

SHANE RATTENBURY, THE PRODUCTIVITY COMMISSION, AND THE RIGHT TO REPAIR: INTELLECTUAL PROPERTY, CONSUMER RIGHTS, AND SUSTAINABLE DEVELOPMENT IN AUSTRALIA

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ABSTRACT

This Article tells the story of the fight for the right to repair in Australia. It is intended to complement comparative research elsewhere, looking at the right to repair in the United States and Canada; the United Kingdom, Switzerland, and the European Union; and other jurisdictions, such as South Africa. Part II of this paper considers the politics of the right to repair in Australia. It explains how Australian Capital Territory (ACT) Attorney-General Shane Rattenbury has sparked a larger law reform inquiry by the Productivity Commission into the right to repair. It highlights how Australia is particularly promising in terms of law reform—due to an unusual consensus amongst the major political parties across the usual divides. Part III focuses on the debate over intellectual property and the right to repair in Australia, and the recommendations of the Productivity Commission. It argues that there needs to be more than just copyright law reform; there should be matching reforms in designs law, trade mark law, patent law, trade secrets, and data protection. Part IV considers the recommendations of the Productivity Commission regarding consumer law and competition policy. It highlights the need for further law enforcement action to protect the right to repair. Part V explores the discussion about the right to repair in the context of sustainable development—looking at submissions on e-waste, the circular economy, and sustainable development. It contends that there should be greater law reform in these areas (going well beyond the limited recommendations of the Productivity Commission in this area). Part VI concludes by noting that the Productivity Commission has asked for action in particular markets in respect of automobiles, agricultural machinery, and tablets. The Article calls for the Australian Parliament

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to go further and recognise a more broadly based right to repair. Such a recognition will require a holistic approach, involving reforms to intellectual property laws, consumer rights and competition policy, and regulation of the environment and sustainable development. It maintains that it is necessary that the jurisdiction of Australia keep pace on the right to repair with its comparative partners.

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I. INTRODUCTION

Historically, there was a strong tradition of repair and recycling and tinkering in colonial Australia—especially given the distance from the imperial center of the United Kingdom.¹ There has also been a significant history of the use of repair by Indigenous communities—particularly in remote and regional Australia. The 2001 television show *Bush Mechanics* has highlighted the ingenuity of Indigenous car mechanics in Australia.² The right to repair, accordingly, could be seen as part of the larger framework of issues in respect of Indigenous intellectual property.³

With the development of a modern economy, the traditional culture of independent repair has come under threat in Australia. The Australian Productivity Commission has observed: “There are growing concerns in Australia and overseas that repairs of consumer products are becoming more difficult (sometimes impossible), resulting in costly and wasteful outcomes for consumers and the broader community.”⁴ The Productivity Commission has explained that there are a range of barriers and obstacles to the right to repair:

Increasing product complexity means that consumers often have to rely on the manufacturer of the product (or the manufacturer’s authorised repairer) to fix or maintain their product. Manufacturers are typically the main and sometimes only provider of repairs for their products. This has contributed to widespread concerns that some manufacturers are using their strong position in repair markets to restrict competition. Many participants made claims of manufacturers refusing to supply independent repairers with the parts, tools and information they need to do repairs.⁵

The Productivity Commission acknowledged that the right to repair is a multi-faceted issue, raising questions of “consumer and competition law, intellectual property protections, product design and labelling standards, and environmental and resource management.”⁶ The law reform body noted that there are a variety of definitions of the right to repair (sometimes depending

1. KATHERINE WILSON, *TINKERING: AUSTRALIANS REINVENT DIY CULTURE* (2019).

2. *Bush Mechanics—The Series* (Warlpiri Medi Association 2001); *Bush Mechanics: The Exhibition*, NATIONAL MOTOR MUSEUM, <https://motor.history.sa.gov.au/events/bush-mechanics-the-exhibition/> (last visited March 22, 2023).

3. MATTHEW RIMMER, *INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH* (2015); TERRI JANKE, *TRUE TRACKS: RESPECTING INDIGENOUS KNOWLEDGE AND CULTURE* (2021).

4. PRODUCTIVITY COMM’N, *RIGHT TO REPAIR: INQUIRY REPORT NO. 97 3* (2021) <https://www.pc.gov.au/inquiries/completed/repair/report/repair-overview.pdf>.

5. *Id.* at 3.

6. *Id.*

upon the disciplinary lens from which one viewed the topic). The Productivity Commission commented that the recognition of the right to repair would affect a range of stakeholders—including “balancing the (sometimes competing) interests of consumers, manufacturers, suppliers[,] and repairers.”⁷

As acknowledged by the Productivity Commission, the topic of the right to repair is a prominent issue in a number of fields of industry and technology. There has been a longstanding debate over access to spare parts for motor vehicles in Australia. There has also been an intense discussion over the repair of agricultural machinery and vehicles. Developments in respect of consumer electronics have also raised issues in respect of repair.⁸ For example, the information and communications technology revolution has created new contexts for discussions around repair.⁹ In the sphere of telecommunications, there has been a lot of discussion in respect of fixing mobile phones and tablets. The public health crisis in respect of COVID-19 has highlighted the importance of medical repairs.¹⁰ The rise of “Industry 4.0” technologies—such as 3D printing, robotics, and advanced manufacturing—have provided new contexts in which to consider the topic of repair.¹¹ Indeed, it could be said that the right to repair is growing in importance as a result of the evolution of a number of forms of technology.

This Symposium paper tells the story of the fight for the right to repair in Australia. It is a work of contemporary history, which seeks to represent the multivocal debate over the right to repair in Australia. It is intended to complement comparative research elsewhere, looking at the right to repair in

7. *Id.* at 4.

8. *Id.* at 73–76.

9. *Apple Founder Steve Wozniak Backs Right-To-Repair Movement*, BBC NEWS (July 8, 2021), <https://www.bbc.com/news/technology-57763037>.

10. Jorge Contreras, *Research and Repair: Expanding Exceptions to Patent Infringement in Response to a Pandemic*, 7 J.L. & BIOSCIENCES 1, (2020).

11. DINUSHA MENDIS, MARK LEMLEY & MATTHEW RIMMER, *3D PRINTING AND BEYOND: INTELLECTUAL PROPERTY AND REGULATION* (2019).

the United States,¹² Canada,¹³ the United Kingdom,¹⁴ Switzerland,¹⁵ the European Union,¹⁶ and other jurisdictions such as South Africa.¹⁷ Part II of

12. Chris Jay Hoofnagle, Aniket Kesari & Aaron Perzanowski, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 783–874 (2019); Leah Chan Grinvald & Ofer Tur-Sinai, *The Right to Repair: Perspectives from the United States*, 31 AUSTL. INTELL. PROP. J. 98, 98–110 (2020); see generally AARON PERZANOWSKI, *THE RIGHT TO REPAIR: RECLAIMING THE THINGS WE OWN* (2022).

13. An Act to amend the Copyright Act (diagnosis, maintenance or repair) 2021, HC Bill [C-272] (Can.) <https://parl.ca/DocumentViewer/en/43-2/bill/C-272/first-reading>; HC Deb; The Hon. Bryan May, Copyright Act, PRIVATE MEMBERS BUS. (15 Apr. 2021) (150) col. 1825, <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-81/hansard#11239176>; Anthony Rosborough, *If a Machine Could Talk, We Could Not Understand It: Canadian Innovation and the Copyright Act's TPM Interoperability Framework*, 19 J.L. & TECH. 141, 141–71 (2021) [hereinafter Rosborough, *If a Machine Could Talk*]; Anthony Rosborough, *Canada needs Right-to-Repair Legislation*, POLY OPTIONS—POLITIQUES (May 14, 2021), <https://policyoptions.irpp.org/magazines/may-2021/canada-needs-right-to-repair-legislation/> [hereinafter Rosborough, *Canada needs Right-to-Repair Legislation*]; Navneet Alang, *A Phone Call Canada Must Take: The Right to Repair our Digital Devices Jibes with Environmental Responsibility*, TORONTO STAR (July 17, 2021), <https://www.thestar.com/business/opinion/2021/07/17/a-phone-call-canada-must-take-the-right-to-repair-our-digital-devices-jibes-with-environmental-responsibility.html>; Meera Nair, *Canadians Should Have a Right to Repair Their Own Devices*, EDMONTON J. (May 4, 2022), <https://edmontonjournal.com/opinion/columnists/opinion-canadians-should-have-a-right-to-repair-their-own-devices>.

14. CHRISTOPHER HEATH & ANSELM KAMPERMAN SANDERS, SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS (2009); THE MANCHESTER DECLARATION 2018, <https://manchesterdeclaration.org/> (last visited March 22, 2023); Osborne Clark, *UK Poised to Require 'Right to Repair' Information for Consumers*, LEXOLOGY (Apr. 15, 2021), <https://www.lexology.com/library/detail.aspx?g=8b139876-7f92-4695-918b-0e8262bf6621>.

15. NICOLAS NOVA & ANAÏS BLOCH, DR. SMARTPHONES: AN ETHNOGRAPHY OF MOBILE PHONE REPAIR SHOPS (2020); *Swiss Consumers want Repair Label on Electronic Appliances*, SWISSINFO.CH (Oct. 21, 2020), <https://swissinfo.ch/eng/business/swiss-consumers-want-repair-label-on-electronic-appliances/46111198#.YPZ4KnN4Mfg.twitter> [hereinafter *Swiss Consumers*].

16. Estelle Derclaye, *Repair and Recycle Between IP Rights, End User License Agreements, and Encryption*, in SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS 21–56 (Christopher Heath & Anselm Kamperman Sanders eds., 2009); Anthony Rosborough, *Unscrewing the Future: The Right to Repair and the Circumvention of Software TPMs in the EU*, 11 J. INTELL. PROP., INFO. TECH. & E-COM. L. 26, 26–48 (2020); Taina Pihlajarinne, *European Steps to the Right to Repair: Towards a Comprehensive Approach to a Sustainable Lifespan of Products and Materials?*, 31 AUSTL. INTELL. PROP. J. 111, 111–19 (2020); Taina Pihlajarinne & Rosa Ballardini, *Paving the Way for the Environment: Channelling 'Strong' Sustainability into the European IP System*, 42 EUR. INTELL. PROP. REV. 239, 239–50 (2020); Sahra Svensson-Hoglund, Jessika Luth Richter, Eléonore Maitre-Ekern, Jennifer D. Russell, Taina Pihlajarinne & Carl Dalhammar, *Barriers, Enablers and Market Governance: A Review of the Policy Landscape for Repair of Consumer Electronics in the EU and the U.S.*, 288 INT'L INST. FOR INDUS. ENV'T ECON. 125488, (2021); Sean O'Neill, *European Union Puts Teeth in Right to Repair*, 7 ENGINEERING 1197, 1197–98 (2021).

17. See the proposal for a right to repair in South Africa as part of the response to the COVID-19 crisis. *Health Justice Initiative Submission to the Parliamentary Portfolio Committee on Trade and Industry on the Copyright Amendment Bill [B13B-2017]*, HEALTH JUST. INITIATIVE (July 9,

this paper considers the politics of the right to repair in Australia. It contends that there is an opportunity for law reform—given support for the policy initiative across the major political parties in Australia. Part III focuses on the debate over intellectual property and the right to repair in Australia, and the recommendations of the Productivity Commission. Part IV considers the recommendations of the Productivity Commission regarding consumer law and competition policy. Part V explores the discussion about the right to repair in the context of sustainable development—looking at submissions on e-waste, product stewardship, repair labelling, and the circular economy. Part VI concludes by noting that the Productivity Commission asked for action in particular markets in respect of automobiles, agricultural machinery, and tablets. The Conclusion then calls for the Australian Parliament to go further and recognize a more broadly based right to repair. It maintains that it is necessary that the jurisdiction of Australia keep pace on the right to repair with its comparative partners—such as the United States of America, Canada, the United Kingdom, the European Union, and elsewhere. Accordingly, the Australian Parliament should adopt a comprehensive package of reforms for a right to repair to promote innovation, consumer welfare, competition policy, and sustainable development.

II. THE AUSTRALIAN POLITICS OF THE RIGHT TO REPAIR

Australian politics are often highly polarized; in many policy areas, it has been very difficult to achieve support across the spectrum of political ideologies for substantive law reform. There was a rare consensus in Australian politics between 2021 and 2022 to support a broad inquiry by the Productivity Commission into the right to repair. To provide a brief overview of the stances taken by the major political parties: The Australian Greens have been champions of the right to repair—pushing for legislative change at a territory, state, and Federal level.¹⁸ The Australian Labor Party has shown a strong interest in the right to repair—particularly in the context of automobile repairs.¹⁹ The National Party of Australia has expressed concerns about limitations and restrictions being placed on repairs in respect of agricultural

2021), <https://healthjusticeinitiative.org.za/2021/07/09/health-justice-initiative-submission-on-copyright-amendment-bill-b13b-2017/>.

18. Hon. Shane Rattenbury, *Can We Fix It? Yes We Can. ACT secures National Agreement on a 'Right to Repair'*, ACT GREENS (Aug. 30, 2019), <https://greens.org.au/act/news/can-we-fix-it-yes-we-can-act-secures-national-agreement-right-repair>.

19. Hon. Andrew Leigh MP, Speech at the Australia Automotive Dealer Associate Conference, Gold Coast Convention Centre (Sept. 4, 2018), http://www.andrewleigh.com/driving_a_better_deal_for_auto_dealers.

machinery and equipment.²⁰ The Liberal Party of Australia has responded to community concerns about the right to repair at a Federal level, with some action by the Treasury in relation to sharing repair information about motor vehicles, and a reference from the Federal Treasurer to the Productivity Commission to more broadly investigate the field.²¹

The Productivity Commission has carried out a comprehensive review of the topic of the right to repair. The Coalition Government led by Scott Morrison received the report of the Productivity Commission—but Parliament was prorogued before they had an opportunity to respond to the recommendations. The next Australian Parliament, formed after the Federal election in 2022, will deliberate upon the recommendations of the Productivity Commission in respect of the right to repair. The Australian Labor Party, led by Anthony Albanese, has formed the government and holds a majority of seats in the House of Representatives; but they will need to negotiate with the Australian Greens, community independents, the National Party, and the Liberal Party to pass legislation in the upper house of the Senate.²²

A. THE AUSTRALIAN GREENS

It has often taken remarkable politicians to progress the debate on the right to repair.²³ In the case of Australia, the Canberra politician Shane Rattenbury has been instrumental in pushing for the Productivity Commission to conduct an inquiry into the right to repair.²⁴ He has called upon the Federal Government, as well as the States and Territories, to work in a collaborative approach to provide for a common framework to recognize the right to repair.

20. Jennie Bremmer, *Nationals call for Consumer Rights to Repair Electronics*, WEST AUSTRALIAN (Oct. 16, 2018), <https://thewest.com.au/business/agriculture/nationals-call-for-consumer-rights-to-repair-electronics-ng-b88991358z>. The West Australian is a daily newspaper published in Perth, Western Australia.

21. Commonwealth, *Parliamentary Debates*, House of Representatives, 24 Mar. 2021, 7 (Hon. Michael Sukkar, Assistant Treasurer), <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fd64bba7e-9b55-427c-ae1f1-2c98b347651d%2F0014%22>.

22. Antony Green, *Federal Election: Australia Votes 2022 Party Totals*, ABC NEWS, <https://www.abc.net.au/news/elections/federal/2022/results/party-totals>; Antony Green, *Federal Election: Australia Votes 2022 Senate*, ABC NEWS, <https://www.abc.net.au/news/elections/federal/2022/results/senate>.

23. The Berkeley Law Conference on the Emergent Right to Repair highlighted the role of Senator Ron Wyden in the United States as a champion of the right to repair—as a co-sponsor of the Fair Repair Act of 2022 (US) and the Critical Medical Infrastructure Right-to-Repair Act of 2020 (US). See Sen. Ron Wyden, Closing Remarks at the Berkeley Law Conference on the Emergent Right to Repair (Apr. 29, 2022) <https://www.law.berkeley.edu/research/bclt/past-events/2022-events/the-emergent-right-to-repair/>

24. Rattenbury, *Can We Fix It?*, *supra* note 18.

Shane Rattenbury is the leader of the Australian Greens in the Australian Capital Territory and is part of a coalition government with the Australian Labor Party in the Australian Capital Territory Government. His current positions include Attorney-General; Minister for Consumer Affairs; and Minister for Water, Energy, and Emissions Reduction. He has previously been the Minister for Climate Change and Sustainability (2016 to 2020) and the Minister for Justice, Consumer Affairs and Road Safety (2012 to 2020). Before his career in politics, Shane Rattenbury had various roles in Greenpeace—including Greenpeace International, Greenpeace Southeast Asia, and Greenpeace Australia Pacific. He was also a public servant in the Department of Industry, Science, and Tourism. Rattenbury was trained in law and economics. This combination of portfolios and interests made Rattenbury well-equipped to become the champion of the right to repair in Australia.

In 2019, Rattenbury sent a manifesto to his Federal, State, and Territory colleagues about the right to repair.²⁵ In his missive, Rattenbury emphasized a number of economic themes in his advocacy for a right to repair. In particular, he highlighted the importance of consumer rights, competition policy, as well as matters of intellectual property and international trade. As a Minister for Consumer Affairs, Rattenbury was worried: “Consumers who wish to maintain, rather than discard, a faulty or damaged product often do not know how that is possible, or what the cost might be.”²⁶ Rattenbury was concerned that Australian competition law had been insufficient in dealing with repair restrictions and limitations, and “premature product obsolescence.”²⁷ He expressed concern that intellectual property was being used to impose repair restrictions: “Manufacturers often use digital rights management (based on intellectual property, copyright, and safety arguments), to compel consumers to repair their broken devices with the manufacturer, rather than allow third-party repairers to provide this service.”²⁸ Rattenbury also flagged that there could be larger questions about whether a right to repair could be challenged under international trade and investment agreements.²⁹

Shane Rattenbury also suggested that there were various positive environmental outcomes, which could be obtained from a right to repair. In

25. The Hon. Shane Rattenbury, *Submission on the Right to Repair*, ACT GOV'T (Jan. 28, 2021), https://www.pc.gov.au/__data/assets/pdf_file/0007/273382/sub133-repair.pdf.

26. *Id.* at 2.

27. *Id.*

28. *Id.* at 5.

29. See EDSON BEAS RODRIGUES, JR., *THE GENERAL EXCEPTION CLAUSES OF THE TRIPS AGREEMENT: PROMOTING SUSTAINABLE DEVELOPMENT* (2012); JUSTIN MALBON, CHARLES LAWSON & MARK DAVISON, *THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS—A COMMENTARY* (2014).

particular, he highlighted the cost of e-waste and abandoned consumer goods. Rattenbury noted that there were limits to what could be achieved by state and territory governments, observing that: “A national framework would enhance consumer repair rights, promote competition in the repair economy and embed requirements for ‘designing out waste’ in products to keep them in the economy for longer.”³⁰ Rattenbury also called for a focus on product stewardship as “a response to market failures that lead to environmental damage.”³¹ He commented that there was a need to correct such industry failures: “[w]ithout the driver of regulated targets and outcomes there is often no incentive for product manufacturers to design products to be durable, reusable or recyclable or to ensure they are collected for recycling at their end-of-life.”³² Rattenbury also saw the right to repair as a means of promoting the U.N. Sustainable Development Goals—in particular, Goal No. 12, which focuses on responsible production and consumption.³³ Moreover, having been a minister with responsibilities for climate change, energy, and emissions reduction, Rattenbury saw the right to repair as a complementary measure to promote climate action—through reducing emissions, particularly bound up with the making of new products in consumer capitalism. In an interview, Rattenbury emphasized the right to repair was a “silent partner” for climate action.³⁴

Rattenbury also highlighted key comparative and international developments in relation to the right to repair. He was impressed by various state and federal efforts in the United States to recognize a right to repair.³⁵ Rattenbury was also conscious of the struggles over copyright law, technological protection measures, and the right to repair in the United States Copyright Office.³⁶ As an environmentalist, the Australian Greens politician

30. Rattenbury, *Submission on the Right to Repair*, *supra* note 25, at 8.

31. *Id.* at 9.

32. *Id.*

33. *United Nations Sustainable Development Goals*, U.N. DEP'T OF ECON. & SOC. AFFAIRS, <https://sdgs.un.org/goals> (last visited March 22, 2023) [hereinafter *SDG 2015*; *United Nations Sustainable Development Goals, Goal 12, Ensure Sustainable Consumption and Production Patterns*, U.N. DEP'T OF ECON. & SOC. AFFAIRS, <https://sdgs.un.org/goals/goal12> (last visited March 22, 2023) [hereinafter *SDG Goal 12*]; G.A. Res. 70/1, *Transforming our World: the 2030 Agenda for Sustainable Development* (Oct. 21, 2015).

34. Interview by Matthew Rimmer, with Hon. Shane Rattenbury, in ACT Legislative Assembly, Canberra (Feb. 12, 2020).

35. See Kylie Wiens, Nathan Proctor, Blake Reid, Kerry Sheehan & Matthew Williams, United States presentations at the Berkeley Law Conference on the Emergent Right to Repair (Apr. 29, 2022), <https://www.law.berkeley.edu/research/bclt/past-events/2022-events/the-emergent-right-to-repair/>.

36. See Pamela Samuelson, Robert Gomulkiewicz, Leah Grinvald, Josh Sarnoff & Kit Walsh, United States presentations at the Berkeley Law Conference on the Emergent Right to

drew inspiration from developments in the European Union in respect of consumer law, eco-design, energy labeling, and the right to repair.³⁷ He highlighted that Sweden had opened the world's first shopping mall dedicated to recycled, reused, and repaired goods: ReTuna Recycling Galleria.³⁸

Rattenbury has skillfully brought together an otherwise diffuse range of stakeholders and community groups to support the push for a right to repair in Australia. After the Productivity Commission received a reference from the Treasurer to investigate the right to repair, Rattenbury appeared before the public hearings. He was positive about the findings of the study:

[C]onsumers should be able to use an independent repair or access the resources needed to repair a product themselves, and that goes to that heart of the definition of a right to repair. This is really central to reducing waste, particularly where there is that deliberate shortening of a product's lifespan.³⁹

Rattenbury was supportive of the mission of the Productivity Commission and encouraged them to tackle not only the economic dimensions of the right to repair but the environmental ramifications of a right to repair.

The Federal leader of the Australian Greens, the Hon. Adam Bandt, supported the initiative of his Canberra colleague Rattenbury, telling the Federal Parliament: “You could also start making other corporations responsible for taking back some of their products—either take them back to recycle them or have them required, by law, to repair them.”⁴⁰ He observed: “That would be a good thing to do to ensure that products that were produced by corporations had to be looked after at the end of their life as well.”⁴¹ Bandt concluded that “you'd have some laws that required corporations to look after the waste product at the end, either by taking it back or fixing it, or by finding

Repair (Apr. 22, 2022), <https://www.law.berkeley.edu/research/bclt/past-events/2022-events/the-emergent-right-to-repair/>.

37. See also Estelle Derclaye, Kessika Richter & Anthony Rosborough, European Union presentations at the Berkeley Law Conference on the Emergent Right to Repair (Apr. 29, 2022), <https://www.law.berkeley.edu/research/bclt/past-events/2022-events/the-emergent-right-to-repair/>.

38. *RETUNA RECYCLING GALLERIA*, <https://www.retuna.se/english/> (last visited March 22, 2023).

39. The Hon. Shane Rattenbury, Right to Repair—Public Hearings, 59 (July 21, 2021), <https://www.pc.gov.au/inquiries/completed/repair/public-hearings/transcripts/all-repair-transcript.pdf>.

40. Commonwealth, *Parliamentary Debates*, House of Representatives, 26 Oct. 2022, 8169, (Adam Bandt, Greens Leader), <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fa8f5f6c7-7a97-4b2e-9b8f-4e1e306fed69%2F0172%22>.

41. *Id.*

a way to turn it into something else.”⁴² The Australian Greens hold the balance of power in the Australian Senate. The Australian Labor Party, who has formed the new the Australian Government in 2022, will ideally need the support of the Australian Greens to pass legislation.

B. THE AUSTRALIAN LABOR PARTY

As a result of the tyranny of distance between locations, there is a strong culture in Australian society of fixing, repairing, modifying, and customizing automobiles (which is well represented in the Mad Max film franchise).⁴³

The Hon. Andrew Leigh MP of the Australian Labor Party has long complained of problems in respect of the right to repair in the field of motor vehicles.⁴⁴ He has been agitating for law reform for several years. On Mother's Day 2018, at JAX Tyres in Essendon, Melbourne, Leigh and the then Leader of the Opposition, the Hon. Bill Shorten MP, announced Labor's “Your Car, Your Choice” policy.⁴⁵ They declared that Labor would put in place a mandatory code requiring manufacturers to share with independent mechanics the information they need to fix modern cars. Leigh explained: “Labor will ensure that Australian motorists have access to independent mechanics, will keep independent mechanics alive, make it cheaper for people to fix their cars, and to ensure that a vital sector of small business is able to continue.”⁴⁶ The Hon. Bill Shorten observed: “Labor is going to draw a line in the sand, we are not going to see the independent family businesses, the small mechanic operations, disappear.”⁴⁷ (It should be noted that Australia's local automobile manufacturing industry in Victoria and South Australia has collapsed, and Australia is now wholly dependent on importing cars from overseas.) Shorten stressed that “Labor is going to keep pushing so that we save the independent car repair industry in this country.”⁴⁸ Stuart Charity of the Australian Automotive Aftermarket Association endorsed the policy proposal. It will be interesting to see whether the new Australian Labor Party government led by Anthony Albanese will take further action on repair restrictions in the motor vehicle industry.

42. *Id.*

43. Kieran Tranter, *Mad Max: The Car and Australian Governance*, 5 NAT'L IDENTITIES 67, 67–81 (2003).

44. Hon. Andrew Leigh MP, *supra* note 19.

45. Hon. Bill Shorten & Hon. Andrew Leigh, Press Conference on *Your Car, Your Choice* for the Australian Labor Party (May 13, 2018), https://www.andrewleigh.com/your_car_your_choice_transcript_press_conference.

46. *Id.*

47. *Id.*

48. *Id.*

The Treasury of the Federal Government held an inquiry into the sharing of motor vehicle information for the purposes of repair.⁴⁹ The Federal Government passed the *Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Act 2021* (Cth). Australian Labor Party Representative, the Hon. Andrew Leigh was pleased by the passage of the regulatory scheme for sharing motor vehicle information in 2021.⁵⁰ Leigh discussed the significance of the scheme, particularly for independent repairers in regional and rural Australia: “Many Australians like to get their car fixed at a mycar, a JAX, an Ultra Tune, a Bridgestone or a Pedders—or, indeed, at a non-chain independent mechanic, such as Island Auto Repairs in Bongaree.”⁵¹ Leigh lamented that the scheme had not been passed in a more expeditious fashion.⁵²

In 2022, Leigh was appointed Assistant Minister for Competition, Charities and Treasury in the new Australian Labor Party Government led by Prime Minister Anthony Albanese.⁵³ Leigh will be a key decision-maker in terms of the response of the Federal Government to the right to repair recommendations made by the Productivity Commission.

In the Productivity Commission inquiry, there was much discussion about the right to repair and motor vehicles.⁵⁴ As this Article will discuss, the Productivity Commission made some further recommendations regarding the right to repair and motor vehicles.⁵⁵ Professor MC Forelle of Cornell University made a submission that highlighted some of the intellectual property dimensions of the topic of automobiles, and the right to repair as well.⁵⁶

49. TREASURY, MANDATORY SCHEME FOR THE SHARING OF MOTOR VEHICLE SERVICE AND REPAIR INFORMATION, (2019), <https://treasury.gov.au/consultation/c2019-t358022>; MATTHEW RIMMER, THE RIGHT TO REPAIR: MANDATORY SCHEME FOR THE SHARING OF MOTOR VEHICLE SERVICE AND REPAIR INFORMATION, (2019), <https://eprints.qut.edu.au/127446/>; Leanne Wiseman, Kanchana Kariyawasasm & Lucas Davey, *The Mandatory Repair Scheme for Motor Vehicles 2019: Australia's First Response to the International Right to Repair Movement?*, 48 AUSTL. BUS. L. REV. 218, 218–33 (2020).

50. Hon. Shorten & Hon. Leigh, *supra* note 45.

51. *Id.*

52. *Id.*

53. The Hon. Dr. Andrew Leigh was sworn in as Assistant Minister for Competition, Charities and Treasury on June 1, 2022. *The Hon Dr Andrew Leigh*, TREASURY, <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022> (last visited March 22 2023).

54. PRODUCTIVITY COMM'N, Inquiry Report, *supra* note 4, at 139–140.

55. *Id.* at 139–40.

56. MC FORELLE, SUBMISSION TO THE AUSTRALIAN PRODUCTIVITY COMMISSION, SUBMISSION NO. 177, PRODUCTIVITY COMMISSION (2021); MC Forelle, *Copyright and the Modern Car: Colliding Visions of the Public Good in DMCA Section 1201 Anti-Circumvention Proceedings*, NEW MEDIA & SOC'Y 1–18 (2021) [hereinafter Forelle, *Copyright*].

A number of the members of the Australian Labor Party have taken a strong interest in the more general debate about the right to repair and the Productivity Commission inquiry. The Hon. Julie Owens observed that community organizations, such as the Bower Repair and Reuse Centre, in her constituency had been lobbying for a right to repair: “A right to repair would also encourage manufacturers to make high-quality, long-lasting goods in the first place, rather than products that conveniently die as soon as the warranty expires.”⁵⁷ Owens noted that the community center promoted a circular economy: “If you are in the community of Parramatta, or anywhere in Western Sydney, and you want to be better at repairing stuff, they run fantastic workshops as well.”⁵⁸ She concluded that the Bower Repair and Recuse Center is “a really interesting organization, and they are doing what they need to do to make this world a better place.”⁵⁹ Although Owens retired in 2022, her sentiments remain pertinent—many Australian Labor Party members would be supportive of such community-based repair organizations.

Likewise, the Hon. Josh Wilson—as the Australian Labor Party’s Shadow Assistant Minister for the Environment—discussed the broader issue of the right to repair in Australia.⁶⁰ He reflected: “We can’t just have a linear economy of using raw materials to make products that are thrown into landfill, are burnt or end up in the ocean.”⁶¹ Wilson also noted: “We can’t have that in terms of the environmental impact, but, in fact, we can’t have it from the point of view of resource sustainability.”⁶² He stressed: “We need to use the materials that are here, at a time when the population is very large and is continuing to grow and at a time when resource consumption per capita is continuing to grow.”⁶³ Wilson called for the development of a circular economy:

You design goods so that you don't throw them away if you don't have to. You use them for as long as possible by repairing them as much as possible and by making sure that they're designed to be repaired. You ensure that manufacturers are obliged to consider that

57. Commonwealth, *Parliamentary Debates*, House of Representatives, 22 Oct. 2020, 7952, (Hon. Julie Owens, ALP MP for Parramatta), <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Ff1f6eccc-f76e-46be-b279-e3d2a88da6c2%2F0026%22>.

58. *Id.*

59. *Id.*

60. Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 2021, 4144, (Hon. Josh Wilson, ALP MP for Fremantle), <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F9174ef36-5bd6-4333-8000-d719ad0b062d%2F0191%22>.

61. *Id.*

62. *Id.*

63. *Id.*

in their design process and that they make sure there are parts available.⁶⁴

Wilson further called for a stronger regime of product stewardship “so that, at the end of all of that, we are only left with the barest minimum of residual waste.”⁶⁵ Wilson represents a left-wing, progressive seat of Fremantle. His views about the environmental importance of the right to repair will be important—especially given that there is a point of convergence there with the opinions of the Australian Greens on the subject.

As Australian Labor Party has formed the new Australian Government in 2022, the views of the politicians within this party will be important in the implementation of the Productivity Commission’s recommendations on the right to repair.

C. THE NATIONAL PARTY OF AUSTRALIA

The National Party of Australia is a conservative party that is focused on regional and rural areas in Australia. Traditionally, the National Party of Australia has formed coalition governments with the (also conservative) Liberal Party of Australia at a Federal level and a state level.

At a state conference in 2018, the Nationals WA (a Western Australian political party affiliated with the National Party of Australia) called for the recognition of the right to repair for farmers, after supporting a motion put forward by the Esperance Branch of the party.⁶⁶ The spokesperson for agriculture, the Hon. Colin de Grussa, discussed the platform.⁶⁷ He commented: “Right to repair legislation would give independent repair shops, such as IT companies and mechanics, the same access to genuine parts, tools and information to aid them in the repair process for consumer electronics.”⁶⁸ De Grussa observed that “it is also vitally important for farmers and workers in the agricultural system.”⁶⁹ He was concerned about the need for specialist repairs in respect of farming equipment and agricultural machinery: “As farming equipment has become more hi-tech, the ability to fix software issues in agricultural machinery has become more complex.”⁷⁰

64. *Id.*

65. *Id.*

66. Bremmer, *supra* note 20.

67. *Nationals Call for Consumers to Have Right to Repair*, NATIONALS FOR REGIONAL WA (Oct. 16, 2018), <https://www.nationalswa.com/nationals-call-for-consumers-to-have-right-to-repair/>. Note that the Western Australian branch of the National Party of Australia is distinct from the Federal branch.

68. *Id.*

69. *Id.*

70. *Id.*

He was also concerned about the repair restrictions imposed by technology developers: “Major machinery manufacturers such as John Deere now require customers to sign a license agreement which prevents them, or unauthorized third-parties, from performing software repairs.”⁷¹ De Grussa observed that, in rural and remote Australia, there were great difficulties in getting timely, affordable, and local access to authorized repair mechanics. This was a particular concern in Western Australia, where agricultural communities can be far-flung and remote from regional centers. He stressed that there were significant costs associated with such barriers to the right to repair in Australian farming communities: “The costs to farmers and the loss in productivity for the agriculture sector are significant and consumers are denied the right to utilize local mechanics or technicians.”⁷²

In 2019, the Hon. Colin de Grussa discussed the scheme for the sharing of motor vehicle service and repair information.⁷³ He urged the Government to consider extending the scope of the Code, or implementing a separate Code, that would address farm vehicles, construction vehicles, and heavy vehicles. Furthermore, de Grussa encouraged “the Government to also consider ‘right to repair’ legislation that will allow more localised access to smart device repairers.”⁷⁴

The Hon. Ken O’Dowd—a Federal member of the Liberal National Party of Queensland—brought a petition to the Australian Government, which requested “a right to repair legalization to ensure access to repair information, spare parts for electronics for consumers and independent repair technicians for all products.”⁷⁵ The petition “asked the House to introduce legalization for Right to Repair for all products including a mandatory data sharing scheme similar to the one for motor car industry.”⁷⁶ The petition also called on the Australian Parliament to “ensure access to spare parts and repair information to the general public and not just to authorized repairers.”⁷⁷ The Assistant

71. *Id.*

72. *Id.*

73. HON. COLIN DE GRUSSA MLC, MANDATORY SCHEME FOR THE SHARING OF MOTOR VEHICLE SERVICE AND REPAIR INFORMATION (2019), <https://treasury.gov.au/sites/default/files/2019-11/c2019-t358022v2-The-Nationals-WA.pdf>.

74. *Id.*

75. Petition, Consumer Rights: Right to Repair, House of Representatives, 13 May 2020, 3260, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F809dc477-581d-4161-a8ca-c741a051ff95%2F0111%22>.

76. *Id.*

77. *Id.*

Treasurer the Hon. Michael Sukkar responded to the petition, explaining that the government was investigating the right to repair.⁷⁸

The Australian Competition and Consumer Commission (ACCC) conducted an investigation of repair restrictions on competition in agriculture and concluded that there needed to be better access to servicing and repairs in agricultural markets.⁷⁹ The Farmers' Federation of Australia reinforced such points in their submission and appearance before the Productivity Commission inquiry in respect of the right to repair.⁸⁰ The Productivity Commission certainly focused heavily upon such concerns in their hearings and the final report.⁸¹ There are parallels to the controversy in the United States over repair restrictions in respect of agricultural machinery.⁸²

D. THE LIBERAL PARTY OF AUSTRALIA

The Liberal Party of Australia held Federal government for a few terms—led by Tony Abbott (2013–2015), Malcolm Turnbull (2015–2018), and Scott Morrison (2018–2022)—before being deposed by Anthony Albanese and the Australian Labor Party in 2022.

In response to concerns raised by independent repairers, Australia's Treasury has been focused on the question of sharing repair information in respect of motor vehicles. In 2021, the Federal Government introduced and passed the *Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Act 2021* (Cth). Assistant Treasurer and Minister

78. Hon. Michael Sukkar, *Productivity Commission Inquiry into Right to Repair*, TREASURY (Oct. 29, 2020), <https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/productivity-commission-inquiry-right-repair>.

79. *Better access to servicing and repairs needed in agricultural machinery markets*, ACCC (May 4, 2021), <https://www.accc.gov.au/media-release/better-access-to-servicing-and-repairs-needed-in-agricultural-machinery-markets#:~:text=The%20ACCC%20has%20recommended%20that,repair%20scheme%20introduced%20in%20Australia>.

80. NAT'L FARMERS FED'N, RE: SUBMISSION TO THE PRODUCTIVITY COMMISSION "RIGHT TO REPAIR" INQUIRY, (2021), https://www.pc.gov.au/__data/assets/pdf_file/0004/272335/sub055-repair.pdf.

81. PRODUCTIVITY COMM'N, *Inquiry Report*, *supra* note 4, at 21.

82. *See* *Forest River Farms v. Deere & Co.*, No. 1:22-CV-00188 (N.D. Ill. Jan. 12, 2022); Matthew Gault & Jason Koebler, *John Deere Hit With Class Action Lawsuit for Alleged Tractor Repair Monopoly*, VICE (Jan. 13, 2022, 10:01 AM), <https://www.vice.com/en/article/xgdazj/john-deere-hit-with-class-action-lawsuit-for-alleged-tractor-repair-monopoly>; *see also* *Agricultural Right to Repair Act*, S. 3549, 117th Cong. (2022); *Right to Repair' Farm Equipment and Empowering Family Farmers is Aim of Tester's New, Groundbreaking Legislation*, JON TESTER (Feb. 1, 2022), https://www.testersenate.gov/?p=press_release&id=8866#:~:text=%E2%80%9CThe%20Agricultural%20Right%20to%20Repair,at%20the%20Open%20Market%20Institute.

Michael Sukkar discussed the significance of the legislation in his second reading speech.⁸³ He maintained that the government has engaged in extensive consultation to “ensure that [the scheme] is effective, fair[,] and safe.”⁸⁴ Sukkar commented: “This bill includes significant reforms to the service and repair industry that have been made possible only through a strong partnership with industry.”⁸⁵ This regime was passed in 2021.

In 2020, Federal Treasurer Josh Frydenberg requested that the Productivity Commission undertake an inquiry into the right to repair in Australia.⁸⁶ He recommended: “The Productivity Commission should examine the potential benefits and costs associated with ‘right to repair’ in the Australian context, including current and potential legislative, regulatory and non-regulatory frameworks and their impact on consumers’ ability to repair products that develop faults or require maintenance.”⁸⁷ In the terms of reference, Frydenberg noted: “In examining the Australian context, the Productivity Commission should identify evidence of the impact of relevant international approaches.”⁸⁸

In particular, Frydenberg asked the Productivity Commission to focus on five main issues. First, Frydenberg wanted the law reform body to consider “the legislative arrangements that govern repairs of goods and services, and whether regulatory barriers exist that prevent consumers from sourcing competitive repairs.”⁸⁹ Second, he asked the Productivity Commission to focus upon “the barriers and enablers to competition in repair markets, including analyzing any manufacturer-imposed barriers, and the costs and benefits associated with broader application of regulated approaches to right of repair and facilitating legal access to embedded software in consumer and other goods.”⁹⁰ Third, he asked the Productivity Commission to consider “the impact of digital rights management on third-party repairers and consumers, and how intellectual

83. Commonwealth, *Parliamentary Debates*, House of Representatives, 24 Mar. 2021, 7 (Hon. Michael Sukkar MP, Assistant Treasurer) , <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fd64bba7e-9b55-427c-ae1f-2c98b347651d%2F0014%22>.

84. *Id.*

85. *Id.*

86. Hon. Josh Frydenberg MP, *Terms of Reference for Productivity Commission Inquiry into the Right to Repair*, PRODUCTIVITY COMM’N (Oct. 29, 2020), <https://www.pc.gov.au/inquiries/completed/repair/terms-of-reference>. The Treasurer exercises his powers to call an inquiry under Parts 2 and 3 of the Productivity Commission Act. *Productivity Commission Act 1998* (Cth) pts 2, 3

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

property rights or commercially-sensitive knowledge would interact with a right to repair.”⁹¹ Fourth, he wanted the advisory body to explore “the effectiveness of current arrangements for preventing premature or planned product obsolescence and the proliferation of e-waste, and further means of reducing e-waste through improved access to repairs and increased competition in repair markets.”⁹² Fifth, he asked the law reform body to investigate “the impact on market offerings, should firms have their control over repair removed.”⁹³ These terms of reference established the scope and the breadth of the inquiry by the Productivity Commission in relation to the right to repair.

In terms of process, Frydenberg advised that “the Commission should consult broadly, including with state and territory consumer affairs regulators.”⁹⁴ Moreover, “the Commission should undertake an appropriate public consultation process including by holding public hearings, inviting public submissions[,] and releasing a draft report to the public.”⁹⁵

The Coalition Government received the final report of the Productivity Commission in 2022—but lost power in the Federal election, before they had an opportunity to respond to the recommendations of the Productivity Commission. Frydenberg lost his seat of Kooyong to the “Teal” community independent Dr. Monique Ryan.⁹⁶ It remains to be seen who will be in charge of the topic of the right to repair in the opposition Shadow Bench of the Liberal Party of Australia.

E. THE PRODUCTIVITY COMMISSION

The Productivity Commission has broad experience in carrying out law reform investigations in respect of intellectual property policy, law, and practice. Over many years, the Productivity Commission has considered the interaction between intellectual property and international trade agreements in Australia.⁹⁷ The advisory body has previously looked at the operation of the

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Paul Sakkar, *How a Political Novice Took Down Australia's Treasurer*, THE AGE (May 28, 2022, 7:08 PM), <https://www.theage.com.au/politics/federal/how-a-political-novice-took-down-australia-s-treasurer-20220526-p5aoq7.html>.

97. PRODUCTIVITY COMM'N, *BILATERAL AND REGIONAL TRADE AGREEMENTS* (2010), <http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf>; PRODUCTIVITY COMM'N, *TRADE AND ASSISTANCE REVIEW 2014–2015* (2016), <http://www.pc.gov.au/research/ongoing/trade-assistance/2014-15/trade-assistance-review-2014-15.pdf>.

compulsory licensing and Crown use provisions of the patents and designs regime.⁹⁸ The Productivity Commission has conducted a holistic inquiry into Australia's intellectual property arrangements.⁹⁹ The law reform body was, therefore, well placed to consider the right to repair. (The Productivity Commission has subsequently received a reference to investigate Indigenous intellectual property.)¹⁰⁰

The inquiry into the right to repair was presided over by two commissioners from the Productivity Commission—Paul Lindwall, the presiding commissioner, and Julie Abramson. An economist by training, Lindwall is in his second term on the Productivity Commission and has worked on a dozen inquiries.¹⁰¹ He has previously been a senior official with the Australian Treasury, the Department of Finance, and the Productivity Commission, and a senior economic adviser to high-level Liberal Party politicians Peter Costello and Malcolm Turnbull. Lindwall also represented Australia at the OECD—and worked as a consultant for the OECD. A lawyer by training, Julie Abramson is in her second term with the Productivity Commission.¹⁰² She has particular expertise in respect of law and regulation. Abramson has undertaken half-a-dozen inquiries with the Productivity Commission—including one on consumer law enforcement and administration. It was widely acknowledged that the combination of Lindwall and Abramson performed the job of undertaking the inquiry into the right to repair in a systematic and thoughtful fashion and were able to engage with a wide range of stakeholders during the process.

The Productivity Commission has a well-organized system of undertaking inquiries. In relation to the right to repair, the Productivity Commission held some initial meetings with interested stakeholders. The law reform body sought feedback from interested parties. The law reform body received 146 initial submissions; and 97 post-draft submissions. The organization also received 196 pre-draft brief comments; and 47 post-draft brief comments. The law reform body held public hearings—many of which were online because of

98. PRODUCTIVITY COMM'N, COMPULSORY LICENSING OF PATENTS: INQUIRY REPORT NO. 61 (2013) <https://www.pc.gov.au/inquiries/completed/patents/report/patents.pdf>.

99. PRODUCTIVITY COMM'N, INTELLECTUAL PROPERTY ARRANGEMENTS: INQUIRY REPORT NO. 78 (2016) <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf>.

100. PRODUCTIVITY COMM'N, DRAFT REPORT ON ABORIGINAL AND TORRES STRAIT ISLANDER VISUAL ARTS AND CRAFTS (2022) <https://www.pc.gov.au/inquiries/current/indigenous-arts/draft/indigenous-arts-draft-overview.pdf>.

101. *Paul Lindwall*, PRODUCTIVITY COMM'N <https://www.pc.gov.au/about/people-structure/commissioners/paul-lindwall>.

102. *Julie Abramson*, PRODUCTIVITY COMM'N, <https://www.pc.gov.au/about/people-structure/commissioners/julie-abramson>.

the COVID-19 spatial and travel restrictions, which were in place at the time. There were hearings held in Sydney, New South Wales; Melbourne, Victoria; and Canberra in the Australian Capital Territory. There was a transcript of the proceedings.¹⁰³ The Productivity Commission released an issues paper,¹⁰⁴ a discussion paper,¹⁰⁵ and a final report.¹⁰⁶

It is worthwhile exploring the recommendations of the Productivity Commission on the right to repair in respect of intellectual property; consumer law and competition policy; and e-waste, product obsolescence, and sustainable development.

III. INTELLECTUAL PROPERTY

The right to repair raises public policy issues across a range of species of intellectual property. There have been conflicts over copyright law, technological protection measures, and the right to repair. Australia's design laws have recognized a right to repair—and there has been litigation over the nature and scope of this spare parts exception.¹⁰⁷ There have been similar questions elsewhere about the right to repair under designs law.¹⁰⁸ There has been a consideration of whether the larger interest in social welfare has been adequately addressed in designs law.¹⁰⁹ There has been debate over trademark law and the right to repair,¹¹⁰ most notably in the context of recent litigation by Apple against a repair store in Norway.¹¹¹ There has been discussion in a

103. PRODUCTIVITY COMM'N, RIGHT TO REPAIR—PUBLIC HEARINGS 381 (2021), <https://www.pc.gov.au/inquiries/completed/repair/public-hearings/transcripts/all-repair-transcript.pdf>.

104. PRODUCTIVITY COMM'N, RIGHT TO REPAIR: ISSUES PAPER (2020), <https://www.pc.gov.au/inquiries/completed/repair/issues/repair-issues.pdf>.

105. PRODUCTIVITY COMM'N, RIGHT TO REPAIR: DRAFT REPORT (2021), <https://www.pc.gov.au/inquiries/completed/repair/draft/repair-draft.pdf>.

106. PRODUCTIVITY COMM'N, Inquiry Report, *supra* note 4.

107. Section 72 of the *Designs Act* 2003 (Cth); *GM Glob Tech Operations LLC v S.S.S Auto Parts Pty Ltd* [2019] FCA 97.

108. David Llewelyn & Veronica Barresi, *Right Holders' Control over Repair and Reconditioning*, in SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS 3–20 (Christopher Heath & Anselm Kamperman Sanders eds., 2009).

109. Alison Firth, *Repairs, Interconnections, and Consumer Welfare in the Field of Design*, in SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS 147–80 (Christopher Heath & Anselm Kamperman Sanders eds., 2009).

110. Michael Pendleton, *Trademarks and Reconditioned Goods in Greater China and at Common Law*, in SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS 127–46 (Christopher Heath & Anselm Kamperman Sanders eds., 2009).

111. *Huseby v. Apple Inc.*, HR-2020-1142-A, Nor. Sup. Ct., <https://assets.documentcloud.org/documents/6936580/Norway.pdf>. For commentary, see Karl Bode, *Norway Supreme Court Signs Off On Apple's Harassment Of An Independent Repair Shop*,

range of jurisdictions about how the patent system deals with patent infringement and the right to repair. There has increasingly been conflict over trade secrets and data protection related to repair.¹¹² Accordingly, there is a need to consider the right to repair across a range of intellectual property regimes—and not merely in isolated systems, such as just designs law or only copyright law.

There is a strong body of evidence that intellectual property restrictions do impact the right to repair in Australia. The evidence is more than merely anecdotal or patchy (as suggested initially by the Productivity Commission in its Draft Finding 5.1).¹¹³ There is a history of conflict over copyright law, technological protection measures, and the right to repair.¹¹⁴ There have been threats of litigation in respect of copyright relating to repair manuals in Australia.¹¹⁵ The High Court of Australia and the Australian Parliament have expressed concerns about the breadth of technological protection measures.¹¹⁶ There has been major litigation over the spare parts exception under designs law.¹¹⁷ There was a landmark dispute in the High Court of Australia over patent law and the distinction between repair and refurbishment.¹¹⁸ There has been a policy discussion about repair information and trade secrets—resulting in action by both the Treasury and the Australian Parliament.¹¹⁹

In light of intellectual property restrictions on the right to repair in Australia, it is essential to craft some significant and lasting public policy solutions in this area. It is worthwhile considering the recommendations of the Productivity Commission in its final report to address intellectual property-related restrictions and limitations on repair. The Productivity Commission did

TECHDIRT (June 5, 2020), <https://www.techdirt.com/articles/20200604/11170944646/norway-supreme-court-signs-off-apples-harassment-independent-repair-shop.shtml>.

112. TREASURY, *Mandatory Scheme for the Sharing*, *supra* note 49.

113. See PRODUCTIVITY COMM'N, DRAFT REPORT, *supra* note 105, at Draft Finding 5.1.

114. Andy Sun, *Blocking Repair or Fair Use of Software? The U.S. Perspectives on Anticircumvention*, in SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS 105–24 (Christopher Heath & Anselm Kamperman Sanders eds., 2009); Matthew Gault, *Nintendo Threatens Repair Shop for Advertising Switch Mod Chip Installs*, VICE (June 18, 2020, 6:15 AM), https://vice.com/en_us/article/7kpxbb/nintendo-threatens-repair-shop-for-advertising-switch-mod-chip-installs.

115. Kyle Wiens, *The Shady World of Repair Manuals: Copyrighting for Planned Obsolescence*, WIRED (Nov. 12, 2012, 6:00 PM), <https://www.wired.com/2012/11/cease-and-desist-manuals-planned-obsolence/>; Tim Hicks, *Toshiba Laptop Service Manuals and the Sorry State of Copyright Law*, FUTURE PROOF (2012), <http://www.tim.id.au/blog/2012/11/10/toshiba-laptop-service-manuals-and-the-sorry-state-of-copyright-law/>.

116. *Stevens v Kabushiki Kaisha Sony Comput. Ent.* [2005] HCA 58.

117. *GM Glob Tech Operations LLC v S.S.S. Auto Parts Pty Ltd.* [2019] FCA 97.

118. *Calidad v Seiko Epson Corp.* [2020] HCA 41.

119. Treasury, *Mandatory Scheme for the Sharing*, *supra* note 49.

make some substantive recommendations for law reform in respect of copyright law, technological protection measures, and contracting out of copyright exceptions. However, the Productivity Commission declined to make recommendations for other forms of industrial property. The regulator did provide a footnote:

While it could not be established that other forms of IP, including patents, designs and trademarks, are materially impacting product repairs to warrant reform at this time, this is not to say that issues in these areas do not exist, nor that they may not become a material issue requiring government intervention in the future.¹²⁰

This hedged statement opens the possibility that there may need to be law reform in other fields of intellectual property—if there is evidence of material issues in that field.

Arguably, it is important that the Productivity Commission crafts a solution for the right to repair, which spans the various fields of intellectual property. It would be insufficient to merely make recommendations for law reform in respect of copyright law, technological protection measures, and contracting out. Given the importance of industrial forms of property, it is imperative to also consider law reform in the fields of designs law, trademark law, patent law, confidential information and trade secrets, and data protection. By necessity, this is a broad, overview discussion of each of these fields of intellectual property—rather than an in-depth investigation of particular areas. No doubt each topic could deserve a paper-long discussion in its own right.

A. COPYRIGHT LAW

As Professor Pamela Samuelson has presciently pointed out, there have long been conflicts over copyright law, the right to repair, and the freedom to tinker.¹²¹ There is a growing literature on the relationship between copyright law and the right to repair.¹²² There have been proposals for copyright law reform to address the right to repair in many other jurisdictions—such as the United States and Canada.

120. PRODUCTIVITY COMM'N, Inquiry Report, *supra* note 4, at 180.

121. Pamela Samuelson, *Freedom to Tinker*, 17 THEORETICAL INQUIRIES L. 563, 563–600 (2016).

122. Sun, *supra* note 114, at 105–24; Wiens, *supra* note 115; Cory Doctorow, *The Copyright Office's DMCA-defanging is Nice, but Man, There Are: So. Many Hoops to Jump Through*, BOING BOING (Oct. 26, 2018, 10:17 AM), <https://boingboing.net/2018/10/26/your-stuff-your-rules.html>; Bryan Bello & Patricia Aufderheide, *The DMCA, Database Protection, and Right to Repair: The Long Tail of Public Interest Activism in the First Digital Copyright Decade*, 56 INFO. & CULTURE 1 (2021); Forelle, *Copyright*, *supra* note 56.

1. *Copyright Exceptions*

The Productivity Commission recognized that copyright laws prevented third-party repairers from accessing repair information (such as repair manuals and diagnostic data), and that was one of the more significant intellectual property-related barriers to repair.

In Finding 5.1, the Productivity Commission recognized that “copyright laws are an impediment to accessing repair information.”¹²³ The Productivity Commission found that “Copyright laws that prevent third-party repairers from accessing repair information (such as repair manuals and diagnostic data) are the most significant unnecessary intellectual property-related barrier to repair in Australia.”¹²⁴

Recommendation 5.2 of the Productivity Commission calls for the introduction of a new use exception in the *Copyright Act* 1968 (Cth). The Productivity Commission recommends: “The Australian Government should amend the *Copyright Act* to include an exception that allows for the reproduction and sharing of repair information.”¹²⁵ The Productivity Commission provides: “In the immediate term, this exception should be included through the existing fair dealing framework in the *Copyright Act*.”¹²⁶ It is worth noting, though, that the courts have read the defense of fair dealing quite narrowly in recent litigation.¹²⁷ So it would be important to ensure that any new defense of fair dealing for the purposes of repair was broadly constructed.

The Productivity Commission comments: “In the medium to long term, the Australian Government should pursue a more flexible copyright exception regime, including a principles-based ‘fair use’ exception.”¹²⁸ The Productivity Commission echoes its previous support for a defense of fair use from its inquiry in respect of Australia’s intellectual property arrangements.¹²⁹ Other law reform bodies, such as the Australian Law Reform Commission, have also

123. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4, at 34.

124. *Id.*

125. *Id.* at 35.

126. *Id.*

127. See Matthew Rimmer, *An Elegy for Greg Ham: Copyright Law, the Kookaburra Case, and Remix Culture*, 17 DEAKIN L. REV. 385, 385–423 (2012); *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108, 108 FCR 235; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146, 118 FCR 417; *AGL Energy Ltd v Greenpeace Australia Pac Ltd* [2021] FCA 625; *Universal Music Publ’g Pty Ltd v Palmer* [No. 2] (2021) FCA 434 .

128. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4, at 35.

129. PRODUCTIVITY COMM’N, IP ARRANGEMENTS, *supra* note 99.

advocated the adoption of a broad-based defense of fair use.¹³⁰ As Professor Pamela Samuelson has observed, the defense of fair use is flexible and adaptable, and can deal with new technologies.¹³¹ Moreover, she observed that the defense of fair use is underpinned by important values such as the progress of authorship, access to information, freedom of speech, competition, technological innovation, and the privacy and autonomy interests of users. Australia would also no doubt benefit from stronger copyright user groups, which would engage in advocacy in respect of copyright exceptions and provide advice on copyright exceptions.¹³²

It should be noted that copyright owner organizations voiced disapproval at the proposals to create further exceptions in respect of Australian copyright law. The copyright collecting society—Copyright Agency—emphasized that “We strongly oppose the introduction of a US-style fair use exception into Australia’s copyright legislation [because] it would necessarily have unintended consequences, particularly given that the issue before the Commission is so specific.”¹³³ Moreover, the Copyright Agency argued: “Any exception introduced into the *Copyright Act* to address this issue, such as a new fair dealing exception, needs to be carefully drafted so that it does not have any wider application or unintended consequences.”¹³⁴ The Australian Copyright Council—an industry advocacy body that represents copyright owners—opposed reforms to copyright exceptions, technological protection measures, and contracting out: “It is the Australian Copyright Council’s position that amending the existing Australian copyright law framework is not appropriate for matters which are best dealt with by changes to consumer and competition law, as the issues raised by the Commission are matters of trade and not of copyright policy.”¹³⁵ Screenrights—a collecting society for broadcast content—opposed the introduction of a defense of fair use, or a defense of

130. AUSTRALIAN L. REFORM COMM’N, COPYRIGHT AND THE DIGITAL ECONOMY: FINAL REPORT, ALRC REPORT 122 (2013), <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/>.

131. Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2537–2621 (2009).

132. Matthew Rimmer, *A Fair Use Project for Australia: Copyright Law and Creative Freedom*, 28 *COPYRIGHT REP.* 165–212 (2010).

133. COPYRIGHT AGENCY, RESPONSE TO PRODUCTIVITY COMMISSION DRAFT REPORT ON RIGHT TO REPAIR, (2021), https://www.pc.gov.au/__data/assets/pdf_file/0005/279212/subdr182-repair.pdf.

134. *Id.*

135. AUSTRALIAN COPYRIGHT COUNCIL, RESPONSE TO THE PRODUCTIVITY COMMISSION DRAFT REPORT: RIGHT TO REPAIR, (2021), https://www.pc.gov.au/__data/assets/pdf_file/0008/279332/subdr189-repair.pdf.

fair dealing for repair.¹³⁶ Australian film and television bodies objected to the introduction of new copyright exceptions and steadfastly defended the system for technological protection measures.¹³⁷

Nonetheless, the Productivity Commission was not daunted by the critical responses of copyright owner groups (particularly after their previous disagreements during the inquiry into Australia's intellectual property arrangements).

2. *Technological Protection Measures*

In Australia, there has been disquiet amongst the judiciary over the expansive approach taken to technological protection measures—known colloquially in Australia as “digital locks.” The High Court of Australia expressed concerns about the overbroad protection of technological protection measures in the case of *Stevens v. Sony*.¹³⁸

The Australian Parliament, though, has further enlarged the scope of technological protection measures, particularly in response to trade agreements such as the *Australia-United States Free Trade Agreement* 2004¹³⁹ and the *Trans-Pacific Partnership* 2015.¹⁴⁰ However, there has been disquiet about the impact of technological protection measures upon consumer rights and competition policy. The IT Pricing inquiry, in particular, expressed deep concerns that Australian consumers were being disadvantaged compared to their U.S. counterparts.¹⁴¹

136. SCREENRIGHTS, DRAFT REPORT: RIGHT TO REPAIR, (2021), https://www.pc.gov.au/__data/assets/pdf_file/0011/279182/subdr174-repair.pdf.

137. AUSTL. FILM & TV BODIES, RESPONSE TO THE PRODUCTIVITY COMMISSION DRAFT REPORT DATED JUNE 2021: RIGHT TO REPAIR, (2021), https://www.pc.gov.au/__data/assets/pdf_file/0010/279181/subdr173-repair.pdf.

138. *Stevens v Kabushiki Kaisha Sony Comp Ent* [2005] HCA 58. For commentary, see MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD (2007).

139. Matthew Rimmer, *Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement*, FIRST MONDAY (Mar. 6, 2006), <https://firstmonday.org/ojs/index.php/fm/article/view/1316/1236>.

140. MATTHEW RIMMER, THE TRANS-PACIFIC PARTNERSHIP: INTELLECTUAL PROPERTY AND TRADE IN THE PACIFIC RIM (2020).

141. H. REP. STANDING COMM. ON INFRASTRUCTURE & COMM'NS, AT WHAT COST? IT PRICING AND THE AUSTRALIA TAX (2013), https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm; Matthew Rimmer, *Clash of the Titans: Apple, Adobe, and Microsoft Under Fire at the IT Pricing Inquiry*, CONVERSATION (Mar. 22, 2013, 12:39 AM), <https://theconversation.edu.au/clash-of-the-titans-apple-adobe-and-microsoft-under-fire-at-it-pricing-inquiry-12878>; MATTHEW RIMMER, IT PRICING: COPYRIGHT LAW, CONSUMER RIGHTS, AND COMPETITION POLICY (2012), http://works.bepress.com/matthew_rimmer/121/.

In the right to repair inquiry, the Law Council of Australia has expressed concern that repairers could be subject to civil remedies and criminal offenses under the technological protection measures scheme.¹⁴² The Law Council of Australia commented:

Technological protection measures (TPMs) may pose a barrier to repair in some cases. The *Copyright Act 1968* (Cth) creates both civil and criminal liability for anyone who circumvents a TPM (sections 116AN, 132APC), manufactures a circumvention device for a TPM (sections 116AO, 132APD) or provides a circumvention service for a TPM (sections 116AP, 132APE). Maximum penalties for these offences reach 550 penalty units (currently \$122,100) and/or five years imprisonment.¹⁴³

The Australian Digital Alliance has also called for exceptions for repair under technological protection measures in a range of inquiries.¹⁴⁴ The Pirate Party of Australia expressed concern about the impact of technological protection measures upon the exercise of free use exceptions and exemptions.¹⁴⁵

In Recommendation 5.1, the Productivity Commission called for amendments to the technological protection measures regime: “The Australian Government should amend the technological protection measures (TPMs) regime in the *Copyright Act 1968* and *Copyright Regulations 2017* to better facilitate repairers’ access to embedded information protected by TPMs necessary for issue diagnosis and repair.”¹⁴⁶ The Productivity Commission observed that the Federal Government should “amend the existing TPM circumvention exception for repair in regulation 40(2)(d) of the *Copyright Regulations 2017*, to clarify its scope and application to permit circumvention in order to access information necessary to perform repairs to the product in which the TPM is installed.”¹⁴⁷ The Productivity Commission also recommended that the

142. L. COUNCIL AUSTR., PRODUCTIVITY COMMISSION—RIGHT TO REPAIR ISSUES PAPER (2021), https://www.pc.gov.au/__data/assets/pdf_file/0007/272896/sub114-repair.pdf.

143. *Id.* at 13.

144. *Submission in response to the ACCC Agricultural machinery: After-sales markets Inquiry*, AUSTR. DIGIT. ALL. (May 31, 2020), <https://digital.org.au/resources/accc-agricultural-machinery-after-sales-markets-inquiry-submission/>; Appearance of Ben Rice, for the Australian Digital Alliance, before the Productivity Commission 292–99 (July 21, 2021), <https://www.pc.gov.au/inquiries/completed/repair/public-hearings/transcripts/all-repair-transcript.pdf>.

145. PIRATE PARTY AUSTR., SUBMISSION TO THE AUSTRALIAN PRODUCTIVITY COMMISSION ON THE RIGHT TO REPAIR (2021), https://www.pc.gov.au/__data/assets/pdf_file/0010/272458/sub074-repair.pdf.

146. PRODUCTIVITY COMM’N, *Inquiry Report*, *supra* note 4, at 35.

147. *Id.*

Australian Government should “amend section 116AO of the *Copyright Act* 1968, to permit the distribution of TPM circumvention devices for the purpose of facilitating a permitted act of circumvention (such as circumvention for the purpose of repairing a product in regulation 40(2)(d) of the *Copyright Regulations* 2017).”¹⁴⁸ Australia has obligations in respect of the standards for protection for technological protection measures under international trade agreements, such as the *Australia-United States Free Trade Agreement* 2004,¹⁴⁹ the *Trans-Pacific Partnership* 2015, and the *Comprehensive and Progressive Trans-Pacific Partnership* 2018.¹⁵⁰

In the inquiry, Anthony Rosborough discussed the push for law reform in Canada on copyright, the right to repair, and technological protection measures, which has received broad support from several of the main parties in the Parliament of Canada.¹⁵¹ The Australian proposals for exceptions for technological protection measures echo recent developments in Canada.¹⁵²

3. Contracting Out

In Recommendation 5.3, the Productivity Commission called for a prohibition on the contracting out of copyright exceptions: “To give full effect to copyright exceptions, including those relating to repair, the Australian Government should amend the *Copyright Act* 1968 to make unenforceable any part of an agreement restricting or preventing a use of copyright material permitted by copyright exceptions.”¹⁵³ It should be noted that this problem of contracting-out of repair is also apparent in other fields of intellectual property—such as designs law, trademark law, patent law, and trade secrets law. It would be useful to prohibit the use of contract terms that restrict repair-related activities otherwise permitted under intellectual property law.

148. *Id.*

149. *Australia-United States Free Trade Agreement (AUSFTA)*, 2004 ATS 1; Rimmer, *Robbery Under Arms*, *supra* note 139.

150. *Trans-Pacific Partnership* 2015; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018 ATS 23. For commentary, see RIMMER, *The Trans-Pacific Partnership*, *supra* note 140.

151. Rosborough, *supra* note 16, at 26, 48.

152. *C-272, An Act to Amend the Copyright Act (diagnosis, maintenance or repair)* (Canada); The Hon. Bryan May, *Copyright Act*, PRIVATE MEMBERS BUS. (Apr. 15, 2021), <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-81/hansard#11239176>; Rosborough, *If a Machine Could Talk*, *supra* note 13, at 141–71; Rosborough, *Canada Needs Right-to-Repair Legislation*, *supra* note 13; Meera Nair, *Canadians Should Have a Right to Repair Their Own Devices*, EDMONTON J. (May 4, 2022), <https://edmontonjournal.com/opinion/columnists/opinion-canadians-should-have-a-right-to-repair-their-own-devices>.

153. PRODUCTIVITY COMM’N, *Inquiry Report*, *supra* note 4, at 34.

It should also be noted that the Free Software Foundation, the open-source movement, the Creative Commons community, and open-source hardware advocates have sought to use open licensing terms to promote the right to repair.¹⁵⁴ Free Software Melbourne discussed the need for open access to repair information in its submission.¹⁵⁵ The submission contends: “We need legislation that would mandate the Fair and Open Access to information required to perform repairs on modern devices.”¹⁵⁶ Moreover, the organization contends: “Open Access to this kind of data also enhances the security of our devices by enabling another level of independent auditing, analysis, and research.”¹⁵⁷

B. DESIGNS LAW

There have been longstanding tensions between the protection of industrial designs, and the scope for the use of spare parts for repair in Australia and elsewhere.¹⁵⁸

Unlike some of the other Australian intellectual property regimes, Australian designs law has a defense in respect of spare parts.¹⁵⁹ The scope of this defense has been recently considered in the 2019 case of *GM Global Technology Operations LLC v S.S.S. Auto Parts Pty Ltd*.¹⁶⁰ Even though such a defense was effective in this particular case, the existing provisions in relation to spare parts are complicated and convoluted.

Noting the Federal Court of Australia precedent, the Law Council of Australia has identified the current strange construction of the spare parts exception in its submission:

That decision illustrated the difficulty faced by registered design owners against whom the defence is raised, in light of the fact that the Act places the onus on the design holder to establish that the use was not for repair purposes. In that case, the design owner failed to

154. Matthew Rimmer, *Lady Ada: Limor Fried, Adafruit Industries, Intellectual Property and Open Source Hardware*, 16 J. INTELL. PROP. L. & PRAC. 1047, 1047–61 (2021).

155. FREE SOFTWARE MELBOURNE, SUBMISSION TO THE PRODUCTIVITY COMMISSION ON THE RIGHT TO REPAIR (2021), https://www.pc.gov.au/__data/assets/pdf_file/0005/272318/sub043-repair.pdf.

156. *Id.*

157. *Id.*

158. Llewelyn & Barresi, *supra* note 108, at 3–20; Firth, *supra* note 109, at 147–80.

159. *Designs Act 2003* (Cth) s 72.

160. *GM Glob Tech Operations LLC v S.S.S. Auto Parts Pty Ltd* [2019] FCA 97. For commentary, see Tyrone Berger, *A First Look at the Designs Repair Defence in Australia*, 14 J. INTELL. PROP. L. & PRAC. 358 (2019); Leanne Wiseman & Kanchana Kariyawasam, *Revisiting the Repair Defence in the Designs Act (2003) in Light of the Right to Repair Movement and the Circular Economy*, 31 AUSTL. INTELL. PROP. J. 133 (2020).

do so except in relation to a small number of transactions, with the result that the “repair” defence was largely made out.¹⁶¹

There was an opportunity for the Productivity Commission to recraft the spare parts exception under designs law to ensure that there is a broad fair use defense for repair under designs law.

However, in its final report, the Productivity Commission merely noted that there had been debate over the reform of the spare parts defense:

Some stakeholders have called for reform of the defence, with one arguing that the current defence is “awkward and cumbersome” and may not fully account for the development of new technologies. However, the defence appears to provide sufficient protection in the few cases that have been brought under it, and with further cases, the courts will be able to fully explore the scope and reach of the defence.¹⁶²

The Productivity Commission also commented that “new technologies such as 3D printing may also increase the accessibility of spare parts, by enabling repairers to fabricate their own replacement parts and be less dependent on conventional manufacturers.”¹⁶³ The regulator was of the view that there was a low likelihood of 3D printed works infringing upon designs.

Arguably, the Productivity Commission should have availed itself of the opportunity to design a broad defense for the right to repair under designs law. Scholars have wondered whether Australia’s designs regime is well-adapted to new technologies, such as 3D printing.¹⁶⁴ There has been a longstanding discussion about the need to modernize Australia’s design laws more broadly. In 2015, the Advisory Council on Intellectual Property provided a review of the designs regime.¹⁶⁵ There has been a more recent investigation into design

161. LAW COUNCIL AUSTRALIA, Law Council of Australia, *supra* note 142, at 10.

162. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4, at 167.

163. *Id.*

164. Mitchell Adams, *The “Third Industrial Revolution” 3D Printing Technology and Australian Designs Law*, 24 J.L., INFO., & SCI. 56, 56–84 (2015); Tyrone Berger, “Substantial Similarity” under Australian Design Law: Application to 3D Printing, in 3D PRINTING AND BEYOND: INTELLECTUAL PROPERTY AND REGULATION 294–307 (Dinusha Mendis, Mark Lemley & Matthew Rimmer eds., 2019); Thomas Margoni, *Design Rights and 3D Printing in the UK: Balancing Innovation and Creativity in a (Dis)harmonised and Fragmented Legal Framework*, in 3D PRINTING AND BEYOND: INTELLECTUAL PROPERTY AND REGULATION 77–98 (Dinusha Mendis, Mark Lemley & Matthew Rimmer eds., 2019); Elizabeth Ferrill, Robert MacKichan, Christopher McKinley & Kelly Horn, *Integrating a Classic Tool for a Modern Challenge: US Designs Patents Implications for 3D Printing*, in 3D PRINTING AND BEYOND: INTELLECTUAL PROPERTY AND REGULATION 185–202 (Dinusha Mendis, Mark Lemley & Matthew Rimmer eds., 2019).

165. ADVISORY COUNCIL ON INTELL. PROP., *Review of the Designs System* (2015), https://www.ipaustralia.gov.au/sites/default/files/acip_designs_final_report.pdf.

law reform by IP Australia.¹⁶⁶ There have been some procedural reforms made in 2021 to the system, with the introduction of a grace period and some further clarification and simplification.¹⁶⁷ The next Australian Parliament should take the opportunity to refashion Australia's design laws, with a broad defense for the right to repair.

There are similar challenges in respect of law reform of design patents in the United States.¹⁶⁸

C. TRADEMARK LAW

There is a growing literature on the impact of trademark law on the right to repair.¹⁶⁹ There has also been some high-profile litigation. In Norway, Apple brought trademark infringement against an independent repairer, Huseby.¹⁷⁰ In the United States, there has been a discussion of the use of the trademark

166. IP AUSTRALIA, *DEFINING DESIGN: DESIGN'S ROLE IN THE AUSTRALIAN ECONOMY* (2020), https://www.ipaustralia.gov.au/sites/default/files/defining_design_ip_australia_report.pdf; IP AUSTRALIA, *TALKING DESIGN: VIEWS FROM AUSTRALIA'S VISUAL DESIGN ECOSYSTEM* (2020), https://www.ipaustralia.gov.au/sites/default/files/talking_design_ip_australia_report.pdf; IP AUSTRALIA, *VALUING DESIGNS: ECONOMIC IMPACT OF DESIGN RIGHTS IN AUSTRALIA* (2020), https://www.ipaustralia.gov.au/sites/default/files/valuing_design_ip_australia_report.pdf; IP AUSTRALIA, *PROTECTING DESIGNS: DESIGN INNOVATION, COPYING AND ENFORCEMENT IN AUSTRALIA* (2020), https://www.ipaustralia.gov.au/sites/default/files/protecting_design_ip_australia_report.pdf; IP AUSTRALIA, *DESIGN REFORM PROJECT—OUTCOMES OF THE REVIEW* (2021), https://www.ipaustralia.gov.au/sites/default/files/design_reform_project_-_outcomes_of_the_review.pdf; IP AUSTRALIA, *DESIGN INITIATIVES*, <https://www.ipaustralia.gov.au/designs/design-initiatives>.

167. *Designs Amendment (Advisory Council on Intellectual Property Response) Act 2021* (Cth).

168. See generally *Design Patents Symposium*, 36 *BERKELEY TECH. L.J.* 1 (2022); see also JOSHUA SARNOFF, *WHITE PAPER ON PROTECTING THE CONSUMER PATENT LAW RIGHT OF REPAIR AND THE AFTERMARKET FOR EXTERIOR MOTOR VEHICLE REPAIR PARTS: THE PARTS ACT*, S. 812; H.R. 1879, 115TH CONGRESS (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082289.

169. Pendleton, *supra* note 110, at 127–46; Jay Sanderson & Teddy Henriksen, *Certified Repairable: Using Trade Marks to Distinguish, Signal and Encourage Repair*, 31 *AUSTL. INTELL. PROP.* J. 161, 161–72 (2020); Ole-Andreas Rognstad, *Revisiting the Concept of Trade Mark Piracy in light of Sustainable Development Goals: a Discussion of the Norwegian Apple Case*, in *INTELLECTUAL PROPERTY AND SUSTAINABLE MARKETS* 101–14 (Ole-Andreas Rognstad & Inger B. Ørstavik eds., 2021).

170. *Huseby v. Apple Inc.*, HR-2020-1142-A, (sak nr. 19-141420SIV-HRET) <https://s3.documentcloud.org/documents/6936580/Norway.pdf> (Nor.). For commentary, see Rognstad, *supra* note 169, at 101–14.

“Lexus” by a third-party broker.¹⁷¹ In South Africa, there has been a trademark dispute in relation to replacement parts for BMW.¹⁷²

In the final report, the Productivity Commission expressed its doubts as to whether trademark owners would be able to bring action for trademark infringement against repairers.¹⁷³ The law reform body noted:

It is unclear whether manufacturers could use trademark law protections to prevent the importation of spare parts into Australia, as has occurred in other countries. In particular, the use of microscopic marks on non-visible product components may not satisfy legislative criteria set out in the *Trade Marks Act 1995* (Cth) as to the “use” of a mark that gives rise to exclusive trademark rights, as the consumer is unable to use the sign to distinguish the goods.¹⁷⁴

Arguably, though, it would be helpful to clarify this position under Australian trademark law by providing for an express defense, exception, or limitation in respect of repair.

In light of the Norwegian trademark dispute between Huseby and Apple, as well as South African trademark litigation over replacement parts and U.S. disputes over Lexus advertising cars, there is a need to ensure that trademark law respects the right to repair. The Australian Parliament should consider law reform to ensure that trademark owners cannot bring trademark infringement actions in respect of cases of repair. As Professor Aaron Perzanowski comments, “Trademark law is meant to prevent unfair competition, but too often manufacturers use it to undermine any competition in the marketplace.”¹⁷⁵

D. PATENT LAW

There is vast jurisprudence dealing with patent law and the right to repair across various jurisdictions.¹⁷⁶ There is also extensive scholarly work on patent

171. *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171 (9th Cir. 2010).

172. *Bayerische Motoren Werke Aktiengesellschaft v. Grandmark International* 2013 (722/12) SA 114 (S. Afr.).

173. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4, at 167.

174. *Id.*

175. PERZANOWSKI, *supra* note 12, at 175.

176. *See, e.g., Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964); *Jazz Photo Corp. v. United States*, 439 F.3d 1344 (Fed. Cir. 2006); *Schütz (U.K.) Ltd. v. Werit (U.K.) Ltd.* [2013] UKSC 16 (U.K.).

law and the right to repair (although most of that literature focuses on the United States,¹⁷⁷ the United Kingdom,¹⁷⁸ and the European Union).¹⁷⁹

In the inquiry, the Productivity Commission did engage with questions about the application of patent law to repairs. However, in the end, the Productivity Commission did not make substantive recommendations for patent law reform in respect of the right to repair.¹⁸⁰

In the 2020 case of *Calidad v. Seiko Epson Corporation*, the High Court of Australia handed down an important precedent on patent exhaustion in a dispute over printer cartridges.¹⁸¹ The Productivity Commission provided this gloss on the complex ruling:

The High Court (in a 4-3 majority) found that once the modifications had been carried out, what remained were the original cartridges with some alterations that had enabled their reuse, and there was no replication of parts and features of the invention as claimed in the patents. Ultimately, the modifications were consistent with “the exercise of the rights of an owner to alter an article to improve its usefulness and enable its re use” (*Calidad*, at [70]).¹⁸²

The Productivity Commission recognized that “there are still uncertainties as to the exact scope and limitations of the recently adopted patent law exhaustion doctrine, including whether the doctrine applies on an international basis to allow for parallel importing of patented articles, or only on a national basis.”¹⁸³ The Productivity Commission noted: “This uncertainty may act to limit the effectiveness of such a doctrine generally, and in particular with respect to product repairs as many repairers choose to source repair inputs

177. Julia Powles, *Replacement of Part and Patent Infringement*, 72 CAMBRIDGE L.J. 518, 518–21 (2013); Tesh Dagne & Gosia Piasecka, *The Right to Repair Doctrine and the Use of 3D Printing Technology in Canadian Patent Law*, 14 CAN. J.L. & TECH. 263, 263–87 (2016); Contreras, *supra* note 10, at 1–7.

178. Mineko Mohri, *Repair and Recycle as Direct Patent Infringement?*, in SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS 59–84 (Christopher Heath & Anselm Kamperman Sanders eds., 2009); Christopher Heath, *Repair and Refill as Indirect Patent Infringement*, in SPARES, REPAIRS AND INTELLECTUAL PROPERTY RIGHTS 85–102 (Christopher Heath & Anselm Kamperman Sanders eds., 2009).

179. Rosa Ballardini & Taina Pihlajarinne, *Incentivizing Circular and Sustainable Innovations Through Patent Law*, in BIOREFINERIES AND CIRCULAR ECONOMY BASED ON WASTE TO ENERGY-FOOD-FEED-CHEMICAL-MATERIAL (Eduardo Jacob-Lopes ed., 2022).

180. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4.

181. *Calidad Pty Ltd. v Seiko Epson Corp.* [2020] HCA 41. For a commentary on this case, see Matthew Rimmer, *The Right to Repair: Patent Law and 3D Printing in Australia*, 20 (1) SCRIPTED: J.L., TECH., & SOC’Y 130-202 (2023).

182. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4, at 179.

183. *Id.* at 186.

online from overseas.”¹⁸⁴ The Productivity Commission also discussed the possibility that the precedent on patent exhaustion could be applied to other legal regimes—such as copyright law.¹⁸⁵ There is of course a larger international literature on exhaustion of intellectual property rights.¹⁸⁶

It is disappointing that the Productivity Commission did not go further, and make recommendations, which would strengthen the right to repair under patent law. While the High Court of Australia has recently ruled on patent exhaustion, it would be helpful to clarify that the provision of repairs does not amount to patent infringement. Australian patent law recognizes a defense of experimental use. However, it is not clear that the defense extends to all forms of repairs. A specific patent defense for repairs would provide reassurance about the legitimacy of conducting repairs. The compulsory licensing regime remains unwieldy at the moment—but in exceptional circumstances could be used to provide access to inventions for the purposes of repair on competition grounds.¹⁸⁷ The Crown use/government use provisions of the patent regime could also be deployed by the government to deal with repair restrictions, which adversely impacted Australian consumers.¹⁸⁸

It is notable that in other jurisdictions, there has been a push for patent law reform to achieve better competition outcomes. Minnesota Senator and one-time Presidential candidate Amy Klobuchar has argued: “While patent protection is critical to our economy, the U.S. patent system can also be used by patent holders to block new market entrants from competing effectively.”¹⁸⁹

E. TRADE SECRETS LAW

Increasingly, trade secrets impinge upon the right to repair. In their study of intellectual property law and the right to repair, Professor Leah Grinvald

184. *Id.*

185. *Id.* at 184–85.

186. SHUBHA GHOSH & IRENE CALBOLI, EXHAUSTING INTELLECTUAL PROPERTY RIGHTS: A COMPARATIVE LAW AND POLICY ANALYSIS (2018).

187. The compulsory licensing provisions enable compulsory access to patented inventions in return for compensation. Chapter 12 of the *Patents Act* 1990 (Cth) deal with compulsory licensing. S 133 provides for the general regime for compulsory licensing. S136D–S136H deals with compulsory licensing for the manufacture and export of pharmaceutical drugs to eligible importing countries.

188. The Crown use provisions enable government use of patented inventions in return for compensation. Chapter 17 of the *Patents Act* 1990 (Cth) concern the Crown. S 163 of the *Patents Act* 1990 (Cth) deals with crown exploitation of inventions. S 163A deals with crown exploitation of inventions during emergencies. S 164 concerns information to be given by the relevant authority. S 165A deals with court orders to cease crown exploitation of inventions.

189. AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 335 (2021).

and Dr. Ofer Tur-Sinai have noted the intersection of trade secrets and the right to repair.¹⁹⁰

In their inquiry, the Productivity Commission only touched on the question of trade secrets and the right to repair.¹⁹¹ The advisory body observed that manufacturers sometimes include clauses about confidential information in contract law: “Manufacturers may also have contractual or licensing arrangements with other businesses (such as authorized repairers) that may include provisions such as non-disclosure of confidential repair information to third parties.”¹⁹² The Productivity Commission provided an example of Toshiba relying upon a combination of copyright law, contract law, and confidential information to restrict access to repair information, including repair manuals.¹⁹³ The law reform organization expressed concerns about the contracting out of repair obligations—including through confidentiality agreements. The Productivity Commission noted that trade secrets were excluded from the data-sharing scheme for motor vehicles.¹⁹⁴ Such an exclusion raises questions about whether the data-sharing scheme will be viable—if such important confidential information and know-how is not included. Ultimately, the Productivity Commission did not make recommendations in respect of the reform of confidential information and trade secrets law.

Australia provides for civil remedies in respect of trade secrets, as well as criminal offences in respect of violation of trade secrets by foreign principals. Australia was required to strengthen its regime for trade secrets protection as part of the *Trans-Pacific Partnership* 2015.¹⁹⁵ However, the nature and scope of defenses for trade secrets remains unclear in Australia. There has been debate as to whether there is a general interest defense (as espoused by Justice Kirby)¹⁹⁶ or a narrow defense related to exposing wrongdoing and iniquity (as recommended by Justice Gummow).¹⁹⁷ There has also been discussion about

190. Leah Chan Grinvald & Ofer Tur-Sinai, *Intellectual Property Law and the Right to Repair*, 88 *FORDHAM L. REV.* 63, 63–128 (2019).

191. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4.

192. *Id.* at 163.

193. *Id.* at 167.

194. *Id.* at 292.

195. *Trans-Pacific Partnership* 2015; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018 ATS 23. For commentary, see RIMMER, *The Trans-Pacific Partnership*, *supra* note 140, at 380–411.

196. Kirby J in *Att’y-Gen (U.K.) v Heinemann Publishers Australia Pty Ltd* [1987] 10 NSWLR 86.

197. Gummow J in *Corrs Pavey v Collector of Customs* [1987] 74 ALR 238.

the need for codification of defenses to trade secrets infringement in other jurisdictions—like the United States.¹⁹⁸

In this context, there is currently a lack of clarity as to whether using trade secrets for the purposes of repair would be allowable. The Australian Parliament and the new Albanese Government should consider making recommendations regarding defenses in respect of trade secrets relating to repair. There should also be a more general overhaul of trade secrets law and policy as a discipline in intellectual property.¹⁹⁹ In his book on *The Right to Repair*, Professor Aaron Perzanowski highlights parallel issues in respect of trade secrets in the US and the EU: “The final weapon in the manufacturer’s IP arsenal is trade secrecy.”²⁰⁰

The open-access community has maintained that repair manuals and other repair data and information should be shared openly—rather than restricted under confidential information and trade secrets.

F. DATA-SHARING

After consultations and legislative reform, Australia’s Treasury has established a motor vehicle service and repair information sharing scheme.²⁰¹ However, it is problematic that this information sharing scheme has been industry-specific—rather than universal. There was also a failure to consider how that scheme would interact with other disciplines of law—like intellectual property. The exclusion of trade secrets from the regime means that there will be significant forms of data, which will not be open for sharing. There is a need for a more general system regarding the sharing of repair information for all technologies and industries—not just the special case of automobiles. It would be desirable to go beyond the model of self-regulatory codes of conduct and establish binding standards in respect of sharing repair information.

In Recommendation 8.1, the Productivity Commission called for an evaluation of the motor vehicle information scheme: “The Australian Government should establish an independent evaluation of the Motor Vehicle Service and Repair Information Sharing Scheme, once it has been in operation

198. Peter Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1, 1–63 (2017).

199. SHARON SANDEEN & ELIZABETH ROWE, TRADE SECRETS AND UNDISCLOSED INFORMATION (2014); ELIZABETH ROWE & SHARON SANDEEN, TRADE SECRECY AND INTERNATIONAL TRANSACTIONS: LAW AND PRACTICE (2015).

200. PERZANOWSKI, *supra* note 12, at 159–64.

201. *Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Act 2021* (Cth). For commentary, see RIMMER, MANDATORY SCHEME FOR THE SHARING, *supra* note 49.

for three years.”²⁰² The Productivity Commission recommended: “The evaluation should assess whether the scheme is effectively meeting its objectives to improve competition and choice, whether the benefits outweigh the costs, and whether any changes are required.”²⁰³

There is a need for a harmonized approach to the right to repair in Australia, which cuts across technology fields and covers all the various forms of intellectual property.

IV. CONSUMER LAW AND COMPETITION POLICY

Australia has updated its consumer law and competition policy in recent times. The *Trade Practices Act* 1974 (Cth) was replaced with the *Competition and Consumer Act* 2010 (Cth). The Harper Review in 2015 has made further recommendations for law reform in respect of competition policy.²⁰⁴ The Australian Competition and Consumer Commission (“ACCC”) has been an active regulator.²⁰⁵ Nonetheless, there has remained concern as to whether Australia’s consumer laws and competition policy have been adequate to deal with some of the challenges of concentrated markets.

The Productivity Commission were much concerned by questions of consumer law and competition policy in respect of their investigation into the right to repair.

As part of the investigation, the Productivity Commission engaged in empirical research into repair markets. Finding 2.1 observed: “A consumer’s decision to repair or replace a broken product is primarily driven by price.”²⁰⁶ The law reform body also reflected: “The inconvenience of repair and consumer preferences for up-to-date products are also likely to make repair less appealing.”²⁰⁷ The Productivity Commission estimated: “The repair sector accounts for about one per cent of all business revenue in Australia and has grown modestly over the past decade.”²⁰⁸ The advisory body commented: “Most repair activity (revenue, number of businesses and workers) comes from industries with more expensive products, such as motor vehicles and machinery, that require regular maintenance and where repair is often more

202. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4, at 20.

203. *Id.* at 20.

204. IAN HARPER, PETER ANDERSON & SU MCCLUSKEY, COMPETITION POLICY REVIEW—FINAL REPORT (2015), <https://treasury.gov.au/publication/p2015-cpr-final-report>.

205. Christine Parker & Vibeke Lehmann Nielsen, *The Fels Effect: Responsive Regulation and the Impact of Business Opinions of the ACCC*, 20 GRIFFITH L. REV. 91, 91–126 (2011).

206. *Id.* at 29.

207. *Id.*

208. *Id.*

cost-effective than replacement.”²⁰⁹ The Productivity Commission noted: “There was less activity in repair industries for relatively less expensive products, such as electronics and appliances, where replacement tends to be more attractive.”²¹⁰ The advisory body opined: “This is likely due to the relatively low and falling prices of these products over time, rapid technological development, and consumer preferences for new and up-to-date products.”²¹¹

These factual findings provide the foundation for the recommendations of the Productivity Commission in respect of consumer law reform and competition policy updates in the report.

A. CONSUMER LAW

Australian consumer law provides some protection in respect of repairs.²¹² The ACCC has brought a number of consumer actions in respect of repairs. In 2017, the ACCC lost a case against LG Electronics Australia Pty Ltd. (“LG”) over customer repairs in the Federal Court of Australia. In 2018, the ACCC partially won an appeal against an earlier judgment dismissing the ACCC’s case against LG.²¹³ The Full Court found that LG made two representations to consumers that were false but dismissed the ACCC’s appeal in respect of other LG statements made to consumers.²¹⁴ ACCC Commissioner Sarah Court commented: “When consumers buy products, they come with a consumer guarantee under the Australian Consumer Law that they will be of acceptable quality.”²¹⁵ She observed: “Manufacturer’s warranties exist in addition to the consumer guarantee rights.”²¹⁶ Court stressed: “Consumers will often still be entitled under the consumer guarantee to a repair, refund or replacement when the manufacturer’s warranty does not apply or has come to an end.”²¹⁷

209. *Id.*

210. *Id.*

211. *Id.*

212. ACCC, *Repairs and Spare Parts*, AUSTL. COMPETITION & CONSUMER COMM’N, <https://www.accc.gov.au/consumers/consumer-rights-guarantees/repair-replace-refund> (Last visited March 22 2023).

213. *ACCC v LG Electronics Australia Pty Ltd* [2018] FCAFC 96.

214. *Id.*; see also *ACCC v LG Electronics Australia Pty Ltd [No 2]* (2018) FCAFC 128.

215. *Full Court finds LG made misleading representations*, ACCC (June 27, 2018), <https://www.accc.gov.au/media-release/full-court-finds-lg-made-misleading-representations>.

216. *Id.*

217. *Id.*

In 2018, the ACCC took action against Apple Inc. over repairs.²¹⁸ The Federal Court ordered Apple Inc to pay \$9 million in penalties for making false or misleading representations to customers with faulty iPhones and iPads about their rights under the Australian Consumer Law (ACL). Apple admitted it had represented to at least 275 Australian customers affected by error 53 that they were no longer eligible for a remedy if their device had been repaired by a third party.²¹⁹ ACCC Commissioner Sarah Court commented: “If a product is faulty, customers are legally entitled to a repair or a replacement under the Australian Consumer Law, and sometimes even a refund.”²²⁰ Court commented: “Global companies must ensure their returns policies are compliant with the Australian Consumer Law, or they will face ACCC action.”²²¹ She observed: “If people buy an iPhone or iPad from Apple and it suffers a major failure, they are entitled to a refund.”²²² Court concluded: “If customers would prefer a replacement, they are entitled to a new device as opposed to refurbished, if one is available.”²²³

CHOICE Australia has made a detailed submission to the Productivity Commission on the right to repair and consumer law.²²⁴ In her evidence to the Productivity Commission, Erin Turner said: “We’re seeing that warranties generally can discourage large groups of consumers from getting a remedy under the consumer law.”²²⁵ She noted that the consumer organization had surveyed 6,571 of its members and supporters in April and May in 2021 about getting remedies on TVs, washing machines, microwaves and lawn mowers.²²⁶ Turner commented that only 24% of people with washing machine issues tried to get a remedy, 15% for TVs, 19% for microwaves and 18% for lawnmowers. She commented: “Often these products could be just outside the warranty period, a few weeks, months, or years.”²²⁷ Turner observed: “So what worried

218. *iPhone and iPad Misrepresentations Cost Apple Inc \$9 Million in Penalties*, ACCC (June 19, 2018), <https://www.accc.gov.au/media-release/iphone-and-ipad-misrepresentations-cost-apple-inc-9-million-in-penalties>.

219. *Id.* These facts are recounted in the press release from the ACCC.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. CHOICE AUSTRALIA, SUBMISSION TO THE PRODUCTIVITY COMMISSION ISSUES PAPER ON THE RIGHT TO REPAIR, (2021), https://www.pc.gov.au/__data/assets/pdf_file/0013/273010/sub126-repair.pdf.

225. Josh Taylor, *Australian Warranties To “Discourage” Repairs or Replacements Under Consumer Law*, GUARDIAN (July 20, 2021, 7:21 PM), <https://www.theguardian.com/law/2021/jul/20/australian-warranties-acting-to-discourage-repairs-or-replacements-under-consumer-law>.

226. CHOICE AUSTRALIA, *supra* note 224.

227. Taylor, *supra* note 225.

me is that this research is telling us is that warranty periods could have a dampening effect on consumers seeking remedy.”²²⁸

The Consumer Action Law Centre (CALC) has argued that “the Productivity Commission should recommend improvements to people’s access to dispute resolution services, including when a person’s right relates to a choice between a repair, refund or replacement.”²²⁹ The Centre maintains: “The responsibility for repair and ethical disposal can be shifted to the supplier or manufacturer of a faulty product, once a person receives the remedy to which they are entitled.”²³⁰ The CALC elaborated: “In short, in relation to faulty products, the burden of a right to repair should not fall on the shoulders of consumers, who have already outlaid the cost for the good.”²³¹ The CALC contends that “it is imperative that any recommendations from the Productivity Commission into a right to repair improve access to justice for people who purchase faulty products, including lemons, which are largely immune to repair, rather than decreasing access to justice through additional barriers.”²³²

In Finding 3.1, the Productivity Commission commented that “consumers sometimes lack the ability to exercise existing rights.”²³³ The Productivity Commission recognized: “The Australian Consumer Law provides consumers with rights to obtain a remedy (repair, replacement or refund) for defective products through consumer guarantees.”²³⁴ The Productivity Commission acknowledged that “these guarantees are reasonably comprehensive.”²³⁵ The Productivity Commission recommended that the consumers’ ability to access their rights could be clarified by a range of reforms—including “clarifying existing rights by explicitly requiring manufacturers to provide software updates for a reasonable period”; “enabling a super complaints process”; “enhancing relevant State and Territory regulators’ alternative dispute resolution options for individual cases”; and “empowering the ACCC to seek pecuniary penalties on suppliers and manufacturers that fail to provide a

228. *Id.*

229. CONSUMER ACTION LAW CENTRE., RIGHT TO REPAIR INQUIRY (2021), <https://consumeraction.org.au/wp-content/uploads/2021/02/210215-CALC-sub-Right-to-repair-FINAL.pdf>.

230. *Id.*

231. *Id.*

232. *Id.*

233. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4, at 29.

234. *Id.*

235. *Id.*

remedy.”²³⁶ Such wide-ranging reforms were further elaborated upon in the recommendations.

In Recommendation 3.1, the Productivity Commission called for software updates for a reasonable period: “The Australian Government should amend the Australian Consumer Law to include a new consumer guarantee for manufacturers to provide reasonable software updates for a reasonable time period after the product has been purchased, with no option to limit or exclude that guarantee.”²³⁷

In Recommendation 3.2, the Productivity Commission called for the creation of a super complaints process.²³⁸ The law reform body suggested: “The Australian Government should enable designated consumer groups to lodge ‘super complaints’ on systemic issues associated with access to consumer guarantees, with the complaints to be fast tracked and responded to by the [ACCC].”²³⁹ The Productivity Commission envisaged that this could be a process of co-design of a super-complaints system “in consultation with the ACCC, relevant State and Territory regulators, and consumer and industry groups.”²⁴⁰ The Productivity Commission commented: “The system should be underpinned by operational principles—including criteria for the assignment (or removal) of designated consumer bodies, evidentiary requirements to support a complaint, and the process and time period by which the ACCC should respond.”²⁴¹

The new Assistant Minister for Competition, Charities, and Treasury, Andrew Leigh MP, has been a supporter of the establishment of a super-complaints process.²⁴² He has stressed that a “super complaint” function within the ACCC will allow trusted consumer groups, such as CHOICE Australia, and business sector advocates to provide feedback on serious complaints of corporate misbehavior.

Academics have called for the use of alternative dispute resolution in consumer law for some time.²⁴³ In Recommendation 3.3, the Productivity

236. *Id.*

237. *Id.* at 30.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Sarah Martin, *Labor Vows to Shake Up ‘Cost Monopolists’ with Fines of up to \$40m for Anti-Competitive Behaviour*, GUARDIAN (July 9, 2022, 10:00 PM), <https://www.theguardian.com/australia-news/2022/jul/09/labor-vows-to-shake-up-cosy-monopolists-with-fines-of-up-to-50m-for-anti-competitive-behaviour>.

243. See Luke Nottage, *The New Australian Consumer Law: What About Consumer ADR?*, 9 QUT L. & JUST. J. 176, 176–97 (2010).

Commission called for State and Territory Governments to develop enhanced alternative dispute resolution powers to “better resolve complaints about the consumer guarantees.”²⁴⁴ The law reform body commented that governments should consider: the need for a “national consumer framework”; “funding options to adequately resource enhanced alternative dispute resolutions”; “the net benefit of options that enable regulators to make enforceable decisions or facilitate enforceable outcomes”; and “as an alternative, the net benefit of certain product markets (such as motor vehicles) having an ombudsman to make enforceable decisions or facilitate enforceable outcomes.”²⁴⁵

In Recommendation 3.4, the Productivity Commission demanded enhanced regulator powers to enforce guarantees, recommending amending “the Australian Consumer Law to make it a contravention for suppliers and manufacturers to fail to provide a remedy to consumers when legally obliged to do so under the consumer guarantees.”²⁴⁶ The law reform body also urged the ACCC to seek pecuniary penalties as well. The use of pecuniary penalties has been extensively used in Australian competition policy as well.²⁴⁷

B. COMPETITION POLICY

In its investigation of the right to repair, the Productivity Commission has also considered the role of competition law and policy in repair markets. In particular, it focused on agricultural machinery; mobile phones and tablets; motor vehicles; and other product markets.²⁴⁸ The Productivity Commission considered the operation of competition rules on anti-competitive agreements, misuse of market power, and exclusive dealing.²⁴⁹ The Productivity Commission reflected upon the philosophy and approach of the ACCC to enforcement of competition law and policy.²⁵⁰ The advisory body also highlighted the complexities of pursuing legal action for breaches of the competition regime. The Productivity Commission also stressed the importance of comparative approaches to competition law and policy in the field of the right to repair.²⁵¹

244. PRODUCTIVITY COMM’N, Inquiry Report, *supra* note 4, at 30.

245. *Id.*

246. *Id.* at 31.

247. OECD, PECUNIARY PENALTIES FOR COMPETITION LAW INFRINGEMENTS IN AUSTRALIA (2018) <https://www.oecd.org/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm>.

248. PRODUCTIVITY COMM’N, DRAFT REPORT, *supra* note 105, at 129.

249. *Id.* at 138.

250. *Id.* at 142–45.

251. *Id.* at 156.

In evidence to the hearings held by the Productivity Commission, there was concern expressed about a lack of competition in key markets. The IT service provider Interactive expressed concern that enterprises are being forced to enter into direct maintenance services contracts with technology manufacturers to be able to access firmware updates.²⁵² iFixit was alarmed by the market domination by technology developers, such as Apple, Samsung, and Microsoft.²⁵³ There has been worry about the position of independent repairers in the motor vehicle industry.²⁵⁴ The Watch and Clockmakers of Australia Inc. was worried that independent repairers were being squeezed out of the marketplace by various monopolies.²⁵⁵ The National Farmers Federation was worried about the domination of farming markets by technology developers and big agriculture companies.²⁵⁶

Rod Sims, when he was the head of the ACCC, expressed his concerns about tackling market power.²⁵⁷ He was worried “whether our market economy is too much favoring the producers at the expense of consumers.”²⁵⁸ Sims maintained that “we must do all we can to align the interests of business and society through sound laws.”²⁵⁹ Sims contended that there was a need to address the gaps in Australia’s competition and consumer laws—particularly for small business. He hoped to “[m]ake unfair contract terms illegal, introduce an Unfairness Provision, regulate the prices and services of monopoly infrastructure and introduce well-targeted regulation to deal with the more damaging market power issues.”²⁶⁰ Sims observed: “Our need for a strong post-COVID recovery invites this [law reform], particularly given the concern that significant disruption often allows the strong to get stronger, to the detriment of our economy and society.”²⁶¹ Rod Sims was particularly concerned about the market dominance of digital platforms, noting: “The

252. Aimee Chanthadavong, *IT Service Provider Interactive hits out at Tech Companies for Monopolistic Firmware Tactics*, ZDNET (July 20, 2021), <https://zd.net/2TpuRM9>.

253. Aimee Chanthadavong, *iFixit CEO Names and Shames Tech Giants for Right to Repair Obstruction*, ZDNET (July 18, 2021), <https://zd.net/3kyA3Z9>.

254. Peter McCutcheon, *Mechanics Say They’ll Go Bust If Car Makers Don’t Share Computer Codes*, ABC (Nov. 21, 2018, 8:55 PM), <https://www.abc.net.au/news/2018-11-21/mechanics-want-car-makers-to-share-computer-codes/10506186>.

255. WATCHMAKERS & CLOCKMAKERS AUSTL. INC., RIGHT TO REPAIR: PRODUCTIVITY COMMISSION, SUBMISSION 83 TO THE ISSUES PAPER (2021), https://www.pc.gov.au/__data/assets/pdf_file/0006/272562/sub083-repair.pdf.

256. Nat’l Farmers Fed’n, *supra* note 80.

257. Rod Sims, *Tackling Market Power in the COVID-19 Era*, ACCC (Oct. 21, 2020), <https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era>.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

main digital platforms have accumulated huge wealth from innovation, and later steps to cement their market power.”²⁶²

In respect of Finding 4.2, the Productivity Commission expressed concerns that some limits on access to repair supplies lacked sound justification.²⁶³ The advisory body doubted that repair problems were a universal problem: “There is no evidence of a systemic competition problem across all repair markets.”²⁶⁴ Nonetheless, the Productivity Commission recognized that there were significant repair limitations in “third party access to repair supplies (such as information, tools and parts).”²⁶⁵ The law reform body was skeptical of some of the justifications for repair limitations provided for by technology developers because “[w]hile manufacturers often justify these limits as a way to safeguard against risks from poor quality repair (particularly for safety and security), these risks can be overstated for many products and types of repair.”²⁶⁶ The Productivity Commission called for greater transparency regarding repair restrictions and limitations, requiring manufacturers to “show clear and verifiable evidence of the associated risks.”²⁶⁷ This Finding 4.2 is frustrating in some ways it suggests that repair restrictions are a problem in only some exceptional markets. However, there was evidence during the inquiry that there were widespread problems in respect of repair restrictions.

There were powerful submissions by organizations representing farmers to the Productivity Commission calling for a right to repair in the field of agriculture.²⁶⁸ Such submissions were opposed by agricultural technology developers, such as John Deere.²⁶⁹ In Finding 4.3, the Productivity Commission highlighted that the field of agriculture was problematic, and that limits on repair supplies for agricultural machinery were harmful. The advisory body stressed that there was a serious problem in this particular market: “Manufacturer and dealer restrictions on repair supplies for agricultural machinery (including repair manuals, diagnostic software tools and spare parts)

262. *Id.*

263. PRODUCTIVITY COMM’N, INQUIRY REPORT, *supra* note 4, at 31.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. Nat’l Farmers Fed’n, *supra* note 80.

269. JOHN DEERE, RE: PRODUCTIVITY COMMISSION RIGHT TO REPAIR ISSUE PAPER, SUBMISSION NO. 84, PRODUCTIVITY COMMISSION (2021), https://www.pc.gov.au/__data/assets/pdf_file/0008/272564/sub084-repair.pdf; JOHN DEERE, A SUBMISSION TO THE PRODUCTIVITY COMMISSION ON THE DRAFT REPORT ON THE RIGHT TO REPAIR, SUBMISSION NO. 176, PRODUCTIVITY COMMISSION (2021), https://www.pc.gov.au/__data/assets/pdf_file/0006/279186/subdr176-repair.pdf.

are causing material harm to farmers and other machinery owners through higher repair prices, reduced access and choice, and greater financial risks from repair delays.”²⁷⁰ The Productivity Commission recommended that there was a need for government intervention to provide for “additional measures” to address harmful repair restrictions and limitations in the area of agriculture.²⁷¹

In Recommendation 8.2, the Productivity Commission recommended the introduction of a repair supplies obligation on agricultural machinery.²⁷² The advisory body observed: “The Australian Government should introduce a repair supplies obligation on agricultural machinery that requires manufacturers to provide access to repair information and diagnostic software tools to machinery owners and independent repairers on fair and reasonable commercial terms.”²⁷³ The law reform body stressed that this was an immediate priority, as soon as the end of 2022.²⁷⁴ The Productivity Commission emphasized that the Australian Government should take into account “developments in the Motor Vehicle Service and Repair Information Sharing Scheme, as well as voluntary information sharing within the agricultural machinery industry.”²⁷⁵ The law reform body recommended that such a scheme for agricultural repair should be evaluated after it had been in operation for three years.²⁷⁶

In Finding 4.4, the Productivity Commission maintained that the extent of harm in mobile phone and tablet repair markets was uncertain: “Manufacturer restrictions on repair supplies for mobile phones and tablets are likely to be resulting in some consumer harm (through higher repair prices and reduced choice of repairer), which could be material in aggregate, given the ubiquitous nature of such goods and the concentrated market for new devices.”²⁷⁷ The law reform body noted that “data limitations and some countervailing market characteristics (such as high product turnover) mean that the evidence base is insufficient to justify specific policy interventions at this time.”²⁷⁸ In Recommendation 4.1, the Productivity Commission called for the ACCC to “undertake a market study of the mobile phone and tablet market.”²⁷⁹ In my view, the focus on the right to repair should not be confined to particular

270. PRODUCTIVITY COMM’N, INQUIRY REPORT, *supra* note 4, at 31.

271. *Id.*

272. *Id.* at 38.

273. *Id.* at 39.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 31.

278. *Id.*

279. *Id.* at 32.

sectors or industries. Arguably, though, the better approach would be to ensure that there was a universal right to repair in Australia.

The draft report by the Productivity Commission briefly discussed in passing some of the impacts of the coronavirus pandemic upon the topic of the right to repair. As part of the inquiry, the author (Rimmer) and his collaborator Dr. Muhammad Zaheer Abbas made submissions to the Productivity Commission, arguing that there needed to be greater coverage of the right to repair in the field of medicine, especially in light of the COVID-19 crisis.²⁸⁰ The U.S. Wyden and Clarke Bill on the right to repair for medical equipment was a useful precedent in this regard.²⁸¹ There were countervailing submissions from the medical device industry that the right to repair should not apply to the field of medicine.²⁸² The Federal Department of Health also made submissions on the regulatory framework for medical devices.²⁸³

In the end, though, the Productivity Commission seemed reluctant to tackle the topic of right to repair in the context of medicine and healthcare. In Recommendation 4.2, the advisory body observed: “The Australian Government should conduct an independent public review of existing medical device regulations to assess whether they strike a balance between repair access and device safety that maximizes community wellbeing.”²⁸⁴ The Productivity

280. MATTHEW RIMMER, A SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY ON THE RIGHT TO REPAIR, SUBMISSION NO. 168, PRODUCTIVITY COMMISSION (2021), <https://eprints.qut.edu.au/212034/>; MUHAMMAD ZAHEER ABBAS, A SUBMISSION ON THE ISSUES PAPER OF THE PRODUCTIVITY COMMISSION ON THE RIGHT TO REPAIR, SUBMISSION NO. 34, PRODUCTIVITY COMMISSION (2021), https://www.pc.gov.au/__data/assets/pdf_file/0006/272292/sub034-repair.pdf.

281. *Wyden and Clarke Introduce Bill to Eliminate Barriers to Fixing Critical Medical Equipment During the Pandemic*, RON WYDEN (Aug. 6, 2020), <https://www.wyden.senate.gov/news/press-releases/wyden-and-clarke-introduce-bill-to-eliminate-barriers-to-fixing-critical-medical-equipment-during-the-pandemic->; Mark Morgenstein & Nathan Proctor, *43,000 Call on Ventilator Manufacturers to Release Repair Information*, MOPIRG (Apr. 3, 2020), <https://mopirg.org/news/usp/43000-call-ventilator-manufacturers-release-repair-information>; Contreras, *supra* note 10.

282. *See* Med. Imaging & Tech. Alliance v. Libr. of Cong. No. 1:22-cv-499 (D.D.C. 2022) (demonstrating activity by medical device trade groups against the right to repair in the United States); Isaiah Poritz, *Medical Device Trade Group Wants Federal Repair Rule Blocked*, BLOOMBERG L. (Mar. 30, 2022, 2:11 PM), <https://news.bloomberglaw.com/ip-law/medical-device-trade-group-wants-federal-repair-rule-blocked>; Mike Masnick, *Medical Device Makers Sue Library of Congress for allowing people to fix their own Medical Devices*, TECHDIRT (May 5, 2022, 9:33 AM), <https://www.techdirt.com/2022/05/05/medical-device-makers-sue-library-of-congress-for-allowing-people-to-fix-their-own-medical-devices/>.

283. DEP’T HEALTH, RESPONSE TO THE PRODUCTIVITY COMMISSION ISSUES PAPER: RIGHT TO REPAIR, SUBMISSION NO. 121 (2021), https://www.pc.gov.au/__data/assets/pdf_file/0011/272909/sub121-repair.pdf.

284. PRODUCTIVITY COMM’N, INQUIRY REPORT, *supra* note 4, at 32.

Commission commented: “The review should consider whether current regulations create incentives for manufacturers to restrict repair, and examine potential ways to improve repair access for low-risk medical devices or for highly qualified independent repair technicians.”²⁸⁵ It remains to be seen whether there will be a reference from the new Albanese government to undertake a further inquiry in this field.

During the right to repair hearing, there were a flurry of submissions about market concentration in the field of watch repairs. In Finding 4.6, the Productivity Commission observed: “The high degree of market concentration and consumer lock-in in the prestige watch market in Australia suggests manufacturer restrictions on the supply of watch repair equipment and components to small independent repairers are resulting in consumer harm.”²⁸⁶ The advisory body noted that “this harm is likely to be limited due to the small size of the prestige watch repair market in Australia.”²⁸⁷ The law reform body commented that “there are credible arguments that these restrictions may constitute a misuse of market power under Australian competition law (s. 46 of the *Competition and Consumer Act* 2010) that substantially lessens competition in the watch repair market by affecting the viability of local watch repairers.”²⁸⁸ The advisory body suggested that such matters may need to be adjudicated and resolved in court.

More broadly, the Productivity Commission considered the role of the ACCC in addressing concerns about enforcement under Australian competition law. The law reform body acknowledged: “There are considerable costs and a high evidentiary threshold for bringing cases under the existing competition provisions in Part IV of the *Competition and Consumer Act* 2010—such as the misuse of market power, exclusive dealing and anti-competitive agreement provisions.”²⁸⁹ The Productivity Commission recognized that this access to justice problem would be “likely to discourage third-party repairers (particularly smaller businesses, such as watch repairers) from taking action against manufacturers and authorized dealers.”²⁹⁰ The Productivity Commission stressed that “the [ACCC] already has powers to investigate credible cases of anti-competitive conduct in repair markets and, if warranted, institute court proceedings.”²⁹¹ The Productivity Commission commented: “New cases could test the impact of recent legislative changes and other global

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 33.

290. *Id.*

291. *Id.*

repair market developments, as well as provide an educative or deterrent effect for broader repair market conduct.”²⁹²

In Recommendation 4.3, the Productivity Commission pointedly remarks that the regulator should investigate the issue of “whether manufacturer conduct in repair markets is contravening the restrictive trade practices provisions of the *Competition and Consumer Act* 2010, with a view to commencing proceedings.”²⁹³ The Productivity Commission even makes a recommendation about the issue that the regulator should focus upon: “The ACCC’s investigation should initially focus on whether the alleged conduct of watch manufacturers is breaching the misuse of market power (s. 46) provisions.”²⁹⁴

A positive obligation to provide access to repair supplies could be a useful means of mandating access to repair supplies—including repair information, spare parts, and diagnostic tools. Professor Aaron Perzanowski has called for competition regulators to engage in active intervention against repair restrictions: “Under appropriate leadership, we could see meaningful efforts by antitrust enforcers to protect competition, resist market concentration, and break up dominant firms when necessary.”²⁹⁵

In the United States, anti-monopoly advocate Lina Khan has been appointed to the Federal Trade Commission by the Biden Administration.²⁹⁶ As iFixit noted, “With [Lina Khan’s] appointment, Right to Repair gains perhaps its highest-profile advocate, and people get a committed advocate to their right to fix the things they own, regardless of what the biggest companies would prefer.”²⁹⁷ In July 2021, Lina Khan and the Federal Trade Commission

292. *Id.*

293. *Id.*

294. *Id.*

295. PERZANOWSKI, *supra* note 12, at 194.

296. See, e.g., Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL’Y 37, 37–74 (2014) (providing an example of Lina Khan’s classic work); Lina Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 710–805 (2017); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counter-revolution and its Discontents*, 11 HARV. L. & POL’Y REV. 235, 235–94 (2017); Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131–32 (2018); Lina Khan, *Sources of Tech Platform Power*, 2 GEO. L. & TECH. REV. 325, 325–31 (2018); Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 973–1098 (2019); Lina Khan & David Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 497–541 (2019).

297. Kerry Sheehan, *Lina Khan is the New FTC Chair, and That’s Great for Repair*, IFIXIT (June 15, 2021), <https://www.ifixit.com/News/50783/lina-khan-is-the-new-ftc-chair-and-thats-great-for-repair>?utm_content=buffer0abf&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

have prioritized taking enforcement action in respect of repair restrictions.²⁹⁸ In 2022, Lina Khan and the Federal Trade Commission have issued warnings over repair restrictions to three major companies—motorcycle company Harley-Davidson,²⁹⁹ outdoor generator maker Westinghouse,³⁰⁰ and grill company Weber.³⁰¹ Khan issued a statement, joined by Commissioner Slaughter, noting that such actions “mark an important step forward, demonstrating our commitment to vigorously protecting Americans’ right to repair.”³⁰² Khan and Slaughter commented about the policy problems generated by repair restrictions: “Illegal repair restrictions can significantly raise costs for consumers, stifle innovation, close off business opportunity for independent repair shops, create unnecessary electronic waste, delay timely

298. *FTC to Ramp Up Law Enforcement Against Illegal Repair Restrictions*, FED. TRADE COMM’N (July 21, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-ramp-law-enforcement-against-illegal-repair-restrictions>; *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers*, FED. TRADE COMM’N (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf; Lina Khan, *Remarks of Chair Lina M. Khan Regarding the Proposed Policy Statement on Right to Repair*, FED. TRADE COMM’N (July 21, 2021), <https://www.ftc.gov/public-statements/2021/07/remarks-chair-lina-m-khan-regarding-proposed-policy-statement-right-repair>.

299. Press Release, Fed. Trade Comm’n, *FTC Takes Action Against Harley-Davidson and Westinghouse for Illegally Restricting Customers’ Right to Repair: Agency Orders Require Companies to Fix Warranties, Come Clean with Customers, and Compete Fairly with Independent Repairers*, (June 23, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-action-against-harley-davidson-westinghouse-illegally-restricting-customers-right-repair-0>; Adi Robertson, *FTC Orders Harley-Davidson to Follow Right-To-Repair Rules*, VERGE (June 23, 2022, 8:55 AM), <https://www.theverge.com/2022/6/23/23180054/ftc-harley-davidson-westinghouse-right-to-repair-warranty-violations-consent-order>; Don Williams, *FTC Asserts Harley-Davidson Owners’ Right To Repair, Access Aftermarket*, ULTIMATE MOTORCYCLE (June 24, 2022), <https://ultimatemotorcycling.com/2022/06/24/ftc-asserts-harley-davidson-owners-right-to-repair-access-aftermarket/>.

300. Press Release, Fed. Trade Comm’n, *FTC Takes Action Against Harley-Davidson and Westinghouse*, *supra* note 299.

301. Press Release, Fed. Trade Comm’n, *FTC Takes Action Against Weber for Illegally Restricting Customers’ Right to Repair Agency Order Requires Grill Maker to Fix Warranty and Come Clean with Customers*, (July 7, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-takes-action-against-weber-illegally-restricting-customers-right-repair>; Sean Hollister, *Weber grills will soon come with the Explicit Right to Repair Them: What Weber was doing has been Illegal Since 1975*, VERGE (July 8, 2022, 1:24 PM), <https://www.theverge.com/2022/7/8/23200649/right-to-repair-ftc-weber-third-party-parts-warranty-act>; Jason Koebler, *FTC Orders Weber to Honor the Sacred Right to Repair Your Own Grill*, VICE (July 7, 2022, 9:42 AM), <https://www.vice.com/en/article/7k8vb4/ftc-orders-weber-to-honor-the-sacred-right-to-repair-your-own-grill>.

302. Lina Khan & Rebecca Kelly Slaughter, *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Harley-Davidson Motor Company Group and MWE Investments Inc.*, FED. TRADE COMM’N (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2223012_2123140HarleyMWEChairStatement.pdf.

repairs, and undermine resiliency—harms that can have an outsized impact on low income communities in particular.”³⁰³ Khan and Slaughter vowed to take further policy action to uphold the right to repair: “It is critical that unlawful repair restrictions continue to be a key area of focus for the Commission and that we continue to use all of our tools and authorities to root out these illegal practices.”³⁰⁴

Arguably, the ACCC should show a similar enthusiasm for enforcement action in respect of repair restrictions, as has been shown by Lina Khan and the Federal Trade Commission, with encouragement from President Joe Biden.³⁰⁵ The new Australian assistant minister for competition, Andrew Leigh MP, has expressed a desire for the Australian government to emulate the policy activity and enforcement intervention of the US Federal Trade Commission.³⁰⁶ Leigh maintained: “Both competition and productivity are kind of seen as soporific words, but they’re at the heart of Australia getting to enjoy the sort of prosperity which lets us live longer lives, healthier lives, to be more generous to disadvantaged Australians and to the region.”³⁰⁷ He contended: “So much of Australia’s prosperity has been driven by productivity and so much of the productivity growth has been driven by making sure that markets are competitive.”³⁰⁸

C. WARRANTIES

The Productivity Commission observed that there have been misleading terms in warranties for mobile phones, gaming consoles, washing machines, and high-end watches regarding independent repairs.³⁰⁹

Finding 4.1 of the Productivity Commission expressed concern that “some manufacturer warranties include terms that automatically void the warranty if repairs are undertaken by a non-authorized repairer or use non authorized parts.”³¹⁰ The law reform body also noted that “[o]ther warranties often contain dense and difficult to understand language, which can lead consumers to mistakenly believe that such terms exist.”³¹¹ The advisory body commented: “These voiding clauses can deter consumers from using third party repairs

303. *Id.*

304. *Id.*

305. *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers*, FED. TRADE COMM’N (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf.

306. Martin, *supra* note 242.

307. *Id.*

308. *Id.*

309. PRODUCTIVITY COMM’N, INQUIRY REPORT, *supra* note 4, at 153–59.

310. *Id.* at 33.

311. *Id.*

during the warranty period, limiting their choice of repairer and reducing competition in repair markets.”³¹² The Productivity Commission also observed: “Many consumers are also not aware that consumer guarantees under the Australian Consumer Law cannot be displaced by terms in warranties, and the guarantees are not extinguished if consumers have previously used non-authorized repair services or spare parts (as long as those services have not caused any damage to the product).”³¹³

In Recommendation 4.4, the Productivity Commission proposed the addition of new mandatory warranty text. The Productivity Commission commented:

The Australian Government should 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 a remedy under the consumer guarantees do not require consumers to have previously used authorised repair services or spare parts.³¹⁴

The Productivity Commission recommended that there should be broad-based consultation with industry and consumer groups in the development of the final wording of this text.³¹⁵

The Productivity Commission also reached Finding 4.8 that a prohibition on warranty voiding clauses was not justified at this time.³¹⁶ The law reform body maintained that “Improvements to awareness of the consumer guarantees (through mandatory warranty text— recommendation 4.4) and the enforcement of those guarantees (through the introduction of pecuniary penalties—recommendation 3.4) will go some way towards reducing the deterrent effect of manufacturer warranty terms that void the warranty if any non-authorized repairs occur.”³¹⁷ The advisory body argued that such a prohibition “may also increase costs for manufacturers and consumers, so is not justified at this time.”³¹⁸

This explanation, though, is unconvincing. Arguably, the Australian Parliament should adopt provisions similar to those of the Magnuson-Moss Warranty Act in the United States, which prohibit manufacturer warranties

312. *Id.*

313. *Id.*

314. *Id.* at 34.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

from containing terms that require consumers to use authorized repair services or parts to keep their warranty coverage.

V. SUSTAINABLE DEVELOPMENT

In a speech to the Australian Repair Summit, Presiding Commissioner Paul Lindwall discussed some of the environmental issues in respect of the right to repair.³¹⁹ He posed the question, “Why do some products last many years, while others break quickly?”³²⁰ Lindwall noted that, in Cuba, repair is a necessity (given the trade restrictions to that jurisdictions). He then considered the position of repair in Australia:

We replace products for a whole range of reasons. It could be the product is broken and it's more expensive to repair than replace. It could be that a new product offers features that we desire, or the new product is more efficient and less environmentally harmful. It could be that we like a change for the sake of fashion. The design of many products today has incorporated solid state technology, including the internet of things, allowing our products to be connected and controlled remotely. This has been an important factor leading to the rapid change over of certain products.³²¹

Lindwall reflected: “Overall we didn't find clear evidence that manufacturers deliberately design products to fail early.”³²² Nonetheless, he observed that there could be a case for a repairability index or labelling scheme, like France.³²³

Environmental advocates and sustainability groups, though, have argued that the Productivity Commission has not gone far enough its findings on the environmental dimensions of the right to repair. Such civil society groups have maintained that there is a need for a more substantive set of law reform recommendations dealing with e-waste, product design and obsolescence, repair labelling, as well as the circular economy, sustainable development, and

319. Paul Lindwall, *Right to Repair Draft Report*, AUSTRALIAN REPAIR SUMMIT, CANBERRA (July 9, 2021), <https://www.pc.gov.au/news-media/speeches/repair>.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

climate action. The parlous state of Australia’s environment is a driving factor for wholesale reform.³²⁴

A. E-WASTE

Environmentalist George Monbiot has been concerned about the production of e-waste and the problem of planned obsolescence: “Our appliances are designed to break down, they are deliberately engineered not to be repaired.”³²⁵ Monbiot contended that there is a need to shift to a model of sustainable production and consumption in a circular economy.

The Hon. Shane Rattenbury has been concerned about the cost of e-waste: “Rapid technological innovation, low-quality manufacturing methods, and globalized markets lowering the costs of consumer goods have supported faster rates of product obsolescence.”³²⁶ He contends: “Stemming the creation of e-waste by extending product viability and life-span will more successfully address environmental and health detriments than measures such as recycling and up-cycling measures”.³²⁷ Rattenbury was of the view that recycling did not go far enough to address the problem of e-waste.

John Gertsakis and Shaun Scallan of the e-Waste Watch Institute have argued to the Productivity Commission that there is a need for a stronger package of policy measures to support product stewardship, the reduction of e-waste, and the transition to a circular economy.³²⁸ Their submission contends: “The right to repair must facilitate and enable easy and if possible (and safe) DIY repair, this will lower the cost of repair dramatically.”³²⁹ The authors call for stronger recognition of key principles of a circular economy—including “designing-out waste from the outset”; and “prolonging the life of products through repair, refurbishment, remanufacturing and reuse.”³³⁰ The authors called for “waste avoidance and reduction by extending product life

324. Ian Creswell, Terri Janke & Emma Johnston, *Australia: State of the Environment 2021*, <https://soe.deceew.gov.au/>.

325. George Monbiot, *People Want a Greener, Happier World Now. But Our Politicians Have Other Ideas*, *GUARDIAN* (July 22, 2020, 11:55 AM), https://www.theguardian.com/commentisfree/2020/jul/21/greener-happier-world-politicians-boris-johnson-consumerism-planet?CMP=share_btn_tw.

326. Rattenbury, *supra* note 25.

327. *Id.*

328. SHAUN SCALLAN & JOHN GERTSAKIS, E-WASTE WATCH INSTITUTE, A SUBMISSION TO THE AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION ON RIGHT TO REPAIR, SUBMISSION 125 TO THE ISSUES PAPER, PRODUCTIVITY COMMISSION (2021), https://www.pc.gov.au/__data/assets/pdf_file/0020/273008/sub125-repair.pdf.

329. *Id.*

330. *Id.*

and prolonging the life of products, components and materials.”³³¹ The submission comments: “Design for durability, repair and reuse can be seen as the ‘first responders’ when considering solutions and preventative measures that can avoid and reduce waste.”³³²

In Finding 7.1, the Productivity Commission suggested that e-waste is a small but growing waste stream: “Annual e-waste generation is growing relatively quickly compared to other waste streams (more than doubling by weight between 2009–10 and 2018–19), but is a small share (less than one per cent by weight) of total waste generated in Australia.”³³³ The Productivity Commission commented that the available data suggested that “the main sources of e-waste (by weight) over the past decade were tools, washing machines, air conditioners, small domestic appliances (such as adapters, irons and clocks), cooking appliances (such as food processors and grills), and cathode ray tube televisions.”³³⁴ The Productivity Commission also predicted that “solar panels and lithium-ion batteries are expected to generate growing quantities of e-waste over the coming decade.”³³⁵

In Finding 7.2, the Productivity Commission maintained that the environmental and health risks from e-waste in landfill are relatively low because “Australia’s landfills are generally well-regulated and well-managed.”³³⁶ The Productivity Commission qualified that statement, noting that “landfill quality varies, particularly among smaller and older landfill sites in regional and remote areas, generating increased risks from e-waste in some sites.”³³⁷

In Recommendation 7.1, the Productivity Commission called for reuse to be included within the annual targets of the National Television and Computer Recycling Scheme.³³⁸ The advisory organization commented: “The Australian Government should amend the *Recycling and Waste Reduction (Product Stewardship — Televisions and Computers) Rules 2021* to count e-waste products that have been repaired and reused towards the annual targets of the National Television and Computer Recycling Scheme (NTCRS) co-regulatory bodies.”³³⁹ The law reform body wanted a consultative process for such a scheme: “The exact design features that need to be incorporated into the NTCRS to enable reuse options should be determined in consultation with the scheme’s liable parties

331. *Id.*

332. *Id.*

333. PRODUCTIVITY COMM’N, INQUIRY REPORT, *supra* note 4, at 37.

334. *Id.*

335. *Id.*

336. *Id.* at 38.

337. *Id.*

338. *Id.*

339. *Id.*

and co regulatory bodies.”³⁴⁰ The Productivity Commission observed that there was a need to guard against various risks—including “manipulating (or ‘gaming’ of) scheme targets, when the same products cycle through the scheme without legitimately being reused”; “unlawful exports for reuse that result in more products in the informal recycling sector, generating worse health and environmental outcomes” and “consumer concerns about data security for repaired and reused products.”³⁴¹ The law reform body suggested: “Any future product stewardship schemes should also include repair and reuse as options within their targets, where practical.”³⁴²

In Recommendation 7.2, the Productivity Commission called for the use of tracking devices to monitor e-waste exports.³⁴³ In its view, “[t]he Australian Government should make greater use of electronic tracking devices to determine the end-of-life outcomes of Australian e-waste collected for recycling.”³⁴⁴ The Productivity Commission stressed: “At a minimum, the Government should increase the National Television and Computer Recycling Scheme’s use of tracking devices, to better monitor co regulatory bodies and their downstream recyclers and logistic providers.”³⁴⁵ The law reform body suggested that the Department of Agriculture, Water and the Environment could also consider the use of “tracking devices in e-waste products outside the scope of product stewardship schemes.”³⁴⁶ The Productivity Commission envisaged that such “tracking should be conducted by independent third party auditors.”³⁴⁷

There were a number of environmental and sustainability groups who questioned the findings of the Productivity Commission, suggesting that they under-estimated the scale and intensity of the problem of e-waste. Such organizations maintained that there should be a stronger set of policy solutions to the problem of e-waste in Australia.

B. PRODUCT DESIGN AND OBSOLESCENCE

There was also much discussion in the right to repair inquiry about product design and planned obsolescence.

The ACT Attorney-General Shane Rattenbury calls for product stewardship laws to support the development of a circular economy: “A truly

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

circular economy will rely, in part, upon product design for next life and new life, through reparability, modularity and disassembly.”³⁴⁸

Australian Earth Laws Alliance (AELA) has been concerned about the problem of planned obsolescence—“an economic strategy to keep people buying the same product again, and again, in a saturated market.”³⁴⁹ AELA recommends:

Mandatory existing environmental design standards to be applied to all relevant products made, imported and sold in Australia. These standards would require Australian companies to manufacture, import or sell products that are designed to be durable and exist for their optimal lifetime, and that can easily be upgraded, repaired and recycled where technically possible.³⁵⁰

AELA recommends amending the objects of the *Product Stewardship Act 2011* (Cth) so that a core objective of the Act is to reduce energy and water use and reduce emissions. In its view, “The *Product Stewardship Act 2011* (Cth) should state that in considering the environmental impacts of products, decision makers will draw on contemporary scientific knowledge, and use an evidenced based approach.”³⁵¹ AELA argues: “Environmental impacts of products must include an assessment of the life cycle of the product, and its contribution to the cumulative impacts of pollution and resource use.”³⁵²

The World’s Biggest Garage Sale, based in Morningside, South Brisbane, submitted: “A ‘Right to Repair’ should not be considered in isolation, but rather in tandem with extended producer responsibility and novel materials.”³⁵³ The submission suggested:

Manufacturers or distributors should be encouraged to work with local organisations embedded in the community so that when an item no longer works or is not wanted, then it can be repaired and reused, repurposed or recycled locally, making it more accessible for consumers; however the manufacturer must pay for this service as part of their extended producer responsibility.³⁵⁴

348. Rattenbury, *supra* note 25.

349. *Challenging Consumption and Planned Obsolescence*, AELA, <https://www.earthlaws.org.au/our-programs/challenging-consumption/planned-ob/>.

350. *Id.*

351. *Id.*

352. *Id.*

353. WORLD’S BIGGEST GARAGE SALE, SUBMISSION FOR THE RIGHT TO REPAIR INQUIRY, (Jan. 30, 2021), https://pc.gov.au/__data/assets/pdf_file/0019/272323/sub045-repair.pdf.

354. *Id.*

The organization contends that “to truly move into a circular economy, we want to prevent future legacy waste..., so we need to explore circular chemistry, circular metallurgy and circular component disciplines.”³⁵⁵ The World’s Biggest Garage Sale argued: “As we move from a linear to a circular economy, repair must be considered integral in any policies and frameworks moving forward.”³⁵⁶ The submission maintained: “Environmental considerations can no longer be ignored at the very critical phase of designing products, where options for repair should be examined.”³⁵⁷

The Australian Academy of Technology and Engineering has called on governments to provide for “targeting manufacturing grant programs and tax incentives toward innovative design for waste avoidance or minimization, including reparability.”³⁵⁸

In Finding 6.1, the Productivity Commission recognized that there was community disquiet about the problem of obsolescence: “There is growing community concern in Australia and overseas that product lifespans are becoming unnecessarily short (‘premature obsolescence’), with detrimental impacts on consumers and the environment.”³⁵⁹ Nonetheless, the law reform body was of the view that “the evidence is mixed on whether premature obsolescence is a significant problem.”³⁶⁰ The advisory body was of the view that “such practices [of planned obsolescence] are unlikely to be widespread.”³⁶¹ The Productivity Commission observed: “The lifespans of some products are becoming shorter, but this is often driven by consumers choosing to replace their products with newer ones rather than the products breaking; indeed, some products are becoming more durable.”³⁶²

The Productivity Commission insisted: “For certain types of products (such as white goods and consumer electronics), some consumers find it difficult to access relevant information about product reparability and durability when making purchasing decisions.”³⁶³ The Productivity Commission observed: “Such information gaps could contribute to premature obsolescence by preventing consumers from selecting more repairable and

355. *Id.*

356. *Id.*

357. *Id.*

358. AUSTRALIAN ACADEMY OF TECHNOLOGY & ENGINEERING, SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO A RIGHT TO REPAIR (2021), <https://www.atse.org.au/wp-content/uploads/2021/01/SUB-2021-02-01-Inquiry-into-the-Right-to-Repair-within-Australia-FINAL.pdf>.

359. PRODUCTIVITY COMMISSION, INQUIRY REPORT, *supra* note 4, at 36.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

durable products based on their preferences, and reducing manufacturers' incentives to develop these products."³⁶⁴

In Finding 6.2, the Productivity Commission maintained that "interventionist responses" to premature obsolescence were unnecessary and not needed.³⁶⁵ The law reform body maintained that it did not support "additional policies to prevent premature product obsolescence—in the form of mandatory product design standards, tax incentives and subsidies, or expanded consumer protection laws—are unlikely to have net benefits for the community."³⁶⁶ The Productivity Commission argued that "[m]andatory product design standards, as well as tax incentives and subsidies for repair, are costly."³⁶⁷ In its view, "Existing consumer protection laws, combined with this inquiry's recommendations ... are likely to address some of the behaviors associated with premature obsolescence."³⁶⁸

It is disappointing that the Productivity Commission shied away from a stronger response to the problem of premature and planned obsolescence (which was identified as a serious and persistent problem by many stakeholders).

C. REPAIR LABELLING

There was significant debate in the Productivity Commission inquiry as to whether labelling and certification schemes would be helpful in dealing with repairs.

Professor Jay Sanderson and Teddy Henriksen have contended that trademarks and labelling schemes could play a useful role in terms of certifying the quality of repairs.³⁶⁹ Sanderson and Henriksen commented: "While a repairable mark and license is not the panacea of repairability, it can help distinguish repairable goods and signal to consumers, manufacturers and governments the efforts implemented to ensure goods are as repairable as they can be."³⁷⁰ Sanderson and Henriksen argued that "once a repairable trade mark and associated standards are established the real work begins; building trust in the mark, and its standards and processes."³⁷¹

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. Sanderson & Henriksen, *supra* note 169, at 161–72.

370. *Id.* at 171–72.

371. *Id.* at 172.

In its submission to the Productivity Commission, Clare Hobby and Andreas Nobell considered the right to repair and sustainability certification.³⁷² Hobby and Nobell contended that “the right to repair is fundamental to longer product use, which in turn supports the shift to a regenerative, circular economy and the prevention of e-waste.”³⁷³ Hobby and Nobell commented that there was a lack of consideration of the need for a circular economy by many technology developers and users.³⁷⁴ The submission also noted the problem of false product claims: “There is a continuing problem of untrue claims that certain products are unsafe to open up and repair.”³⁷⁵ Hobby and Nobell suggested that there was a need for the regulator to take further action in respect of greenwashing.

The Australian Academy of Technology and Engineering has provided support for the recognition of the right to repair.³⁷⁶ The Academy “recommended a legislated consumer right to repair products in Australia, starting with electronics.”³⁷⁷ The Academy discussed the need for standard-setting and labelling systems in respect of repair: “Creating standards and certification systems for reused, repaired and remanufactured goods to build consumer confidence and promote sustainable design.”³⁷⁸

As of January 2021, France is the first country in the European Union to have implemented a repairability index on 5 categories of electronic devices. The architect of the scheme Jean-Paul Ventere has discussed the right to repair mandates in France.³⁷⁹ There has been much public policy interest in France’s new ‘repairability index’.³⁸⁰ Maddie Stone commented upon the development: “The repairability index represents part of France’s effort to combat planned obsolescence, the intentional creation of products with a finite lifespan that need to be replaced frequently, and transition to a more circular economy

372. CLARE HOBBY & ANDREAS HOBELL, SUBMISSION TO INQUIRY—RIGHT TO REPAIR IN AUSTRALIA (2021), https://www.pc.gov.au/__data/assets/pdf_file/0007/273895/sub137-repair.pdf.

373. *Id.*

374. *Id.*

375. *Id.*

376. AUSTL. ACAD. TECH. & ENG’G, *supra* note 358.

377. *Id.*

378. *Id.*

379. Jean-Paul Ventere, *Climate Crisis. Right to Repair Mandates In France*, YOUR POSITIVE IMPACT (Apr. 25, 2022), <https://yourpositiveimprint.com/episodes/climate-crisis-right-to-repair-mandates-in-france-jean-paul-ventere/>.

380. *The French Repair Index: Challenges and Opportunities*, RIGHT TO REPAIR (Feb. 3, 2021), <https://repair.eu/news/the-french-repair-index-challenges-and-opportunities/>.

where waste is minimized.”³⁸¹ Stone observes that the policy initiative has global implications: “Repair advocates say that the index will serve as a litmus test for other nations weighing similar regulations, help consumers make better choices, and hopefully incentivize companies to manufacture more repairable devices.”³⁸² Professor Aaron Perzanowski comments that “France’s stance against planned obsolescence is an important step forward” because it “recognizes the unavoidable convergence of consumer protection and environmental regulation.”³⁸³

In the European Union, there has been an interest in the adoption of further repair labelling schemes. The Greens/EFA in the European Parliament have been campaigning for the adoption of a repair score as part of a sustainability labelling scheme.³⁸⁴ The Greens/EFA have the policy ambition “to reduce e-waste and enable consumers to make informed choices about whether or not their electronics can be repaired.”³⁸⁵ Supporting a sustainability labelling scheme, the Greens/EFA commented: “The repair score will tell consumers how easy a product is to repair before they make the choice to buy it.”³⁸⁶ They observed: “The repair score would grade products based on: accessible product design; the tools needed to perform the repair; the availability of spare parts; and the prices of spare parts.”³⁸⁷ The Greens/EFA noted: “This repair score should also take into account the environmental footprint and how circular a product is (whether it will last, and whether it can be repaired, reused or recycled).”³⁸⁸

There has also been much interest in Switzerland about the adoption of a “repairability index.”³⁸⁹ There has been interesting empirical research on the role of independent repairers working in the field of mobile phones in Switzerland.³⁹⁰

The Productivity Commission showed enthusiasm during the inquiry for the new French scheme for repair product labelling. In Finding 6.3, the Productivity Commission ruled that “better consumer information could lead

381. Maddie Stone, *Why France’s New ‘Repairability Index’ is a Big Deal*, GRIST (Feb. 8, 2021), <https://grist.org/climate/why-frances-new-repairability-index-is-a-big-deal/>.

382. *Id.*

383. PERZANOWSKI, *supra* note 12, at 222.

384. *Support a Repair Score in Europe*, GREENS/EFA, https://act.greens-efa.eu/repairscore?source=gg_twitter_20210719.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Swiss Consumers*, *supra* note 15.

390. NICOLAS NOVA & ANAIS BLOCH, DR. SMART-PHONE: AN ETHNOGRAPHY OF MOBILE PHONE REPAIR SHOPS (2020), <https://hal.archives-ouvertes.fr/hal-03106034>.

to longer-lived products.”³⁹¹ The Productivity Commission maintained: “Product labelling is likely to help address information gaps in product repairability and durability for certain products, such as white goods and consumer electronics (finding 6.1).”³⁹² The Productivity Commission insisted that labelling “can assist consumers to purchase more repairable and durable products that align with their preferences and encourage manufacturers to develop these types of products.”³⁹³

In Recommendation 6.1, the Productivity Commission called for the development and introduction of a product labelling scheme.³⁹⁴ The law reform body observed that “the Australian Government should develop a product labelling scheme that provides consumer information about product repairability and/or durability.”³⁹⁵ The law reform body anticipated that there would be three stages. First, the Australian Government would establish a working group to introducing a product labelling scheme within five years.³⁹⁶ Second, the Australian Government needed to “design and implement a pilot scheme for products where it is likely to have the most benefits (such as white goods and consumer electronics).”³⁹⁷ Third, the Australian Government would review the pilot scheme within two years of commencement to assess its effectiveness.³⁹⁸

D. THE CIRCULAR ECONOMY, SUSTAINABLE DEVELOPMENT AND CLIMATE ACTION

Discussing the Productivity Commission report, Jeff Sparrow commented that the topic of the right to repair raised larger issues in respect of sustainable development and climate action.³⁹⁹ He commented: “If we want to reverse the ecological catastrophe engulfing our planet, we must refocus attention on what is produced and how.”⁴⁰⁰ Sparrow reflected upon the public policy significance of the right to repair: “In an increasingly fragile world, we need more—much more—control over production.”⁴⁰¹ Sparrow suggested that the right to repair

391. PRODUCTIVITY COMM’N, INQUIRY REPORT, *supra* note 4, at 37.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. Jeff Sparrow, *Ending over Mending: Planned Obsolescence is Killing the Planet*, GUARDIAN (Mar. 16, 2021, 12:30 PM), https://theguardian.com/commentisfree/2021/mar/17/ending-over-mending-planned-obsolence-is-killing-the-planet?CMP=share_btn_tw.

400. *Id.*

401. *Id.*

should also lead us to consider the various pressing needs to repair the planet: “In the era of catastrophic climate change, it’s very clear where ending over mending leads.”⁴⁰²

It is notable that there has been an array of innovation strategies in respect of clean, sustainable technologies to encourage responsible consumption and production. In Australia, there has been the establishment of a growing networks of repair cafes (like the Bower Reuse and Repair Centres) and social enterprises (such as Logan’s Substation 33). It is notable that a number of these organizations made submissions to the Productivity Commission. The Bower Reuse and Repair Centres called on the Treasurer Josh Frydenberg to “[i]ntroduce mandatory schemes for manufacturers of new products to provide spare parts and repair manuals for a mandated period of time.”⁴⁰³ The submission also recommended “[t]ax breaks for repairs of personal and household items.”⁴⁰⁴ The submission also called for the adoption of “[o]ther best practice measures to boost the circular economy, lengthen product life, reduce landfill and protect the environment.”⁴⁰⁵ The community group called for reusability and reparability standards in the *Product Stewardship Act* as well as a broad right to repair. There has even been the establishment of circular economy precincts, like those set up by the World’s Biggest Garage Sale.⁴⁰⁶ Makerspaces, fab labs, and hackerspaces in Australia and overseas have also been focused upon repair, recycling, and upcycling. There have been an array of small businesses and independent repairers who have been engaged in repair.

Australian governments have increasingly focused on the establishment of research institutions and networks to support a circular economy. UNSW’s Professor Veena Sahajwalla is the founding Director of the Centre for Sustainable Materials Research & Technology at UNSW.⁴⁰⁷ She has been focused on producing a new generation of green materials, products and resources derived from waste. Professor Sahajwalla has also been a leader of the ARC Industrial Transformation Hub for “green manufacturing,” which concluded its work in 2020.⁴⁰⁸ The hub undertook research into the high

402. *Id.*

403. *Right to Repair Petition*, BOWER REUSE & REPAIR CTRS., <https://bower.org.au/1122-2/>.

404. *Id.*

405. *Id.*

406. WORLD’S BIGGEST GARAGE SALE, *supra* note 353.

407. *Scientia Professor Veena Sahajwalla*, UNSW, <https://research.unsw.edu.au/people/scientia-professor-veena-sahajwalla> (last visited March 22 2023).

408. *ARC Green Manufacturing Research Hub*, UNSW, <https://www.smart.unsw.edu.au/research-programs/arc-green-manufacturing-research-hub> (last visited March 22 2023).

temperature transformation of waste rich in plastic and metals, such as from used cars and electronic waste, as well as textiles. The New South Wales Government and UNSW established the NSW Circular Economy Innovation Network.⁴⁰⁹ This organization was known as NSW Circular.⁴¹⁰ NSW Circular's mission was to deliver a zero-carbon circular economy.⁴¹¹ There has been efforts in 2022 to transform this New South Wales network into an Australian-wide network—with Circular Australia.⁴¹² The Federal Government could consider establishing research frameworks to encourage sustainable innovation—such as through a Centre of Excellence or a new Co-operative Research Centre.

David R. Boyd—the U.N. Special Rapporteur on Human Rights and the Environment—has discussed the importance of law reform to promote a circular economy.⁴¹³ He suggests:

Consumers need to think in new ways about the things they need and be open to leasing or renting instead of owning, enabling manufacturers to build new business models and be responsible for the durability, reuse, and recycling of their products. Governments need to enact stronger laws governing the disposal of waste, the manufacturing of disposable products, and the elimination of toxic substances. Businesses need to rethink their current approach and embrace the opportunities offered by the circular economy, cradle-to-cradle design, and biomimicry.⁴¹⁴

Boyd maintains that the “adoption of the circular economy could yield trillions of dollars in resource savings annually, along with enormous benefits for human and ecosystem health.”⁴¹⁵

Sustainable Development Goal No. 12 is focused on responsible production and consumption.⁴¹⁶ The U.N. Development Programme (UNDP)

409. *NSW Circular Economy Innovation Network*, UNSW, <https://newsroom.unsw.edu.au/keywords/nsw-circular-economy-innovation-network> (last visited March 22 2023).

410. *Circular Economy Policy*, NSW EPA, <https://www.epa.nsw.gov.au/your-environment/recycling-and-reuse/response-to-china-national-sword/circular-economy-policy>; *NSW Government Commits to a Circular Economy*, LIBERAL PARTY AUSTR., (Mar. 21, 2022), <https://nswliberal.org.au/Shared-Content/News/2022/NSW-government-commits-to-a-circular-economy>.

411. *Id.*

412. CIRCULAR AUSTRALIA, <https://circularaustralia.com.au/> (last visited March 22 2023).

413. DAVID R. BOYD, *THE OPTIMISTIC ENVIRONMENTALIST: PROGRESSING TOWARDS A GREENER FUTURE* 51–67 (2015).

414. *Id.* at 66.

415. *Id.* at 67.

416. SDGs 2015, *supra* note 33; SDG Goal 12, *supra* note 33; UN General Assembly, *supra* note 33.

has sought to help realize the Sustainable Development Goals with the establishment of a network of Accelerator Labs.⁴¹⁷ At an international level, the UNDP administrator Achim Steiner has established a network of UNDP Accelerator Labs to help realize the U.N. Sustainable Development Goals.⁴¹⁸ Steiner has explained the impetus for the initiative: “These Labs, will enhance our capacity to provide more agile and solutions-focused support to countries as they build on local expertise and global best practices.”⁴¹⁹ The initiative was supported by the Federal Republic of Germany and the State of Qatar. As of July 2021, the UNDP Network of Accelerator Labs consists of 91 locations, supporting 115 countries.⁴²⁰ There are Accelerator Labs located in several regions, including Central America, the Caribbean, South America, Africa, the Middle East, Eastern Europe, Asia, and the Pacific. Thus far, the Australian Government has not made much progress in translating the Sustainable Development Goals into new laws, regulations, policies, and practices.⁴²¹ As yet, Australia is not a funder, participant, or a host in the UNDP Accelerator Labs. But conceivably, Australia could play a significant and instrumental role as a funder, host, and a participant in the UNDP Accelerator Labs system.

There has also been a growing focus on the reform of intellectual property law, policy, and practice to promote Sustainable Development Goals.⁴²² There

417. *Accelerator Labs*, UNDP, <https://acceleratorlabs.undp.org/content/acceleratorlabs/en/home.html>.

418. See Matthew Rimmer, *The UNDP Accelerator Lab Network: Intellectual Property, Innovation Policy, Sustainable Development, and the COVID-19 Recovery*, in RETHINKING THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN THE POST PANDEMIC WORLD (2023), (Taina Pihlajarinne, Jukka Mahonen, and Pratyush Upreti eds., 2023) (discussing this initiative broadly).

419. *German Ministry for Economic Cooperation and Development supports bold new pathway to development through 60 UNDP Accelerator Labs*, UNDP (June 27, 2019), <https://www.undp.org/content/undp/en/home/news-centre/news/2019/undp-accelerator-labs.html>.

420. *Accelerator Labs*, *supra* note 417.

421. MATTHEW RIMMER, A SUBMISSION ON INTELLECTUAL PROPERTY AND THE UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS (2018), <https://eprints.qut.edu.au/121459/>; SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE, AND TRADE, UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS (2019), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/SDGs/Report.

422. CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA (2007); JEREMY DE BEER, IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA (2009); DEAN BAKER, ARJUN JAYADEV & JOSEPH STIGLITZ, INNOVATION, INTELLECTUAL PROPERTY, AND DEVELOPMENT: A BETTER SET OF APPROACHES FOR THE 21ST CENTURY (2017); MARGARET CHON, PEDRO ROFFE & AHMED ABDEL-LATIF, THE CAMBRIDGE HANDBOOK OF PUBLIC-PRIVATE PARTNERSHIPS, INTELLECTUAL PROPERTY GOVERNANCE, AND SUSTAINABLE DEVELOPMENT (2018); Sara Bannerman, *The World Intellectual Property*

has been a WIPO Development Agenda—although that initiative has been quite technocratic in its operation.⁴²³ Kyle Wiens of iFixit has been concerned that intellectual property is putting circular economy in jeopardy.⁴²⁴ Nobel Laureate Joseph Stiglitz and his collaborators have emphasized that current intellectual property institutions and treaties are not well aligned with the sustainable development goals.⁴²⁵ Professor Margaret Chon and her collaborators have promoted the use of intellectual property partnerships to help realize the Sustainable Development Goals.⁴²⁶ Professor Sara Bannerman has called for a substantive reform agenda, which considers the full panoply of sustainable development goals.⁴²⁷ The author of this submission has argued that regional trade agreements need to be better informed by the sustainable development goals.⁴²⁸ There has also been an increasing interest in the role played by intellectual property in fostering clean innovation, green businesses, and sustainable markets.⁴²⁹ There is a growing scholarship in respect of intellectual property, clean technologies, and climate change.⁴³⁰

VI. CONCLUSION

In its conclusion to the inquiry, Australia’s Productivity Commission posed the question: “Are broader right to repair laws needed?”⁴³¹ The law reform body noted that “many participants to this inquiry supported the

Organization and the Sustainable Development, 122 FUTURES 102586 (2020); Rogstad & Ørstavik, *supra* note 169.

423. Development Agenda for WIPO, WORLD INTEL. PROP. ORG., <https://www.wipo.int/ip-development/en/agenda/>; CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA (2007); JEREMY DE BEER, IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION’S DEVELOPMENT AGENDA (2009).

424. Kyle Wiens, *Intellectual property is putting circular economy in jeopardy*, GUARDIAN (June 4, 2014, 2:00 PM), <https://www.theguardian.com/sustainable-business/intellectual-property-circular-economy-bmw-apple>.

425. BAKER, JAYADEV & STIGLITZ, *supra* note 422.

426. CHON, ROFFE & ABDEL-LATIF, *supra* note 422.

427. Bannerman, *supra* note 422.

428. See Matthew Rimmer, *The Trans-Pacific Partnership and Sustainable Development: Access to Genetic Resources, Informed Consent, and Benefit-Sharing*, in BIODIVERSITY, GENETIC RESOURCES AND INTELLECTUAL PROPERTY: DEVELOPMENTS IN ACCESS AND BENEFIT SHARING 151–84 (Charles Lawson & Kamalesh Adhikari eds., 2018); RIMMER, *supra* note 140, at 525–50.

429. OLE-ANDREAS ROGNSTAD & INGER B. ØRSTAVIK, *Intellectual Property and Sustainable Markets* (2021).

430. MATTHEW RIMMER, INTELLECTUAL PROPERTY AND CLIMATE CHANGE: INVENTING CLEAN TECHNOLOGIES (2011); MATTHEW RIMMER (ED.), INTELLECTUAL PROPERTY AND CLEAN ENERGY: THE PARIS AGREEMENT AND CLIMATE JUSTICE (2018).

431. PRODUCTIVITY COMM’N, INQUIRY REPORT, *supra* note 4, at 20.

further adoption of repair supply obligations in Australia.”⁴³² The Productivity Commission observed that some participants “proposed extending obligations to many other products and types of repairs supplies.”⁴³³ However, the advisory body did not necessarily support such a broad approach: “While the Commission sees a role for repair supplies obligations, their adoption should be targeted to areas where there is evidence that they are needed.”⁴³⁴ The law reform body, in particular, focused on the motor vehicle information scheme, and agricultural machinery. This paper argues that there is a strong case for a broader approach to Australia’s right to repair laws. It maintains that the new Australian Government led by Anthony Albanese should adopt a comprehensive approach to the right to repair—not one that is industry-specific, or particular to certain technologies.

The Productivity Commission is commended for running such an inclusive and rigorous process in its inquiry in relation to the right to repair. In spite of all the disruptions caused by the COVID-19 crisis in Australia, the Productivity Commission nonetheless did a commendable job at canvassing all the various stakeholders. The law reform body is certainly to be congratulated for producing a comprehensive discussion paper on the complex and tangled topic of the right to repair. Taking an interdisciplinary, holistic approach to the issue, the Productivity Commission shows a strong understanding that the topic of the right to repair is a multifaceted policy issue. Its final report covers the fields of intellectual property, consumer law, competition policy, product stewardship, and environmental law. The law reform body displays a great comparative awareness of developments in other jurisdictions in respect of the right to repair. The policy body is also sensitive to the international dimensions of the right to repair—particularly in light of the U.N. Sustainable Development Goals. The Productivity Commission puts forward a compelling package of recommendations, which will be useful in achieving law reform in respect of the right to repair in Australia.

Nonetheless, this Article argues that there is a need to go further than the final recommendations of the Productivity Commission. While a number of the recommendations are a useful starting point for law reform, there is an urgent need to build upon those recommendations and develop a more substantive framework for the right to repair. The new Albanese Government should build a comprehensive package of reforms to achieve a right to repair in Australia. In the field of intellectual property law and policy, it is insufficient to merely make reforms on the right to repair to copyright law, technological

432. *Id.*

433. *Id.*

434. *Id.*

protection measures, and contracting law. There is also a need for the modernization of designs law. Australia's trademark law should be updated to ensure that trademark infringements cannot be launched against independent repairers. Likewise, Australia's new precedent on patent exhaustion may not be adequate to protect repairers. A proper defense on the right to repair may be necessary. Moreover, Australia's burgeoning laws in respect of confidential information and trade secrets should have proper exceptions and defenses—including in relation to the right to repair. Data sharing laws and regulations should cover all fields and industries—not just the special case of motor vehicles. Intellectual property law, policy, practice requires refashioning to better accommodate the needs and the demands of the U.N. Sustainable Development Goals.

No doubt guided by its expert commissioner Abramson, the Productivity Commission made a set of useful and helpful recommendations to improve the operation of consumer law and competition policy in the field of the right to repair. Much will depend upon the behavior of the regulator, the Australian Competition and Consumer Commission. Gina Cass-Gottlieb has been appointed as the new chair of the ACCC.⁴³⁵ She has stressed: “The ACCC is a world-leading regulator with a high performing, capable and diverse team that is committed to the safety, interests and welfare of consumers and the maintenance of effective competition across the Australian economy.”⁴³⁶ Cass Gottlieb has emphasized that she will focus on the regulation of the digital economy.⁴³⁷ She has also promised to tackle the problem of price gouging (which may well have some connections to the topic of the right to repair).⁴³⁸ It remains to be seen how she will respond to the recommendations of the Productivity Commission on the right to repair in respect of the application and enforcement of consumer law and competition policy in Australia. Arguably, Australia needs to have an energetic and vigorous regulator on the right to repair—like the United States has with the leadership of Lina Khan at

435. *New Chair Gina Cass Gottlieb Starts at ACCC*, ACCC (Mar. 21, 2022), <https://www.accc.gov.au/media-release/new-chair-gina-cass-gottlieb-starts-at-accc#:~:text=Highly%20respected%20competition%20lawyer%20Gina,experience%20across%20complex%20competition%20matters>.

436. *Id.*

437. Ben Butler, *The Power of One: Gina Cass-Gottlieb on Becoming the First Woman to lead the ACCC*, GUARDIAN (Mar. 25, 2022, 3:00 PM), <https://www.theguardian.com/australia-news/2022/mar/26/the-power-of-one-gina-cass-gottlieb-on-becoming-the-first-woman-to-lead-the-accc>.

438. Peter Ryan, *New ACCC chair Gina Cass-Gottlieb vows to target price gougers, plays down Murdoch family links*, ABC NEWS (Mar. 27, 2022, 5:16 PM), <https://www.abc.net.au/news/2022-03-28/accc-chair-gina-cass-gottlieb/100943878>.

the Federal Trade Commission. The new assistant minister Andrew Leigh MP is keen for Australia to take decisive action in respect of competition policy.⁴³⁹

The Productivity Commission also made some cautious recommendations in respect of e-waste, product stewardship, and repairability labelling and indexing. Arguably, there is a need for a stronger set of policy prescriptions to fully realize the environmental benefits of a right to repair. There are many aspects of Australian society in 2022 that remain resolutely unsustainable. There will need to be a larger undertaking to transform Australia's culture to one that embraces the U.N.Sustainable Development Goals. It will require a revolution to change Australia's economy to a fully circular economy. As Professor Aaron Perzanowski has remarked, "[l]egislation and regulation are part of the solution, but fixing our culture of repair will demand lasting changes to our behavior as consumers and citizens."⁴⁴⁰

439. Martin, *supra* note 242.

440. PERZANOWSKI, *supra* note 12, at 268.