Australian Government
Productivity Commission

Consumer Law Enforcement and Administration

Productivity Commission Draft Report

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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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

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).

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.

Contents

Acknowledgments

The Commission is grateful to everyone who freely gave their time to discuss the matters canvassed in the terms of reference, especially those who met with the Commission and provided written submissions.

The Commission would like to express its appreciation to the staff who worked on the study. The team was led by Tom Nankivell and comprised Catie Bradbear, Pragya Giri, Darren Magennis, Daniel McDonald and Stewart Plain.

Commissioner

For the purposes of this study the Commissioner is:

Julie Abramson

Disclosure of interests

The *Productivity Commission Act 1998* specifies that where Commissioners have or acquire interests, pecuniary or otherwise, that could conflict with the proper performance of their functions during an inquiry they must disclose the interests.

Julie Abramson has advised the Commission that she is a member of the independent expert panel — chaired by Professor Ian Ramsay — currently undertaking a *Review of the financial system external dispute resolution and complaints framework*.

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACLink	Australian Consumer Law Intelligence Network Knowledge
ADR	alternative dispute resolution
ANAO	Australian National Audit Office
ASIC	Australian Securities and Investments Commission
CAANZ	Consumer Affairs Australia and New Zealand
CAV	Consumer Affairs Victoria
CDRAC	Compliance and Dispute Resolution Advisory Committee
COAG	Council of Australian Governments
DIRD	Department of Infrastructure and Regional Development
EDR	external dispute resolution
EIAC	Education and Information Advisory Committee
ERAC	Electrical Regulatory Authorities Council
EESS	Electrical Equipment Safety System
ESV	Energy Safe Victoria
FOS	Financial Ombudsman Service
FTOG	Fair Trading Operations Group
GTRC	Gas Technical Regulators Committee
IGA	intergovernmental agreement
IT	information technology
MCCA	Ministerial Council on Consumer Affairs
MoU	Memorandum of Understanding
NCC	National Construction Code
PRAC	Policy and Research Advisory Committee
PSOG	Product Safety Operations Group

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.

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.

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

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

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.

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

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.

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.

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.

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.

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.

- 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

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.

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.

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.

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?

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?

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*.

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?

Research and advocacy as inputs into policy

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?

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.

CHAPTERS

1 About the study

Key points

- This study is about the enforcement and administration arrangements underpinning the Australian Consumer Law (ACL) and related regulation. The matters examined include:
  - progress in consumer protection policy since the Commission's previous, 2008 review
  - the operation of the ACL multiple-regulator model
  - mechanisms for strengthening enforcement and administration
  - the interface between the ACL regulators and specialist consumer safety regimes
- The study has not assessed the case for shifting to a single-regulator model for the ACL.
- The Commission has drawn on an array of information and analysis and has consulted widely, although it has been hampered by a lack of evidence on some matters.

In July 2009, when the Council of Australian Governments (COAG) agreed to establish the Australian Consumer Law (ACL), COAG also committed to review the new law and its enforcement and administration arrangements within seven years.

Consumer affairs officials under the banner of Consumer Affairs Australia and New Zealand (CAANZ) are now reviewing the ACL. That review is focussing mainly on the adequacy of the ACL's consumer protection provisions, with limited attention to how they are administered and enforced. CAANZ delivered an interim report in November 2016 and is scheduled to provide a final report by March 2017.

On 29 April 2016, the Productivity Commission was asked to undertake an independent study of the enforcement and administration arrangements supporting the ACL and related consumer protection regulation, to complement the CAANZ review. The Commission is also to deliver its final report by March 2017.

This chapter explains how the Commission has undertaken the study to date. It covers:

- the scope of the study, including which matters are covered by the terms of reference and how the Commission has interpreted its task (section 1.1)
- how the Commission has assessed the matters under reference, including its processes for obtaining and testing information and the analytical approaches used (section 1.2).

1.1 The study's scope

The terms of reference

The Commission has been asked to evaluate 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 terms of reference — set out in full in attachment A — indicate that, in undertaking the study, the Commission should address:

- the complementary roles played by ACL regulators and the effectiveness of existing mechanisms in improving the coordination, consistency of approach and collaboration between ACL regulators
- the roles of specialist safety regulatory regimes in protecting consumers, their interaction with ACL regulators and the extent to which the responsibilities of different regulators are clear
- the implications of changes in the level of resourcing and regulator involvement in the administration of the ACL, including the national product safety law
- other regulatory models, including from overseas, that may inform improvements to the current model to ensure it can address new and emerging issues.

The study is also required to examine what progress has been made to address the issues the Commission identified in its 2008 *Review of Australia's Consumer Policy Framework*.

Which laws, regulations and government bodies are covered?

The terms of reference variously refer to the 'national consumer policy framework' and, at a more specific level, the 'Australian Consumer Law', the 'multiple-regulator model' and the 'ACL regulators', the 'national product safety law' and 'specialist safety regulatory regimes'. While the study is focused mainly on the administration and enforcement of the ACL through the multiple-regulator model, it is important to clarify exactly which laws, regulations and bodies are covered by these different terms.

As the Commission noted in its 2008 review, many general economic policies influence consumer wellbeing, even if their intent is not couched in those terms. For example, it noted that sound macroeconomic policies and extensive competition and trade reforms have delivered large gains to consumers over the last few decades, including by putting downward pressure on prices, enhancing product quality and expanding consumer choice. These broader policies can be seen as the key government measures that impact on consumer wellbeing, but are not covered by this study.

The study also does not deal with laws or regulations that cover anticompetitive conduct or market structure, or that regulate pricing (which the Australian Competition and Consumer

Commission (ACCC) administers, in addition to its role in administering the ACL; and which some state and territory bodies may administer at the state or territory level).

Rather, the study is to focus on the enforcement and administration of a narrower set of consumer regulation. Specifically, for this study, the Commission interprets the national consumer policy framework — which might be better understood as the national consumer protection framework — to encompass:

- the Australian Consumer Law regime (box 1.1)
- the national consumer product safety law (which is part of the ACL — box 1.1)
- elements of the Australian Securities and Investment Commission (ASIC) Act (box 1.1)
- national, and state and territory, specialist consumer protection regulation (box 1.2).

The framework also includes the regulators and other bodies, such as ombudsmen and tribunals, responsible for administering these laws, and bodies such as CAANZ and the ministerial council that oversee the framework. (The ACL regulators are listed in box 1.1).

Box 1.1 The Australian Consumer Law regime

The Australian Consumer Law

The ACL is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). The ACL enhanced and combined the consumer protection (and empowerment) 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 Schedule 2 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) (ASIC Act).

The ACL's national consumer product safety law

The national consumer product safety law is part of the ACL and is contained in Part 3-3 of Schedule 2 of the *Competition and Consumer Act 2010*. It includes provisions for preventing supply and recalling unsafe consumer goods. It also includes provisions that allow standards to be made to improve the safety of consumer goods and for warning notices to be issues to alert consumers to risks. It covers matters including mandatory safety standards, interim and permanent bans, product recalls, safety warning notices, and mandatory reporting of certain incidents associated with consumer goods.

(continued next page)

Box 1.1 (continued)

The consumer protection elements of the ASIC Act

Division 2 of Part 2 of the ASIC Act includes many of the same consumer protection laws as the ACL, applied to supplies of financial services and financial products. The Act includes provisions dealing with misleading or deceptive conduct, unconscionable conduct, bait advertising, harassment and coercion, pyramid selling, unfair contract terms, unsolicited credit or debit cards and asserting a right to payment for unauthorised advertisements. It includes penalties, enforcement powers and consumer redress options that are similar to those in the ACL.

The ACL regulators

At the commonwealth level, the ACL is administered and enforced by the ACCC, with 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 enforcement of the ACL by these regulators.

Box 1.2 **The specialist consumer protection regimes**

The generic consumer protection regulation of the ACL is accompanied by a multitude of consumer regulations specific to a particular product characteristic, market or industry. 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 can be involved in administering and enforcing these regimes. For example, Food Standards Australia New Zealand develops and administers the Food Standards Code. However, enforcement of this code is the responsibility of the state and territory food and health agencies (and the Commonwealth Department of Agriculture for imported foods) and, in some jurisdictions, local governments. In some cases, dedicated agencies are responsible for enforcing and administering a specialist regulatory regime. However, in the states and territories, the ACL regulator will also sometimes have responsibility for enforcing specialist regulation, in addition to the ACL.

Chapters 2 and 5 provide more information on the specialist consumer protection regimes.

Should the 'single-regulator model' be in scope?

The Commission's principal task is to evaluate the effectiveness of the multiple-regulator model in supporting a single national consumer policy framework.

A threshold question in approaching this task is whether the current multiple-regulator model should be assessed against the benchmark of a single-regulator model, as the Commission did in 2008, or, with a multiple-regulator model having been adopted, against the theoretical benchmark of how a multiple-regulator model might ideally work.

In answering this, the Commission has been cognisant of the original rationale and context for adopting the multiple-regulator model, as well as practical constraints on what can be achieved in this study.

The Commission's approach in 2008

The 2008 review identified a range of possible benefits from adopting the multiple-regulator model for administering and enforcing the ACL, including:

- administration of the ACL had some synergies with the other regulatory functions of the State and Territory regulators
- greater responsiveness to local issues, and scope for policy experimentation and learnings from jurisdictional differences
- there were additional costs associated with creating a parallel regional office network (under a single-regulator model)
- opposition from State and Territory jurisdictions to a single-regulator model risked jeopardising the adoption of the single national consumer law.

The Commission also saw some inherent risks in the multiple-regulator model, including around the potential for inconsistency across jurisdictions. It considered that these risks were likely to increase, particularly as markets continue to become more national in scale over time. The report pointed to advantages in moving to a single-regulator model over the longer term, with all enforcement to be the responsibility of the ACCC. It considered that this would improve the consistency of enforcement, preclude wasteful duplication of regulatory effort, and better allow for linkages with competition policy through the ACCC.

This implies that, at some point, it will be appropriate to closely (re)assess the means and merits of shifting to a single-regulator model for the ACL.

Scope of the current study

At this time, the Commission has not entertained a broader review of the relative merits of a single- and multiple-regulator model as:

- The terms of reference for this study are focused squarely on the current operation of the multiple-regulator model and possible means of strengthening it.
- In recommending the initial use of the multiple-regulator model, the 2008 report recognised that retaining regulators in each jurisdiction would help secure adoption of a single ACL. The new national consumer protection system commenced only in 2011, and at this stage the multiple-regulator system appears to be operating broadly as intended in 2008 (chapter 3).
- The 2008 report considered that changes to other consumer regulation would aid the adoption of a single-regulator model. These include the adoption of a 'single law' model for those specialist safety regimes where there remain differences in the laws at the state and territory level. There has been some reform in those areas, but further progress is required (chapters 2 and 6).
- Little data is presently available on important aspects of the multiple-regulator model's performance (chapters 3 and 4). The Commission is recommending that richer data be collected and made public in the future to enable better assessments (chapter 4). However, in the meantime, data gaps make it difficult to reach definitive judgments about the performance of the multiple ACL regulators.

The Commission has therefore focused in this study on the operation of the current multiple-regulator model and possible improvements to it. It will be appropriate to revisit the case for a single-regulator model for administering and enforcing the ACL further into the future, particularly if more problems with the current model become evident and/or if better information on the performance on the multiple-regulator model is made available that indicates further scope for improvement.

Consumer protection functions at the national level

Two further scope issues are whether the study should give close consideration to the siting of ACL responsibilities at the national level within the ACCC and whether the ACL matters regulated by ASIC should continue to be exempt from the generic provisions administered by the ACCC. As discussed below, these matters have been considered previously and the Commission is unaware of any recent developments that would warrant a detailed reconsideration in the context of this study.

The ACCC's consumer protection and competition functions

In 2008, the Productivity Commission endorsed the combination of consumer law and other market regulation functions within the ACCC, and these functions remain with the ACCC today.

The ACCC itself has argued that one of the core strengths of Australian competition policy is that competition enforcement, consumer protection and economic regulation are combined within a single, economywide agency with the objective of making markets work to enhance the welfare of Australians. In its view, having a single body fosters a pro-market culture, facilitates coordination and depth across the functions, ensures small businesses do not 'fall between the cracks', provides a source of consistent information to business and consumers about their rights, and provides administrative savings and skills enhancement through the pooling of information, skills and expertise (ACCC 2014b).

A paper prepared for the Monash Business Policy Forum (Maddock, Dimasi and King 2014) has recently argued that combining competition and consumer functions is inconsistent with best practice design of regulatory institutions. It has argued that consumer protection matters can be used to raise the agency's public profile to the detriment of competition enforcement and there are likely to be internal divisions of culture.

This matter was considered recently by the 2015 Competition Policy Review (the 'Harper Review'), which again noted the synergies in having competition and consumer functions in the one institution. A number of submissions to the Harper Review (including from CHOICE and the Consumer Action Law Centre, as well as the ACCC itself) supported retaining a combined competition and consumer body. The Harper Review was not satisfied that separating these functions would deliver an overall benefit, and recommended their retention within the single agency of the ACCC (Harper et al. 2015, p. 463).

ASIC's consumer protection functions

ASIC has attracted significant scrutiny over recent years, and has recently been the subject of an independent capability review. That review noted:

> ASIC's mandate is broad, having grown considerably over the last two decades, generally in response to major reform processes and reviews. The Wallis Inquiry recommended having investor and consumer protection within the one agency, especially given the growing inter-linkages between different financial products and services. In addition, other policy reforms have led to the expansion of ASIC's mandate, for example the move of consumer credit from a fragmented, state-based system to ASIC as a single national regulator. (ASIC Capability Review Panel 2015, p. 34)

In addition to that review, there is now a further review underway of ASIC's enforcement powers (O'Dwyer 2016a).

While ASIC is technically included as one of the ACL regulators, it can be seen as a specialist regulator in the financial services area, much as the Therapeutic Goods Administration is a specialist regulator in relation to therapeutic goods. There are some differences: ASIC's powers mirror rather than supplement the other generic ACL requirements. Nevertheless, ASIC brings to bear significant technical expertise in financial services and there are likely to be synergies between ASIC's consumer protection functions and its other financial regulation functions, particularly the licensing of financial service providers.

In 2008, the Productivity Commission considered whether the financial services matters regulated under the consumer protection provisions in the ASIC Act should in fact be exempt from the generic provisions of the ACL. It considered that there was a strong underlying rationale for the new generic consumer law to encompass all sectors, albeit with primary enforcement responsibility for infractions of the ACL in relation to financial services remaining with ASIC. This recommendation was not accepted.

While drawing lessons from ASIC's interactions with ACL regulators where appropriate, the Commission's main focus with respect to the multiple-regulator model has been on how the State and Territory regulators and the ACCC implement the ACL. It has paid less attention to the operation of ASIC and has not re-examined the issue of whether the ACL should continue to provide an exemption for financial services in this study.

1.2 The Commission's approach

The key tasks invoked by the terms of reference can be grouped into four main elements:

- to review the progress made in addressing the issues identified in the Commission's last consumer policy report in 2008
- to examine the effectiveness of the multiple-regulator model in supporting a single national consumer policy framework
- to identify and suggest ways of strengthening the model
- to survey the interface between the ACL regulators and the wide array of specialist safety regulators and identify means of improvement.

The study uses a wide range of information to address these elements, but hard evidence on several matters is scant (box 1.3). The Commission has had to rely more heavily on qualitative and subjective material, including the views of stakeholders and of the regulators themselves. The upshot is that some of the findings in this draft report are tentative.

Box 1.3 **The study's evidence base**

Consultation

Following receipt of the terms of reference, the Commission advertised the study and sought to consult with all ACL regulators and a range of other interested parties to inform its issues paper, which was released on 15 July 2016. The Commission received 30 submissions (appendix B). The Commission held additional, follow-up consultations with several study participants. It has also had access to submissions made to the parallel CAANZ review of the ACL.

While the ACCC lodged a submission to this study, submissions were not received from other ACL regulators. The Commission wrote to the Chair of the CAANZ Compliance and Dispute Resolution Advisory Committee (CDRAC) on 16 September 2016 seeking a range of data and information on the activities of State and Territory ACL regulators. CDRAC provided a response on 11 November 2016 and also responded to some further requests, although, as explained in later chapters, it indicated that it was not in a position to provide all the information the Commission had sought.

In all, the Commission has had discussions with and/or received submissions or information from a range of study participants, including individuals; consumer, business and legal groups; ACL regulators (separately and as a group) and specialist safety regulators; ombudsmen; and other consumer policy experts and government officials (appendix B).

Information sources

The ACL regulators have compiled a series of 'implementation reports' each year since 2011. The reports document the steps that ACL regulators, individually and jointly, have taken to implement the ACL and to improve its operation. Although not without gaps, these reports provide a starting point for the study's assessments.

The study also draws on:

- discussions with and submissions from various study participants (see above)
- the annual reports of the ACL regulators or their parent agencies
- research undertaken for the parallel CAANZ review of the ACL, including on overseas consumer regulation models and on ACL remedies and penalties in Australia
- material provided by CDRAC and the Australian Government Treasury in response to specific data and information requests from the Commission
- previous Productivity Commission research, including its 2008 *Review of Australia's Consumer Policy Framework* and its 2014 report, *Access to Justice Arrangements*
- other recent government reports, including an audit of the ACCC's fair trading functions, a capability review of ASIC, and the interim report of the CAANZ review of the ACL.

However, evidence on some matters is scant. Some of the internal processes of the ACL regulators are opaque to outsiders, and there is limited useful data on the State and Territory ACL regulators' resource levels and activities.

Further input

This draft report provides an opportunity to 'test' the Commission's preliminary understandings and findings, and the report also includes a range of specific information requests intended to bolster the evidence base. The Commission is seeking submissions on the draft report by 23 January 2017. It will provide its final report to government in March 2017.

Progress since the 2008 review

The Commission's analysis commences in chapter 2 with a review of progress in addressing the problems identified in the Commission's 2008 *Review of Australia's Consumer Policy Framework.*

The 2008 review examined the consumer protection area in depth, including arrangements for administering and enforcing it. The 2008 report took account of changing market conditions, including trends to greater product complexity and the increasingly national nature of product markets, and used standard Commission assessment frameworks and criteria. Among other things, the Commission was required to have regard to consumer wellbeing, productivity and efficiency, regulatory burdens on consumers and business, the need for evidence-based policies and developments in consumer policy overseas.

The 2008 review identified a range of issues with the previous consumer protection framework, including inadequate protections in the laws; differences in laws across states and territories; regulatory complexity; inconsistency, gaps and overlap in enforcement; and unclear delineation of responsibilities between Commonwealth, State and Territory governments. To address the problems it identified, the 2008 review made 30 recommendations, the central one being to establish a new national generic consumer law — the ACL — to be administered and enforced through the multiple-regulator model.

To review the progress made in addressing the problems identified in 2008, this study provides a simple stocktake of its main recommendations. Chapter 2 identifies those that have been implemented and those where there has been no, limited or incomplete implementation. Several areas of 'unfinished business' from the 2008 review are revisited in later chapters, particularly in chapters 4 and 6, where the Commission has assessed the case for governments to revisit and progress the earlier recommendations.

The operation of multiple-regulator model

The study's assessment of the multiple-regulator model — centred in chapter 3, although also drawing on material in chapters 2 and 4 — takes the model as a given and examines how it is operating against the benchmark of how such a model might ideally operate.

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.

The ACL regulators have sought to address these risks through formal arrangements to govern how they administer the ACL. In June–July 2010, they signed a Memorandum of Understanding (MoU) setting out their intended approaches to matters including communication, cooperation and coordination; complaint handling; information sharing; compliance and enforcement; and product safety. The MoU is complemented by other documents and directives, such as the ACL regulators' *Compliance and Enforcement Guide.*

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 detailing the mechanisms (chapter 2), the study seeks to gauge their effectiveness. For example, it has probed for evidence of a lack of coordination between the ACL regulators or of inconsistent interpretations and applications of the ACL (chapter 3).

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

The Commission has not been asked to undertake a performance audit of the various regulators that comprise the multiple-regulator model. Nor has it been asked to determine whether the level of resourcing for the regulators, individually or collectively, is adequate. Accordingly, the study's findings about the operation of the multiple-regulator model do not address whether individual regulators are operating as effectively as they might, or the adequacy of consumer protection provided under the ACL. Rather, the study is focussing on the operation of the multiple-regulator model *as a system* for enforcing the ACL and examining ways to improve it.

The Commission has also been careful to distinguish those outcomes attributable to the multiple-regulator model from those outcomes with other causes. For example, study participants have raised several concerns about aspects of the enforcement of the ACL, including that some penalties for breaches of the law are inadequate. However, insufficient penalties would hamper enforcement in much the same way whether there was a single regulator or several. By contrast, inconsistent approaches to administration and enforcement across jurisdictions are likely to be more dependent on the multiple-regulator model, and as noted the Commission has given this particular attention.

Strengthening administration and enforcement and the broader framework

The study's examination of means of strengthening administration and enforcement of the ACL under the multiple-regulator model is centred in chapter 4. Some broad means of strengthening the consumer policy framework are discussed in chapter 6.

The Commission has identified prospective areas for reform from its stocktake of 'unfinished business' from the 2008 review (chapter 2), from it analysis of the performance of the current arrangements (chapter 3) and from study participants' suggestions.

The areas examined in chapter 4 are:

- the administration and enforcement of the ACL's product safety provisions
- the collection and analysis of data on consumer complaints and incidents
- the enforcement tools available for State and Territory ACL regulators

- the maximum financial penalties available for breaches of the ACL
- performance reporting by the ACL regulators.

The areas examined in chapter 6 are:

- reforms to industry-specific consumer regulatory regimes
- arrangements for consumer redress
- funding of consumer policy research and advocacy.

In examining reform options in these areas, the study has applied relevant economic, regulatory and governance criteria, including giving weight to efficient resource use, proportionality in enforcement, transparency and accountability, and the need to minimise undue regulatory burdens. It has also considered the fiscal impacts of proposals, although these are given no more or less weight than other, equivalent, monetary and non-monetary costs and benefits in the Commission's assessment calculus. Where there is insufficient information to judge whether a particular reform is warranted, the Commission has requested further information and/or set out a process to ascertain the merits and practical steps and hurdles to implementation.

The interface between ACL regulators and specialist safety regimes

The Commission's assessment of the interface between specialist safety regulatory regimes and the ACL regulators is set out in chapter 5. A description of roles and nature of the specialist consumer protection regimes is provided earlier, in chapter 2.

The specialist safety regulatory regimes 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.

This juxtaposition of regulatory regimes has the potential to 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 administration costs among regulators.

Chapter 5 looks initially at whether the delineation of responsibilities between the different regulators is clear and well understood. This is examined from two perspectives:

- how well specialist safety regime regulators and ACL regulators themselves have clarity about their respective responsibilities, and how well consumers and suppliers understand those responsibilities
- what might be done to improve understanding of the regulators' remits in administering and enforcing product safety, or to ensure that, even where there is uncertainty, issues and concerns find their way to the right regulator(s).

Chapter 5 then looks at how ACL regulators and the specialist regimes interact to deal with product safety concerns that are subject to both sets of regulators and whether this interaction can be improved.

To explore these matters, 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 regulators' self-assessments, stakeholders' observations and other indicators of how these work.

The Commission received some comment on the performance of certain specialist regulatory regimes. For example, the Australian Construction and Justice Group was strongly critical of specialist building regulators, submitting that the failure of the New South Wales regulator to deal adequately with consumer complaints results in hundreds of thousands of dollars of harm to individual consumers and millions of dollars of harm to taxpayers in that state (sub. 16).

However, the Commission has not been asked to examine the performance of the specialist regulators or the adequacy of the consumer protection provided by the specialist regulatory regimes. Rather, the focus in this study is on the ACL–specialist regulator interface and means to improve that aspect of the regulatory system.

2 The consumer protection landscape

Key points

- The Australian consumer protection landscape comprises a complex web of laws, regulators, redress mechanisms and associated bodies.
- There have been significant reforms to the landscape in recent years, most notably the introduction of a single generic consumer law — the Australian Consumer Law (ACL) — as recommended by a Productivity Commission inquiry in 2008.
  - Reforms that followed include a national credit law, mandatory reporting for serious harms associated with consumer goods, protections and remedies in relation to defective goods and services, unfair contract terms protections, and stronger enforcement powers for regulators.
  - Several recommendations from the 2008 inquiry have not been implemented or fully progressed. These include reform to specialist consumer protection regimes; the creation of a database of serious complaints; and the provision of government support for advocacy and consumer research.
- The ACL is administered and enforced by the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, and the eight State and Territory fair trading and consumer protection bodies. Cooperation and coordination is promoted through a series of formalised processes.
- In addition to the ACL there is a range of specialist consumer protection regimes. There is no common model for the institutional architecture of these regimes. In some cases, an ACL regulator will also be responsible for specialist regulation.
- There are several options for consumer redress, including the State and Territory ACL regulators, ombudsmen, tribunals and the court system.
- Consumer policy research and advocacy are important inputs into the development of evidence-based policy.

The consumer protection landscape in Australia is complex. It includes generic consumer laws and the bodies that administer and enforce them, complemented by a multitude of product- and industry-specific consumer protection regulation and licensing regimes. There are also opportunities for redress provided through bodies including ombudsmen, tribunal and court processes. Consumer research and advocacy bodies also play a role.

Over time, this landscape has evolved in response to changes in products, markets, consumers and business practices. The introduction of the Australian Consumer Law (ACL) in 2011 following an inquiry by the Productivity Commission in 2008 marked a significant reform to the consumer protection framework. Now, eight years on from that inquiry, the terms of reference for this study direct the Commission to review the progress made in addressing issues with the previous framework raised by the Commission in 2008.

Understanding the current consumer protection landscape is important for the other elements of the study's terms of reference too — including gauging the effectiveness of the multiple-regulator model and where it can be improved (chapters 3 and 4), and how those ACL regulators interact with the specialist safety regimes (chapter 5).

Accordingly, to lay the groundwork for the subsequent analysis, this chapter outlines:

- recent changes to the consumer protection landscape in Australia, focussing on the Commission's 2008 report and the reform processes that followed (section 2.1)
- the generic consumer protection system today, including the roles of the organisations that administer and enforce the ACL (section 2.2)
- the specialist consumer protection regimes (section 2.3)
- other elements of the consumer protection landscape, particularly options for redress and consumer advocacy and policy research (section 2.4).

2.1 Recent changes to the consumer protection landscape in Australia

A series of Productivity Commission reports in the mid-2000s highlighted the need for a thorough examination of Australia's consumer policy framework.

- Its 2005 *Review of National Competition Policy Reforms* identified several problems, including a lack of coordination between organisations involved in consumer policy development, and recommended a national review of consumer protection policy and administration (PC 2005).
- This recommendation was supported by the Taskforce on Reducing Regulatory Burdens on Business, which reported in January 2006, and found duplicative and inconsistent regulations across jurisdictions (Regulation Taskforce 2006).
- Also in January 2006, the Commission's *Review of the Australian Consumer Product Safety System* found that there was a strong case for national uniformity in the regulation of consumer product safety (PC 2006).

The Productivity Commission's 2008 review

In December 2006, the Productivity Commission was asked to identify improvements to the consumer policy framework that would assist and empower consumers (including disadvantaged and vulnerable consumers). It was also asked to report on ways to promote harmonisation and coordination of consumer policy across jurisdictions; identify consumer regulations that could be revised or repealed; and examine the scope for more effective use of alternative approaches to regulation (such as self-regulatory approaches and consumer education) and principles-based regulation.

In the resulting *Review of Australia's Consumer Policy Framework*, published in April 2008, the Commission found that differences in consumer protection provisions between different jurisdictions were leading to variable outcomes for consumers, adding costs for business and resulting in long delays in implementing changes to consumer policy. For example, variations arose in regard to:

- the definition of a consumer, and hence the coverage of the statutes across jurisdictions
- standards for what constituted harassment or coercion in connection with business activities
- requirements for door-to-door selling and telemarketing activities
- the enforcement powers available to regulators
- redress mechanisms for consumers and penalties for breaches of the law.

The review also found a lack of clear objectives to guide policy development, an inappropriate delineation between the responsibilities of the Commonwealth and State and Territory governments, inadequate evaluation processes, and missing or deficient policy instruments (such as gaps in the enforcement toolkit and deficiencies in redress mechanisms) (PC 2008).

The Commission concluded that there was a pressing need to put in place a new set of institutional arrangements. These arrangements were intended to be more compatible with the changes in Australia's consumer markets and the consumer environment (box 2.1). In all, the Commission's 2008 review made 30 recommendations.

The central recommendation was to establish a new national generic consumer law, combining and enhancing the relevant parts of the previous *Trade Practices Act 1974* (Cth) and State and Territory consumer protection regimes.

The new law was to be enforced jointly by the Australian Competition and Consumer Commission (ACCC) and State and Territory consumer affairs or fair trading regulators (with the Australian Securities and Investments Commission (ASIC) to enforce parallel provisions in the financial services area). The Commission saw advantages in moving to a single-regulator model over the longer term, including that it would improve consistency of enforcement, eliminate the duplication of regulatory effort and better allow for linkages with competition policy through the ACCC. However, it also recognised the benefits of a multiple-regulator model, at least in the first instance, including synergies between the role of the State and Territory fair trading authorities in enforcing the generic consumer law and their other regulatory roles, including the enforcement of certain industry-specific laws (PC 2008).

Other recommendations from the 2008 report addressed deficiencies in relation to industry-specific regulation, unfair contract terms, defective products, consumer redress, enforcement tools and approaches, and consumer empowerment, research and advocacy.

Box 2.1 Changes in consumer markets

In its 2008 *Review of Australia's Consumer Policy Framework*, the Commission observed a number of changes in the market environment in which consumers operate. Many of those changes are still relevant today. They include:

- *consumer markets becoming more national* — a sizable share of goods and services are provided by firms that operate across jurisdictions. In part, this is made possible by the broad similarities in consumer demands across Australia, with demand more influenced by factors such as age, income and family type than where a consumer lives
- *technological change adding complexities to the policy challenge* — technological change and access to the internet has contributed to greater choice, product complexity and availability of information for consumers. Yet it has also raised new redress issues, created additional opportunities for fraud and added to the global dimension of consumer policy. (The rapid growth in social media since 2008 will only have amplified these effects.)
- *a greater variety of goods and services* — a more competitive market environment has increased the range of products available for consumers. Coupled with this, there has been an acceleration in the importance of 'dynamic' goods and services — such as electronic appliances — whose characteristics change frequently
- *consumer spending patterns changing* — reflecting demographic, lifestyle and other factors, the pattern of consumer spending continues to change. In particular, a greater share of household income is now spent on services. Yet, deficiencies in services are often harder to identify, and hence service transactions are likely to put a greater premium on consumer confidence and trust in the supplier.

Source: PC (2008).

Subsequent reforms to the consumer protection framework

The Australian consumer protection landscape has undergone considerable reform since 2008, with many of the Commission's recommendations implemented.

Following agreement among Council of Australian Governments (COAG) members and the passage of the relevant legislation in each jurisdiction,[1] the unified ACL took effect on 1 January 2011. It replaced approximately 900 substantive provisions of at least 20 Commonwealth, State and Territory Acts. For example, legislation adopting the ACL in Queensland simultaneously amended 25 other pieces of legislation, including the *Chicken Meat Industry Committee Act 1976* (Qld) and the *Tourism Services Act 2003* (Qld) (O'Shea 2013).

[1] In October 2008, COAG agreed to a set of reform proposals by the Ministerial Council on Consumer Affairs (MCCA) based on the Commission's report. In July 2009, it signed an Intergovernmental Agreement to underpin the establishment of a national consumer law — the ACL. Following finalisation of the legislation, the first ACL bill was passed by both houses of federal Parliament in March 2010, with the second passed in June 2010. Subsequently, the ACL was introduced by each State and Territory through their own acts. As recommended by the Commission, the ACL was to be administered and enforced under a multiple-regulator model.

The changes to the consumer protection landscape since 2008, including those encompassed within the new generic consumer law, have included:

- adoption of a common overarching objective for consumer policy
- referral by the States and Territories of the power to regulate consumer credit to the Commonwealth, with consumer credit regulated under the *National Consumer Credit Protection Act 2009* (Cth) and enforced and administered by ASIC (ASIC 2016)
- introduction of a national product safety law as part of the ACL (although enforcement and administration remains with the States and Territories — see below)
- introduction of mandatory reporting requirements for suppliers to report deaths, serious injuries or illnesses associated with consumer goods
- the introduction of new 'consumer guarantee' laws to replace 'statutory implied conditions and warranties' in consumer contracts
- new national rules for lay-by agreements and unfair contract terms protections
- the introduction of stronger enforcement powers for regulators, including civil pecuniary penalties and infringement notices (CAANZ 2016b).

While there has been considerable reform, several of the 2008 report's recommendations have not been implemented or fully progressed, including in the following areas:

- *Industry-specific consumer regulation* — The Commission's 2008 report recommended that the COAG conduct a review and reform process of industry-specific consumer regulation. This process was to identify and repeal unnecessary regulation, identify unnecessary divergences and consider the case for transferring policy and regulatory enforcement responsibilities to the Commonwealth Government. The Commission has been informed that the specific process has not occurred (section 6.1). There have, though, been significant efforts to review and reform differences across jurisdictions in some areas of regulation through other processes (including through the COAG Seamless National Economy Initiative).
- *Consumer product safety regulation* — The 2008 report recommended that responsibility for the new consumer product safety provisions of the ACL generic product safety regulation should ideally be transferred to the Commonwealth Government and undertaken by the ACCC. However, recognising the challenges to achieving this, it also recommended an 'alternative model', involving some continued powers for the States and Territories, and continued involvement in enforcing product safety laws. This alternative option was adopted by the States and Territories. Chapter 4 discusses the case for revisiting the Commission's preferred approach.
- *Database of consumer concerns* — The 2008 report recommended that all consumer regulators should participate in a shared national database to facilitate more effective referral of complaints and sharing of information. There has been little progress towards this (chapter 4).
- *Alternative dispute resolution* — The 2008 report recommended a range of enhancements to alternative dispute resolution (ADR), including effective and properly resourced

government-funded mechanisms to deal with consumer complaints and a review mechanism to periodically reassess the nature and structure of all ADR arrangements. This review process has not been established.

- *Consumer research and advocacy* — The 2008 report recommended an increase in public funding for research and consumer advocacy. Despite some early consultation, there has been no progress towards this (chapter 6).
- *The Commonwealth Consumer Affairs Advisory Council* — The 2008 report recommended that the Commonwealth Government enhance the Council's capacity. However, its membership is currently vacant and it has not been active for several years.

Ultimately, even with the recent changes in the consumer protection landscape, there remains a complex web of legislation and regulation, regulators, self-regulatory bodies, redress avenues and policy research and advocacy groups that make up the consumer protection landscape today (figure 2.1).

Figure 2.1 **Elements of the consumer protection landscape**

2.2 Administration and enforcement of the ACL

Under the multiple-regulator model, administration and enforcement of the ACL is split between the ACCC and ASIC at the Commonwealth level and State and Territory fair trading and consumer protection bodies. With 10 regulators involved at different levels of government, there is scope for differences across their approaches to administering and enforcing the ACL and their broader responsibilities.

The ACL regulators have put in place a range of arrangements to manage this. In 2009, COAG signed an intergovernmental agreement setting out the process for implementing the ACL, its content, and how it would be administered and enforced (box 2.2). And in June–July 2010, the ACL regulators signed a Memorandum of Understanding (MoU) that:

> … set out a framework for communication, cooperation and coordination between the Parties so that they can, both collectively and within each of their own jurisdictions, most effectively protect and empower consumers and promote fair trading under the ACL. (ACL Regulators 2010a, p. 2)

This section outlines the nature and roles of the ACL regulators and the processes and governance arrangements developed for administering and enforcing the ACL under the multiple-regulator model.

ACL responsibilities under the multiple-regulator model

The roles of the ACL regulators

There are differences in the roles of the ACL regulators under the multiple-regulator model. By and large:

- The ACCC targets systemic matters and takes a national approach to enforcement, compliance and education. It engages internationally to pre-empt emerging issues. It does not engage in individual dispute resolution, conciliation or mediation.
- ASIC undertakes enforcement, compliance and education of consumer issues in the financial system. It also does not undertake dispute resolution, which rather is conducted by approved external dispute resolution providers.[2]
- The State and Territory regulators typically deal with localised issues and often undertake conciliation, mediation and other such actions to resolve particular disputes. They also undertake jurisdiction-based enforcement and compliance activities. They may also undertake some systemic investigations in their jurisdiction and cooperate with other regulators on national issues.

[2] Membership of an ASIC-approved external dispute resolution scheme is a licence condition for all firms that deal with retail clients. These arrangements are currently the subject of a separate *Review of the financial system external dispute resolution and complaints framework* — chaired by Professor Ian Ramsay.

Box 2.2 The ACL Intergovernmental Agreement and Memorandum of Understanding

Intergovernmental agreement

On 2 July 2009, the Commonwealth and all States and Territories ratified the intergovernmental agreement (IGA) for the ACL, agreeing to implement and enforce the ACL to ensure a nationally consistent consumer protection regime.

The IGA was created to give effect to the implementation plan for the ACL. It outlines elements including:

- the legislative approach and contents of the ACL
- consultation and voting processes in the event of an alteration to the ACL
- that the administration and enforcement of the ACL will be shared by the Commonwealth, and State and Territory agencies, with this relationship formalised by a Memorandum of Understanding (MoU)
- the product safety powers of the Commonwealth and State and Territory governments with respect to product bans, mandatory safety standards and product recalls.

The IGA also recognised the importance of research and advocacy in supporting evidence-based policy and recommended that the IGA be reviewed after it had been operating for seven years.

Memorandum of Understanding

In accordance with the IGA, in June–July 2010, the Commonwealth, State and Territory consumer protection agencies signed an MoU. Part 4 of the MoU sets out how the ACL regulators will act and interact in relation to six 'Elements of Understanding', namely:

- *Communication, cooperation and coordination* — particularly in regards to monitoring compliance with the ACL, enforcement, complaints, education and reporting; as well as in other peripheral activities.
- *Complaint handling* — agreement on collaboration to promote consistency in management and practices should a complaint be referred to another party.
- *Information sharing and confidentiality* — ensuring procedures exist around sharing of information, and appropriate management practices in regards to confidentiality of and receiving and disclosing information.
- *Compliance strategies* — cooperative development of strategies that address actual or prospective consumer harm, such as education campaigns, guidance and consultation.
- *Enforcement activities* — establishing a cooperative working arrangement in cases of consumer harm being identified across multiple jurisdictions.
- *Product safety* — supporting product safety through a cooperative framework.

Sources: ACL Regulators (2010a); COAG (2009).

The ACCC (sub. 23, p. 2) commented on this complementary approach:

> While there are important variations in approach, at a high level the capacity of State and Territory ACL regulators to address localised conduct and provide conciliation or complaint resolution functions for consumers complements the ACCC's enforcement and compliance model that endeavours to address more systemic and national matters.

Compliance and enforcement tools

The ACL regulators use a range of approaches and powers to encourage and enforce compliance with the ACL. Broadly, they:

- inform and educate consumers — particularly vulnerable and disadvantaged consumers[3] — and businesses about their rights and obligations
- undertake inspections or other activity to promote and monitor compliance by business
- handle consumer complaints and help resolve their disputes with traders (State and Territory ACL regulators only)
- undertake enforcement against non-compliant businesses.

The ACL regulators have a range of enforcement options under the ACL itself, which have been strengthened since the Commission's 2008 *Review of Australia's Consumer Policy Framework*.[4] These include non-punitive orders to rectify harm and/or prevent further harm, and injunctions, compensation orders, adverse publicity orders, disqualification orders, and civil pecuniary penalties and criminal penalties.

There are, however, some differences in enforcement powers available to the different ACL regulators, including differences between the States and Territories. These are discussed in chapter 4.

Cooperation and jurisdictional flexibility

Even with the broadly defined roles outlined above, there is scope for flexibility in the roles played by different ACL regulators. For example, the ACCC is able to take some action under the ASIC Act where necessary (and vice versa).[5] More broadly, the ACL regulators frequently work cooperatively to produce a national response to a consumer issue (box 2.3). On these projects, a 'lead regulator' is established, with one of the ACL regulators managing the response. In many cases, the lead regulator may be from one of the larger states or the ACCC. The system can enable ACL regulators to benefit from the efforts and expertise of others.

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3 In 2015-16, efforts to assist disadvantaged and vulnerable consumers focused on emerging consumer protection issues and raising awareness among vulnerable and disadvantaged consumers, with key areas including potential hazards to children presented by pool toys and button batteries (CAANZ 2016e).

4 The adequacy of ASIC's enforcement regime is currently the subject of a review by an independent panel (O'Dwyer 2016a).

5 ASIC and the ACCC share responsibility for matters for which there is jurisdictional overlap in relation to consumer product or services and financial products or services. Delegations under section 102 of the ASIC Act, and section 26 of the Competition and Consumer Act, allow each agency to impart some of its powers to the other agency where it is expedient for a single agency to address an area of overlap, or for both agencies to be able to undertake joint activities with the same set of powers. ASIC and the ACCC have developed an MoU that creates a framework for the two regulators to share information and coordinate on projects of mutual interest (sub. 23, p. 16).

Further, even with extensive cooperation and coordination at the national level, the ACL regulators retain the flexibility to undertake activities at a local level according to their own priorities. For example, the compliance activities of Tasmania's Consumer Affairs and Fair Trading (now part of Consumer, Building and Occupational Services) in 2014-15 included charitable fundraising, incorporated associations, security agents, prepaid funerals and residential and retail tenancy. In contrast, Queensland's compliance operation priorities for 2016-17 include security providers, the real estate industry, car hire businesses, and checking showbags at the Royal Queensland Show (Queensland Government 2016; Department of Justice Tasmania 2015).

Box 2.3 Some recent compliance and enforcement activities

The following are examples of activities undertaken recently to promote compliance with the ACL.

- Following regulatory changes to the Australian travel agent industry, in 2014-15 the ACL regulators implemented a national education campaign to help consumers and stakeholders understand their rights. The campaign made use of website content, an online video, digital, print and radio advertising, media engagement, and blogger and social media activities.
- In 2015-16, ACL regulators concluded the NSW Fair Trading-led training providers' national project. The project included:
  - a series of investigations by the ACCC, working with other Commonwealth, State and Territory agencies, including joint investigations with NSW Fair Trading. In 2015-16, the ACCC accepted one enforceable undertaking and instituted proceedings in the Federal Court against four registered training organisations and one broker
  - a national education campaign to help consumers make informed choices.
- NSW Fair Trading is the lead agency on an investigation and prosecution of an online cleaning business offering bond cleaning services to consumers in capital cities around Australia. Public warnings about the trader have been issued by New South Wales, the Northern Territory and Western Australian consumer regulators, and two websites have been removed by NSW Fair Trading on behalf of the ACL regulators.
- In 2015, Consumer Affairs Victoria coordinated a joint compliance operation with NSW Fair Trading and the Queensland Office of Fair Trading against Daiso, an importer and chain retail store trader. Simultaneous inspections led to the seizure of allegedly non-compliant products, and Consumer Affairs Victoria has issued proceedings against Daiso in the Federal Court for contraventions of the ACL in three states.
- Queensland Office of Fair Trading led a project during 2013 and 2014 to inform industry and consumers of their rights and obligations regarding 'was/now' pricing. Regulators issued substantiation notices to 36 traders: and nine traders were then issued with an educational letter, one with an official warning. Six cases were referred for full investigation.
- Between 2013 and 2015, Western Australia Consumer Protection led a national compliance project focused on several high-risk property spruiking industry participants. Twenty traders received legal notices to substantiate claims made in advertisements and seminars, prompting legal action against 10 entities and their associates.

Sources: CAANZ (2016d, 2016e); CDRAC response (2016).

ACL regulators' broader responsibilities

For all ACL regulators, administration and enforcement of the ACL is just one of a number of functions with which they are charged.

At the national level

The ACCC is responsible for maintaining and promoting competition and regulating national infrastructure, in addition to enforcing the ACL.

Likewise, ASIC's broader responsibilities include overseeing markets, managing company registration and licensing of financial services providers.

Among the State and Territory regulators

In information provided by the Compliance and Dispute Resolution Advisory Committee (CDRAC), the State and Territory ACL regulators commented that they 'have a range of functions and responsibilities across a wide variety of industries' (CDRAC response 2016, p. 14) (table 2.1, figure 2.2). These responsibilities vary depending on the jurisdiction, and can reflect a range of factors, including historical regulatory arrangements and local priorities. The variations are partly explained by the differences in the government departments under or within which State and Territory ACL regulators are located (figure 2.2).

Table 2.1 **Regulation administered by the State and Territory ACL regulators**
Including fair trading legislation

Jurisdiction	*Acts*	*Regulations*
ACT[a]	16	11
NSW	46	32
NT	14	7
Qld	60	22
SA	42	29
Tas	18	1
Vic	29	32
WA	48	45

[a] Access Canberra regulates over 100 separate Acts and regulations, 16 relate to the functions of the Commissioner for Fair Trading.

Source: CDRAC response (2016).

Figure 2.2 **Functions of the State and Territory ACL regulators[a]**

Regulator	Department	Selection of other responsibilities
NSW Fair Trading	Dept of Finance, Services and Innovation	Building professionals, Charitable fundraising, Conveyancers, Electricity (consumer safety), Funeral funds, Home building, Motor dealers and repairers, Occupational licensing, Plumbing and drainage, Residential tenancies, Retirement villages.
Consumer Affairs Victoria	Dept of Justice	Conveyancers, Co-operatives, Domestic building contracts, Estate agents, Funerals, Motor car traders, Residential tenancies, Retirement villages, Sale of land, Sex work, Travel agents.
Qld Office of Fair Trading	Dept of Justice and Attorney-General	Anglican Church of Australia, Charitable funds, Collections, Funeral benefit business, Guides Qld, Land sales, Motor dealers and chattel auctioneers, Partnership, Property occupations, Roman Catholic Church, Security providers, Tattoo parlours, Tourism services, Uniting Church.
WA Consumer Protection	Dept of Commerce	Charitable collections, Co-operatives, Debt collectors, Employment agents, Hire-purchase, Motor vehicle dealers, Real estate and business agents, Residential tenancies, Retail trading hours, Retirement villages, Street collections, Travel agents.
Consumer and Business Services SA	Attorney-General's Dept	Births, deaths and marriages registration, Conveyancers, Co-operatives, Gaming machines, Hairdressers, Lottery and gaming, Plumbers, gas fitters and electricians, Residential tenancies, Second-hand vehicle dealers, Security and investigation agents.
Consumer, Building and Occupational Services, Tasmania	Dept of Justice	Collections for charities, Conveyancing, Cooperatives, Prepaid funerals, Retirement villages, Trades unions ,Residential tenancy, Property agents and land transactions, Motor vehicle traders, Security and investigations, Flammable clothing.
NT Consumer Affairs	Dept of Attorney-General and Justice	Building, Business tenancies, Caravan parks, Partnership, Residential tenancies, Retirement villages, Sale of goods, Uncollected goods.
Access Canberra	Chief Minister, Treasury and Economic Development Directorate	Agents, Sale of motor vehicles, Tobacco and other smoking products, Liquor, Security industry, Second-hand dealers, Retirement villages, Plastic shopping bags.

a Legislation managed by the State and Territory ACL regulators ranges from those that are clearly associated with consumer protection, to those where the link is more remote.

Source: CDRAC response (2016).

Many (though not all) of the State and Territory ACL regulators manage legislation associated with specific industries such as motor dealers, building and construction, and funeral funds. A small number of the regulators also have a role in the licensing of occupations such as electricians, plumbers and gasfitters. Finally, some of the regulators manage legislation that none or few of their ACL counterparts manage. For example, South Australia's Consumer and Business Services and Access Canberra both manage that State/Territory's Births, Deaths and Marriages Registration Act, Queensland Fair Trading administers that State's Tourism Services Act, and NSW Fair Trading administers that State's Biofuels Act.

In many cases, non-ACL activities may account for a large and/or greater proportion of an ACL regulator's work than the work directly stemming from its ACL responsibilities. For example, 49 per cent of phone calls to the Northern Territory Consumer Affairs in 2014-15 were from people seeking advice on residential tenancies (NT Consumer Affairs 2015).

The ACL regulators draw upon multiple pieces of legislation

It is not unusual for an ACL regulator to take enforcement action under multiple pieces of legislation. As noted by CDRAC:

> … it is common for teams involved in the administration of the ACL to administer a wider range of legislation. This has provided regulators with both flexibility in responding to consumer issues using the most appropriate legislative provisions and, commonly, a holistic response that utilise multiple statutes as part of their response, to address more consumer and marketplace issues. (CDRAC response 2016, p. 14)

This is also the experience of ASIC, as it finds that: 'Many concerns under the ACL also potentially breach other legislation, such as the *National Consumer Credit Protection Act 2009* (National Credit Act) and the *Corporations Act 2001*' (CAANZ 2016d, p. 24).

Indeed, the ACL can be considered a 'baseline' for general regulatory action, with more specialised consumer protections regulations called upon where needed (box 2.4). As noted by CDRAC:

> Regulators have found that the provisions of the ACL can often be utilised together with, or instead of, local industry-specific legislation to get the most appropriate outcome in compliance matters. (CDRAC response 2016, p. 14)

Box 2.4 Using the ACL to deal with industry-specific concerns

The State and Territory ACL regulators pointed to several activities they have undertaken recently in which they draw upon the ACL to address industry-specific concerns.

- Between June and October 2013, ACL regulators implemented national short-term bans to protect consumers from the risk of injury associated with products containing synthetic drug substances. At the time, the State and Territory drug and poisons laws did not regulate these products, and once legislation was modified, the ACL-based bans lapsed.
- Consumer Affairs Victoria took action in the Federal Court against Hocking Stuart (Richmond) Pty Ltd — a real estate agent — under the broader ACL provisions, rather than the more specific offence provisions in the state-based real estate legislation. The action to address underquoting revealed the agency had advertised price ranges lower than the expected selling price in the marketing of 11 properties.
- Access Canberra used the wider reach of the ACL to address non-compliance with transport regulation requirements. In this case, consumers were charged for a service (testing of vehicles' brakes) that was not completed to the required standard, and the ACL was applied on the basis that consumers had been misled about the nature of services they had received.

Sources: CAANZ (2014); CDRAC response (2016).

ACL governance arrangements

The ACL regulators have well-developed governance arrangements (figure 2.3).

At the apex, consumer affairs ministers come together on a biannual basis in the Legislative and Governance Forum on Consumer Affairs.[6] The Forum consists of all Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading and consumer protection laws. It considers consumer affairs and fair trading matters of national significance and, where possible, develops a consistent approach to those issues.

Consumer Affairs Australia and New Zealand (CAANZ) is the principal forum for cooperation and coordination between the ACL regulators. It brings together senior officers of the Commonwealth, State, Territory and New Zealand consumer affairs and fair trading agencies at least three times per year.

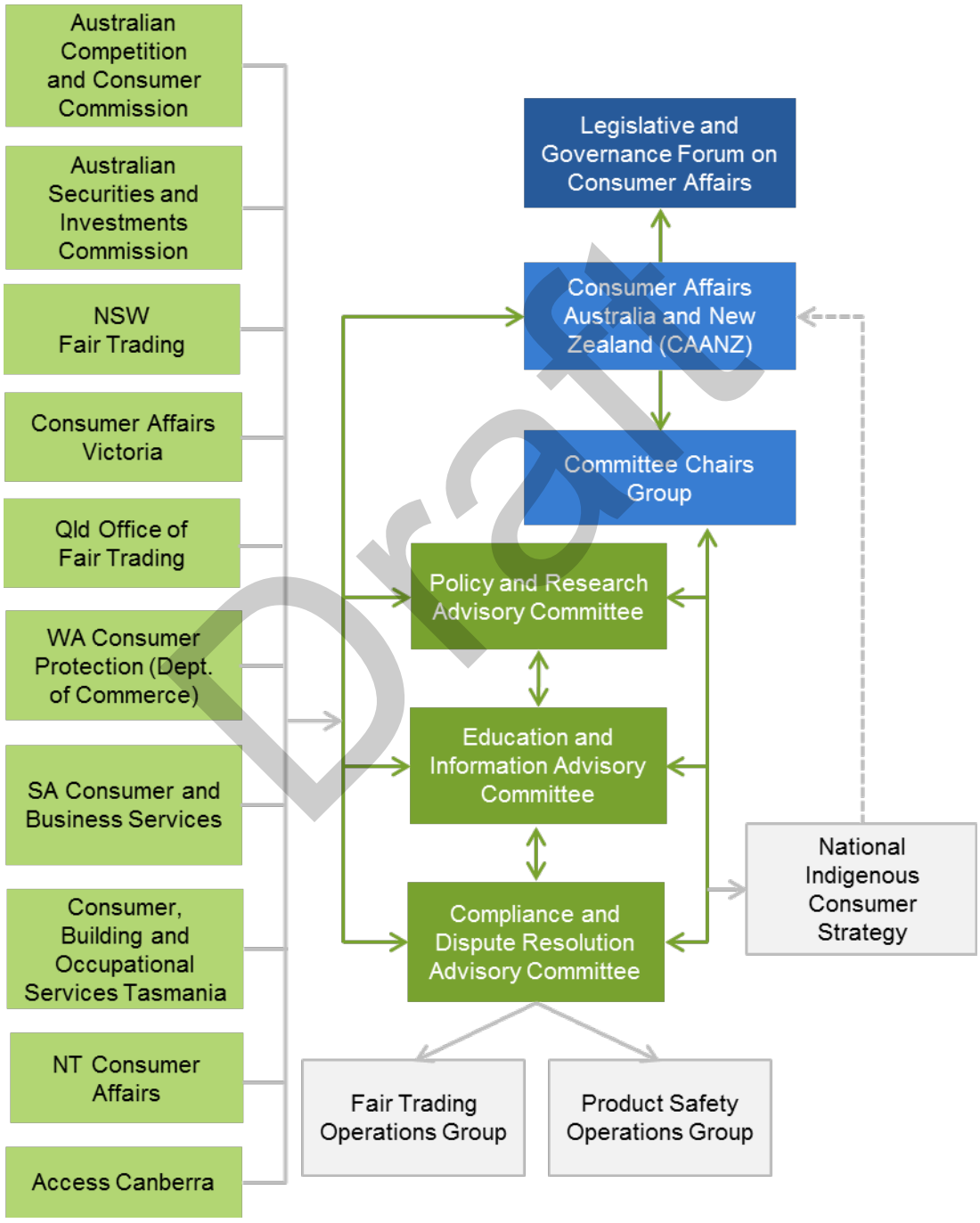
Three committees meet on a monthly basis to provide support to CAANZ:

- Policy and Research Advisory Committee (PRAC) develops common policy approaches to national consumer issues, and coordinates any amendments to the ACL.
- Education and Information Advisory Committee (EIAC) coordinates education and information activities and some more general consumer issues.

6 Formerly known as the Ministerial Council on Consumer Affairs (MCCA).

- CDRAC coordinates dispute resolution, compliance and enforcement activities. It is supported by a Fair Trading Operations Group (FTOG), which provides day-to-day liaison on enforcement issues.

Figure 2.3 **The architecture of the multiple-regulator model**



Source: Adapted from CAANZ (2016e).

Within these committees, a number of working groups, sub-committees and other ad hoc groups are formed to work on specific projects. For example, CDRAC has recently established a *Product Safety Operations Group* (PSOG) to replace the *Product Safety Consultative Committee*, which was disbanded at the end of 2014-15. The PSOG will provide advice to CDRAC on proposed consumer product safety compliance and monitoring activity, coordinate the delivery of national product safety projects and activities, and provide a forum for all member jurisdictions to collaborate on emerging product safety issues (CDRAC response 2016).

As noted, the ACL Regulators signed an MoU (box 2.2) which sets out a framework for communication, cooperation and coordination in the administration and enforcement of the ACL. To meet these obligations, ACL regulators have developed a series of plans and strategies, further discussed in chapter 3.

There are other mechanisms — outside the formal ACL architecture — through which regulatory agencies are able to discuss consumer law issues, such as the Federal Regulatory Agencies Group. The Small Business Commissioners — which are in several Australian jurisdictions — also regularly meet and may discuss issues relating to the ACL.

2.3 Specialist consumer protection regulation

As noted, the generic consumer protection regulation of the ACL is augmented by consumer regulations specific to particular products, markets or industries. These specialist regulations are often introduced if the risk of consumer detriment is high and/or the quality of the product or service is difficult to establish prior to purchase (PC 2008).

Specialist consumer regulation tends to be more prescriptive than the generic law. It may define a product's characteristics (such as electrical products or motor vehicles) or acceptable trader behaviour (for example, through occupational licensing).

Such regulations affect many consumer transactions, including everyday purchases such as food, purchases of financial services or utilities, the hiring of professionals such as real estate agents and tradesmen, and significant purchases such as buying a house or car.

Many specialist regulatory regimes are safety-related, such as those applying to electrical products and therapeutic goods, but there are also specialist regimes dealing with, for instance, products (such as some LED lights) that may cause electro-magnetic interference with digital television and radio reception.

A range of regulators administer and enforce the specialist legislation. They typically have specific experience and technical expertise relevant to the subject matter of their regulatory framework (although, in some cases, the specialist regulatory function and the ACL function are housed in the same body). The ACCC said that:

> Specialist regulators … administer regulatory frameworks that are specifically tailored to a category of risk or a particular industry. This allows specialist regulators to develop expert knowledge of the technical details of those risks and to develop strong relationships with those industries. That expert knowledge and strong relationships should enable them to respond effectively and efficiently to emerging issues in those industries or that relate to those categories of risk. (sub. 23, p. 21)

The institutional architectures that apply across specialist safety regimes vary significantly:

- some specialist regimes (for example, for new passenger motor vehicles) operate under a single national law, but in others there are separate state- and territory-based laws or state/territory-based variations on the national law (figure 2.4)
- some specialist regimes (such as for therapeutic goods) have a single specialist national regulator responsible for enforcement, but for other specialist regimes each state or territory has responsibility for the administration and enforcement of that regime
- in these latter cases, arrangements in states and territories vary. For example:
  - Victoria has established an independent regulator — Energy Safe Victoria — to oversee the design, construction and maintenance of electricity, gas and pipeline networks to ensuring gas and electrical appliances meet safety and energy efficiency standards. Most other jurisdictions have these responsibilities sitting within (or spread between) government departments
  - in Western Australia, New South Wales and the ACT, builder licensing, builder compliance and consumer protection sit within the one agency, whereas in Queensland builder licensing and compliance sit within the Building and Construction Commission and consumer protection sits within the Office of Fair Trading.

These variations may reflect the different nature of the products, services or activities being regulated and/or historical approaches to governance and institutional design, or different resource availability, in each jurisdiction.

Further, the enforcement powers of specialist regulators also differ. For example:

- there are differences in powers and remedies across the State and Territory electrical safety regulators (ACCC, sub. 23)
- currently, some specialist regulators have recall powers (such as the Therapeutic Goods Administration), while others do not (such as the Department of Infrastructure and Regional Development).[7]

In many cases, there is an overlap between the work of the specialist safety regimes and the ACL regulators. Chapter 5 further discusses the way that this is managed.

[7] Legislation is pending to allow the Minister for Infrastructure and Transport to issue recall notices.

Figure 2.4 **Some specialist consumer protection regimes**

2.4 Other elements of the consumer protection landscape

There are three other components that complete the consumer protection landscape: mechanisms for redress, consumer advocacy and consumer policy research.

Redress mechanisms

Consumers' access to redress is an important feature of Australia's consumer protection system. Australia has a well-established dispute resolution framework (CAANZ 2016b, p. 46), but this framework is complex and different institutions have responsibility for different parts of the system. The effectiveness of this system is discussed further in chapters 4 and 6.

In most cases — 87 per cent according to the 2016 CAANZ Australian Consumer Survey — a consumer will initially direct a complaint to the business concerned. Complaints are often successfully resolved through this informal route (84 per cent of resolved complaints in 2016 were settled in this way). Information on consumers' rights and responsibilities assists with resolution in this manner. According to CHOICE, 'the majority of … members are able to resolve their own issues once provided with additional information about the application of the law' (sub. 11, p. 18).

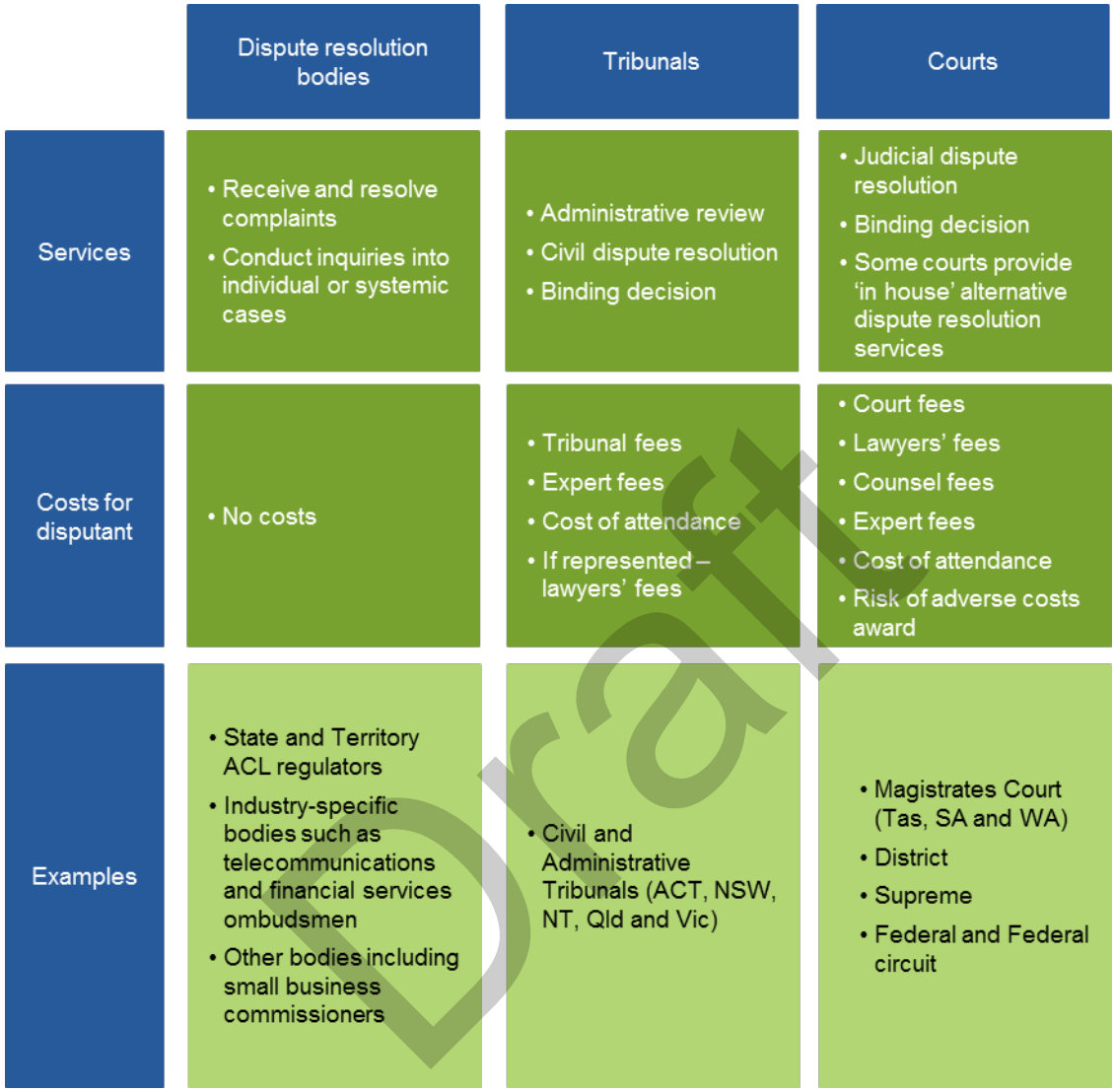
Where necessary, consumers can pursue further action to resolve their complaint, including through ombudsmen and other complaints bodies and tribunals and, if other means are unsuccessful, the court system (figure 2.5).

The ACL regulators and ombudsmen

For many consumers who have been unable to resolve a problem with a business, the ACL regulator in their state or territory provides a first point of contact for making a complaint.[8] The ability and willingness of a State and Territory ACL regulator to assist with a complaint varies across jurisdictions. However, at a minimum, they require that the consumer has already contacted the business, and that there is not an alternative organisation better suited to address the complaint.

[8] The Australian Consumer Survey 2016 indicates that the most common channel for making a complaint is through the State and Territory ACL regulators (46 per cent), followed by the ACCC (17 per cent) (CAANZ 2016c). As noted, the ACCC does not have redress mechanisms available to individual consumers. However, it does have scope to refer consumers in the right direction.

Figure 2.5 **Opportunities for consumer redress**



Source: Adapted from PC (2014a).

The tools the State and Territory ACL regulators draw upon to address complaints include contacting the business to seek consumer redress or for the business to cease non-compliant conduct, and informal or formal mediation with a business (CDRAC response 2016). The regulators are unable to compel businesses to participate in a conciliation process or to resolve a dispute.

CDRAC provided the Commission with some information on complaint outcomes. Although in some cases the data are incomplete and/or include some non-ACL matters (see chapter 3), the following illustrates dispute resolution activities in three States in 2015-16:

- Queensland Fair Trading[9] referred 889 complaints to another regulator or ADR service, resolved 7362 complaints through conciliation, was unable to resolve 1412 complaints through conciliation and had 884 complaints escalated to a tribunal.
- Consumer Affairs Victoria referred 132 complaints to another regulator or ADR service, resolved 3456 complaints via conciliation and had 1916 complaints unresolved via conciliation.
- Western Australia Consumer Protection referred 625 complaints to another regulator or ADR service, resolved 4999 complaints via conciliation and had 1930 complaints unresolved by conciliation (CDRAC response 2016).

Ombudsmen and other complaints bodies provide another avenue for dispute resolution. Ombudsmen are independent organisations, primarily with a complaint handling and investigation function. While they commonly draw upon their experience to facilitate dispute resolution between the parties, and to contribute to policy discussions and consultations, ombudsmen do not advocate for either side and they are not industry regulators (ANZOA, sub. to CAANZ, p. 2). Ombudsmen and other complaints bodies resolve close to 550 000 disputes each year, compared to around 1 million disputes resolved by tribunals and courts together (PC 2014a).

The two main forms of ombudsmen are called 'industry ombudsmen' (discussed further below) and government ombudsmen (which seek to resolve complaints with government agencies).

Dedicated industry ombudsmen resolve disputes in particular industries such as energy and water, telecommunications and financial services. Often the nature and structure of these industry ombudsmen reflect the historical reform process that has taken place in that industry. For example, there are six energy and water ombudsman in the Australian states and territories, while there is one telecommunications ombudsman which provides national coverage. Membership of an ASIC-approved external dispute resolution scheme is a licence condition for all financial firms that deal with retail clients. There are currently two approved schemes: the Financial Ombudsman Service and the Credit and Investments Ombudsman (Australian Government 2016b).[10]

Some industry ombudsmen have powers to make binding determinations (although very few complaints — around 1 per cent — actually reach the stage where a determination or binding decision is made) (PC 2014a).

9 Data relate to all complaints and do not distinguish between ACL related complaints and other matters.

10 The Financial Ombudsman Service hears complaints relating to services such as banking, credit, loans, life insurance, superannuation, financial planning, insurance broking, investments, and general insurance. The Credit and Investments Ombudsman hears complaints relating to services provided by organisations such as credit unions, building societies, non-bank lenders, mortgage and finance brokers and financial planners.

These arrangements are currently the subject of a separate review by an independent panel chaired by Professor Ian Ramsay — *Review of the financial system external dispute resolution and complaints framework*.

Other bodies can also help consumers resolve complaints or direct them to the best ADR mechanism. For example, the State and Territory small business commissioners can provide mediation services, while the Australian Small Business and Family Enterprise Ombudsman provides small businesses with advice on access to an appropriate low cost dispute resolution service (ASBFEO 2016).

Resolution of consumer disputes through the State and Territory ACL regulators and ombudsmen is further discussed in chapter 6.

Tribunals and courts

Consumers may also seek redress for a complaint through the tribunal or court system (figure 2.5).

The Commission found in 2014 that there were 54 tribunals in Australia, which collectively resolve around 395 000 disputes per year (PC 2014a). Compared to the formal court system, civil tribunals provide informal, low cost and timely avenues for resolving disputes. Tribunals make legally binding and enforceable decisions and decide on matters according to the law, as established through legislation and the superior courts. However, compared to the court system, tribunals are less formal, are mostly not bound by the legal rules of evidence, and do not always allow legal representation.

Tribunals often extensively use ADR techniques, and many operate under legislation that encourages this. Where matters are referred to mediation or conciliation, they are often resolved through conferences between the parties prior to formal hearings (PC 2014a).

The courts may also refer matters to ADR. Of the small proportion of civil disputes that make their way to the formal civil justice system, most are resolved — for a range of reasons — prior to the final judgment.

Unlike with ombudsmen and other complaints bodies, taking a dispute through the tribunal and court system can result in a cost to the consumer. Court and tribunal fees tend to differ across jurisdictions (chapter 4).

The performance of the courts and tribunals — and scope for their reform in the context of this study — is discussed in chapter 6.

Consumer policy research and advocacy

Consumer policy research enhances the information base on which policy is made. There are a number of organisations in Australia which undertake research, including the ACL regulators, advocacy groups, and university research centres.

There appears to be some scope for the CAANZ committees to undertake research themselves, as well as to contract out policy work to other organisations. For example, the

PRAC recently reviewed ACL penalties and remedies across jurisdictions (see chapter 4), while in December 2015, CAANZ commissioned researchers from the Queensland University of Technology to undertake a study of consumer policy frameworks in comparable countries.

Further, in 2014, the Commonwealth Government provided a $2.8 million grant over four years for CHOICE to undertake a mix of research, tailored information, education campaigns and advocacy to improve the experiences of consumers in the travel market (CHOICE 2014).

Consumer advocacy groups seek to inform and empower consumers and influence government policies affecting consumers. Advocacy activities can be undertaken by individual consumers, independent not-for-profit bodies, government-funded bodies and government agencies. Consumer advocacy groups may fit one of several categories:

- bodies with a general consumer policy and consumer advocacy focus (such as CHOICE, and the Consumers' Federation of Australia)
- bodies with a focus on a specific consumer concern, such as the Australian Communications Consumer Action Network or the Public Transport Users Association
- bodies that link their specific services to consumer advocacy (such as community legal centres and other advice services).

From time to time, the Government acts to support consumer advocacy. For example, the Australian Communications Consumer Action Network, which represents consumers in telecommunications, broadcasting, the internet and online services, is funded through a legislated charge on telecommunications carriers (ACCAN nd).

Resourcing of consumer policy research and advocacy is further discussed in chapter 6.

3 How is the ACL multiple-regulator model performing?

Key points

- 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.
- 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.
  - The multiple-regulator model allows for different approaches among jurisdictions to various aspects of their administration and enforcement of the ACL.
  - Some unintended and/or unwarranted differences are likely to arise, but it is unclear whether these inconsistencies lead to materially different outcomes for consumers or businesses across jurisdictions.
- 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.
  - There is likely to be some variability between the regulators in the extent and manner in which risk-based compliance and enforcement are implemented in practice.
  - Some regulators have been criticised for undertaking insufficient enforcement. Limited resources may partly explain this.

The terms of reference ask the Commission to examine the effectiveness of the multiple-regulator model in supporting a single consumer protection framework. They also specify that the Commission should assess existing mechanisms for improving the coordination, consistency of approach and collaboration between ACL regulators having regard to the Memorandum of Understanding (MoU) agreed by the regulators in June-July 2010.[11]

As foreshadowed in chapter 1, the Commission's assessment of the multiple-regulator model in this chapter takes the model as a given and examines how it is operating against the benchmark of how such a model might ideally operate.

[11] Part 4 of the MoU sets out intended approaches to matters including communication, cooperation and coordination; complaint handling; information sharing; compliance and enforcement; and product safety.

The approach focusses on the operation of the multiple-regulator model *as a system* for administering and enforcing the ACL, and as such does not seek to assess whether individual regulators are operating as effectively as they might, or the adequacy of consumer protection provided under the ACL. Further, concerns over deficiencies in the ACL itself are currently being examined in the parallel Consumer Affairs Australia and New Zealand (CAANZ) review of the ACL.

The assessment in this chapter is set out as follows:

- section 3.1 is an overview of the operation of the multiple-regulator arrangements to date, drawing in particular on high-level information provided by ACL regulators and the views of study participants
- section 3.2 takes a more detailed look at the consistency of ACL regulators' approaches and activities, drawing on participants' views and evidence where available
- section 3.3 examines whether ACL regulators are adopting a risk-based approach to compliance and enforcement, drawing mainly on a survey of the ACL regulators.

These sections each look across a range of matters covered in the 2010 MoU and in related documents, including the regulators' *Compliance and Enforcement* guide (see below).

The assessment of the multiple-regulator model also draws on the material discussed in chapter 2 on the regulatory landscape, and the analysis of specific areas for potential strengthening of the multiple-regulator model that follows in chapter 4.

3.1 Overview of the operation of the multiple-regulator model

The ACL regulators' reported progress

The ACL regulators have compiled a series of reports that document steps they have taken to implement the ACL and initiatives to improve its operation. An initial report was released in June 2011 (six months after the ACL commenced). Subsequent reports have been published annually, between November and February, detailing activities during the preceding financial year.

These implementation reports typically run to about 40 pages and contain a range of summary data and case studies on the activities of the ACL regulators. The matters reported on include:

- research on changes to the ACL, such as the extension of the ACL to provide unfair contract-term protection to small businesses
- joint information and education initiatives, including developing campaigns on particular issues such as online shopping

- compliance and dispute resolution activity, including progress on national compliance projects, a summary of enforcement outcomes for the year and examples of particular enforcement actions
- joint initiatives on product safety, including the progress of national recalls.

The implementation reports demonstrate that the ACL regulators have developed several mechanisms for facilitating interaction and cooperation between them. The presence of robust mechanisms, while not guaranteeing the effectiveness of the multiple-regulator model, is necessary to ensure effective regulator interaction.

Joint processes, plans, publications and projects

The formal interaction processes adopted pursuant to the MoU include regular monthly meetings of ACL regulator officials, in the form of several specialist advisory committees. Within these committees, a number of working groups, sub-committees and other ad hoc groups are formed to work on specific projects. These processes feed into meetings of senior CAANZ officials and, ultimately, a ministerial-level forum. The architecture of these formal mechanisms is detailed in chapter 2 (and illustrated in figure 2.3, reproduced as figure 3.1 below).

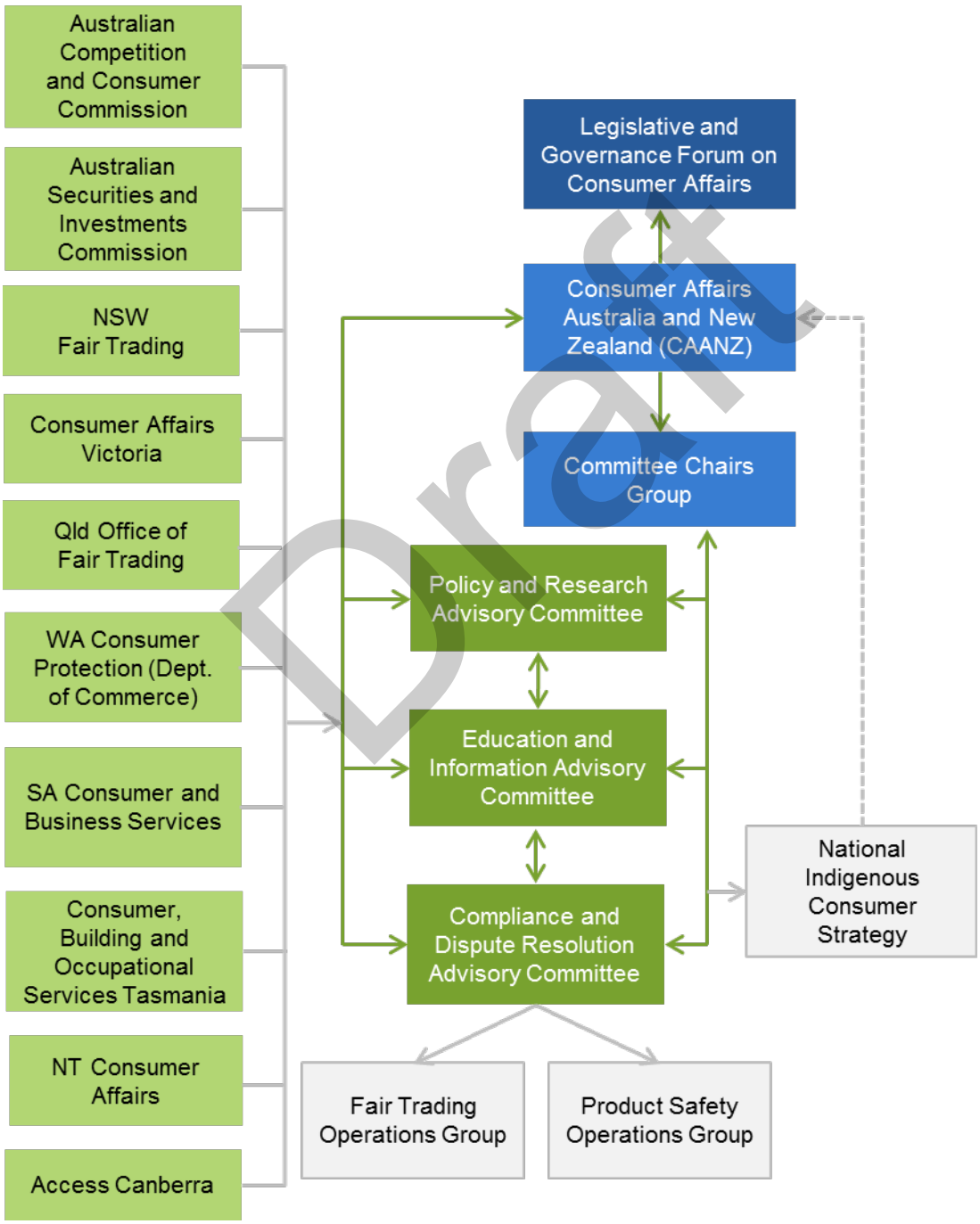
Through these mechanisms, the ACL regulators have developed a series of regulatory plans and strategies, and instituted measures to improve cross-agency collaboration, coordination and consistency. These actions include:

- publishing a *Compliance and enforcement* guide that explains how the ACL regulators have agreed to act together and individually to achieve compliance with the ACL
- issuing other regulatory guidance material on the operation of the ACL for businesses and consumers. This includes the *Avoiding unfair business practices* guide; the *Consumer guarantees* guide; the *Product safety* guide; the *Sales practices* guide; and the *Unfair contract terms* guide
- developing websites, phone apps and other educational materials for use in all jurisdictions to assist consumers and businesses understand their rights and responsibilities under the ACL
- agreeing on a lead agency approach for compliance and enforcement actions that affect multiple jurisdictions
- developing a crisis management protocol with common procedures for dealing with issues that an ACL regulator considers may warrant an urgent national response
- establishing the 'Australian Consumer Law Intelligence Network Knowledge' (ACLink) system, which is a secure IT platform that allows regulators to post alerts, share information and intelligence, and submit information requests to other regulators.

The ACL regulators also collaborate through 'national compliance projects', in which particular issues (deemed by ACL regulators to be of particular importance) are analysed

to better inform the regulators' approach to administration and enforcement, or to provide education and guidance to consumers and/or businesses. Some recent examples of these projects are summarised in box 3.1, along with some other cooperative undertakings by the ACL regulators.

Figure 3.1 **The architecture of the multiple-regulator model**



Source: Adapted from CAANZ (2016e).

Box 3.1 Case studies of ACL regulators' cooperative activities

The annual ACL implementation reports document progress on cooperative activities. Recent examples of cooperation to address systemic issues include the following.

- *Training Providers:* NSW Fair Trading led a project which identified conduct issues among training providers, including misleading vulnerable consumers into signing up for courses funded by loans through the VET FEE-HELP scheme. This led to a series of investigations by the ACCC, in conjunction with other agencies, including NSW Fair Trading. ACL regulators have also developed education campaigns to help consumers make informed choices or inform them of their options for redress if they have been misled.
- *Credit Card Chargebacks:* Consumer Affairs Victoria led a project to increase regulators' understanding of chargebacks and how it could be used to address disputes. Two factsheets and a 'useful links' document were developed for internal regulator use to assist in providing information to consumers. As a result of the project, complaint handling procedures were changed, with advice being proactively provided to consumers to assist them to seek chargebacks without having to contact an ACL regulator first.
- *Real Estate Agent Services:* NSW Fair Trading led a research project to identify the key regulatory issues for the real estate agency sector at a national level. As part of the project regulators shared lessons learned, experiences and best practice models. As a result, a pilot national real estate regulators group will be established.
- *Travel and Accommodation:* The Queensland Office of Fair Trading led a project examining conduct and trends in the travel industry, including determining the effects of closure of the Travel Compensation Fund. National data analysis identified no obvious systemic issues detrimental to consumers, so targeted compliance activities were not considered necessary, although the Compliance and Dispute Resolution Advisory Committee (CDRAC) supported the ongoing monitoring and sharing of information about the industry by all ACL regulators. As part of the project, CAANZ funded CHOICE to undertake some travel industry analysis.
- *Toppling furniture:* The ACCC reviewed the hazard to children of falling furniture and determined that increased consumer awareness was necessary. Subsequently, ACL regulators worked together — through the Education and Information Advisory Committee — to improve industry practices and awareness.

The ACL regulators (CDRAC response 2016) have also pointed to several cases where actions have been pursued against particular individuals or companies operating in multiple jurisdictions. These include the regulators' responses to:

- a discount variety good importer and retail chain operator with 27 outlets across the eastern seaboard selling products not compliant with mandatory product safety standards. Following a joint compliance operation with the Queensland and New South Wales ACL regulators, Consumer Affairs Victoria has taken action in the Federal Court
- an online electronic goods retailer who is reported to have not supplied goods, or goods have been of poor quality or unsuitable for the Australian market. NSW Fair Trading has engaged with the business to resolve consumers' complaints and is monitoring the business on behalf of all ACL regulators
- an individual telling prospective property purchasers that they can buy a property using little or none of their own money. The ACCC has taken action in the Federal Court drawing on work from the New South Wales and Western Australian ACL regulators (and a delegation from ASIC to launch proceedings under the ASIC Act).

Sources: CAANZ (2016e); CDRAC response (2016).

Regulators see the level of coordination as a strength

The ACL regulators' reported activities — including the development of various documents and procedures and the completion of joint projects in identified problem areas — suggest that the regulators have taken several steps to adopt or maintain various high level 'good regulatory practices' and to put in place robust mechanisms to collaborate and coordinate with each other. This is also a view expressed by the regulators themselves:

> … the national consumer policy framework has facilitated regulator communication and cooperation between regulators in the areas of policy and research, education and information, and compliance and dispute resolution. These arrangements have given rise to an unprecedented level of coordination between consumer regulators, as highlighted in the annual ACL progress reports. (CAANZ 2016b, p. 5)

Study participants' views

A range of study participants — including consumer organisations, law bodies and some business groups, as well as the ACL regulators — have provided broad comments on the operation of the multiple-regulator model. The Commission has obtained views through direct consultations, and in submissions to both this study and the concurrent CAANZ review of the ACL.

Obstacles to forming a view

External observers can find it difficult to form a clear and comprehensive view on the administration and enforcement of the ACL, a point noted by both the Law Council and the Consumer Action Law Centre (Consumer Action). Consumer Action said that the ACL implementation reports do not appear to be comprehensive and that the internal processes of the ACL regulators, for example in determining what matters become 'national projects' and how priorities are set, are opaque to outsiders. It was also critical of the (limited) data that a number of ACL regulators publish on their activities, stating:

> … a lack of easily available and consistently reported enforcement data makes thorough assessment of regulators difficult. (sub. 10, p. 2)

In addition to data and information deficiencies that make it difficult for external parties to assess regulator performance, it can also be difficult for external parties to accurately identify whether consumer protection regulation concerns can be attributed to the influence of the multiple-regulator model or some other cause, such as a deficiency with the law itself or the resourcing level provided to the regulators operating under the model.

Many support the view that the model is working quite well

A range of participants indicated that the multiple-regulator model is working reasonably effectively or, at least, that the steps taken have reduced problems that might have otherwise arisen, given the nature of the model. For example, both CHOICE (sub. 11, p. 4)

and the Consumers' Federation of Australia (sub. 19, p. 1) commented that the ACL is largely being enforced well. Some industry organisations were also positive about the model. The Australian Dental Industry Association submitted that:

> … the dental industry is fully supportive of the benefits associated with the 'single law – multiple regulator' model for general consumer protection in Australia. In providing a degree of nationwide consistency, this approach has helped industry both understand and meet its compliance obligations. (sub. 30, p. 3)

And the Federal Chamber of Automotive Industries (FCAI), while considering that the multiple-regulator model is still bedding down, said:

> Australian industry and consumers need a uniform national consumer law and the adoption of the ACL by the States and Territories has certainly assisted in that respect. As the ACL continues to bed down, industry, consumers and all levels of government will be better positioned to implement the law in a consistent manner. In effect the law has only been in operation for around six years at this point, so it would be expected that the application and agreed understanding of the law is still evolving. Further, it should be acknowledged that even with a template approach outcomes will differ due to the unique circumstances in similar matters. Overall the FCAI is of the view that the current model is appropriate. (sub. 25, p. 1)

There are also concerns

At the same time, no participant thought that the multiple-regulator model was working flawlessly or could not be improved.

Several participants raised concerns about differences among the approaches of ACL regulators. For example, Consumer Action said:

> While Consumer Action remains broadly supportive of the multi-regulator model, we do see a significant distinction between the national and state based regulators — state based regulators are generally less proactive in enforcing the ACL, report less useful enforcement data and make less use of the media to publicise their actions. (sub. 10, pp. 1–2)

The Law Council of Australia (SME Committee) submitted:

> … there appears to be a considerable difference between the way the various ACL Regulators operate in terms of identifying their priority areas, communicating these priorities to businesses and consumers and ultimately their respective enforcement strategies. …
>
> SME Committee members are also aware of some evidence of better coordination in relation to particular matters, for example the recent joint activities between the ACCC and the NSW Office of Fair Trading in relation to vocational training colleges and the ACCC and Department of Justice in relation to express warranties. However, such joint activity appears to be more the exception than the rule. (sub. 8, pp. 1–2)

The Retail Council stated:

> Our members report that there are differences between these agencies in terms of the advice provided to consumers, how investigations are conducted and how matters are resolved. (sub. 3, p. 2)

And the Australian Toy Association commented:

> Although it was a huge improvement to consolidate the responsibility for making regulation to the ACCC, the enforcement is still split between the ACCC and the different State Regulators. Each is able to make an interpretation of a regulation and this leads to more opportunities to get it wrong. Once an interpretation has been made, it has proven to be impossible to get it adjusted. (sub. to CAANZ, p. 5)

Concerns have often been raised about the handling of product safety incidents although, in many of the cases, they have involved interaction with specialist safety regulators. As such, the concerns are not necessarily attributable to the multiple-regulator model (box 3.2).

Box 3.2 Many concerns have been about product safety

Study participants have often made reference to examples of consumer safety issues related to a limited range of products, namely, hoverboards, Infinity cables, Samsung washing machines and non-conforming building products. These concerns have typically involved problems with interaction, such as inconsistent approaches between jurisdictions and unnecessary delays in developing coordinated approaches.

For example, the Retail Council noted that:

> The hoverboards situation that emerged in early 2016 is a good case study of the impact of regulators responding out of synch with each other. Hoverboards were a popular purchase for Christmas 2015 but only a few weeks later a number of house fires occurred which were linked with the recharging of hoverboards. Rather than using a national approach, states and territories reacted to these events at different paces which resulted in different rules for sales in different states and territories. For example, Victoria's electrical safety regulator issued a public warning on Jan 5 2016 and some specific hoverboards were recalled. In contrast a national ACCC-led interim ban on hoverboards that did not meet certain safety standards was not introduced until March 2016. This regulatory inconsistency, combined with extensive media coverage about the dangers of the hoverboards, created confusion amongst customers and retailers about the safety status of hoverboards. (sub. 3, pp. 1–2)

Another example is the recall of Samsung washing machines, about which CHOICE submitted:

> The Samsung washing machine recall has been confusing for consumers, with the end result being that after several years there are still tens of thousands of potentially dangerous washing machines in Australian consumers' homes and fires are continuing to damage homes. …
>
> The number of regulators involved in the Samsung recall heightened the risk of consumer confusion and consumer detriment. In the example above, multiple regulators were involved at different points during the recall, but not in a complementary way. Conflicting advice was given. Having a single regulator with ultimate responsibility for managing product safety recalls and communicating with the public about these would reduce the risk of conflicting advice being given to consumers. If the ACCC were responsible for this, it would also increase the likelihood that information about recalls will reach a wider audience. (sub. 11, pp. 14–15)

However, participants have also noted that problems have not necessarily been due to the ACL multiple-regulator model, but the interaction with other specialist product safety regulators. For example, Nottage (a legal academic) said that:

> The cooperation between the ACCC and state/territory regulators seems to be working quite well. …
>
> The biggest problem however is the (lack of) coordination between the consumer regulators and the 'specialist' regulators. (sub. 18, p. 3)

On a different point, Cousins (a former ACCC Commissioner and former director of Consumer Affairs Victoria) raised concerns about the impact of institutional structures on the operation of the State and Territory ACL regulators:

> The State/Territory agencies form parts of bigger departments. They are headed by Commissioners in some cases and Directors in others. They have restricted independence in resourcing and often in their operational decision making. Departmental heads have varying influence and ultimately the Minister can enforce control. This is not the best structure for undertaking enforcement work. (sub. 20, p. 2)

In its submission, the Queensland Law Society recognised that there has been progress under the multiple-regulator model while further improvement is possible. The Society said:

> The Queensland Law Society (the Society) is aware of the high level reforms documented in the ACL implementation progress reports. Anecdotally the Society is aware that these reforms have led to improvements in the on the ground administration, compliance and enforcement of the ACL by its multiple regulators.
>
> However, the Society recognises that there is still room to continue to improve the existing coordination between the multiple regulators of the ACL to ensure there is no duplication of roles between the regulators. (sub. 4, p. 1)

The Commission's preliminary view

While it is difficult for external observers to gauge the effectiveness of ACL regulators' activities and interactions, it is clear that they have taken several steps to make the multiple-regulator model work effectively. The ACL regulators themselves see the level of coordination as 'unprecedented'.

At the same time, some study participants have identified areas of deficiency and/or possible improvement within the model. Several of these are examined in the following sections and in chapter 4, and, to foreshadow their findings, the Commission agrees that there is scope to improve some aspects to enhance the operation of the model. There are also questions about the level of resources that governments provide for administering and enforcing the ACL, although hard evidence on this matter, as with several others, is limited.

At this stage, and recognising the limits on the available evidence, 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.

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.

3.2 Consistency in administration and enforcement

The degree of consistency between ACL regulators in their approaches to administering and enforcing the ACL is an important indicator of the success of the multiple-regulator model in supporting a single consumer protection framework. Of course, there would be some scope for inconsistency in administration and enforcement even if there were a single national regulator, as almost inevitably cultures and approaches in 'branch offices' would diverge at the margin. However, having 10 independent regulators across two levels of government substantially amplifies the potential for inconsistency.

Before examining the available evidence of the extent of inconsistency attributable to the multiple-regulator model, it should be recognised that:

- having 'different' approaches is not the same as having 'inconsistent' approaches
- the different roles of the regulators will warrant different approaches in some cases, most obviously the Australian Competition and Consumer Commission (ACCC) focuses on systemic issues of national importance, which may necessitate a different approach compared to the State and Territory ACL regulators
- there may be genuine reasons for differences in approaches or activities across the State and Territory regulators, including where there are differences across jurisdictions in:
  - demographics (such as population density and concentrations of vulnerable consumers), which could result in different regulatory priorities or necessitate the use of a different approach or mix of regulatory activities
  - fiscal or economic conditions, which might affect the resourcing priorities of State and Territory governments
  - the regulatory instruments available to State and Territory governments that may be used to complement or substitute for action under the ACL[12]
  - the procedures and administration rules of the broader justice system
- not all instances of potentially *inappropriate* differences in the administration of the ACL can be attributed to a failure of the multiple-regulator model (box 3.3).

To assess whether there are inconsistencies that represent failings of the multiple-regulator model, the Commission has examined participants' concerns and probed for other evidence that might indicate whether, and if so to what extent, there are unintended or unwarranted differences across the ACL regulators.

[12] As discussed in chapter 2, CDRAC has provided the Commission with a number of examples where the ACL has been used instead of industry-specific regulations.

Box 3.3 Not all potential inconsistency is attributable to the multiple-regulator model

Some concerns about inconsistency raised by participants could arise under a single-regulator model as much as a multiple-regulator model, depending on the approach adopted by the relevant regulator(s).

For instance, some participants expressed concern that small businesses, whilst still consumers, are treated differently to individual consumers.

- The Small Business and Family Enterprise Ombudsman commented that 'small businesses suffer from many of the same practical obstacles in taking private action as individual consumers', but that currently the State and Territory ACL regulators 'tend to be more focused on redress for individual consumers' (sub. 21, p. 1).
- The Western Australian Small Business Development Corporation (SBDC) similarly noted that 'small business consumers are generally not entitled to assistance from the Department of Commerce on an individual basis for disputes under the ACL' (sub. 27, p. 2). The SBDC also noted that there was a 'grey area' around the provision of assistance to private landlords in dispute with suppliers, as these 'consumers' are considered a business by the Department of Commerce (the Western Australian ACL regulator), but are not considered a small business by the SBDC (and therefore unable to potentially utilise the SBDC's alternative dispute resolution services).

While such matters are of concern to these stakeholders and may warrant attention, they cannot properly be attributed to the multiple-regulator model.

Study participants pointed to several potential inconsistencies

Study participants expressed concerns that there could be some inconsistencies between ACL regulators in the way they approach or undertake some functions. 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 enforcement priorities and patterns and levels of enforcement activity. Most of the concerns seem to relate mainly to differences among the State and Territory regulators.

For businesses, the concerns revolve around differences in approaches and interpretations by ACL regulators that could increase the costs of doing business across different States and Territories. This could be because businesses need to adopt different approaches to compliance, regulator interaction and dispute resolution depending on which jurisdiction their customer is in.

As noted in section 3.1, the Retail Council identified differences in approaches of ACL regulators in different States and Territories as a concern. It elaborated that:

> Our members report that consumers can get different advice for the same failure or issue depending on the state-body they speak to. This means customer concerns take longer to resolve than is needed because the customer can start the process with unrealistic expectations

about the remedy they will be offered. It also undermines the operation of the ACL itself which should treat all consumers and retailers the same no matter where they reside or operate.

The undertaking of investigations is also variable between states. Retail Council members report that the level of information provided by some state bodies when investigating matters is excellent but in other states it is not sufficient to quickly respond to customer concerns and resolve the issue. (sub. 3, p. 2)

As noted earlier, the Law Council of Australia (SME Committee) noted that there appeared to be differences in ACL regulators' enforcement strategies, including how they identify and communicate their priority areas. It also commented:

… it is difficult to discern how the ACL Regulators are working together to remove inconsistencies, gaps and overlaps in ACL enforcement. SME Committee members are aware of situations where different ACL Regulators have taken quite different approaches to the same issue, particularly in relation to electrical safety standards and product safety. (sub. 8, p. 2)

Consumer organisations have also raised concerns about the consistency of the ACL regulators' approaches (although these are often coupled with concerns about the magnitude of activity, and other elements of the consumer protection system, as well). For consumers, inconsistencies in approaches can create uncertainty about their rights and obligations, and differences in access to redress mechanisms, potentially advantaging or disadvantaging consumers in some jurisdictions relative to others. CHOICE submitted that:

… the actual experience of individual consumers across Australia can differ depending on the State or Territory that they live in. Consumers attempting to enforce the law themselves by taking disputes to Tribunals may pay higher fees if they live in one State or Territory instead of another. Two consumers residing in different States or Territories who approach their local ACL regulators with the same complaint may be given different and conflicting advice, or one may be redirected to another body while the other is assisted immediately. One of the great benefits of the ACL is that it is a nationally consistent law, but the experiences of consumers in seeking enforcement of that law are not consistent. (sub. 11, p. 4)

Concerns about inconsistency in the way dispute resolution is conducted across the States and Territories were also raised.[13] For example, Consumer Action submitted:

Our observation is that dispute resolution activities can be highly variable between regulators, and change in importance for particular agencies over time. (sub. 10, p. 13)

[13] This is a concern about the specific activities of the State and Territory ACL regulators because the national ACL regulators do not resolve individual complaints. The ACCC does accept complaints from consumers, which form part of its intelligence gathering for its enforcement activities, but it does not engage in individual dispute resolution, conciliation or mediation. Similarly, while ASIC does not conciliate disputes between consumers and financial service providers, financial service providers that deal with retail clients are required, as part of their licensing conditions, to be members of an external dispute resolution scheme that resolves disputes between consumers and members (these schemes subsequently provide reports back to ASIC about their complaint handling, including where they have identified potentially systemic issues).

Supporting evidence of inconsistency in regulators' approaches

The Commission has probed for other evidence on the presence of inconsistencies across regulators' administration and enforcement of the ACL. However, available evidence is limited, and even where it points to some difference in approach or activity, it is often difficult to identify whether this represents an inconsistency that could lead to materially-different outcomes for consumers or businesses across jurisdictions.

Resourcing and its impacts on ACL activities including enforcement

Disproportionate levels of resources across jurisdictions devoted to administering and enforcing the ACL could point to the potential for inconsistent approaches.

A number of participants — such as Consumer Action (sub. 10) and the Law Council of Australia (sub. 8) — raised concerns over the resourcing of the regulators, particularly the State and Territory regulators. These concerns have often been in the context of the regulators undertaking insufficient enforcement activity. The regulators themselves have also stated that resource availability limits their enforcement activity (see section 3.3, below).

There is also a more general concern that State or Territory ACL regulators have had their resourcing substantially reduced since the introduction of the single-law, multiple-regulator model, thereby reducing their ACL-related activities more generally. For example, Cousins submitted:

> In recent years State/Territory agencies have been greatly weakened by broader moves within their governments to change the approach to service delivery and the way departments and their agencies are organised. Functions previously undertaken by these agencies have been shifted into their respective departments and their resources have often been diminished. (sub. 20, p. 2)

However, across-the-board resource constraints are not the main issue in terms of consistency (although limitations on resources could diminish the ability of regulators to attend meetings and engage in cooperative and collaborative activities).

Rather, the key question from a consistency angle is whether there are substantially disproportionate resourcing levels across regulators, leading to different levels of consumer protection across jurisdictions.

While the Commission has heard that some State or Territory ACL regulators are particularly affected by resource constraints, little useful information is publicly available on the resources allocated to administering and enforcing the ACL at the state and territory level. The Commission wrote to CDRAC requesting data on the regulators' resourcing levels for ACL matters. CDRAC responded:

> Consumer law regulators are generally unable to provide financial data that accurately calculates resourcing for ACL related responsibilities. The following issues should be noted:
>
> - Each regulator has a diverse range of responsibilities and the ACL is only part of those responsibilities.

- ACL regulators do not have exclusive dedicated ACL resources.
- ACL activities are undertaken by a range of teams, both within and outside consumer law regulators' structures. This includes functions relating to licensing, dispute resolution, investigation, education, policy, human resources, corporate services, legal services, payroll etc some of which are not located within an agency.
- ACL regulators are funded differently.
- Resourcing and allocation are heavily influenced by government priorities, machinery of government, and electoral cycles.
- There are significant resource implications if regulators were to estimate and the information provided could not be certified as being accurate. (CDRAC response 2016, p. 12)

Hence, while there may be disparities in resourcing that could contribute to inconsistent ACL outcomes across jurisdictions, the Commission has been unable to verify this.

Other indicators of inconsistencies in compliance and enforcement

The Commission has also attempted to probe for other signs of inconsistency by looking for evidence of variability in the activity, or 'outputs', of the ACL regulators, including in relation to compliance and enforcement.

The propensity of the State and Territory ACL regulators to use higher level enforcement actions, such as prosecutions, is explored in section 3.3.

As discussed in that section, comparable data is not readily available. The Commission sought better data on the enforcement activity of each of the regulators as part of its information request to CDRAC, but it was not forthcoming. CDRAC noted that, for several reasons, it 'considers the aggregated national enforcement outcomes are a better measure of ACL enforcement outcomes than disaggregated jurisdictional outcomes' (CDRAC response 2016, p. 4). These reasons centred on the collaborative aspects of the regulators' activity, including, for example, regulators' combined efforts under the lead regulator approach, which would not be accurately reflected in disaggregated statistics (see section 3.3).

Nonetheless, it appears that the larger regulators (the national regulators and those from the more populous states) undertake more high-level enforcement actions and tend to have a more sophisticated approach to risk assessment than their smaller counterparts.

While there may be some valid reasons for such differences, they would still raise questions as to whether businesses and consumers in different jurisdictions face or enjoy different levels of consumer protection.

Indicators of inconsistency in enquiry and complaint handling

Another area where data limitations have restricted attempts to compare ACL regulators' activities is in enquiry and complaint handling. Most State and Territory ACL regulators publish some data on these matters on their websites or in annual reports, but the measures vary across jurisdictions and the data are difficult to compare. The Commission's information request to CDRAC sought the relevant statistics for each jurisdiction. CDRAC provided some data (table 3.1), but the data supplied was not comprehensive and was heavily qualified.

Taken at face value, the data provided by CDRAC suggests at a minimum that there are differences in the volume of enquiries and complaints handled between States and Territories beyond that explained by differences in population — for instance, it appears that the New South Wales regulator receives proportionately more complaints than the regulators in Victoria or many of the smaller jurisdictions.

However, there are several reasons for caution in interpreting the data in table 3.1.

- The regulators do not report in a consistent manner the number of contacts and complaints received, nor how they are dealt with.
- ACL matters comprise only a subset of the activities of the State and Territory regulators and the reported measures are often not split between ACL and other matters.
- Some regulators are unable to report on all enquiries because they are addressed by whole-of-government call centres without referral to the ACL regulator.

Table 3.1 **Enquiry and complaint activity by State and Territory ACL regulators, 2015-16[a]**

	Contacts	*Total complaints*	*Total enquiries*	*ACL related complaints*	*ACL related enquiries*
ACT		274	6 395	181	unknown
NSW	7 799 047	51 221		unknown	unknown
NT	17 137			229	unknown
QLD	174 479	14 505	69 185	unknown	unknown
SA		4 866	40 835	unknown	unknown
TAS	12 114	193	11 921	61	2 439
VIC	349 985			11 272	73 952
WA		11 711		8 411	

a Each regulator also provided a number of qualifications on the reported statistics.'Contacts' for NSW include website sessions, app downloads and social media reach.

Source: CDRAC response (2016), table 2, p. 9.

With little robust data, the Commission also scanned for other indicators of inconsistency in relation to enquiries and complaint handling. It found some minor points of difference, including in relation to:

- the way complaints can be lodged, and the information on associated processes and outcomes, on the State and Territory ACL regulators' websites. For example, the prominence given to lodging complaints on the regulators' home pages varies. [14]
- the powers available for regulators to resolve disputes. Specifically, in South Australia, the Commissioner for Consumer Affairs can order a compulsory conference (although the parties are still not bound to reach an agreement).[15] However, the dispute resolution services offered by most ACL regulators are such that the regulator cannot compel participation and cannot make binding determinations.

In addition, the 2016 Australian consumer survey (discussed below) points to differences in approaches between the States and Territories in relation to enquiry and complaint handling.

The 2016 Australian consumer survey

The 2016 CAANZ Australian consumer survey provides an alternative source of evidence on potential differences in the approaches of ACL regulators across jurisdictions, although, as the survey report itself notes, there are some limitations to the survey data. (These include the representativeness of the sample and difficulty in establishing whether there is a non-response bias.) In some areas — such as general awareness of consumer protection laws — the survey reports relatively consistent results across all States and Territories. In some other areas, the survey results suggest differences.

In response to questions about consumers' perceptions of the ACL, the survey report noted:

> Respondents in New South Wales were more likely to agree that the government provides adequate access to dispute resolution services whilst respondents in Victoria are less likely to agree that the government provides adequate information and advice to consumers about their rights. (CAANZ 2016c, p. 27)

In comparing the survey results with the previous survey in 2011, Victoria was identified as a key source of an overall decrease in consumer awareness of dispute resolution services offered by State and Territory ACL regulators (44 per cent of respondents nationwide were aware of the service, down from 47 per cent in 2011), with the report noting:

[14] To illustrate, NSW Fair Trading has a prominent link to its 'Lodge a complaint' page in the centre of its home page, and from the Lodge a complaint page, a complainant can then select to submit their complaint via an online form or download the form and submit by mail. In contrast, from Access Canberra's homepage, a potential complainant must click through several links to a page that provides information on making a complaint, and from here, download a complaint form via a hyperlink embedded in the text.

[15] Traders that fail to attend a compulsory conference can be prosecuted, with the maximum penalty for the offence either $5000 or $10 000 (and an expiation, or infringement, notice of $315), depending on the size of the claim.

> Awareness of these services has decreased since 2011 (down 3 percentage points) and this decrease is predominantly driven by a decrease in Victoria (down 6 percentage points). (CAANZ 2016c, p. 36)

Businesses were also surveyed and, again, there were some reported differences in the experiences of businesses in different jurisdictions. Businesses were surveyed about their awareness of dispute resolution services, with the proportion indicating that they were aware of these services varying to a limited extent, from 56 per cent in South Australia up to 70 per cent in New South Wales. More striking is that, of those businesses that said they were aware of the dispute resolution role of ACL regulators, there was considerable variation in the proportion of businesses that had actually been involved in the process:

> Business respondents in New South Wales are more likely to have participated in the services (43%) while those in Victoria (20%) and South Australia (14%) were less likely to have participated in these services. (CAANZ 2016c, p. 76)

Overall, the survey results are suggestive of some differences in the approaches of regulators in different jurisdictions. In particular, they support the impression drawn from complaint handling statistics that there appears to be a higher level of activity and awareness in New South Wales.

Some inconsistency seems probable

As noted in chapter 2 and section 3.1, the ACL regulators have well-developed governance arrangements and mechanisms that appear to facilitate a high degree of communication, coordination and collaboration.

Nevertheless, information from participants together with other evidence, albeit limited, indicates potential inconsistencies in the administration and enforcement of the ACL. There appears to be scope for differences in particular in the activities of the State and Territory regulators, including in their provision of advice and guidance, conciliation of consumer disputes and the quantity and mix of compliance and enforcement activities.

While some differences may be warranted, it seems probable that some unintended or unwarranted differences will arise from time to time.

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.

How large is the problem?

The Commission has not been able to meaningfully assess the extent of inconsistencies in the approaches of the ACL regulators.

There is not much robust data available and although a number of submissions have raised issues of inconsistency, the comments and examples provided have generally not been very specific, particularly on the materiality of the impacts on consumers or businesses from the potential inconsistencies.

Further, it is notable that the Commission, aside from comments from the Retail Council, has not heard many concerns about inconsistencies from those business stakeholders — particularly national retailers and peak business organisations — who might otherwise have been expected to be among those most affected by across-jurisdiction inconsistencies. This could be interpreted as suggesting that any inconsistencies in ACL administration and enforcement, from a business viewpoint at least, are not overly material.

While inconsistency across jurisdictions can also affect consumers, it can be seen as both advantaging some consumers while disadvantaging others, depending on where in Australia they live. (Of course, to the extent that inconsistencies drive up business costs and thus, prices, this would also have an adverse flow-on impact on consumers generally.)

Overall, it is not clear that whatever inconsistencies now arise under the multiple-regulator model create substantial costs for the community in aggregate. However, the Commission would welcome additional evidence that counters (or confirms) this view.

How should inconsistency in approaches be addressed?

Consistency in ACL regulators' approaches to administer and enforce the ACL is a stated objective of the MoU between regulators but, as noted, there are some differences and, potentially, inconsistencies in the approaches of ACL regulators. It is beyond the scope of this study to identify which is the 'best' approach by regulators.

At present, responsibility for addressing inconsistencies in the administration and enforcement of the ACL lies with the regulators themselves. The interim report of the CAANZ review of the ACL states that:

> … since the ACL was implemented, regulators have worked collaboratively to coordinate compliance and enforcement approaches to enhance consistency in outcomes. (CAANZ 2016a, p. 175)

The interim report goes on to note, in the context of the CAANZ Policy and Research Advisory Committee's work to map penalties and remedies across the jurisdictions, that this work and continued collaboration between regulators will assist in achieving a more coordinated and consistent approach to enforcement (CAANZ 2016a, p. 176).

However, to the extent that the concerns raised earlier are material, there is a case for CAANZ to undertake wider work to identify where material differences in approaches occur, assess whether such differences are warranted or not, and suggest where (and how) different approaches could be brought into greater consistency. For example, the Retail Council argued:

> Consistency and service levels for consumers could be improved if state bodies worked together to develop a national best practice model for providing information to consumers, conducting investigations and resolving disputes. (sub. 3, p. 2)

Cousins suggested another, more far-reaching, option, namely to establish an independent body to act as a national co-ordinator for ACL enforcement matters. He contended that this would:

> … help to reduce the political influence which often seems to impinge on co-ordination between the agencies. It could work to overcome the difficulties the agencies themselves often experience in achieving real and effective coordination. And it could promote greater transparency through things like a national complaint data base and effective reporting of enforcement activities. (sub. 20, p. 3)

However, an institutional change of this magnitude would require greater evidence of problems with the operation of the current model than the Commission has so far received.

There is, however, a case for ACL regulators to provide richer and more comparable data and information on their resources, activities and outcomes (chapter 4). While not a silver bullet, such data and information could make it easier to identify any problematic inconsistencies and would provide greater transparency in the ways the different regulators administer and enforce the ACL.

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.*

3.3 Strategies for compliance and enforcement

The terms of reference ask the Commission to examine the ACL regulators' risk-based approaches to enforcement as part of evaluating the effectiveness of the multiple-regulator model. Promoting 'proportionate risk-based enforcement' is one of six operational objectives set out in the *Intergovernmental Agreement for the Australian Consumer Law*.

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.

This approach is reflected in the ACL *Compliance and Enforcement Guide*, which states:

> To make the best use of resources and maximise public benefit, compliance and enforcement activity will target areas of strategic priority, and incidents with evidence or likelihood of consumer detriment. (ACL regulators 2010, p. 8)

The guide sets out how the ACL regulators intend to administer and enforce the ACL, which accords closely with the principles of risk-based compliance and enforcement. Key elements of the guide are set out in box 3.4 — in part, the ACL regulators' stated approach involves an escalation strategy, as represented by the stylised compliance and enforcement pyramid.

However, implementing risk-based compliance and enforcement strategies in practice can be quite challenging. Among other things, where information on consumer problems is limited or incomplete, it may be difficult to quantify risks with any great precision. To undertake risk-based compliance and enforcement, regulators must also have appropriate tools and remedies. And, given their limited resources, regulators must make choices at the margin between, for example, pursuing additional prosecutions or devoting those resources to additional education of businesses and consumers on their rights and responsibilities under the ACL, or mediating disputes.

Study participants' views

It is difficult for external observers to determine the extent to which the ACL regulators pursue risk-based compliance and enforcement in practice. As noted earlier, study participants have argued that the ACL implementation reports do not appear to be comprehensive and that the internal processes of the ACL regulators, for example in determining what matters become 'national projects' and how priorities are set, are often opaque to outsiders. Also problematic is the limited data available on a number of ACL regulators' resources and activities.

In submissions to both this study and the CAANZ review of the ACL, a small number of organisations commented on the extent to which the ACL regulators implement a risk-based approach, as they interpreted it, and/or means of improving enforcement. Views were mixed, although several participants expressed concern about under-enforcement of the ACL (box 3.5).

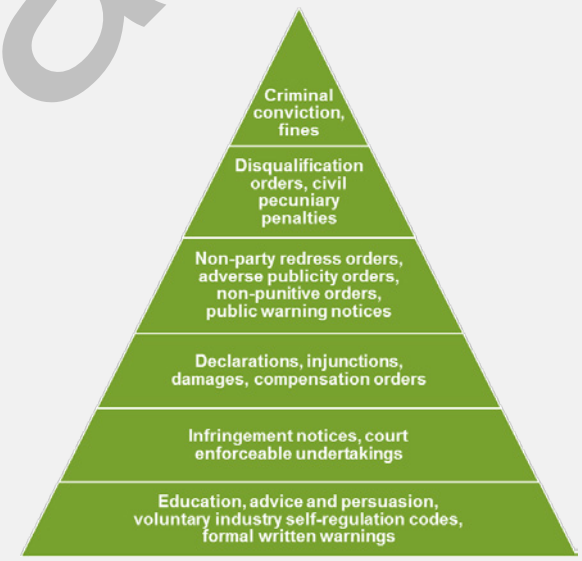
Box 3.4 ACL regulators' *Compliance and Enforcement* guide

This 16 page guide sets out principles that the regulators intend to follow in their approach to compliance and enforcement, including how the regulators will:

- respond to consumer issues and evidence of consumer detriment
- use their compliance and enforcement powers
- approach ACL compliance.

The guide is set out in four sections, covering:

- *Elements of compliance and enforcement*. This section notes that reducing consumer detriment is a 'core issue' for regulators, sets out the regulators' approach to compliance and the outcomes that regulators will try to achieve from taking enforcement action. The section notes the dispute resolution role of the State and Territory ACL regulators, and that even where a dispute is resolved, a regulator may still take enforcement action.
- *Approaches to compliance and enforcement*. This section sets out that regulators will adopt a risk-based and outcome-focused approach. It also sets out several guiding principles under the headings of: Transparency; Confidentiality; Timeliness; Proportionality; Targeted; Accountability; and National awareness.
- *Applying the law*. This section documents how the regulators will set priorities and determine approaches to enforcement, noting that these are determined independently by each ACL regulator. The section highlights a range of enforcement options available to regulators and highlights the pyramid approach to compliance and enforcement (see figure).



- *Impact on traders and consumers*. This section summarises the national approach, but reiterates the independence of the ACL regulators, noting that different actions between regulators could reflect different priorities rather than inconsistent application of the law. It also canvasses a couple of common questions, including what might lead to a regulator investigating a business.

Source: ACL Regulators (2010b).

Box 3.5 Participants' views on ACL regulators' approaches to enforcement

The Law Council of Australia noted:

> The Committee believes that the ACL promotes a proportionate and risk-based approach to enforcement. The enforcement tools available to ACL regulators enable them to give effect to an appropriate 'enforcement pyramid', whereby sanctions of escalating severity (and enforcement cost) are used to deal with increasingly serious breaches of the law. (sub. to CAANZ, p. 3)

However, it also cautioned that:

> [T]he ability of ACL regulators to give effect to such an approach will be affected by their funding. The overall level of funding and staffing at ACL regulators has been reducing, and there are concerns that the level of enforcement may be in decline. Additional and more consistent reporting by ACL regulators could assist in assessing the extent to which the ACL is being enforced. (sub. to CAANZ, p. 4)

The Australian Toy Association raised concerns with respect to the enforcement of product safety provisions:

> It is particularly concerning that we have not achieved proportionate, risk-based enforcement in the area of product safety, but instead are often faced with a letter of the law approach that has little to do with safety or consumer welfare. (sub. to CAANZ, p. 9)

The Consumers' Federation of Australia (CFA) noted that there was some scope for improvement:

> In CFA's view, the ACL is largely being enforced well, but there remain things that could be done to improve this. In particular, changes could be made to bolster the power of the regulators, enhancing their ability to enforce the law. (sub. 19, p. 1)

More broadly, Consumer Action identified a range of concerns with the approach to enforcement by the ACL regulators, drawing on the *Regulator Watch* report it commissioned in 2013, including that:

- The quantity of enforcement work could be increased across all ACL regulators.
- With the exception of the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC), the reporting of enforcement work is poor — particularly in the ACT, NT, QLD, SA and TAS. This should be improved, as full and transparent reporting enables third parties to assess the effectiveness of regulation, and improves regulator accountability.
- Regulators could make better use of the media to improve the profile and visibility of regulation, and create a culture of compliance.
- Regulators and the governments to which they are accountable should ensure that model litigant policy does not interfere with regulators' ability to use their enforcement powers to protect consumers, and where appropriate, test the law. (sub. 10, p. 2)

Nottage also expressed concern about a lack of higher-level enforcement actions by ACL regulators, noting:

> The ACL regulators focused initially on 'education'. The ACCC even announced unilaterally that they would not enforce a Regulation requiring notice of Consumer Guarantees to be added to 'extended' or voluntary supplier's warranties, for a year beyond the enacted implementation date. (Imagine if the police announced that it would not enforce new drink driving or other criminal laws for a year!) It is only in recent years, perhaps mindful of this five-yearly review, that the consumer regulators (especially ACCC) have commenced enforcement action. Without establishing credibility and experience for escalating enforcement action up the 'regulatory enforcement pyramid', we cannot expect regulators to obtain more 'cooperative' behaviour from suppliers. (sub. 18, p. 1)

To what extent is a risk-based approach adopted in practice?

To help explore the extent to which the ACL regulators implement a risk-based approach to compliance and enforcement, the Commission has looked at:

- what policies and procedures each ACL regulator has in place for assessing risks and prioritising compliance and enforcement activities
- the (limited) evidence available on the weight ACL regulators give in practice to actions at different levels within the compliance pyramid
- whether those patterns are consistent with a risk-based approach to compliance.

Policies and procedures for identifying risk and prioritising actions

As noted in chapter 2 and earlier in this chapter, there is a range of mechanisms in place to facilitate coordination and cooperation amongst the ACL regulators, including a ministerial forum and CAANZ (and its subcommittees). These bodies have jointly produced a strategic agenda for 2015–2017 to implement an integrated and harmonised approach to consumer protection. Among other things, the agenda sets out priorities that will be used to determine where time, effort and resources are allocated, and canvasses emerging challenges and factors that have been taken into account in formulating the agenda (CAF and CAANZ 2015).

The Commission has also surveyed the individual ACL regulators' policies and procedures for assessing risks and prioritising compliance and enforcement activities (drawing in part on the information and links provided in the CDRAC response 2016).

The national ACL regulators — the ACCC and the Australian Securities and Investments Commission (ASIC) — have quite complex and well-developed approaches, as canvassed in recent reviews (box 3.7). For example, the ACCC's compliance and enforcement policy sets out how it will prioritise its compliance and enforcement activities, specifying factors (such as the extent of potential consumer detriment) it considers in establishing its priorities, and the priority areas of the economy that the ACCC has identified as of particular interest for the year (ACCC 2016a). The ACCC updates the policy annually, and submits that this is a substantial undertaking that involves:

> - extensive consultation with ACCC staff, consumer and industry stakeholders, other ACL agencies, other regulatory agencies, ombudsmen, and relevant government departments
> - review of the priorities of our international counterparts
> - analysis of ACCC complaint statistics and trends
> - a review of the progress of projects underway in connection with previous priorities. (sub. 23, p. 7)

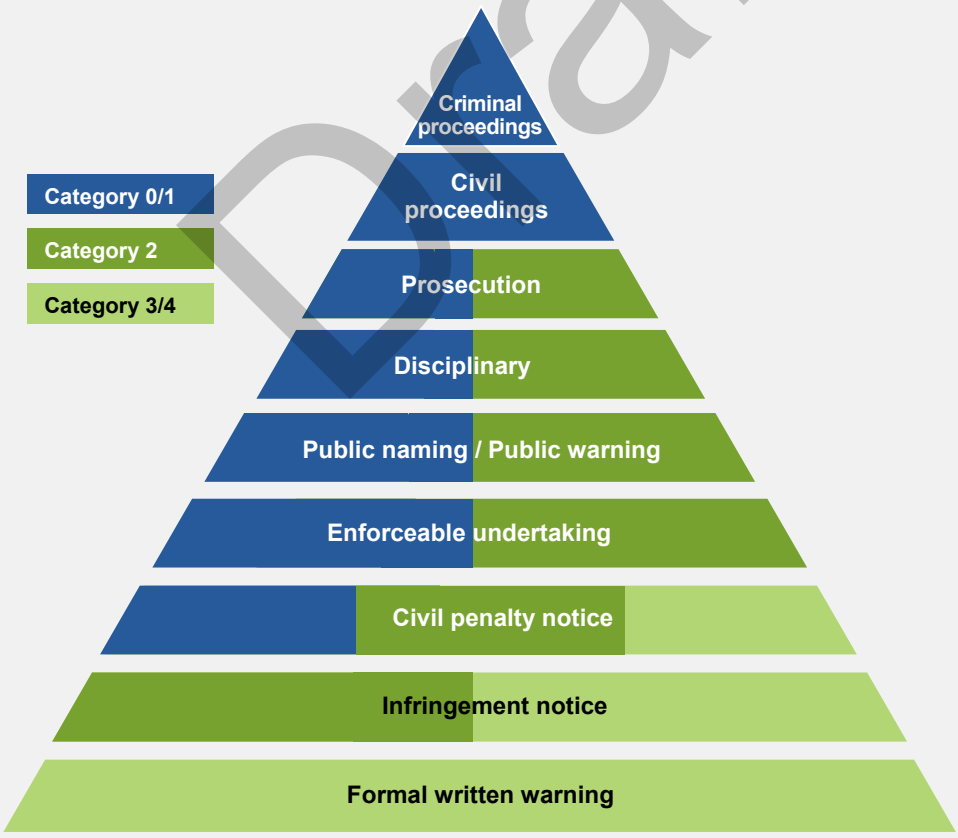
The published policies and procedures of the State and Territory ACL regulators are more mixed, and range from brief points about prioritising complaint handling on the regulator's

website to extensive compliance and enforcement policy documents. Several regulators have quite detailed formal 'triaging' protocols for determining whether and how to respond to queries, complaints or identified infractions of the ACL (a flowchart of Consumer Affairs Victoria's approach is reproduced in figure 3.2). The Queensland Office of Fair Trading's policy is an example of the more detailed approach (box 3.6).

Box 3.6 Queensland's compliance and enforcement policy

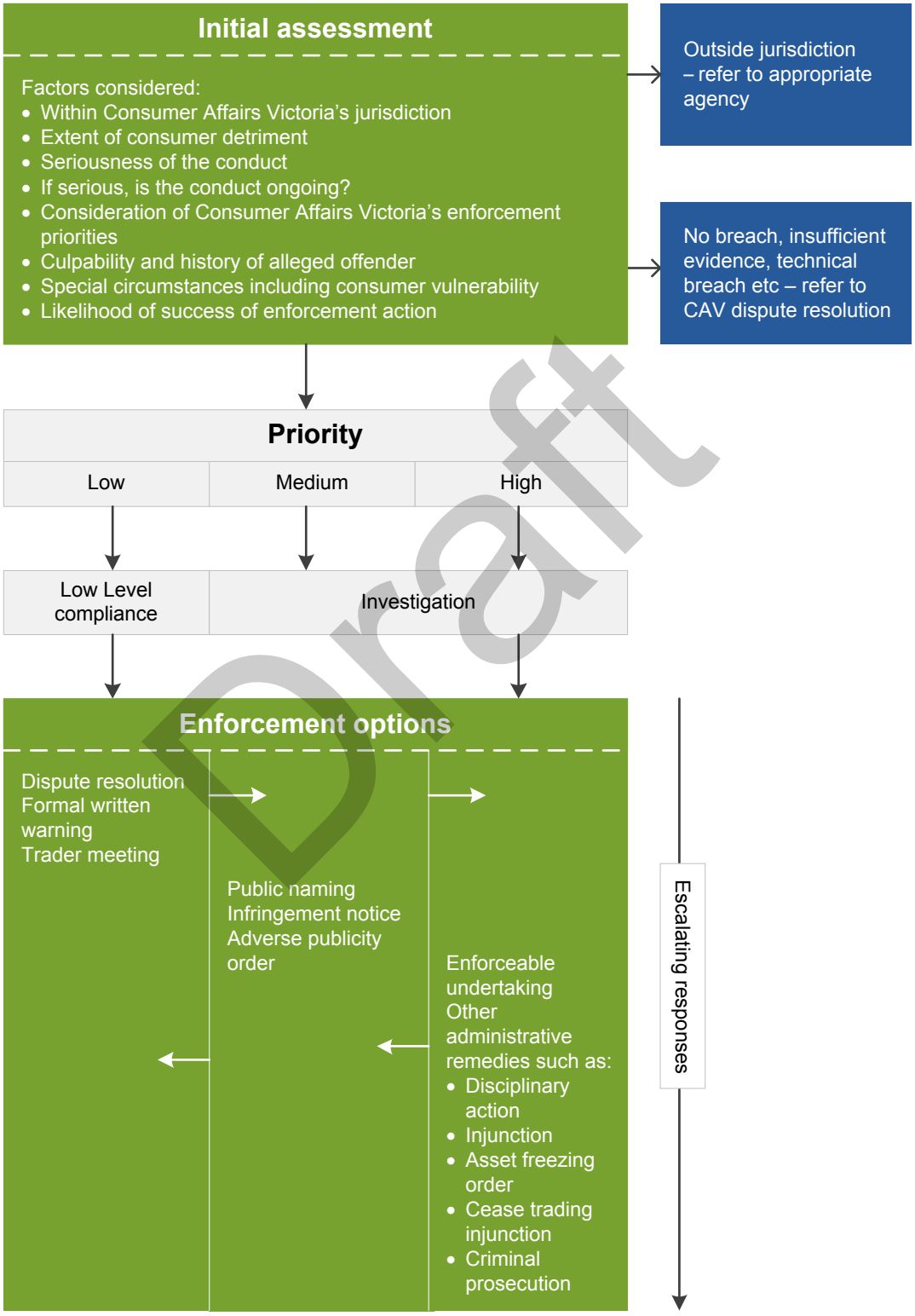
The Queensland Office of Fair Trading has published an extensive (69 page) compliance and enforcement policy document. The document sets out the regulator's approach to assessment of complaints for further investigation, which applies a series of filters and decision rules to determine its response. This includes a categorisation process for assigning matters to one of five risk categories based on the seriousness of the suspected breach. These categories are used to prioritise investigations and determine actions. The policy includes an enforcement pyramid that assigns enforcement options to the breach categories (see figure below).

The policy also sets out procedures for conducting investigations; how enforcement tools will be used; and review processes, including details on the process for a review initiated by a complainant dissatisfied with the outcome. In addition, the Queensland regulator publishes further information on its website about its compliance program, including the sectors that will be the focus of its scheduled compliance operations for the current financial year.



Source: Queensland Office of Fair Trading (2016).

Figure 3.2 **Consumer Affairs Victoria's process for selecting matters for compliance and enforcement action**



Source: CAV (2016).

Strategic priorities, or areas where regulators will focus their attention, are not identified by all of the State or Territory ACL regulators. Where priorities are identified, they tend to be fairly broad — for example, two of Consumer Affairs Victoria's listed priorities are 'product safety' and 'fair trading'. It is not clear that such broadly-specified and encompassing priorities would provide much substantive guidance to the regulator or for regulated parties.

In summary, all the ACL regulators have statements indicating adherence to risk-based compliance and enforcement principles, albeit with varying degrees of detail. Further, all the ACL regulators state that they will consider a range of factors in prioritising investigative and enforcement actions, but again with varying degrees of published detail on procedures.

However, how regulators actually assess risk and identify emerging issues and areas of high priority is less clear. Only in the case of some of the larger regulators, such as the ACCC, is it apparent that they have protocols for analysing complaint, incident or other data to rank or quantify risks and identify meaningful priority areas. Recently, there have been some in-depth reviews of both the ACCC and ASIC, which found that there is some scope for improvement in their compliance and enforcement approaches (box 3.7).

A further question is the extent to which the regulators' policies translate into practice. It is beyond the scope of this study to conduct an individual audit of each regulator's adherence to its compliance and enforcement policies. It is also not clear to what extent variation in the focus and comprehensiveness of regulators' stated approaches to compliance and enforcement leads to differences in actual approaches across jurisdictions.

What weight do ACL regulators give to different compliance activities?

Many regulator resources are devoted to education for consumers, education and compliance inspections of businesses, and handling of consumer enquiries and complaints (that is, the activities that make up the bottom layer of the compliance and enforcement pyramid). The outcomes of these activities are difficult to reduce to statistical evidence.

There is some data available on the enforcement activities of the ACL regulators, which indicates that there is a small number of higher level enforcement activities (table 3.2). This is consistent with data collated in the 2013 *Regulator Watch* report (Renouf, Balgi and Consumer Action Law Centre 2013). Consumer Action has undertaken further assessment of enforcement activity since 2013 (sub. 10, attachment 2) and reports that it is still low (and inconsistent) amongst jurisdictions.

Box 3.7 Recent reviews of the national ACL regulators' approach to compliance and enforcement

Australian National Audit Office review of the ACCC

In a recent review of the effectiveness of the ACCC in managing compliance with fair trading obligations, the ANAO concluded that the ACCC effectively carried out many of its regulatory compliance activities, including that it had a 'sound compliance and enforcement strategy, based on an extensive consultative process for determining strategic priorities' (p. 7).

The ANAO also identified some scope for improvement, particularly the use of a greater variety of intelligence (including complaint data from other regulators) in targeting compliance and enforcement activities, noting:

> … the ACCC's case selection activities focus too heavily on individual complaints and instances of non-compliance. Greater use of intelligence in the case selection process, aimed at identifying trends and patterns of conduct suggesting widespread consumer detriment, would enable the ACCC to more effectively target its investigative and enforcement activities. (pp. 9–10)

That said, the ANAO noted that, in respect to the cases the ACCC did pursue, it consistently took appropriate proportionate enforcement actions, including having regard to the deterrent effect of the actions. Further, the ANAO also found that these actions were effective in managing non-compliance.

In response, the ACCC (sub. 23) agreed with the three recommendations made in the report that focused on intelligence gathering and complaints data and has begun taking steps towards implementing them, although it notes that some are complex and require involvement of other regulators.

ASIC Capability Review

This 2015 review of ASIC found that ASIC's regulatory posture included too heavy an emphasis on enforcement in its communications, coupled with a high proportion of its resources devoted to enforcement actions relative to that of peer regulators.

The Capability Review Panel noted that ASIC's least intrusive regulatory tools of education and guidance were generally its most pro-active and cost effective, and that the main opportunities for improvement related to its use of litigation. Accordingly, the Panel recommended that ASIC should refine its approach to enforcement, including that it:

- develop a targeted approach to litigation, pushing risk appetite to pursue cases that are strategically important, particularly in testing the veracity of the law pursuing conduct [Recommendation 27]. While ASIC is able to cite a number of specific examples where they have pursued strategically important cases, it is the view of a number of informed stakeholders consulted by the panel that ASIC is not doing enough in this area, or as much as peer regulators …
- use litigation as a way of communicating key messages to the regulated population to have the desired deterrence effect. The ACCC does this effectively through targeted stakeholder consultation in establishing annual priorities and a concerted and strategic communications program delivered by the ACCC Chair and Commissioners. There is a persistent perception (including among informed stakeholders) that this is not being pursued by ASIC to the fullest extent possible and that the current strategy is not having the desired effect. (p. 120)

In response, ASIC said it supported these objectives on how it uses its regulatory toolkit and that while it strives to continually improve its enforcement effectiveness, the recommendation outlined in the first dot point above reflects ASIC's current practice.

Sources: ANAO (2016); ASIC Capability Review Panel (2015); ASIC (2016a).

In response to a request from the Commission to split the data in table 3.2 on ACL enforcement outcomes by regulator, CDRAC stated that this was not an appropriate measure for a number of reasons. These included that it would not reflect individual agency contributions to national approaches (such as national compliance projects or where a lead regulator approach is used). The response also noted that smaller regulators may concentrate on changing local traders' behaviours and leave more-complex cross-border matters to larger regulators (CDRAC response 2016).

Table 3.2 **ACL enforcement outcomes, 2015-16**
Total for all ACL regulators

Activity[a]	*Number*	*Value ($)*
Infringement notices	195	902 886
Enforceable undertakings	33	
Public warnings	66	
Court cases	149	
Court action fines		711 400
Court action costs		122 165
Compensation awarded[b]		2 963 849
Civil pecuniary penalty orders		15 642 000

[a] Actions taken under the ACL, or under the ACL with other legislation. [b] As a result of court action or enforceable undertaking negotiations.

Source: CDRAC response (2016).

Are the low numbers of enforcement actions inconsistent with a risk-based approach to compliance and enforcement?

That enforcement actions, particularly of a formal nature, are relatively rare could tend to mean one of two main things:

- it could be a reasonable response by regulators and reflect the best allocation of their resources in keeping with a proportionate risk-based approach, and/or the effective deterrence effect of the possibility of enforcement action
- it could reflect a lack of capacity or inclination to pursue, often expensive, high-level enforcement actions, perhaps because of inadequate resourcing.

In support of the first explanation, 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 educative and regulatory guidance activities.

However, some participants emphasised the latter view, contending that the State and Territory ACL regulators in particular[16] were not sufficiently proactive in enforcing the ACL. For instance, Consumer Action stated:

> Consumer Action is concerned that levels of consumer protection in Australia are not as high as they could be, and that state-based regulators in particular are failing to fulfil the potential of the ACL and the multi-regulator model.
>
> While under-resourcing is a significant issue (and should not be dismissed lightly), there is capacity for the culture of enforcement to be strengthened at many ACL regulators — particularly in terms of how much enforcement work is undertaken, and the manner in which it is reported. (sub. 10, p. 4)

The Commission has insufficient information to determine which of these two views is the more accurate, recognising that some of both views may be at play.

Limited resources are a constraint

The view that high-level enforcement action is constrained by available resources is supported by statements made by the regulators themselves. For instance, the ACCC submitted that:

> We cannot do everything and it is inevitable that there will be circumstances where, while compliance or enforcement action could produce a desirable outcome, action cannot be taken because of resourcing constraints.
>
> If we had more resources we could do more. …
>
> A useful illustration of the impact of our limited resources is consideration of the number of matters we progress to litigation. We are currently sufficiently resourced to conduct approximately 30 cases in court each year across all the obligations provided for by the CCA – competition law, regulated infrastructure, industry codes and the ACL. (sub. 23, p. 10)

In another example, Consumer Affairs Victoria states in its compliance and enforcement policy that:

> Consumer Affairs Victoria identifies far more issues and contraventions of legislation than it has resources to fully investigate. In light of this, resources must be allocated where we can best influence non-compliant conduct. In some cases, dispute resolution or low level compliance activity may be pursued where this is likely to secure redress for the consumer. Similarly, enforcement action may be pursued where there is high likelihood of success. (CAV 2016)

For their given resource allocations, regulators may be making allocations between various compliance and enforcement activities as well as might be expected. However, the comments above appear to imply that, were these ACL regulators provided with more resources, they would devote a greater share of their resources to higher-level enforcement

[16] However, Nottage pointed to the ACCC as a key culprit for what he saw as under enforcement of the ACL (sub. 18, p. 1; box 3.5).

actions. This in turn implies that resource constraints have influenced the pattern of the compliance and enforcement activities that the regulators currently undertake.

The current resource constraints thus make it even more important that regulators undertake a risk-based approach to ensure that relatively costly enforcement activity is appropriately targeted. This means that case selection for elevated responses is important — a point noted by the ACCC, which submitted:

> We must be, and we are, very selective about the matters we pursue through to litigation. Complaints we do pursue go through a series of increasingly in-depth investigations with fewer and fewer progressing to each subsequent phase. (sub. 23, p. 10)

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.

Addressing constraints on adopting risk-based approaches

ACL regulators have sought to adopt a proportionate, risk-based approach to compliance and enforcement, but it is apparent that there are some constraints that limit this in practice, and accordingly, it appears that there is scope for improvement.

One of these limitations is in intelligence gathering and analysis. Improved intelligence analysis and sharing, including through nationally aggregated complaints data analysis, could assist in improving the ability of ACL regulators to better assess regulatory risks and allocate resources accordingly. As the ANAO noted with respect to the ACCC:

> Greater use of intelligence in the case selection process, aimed at identifying trends and patterns of conduct suggesting widespread consumer detriment, would enable the ACCC to more effectively target its investigative and enforcement activities. (ANAO 2016, pp. 9–10)

The scope for enhanced intelligence sharing and analysis is discussed further in chapter 4.

Another apparent constraint is the capacity of ACL regulators to implement a proportionate response because of limitations and inconsistencies in the enforcement tools and remedies at their disposal. One issue is if the penalties are insufficient, then the deterrent effect of high-level enforcement actions will be ineffective. The ACCC (sub. 23) submitted that it considered the maximum penalties under the ACL are too low. Another issue identified by the ACCC is inconsistency in tools available to ACL regulators:

> The enforcement tools and remedies available to ACL regulators vary from jurisdiction to jurisdiction and this variation may limit the efficacy of the multi-regulator model. There are a number of variations between jurisdictions, but in particular we note that 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. (sub. 23, p. 9)

These issues are addressed in chapter 4. The Commission considers that some maximum penalties under the ACL are insufficient to have an effective deterrent effect, particularly for large businesses. Inadequate penalties and enforcement tools can limit the effectiveness of the proportionate, risk-based approach to compliance and enforcement. Accordingly, penalties should be sufficiently high to be an effective deterrent and all regulators should also have an appropriately broad and granular suite of enforcement tools to enable cost-effective and graduated responses to contraventions of the ACL.

There are also separate questions about the level of resources that governments provide for the administration and enforcement of the ACL. As noted, limits on ACL regulators' resources can influence the pattern and extent of the compliance and enforcement activity they undertake. As such, limits on resources can influence *how* regulators go about implementing risk-based compliance strategies as well as the overall effectiveness of those strategies. A number of study participants have indicated that the extent of ACL regulators' activities is limited by resource constraints. However, determining the optimal levels of resourcing for ACL matters relative to other government and social priorities are ultimately decisions for governments and beyond the scope of this study.

4 Strengthening enforcement and administration under the model

Key points

- Increasingly national product markets make it difficult to justify responses to product safety issues in individual jurisdictions, and the States and Territories have rarely exercised their powers to impose interim bans or compulsory recalls in their own jurisdictions under the Australian Consumer Law (ACL). The States and Territories relinquishing these powers would reduce scope for confusion by clarifying that it is the Commonwealth's responsibility to respond to all ACL product safety issues that warrant a compulsory recall or ban.
- The Commonwealth's regulation impact assessment requirements may impede the timely implementation of national interim product bans. There is a case to exempt interim bans from such assessments.
- Developing a national database of complaints and product safety incidents would enable better risk assessment and help target compliance and enforcement activity.
- Australian governments should look to reduce remaining inconsistencies in enforcement powers across jurisdictions, particularly in infringement notice powers and other additional remedies that the States and Territories have introduced to augment the ACL 'toolkit'.
- Current financial penalties appear insufficient to deter some breaches of the ACL. Governments should consider options for increasing maximum penalties, including alignment with the competition penalties in the *Competition and Consumer Act 2010*.
- Reporting by ACL regulators on resources, activities and outcomes from those activities is inconsistent between jurisdictions. ACL regulators should publish a comprehensive and comparable set of performance metrics and information to enhance their public accountability and enable improvements in regulator performance.

The study's terms of reference ask about means of strengthening administration and enforcement of the ACL under the multiple regulator model.

The Commission has identified prospective areas for reform from its stocktake of 'unfinished business' from the 2008 review (chapter 2), from its analysis of the performance of the current arrangements (chapter 3), from research on approaches abroad and from study participants' suggestions.

The areas examined in this chapter are:

- administration and enforcement of the ACL's product safety provisions (section 4.1)
- intelligence gathering and sharing, including scope for a national database of consumer complaints and incidents (section 4.2)

- enforcement tools available for State and Territory ACL regulators, including the maximum financial penalties available for breaches of the ACL (section 4.3)
- performance reporting by the ACL regulators (section 4.4)

(Chapter 6 examines some other means to strengthen the consumer protection framework.)

In examining reform options in these areas, the study has applied relevant economic, regulatory and governance criteria, including giving weight to efficient resource use, proportionality in enforcement, transparency and accountability, and the need to minimise undue regulatory burdens. It has also considered the fiscal impacts of proposals, although fiscal costs are given no more or less weight than other, equivalent, monetary and non-monetary costs and benefits in the Commission's assessment calculus. Where there is insufficient information to judge whether a particular reform is warranted, the Commission has requested further information and/or set out a process to ascertain the merits and practical steps and hurdles to implementation.

4.1 Institutional arrangements for the generic national product safety regime

The national product safety system encompasses four main categories of regulatory tool: standards, recalls, bans and safety warning notices. Commonwealth and in some cases State and Territory Ministers for consumer affairs can publish notices to exercise these powers over consumer goods.[17] Once particular goods are covered by a standard, recall, ban or safety warning notice, ACL regulators enforce the law by ensuring that suppliers comply with the relevant requirements.

In 2006, the Commission released a research report on *Consumer Product Safety* that considered options for creating a more harmonised approach to generic (as opposed to specialist) product safety. It recommended a one-law, single-regulator approach, with the Commonwealth to be responsible for all product safety administration and enforcement. However, recognising the challenges in achieving its preferred approach, it also recommended an 'alternative model', involving continued powers for the States and Territories to issue compulsory recalls, interim bans and public warnings, and continued involvement in enforcing product safety laws.

The Commission's 2008 *Review of Australia's Consumer Policy Framework* reiterated these recommendations, and the Council of Australian Governments (COAG) decided to adopt the alternative model when establishing the ACL (although the Northern Territory then ceded its generic product safety powers and enforcement responsibilities to the Commonwealth).

[17] Standards, bans and warning notices can also apply to 'product related services', which are the installation, maintenance, repair, cleaning, assembly or delivery of consumer goods.

Adoption of the alternative model reduced the powers of State and Territory Ministers, but left enforcement responsibilities shared between ACL regulators. More specifically, only the Commonwealth Minister with responsibility for consumer affairs now has the power to issue mandatory standards and permanent bans. Table 4.1 describes the generic product safety powers, indicates which Minister can exercise each power, and provides a current example of this power in action.

The alternative model has successfully addressed many of the issues that were identified in the 2006 report. For example, mandatory standards are now national, as are permanent bans. This has significantly reduced compliance burdens for businesses that operate in more than one State or Territory. It has also increased the uniformity of product safety across Australia, as products that may have previously been banned in some or most jurisdictions are now banned nationally.

Table 4.1 **ACL product safety powers**[a]

Regulatory tool	*Description*	*Who has the power?*	*Example*
Interim ban	Prohibits the sale of certain consumer goods, for 60 days, if they are of a kind that will or may cause injury (with possibility of extension by 60 days)	Commonwealth and State and Territory Ministers	Hoverboards that do not meet safety standards (from 18 March 2016 to 16 July 2016)[b]
Permanent ban	Prohibits the sale of certain consumer goods permanently	Commonwealth Minister	Tinted headlight covers[c]
Voluntary recall	A business can voluntarily recall goods that are banned, may cause injury or do not comply with safety standards	Commonwealth Minister receives notice within two days and may publish a copy of the notice on the internet	Cars with Takata airbags (more than 40 million vehicles worldwide)[d]
Compulsory recall	Requiring the supplier of consumer goods to take action to address safety issues that may cause injury	Commonwealth and State and Territory Ministers	One brand of teeth whitening products containing more than 6% hydrogen peroxide (22 others were voluntarily recalled)[e]
Safety warning notice	Warns the public of possible risks involved in the use of consumer goods of a kind specified in the notice	Commonwealth and State and Territory Ministers	Ethanol fuelled fireplaces — warning of dangers and to follow instructions carefully[f]
Mandatory standard	Requirements for certain consumer goods that prevent or seek to reduce the risk of injury	Commonwealth Minister	Projectile toys — requirements for certain measurements, design elements, maximum energy and labelling[g]
Information standard	Requirements for certain information to be provided about goods or services	Commonwealth Minister	Country of origin labelling requirements for food

a Interim bans, permanent bans, safety warning notices and mandatory standards also apply to 'product related services' **b** O'Dwyer (2016b) **c, d, e, f, g** ACCC (nd)

Source: Australian Consumer Law, Part 3-3; ACCC (nd).

Nevertheless, comments from some study participants point to some ongoing issues with the alternative model:

> Inconsistency between various state jurisdictions and poor communication between regulators can result in slow moving intervention, such as that seen earlier this year in relation to hover boards. In that example, the then Victorian Consumer Affairs Minister, Jane Garrett, called for an interim national ban on sales of the product on 5 January — yet a national ban was not applied by the Federal Assistant Treasurer until 18 March, despite the destruction of two homes through fires caused by the devices. (Consumer Action, sub. 10, p. 3)[18]

It is timely to reconsider the model for product safety regulation in Australia given ongoing concerns about some aspects of the system, developments in the market for consumer products over the past decade and more than five years' experience with the current arrangements. This section first addresses the allocation of product safety powers under the ACL (including to issue interim bans and recalls), and then which regulators should be responsible for enforcing the product safety elements of the ACL.

Product safety powers

Adoption of the 'alternative model' from the 2006 and 2008 Commission reports resulted in the relevant States and Territories relinquishing powers to issue mandatory standards and permanent bans, but retaining power to issue interim bans, compulsory recalls and safety warning notices. The following considers whether the States and Territories should continue to share these powers with the Commonwealth.

Should regulatory responses to safety issues be local or national?

The most cogent rationale for the States and Territories to continue to have product safety powers is that they are more responsive to local issues than the Commonwealth. The prevalence of safety problems or risks can vary between jurisdictions — for example, there may be many more all-terrain vehicles in jurisdictions with large rural communities. And when a product safety incident occurs in a particular jurisdiction, there may be greater community awareness and concern about the issue in that jurisdiction than in others. It is argued that State and Territory regulators are more attuned to localised community concerns than a national regulator, and are likely to react more quickly.

However, localised product safety responses raise important questions about how a different application of the law, or a different level of consumer protection, in one jurisdiction can be justified. More specifically, it is not clear why a product should be sold in one State or

[18] State and Territory electrical safety regulators were involved in the regulatory response as issues with hoverboards were in part an electrical safety issue. However, the powers that were ultimately exercised to deal with the issue were the Commonwealth Minister's interim banning powers under the ACL. The focus of this section is on product safety arrangements under the ACL. Specialist safety regimes are considered in chapter 5.

Territory if it has been adjudged to be unsafe in another. Further, assuming that a State- or Territory-based regulator performs an appropriate analysis of the risks, it is duplicative for the same analysis and legislative process to be performed in other jurisdictions.

The expansion of online commerce since 2006 likely means that truly local markets for products are increasingly uncommon. The scale required for efficient manufacturing of products means that localised production and consumption of consumer goods is limited. Manufacturers or importers typically supply products outside of their own State or Territory (if not country). Online commerce has only enhanced this effect, by dramatically lowering the cost of supplying products interstate or internationally.

Recent experience with product safety issues highlights the increasingly international nature of product markets. Hoverboards and Samsung Galaxy Note 7 mobile telephones were released globally at around the same time. Similarly, issues with Volkswagen diesel cars and Takata airbags affected consumers worldwide. This meant consumer regulators around the world were dealing with the same issues simultaneously. The engagement of a national regulator with international counterparts likely provides a distinct advantage in such cases.

To the extent that some products may be more common in some jurisdictions than others, this is better managed by changing the intensity of compliance or enforcement activity instead of applying different laws (PC 2006, p. 302). For example, if all-terrain vehicles are more common in a particular area, it might require more regulator effort to warn users of the dangers (for example, of crush injuries from rollovers) but it is less likely to require more stringent laws than elsewhere in Australia.

The relatively small number of consumer goods that is available in only one or some States or Territories of Australia suggests that there is a limited role for product safety laws that do not apply nationally. The trend towards national and international consumer goods markets is increasingly making 'local issues' for product safety less relevant.

Fragmentation continues to cause some confusion and undermines confidence

The implementation of the Commission's recommendations for national mandatory standards and permanent bans has addressed what were the most significant concerns about fragmentation and duplicative compliance costs for business. The 2006 report found that 65 per cent of banned products were banned in only one jurisdiction, and only 7 per cent of bans applied in more than four jurisdictions (PC 2006, pp. 304, 306). All bans are currently national.

Nevertheless, business groups consider that having multiple regulators continues to cause some confusion and increase compliance costs. For example, the Australian Toy Association submitted that:

> … [multiple regulators] makes it difficult for suppliers to understand the requirements. Individual regulators are unable to provide a complete answer and answers from different

> regulators may conflict with each other. All of this leads to a great deal of confusion and contributes to the possibility of unsafe or non-compliant product. It also adds to the cost of compliance for responsible suppliers. (2016, p. 5)

Dealing with multiple regulators (including specialist regulators) could be a significant issue for manufacturers and importers in some circumstances. Resolving doubts about the safety of a product could involve convincing up to as many as eight separate regulators, or even more for products that are also covered by specialist regulation (see chapter 5). For example, if an effective response to a safety concern involves placing a warning on packaging instead of a ban, it would be difficult to negotiate that outcome under current arrangements, as eight ACL regulators have the power to issue an interim ban.

The observations of the Consumer Action Law Centre (Consumer Action), noted at the start of this section, indicate that consumer groups consider that the need for cooperation and coordination between jurisdictions can lead to delays in implementing interim bans. While the Commission does not doubt that this is the case, there is some evidence that Australia is not significantly out-of-step with other countries. For example, in relation to hoverboards, the timing of responses by Australian regulators is comparable to that of overseas regulators (box 4.1).

Box 4.1 International comparison – regulator responses to 'hoverboards'

Hoverboards were a popular Christmas gift in Australia and internationally in 2015. Issues caused by faulty batteries and charging equipment emerged across many countries at around that time.

In response to emerging issues with hoverboards, a media release was issued by the ACCC on 10 December 2015 warning consumers of the dangers, a further warning was published by the Commonwealth Minister on 14 January 2016, a national interim ban applied from 19 March 2016 to 16 June 2016 and a mandatory standard applies from 17 July 2016.

Similarly, the US Consumer Product Safety Commission issued a warning on 20 January, wrote to manufacturers, importers and retailers on 18 February 2016, urging them to ensure their hoverboards comply with voluntary safety standards, and commenced a recall on 6 July 2016.

The New Zealand energy safety regulator reclassified hoverboards as 'medium risk articles' from 15 February 2016. Relatively few other countries appear to have regulated specifically for hoverboards.

The hoverboard example demonstrates that the response by Australian product safety regulators was comparable to that in other jurisdictions. A similar analysis of regulator responses, to an issue that arose at the same time across many countries, is possible for Samsung Galaxy Note 7 mobile telephones. It also shows that the Australian response was comparable to that of other jurisdictions.

While this analysis should be treated with caution as it is based on a small number of events, the observation that the responses of Australian product safety regulators to emerging issues is comparable to overseas jurisdictions suggests the possibility that the current sharing of powers may be less of a concern for the effectiveness of the system than it is for public confidence in that system.

Sources: ACCC (nd); New Zealand Government (2016); United States Government (nd).

The States and Territories rarely use their recall or banning powers

As noted above, a key rationale for retention of State and Territory powers was their ability to respond promptly to issues arising in individual jurisdictions.

However, the States and the ACT have exercised their powers under the ACL to order compulsory recalls or impose interim bans only rarely. Since 2011, they have imposed interim bans in relation to only three product safety matters and ordered two compulsory recalls. And some of these instances were in unusual circumstances, for example, a New South Wales and South Australian interim ban on synthetic drugs was used to fill gaps in other regulatory regimes.

This rare use of powers 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 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.

Nevertheless, in response to an information request from the Commission, the Compliance and Dispute Resolution Advisory Committee (CDRAC) said:

> The States and Territories have found that the process of imposing an interim ban to have been beneficial for consumers and regulators alike, despite the relatively small number of interim bans imposed since the commencement of the ACL. While the imposition of an interim ban is considered a very serious response by State and Territory regulators, it is generally a quicker and more flexible process than the Commonwealth's process for imposing interim or permanent bans nationally. (pers. comm., 25 November 2016)

Clarifying responsibility for interim bans and compulsory recalls

Given that the States and the ACT exercise their compulsory recall or interim banning powers in their jurisdictions only very rarely, the question arises as to whether they should relinquish these powers. Doing so would clarify that it is the responsibility of the Australian Competition and Consumer Commission (ACCC) to immediately address all product safety incidents that may warrant a compulsory recall or interim ban under the ACL. This could improve consumer confidence in the product safety system and reduce confusion for national businesses.

The Commission notes CDRAC's comments about the speed of the Commonwealth's processes, but believes that reforms can address concerns in this area (see below).

In these circumstances, the Commission sees merit in the States and the ACT relinquishing their powers to impose interim bans and order compulsory recalls. Clarifying that bans (interim or permanent) and compulsory recalls under the ACL are solely the ACCC's responsibility would reduce regulatory uncertainties for consumers and business. 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 safety issues with only one regulator, instead of potentially eight or more.

If such an approach was to be accepted then any effects on ACCC resources would also need to be considered.

The existing systems for coordination, cooperation and communication between Ministers, through the Ministerial Forum on Consumer Affairs, and senior officials (CAANZ) are well developed and allow for information to be shared on emerging product safety issues. If State and Territory Ministers relinquish their powers, it is expected that these mechanisms would readily support sharing of information to alert the Commonwealth Minister of issues that may require a compulsory recall or interim ban. CAANZ could also consider whether any additional mechanisms would be required to support the suggested change.

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.

A move to the Commonwealth having sole responsibility for interim bans and compulsory recalls under the ACL would remove one element of overlap between product safety responsibilities. However, there would continue to be overlap between the product safety responsibilities of the ACL regulators and specialist regulators and the Commission is not proposing to remove such powers from specialist regulators. Accordingly, implementation of the above recommendation would simplify the system, but the need for coordination and cooperation between regulators would remain.

Streamlining processes for Commonwealth interim bans

An interim ban is intended to be a prompt response to a product safety issue that could cause harm to consumers. Promptness is often required as, in the absence of a ban, suppliers will continue to sell the relevant product, exposing consumers to risk of injury or death. However, balanced against the need for promptness are the significant implications for a manufacturer or importer of having a product banned. Accordingly, decisions about interim bans need to be both fast and based on accurate information.

Several study participants observed that State and Territory governments appear able to issue interim product bans more promptly than the Commonwealth Government. The interim report of the CAANZ review of the ACL suggests that the Commonwealth Government's regulatory impact assessment (RIA) process was a hurdle to quickly imposing an interim ban on hoverboards[19] (CAANZ 2016a). Box 4.2 sets out the RIA process that the ACCC must follow in order to apply an interim ban.

Box 4.2 RIA requirements for interim bans

To fully comply with the RIA requirements, the ACCC must complete the following steps each time it seeks to impose an interim ban:

1. Complete an 'Is a RIS required' form, and submit it to the Office of Best Practice Regulation (OBPR). A RIS is a document that is submitted to a decision maker setting out the results of a RIA. A RIS will be required unless the proposal is considered 'minor or machinery in nature', which can be the case if relatively few products or few businesses are affected.
2. Assuming that the OBPR decides that a RIS is required, prepare an early assessment RIS and have it certified by a Deputy Secretary within the ACCC. An early assessment RIS must include a statement of the problem, why Government action is needed, the relevant policy options, the likely net benefit of each option, and a consultation plan.
3. An early assessment RIS must also include regulatory costings that have been agreed with the OBPR.
4. Submit the early assessment RIS (including regulatory costings) to the OBPR. Any comments received at this stage can be incorporated at the final RIS stage.
5. Provide advice to the relevant Commonwealth Minister, attaching the early assessment RIS (which can occur concurrently with step 4).

As an example, the final RIS for the mandatory standard that applies to hoverboards is 47 pages, noting that this document is more detailed than the early assessment RIS that was required for the interim ban. The early assessment RIS is not publicly available.

Sources: Australian Government (2014, 2016a).

There is some flexibility in the RIA process under certain circumstances. For example, a Prime Minister's exemption can apply 'when there are truly urgent and unforeseen events requiring a decision before an adequate regulatory impact assessment can be undertaken' (Australian Government 2014, p. 56). However, no such exemptions have been granted, for any Commonwealth Government decision, since March 2014. An interim ban could also be applied without a RIA and the process may be 'compliant, but not best practice' if a RIA is completed at a later time. Nevertheless, there may be good reasons for the ACCC

[19] The CAANZ review includes an option for consultation that would involve replacing Ministerial decisions with an 'administrative order', to be made by ACL regulators. This has been presented as a way to streamline the process for product bans and mandatory recalls. A change in the form of a regulatory decision is unlikely to alter the decision about whether a RIA is required. Accordingly, any such change could increase the need for a streamlined RIA process as there would be less time for a RIA if the ACCC is free to act more promptly by way of an administrative order.

seeking to adopt a best practice approach in the context of a decision that can have significant implications for consumers and businesses.

While a RIA can play an important role in ensuring that regulatory action is justified, for example, by ensuring that economic costs and benefits are given due consideration, urgency is more important for interim bans than for many other regulatory decisions to which the regulatory impact assessment process applies. Accordingly, the Commission considers that there is a strong case for making special arrangements for interim bans.

The Commission's preliminary view is that there is a case for interim bans to be exempt from the RIS requirements. Whilst it would be ideal for interim bans to be exempt, the Commission notes that no other areas of regulatory activity are exempt from RIS requirements, other than 'minor or machinery' changes to regulatory settings. In the event that an exemption is not provided, a fall-back would be for the Office of Best Practice Regulation to develop a template for the ACCC to complete in order to satisfy RIS requirements.[20]

A decision about providing an exemption is finely balanced and depends largely upon the relative weights applied to the benefits of urgency versus consideration of the economic costs and benefits of a decision. The Commission's preliminary view is that the need for promptness outweighs the benefits of a RIS for interim bans. However, it is also possible that a RIS could be acceptable if it can be performed without delaying the regulatory response.

Commonwealth-imposed interim bans would continue to be subject to the conference requirements in Division 3 of Part XI of the *Competition and Consumer Act 2010*, which require the Commonwealth Minister to publish a notice of a proposed ban and hold a conference with suppliers of the relevant consumer goods. A complete RIS should continue to be prepared for a permanent bans.

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.

[20] Current RIS requirements are free-form, with seven high level 'RIS questions' to be answered. For example, 'What is the likely net benefit of each option'? For an interim ban, this might be replaced with questions such as: how many businesses will be affected? (response: a number) How many of the relevant products are likely to be affected by the ban? (response: a number) What is their average wholesale price? (response: a number) what is their average retail price? (response: a number) What is the nature of the safety risk? (response: no more than four sentences). It is envisaged that the template be no more than two pages.

Safety warning notices

Safety warning notices allow a Minister to publish a warning to consumers about risks inherent in the use of certain consumer goods or product related services. These notices are almost invariably picked up by the media and widely reported to warn consumers about the relevant risks. Like the other product safety powers, they are exercised rarely. Each of the State and Territory ACL regulators appear to use this power a few times a year.

Unlike interim bans and compulsory recalls, a publication of a safety warning notice involves limited costs for business and should only benefit consumers who heed any warnings given. Accordingly, there are limited downsides to State and Territory Ministers continuing to have the power to publish safety warning notices, although a national approach to warnings would also have some benefits.

Product safety enforcement

The sharing of product safety enforcement between ACL regulators allows State and Territory regulators to access synergies with their other regulatory responsibilities to efficiently administer product safety laws. However, shared responsibilities pose risks of inconsistency and informal shifting of those responsibilities (mostly towards the ACCC). The following considers each of these issues to determine whether there is a case for changing the approach to product safety enforcement in Australia.

Synergies and geographic reach of State and Territory ACL regulators

Enforcement of product safety laws often involves visiting businesses to check for safety issues with products being offered for sale, including compliance with mandatory standards, bans and recalls. This requires a significant presence in each State and Territory, including the ability to deploy staff to every part of Australia. The New South Wales and Victorian ACL regulators provide examples of their involvement in this activity in their 'Year in Review' reports:

> In 2014-15, we undertook 1,362 inspections of premises for banned or unsafe products, resulting in the removal of 15,627 products from sale. These included 3,967 children's products that could cause serious harm or death, such as projectile toys, small powerful magnets, nightwear, aquatic toys and portable swimming pools. (CAV 2015, p. 10)

> 44 staff from across Fair Trading were deployed into the field, inspecting 17,822 products across 738 businesses. 125 toys were retrieved from the field and assessed. 97 toys were sent for testing and 95 failed resulting in 35 penalty infringement notices being issued, seven matters referred for prosecution and one warning letter issued. (NSW Fair Trading 2016c, p. 24)

State and Territory ACL regulators generally have many offices throughout their jurisdictions, sometimes achieved by co-locating several regulatory functions in the one building. For example, there are 19 fair trading centres in New South Wales. This allows

State and Territory ACL regulators to effectively deploy resources across their jurisdictions to enforce product safety laws.

State and Territory ACL regulators also likely benefit from synergies between their product safety functions and their other consumer protection functions. For example, a visit to a business may be for multiple purposes — to check licensing conditions, to enforce generic consumer protection laws and for product safety purposes. There are also likely to be synergies between the product safety functions of State and Territory ACL regulators and those of State- and Territory-based specialist regulators (for example, for electrical safety and food), whether or not specialist regulators are located within the same agencies as ACL regulators (see chapter 5).

Risks of inconsistencies and shifting responsibilities

Whilst State and Territory enforcement of product safety laws may have advantages of geographic reach and synergies with other regulatory functions, shared responsibility increases the risk of inconsistencies in application of those laws (chapter 3). For example, the Retail Council has suggested that inconsistencies continue to be observed:

> The undertaking of investigations is also variable between states. Retail Council members report that the level of information provided by some state bodies when investigating matters is excellent but in other states it is not sufficient to quickly respond to customer concerns and resolve the issue. (sub. 3, p. 2)

Shared responsibility for product safety enforcement also creates a risk of responsibilities being shifted between jurisdictions without an explicit agreement for this to occur. This also has implications for resourcing. For example, the Law Council of Australia has noted an apparent trend:

> The SME Committee is aware of some limited institutional changes which have occurred since 2008, associated primarily with the transfer of many product safety functions from the State and Territory Regulators to the ACCC. We have also observed a scaling back by State and Territory regulators of their activities in terms of investigating and litigating ACL contraventions. (sub. 8, p. 9)

David Cousins raised concerns about the State and Territory agencies' institutional structures:

> The State/Territory agencies form parts of bigger departments. They are headed by Commissioners in some cases and Directors in others. They have restricted independence in resourcing and often in their operational decision making. Departmental heads have varying influence and ultimately the Minister can enforce control. This is not the best structure for undertaking enforcement work. (sub. 20, p. 2)

The ACCC has also mentioned that the arrangements have seen it take on more responsibility for product safety:

> The success of this model is contingent on the State and Territory regulators retaining expertise and capacity to deliver on their role in consumer product safety, including in market

> surveillance, compliance and enforcement. The consumer product safety expertise and capacity of some ACL regulators has decreased since implementation and this has shifted the need for responses to the national regulator, in a way not envisaged by the reforms. (sub. 23, p. 15)

There is relatively limited evidence of inconsistencies in enforcement of product safety laws, but concerns expressed by stakeholders about inconsistency reinforce the importance of cooperation and coordination mechanisms to the continued success of the single-law, multiple-regulator model (see chapter 3).

A single regulator would address these weaknesses and have some additional benefits

The above issues — the inconsistency in the application of product safety laws and the shifting of, and in some cases poorly delineated, responsibilities — are likely inherent weaknesses of the current approach. The Commission recommended a single product safety regulator in its 2006 and 2008 reports, partly to avoid these problems.

An additional benefit of a single product safety regulator is the potential it would offer for the ACCC to develop a higher profile as a regulator of product safety. For example, the US Product Safety Commission was established in 1972 and has over 500 employees and has a relatively high profile. A higher-profile regulator can increase consumer and business confidence in the regulatory regime, with positive implications for rates of consumers reporting issues and voluntary compliance by businesses.

A single, larger product safety regulator might also develop its own internal synergies. It would allow more effective training, knowledge sharing, career development and succession planning, and allow for staff specialisation in certain aspects of product safety functions.

A single, product safety regulator would also avoid inefficiencies that inevitably arise from duplication and coordination of effort, and the need for information sharing, which occurs when eight ACL regulators deal with ostensibly the same issues.

Change is not presently recommended

While there would be some advantages of moving to a single regulator for generic product safety laws, in the absence of evidence of significant failings in product safety enforcement the Commission does not recommend change at the current time, for the reasons advanced in earlier paragraphs.

However, this issue should be revisited in the future as the balance of costs and benefits is affected by changes in institutions and markets. The benefits of a single, product safety regulator may be enhanced as product markets continue to become even more national and international. Similarly, synergies exist between industry-specific regulation (for example, occupational and business licensing) and product safety laws. Should COAG progress the Commission's recommendations for reform or repeal of industry-specific

regulation, some of those synergies may be reduced, tipping the balance towards consolidating enforcement responsibilities within a single regulator.

4.2 Intelligence gathering and sharing

Individual ACL regulators typically collect data and information for their own jurisdiction. This can include the details of enquiries and complaints submitted by consumers or identified from other sources, such as their inspection and compliance activity. This data can be analysed to identify and target areas where disputes or product safety incidents are more likely to arise. This could include identifying higher risk industries, business models or even particular traders.

This intelligence can be valuable in focussing a regulator's effort on issues that entail a greater likelihood of consumer harm. However, the complaints collected by any one regulator are only a subset of the stock of intelligence collected by ACL regulators nationwide. Accordingly, the scope for any one regulator to identify systemic issues is likely lower than what might be possible from analysis of a combined dataset, particularly for smaller jurisdictions that might only collect a small number of complaints.

How is intelligence and data currently shared?

Regulators already interact and share information in a range of ways. These include regular meetings of the CAANZ advisory committees, as part of completing specific national projects and by posting or seeking information more generally through ACLink. The ACCC noted that these processes are useful, but resource intensive:

> ACL regulators invest significant resources into information sharing. This includes the creation of ACLink, a secure extranet that allows ACL regulators to share intelligence and information about complaints and investigations, communicate on compliance and enforcement issues and alert members to emerging issues and complaints of interest. Monitoring, preparing material and responding to requests in ACLink can be time consuming, but we recognise that the information provided may assist enforcement decision-making by State and Territory regulators. (sub. 23, p. 18)

Mechanisms such as ACLink facilitate the sharing of intelligence between ACL regulators, but in an ad hoc or reactive way. The ACCC (sub. 23, p. 20) submitted that most information and intelligence sharing between ACL regulators is 'request based', either to contribute to a national project or in response to a particular high profile issue.

The Australian National Audit Office (ANAO) also recently noted that ACLink, as a means of exchanging information between ACL regulators, was not equivalent to a national database of complaints and other information:

> ACLink allows Australian Consumer Law regulators to request and post information about topics of interest — such as traders, industries and conduct. While this is useful in the context

> of individual investigations (such as in reducing duplication of investigative efforts), it is significantly less useful than complete disaggregated complaints data for the purposes of identifying trends, patterns and issues of concern. (ANAO 2016, p. 28)

Databases of consumer issues are not novel

The idea of a national database for intelligence sharing is not new. In its 2008 report, the Commission recommended that all ACL regulators contribute to the then AUZSHARE shared database of serious complaints and cases.[21] However, its development faltered for a number of reasons, including IT interoperability, taxonomy issues and, ultimately, a lack of funding.

There are other examples of databases being used to share data on consumer issues, including publicly with industry and consumers. These can provide insights into how the ACL regulators might improve their data analysis and sharing.

An obvious proximate example is the complaints register recently launched by NSW Fair Trading, although this model is not comprehensive as it only lists businesses once the number of complaints lodged against them meets a minimum threshold (box 4.3).

Box 4.3 NSW Fair Trading Complaints Register

This public register lists businesses that have had at least 10 complaints lodged against them in a calendar month. The register commenced from 1 July 2016, with data for the first month published on 25 August 2016 (20 businesses were listed for the first month). Information listed on the register includes the businesses' recognised trading or brand name and the number of complaints by product classification.

NSW Fair Trading only includes complaints on the register that it considers 'have been made by a real person, relating to a real interaction with a business', but it also notes that many complaints are reflective of poor customer service and that a business listed on the register may not have breached any laws.

The stated objectives of the register are to provide businesses with an incentive to provide better customer service and to help consumers make more informed decisions. It also is part of the New South Wales Government's open data policy.

Source: NSW Fair Trading (2016b).

[21] Three jurisdictions were already contributing their complaints to AUZSHARE in 2008.

A more comprehensive model is the (financial) Consumer Complaint Database in the United States, managed by the Consumer Financial Protection Bureau (box 4.4).

Box 4.4 US Consumer Complaint Database

The US Consumer Financial Protection Bureau handles complaints from consumers about financial service providers. Consumers can lodge a complaint with the Bureau which then forwards it on to the relevant company for a response. The Bureau does not verify the facts of the complaint, but does check that there was a commercial relationship.

These complaints are then listed in a public database on the Bureau's website after the company responds to the complaint, or they have had the complaint for 15 days. For each complaint, details reported in the database include:

- the category of financial service and the issue complained about
- the date received, the complainant's state location and, if the complainant consents, a de-identified narrative description of their complaint
- the name of the company, details about its response to the consumer and, if it chooses, a public response.

Since commencing in July 2011, over 620 000 complaints have been added to the database, with 97 per cent of complaints responded to by companies in a timely manner. In addition to the data being publicly available for use by interested parties, the Bureau also analyses the data to inform its compliance and enforcement activities.

Source: Consumer Financial Protection Bureau (2016).

Another potentially instructive model, particularly in terms of how complaint data might be presented publicly, is the complaint data reporting by the Financial Ombudsman Service.[22] Under its terms of reference, it is required to meet a number of reporting obligations, including reporting to the Australian Securities and Investments Commission (ASIC) instances where it identifies systemic issues (that is, issues likely to affect others, not just the parties to the particular dispute) and instances of serious misconduct (such as conduct that is fraudulent, grossly negligent or a wilful breach of the law). Of particular note, it also publishes information on complaints on its website in the form of comparative tables that provide information on each member financial service provider (FSP), including:

- the chance of a dispute against the FSP[23]
- the average time taken to resolve complaints
- the outcomes of the resolution process (FOS 2016a).

[22] The Financial Ombudsman Service is one of two ASIC-approved external dispute resolution schemes for financial services. It hears complaints relating to services such as banking, credit, loans, life insurance, superannuation, financial planning, insurance broking, investments, and general insurance (chapter 6).

[23] Calculated as the number of disputes lodged divided by a volume measure of FSP activity (such as the number of policies the FSP has issued in the same product group).

Increasing the use of data for monitoring and surveillance

More systematic sharing of data through a national database (of complaints, product safety incidents and/or other relevant data) would have a number of benefits. For instance, analysis of a combined dataset, which was updated in a timely way, would generally lead to the earlier identification of systemic issues and better focus of regulatory effort. Another use might be as an information source of increased information to empower consumers to make better informed purchasing decisions.

Consumer advocates have supported the development of a publicly accessible national complaints database (box 4.5).

As noted above, the ANAO's recent assessment of the ACCC's fair trading functions found that ACLink had limitations relative to having direct access to complaints data from other regulators. It subsequently recommended that the ACCC regularly obtain complaints data from the other ACL regulators, to which the ACCC agreed (ANAO 2016).

The ACCC, in its submission to this study, was broadly supportive of a national database, for both ACL complaint data and product safety incidents, noting:

> The establishment of a national database would protect against information siloing, help identify issues of local and national significance and improve operational and strategic coordination and decision-making across all jurisdictions. (sub. 23, p. 4)

Box 4.5 Participants' views on a national complaints database

A number of organisations have put forward views on a national complaints database.

CHOICE considered that the recently introduced New South Wales complaints register could be adopted nationally, stating:

> Providing consumers with access to relevant information currently held by businesses can be facilitated by governments; NSW Fair Trading's pilot complaints register is one example that could be adopted nationally. CHOICE strongly supports the decision to create a consumer complaints register that will publish information about individual traders or franchisors who are the subject of a high number of complaints and encourages other States and Territories, and the Federal regulators such as the ACCC and ASIC, to follow suit. (sub. 11, pp. 26–27)

Consumer Action also submitted that ACL regulators should publish consumer complaints:

> Publication of consumer complaint data held by regulators would promote consumer outcomes and help consumers exercise their rights under the ACL. Publication would also assist consumers make informed decisions about where to buy goods and services and would provide incentives for businesses to deliver consistently good customer service. Transparency about complaint data would also serve as a relatively efficient, non-regulatory measure to promote the effective function of consumer markets. The NSW Office of Fair Trading will publish a complaints register from later this year, and has issued guidelines about how it will be designed and administered. Consumer Action submits that all regulators should adopt these guidelines and publish consumer complaints. (sub. to CAANZ, p. 56)

Legal Aid NSW also supported the:

> … establishment of a national, publicly available, complaints register … (sub. to CAANZ, p. 3)

Linking ACL data with other datasets

One of the defining features of the digital age is the proliferation of data, and the increasing scope for data analytics to inform decision making — that is, the age of 'big data'. Accordingly, it is likely that there will be scope for a database on consumer complaints and other data collected by ACL regulators to be linked for analysis with other sources of data. This could include data collected by other regulators, such as the specialist safety regulators, or third party data that might reveal information about consumer transactions and issues (such as internet searches). This could facilitate more advanced analysis and increase the timeliness with which emerging issues are identified.

Project Sentinel is an example of the move by the ACL regulators towards this type of broader data analysis (box 4.6). However, the ACCC noted (in the context of responding to the ANAO's recommendations for use of enhanced data analysis) that this is likely a longer-term proposition and that 'the scope of this project is unlikely to deliver the information sharing solution that would be beneficial in the short to medium term' (sub. 23, p. 19).

Box 4.6 **Project Sentinel**

Project Sentinel is an ACL national compliance project led by New South Wales. The aim of the project is first to develop a platform that enables users to transform and integrate data from multiple sources on consumer matters. It is also intended to provide a range of analytical tools to draw meaning from the data. A stated potential benefit of the project is that it could 'greatly improve regulators' ability to share information and identify consumer issues in the marketplace at a national level'.

In the first instance, the ACL regulators have agreed to a proof-of-concept trial. The trial is seeking to assess regulatory compliance in the automotive industry at the national level (for instance, identifying where a person is selling motor vehicles as an unlicensed motor vehicle dealer or odometers are being wound back).

Subject to the outcomes of the trial, the ACL regulators have agreed to consider developing a shared operational analytics capability. The ACCC (sub. 23) noted that the key learnings arising from the trial so far are the importance of appropriate resourcing for IT infrastructure and having a common taxonomy for data categorisation.

Source: NSW Fair Trading (2016a).

A publicly accessible component

As noted, consumer organisations have advocated the creation of a publicly accessible national complaints database, often citing the recently launched New South Wales complaints register. For instance, Consumer Action suggested that the recently-launched scheme is already having positive effects and should be replicated nationally:

> Early indications suggest that the NSW OFT complaints register is having a significant experience on some business, to the benefit of consumers. Since March 2016, there has been a

> 43 percent reduction in complaints about traders who were routinely reaching the threshold for the register. This suggests that the initiative ought to be replicated by all ACL regulators. It would then be a simple step to collate data into a national complaints register providing monthly comprehensive data nationwide — and putting industry on notice that if complaints pre-dominate, then this will be publicly known. A national complaints register could also leverage the collective resources of the various ACL regulators, enabling the register to be widely promoted and generating a higher profile for the concept of consumer complaints generally. (sub. 10, pp. 7–8)

However, there are concerns from business about the operation of the New South Wales complaints register. For example, the Ai Group submitted that:

> While we support the rationale for the NSW scheme, we have a number of concerns with its design which we do not consider reflects best regulatory practice and creates a disproportionate outcome. This design gives rise to broader issues with respect to a process that lacks procedural fairness, creates the potential for increased abuse of process by consumers and an unnecessary regulatory burden (including resourcing issues) on both the regulator and affected businesses, and unfairly causes reputational damage to businesses over frivolous and vexatious claims. (sub. 26, p. 3)

Some of the concerns about the New South Wales complaints register arise because of the way the register is designed.

- The complaints register is based on lodged complaints, rather than upheld complaints, so it could adversely affect some businesses where complaints are subsequently found to be baseless (or vexatious). However, given the time taken to resolve disputes, using a model of upheld complaints could make the resource much less timely and useful in informing consumers.
- The 10 complaints per month threshold for listing has the effect of reducing the number of listed businesses and notionally should lead to reporting of systemic or repeated behaviour rather than isolated incidents. However, it is also likely to result in a reporting bias towards larger firms that have greater volumes of transactions, even though their complaint-to-transaction ratios might be relatively low.
- A related issue is that because complaints are reported under a recognised trading name or brand, discrete businesses operating under the same banner, such as franchises, could be affected by the conduct of other operators. However, NSW Fair Trading (2016b) contends that business practices are likely to be set by a brand's head office rather than individual entities and that complaints should therefore be recorded against the brand as a whole.

The other models noted above — the US financial complaint database and that of the Financial Ombudsman Service — are much more comprehensive approaches than the New South Wales complaints register, in that they either list every complaint or provide complaints statistics about each business. They also contain details on complaint outcomes.

A comprehensive approach still risks adversely affecting businesses through the publication of baseless or vexatious complaints, but it could nonetheless contribute to a greater degree of transparency in business to consumer transactions, and meet the objectives of government open data policies (which is a stated objective of the New South Wales Government).

However, a comprehensive database is likely to be more resource intensive than the New South Wales model, and the costs and benefits to businesses and consumers of such an approach are not immediately clear. In the first instance, it would seem that the New South Wales model should be assessed after an appropriate period. This assessment could inform how complaints data would best be presented to the public.

One factor that potentially affects both the value of the information to consumers and the reputational effect on businesses is the wider issue of information sharing through the internet, including review sites and forums, and social media more generally. These platforms already facilitate access to information on business conduct, albeit in an ad hoc and unsubstantiated way, and should be taken into account in considering what added value (or harm) might accrue from developing different models of publishing complaints data.

Next steps

Improving digital technologies and data analytics suggest large-scale data analysis will be an area of increasing benefit for ACL regulators. However, while these changes can be expected to increase the benefits of a national database, such development should as always only proceed if justified by cost–benefit analysis.

The increasing importance of access to data, across governments and society more generally, is reflected in the Commission's concurrent inquiry into *Data Availability and Use*. This inquiry is tasked with examining, among other things, the benefits and costs of making data more available, and how consumers can use and benefit from access to data. The draft report has made a range of recommendations around facilitating access to data, including that government agencies should adopt data management standards that, among other things, support the sharing of data across Australian governments and agencies (PC 2016a).[24]

Hence, it seems sensible to consider how a national database of complaints and other information, such as product safety incidents, could be advanced.

[24] The draft report also makes recommendations about increasing the rights of consumers in regard to data about them, and a role for ACL regulators to educate consumers about these new rights.

A useful first step would be to identify any significant impediments to establishing such a database. The ACCC has identified several technical and procedural issues, such as:

- Taxonomy — one of the key impediments to effective information synthesis has been an inability to decide amongst participants on appropriate naming conventions, or taxonomy, for contacts. Without this base-line agreement any eventual national system may be less useful
- Database governance structure — it will be critical to ensure that any national database delivers on the needs of all participants
- Privacy and security issues — agency privacy and information sharing policies may need to be amended to allow for a national database.
- Shared protocols publicly communicating relevant results and information obtained through use of the database — participants will need to agree as to how joint information can and cannot be used. (sub. 23, p. 20)

Ultimately though, the ACCC considered that the cost of moving to compatible IT systems is the main impediment. It submitted that:

> … to date there has been an unwillingness or inability to break off existing IT contracts in favour of new, complementary systems, or to fund multiple sets of licencing fees. Existing IT budgets are a key constraint on developing a national complaints database … (sub. 23, p. 20)

One solution to this 'key constraint' might be to develop a staged introduction of IT systems that would support a national database. This could involve the development of protocols, such that as regulators' IT systems are progressively upgraded, there is a convergence towards a standardised approach. If adopted, this incremental approach would avoid future costs from the adoption or development of incompatible IT systems and inconsistent taxonomy.

The Commission is further aware of a practical difficulty in that, in a number of cases, ACL regulators are located within other broader departments with differing IT providers and capabilities.

If the benefits of a national database are sufficiently large, this could justify incurring the costs of breaking IT contracts or replacing IT systems in some jurisdictions (rather than waiting for contracts to expire or until systems are due to be replaced). However, with this approach, the costs of implementing common IT systems are unlikely to be proportionately distributed among jurisdictions.

Under this scenario, there may be a case for arrangements where funding is sourced from jurisdictions in line with the likely benefits they derive from a national database. Because the benefits are likely to accrue both within jurisdictions and nationally, some Commonwealth funding may be appropriate to assist with the incremental cost of new IT systems. That said, the details of any funding arrangements would depend on the distribution of those costs and associated benefits.

In the first instance, CAANZ could examine the impediments, including costs, to the establishment of a national database, identify the preferred approach and develop an implementation plan to achieve that goal.

In the case of a publicly accessible component of a national database, the recent launch of the New South Wales initiative provides the opportunity for further assessment of the benefits and costs from the publication of (limited) complaints data. Such an assessment should be undertaken before the scheme, or a more comprehensive approach to public data access, is adopted on a national basis.

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.

4.3 Enforcement tools and penalties

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 infringement notices — are now available for the regulators to call on, as well as a broader suite of tools (box 4.7).

There have been two main issues raised regarding enforcement tools and penalties during the course of this study: differences in remedies and penalties across jurisdictions; and financial penalties being of insufficient magnitude to deter breaches of the ACL.

Box 4.7 ACL penalties and remedies

Penalties and remedies available under the ACL itself include:

- *civil pecuniary penalties* — monetary fines imposed and collected by civil courts. The civil standard of proof is applied (namely the balance of probabilities)
- *criminal penalties* — legal action against a firm that is suspected to have contravened a criminal prohibition. It must be proven that the law was contravened beyond reasonable doubt
- *disqualification orders* — consumer regulators may apply to a court for an order disqualifying a person from managing a corporation for a contravention of the ACL
- *compensation orders* — people affected by a breach of the ACL can seek compensation (which might include orders to pay damages or to repair goods) for loss or damage suffered or likely to be suffered as a result
- *injunctions* — consumer regulators or an affected person may seek an injunction to stop a business from engaging in conduct in breach of the ACL, or take a certain action, such as refund money or honour a promise
- *non-punitive orders* — a court can order a person to engage in activities such as to establish a compliance program, training course or revise internal operations.

Additionally, the ACL regulators may use enforceable undertakings, and infringement, substantiation and safety warning notices in their compliance and enforcement activities (although their powers with respect to these may differ — see below). For example, an infringement notice, requiring payment of a penalty, may be issued where there are reasonable grounds to believe that a person has contravened certain consumer protection laws (discussed further below).

Sources: ACCC (2013, nd); Australian Government (2013); PRAC (2015).

Remedies and penalties differ across jurisdictions

A number of participants noted that enforcement remedies and penalties available to the ACL regulators for breaches of the ACL vary between jurisdictions. For example, the ACCC commented:

> The enforcement tools and remedies available to ACL regulators vary from jurisdiction to jurisdiction and this variation may limit the efficacy of the multi-regulator model. (sub. 23, p. 9)

This issue also arose in the CAANZ review of the ACL. Its interim report notes that 'since the ACL was implemented, regulators have worked collaboratively to coordinate compliance and enforcement approaches to enhance consistency in outcomes' (CAANZ 2016a, p. 175). Indeed, research undertaken in May 2015 by the CAANZ Policy and Research Advisory Committee (PRAC) for that study highlights a range of differences in the penalties and remedies available across jurisdictions.

Several of these relate to differences in legal systems across jurisdictions — in particular, the legal authority for certain courts to dispense civil remedies, pecuniary penalties and criminal fines and punish contempt of court (box 4.8).

Box 4.8 Some differences in remedies and penalties

- **Civil remedies** — Different courts have different powers to dispense ACL civil remedies (Local/Magistrates and County/District courts). In New South Wales, neither the Local nor District court can dispense any civil non-pecuniary remedy (the Local court can impose compensation orders in addition to a penalty when a person is convicted of an offence). In Queensland, each court can dispense some remedies separately, and some others only as part of other proceedings, while in South Australia and the ACT all courts can dispense civil remedies in an unrestricted manner.
- **Pecuniary penalties and criminal fines** — Local/Magistrates courts have different powers to hear civil pecuniary penalties and criminal fines, and to impose the maximum fine.
  - Except in Western Australia, all jurisdictions'[25] Local/Magistrates courts can impose civil pecuniary penalties, though there are differences in the maximum penalties that can be imposed — only in Victoria and the ACT can the Magistrates court impose the maximum penalty.
  - In all jurisdictions with the possible exception of Victoria,[25] Local/Magistrates courts can hear ACL criminal matters, though the maximum fine that the courts can impose varies across jurisdictions. For example, the Magistrates Courts in New South Wales, Tasmania and the ACT can impose the maximum fine, while the Western Australian and South Australian Magistrates Courts can only impose maximums of $36 000 and $150 000 respectively.
- **Contempt of court** — Powers to punish contempt of court vary. Breaches of non-monetary civil remedies ordered by Local/Magistrates courts and County/District courts are prescribed in the legislation establishing those courts and therefore differ.

Source: PRAC (2015).

However, there are also differences in the regulators' powers with respect to breaches of the ACL, specifically, the powers of the ACL regulators to issue infringement notices and to draw on additional remedies (PRAC 2015). The ACCC noted:

> There are a number of variations between jurisdictions, but in particular we note that 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. (ACCC, sub. 23, p 9)

The 2015 PRAC study found the following differences in infringement notice powers:

- Victoria and the ACT do not have an infringement penalty regime for ACL offences. In those jurisdictions that do, there are differences between the ACL provisions prescribed as infringement offences (table 4.2)

[25] The Northern Territory is unknown.

- monetary penalties for infringement notices vary across jurisdictions and can differ according to the offence and whether the offender is an individual or a body corporate
- only the Commonwealth and Queensland are able to publicly identify the recipients of infringement notices.

Table 4.2 **Powers to issue infringement notices[a,b]**
Selected ACL breaches

ACL section[c]	*Cwlth*	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*ACT*	*NT*
Unconscionable conduct s.21(1)	✓	✗	✗	✓	✗	✗	✗	✗	✓
False or misleading representations about goods/servs s. 29(1)	✓	✗	✗	✓	✗	✗	✗	✗	✓
Wrongly accepting payment s. 36 (4)	✓	✗	✗	✓	✗	✓	✓	✗	✓
Harassment and coercion s. 50	✓	✗	✗	✓	✗	✓	✓	✗	✓
Lay-by agreements must be in writing etc s. 96(1)	✓	✓	✗	✓	✓	✓	✓	✗	✓
Supplying etc. consumer goods that do not comply with safety standards ss. 106(1)-(3)&(5)	✓	✓	✗	✓	✓	✓	✓	✗	✓
Compliance with recall notices ss.127(1)&(2)	✓	✓	✗	✓	✓	✓	✓	✗	✓
Suppliers to report consumer goods associated with death or serious injury or illness s. 131(1)	✓	✗	✗	✓	✗	✓	✓	✗	✓
False or misleading information etc s. 222(1)	✓	✗	✗	✓	✗	✓	✓	✗	✓
Power of regulator to publicly identify recipients of infringement notices	✓	✗	✗	✓	✗	✗	✗	✗	✗

[a] Penalty levels vary between the Commonwealth, States and Territories. [b] There is a range of other breaches of the ACL for which infringements notices can also apply, but are not shown in this table. [c] The provisions are in chapters 2, 3 and 5 of the ACL (in Schedule 2 of the Competition and Consumer Act). Some States issue infringement notices under the equivalent offence provisions in chapter 4 of the ACL.

Source: PRAC (2015).

That study also found differences between the States and Territories with respect to the availability of additional remedies for breaches of the ACL — indeed, only in Tasmania, the ACT and the Northern Territory does the enforcement 'toolkit' exactly match that in the ACL (PRAC 2015). In particular, the 2015 study found that:

- there are variations on the scope or wording of remedies in the local fair trading legislation, including for public warning notices, injunctions, compensation orders and non-punitive orders
- two remedies in Victoria have no ACL equivalent: they are that a trader must cease trading should it fail to respond to a show cause notice; and that a court (including the Tribunal) may make any order it considers fair regarding a person who has (or may) suffered loss or damage as a result of a contravention of the ACL
- in New South Wales, on the second and subsequent conviction of a person for certain ACL offences, an additional penalty of three years imprisonment (Supreme court) or two years imprisonment (Local court) can be imposed (PRAC 2015).

The precise impact of the differences across jurisdictions is not clear. For example, it is not known how many infringement notices a jurisdiction might have issued if it had that power.

There may be sound reasons for some differences between jurisdictions. The flexibility of the multiple-regulator model to allow for differences between the procedures and administration rules of the broader justice systems in each of the states and territories is noted in the CAANZ review of the ACL (CAANZ 2016a). These differences may appropriately reflect variations in local preferences or conditions. For example, imposing a maximum penalty in some courts may reflect a desire for larger cases to be heard by more senior courts.

However, some participants, such as the Governance Institute of Australia (sub. to CAANZ), have called for greater consistency between the penalties imposed across jurisdictions. The ACCC also raised concerns with the current approach:

> We are conscious that the tools and remedies available to investigate and resolve matters vary among jurisdictions. We recognise there may be legitimate policy reasons for variation. However, the efficient operation of the multi-regulator model may be distorted if limitations in tools and remedies prevent regulators from engaging in proportionate, risk-based enforcement. (sub. 23, p. 3)

While many of the differences in remedies and penalties across jurisdictions reflect their broader legal systems, it would be pertinent to consider areas where there is scope to reduce differences in more ACL-specific remedies and penalties across jurisdictions. One such area is the power of the States and Territories to issue infringement notices. Given the scope for infringement notices to allow regulators to deal with minor offences in a cost-effective manner, there may be potential benefits from States and Territories revisiting their powers to issue these and the range of breaches to which they apply.

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'.

Are pecuniary penalties too low?

Several study participants also questioned whether the civil pecuniary and criminal penalties available to the ACL regulators are of an appropriate magnitude (box 4.9).

Box 4.9 Participants' comments on the magnitude of penalties

Several participants commented that they consider penalties under the ACL to be too low:

> The maximum penalties available for breaches of the specific prohibited practices under the ACL are too low. They can often be a fraction of modern marketing budgets for large institutions, and easily absorbed and ignored as little more than a cost of doing business. There are no pecuniary penalties at all for breach of the misleading or deceptive conduct or unfair contract terms provisions. It is also unclear why penalties for the consumer law provisions are lower than those for competition provisions under the *Competition and Consumer Act 2010* (the Act). (CHOICE, sub. 11, p. 9)

> The regulators also need appropriate enforcement tools available to them, in order to punish individual traders who have breached the law, and deter others from engaging in the same conduct. The current penalties available are not nearly high enough to deter businesses from bad behaviour. … Fines need to be proportionate and effectively deter bad conduct, and $1.1 million per breach is manifestly insufficient. (CFA, sub. 19, p. 3)

> While fixed caps give some certainty to business, the deterrent effect can be undermined if profit from breaching behaviour outweighs the penalty. The Federal Court identified this as an issue in unconscionable conduct proceedings brought by the ACCC against Coles Supermarkets. For a company with annual revenue in excess of $22 billion, a $1.1 million penalty may be insufficient to change behaviour. … In 2014 Telstra was issued a $102 000 penalty by the ACCC for advertisements which misrepresented the price of a new iPhone 6 phone plan bundle. … In the context of more than a $400 million increase in revenue, largely attributed to increased sales of the iPhone 6, the same product which was found to have misleading advertising, the deterrent effect of a $102 000 penalty is questionable. It should be noted that the ACCC did not seek the maximum penalty in this case. (ACCAN, sub. 6, pp. 5-6)

> At the same time, penalties for engaging in anti-competitive and anti-consumer conduct and for breaching the rights of consumers are inadequate. Penalties are too small to act as a deterrent, are low by international standards and are seen by transgressors as a mere 'cost of doing business' according to the Federal Court, the Australian Competition and Consumer Commission, and consumer advocates. This clearly has implications for the efficacy of administration and enforcement of the Australian Consumer Law. (Leigh, sub. 1, p. 1)

The maximum financial penalties currently available under the ACL ($1.1 million for companies and $220 000 for individuals) have remained unchanged since the introduction of the ACL in 2011. Since that time, the courts have ordered penalties of more than $44 million, with penalties at or above $1 million in 18 cases (Sims 2015).

The main concern of participants is that the current penalties do not deter breaches of the ACL, and some argued that fines under the ACL were sometimes incorporated into a business's normal costs of doing business (Leigh, sub. 1; CHOICE, sub. 11).

Participants put forward a number of examples of cases where the financial penalties appear to be small relative to the potential benefits accrued by a business. For example, CHOICE (sub. 11) asserted that the financial benefit from falsely advertising free range eggs would be in the order of $30 million, yet penalties were issued in the range of $50 000 to $300 000. The CFA (sub. 19) submitted an example of Reckitt Benckiser, which was fined $1.7 million for misleading consumers by advertising targeted pain relief under its Nurofen brand. The CFA contended:

> This fine pales in comparison with the profits that Reckitt Benckiser made by tricking customers into paying the premium. The ACCC estimates that the company sold 5.9 million units containing the misleading representation. At $12.42 for Nurofen Period Pain Caplets in comparison with $1.65 for generic Ibuprofen, the company made an estimated $63 million more than a company selling correctly marketed generic pain relief. (p. 3)

Following the Reckitt Benckiser judgment, ACCC Chairman Rod Sims commented:

> Penalties under the Australian Consumer Law generally should be at a higher level … The maximum penalty under Competition Law is generally $10 million per breach, and it's a bit hard to understand why there's that significant difference. So we do have general concern about penalties under the Australian Consumer Law as not being adequate to give the right amount of deterrence. (Sims 2016)

In December 2014, following proceedings instituted by the ACCC, the Federal Court found[26] that Coles engaged in unconscionable conduct by way of 'serious, deliberate and repeated' misconduct in its engagement with suppliers (ACCC 2014a). Amongst other non-pecuniary penalties, Coles was ordered to pay penalties of $10 million plus costs. In her judgment, Justice Gordon said:

> It is a matter for the Parliament to review whether the maximum available penalty of $1.1 million for each contravention of Pt 2-2 of the ACL by a body corporate is sufficient when a corporation with annual revenue in excess of $22 billion acts unconscionably. The current maximum penalties are arguably inadequate for a corporation the size of Coles. [at 106]

An alternative view that has been advanced is that the current regime is adequate in achieving compliance. Some stakeholders suggested that a range of other factors would have a greater impact on deterrence, including increasing the likelihood of enforcement action being taken (CAANZ 2016a).

The Commission agrees that increasing enforcement efforts would also increase deterrence, although that is not necessarily a reason in itself to leave fines at their current levels.

[26] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405.

In its submission to this study, the ACCC said:

> In our view, the current maximum penalties available under the ACL are too low and need to be increased if they are to act as an effective deterrent. Court ordered penalties are an important part of our enforcement toolkit and, like all enforcement tools, need to be set at an appropriate level if they are to form part of a proportionate response to consumer harm. (sub. 23. p. 9)

Similarly, the CAANZ review of the ACL noted that:

> … for a penalty to effectively deter future breaches of the ACL, it must adequately reflect the nature and gravity of the breach and be sufficient to not be considered 'an acceptable cost of doing business'. Accordingly, there may be opportunities to review the amount of the current maximum penalties. (2016a, p. 180)

Both of these comments support a longstanding view of the Commission regarding the deterrence effect of penalties. In 2008, the Commission stated that:

> … enforcement mechanisms should aim to ensure that the ultimate cost of engaging in illegal conduct significantly outweighs its perceived benefits and the costs to other parties of taking enforcement action. (2008, p. 237)

The CAANZ review of the ACL has 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 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. Based on the information provided during this study, the Commission agrees that there is a strong case for increasing penalties for breaches of the ACL.

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*.

4.4 Accountability and performance reporting

An issue that arises throughout this report is the lack of publicly available data and metrics to enable or bolster analyses of the activities and performance of the ACL regulators.

Reporting on the compliance, enforcement and other activities of ACL regulators, the resources used and the results obtained, is important for regulators' accountability. Such reporting can assist consumers, business and government to develop an evidence-based view about the effectiveness of ACL regulators. It enables governments to make better decisions about the resourcing of regulators and for electorates to hold their governments

to account for those decisions. It also enables governments that have entered into intergovernmental agreements to ensure that all parties are playing their part. Improved reporting on the compliance, enforcement and other activities of ACL regulators would also better inform any future review of administration and enforcement of the ACL under the multiple-regulator model.

Further, reporting on a comparable basis can enable regulators to benchmark their own performance, and identify and adopt better practices. Indeed, the one-law, multiple-regulator model provides a unique opportunity for benchmarking of regulator performance which does not currently appear to be fully exploited, partly due to limited collection of performance data.

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. Reporting is usually for total staffing numbers and total budgets (which can be over 700 people and almost $100 million in the larger states), but these resources are deployed across a range of regulatory functions, many of which are only tangentially related to the ACL. And the data published in the annual ACL implementation reports is aggregated across all the regulators.

The 2013 *Regulator Watch* study made a number of criticisms of the reporting practices of most ACL regulators:

> Current reporting is not sufficiently comprehensive, with regulators rarely reporting against all enforcement powers, types of wrongdoing or industries. With few exceptions it is not timely or frequent enough. And reported information is not comparable between jurisdictions and often not fully comparable across time. (Renouf, Balgi and Consumer Action Law Centre 2013, p. 13)

During this study, the Commission requested the ACL regulators, through CDRAC, to 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), CDRAC raised several reservations 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 at the individual jurisdiction level could be misleading because of the collaborative nature of operations under the multiple-regulator model. For example, a lead regulator approach is often taken with contributions from other regulators.

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.

The Commission considers that there is a strong case for ACL regulators to publish a rich array of data and information on their resources and activities.

The following sections elaborate on why performance reporting can pose a challenge for regulators engaged in risk-based compliance and enforcement, sets out the data and information currently reported by the ACL regulators and identifies gaps in transparency and reporting that should be filled.

The reporting challenge for risk-based compliance and enforcement

Modern regulator practice is for regulators 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 (chapter 3).

The adoption of a risk-based approach to compliance and enforcement poses a challenge for reporting on the activities of ACL regulators because education and persuasion activities (or innovative approaches that prevent harm before it occurs) are not as easily measured as some other compliance and enforcement activities.

Metrics that focus on higher level enforcement actions (such as fines issued, licences revoked or criminal convictions) can overstate the performance of regulators that have allowed a problem to develop and understate the performance of regulators that prevent harm to consumers or efficiently arrange for redress.

Indeed, a narrow focus on the functions and processes conducted by regulators could miss reporting activities that make significant contributions to consumer welfare. As Sparrow — a leading international expert in regulatory and enforcement strategy, security and risk control — points out:

> Much of the frustration surrounding performance reporting stems from the fact that functional- and process-centred performance stories do not naturally include an account of risks mitigated, hazards eliminated or patterns of non-compliance addressed. The performance account that accompanies a problem-solving or risk control operation consists almost entirely of such. (Sparrow 2000, p. 282)

Measuring the performance of a risk-based regulator by reference to how often it uses its regulatory 'tools' (fines issued, litigation commenced, disqualification orders made) is akin to measuring the performance of a tradesperson by how many times they use their hammer, screwdriver or saw. What is important in both contexts is the outcome, not the number of times each tool is used.

An even greater challenge in designing the most appropriate approaches for reporting on compliance and reporting activities is the effect that it can have on the behaviour of regulators. Regulators that are judged by how often they use each available tool will behave differently to those that are judged by outcomes.

One way in which consumer regulators might respond to a demand to report a lot of activity would be to focus on relatively trivial breaches of the ACL that do relatively little harm to consumers. An example of this is fining restaurants for applying a surcharge on weekends or public holidays by having an asterisk at the bottom of a menu instead of printing a different menu.[27] This type of regulatory behaviour can reduce respect for the law and have negative effects on levels of voluntary compliance (Tyler 1990, p. 4). It can also consume regulatory resources without contributing significantly to consumer wellbeing.

Narrowly-based measures of outcomes can also create perverse incentives. In the context of the ACL, it would be possible to choose narrow performance measures that could mislead — for instance, are more consumer complaints a sign of more problems, or of more consumers that are aware of their rights? Narrow performance measures could also provide poor incentives to regulators. For example, a drive to reduce injury rates through product safety regulation might result in products being banned that are beneficial to consumers, but carry inherent risks, such as ladders or rechargeable batteries.

One response to the reporting challenge posed by a risk-based approach to regulation would be to limit reporting on enforcement activities to avoid the potential for performance metrics to be used or misused. Sparrow has considered this issue and argued that withholding information is not the path to follow:

> The second question students [in seminars for senior regulators] raise is this: 'So to get the public and the politicians to pay attention to this broader, more complex performance story, should we withhold the traditional statistics … so we are not held hostage by them?'
>
> My normal advice is this: 'No, it's a democracy, and transparency is the default setting. You cannot and would not want to hide that information. It remains important managerial information. Your job is not to withhold the traditional performance account, but to dethrone it. You have to provide a richer story that better reflects the breadth of your mission and

[27] Component pricing laws (s. 48 of the ACL) require a single price to be stated for goods and services. Upon commencement of the ACL in 2010, s. 48 applied to restaurants and cafes preventing them from applying weekend and holiday surcharges without printing a separate menu for those days. A number of businesses were issued with infringement notices for contravention of s. 48. An amendment was made to the ACL in 2013 to allow restaurants and cafes to apply weekend and public holiday surcharges by using the words: "a surcharge of [percentage] applies on [the specified day or days]".

contributions your agency makes. You have to provide that story even if the press, the politicians, and the public do not seem to be asking for it just yet. Educate them about what matters, by giving it to them whether they ask for it or not. In the end, you can reshape their expectations.' (2016, p. 90)

How to meet the reporting challenge for responsive regulators?

The *ASIC Capability Review* developed a performance reporting framework, based on Sparrow (2000), that addresses concerns about both process-based and narrowly outcome-focused performance measures (figure 4.1).

Figure 4.1 **ASIC Capability Review: tiered reporting framework**

Reporting Tier	Elements	Examples
Tier 1	Effects, impacts and outcomes	• Perception and awareness of consumer protection laws • Experience of consumer problems, resolution of problems
Tier 2	Behavioural outcomes	• Compliance and non-compliance rates • Other behavioural changes (adoption of best practices, other risk and harm reduction activities, voluntary actions)
Tier 3	Agency activities and outputs	• Enforcement actions • Inspections • Education and outreach • Collaborative partnerships • Other compliance-generating or behavioural change inducing activities
Tier 4	Resource efficiency	• Agency resources • Regulated community's resources • Government authority

Source: ASIC Capability Review Panel (2015), adapted from Sparrow (2000).

The framework has four tiers. Tiers 3 and 4 entail information about agency activities and outputs, and resource efficiency, respectively. As noted above, this information can enable governments to make better decisions about the resourcing of regulators, enable governments that have entered intergovernmental agreements to ensure that all parties are playing their part and allow benchmarking to be conducted across ACL regulators. In addition, publicity about activity levels can buttress the deterrent effect of enforcement actions. Tiers 1 and 2 look to the effects, impacts, outcomes and behavioural changes resulting from regulator activity.

ASIC has committed to implement recommendations for improved performance reporting in its implementation plan for the *ASIC Capability Review*:

> Taking up this challenge, we have been working for some time to further develop the performance metrics we use to improve the range and precision of information we can provide publicly on our performance as an organisation. We are also exploring how to apply these performance metrics at the level of individual teams so that we can use the same approach in both our external and internal reporting. (ASIC 2016a, p. 1)

ACL performance reporting — where are the gaps?

The performance reporting framework from the *ASIC Capability Review* provides a benchmark against which current reporting by ACL regulators can be assessed.

ACL regulators already report some information relevant to Tier 1 and Tier 2:

- The annual ACL implementation reports (section 3.1) follow the pattern suggested by Sparrow for risk-based (or 'problem-solving') regulators, although they require more detail to meet the standard envisaged:

  > Rather than aggregate statistics, the problem-solving approach produces a performance account consisting of a collection of short stories. Each story describes a specific problem or risk, the evidence of its existence and seriousness, an account of solutions designed and implemented, and evidence of the results achieved. Each story relies on a different set of measures, tailored to the problem. (Sparrow 2000, p. 287)

- The Australian Consumer Survey provides information about consumer and business experience and understanding of consumer laws. Moreover, as the survey was conducted in 2011 and in early 2016, it provides some evidence of changes in consumer harms over the life of the ACL.
- The Australian Consumer Survey also provides an indicator of compliance (and non-compliance) rates with the ACL. For example, it provides information about the prevalence of 'consumer problems', and whether they were resolved to the satisfaction of the consumer, reported across 22 categories and by jurisdiction. This would allow ACL regulators, or suitably motivated stakeholders, to analyse the effectiveness of ACL regulators at limiting the impact of consumer problems.

ACL regulators have adopted very divergent practices for Tier 3 performance reporting:

- As shown in table 4.3, NSW Fair Trading, Consumer Affairs Victoria (CAV) and the ACCC provide the most comprehensive information on their ACL-related activities. NSW Fair Trading and CAV publish an annual report and a 'year in review' report. The level of Tier 3 reporting by the ACCC and NSW Fair Trading is adequate, in that it provides details of almost all of the relevant agency activities and outputs. As Consumer Action has observed:

  > There are however some good practices and some signs of improvement. ACCC and NSW OFT have for a number of years made enforcement data available quarterly and on a reasonably timely basis. (2013, p. 13)

- By contrast, the ACL regulators in Western Australia, Queensland and the ACT publish very little detail on their ACL compliance and enforcement activities. This may partly reflect a structural issue, whereby their main reporting occurs as part of broader reporting by their parent agencies.
- Tasmanian, South Australian and Northern Territorian ACL regulators publish some information on their compliance and enforcement activities, but it is not as comprehensive as that published by NSW Fair Trading, CAV or the ACCC.

Similar observations have been made in the Regulator Watch Report (Renouf, Balgi and Consumer Action Law Centre 2013) for the ACL regulators other than the ACCC and NSW Fair Trading:

> Recent CAV Annual Reports include a lot less statistical data than earlier years. (p. 64)
>
> Until 2008/2009 the WA CPD published a *Year in Review* ... It appears that *Year in Review* is no longer being published … There is patchy information available on infringement notices, prohibition notices, traders named, orders to remedy defects and breaches, rectification notices, and warning letters. (pp. 67–68)
>
> The Qld OFT publishes almost no useful information about enforcement. (p. 66)
>
> There is very little reported on consumer enforcement activity by the ACT ORS. (p. 69)
>
> There is almost no statistical information available on enforcement actions taken by NT CA. (p. 70)
>
> Tas CAFT reports on prosecution, warnings and until 2009/10 licensing action against each Act. There is no information about civil litigation or enforceable undertakings. (p. 71)
>
> While South Australia reporting is somewhat more comprehensive than Queensland and the Territories there are long delays between the end of the year reported on and publication. (p. 14)

Reporting by ACL regulators on the level of resources devoted to the ACL (Tier 4) is almost nonexistent. In most cases, responsibility for the ACL is shared by an agency that has many other responsibilities and resourcing is not separately reported for ACL compliance or enforcement activities. The ACCC is one exception, having reported that $50.48 million and 230.6 staff were devoted to ACL compliance and enforcement activities in 2015-16 (ACCC and AER 2016, p. 65).

Table 4.3 **Publicly reported metrics on ACL regulators**[a]

Statistic	NSW	Vic	Qld[b]	WA	SA	Tas	ACT	NT	ACCC
Number of consumer and trader complaints	✓	✓	a	×	✓	✓	✓	✓	✓
Top 5 / Top 10 consumer complaints (categories) (with numbers)	✓	✓	a	×	✓	×	×	✓	×
Number of trader compliance visits	✓	✓	✓	×	✓	×	×	✓	✓
No. of infringement notices issued and value	✓	✓	a	✓	×	×	✓	✓	✓
No. of investigations	✓	✓	×	×	✓	✓	×	✓	×
No. of prosecutions commenced	✓	×	×	×	✓	×	×	×	✓
Prosecution results	✓	✓	a	×	✓	×	×	×	✓
Summaries of enforcement action outcomes	✓	✓	×	✓	✓	×	×	✓	✓
'Stories' about special projects	✓	✓	a	×	×	×	×	×	✓
Customer feedback (% positive/negative)	✓	×	a	×	×	×	×	×	×
Details of public warnings issued	✓	×	a	×	✓	×	×	×	✓
% consumer complaints resolved	✓	✓	✓	×	×	✓	×	×	×
No. of website visitors	✓	✓	×	×	×	×	×	×	✓
No. of attendees at info sessions	✓	✓	×	×	×	×	×	×	×
No. of telephone inquiries	✓	✓	×	×	✓	×	×	✓	×
Social media statistics	✓	✓	×	×	×	×	×	✓	×
No. of subscribers to eNews services	✓	×	×	×	×	×	×	×	×
Number of publications developed	✓	×	×	×	×	×	×	×	×
Number of hard copy publications distributed	✓	×	×	×	×	✓	×	×	×
Names of parties to enforceable undertakings	✓	✓	a	×	✓	×	×	×	✓
No. of recalls	×	×	×	×	×	×	×	×	✓
No. of product safety risk assessments	×	×	×	×	×	×	×	×	✓

[a] There may be some differences in the methodology used by each regulator when reporting a particular metric, so the same metric may not necessarily be consistent across jurisdictions. [b] Metrics marked 'a' are available, but found in a range of locations, for example, the Queensland Government's 'open data portal' and media releases.

Filling the gaps for Tier 1, 2 and 3

Filling gaps for Tier 1 and Tier 2 reporting would involve improving the existing ACL implementation reports and the Australian Consumer Survey. ACL implementation reports could be improved by providing more details about how the actions of the ACL regulators changed compliance or non-compliance rates or resulted in behavioural changes by consumers or businesses. The Australian Consumer Survey could be expanded to include product safety and feedback should be sought from businesses and consumers to improve its design.

Filling the gap for Tier 3 reporting should not be a significant challenge, either in terms of sign or for data collection or availability. ACL regulators in the larger jurisdictions provide adequate reporting on their activities and outputs. An annual report coordinated by CAANZ that combines elements of the annual reports and 'year in review' reports published annually in the larger jurisdictions would result in adequate Tier 3 reporting. CAANZ could also consider, as an example of Tier 3 reporting, the ACCC's annual performance reports, prepared under the (relatively new) Commonwealth reporting framework.

Filling the gap for Tier 4 reporting (resourcing)

Filling gaps in reporting on resourcing (Tier 4 reporting) will be a more significant challenge. The Commission recommends that CAANZ develop and consider options to improve reporting on resourcing employed on ACL-related activities. Options for consideration are set out below.

One option that CAANZ should consider is for each ACL regulator to estimate resources devoted to ACL activities. As noted above, CDRAC has indicated that it is difficult to separate out the agency staff and resources dedicated to the ACL. The ACCC provides estimates of the total number of staff and budget for ACL-related activities. It also has to separate out ACL resourcing from other resources, to some extent. For example, it makes an allocation for corporate overheads, legal and economic advice and executive support. (ACCC and AER 2016, p. 31). The State and Territory ACL regulators should seek to publish broad estimates of the ACL proportion of their resources, even if there is some sharing of staffing and resources between ACL and other functions. Some 'rules of thumb', based on the knowledge and experience of the relevant managers and senior executives, may be relied upon to arrive at these estimates.

Another option, albeit less beneficial, would be for ACL regulators to report on resourcing according to whatever structures that they currently adopt. This might involve using a broader 'consumer protection' lens, or several lenses. If, for example, a regulator is currently structured by industry sectors and has divisions devoted to 'retail', 'gambling' and 'legal and policy', then it would report the number of effective full time equivalent staff in each area. Whilst this would not allow direct observation to be made of efficiency, it would provide stakeholders with a better indicator of how efficiently resources are being deployed than is currently possible.

The Commission's recommended approach

The Commission's preferred option is for CAANZ to develop a reporting framework. A framework developed by CAANZ would have the advantage of ensuring the maximum possible level of comparability across jurisdictions. A common reporting framework could be implemented in enhanced annual ACL implementation reports, with details on resourcing, activities (including statistics on the use of each of the ACL compliance tools) and analysis of how activities have influenced behaviour and outcomes.

An alternative option to a CAANZ coordinated reporting framework would be for each State and Territory to publish 'year in review' reports, or other more detailed annual reports, with information similar to that currently published by NSW Fair Trading and CAV in their 'year in review' reports. This approach would offer less comparability than a single report developed by CAANZ. However, it would at least provide increased transparency in those jurisdictions that currently provide very little Tier 3 reporting. This should be accompanied by additional information on resourcing, as discussed above.

An important task for CAANZ, irrespective of which option is adopted, is for it to determine the most appropriate lens through which the performance of ACL regulators should be viewed. A narrow ACL lens would provide the greatest comparability, but could involve issues, as noted above, with separating ACL from other information. The broader the lens used, the less useful or comparable the information. Indeed, it may prove necessary to use multiple lenses to provide the best possible reporting on the performance of ACL regulators.

The Commission is aware of the need to minimise compliance 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.

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.

5 Interaction between specialist safety and ACL regulators

Key points

- Specialist safety regulators and Australian Consumer Law (ACL) regulators generally have a clear understanding of their respective remits, which minimises gaps and overlaps in regulatory coverage.
  - Greater use of instruments such as a Memorandum of Understanding, and more regular formal meetings between regulators to discuss their remits would provide further clarity.
- Although consumers and suppliers are sometimes unsure about which regulators are responsible for a particular matter, regulators typically aim for a 'no wrong door' approach and 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.
- ACL and specialist safety regulators generally interact effectively to ensure that consumer and supplier concerns that are subject to both sets of regulators are dealt with in a comprehensive, coordinated and consistent manner.
- In a small number of cases, regulators' coordination and consistency of approach has been wanting (principally in responding to safety concerns about some electrical goods and building products).
- Interaction between ACL and specialist safety regulators could be enhanced by:
  - instituting formal mechanisms such as regular national forums for specialist safety regulators for building and construction — to facilitate greater cohesion and consistency in their approach to enforcement and in their interaction with ACL regulators
  - greater national consistency in the laws underpinning the specialist safety regime for electrical goods — to enable more comprehensive and consistent enforcement by ACL and specialist regulators
  - greater information sharing — to hasten the identification of important product safety concerns, and to better determine what actions are warranted and by which specialist or ACL regulator(s).
- In some cases, additional powers for specialist regulators will improve their capacity to administer and enforce their safety regimes, and will likely lessen the need for interaction with ACL regulators.

The Australian Consumer Law (ACL) contains a range of generic consumer product safety laws. Under these laws, all consumer products are expected to be safe and meet consumer guarantees. Commonwealth, State and Territory Ministers can regulate consumer goods and product-related services by issuing safety warning notices, banning products on a temporary or permanent basis (Commonwealth), imposing mandatory safety standards (Commonwealth) or requiring the compulsory recall of unsafe products.

Responsibility for administering and enforcing these laws is shared between the Australian Competition and Consumer Commission (ACCC) and the ACL regulators in each state and territory. (The Australian Securities and Investments Commission, which regulates financial services rather than products, has no role in the national ACL product safety regime.)

Operating alongside these generic national consumer product safety laws are specialist safety regulatory regimes for some types of products (such as those for building and construction, electrical goods, food, gas appliances, and medical devices). For example, the safety of electrical consumer goods is primarily regulated through state- and territory-based electrical safety acts and regulations, which are administered and enforced by specialist state- and territory-based regulators.

Within the context of broader enforcement and administration of the ACL, the Commission has been asked to examine the roles of specialist safety regimes in protecting consumers, their interaction with ACL regulators and the extent to which the delineation of responsibilities of the ACL and specialist regulators are clear.

To this end, this chapter discusses the:

- specialist safety regimes and the regulators responsible for their administration and enforcement (section 5.1)
- extent to which ACL and specialist safety regulators understand the delineation of their remits, and options to improve this understanding (section 5.2)
- extent to which consumers and suppliers understand the delineation of responsibilities between ACL and specialist safety regulators, and options to improve this understanding (section 5.3)
- interaction between ACL and specialist safety regulators, whether that interaction needs to be improved and, if so, how might that occur (sections 5.4 and 5.5, respectively).

The Commission has not been asked to examine the performance of the specialist safety regulators or whether they are being adequately resourced to perform their functions. Accordingly, this chapter does not address the adequacy of the consumer protection provided by these specialist regulatory regimes.

5.1 Australia's specialist safety regimes

Australia has various specialist safety regulatory regimes to deal with specific types of complex products or products where safety is paramount. As the ACCC noted:

> Parliaments have identified enhanced public risk or the need for particular expertise and established specialist regulators in several industries. It is not sustainable to remove or reduce those specialist regimes and expect the same level of attention and expertise from generalist [ACL] regulators. (sub. 23, p. 3)

Specialist product safety regimes exist for:

- boats and marine safety
- building and construction
- electrical goods
- food
- gas appliances
- industrial chemicals
- medicines and medical devices
- road transport vehicles
- pesticides and veterinary medicines (ACCC 2016d).

These specialist safety regimes and their regulators have a variety of forms.

Some regimes (such as that for medicines and medical devices) are national — applying Commonwealth legislation and having one regulator to administer and enforce that body of law. Other regimes operate at the state and territory level (such as those for electrical goods or gas appliances) — applying jurisdiction-specific legislation and having corresponding state- and territory-level regulators. (In the case of food and of building and construction, these jurisdiction-specific regimes also draw on national standards or codes.)

Moreover, the number of regulators in state- and territory-level regimes can vary. Some jurisdictions have many regulators to administer and enforce a regime whereas other jurisdictions have only one. The food safety regime in Queensland, for example, is regulated by local governments, public health units, the Department of Health (Food safety standards and regulation) and Safe Food Production Queensland. This is in contrast to the situation in the ACT and New South Wales, where the food safety regime is administered by one regulator — ACT Health and the NSW Food Authority, respectively (FSANZ 2016).

Specialist safety regulators also exhibit a variety of organisational forms. Some regulators are stand-alone, independent regulators (for example, Energy Safe Victoria is an independent statutory body). Others are specialist units within Commonwealth or

State/Territory government departments, or agencies that sit under the umbrella of State or Territory ACL regulators.

A further variable in this mix is that some regimes also encompass the licensing of practitioners that supply the regulated products to consumers (for example, builders, electricians and gas plumbers). In others, this is the responsibility of a separate regulator to that primarily responsible for administering and enforcing the specialist safety regime.

5.2 Regulators' understanding of the delineation of their responsibilities

The Commission's 2006 *Review of the Australian Consumer Product Safety System* noted that:

> For the overall consumer protection system to work well it is important that the boundaries between the specific safety regimes and the general consumer product safety system are as clear as possible and responsibility for monitoring the safety of consumer products is unambiguous. (PC 2006, p. 93)

An important condition for an efficient and effective consumer protection regime is that ACL and specialist safety regulators have the same understanding of their respective responsibilities. This clarity (and processes to ensure it continues in the face of a changing environment) is necessary to avoid gaps in their regulatory coverage and/or overlap and duplication of their regulatory effort.

Achieving this, in turn, reduces the risk of gaps in the protection afforded consumers against unsafe products, of duplication in compliance costs for suppliers and of unnecessary administration costs among regulators.

The Queensland Consumers' Association endorsed these sentiments. It considered it essential that the various regulators involved in consumer protection 'have clear responsibilities and roles and that there is minimum overlap and duplication' and that those regulators 'fully understand the roles etc. of other [regulator] bodies and assist consumers to contact the most appropriate body' (sub. 9, p. 1).

How well do regulators understand their remits?

While the responsibilities of ACL and specialist safety regulators are set out in their enabling legislation, that legislation can nonetheless result in areas where their authority can overlap. As Complementary Medicines Australia (sub. 15) stated:

> … products that are subject to specialist safety regulation are also subject to general consumer protection. … many consumer products are potentially subject to regulation by a number of regulators and particular safety issues could be dealt with by more than one regulator. (p. 5)

There are no objective measures that can illustrate the extent to which ACL and specialist safety regulators understand the delineation of their respective responsibilities.

In the absence of such measures, the Commission has examined indirect or subjective indicators, namely:

- the prevalence of arrangements addressing the delineation
- study participants' observations on regulators' understanding of the delineation.

Arrangements addressing the delineation of responsibilities

The presence of agreed arrangements between regulators to spell out the delineation of responsibilities is clear evidence that they understand that delineation. That understanding may also be inferred from the presence of arrangements to discuss and agree on respective responsibilities as and when the need for that delineation arises.

For example, Energy Safe Victoria (sub. 7) noted that the Electrical Regulatory Authorities Council (ERAC) and the Gas Technical Regulators Committee (GTRC) are effective national forums for determining responses to national safety issues. Their value in allocating responsibilities is assisted by having a number of ACL regulators on those bodies: the ACCC, NSW Fair Trading and Access Canberra in the case of ERAC and NSW Fair Trading and Access Canberra in the case of GTRC.

In addition to these forums, ERAC has developed a set of recall guidelines that set out how the specialist regime will work in conjunction with the ACL (including the ACL's recalls regime and the mandatory reporting requirement). This agreed division of responsibilities often involves a 'home regulator' being nominated from one of the ERAC members who will be the point of contact for the trader and the ACCC.

Similarly, the ACCC has formal arrangements in place to refer product safety reports and recalls to specialist regulators, and these arrangements generally function well, although there are costs associated with this:

> [T]he administrative overhead involved in referring these matters to other agencies is relatively high and a significant proportion of these referrals involve negotiations about the respective roles and responsibilities of the ACCC and the relevant specialist regulator. We have attempted to establish interagency agreements to resolve these issues but these negotiations are ongoing, protracted and resource intensive. (sub. 23, p. 23)

The ACCC has also developed a formal Memorandum of Understanding (MoU) with the Department of Infrastructure and Regional Development (DIRD), the agency responsible for the specialist safety regime for road transport vehicles. That MoU will, among other things, provide clarity for third parties about the respective regulatory responsibilities where joint action on product safety issues is warranted.

State and Territory ACL regulators informed the Commission that they have well-established processes to discuss product safety issues and identify where respective responsibilities should lie. This discussion occurs via:

- the Product Safety Operations Group and the Compliance and Dispute Resolution Advisory Committee teleconferences — held monthly
- the Govdex platform (a secure internet-based collaborative workspace for government agencies) — when issues arise
- out-of-session teleconferences to respond to critical issues — as needed.

As part of these processes, where a product also involves a specialist safety regime, ACL regulators normally contact the relevant specialist regulators to determine where responsibility for any action might reside (CDRAC response 2016).

In addition, State and Territory ACL regulators noted various arrangements that assist in identifying areas of overlapping responsibilities with specialist regulators and for determining how responsibilities should be allocated. Examples of these arrangements are provided in box 5.1.

Box 5.1 State- and territory-level arrangements to clarify the delineation of regulator responsibilities

In Victoria, Energy Safe Victoria (ESV) and Consumer Affairs Victoria (CAV) have an informal agreement on their division of responsibilities.

In New South Wales, NSW Fair Trading is also the regulator for electrical safety, gas safety and plumbing through its specialised Energy and Utilities Unit in the Building and Construction Service. This arrangement enables quick liaison within the agency in relation to products and incidents of concern, to determine the most appropriate response under the ACL, specialist safety legislation in New South Wales, or whether another specialist safety regulator should respond on behalf of other regulators.

In Queensland, the Queensland Building and Construction Product Committee (QBCPC) — formed in December 2015 — aims to protect home owners and industry members from non-compliant and non-conforming products. The committee is comprised of the QBCPC, Queensland Office of Fair Trading and Queensland Electrical Safety Office.

Sources: CDRAC (2016); ESV (sub. 7).

In some cases, where a state- and territory-level ACL regulator is also responsible for regulating various specialist safety regimes, the delineation of respective responsibilities is 'internalised' within that regulator. This joint ACL/specialist regulator role particularly occurs to varying degrees for the building and construction, electrical goods and gas appliances safety regimes in NSW, the Northern Territory, South Australia and Western Australia. Where this joint role occurs, regulator confusion around the delineation of responsibilities between ACL regulators and these specialist regimes is not an issue.

The prevalence of these various formal and informal arrangements among ACL and specialist regulators suggests they generally have a good understanding of where their respective roles and responsibilities lie.

Study participants' observations

Submissions also give insights into how well regulators understand their respective responsibilities and the success of arrangements aimed at delineating those responsibilities.

In the electrical goods area, Lighting Council Australia suggested there is a lack of clarity among regulators about who should enforce safety regulations:

> We know of regulators declining to take action against non-compliant suppliers because they are aware that a number of non-compliance issues on the same product have been raised with various other regulators (electrical safety regulators, ACMA on electro-magnetic compatibility) and they consider that another regulator will investigate the product and supplier. (sub. 14, p. 3)

In the realm of the food-medicine and ACL regulators' interface, Complementary Medicines Australia observed:

> … officials in regulators of specialist safety regimes do communicate and cooperate with other specialist safety regulators or with ACL regulators where required on matters of safety. (sub. 15, p. 4)

More generally, the ACCC stated that, while the rationale for specialist regulators remains well considered and persuasive, its experience is that 'delineation occurs informally' (sub. 23, p. 22). Moreover, it suggested that clarity around respective responsibilities was still evolving. In the food safety area, for example, where a case involved debate about whether a product was a food or not, it noted:

> There should also be a clear delineation of roles and no need for food safety regulators to approach us for assistance with food safety concerns. For example, recent concerns about the supply of raw-milk were resolved within the food safety regulatory framework but discussions about the potential application of the ACL nonetheless diverted our resources for several months. (sub. 23, p. 22)

Thus, although the various arrangements designed to clarify the respective responsibilities of ACL and specialist safety regulators appear to generally work well, some unclear boundaries still occur. The raw milk (or 'bath milk') example above (where there was some confusion about the characteristics of a product and, hence, which regime it should be regulated under) is an example of this.

Improving regulators' understanding of the delineation of responsibilities

Where overlapping responsibilities or deficiencies in the toolkit of specialist regulators mean that joint ACL/specialist regulator action is needed to address product safety concerns, it may be useful to formalise the delineation of responsibilities.

In this regard, MoU have proved a useful tool in delineating responsibilities where regulators have overlapping jurisdiction (NZ PC 2014, p. 184).

In Australia, this approach is used by the Queensland Office of Fair Trading and the Energy and Water Ombudsman Queensland. They have entered into an MoU that, among other things, is designed to avoid overlap or conflict between their regulatory responsibilities affecting consumers in the Queensland energy and water market (QOFT and EWOQ 2013). And, as noted, the ACCC has followed this approach with DIRD.

Developing and maintaining formal arrangements, such as MoUs, is not a costless exercise though, and they will only be justified where the expected benefit of such arrangements exceeds their cost. For some specialist safety regulators, this is unlikely to ever be the case. The Australian Maritime Safety Authority, for example, indicated that over the past six years it has been involved in only two cases of consumer product safety which required its interaction with ACL regulators (in both cases with the ACCC) (AMSA, pers. comm., 13 September 2016). This level of interaction would clearly not justify the effort needed to develop and maintain a MoU between it and the ACCC.

Nonetheless, specialist regulators themselves acknowledge there is a place for such arrangements to improve clarity:

> The current arrangements [for determining respective responsibilities and roles] have worked well but there could be improvements by establishing more formal arrangements between the different regulators, including development of MOUs or enforcement protocols. (ESV, sub. 7, p. 10)

In this regard, the ACCC (sub. 23) has suggested that more could be done by specialist regulators to better clarify and delineate roles and responsibilities — for example, via interagency agreements.

However, concerns about 'ex ante' lack of clarity among regulators about their respective responsibilities should be put into context. While pre-emptive arrangements to remove confusion about respective responsibilities are lacking in some areas, an effective substitute may be to ensure that when an area of potential joint responsibility arises, there are processes in place to quickly identify that this is so and to sort out who should do what. The formal and informal arrangements noted above suggest that arrangements are in place to achieve this and that they generally work well.

5.3 Consumers' and suppliers' understanding of the delineation of regulatory responsibilities

While it is critical that regulators understand the delineation of their responsibilities, it is also important that consumers and suppliers understand that delineation to assist them to identify which agency they might register complaints with or from whom they might seek information about their rights and responsibilities as consumers or suppliers.

How well do consumers and suppliers understand regulators' remits?

Objective measures of consumers' and suppliers' understanding of the remits of ACL and specialist safety regulators are also not available.

However, there are grounds to believe that these groups do not generally have a clear understanding of regulators' respective responsibilities.

First, the regulatory landscape is complex. As Maddock, Dimasi and King recently observed:

> The existing framework for consumer protection in Australia involves a hodgepodge of different regulators. Many regulatory functions overlap and it can be difficult to determine exactly which regulators are responsible for specific functions. Consumer protection laws are contained in a variety of different legislation including the Australian Consumer Law and industry and product specific legislation spanning everything from transport, to financial products, to pesticides. (2014, p. 29)

Second, the regulatory responsibilities of ACL and specialist regulators are hardly the stuff of life for consumers. Thus, in the course of their normal lives, consumers are unlikely to know or care about what body would deal with any product safety concerns their future might bring.

Suppliers, on the other hand, seem more likely to have a better idea of the responsible regulator as this would be an integral part of their business environment. This would be especially so if the regulator was also a licencing body for their business activities.

Even so, as discussed below, there is evidence that many suppliers, as well as consumers, generally do not have a clear understanding of the delineation of regulatory responsibilities.

Study participants pointed to some confusion among consumers and suppliers

Submissions to this study and to the Consumer Affairs Australia and New Zealand (CAANZ) review of the ACL pointed to confusion among consumers and suppliers about respective responsibilities.

Lighting Council Australia noted:

> It is often not clear which agency is responsible for investigating the different aspects of the Australian Consumer Law. It may be product related, i.e. a toy, a function of electrical safety

> laws or another regulation relevant to electrical equipment. We are unsure where to report non-conformance … (sub. 14, p. 3)

The Australian Toy Association expressed similar concerns among its supplier members:

> … different aspects of product safety are covered by different regulators, e.g. the ACCC looks after ingredient labelling for cosmetics, but [the National Industrial Chemicals Notification and Assessment Scheme] is responsible for the safety of the chemicals; the ACCC seem to be responsible for some aspects of electrical products, but the States are responsible for others. … This complexity makes it difficult for suppliers to understand the requirements. … All of this leads to a great deal of confusion and contributes to the possibility of unsafe or non-compliant product. It also adds to the cost of compliance for responsible suppliers. (sub. to CAANZ, p. 5)

CHOICE noted the potential confusion for consumers around the relative responsibilities of the Therapeutic Goods Administration (TGA) and the ACCC in the health and medical area:

> TGA's website states that it is 'the primary government stakeholder and regulator within the co-regulatory system of advertising for therapeutic goods'. The ACCC's website notes that one of its priority areas for enforcement in 2015/16 is 'health claims' and 'consumer issues in the health and medical area'. Both of these regulators are claiming some responsibility for regulating therapeutic goods advertising, which could cause some confusion for consumers wanting to lodge complaints. (sub. 11, p. 26)

More generally, the Office of Small Business and Family Enterprise Ombudsman (sub. 21) highlighted the scope for confusion for both consumers and suppliers. This, it held, was particularly the case where State and Territory specialist regimes overlay the role of the State fair trading agencies and the ACCC as enforcers of product safety, leading to red tape and confusion, and complicating the regulatory landscape.

Study participants submitted several cases of where confusion had occurred (box 5.2).

Other evidence on the regulatory maze

Elsewhere, the Australian Industry Group has noted that in the building and construction sector, Australia has a complex maze of overlapping regulators with a variety of responsibilities. A survey of its members found this situation has resulted in uncertainty for stakeholders about which regulator has responsibility when non-conforming building products (NCP) and their associated safety implications are detected:

> Ai Group found that 43 per cent of respondents had not lodged a complaint when encountering NCP. Of these, close to half indicated that: they did not know who to complain to; they did not know how to lodge a complaint; or reported that complaints previously lodged did not achieve a result. (AiG 2015, p. 10)

The Victorian Auditor-General's reached a similar conclusion with respect to that state's regulators in its 2015 report on *Victoria's Consumer Protection Framework for Building Construction*:

An effective consumer protection framework for building construction should have a number of critical features …

- Consumers and building practitioners should be aware of and have access to clear, comprehensive and timely information and advice on their rights and obligations.

The current Victorian building consumer protection framework does not possess these features, and needs strengthening. (2015, p. ix) [28]

Box 5.2 Case studies of confusion about regulatory responsibilities

Accord Australasia drew attention to confusion about responsibilities between the ACCC and various regulatory authorities responsible for deciding on the level of access for medicines and chemicals. It referred to a case where the Advisory Committee on Chemicals Scheduling had approved the use of a teeth-whitening product for home use. However, the ACCC subsequently decided that all persons, including dental practitioners, were not permitted to provide that particular teeth-whitening kit to patients to take home and use. Accord noted:

> This action on behalf of the ACCC to usurp the role of the public health risk manager has led to confusion and uncertainty in the market place. Regarding decisions by Commonwealth risk managers such as the Scheduling Delegate on public health matters, the TGA on therapeutic goods and the Australian Pesticides and Veterinary Medicines Authority (APVMA) for agvet products, the enforcement arm of the ACL should defer to their decisions and not take further unilateral action. Additionally, clearer guidance is required regarding the hierarchy of legislation and whether an Act of general application such as the ACL has precedence over specialist Acts such as the Therapeutic Goods Act … (sub. 22, p. 3)

The Australian Dental Industry Association also referred to this case as an example of the failure of the ACCC and the TGA to deliver a coordinated and consistent approach to product safety regulation. This, it claimed, has led to 'marketplace confusion, higher compliance costs and job losses' (sub. 30, p. 3).

The Queensland Consumers' Association (sub. 9) provided a case study of a malfunctioning engine in a passenger motor vehicle — a serious safety hazard — that indicated consumers were uncertain about which regulator (the specialist safety regulator or the ACCC) was responsible for dealing with the matter. However, the Federal Chamber of Automotive Industries considered, from a suppliers' perspective, that the ACL/specialist safety arrangements were working well (sub. 25, p. 2), and raised no concerns about the delineation of responsibilities.

CHOICE noted the experience of the Samsung washing machine recall, where clear delineation of regulatory responsibilities was absent:

> The number of regulators involved in the Samsung recall heightened the risk of consumer confusion and consumer detriment. In the example above, multiple regulators were involved at different points during the recall, but not in a complementary way. Conflicting advice was given. (sub. 11, p. 15)

[28] The *Building Legislation Amendment (Consumer Protection) Act 2015* (Vic) aims to address the findings of the Victorian Auditor-General's (2015) report (the Act received assent on 19 April 2016 and is expected to come into force on 1 July 2017). While it is too early to tell if this will be the case, the reforms do not appear to directly address the issue of improving consumers' and suppliers' understanding of ACL and specialist regulators' responsibilities.

Ensuring that consumers and suppliers find the right regulator

Websites are the most common point of contact

Consumers and suppliers have a range of generally available sources to inform them about the delineation of the respective responsibilities of ACL and specialist safety regulators. Suppliers may also have access to their industry associations to assist them in this regard.

The *Australian Consumer Survey 2016* identified that although telephone helplines are a common source of information, consumers overwhelmingly go online to find information or advice on consumer protection matters:

> … the most common sources for information or advice are state regulator websites and telephone helplines, ACCC website and general internet searching. Since 2011, there has been an increase in consumer respondents nominating state regulator websites, ACCC website and telephone helpline, and general internet searching as main sources of information or advice. (CAANZ 2016c, p. 32)

Annual reports of regulators tell a similar story:

> Overwhelmingly, audiences choose to source [Consumer Affair Victoria's] information through the Consumer Affairs Victoria website <consumer.vic.gov.au>. Visits to our website have increased by nearly 78 per cent in the last two years, with a total of 2 942 816 visits in 2014-15, up from 1 654 784 in 2012-13. (CAV 2015, p. 16)

As an example of the information provided, the ERAC website informs consumers and suppliers about the electrical regulatory system, the regulatory agencies involved and their responsibilities, and has links to the websites of the various specialist electrical and general ACL regulators. Likewise, the ACCC's Product Safety Australia website provides information on who regulates what — in this case, in the realm of general consumer goods (the ACL regulators) and specific product areas (specialist safety regulators). That site also contains links to further information on the specific product safety regimes and their regulators (ACCC 2016d).

Complementary Medicines Australia provided a further example of regulators using their websites to provide clarity about their area of responsibilities:

> … in 2014 the Therapeutic Goods Administration published the food–medicine interface guidance tool to assist manufacturers and importers of products to understand whether certain products are regulated as therapeutic goods or as food due to the different regulatory requirements that apply. (sub. 15, p. 4)

This guidance tool is available on the TGA website.

These quotes and examples highlight the importance of regulators' websites as the primary port of call for those seeking information on which regulator might have responsibility for their product safety complaints or queries.

Channelling inquiries

Arguably of more importance than whether consumers and suppliers understand the respective responsibilities of regulators is whether those with concerns about product safety who contact a regulator are redirected to the appropriate regulator in a timely manner. Examples of this practice are shown in box 5.3.

Box 5.3 Examples of ACL regulators redirecting consumer and supplier concerns.

Data from Northern Territory Consumer Affairs showed that, in 2014-15, the Northern Territory Consumer Affairs Call Centre received 12 824 telephone calls. Of these, 780 were referred to more appropriate organisations (NT Consumer Affairs 2015).

Similarly, in Victoria (and in line with an informal agreement on respective responsibilities), CAV generally redirects electrical and gas appliance safety issues to ESV as the specialist safety regulator, and responds quickly to safety issues brought to its attention by ESV (sub. 7).

Equivalent arrangements operate in New South Wales, where NSW Fair Trading's website provides information about the specialist regimes it regulates, and provides referral information to the NSW Food Authority, Health Care Complaints Commission, TGA, and to Safework NSW (CDRAC 2016).

These redirections are examples of regulators' 'aim to ensure that there is "no wrong door" for a consumer that is seeking assistance with consumer issues' (ACCC, sub. 23, p. 14).

There are, however, no direct measures on how well this aim is met and the extent to which consumers are directed to the most 'appropriate' regulator for their product safety concern.

A proxy for how well regulators redirect complaints and queries to the most appropriate regulator may be inferred from the level of satisfaction reported by consumers in their contact with ACL regulators. Survey data shows that those who contacted the state regulator or the ACCC for information or advice showed high levels of satisfaction with the information they received:

> Those who contacted the state regulator or the ACCC for information or advice show high levels of satisfaction with the information they received. Of those who contacted a state regulator, 77% were satisfied with the information or advice received. Of those who contacted the ACCC, 82% were satisfied with the information or advice received. (CAANZ 2016a, p. 49)

While high, these percentages still indicate that around 20 per cent of those contacting ACL regulators were not satisfied with the information or advice they received. And, although not a direct measure of how well consumers and suppliers with concerns about product safety were redirected to the most appropriate regulator, it nonetheless suggests that further action by regulators is needed to ensure the 'no wrong door' aim is realised.

Separately, the Commission visited the websites of various ACL and specialist safety regulators and found that some provided only limited assistance in clarifying their relative responsibilities or in redirecting queries to a more appropriate regulator.

Improving websites and how inquiries are channelled

What then might be done to achieve the goals of helping consumers and suppliers to understand the regulators' remits or to better realise the 'no wrong door' objective?

Given the evidence of where consumers seek information, their understanding of regulators' responsibilities would likely be improved if regulators regularly assessed their websites' capacity to address this issue and (where these are deficient) made efforts to improve them.

The Governance Institute of Australia advocated this approach. It argued for better website entry points, with capacity to channel consumer or supplier complaints or queries to the most appropriate regulator based on 'some simple gateway questions':

> We suggest that ACL regulators develop a central consumer website to operate as a single 'one-stop shop' containing hyperlinks which lead consumers to the relevant site appropriate to their complaint, depending on their responses to some simple gateway questions. A consumer enquiry could therefore be funnelled to the website of the relevant regulator such as ASIC, ACCC or the consumer affairs websites of the states and territories, depending on the information provided in their responses. A consumer enquiry could therefore be funnelled to the website of the relevant regulator … depending on the information provided in their responses. (Governance Institute of Australia, sub. 13, p. 2)

So too did the 2016 report on *Strategies to address risks relating to non-conforming building products*, which noted there was 'No central point of information for industry or consumers' although this approach is available for electricity and gas (SOG 2016, p. 16). That report subsequently recommended:

> … the establishment of a national 'one-stop-shop' website to provide a central point of information for consumers and participants in the building product supply chain. … A national website on [non-conforming building products] could provide information to the Australian building product supply chain and consumers about:
>
> - responsibilities within the building product supply chain and regulatory mechanisms at each stage …
> - how to contact jurisdictional regulators. (SOG 2016, p. 20)

International experience also offers support for this approach to improve consumers' understanding of which regulator is responsible for dealing with their particular complaint. On this matter, Legal Aid NSW, in its submission to the CAANZ ACL review, noted:

> … New Zealand provides a useful model for providing clarity to consumers about complex consumer remedies. The New Zealand consumer website, 'Consumer Protection', has easily accessible information through the use of formatting, pictures and an accessible user interface. It also poses questions to consumers about their problem and helps them narrow down and identify the relevant section of the legislation, or the remedy that may apply to their situation. (sub. to CAANZ, p. 6)

In summary, ACL and specialist safety regulators could assist consumers by regularly assessing whether their websites include clear information about regulators' relative

responsibilities and include facilities to accommodate the timely redirection of complaints or queries to the most appropriate regulator. Where their websites are deficient in these areas, addressing these deficiencies would help regulators to meet the goal of 'no wrong door' for a consumer that is seeking assistance with consumer issues.

5.4 Interaction between ACL and specialist safety regulators

The Commission has found that the interaction between ACL and specialist safety regulators generally seems to work well.

At the same time, participants drew attention to a handful of cases where the interaction of ACL and specialist safety regulators has been wanting. These cases tend to be concentrated in specific product areas and suggest that changes are needed to improve coordination and consistency in regulators' responses to product safety concerns. These cases, though — to put them in context — represent a very small share of the 1150 or so product safety recalls from January 2015 to December 2016 (ACCC 2016b).

Examples of good interaction

Several participants' commented positively on the interaction between ACL and specialist safety regulators. ESV, for example, noted:

> … the current multiple regulator model of response to consumer safety with a combination of Australian Consumer Law (ACL) and specialist safety technical regulators operates reasonably well, although there is some scope for improvement with respect to the coordination, application and enforcement of nationwide recalls and bans that are initiated or led by specialist regulators such as ESV.
>
> Typically, when addressing a safety issue related to electrical or gas appliances or equipment, there will be a lead specialist regulator or 'home regulator' that will coordinate the response nationally. This works well for both suppliers and the specialist regulators in other jurisdictions. In particular, it provides the supplier with one regulator who is able assist the supplier in preparing a recall strategy and recall notice that will be acceptable to all regulators. (sub. 7, p. 1)

The Legal Practice Section of the Law Council of Australia also noted the value of the 'lead' or 'home' regulator approach in reducing problems that could otherwise arise when ACL and specialist regulators need to interact with respect to product safety recalls:

> … the regulation of product recall action often involve duplication of resources in dealing with multiple regulators, including the ACCC and specialist regulators of the states and territories (e.g. for electrical goods). Although we acknowledge that the concept of a 'home regulator' (which is not legislated) seeks to reduce some uncertainty for goods of this nature. (sub. to CAANZ review, p. 52)

The SME Committee of the Business Law Council considered that interaction generally works well and that the product safety regime in Australia is operating effectively, although it too noted some aspects could be improved:

> … generally the specialist safety regulatory regimes are operating effectively. The only area where SME Committee members have identified a lack of cohesion has been in relation to specialist electrical regulatory regimes. There have been a number of cases where different State and Territory based regulators and the ACCC appear to have had different views about the remedial steps which a particular business should be implementing in order to address a potential safety issue. (sub. 8, p. 7)

The ACCC (sub. 23) acknowledged that there has been substantial progress in improving the interaction of ACL and specialist safety regulators since the introduction of the ACL, and considered that current arrangements work well:

> We have established consumer product safety regulatory practice that does not impede the ability of local ACL regulators to develop approaches for local issues, and allows specialist safety regimes to respond to the risk of consumer detriment from unsafe specialist products. (p. 8)

> … the current ACL and specialist regulator arrangements have gone a large way to dealing with the previously identified issues such as inconsistency, gaps and overlaps in regulation and unclear delineation of responsibilities among ACL regulators … (p. 15)

Other examples of constructive interaction between ACL and specialist regulators where their responsibilities overlap are shown in box 5.4.

Box 5.4 Examples of formal arrangements facilitating interaction between ACL and specialist regulators

- The Queensland Building and Construction Product Committee (comprising the Queensland Building and Construction Commission, the Queensland Office of Fair Trading and the Queensland Electrical Safety Office), which aims to protect consumers and suppliers from non-compliant and non-conforming building products.
- The Non-Conforming Building Product Working Group — formed in 2016 — comprising Consumer Affairs Victoria, the Victorian Building Authority, Worksafe Victoria and Energy Safe Victoria, which aims to ensure a consistent and coordinated approach to issues arising out of the use or sale of non-conforming building products in Victoria.
- Consumer Affairs Victoria sits on a working group (with the Victorian Building Authority and Energy Safe Victoria) that meets regularly to consider gas, electrical and building safety issues.
- NSW Fair Trading (in its role as ACL and specialist regulator for building and construction) participates in the whole of government Building Industry Coordination Committee to allow a quick and holistic response to safety issues involving building products, covering ACL and Building Code of Australia issues.

Source: CDRAC (2016).

Examples of poor interaction or weakness in the interaction process

The interaction between ACL and specialist regulators, however, has not been a universal success. Nottage, for example, pointed to a range of failures in coordination among ACL and specialist safety regulators:

> The biggest problem however is the (lack of) coordination between the consumer regulators and the 'specialist' regulators. Consider the … (non-)recalls of Samsung washing machines and Infinity cabling (electrical product regulators). Or imported frozen berries (food regulators). Or (delayed) recalls of Volkswagen vehicles (long before the company's fraud about emissions, which has been punished far more harshly by some overseas regulators), or of Honda vehicles with airbags that have caused fatal accidents in other countries (motor vehicles regulator). (sub. 18, pp. 3–4)

Submissions to the CAANZ review of the ACL also noted examples of poor interaction:

> Recent 'hover board' cases in the 2015 Christmas period exemplified the confusion and lack of consistency across States and Territories. (ARA 2016, p. 12)

The Retail Council, too, was critical of the lack of consistency among regulators in their responses to product safety concerns. It noted:

> One of the key benefits of the ACL is that it is a national system. This is particularly beneficial for national retailers who operate business models that cross state boundaries. … [But] there are also other state-based regulators, such as the electrical safety regulators … If these … regulators react to safety concerns at different paces, then it can create confusion amongst customers and retailers. … The hoverboard situation that emerged in early 2016 is a good case study of the impact of regulators responding out of synch with each other. (sub. 3, p. 1)

The ACCC, while generally positive about the ability of current interaction arrangements to deliver consistent and coordinated responses to product safety concerns, identified an inherent weakness in the current arrangements:

> Some specialist regulators, such as some State and Territory electrical safety regulators, also lack regulatory tools and remedies and this sometimes prompts them to seek our assistance. A good example of this is the lack of consistent recall powers across the State and Territory electrical safety regimes that prompted our involvement in the Infinity cable recall. (sub. 23, p. 9)

Box 5.5 describes the Infinity cable recall in more detail.

Elsewhere, a review of the regulatory framework dealing with non-conforming building products found significant weaknesses in the interaction of ACL and building regulators:

> … consumer law regulators have varying degrees of cooperation with building regulators and different approaches to the treatment of building products under the ACL. (SOG 2016, p. 13)

Box 5.5 **Regulator interaction: the Infinity cabling recall case**

The 2014 recall of Infinity brand electrical power cables resulted from the goods failing to comply with mandatory electrical safety requirements. Although the cables fell under the jurisdiction of State and Territory electrical safety regulators, the importer had liquidated and the ACCC assisted with developing a national approach to recalling the cables and remediating affected homes. The ACCC convened a taskforce, comprised of State and Territory electrical safety and ACL regulators.

While electrical safety regulators invoked their own legislation to develop a remediation plan for electricians, the taskforce also drew on ACL voluntary recall requirements and compulsory recall powers. The ACL powers enabled the taskforce to require wholesale cable suppliers to help remediate the safety concerns. The ACL's consumer guarantee provisions were also invoked in instances where electricians were not prepared to take action to replace sub-standard cables they had installed.

The case highlights the challenges for State and Territory electrical safety regulators when faced with an issue spanning multiple jurisdictions and various channels of supply. These challenges are compounded by a lack of harmonisation of the legislation underpinning these regimes (particularly the minimum power threshold below which they have no jurisdiction) and their inability to enforce recall powers beyond their jurisdiction. This in turn led to reliance on the national ACL regulator for assistance in addressing and resolving the safety issue.

Source: ACCC (pers. comm., 5 July 2016).

5.5 How might interaction be improved?

The preceding sections identify some areas where there have been concerns about poor coordination among ACL and specialist regulators in dealing with product safety issues. Where this has occurred, participants have pointed to the risks this poses for consumer protection and for unnecessary compliance costs on suppliers.

In response to those concerns, the Commission has considered a range of options that might improve the interaction between ACL and specialist regulators:

- formal or informal arrangements to clarify regulatory and operational responsibilities
- sharing information and data
- expanding specialist regulators' toolkit of enforcement options
- moving to one law for some specialist safety regimes.

Arrangements to clarify regulatory and operational responsibilities

These arrangements include:

- formal arrangements to define regulators' approaches to the administration and enforcement of consumer protection legislation and/or their respective responsibilities. This can include specifying lead regulator roles

- regular forums or meetings to discuss existing or emerging product safety issues and agree on the various regulators' roles.

Formal arrangements such as MoUs

The Ai Group (sub. 26) called for better protocols for collaboration between ACL and specialist safety regulators:

> Ai Group deals with a number of specialist regulators covering electrical products, building products, plumbing products, work health and safety, and border protection, to name a few. Ai Group believers that where there is overlap between the remit of these specialist regulators and ACL regulators, consideration should be given to establishing publicly available protocols that govern the operation of regulators. (sub. 26, p. 3)

The Queensland Law Society supported such an approach:

> [the QLS] submits that the existing co-ordination and co-operation between [ACL and specialist safety regime] regulators would be improved through the formalisation of these existing arrangements in a similar way to that which has occurred between the multiple regulators of the ACL. (sub. 4, p. 9)

So, too, did Consumer Action, which called for:

> … clearer consumer protection objectives for industry-specific regulators — including better protocols for collaboration between [specialist safety regime and ACL] regulators. (sub. 10, p. 3)

Some regulators already have MoUs with specialist safety regulators. As noted, the ACCC, for example, has recently completed an MoU with DIRD. MoUs have previously been used by specialist safety regulators to improve coordination among regulators and reduce the risk of unnecessary compliance costs on businesses (box 5.6).

Box 5.6 Specialist safety regulators' use of MoUs

Although dated, the Office of the Chief Electrical Inspector (OCEI) —the antecedent of Energy Safe Victoria — provided an example of specialist regulators using MoUs to improve coordination with other regulators in a submission to an inquiry into Victoria's regulation of the housing construction sector:

> The OCEI has recognised the need for coordination between various regulators. As such, the OCEI signed a number of Memoranda of Understanding with other regulators. Memoranda of Understanding have been established with such organisations as the Essential Services Commission, the Victorian WorkCover Authority, Energy and Water Ombudsman (Victoria) and with emergency services. (OCEI 2005, p. 6)

That submission also noted:

> … consideration should be given to having a Memorandum of Understanding developed with the Building Commission to maximise efficiencies and minimise any perceived duplication of activities. (2005, p. 6)

Source: OCEI (2005).

However, not all interactions warrant the effort required to establish such an arrangement. In the case of the ACCC and DIRD MoU, the level of interaction is significant — with the agencies cooperating on over 400 car and motor bike recalls in 2015 and 2016. With this level of interaction, the effort in developing an MoU is relatively easy to justify. In contrast, the minimal interaction between the Australian Maritime Safety Authority and the ACCC noted earlier (two cases in six years) would clearly not justify the investment in developing and maintaining an MoU.

In some cases, an MoU between ACL and specialist regulators is impractical. This is particularly likely where the specialist safety regime has multiple regulators. In Queensland, for example, the food safety regulators include the Department of Health (Food Safety Standards and Regulation), Safe Food Production Queensland, and almost 80 local governments. The same practical barrier, though, would not apply to establishing an MoU with the food safety regulator in the ACT and New South Wales, as they have only one regulator — ACT Health and the NSW Food Authority, respectively.

Moreover, as a group, ACL regulators advised the Commission that they generally find more informal and flexible modes of cooperation with their regulatory partners are of greater benefit in maintaining constructive working relationships than a formal MoU. They note that, generally, strong interagency relationships — led by senior executives supported by regular meetings — are a more productive and sustainable way of ensuring effective working relationships. This approach, they argue, enables agile, tactical responses to emerging issues and whole of agency collaboration (CDRAC response 2016, p. 25).

Nonetheless, they acknowledged there is a role for MoUs, particularly where there is a complex legal framework requiring definition of agency roles and responsibilities (CDRAC response 2016, p. 25).

Information provided to the Commission suggests that regulators are well aware of the value of MoUs and do pursue these where they are warranted. In addition, it appears that, aside from cost and practicality reasons, regulators face no obvious impediments to negotiating MoUs where these are a sensible tool for clarifying roles and responsibilities in areas of overlapping jurisdiction.

The lead regulator model

As noted, another formal arrangement that has benefited some ACL/specialist regulator interactions is that of establishing a lead or home regulator. ACL regulators informed the Commission that where more than one ACL or specialist regulator is able to respond to product safety issues across Australia, the Product Safety Operations Group (within the ACCC) assists ACL regulators and specialist regulators to take a coordinated approach (CDRAC response 2016, p. 23).

While this arrangement appears to work well for product safety issues of an Australia-wide nature, less clear is how well a lead regulator approach is achieved at the state or territory

level where ACL and specialist regulators' responsibilities overlap. Accordingly, the Commission invites participants' views on the value of the lead regulator approach at the intrastate and territory level and what impediments there might be to achieve that approach.

INFORMATION REQUEST

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

Regular forums or meetings

Where state- and territory-based specialist safety regulators interact one-on-one with their state or territory ACL counterpart, the risk of the ACL regulator having to accommodate many and different specialist regulator approaches does not exist.

However, where state- and territory-based specialist safety regulators need to interact with a national ACL regulator (that is, the ACCC), the risk of the ACCC having to accommodate many and different regulatory approaches is high.

Regular meetings among those state- and territory-based specialist regulators provide an avenue whereby they can discuss any differences between their approaches and agree on their and the ACCC's respective roles in any joint action. Regular meetings can also prove useful for single national specialist regulators and the ACCC to agree on their respective roles.

Similar arrangements are used by ACL regulators to facilitate coordination and consistency in their approaches to administer and enforce ACL product safety. The CAANZ implementation progress reports, for example, indicate that ACL regulators have put considerable effort into developing and formalising effective processes for communication and cooperation among themselves, and for the coordination of their regulatory efforts where needed. As Northern Territory Consumer Affairs observed:

> The Compliance and Dispute Resolution Advisory Committee provides a platform where all regulators can discuss compliance, enforcement and dispute resolution issues across a variety of legislation with a prime focus on the Australian Consumer Law. These discussions aid agreement on consistent enforcement, compliance and dispute resolution from a cross jurisdictional perspective. (2015, p. 10)

National forums of regulators already exist in relation to several specialist safety regimes and appear to be working effectively (box 5.7)

Box 5.7 National forums of specialist safety regulators

For the electrical goods and gas appliances specialist safety regimes, these forums also include some ACL regulators as members, in addition to the specialist regulators from each jurisdiction. ESV (sub. 7) has noted that these are effective forums for sharing technical information and responding to national safety issues. The Senior Officers Group report on non-conforming building products also found that these electrical and gas forums 'have proven to be valuable in assisting government agencies to work more cooperatively and efficiently across jurisdictions and portfolios' (SOG 2016, p. 19).

The food safety area also has existing forums and working groups that are valuable in developing a nationally consistent approach to regulation among the many specialist regulators. On this matter, the Department of Health stated:

> … the Australia and New Zealand Ministerial Forum on Food Regulation … has responsibility for … the general oversight of the implementation of domestic food regulation and standards; and the promotion of a consistent approach to the compliance with, and enforcement of, food standards. (sub. 5, p. 1)

Formalised institutional arrangements also exist to deliver a nationally consistent approach to food safety regulation and enforcement for imported goods. As the Australian National Audit Office has previously noted:

> [The Department of] Agriculture is engaged with other Commonwealth, New Zealand, and state and territory food safety authorities as a member of the bi-national food regulation system. … At the operational level, Agriculture is a member of the Food Regulation Standing Committee Implementation Sub-Committee for Food Regulation to help promote a nationally consistent regulatory approach across jurisdictions. (ANAO 2015, p. 108)

Of the state- and territory-based specialist safety regimes, only that for building and construction does not have a national forum. This state of affairs was highlighted in the 2016 Senior Officers Group report on non-complying building products. That report found significant weaknesses in the interaction of ACL and building regulators:

> There is no central coordinating mechanism or forum for building regulation that could provide a central point of contact for building regulators or industry, nor a mechanism to encourage information-sharing and collaboration between jurisdictions. (SOG 2016, p. 12)

It went on to note that such a forum would facilitate greater collaboration and information sharing between building regulators in all jurisdictions, and recommended:

(a) establishing a national forum of building regulators to facilitate greater collaboration and information-sharing between jurisdictions;

(b) improving collaboration between building and consumer law regulators and consistency in the application of the 'false and misleading claims' aspect of the Australian Consumer Law … (SOG 2016, p. 18)

While the Commission expects this recommendation to lead to the establishment of a national forum of building regulators, this has not yet occurred. In view of the benefits identified by that report and apparent from other national forums for specialist regulators, the Commission endorses the recommendation to establish such a forum.

Regular meetings (rather than national forums) also have value in facilitating the effective interaction of the ACCC and national specialist regulators. For some regulators, such meetings are already part of the ACL and specialist regime interaction (box 5.8).

Box 5.8 ACCC liaison with national specialist regulators

The ACCC liaises regularly with several national specialist regulators.

It has regular meetings with DIRD:

> With respect to the product recall requirements, the FCAI [Federal Chamber of Automotive Industries] members operate according to the FCAI Code of Practice for the Conduct of an Automotive Safety Recall and the ACL. The FCAI has regular meetings with DIRD to ensure that the operation of the Code is meeting expectations and DIRD in turn liaise with the ACCC on the overall administration and implementation of the consumer law in this respect. (FCAI, sub. 25, p. 2)

The ACCC also liaises regularly with the TGA and the regulator for industrial chemicals (the National Industrial Chemicals and Notification Assessment Scheme — NICNAS).

- The ACCC's liaison with the TGA is to determine which regulator has jurisdiction to deal with goods where it is unclear whether goods fit within the TGA or ACL remit. In some instances where there is a regulatory overlap, the ACCC and the TGA have agreed that they will both deal with a product — an example of this was their dealing with the Reckitt Benckiser (the parent company of Nurofen) case. In that example, the TGA took action to address advertising representations made by Nurofen in the marketing of pain-specific product ranges, while the ACCC addressed concerns about representations on the packaging of these pain-specific products (ACCC, pers. comm., 7 November 2016).
- The ACCC (via its Consumer Product Safety Branch) is also part of the Cosmetics Interface Working Group along with TGA and NICNAS. This group meets around two to four times a year to discuss the cosmetic/therapeutic interface and to resolve issues with products that can challenge that interface (ACCC, pers. comm., 22 Nov 2016).

In addition to these regular meetings, the ACCC maintains ad hoc communication with the TGA, NICNAS and the Australian Pesticides and Veterinary Medicines Authority (APVMA) — the national regulator for agricultural and veterinary chemicals — as and when product safety concerns suggest joint action might be required. Given the infrequent incidence of recalls and inquiries involving NICNAS and the APVMA (on average, fewer than a handful of cases in any year) this level of interaction seems appropriate (ACCC, pers. comm., 22 Nov 2016).

Sharing of information and data between regulators

Some participants argued that deficiencies in intelligence gathering and sharing represent a barrier to effective collaboration between regulators in the enforcement of consumer protection. Nottage, for example, observed that such deficiencies represent:

> … a major impediment to better inter-agency collaboration and enforcement. Unlike its major trading partners, the ACL does not allow the ACCC and consumer regulators even to share information from suppliers' mandatory accident reports, without consent, to other specialist regulators ... (sub. 18, p. 4)

The Senior Officers Group report on non-conforming building products also identified the value of information sharing for improving interaction between ACL and specialist safety regulators. That report noted:

> Better information-sharing and collaboration between consumer law regulators and building regulators would improve responses to identified NCBPs. (SOG 2016, p. 19)

As discussed in chapter 4, information and data sharing among ACL regulators is a valuable means to improve coordination among those regulators and enhance joint targeting of areas where product safety concerns were an issue. Some participants considered a similar approach would deliver more effective interaction among ACL and specialist regulators. In this regard, the Queensland Consumers' Association considered consumer protection from unsafe products could be fundamentally improved by, among other things:

> Effective integration, sharing and analysis of information about consumer complaints, etc. between regulatory bodies (such as the Department of Infrastructure, the ACCC, and state and territory Offices of Fair Trading) … (sub. 9, p. 4)

On this issue, the Australian National Audit Office's report on the *Administration of the Imported Food Inspection Scheme* recently observed:

> The activities of co-regulators in the food regulatory system, in particular cases of non-compliance identified by co-regulators, can be a useful source of intelligence to inform Agriculture's compliance activities and risk assessments under [the Imported Food Inspection Scheme]. The primary means by which the department currently obtains information from co-regulators is through membership of a number of multi-jurisdictional forums as part of the bi-national food regulatory system. The department also reviews publically available information released by co-regulators on food incidents, including national food recall notices and the published outcomes of compliance activities. The department is, however, yet to establish agreed arrangements with co-regulators to share regulatory intelligence. (2015, p. 41)

These observations suggest the sharing of information among 'co-regulators', such as the State and Territory ACL regulators and specialist safety regulators, would deliver similar benefits.

The ACCC also expressed support for more data sharing as a means to achieving more effective ACL regulator interventions:

> In a regulatory environment where intelligence is key to achieving strategic interventions in a coordinated manner, the funding of a national complaints database should be considered. … The establishment of a national database would protect against information siloing, help identify issues of local and national significance and improve operational and strategic coordination and decision-making across all jurisdictions. (sub. 23, p. 4)

In principle, such data sharing could improve operational and strategic coordination among specialist safety regulators, and in doing so facilitate more coordinated interaction between them and ACL regulators.

However, the push for more data and information sharing to bring about more effective regulation was met with a note of caution from the Queensland Law Society. It argued for the need for adequate safeguards around the collection and use of that information:

> The Society notes a balance should be sought to be achieved that facilitates the sharing of information, in order to bring about greater efficiencies and more effective regulation, but which also ensures that the information entrusted to ACL regulators is treated in a manner which complies with the appropriate legislation dealing with its collection, retention, usage, amendment and storage. (sub. 4, p. 6)

Little information is publicly available on the extent to which specialist safety regulators currently share data and market intelligence amongst themselves and with ACL regulators. There is also little information available on the likely benefits of such data sharing on improving the coordination of specialist regulators' regulatory focus or on the likely benefits of it improving the coordination of specialist and ACL regulators' regulatory focus and enforcement activities. Accordingly, the Commission invites participants' views on whether such data sharing is feasible, where it might occur (and how it might be introduced) and what might be the benefits of introducing or expanding data sharing arrangements.

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?

Expanding specialist safety regulators' toolkit of powers

The ACCC (sub. 23) drew attention to gaps in the regulatory toolkit of specialist regulators, noting that these gaps constrain some specialist regulators from securing prompt national responses to product safety concerns within their remit. It observed that this deficiency effectively forced specialist regulators to interact with ACL regulators in order to address some product safety matters:

> Some specialist regulators, such as some State and Territory electrical safety regulators, also lack regulatory tools and remedies and this sometimes prompts them to seek [the ACCC's] assistance. (p. 9) … Specialist regulators need the regulatory tools and national frameworks so that they can do their job without reliance on the ACL and the ACCC. (p. 16)

ESV made the same point (sub. 7). It noted that state and territory level specialist safety regimes for electricity and gas lack powers to issue a recall or issue a prohibition ban beyond their jurisdiction. As a consequence, where a national recall is justified on safety grounds, each state and territory specialist regulator would need to issue its own recalls and

bans. This situation erodes the efficiencies otherwise available from dealing with one lead or home regulator. ESV also noted that specialist regulators may even lack the legislative authority to institute a recall or ban for some electrical products.

The delays and inefficiencies inherent in having each state and territory specialist regulators institute their own recalls or bans (or where they lack the authority to do so) means that they need to rely on the ACCC to effect a nationally consistent approach.

Gaps in the regulatory toolkit have also been an issue for some *national* specialist safety regulators, with the Commission being told of gaps in their powers that force them to interact with ACL regulators in order to address safety concerns within their remit. Two examples follow.

First, the specialist regulator for road transport vehicles (which sits within DIRD), for example, does not have the legislative authority to unilaterally institute recalls. At present, if it finds the need for a recall to address product safety concerns, it calls upon the ACCC to do so using its powers under the ACL.

However, recent reforms to the *Motor Vehicles Standards Act 1989* (Cth) (announced in February 2016) give the Minister for DIRD the power to institute such recalls (DIRD 2016). This change addresses the 'grey' area of commercial vehicles (box 5.9).

Box 5.9 Removing the grey area in vehicle recall powers

ACCC recalls conducted in response to requests for a recall from the Minister for the Department of Industry and Regional Development are done so under the ACL. Technically, therefore, those powers are only applicable to 'consumer' vehicles.

This is problematic in some cases.

Commercial vehicles (such as buses and taxis) are technically not consumer products and, hence, not subject to the recall powers under the ACL.

Transferring the recall powers for road transport vehicles from the consumer portfolio to the Minister for the Department of Industry and Regional Development means they will apply to all vehicles regardless of whether they are 'consumer' or commercial vehicles.

Source: DIRD (2016).

A second example is the TGA, which currently has no power to impose an injunction to prevent businesses from operating in breach of their obligations under the Therapeutic Goods Act and its associated Regulations. In order to institute such an injunction, the TGA engages with state, territory or national (the ACCC) ACL regulators, who have access to injunctions under the ACL.

This gap in the TGA's regulatory toolkit was, among other things, considered as part of the recent *Review of Medicines and Medical Devices Regulation*. That review recommended consideration be given to broadening the current range of enforcement powers available to the TGA (Sansom, Delaat and Horvath 2015, p. xv). The Government's response to that

report agreed with this recommendation and subsequent reforms are expected to augment the powers available to the TGA such that this gap will no longer exist (TGA, pers. comm., 14 October 2016). The implication of this is that the need for TGA and ACL regulator interaction will in future diminish.

The two examples above indicate that at least some of the gaps in specialist regulators' toolkit of powers are soon to be filled.

The feasibility of addressing the gaps indicated by the ACCC and ESV is not clear, although the CAV has noted:

> We have piloted new protocols for national enforceable undertakings, enabling some actions against national businesses to be applied across Australia. This promotes consistency in compliance and enforcement approaches between jurisdictions. (2015, p. 32)

Accordingly, the Commission is seeking participants' views on where gaps in the regulatory toolkit of specialist regulators exist and what changes might be made to address those gaps.

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?

The CAANZ review of the ACL is also looking at this area:

> The ACL Review is currently considering whether the protections provided for in the ACL are adequate and fit for purpose. This includes consideration of the enforcement powers, penalties and remedies applying under the ACL. The tools and remedies available to ACL and specialist regulators can also have an impact on how the ACL is administered and enforced, and are therefore relevant to the PC Study to this extent. (ACCC, sub. 23, p. 9)

Accordingly, the Commission invites those who provide submissions on this matter to the CAANZ review to either alert us to that information or also provide that information to the Commission in a submission.

Moving to 'one law' for specialist safety regimes

Some specialist safety regimes are based on national legislation. These regimes comprise those for boats and marine safety, industrial chemicals, medicines and medical devices, pesticides and veterinary chemicals, and for road transport vehicles. By definition, these regimes operate under one (national) law.

Other specialist safety regimes are based on State or Territory legislation. These regimes comprise those for building and construction, electrical goods, food, and gas appliances.[29] Across Australia, therefore, these specialist regimes operate under a variety of different (sometimes significantly so) laws.

Thus, where state- and territory-based regulators interact with an ACL regulator outside their own state or territory (in practice, the ACCC), their interaction will be complicated by differing laws underpinning what those specialist regulator can do.[30] An example of this is the inconsistent recall powers under the various State and Territory electrical safety regimes, which prompted the ACCC's involvement in the Infinity cable recall (ACCC, sub. 23).

The general case for moving to 'one law'

Previously, the Commission has argued for moving to one body of law to underpin specialist safety regimes. In its 2006 *Review of the Australian Consumer Product Safety System*, the Commission noted that:

> Consistent legislation … may also facilitate cooperation between jurisdictions on administration and enforcement issues. While it is possible to devise ways to achieve some consistency in mandatory standards and bans without changing legislation, consistency in the 'rules of the game' would provide a surer way to achieve consistency in the application and enforcement of product safety regulations. (2006, p. 304)

Recent comments by the chairman of the ACCC, when talking specifically about the experience of the ACL, add support to the generic value of one law in fostering better cooperation among specialist regulators:

> The ACCC strongly backs the 'one law, multiple regulators' model which underpins the Australian Consumer Law. The ACL is a single national law enforced in all jurisdictions by the various consumer regulators.
>
> This model has fostered an unprecedented level of cooperation between consumer regulators. It has enabled jurisdictions to better coordinate action and speak as 'one voice' to industry, and

[29] Although the building and food safety regimes draw on national standards, the regulation of those products is based on state- or territory-level legislation.

[30] This complication does not exist where a state or territory specialist regulator is interacting with their state or territory ACL counterpart. In that case, the ACL regulator will always be facing one (the same) set of specialist regime laws.

> has increased the effectiveness and responsiveness of consumer protection interventions. (Sims 2015)

Moving to one law offers not only the potential to improve the effectiveness of consumer protection interventions by specialist safety regulators, but also the potential for those regulators to present a common position in any interaction with the ACCC.

The need for reform in the electrical goods safety regime

Among the state- and territory-based specialist safety regimes, submissions identified the one-law option to be most relevant for the electrical goods safety regime (box 5.10).

Box 5.10 Study participants' views about one law for the electrical goods safety regime

The SME Committee of the Australian Law Society identified a lack of cohesion in relation to that electrical goods safety regime and noted problems that this caused regulators in their interaction with the ACL system:

> The only area where SME Committee members have identified a lack of cohesion has been in relation to specialist electrical regulatory regimes. There have been a number of cases where different State and Territory based regulators and the ACCC appear to have had different views about the remedial steps which a particular business should be implementing in order to address a potential safety issue. (p. 7 of attachment to sub. 28)

Lighting Council Australia also drew attention to the lack of harmonisation between State and Territory electrical safety regimes (and, by inference, the effect this can have on a common interface with the ACCC):

> The state and territory based electrical safety authorities provide an example of poor regulatory coordination. … Currently there are still multiple state electrical safety schemes in place and this is causing considerable confusion and additional regulatory burden for industry as well as a continued lack of compliance activity, and makes coordination difficult. (sub. 14, pp. 1–2)

DFAT also supported a move to one law, although it did so on the basis that this would reduce the regulatory burden:

> … the various specialist safety regimes, means that many consumer products are subject to regulation by a number of jurisdictions and regulators. For example, electrical consumer appliances are covered by the ACL, but their safety is regulated through State and Territory electrical safety acts and regulations. These can stipulate different technical standards and conformity assessment procedures for each of the products. This can add to administrative costs for business and government, with different states maintaining different product databases, and multiple sets of state based rules with different requirements and product marking. (sub. 29, p. 4)

This problem has also drawn comment elsewhere. The Ai Group observed:

> … there is a lack of harmonisation between state electrical safety regulations leading to disparate approaches by regulators and accredited third party certifiers in the application of product standards, product approval practices, product marking requirements and enforcement actions against [non-conforming building products]. Electrical products can sometimes be legally sold in some jurisdictions, but are banned from sale in others. (2013, p. 21)

Electrical safety regulators themselves have acknowledged the need for more consistency across jurisdictions and have been working to achieve this since 2007. The Lighting Council of Australia described this journey from its observations in its submission (box 5.11).

Box 5.11 The pursuit of consistency among electrical safety regimes

Around 2007, electrical safety regulators recognised the need to reform safety regimes then in operation in order to improve regulatory visibility, compliance resourcing, coordination of compliance activity and compliance of imported products. The key outcomes were to be national consistency, a single publicly accessible database of all electrical product suppliers, a database listing all medium and high risk electrical products, consistent scheme rules across jurisdictions, and a single recognised mark (the 'Regulatory Compliance Mark') on all appropriate products. Such a scheme was to be known as the Electrical Equipment Safety System (EESS). It was developed by the Electrical Regulatory Authorities Council (ERAC).

In addition, the Australian Communications and Media Authority has agreed to align its supplier registration database and product marking requirements with the EESS requirements. Since 2013, all electro-magnetic compatibility generating product suppliers and Queensland electrical equipment suppliers, along with other state or 3rd party certified electrical equipment have been listed on a national database managed by Energy Safe Victoria.

All states and territories except NSW were involved in the ERAC review. (NSW was invited but did not participate.) The Queensland Electrical Safety Regulator Regulatory Impact Statement 2009 on the proposed EESS was signed by all state ministers except the NSW Minister. Queensland developed model legislation, as well as scheme rules and implemented its own legislation and regulations from 1 March 2013.

Nine years after the review started:

- NSW is continuing with its separate regulatory approach. Lighting Council Australia believes NSW is still involved in the development of an EESS Intergovernmental Agreement.
- Queensland has implemented the new EESS, its national database and taken the lead to develop the Intergovernmental Agreement.
- Victoria had committed to being a part of the EESS, but successive government changes have intervened and slowed the process of adoption. It is understood legislative instruments are before the Victorian government to complete the adoption.
- Other states and territories are in various stages of transition to the new EESS scheme and NSW has a watching brief.
- An Intergovernmental Agreement has been in development for three years.

Currently there are still multiple state electrical safety schemes in place.

Source: Lighting Council Australia (sub. 14).

At present, it appears that progress to national consistency for electrical safety regimes is at an impasse. The Commission invites participants' views on what might be needed to break the current impasse and what role the Commonwealth Government might play in any change.

INFORMATION REQUEST

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

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.

6 Other reforms to the consumer protection framework

Key points

- Given continuing differences between some state and territory industry-specific consumer regulation, a review and reform program to improve national consistency (along the lines of that suggested in the Commission's 2008 report) appears to still have merit.
- Study participants have raised concerns about consumers' ability to seek redress. Some concerns would be addressed through implementing the reforms identified in the Commission's 2014 *Access to Justice Arrangements* inquiry. The Commission has also found that:
  - prior to the introduction of a retail ombudsman, several questions would need to be addressed to determine if it would be an efficient and effective mechanism for resolving disputes
  - there is scope to improve the transparency and effectiveness of the ACL regulators' dispute resolution processes through adopting benchmarks for best practice and introducing a review mechanism to identify gaps and to benchmark their services
  - a rigorous analysis should guide the introduction or expansion of a super complaint mechanism.
- Increasing government funding for consumer advocacy — as suggested by the Commission in 2008 — would help to address gaps and improve the robustness of the policy development process. There may also be a case for additional funding to fill gaps in consumer policy research.

While the earlier chapters have focused on the multiple-regulator model and its relationship with other specialist product safety regimes, as discussed in chapter 2 there are also other elements of the landscape that contribute to consumer protection.

In 2008, the Commission recommended a range of reforms to the broader landscape, including industry-specific regulation, dispute resolution arrangements and consumer policy research and advocacy. More recently, the Commission's *Access to Justice Arrangements* inquiry also recommended reforms that would enhance consumers' access to redress.

Some of the concerns raised in those reports — along with some new issues — have also been raised in the context of this study. In several cases, the recommendations of the Commission have not been implemented or fully progressed.

Against this backdrop, this chapter examines:

- whether there is a need to further pursue reforms to industry-specific consumer regulatory regimes as recommended in the Commission's 2008 review (section 6.1)
- access to justice and consumer redress issues (section 6.2), including:
  - complaint resolution issues, including the case for a retail ombudsman
  - super complaints
  - reforms to tribunals and courts
- the case for increased funding for consumer policy research and advocacy (section 6.3).

6.1 Reform of industry-specific consumer regulation

The Commission's 2008 *Review of Australia's Consumer Policy Framework* identified a range of problems with the previous consumer protection framework, including differences in laws across states and territories. To address the problems it identified, the review made nearly 30 recommendations, among which was one to reduce unnecessary and inconsistent industry-specific consumer regulation.

The 2008 recommendation on industry-specific consumer regulation

The Commission identified a range of problems that a more coherent national approach to industry-specific consumer regulation could address:

- Jurisdictional differences add unnecessarily to business compliance costs and penalise consumers.
  - Australia's consumer markets are becoming more national — a trend expected to continue given Australia's openness to international competition and ongoing developments in supply chain management and e-commerce. Imposing multiple and divergent policy regimes on suppliers servicing the Australian market (or large parts of it) raises their cost of doing business. A large part of these costs will be passed on to consumers in the form of higher prices.
  - Differing regulations also penalise consumers in other ways, as protections and redress options for consumers facing the same problems can depend on where they live. Such differences detract from fairness in outcomes and from consistency in the signals to consumers and businesses about their rights and responsibilities.
- The need to supplement the generic consumer law is not always clearly demonstrated.
- Some specific regulation is overly prescriptive, reducing the responsiveness of suppliers to the changing needs of consumers and increasing costs and therefore prices.
- Some regulations appear to be primarily designed to protect existing businesses from competition, rather than protect consumers (PC 2008, pp. 17, 87–88).

In response, the Commission recommended a Council of Australian Governments (COAG) review process to oversee a reform program to remove unnecessary regulation and to move to more consistent industry-specific consumer regulation among the states and territories (box 6.1).

Box 6.1 Recommendation 5.1 to reform industry-specific consumer regulation

In 2008, the Commission recommended that:

> COAG's Business Regulation and Competition Working Group (BRCWG), in consultation with the Ministerial Council on Consumer Affairs, should instigate and oversee a review and reform program for industry-specific consumer regulation that, drawing on previous reviews and consultations with consumers and businesses, would:
>
> - identify and repeal unnecessary regulation, with an initial focus on requirements that only apply in one or two jurisdictions;
> - identify other areas of specific consumer regulation where unnecessary divergences in requirements, or lack of policy responsiveness, have significant costs; and
> - determine how these costs would be best reduced, whilst maintaining protections for consumers, with explicit consideration of:
>   - the case for transferring policy and, where appropriate, regulatory enforcement responsibilities to the Australian Government and how this transfer might be best pursued; and
>   - a process and timetable for harmonising and streamlining currently divergent specific regulation that remains the responsibility of the States and Territories.

Source: PC (2008, p. 98).

What has happened since 2008?

In August 2008, the Ministerial Council on Consumer Affairs noted the Commission's recommendation to reform industry-specific consumer regulation, and indicated that the Business Regulation and Competition Working Group had begun a process to do this (MCCA 2008).

However, preliminary investigations suggest that this specific process was essentially overtaken by other initiatives. There were, for example, significant efforts to review and reform differences across jurisdictions in some areas of regulation through other reform processes, such as:

- the 2008 COAG Seamless National Economy initiative
- a National Regulatory and Competition Reform Compact, agreed in 2012
- other COAG initiatives, such as the ongoing work of the Australian Building Codes Board
- industry-driven initiatives for harmonisation
- State, Territory and Commonwealth initiatives to reduce red tape and ease the regulatory burden on businesses.

Commission reports in the intervening years have identified that these efforts have resulted in some progress in particular industries, such as the national regulation of credit and the establishment of a National Construction Code in 2011. There has also been some small progress in occupational licensing, with scope for further reform. In other areas, such as electrical product safety regulation, progress appears to have stalled (box 6.2).

Box 6.2 Reforms to industry-specific consumer regulation

Since the Commission's 2008 *Review of Australia's Consumer Policy Framework*, there have been reforms to industry-specific consumer regulations in the following areas.

Consumer credit

The Commission's 2008 report identified regulation of consumer credit as a priority area. In 2009, the States and Territories referred power to regulate consumer credit to the Commonwealth, with consumer credit regulated under the *National Consumer Credit Protection Act 2009* (Cth).

Building and construction

In the building and construction area, the National Construction Code (NCC) was established through the Seamless National Economy program in 2011. This has reduced some differences across jurisdictions. In addition, the Australian Building Codes Board is continuously working to harmonise and streamline divergent regulations. Where this cannot be achieved, it has a Variation Management Strategy, which aims to reduce state and territory variations to the NCC. Nonetheless, previous work by the Commission has found differences still remain in key areas.

- Local government intervention was identified as an area in need of reform by the Building Ministers' Forum in 2006 (PC 2012). However, it is unclear what further reform is needed in this area.
- The Commission also identified scope to include electrical, gasfitting and telecommunication regulations into the NCC (PC 2012). Of these, gasfitting is currently being considered for inclusion in the NCC (DIIS, pers. comm., 7 Nov. 2016).

Occupational licensing

For occupational licensing, COAG agreed to a national approach (under the Seamless National Economy initiative) to be administered by the National Occupational Licensing Authority. However, the Commission's report on Geographic Labour Mobility noted that State and Territory governments were concerned about the proposed model and its potential costs, and that this approach was abandoned in December 2013 (PC 2014b).

- Since then there has been some small progress in facilitating cross-border recognition of occupations through the Council for the Australian Federation's work into automatic mutual recognition. In the Commission's 2015 report into mutual recognition schemes, it recommended that State and Territory governments give higher priority to expanding the use of automatic mutual recognition (PC 2015).

(continued next page)

Box 6.2 (continued)

Therapeutic goods

While there is a national regulator for therapeutic goods, in 2008 the Commission found that variations in the classification of poisons meant the conditions of sale for some pharmacy-only medicines differed between jurisdictions. This appears to still be the case (TGA 2014).

- The framework for the regulation of therapeutic goods in Australia has, however, recently undergone considerable scrutiny via the Review of Medicines and Medical Device Regulation. Announced by the Commonwealth Government in October 2014, the panel undertaking the review reported to the Government in two stages, on 31 March 2015 and 31 July 2015. In September 2016, the Government released its response to the review, which supported 56 of the review's 58 recommendations. These will improve access to therapeutic goods for consumers and remove unnecessary red-tape for industry, whilst maintaining the safety of therapeutic goods in Australia. The Department of Health is currently working on implementing these supported recommendations (DoH, pers. comm., 22 Nov 2016).
- The review recommended that the mechanism by which products are classified as poisons be further examined for potential improvements in scheduling decision-making methodology, efficiency and transparency. The Department of Health is currently carrying out this work in consultation with the States and Territories and external non-government stakeholders.

Food safety

There has been some progress in the regulation of food safety since 2008. In particular, COAG agreed to reform the Australia and New Zealand Food Regulation Ministerial Council voting arrangements, develop a nationally consistent approach to monitoring and enforcement of food standards, and improve food labelling policies and laws. (That Ministerial Council is now the Australia and New Zealand Ministerial Forum on Food Regulation — the Forum; and, following the changes to COAG Councils in 2013, it is no longer a COAG body.) Other reforms include establishing the Code Interpretation Service and country of origin labelling (PC 2016b).

- However, differences across jurisdictions remain. In particular, jurisdictions impose requirements additional to those in Annexes A (offences, defences, definitions, and provisions) and B (monitoring, enforcement, licensing and auditing) of the model food provisions of the Food Regulation Agreement. Further, adoption of provisions in Annex B is optional (PC 2012).

The Forum is supported by the Food Regulation Standing Committee, which is responsible for coordinating policy advice to the Forum and ensuring a nationally consistent approach to the implementation and enforcement of food standards. This committee is, in turn, supported by the Implementation Sub-Committee. The Forum and its subsidiary bodies do work to reduce inconsistencies and unnecessary regulation (Department of Health, pers. comm., 22 Nov 2016).

Electrical product safety and Gas appliance safety

There has been some progress in the area of electrical product safety, but differences across jurisdictions remain. While a national scheme for electrical equipment safety has been developed — the Electrical Equipment Safety Scheme — it has not been adopted universally (New South Wales retains a separate regulatory approach). (This issue is discussed in chapter 5.)

In the area of gas appliance safety, regulations also vary across jurisdictions, although the National Energy Customer Framework has been adopted in all states with the exception of Victoria (DIIS 2016).

Regulations still differ and impose costs on business and consumers

Some participants acknowledged the progress in addressing differing industry-specific consumer regulation across jurisdictions. The Australian Competition and Consumer Commission (ACCC) and the Law Society of NSW, for example, stated:

> During the creation of the ACL, ACL regulators undertook considerable work to harmonise standards and bans under consumer laws, with a substantial reduction in the number of regulations. (ACCC, sub. 23, p. 24)

> The Law Society considers that the introduction of the ACL has gone a considerable way to remove the unnecessary and costly divergences in regulatory requirements between industry-specific state and territory consumer protection regimes since 2008. (sub. 28, p. 2)

Energy Safe Victoria also referred to progress in bringing consistency to some industry-specific regulations affecting gas and electrical equipment:

> The requirements for certification of gas and electrical equipment are [now] almost identical across all Australian jurisdictions so there are no additional fees or burdens on industry. One certificate of approval or acceptance for gas equipment or electrical equipment is recognised nationwide. (sub. 7, p. 10)

However, participants also noted that differences remain in many areas:

> The State/Territory regulators have an important role in administering consumer laws, both general laws such as the ACL, but also many industry-specific laws covering significant areas such as building, real estate and motor car traders. Unfortunately, it seems to have been too difficult to date to achieve national uniformity in these industry-specific laws. (Cousins, sub. 20, p. 1)

As a result, the range of problems identified in the Commission's 2008 report that are associated with such differences are also likely to remain. The Consumer Action Law Centre (Consumer Action), for example, drew attention to the ongoing risk that some industry-specific regulation (in the building area) is being used to assist industry rather than to benefit consumers (sub. 10, p. 12).

Accordingly, the thrust of the 2008 report's recommendation for a review process to reform some industry-specific regulation that is based on state and territory legislation appears to still have merit.

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.

6.2 Consumer redress

A well-functioning system for redress gives consumers confidence to enter into contracts and provides an incentive for businesses to comply with laws and regulations (PC 2014a). As noted in chapter 2, the civil justice system in Australia offers a range of mechanisms for resolving consumer disputes. However, concerns have been raised by participants in both this study and in the Consumer Affairs Australia and New Zealand (CAANZ) review of the ACL in relation to:

- ombudsmen and complaint resolution
- the scope for super complaints
- the accessibility of courts and tribunals.

Ombudsmen and complaint resolution

As outlined in chapter 2, ombudsmen are independent organisations, primarily with a complaint handling and investigation function. While they commonly draw upon their experience to facilitate dispute resolution between parties, and to contribute to policy discussions and consultations, ombudsmen do not advocate for either side and they are not industry regulators (ANZOA, sub. to CAANZ, p. 2).

The two main forms of ombudsmen are industry ombudsmen (discussed further below) and government ombudsmen (which seek to resolve complaints with government agencies).

Industry ombudsmen provide an opportunity for consumers to resolve small disputes relatively quickly and at no financial cost, without the need to resort to the legal system. Ombudsmen can also identify systemic cases of consumer harm. They typically deal with disputes between consumers and service providers in a particular industry, such as energy and water, financial services and telecommunications. Some industry ombudsmen, such as the Telecommunications Industry Ombudsman, are established by governments under specific legislation (statutory ombudsmen).

Industry ombudsmen adopt a range of dispute resolution processes.[31] They may assist parties to reach an agreement, provide advice to the parties on the dispute, or evaluate the dispute and make a determination (PC 2014a). A determination is binding on the industry member, although not the consumer, who can choose to accept or reject the determination (NADRAC 2013).

[31] Dispute resolution refers to all processes that are used to resolve disputes. Dispute resolution processes may be facilitative (such as mediation, facilitation and facilitated negotiation), advisory (such as expert appraisal and case presentation) or determinative (such as arbitration, expert determination and private judging). Alternative dispute resolution (ADR) is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. Internal dispute resolution (IDR) refers to the internal procedures an organisation has in place to resolve complaints made to it, while external dispute resolution (EDR) is through a third party (NADRAC 2013).

Schemes are usually funded by industry members. While ombudsmen's services are free to consumers, typically businesses bear the cost of an ombudsman hearing a dispute. In some cases, ombudsmen will scale fee levels to provide an incentive for businesses to reach an early resolution.

Many participants in the Commission's 2014 inquiry into *Access to Justice Arrangements* commented positively on ombudsman services for enabling access to justice for all consumers (PC 2014a).

While ombudsman services have advantages, the Commission has found that there remains room for improvement. The 2014 inquiry recommended changes including that:

- businesses or government organisations should immediately inform any individual who makes a complaint about the availability of external review
- the requirement that complaints to ombudsmen be made in writing should be removed
- the case for consolidating some ombudsman services should be examined (especially if a service is highly costly to run and receives only a small number of complaints) and proposals for new ombudsman services should be vetted to see if that function could be performed by an existing service
- government ombudsmen's reporting powers should be expanded and the reporting of data standardised. Consideration should also be given to the appropriateness of imposing a fee on government agencies for ombudsman services (PC 2014a).

While the Commonwealth Government (Attorney-General's Department 2015) has released a response to the *Access to Justice Arrangements* report, it did not indicate whether it intends to implement these particular recommendations.

Earlier, in 2008, the Commission made other recommendations to enhance the effectiveness of alternative dispute resolution (ADR) arrangements. In particular, it recommended that Australian governments should ensure there are effective, properly resourced, government-funded ADR mechanisms to deal in a consistent manner with all consumer complaints not covered by industry ombudsmen (discussed further below).

It also suggested that existing financial ADR (more usually referred to as external dispute resolution (EDR) in this context) services should be integrated into a single umbrella scheme (providing a single access point for consumers while also allowing independent governance of schemes), and that any new scheme should be accessed through the gateway of the Financial Ombudsman Service (FOS) (PC 2008).

Since the 2008 report, there have been several developments in financial services EDR. The FOS was established in 2008 following the merger of five predecessor schemes: the Financial Industry Complaints Service, the Banking and Financial Services Ombudsman, the Insurance Ombudsman Service Ltd, the Credit Union Dispute Resolution Centre and the Insurance Brokers Disputes Ltd (Australian Government 2016b).

The Commission notes that the *Review of the financial system external dispute resolution and complaints framework* — chaired by Professor Ian Ramsay — is currently examining EDR services for financial services.

A retail ombudsman?

A number of participants in this study and in the CAANZ review of the ACL have advocated establishing an Australian retail ombudsman, similar to that in the United Kingdom.[32] For example, Legal Aid NSW recommended:

> … consideration be given to the establishment of a retail ombudsman. This could be an alternative means of resolving disputes, particularly disputes of small economic value. (sub. to CAANZ, p. 23)

Consumer Action submitted that:

> Consumer Action strongly recommends that industry External Dispute Resolution (EDR) models are extended to markets with significant consumer problems and a lack of suitable dispute resolution. A Retail Ombudsman for Australian consumers would meet this goal, and could provide a nationally available forum to hear consumer disputes at no cost to the consumer. (sub. to CAANZ, p. 51)

The UK Government has authorised the UK Retail Ombudsman[33] to assist in resolving consumer disputes, consistent with a European Union (EU) Directive on consumer ADR. Businesses that are members of the Retail Ombudsman scheme are obligated to comply with the Ombudsman's determination (although it is not compulsory for retailers to become a member of the scheme) (box 6.3). If the Ombudsman cannot resolve the dispute (or if the consumer is unhappy with the outcome), the consumer may take the complaint to the relevant regulator or a court (CAANZ 2016a). A report prepared for the CAANZ review of the ACL noted that there is less emphasis on dispute resolution through the court (and tribunal) system in the United Kingdom compared to Australia (Corones et al. 2016).

[32] Participants include the Consumer Action Law Centre; Law Council of Australia's Competition and Consumer Committee and SME Business Law Committees; Legal Aid NSW; Legal Practice Section of the Law Council of Australia's Legal Practice Section; Legal Aid Queensland; and Public Transport Ombudsman Victoria (CAANZ 2016a).

[33] The Retail Ombudsman deals with disputes between consumers and retailers (in store and online), supermarkets, garden centres, restaurants and takeaways, hotels and leisure providers, boiler installation and repair providers, and airlines. There is also a Consumer Ombudsman that deals with disputes about energy, communications, property and copyright licensing (ANZOA, sub. to CAANZ).

Box 6.3 The EU directive on ADR and the UK Retail Ombudsman

The UK Retail Ombudsman was formed following the issuing of an EU directive on consumers' access to alternative dispute resolution (ADR) arrangements. The EU directive seeks to ensure that consumers have access to out-of-court redress in every EU member state, regardless of the nature of goods and services involved, or the place of purchase.

Under the directive, the UK Government must ensure that ADR is available for any dispute concerning contractual obligations between a consumer and business. All businesses are required to provide consumers with details of an appropriate ADR provider if they have been unable to resolve a complaint, and inform the consumer whether or not they intend to refer the dispute to that ADR provider.

The UK Retail Ombudsman is able to direct a business that is a member to take or desist from taking certain actions, including the issuing of a formal apology, and can also direct that a member pay compensation. Members are contractually obligated to implement the Ombudsman's decision. However, if not a member, it is up to that business' discretion as to whether it complies with the decision.

Sources: DBIS (2014); Ombudsman Services (2014); The Retail Ombudsman (2016).

The interim report of the CAANZ review of the ACL noted that the effectiveness of the UK scheme has not yet been assessed. Further, it commented that 'as the wider dispute resolution landscape is the subject of multiple reviews in Australia, it is [as] yet unclear whether a Retail Ombudsman will be warranted and what its broader implications may be' (CAANZ 2016a, p. 165).

In the Commission's view, several difficult questions would need to be adequately addressed before embracing a retail ombudsman scheme for Australia. They include:

- Does the general retail market exhibit characteristics that lend themselves sufficiently to an ombudsman service? Previously, the Commission has found that ombudsmen are most suited to markets where essential services are involved, the market is characterised by large firms and limited competition, and consumers lack information and bargaining power compared to businesses, making it difficult for them to assert their rights (PC 2014a).
- Would there be sufficient incentives for retailers to sign up to a general ombudsman scheme and willingly be bound by its decisions? Given that general retailers are not licensed in the same way as businesses in other industries with ombudsman services (such as financial services), it may be difficult to induce retailers to join and comply with the scheme. As the Australian Securities and Investments Commission (ASIC) notes in its submission to the review of the financial services EDR framework:

  > A scheme's effectiveness relies on its ability to ensure that members abide by its decisions and by its rules. … Binding members to scheme decisions brings finality to the dispute resolution process, and ensures that EDR remains a timely and cost effective alternative to the courts for all users. (ASIC 2016c, p. 16)

- How would an ombudsman service be funded? Industry ombudsmen tend to be resourced through industry contributions. Yet, as noted above, a lack of licensing powers may mean there is little incentive for retailers to contribute to the service.
- Is there currently a material gap in the mechanisms available to consumers for resolving disputes that a general retail ombudsman would fill? And if so, would that gap remain even with appropriate reforms to current consumer dispute resolution mechanisms? In its submission to the CAANZ review of the ACL, the Australia and New Zealand Ombudsman Association (ANZOA) observed that '[i]n Australia, the dispute resolution role of the UK Retail Ombudsman is undertaken by the state and territory offices of Consumer Affairs/Fair Trading.' (ANZOA, sub. to CAANZ, p. 2).

Reviewing the conciliation services provided by the ACL regulators

Further analysis would be required to gauge the extent to which the conciliation services provided by the ACL regulators currently fulfil the Commission's 2008 recommendation for effective and properly resourced mechanisms for dealing with consumer complaints. Yet there is little information publicly available on the nature and outcomes of the dispute resolution services, and what information is available is inconsistent across jurisdictions.

However, as discussed in chapter 3, there appear to be at least some differences in the approaches of the State and Territory regulators to conciliation of consumer disputes.

Some participants have expressed broader concerns about these services. For example, Consumer Action observed that 'dispute resolution activities can be highly variable between regulators, and change in importance for particular agencies over time' (sub. 10, p. 13). It went on to say 'there appears to be little transparency about outcomes or systemic issues identified through the process' (p. 14).

It has become common practice for customer dispute resolution schemes to provide services that are consistent with benchmarks for industry-based customer dispute resolution, such as those developed (first in 1997 and since updated) by the Commonwealth Government in collaboration with industry-based dispute resolution schemes, consumer groups, government and regulatory authorities (box 6.4). Further, industry-based dispute resolution schemes generally require independent review of the scheme as a prerequisite for approval.[34]

[34] For example, approved financial services external dispute resolution schemes must commission independent reviews of the scheme's operations and performance at appropriate intervals (three years after initial approval and every five years thereafter unless ASIC specifies a shorter timeframe) (ASIC 2016c).

Box 6.4 Benchmarks for industry-based customer dispute resolution

The six benchmarks and underlying principles of best practice are:

- *Accessibility* — the office makes itself readily available to customers by promoting knowledge of its services, being easy to use and having no cost barriers.
- *Independence* — the decision making process and administration of the office are independent from participating organisations.
- *Fairness* — the procedures and decision-making of the office are fair and seen to be fair.
- *Accountability* — the office publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators.
- *Efficiency* — the office operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum, and regularly reviewing its performance.
- *Effectiveness* — the office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance.

Source: The Treasury Department (2015).

While the Commission recognises that the ACL regulators are not industry-based dispute resolution schemes and often have a number of regulatory responsibilities, they do provide services akin to some of those provided by such schemes. It might therefore be expected that the dispute resolution services of the ACL regulators should also be consistent with a similar set of principles and be subject to periodic review. In its submission to this study, Consumer Action commented:

> Consumer Action encourages all dispute resolution services to be more transparent, by being subject to regular and public evaluations, so as to contribute to quality outcomes and efficient resolution of problems. (sub. 10, p. 13)

In 2008, the Commission also recommended a broad review process — the establishment of a formal cooperative mechanism between the various consumer regulators, ADR schemes and other stakeholders to reassess every five years the nature and structure of ADR arrangements to achieve best practice and address redundancies or new needs (PC 2008). The Commission understands that this process has not been implemented.[35]

Such a mechanism could have several advantages. It would enable ACL regulators to benchmark their services, identify best practice, and assess whether there are opportunities to improve services. For example, the FOS noted the potential of online dispute resolution in its submission to the *Review of the financial system external dispute resolution and complaints framework*, with a number of case studies from around the world demonstrating

[35] The Commission understands that some jurisdictions assess their broader ADR processes from time to time. For example, in 2013–14, the NSW Law Reform Commission reviewed ADR within that State (CDRAC response, 2016). ADR was also the subject of some discussion in the Victorian *Access to Justice Review* (DoJR 2016).

its potential for resolving low value claims (FOS 2016b). A formal cooperative mechanism would also enable the identification of gaps in the broader consumer dispute resolution landscape.

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?

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*.

Super complaints

In the United Kingdom, in addition to standard consumer complaints, certain bodies can make a 'super complaint' (box 6.5). Super complaints enable organisations deemed to be representative of consumer interests to lodge complaints on behalf of classes of consumers, and for the complaint to be fast-tracked with the relevant regulator (Consumer Action, sub. 10).

During this study and in the CAANZ review of the ACL, a small number of participants have advocated for the introduction of a super complaint system (box 6.6). The Commission notes that the ACL review interim report does not examine this issue.

Box 6.5 Super complaints in the United Kingdom

In the United Kingdom, a super complaint is designed to bring to the attention of the Office of Fair Trading or other relevant regulator, market features that appear to be significantly harming the interests of consumers. A market feature may relate to the structure of the market (or any aspect of that structure), the conduct of a person(s) who supplies or acquires goods or services in the market, or the conduct of their customers.

The response to a super complaint is fast-tracked. Within 90 days of receipt, the UK Office of Fair Trading or other regulator concerned has a duty to publish a public response stating what action, if any, it intends to take.

Only designated consumer bodies can make a super complaint. These bodies are expected to provide strong analysis and evidence in support of any super complaint made.

Source: UK Office of Fair Trading (2002).

Box 6.6 Participants' views on super complaints

CHOICE, in its submission to the CAANZ review of the ACL, stated:

> A new process should be established under the Australian Consumer Law to let specified consumer organisations 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 Federal Government required to then respond publicly after another specified period. In order to constitute a super complaint, a reference must relate to widespread concern or conduct in a market and must meet other significant thresholds in relation to information provision. This measure has no additional costs for government, regulators and businesses. It would lead to better information being provided to regulators. (CHOICE, sub. to CAANZ, p. 43)

The Consumer Action Law Centre also raised the issue of super complaints, submitting:

> A super-complaint framework should be included in the ACL and adopted by consumer regulators. While systemic harm is commonly acted on by regulators when reported by consumer organisations, the public nature of super-complaints is significant, particularly in relation to issues that might 'fall between the cracks' of regulatory bodies. A super-complaint might encourage increased focus and cooperation to deal with an issue. A super-complaint framework that also requires a response from Government might also facilitate an issue being dealt with more quickly and efficiently, reducing consumer harm more effectively. (Consumer Action, sub. to CAANZ, p. 56)

The Australian Communications Consumer Action Network also advocated for a super complaints system:

> ACCAN suggests that the Commission investigate the merits of a 'super complaints' process. This would allow recognised representative organisations such as ACCAN to make a complaint to regulators on behalf of a group of consumers about systemic market problems. This model has been in place in the UK since 2003 and has been very successful. (ACCAN, sub. 6, p. 12)

The Commission's 2008 analysis

Introducing a super complaints mechanism to Australia was raised in the Commission's 2008 *Review of Australia's Consumer Policy Framework*. The Commission commented that the key question in considering a super complaint mechanism was the adequacy of existing intelligence about and prioritisation of consumer problems. It considered that it was not clear that there were any material shortcomings in these aspects of complaint handling in the Australian system at that time (PC 2008).

The report also noted that regulators might not formally investigate an issue due to their priorities, rather than any institutional failure. The Commission noted that regulators consider the way they prioritise their use of resources, therefore mandating that priority be given to the investigation of super complaints could use investigative resources that would have been better deployed elsewhere (PC 2008).

Subsequent developments

In 2011, the NSW Minister for Fair Trading announced that NSW Fair Trading and CHOICE would pilot a super complaints project. A Memorandum of Understanding between NSW Fair Trading and CHOICE established the pilot and 'set out the role of the parties, the scope of and process for handling super complaints, and the range of possible responses to the issues raised' (NSW Fair Trading 2013, p. 4).

Since its introduction, two super complaints have been brought to NSW Fair Trading:

- On 8 March 2012, CHOICE submitted a complaint on the operations of electricity switching websites. Its concerns included that in visiting these sites, consumers would be misled into thinking that they would find the 'best' electricity deal available.
- On 29 August 2013, CHOICE submitted a complaint alleging that eggs are labelled as 'free range' when they are produced on farms where the outdoor stocking density is greater than the 1500 birds per hectare outlined in the *Model Code for the Welfare of Animals: Domestic Poultry* (NSW Fair Trading 2014).

Although intended originally as an 18 month pilot, NSW Fair Trading will continue to give consideration to any subsequent complaint from CHOICE (NSW Fair Trading, pers. comm., 24 October 2016).

Is there a case for super complaints?

In the Commission's view, several issues would need to be addressed prior to broadening the NSW pilot scheme to other jurisdictions. These include:

- 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' (box 6.6), 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.

- Would the issues that arise through the super complaint process not be adequately identified by the regulators through other mechanisms? For example, the ACCC and ASIC already conduct investigations into systemic issues.[36] 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.[37]
- To what extent would consumer advocacy 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?

Any proposal to expand or introduce a super complaint mechanism should be rigorously assessed and include an assessment of whether processes are already in place that can identify the types of concerns that might arise through a super complaint.

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?

Reform of the tribunals and courts

Study participants have raised concerns about accessibility of redress through the courts and tribunals (box 6.7). They identified areas such as complexity, cost and inaccessibility for consumers with no or little legal experience.

While this study has not examined these matters in any detail, given the scope outlined in chapter 1, several recent reviews have addressed similar concerns.

[36] For example, in the case of the free range egg complaint, the ACCC was already aware of the issues, and had taken enforcement action against a number of egg producers on the basis that their eggs had been misleadingly labelled free-range (Parker and de Costa 2016).

[37] Some ombudsmen may also instigate their own investigations in order to identify systemic issues (PC 2014a).

Box 6.7 Participants' comments on courts and tribunals

Several participants to the study and the CAANZ review of the ACL raised concerns about the accessibility and availability of opportunities for consumer redress through courts and tribunals:

> We question how well consumers understand the various legal avenues of redress under the legislation and how this impacts on their ability to utilise the provisions. We note that, depending on their grievance, consumers can institute proceedings in the Federal Court of Australia or lodge a claim with various state tribunals or courts. A consumer requires a certain level of sophistication in order to determine whether they may have a claim and through what court or tribunal they can pursue it. (Governance Institute of Australia, sub. 13, pp. 1–2)
>
> … where a consumer is unable to resolve a consumer dispute by agreement and negotiation with a trader, their only alternatives are to request assistance from NSW Fair Trading, which is under-resourced and unable to impose a binding resolution on parties, or take a matter to the NSW Civil and Administrative Appeals Tribunal, an adversarial process which we see cause significant anxiety to vulnerable consumers due to the cost, time and overall complexity of the processes. Enforcing NCAT judgments against recalcitrant traders is often very time consuming and difficult for consumers. (Redfern Legal Centre, sub to CAANZ, p. 14)
>
> For example, to bring an action in a tribunal consumers are liable to pay a fee, which in some cases may exceed or form a significant part of the amount claimed. In addition, consumers are usually required to prepare a case and appear before the tribunal, which often means taking time off work. Compared to the TIO process, tribunals are more adversarial in nature with consumers potentially having to put their case to an opposing lawyer. This is a large barrier to any consumer, let alone those with low levels of education or language skills. (Australian Communications Consumer Action Network, sub. to CAANZ, p. 5)
>
> Historically, these tribunals, such as the NSW Civil and Administrative Tribunal, have provided effective and low cost avenues for enforcing rights. However, over the last few years many of these state based tribunals have become much more formal in how matters need to be presented and in their processes and procedures. (Law Council of Australia, sub. to CAANZ, pp. 11–12)
>
> Delay … has very real tangible and intangible costs for our clients. For small civil claims, there is typically around a six month delay between applying to VCAT and having a case heard. In a recent case, Consumer Action assisted a client in relation to a defective vehicle which involved an eleven month delay between the time our client stopped using the defective car to the time a favourable result in VCAT was achieved. (Consumer Action, sub. to CAANZ, p. 51)

In particular, the Commission's 2014 review of *Access to Justice Arrangements* noted issues such as creeping legalism in tribunals (which mean they are not the low cost mechanism originally intended), unnecessary costs and delays in court processes, and the overly adversarial nature of the system more broadly (box 6.8). The Commission proposed an extensive set of reforms to the civil justice system. The Commission urges governments to work to implement these recommendations, many of which would benefit consumers.

Additionally, two recent Victorian reports have identified problems and potential improvements in court and tribunal systems:

- A review prepared for Consumer Action, the Tenants Union of Victoria and WEstjustice Western Community Legal Centre of tenants' and consumers' experiences of the Victorian Civil and Administrative Tribunal (VCAT) found that, despite its aspiration to be accessible and informal, there are substantial barriers that inhibit

Box 6.8 The Commission's access to justice inquiry

The Commission noted in its 2014 *Access to Justice Arrangements* inquiry that governments, in granting courts and tribunals exclusive jurisdiction over certain matters, have a responsibility to ensure that these institutions operate as efficiently and effectively as possible. The Commission found that there are numerous improvements that could be made, including:

- *Tribunals have been accused of creeping legalism*. While intended to be a low cost alternative to the courts, they are being seen by users as increasingly formal bodies, with the use of legal representation thought to be contributing to this problem. The Commission considered that some restrictions on representation in tribunals were appropriate and should be enforced more firmly.
- *Court processes have been improved but reforms have been uneven*. Reforms have meant courts now take a more active approach to judicial management of cases, including by taking greater initiative in case preparation. However, progress has been uneven across jurisdictions, and court processes do not yet sufficiently ensure that unnecessary costs and delays are avoided. The Commission considered that well-targeted and appropriately employed case management could yield further significant benefits for efficiency and further reduce costs and delays.
- *The system is adversarial, so there is little incentive to cooperate*. The adversarial behaviour of parties can hinder the resolution of disputes or even exacerbate them. There is scope to improve efficiency and effectiveness through greater cooperation. More use should be made of pre-action protocols, which can help resolve disputes early by narrowing the range of issues in dispute and facilitating ADR. The arrangements for determining costs awards should also be reformed, through the use of fixed scales.
- *Not all parties are on an equal footing*. The effectiveness of the adversarial system is premised on parties being on an equal footing, but differences in the bargaining power of litigants are evident, particularly with self-represented litigants. There remains scope to further simplify forms and procedures and provide information to support self-representation, as well as better equipping judges and court staff through training, clearer rules and guidelines. Further, some self-represented litigants would benefit from direct assistance, such as advice and representation options.
- *Prices do not always reflect the balance of private and public benefits*. Private parties are typically the primary beneficiaries from engaging in litigation, though the wider community also benefits through the enforcement (and sometimes clarification) of the rule of law. Given this mix of benefits, it is appropriate that litigants bear a share of court costs through fees (and, in some cases, all costs). Clear and consistent criteria for setting court fees are required. Further, the level of cost recovery in most courts could be increased, which would send a signal to litigants to consider other suitable avenues for resolving disputes.
- *Technology can generate time and cost savings*. In the past decade, many Australian courts and governments have implemented significant reforms aimed at better using technology to improve the efficiency of legal processes. However, investment in IT has been uneven across jurisdictions, and the availability, quality and use of technology varies widely, partly due to a lack of resources. Increasing court fees may provide the funds required to upgrade technology where necessary.

Source: PC (2014a).

consumers from accessing VCAT. The review found, amongst other things, that legislative reform is required along with an easier application process and greater willingness to allow representation in small claims (Cameronralph Navigator 2016).

- A review of access to justice in Victoria found areas of weakness, including a lack of data, poor technology and under-resourcing of legal assistance and related services that are not sufficiently integrated. It identified measures to improve the system and accessibility (DoJR 2016). The Victorian Government is now considering its response to this review.

Differences in fees across jurisdictions

One issue that has been raised of particular relevance to this study is the differences in tribunal and court fees across Australia. CHOICE commented that:

> It is not fair that a consumer experiencing a problem with a business in South Australia will pay nearly six times more than a similar consumer in Queensland would in order to seek a remedy. The ACL is a nationally consistent law, and should apply equally across Australia – including in terms of enforcement and consumer access to remedies. … Fees should be consistent and as low as possible in order to facilitate access to justice. Vulnerable or disadvantaged consumers should also have access to a fee waiver scheme, in order to best facilitate access to justice. (sub. 11, p. 19)

In its submission, CHOICE provided a table illustrating the fees in each of the State and Territory tribunals and small claims courts (table 6.1). A number of tribunals offer fee waivers for disadvantaged clients.

Table 6.1 **Fees in tribunals and courts**

State/Territory	*Tribunal or court*	*Filing fee*	*Application type*
ACT	ACT Civil and Administrative Tribunal	$68	When the amount in dispute is $2 000 or less
NSW	NSW Civil and Administrative Tribunal	$47	If the amount claimed is $10 000 or less
NT	NT Magistrates Court	$65	Small claims – statement of claim
Qld	Qld Civil and Administrative Tribunal	$23.80	Not more than $500 in dispute
SA	South Australian Magistrates Court	$138	Minor civil action
Tas	Magistrates Court of Tasmania	$111	Claim for $5 000 or under
Vic	Victorian Civil and Administrative Tribunal	$59.80	Claims for less than $500
WA	Magistrates Court of Western Australia	$106	Filing fee for claim not exceeding $10 000

Source: CHOICE, sub. 11, pp. 18–19.

While fees are a visible difference across jurisdictions, there are also less discernible variations which may not be picked up by a consumer.

- The costs to governments of maintaining tribunals vary across jurisdictions. In 2011-12, the average cost in VCAT's civil division was $290 per case, whereas the average cost in New South Wales' civil tribunal (which is now part of the NSW Civil and Administrative Tribunal (NCAT) was around $440 per case and minor civil disputes in the Queensland Civil and Administrative Tribunal (QCAT) cost $250 (PC 2014a).[38]
- Investment in IT has been uneven across jurisdictions, with the availability, quality and use of technology varying widely. For example, online lodgement is not available in the ACT Civil and Administrative Tribunal (ACAT) or QCAT, and is only available for particular matters in most other amalgamated tribunals (PC 2014a).
- Some tribunals automatically allow legal representation (such as ACAT), but permission for legal representation is generally required in VCAT, QCAT and NCAT (PC 2014a).
- Differences in legislation can have a significant impact on how complex, and therefore how costly and time consuming, cases are in different jurisdictions (PC 2014a). While the ACL is the same across jurisdictions, courts and tribunals also hear cases involving legislation unique to that jurisdiction, which may impact on tribunal costs overall. Particularly in courts, a single case may encompass several causes of action.

Against this background, it might be expected that different fees could reflect differences in local costs and processes. However, the extent to which tribunal fees do actually take these factors into account is not clear.

In its 2014 *Access to Justice Arrangements* inquiry, the Commission recommended that tribunal and court fees should be based on a consistent methodology or framework (box 6.8). While it is not necessarily appropriate to fully cost recover in the case of civil disputes,[39] adopting a transparent framework based on some portion of actual costs could lead to a more efficient provision of tribunal services.

Perhaps of greater concern is whether there is inconsistency in the approach and decisions made by tribunals and courts on ACL matters across jurisdictions. While this is an issue that has been raised by some participants, the Commission is not aware of any concrete evidence that supports these concerns.

[38] The average cost per case was be calculated by dividing total expenditure (or total expenditure of a particular tribunal division) by finalised cases. This approach includes the full cost of overheads (PC 2014a).

[39] The Commission found that cost recovery in courts and tribunals was low — around 2-13 per cent — and considered that there was a strong rationale for increasing the overall quantum of fees collected from parties using courts and tribunals. However, it suggested that low levels of cost recovery may be appropriate for a range of disputes, including small claims, consumer, residential or tenancy matters. In such cases, cost-reflective fees may often exceed the amount in dispute (PC 2014a).

6.3 Research and advocacy as inputs into policy

The Commission's 2008 *Review of Australia's Consumer Policy Framework* identified a need for greater public funding of both consumer policy research and advocacy, to better inform consumer policy (box 6.9). Subsequently, the potential value of advocacy and research was recognised in the 2009 intergovernmental agreement for the ACL:

> The Parties recognise the importance of evidence-based policy supported by robust research and effective stakeholder advocacy. To this end, the Commonwealth will work with the States and Territories to develop further the effectiveness of consumer representation and consumer policy research nationally. (COAG 2009, p. 10)

However, as noted in chapter 2, the Commission's recommendation on these matters has not been implemented. This section revisits the main issues from the 2008 inquiry and examines whether there remains a need for the previously proposed reforms.

Box 6.9 The Commission's 2008 recommendation

In 2008, the Commission recommended (rec. 11.3) that:

> Within the broader consumer policy implementation framework agreed to by CoAG, the Australian Government, in consultation with MCCA [Ministerial Council on Consumer Affairs], should take the lead role in developing arrangements to provide additional public funding to:
>
> - help support the basic operating costs of a representative national peak consumer body;
> - assist the networking and policy functions of general consumer advocacy groups; and
> - enable an expansion in policy-related consumer research.
>
> Part of the latter funding component should be used to establish and support the operation of a dedicated National Consumer Policy Research Centre (NCPRC), with the remainder provided as contestable grants for research on specified consumer policy issues. An independent review of the effectiveness of the NCPRC in delivering beneficial research outcomes should be conducted after 5 years.
>
> The new funding arrangements should be subject to appropriate guidelines and governance requirements to help ensure that taxpayer support contributes to high quality advocacy and policy research in priority areas, and that the national interest is appropriately represented.

Source: PC (2008, pp. 291–292).

Funding for consumer research

The Commission's 2008 analysis

The 2008 inquiry highlighted a paucity of relevant data and information available for decision makers to assess consumer policy issues. The report identified several information gaps, and further found that the dissemination of research (when it occurred) was not always effective. It found that researchers examining consumer policy issues can be hard-pressed to attract private funding because consumers have little individual incentive to undertake or fund such research, despite the potential collective benefits for Australian

consumers from a strengthened evidence base. This is a similar problem experienced by consumer advocacy groups (discussed further below).

The Commission concluded that there was a strong case for increased government funding for research activities related to consumer policy. It recommended that, subject to appropriate governance arrangements, additional public funding should be provided along the following lines:

- a base funding component to support the establishment and operation of a National Consumer Policy Research Centre (NCPRC)
- a second contestable funding pool to support research on specific consumer policy issues (PC 2008).

Subsequent developments

Despite an initial issues paper and public consultation process led by the Commonwealth Treasury in 2009, this recommendation has not been progressed by Australian governments. An NCPRC has not been established, and the Commission understands that there has not been a concerted effort to increase funding for consumer research more generally. Participants commented on this in submissions to the CAANZ review of the ACL (box 6.10).

Box 6.10 Comments on funding for research

The lack of progress on the Commission's 2008 recommendation has been noted in submissions to the CAANZ review of the ACL.

Consumer Action noted:

> … there is also a need for a well-funded National Consumer Policy Research Centre (NCPRC), as was recommended by the Productivity Commission in 2008. In 2009, the Federal Government consulted on [the] need for government support for consumer advocacy and consumer policy research. Despite there being over 30 submissions in favour of nationally funding consumer advocacy and research, the Government did not finalise this consultation. (Consumer Action, sub. to CAANZ, p. 7)

This was supported by Justice Connect's Referral Service's submission, which said:

> Justice Connect's Referral Service endorses the suggestion of the Consumer Action Law Centre regarding the need for a well-funded National Consumer Policy Research Centre to undertake consumer policy research and advocacy. We believe that an evidence based approach to understanding the experiences and barriers faced by vulnerable consumers is critical for the ACL to achieve its operational objectives. (Justice Connect's Referral Service, sub. to CAANZ, p. 3)

One development since 2008 has been the establishment of the Policy and Research Advisory Committee (PRAC) (see chapter 2) as part of the ACL organisational architecture. Recent work initiated by PRAC includes a review of ACL penalties and remedies across jurisdictions (see chapter 4), and a consultation paper and public consultation process on extending unfair contract term protections to small businesses (CAANZ 2016d).

Is there still a need for increased funding?

Notwithstanding the work of PRAC, and some other positive examples (for example, the market studies conducted by the ACCC),[40] it appears that consumer research is of low priority under the ACL, and that gaps may remain. For example:

- the Commonwealth Consumer Affairs Advisory Council — which has a research as well as advisory role — has had a vacant membership for several years. Previously, the Council had conducted studies into issues such as credit card surcharges and non-transparent transaction fees and reviewed benchmarks for industry dispute resolution schemes
- the ACL regulators appear to have very few publications of original research on their websites. While Consumer Affairs Victoria has previously been active in consumer research (as noted in the 2008 report), there appear to be no new publications since 2012
- data which could be utilised by consumer policy researchers for a range of projects continues to be tightly held by the ACL regulators (see chapters 3 and 4)
- some participants to the ACL review noted a need for greater engagement and input on the research and data needed to inform future policy development (CAANZ 2016a).

Against this background, the Commission would be interested in understanding the extent to which gaps in consumer policy research exist and whether further funding is needed.

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?

Funding for advocacy

The 2008 analysis and recommendations

The Commission's 2008 report found that consumer advocacy bodies can play an important role by injecting consumer perspectives into the policy making process, but that sometimes the bodies have insufficient resources to do so. Consumer groups find it more difficult than business bodies to attract funding because of the 'free rider' problem (box 6.11) (PC 2008).

[40] The ACCC is currently conducting market studies into the cattle and beef sector, the communications sector and the new car retailing industry (ACCC 2016c).

Box 6.11 The Commission's 2008 analysis

The Commission's 2008 report found that consumer involvement in the policy development process helps to identify problems faced by consumers that might warrant government attention and also helps ensure that policy makers consider the effects of policy proposals on consumers.

However, many consumer groups reported that they lacked sufficient resources to adequately represent consumer interests in policy forums. Indeed, the Commission found that some consumer groups had difficulty participating in the 2008 inquiry itself, with some representatives mentioning they put together submissions in their spare time 'around a kitchen table'.

The free rider problem was considered to be at the heart of the lack of resources — while consumers in aggregate may value the services provided by advocacy groups, at an individual level consumers have an incentive to 'free ride' on the contributions of others. There was also concern that some consumer organisations may be perceived as not always adequately representing the interests of consumers as such.

The Commission found that there was a case for government to help ensure that relevant consumer representatives have the financial means to make an effective input into policy. While the free rider problem alone provides a prima facie rationale for government to consider assistance for such bodies, the lack of resources might not matter were there sufficient consumer input on relevant issues. However, the Commission found that this was not the case, that government bodies sought consumer input but that many consumer groups and representatives were overloaded, hampering their input into policy processes.

The Commission concluded that there would be net benefits from the provision of additional taxpayer resources for consumer advocacy. Further, it specified that this publicly-funded consumer advocacy should:

- seek to ensure that the advocacy supported is reasonably representative of the diversity of consumers' interests
- focus on core consumer issues and should not be dispersed too widely across other public interest issues.

Source: PC (2008).

The Commission judged that increasing public funding for advocacy organisations would deliver a net community benefit. It recommended that the Commonwealth Government should take the lead role in developing arrangements to provide additional public funding for consumer advocacy, in particular to:

- help support the basic operating costs of a representative national peak body
- assist the networking and policy functions of general consumer advocacy groups
- enable an expansion in policy-related consumer research (PC 2008).[41]

41 The Commission reiterated this recommendation in its 2011 inquiry into Australia's urban water sector (PC 2011). That inquiry had a similar experience to the 2008 inquiry, with less input from consumer organisations compared to government or businesses, and those policy advocates who did participate noted that limited resources meant they were unable to contribute fully.

Subsequent developments

Funding for consumer advocacy was also discussed in the issues paper and consultation process led by the Commonwealth Treasury in 2009. However, there was no further progress beyond that stage.

In the meantime, funding for consumer advocacy has been provided on an ad hoc basis. For example, in 2014 Consumer Affairs Ministers approved the provision of a consumer advocacy and research grant to CHOICE to fund the development of a Consumer TravelHub. The Government has also played a role in ensuring some sector-specific consumer advocacy groups receive funding (box 6.12).

Box 6.12 Consumer advocacy in energy and communications

In January 2015, the COAG Energy Council established Energy Consumers Australia (ECA) to advocate on national energy market matters of strategic importance and material consequence for energy consumers, in particular household and small business consumers. ECA is funded through energy market participant fees collected by the Australian Energy Market Operator, with ECA's budget approved by the COAG Energy Council.

Prior to the establishment of ECA, the Consumer Advocacy Panel (established in 2008) provided grants for advocacy and research on electricity and natural gas consumer issues. Before it, the National Electricity Consumer Advocacy Panel (established in 2001) performed this function.

There is also an Australian Communications Consumer Action Network (ACCAN) (as mentioned in chapter 2). It was established in 2009 to act as the peak body representing the interests of consumers in relation to communications and telecommunications issues. ACCAN undertakes research and policy development, educates consumers and advocates for them on communication consumer issues. ACCAN is funded through licence fees for telecommunications carriers and received $1.8 million funding in 2009-10. ACCAN provides $250 000 per year in grant funding for projects that further its goals.

Sources: ACCAN (nd); ECA (2016); PC (2011).

Is there still a need for enhanced funding?

There do not appear to have been any general developments since 2008 that would challenge the economic basis for the Commission's recommendation. For example, while social media has significantly changed the way that consumers are able to voice their concerns, it is not a substitute for organised and informed consumer advocacy. Being able to make an effective contribution to the policy debate requires time, resources and know how (PC 2008).

In considering whether there is a contemporary need for enhanced funding, another question is whether, in 2016, there is significant unmet demand from policy makers for input from informed consumer advocates or, at least, whether some consumer advocates

that could make a valuable contribution are unable to take up opportunities to provide input because they lack resources. Some participants to the study suggest that this remains the case (box 6.13). For example, the Consumers' Federation of Australia has told the Commission that it must prioritise which government processes it can participate in, and has frequently had to turn down requests for input.

Box 6.13 Participants' comments on funding for consumer advocacy

CHOICE submitted that many advocacy groups remain underfunded and reiterated the 2008 recommendation:

> Community legal centres, financial counselling programs and peak bodies like the Consumers' Federation of Australia are all currently underfunded, or in some cases receive no government funding at all. Federal and State governments need to look at overall funding arrangements for these bodies and ensure adequate and sustainable funding is provided. (CHOICE, sub. 11, p. 23)

The Consumers' Federation of Australia noted:

> A funded peak body with capacity to both coordinate diverse consumer organisations as well as undertake or commission consumer research will facilitate better consumer policy outcomes, because the consumer interest will be strongly articulated in policy debates. … While CFA endeavours to take an active role in review processes relevant to the operation of consumer protection laws in Australia, a lack of adequate resourcing makes this more difficult than it should be. (CFA, sub. 19, p. 5)

In its submission to the CAANZ review of the ACL, Consumer Action noted that the Commission's recommendation was not implemented and went on to suggest a funding model for advocacy and research:

> Consumer Action notes that the Federal Government does not provide specific funding for consumer policy research and advocacy, despite a Productivity Commission recommendation that it should. … It appears that the Federal Government has been reticent to provide funding for these purposes, given the call on taxpayer dollars. Enabling pecuniary penalties and other undistributed funds to non-party consumers to be directed to a national Consumer Law Fund may work to achieve the Productivity Commission recommendation, without the need to call on taxpayer dollars. (Consumer Action, sub. to CAANZ, pp. 48–9)

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.

APPENDICES

A Terms of reference

Productivity Commission study of the enforcement and administration arrangements underpinning the Australian Consumer Law

I, Scott Morrison, Treasurer, pursuant to Parts 2 and 4 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission (the Commission) undertake a study of the enforcement and administration arrangements underpinning the Australian Consumer Law.

Background

The Australian Consumer Law (ACL) commenced on 1 January 2011 as a single, harmonised consumer law bringing together the consumer protection provisions of the *Trade Practices Act 1974* and previous state and territory fair trading laws. The ACL operates under a 'single-law, multiple regulator' model where the ACL is jointly enforced and administered by the Australian Competition and Consumer Commission (ACCC) and state and territory consumer agencies. The Australian Securities and Investments Commission (ASIC) administer similar provisions under the ASIC Act in relation to financial products and services.

A review of the ACL is being undertaken by Consumer Affairs Australia and New Zealand (CAANZ), on behalf of the Legislative and Governance Forum on Consumer Affairs. CAANZ will examine the effectiveness of the provisions of the ACL, the extent to which the national consumer policy framework has met the objectives agreed by COAG and the flexibility of the ACL to respond to new and emerging issues.

Clause 23 of the *Intergovernmental Agreement for the Australian Consumer Law* provides that a review of the enforcement and administration arrangements supporting the ACL be undertaken within seven years of its implementation. This study satisfies this requirement.

Scope of the study

The objective of this study is to examine the effectiveness of the 'multiple regulator' model in supporting a single national consumer policy framework and make findings on how this model can be strengthened drawing from the experience of regulators in the period since the ACL commenced in 2011, including the risk-based approach of regulators to enforcement.

The study will also review the progress that has been made in addressing issues with the previous framework raised by the Commission in its 2008 '*Review of Australia's Consumer Policy Framework*', including regulatory complexity, inconsistency, gaps and overlap in enforcement, and unclear delineation of responsibilities between Commonwealth, state and territory governments.

In undertaking the study, the Commission should:

- assess the complementary roles played by ACL regulators and the effectiveness of existing mechanisms in improving the coordination, consistency of approach and collaboration between ACL regulators having regard to the Memorandum of Understanding agreed by regulators;
- examine the roles of specialist safety regulatory regimes[42] (such as therapeutic goods, food safety, building and construction industry and electricity and natural gas regimes) in protecting consumers, their interaction with ACL regulators and the extent to which the responsibilities of different regulators are clear;
- consider the implications of changes in the level of resourcing and regulator involvement in the administration of the ACL, including the national product safety law; and
- report on other regulatory models, including models or approaches to consumer protection overseas that may inform improvements to the current model to ensure it remains flexible and responsive in addressing new and emerging issues.

Process

In undertaking this research study, the Commission should consult widely with Commonwealth, state and territory governments, consumer representatives and the business community. The final report is to be provided to the Commonwealth Government by March 2017.

S. MORRISON
Treasurer

[Received 29 April 2016]

[42] Noting that the responsibilities of some specialist regulatory regimes may be split between agencies or dealt with by different parts of agencies.

B Consultation

In preparing this study, the Commission received 30 written submissions from study participants (table B.1), and had access to submissions to the parallel CAANZ review of the Australian Consumer Law. Submissions to that review are referenced as 'sub. to CAANZ' in this report. The Commission also sent a request to CDRAC for information on the ACL regulators. CDRAC's response is referenced as 'CDRAC response 2016' in the report, and the response is published on the study page on the Commission's website. The Commission also held meetings with a range of individuals, consumer groups, industry bodies, regulators and other government agencies (table B.2).

Table B.1 **Submissions**

Participants	*Submission no.*
Accord Australasia	22
Alex Cokic	2
Andrew Leigh	1
Australian Communications Consumer Action Network (ACCAN)	6
Australian Competition and Consumer Commission (ACCC)	23
Australian Dental Industry Association (ADIA)	30
Australian Industry Group (Ai Group)	26
Australian Institute of Company Directors	12
Australian Small Business and Family Enterprise Ombudsman	21
CHOICE	11
Complementary Medicines Australia	15
Consumer Action Law Centre	10
Consumers' Federation of Australia	19
David Cousins	20
Department of Foreign Affairs and Trade (DFAT)	29
Department of Health	5
Energy Safe Victoria	7
Federal Chamber of Automotive Industries (FCAI)	25
Governance Institute of Australia	13
Law Council of Australia	8
Law Society of NSW	28
Lighting Council Australia	14
Luke Nottage	18
Queensland Consumers' Association	9
Queensland Law Society	4
Retail Council	3
Shopping Centre Council of Australia (SCCA)	17
Small Business Development Corporation (WA)	27
Swisse Wellness Pty Ltd (in confidence)	24
The Australian Construction and Justice Group	16

Table B.2 **Stakeholder consultations**

Participants
Access Canberra (ACT)
Ann Patten
Australian Chamber of Commerce and Industry
Australian Communications and Media Authority
Australian Competition and Consumer Commission
Australian Industry Group
Australian Retailers Association
Australian Securities and Investments Commission
Australian Small Business and Family Enterprise Ombudsman
Consumer Affairs Australia and New Zealand
CHOICE
Consumer Action Law Centre
Consumer Affairs Victoria
Consumer and Business Services (South Australia)
Consumer, Building and Occupational Services (Tasmania)
Consumer Protection, Department of Commerce (Western Australia)
Council of Small Business Australia
Department of Industry and Regional Development
Department of Treasury (Australian Government)
Energy Safe Victoria
Financial Ombudsman Service
Law Council of Australia, Business Law Committee
Master Builders Association
Ministry of Business, Innovation & Employment (New Zealand)
Municipal Association of Victoria
National Farmers Federation
Northern Territory Consumer Affairs
NSW Fair Trading
Office of Best Practice Regulation (Australian Government)
Queensland Office of Fair Trading
Shopping Centre Council of Australia
Standards Australia
Therapeutic Goods Administration
Victorian Automobile Chamber of Commerce

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