if it concludes that the Government should consider a right, this right should not be broad but narrow and focused on areas of legitimate and proven concern.**

While the Issues Paper outlines no concerns that have been raised specifically about the video games industry, with consoles mentioned just once in a text box, we are concerned that a recommendation for right to repair policy would nevertheless affect our industry. As mentioned above, consoles are not like other products. Console manufacturers have a vested interest in designing their devices to last as long as possible without the need for repair or replacement. Consoles are also under constant attack from bad actors seeking to hack or tamper with them. Manufacturers must rely on specialised hardware design, firmware and software for defence: features that would be eroded by right to repair measures. Should the Commission make recommendations for right to repair policies, we urge it to avoid recommending broad and indiscriminate policies, but rather only precise and targeted measures focused on specific sectors or activities where it is demonstrated both that problems exist, and that a government response is needed.

**Console manufacturers are committed to providing their customers with access to remedies for goods that require repair, and we are not aware of any deficiencies in the ACL that prevent consumers from accessing such remedies.**

Console manufacturers take great care to uphold all consumer guarantees, rights and remedies under the ACL, not only because they take these responsibilities seriously, nor just to protect their reputations, but also because it is in their commercial interest for their customer's consoles to be in good working order. We are confident that console

purchasers have ready access to all relevant information about their rights, with both the manufacturers and retailers of consoles overwhelmingly open and transparent about their customers' rights and pathways for remedies, including but not limited to providing information at the point of purchase. Should the Commission identify potential gaps in the ACL, such as if inadequate consumer knowledge is found, they should be addressed in the context of broader consumer law reform or efforts to improve compliance and consumer information, rather than as a narrow right to repair issue.

**All console manufacturers offer accessible, thorough and cost-effective repair and/or replacement services. Their priority is product integrity, and they strive to ensure that if any consoles do require repair or replacement, these repaired or replaced devices are reliable and safe to use. It is appropriate for manufacturer's warranties to be able to be limited or voided if unauthorised modifications or repairs are carried out, with such terms necessary and existing solely to protect the integrity of consoles, the safety of console owners, and the manufacturer's commercial rights. Restricting how manufacturers can offer voluntary warranties will discourage them from offering them in the first place, leading to poorer outcomes for consumers. Nevertheless, there remains an independent and freely-operating repair market in Australia that co-exists with console manufacturers, and neither IGEA nor the manufacturers are aware of any concerns that have been raised by third-party repairers, publicly or privately, about competition issues.**

Given the vested interest of console manufacturers to ensure that their customers do not need to replace or repair their devices, all three manufacturers offer, in addition to mandatory guarantees under the ACL, additional voluntary warranties and comprehensive repair and/or replacement services. We strongly urge the Commissioner against recommendations to prohibit or restrict the ability of manufacturers to determine the circumstances around which their voluntary warranties will apply. Not only are terms that restrict or void a warranty in the event of unauthorised modifications or repairs of a product commonplace across multiple sectors, but for console manufacturers, they also act to protect their customers' consoles, reduce the risk of physical harm to their consumers, and to mitigate the risk of intellectual property (IP) infringement and other improper or illegal activities. It is not inappropriate, nor unreasonable, for console manufacturers to determine that their voluntary warranties should be limited or voided where the product is no longer the same as when originally supplied. An inevitable consequence of imposing restrictions on the ability of manufacturers to set conditions around their own voluntary warranties will be that fewer manufacturers, across all sectors, will be inclined to offer them to consumers.

**Few sectors face as many persistent and severe challenges to IP as video games, and a broad right to repair would hinder the ability of console manufacturers to fight widespread piracy and IP theft in Australia.**

According to the Australian Government's own data, one in five Australian game players illegally pirated video games in 2019, while one in three did so in 2018. To protect the IP of consoles and the IP of the games played on them (including valuable Australian-owned video game IP), console manufacturers implement firmware and software such as Technological Protection Measures (TPMs) designed specifically to act as digital locks and to fight hacking and piracy. However, one of the biggest IP-related threats facing our



industry is the modification or “cracking” of consoles to bypass TPMs to copy games illegally or to enable those devices to play illegally-copied games. The implementation of right to repair measures to theoretically make it easier for independent repairers to access consoles also provide the tools needed by hackers and pirates to break into consoles. While certainly not all independent repairers would willingly engage in facilitating IP theft, unfortunately there are some that do. Others might further, through inexperience, negligence or pragmatism, weaken the security of consoles they repair.

**‘Planned product obsolescence’ is not relevant to the video games sector and should not be used as justification for right to repair policy.**

One of the arguments raised in the Issues Paper for right to repair policy is the concept of planned product obsolescence, or the alleged strategy of designing a product purposely so that it becomes out-of-date or useless within a shorter than necessary period of time. At least with consoles, planned product obsolescence does not exist. Consoles follow a widely-accepted and predictable pattern of long-term generational releases where new generations of consoles are typically only launched every 5-8 years, with long-term support and repair services for older consoles provided by all console manufacturers. Further, given it is widely speculated that many consoles are sold at a loss on a per-unit basis at least during a part of their life-cycle, planned product obsolescence would be counter to the business model of console manufacturers.

**Video game consoles are likely to comprise only a tiny proportion of total e-waste in Australia. Due to consoles’ lengthy life cycle, durability-centred design, multi-purpose use, long-term resale value, and ease of environmentally-friendly disposal, there are no environmental reasons in our sector for a right to repair policy.**

Video game consoles likely comprise only a tiny proportion of e-waste in Australia due to their long-term generational life-cycles, high durability, alternative uses (such as being multi-purpose media centres) and substantial retained resale or trade-in value, even when no longer operating. Consoles are otherwise easily able to be collected by or taken to e-waste recycling centres due to their compact design and size. Further, we believe that as repairs carried out by the manufacturer’s own repair services are likely to be of higher quality than those carried out by an independent repairer, manufacturer-repaired consoles have a higher likelihood of not becoming e-waste.

**While we do not consider there to be evidence in our sector for any of the right to repair policies raised for discussion in the Issues Paper, and in contrast believe that there are compelling cases against considering them, we welcome further discussion with the Commission about any issues that it identifies during its consultation, and how Government can work with industry to address them.**

We urge the Commission to keep a balanced view when assessing competition issues and potential policy options regarding the repairs market. We note that the Commission in the Issues Paper already recognises that not all competition issues that are identified will require new regulation. Areas where there could be positive outcomes achieved include more robust enforcement of existing competition laws and additional efforts to raise consumer awareness of their existing rights. If, and where, genuine issues are identified about the video games sector, as the relevant industry body we would welcome in the first instance the opportunity to discuss collaborative or industry-led approaches to address them (such as industry codes rather than regulation).

## Specific responses to the Information Requests

### What is this inquiry about?

#### Information Request 1

a) What would a 'right to repair' entail in an Australian context? How should it be defined?

**The video games sector is already focused on making sure players own robust and problem-free consoles, including by providing repair or replacement services to their customers that are offered 'at-cost' or 'near-cost' by all three console makers.**

We will take the opportunity here to state at the outset that we do not believe there is any compelling evidence from our sector for the introduction of any right to repair policies. Consoles are mentioned just once in a text box in the Issues Paper and not in any substantive text. Further, our sector is very different from the other sectors and kinds of products that the Commission discusses far more frequently in the Issues Paper.

#### No commercial incentive for consoles to be replaced or repaired

Consoles do not follow the business model of all the other products that are mentioned in the Issues Paper (or most other products in any other market for that matter), in that it is not in the commercial interest of their manufacturers for consoles to need to be replaced or repaired. This is because in isolation, despite selling in their hundreds of millions of units worldwide, the sale of the consoles themselves may not necessarily be their manufacturers' most significant or important revenue-generating activity.

In fact, it is widely considered a norm that many modern high-end consoles, including within the current generation of consoles, have been sold to consumers at a loss to the manufacturer on a per-unit basis at least during the early stages of their release.<sup>3</sup> In other words, many commentators believe that every time a consumer purchases a newly-released console, there is a good chance that it comes at a net cost to the manufacturer.<sup>4</sup> This is a reasonable assumption when one considers the hundreds of millions, and potentially billions, of dollars of R&D that must be invested into developing a new console, let alone the manufacturing, marketing and distribution costs, that must then be sold at a competitive price point of no more than a few hundred dollars each.<sup>5</sup>

This per-unit loss can be accepted on a strategic commercial basis because consoles are sometimes referred to as 'loss leaders'. Console manufacturers seek to recover these losses and earn profit through the sale of their own games, from royalties extracted from the sale of games made by third-party publishers, as well as from other, newer form of income such as subscription revenue. However, this business model can only work if customers have well-functioning consoles, underpinned by a secure and technologically-stable environment, that allow them to purchase and play games.

<sup>3</sup> See, for example: <https://www.nytimes.com/2020/11/11/technology/sony-playstation-5-ps5.html>

<sup>4</sup> According to analysis from Citigroup, included in the link above, Sony is expected to lose as much as USD 100 on each USD 500 PlayStation 5 console that it sells.

<sup>5</sup> Also as outlined in the link above, improvements in production efficiencies mean that the per-unit loss to manufacturers from the sale of consoles may diminish over time, and may result in cost-neutrality or even profit later in their release cycle.

### Manufacturers repair consoles as a customer service – not a revenue stream

As console makers generate more profit from the sale of games and services than from the sale of the consoles themselves or the sale of repair services for those consoles, they have a vested interest in ensuring that their consoles are designed to be as long-lasting as possible. It is for this reason that all three console manufacturers design their products for long-term functional durability, including by investing heavily into innovative design, high-quality materials, extensive stress-testing and production techniques that result in the lowest possible manufacturing defect rate.

For the same reason, all three console manufacturers offer extensive and affordable services for customer support, repairs and/or replacements.<sup>6</sup> The servicing, repairs and replacement of consoles are not major revenue sources for their manufacturers, and all three console makers have priced these services with cost-recovery as their goal rather than profitability. Not only do all three console makers provide these services at-cost or near-cost, but we are also advised that at least some console makers provide some services at below-cost to ensure that they are cost-effective for the customer. This contrasts with the motor vehicle servicing and repairs industry, for instance, which the Issues Paper notes is highly connected with the automotive sales industry and provides a significant revenue stream for vehicle manufacturers.

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<sup>6</sup> Manufacturer-undertaken repairs of consoles typically involves either the manufacturer undertaking the repair or providing a replacement console to the customer, depending on the manufacturer, the circumstances, or sometimes the customer's preference. One reason why a manufacturer may choose to provide a replacement console rather than returning the (repaired) console back to the customer is that it may reduce the time the customer is without a console. References to repairs undertaken by manufacturers in this submission generally refers to both repairs and replacements.

## The Commission's approach to the inquiry

### Information Request 2

- a) What types of products and repair markets should the Commission focus on?
- b) Are there common characteristics that these products share (such as embedded technology and software or a high/low degree of product durability), and which characteristics would allow policy issues to be considered more broadly?
- c) If there are particular products that the Commission should focus on, what are the unique issues in those product repair markets that support such a focus?

**The Commission must take an evidence-driven approach in its inquiry, including on the risks of right to repair, and if it concludes that the Government should consider a right, this right should not be broad but narrow and focused on areas of legitimate and proven concern.**

We note that the Issues Paper outlines no concerns that have been raised specifically about the video games industry concerning right to repair issues. For example, while the Issues Paper mentions cars or vehicles over 40 times, and Apple 23 times, video game consoles are not mentioned in the substantive text and are only mentioned once briefly in a text box. However, we are nevertheless concerned that any potential recommendation from the Commission of broadly-scoped right to repair measures would almost certainly affect our industry.

#### Right to repair policies are not needed and may harm the games industry

As we have outlined, the video game console ecosystem follows a very different business model to almost any other product, with it being in the interests of both consumers and manufacturers that consoles last for as many years as possible without needing to be replaced or repaired. Another unique characteristic of our industry that is further discussed in this submission is that consoles face more vigorous and more persistent attacks from hackers, pirates and other malicious actors than arguably any other products, and therefore rely more than almost any other sector on specialised hardware design, firmware and software as in-built protection mechanisms. Efforts to implement a right to repair policy will, whether intended or not, also better arm these malicious actors and erode the ability of manufacturers to protect their products, the IP of game developers, and players themselves.

#### Targeted and collaborative approaches to areas of concern where possible

The solution we see is that should the Commission, following its consultation, consider that right to repair measures be considered further by Government, its recommendations for any measures should focus on specific sectors or products where problems exist, or where complaints are found to be justified. Further, any specific right to repair measures that may be recommended should be based on data, targeted and precise in terms of their scope and impact, pragmatically taking into account any risks associated with unintended consequences. We urge the Commission against considering broad or sweeping measures that would affect businesses indiscriminately regardless of need or effectiveness. For instance, one way to achieve a targeted, sector-by-sector approach could be through the use of industry codes, rather than imprecise regulation that may impose unnecessary red tape on some businesses or even entire market sectors.

## Existing consumer rights in consumer law

### INFORMATION REQUEST 3

- a) Do the consumer guarantees under the ACL provide adequate access to repair remedies for defective goods? If not, what changes could be made to improve access to repair remedies? Are there barriers to repairing products purchased using new forms of payment technologies, such as 'buy now pay later'?
- b) Is the guarantee of available repair facilities and spare parts effective in providing access to repair services and parts? Or is the opt-out clause being widely used, making the guarantee ineffective?
- c) Should consumer guarantees seek to balance the broader societal costs of remedy choices (such as the environmental impacts of replacements) with consumer rights, and if so how? For example, should repairs be favoured as a remedy?
- d) Are consumers sufficiently aware of the remedies that are available to them, including the option to repair faulty products, under the ACL's consumer guarantees?
  - If not, would more information and education be a cost-effective measure to assist consumers understand and enforce guarantees? What would be the best way to deliver this information? What other measures would be more effective?

**Console manufacturers are committed to providing their customers with access to remedies for goods that require repair, and we are not aware of any deficiencies in the ACL that prevent consumers from accessing such remedies.**

#### Support and compliance with the strong protections provided by the ACL

As outlined in the Issues Paper, the ACL provides a wide-ranging framework of consumer protections and guarantees. These include that goods must be of acceptable quality, must satisfy any express warranties, and must have spare parts and repair facilities reasonably available for a reasonable time. Where these guarantees are not met concerning a game console or accessory, customers are already able to obtain remedies they are entitled to, including a repair, or their choice of replacement or refund for 'major' problems.

When console manufacturers are contacted by customers who have encountered a problem with their device, they identify whether and what remedies the customer is entitled to with reference to both the consumer guarantees under the ACL as well as any applicable voluntary manufacturer's warranties that they offer (for example, a manufacturer may choose to extend their warranty if they believe doing so was in the interests of the consumer guarantees under the ACL, even if another remedy was also available via the supplier). Some console manufacturers have told us that they may offer a repair or replacement of a console in some circumstances, even where they do not believe there is a strict legal requirement to do so, on a case-by-case basis for other reasons including customer goodwill.

Console manufacturers take great care to uphold (and often going beyond) these guarantees and rights to remedies, not only because they take these legal responsibilities seriously, but because it is in their interest for their customers' consoles to be in good working order. Product integrity is a priority for console manufacturers, who want their consumers to be confident that if their consoles require repairs, those

consoles are still reliable and safe to use. To achieve this, all console manufacturers provide comprehensive, responsive and high-quality repair and/or replacement services in Australia. While for the reasons discussed it is likely that this level of support would already be offered even in the absence of legal obligations, such as to make available repair services and spare parts, the legal guarantees under the ACL are an essential minimum standard of expectation that we continue to support strongly.

#### Transparency around our players' rights and guarantees

The Issues Paper at page 6-7 highlights potential difficulties around enforcement of certain consumer guarantees under the ACL, including that it is often up to consumers to be aware of their rights and to pursue a remedy in the first instance.

We do not see any evidence that lack of consumer knowledge about their rights is a significant issue in our industry, with the manufacturers and chain stores involved in the console supply chain having highly-developed customer service infrastructure. While it is necessary that the primary onus is on individuals to be aware of their legal rights, console manufacturers take care to make sure they support their customers by providing transparent information about their customers' rights under the ACL as well as any additional rights they have under voluntary manufacturer's warranties. For example, console manufacturers already provide clear and fulsome information on rights and remedies in notices or documentation available at the point of purchase, within the product box and online, outlining information such as procedures for obtaining repairs. The console makers have reported to us that the vast majority of the customers who contact them seem to have a high level of awareness of their rights and access to remedies.

If the Commission does identify gaps in the existing ACL, we support those findings being passed on to relevant federal, state and territory agencies for action or reform. However, we do not believe that any such findings would necessarily demonstrate the case that right to repair policy is needed. Instead, other policies such as better compliance or outreach by government or industry to make consumers more aware of their rights (and their ability to enforce those rights) could be more effective. In other words, if the Commission does find that inadequate consumer knowledge about rights and remedies is a key concern, this issue should be dealt with directly, such as through consumer awareness campaigns, stronger communication to businesses about their obligations or, if necessary, consideration of industry codes to target sectors of concern.



## Competition issues in repair markets

### INFORMATION REQUEST 4

a) The Commission is seeking information on the nature of repair markets in Australia, including detailed data on the repair markets for specific products, covering:

- market size – by employment, revenue, number of businesses, profit margins
- market composition – such as market share between authorised, independent and DIY repairers.

b) Is there any evidence of a difference in quality, safety or data security between authorised repair networks and independent repairers? Are there ways to address concerns around quality, safety or data security while promoting a vibrant independent repair market?

c) Are there available examples of the contracts between OEMs and authorised repairers? Do these contracts limit effective competition in repair markets (such as by limiting the number and reach of authorised repairers or requiring authorised repairers to not be authorised by a competing brand)?

- What is the process to become authorised? Is it open and competitive?

d) Are there specific examples or other evidence of practices by OEMs or their authorised repairers that create barriers to competition in repair markets?

- Do other factors also create barriers to competition in repair markets, such as short-sighted consumer behaviours, switching costs, poor information availability or consumer lock-in?

e) What is the relationship between the intensity of competition in the primary product market and the risk of consumer harm from a lack of competition in repair markets? Can competitive primary markets compensate for non-competitive repair markets?

- Is an absence of effective competition in the primary market a necessary condition for consumer harm from non-competitive repair markets?
- To what extent would measures that enhance competition in the primary market address concerns about a lack of competition in repair markets?

f) Are the restrictive trade practices provisions of the CCA (such as the provisions on misuse of market power, exclusive dealing or anti-competitive contracts) sufficient to deal with any anti-competitive behaviours in repair markets?

g) What policy changes could be introduced if there is a need to increase competition in repair markets and improve consumer access to, and affordability of, repairs?

- What are the costs and benefits of any such proposal to the community as a whole? How does it balance the rights of manufacturers and suppliers, with those of consumers and repairers?

**All console manufacturers offer accessible, thorough and cost-effective repair and/or replacement services. Their priority is product integrity, and they strive to ensure that if any consoles do require repair or replacement, these repaired or replaced devices are reliable and safe to use. It is appropriate for manufacturer's**

**warranties to be able to be limited or voided if unauthorised modifications or repairs are carried out, with such terms necessary and existing solely to protect the integrity of consoles, the safety of console owners, and the manufacturer's commercial rights. Restricting how manufacturers can offer voluntary warranties will discourage them from offering them in the first place, leading to poorer outcomes for consumers. Nevertheless, there remains an independent and freely-operating repair market in Australia that co-exists with console manufacturers, and neither IGEA nor the manufacturers are aware of any concerns that have been raised by third-party repairers, publicly or privately, about competition issues.**

As discussed throughout this submission, console manufacturers focus on ensuring that their customers have well-functioning devices that last for as many years as possible. It is not in their commercial or other interest for their customers to need to replace or repair their consoles, and have committed to providing consumers with repairs or replacements that are easy, reliable, secure, accessible and affordable whenever necessary.

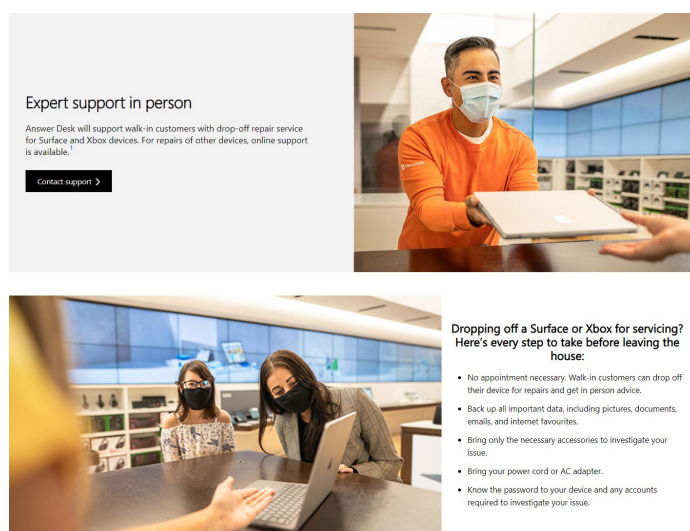
#### Support, repairs and remedies offered by console manufacturers

In addition to the mandatory consumer guarantees under the ACL, all three console manufacturers also offer voluntary – but enforceable – manufacturer's warranties that provide additional protections and rights for their customers. These may include access to certain remedies that might not otherwise be available under the mandatory consumer guarantees, such as the specific right to claim repairs from the manufacturer during the applicable warranty period, rather than just compensation. The availability of additional protections and repair services are a key area where the three console manufacturers compete heavily with each other to provide the best offering to their consumers.

Practical measures implemented by console manufacturers to support and fulfil their mandatory and voluntary commitments include:

- All console manufacturers operate or authorise physical facilities within Australia to carry out repairs and/or to facilitate the replacement of consoles. Customers may be able to drop their consoles off at these facilities in person, or they can easily send their console in for repair via post, via drop-off locations, or courier.

#### Microsoft offers walk-in and drop-off repairs and advice for Xbox consoles



Source: Screenshot from <https://www.microsoft.com/en-au/store/locations/answer-desk> (accessed 31/12/20)

- All console manufacturers provide free in-warranty repairs and/or replacement, and some offer affordable after-warranty repair options. As previously mentioned, in contrast to sectors like the automobile industry, in circumstances where a cost is charged for console repairs or replacement, fees are typically driven by cost-recovery rather than a profit, with the key goal being to ensure that their customers' consoles are always in good working order.
- Comprehensive remote support is available to help customers to troubleshoot their problems from within their own homes, such as online or help via phone.

#### Manufacturer's warranties and unauthorised modifications and repairs

In this part of the submission, we would like to take the opportunity to directly address the sole mention of video game consoles in Box 4 of the Issues Paper as possible examples of "warranty terms that void the warranty if repairs are undertaken by non-authorised repairers". This is a reference to the fact that the voluntary warranties of console manufacturers may not necessarily cover damage caused by modifications or repairs undertaken by non-authorised repairers, or may exclude consoles that have been modified or repaired by non-authorised repairers.<sup>7</sup> To avoid any doubt, these terms relate to manufacturer's warranties, which as we have discussed are in addition to mandatory guarantees under the ACL, and are offered entirely voluntarily by console manufacturers. As Box 2 of the Issues Paper notes, even though these warranties are offered voluntarily, they are also enforceable by the customer under consumer law.

First, we are puzzled and disappointed that the Issues Paper has listed consoles as the sole example of goods with such terms in their voluntary manufacturer's warranties. It is a standard practice of such warranties across a wide range of products sold in Australia to include specific exclusions that apply where unauthorised repairs and modifications have occurred. We note that the Issues Paper has questioned whether the purpose of such terms is to target the competitiveness of the independent repair market. Concerning our sector at least, this is positively not the case. To the extent that these terms are included in the warranties covering consoles, they exist necessarily and for the sole purpose of protecting the integrity of consoles and their manufacturers' own commercial rights, as well as to protect the safety of their consumers (discussed below).

Before we cover these points in greater depth, we note from our research in preparing this submission that it is a common term in warranties that we reviewed - spanning products from electronics and appliances to household fittings and outdoor equipment - for such exclusions to apply even where the subsequent fault is not obviously related to the unauthorised repair or modification carried out. Further, these warranties often include terms that list other circumstances (unrelated to unauthorised repairs or modifications) where the warranty may be limited or voided even where there is no apparent link with the subsequent fault.

For example, common exclusions that we came across included:

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<sup>7</sup> There appears to be an error in Box 4 of the Issues Paper, which lists the manufacturer's warranty covering Xbox One consoles as an example of one where the warranty is voided "if repairs are undertaken by a non-authorised repairer ... even where the repairs are unrelated to a subsequent fault covered by the warranty". Assuming that the terms have not changed since the Issues Paper was written, this example is incorrect. As at the time of writing this submission, Microsoft's [standard limited warranty](#) that covers Xbox consoles in Australia excludes specifically the "damaged caused" by unauthorised repairs or modifications only.

- where a serial number of a product has been removed or defaced
- where a product has been opened, disassembled or reassembled
- where a product has been installed or placed in an environment not specified by the manufacturer (even if that has not necessarily caused the fault)
- where a non-OEM consumable or spare part has been used with a product, and
- where there has been physical or verbal abuse towards a manufacturer's staff.

Other warranties that we saw also commonly held terms that excluded specific products in a range of products, or specific parts of a product, such as fragile elements.

### The real risks to consumers and manufacturers from unauthorised repairs

Video game consoles are highly complex technical devices that are built to exact technical and design specification, with each generation a culmination of years of R&D. In almost all cases, the repair of consoles requires specialist expertise to ensure that those repairs are performed to a standard of quality necessary for the consoles to continue working well, not just in the immediate term but for years to come. It is for this reason that all three console manufacturers provide comprehensive in-warranty repair or replacement services, and some also offer cost-effective after-warranty repair services.

#### *Dangers to consumers and consoles*

Manufacturers that operate their own repair facilities invest heavily to ensure that their trained repairers meet the required level of skill necessary to undertake repairs at a level of standard and quality that consumer law and consumers require. For instance, if an improperly-trained repairer installs a power supply for a console that has the wrong technical specification, or installs it improperly, it could cause a console to overheat, to consume far more energy than usual, and to damage other parts of the console. At worst, it could even deteriorate the console beyond repair possibility, causing a premature end to the console's life and forcing players unnecessarily to buy a new one. While of course problems like these will not necessarily arise with all independent repairers, they are more likely to arise with unauthorised repairs than repairs carried out by manufacturers.

Even more importantly, authorised repairers have the expertise needed to ensure that the console continues to comply with all relevant Australian electrical safety, radiation, radiocommunications, and energy efficiency laws, regulations and standards. Independent repairers who have not been appropriately trained not only have the potential to make an otherwise compliant device non-compliant (an obligation that the manufacturer has a requirement to keep), but incorrectly-performed repairs may also lead to serious dangers like electrical discharges that could damage the console or, more critically, harm its users. Manufacturers are also able to protect supply chain security by ensuring that counterfeit and/or compromised parts are not used to repair a console, a problem that has been identified in other parts of the consumer electronics market.

#### *Compliance and accreditation issues*

While some independent repairers undoubtedly provide high-quality services, it is impossible for console manufacturers to guarantee that repairs performed by third-party repair operators will respect the safety and security requirements of the console, or the quality standards that manufacturers are legally committed to and must honour. Not only

are console manufacturers unable to provide any oversight over independent repairs or repairers, including on important issues like electrical safety, but we are also unaware of any external oversight over independent repairers, such as by regulators or licensing bodies. Further, there is even no internal self-governance, standards-setting or accreditation for electronic repairers, such as by an overarching industry body. By contrast, the vehicle repairs industry is represented by various bodies including the Australian Automobile Repairers Association (AARA), the Australian Motor Bodies Repair Association (AMBRA), the Motor Trades Association of Australia (MTAA), and related state and territory bodies.

#### *Commercial and reputational risks*

As the Issues Paper recognises at page 10, there is a real risk to a manufacturer's reputation, as well as potential legal liabilities, if repairs are carried out poorly by third parties that lead to problems that could be erroneously attributed to product quality. Of course, in all circumstances where a manufacturer can reasonably determine that the customer is entitled to a remedy from them, they will meet their obligations. However, given that consoles comprise highly-interconnected hardware, firmware, software and accessories that work together in precise ways, a fault may be directly or indirectly, and wholly or in part, caused by unauthorised access, repairs or modifications even where that link may not be immediately apparent. For example, even a slight degradation to a console's cooling system caused by an unauthorised repair could cause another part of the system to overheat. However, it could take months for that part to become noticeably faulty, despite being directly caused by the weakened cooling. In these circumstances, a customer could be unable or unwilling to believe that the two issues are linked.

#### *Threats from malicious actors*

Finally, manufacturers also invest heavily in their own console repair or replacement services to protect their commercial rights. This is because authorised repairs, or the direct replacement of faulty consoles, help to protect a manufacturer's own proprietary components as well as the IP of third-party game developers. This presents a further reason why console manufacturers may consider it necessary to include conditions in their voluntary warranties against unauthorised tampering that, for the sake of argument, some may consider on the surface to be overly-caution terms.

Unlike almost all other products on the market, consoles face a real and ongoing threat from malicious actors, including hackers and pirates. These threats come in the form of players seeking to modify their consoles to facilitate IP infringement, to install software that may help them to cheat in games against others, to defraud the manufacturer by attempting to gain free credits or games, or to defraud other users. Some third parties also provide these often-illegal services to customers for a fee. And unfortunately, there is an overlap between these third parties and some independent repairers who offer these additional services secretly (and sometimes in plain sight). These risks are discussed in detail in our response to Information Request 5 below.

#### The importance of flexibility in setting the terms of voluntary warranties

We believe it is appropriate, as well as a longstanding and well-accepted practice, for a manufacturer to be able to set the conditions on which their own voluntary warranties will and will not apply. The challenges highlighted above mean that for some console

manufacturers, it may only be feasible and appropriate for them to offer their voluntary manufacturer's warranties on the condition that they may be limited or voided where the product is no longer the same as when originally supplied. Given that consumers can rely on the warranty for any necessary repairs to their console during the warranty period, and in any event are also covered by the mandatory guarantees under the ACL, we do not believe this approach is unreasonable or oppressive. Further, as the Issues Paper notes, the restrictive trade practices provisions of the CCA such as the provisions on misuse of market power, exclusive dealing or anti-competitive contracts already apply to the relationship between manufacturers and the repairs market. We argue that they send a sufficiently-clear message that warranty terms should not be used for the purpose of reducing competition.

We strongly urge the Commission against making any recommendations for the Government to consider restricting how manufacturers may offer their voluntary warranties. In particular, we encourage the Commission to not focus on warranties in isolation but to recognise that even where a console has been modified or repaired, a subsequent fault that may or may not be related to the alteration is still likely to be covered by the non-excludable consumer guarantees provided by ACL. In the event that the Commission finds that manufacturers are contravening these guarantees or the restrictive trade practices provisions of the CCA (which the Issues Paper does not suggest is occurring), or that there is confusion or inadequate consumer understanding of guarantees and warranties (noting that there is mandatory text about consumer guarantees that has to be included in voluntary warranty documents), then these are separate issues that can and should be dealt with directly.

Unfortunately, an unintended but entirely counter-productive consequence of imposing restrictions on the ability of manufacturers to set conditions around their own voluntary warranties is that many will decide to simply stop providing them or to scale them back to avoid further commercial and legal risks. Clearly, this would only lead to an inferior outcome for consumers and one that governments, industries and consumers would all be keen to avoid.

#### The scale of the current independent repairs market

To conclude our response to this section, and notwithstanding the key issues raised above, the Commission should also be aware that there remains an active, diverse and competitive independent repair market for consoles and other games-related devices. Many third-party repairers are small businesses or hobbyist with a strong online presence (for example, there is even a 'console repairs' category on online job marketplaces such as Airtasker). In addition to numerous independent repairers, some of the key retailers of consoles also operate their own repair services, leveraging their existing access to customers. In particular, EB Games operates its 'Reboot' service that enables any Australian console owner (not just existing customers) to bring their device into any EB Games store for repairs, cleaning and servicing. Given that EB Games operate well over 300 retail stores across all states and territories, they have an extensive reach and market that ensures there is strong competition in the console repair market. There is therefore no shortage of repair options for console owners.

Console manufacturers do not take any action to restrict or otherwise interfere with the independent repair market. Further, as they operate their own repair and/or replacement



services rather than to outsource these services to third parties, they do not give any segment of the independent repair market an unfair advantage over others. Finally, neither IGEA nor any of the console makers are aware of any concerns that have been raised, whether publicly or privately, from third-party repairers about competition issues in the local console repair market.

## Intellectual property protections

### INFORMATION REQUEST 5

a) To what extent do current IP laws already facilitate repairs by consumers or independent third parties (e.g. the spare parts defence under the Design Act)?

b) Are there any aspects of IP laws where consumers' rights with respect to repairs are uncertain?

c) Do current IP protections (e.g. intellectual property rights, technological protection measures, end-user licencing agreements) pose a significant barrier to repair in Australia? If yes, please comment on any or all of the following:

- the specific IP protections that prevent consumers from sourcing competitive repairs and/or inhibit competition in repair markets
- the types of products or repair markets these barriers mainly affect
- the prevalence of these barriers
- the impacts of these barriers on third party repairers and consumers (e.g. financial cost, poorer quality repairs)
- options for reducing these barriers and their associated benefits, costs and risks (including potential impact on market offerings).

d) In what ways might government facilitate legal access to embedded software in consumer and other goods for the purpose of repairs? What are the pros and cons of these approaches?

**Few sectors face as many persistent and severe challenges to IP as video games, and a broad right to repair would hinder the ability of console manufacturers to fight widespread piracy and IP theft in Australia.**

#### The Australian Government's own data on video game IP infringement

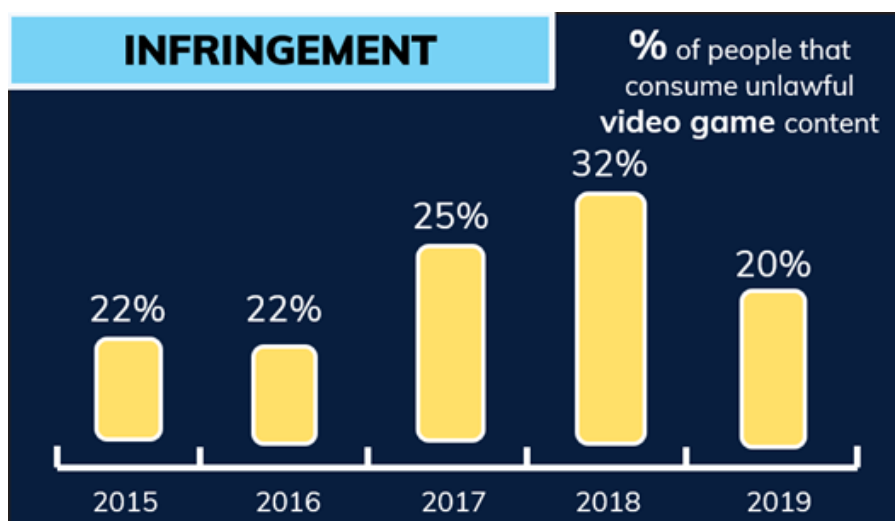
According to the Australian Government's own research, the copyright infringement of video games and other media remains pervasive in Australia, despite strong laws against the practice. Specifically, the (then) Department of Communications and the Arts' latest consumer survey on online copyright infringement conducted in 2019 found that:<sup>8</sup>

- 16% of Australian media consumers admitted to consuming at least some of their content illegally.
- One-in-five (20%) Australian video game players admitted to consuming unlawful video game content.
- Between 2015 and 2018, the proportion of Australian video game players who admitted to consuming unlawful video game content rose steadily from 22% to 32% (the study notes that the 'fall' from 2018 to 2019 may be caused by sampling differences rather than necessarily a reduction in Australians committing piracy).

<sup>8</sup> <https://www.communications.gov.au/documents/consumer-survey-online-copyright-infringement-2019>

- Over three-quarters of Australian game players (78%) who consumed free video game content admitted to consuming all or some of that content illegally.

Proportion of Australian game players who unlawfully consumed video games



Source: Department of Communications and the Arts,  
<https://www.communications.gov.au/sites/default/files/consumer-survey-on-online-copyright-infringement-2019.pptx>

As the Issues Paper acknowledges on page 10, the reasons why manufacturers may decline against dealing with independent repairers include the need to protect IP rights. Nowhere is that need greater than in the video games industry. Consoles are unique and different from other devices, appliances and consumer products as they are actively targeted by, and vulnerable to, attempts to commit IP theft. In our sector, there is a constant battle and arms race between manufacturers and malicious actors seeking to hack consoles and pirate games. As a result, console manufacturers have no choice but to invest heavily into efforts to protect their users, the integrity of the gaming experience, their own IP, and the IP of third-party game developers who rely on them for protection.

If third parties are given greater access to the tools to dismantle the security of devices which may be necessary to carry out repairs, such as through right to repair policies, this will inevitably lead to increased IP infringement, recognising that it would be impossible to differentiate between legitimate repairers and malicious actors. These issues are explored in this section.

Copying of console hardware and firmware and video game software

Console manufacturers have a responsibility for protecting not only their own console's sensitive operating systems, hardware and firmware, but also the software data from games developed by third parties that are played on the console (which the manufacturer may have given contractual commitments to the games' developers to protect). All of this highly-valuable IP is vulnerable to theft.

Some parties seek to break into consoles to reverse-engineer proprietary components, which can be the culmination of decades of R&D. Others seek to break into consoles so that they can copy the source code of installed video games. This data can then be copied an unlimited number of times and distributed or sold to others, harming the interests of game developers including Australian game developers (who have created

some of the most popular, valuable and exportable Australian creative IP of any kind). There are numerous parts of the internet, including torrent and file-sharing websites, where players can easily distribute and download illegally-copied video games for free.

Others still use copied firmware and software data to build unauthorised physical gaming devices, generally bundled with illegally-copied games, with some such devices violating hundreds or thousands of IPs. Unfortunately, these kinds of devices are readily available for sale in Australia, with many businesses brazenly selling them on their own websites, on social media, in online marketplaces and through word of mouth. For example, IGEA has previously been contacted by a distraught consumer who had paid thousands of dollars for a custom arcade machine from a small unauthorised Australian workshop that specialised in building illegal physical gaming devices. The arcade machine was sold with pre-installed games, but when the customer realised those games had been illegally-sourced and attempted to return the machine, the workshop refused.

As of the time of writing, some of these devices are even being openly sold in highly-reputable physical and online retail stores, with those stores presumably unaware that those devices are illegally infringing on the IP of video game publishers.<sup>9</sup>

#### Breaching technological protection measures (TPMs) in consoles

A further way in which right to repair policies will harm our industry's ability to protect its IP is by giving third parties with a greater ability to physically manipulate or modify individual consoles (often referred to as "modding", "chipping" or "cracking") to enable them to play illegally-copied versions of games. This occurs through the removal or disabling of security software such as TPMs that console manufacturers implement in their consoles, and are vital to the effective prevention (or at least minimisation) of IP infringement in our sector.

TPMs are also some of the most effective deterrents against the infringement of video game IP. TPMs include protection and authentication software and mechanisms that check the game to ensure that it is a legitimate copy. The deployment of TPMs by console manufacturers benefits all game creators, not just platform holders. TPMs underpin the entire video game ecosystem and the willingness of developers to invest the tens or hundreds of millions of dollars that it can take to innovate their products and to develop new games. With a secure hardware system in which to create and publish new games, developers, who are often small-to-medium-sized creative businesses, are more willing to make the financial investments necessary to support the development of new games. This in turn benefits the consumer who has a wider array of games and interactive experiences to enjoy. TPMs have allowed the games industry to move beyond packaged goods and to embrace new digital technologies and distribution models.

However, TPMs are vulnerable to modding or tampering, and once third parties have access to a console's firmware and the ability to modify it, they become ineffective. In Australia and around the world, hackers, pirates and other malicious actors have created a black market and are constantly attempting to crack consoles. For instance, a console may be modified to remove the TPMs that recognise that a disc inserted into it is an illegally-copied version, or the TPMs that recognise that a film being played via the device

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<sup>9</sup> We have chosen not to provide examples in a public document, but can provide some confidentially upon request.

has been pirated. Once it has been cracked, the console could enable any number of illegally-copied games to be played on it, facilitate widespread piracy and the theft by its owner of thousands of dollars of IP from many game developers and publishers.

#### Beyond IP theft: other risks of modding or cracking consoles

While TPMs are vital to our industry's fight against IP theft and piracy, TPMs have many other consumer and platform security-focussed uses, including some that are equally important or even more so. For example:

- TPMs help consumers who have purchased a game to be able to move it between their devices or to reinstall the game if they lose their device. They also enable existing software to be securely updated and patched.
- TPMs help to protect players' digital assets such as their personal information and content they have acquired within games. In this way, they help to stop malicious and unauthorised third parties from accessing consumer information or stealing content that other parties have acquired.
- TPMs also underpin vital online safety controls on consoles and enable parents to place digital locks over what their children play or access.
- TPMs deter console hacking that some players perform in an attempt to give them an advantage against other players, such as by installing cheating software.

While we have focused on IP as that is the topic the Commission has specifically sought views on, attacks on consoles are not just carried out for piracy-related reasons. Some players or third-party 'repairers' may also seek to hack consoles to install cheating software to give the player an unfair advantage against others or to remove vital firmware such as protections against online, fraud and privacy-related harms (vital shields provided by the manufacturer) in a misguided belief that it may increase the performance of the console. Disabling or corrupting a console's security system or installing unauthorised software will not only make the device more unstable and unreliable, but it will also likely cause performance issues that could be maliciously or mistakenly blamed on the console itself or on affected games, leading to reputational and potentially commercial risks for our industry.

Finally, where untrained or insufficiently-trained individuals attempt to tamper with their devices, it also creates a significant electrical risk that can cause great harm not only to the device but to themselves (or their customers). If the modified console is then on-sold to another party, these risks would unwittingly transfer to them.

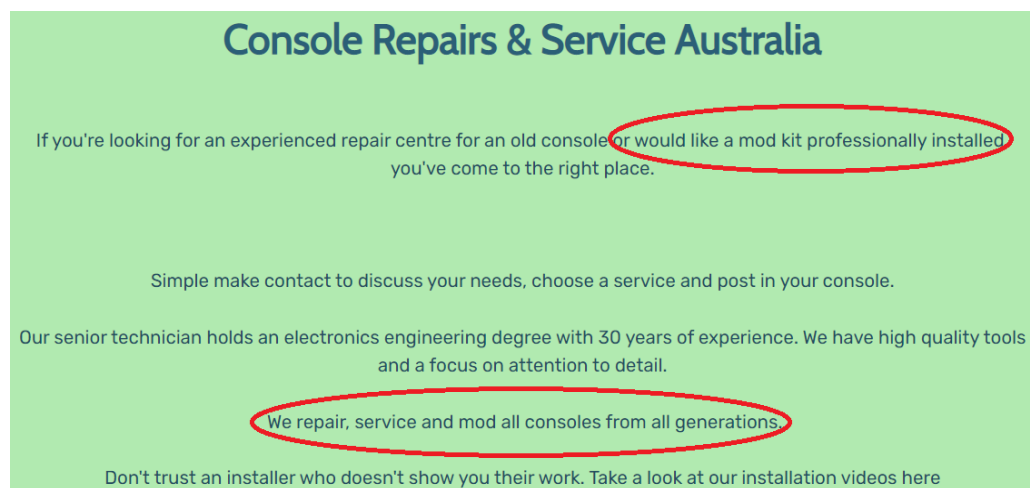
#### The blurred line between legitimate repairers and malicious actors

The modding, chipping or cracking of consoles typically need to be carried out by skilled technicians and may be undertaken as a commercial service. As the Issues Paper notes on page 8, independent repairers are often DIY and self-repairers, and this is no different in our sector. At the outset, we note that there are many independent repairers in Australia that are highly trained and professional. However, in our sector (and potentially uniquely in our sector) there are also repairers with the ability and willingness to offer both legitimate and illegitimate services. While most repair shops might not seek to use repair methods for illegal purposes such as the removal or disabling of a device's security

features, some would likely, while others might inadvertently weaken a system's anti-piracy and security settings during the course of their repairs.

This is not a hypothetical risk, but one that has existed for decades, and still exists today. It is an unfortunate reality that there remains a linkage between IP-infringing behaviour and some independent electronic repairers, including both hobbyists as well as electronic repair shops. Modding, chipping or cracking services, such as for facilitating IP infringement, are sometimes advertised publicly, or more commonly, privately through word of mouth or online communities. In addition to the sale of modding services, these third parties may also offer for sale "pre-modded" consoles. This submission's author has both personally encountered a bricks-and-mortar repair shop in Sydney that has offered such services, as well as seen the sale of these services and pre-modified consoles advertised online (see below). The relative prevalence of independent repairers that also offer modding services is likely aided by the fact that, as previously discussed, there is no external or internal governance or oversight, nor professional licensing or accreditation framework, of the independent electronic repair market.

Some independent repairers offer both repair and "modding" services



*Source: Screenshot from the website of an Australian console repair business easily found via a search engine (accessed 31/12/20). While not all "modding" of consoles have a primary purpose of circumventing copyright protections to enable the console to play illegally-copied games, it is arguably the most common purpose.*

Unfortunately, we believe that one of the negative impacts of right to repair policies, such as legislation to force greater access to hardware and embedded software in consoles, is that it would erode the ability of console manufacturers to make their products resistant to tampering and copying and would be a tool used by hackers, pirates and other malicious actors to expand their illegitimate practices. In particular, making available to independent third parties unfettered access to detailed information on repairability, such as diagnostic tools and detailed repair manuals, as well as proprietary components of a console such as certain spare parts, would create enormous risks to their own IP and the IP of other third-party game developers.

For example, a requirement for a console manufacturer to design their products in a specific way or to make available certain tools or proprietary parts to hypothetically make it easier for independent repairers to access internal components will also hand these tools over to malicious actors. A requirement for a manufacturer to make available to



repairers technical specifications would carry even broader risks. This is because there will be no way for manufacturers to prevent those specifications, such as a console's security roadmap and how to disable them for repairs, from subsequently being published widely or passed on to malicious actors.

For all of these reasons, we do not believe that it is possible to develop and implement even a narrow right to repair policy in a way that will not also aid IP-infringing activities. Attempting to balance right to repair with protecting manufacturers through a legislative framework, such as by prohibiting repairers from leveraging right to repair to facilitate IP infringement, would be an ineffective solution that exists on paper only, as decades of existing copyright laws and penalties have generally been unable to stem piracy. The reality is that even the most robust laws prohibiting IP infringement have little meaningful impact on changing piracy behaviour and, for our sector at least, practical measures like TPMs are not only at the top of the list of tools that we have available to fight IP theft, but it is also one of the only available tools.

## Planned product obsolescence strategies

### INFORMATION REQUEST 6

- a) What evidence is there of planned obsolescence in Australian product markets? Do concerns about planned obsolescence principally relate to premature failure of devices or in them being discarded still working when more attractive products enter the market?
- b) How can the Commission distinguish between planned product obsolescence and the natural evolution of products due to technological change and consumer demand?
- c) How does planned obsolescence affect repairers, consumers and the broader community in Australia?
- d) What measures do governments currently use to prevent planned obsolescence or mitigate its effects (in Australia and overseas)? How effective are these measures?
- e) What are the benefits, costs and risks of Australia adopting measures similar to those currently used overseas, such as product design standards and reparability ratings?
- f) Do consumers have access to good information about durability and reparability when making purchases? If not, how could access to information be improved?

**‘Planned product obsolescence’ is not relevant to the video games sector and should not be used as a justification for right to repair policy.**

One of the arguments discussed in the Issues Paper for right to repair is the concept of planned product obsolescence, or the hypothesised strategy of manufacturers deliberately designing version of their products so that they will become out-of-date, useless or irrelevant within a shorter than necessary period of time. This is a widely debated and disputed concept, with the Issues Paper at page 19 noting the difficulty in distinguishing between “the rapid change of products in response to technological change compared to deliberate attempts to reduce a product’s lifespan”.

#### The long-term ‘generational’ nature of video game consoles

At least concerning consoles, planned product obsolescence is a concept that is not only an irrelevant issue, but is an idea that is antithetical to their business model. This is because video game consoles follow a widely-accepted, predictable and transparent pattern of long, generational cycles. The key characteristic of this landscape is that new generations of consoles are typically only released approximately every 5-8 years. For example, there was a seven-year gap between the release of the Microsoft *Xbox Series X / S* and the Sony *PlayStation 5* in November 2020, and the release of their preceding generations of consoles in 2013. This is illustrated in further detail in the box below.

This practice of generational console releases means that whenever a consumer buys a new console, they know that it will be many years before a subsequent generation of consoles is released. While updated versions of consoles may be released within a generation, the changes are generally minor or cosmetic. For example, updated consoles may carry technical improvements, may be slightly smaller, or may be released in new colours. They are also generally aimed not towards players who already own that generation of console, but rather to attract brand new consumers.

### Year of first release of select major video game consoles

Microsoft	Nintendo	Sony
<i>Xbox</i> (2001)	<i>64</i> (1996)	<i>PlayStation</i> (1994)
<i>Xbox 360</i> (2005)	<i>GameCube</i> (2001)	<i>PlayStation 2</i> (2000)
<i>Xbox One</i> (2013)	<i>Wii</i> (2006)	<i>PlayStation 3</i> (2006)
<i>Xbox Series X / S</i> (2020)	<i>Wii U</i> (2012)	<i>PlayStation 4</i> (2013)
	<i>Switch</i> (2017)	<i>PlayStation 5</i> (2020)

Source: IGEA

### Older consoles and games: far from obsolete and just as useful

Even when a new console generation comes out, consumers know that they will still be able to play their existing games and/or their existing consoles for years to come due to a number of consumer-focused initiatives taken by the industry. These include:

- Major game developers and publishers typically release versions of their games that are compatible with both new and previous generations of consoles, or separate versions of those games for each console generation, for years even after the release of a new console.
- The design of new consoles for “backwards compatibility” enables them to play games designed for the previous console. For example, the *PlayStation 5* can play most *PlayStation 4* games, while the *Xbox Series X / S* can play most *Xbox One* games.
- The expanded role of many modern consoles into becoming multi-use media centres means that even if their owners choose to no longer play games on them, such as because they own a newer console, those older consoles still have significant value and usefulness. For example, many consoles are also DVD players and support apps from video streaming services.

Finally – and most importantly – console manufacturers have continued to actively provide support for older consoles well beyond the reasonable expectation of manufacturers in most other sectors. It is common for older console generations to still be manufactured and for spare parts to be available for many years after the release of newer consoles, and older consoles continue to be supported through updates and repairs. Microsoft, Nintendo and Sony still provide core functionality and support for the *Xbox 360*, *Wii* and *PlayStation 3* respectively, despite those consoles being first released in the mid-2000s, to ensure that owners of that generation of consoles can still enjoy them. For example, even though Sony released the *PlayStation 5* in November 2020, it still released a system software update for its 14-year-old *PlayStation 3* the following month.

## Current management of e-waste in Australia

### INFORMATION REQUEST 7

a) What data are available on the amount of e-waste generated in Australia?

- What data is there on the composition of e-waste in terms of particular materials (such as hazardous materials) by product type?
- How does hazardous e-waste compare to hazardous general waste in its prevalence and risks? Is there merit in distinguishing between hazardous e-waste and non-hazardous e-waste? And if so, how could this be done in practice?

b) What estimates are available on the costs of e-waste disposal on the environment, human health and social amenity, in Australia and internationally?

- How do the impacts differ by disposal type, or by the type of product or hazardous material?

c) How much of Australia's e-waste is shipped overseas for recycling? Is there evidence of circumstances where this creates problems for recipient countries?

- Are there barriers to the expansion of domestic recycling facilities or the adoption of new recycling technologies in Australia (such as plasma arc incinerators)?

d) What are Australia's current policy settings for managing the potential environmental and health effects of e-waste (such as landfill bans, the National Television and Computer Recycling Scheme or Mobile Muster)? Are these policy settings broadly right – that is, are they proportional to the impacts of e-waste on the community?

e) How can a right to repair policy further reduce the net costs of e-waste in Australia, and would such an approach be an effective and efficient means of addressing the costs of e-waste to the community?

**Video game consoles are likely to comprise only a tiny proportion of total e-waste in Australia. Due to consoles' lengthy life cycle, durability-centred design, multi-purpose use, long-term resale value, and ease of environmentally-friendly disposal, there are no environmental reasons in our sector for a right to repair policy.**

#### Older consoles and e-waste: many reasons to keep and few to dispose

First, as previously discussed, consoles are designed and built for long-term durability as it is in the interest of both manufacturers and consumers that devices operate for as long as possible without needing to be replaced or repaired. Manufacturers offer repair services for older consoles, and given that repairs carried out by the manufacturer will often be of much higher quality than repairs carried out by an independent repairer, right to repair policy is likely to lead to more – not fewer – consoles going into disrepair and eventually turning into e-waste.

Second, just because a console is an older generation does not mean it is no longer enjoyed – meaning that owners have little reason to dispose of them. Unlike other kinds of products like kitchen appliances and household equipment, which will often be disposed of when their owners obtain a newer replacement, older consoles are typically kept so that their owners can enjoy nostalgic or 'retro' gaming, or to enable their children to experience older games. Also, as previously discussed, many consoles are also multi-

purpose media centres able to stream online videos, play physical media such as DVDs and load content from disc drives, depending on the device. This means that rather than throwing them out, many families choose to keep using their console even after they no longer play games with it or have replaced it with a newer gaming console.

Third, there is unlikely to be any other common consumer product with as high retained-value as gaming consoles. Many older consoles remain valuable because they are highly sought-after by the gaming community due to their cult followings and the unending popularity of nostalgic or 'retro' gaming. This means that owners of older consoles are highly incentivised to trade them into stores for credit or to sell them directly via online platforms rather than to turn them into e-waste. By way of example, as at the time of writing, *Nintendo Wii* consoles, which were released in 2006, were easily selling on eBay Australia for a minimum of \$100, with some special-edition versions selling for over \$300.

### Trade-in values of previous generation consoles offered by a major retailer

## Retro Consoles

MODEL	ALIVE	DEAD
PlayStation 2 (Original)	\$40	\$12
PlayStation 2 (Slim)	\$50	\$15
PlayStation 2 (New Look)	\$55	\$15
Xbox (Original)	\$12	\$6
GameCube	\$75	\$35
Game Boy Advance SP	\$45	\$12
Game Boy Advance	\$15	\$7
Nintendo 64 (N64)	\$125	\$60
PlayStation 1 (Original)	\$25	\$10
PS One	\$35	\$12
Game Boy Color	\$40	\$20
Game Boy Pocket	\$15	\$7
Game Boy (Original)	\$25	\$10
Super Nintendo (SNES)	\$80	\$35
SEGA Mega Drive	\$60	\$30
Nintendo Entertainment System (NES)	\$50	\$20
SEGA Master System	\$40	\$20
ATARI Lynx	\$15	\$7

Source: Screenshot from the 'The Gamesmen' store website, <https://www.gamesmen.com.au/trade> (accessed 31/12/2020)

Finally, even where a console is inoperable, there are many options for environmentally-friendly disposal or recycling. First, unusually for any product, some stores will provide store credit even for consoles that no longer work. As seen in the example above, even some non-working consoles from the 1980s can be easily exchanged for store credit. Also, while we are confident that video game consoles are less likely to be disposed of than almost any other products, they are accepted by all e-waste recycling centres, and their small size means they are easy to be collected or dropped off.

## Possible policy options to address barriers to repair

### INFORMATION REQUEST 8

- a) What policy reforms or suite of policies (if any) are necessary to facilitate a 'right to repair' in Australia?
- b) Are there any other barriers to repair and/or policy responses that the Commission should consider?
- c) What are the costs and the benefits of the various policy responses that have been proposed to facilitate repair (such as those outlined in table 1)?
- d) Are there other international policy measures or proposals that the Commission should consider as part of this inquiry?

**While we do not consider there to be evidence in our sector for any of the right to repair policies raised for discussion in the Issues Paper, and in contrast believe that there are compelling cases against considering them, we welcome further discussion with the Commission about any issues that it identifies during its consultation, and how Government can work with industry to address them.**

In addition to the Information Requests, the Commission's Issues Paper also raises or flags specific potential policy options, as well as listing some international approaches. As requested, we have provided a summary of our views on each of the policy ideas raised, albeit recognising that, as the Issues Paper states at page 25, those ideas do not necessarily represent the Commission's position or direction of thought. Our views are outlined in the table commencing on the following page.

As a general concluding comment, we urge the Commission, in considering its policy options, to take a balanced and practical view over potential competition issues regarding the repairs market, recognising that 'right to repair' does not exist in a policy vacuum but is affected by, and in turn can affect, other policy issues including but not limited to IP or red tape reduction. We note that the Commission in the Issues Paper already recognises that not all potential issues that are identified will require new regulation. Areas where positive outcomes could be achieved without new regulation include stronger enforcement of existing competition laws and additional efforts to raise consumer awareness of their rights.

In the unlikely event that specific issues are identified in relation to our sector where the Commission considers that an active response is needed, IGEA as the relevant industry body would welcome in the first instance the opportunity to discuss collaborative or industry-led approaches to address them. On the other hand, if the Commission ultimately chooses to make broad recommendations that will impact sectors where right to repair issues have not specifically been identified or raised (such as ours), an approach we have already stated our opposition to, it should do so as thoughtfully and as practically as possible. For example, any broad recommendations should recognise that their implementation can be achieved in flexible ways and that an opportunity should first be provided to industry bodies to work out the most appropriate way to implement them for their respective sectors, such as through sector-specific voluntary industry codes.



## IGEA's response and feedback to policy options raised in the Issues Paper

Issues Paper: Possible policy option	IGEA's response and feedback
<i>The provision of additional information to consumers at the point of sale, such as information relating to consumer rights, product reparability or warranties (p. 7)</i>	<p>All three console manufacturers already provide this information clearly, including on mandatory consumer guarantees, voluntary manufacturer's warranties, and the repair and/or replacement solutions they provide. In addition, it is also relevant to note here that more so than almost any other product, consoles are exhaustively discussed online by commentators and other third parties, with significant analysis and discussion available that dives deep into all aspects of consoles, including their reparability.</p> <p>While it is our observation that console buyers are generally highly informed customers, we are happy to consider further guidance on how our industry can be even more transparent if needed.</p>
<i>Clarification of what 'reasonable' means in relevant ACL provisions (such as in relation to the availability and time period of repair supplies) for given products (p. 7)</i>	What will constitute a 'reasonable' period, for instance in terms of availability and time period of repair services, will differ drastically from product to product. Having a set period which could be met in one sector would be unreasonable or unachievable for others.
<i>The rationale for the use of 'opt-out' clauses for the provision of spare parts and repair facilities (p. 7)</i>	Not relevant to our sector. All three console manufacturers offer extensive repair and/or replacement services for their devices.
<i>The availability of consumer guarantees for business products over the value of \$100 000 (p. 7)</i>	Not relevant to our sector. Video game consoles are relatively inexpensive multi-purpose consumer products with a long life.
<i>Compliance with, and enforcement of, consumer guarantees as they relate to consumers' ability to obtain repairs (p.7)</i>	We are not aware of any evidence that the existing consumer guarantees regarding repairs are ineffective, nor of any non-compliance in our sector, nor that customers face difficulties in obtaining repairs (or replacements). The business model of console manufacturers is dependent on their customers having stable and well-functioning gaming systems.
<i>To the extent it can be demonstrated that some IP protections are a significant barrier to repair in Australia, one way of addressing this barrier is by introducing new defences or exceptions to IP laws for repairs (p.16)</i>	<p>The Australian Government has already responded to the Commission's 2016 inquiry into Intellectual Property Arrangements and decided against adopting Fair Use or significantly expanding the current fair dealing and specific exceptions framework.</p> <p>Reform of copyright policy to indirectly address an unrelated policy objective, such as to create a new specific exception for independent repairers, is unwise and</p>

Issues Paper: Possible policy option	IGEA's response and feedback
	<p>impracticable. Further consideration of this issue, where absolutely necessary, must only be progressed via holistic copyright reform.</p> <p>Finally, we note the position that the US Government has taken in enacting Section 1201 of the <i>Digital Millennium Copyright Act</i> (DMCA), which makes it illegal to bypass TPMs. While limited exemptions were granted for certain repair markets through its triennial rulemaking proceedings, the US Government specifically excluded video game consoles from this exception in recognition of the vital role that TPMs play to safeguard games and harms to third parties if TPMs were circumvented.</p>
<p><i>Introducing regulations to ensure product reparability (p. 20)</i></p>	<p>As the Issues Paper recognises, this would impose compliance costs on manufacturers, likely reduce the range of products available to Australian consumers, and likely increase the prices of products.</p> <p>As the Commission undoubtedly appreciates, all product design is a balancing act between different priorities, and with consoles, this includes matters such as security, accessibility, consumer safety, unit size, aesthetics, battery performance, hardware specifications, drive space as well as reparability. Setting rules that would require product reparability to be prioritised above these other important design considerations may not be in the best interests of either consumers or manufacturers.</p> <p>Further, policies intended to notionally improve product reparability would directly arm malicious actors with the tools to better hack consoles to commit IP theft, fraud and other crimes, while also encouraging inexperienced consumers to try to repair their devices themselves, potentially causing harm to themselves and their devices.</p> <p>Rather than looking at unnecessary regulatory approaches, the Commission should focus on whether outcomes for consumers are being met. In the case of our sector, all three console manufacturers prioritise customer satisfaction, including by investing heavily in their repair and/or replacement solutions to meet both their mandatory obligations and voluntary commitments.</p>

Issues Paper: Possible policy option	IGEA's response and feedback
<p><i>Duty to deal – requirements for OEMs to provide independent repairers fair access to parts, tools and/or repair information (p. 25)</i></p>	<p>We would not support a 'duty to deal' as it would lead to less durable consoles due to lower quality repairs, jeopardise consumer safety, and increase the risk of IP theft, not only via the copying of proprietary internal components but by those who would use the duty as a tool to copy games illegally more easily or modify consoles to play pirated games downloaded from the Internet.</p> <p>Because most parts of a console contribute to an encrypted system protected by TPMs to preserve the device against hacking and game piracy, console manufacturers cannot directly provide spare parts or similar diagnostic software to independent repair companies without compromising console systems and technology as well as safety. This issue is heightened by the fact that due to the lack of accreditation or licensing of independent repairers, it may be impossible for a manufacturer to tell the difference between a skilled or unskilled repairer, or a legitimate repairer and a malicious hacker.</p> <p>Notwithstanding the above, from a purely practical perspective, the console manufacturers have not reported having been contacted by third-party repairers seeking repair information or access to parts or tools. This suggests that there is no evidence that 'duty to deal' would even be beneficial to the independent repair market. We also note that even if there were a 'duty to deal', there is still a cost barrier where tools and diagnostics equipment may inherently be too costly for some independent repairs.</p>
<p><i>Obligations on manufacturers to produce spare parts for a specific period (p. 25)</i></p>	<p>We strongly prefer the current approach under the ACL of manufacturers being required to have spare parts available for a 'reasonable period'. As discussed above, what will constitute a 'reasonable' period will differ drastically from product to product. It is unlikely to be possible to mandate a specific set period that works for all.</p>
<p><i>Product design standards for easy product disassembly (p. 25)</i></p>	<p>As discussed in this submission, product design is a complex balance of several competing priorities, including security, safety, functionality, accessibility, aesthetics and reparability (among many other considerations). This makes product design a highly challenging area for regulation, as complying with product design standards for</p>

Issues Paper: Possible policy option	IGEA's response and feedback
	<p>easy product disassembly may only be achievable by having them prioritised over other design priorities. At worst, such product design standards may potentially even compromise physical design barriers that some manufacturers put into place to prevent electrical discharges or to make their devices resilient against hacking, piracy and other attacks by malicious actors.</p> <p>While we are not supportive of this policy approach generally, should the Commissioner ultimately decide to make a recommendation for such product design standards, we would encourage the Commissioner to consider making the recommendation that any such standards be principles-based, flexible and drafted in close consultation with affected industries. There is a risk that if certain standards prove to be unworkable, then some products in our sector or others may be withdrawn from sale in the Australian market.</p>
<p><i>Product information and labelling about reparability and product durability (p. 25)</i></p>	<p>We believe that this approach, in principle, could be considered further, as long as any proposed product information and labelling requirements are not unduly burdensome for manufacturers to implement and take into account the ease of access to repairs or replacements provided by the manufacturer. However, given that these laws currently only exist in France and only came into force in January 2021, a more prudent approach may be to wait and see how those laws operate in practice first before considering whether they are appropriate for use in Australia.</p>
<p><i>Laws prohibiting planned product obsolescence (p. 25)</i></p>	<p>We believe this policy option carries significant risk. While planned product obsolescence is antithetical to how the console ecosystem works, we are generally concerned that certain design considerations - such as designing a console in a way that appeals aesthetically to consumers or is resistant to IP theft - could be erroneously considered to be planned product obsolescence. The Issues Paper itself recognises this tension on page 20.</p> <p>We also note that France is the only territory in the world that has currently passed or enacted such laws and that so far, there have</p>

Issues Paper: Possible policy option	IGEA's response and feedback
	been very few examples where cases have been successfully prosecuted.
<i>Extended guarantee periods and longer periods where burden of proof of fault lies with the firm (p. 25)</i>	Of all the possible options flagged in the paper, this one arguably extends the farthest outside the reasonable scope of 'right to repair'. Extending guarantee periods is a significant and far-reaching policy change. We are unaware of evidence, either concerning the repair market or otherwise, that suggests such a major change is needed. Should this idea be considered further, which we do not support in the strongest terms, it must be incorporated into the broader ACL reform agenda and considered holistically.
<i>Subsidies for repair (p. 25)</i>	We have no view on this policy option.

## **Any questions?**

**For more information on any issues raised in this submission, please contact  
IGEA's Director of Policy & Government Affairs, Ben Au**

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