



Australian Government  
Productivity Commission

# Consumer Law Enforcement and Administration

## Productivity Commission Draft Report *Overview & Recommendations*

December 2016

This draft report has been prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

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### An appropriate reference for this publication is:

Productivity Commission 2016, *Consumer Law Enforcement and Administration*, Draft Report, Canberra, December.

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The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website ([www.pc.gov.au](http://www.pc.gov.au)).

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## Opportunity for further comment

You are invited to examine this draft and comment on it by written submission to the Productivity Commission, preferably in electronic format, by Monday 23 January 2017.

Further information on how to provide a submission is included on the study website: <http://www.pc.gov.au/inquiries/current/consumer-law/make-submission#lodge>.

The Commission will prepare the final report after further submissions have been received and, as required, it has held further discussions with stakeholders. The Commission will forward the final report to the Commonwealth Government in March 2017.

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## OVERVIEW

## Key points

- Despite the adoption of a single Australian Consumer Law (ACL) in 2011, Australia's consumer protection framework remains complex:
  - Two Commonwealth and eight State and Territory regulators administer and enforce the generic ACL.
  - Numerous specialist safety regulatory regimes complement the ACL.
  - Redress is provided via ombudsmen, tribunals and courts, as well as most ACL regulators.
- The multiple-regulator model for the ACL appears to be operating reasonably effectively given the intrinsic challenges in having 10 regulators administer and enforce one law.
  - The ACL regulators communicate, coordinate and collaborate with each other through well-developed governance arrangements.
  - Some regulators have been criticised for undertaking insufficient enforcement. Limited resources may partly explain this.
  - However, the limited evidence available on regulators' resources and performance makes definitive assessments difficult.
- There is scope to strengthen the ACL's administration and enforcement. Matters to be addressed include:
  - developing a national database of consumer complaints and incidents
  - providing all State and Territory ACL regulators with the full suite of enforcement tools
  - increasing maximum financial penalties for breaches of the ACL
  - exempting interim product bans from Commonwealth regulatory impact assessments
  - centralising powers for interim product bans and compulsory recalls in the ACCC
  - improving the transparency of the resourcing and performance of the ACL regulators.
- The ACL regulators and specialist safety regulators generally understand the delineation of their remits and interact effectively, notwithstanding a handful of problematic cases. Consumers and suppliers are not always clear about which regulator to contact but they are typically redirected to the right regulator in a timely manner.
- Interactions between ACL and specialist safety regulators could be enhanced through:
  - greater information sharing between ACL and specialist regulators
  - addressing deficiencies in the tools and remedies available to specialist regulators
  - regular national forums of building and construction regulators
  - greater national consistency in the laws underpinning electrical goods safety.
- Governments should revisit previous Productivity Commission recommendations on industry-specific consumer regulation, consumer dispute resolution, consumer research and advocacy, and access to justice.

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# Overview

When the Commonwealth, State and Territory governments all agreed to adopt a generic Australian Consumer Law (ACL), they opted to retain their own consumer regulators to administer and enforce it. The ‘one-law, multiple-regulator’ model (box 1) commenced in January 2011.

Consumer Affairs Australia and New Zealand (CAANZ), which comprises senior consumer affairs officials, is currently reviewing the content of the ACL. CAANZ issued an interim report in October 2016, with its final report due in March 2017.

In parallel, the Productivity Commission is undertaking this study of the arrangements for administering and enforcing the ACL.

## The study’s scope

The main task is to examine the effectiveness of the multiple-regulator model in supporting a single national consumer policy framework, and to make findings on how the model can be strengthened. The study’s terms of reference invoke several questions:

- How are the roles of the national ACL regulators delineated from those of the states and territories?
- Are the 10 ACL regulators collaborating effectively, tapping into each other’s intelligence sources and taking advantage of synergies?
- Are there gaps, overlaps or inconsistencies in administration and enforcement, and how do the ACL regulators’ compliance and enforcement strategies deal with risk?
- What improvements are possible within the constraints of the multiple-regulator model?

The terms of reference also raise questions about the interface between the ACL regulators and the wide array of specialist safety regulators, such as those for building and construction, electrical goods, food, gas appliances and therapeutic goods (box 1). Do the different regulators understand where their respective remits begin and end, and how well do they cooperate if there is overlap or a crisis? And how easily can consumers and businesses navigate the system, so that their concerns, complaints and queries do not get lost in a bureaucratic maze?

A residual task is to review the progress made in addressing the issues identified in the Commission’s last (2008) consumer policy report. That report ushered in the single ACL, but not all of the report’s recommendations have been fully implemented. Do governments today need to revisit or revitalise some of those reforms?

## Box 1 The regulatory landscape for consumer protection

### *The Australian Consumer Law*

The ACL is set out in a schedule of the *Competition and Consumer Act 2010* (Cth). The ACL enhanced and combined the consumer protection provisions of the *Trade Practices Act 1974* (Cth) and elements of existing State and Territory consumer laws. It applies generically to virtually all consumer goods and services but is confined to narrowly defined consumer protection issues, such as:

- consumer rights not to be misled or treated unconscionably when buying goods and services
- consumer rights in relation to door-to-door and telephone sales, and lay-by agreements
- consumer guarantees of acceptable quality for goods, and due care and skill for services
- ‘unfair terms’ in standard form contracts (for small businesses as well as consumers)
- consumer product safety matters
- penalties, enforcement powers and consumer redress options.

The provisions in the schedule do not apply to financial matters, but there are broadly parallel provisions dealing with these matters in the *Australian Securities and Investments Commission Act 2001* (Cth).

### *The ACL regulators*

At the Commonwealth level, the ACL is administered and enforced by the Australian Competition and Consumer Commission (ACCC), with the Australian Securities and Investments Commission (ASIC) enforcing the parallel provisions with respect to financial services.

At the state and territory level, the relevant regulators are:

- New South Wales — NSW Fair Trading
- Victoria — Consumer Affairs Victoria
- Queensland — Queensland Office of Fair Trading
- Western Australia — WA Consumer Protection (Department of Commerce)
- South Australia — Consumer and Business Services
- Tasmania — Consumer, Building and Occupational Services
- Australian Capital Territory — Access Canberra
- Northern Territory — Northern Territory Consumer Affairs.

The ‘multiple-regulator model’ refers to the joint administration of the ACL by these regulators.

### *The specialist consumer protection regimes*

The generic ACL is accompanied by a multitude of consumer regulations specific to particular products, markets or industries. Examples at the national level include the Food Standards Code and the Therapeutic Goods Act. Examples at the state and territory level include Acts and regulations addressing electrical product safety, the operations of motor vehicle dealers and the licensing of tradespeople.

An array of bodies administers and enforces these regimes. In some cases, dedicated specialist agencies are responsible. However, in the states and territories, the ACL regulator will also often have responsibility for enforcing some specialist regulation, in addition to the ACL.



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## The Commission's approach

The study takes the multiple-regulator model in its current form as a given, and assesses how it is operating against the benchmark of how such a model might ideally work.

As a means of supporting 'a single consumer policy framework', the multiple-regulator model confronts some obvious challenges. With 10 regulators involved at different levels of government, there are risks of gaps or overlaps in investigations and enforcement, and of inconsistent approaches to interpreting, administering and applying the law.

Formal arrangements between the ACL regulators attempt to minimise these risks. In June-July 2010, they signed a Memorandum of Understanding (MoU) setting out their intended approaches to communication, cooperation and coordination; complaint handling; information sharing; compliance and enforcement; and product safety. Other documents, such as the ACL regulators' *Compliance and Enforcement* guide, complement the MoU.

In accordance with the terms of reference, the study gives particular attention to the coordination, consistency and collaboration mechanisms agreed between the ACL regulators. As well as exploring the workings of these mechanisms, the study seeks to gauge their effectiveness. For example, as a test, it has probed for evidence of a lack of coordination between the ACL regulators, or of inconsistent interpretations and applications of the ACL.

The study also examines other aspects of the administration and enforcement of the ACL, including how the regulators seek to deal with risk, resourcing issues, the level of penalties for breaches, the allocation of responsibilities for administering product safety provisions, and the adequacy of performance reporting by the regulators.

The Commission has been careful to distinguish those outcomes attributable to the multiple-regulator model from those outcomes with other causes. For example, insufficient penalties would hamper enforcement in much the same way whether there was a single regulator or several.

The study draws on a wide range of information, but hard evidence on several matters is scant. The Commission has had to rely more heavily on qualitative and subjective material, including the views of stakeholders and of the regulators themselves.

## The effectiveness of the multiple-regulator model

The multiple-regulator model appears to be operating as intended in most respects. The regulators have taken several steps to adopt or maintain good regulatory practices, and to put in place robust mechanisms to collaborate and coordinate effectively. With some caveats or exceptions, study participants expressed support for the multiple-regulator model or, at least, indicated that the steps taken by the ACL regulators have reduced the

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problems that might otherwise have arisen. The Commission has not found much solid evidence to the contrary.

This is not to deny that there are potential inconsistencies and other deficiencies in the way the ACL is being administered and enforced. There are also questions about the level of resources that governments provide for the administration and enforcement of the ACL.

At this stage, however, the multiple-regulator model appears to the Commission to be operating reasonably effectively given the intrinsic challenges in having 10 regulators administer and enforce one law.

### **Collaboration and coordination mechanisms are extensive**

The ACL regulators communicate, coordinate and collaborate with each other through well-developed governance arrangements. They have established protocols, meet regularly, share intelligence, develop common educational and guidance materials, undertake joint investigations, and designate lead regulators to deal with certain multi-jurisdictional cases.

The arrangements accommodate and enable the different regulators to play different roles. The ACCC generally focuses on systemic issues that have national implications, whereas the State and Territory ACL regulators typically address problems specific to their jurisdictions, including undertaking conciliation, mediation and other actions to resolve particular consumer disputes. However, sometimes the regulators from the larger states in particular will take the lead on an issue with national implications. ASIC can be thought of more as a specialist regulator because it is responsible for consumer protection as it applies to financial services, although it also collaborates and coordinates with the other ACL regulators. Overall, the multiple-regulator model can enable the various ACL regulators to benefit from the efforts and expertise of others.

Despite the potential complexities, the ACL regulators' view is that the arrangements have given rise to high levels of coordination.

### **There remains scope for some inconsistency**

Some study participants contended that there are inconsistencies between jurisdictions' administration and enforcement of the ACL. They pointed to the ways the different ACL regulators interpret the law, the advice they provide to businesses and consumers, how and whether they handle and conciliate consumer complaints, and their priorities, patterns and levels of enforcement activity.

Most of the concerns appear to stem mainly from differences across the State and Territory regulators. Business groups are concerned that variations in interpreting and administering the law can increase the complexity of doing business in multiple states and territories. For

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consumer groups, the prime concern is that differences in consumer protection and redress can disadvantage consumers in some states or territories relative to others.

Some differences in regulators' approaches and activities are to be expected under the multiple-regulator model. The ACL regulators remain independent, so differences could reflect the priorities or resourcing decisions of their respective governments. The national regulators also play different roles than those in the states and territories. And at the state and territory level, there are differences in the characteristics of each jurisdiction that might warrant a different level and mix of ACL activities. These include demographic differences and variations in the regulatory instruments available to State and Territory governments that may be used to complement or substitute for action under the ACL.

Even so, some unintended or unwarranted differences will inevitably arise from time to time. It is not clear that the problems are serious or commonplace, but richer and more comparable information on regulators' resources, activities and outcomes (see below) could make it easier to identify any problematic inconsistencies.

### **Risk-based compliance and enforcement policies are the norm**

Modern regulator practice is to undertake strategic and proportionate compliance and enforcement activity. This approach gives greater attention to matters of higher risk for consumers and to the most effective means of reducing harms. It tends to focus regulator activity on measures such as education, inspections and warnings, with prosecutions and other more costly and punitive enforcement actions used more sparingly and strategically.

The Commission surveyed the ACL regulators' policies and procedures for prioritising compliance and enforcement actions. It found:

- all the ACL regulators have formal statements indicating adherence to risk-based compliance and enforcement principles
- some larger regulators have protocols for analysing complaint, incident or other data to rank or quantify risks and/or prioritise compliance and enforcement activities
- several regulators have formal 'triaging' protocols for determining whether and how to respond to queries, complaints or identified infractions of the ACL.

A large share of the State and Territory ACL regulators' resources are devoted to activities such as education for consumers, trader engagement, and handling of consumer enquiries and complaints.

The Consumer Action Law Centre contended that State and Territory ACL regulators in particular are not sufficiently proactive in enforcing the ACL. Comments from some of the ACL regulators indicate that the quantum of prosecutions and other high-level enforcement action is limited by available resources, but Consumer Action argued that regulator culture was also responsible.

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The Commission has insufficient information to determine whether this is the case. However, large numbers of punitive enforcement actions are not necessarily an indicator of regulatory success: they could for example reflect the ineffectiveness of a regulator's educational and regulatory guidance activities.

## **The interface between the ACL regulators and the specialist consumer safety regimes**

Commonwealth, State and Territory governments have specialist safety regulatory regimes that operate in conjunction with the generic product safety and other provisions in the ACL. For example, gas appliances are covered by the ACL, but their safety is regulated principally through state- and territory-based Acts that are, in turn, administered and enforced by specialist state- and territory-based regulators.

In principle, this juxtaposition of regulatory regimes could cause confusion about regulatory responsibilities among consumers, suppliers and regulators themselves. This could lead to gaps and overlaps in regulatory coverage with, in turn, gaps in consumer protection, duplication of compliance costs for suppliers of regulated products, and unnecessary administrative costs for regulators.

To explore these issues, the Commission has examined the prevalence of protocols, forums or other mechanisms addressing the delineation of regulators' responsibilities, and how well ACL and specialist safety regulators interact. It has also examined whether there are mechanisms for ensuring that consumers and suppliers can find the right regulator. The Commission has drawn on stakeholders' observations and other indicators of how well these mechanisms work.

At this stage, the study has uncovered little evidence of general and significant problems with the ACL–specialist regulator interface. However, there is scope for improvement, both generally and particularly with respect to a small number of specialist regulatory fields.

### **The regulators generally know their remits and interact effectively**

The specialist safety regulators and ACL regulators generally have a clear understanding of their own and others' remits, even though inevitably there is scope for difficult-to-resolve 'boundary' issues to emerge — for example, should 'bath milk' be considered food for regulatory purposes? In addition to informal contacts between regulators, there are various formal arrangements, such as MoUs and regular meetings between regulators, designed to clarify the respective responsibilities of ACL and specialist safety regulators.

The ACL and specialist safety regulators generally interact effectively to ensure consumer and supplier concerns that are subject to both sets of regulations are dealt with in a comprehensive, coordinated and consistent manner. Regulators often adopt a lead or home

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regulator approach in reducing problems that could otherwise arise when ACL and specialist regulators need to interact about product safety incidents and recalls. There are also forums in most regulatory arenas to share knowledge and foster cooperative relationships.

Study participants drew attention to a handful of cases where the interaction of ACL and specialist safety regimes has been wanting. In these cases, almost all of which relate to electrical goods and building products, regulators' coordination and consistency of approach has been poor. However, to put them in context, these cases represent a very small share of the more than 1100 product safety recalls since January 2015.

### **'No wrong door' for consumers and businesses**

Consumers and suppliers are sometimes unsure about which regulators are responsible for a particular matter, but under the 'no wrong door' approach, regulators aim to have effective processes to direct complaints or queries to the most appropriate body. The limited evidence available suggests that appropriate and timely referral is the norm.

## **Steps to strengthen administration and enforcement and the national consumer policy framework**

The Commission has identified several potential reforms or actions that could strengthen administration and enforcement of the ACL and support the national consumer policy framework. Some involve revisiting earlier proposals from the Commission's 2008 consumer policy framework review that remain or have again become pertinent. Others are newer and, in some cases, need further development, refinement and testing. The Commission is seeking feedback on the need for, feasibility and design of the potential measures to assist in refining them for the final report.

### **Work towards a national database of consumer complaints and incidents**

The ACL regulators individually collect data and information from sources such as consumer complaints and their own inspection and compliance activity, but the mechanisms they use for sharing it are relatively slow and resource intensive.

Better intelligence sharing through a nationally-aggregated complaints and incidents database would enhance the ability of ACL regulators to assess regulatory risks and allocate their resources.

Creating a national database for intelligence sharing is not a new idea. In its 2008 report, the Commission recommended that all ACL regulators contribute to the then AUZSHARE database of serious complaints and cases. However, its development faltered for a number of reasons, including IT interoperability, taxonomy issues and, ultimately, a lack of funding.

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The case for a national database should be revisited. Improving digital technologies and data analytics point to large-scale data analysis becoming an area of increasing benefit for ACL regulators. These changes can be expected to increase the benefits of a national database. Such development should, as always, proceed only if justified by cost–benefit analysis, and with an implementation plan in place to tackle practical impediments such as IT interoperability.

## **Enlarge access to the full suite of enforcement tools**

The capacity of the ACL regulators to implement a proportionate response to breaches of the ACL can be constrained by the enforcement tools and remedies at their disposal.

Since the Commission’s 2008 report, there has been a significant expansion in the suite of tools available to enforce the consumer law. Several of the mechanisms that the Commission supported in that report, such as civil pecuniary penalties and substantiation notices, are now available under the ACL itself.

However, not all regulators have access to the full suite of available tools. For example, some State and Territory ACL regulators are not empowered to issue infringement notices, and, of those that can, some are not permitted to publicly identify the recipients. And some jurisdictions have granted their regulators further enforcement powers than those provided in the ACL itself.

At a minimum, given that infringement notices provide scope for regulators to deal with minor offences in a cost-effective manner, the State and Territory governments should revisit their regulators’ powers to issue them and the range of breaches to which they apply.

## **Recalibrate financial penalties for breaches of the ACL**

Another concern is whether the civil pecuniary and criminal penalties available to the ACL regulators are sufficiently large to deter breaches. The maximum financial penalties currently available under the ACL (\$1.1 million for companies and \$220 000 for individuals) have remained the same since 2011. Study participants cited several cases where the penalty imposed for a breach of the ACL seemed to have been swamped by the commercial returns.

The CAANZ review of the ACL suggested that the maximum penalties could be aligned with those imposed for breaches of the competition provisions in the *Competition and Consumer Act 2010*. This would mean that companies could incur the greater of: a maximum penalty of \$10 million, three times the value of the benefit the company received from the breach, or 10 per cent of annual turnover in the preceding 12 months if the benefit cannot be determined. The maximum penalty for individuals would be \$500 000.

The Commission agrees that there is a strong case for increasing maximum financial penalties for breaches of the ACL.



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## **Exempt interim national product bans from regulatory vetting**

State and Territory governments appear able to issue interim product bans more promptly than the Commonwealth. The interim report of the CAANZ review of the ACL suggested that the Commonwealth's regulatory impact assessment requirements were a hurdle to quickly imposing an interim ban on hoverboards, following a series of house fires linked to their recharging units.

Regulatory impact assessments can play an important role in ensuring that regulatory action is warranted, and the Commonwealth's requirements entail some flexibility.

However, promptness is particularly critical in product safety cases that might warrant an interim ban. The Commission sees a case to exempt interim bans from the Commonwealth's regulatory assessment requirements, although the requirements should be retained for permanent bans.

## **Relinquish State and Territory powers to issue recalls and interim bans**

While the ACCC has primary responsibility for exercising product safety powers under the ACL, the States and Territories retain powers to issue interim bans, compulsory recalls and public warnings (although the Northern Territory ceded its product safety powers to the Commonwealth in 2011).

The States and the ACT have only rarely exercised their powers under the ACL to order compulsory recalls or impose interim bans. This has a range of possible explanations. It could reflect successful cooperation and coordination between jurisdictions, allowing information about unsafe products to be shared, leading to a default of a national regulatory response through the ACCC without the need for the States and Territories to take interim action. It could also reflect the national market for consumer goods, in which product safety issues typically arise in all jurisdictions simultaneously, requiring a national response.

Given this, there is merit in the States and the ACT relinquishing those powers. This would make clear that it is the ACCC's responsibility to immediately respond to all product safety incidents that may warrant a compulsory recall or interim ban.

Clarifying that compulsory recalls and bans (interim or permanent) under the ACL are solely the ACCC's responsibility would reduce regulatory uncertainties for consumers and businesses. Consumers would better know where to go to report problems and seek information, and for regulatory action to be taken as necessary. And businesses would need to discuss possible solutions to ACL safety issues with only one regulator, instead of up to potentially as many as eight.

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## **Address resourcing issues transparently**

There are questions about the level of resources that governments provide for administering and enforcing the ACL. Limits on resources can influence the pattern and extent of ACL regulators' compliance and enforcement activity.

There is little useful data on many of the State and Territory ACL regulators' resourcing levels, but several study participants have expressed concern that there have been some reductions in resourcing since the commencement of the ACL.

Determining the optimal level of resourcing for ACL matters relative to other government and social priorities is beyond the scope of this study.

What can be said is that governments should address resourcing issues transparently, including any changes that would result in an effective shift in responsibilities for administering or enforcing the ACL to other jurisdictions. Enhanced performance reporting (discussed below) would contribute to such transparency.

## **Embrace richer performance reporting**

A problem that has arisen throughout this study is the dearth of specific data to enable or bolster analyses of the activities and performance of ACL regulators, particularly at the state and territory level.

While the national ACL regulators and some of the State and Territory regulators publish a broad range of metrics and performance information, not all do, and little that is published focusses on the ACL-specific component of regulators' activities. For example, only highly aggregated information is published on the resourcing of State and Territory ACL regulators, mostly at the agency level.

During this study, the Commission requested that the ACL regulators provide time-series data on ACL regulator resources and various activities, and to break down some existing aggregated data to the jurisdictional level.

While some of the requested data was furnished by the State and Territory regulators (the ACCC having provided a separate submission), several reservations were raised about the provision and use of the full range of data sought. Concerns include that:

- it would be problematic to split out the ACL element of the resources and activities of the regulators, which typically enforce a range of other consumer protection laws as well
- ACL regulators often use tools such as consumer education, trader engagement and marketplace statements, which would not be captured in data on 'enforcement' actions
- publishing statistics for individual jurisdictions could be misleading because of the collaborative nature of operations under the multiple-regulator model.



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The Commission recognises that deriving meaningful performance statistics can be challenging, and that there can be concerns about the way performance metrics are sometimes used (and misused). It also understands that the Commonwealth, State and Territory governments presently have their own accountability requirements for their agencies.

However, these issues are not unique to ACL regulators, with national comparable performance monitoring achieved in other complex areas of government service provision.

In the Commission's view, there are sound public accountability and regulatory efficiency grounds for the ACL regulators to publish a more granular, meaningful and comparable array of performance metrics and information on their operations.

The tiered performance reporting framework articulated in the recent ASIC capability review represents an approach that might be more widely adopted. It calls for not only data and information on regulators' resources and activities but also more textured reporting on the behavioural changes and outcomes attributable to those activities.

This draft report sets out some options for improving ACL regulator performance information within the tiered framework. There are some complex knots to untangle in determining, for example, whether to report using a narrow ACL lens, a broader consumer protection lens or several lenses. The Commission is aware of the need to minimise regulatory burdens for regulators as well as for businesses, and is seeking feedback on the merits and best way of advancing these or alternative reporting approaches for the ACL regulators.

## **Enhance the ACL–specialist regulator interface**

The study has identified several ways to enhance the interaction between ACL and specialist safety regulators, particularly in the areas where there are gaps in coverage or specific concerns:

- Formal mechanisms such as regular national forums for specialist safety regulators in building and construction would help make their approaches to enforcement and to interacting with ACL regulators more cohesive and consistent.
- Greater information sharing among ACL and specialist safety regulators more generally would hasten the identification of important product safety concerns, and enable them to better determine what actions are warranted and which specialist or ACL regulator(s) should undertake those actions.
- Greater national consistency in the laws underpinning the specialist safety regime for electrical goods would enable more comprehensive and consistent enforcement by ACL and specialist regulators.

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- In some cases, additional powers for specialist safety regulators would improve their capacity to administer and enforce their regimes, and would likely lessen the need for interaction with ACL regulators.

The Commission recognises that acting on the last two observations would involve reforming the nature and powers of specialist regulatory regimes themselves. These options would need to be considered on their own merits, and, in that broader assessment, the benefits of improving the ACL–specialist interface may well be of relatively minor importance.

## Revisit previous Commission recommendations

Many of the issues identified in the Commission’s 2008 *Review of Australia’s Consumer Policy Framework* have been addressed in the years since. Indeed, establishing the ACL itself realised the 2008 review’s central recommendations.

However, some of that review’s recommendations have not been implemented or fully progressed. In addition to those discussed above, the Commission in this study has identified a further three that should be revisited.

First, the 2008 review recommended a COAG-led process to review and reform industry-specific consumer regulation. Among its other tasks, this process was to identify unnecessary divergences in State and Territory regulation, and consider the case for transferring policy and enforcement responsibilities to the Commonwealth. Although administrative changes have made it difficult now to determine how far the reform advanced, it appears that matters in the relevant Commission recommendation are ‘unfinished business’. There remain some important differences between jurisdictions’ regulations, particularly in relation to electrical appliances, and building and construction. There is a case to revitalise review and reform of these matters, particularly in relation to electrical safety standards.

Second, the 2008 review noted the importance of effective and properly resourced government-funded mechanisms for alternative dispute resolution, to deal in a consistent manner with consumer complaints (where those complaints are not covered by an industry-based ombudsman). Some participants in this study have suggested that the dispute resolution services provided by the ACL regulators remain deficient. To address any such deficiencies, one option would be to require that the ACL regulators’ mechanisms meet the Commonwealth’s benchmarks for industry-based customer dispute resolution schemes. A broader approach would be to establish a review mechanism (as suggested in 2008) to reassess, every five years, the nature and structure of all alternative dispute resolution arrangements available for consumer complaints, which would help to identify best practice and address redundancies or new needs.

Third, the 2008 review observed gaps in the ability of consumer research to meet the needs of policy makers, and of consumer advocacy groups to engage in the policy development

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process. Throughout this study, the Commission has heard that gaps persist, at least in relation to consumer advocacy. It considers that there remains a case for increasing government funding for consumer advocacy, and possibly also for consumer research, as recommended in 2008.

More recently, the Commission's 2014 review of *Access to Justice Arrangements* proposed an extensive set of reforms to the civil justice system. The recommendations addressed issues such as creeping legalism in tribunals, unnecessary costs and delays in court processes, and the overly adversarial nature of the system more broadly. The Commission urges governments to work to implement these recommendations, many of which would benefit consumers.

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# Recommendations, findings and information requests

## Assessments of the multiple-regulator model

### DRAFT FINDING 3.1

The multiple-regulator model appears to be operating reasonably effectively given the intrinsic difficulties of having 10 regulators administer and enforce one law. However, the limited evidence available on regulators' resources and performance makes definitive assessments difficult. Enhanced performance reporting requirements (Draft Recommendation 4.2) would help address this limitation.

### DRAFT FINDING 3.2

The Australian Consumer Law (ACL) regulators communicate, coordinate and collaborate with each other through well-developed governance arrangements, and have mechanisms in place to promote consistent approaches to the interpretation and application of the ACL. Nevertheless, the multiple-regulator model allows for differences among jurisdictions in approaches to aspects of their administration and enforcement of the ACL, which likely create inconsistent outcomes for consumers and for businesses.

### INFORMATION REQUEST

*The Commission invites further comment and detailed information on:*

- *the nature of inconsistencies, including specific examples, in the approaches of the ACL regulators to administration and enforcement*
- *the materiality of these inconsistencies for consumers and/or businesses*
- *options for addressing inconsistencies across ACL regulators.*

### DRAFT FINDING 3.3

ACL regulators have developed policies and protocols to implement strategic and proportionate approaches to compliance and enforcement, including prioritising matters that represent higher levels of risk to consumers. The extent to which these are implemented in practice is likely to vary across regulators.

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## The generic national product safety regime

### DRAFT RECOMMENDATION 4.1

The State and ACT governments should relinquish their powers to impose compulsory recalls or interim bans. This would signal that it is the Commonwealth's responsibility to immediately respond to all product safety issues that warrant a compulsory recall or ban.

In parallel with any such change in responsibilities, there should be a mechanism for State and Territory governments to raise and provide input on product safety matters to the Australian Competition and Consumer Commission (ACCC) that they consider would warrant a compulsory recall or ban.

### DRAFT FINDING 4.1

The Commonwealth Government's regulation impact assessment requirements may impede the timely implementation of national interim product bans. There is a case to amend the requirements to exempt interim bans from such assessments. Permanent product bans should continue to be subject to the existing regulatory impact assessment requirements.

## Performance reporting

### DRAFT RECOMMENDATION 4.2

ACL regulators should publish a comprehensive and comparable set of performance metrics and information to enhance their public accountability and enable improved regulator performance. Consumer Affairs Australia and New Zealand (CAANZ) could be charged to develop a reporting framework with a view to providing meaningful metrics and information on:

- resources expended on regulator activities
- the range and nature of regulator activities
- behavioural changes attributable to regulator activities
- outcomes attributable to regulator activities.

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## A national database

### DRAFT FINDING 4.2

A national database of complaints and product safety incidents has merit. It would enable better identification and analysis of consumer hazards and risks, and help focus ACL regulators' compliance and enforcement activity. CAANZ should examine the impediments to establishing such a database, its likely benefits and costs, and, subject to the findings of that analysis, develop a plan to implement such a system. CAANZ should also consider what information from the database should be publicly available.

## Enforcement tools and penalties

### DRAFT FINDING 4.3

There are some small differences in the enforcement powers of the ACL regulators across jurisdictions. There is scope to improve consistency in infringement notice powers and other additional remedies that the States and Territories have introduced to augment the ACL 'toolkit'.

### DRAFT FINDING 4.4

Australian governments should increase maximum penalties for breaches of the ACL. They should consider the option, being examined by CAANZ, of aligning them with the penalties for breaches of competition provisions in the *Competition and Consumer Act 2010*.

## Interaction between ACL and specialist regulators

### DRAFT FINDING 5.1

While interaction between ACL and specialist safety regulators generally works well, some changes are warranted. Options to improve the response to product safety concerns currently dealt with by joint ACL and specialist regulators' actions include:

- instituting formal arrangements to guide cooperation and coordination between building regulators and ACL regulators, and between the ACCC and some national specialist safety regulators
- expanding the regulatory tools and remedies available to specialist safety regulators (or at least developing a process to allow them to better harness the national reach of regulatory powers under the ACL)
- introducing greater consistency of legislation underpinning the specialist safety regime for electrical goods.

### INFORMATION REQUEST

Are there particular impediments to establishing a lead or home regulator approach at the intrastate and territory level and, if so, how might those impediments be addressed?

### INFORMATION REQUEST

*Is introducing or expanding data sharing among specialist regulators themselves, and between specialist regulators and ACL regulators, feasible? Where might it occur (and how might it be introduced)? What might be the benefits of introducing or expanding data sharing arrangements in terms of improving the interaction between ACL and specialist regulators?*

### INFORMATION REQUEST

*Where are there 'gaps' in the regulatory powers of specialist safety regulators that require them to have recourse to ACL regulators' powers to address product safety issues within the specialist regulators remit? What changes might be made to 'fill the gaps' in the specialist safety regulators' toolkit of remedies and what might be the implementation pathway to provide those additional powers?*

### INFORMATION REQUEST

*What is needed to progress the move to national consistency among all State and Territory electrical safety regimes?*



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## Industry-specific consumer regulation

### DRAFT FINDING 6.1

Australian governments should review, and revitalise as necessary, progress in relation to Recommendation 5.1 from the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*. That recommendation called for a process to review and reform industry-specific consumer regulation that would, among other things, identify unnecessary divergences in state and territory regulation and consider the case for transferring policy and enforcement responsibilities to the Commonwealth Government.

## Consumer redress

### INFORMATION REQUEST

*Are there gaps or deficiencies in the current dispute resolution services provided by the ACL regulators that a retail ombudsman would fill? What incentives would attract retailers to sign up to such a scheme and observe its determinations? How could the scheme be funded?*

*The Commission seeks further detail on the extent to which the dispute resolution services offered by the State and Territory ACL regulators meet/fall short of the Commission's 2008 recommendation for effective, properly-resourced, government-funded alternative dispute resolution (ADR) mechanisms that deal consistently with all consumer complaints?*

*Does the case for the ADR review mechanism as outlined in 2008 remain? Are there impediments to its implementation and, if so, how could these be addressed?*

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**DRAFT FINDING 6.2**

There is scope to improve the transparency and effectiveness of the dispute resolution services provided by the State and Territory ACL regulators through:

- applying the Commonwealth Government's Benchmarks for Industry-Based Customer Dispute Resolution Schemes to the services provided by the ACL regulators
- establishing a formal cooperative mechanism between the various regulators, alternative dispute resolution schemes and other stakeholders to reassess every five years the nature and structure of alternative dispute resolution arrangements to achieve best practice and address redundancies or new needs — as per recommendation 9.2 from the Commission's 2008 *Review of Australia's Consumer Policy Framework*.

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**INFORMATION REQUEST**

*To what extent have consumers received an additional benefit from the New South Wales super complaint pilot? Has it resulted in an additional burden for the regulator or businesses? Are there gaps in the current activities of the ACL regulators that this process would fill?*

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**Research and advocacy as inputs into policy**

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**INFORMATION REQUEST**

*Is there still a need for additional funding for consumer policy research as envisaged in the Commission's 2008 Review of Australia's Consumer Policy Framework?*

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**DRAFT FINDING 6.3**

In its 2008 *Review of Australia's Consumer Policy Framework*, the Commission identified material gaps in consumer input in policy processes. The Commission considers that recommendation 11.3 from the 2008 report — which in part directs the Commonwealth Government to provide additional public funding to support consumer advocacy — should be revisited.