

**Productivity Commission - Submission on the Circular Economy 2024 for:**

Information Request #3 - Barriers to the Circular Economy; and  
Information Request #4 - Governments' Role in the Circular Economy

**Product Liability Risk and Insurance Barriers**

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**About Michelle D. Smith:** I have 25 years of experience in the financial sector, working in Australia, Europe and the United States, assisting insurance companies with risk management strategies. My career included 14 years at a global insurance consultancy, followed by 11 years at a major US investment bank. I am a Fellow of the Institute of Actuaries of Australia and the Society of Actuaries (USA), and am currently completing a Juris Doctor at Melbourne Law School ('MLS').

Studying with the Sustainability Business Clinic at MLS this year, I learned a great deal about the circular economy and the challenges in this space. In particular, certain challenges arise from product liability exposure and in accessing insurance in a marketplace tailored to the traditional, linear economy. I was motivated to make this submission based on what I learned about liability exposure in the circular economy, combined with my extensive experience in insurance markets.

**I. Executive Summary**

As indicated in the Circular Economy 'Call for Submissions',<sup>1</sup> a key step along the circular economy loop is the repair and reuse of products.<sup>2</sup> However, intermediaries involved in the repair and reuse of common household items face obstacles in managing their liability exposure.

This submission outlines the nature and impact of these challenges, focusing on intermediaries facilitating repair and reuse of affordable household electrical items. These challenges will hamper growth in the repair and reuse of electrical products.

**Recommendation:** To accelerate the repair and reuse of household electrical items, the government should take action to relieve circular economy intermediaries of their liability exposure, and/or facilitate access to affordable insurance coverage. Examples of possible actions are given in Section IV, and include premium subsidisation, and assisting the formation of umbrella organisations of repairers.

Section II provides background on product liability exposure in the circular economy. Section III presents evidence of challenges faced by circular economy intermediaries in managing this exposure. Finally, Section IV offers examples of actions that governments can take to remove these barriers.

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<sup>1</sup> Australian Government Productivity Commission 'Opportunities in the Circular Economy: Call for Submissions' (September 2024) ('Call for Submissions').

<sup>2</sup> Ibid p 5, Figure 2; p 10, Figure 3.

## II. Background: Product Liability Exposure of Reuse/Recycle Intermediaries

### 2.1 Origins of Product Liability for Repairers and Resellers

Perhaps the most famous case in tort law was the one that established liability in the linear manufacturer–consumer economy almost a century ago,<sup>3</sup> where a drink manufacturer was held liable for a ginger beer that made a consumer sick. This established what is known as 'product liability' for manufacturers - that is, liability for harm to consumers caused by their products.

Nowadays, product liability extends to anyone who enters the chain in a product's life cycle, including repairers, and/or re-sellers of used products. To the extent the actions of the repairer or reseller cause harm to the end consumer, that intermediary may be liable for damages. This could happen, for example, where a product repair causes an electrical fire in a consumer's home.

### 2.2 Business Models for Repair of Different Types of Consumer Goods

Consumers tend to get their "big-ticket" items like cars and major household appliances (e.g., heating systems) repaired when they fail, because that is the most cost effective and convenient solution to the problem. Consequently, repair of these big-ticket items is an established and viable business model. This also means there is substantial historic data on consumer claims for damages against these repairers, and insurers are able to offer insurance at prices informed by the data. The result is that insurance is generally available for repairers of big-ticket items. Without this insurance, it would be difficult for these repairers to operate.

However, consumers are less likely to have small household electrical items repaired. They are more likely to either discard failed products and buy an affordable replacement, or claim under warranty, which may also lead to discarding the defective product. This behaviour runs counter to the goals of the circular economy.

Consumers behave this way for small appliances because it is often cheaper and more convenient for them to get a new product, than to get the defective one fixed. This "cultural norm" has led to escalating volumes of electronic waste, and a shortage of entrepreneurs who see economic opportunity in repairing small household electrical items.

Consequently, repair of small electrical items has flourished mainly in the non-profit sector, through the development of such entities as 'Repair Cafes' and 'Men's Sheds'. Other important intermediaries include thrift stores or "Op Shops", raising funds for charitable purposes by selling used electrical goods in their stores.

While the non-profit business model of these intermediaries addresses the cost and convenience issues of repair and reuse for the consumer, the product liability exposure of these intermediaries could be a significant barrier to their growth. Section III below presents evidence that product liability exposure is posing a significant barrier to repair and reuse of household electrical items.

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<sup>3</sup> *Donoghue v Stevenson* [1932] AC 562.

### III. Product Liability Barriers in Repair and Resale of Small Electric Products

#### 3.1 Resale Case Study: Op Shops and Household Electrical Items

Thrift stores or "Op Shops", as they are known in Australia, play a key role in the circular economy as intermediaries in the resale of used household items. In the UK, Red Cross stores accept donations of household electrical items for resale.<sup>4</sup> However, the Australian Red Cross does not accept donations of any electrical items.<sup>5</sup> Meanwhile, the majority of Salvation Army "Salvos Stores" in Australia do accept electrical items, but around 40% of them do not accept any.<sup>6</sup> Reviews of other chains of Op Shops showed a similar mix of stores that either do or do not accept donated electrical items for resale.

While all stores accept other household items, it is likely the added complexity and liability attached to the resale of electrical items creates a barrier preventing stores from accepting electrical items. At a minimum, stores accepting donations of electrical items need to conduct testing, known as "Test and Tag",<sup>7</sup> on donated items before resale. This adds to the costs, time and resources Op Shops must invest in the resale of such items. Furthermore, their insurance would need to cover product liability related to the resale of electrical items (see Case Studies 3.2 - 3.4 below). Anglican Insurance and Risk Services ('AIRS') has produced a helpful summary of the steps Op Shop operators need to follow to manage risks, including those associated with the resale of electrical items.<sup>8</sup>

#### 3.2 Resale Case Study: Stallholders and Ansvar Non-Profit Product Liability Exclusions for Electrical Items

Local Community Insurance Services, a business of Marsh McLennan, arranges insurance for community groups across Australia.<sup>9</sup> One of their products is Stallholder Insurance for stall operators at community events such as farmers markets or car boot sales.<sup>10</sup> A **notable exclusion** from their product liability coverage is the **sale of second-hand electrical items**.<sup>11</sup>

Ansvar is a specialist provider of insurance solutions for community groups and non-profits. In their standard product liability insurance there is a **policy exclusion** for **second-hand electrical products**, unless they have been through specified tests.<sup>12</sup>

As seen in the case studies below, this type of exclusion in product liability insurance for the reuse/repair/resale of electrical items appears widespread across initiatives in the circular economy.

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<sup>4</sup> <https://www.redcross.org.uk/shop/furniture-and-electrical-charity-shops#>.

<sup>5</sup> <https://www.redcross.org.au/shop/donate-clothes-and-goods/>.

<sup>6</sup> <https://www.salvosstores.com.au/stores>.

<sup>7</sup> <https://www.safework.nsw.gov.au/hazards-a-z/electrical-and-power/electrical-inspection-and-testing>.

<sup>8</sup> [https://www.airs.org.au/risk-management/risk-resource/op\\_shop\\_risk.pdf](https://www.airs.org.au/risk-management/risk-resource/op_shop_risk.pdf).

<sup>9</sup> <https://www.localcommunityinsurance.com.au/about.aspx>.

<sup>10</sup> <https://www.localcommunityinsurance.com.au/insurance/stall-holder/about.aspx>.

<sup>11</sup> <https://www.localcommunityinsurance.com.au/insurance/stall-holder/exclusions.aspx>.

<sup>12</sup> <https://www.ansvar.com.au/wp-content/uploads/Ansvar-GPL-PDS-and-Policy-Wording-0624-V1.pdf>.

### 3.3 Repair and Resale Case Study: Men's Shed Product Liability Exclusions for Electrical Items

Men's Sheds in Australia are community-based, non-commercial organisations that create an environment for people to work together on meaningful projects. The Australian Men's Shed Association ('AMSA') is a nationwide umbrella organisation of Men's Sheds<sup>13</sup> that coordinates insurance coverage for community Men's Sheds<sup>14</sup> by acting as a group purchasing body for insurance.<sup>15</sup>

Many Men's Sheds in Australia fix household items, including electrical products, as part of their activities. Thus, an important component of the AMSA group insurance policy is product liability insurance with significant aggregate limits.<sup>16</sup>

However, there are **two key exclusions** in the Men's Shed policy that limit product liability coverage related to fixing electrical items. The first of these is the exclusion for "Test and Tag" testing (described in 3.1 above) on non-shed owned property.<sup>17</sup> The second is the new 2024 policy **exclusion of electrical items** from 'Production of Goods for Sale' that were previously included in AMSA product liability coverage.<sup>18</sup> Both exclusions signal a reluctance to insure product liability related to work on, and resale of, electrical items by community organisations.

### 3.4 Repair Case Study: Repair Cafes Across Australia, Ireland and the UK

Repair Cafes are monthly events, sponsored by community organisations, where local residents bring in their household items to get repaired at no cost. Repair Cafes started in The Netherlands in 2009, and have now grown to approximately 4,000 cafes globally,<sup>19</sup> including 110 in Australia.<sup>20</sup> By far, the most popular item to have fixed at a Repair Cafe is a small household electrical appliance, comprising around 60-70% of all items brought in for repair.<sup>21</sup>

However, there are indications that inability to **access product liability insurance** for Repair Cafes fixing electrical items in common law countries (such as Australia, Ireland and the UK) has become a **significant barrier to repair** activity. Rediscovery Ireland has produced a video presentation and report on this issue.<sup>22</sup> This has been solved in the UK through Repair Cafe umbrella groups arranging group insurance to cover Repair Cafes that meet specified underwriting standards.<sup>23</sup>

<sup>13</sup> [Australian Mens Shed Association](https://mensshed.org) ('AMSA') (Web Site) <<https://mensshed.org>>.

<sup>14</sup> AMSA 'Shed Insurance' (Web Page) <<https://mensshed.org/for-mens-sheds/shed-insurance/>>.

<sup>15</sup> AMSA 'Insurance Program 2024' (Everest Risk Insurance Document, 2024 Policy Year) <<https://everestrq.com.au/wp-content/uploads/sites/11/2023/02/AMSA-FAQ-V9.0-1.pdf>>.

<sup>16</sup> Ibid [18].

<sup>17</sup> Ibid [28].

<sup>18</sup> Ibid [29].

<sup>19</sup> <https://openrepair.org/wp-content/uploads/2024/10/ORA-report-2024-The-rise-of-community-repair.pdf> page 3.

<sup>20</sup> <https://www.griffith.edu.au/law-futures-centre/our-research/australian-repair-network>.

<sup>21</sup> <https://openrepair.org/wp-content/uploads/2024/10/ORA-report-2024-The-rise-of-community-repair.pdf> page 12-13.

<sup>22</sup> Rediscovery Ireland, 'Insurance for Repair Cafes' (Video, May 2024) 0:29:00 - 0:52:00; Rediscovery Centre, [Removing Insurance Barriers to Community Repair: The Study of Repair Cafés in Ireland](#) (Final Report, August 2024).

<sup>23</sup> <https://repaircafewales.org/membership/>.

In Australia, there is no national umbrella organisation for Repair Cafes, like there is in Wales, New Zealand, France and Denmark.<sup>24</sup> Thus, individual Repair Cafes are on their own trying to navigate the complex world of product liability insurance.

#### IV. Sample Government Actions

The below is a short list of actions the government could take to assist intermediaries engaged in the repair/reuse/resale of household electrical items in managing their product liability exposure.

Example Action 1: Facilitate Umbrella Organisation, Risk Management Standards and Group Liability Insurance for Australian Repair Cafes.

Similar to what has been done in Wales through the umbrella organisation Repair Cafe Wales, the Australian government could facilitate formation of a national umbrella organisation for Australian Repair Cafes. This body could recommend risk management standards and facilitate access to group insurance covering product and public liability for repairs of electrical items.

Example Action 2: Provide Incentives to Insurance Companies to Assume Product Liability Risk for the repair/reuse/resale of Household Electrical Items.

A primary reason insurers are reluctant to assume product liability in the repair/reuse/resale of household electrical items is likely the lack of claims data. There is also the issue of inconsistent risk management standards across the many disparate initiatives in the circular economy for electrical items. The government could play a role in setting risk management standards to guide underwriting by insurers. They could also provide premium subsidies to repair intermediaries, or some kind of backstop (e.g. excess of loss support) to encourage insurers to take this risk. If the current lack of insurance is due to lack of data and underwriting standards, such an arrangement would only need to be temporary, until sufficient claims data is established.

Example Action 3: State Legislative Change to Tort Liability Statutes

State-based tort liability statutes could be amended to relieve certain intermediaries engaged in the repair/reuse/resale of household goods from product liability. However, this could be challenging to implement in practice.

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<sup>24</sup> <https://openrepair.org/wp-content/uploads/2024/10/ORA-report-2024-The-rise-of-community-repair.pdf> page 34.