Australian Government
Productivity Commission

Consumer Law Enforcement and Administration

Productivity Commission Issues Paper

July 2016

The Commission has released this issues paper to assist individuals and organisations to prepare submissions. It contains and outlines:

- the scope of the study
- the Commission's procedures
- matters about which the Commission is seeking comment and information
- how to make a submission.

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- the scope of the study
- the Commission's procedures
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- how to make a submission.

Participants should not feel that they are restricted to comment only on matters raised in the issues paper. The Commission wishes to receive information and comment on issues which participants consider relevant to the study's terms of reference.

Key study dates

Receipt of terms of reference	29 April 2016
Due date for submissions	30 August 2016
Release of draft report	November 2016
Final study report to the Australian Government	March 2017

Submissions can be lodged

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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).

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1 About the study

Background

In 2009, the Council of Australian Governments (COAG) agreed to the establishment of a 'single law, multiple regulator' model for general consumer protection in Australia. This model was based on the recommendations of the Productivity Commission's 2008 report, *Review of Australia's Consumer Policy Framework*.

The new Australian Consumer Law (ACL) took effect in January 2011. In essence, the ACL enhanced and combined the consumer protection provisions of the *Trade Practices Act 1974* (Cth) (and similar provisions in the Australian Securities and Investment Commission (ASIC) Act) and elements of existing state and territory consumer laws.

Under the multiple regulator model, administration and enforcement of the ACL is split between the Australian Competition and Consumer Commission (ACCC) and ASIC at the Commonwealth level and state and territory fair trading and consumer protection bodies.

In 2015, consumer affairs officials under the banner of Consumer Affairs Australia and New Zealand (CAANZ) began a review of the ACL. That review is focussing mainly on the adequacy of the consumer protection regulations in the ACL itself, with limited attention to how they are enforced and administered. That review is scheduled to deliver an interim report in the second half of 2016 and a final report by March 2017. (Information on that review is available at http://consumerlaw.gov.au/review-of-the-australian-consumer-law/about-the-review/.)

In parallel with the CAANZ review, the Australian Government has asked the Productivity Commission to undertake an independent study of the enforcement and administration arrangements supporting the ACL and related consumer protection regulation.

Scope of the study

The Commission is 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. It has also been asked to review the progress made in addressing issues with the previous framework, raised by the Commission in its 2008 report.

The terms of reference (ToR) — set out 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 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.

Clarifying some terms

The ToR refer to several terms and entities — including 'the ACL', 'national product safety law', the 'ACL regulators' and 'specialist safety regulatory regimes' — which may be confused or conflated with other concepts or entities. Boxes 1 and 2 provide clarification of how those terms are defined for this study.

Some matters not in scope

The ToR do not ask the Commission to examine laws, policies or regulations generally that deal with anticompetitive conduct, market structure or pricing regulation (which the ACCC administers, in addition to its role in administering the ACL). Rather, the study will focus on a narrower set of consumer protection regulation and, particularly, how that regulation is administered and enforced.

This study is not focussing on the content and adequacy of laws and regulations offering consumer protection under the ACL or specialist safety regimes. As noted, the content of the ACL is being examined by the parallel CAANZ review. That review's issues paper has raised several questions about the general and specific protections available under the ACL, and the effectiveness of remedy and offence provisions. The Commission does not intend to comment on such issues (except insofar as aspects of the content of the ACL, such as allowable penalties, have some effect on how the ACL is administered and enforced). Participants with concerns about the general content of the law are advised to direct their concerns to the CAANZ review.

While the role of specialist safety regimes is relevant to the study, the Commission does not plan to provide an in-depth review of the adequacy of performance of any particular specialist safety regimes. These regimes will be considered in the context of their interaction with ACL regulators, the extent to which the responsibilities of different regulators are clear and the extent to which these factors affect the effectiveness of the multiple regulator model in supporting a national consumer protection framework. Arguments for greater national consistency may also be relevant for specialist safety regimes where this would clearly serve sound public policy objectives.

Box 1 Which laws does the study cover?

What is the Australian Consumer Law?

The ACL is confined to narrowly defined consumer protection issues, such as:

- general 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
- 'unfair terms' in standard form contracts (for small businesses as well as consumers)
- consumer product safety
- penalties, enforcement powers and consumer redress options.

The ACL is set out in Schedule 2 of the *Competition and Consumer Act 2010* (with broadly parallel provisions in Subdivision D of the ASIC Act).

The ACL does not cover broader 'pro-consumer' and/or 'pro-competitive' regulations such as anticompetitive conduct, market structure or pricing regulation, or broader trade, tax and other economic policies that are also relevant for consumer wellbeing.

What is the national product safety law?

The national consumer product safety law is an element of the ACL. All consumer products are expected to be safe and meet consumer guarantees under the ACL. Commonwealth, state and territory ministers can regulate consumer goods and product-related services in general terms by issuing safety warning notices, banning products on a temporary basis and requiring the compulsory recall of unsafe products. The Commonwealth minister can also ban products on a permanent basis and impose mandatory safety standards.

Banned products cannot be sold and suppliers must ensure that products or product-related services comply with relevant mandatory standards before they are offered for sale.

Mandatory standards and bans are introduced when considered reasonably necessary to prevent or reduce the risk of injury to a person.

If a product or service presents a safety risk or is non-compliant with a mandatory standard or ban, it may need to be recalled. While many recalls are initiated by a supplier, they may also be ordered by the Commonwealth or a state or territory minister responsible for competition and consumer policy. Depending on the product being recalled, it may also be necessary to notify a specialist Commonwealth regulator or a state or territory safety authority of the recall.

(For more detail, see www.accc.gov.au/business/treating-customers-fairly/product-safety.)

Box 2 **Which regulators are covered by the study?**

Who are the ACL regulators?

At the Commonwealth level, the ACL regulators are the ACCC and ASIC.

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

- Australian Capital Territory — Access Canberra
- New South Wales — NSW Fair Trading
- Northern Territory — NT Consumer Affairs
- Queensland — Office of Fair Trading, Department of Justice and Attorney-General
- South Australia — Office of Consumer and Business Affairs
- Tasmania — Tasmanian Consumer Affairs and Fair Trading
- Victoria — Consumer Affairs Victoria
- Western Australia — Department of Commerce (Consumer Protection)

What are specialist safety regulatory regimes?

In relation to some types of products, specific consumer product safety regulation operates alongside the ACL. For example, electrical consumer appliances are covered by the ACL, but their safety is regulated principally through state- and territory-based electrical safety acts and regulations, which stipulate specific technical standards that qualifying electrical products must meet. Those acts and regulations can also provide for the certification of products and licensing for electricians.

As well as electrical safety, there are specialist safety regimes in several other fields, including (but not limited to) therapeutic goods, food safety, building and construction, and natural gas. Some of these are state- or territory-based; others are nationally-based.

These specialist safety regimes are typically administered by stand-alone bodies, such as the Therapeutic Goods Administration or Energy Safe Victoria, or specialist units within government departments (and sometimes within fair trading or consumer affairs bodies).

The Commission's approach

The Commission's 2008 review recommended a set of objectives for the ACL, with a principal focus on consumer wellbeing (PC 2008). These objectives were accepted by COAG and subsequently embodied in an intergovernmental agreement to introduce a new national consumer policy framework that would enhance consumer protection and reduce complexity for business (box 3).

In accordance with that intergovernmental agreement, all ACL regulators at the Commonwealth, state and territory level signed a Memorandum of Understanding (MoU) to provide the framework for communication, cooperation and coordination between the parties in administering and enforcing the ACL (ACCC et al. 2010).

The Commission will have regard to these objectives, the framework set out in the MoU and standard concepts of regulator efficiency when assessing progress since 2008 and the effectiveness of the multiple regulator model in delivering a single national consumer policy framework.

Likewise, while recognising the differences between generic consumer protection and specialist safety regulation, the Commission intends to assess issues relating to the latter through the same broad prism of consumer welfare and regulatory efficiency that it will use to assess the ACL regulatory regime.

The Commission will conduct its own analysis and draw on consultations and submissions. Where relevant, the Commission will utilise previous research and government reviews in Australia and internationally.

In addition, the Commission intends to draw on case studies of significant consumer protection incidents — such as the Infinity cable recall. These case studies are expected to help identify how well (or not) the current ACL multiple regulator model and its interaction with specialist safety regulatory regimes is operating and provide lessons for how to strengthen the effectiveness of existing arrangements.

Box 3 Objectives of the Australian Consumer Law

Australia's national consumer policy framework has an overarching objective that emphasises informed consumers, effective competition and fair trading:

> The objective of the new national consumer policy framework is to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly. (COAG 2009, p. 3)

To achieve this objective, the Intergovernmental Agreement identified six operational objectives:

- ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition
- ensure that goods and services are safe and fit for the purposes for which they were sold
- prevent practices that are unfair
- meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage
- provide accessible and timely redress where consumer detriment has occurred
- promote proportionate, risk-based enforcement.

Source: COAG (2009).

How you can contribute to this study

The Commission intends to publish a draft report in November 2016. The Australian Government has asked the Commission to provide its final report by March 2017.

The Commission is seeking initial submissions by 30 August 2016 for consideration for its draft report. Study participants will have an opportunity to comment on the draft report through further submissions. Details on how to make a submission are provided in attachment A.

This issues paper is intended to assist participants in preparing a submission. It sets out some of the issues the Commission has identified, at this stage, as being relevant to the study. The questions raised here are not intended to be exhaustive. In preparing submissions, participants need not address all of these issues and are welcome to provide information on other issues they consider relevant.

Some participants in this study may also have made submissions to the parallel CAANZ review. If you have made a submission to that review, you may either refer to any relevant sections in your submission to the Commission, or submit the same material where it is relevant to the Commission's study.

2 How is the multiple regulator model for the ACL working and how could it be improved?

Reported progress

There has been significant reform in relation to generic consumer protection law since the Commission's previous review in 2008.

As noted, in 2009 Australian governments under the banner of COAG agreed to adopt the Commission's main recommendations for a new national consumer policy framework. This agreement was supported by a MoU among ACL regulators signed in 2010. The ACL itself took effect on 1 January 2011.

Since the inception of the single law, multiple regulator arrangements, ACL regulators have developed a series of regulatory plans and strategies, and instituted measures to improve cross-agency coordination and consistency. Many of these have been documented in a series of annual progress reports on the implementation of the ACL (for example, CAANZ 2016b). The actions reported include:

- publishing the *Compliance and Enforcement Guide* to explain how ACL agencies have agreed to act together and individually to achieve compliance with the ACL
- establishing the 'Australian Consumer Law Intelligence Network Knowledge' (ACLINK) system, and various working groups and committees, to share information, discuss enforcement priorities and coordinate dispute resolution and compliance activities
- agreeing on a lead agency approach for compliance and enforcement action
- developing websites, phone apps and other educational materials for use in all jurisdictions to assist consumers and business understand their rights and responsibilities under the ACL

At face value, the reported developments suggest that the ACL regulators have gone some distance to adopt the various high level 'good regulatory practices' advocated in the 2008 report. They appear to have a broad array of enforcement tools, pursue risk-based enforcement approaches, and have in place mechanisms to communicate and coordinate with each other.

On this latter point, according to the issues paper for the ACL review:

> … 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 2016a, p. 5)

However, there are issues around the availability of evidence to verify the success of the multiple regulator model in delivering consumer protection. In 2013, for example, a report argued that:

> Assessing the effectiveness of Australia's consumer protection regulators' enforcement work is made problematic by the inconsistencies, lacuna and unhelpful approaches that riddle the reporting of enforcement work. (Renouf, Balgi and Consumer Action Law Centre 2013, p. 10)

INFORMATION REQUEST

The Commission is seeking participants' comments on the progress in implementing the ACL and the general success of the multiple regulator model.

To what extent have issues noted in the Commission's 2008 report — such as inconsistency, gaps and overlaps in enforcement and unclear delineation of responsibilities among regulators — been addressed by the current arrangements? To what extent have the 'high level' reforms documented in the implementation progress reports been reflected in improvements in 'on the ground' administration, compliance and enforcement of the ACL?

What evidence or metrics are available that can be used to assess or substantiate these claims?

What have been consumers' and businesses' experiences under the ACL regime? Does the multiple regulator model cause any confusion or other problems for consumers seeking redress or for business operations? How, in broad terms, could any such problems be addressed?

What, if any, alternatives to the multiple regulator model should be considered? What benefits and costs would the alternatives have?

Some particular concerns and challenges

Any regulatory regime will always face some challenges, whether it be due to, for example, resourcing constraints for enforcement or the changing nature of the products or the marketplace the regime seeks to regulate. From its preliminary research and consultations on the ToR, the Commission is aware of a number of potential concerns or challenges around the administration and enforcement of the ACL. There are also some suggestions for improvement. (The following list is not intended to be exhaustive. The Commission will be seeking views and evidence from participants on these or other concerns or challenges for the enforcement and administration of the ACL.)

Resourcing issues

One matter raised by the ToR is the level of resources for enforcing the ACL. No regulatory regime is ever able to prevent all problems before they emerge or deal 'perfectly' with all problems once they do. However, there is the question of whether the

current levels of resources devoted to consumer protection are appropriate and commensurate to the risks being managed.

Alongside this issue, the Commission understands that the level of resources available for enforcement of the ACL varies at the state and territory level (relative to, for example, their populations). In theory, this could lead to differences in the intensity of enforcement and, potentially, the level of consumer protection — or the availability of consumer redress — in different jurisdictions. (Evidence of different resourcing levels between jurisdictions leading to different consumer outcomes may be clearest in areas or incidents where the same adverse business act or strategy is exploited nationwide.) Alternatively, it may be that relatively under-resourced jurisdictions use different enforcement strategies or are able to refer some issues — particularly where they have a more 'national' character — to better resourced jurisdictions.

INFORMATION REQUEST

Are the levels of resources for enforcing the ACL adequate? What are the effects of differences in resources available to state and territory ACL regulators? To what extent, if any, does the potential for the ACCC or ASIC to undertake enforcement actions affect the resources the states and territories devote to ACL enforcement?

Enforcement tools and approaches

One of the objectives of the consumer policy framework is to 'promote proportionate, risk-based enforcement'. According to the CAANZ Review Issues Paper (p. 36), the ACL regulators achieve this partly through cooperation and targeting their enforcement activities at priority areas or areas where there is evidence of likelihood of consumer harm.

Implementing proportionate, risk-based enforcement practices can be quite challenging in practice. 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 proportionate, risk-based enforcement, regulators must also have appropriate tools and remedies. And, given their limited resources, regulators must make difficult choices at the margin between, for example, pursuing additional prosecutions rather than additional business and community education around consumer law matters.

INFORMATION REQUEST

To what extent do the ACL regulators achieve proportionate, risk-based enforcement in practice? Are changes to the current approaches of the ACL regulators warranted, and is there any evidence to show that such changes would lead to improved outcomes for consumers overall? Are the enforcement tools and remedies available to regulators sufficient to address risks to consumers?

Allocation of issues and responsibilities between regulators

At the Commonwealth level, both the ACCC and ASIC have responsibilities for enforcing the ACL (although it is also possible to see ASIC as a 'specialist' regulator in the financial services field). A question for this study is whether communication and cooperation between ASIC and the other Commonwealth and state and territory ACL regulators, and the coordination of their enforcement activities, is operating effectively. There are also questions about how problems that emerge in particular jurisdictions, but have wider implications, are allocated between state, territory and national ACL regulators.

INFORMATION REQUEST

What mechanisms are used to coordinate the regulation and enforcement of consumer financial products (or the financial aspects of consumer products) between ASIC and the other ACL regulators, and how effective are they?

How adequate are current arrangements among ACL regulators (and specialist safety regulatory regimes) for identifying consumer concerns that are 'extra-jurisdictional' and for developing a consistent national regulator response? How might these arrangements be improved?

Intelligence gathering and sharing

Another set of issues relates to the sophistication with which data on breaches of the ACL (or on emerging consumer protection problems) are collected and analysed.

Individual ACL regulators typically collect and analyse such data for their own jurisdiction, which can be valuable in focussing their regulatory effort on areas where the likelihood of consumer harm is greatest. Such databases can also assist in alerting consumers to likely problem areas (as does, for example, the NSW Fair Trading Complaints Register). The Commission's 2008 report recommended that all consumer regulators should participate in a shared national database of serious complaints and cases. ACL regulators have some mechanisms in place to share information with their counterparts, such as 'ACLINK'. However, the Australian National Audit Office has noted that it has some limitations (ANAO 2016, p. 28).

Australia still does not have a national database — such as the Consumer Complaint Database in the United States, managed by the Consumer Financial Protection Bureau — that would more readily enable analysis of complete disaggregated complaints data for the purposes of identifying trends, patterns and issues of concern.

INFORMATION REQUEST

What ongoing arrangements are there for ACL regulators and regulators of specialist safety regimes to share information on consumer protection problem areas on a national basis? Are such arrangements adequate, including for a future where markets are increasingly national in nature and new products and services are constantly entering those markets?

If not, what arrangements might be cost-effective to institute that could provide such a national database? Are there approaches used by other countries that provide lessons for Australia on how it might improve the sharing of information among the different ACL regulators, or in other ways (for example, artificial intelligence or machine learning) identify emerging consumer harms or scams, or areas for priority enforcement?

Other issues

Some other issues that have been raised in the context of the parallel ACL review, that bear on the administration and enforcement of the ACL, include:

- differences in access to remedies for breaches of the ACL (for example, differences in application fees to access courts and tribunals and different penalties available in different states and territories)
- the increase in online sales, and whether state- or territory-based ACL regulators are well placed to address concerns around imported products, particularly where there is no local distributor
- whether ACL regulators are appropriately equipped to regulate business-to-business transactions, as they are now responsible for following recent amendments to the ACL that extended some of its protections to small business.

More broadly, the Commission is seeking participants comments and evidence on any other problematic aspects of the multiple regulator model for enforcing the ACL or how it is operating at present, the source of those problems, and suggestions on how the model or its operation could be improved.

GENERAL INFORMATION REQUEST

What problems are there with the administration and enforcement of the ACL under the multiple regulator model and how could it be improved?

Where particular problems have arisen in the enforcement of the ACL, are these because of (a) weaknesses in the law (b) weaknesses in the way enforcement is undertaken (c) insufficient resources to enable sufficient enforcement action?

3 Specialist safety regulatory regimes and their interface with the ACL

As part of assessing how effectively the multiple regulator model is supporting a national consumer protection framework, the ToR require the Commission to also examine: the role of specialist safety regimes in protecting consumers; their interaction with the ACL; and the extent to which the responsibilities of the different specialist regime and ACL regulators are clearly delineated.

The institutional 'architecture' for consumer safety regulation

As noted earlier, the ACL has within it a national product safety and enforcement system (box 1). Under this system, Commonwealth, state and territory ACL regulators have responsibility for general consumer products.

Governments have also established specialist safety regulatory regimes to deal with safety issues for specific types of complex products or where safety is paramount. Regulators of these specialist regimes typically have specific experience and 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). Examples of these specific areas and their regulators are contained in box 4. The ToR explicitly mention therapeutic goods, food safety, building and construction industry regulation, and electricity and natural gas regimes, as examples of specialist safety regimes the Commission should consider.

Box 4 **Some specialist safety regimes and their regulators**

Specialist safety regimes and their regulators exist in the following areas:

- Agriculture – Australian Pesticides & Veterinary Medicines Authority
- Boats and marine safety – Australian Maritime Safety Authority
- Building and building materials – for example, Consumer Affairs Victoria, NSW Fair Trading, Queensland Building and Construction Commission, SA Office of the Technical Regulator, Victorian Building Authority
- Drugs and therapeutic goods – Therapeutic Goods Administration
- Electrical appliances and goods – for example, Energy Safe Victoria, NT Worksafe, Dept. of Business, Queensland Electrical Safety Office
- Food – Food Standards Australia and New Zealand, Prime Safe (Victoria), Therapeutic Goods Administration
- Gas appliances – for example, Energy Safe Victoria, SA Office of the Technical Regulator, Queensland Department of Natural Resources and Mines, WA Department of Commerce (Energy Safety)
- Motor vehicle and road traffic safety (Transport) – Department of Infrastructure, Transport, Regional Development and Local Government (Cth)
- Veterinary products – Australian Pesticides & Veterinary Medicines Authority.

Source: ACCC (2016).

There is significant variation in the institutional architecture that applies across specialist safety regimes:

- some specialist regimes (for example, therapeutic goods and motor vehicle safety) 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.
- 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 is that regime
- in these latter cases, arrangements in states and territories vary. For example:
  - Victoria has established an independent regulator — Energy Safe Victoria — to deal with issues across electricity, gas, pipes and cabling, whereas most other jurisdictions have these responsibilities sitting within (or spread between) government departments
  - in Western Australia, NSW 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 different jurisdictions.

INFORMATION REQUEST

The Commission would welcome comprehensive information on the specialist consumer safety regulatory regimes that lie outside the ACL and the regulators responsible for administering those regimes in and across jurisdictions in Australia. What are the rationales for the delineation of enforcement responsibilities under the different regimes?

Some potential problems and issues

Whatever the reasons for these different institutional designs, the architecture of the specialist safety regulatory regimes and their interaction with the ACL raise several issues for the study, both in relation to the effectiveness of the ACL and of the specialist regimes themselves. Some changes in the market, including the growth in 'bundled' products, Internet sales and the increasingly national nature of markets, may also have ramifications for how consumer product safety is and should be regulated. (Again, the following set of issues is not intended to be exhaustive, and participants are invited to submit views and

evidence on these or other concerns or challenges in relation to the specialist regulatory regimes and their interaction with the ACL.)

Complexities associated with multiple regulators

The multiple regulator model for the ACL together with the myriad of specialist safety regimes and their regulators means that many consumer products are potentially subject to regulation by a number of regulators, and that any particular safety issue could also be addressed by more than one regulator.

Products that are subject to specialist safety regulation, such as electrical products, have always been subject to general consumer protection regulation too. However, products are increasingly being sold with a bundle of features and related services that mean their supplier potentially needs to comply with multiple fields of regulation and multiple regulators. For example, a manufacturer or supplier of an Internet-enabled fridge sold on finance or with an energy plan might need to deal with the regulations of the Australian Communication and Media Authority, a specialist regulator, a state or territory ACL regulator and/or the ACCC and ASIC.

Consumers will not always be familiar with which regulator is best placed to deal with their product safety concerns. In those cases, they may well first bring their concerns for a 'specialist' product to a Commonwealth, state or territory ACL regulator with responsibility for general consumer products. Alternatively, they may bring their concerns about a general product to a regulator of a specialist safety regime.

There are a number of examples where there is scope for uncertainty around which regulator or regulators are responsible for a consumer safety issue. For example, the Australian Retailers Association submission to the CAANZ review noted:

> Recent 'hover board' cases in the 2014 Christmas period exemplified the confusion and lack of consistency across States and Territories. … for [ARA] retailers and for the ARA there was confusion on which jurisdiction was doing what and on what manufacturer or product type. (ARA 2016, p. 12)

Recent regulatory actions in relation to a brand of washing machines (box 5) also exemplify the complexities that can arise for consumers and industry around which regulator has primary responsibility for incidents of non-compliance, where both ACL and specialist safety regulation applies.

Box 5 Product safety recall — specialist and ACL regulator involvement

The case of Samsung washing machines is an example of an electrical safety issue involving specialist regulators raising broader issues about the interaction of safety recall remedies and consumer guarantees.

NSW Fair Trading is leading a recall, in its capacity as the NSW electrical safety regulator, and working closely with the ACCC to address safety concerns associated with six models of Samsung top loader washing machines that were sold nationally between 2010 and 2013. The affected units have an internal fault where condensation can penetrate an electrical connector causing deterioration which may in turn cause a fire.

Samsung continues to work with regulators on the recall and, in September 2015, issued a media statement clarifying that consumers are entitled to refunds or replacement for recalled washing machines, following reports that some consumers were only offered a repair.

Regulators are advising consumers that where there is a major safety failure in breach of the consumer guarantee of acceptable quality, consumers have a choice of remedy, which is not overtaken by the electrical safety recall.

Source: CAANZ (2016a).

Examples such as these illustrate some of the challenges for regulators in ensuring that consumers, and indeed suppliers, sufficiently understand the delineation of responsibilities among ACL and other regulators, and that consumer problems are dealt with by the most appropriate regulator (or regulators).

A threshold question is how significant or problematic are the challenges posed by product complexity and bundling for consumer safety regulation.

INFORMATION REQUEST

What challenges do product complexity and bundling, and overlapping regulation, pose for ACL regulators, specialist safety regime regulators, businesses and consumers? What are some current examples of particular concern? How significant are these challenges? Does the availability of alternative avenues of regulating particular products assist ACL or specialist safety regulators in protecting consumers?

To the extent that there are potentially significant problems, good communication between regulators would be one way to help ensure consumer protection does not 'fall between the cracks' or suffer from undue regulatory complexity or inefficient enforcement. This would require that regulators of specialist safety regimes and ACL regulators communicate with each other effectively about how responsibility should be allocated to deal with an unsafe product — either to ensure it is effectively dealt with where it is the responsibility of both regimes or to ensure that consumer concerns are referred to the whichever is the most appropriate ACL or specialist regulator of that product. It might also require cooperation in enforcement efforts, so that a 'lead' regulator, when meeting with a relevant supplier,

would seek to ensure compliance with all relevant regulations, including those of other specialist safety regimes.

This might be achieved through protocols for communication and cooperation (as between ACL regulators, for example). The Commission understands that officials in regulators of specialist safety regimes already communicate and cooperate with other specialist safety regulators or with ACL regulators (and vice versa) to some extent, albeit often informally. Since the inception of the ACL, the CAANZ implementation progress reports suggest 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. An issue is whether there is a need for similar, formal provisions between ACL regulators and regulators of specialist safety regimes.

Another means of achieving the required communication and coordination may be through amalgamating ACL and some safety regime regulatory functions, and 'internalising' lines of communication and cooperation in this way. This model is evident in the organisation of, for example, the NSW Office of Fair Trading (which effectively embraces building, electricity and gas regulation responsibilities too).

A more general issue is whether there is scope to improve enforcement of specialist safety regulation and/or general consumer protection regulation by altering any of the delineations of enforcement responsibilities, whether within or across regimes or jurisdictions.

INFORMATION REQUEST

Are current protocols for communication, cooperation and coordination between regulators of specialist safety regimes and ACL regulators effective in dealing with consumer concerns where regulators in both regimes have responsibility for consumer protection? In particular:

- *Are those protocols effective in ensuring that consumer concerns about product safety received by one regulator are effectively directed to the most appropriate (ACL or specialist safety regime) regulator?*
- *Are there examples of especially good or poor interaction between ACL and specialist regulators, and what lessons might these provide to improve interaction between ACL and specialist safety regime regulators?*

What changes to current arrangements are needed to achieve effective communication, cooperation and coordination of consumer protection regulation among regulators of ACL and specialist safety regulatory regimes?

Can formal protocols for communication and cooperation provide effective channels or are broader organisational changes (such as co-location or amalgamation of regulatory functions) needed?

Regulatory variations at the state and territory level

In some specialist safety areas, variations in the laws between jurisdictions reduce the scope for consistent national responses by regulators of the ACL or specialist safety regimes — such as occurred with hoverboard electric self-balancing scooters (where some of the recharging units have caught fire). For example, different jurisdictions have different 'minimum voltage thresholds' in their electrical appliance safety laws. Thus, a solution in one state or territory (to a problem that may arise in all jurisdictions) may not be feasible under the electricity safety laws of other jurisdictions.

This raises the question of whether there is or remains a valid rationale for variations in consumer product safety laws at the state and territory level, particularly given the increasingly national (and international) nature of markets. A number of specialist product safety areas operate under uniform national legislation, and the ACL itself is an example of the replacement of different state and territory laws with a nationally uniform law. In its 2008 *Consumer Policy Framework* report, the Commission recommended a review and reform program for industry-specific consumer regulation that would, among other things, identify areas where unnecessary divergences in requirements have significant costs and consider means of reducing these costs, including the case for transferring policy to the Australian Government. While the Commission understands that there have since been some attempts to achieve nationally uniform approaches in some remaining areas of state and territory difference, notably electrical safety, there is at present no agreement on the need for, and means of attaining, a nationally uniform approach in that area.

INFORMATION REQUEST

What progress has been made in removing unnecessary and costly divergences in regulatory requirements between industry-specific state and territory consumer protection regimes since 2008? Where progress has been limited, why? Is there a case for pursuing a 'one law' model for areas of consumer product safety regulation, or other means of reducing the costs of variations, where there are currently state variations? If so, what areas should be priorities for review?

Other market developments

As noted above, the growth in product bundling and the increasingly national (and international) nature of markets pose some challenges for how consumer product safety is regulated generally.

A further relevant development is the growth in direct (online) purchasing. Many specialist safety regimes have pre-market certification of products as a core element of their consumer protection role, but this is becoming harder to achieve where consumers or small suppliers acquire goods directly from abroad by purchasing over the Internet. In such cases, products can end up in consumers' hands having bypassed the usual scrutiny by

regulators of specialist safety regimes. Where products subsequently fall short of explicit or implied product safety or quality expectations, it is likely that consumer complaints would be directed to general ACL regulators. Either way, the lack of a domestic 'supplier' of the product may make it difficult for regulators to address.

INFORMATION REQUEST

What are the ramifications of changes in products and nature of sales (including the move to online sales) for the enforcement of consumer product regulation? Are there other models that could provide lessons for the approach adopted in Australia?

References

ACCC et al. (Australian Competition and Consumer Commission, Australian Securities and Investment Commission, NSW Office of Fair Trading, Consumer Affairs Victoria, Queensland Office of Fair Trading, WA Department of Commerce, SA Office of Consumer and Business Affairs, Tasmania Consumer Affairs and Fair Trading, ACT Office of Regulatory Services, NT Consumer Affairs, the New Zealand Commerce Commission and the New Zealand Ministry of Consumer Affairs) 2010, *Australian Consumer Law Memorandum of Understanding*.

ARA (Australian Retailers Association) 2016, *Submission to the Australian Consumer Law Review*, May.

CAANZ (Consumer Affairs Australia and New Zealand) 2016a, *Australian Consumer Law Review: Issues Paper*, March.

—— 2016b, *Implementation of the Australian Consumer Law: Report on progress V (2014-15)*, February.

COAG (Council of Australian Governments) 2009, *Intergovernmental Agreement for the Australian Consumer Law*, June.

PC (Productivity Commission) 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra.

Renouf, G., Balgi, T. and the Consumer Action Law Centre 2013, *"Regulator Watch": The Enforcement Performance of Australian Consumer Protection Regulators*, March.

Attachment A: Terms of reference

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[1] (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]

1 Noting that the responsibilities of some specialist regulatory regimes may be split between agencies or dealt with by different parts of agencies.

Attachment B: How to make a submission

How to prepare a submission

Submissions may range from a short letter outlining your views on a particular topic to a much more substantial document covering a range of issues. Where possible, you should provide evidence, such as relevant data and documentation, to support your views.

Generally

- Each submission, except for any attachment supplied in confidence , will be published on the Commission's website shortly after receipt, and will remain there indefinitely as a public document.
- The Commission reserves the right to not publish material on its website that is offensive, potentially defamatory, or clearly out of scope for the study.

Copyright

- Copyright in submissions sent to the Commission resides with the author(s), not with the Commission.
- Do not send us material for which you are not the copyright owner — such as newspaper articles — you should just reference or link to this material in your submission.

In confidence material

- This is a public review and all submissions should be provided as public documents that can be placed on the Commission's website for others to read and comment on. However, information which is of a confidential nature or which is submitted in confidence can be treated as such by the Commission, provided the cause for such treatment is shown.
- The Commission may also request a non-confidential summary of the confidential material it is given, or the reasons why a summary cannot be provided.
- Material supplied in confidence should be clearly marked 'IN CONFIDENCE' and be in a separate attachment to non-confidential material.
- You are encouraged to contact the Commission for further information and advice before submitting such material.

Privacy

- For privacy reasons, all **personal** details (for example, home and email address, signatures, phone, mobile and fax numbers) will be removed before they are published on the website. Please do not provide these details unless necessary.
- You may wish to remain anonymous or use a pseudonym. Please note that, if you choose to remain anonymous or use a pseudonym, the Commission may place less weight on your submission.

Technical tips

- The Commission prefers to receive submissions as Microsoft Word (.docx) files. PDF files are acceptable if produced from a Word document or similar text based software. You may wish to research the Internet on how to make your documents more accessible or for the more technical, follow advice from Web Content Accessibility Guidelines (WCAG) 2.0<http://www.w3.org/TR/WCAG20/>.
- Do not send password protected files.
- Track changes, editing marks, hidden text and internal links should be removed from submissions.
- To minimise linking problems, type the full web address (for example, http://www.referred-website.com/folder/file-name.html).

How to lodge a submission

Submissions should be lodged using the online form on the Commission's website. Submissions lodged by post should be accompanied by a submission cover sheet.

Online* www.pc.gov.au/inquiries/current/consumer-law

Post* Consumer Law Enforcement and Administration
Productivity Commission
GPO Box 1428
Canberra City ACT 2601
Australia

* If you do not receive notification of receipt of your submission to the Commission, please contact the Administrative Officer.

Due date for submissions

Please send submissions to the Commission by **30 August 2016**.