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Right to Repair
Productivity Commission
4 National Circuit
Barton ACT 2600, Australia

Submitted via online form

RE: Right to Repair Draft Report Consultation

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission regarding the Right to Repair Draft Report.

Ai Group is a peak national employer association representing and connecting thousands of businesses in a variety of industries and sectors across Australia. Our membership and affiliates include private sector employers large and small from more than 60,000 businesses employing over 1 million staff.

In January 2021, Ai Group provided a submission to the Right to Repair Inquiry, available here.

We remain committed to the pursuit of solutions to the waste crisis that are both financially and environmentally sustainable and recognise the place that right to repair (R2R) has in this discussion.

Specific comment

Enhance consumer rights

Draft rec 3.2

Australian consumers should have *consistent* access to dispute resolution mechanisms and businesses should not have different dispute resolution expectations placed on them based on the State or Territory their product is purchased in. Therefore, Ai Group do not support the proposed fragmented approach to what is clearly a national issue. A broader discussion about the adequacy of *national* dispute resolution mechanisms would be more useful.

Draft rec 3.3

A well-designed system should involve input from all players, particularly those impacted as significantly as the businesses the system would apply to. Beyond that, Ai Group have no further comment regarding super complaints at this time.

Enable access to repair supplies

Information request 4.1

Ai Group will address systematic differences in quality, safety or security between authorised and third-party repairers with regard to safety, human health and the environment later in this submission.

With respect to repair supplies, members note a need for more clarity around when the right to repair would apply (inside and/or outside of manufacturer's warranty). Members agreed that outside of warranty consumers are entitled to pursue the repair remedy of their choosing, although the PC should remain mindful of creating conditions that protect consumer safety.

Some of the issues with un-authorised third-party repair inside of the manufacturer's warranty period are as follows:

- A manufacturer or authorised representative needs to inspect the item to perform a root cause analysis to establish eligibility for warranty repair in the first instance.
- If the consumer believes they will be claiming back the unauthorised third-party repair cost from the manufacturer, they have no incentive to shop around or keep costs down.
- Over-servicing due to poor diagnostic knowledge/skill can lead to over-repair (using more parts/labour than is required), driving up costs which are then passed to manufacturers (or consumers if it is not a warranty repair).

Members suggested that if a right to unauthorised third-party repair is given to consumers during the manufacturer's warranty period, right of first reply should be given to the manufacturer. The manufacturer would then have a set timeframe in which they must respond with a quote and timing for the work. If the consumer decides to use a third party instead, the cost of the repair reclaimed from the manufacturer should be capped at what was initially quoted.

There was strong member consensus that in almost all instances, a manufacturer can repair a product more effectively and at a better price than an unauthorised third-party repairer. In addition to the cost benefit, OEMs noted that they use repair data to improve their products, and prevalence of third party repair without reporting issues back to the manufacturer could lead to missed opportunities to make improvements which would benefit consumers. As such, it would be better for consumers to support more repair through OEMs and their authorised representatives, rather than diverting them away.

Finally, members raised considerable concern regarding the grey market[1] and the applicability of R2R where products have been refurbished by third parties and sold on. Second-hand items and display models must be treated sensibly in terms of equitable warranty and repair expectations so that manufacturers, suppliers, and consumers do not experience negative outcomes or encounter a perverse disincentive to avoid reuse or refurbishment. This area of the market will require more attention over time, given its strategic importance to circular economy transition.

[1] Trade of a product through distribution channels that are not authorised by the OEM, approved supplier, or trademark proprietor.

Information request 4.2

The PC has noted that:

> *"Preliminary analysis suggests that restrictions on third-party repair supplies could be harming consumers in repair markets for agricultural machinery and mobile phones and tablets. However, the evidence base on the magnitude of repair barriers in these markets is patchy and largely anecdotal, preventing a rigorous assessment of whether additional policies would provide net benefits to the community."*

Given that the PC has acknowledged that rigorous assessment of net benefits to the community could not be completed, Ai Group argue that further action is not justified. The suggested review of the policy landscape in the coming years, inclusive of an evaluation of the proposed mandatory scheme for the sharing of motor vehicle service and repair information (once operational for three years) would make sense. However, success in the motor vehicle repair space would not necessarily translate to the same requirements being fit for purpose for a positive obligation in other product classes. This is because vehicle repair work standards are well-established and replacement parts are widely obtainable already, the same cannot be said of most other products. As such, decisions to implement similar mandatory schemes should be made on a case by case basis, in close consultation with impacted industries and other stakeholders.

Information request 3.1

An agreement about a uniform acceptable timeframe to stock spare parts made in consultation with impacted manufacturers may improve access to repair remedies and could possibly take place through a code of conduct (voluntary or otherwise), or something similar.

A member in the consumer electronics industry with significant industry reach commented that:

> *"Account should be taken of the [cost of making] parts available for repair over extended periods of time… Additionally, these parts may never be required, and likely come at a cost that would dissuade the average user from seeking repair of an older product. Some parts may degrade while in storage and re-manufacture [may not be] an option, as technology rapidly moves on in the consumer electronic market and [required] manufacturing facilities may no longer be available, making the supply of such parts impractical."*

Another member in the telecommunications industry advised that the cost of parts may be prohibitive in products that are less common or popular, which may impact the financial viability of repairs of those products or place undue stress on smaller manufacturers and lead to competition issues.

In terms of software, a large member in the technology area indicated that while they do support availability of software updates for a 'reasonable period of time,' the definition of reasonable needs to be clearly articulated. Their view would be that not more than five years would be reasonable. They also raised concerns about provisions that would require their business to allow consumers the choice to reject updates (which are often required for security and secure operation).

Given the interconnectedness of some devices, OEMs have contractual obligations with third parties for software. The messaging to consumers must be clear that software being available for longer may not necessarily lead to better performance or enhanced features after a certain point. This is because technology inevitably advances beyond existing product hardware and updates simply can't improve the device further. There isn't much many manufacturers can do about technology moving on, although one OEM did note that there are more options available in customised environments such as defence and infrastructure, where products can be supported for longer, in some cases, even for decades.

Information request 5.1

Ai Group are cautiously supportive of the merits of introducing a 'fair use' or 'fair dealing' exception in the Copyright Act to allow third-party repairers to share copyright information (such as manuals and schematics). The caveat is that it should only take place where the third-party repairers are suitably qualified and accredited. This will ensure the safety of repairers and their customers and limit the scope for sub-par work to lead to disputes regarding liability between consumers, manufacturers, and repairers. This should only be introduced if *all* players in the Australian market are expected to share this information with credible repairers, and those who refuse to take part are removed from the market. This would level the playing field and eliminate free riding.

Information request 5.1(2)

Ai Group are cautiously supportive of the merits of amending the Copyright Act to allow third party repairers to legally procure tools to circumvent digital locks to access repair information (such as diagnostic data) in *some* circumstances. A large member in the technology space made absolutely clear they will not be supplying repairers with information which would enable them to bypass consumers digital lock screens as it would put consumers at significant risk.

As stated in the previous information request, the caveat is that it should only take place where the third-party repairers are suitably qualified and accredited. It should only be introduced if all players in the Australian market are expected to share this information with credible repairers, and those who refuse to take part are removed from the market to level the playing field.

As noted in our last submission, data security, privacy and safety are important issues in R2R. There is ongoing international debate about whether R2R helps or harms cyber security. Several manufacturers overseas have opposed R2R raising concerns about weakening the security of their products. Other concerns raised include protecting companies' proprietary information and IP, and whether source code should be open-access or closed. It is clear that any impacts of a R2R on data security, privacy and safety should be fully considered. Furthermore, strengthening cyber security in products involves establishing trusted supply chains and networks for the lifecycle of the product. Authorised access to proprietary information has wider implications than the cost and availability of repair.

Ensure warranties do not impede independent repair

Draft rec 4.2

Ai Group oppose this recommendation on the grounds that non-authorised repair and spare parts put consumers and businesses at risk. See information request 4.3 for further detail.

Information request 4.3

Ai Group strongly oppose the prohibition of warranties from containing terms that require use of authorised repairers or spare parts to maintain the warranty on the grounds that it may put consumers and businesses at risk of harm from unqualified, unskilled, and otherwise unscrupulous players in the repair market.

Approved parts and inputs for products are primarily about safety and product performance. Just because a part fits or functions inside of a product does not mean that it supports the product to perform optimally or even safely, and non-standard parts and inputs can damage products or reduce their lifespans.

There are many areas in the layouts of electrical products that consumers or unqualified repair persons should not be allowed to access (to avoid injury or death). This is often the reason manufacturers refuse to supply independent repairers with information to undertake repair work.

Beyond the safety concerns, Ai Group members note that using incorrect, non-standard or sub quality parts can lead to less durability and reduce the life span of a product considerably. As products become more complex and integrated, it will become increasingly difficult to determine faults, or to isolate issues to certain areas of a product. For example, if the wrong chip is inserted into a laptop, it may short the entire system, which is an easy mistake, but not one an OEM would make. It would not be reasonable for the OEM to replace a product because of such an error, especially never having inspected the product before the repair caused a failure.

To demonstrate the point, one member noted that they had seen an unauthorised third-party repair where blue cellophane was used beneath a screen to mimic the look of LCD. It had been attached using a hot glue gun (no use of original or even non-standard parts) and charged to the consumer at a premium price. The consumer reported feeling safe with this repairer given they had a shop front, but not only was their repair improper and overcharged, their warranty was rightly voided as a result, given their device now contained cellophane and hot glue remnants. This is the reality of providing carte blanche to unauthorised repairers.

In the event such prohibitions are introduced, they should be designed to limit manufacturer liability for damage beyond their control. An Ai Group member suggested that repairers be required to guarantee their work which would help to promote a safe and fair repair environment. Another member expressed the view that:

> *"We would actually argue that in addition to mandatory provision of that information, the manufacturer should be legally protected from harm caused if the owner (or their appointed service provider) suffers harm or loss in carrying out the repairs described in the service manual."*

These member views are consistent with the US *Magnuson-Moss Warranty Act*, which permits warranty terms that limit manufacturer liability for damage caused by unauthorised repairs or

parts, if they can demonstrate third-party fault. That said not all poor repair work is as obvious as cellophane and hot glue, meaning demonstrating fault could be costly and require forensic investigation, a reverse burden of proof which still represents a fairness issue to the OEM.

One member touched on these issues, saying:

> *"To allow any third party to service equipment during the warranty period [with] non-OEM or genuine parts will lead to more failures and increased warranty costs. These higher costs may result in shortened warranty periods, a removal of extended warranty options or increased product cost to the purchaser as the supplier has to set aside a greater proportion of the sales proceeds to a warranty account to provide for future claims."*

Better information for consumers on product durability and repairability

Draft rec 3.1

As noted in our last paper, more could be done to educate consumers about the durability and lifecycle expectations of the products they buy. Guidance on how long common household products could reasonably be expected to last without fault (durability) under consumer guarantees could be a useful tool to influence consumer behaviour for the better. However, durability guidance, repairability ratings and other labelling provisions along these lines could be challenging to produce for several practical reasons.

Early discussions with Ai Group members revealed the following:

- The meaning of 'reasonable' is not well defined or understood which creates a foundational issue when it comes to determining the 'reasonable' term of a products life.
- Different guides or ratings would need to be used for household consumers and B2B consumers, given the different use patterns of the product. For example, a flat screen TV used for a few hours a day in a household will likely last longer than the same TV placed in a retail storefront running 24 hours a day.
- Care of a product will impact durability; therefore, minimum care requirements would also need to be considered if consumers are to expect certain lifespans.
- Technology and product design changes often and relying on case law for product durability standards can be problematic as it looks to the past. Members suggested the ACCC could be more flexible in issuing or reissuing guidance.
- Price point should not be used as a guide (products don't necessarily last longer because they're more expensive).
- Members suggested the consideration of 'medium-time to failure' (average amount of time a non-repairable product functions before failure) as another useful tool for consumer guidance.
- Some members see repairability ratings as inevitable given activity in Europe but note that if we move forward with it in Australia, we should look to models such as the French repairability rating and improve on them before adoption.

Improve management of e waste to facilitate repair and reuse

Draft rec 7.1

Ai Group support amending the National Television and Computer Recycling Scheme (NTCRS) to count repaired and reused products in annual targets. This would support product stewardship and circular economy goals through the promotion of re-use and refurbishment, which are preferable outcomes in the waste hierarchy.

General Comments

Definitions

Ai Group members raised concerns around several definition issues associated with R2R, including:

- R2R should be defined as clearly as possible to avoid any ambiguity between the key terms of 'repair,' 'maintain,' and 'modify'. Modification of product (making changes to something which extends past its initial scope of delivery) can have serious environmental and safety consequences.
- 'New' and 'Used' are not straight forward terms, given the practice of refurbishment (likely to become more common given our transition to circular economy) and the prevalence of the 'grey market.[2]' Careful consideration needs to be given to these concepts to make sure the correct parties are liable for products.
- It is essential that the term 'reasonable' is defined with clarity and consistency.

Business Consumers

Many of the report recommendations have the potential to impact business to business (B2B) transactions. A number of our members operate in the B2B environment and any changes to legislation or regulation should be drafted in such a way as avoid adverse impacts on these B2B commercial relationships.

Some business consumers are captured by the ACL, and numbers will increase with the threshold for inclusion rising from $40 000, to $100 000. Members note that there is a difference in power between household and business consumers and using a dollar value to define a consumer is a blunt instrument.

Safety – Human Health and the Environment

There is often an inference that OEMs are 'hiding behind' safety as an excuse not to allow repair, however Ai Group argue that these concerns are genuine and should be listened to.

[2] Product sold outside the producer's authorised distribution channels, predominantly by businesses without a relationship to the producer of the goods.

Allowing anyone to complete repairs without appropriate accreditation could cause significant harm and undermine the safety of the community. As in our last submission, we note the following statement made by one of our members:

> *"[We] harbour some concerns about the skills, education levels and workmanship of many independent repairers, as most have not received or not been given the opportunity to take part in any official factory training, which large companies normally provide to their own authorised repairers."*

The Compressed Air Association of Australasia (managed by Ai Group) have provided the following examples to demonstrate aftermarket parts and non-accredited repair risk to human health and the environment:

> *Incorrect lubricant used on air compressor*
> The below image examples show a product failure due to a third-party who used a non-OEM lubricant in a Queensland Coal Mine. Unlike the pictures, the interior should be clean, polished, and metal. The cost of this failure to the business, including installation, production, and transport, is likely to exceed $100k.

Drive Coupling Replacement by a non-qualified repairer

Photos from a site below show the aftermath of a non-authorised drive coupling replacement. Due to the seriousness of the damage, staff were not allowed on site, and it is our understanding that there were some personal consequences for those directly involved. The coupling on the OEMs compressor was changed by a non-qualified repairer and disintegrated, causing debris to penetrate the enclosure. Nobody was hurt, but they could have been. The coupling replacement that caused this issue requires repair by someone with special training, skills, and tools.

Another Ai Group member that makes industrial fans provided Ai Group with the following account:

> *"One of our industrial plug fan motors was damaged by a wrongly programmed controller [installed by a third-party repairer], while under warranty. The end user (a supermarket) had decided to get a local company to replace the motor. We were contacted a week later [when] the fan was totally disintegrated, causing major damage to the motor and equipment around it, and nearly causing injury or fatalities.*
>
> *[The] root cause was the wrong parameters. But if we (the manufacturer) were involved, we would have advised/performed the correct disassembly of the fan impeller, [and completed] balancing after motor replacement. Not only would the warranty have continued, it would have been safer and more cost effective [to the business consumer]. If they were "lucky," and the unbalance was not so bad that it destroyed the fan, it [still] would have caused the "new" motor bearings to fail prematurely. R2R can cause fatalities if not defined properly [and applied to] the right products."*

The best way to address concerns regarding quality and safety is to ensure that there are clear and enforceable expectations regarding competency/qualifications (including knowledge of applicable Australian Standards) required by any business or individual engaged in repair activities. This may involve partnership with industry (whether voluntary or mandatory) to provide official factory training to third-party repairers to address the issues raised above.

We have previously noted that there is evidence of some success in the utilisation of authorised dealers/repairers that service similar products for multiple brands. The ability to service like products for more than one brand helps these repairers to create an economy of scale with access to genuine parts and up to date service training covering the latest technologies. The outcome is a reliable and safe repair option for the consumer.

Other Barriers to Repair

A more formalised R2R will not make a significant impact on other substantial barriers to repair, such as the significant 'call out' fees often charged by repair agents for the repair of larger appliances or equipment. In these cases, the cost of a quote is prohibitive to the consumer, rather than the repair itself. Similarly, short-sighted consumer behaviours, switching costs, poor information availability, lack of insurance options and consumer lock in all create barriers to competition in repair markets.

Our members report that in many cases consumers do not bother to obtain repair quotes, favouring replacement in the first instance. This is unfortunate for manufacturers/suppliers who may want to engage in more repair activity but are not able to as they are subject to the will of the consumer. In Australia, manufacturers are also often reliant on the import of parts from overseas and vulnerable to freight issues and delays, which are now commonplace in Australia. This will often, through no fault of their own, make the repair option too slow for the consumer and result to a replacement (as a complete item, rather than a niche part, is more likely to be in stock domestically).

Intellectual Property (IP)

As discussed in our last submission, R2R cannot and should not be considered without reviewing its interaction with IP rights. This will be a substantial piece of work given the complexities of the system.

With regard to access to repair manual and schematic IP, we were advised that:

> *"Significant IP is contained in the product manuals provided with [purchase], and [any] company authorising [a repair] manual should be entitled to financial compensation for the contained value. If access is required to standard operational manuals, they should be available for sale."*

Final Comments:

The draft report notes that consumers already have considerable rights to have their products repaired, replaced, or refunded under guarantees in ACL. These considerable rights against current rate of repair would support Ai Group's statement in our January 2021 submission that R2R is only useful if people can and will choose to use it, and consumers have shown a preference for replacement over repair. To combat this, significant education, support, and smart policy thinking is required; not simply adding to our already complex and costly regulatory environment. A formal R2R that does not adequately consider safety, accreditation, IP, and the financial viability of repair versus replacement is unlikely to result in the desired impact and may put both consumers and businesses at risk.

Through discussion with members, it is clear that in most cases repair by an OEM or their authorised representative is cheaper and more effective. As such, supporting consumers to seek repair through authorised pathways would lead to better outcomes for them, while limiting the risk of harm. Consumer harm from unauthorised repair can come in a variety of formats ranging from extreme (compromised safety, injury, death) to over-servicing or non-standard parts causing wider system issues and reducing product life.

Refinement of existing instruments, filling of any necessary gaps and enhanced consumer education combined with the growing product stewardship landscape for any eventual waste will also be effective in helping Australia to meet its waste and circular economy goals.

Should you wish to discuss the matters raised in this submission, please contact our adviser Rachael Wilkinson.

Sincerely yours,

Louise McGrath
Head of Industry Development and Policy