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Australian Consumer Law Enforcement and Administration

Submission to the Productivity Commission on the Consumer Law Enforcement and Administration Draft Report

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments to the Productivity Commission (PC) in response to the release of its draft report on consumer law enforcement and administration (the Draft Report).

There is room for improvement in the enforcement and administration of our consumer law, and the Draft Report outlines a number of important recommendations that would achieve this goal if implemented. For example, the Australian Consumer Law (ACL) regulators would benefit from stronger enforcement tools to better deter offending conduct. In particular, the level of penalties currently available for breaches of the consumer law is far too low to act as an effective constraint on unlawful behaviour. It is vital that penalties are set at a high enough level to significantly impact businesses caught doing the wrong thing; lifting penalties to align with those available for breaches of the competition law would address this.

Regulators can also do more to improve markets by releasing information they already collect. The release of data currently held by ACL regulators, particularly complaints data and product safety incident reports, would help consumers navigate the market more effectively and make informed decisions about the businesses they choose to deal with. There have been 10,000 mandatory product safety reports made since the law was introduced, and almost all of these are kept confidential due to the operation of the law. There is a compelling public interest reason for releasing this data, but the regulator's hands are currently tied. Amending the law to remove the confidentiality provisions would enable the regulator to more effectively compel market changes, as businesses will be provided with a stronger incentive for ensuring the products they sell are safe.

CHOICE endorses the recommendation for a single regulator, preferably the Australian Competition and Consumer Commission (ACCC), to be responsible for product safety recalls and bans. The confusing Samsung washing machine recall highlighted the importance of having a single responsible regulator. Consumers affected by this recall received contradictory advice at different points, causing significant confusion and uncertainty. Had one regulator been clearly responsible from the start, this confusion could have been avoided.

Finally, consumer problems can be better addressed by more formally involving and supporting consumer advocates. This should be done in two ways. First, by adequately resourcing not-for-profit groups that directly assist consumers and can undertake consumer advocacy. This should include increased funding for financial counselling, for community legal centres and for groups

like the Consumers' Federation of Australia. Secondly, groups with strong understanding of consumer issues and ties to the community should be able to make 'super complaints' to regulators in order to get necessary responses to important problems.

Recommendations

- The existing $1.1m penalties available for breaches of the specific protections in the ACL are not substantial enough to act as an effective deterrent against unlawful conduct. These should be amended to match those under the competition provisions of the *Competition and Consumer Act.* The maximum penalty should be indexed rather than static.
- The penalties available for breaches of the specific protections in the ACL should also apply to misleading and deceptive conduct and unfair contract terms.
- All of the ACL regulators should have the power to issue infringement notices in the same fashion as the ACCC.
- Funding for regulators must be adequate, secure and non-conflicted.
- Organisations that assist consumers in enforcing their rights – such as community legal centres, financial counselling programs and bodies like the Consumers' Federation of Australia – should receive adequate and sustainable funding from Federal, State and Territory governments.
- Consumer organisations should not be restricted from engaging in policy processes where they are funded by government.
- ACL regulators should publish a comprehensive and comparable set of performance metrics and information to enhance their public accountability and enable improved regulator performance.
- The section 132A confidentiality provisions of mandatory reports should be revoked to enable the ACCC to publicly release these reports.
- A public portal and publicly accessible, searchable database of consumer product incident reports should be adopted in Australia, based on the US model www.SaferProducts.gov
- Other Federal, State and Territory regulators should follow the lead of NSW Fair Trading and create consumer complaints registers that will publish information about individual traders who are the subject of a high number of complaints. Where possible, this information should be published in a consistent format nationally to allow comparison and aggregation of data.
- Specified consumer organisations should have a right under the Australian Consumer Law to make a 'super complaint' to the relevant regulator, with the regulator being

obliged to respond to that complaint publicly within a specified period of time (e.g. 90 days), and the relevant government (Federal, State or Territory) required to then respond publicly after another specified period.

- A single regulator, preferably the ACCC, should have ultimate responsibility for managing product safety recalls.
- Interim product bans should be exempt from the requirements of the Commonwealth Government's regulation impact assessment.
- The Australian Government Guide to Regulation should be amended so that new regulations no longer have to be fully offset by removing other regulations, giving the Federal Government greater flexibility to remove or add regulations as the community requires.

Stronger enforcement tools

Recalibrate financial penalties for breaches of the ACL

Penalties for breaches of the Australian Consumer Law are either set at a level that is inadequate to deter bad conduct and effect positive market change, or are entirely absent. It is vital that penalties are high enough to protect consumers from harm. Penalties that are too low risk becoming part of the cost of doing business where the benefits gained through unlawful conduct are substantial. As discussed in CHOICE's earlier submission to this study, an example of such an imbalance can be seen in the multiple ACCC "free range egg" cases, where total penalties awarded to date are dwarfed by profits gained through misrepresentations.[1]

The Draft Report's Draft Finding 4.4 states that Australian governments should increase maximum penalties for breaches of the ACL, and consider aligning them with the penalties for breaches of the competition provisions in the Competition and Consumer Act 2010. That is, for companies, the greater of:

- $10 million;
- Three times the value of the benefit the company received from the breach; or
- If the benefit cannot be determined, 10 percent of annual turnover in the preceding 12 months.

CHOICE supports Draft Finding 4.4. There is no policy basis for distinguishing between the ACL and the competition law provisions when setting maximum penalties. Aligning the penalties to match the competition provisions would lift penalties to a more appropriate level, likely to create a stronger deterrent effect. As raised in the CAANZ Interim Report for the ACL Review, CHOICE also supports the suggestion to index the maximum penalty rather than apply a flat cap; this would help future-proof the maximum penalties.

In addition to raising penalties, consideration should be given to boosting the regulators' enforcement toolkits in cases where they are lacking. As the Draft Report notes, some ACL regulators have the ability to issue infringement notices while others do not, and some regulators' powers to issue infringement notices are broader than others. CHOICE agrees with Draft Finding 4.3; there is scope to improve consistency in infringement notice powers. These

[1] Total penalties handed down have reached $950,000; additional profits from selling fake 'free range' eggs in 2014 are estimated to be $29.8 million.

powers provide regulators with an efficient, cost-effective way of enforcing the law and raising awareness of bad practices. All of the consumer regulators should have equal powers to issue infringement notices.

Increasing the powers available to the regulators is an obvious way to bolster their power. However, additional or stronger enforcement powers need to be coupled with adequate funding in order to be effective. Regulators need to have adequate, stable and non-conflicted funding to conduct their work. CHOICE urges the Productivity Commission to recommend that greater funding be provided for the regulators, particularly to the Australian Securities and Investments Commission (ASIC) to conduct enforcement and compliance activities.

Recommendations 1, 2, 3 and 4

- The existing $1.1m penalties available for breaches of the specific protections in the ACL are not substantial enough to act as an effective deterrent against unlawful conduct. These should be amended to match those under the competition provisions of the *Competition and Consumer Act.* The maximum penalty should be indexed rather than static.
- The penalties available for breaches of the specific protections in the ACL should also apply to misleading and deceptive conduct and unfair contract terms.
- All of the ACL regulators should have the power to issue infringement notices in the same fashion as the ACCC.
- Funding for regulators must be adequate, secure and non-conflicted.

Increase funding for consumer advocacy and research

As the Consumers' Federation of Australia stated in its submission to the Issues Paper for this study, consumer organisations complement the work of the ACL regulators by conducting investigations, gathering complaints, providing advice and engaging in direct dispute resolution for consumers[2]. This work is valuable to consumers, regulators and policy makers. Consumer organisations are able to gather evidence of systemic poor conduct through direct connections with affected consumers, which can be used to better direct regulator resources.

[2] Consumers' Federation of Australia, 31 August 2016, Submission to the Productivity Commission's Issues Paper for Study into enforcement and administration arrangements underpinning the Australian Consumer Law.

Draft Finding 6.3 of the Draft Report notes that the Commission directed the Commonwealth Government to provide additional public funding to support consumer advocacy in its 2008 Review of Australia's Consumer Policy Framework. Nearly 10 years on, it is a great disappointment that this recommendation has not been acted upon. CHOICE agrees that this recommendation should be revisited, and also notes that consumer organisations should not be restricted from engaging in policy processes where they are funded by government. Government-funded organisations, including Community Legal Centres, are well positioned to contribute to policy reform and development due to the expertise of their staff and the high volume of cases they deal with. Case studies can provide valuable evidence demonstrating a need for policy reform; preventing organisations from sharing these is a wasted opportunity for policy-makers.

Recommendations 5 and 6

- Organisations that assist consumers in enforcing their rights – such as community legal centres, financial counselling programs and bodies like the Consumers' Federation of Australia – should receive adequate and sustainable funding from Federal, State and Territory governments.
- Consumer organisations should not be restricted from engaging in policy processes where they are funded by government.

Data and transparency

Embrace richer performance reporting

CHOICE endorses the Draft Report's Draft Recommendation 4.2. As the recommendation states, regulators should publish a comprehensive and comparable set of performance metrics and information.

Performance metrics alone may not present a full picture of a regulator's work. However, failure to publish this information leaves the public completely in the dark and unable to assess a regulator's performance at all. As noted in the Draft Report, the approach taken by different regulators varies greatly – while the ACCC, NSW Fair Trading and Consumer Affairs Victoria all publish a fairly wide range of metrics, other State and Territory regulators fall far short. Information on ACL regulators' resources and activities are valuable and should be published in a way that facilitates comparisons.

Recommendation 7

- ACL regulators should publish a comprehensive and comparable set of performance metrics and information to enhance their public accountability and enable improved regulator performance.

Work towards a national database of consumer complaints and incidents

There are datasets currently held by regulators that would provide substantial benefit to the public if released. The first of these, data on mandatory safety reports, cannot be released unless the law is amended to remove confidentiality requirements. The confidentiality provisions for mandatory reports, found in section 132A of the ACL, should be revoked. Since the ACL came into force on 1 January 2011 there have been over 10,000 mandatory reports made of actual injuries or deaths caused by the use or foreseeable misuse of products and services. We know the details of just eight of those, due to legal action taken against Woolworths for failing to make mandatory reports within the required timeframe.

These reports represent vital safety information. If they could be shared with other Australian and international regulators, this information could be used to better coordinate regulator responses to safety hazards. If they could be shared with consumer advocates, they could better warn consumers of risks. If testing bodies like CHOICE could access them, we could adapt our testing to better take account of consumer experiences with goods. And if these reports were publically available, Australian consumers could make more informed decisions about which businesses to deal with. The Australian public has a right to know the nature of these injuries or deaths, including the steps taken by suppliers in response to the incidents. CHOICE research has found that Australian consumers overwhelmingly support reform that would enable mandatory reports to be published, with 88% agreeing that these reports should be made public[3]. 77% of survey respondents said they would be likely to refer to this information when making buying decisions, if the reports were listed on a national product safety website[4].

In other jurisdictions, similar information is made available. In the United States, the Consumer Safety Protection Bureau publishes a publicly accessible, searchable database of consumer product incident reports at www.SaferProducts.gov. In Japan, accident reports made by

[3] CHOICE Consumer Pulse Wave 11, fieldwork conducted between 2 December 2016 and 12 December 2016, question B4. 'Do you think these safety reports should be made available to the public?', N = 1052.
[4] Ibid, question B5. 'If these reports were listed on a national product safety website, how likely would you be to refer to it in your buying decisions?'.

suppliers to the regulator are disclosed. CHOICE would like to see a similar model adopted in Australia, to enable full disclosure of mandatory product safety reports.

The second valuable type of data held by regulators is complaints data. As outlined in our submission to the Issues Paper, CHOICE strongly supports the approach taken by NSW Fair Trading to create a consumer complaints register that publishes information about traders who are the subject of a high number of complaints. We encourage other states and territories, and Federal regulators including the ACCC and ASIC, to follow suit.

Draft Finding 4.2 of the Draft Report acknowledges that a national database of complaints and product safety incidents has merit. CHOICE strongly supports this recommendation. Sharing data on product safety reports and other consumer complaints will improve consumer welfare by empowering consumers to make more informed decisions about where to buy goods and services. Publication of this data will also incentivise businesses to improve their complaints handling processes and their business practices more generally, as the experience in NSW is already demonstrating.[5]

Recommendations 8, 9 and 10

- The section 132A confidentiality provisions of mandatory reports should be revoked to enable the ACCC to publicly release these reports.
- A public portal and publicly accessible, searchable database of consumer product incident reports should be adopted in Australia, based on the US model www.SaferProducts.gov
- Other Federal, State and Territory regulators should follow the lead of NSW Fair Trading and create consumer complaints registers that will publish information about individual traders who are the subject of a high number of complaints. Where possible, this information should be published in a consistent format nationally to allow comparison and aggregation of data.

Super complaints

Putting in place a framework that will enable consumer organisations to systematically provide the regulators with information on harmful products and practices will help the regulators to be

[5] See Consumer Action Law Centre's submission to the Issues Paper, "since Match 2016, there has been a 43 percent reduction in complaints about traders who were routinely reaching the threshold for the register" p7-8.

more responsive. A super complaints power modelled on the UK's system would achieve this. CHOICE recommends that consumer organisations be given the power to make super complaints to relevant consumer law regulators, including the ACCC and the ASIC. In line with the UK model, regulators should be required to respond publicly to these complaints within a specified period, with the Federal, state or territory government then required to respond publicly, again within a specified period.

The UK process has given consumer groups in that jurisdiction the ability to highlight issues of concern and provide regulators with valuable insights into emerging and systemic issues. For example, in September 2016 the UK consumer organisation Which? lodged its first super complaint to the financial regulators, calling for bank transfer protections to be strengthened to better protect consumers from fraud. Specifically, Which? used the super complaint power to request the regulators formally investigate the scale of bank-transfer fraud and how much it is costing consumers take action, and propose new measures and greater liability for banks to ensure consumers are better protected when they have been tricked into making a bank transfer.[6]

The response to this super complaint has been significant, with the UK Payment Systems Regulator promptly conducting a comprehensive investigation and consultation and publishing its findings. The regulator in this instance found that there is evidence to suggest that "some banks could do more to identify potentially fraudulent incoming payments and to prevent accounts falling under the influence of scammers".[7] The regulator has developed a plan to bring about changes to the industry. In addition to the regulator response, the super complaint process was widely reported in the media, raising consumer awareness of the problem.[8] This example demonstrates the value of a super complaint process with firm timeframes for formal responses, and that enables consumer organisations to direct their complaints to the relevant regulator.

As discussed in the Draft Report, CHOICE has used the NSW super complaints pilot program to lodge two complaints with NSW Fair Trading since 2011; a complaint regarding misleading free range egg labelling and a complaint on electricity switching websites. Both 'super complaints' were escalated by NSW Fair Trading to wider, national processes, resulting in outcomes that

[6] Which?, 23 September 2016, 'Which? makes scams super-complaint', available via http://www.which.co.uk/news/2016/09/which-makes-scams-super-complaint-453196

[7] UK Payment Systems Regulator, 16 December 2016, 'Which? authorised push payment super-complaint: our response', available via https://www.psr.org.uk/psr-publications/news-announcements/which-super-complaint-our-response-Dec-2016

[8] For example, see A. Murray, 23 September 2016, 'Banks investigated for failing to help scam victims', The Telegraph, available at http://www.telegraph.co.uk/personal-banking/savings/which-makes-super-complaint-to-force-banks-to-help-scam-victims/

we do not believe would have been achieved outside of the 'super complaints' mechanism. The fact that both 'super complaints' had implications beyond NSW was not surprising given CHOICE is a national consumer advocacy organisation operating under a national consumer law, and tends to focus its resources on issues where there is widespread detriment, beyond individual jurisdictions. From this experience, we suggest the true value of 'super complaints' is only likely to be realised through a national mechanism.

The Draft Report raises a number of issues that it proposes would need to be addressed before widening the 'super complaints' process beyond NSW. We have provided some feedback on these issues below:

Draft Report	**CHOICE response**
To what extent would the obligation to investigate and respond to a super complaint divert regulators' resources from alternative activities? While CHOICE mentions in its submission that a super complaint process has no additional costs for 'government, regulators and businesses', a super complaint could draw upon resources being used for other activities deemed as important by the regulator. In preparing its response, the regulator would also need to consult with the concerned businesses, which could result in some cost for them.	The obligation to respond publicly to a super complaint does not oblige the regulator to undertake an extensive investigation of the issue. If a regulator believes the evidence presented by the consumer organisation does not make the case for an escalated response, and/or it believes that for resourcing reasons its priorities lie elsewhere, it would be useful for this to be stated publically, providing greater clarity and transparency around the regulator's priority setting and resourcing. For example, it may indicate that despite evidence of systemic consumer harm, a particular regulator is not resourced to address the issue. It is also difficult to see how costs incurred by businesses in responding to a complaint would be any different to the costs incurred if the complaint was not lodged through such a mechanism, unless the assumption is that businesses do not currently need to respond to complaints.
Would the issues that arise through the super complaint process not be adequately	Feedback from the UK suggests that the public nature of super complaints is

identified by the regulators through other mechanisms? For example, the ACCC and ASIC already conduct investigations into systemic issues. They have a range of mechanisms in place to enable this, including through monitoring complaints data. Additionally, all the ACL regulators have powers that allow them to bring action on behalf of one or more persons for a contravention of the ACL.	extremely significant, and that the process provides an important additional layer of strategic market analysis to regulators. This consideration is consistent with the Australian National Audit Office's 2016 audit of the ACCC, in particular its recommendation around focusing on trends and patterns in market intelligence and identifying high levels of widespread consumer detriment: "*Of particular importance, the ACCC has made inadequate use of intelligence for targeting compliance and enforcement activities, focuses too narrowly on individual complaints (rather than trends and patterns) in case selection activities and does not have adequate arrangements for ensuring that complaints involving high levels of widespread consumer detriment are considered by appropriate senior officers. Improvements in these areas would provide greater assurance that the ACCC is targeting its regulatory activities at conduct involving the greatest level of widespread consumer detriment.*"[9] Feedback from the UK also suggests that the most useful element of super-complaints for complainants is the time-limited nature of the process, allowing advocates to kick start issues that may be 'stuck', including the required response from government (note that a government response was not part of CHOICE's NSW Government trial).
To what extent would consumer advocacy	Just as the super complaints process

[9] See Australian National Audit Office, 'Managing Compliance with Fair Trading Obligations', 2016, accessible at https://www.anao.gov.au/work/performance-audit/managing-compliance-fair-trading-obligations

groups have the capacity to actively assemble the data and evidence required to make the case for a super complaint, and how would this impact their other activities?	imposes a structure on regulators in their required response, it also imposes a certain focus on consumer organisations in bringing forward compelling evidence of systemic consumer detriment. While this may be helpful for the process, it also need not be overly burdensome. It is not the role of consumer organisations to perform the role of regulators, i.e. to undertake full-scale market investigations and consult on detailed solutions. It is enough to create a reasoned starting point from which regulators can determine if a detailed investigation is warranted and possible. It should also be accepted that not every super complaint lodged would progress to further action, and this would be evidence of the mechanism working as intended. If the threshold of evidence was set too high, requiring too great a capacity, it would likely undermine the strategic, intelligence gathering benefits of the process, and instead produce repeated reports of very obvious, established issues which add nothing to regulators' understanding.

Recommendation 11

- Specified consumer organisations should have a right under the Australian Consumer Law to make a 'super complaint' to the relevant regulator, with the regulator being obliged to respond to that complaint publicly within a specified period of time (e.g. 90 days), and the relevant government (Federal, State or Territory) required to then respond publicly after another specified period.

Better product safety regulation

As discussed in CHOICE's submission to the Issues Paper, product safety recalls can be confusing for consumers and businesses, particularly when determining which body is responsible for the recall. During the Samsung washing machine recall, significant consumer confusion was caused by the regulators' and the manufacturer's actions. Multiple bodies made public and sometimes conflicting statements on the recall and on consumers' rights to redress. CHOICE supports the Draft Report's Draft Recommendation 4.1, for State and ACT governments to relinquish their powers to impose compulsory recalls or interim bans, in order to clearly signal that product safety recalls and bans are the Commonwealth's responsibility.

Recommendation 12

- A single regulator, preferably the ACCC, should have ultimate responsibility for managing product safety recalls.

Exempt interim national product bans from regulatory vetting

The Draft Report notes that the Commonwealth Government's regulation impact assessment requirements may prevent national interim product bans from being implemented rapidly. Exempting interim product bans from the assessment requirements would streamline this process and enable regulators to take action more rapidly in situations where consumer harm is likely.

It is worth considering reform to the regulation impact assessment requirements more broadly. Some aspects of the Regulatory Impact Statement (RIS) process and current Federal Government requirements for assessing regulation give too much emphasis to business costs while not always capturing the benefits of regulation to consumers, or the costs to consumers of failing to act. For example, the Australian Government Guide to Regulation currently requires that new regulations must be fully offset by removing other regulations. This can leave regulators unable to progress necessary reforms. It is ridiculous to assess regulations from this entirely quantitative perspective, rather than based on the quality of outcomes, or consideration of the problem the regulation was initially intended to address. While it is highly likely that certain regulations are redundant, cause more harm than good, and/or that the same problem could be addressed far more effectively and efficiently, none of this is captured in a simplistic 'offsetting' requirement. The Productivity Commission should consider how frameworks for assessing the effectiveness of current regulations or the need for new regulations can better include measures that capture consumer outcomes.

Recommendations 13 and 14

- Interim product bans should be exempt from the requirements of the Commonwealth Government's regulation impact assessment.
- The Australian Government Guide to Regulation should be amended so that new regulations no longer have to be fully offset by removing other regulations, giving the Federal Government greater flexibility to remove or add regulations as the community requires.