CENTRE FOR A WASTE-FREE WORLD

Submission to the Productivity Commission Draft Report "RIGHT TO REPAIR"

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ABOUT US

QUT Centre for a Waste-Free World is a multidisciplinary research centre that utilises scientific knowledge to develop, and implement new waste technologies and processes using social science knowledge to catalyse change and reduce the social, environmental and economic costs of waste by transforming it into valuable circular commodities. The research focuses of the Centre include

» the elimination of waste (prevention)
» moving materials from a state of waste into a state of value (post-waste)
» fostering behavioural change and education surrounding waste and the circular economy
» designing new economically viable solutions for waste
» developing new regulatory or governance approaches that facilitate change.

The following submission is made on behalf of the QUT Centre for a Waste-Free World with input from multidisciplinary experts in the disciplines of law, science, design, and robotics.

1. INTRODUCTION

The Centre for a Waste-Free World supports the Productivity Commission's examination of the 'right to repair' and the draft recommendations that have followed from its inquiry. We understand that this inquiry into the right to repair is being undertaken in conjunction with other actions by the Federal Government in support of the circular economy, including: the Treasury's proposed scheme for the mandatory sharing of car repair information, the recent review of the *Product Stewardship Act 2011*(Cth), and the ACCC's 2020 enquiry into agricultural machinery and the after-sales market (which includes examination of an agricultural right to repair). This inquiry also coincides with significant ongoing US policy developments on the 'right to repair'

The Centre broadly supports the reform recommendations made by the Commission and believes that the adoption of these recommendations, via legislative changes and supporting frameworks, would positive contribute to slowing the consumption of resources/materials in line with the aim of a circular economy. We also support the Productivity Commission's recognition of the fact that various factors currently restrict the ability and capacity of citizen-consumers to utilise 'repair' options. For example, corporate practices, design considerations, and lack of infrastructure and knowledge. The Productivity Commission subsequently acknowledges that enabling the right to repair is multi-faceted, requiring various regulatory, cultural and economic changes. We agree that progress towards a right to repair engages consumer and competition law, intellectual property, product design, labelling standards, and environmental and resource management. We also agree that Australia needs to implement appropriate legislative and policy responses that aim to generate, support and encourage the right to repair generally, and the right for consumers to access domestic repair services specifically. The implementation of such laws would bring Australia more in line with the US, EU and Canada's approaches to the right to repair. Finally, we acknowledge that expanding the domestic repair market could bring about substantial social benefits, including job-creation, and overall support a green recovery for the Australian economy as it emerges from the COVID-19 pandemic.

2. THE 'RIGHT TO REPAIR' AND THE CIRCULAR ECONOMY

2.1 About 'Repair'

Repairing products is not a new concept. Repairing and recycling broken domestic goods has been prominent throughout society's history. As an everyday activity, repairs and maintenance

were undertaken by individuals to extend the useful life of goods that were often of high cost but also of higher economic and affective value.[1]

Knowledge, skills and materials for disassembly and repair were readily available in the home or in local communities. For example, it was customary to repair garments in the home or buy parts to fix small electronics. Sewing skills were passed down generationally and taught in schools. However, in today's digital consumer economies and throwaway societies, these manual skills of repair are being lost and outpaced by technological advancements incorporated into a growing number of consumer products.

As noted in the commissioner draft report, the concept of the 'right to repair' describes a consumer's ability to repair faulty goods, or access repair services, at a competitive price.

Internationally, the right to repair is being examined and steps to support a resurgence in this space, can be witnessed in both the United States of America and the European Union. For example, the right to repair in the United State was first considered within the automotive industry. Automotive right to repair came into effect in the summer of 2012 when the Massachusetts Legislature passed, granting motorist's the right to access spare car parts.[2] Twenty states have since followed suit.[3] Furthermore, in 2021, President Biden signed an executive order in support of the right to repair, specifically highlighting its ability to support competition within the marketplace.[4] Currently, right to repair legislation in the US does not generally impact directly on the design of objects.

In comparison, pursuit of the right to repair in the European Union focuses on design and resource management, and is subsequently addressed in environmental law as part of resource management. The most notable contribution in this area from the European Union is the Eco-Design Directive. This policy came into effect in 2021,[5] and established broad design requirements for products, setting minimum standards related to the availability of spare parts, ease of disassembly, product durability and longevity, recycling, and energy efficiency measures, including access to spare parts and software for up to 10 years.[6]

2.2 Pursuit of the 'Right to Repair' in Australia

Overall, to significantly address waste as an environmental problem, regulatory, cultural and economic changes are required beyond merely enabling an individual's right to repair. Hence, any regulatory developments on the right to repair needs to form part of a broader set of changes to production and consumption practices to address material consumption and waste

[1] Gianenrico Bernasconi, 'Technical Cultures of Repair, from Prehistory to the Present Day' (23 August 2018) <https://networks.h-net.org/node/73374/announcements/2236555/technical-cultures-repair-prehistory-present-day>.
[2] 'Automotive', *The Repair Association* <https://www.repair.org/automotive>.
[3] James Seddon and Darrell West, 'President Biden's Right to Repair Order Needs Strengthening to Aid Consumers', *Brookings* (14 July 2021) <https://www.brookings.edu/blog/techtank/2021/07/14/president-bidens-right-to-repair-order-needs-strengthening-to-aid-consumers/>; Leanna Wiseman and Kanchana Kariyawasam, *US and EU Laws Show Australia's Right to Repair Moment Is Well Overdue* (2020) <https://research-repository.griffith.edu.au/bitstream/handle/10072/394848/Wiseman417315-Published.pdf?sequence=2&isAllowed=y>.
[4] 'Executive Order on Promoting Competition in the American Economy', *The White House* (9 July 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.
[5] Leanna Wiseman and Kanchana Kariyawasam (n 3).
[6] European Union, *DIRECTIVE 2009/125/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL* (21 October 2009) <https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32009L0125&from=EN>.

generation. The right to repair should not be interpreted or reduced to an individual's right to consume in the way they choose, and should be part of a broader movement towards a circular economy.

Ultimately, regulatory developments in relation to the right to repair, should be positioned within the broader policy support for the development of a circular economy, which is being pursued by Australia and other jurisdictions internationally. Despite an acknowledgement that the repair of products can encourage the growth of the circular economy, the current draft report fails to outline why this is the case.

The circular economy is an alternative economic approach, centred on resource efficiency and regenerative systems,[7] and is being actively pursued domestically within the National Waste Policy and Action Plan,[8] to guide waste management practices.

Centred on an aim for products and materials to maintain their useful life for as long as possible, the circular economy aims to reduce the consumption of natural resources, by generating production and consumption 'loops' for materials, allowing them to be used for additional production applications within the economy. To do this, the circular economy focuses on reuse, repair, repurposing, redesigning and recycling activities, with a preference for increasing services, as opposed to the mass consumption of goods, in order to support economic growth.[9] Subsequently, the circular economy dictates that products produced for use within this system should be designed to be re-used, repaired, reprocessed and, least preferably, recycled.[10]

[7] Geissdoerfer et al (n 8) 759.
[8] Australian Government Department of the Environment and Energy, *National Waste Policy. Less Waste, More Resources* (2018) <https://www.environment.gov.au/system/files/resources/d523f4e9-d958-466b-9fd1-3b7d6283f006/files/national-waste-policy-2018.pdf>; Federal Government Department of the Environment and Energy, *National Waste Policy Action Plan* (2019) 41 <https://www.environment.gov.au/protection/waste-resource-recovery/publications/national-waste-policy-action-plan>.
[9] Especially for individuals from high-income countries consume around 10 times higher quantities of materials than low-income countries. To address this, a reduction in the individual consumption of high-income countries to allow a levelling out of consumption to meet basic needs within low-income countries will need to become a focus of decision makers. See United Nations Environment Programme, *Resource Efficiency for Sustainable Development: Key Messages for the Group of 20* (International Resource Council, 2018) <https://www.resourcepanel.org/sites/default/files/documents/document/media/thinkpiece_-_resource_efficiency_-_key_messages_for_the_g20_270818.pdf>.
[10] Eléonore Maitre-Ekern, *Environmental Law and Economics -The Choice of Regulatory Instruments for a Circular Economy*, vol 4 (Springer International Publishing, 2017) 312 <https://link-springer-com.ezp01.library.qut.edu.au/content/pdf/10.1007%2F978-3-319-50932-7.pdf>; Ellen MacArthur Foundation, 'What Is the Circular Economy?' (1 July 2020) <https://www.ellenmacarthurfoundation.org/circular-economy/what-is-the-circular-economy>.

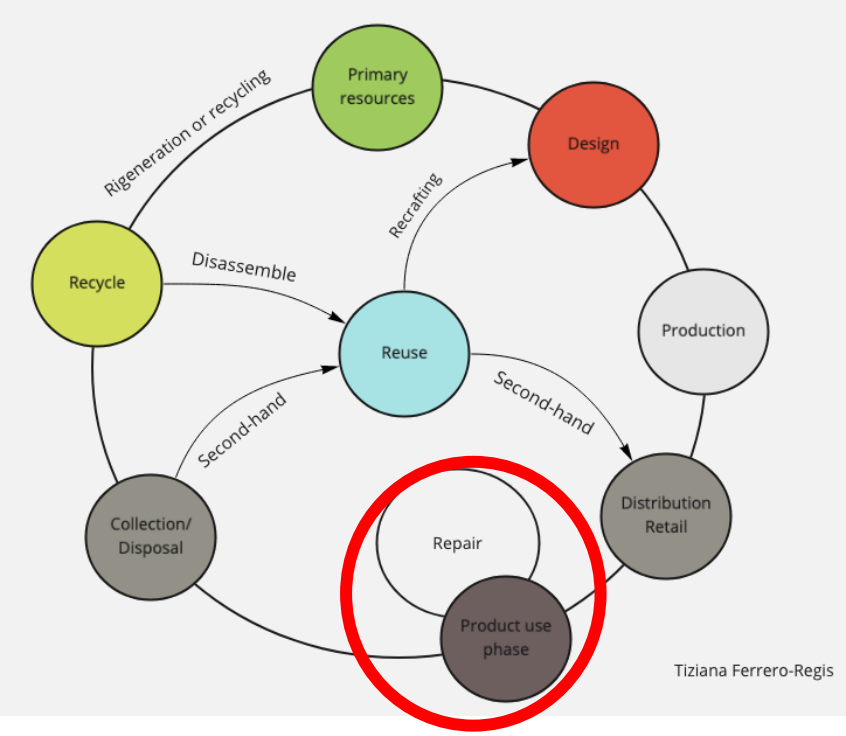

Diagram 1: Repair situated in the product use phase within the circular economy.

Research often links the achievement of a circular economy with the United Nations Sustainable Development Goals (SDG), particularly SDG 12, which relates to Sustainable Production and Consumption.[11] This suggests that considerations made in accordance with progressing a circular economy, should incorporate social, environmental and economic concerns, as well as afford weight to the ability of future generations to fulfil their needs.

Ultimately, supporting the 'right to repair' can contribute to extending the material 'loop' for products within a circular economy. This is because 'repair' allows for a product to maintain, and even extend its useful life in its original form (in other words without material degradation).[12] Furthermore, supporting the 'right to repair' can encourage the growth of additional service-based businesses that aim to stem instances of material consumption that would otherwise occur when a product breaks. It also allows for the creation of high-skill repair jobs. In fact, in accordance with Australian economist Richard Denniss, a community that repairs its goods *'would employ more people, per dollar spent, than a community that instinctively disposes of them'*, and would '*create more high-skill jobs and reduce the cost of living*.'[13] As such, generating and supporting a 'right to repair' would allow for an extension of the useful life of products, support jobs creation, and uphold Australia's pursuit of the circular economy.

[11] Sustainable Development goal 12 is featured alongside the circular economy within Australia's 2018 National Waste Policy. See National Waste Policy (n 5) 7, 8. Also see United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN Doc A Res 70/1 (21 October 2015, adopted 25 September 2015) 14.
[12] Leanne Wiseman and Kanchana Kariyawasam, 'Revisiting the Repair Defence in the Designs Act (2003) in Light of the Right to Repair Movement and the Circular Economy' 15, 145.
[13] Katherine Wilson, 'Mending Hearts: How a "Repair Economy" Creates a Kinder, More Caring Community', *The Conversation* <http://theconversation.com/mending-hearts-how-a-repair-economy-creates-a-kinder-more-caring-community-113547> ('*Mending Hearts*').

3. SUMMARY OF RECOMMENDATIONS MADE IN RESPONSE OF THE DRAFT REPORT

3.1 Need to afford weight to social and environmental concerns

Review of the commission's draft report highlighted the current conflict between a consumer's right to repair and manufacturers' business models. Citizens and small businesses may be harmed by the lack of right to repair, and some manufacturing companies may be harmed if the right to repair was implemented. We suggest this is a narrow way to frame the issue of the right to repair. Enabling the right to repair has the potential to mitigate future environmental harms and to create sustainable employment, and these considerations should subsequently carry weight.

Overall, the inquiry, and its recommendations, lack sufficient emphasis on avoiding environmental harms caused by the difficulties associated with the lack of ability to repair goods. Yet, the right to repair, as described above, forms part of a circular economy and realising sustainable development more generally. As such, environmental and social concerns should form the basis of decisions made and laws implemented to promote sustainable, circular production and consumption, and the right to repair.

The circular economy is more than a waste management tool, and is instead a strategy for addressing larger resource use and sustainability matters. Reducing future harm to environments and public health from e-waste, plastic waste and other wastes associated with consumer goods, should be regarded as both intrinsically and instrumentally vital in this instance.[14] Broader recommendations could be developed around the right to repair that focuses on how to reduce environmental harm through enabling repairs, and also how to generate sustainable, meaningful employment in repair and maintenance jobs.

3.2 Assessment of Consumer Harm

The Commission is seeking views on its preliminary assessment of the criteria use to determine *'competition in key repair markets'* as outlined in the draft report on page 12. Although we agreed with the vast majority of criteria in this assessment, we did not agree with the inclusion of the criterion: *'consumers are not compensated by lower prices in the primary market.'*

Although it is understood that in certain consumer product markets, initial high prices would impede the ability of consumers to access new and possibly more environmentally friendly technological advancements, the inclusion of this criterion continues to perpetuate the preference for ongoing consumer material consumption, over the circular economic aim for reduced consumption and prolonged products lifespans.

[14] Jurgita Malinauskaite and Fatih Buğra Erdem, 'Planned Obsolescence in the Context of a Holistic Legal Sphere and the Circular Economy' [2021] *Oxford Journal of Legal Studies* gqaa061, 12.

It is arguable that advances in manufacturing technologies and artificially cheap and offshore manufacturing has reduced purchase prices. These lowered costs are separate to and irrespective of a product's actual lifecycle cost. Lower prices and more consumer products have encouraged the unsustainable increase in consumption and the phasing out of the pursuit of repair in the first instance. Ultimately, offsetting the establishment of a right to repair in favour of maintaining low purchase prices for consumer product consumption, should not factor into this assessment. This criterion does not assist in promoting the right to repair, and is operationally contrary to the aims of the circular economy overall.

3.3 Need to investigate and enhance manufacturer responsibilities and avoid over-emphasising consumer responsibility

It was noted that the recommendations proposed by the commission in the draft report focused mainly on individual consumers pursuing rights against manufacturers. This is seen through the large focus on reforming existing Consumer Laws that is considered in the draft report. The over-emphasis on individual consumer's actions negates consideration of ways in which manufacturers can take greater responsibilities for supporting the right to repair, and of broader structural changes that are required to meaningfully enable a right to repair.

In saying this, we support the suggestions made to provide regulators with alternative dispute resolution processes to assist consumers to resolve their claims, and enable designated consumer groups to lodge 'super complaints' fast tracked by the ACCC about consumer guarantees. Such measures would go a way to addressing these imbalances, but more needs to be done. Specifically, greater onus must be imposed on manufacturers, rather than the ongoing focus on consumers.

One possibility for addressing this is to recommend, and work towards, mandatory due diligence legislation consistent with the EU and broadly similar to the *Modern Slavery Act 2018* (Cth). Manufacturers should be required to draft and publish reports about what they are doing to enable repairs of their products and/or what they are doing to address waste in their supply chains.

Product Stewardship legislation was discussed by the commission within the draft report. Although the recommendations made with regards to this legislation is supported in this submission, it is noted that the schemes under this legislation are extremely limited in scope. As such, the effects of the recommendations proposed under the draft report would in relation to the Product Stewardship Act, although supported, would be limited and should be supported by additional governance approaches. For example, an alternative perspective to consumer product ownership and repair is the concept of consumers leasing or subcontracting products that would be returnable to the manufacturer. Such an arrangement would create reverse logistical flows and require manufacturers to repair and process their own products.

3.4 Introduce general fair use exemption rather than a specific exemption for repair

We note that the Productivity Commission has considered the role of intellectual property rights in preventing repair, and has made recommendations for amendments to Copyright laws (also noted as a defense in the *Design Act 2003* (Cth)).[15] A broader, open-ended exemption for 'fair use' of materials subject to copyright law has long been supported by leading IP scholars in Australia and globally.[16] The problem with merely adding 'repair' as a general exemption under 'fair dealings', is that such a specifically worded exemption could unintendedly limit the potential application of this exemption for unintended actions that may be associated with, or necessary to the act of repair, but may not be itself an immediate act of repair. For example, depending on how this exemption is worded and defined, a specific 'repair' exemption may not extend to actions undertaken in pursuit of extending a products lifespan, for example, product maintenance. Yet, by contributing to the prolonging of a product lifespan, these acts should also be exempt.

Instead, simplifying the exceptions to copyright, by replacing multiple existing exceptions associated with 'fair dealings' with a more general 'fair use' exemption will bring Australia more in line with international best practice and will better enable a repair culture. Various factors could be legislatively prescribed to determine fairness that would enable repair (as seen in the US). Failing the introduction of a broader and unified exemption to copyright, we support 'repair' being incorporated as a fair dealing under the existing copyright regime I.e. that a specific exemption be created for repair. Manufacturers should be prevented from removing the operation of the exemptions under the Copyright Act via contractual terms.

[15] See Wiseman and Kariyawasam (n 2), discussion on this exemption and on the court case of f GM Global Technology Operations LLC v SSS Auto Parts Pty Ltd. Says the repair defence 'falls far short of the right to repair that many consumers are now looking for.' Held that the 2020 revision of the *Designs Act 2003* (Cth) is a lost opportunity for taking into account national policy developments that promote reparability.
Other notions being undertaken by government - include the Treasury's proposed scheme for the mandatory sharing of car repair information, the Final review of the Product Stewardship Act 2011 (Cth) which "acknowledged the need to improve our capacity to better design, re-use, repair and recycle the goods we use"; the ACCC's 2020 enquiry into agricultural machinery and the after-sales market (which includes examination of an agricultural right to repair) and the call for the Productivity Commission to conduct an enquiry into the right to repair.
[16] See, eg, Kylie Pappalardo and Brian Fitzgerald, 'Copyright, Fair Use and the Australian Constitution' in Brian Fitzgerald and John Gilchrist (eds), *Copyright Perspectives* (Springer International Publishing, 2015) 125 <http://link.springer.com/10.1007/978-3-319-15913-3_8>; Patricia Aufderheide et al, 'Calculating the Consequences of Narrow Australian Copyright Exceptions: Measurable, Hidden and Incalculable Costs to Creators' (2018) 69 *Poetics* 15 ('Calculating the Consequences of Narrow Australian Copyright Exceptions').

3.5 Reduce focus on waste-management as a solution due to inherent limitations in waste management and specific deficiencies in Australia's waste management systems

The recommendations seen in the draft report, continue to largely uphold linear waste management policy and ideas as opposed to circular principles. This can be witnessed through solutions suggested in relation to the management of e-waste.[17]

Currently, the commission holds that the potential impacts on the environment and health from such hazardous materials as contained in e-waste, is moderate and manageable due to Australia's generally well-developed landfill management practices.[18] However, well-developed landfilling practises are not always consistent throughout Australia. For example, Figure 3.1 below shows the landfilling facilities and transfer station of Western Downs Council.

Fig 3.1 – Landfill and transfer station practises of Western Downs Council

Regardless of this, the ongoing utilisation of landfilling without consideration of alternative avenues for these products is contrary to the aims of the circular economy. Ultimately, the ongoing landfilling of e-waste materials should not be the aim for used electronic material. Instead, landfilling should be a final choice with reuse, repair, and redesign preferable. Although the subsequent recommendation for waste to be monitored through GPS tracking is a necessary step, it does not address the underlying issue of exporting waste in the first instance. It also does not consider the wider possibility that these tracking devices can be removed from the e-waste items being exported, as well as other possible instances of fraud that would negate the inclusion of GPS tracking in the first instance.

[17] Productivity Commission, 'Right to Repair - Productivity Commission Draft Report' (11 June 2021) 20–23 <https://www.pc.gov.au/inquiries/current/repair/draft>.
[18] Ibid 21.

Overall, 80% of pollution and 90% of manufacturing costs associated with e-waste are the result of decisions made at design stage,[19] as such, it is surprising that design and planned obsolescence is not more readily considered in addition to waste management improvements under this draft report. More discussion on this issue features below.

3.6 Increase emphasis on physical and economic access to repair and maintenance services, knowledge and tools

Having access to repair is predominately focused on consumer's ability to conveniently and cost effectively access repair services of their choice for the repair of a broken/damaged product. Warranties are relevant to enabling consumer access to repair, and specifically the introduction of legislative measures that void clauses regarding third party repairs. We support the recommendation to amend r. 90 of the Competition and Consumer Regulations 2010 to require manufacturer warranties ('warranties against defect') on goods to include text (located in a prominent position in the warranty) stating that entitlements to consumer guarantees under the Australian Consumer Law do not require consumers to use authorised repair services or spare parts.

Guarantees are also relevant in this instance, as recognised in the draft report, Australian Consumer Law establishes consumer guarantees that when not met, entitle consumers the right to access repair, refund or replacement options at the discretion of the manufacturer. To better support the repair market more generally, and the possibility of establishing a domestic repair market more specifically, it is recommended that in addition to including mandatory referencing of consumers rights under guarantees, as referenced above, consumer laws should specify the preference of these remedies as opposed to leaving this decision to the discretion of the manufacturer. For example, repair and refund should be pursued over replacement.

On a more general note, with regards to access to conveniently located, and cost-effective repair services, it has been noted in the draft report that the commission feels that a consumer's decision to repair or replace a broken product is driven fundamentally by price. Although we support the role that price plays in these decisions, we would also suggest that the role convenience plays has almost equal weight in influencing consumer decisions in this area.

As recognised by the commission, there are various considerations, from legal and market impediments to costs, convenience and customer preference, and the level of weight afforded to this list will be different depending on the product in question. It is also true that, ultimately, price-sensitive consumers will almost always buy the cheapest product presented on the market in order to fulfil their needs. This is regardless of the quality and lifetime stipulated for that product. Against this background, pricing low-quality products with a short lifespan at a lower level on the market would increase consumer welfare by meeting the needs of the price-sensitive consumers. However, it is doubtful whether these 'consumer benefits' are in fact

[19] Malinauskaite and Erdem (n 14) 10.

upheld in the long run, as cheaper products that break easily leave consumers with no option but to repurchase the same product again. This is not only detrimental to the consumer but also the environment.[20]

Similarly, the role of 'price' subsequently applies to decisions made in relation to whether to pursue repair of a broken product. Ultimately, the decision to pursue repair of a broken product is weighed itself against the cost of the initial product, the cost of the intended repair, and the convenience of undertaking the repair (including time). For example, where the physical time taken to source a repairer and deliver the product to the repair services is significant, this option is less viable to the consumer. As such, in addition to price, convenience plays a significant role in consumers' choice to repair.

Subsequently, it is recommended that 'convenience' carry more weight in the decisions of the commission, and access to repair services, which encompasses both access to domestic repair services together with the turnaround time associated with these services, noted as a vital condition to changing consumer behaviour and preference for utilising repair options. As such, it is recommended that a focus on supporting convenient repair services be incorporated into the recommendations of the commission. For example, incentives for repair 'hubs' established at local council resource recovery centres could form part of the commission's strategy. These centres could also look to employ or encourage members from the older generations, who still possess knowledge and skill in repair, to be involved in repair projects and education in these centres. This might also contribute to social gains for these individuals.

3.7 Ensure on-going access to repair and supplies including supportive software updates

Consumers' right to repair should be supported by laws mandating access to repair supplies, in order to prolong the use of their purchased products. These repair supplies would include digital materials, such as software updates.

Currently the draft report does not address the lack of supportive software updates provided by manufactures for older products. This includes the ability for consumers to reverse mobile updates reserved for the newer models that are downloaded and subsequently adversely affect operating systems of that product (planned obsolescence). It is noted that a proposal was suggested for extending consumer guarantees covering software updates, but that this currently does not form the basis of the recommendations made by the commission. It is recommended that this be reexamined and addressed, especially with the prevalence and central function of software (including updates) to the function of consumer products in today's market.

Products designed to be highly streamlined, in size and performance, incorporate specialized manufacturing processes, such as air-pressure to seal products shut. Examples include Apple Air laptops. These types of products would subsequently pose health and safety risks were repairs to take place by general repair servicemen. In order to generate convenience for

[20] Ibid 17.

consumers to repair these products it is recommended that services for these products be offered in store. This would increase on shore domestic repair market.

Whether consumers are willing to trade reparability of devices for other design features is a question that remains open. However, the case of Apple Iphone 6 battery replacement program suggests that, given a choice between a low-cost repair and buying a new mobile phone, many consumers will opt for the low cost repair. This indicates that with in store repair options, consumers would be willing to keep their existing devices over new designs, when fully informed about reparability.

3.8 Strengthen the coverage and extension of warranties

We support the introduction of statutory warranties that have extended periods. Warranties are examined and proposed in the draft report, and the proposals suggested in relation to warranties such as voiding clauses being removed from warranties, and guarantees added to warranties to make consumer rights clearer, is supported. However, it is further recommended that mandatory warranties be proposed as standard, and that these mandatory warranty periods reflect the specific time periods set through the recommended durability guidelines as proposed by the commission in association with consumer laws. This would allow for stronger links to be made between the framework in this area, and deal with potential obsolescence that can occur shortly after the expiration of manufacturer set warranty dates.

Warranties should also include the time manufacturers will commit to providing spare parts. For example, the United States currently requires seatbelts to last for five years or 50,000 miles. The Italian government guarantees two years of service for any new computer.

3.9 Increase emphasis on product design and planned obsolescence

The draft report does not adequately consider or respond to product design, despite highlighting the importance of product design to the ability to repair. Regardless of whether parts were made available or access was convenient and affordable to entice consumers, the ability to repair products will still be hindered if products are designed to break, or are not designed to be repairable. Subsequently the failure to consider product design and planned obsolescence in this draft report affects the feasibility and could negate other actions proposed by the commission.

For compatibility with a circular economy and the right to repair, laws and policies instigated to address product design should aim to eliminate harmful chemicals contained in products that may hinder repair.

Similarly, planned obsolescence, which is linked to the drive for increased sales and profits, and defined as the practice of designing products with a short lifetime for the purpose of encouraging consumers to buy replacements more quickly than they might otherwise have to

needs to be addressed.[21] Not only does this concept directly conflict with a circular economy,[22] but it ultimately undermines repair viability in that by designing products to fail or to not be repaired the financial viability for consumers to pursue repair services are reduced. It also negates ability for meaningful extension of those products lives.
The current stance of the commission on the issue of planned obsolescence, it that '*the commission has not found evidence to suggest that such practices are widespread. The ACCC submitted that it has seen little evidence of manufacturers designing a product to fail, and competitive pressures and reputational risk will often mitigate incentives for such behaviour...In many cases, consumers' decisions to 'prematurely' dispose of their products, or to opt for shorter lived or less repairable products, reflect personal preferences, rather than information gaps on product durability or reparability at the time of purchase.'*

Yet, we wonder how this conclusion has ultimately been reached. This is because manufacturers maintain information related to their product's quality (ie product lifespan) and this information is not readily available to third parties. Furthermore, in instances where an oligopoly presents in the market, as is the case in the mobile phone market, there can actually be an incentive for oligopolists manufacturers to collude to reduce the durability of their products…' to increase sales.[23] This is because without product choice in which to exercise consumer purchasing power, consumers have little option but to continue purchasing the available products on offer in order to fulfil their needs. Ultimately, this conflicts with the conclusion of the commission and further negates the commission's argument surrounding *'competitive pressures and reputational risks'* keeping the market in check in this area.

Overall, literature suggests there are two areas where corporates incorporate planned obsolescence:

a. *Technological obsolescence* – including the failure of companies to support software and hardware updates for older models; and
b. *Style obsolescence* – relating to the aggressive marketing and messages used to influence consumers into buying newer products in line with aesthetic trends.

The draft report notes 'personal preferences' and 'fashion' as reasons why consumers discard products prematurely, this suggests that from the list above, there would be at least be a degree of evidence indicating the existence of style obsolescence existing within the market. As such, planned obsolescence, at least to this degree, should be further considered. This submission recommends that design and planned obsolescence be considered in greater depth in the commission's final report, specifically the consideration of bans to planned obsolescence.

Ultimately, bans to planned obsolescence can be supported when viewed alongside the circular economy concept, and taking into consideration social and environmental

[21] Ibid 2.
[22] Linklaters LLP-Sonia Cissé et al, 'In the Crosshairs: Planned Obsolescence', *Lexology* (31 March 2020) <https://www.lexology.com/library/detail.aspx?g=463c3580-1dfc-48b4-b57c-159b147b4708> ('*In the Crosshairs*').
[23] Malinauskaite and Erdem (n 14) 17.

considerations with the 'support of the utilitarian notion of responsibility for the sustainability of future generations to fulfil their needs'.[24] As previously stated, Australia has accepted the circular economy concept and similarly supports the sustainable development goals, and as such, has a duty to consider the rights of future generations. Legally banning such products would also allow for the creation of a central legal definition for this practice to be established, and would afford consumers and consumer group's additional rights and remedies pursuant to identified instances of unfair commercial practices.

One such option for the commission to consider is France, who is one of the first countries in the world to define and outlaw the practice of planned obsolescence under the *Energy Transition for Green Growth Act 2015*. Law reads *"Planned obsolescence means the techniques by which a manufacturer aims to* ***deliberately*** *reduce the life of a product to increase its replacement rate. It is punishable by two years' imprisonment and a fine of €300,000."*[25]

- It is noted that this law's inclusion of the word 'deliberately' makes this definition difficult for consumers to prove, particularly given the fact that manufacturers hold product knowledge and can instigate trade secrets. As such, pursuit of legal bans should instead establish an onus on manufactures to prove that they did not aim to deliberately reduce the life of their products.

More generally, the commission's report could be strengthened with reference to the European Union's work in this area. Examination of the European Union's sustainability strategy and principles reveals a significant focus being placed on the design of products in pursuit of the circular economy. For example, mandatory design requirements stated in the Eco-design Working Plan 2016-2019, (attached to the 2015 EU Circular Economy Action plan) includes requirements for washing machines whereby these products include: 1) information requirements for refrigeration gases; 2) design for easier dismantling for recycling, material recovery and depollution purposes, 3) declaration on spare parts availability, 4) access to repair and maintenance information for independent repairers with reasonable and proportionate fees.

It is recommended that repair and durability requirements be proposed for products entering Australia's market.

3.10 Introduce mandatory labelling scheme indicating reparability and longevity of products

It is interesting to note that the commission considers *'consumers decisions to 'prematurely' dispose of their products, or to opt for shorter lived or less repairable products, [to] reflect personal preferences, rather than information gaps on product durability or reparability at the time of purchase'* yet have decided to pursue labelling and information for consumers at the

[24] Ibid 30.
[25] 'Interview: The True Story of France's Fight against Planned Obsolescence', *Buy Me Once* <https://buymeonce.com/blogs/articles-tips/interview-france-fight-planned-obsolescence> ('*Interview*'); 'Article 99 - LAW 2015-992 of August 17, 2015 Relating to the Energy Transition for Green Growth (1) - Légifrance' <https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000031044819>.

time of purchase as the primary method for addressing design and planned obsolescence and encourage the right to repair. Regardless, information was requested by the commission on the topic of labelling, with the commission seeks views and evidence on whether product labelling standards would benefit the community and how government might approach such a labelling scheme.

Overall, consumers should be able to make an informed choice related to the products they purchase, this includes the lifetime pricing of products to reflect the true cost of ownership and durability of the product.[26] The 2017 PLATE conference, authored by employees of environmental ministries or attached agencies in Austria, Belgium, France, Germany, and Italy looked at the planned obsolescence of products and concluded that '*[m]anufacturers and consumers interact with one another and influence product development and consumption patterns. The lack of information concerning durable and repairable products causes an asymmetry in the market balance and leaves consumers unable to make the best buying decisions regarding to their own needs.*' As such, there are obviously benefits to introducing mandating uniform labelling systems that would allow consumers to access information and make fully informed purchasing decisions when exercising their purchasing power as consumers. However, in this instance, the amount of information accessible to consumers is key to the success of such labelling schemes.

While *'too little information may result in consumers not having sufficient information to decide to purchase the product, access to too much information can confuse consumers in making a purchasing choice.*[27] Furthermore, under behavioral economics, consumers are irrational when making decisions, as such, consumers that are cost driven will still choose the cheapest option. So merely informing consumers through labels will not be enough to curb design related practices. In addition, it must be kept in mind that, as is noted by the commission, price plays a significant role in these decisions. As such, labels alone are insufficient to address planned obsolescence and associated negative behaviour.

Ultimately, it is recommended that uniform, mandatory minimum requirements for labels be established and enforced, and that these label inform consumers about both the lifespan and reparability of products in a clear manner. Current examples of clear labels already employed at a domestic level include, the Australasian recycling label – which informs consumers how to dispose of packaging at its end-of-life, and the electricity efficiency labels – that rate the electrical efficiency of products.

In addition, the commission should also consider initiating labelling schemes that incentivise companies to build in repair design traits. International examples of sustainability focused labelling include EPEAT eco-label for technology products, and the EU Ecolabel, which promotes the circular economy by encouraging producers to generate less waste and CO_2.

France recently introduced a law that requires companies to tell people how long spare parts will be available. France is also rolling out a "reparability rating" label for electronic products.

[26] Malinauskaite and Erdem (n 14) 19.
[27] Fernando Branco, Monic Sun and J Miguel Villas-Boas, 'Too Much Information? Information Provision and Search Costs' (2016) 35(4) *Marketing Science* 605 ('Too Much Information?').

The European Commission has also launched a study into 'reparability labels' based on a scoring system. Other examples of Regional/national label schemes include the Nordic Swan label and German Blue Angel, as well as the criteria for Green Public Procurement (GPP) criteria. For some products, GPP criteria rewards products that can be disassembled with simple tools, as well as specify the availability of spare parts for a time after expiration of warranty.

3.11 Shifting consumer cultures: consider educational campaigns and marketing restrictions

The right to repair requires consumers understand why repairing benefits themselves and/or wider society and environmental goals. It also requires consumers have some basic knowledge about how to repair and maintain goods, as well as how and when to access repair services. Public education campaigns would be a starting point for developing a pro-repair culture and understanding.

Similar to government campaigns to preserve resources during world wars, or water during droughts, second hand products and repair could be marketed as desirable. At the same time, proactive governance in the marketing campaigns of manufacturers to address instances of *style obsolescence* would help avoid undermining these educational campaigns.

The contemporary culture of disposable cheap fashion has been created over recent decades with the lifting of tariffs on imports of foreign manufactured products. Australia's own textile and garment manufacturing industry has shrunk and most of our manufacturing is now done offshore. Materials, machinery and skilled labour are no longer located in Australia. These challenges need to be addressed if a repair culture is to be redeveloped domestically.

The arrival of fast-fashion companies, such as H&M, has changed consumer perceptions about the cost of clothing to the point it is now considered disposable.

Consideration should also be given to marketing restrictions on electronic goods and other kinds of consumer goods. Marketing promotes consumption, not re-use and repair, and it promotes a culture that values new items and trends- an environment which Friel describes as 'consumptagenic'.[28] Marketing restrictions are in place for harmful commodities like alcohol and tobacco, and these restrictions could be extended out, keeping in mind the significant environmental and public health costs associated with unsustainable production, consumption and waste of goods.

[28] See specifically, Sharon Friel, 'It's a Consumptagenic World: Producing Climate Change, Exacerbating Health Inequities' in *Climate Change and the People's Health* (Oxford University Press, 2019) 57–112 <https://oxford.universitypressscholarship.com/10.1093/oso/9780190492731.001.0001/oso-9780190492731-chapter-2> ('It's a Consumptagenic World').

3.12 Limited inclusion of products in the Draft Report

It was noted that there was a significant focus on higher end consumer goods within the draft report. However, the right to repair should be extended to other products in the economy. The Productivity Commission also needs to broaden the scope to include manufacturers restricting access to embedded software and cloud-based services.

Considering the environmental impact of Australia's textiles and clothing waste, the longevity and repair of clothing and textiles should be included in the scope of the right to repair final report. Australians discard an estimated $140 million worth of clothing each year, with an average lifetime of three months per item.[29] The recent national Clothing Textile Roundtable held in Canberra established that Australia disposes 800,000 tonnes of textiles a year whose majority goes to landfill. Minister Lay announced her intention to include clothing textiles to the Minister's product stewardship priority list, but considering ways in which repair could be supported and encouraged for textiles could help address this problem by a multifaceted approach.

[29] Ragtrader, 'Let's Get Wasted' (18 September 2014) <http://www.ragtrader.com.au/news/let-s-get-wasted>.