

**23 July 2021**

Right to Repair Inquiry  
Productivity Commission  
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### **Productivity Commission – Right to Repair Draft Report (June 2021)**

1. The Business Law Section of the Law Council of Australia welcomes the opportunity to comment on the 'Right to Repair' draft report released by the Productivity Commission (**Commission**) in June 2021 (**Draft Report**), as part of the Commission's Right to Repair Inquiry (**Inquiry**).
2. The Business Law Section has received contributions from two of its committees in relation to this consultation:
  - a. The Competition and Consumer Committee; and
  - b. The Intellectual Property Committee (together, the **Committees**).
3. In summary, the Committees are of the view that existing laws generally provide adequate rights and remedies to consumers in relation to repairs. Any changes to existing regulatory settings should only be in response to clear evidence of market failures and following detailed consultation with industry. In addition, the Intellectual Property Committee is supportive of the Commission's proposal to amend the *Copyright Act 1968* (Cth) to adopt a general fair use defence in relation to copyright.
4. This submission is divided into two parts, each dealing with separate Information Requests and Draft Recommendations raised in the Draft Report. Part A of this submission has been prepared by the Competition and Consumer Committee, while Part B has been prepared by the Intellectual Property Committee.

## Part A: Competition and Consumer Committee

### Introduction

5. The Competition and Consumer Committee's comments on the Draft Report are limited to those parts of the Draft Report that are relevant to competition and consumer law.
6. In summary, the Competition and Consumer Committee considers that:
  - a. Existing competition and consumer laws generally provide **adequate rights and remedies** to consumers in relation to cost and availability of repairs.
  - b. Regulatory intervention is only justified where there is **clear evidence** of market failure yet many of the submissions provided to the Commission contain very limited or merely anecdotal evidence of unnecessary barriers to repairs.
  - c. Even in those instances where barriers may be identified, it is by no means clear that those instances are leading to **adverse outcomes** for the community as a whole. This is because it may not be efficient or cost effective for consumers always to repair products, or for manufacturers to be required to support a product for an indefinite period of time.
  - d. In the absence of clear evidence of market failure, a **positive obligation** on manufacturers to provide third-party access to repair supplies such as repair information, tools, equipment and parts should **not** be introduced. Such a significant and onerous regulatory obligation could impose considerable compliance and other costs on manufacturers, leading to unintended consequences such as decreased product innovation and increased prices for consumers.
  - e. Current regulatory settings relating to consumer access to repairs and independent repairers' access to repair supplies reflect a careful balancing of the interests of consumers, retailers and manufacturers. Even modest changes to regulatory settings should be approached with caution, and only in response to clear evidence of market failures and following detailed consultation with industry.

### No clear market failure to justify substantial regulatory intervention

7. The Competition and Consumer Committee is of the view that existing laws, particularly the Australian Consumer Law and the restrictive trade practices provisions of the *Competition and Consumer Act 2010* (Cth), generally provide adequate rights and remedies to consumers in relation to repairs. These regulatory settings also reflect a careful balancing of the sometimes competing interests of consumers, retailers and manufacturers. In this context, substantial further regulatory intervention is not justified in the absence of clear evidence of market failure.
8. The Competition and Consumer Committee submits that the Inquiry has not uncovered clear evidence of market failure, and accordingly, that any adjustments of current regulatory settings should be approached with caution. This is because even modest adjustments to regulatory settings can lead to unintended consequences such as reduced innovation, increased prices for goods and services or even customer confusion. In particular, the Competition and Consumer Committee notes that many submissions provided to the Inquiry contain limited or merely anecdotal evidence of manufacturers restricting access to repair supplies and other barriers to repair. The Draft Report itself identifies that the Commission's

analysis 'did not indicate a systemic competition problem across the repair industries analysed'<sup>1</sup> and that evidence raised by submissions was 'patchy' and 'incomplete'.<sup>2</sup>

9. The Competition and Consumer Committee agrees with the Commission that an in-depth, case-by-case analysis of repair markets and primary markets for each relevant product would be required to determine whether any barriers to repair are generating harm in any given product market. In particular, and as discussed below at paragraphs 10 - 16 below, the Competition and Consumer Committee is also of the view that stronger market-by-market evidence and a review of the recently-tabled mandatory service and repair information sharing scheme for motor vehicles after it has been in operation for a minimum of three years is required before further considering a substantial regulatory intervention in the form of a positive 'right to repair'.

### Positive Right to Repair

#### *Information Request 4.2 A Positive Obligation To Provide Access To Repair Supplies*

*The Commission is seeking feedback and evidence on the costs and benefits of different approaches to designing and implementing a positive obligation on original equipment manufacturers to provide access to repair supplies to third-party repairers. In particular:*

- *evidence on the effectiveness of positive obligation schemes overseas (such as motor vehicle repair information schemes in the United States and Europe, and spare parts requirements in Europe)*
- *should a positive obligation be applied across all product markets or targeted towards particular product markets? If so, which product markets, and why?*
- *should a positive obligation mandate access to all repair supplies or a subset of repair supplies (such as repair information, spare parts, or diagnostic tools)?*
- *how should a positive obligation be implemented and enforced in practice?*

10. The Competition and Consumer Committee notes the calls by some independent repairers and consumer groups for a 'positive' economy-wide obligation that would oblige manufacturers to make repair supplies such as repair information, tools, equipment and parts available to third parties.
11. As noted above, the Competition and Consumer Committee does not consider that the case has been made for such a significant regulatory intervention and has serious concerns that such an obligation could result in unintended consequences across the economy.
12. As noted in the Draft Report, there are numerous reasons why some manufacturers may seek to restrict access to repair information, tools, equipment or parts. For example:
- a. it may be too costly to supply to every independent repairer that asks, particularly for products in lower price brackets;
  - b. providing independent repairers with access to spare parts and tools requires manufacturers to produce and warehouse parts for long periods of time which may be cost prohibitive;
  - c. manufacturers may not wish to be held liable for poor-quality repair work by unauthorised parties which is outside their control;

<sup>1</sup> Draft Report, p. 112.

<sup>2</sup> Draft Report, pp. 9-11.

- d. manufacturers may have concerns that independent repairers may not have the skills or training to safely or securely repair products, particularly for complex vehicles, devices or equipment; and
  - e. disclosing repair manuals and other repair information to independent repairers may disclose valuable trade secrets and other intellectual property, reducing the incentives of manufacturers to invest in research and product development.
13. A positive obligation on manufacturers to provide third party access to repair supplies disregards those legitimate reasons for restricting access, potentially creating substantial compliance and other costs for manufacturers, reducing their incentives to innovate and develop products and potentially resulting in worse consumer outcomes.
14. If there are instances where certain manufacturers are seeking to restrict third party access to repair supplies for anti-competitive reasons, the Competition and Consumer Committee submits that existing competition laws such as the provisions on misuse of market power, exclusive dealing or anti-competitive agreements are sufficient to deal with such conduct. While there may be relatively few cases to date dealing with such behaviour, it does not follow that existing competition laws are inadequate. First, in the Committee's experience, the threat of regulatory scrutiny is often enough to shape business behaviour and mitigate incentives for anti-competitive conduct and this is true regardless of whether or not there are examples of enforcement action to date. Second, and as identified in the Draft Report, evidence submitted to the Inquiry of manufacturers actually restricting third party access to repair supplies was limited, largely anecdotal and does not point to any systemic competition issues in repair markets.<sup>3</sup>
15. The Competition and Consumer Committee notes the Commission's observations about the incomplete evidence it has received to date and its request for further feedback and evidence of consumer harm in repair markets. If the Commission is ultimately of the view that any further evidence submitted in the Inquiry justifies intervention in any market for access to repair supplies, the Committee is of the view that such intervention should still be less intrusive than a 'positive' obligation on original equipment manufacturers. In addition, further intervention should only occur after an in-depth, case-by-case analysis of the relevant repair markets and primary markets to determine whether any barriers to repair are generating harm.
16. The Competition and Consumer Committee agrees with Draft Recommendation 4.1 that a review of the operation of the mandatory service and repair information sharing scheme for motor vehicles after it has been in operation for a minimum of three years is also required before considering further a substantial regulatory intervention in the form of a positive 'right to repair'.

### **Enhancing complaints resolution**

17. The Competition and Consumer Committee considers that the existing consumer guarantees provide adequate protection to consumers in respect of defective goods, including repair remedies. The Competition and Consumer Committee also agrees that a well-functioning consumer redress system is essential for the effective operation of the consumer guarantees.

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<sup>3</sup> Draft Report, pp. 9-11, 28.

### **Alternative dispute resolution**

#### *Draft Recommendation 3.2 Powers For Regulators To Enforce Guarantees*

*State and Territory Governments should introduce alternative dispute resolution mechanisms to better resolve complaints about the consumer guarantees, such as compulsory conciliation or direction powers (as are used in South Australia and New South Wales).*

*To inform the most effective design and use of any alternative dispute resolution mechanism, appropriate cost-benefit analysis and sufficient regulator resourcing would be required prior to implementation.*

18. The Competition and Consumer Committee is supportive of Draft Recommendation 3.2 in principle. The South Australian compulsory conciliation scheme and the power of the New South Wales Commissioner for Fair Trading to issue consumer guarantee directions may be useful models for other jurisdictions. However, the Committee considers that such regimes should not be introduced more broadly without a detailed cost / benefit analysis of the operation of those regimes to date. Moreover, the expansion of those schemes to other jurisdictions should not occur without community and industry consultation.

### **Super complaints**

#### *Draft Recommendation 3.3 Enabling A Super Complaints Process*

*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 Australian Competition and Consumer Commission (ACCC).*

*The Australian Government should design the super complaints system in consultation with the ACCC, relevant State and Territory regulators and consumer groups. The system should be underpinned by sound 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.*

19. The Competition and Consumer Committee does not consider that the case has been made for the establishment of a 'super complaints' regime as a means of improving consumer access to remedies relating to consumer guarantees. The Committee understands that such a mechanism, if introduced, would allow certain designated consumer organisations to lodge complaints on consumer issues perceived to be systemic, with the ACCC then required to provide a response within a certain time period including outlining any enforcement action it proposes to take.
20. The Committee notes that a cornerstone of the ACCC's *Compliance and Enforcement Policy and Priorities* is to take action in respect of conduct that is of significant public interest or concern, and conduct that results in substantial consumer or small business detriment. Although the ACCC is not a complaints-handling body,<sup>4</sup> the ACCC has a demonstrated history of taking enforcement action in respect of systemic breaches of consumer laws, including in response to complaints received from consumer rights groups.<sup>5</sup>

<sup>4</sup> See for example page 5 ACCC 2021 Compliance and Enforcement Policy and Priorities.

<sup>5</sup> For example, the Committee understands that a complaint by CHOICE led to the ACCC's investigation of [Mosaic Brands Ltd](#) for various breaches of the ACL relating to its marketing of health products during the COVID-19 pandemic. Ultimately, \$630,000 in

21. Accordingly, it is unclear what a 'super complaints' regime would add to the ACCC's existing role, other than requiring the ACCC to divert its resources to responding to 'super complaints', regardless of the relative merit of those complaints as compared with other complaints the ACCC has received and of which only the ACCC may be aware. The Committee's view is that the ACCC is already well-placed to assess how it prioritises the complaints it receives, both in terms of which complaints are investigated and in what time frame. Maintaining that flexibility ensures that the ACCC can appropriately balance the interests of consumers, businesses and the community in pursuing its enforcement activities.
22. Although the Committee is of the view that the case for a 'super complaints' regime has not been made, if the Commission were to recommend such a regime, the Committee considers that:
- a. any criteria for the assignment and/or removal of designated consumer bodies would require careful consideration to adequately balance the interests of consumers and business. Any such criteria should be subject to further consultation;
  - b. any regime allowing for the lodging of 'super complaints' should be subject to thresholds (for example, the number of consumers affected and/or the total value of the potential harm) as well as the substantive evidentiary requirements mentioned in the Draft Report;<sup>6</sup> and
  - c. in accordance with the ACCC's usual practice, the ACCC ought to consult on and publish guidance as to its process and procedures for assessing 'super complaints'.

### **Regulatory Guidelines on Consumer Guarantee as to acceptable quality and durability**

23. The Competition and Consumer Committee notes that in September 2019, Consumer Affairs published guidelines on the consumer guarantee as to acceptable quality and 'durability'.<sup>7</sup> The Committee had long advocated for further regulatory guidance as to the meaning of these concepts and was supportive of the introduction of these guidelines. As noted in the Committee's original submission to the Inquiry, the Committee considers that these guidelines should be regularly reviewed, with additional practical examples added over time to assist manufacturers, traders and consumers to better understand these concepts.

#### ***Estimates of minimum expected durability***

##### *Draft Recommendation 3.1 Guidance On Reasonable Durability Of Products*

*The Australian Competition and Consumer Commission (ACCC) should develop and publish estimates of the minimum expected durability for products within major categories of common household products.*

*The estimates would be a guide only to support application of the acceptable quality consumer guarantee in section 54 of the Australian Consumer Law. It could use ranges to take into account lower and higher value products in each category.*

*The ACCC guidance should be developed in consultation with State and Territory consumer law regulators, consumer groups and business groups representing product suppliers and manufacturers, and should be updated over time.*

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penalties were imposed on Mosaic Brands Ltd, which also gave [an s87B undertaking](#) to (amongst other things) identify and refund affected consumers.

<sup>6</sup> Draft Report, pp. 102-105.

<sup>7</sup> Consumer Affairs, *Guidance on the consumer guarantee as to acceptable quality and 'durability'* (September 2019).

24. While the Competition and Consumer Committee is supportive in principle of further practical regulatory guidance on the meaning of 'durability', the Committee considers that there are a number of risks associated with providing 'durability estimates' for particular product categories.
25. The Committee agrees with the Commission that there would be costs and practical challenges associated with developing specific estimates due to the various factors that influence product durability.<sup>8</sup> More significantly, the Committee agrees that there is also a risk that durability estimates could take on 'heightened importance' in how they are used by industry and become 'de facto standards'.<sup>9</sup>
26. The Competition and Consumer Committee submits that these risks may have serious consequences. For example, the introduction of de facto standards may result in implicit constraints on the design and specifications of products due to manufacturers' desire for consistency with the recommended guidelines, rather than promoting competition between manufacturers on price and quality more generally.
27. Conversely, the Competition and Consumer Committee also recognises the risks pointing in the other direction, including that if these estimates are too caveated or generalised, they will fail to provide the requisite extra layer of certainty to consumers and businesses that motivated their introduction in the first place.
28. Accordingly, the Competition and Consumer Committee submits that a more detailed cost / benefit analysis is required before Draft Recommendation 3.1 is accepted. It may be preferable for existing regulatory guidance to be supplemented by practical case studies which provide further guidance to business and consumers about how they can estimate product durability depending on the circumstances in question.
29. If, however, the Commission is minded to recommend that the ACCC publish durability estimates, such guidance should only be published after a rigorous consultation process with State and Territory consumer law regulators, consumer groups and business groups. Additionally, any such guidance should be clear that any product's 'minimum expected durability' set out in the guidance is a non-authoritative estimate, and in all cases whether a product is sufficiently durable for the purposes of the consumer guarantees depends on the particular product in question.

### **Manufacturer Warranties**

30. The Competition and Consumer Committee notes that manufacturer warranties provide consumers with additional rights above and beyond the consumer guarantees in the Australian Consumer Law. Manufacturer warranties are generally provided at no charge to the consumer (or at least they are provided as part of the upfront cost of the product) and they often provide consumers with efficient and effective recourse where products are faulty or do not function as intended.

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<sup>8</sup> Draft Report., p. 86

<sup>9</sup> Draft Report, p. 86.

**Prohibiting voiding of warranties if consumers do not use authorised repairers and/or parts**

*Information Request 4.3 A Prohibition On Warranty Void Terms*

*The Commission is considering recommending provisions similar to the Magnuson-Moss Warranty Act in the United States, which prohibits manufacturer warranties from containing terms that require consumers to use authorised repair services or parts to keep their warranty coverage.*

*In particular:*

- *would manufacturers respond by increasing product prices or making their warranties less generous? Would this latter change have any practical impact on consumers given they are also covered for defects under consumer guarantees?*
- *how could such a prohibition be designed and communicated to ensure that consumers are aware that voiding terms are now prohibited?*
- *how could the prohibition be designed to limit manufacturer liability for damage beyond their control? For example, the Magnuson-Moss Warranty Act permits warranty terms that limit manufacturer liability for damage caused by unauthorised repairs or parts, if they can demonstrate third-party fault.*

*Information Request 4.3 also asks whether terms within end-user license agreements that purport to restrict repair related activities (discouraging third-party repair) should also be prohibited? Is a disclosure as proposed under draft recommendation 4.2 sufficient or is a legislative prohibition required?*

31. The Competition and Consumer Committee does not support the introduction of a prohibition on manufacturer warranties containing terms that require consumers to use authorised repair services or parts to keep their warranty coverage.
32. As noted above, manufacturer warranties provide a range of benefits to consumers above and beyond the consumer guarantees in the Australian Consumer Law. There are legitimate reasons why some manufacturers may require consumers to use authorised services and parts as a condition of maintaining the warranty, including:
  - a. manufacturers may not wish to be held liable for poor-quality repair work by unauthorised parties which is outside of their control;
  - b. while manufacturers would still, in theory, be able to exclude liability under the manufacturer's warranty for poor-quality repair work,<sup>10</sup> it can be difficult and costly to determine if poor-quality repair work has caused or contributed to a defect in the product. These costs and delays can be avoided by requiring customers to use only authorised repairers and authorised parts; and
  - c. prohibiting anti-voiding clauses may fundamentally change the cost structure on which manufacturers' warranties and/or product prices are based, resulting in higher prices for consumers, less generous terms in the manufacturer's warranty or even a decision by some businesses to stop offering manufacturer's warranties entirely.

<sup>10</sup> See comments in Draft Report, pp. 151-153.



33. The introduction of a prohibition similar to that in the Magnuson-Moss Warranty Act in the United States disregards the legitimate reasons why some manufacturers may choose to require consumers to use authorised repair services and parts to maintain warranty coverage.

***Additional warranty text on the consumer guarantees***

*Draft Recommendation 4.2 Additional Mandatory Warranty Text*

*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 consumer guarantees under the Australian Consumer Law do not require consumers to use authorised repair services or spare parts.*

34. The Competition and Consumer Committee is supportive of Draft Recommendation 4.2 in principle. However, while the proposed additional wording to be included in Regulation 90 is technically accurate, it does not include the important caveat that there are circumstances in which using 'unauthorised' repairers or parts may be inadvisable for the consumer depending on the particular circumstances, namely:
- a. As the Draft Report notes, there may be benefits to using authorised repairers and authorised parts in some circumstances to maintain the safety, security, quality and environmental standards of products.<sup>11</sup> For example, where goods have particularly complex or proprietary technology, the use of unauthorised repairers or parts might ultimately result in reduced product life or product functionality; and
  - b. Use of unauthorised repairers or unauthorised parts may prejudice a customer's claim under the consumer guarantees where the unauthorised repairer or part causes or contributes to a defect in the product.
35. Accordingly, the Committee submits that any amendment to Regulation 90 should be drafted in a way that does not mislead consumers as to the potential benefits of using authorised repairers and authorised parts and to the potential for unauthorised repairers and unauthorised parts to impact on the remedies available under the consumer guarantees where they cause or contribute to a defect in the product. This could be achieved, for example, through additional mandatory text or through a cross-reference to a short explanatory note on the ACCC website addressing the complexities identified above.
36. Finally, the Competition and Consumer Committee submits that alternative approaches, such as further publicity and consumer education, may be better suited to improving consumer awareness about the consumer guarantees regime and the fact that statutory entitlements must not be conditional on using only authorised repairers and parts.

**Part B: Intellectual Property Committee**

37. The Intellectual Property Committee makes the following submission in response to Information Request 5.1 and Draft Finding 5.2 of the Draft Report.

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<sup>11</sup> Draft Report, p. 111.

## **Improving Access to Repair Information**

### *Information Request 5.1 Improving Access to Repair Information*

*The Commission is considering recommending amendments to intellectual property laws to improve access to repair information through the options outlined in draft finding 5.2. It is seeking views on each option, in particular:*

- whether the proposed reform options will assist repairers in accessing repair information, and therefore facilitate third-party repair*
- what types of contractual arrangements that could override such reforms are most likely to be of concern*
- the costs, benefits and risks of pursuing each option.*

### *Draft Finding 5.2 Options to Improve Access to Repair Information*

*There are two main options to amend intellectual property protections to improve access to repair information.*

- Amend the Copyright Act 1968 to allow for the reproduction and sharing of repair information, through the introduction of a fair use exception or a repair-specific fair dealing exception.*
- Amend the Copyright Act 1968 to allow repairers to legally procure tools required to access repair information protected by technological protection measures (TPMs), such as digital locks. This may also require the Australian Government to clarify the scope and intent of the existing (related) exception for circumventing TPMs for the purpose of repair.*

*To reduce the risk of manufacturers using contractual arrangements (such as confidentiality agreements) to 'override' the operation of any such reforms, it may also be beneficial to amend the Copyright Act 1968 to prohibit the use of contract terms that restrict repair-related activities otherwise permitted under copyright law.*

38. As previously noted, the question of whether repair rights are required as an economic or policy matter is beyond the expertise of the Intellectual Property Committee and the Intellectual Property Committee addresses this question on the assumption that that question has been answered.
39. Intellectual property (**IP**) infringement and technological protection measures (**TPMs**) can act as a barrier to repair in some instances. However, barriers to repair are much broader than IP related barriers, as they also involve issues of whether products are designed for repair at all, as well as access to spare parts, bespoke repair equipment, computer code and manuals as well as the effect of common contractual restrictions.
40. The Intellectual Property Committee agrees with the proposition that the *Copyright Act 1968* (Cth) should be amended to adopt a general fair use defence in relation to copyright. A fair use defence is a measure which the Intellectual Property Committee has previously recommended for general reasons.<sup>12</sup> The fair use defence is an integral part of copyright law in the United States and the adoption of a fair use defence in Australia would make the

<sup>12</sup> See Intellectual Property Committee, Business Law Section, Law Council of Australia, Submission No 765 to Australian Law Reform Commission, *Copyright and the Digital Economy* (8 August 2013); Intellectual Property Committee, Business Law Section, Law Council of Australia, Submission No 64 to Productivity Commission, *Intellectual Property Arrangements* (1 December 2015).

position more consistent in both jurisdictions. Given the position in the US, it is unlikely that the enactment of a fair use defence in Australia will give rise to a finding of breach of international treaties. As detailed in the Intellectual Property Committee's earlier submission, courts in the US have held that actions such as copying repair manuals or circumventing protection measures for the purpose of repair are protected by the defence.

41. A broad fair use defence has benefits over a specific fair dealing defence directed to repair, as technological innovation frequently outpaces the ability of the legislature to enact new specific laws, and a broad defence would avoid the same need to amend the *Copyright Act 1968* (Cth) each time there is a technological development affecting repair.
42. If concerns are raised about the acquisition of property other than on just terms, as was the case in relation to the *Competition and Consumer Amendment (Motor Vehicle Service And Repair Information Sharing Scheme) Act 2021* (Cth), the fair use defence could be enacted to apply only to future copyright. This would then take time to work, but the product life cycles of consumer products are often short.
43. While it is the Intellectual Property Committee's recommendation that Australia's copyright law be amended to include a fair use defence, a fair dealing exception which enables the right to repair in specific circumstances would be an additional option. Such a provision, if adopted, would benefit from careful drafting. The poorly drafted TPM provisions are an example of legislation which attempts to be too specific and detailed.
44. Providing additional exceptions to IP legislation will not provide repairers with rights of access to the spare parts, bespoke repair equipment, computer code and manuals they may need nor avoid common contractual and warranty restrictions. These additional issues go well beyond copyright (or IP issues more generally) and it is submitted that whether or not regulatory reform is desirable on these topics is more appropriately evaluated through a consumer law lens. The Intellectual Property Committee supports the submission by the Competition and Consumer Committee on those issues.

### **Conclusion and further contact**

45. The Committees would be pleased to discuss any aspect of this submission.
46. If you have any questions regarding this submission, please contact the Competition and Consumer Committee Chair, Jacqueline Downes, via email:  
or the Intellectual Property Committee Chair, Matthew Swinn, via email: in the first instance.

Yours faithfully

**Greg Rodgers**

**Chair, Business Law Section**