

Australian Consumer Law Review

Interim Report



October 2016

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MESSAGE FROM THE CHAIR

On behalf of Consumer Affairs Australia and New Zealand, I am pleased to present this Interim Report on the Australian Consumer Law Review.

In preparing the report we consulted with a wide range of stakeholders, including individual consumers and businesses, consumer advocates, industry representatives, legal practitioners, community legal centres and academics. We drew on feedback from over 160 submissions made to the Issues Paper released on 31 March 2016 and through face-to-face consultations held with stakeholders across Australia, as well as findings from the Australian Consumer Survey 2016, a study into overseas consumer laws and other relevant research.

We would like to thank all those who have provided their views on the effectiveness of the Australian Consumer Law and how it could be improved.

The Interim Report focuses on a number of key areas, highlighting issues that stakeholders have raised and identifying potential options for reform. We are seeking views on these issues and options, including their benefits and costs and whether there are any consequences, risks and challenges that should be considered.

As highlighted in the report, the Australian Consumer Law Review is one of a number of reviews into issues affecting Australian consumers. I wish to emphasise that we are closely monitoring the progress and outcomes of these reviews and do not intend to address the same issues.

Feedback on the Interim Report will be crucial for the Final Report that will be presented to the Legislative and Governance Forum on Consumer Affairs in March 2017. That report will make findings and identify options to improve the law's efficiency and effectiveness, providing a blueprint for Australia's national consumer policy framework for years to come.

I therefore encourage you to make your views known to the Australian Consumer Law Review by making a submission to this report.

Simon Cohen
Chair, Consumer Affairs Australia and New Zealand

INTRODUCTION

About this review

Five years after introducing a generic national consumer law, the federal, state and territory governments are seeking the views of the Australian community on options to improve the Australian Consumer Law (ACL).

The ACL Review is being conducted by Consumer Affairs Australia and New Zealand (CAANZ) in accordance with terms of reference agreed by the Legislative and Governance Forum on Consumer Affairs in June 2015 (see **Appendix A**).¹ The review commenced on 31 March 2016 with the release of an Issues Paper for public consultation, with submissions sought by 27 May 2016.

A wide range of stakeholders made submissions on the Issues Paper providing views on how Australia's consumer policy framework is operating and what could be improved. This helped inform the drafting of the Interim Report which seeks your views on issues and potential options for reform in a range of key areas.

The Interim Report is another opportunity for you to provide CAANZ with views on how the consumer policy framework could more effectively meet its objectives and address the risk of consumer and business detriment at an appropriate level of regulatory burden.

The review process

CAANZ will prepare a Final Report to present to the Legislative and Governance Forum on Consumer Affairs by March 2017. It will draw on feedback on this Interim Report, along with feedback from the Issues Paper and stakeholder consultations, findings from the CAANZ-commissioned Australian Consumer Survey 2016 and *Comparative study of overseas consumer policy frameworks*, as well as other research.

Making a submission

We are seeking feedback from as many stakeholders as possible, and in sufficient detail to test the issues and options presented in this Interim Report. In particular, we are interested in the viability and anticipated benefits and costs of options, including compliance costs.

To help guide stakeholder submissions, questions are included throughout the Interim Report.

The closing date for submissions is Friday, 9 December 2016.

You may lodge your submission electronically or by post, however, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

1 The Legislative and Governance Forum on Consumer Affairs is commonly referred to as the Consumer Affairs Forum (CAF). It comprises all Commonwealth, state, territory and New Zealand Ministers responsible for fair trading and consumer protection.

Electronic lodgement is to be made via the ‘**Australian Consumer Law Review — Have Your Say**’ page on the Australian Consumer Law website: www.consumerlaw.gov.au.

Confidential submissions

Unless you indicate that you would like all or part of your submission to remain confidential, all information (including name and address details) contained in submissions will be published on the ACL website.

Confidential submissions should be clearly marked as confidential. Automatic confidentiality statements in emails are not sufficient to make your submission confidential. If you would like part of your submission to remain confidential, you should provide this information clearly marked as such in a separate submission.

Guide to the Interim Report

The Interim Report does not cover all the areas canvassed in the Issues Paper, or that fall within this review’s terms of reference. Rather, the Interim Report focuses on a range of key areas where issues have been raised (drawing on submissions, other feedback and research undertaken to date) with views sought on potential options for reform.

In describing key areas, this report draws on feedback that illustrates the spectrum of views that were raised in submissions, rather than referencing all submissions on each topic. Nevertheless, all stakeholder views have been considered in the development of this report.

The Interim Report is structured and cross-referenced to allow you to focus on aspects relevant to you — you need not read the entire document. A consolidated list of questions for consultation is at **Appendix B**.

Chapter	Topic	Key area
1.	Setting the context	Issues raised and potential options for reform regarding the nature and extent of the ACL’s scope and coverage. This chapter also outlines the progress of the ACL Review and feedback on small business issues.
2.	The legal framework	Issues raised and potential options to enhance the effectiveness of: <ul style="list-style-type: none">• consumer guarantees• product safety• unconscionable conduct and unfair trading• unfair contract terms• unsolicited consumer agreements.
3.	Administration and enforcement	Issues raised and potential options to enhance the effectiveness of the ACL’s implementation, administration and enforcement.
4.	Emerging consumer policy issues	Issues raised and potential options to enhance the effectiveness of the ACL for online purchasing.
5.	Other issues	A range of potential ‘technical’ amendments to enhance the effectiveness of the ACL that do not directly relate to one of the above chapters.

ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACT	Australian Capital Territory
AIPE	Australian Institute of Professional Education Pty Ltd
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
CAANZ	Consumer Affairs Australia and New Zealand
CAF	Legislative and Governance Forum on Consumer Affairs
CAV	Consumer Affairs Victoria
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
Cth	Commonwealth
COAG	Council of Australian Governments
EU	European Union
FCA	Federal Court of Australia
GDP	Gross Domestic Product
GSP	General safety provision
Ibid.	in the same source
ICPEN	International Consumer Protection and Enforcement Network
ISO	International Organization for Standardization
MOU	Memorandum of Understanding
NSW	New South Wales
NT	Northern Territory
NZ	New Zealand
OECD	Organisation for Economic Co-operation and Development
Qld	Queensland
QUT	Queensland University of Technology
QUT study	Queensland University of Technology study for CAANZ, <i>Comparative study of overseas consumer policy frameworks</i> , April 2016
RAPEX	Rapid Exchange of Information System
RIS	Regulation Impact Statement
SA	South Australia
SME	small and medium-sized enterprises
TGA	Therapeutic Goods Administration

TPA	<i>Trade Practices Act 1974 (Cth)</i>
UCT	Unfair contract terms
UK	United Kingdom
US	United States
VCAT	Victorian Civil and Administrative Tribunal
VET	vocational education and training
Vic	Victoria
WA	Western Australia

1. SETTING THE CONTEXT

1.1 Overview

1.1.1 The Australian Consumer Law (ACL)

The ACL commenced on 1 January 2011 as Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA). It is a single generic consumer protection law that applies across Australia, through state and territory application laws.

The ACL is jointly administered and enforced by federal, state and territory consumer law regulators under the *Intergovernmental Agreement for the Australian Consumer Law* (signed on 2 July 2009).²

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

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.³

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

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

1.1.2 Review of the ACL

When the ACL commenced, it represented a significant national reform replacing a large number of sections contained in national, state and territory fair trading laws. This is the first review since the law commenced.

CAANZ is approaching this review with a view to maintaining the ACL's benefits while reforming and improving the law in the following ways:

- clarifying, simplifying and, where appropriate, streamlining the law so that it can be more easily and readily understood and applied by consumers and businesses to resolve disputes earlier, more quickly, and more cheaply

2 *Intergovernmental Agreement for the Australian Consumer Law*, 2 July 2009, paragraph C, www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf.

3 *Ibid*, paragraph D.

- strengthening the law where there are regulatory gaps and evidence of consumer detriment, including evidence of consumer vulnerability or disadvantage in the relevant circumstances, and which cannot be adequately addressed through non-regulatory measures
- ‘future proofing’ the law to the extent possible to ensure that it is sufficiently flexible to deal with emerging industries and market practices and maintains appropriate levels of consumer protection, while not stifling innovation or competition in the marketplace.

In identifying potential options for reform outlined in the Interim Report, CAANZ has given particular regard to the above principles and where stakeholders have clearly identified:

- a regulatory gap in relation to harmful market practices or business models that is not adequately addressed by the consumer law or by other regulatory frameworks, including industry self-regulation
- evidence of consumer or business detriment (or risk of detriment), having regard to the extent, gravity, likelihood and consequences of that detriment
- uncertainties in the law that create barriers to parties resolving their own disputes where possible, and to accessing appropriate remedies
- evidence that the allocation of risk between traders and consumers in the market is not fair and efficient, and does not effectively promote competition
- evidence that the law is not operating as intended — for example, it does not adequately reflect consumer and trader behaviours in the market, is outdated, or does not effectively deter poor conduct by traders
- lack of flexibility in the law to deal with emerging issues, noting the benefits of a consistent generic approach (as supported by the Australian Consumer Survey 2016 findings) and the need for robust evidence for any industry-specific reforms
- evidence of regulatory overreach, or consumer benefits that are disproportionate to the compliance costs for traders and impacts on competition.

In this context, evidence includes:

- quantitative and qualitative evidence provided by stakeholders, consumers, businesses, and regulators, including their experiences with issues in the marketplace, applying the law (including enforcement and compliance outcomes) and dealing with enquiries and disputes
- findings of the Australian Consumer Survey 2016
- where relevant, findings from other reviews, jurisdictions, and local and international research.

1.1.3 Other relevant reviews

It is important to note that, in addition to the ACL Review, a range of other reviews and inquiries relevant to Australian consumers have recently been completed, are underway, or are about to commence. CAANZ is monitoring the progress, outcomes and government responses to these reviews and does not intend for the ACL Review to address the same issues.

For example:

- In late 2015, the Australian Government responded to the Competition Policy Review and Financial System Inquiry, and has since commissioned the Productivity Commission to undertake inquiries into improving the availability and use of public and private sector data, and to increasing the application of competition, contestability and informed user choice to human services. Earlier this year, the Government announced it would accelerate implementation of the Financial System Inquiry's recommendation to review the Australian Securities and Investment Commission's (ASIC) enforcement regime, including penalties.
- In April 2016, the Australian Government responded to the Productivity Commission's report into access to justice arrangements and released for consultation the final report of the Independent Review of Small Amount Credit Contracts.
- In June 2016, Western Australia's Joint Standing Committee on Delegated Legislation reported on its inquiry into Access to Australian Standards adopted in delegated legislation.
- In August 2016, the Australian Government released terms of reference for an independent review into the financial system's external dispute resolution and complaint framework, which will report by the end of March 2017. This will occur in parallel with a review by ASIC of the small business jurisdiction of the Financial Ombudsman Service.
- In August 2016, Victoria's Department of Justice and Regulation reported to the Attorney-General on its review into access to justice in Victoria.

Several of these reviews are described in more detail in **Chapter 3.1, 'Implementing the Australian Consumer Law and its objectives'**.

1.1.4 Progress of the ACL Review

CAANZ is drawing on a range of sources to build a broad evidence base to support its findings and options for reform. This includes seeking views on the Issues Paper, holding face-to-face consultations with stakeholders across Australia, commissioning a national survey of consumers and businesses and a study of overseas consumer policy frameworks, and drawing on other research.

Also, this review's terms of reference require that the administration and enforcement arrangements underpinning the ACL be independently assessed. The Productivity Commission is currently undertaking this work.

1.1.5 Feedback on the Issues Paper

The ACL Review's Issues Paper was released for public consultation on 31 March 2016 with submissions sought by 27 May 2016.⁴ CAANZ received more than 160 submissions and 100 online comments from a wide range of stakeholders, including consumers, businesses, consumer advocates, industry representatives, community legal centres, legal practitioners, and academics (see **Figure 1** below).

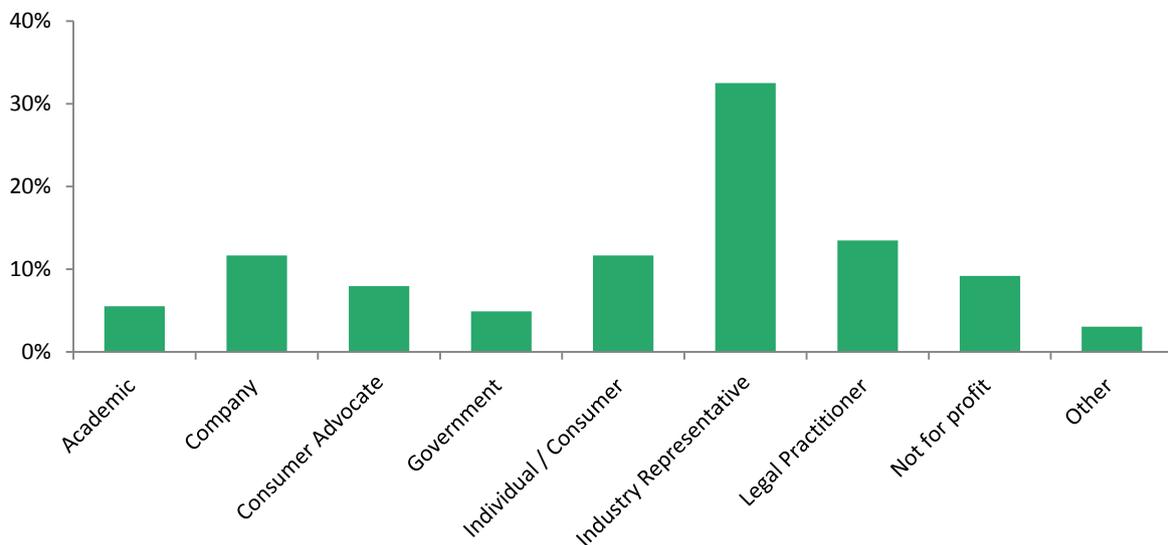
⁴ *Australian Consumer Law Review Issues Paper*, CAANZ, March 2016, at: www.consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/.

Stakeholders who made non-confidential submissions are listed at **Appendix C** and their submissions are available at:

www.consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/issues-paper/.

CAANZ would like to thank all those who provided feedback to the Issues Paper.

Figure 1: Proportion of Issues Paper submissions by submitter type



Stakeholders addressed many of the issues highlighted in the Issues Paper, particularly the key areas identified in this report.

Most stakeholders viewed the introduction of the ACL as a positive development in providing a consistent set of rights and responsibilities that applies nationally and across industries. This has helped reduce regulatory complexity, duplication and overlap.

There was also a broad level of agreement that the ACL is generally functioning well, but some stakeholders indicated areas where they consider the ACL could be clarified or strengthened to address regulatory gaps and evidence of consumer detriment.

Specific issues about the law, and potential options to enhance its effectiveness, are identified throughout this report. While many of the submissions focused on specific ACL provisions, broad and recurring themes included:

- access to information about the ACL
- access to remedies under the ACL
- the appropriateness of the penalties and remedies available under the ACL.

Stakeholders also highlighted differences between the level of consumer empowerment, with some consumers highly vulnerable while others much more empowered to exercise their rights. Feedback also indicated differences in the level of understanding between types and sizes of businesses. Specific issues about small businesses are addressed in **Chapter 1.3, 'Small business'**.

1.1.6 Face-to-face consultations

In addition to seeking submissions to the Issues Paper, the ACL Review's Secretariat met with more than 80 stakeholder groups in Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth and Sydney, including businesses and industry peak bodies, consumer advocates, community legal centres, dispute resolution bodies, legal practitioners, academics and other government agencies.

A list of face-to-face consultations is provided at **Appendix D**. CAANZ would like to thank those stakeholders for their participation and feedback, noting that a number of them also made submissions to the Issues Paper.

This Interim Report draws on feedback from these discussions, and will be the subject of further face-to-face consultations during the public consultation period.

1.1.7 Australian Consumer Survey 2016

The Australian Consumer Survey 2016, conducted by EY Sweeney, is the second national survey of consumer and business awareness and understanding of Australia's consumer laws. The first survey was conducted in 2010-11, shortly before the ACL was introduced.

More than 5,400 consumers and 1,200 businesses were surveyed with the results benchmarked against the 2011 survey to identify trends in awareness and understanding of Australia's consumer laws and experience with consumer problems. The survey report is available at: www.consumerlaw.gov.au/australian-consumer-survey/.

Findings from the 2016 survey highlight a number of positive trends:

- Consumer and business awareness of Australia's consumer laws remain high (at 90 and 98 per cent respectively).
- Consumers and businesses are experiencing a lower incidence of consumer problems (an average of 3.44 per month compared to 5.15 per month in 2011).
- Consumers feel more empowered to resolve disputes (82 per cent compared to 75 per cent in 2011), are more satisfied with the adequacy of regulators' information and advice (54 per cent compared to 38 per cent in 2011), and are more likely to believe the law provides adequate protection (54 per cent compared to 50 per cent in 2011).
- More businesses believe the ACL's introduction has had a positive impact on their compliance with the law (56 per cent compared to 42 per cent in 2011) and are more likely to agree consumer disputes result in a fair outcome (70 per cent compared to 50 per cent in 2011).
- The annual cost for businesses in dealing with consumer problems has decreased by \$3.5 billion (\$18.03 billion compared to \$21.56 billion in 2011).

However, the survey also found that consumers are now less confident that businesses will do the right thing, and not mislead or cheat consumers (64 per cent compared to 71 per cent in 2011).

While the 2016 survey's findings suggest there have been important gains in the last five years, CAANZ notes that there is room for improvement and is using these findings to inform the review.

1.1.8 Comparative analysis of overseas consumer policy frameworks

To inform the review of overseas developments in consumer policy, CAANZ commissioned the Queensland University of Technology to undertake a study into consumer policy frameworks in comparable jurisdictions (the QUT study). In particular, the QUT study considered frameworks in Canada, the European Union (EU), New Zealand, Singapore, the United Kingdom (UK) and the United States of America (US).

The QUT study examined four broad areas:

- approaches to unconscionable conduct or highly unfair trading practices
- approaches to the regulation of e-commerce and peer-to-peer transactions
- institutional structures relating to the administration and enforcement of consumer laws
- measures to facilitate access to justice.

The study's report was released in April 2016 and is available at:

www.consumerlaw.gov.au/review-of-the-australian-consumer-law/projects/. It made several broad observations:

- There is a high level of convergence between Australia's consumer policy framework and comparable jurisdictions, with most adopting a combination of general and specific protections with regard to unconscionable and highly unfair trading practices.
- The common regulatory approach to protecting consumers in e-commerce is to modify existing regulatory frameworks rather than adopt a different model. In this regard, jurisdictions have adopted similar approaches in relation to product quality, misleading pricing practices, fake reviews and fraud.
- Institutional structures for the administration and enforcement of consumer laws vary between jurisdictions, with differences in the level of private action, regulator activity, and the roles played by non-government consumer groups.
- Access to justice is integral to a consumer policy framework's success in providing effective consumer protection. It requires a combination of strategies that must be assessed from the perspectives of both traders and consumers. They commonly include:
 - the form and content of legislation
 - information and education
 - assistance and advice
 - alternative dispute resolution
 - regulatory oversight and enforcement.

1.1.9 Productivity Commission study of the administration and enforcement arrangements underpinning the ACL

The ACL Review's terms of reference require an independent assessment of the opportunities to improve the 'multiple regulator model'. The Productivity Commission has been commissioned to undertake this work.

The Commission released an Issues Paper for consultation in July 2016 and will make its final report by March 2017. Information about the study, including its terms of reference, is available at: www.pc.gov.au/inquiries/current/consumer-law.

1.2 Scope and coverage of the ACL

Stakeholders had a range of views regarding the nature and extent of the ACL's scope and coverage, in particular, on:

- what conduct is covered by, and who is protected, under the provisions
- the appropriateness of the various exemptions within the ACL
- the interaction between the ACL and the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)*.

CAANZ seeks your views on the following overarching questions:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?
- What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements? Are there any unintended consequences?

Key observations

The ACL introduced a single national generic consumer protection law that applies to all sectors of the economy and covers a wide range of business-to-consumer and business-to-business transactions. The ASIC Act contains a number of similar protections with regard to financial services.

Stakeholders generally agreed that the ACL is functioning well, however, a range of views were expressed about the ACL's scope and coverage, including its clarity and coherence.

While the ACL places obligations on suppliers engaging 'in trade or commerce', the person or entity that is protected depends on the provision in question. Some protections are limited to a defined class of 'consumer' — for example, the consumer guarantees provisions treat a business purchasing goods and services for less than \$40,000 as a 'consumer' (subject to some exceptions). In some cases where broader protections in the marketplace are considered necessary, the protections extend to both individuals and businesses, such as the prohibition against misleading or deceptive conduct.

Conduct covered by the ACL

Stakeholders expressed views about:

- whether '**in trade or commerce**' should continue to be the key factor for determining which conduct is covered by the ACL, noting some uncertainty about the extent to which the activities of charities and not-for-profits are covered
- the extent of consumer protection with regard to **fundraising activities**, noting that several jurisdictions have recently taken steps to ease the regulatory burden on the sector

CAANZ notes that any change to the 'in trade or commerce' threshold would likely alter the ACL's scope and objectives. As there was a high level of stakeholder support for the current overarching and operational objectives (see **Chapter 3.1, 'Implementing the ACL and its objectives'**), a general review of this threshold is not considered necessary at this time, although it may be a matter for future consideration.

Key Observations (continued)

CAANZ acknowledges that there is some uncertainty about how existing ACL obligations are likely to apply to the activities of charities and not-for-profits and considers that greater clarity could be provided through further regulator guidance. CAANZ also notes the desire of some stakeholders to specifically apply ACL provisions to fundraising and repeal state fundraising laws. In this regard, evidence is sought as to the extent of any regulatory gap that would warrant intervention, as well as further information on whether extending consumer protection is necessary or desirable to facilitate potential fundraising reforms in the states and territories.

Who is protected under the ACL?

Stakeholders expressed views about:

- the clarity and appropriateness of having **multiple definitions** of who is protected
- the appropriateness of the **\$40,000 threshold**
- the appropriateness of the **various exemptions within the ACL** in the context of a generic national consumer law
- the **interaction between the ACL** and ASIC Act in providing consumer protection.

CAANZ seeks feedback on the appropriateness of the \$40,000 threshold for the definition of ‘consumer’, noting that the threshold has not changed since 1986.

In relation to exemptions, CAANZ also notes that given the economy-wide application of the ACL, each ‘carve out’ has the potential to undermine the benefits of a nationally consistent approach to consumer protection. However, given the number of exemptions that currently exist in the ACL, priority will be given to considering specific exemptions highlighted in feedback to date, particularly in relation to:

- publicly listed companies and unconscionable conduct (see **Chapter 2.3 ‘Unconscionable conduct and fair trading’**)
- insurance contracts and unfair contract terms (see **Chapter 2.4, ‘Unfair contract terms’**).

In relation to the ACL and ASIC Act, CAANZ notes the Memorandum of Understanding between the ACCC and ASIC, and arrangements for the reciprocal delegations of powers, to ensure matters are capable of being investigated by the most appropriate regulator. Stakeholder views are sought on whether the ASIC Act should expressly cover financial products as well as financial services.

OPTIONS

1. Clarify the current application of the ACL to the activities of charities, not-for-profits and fundraisers, and investigate whether there are regulatory gaps that warrant intervention.
2. Increase the \$40,000 threshold in the definition of ‘consumer’, for example, to \$100,000 and link it to the Consumer Price Index.
3. Expressly apply all consumer protections for financial services to financial products in the ASIC Act.

Coverage of the ACL provisions

1.2.1 The Australian Consumer Law

The ACL is the key generic consumer protection law in Australia, applying across all sectors of the Australian economy. It includes:

- core consumer protection provisions prohibiting misleading or deceptive conduct, unconscionable conduct and unfair contract terms
- specific prohibitions or regulation of unfair practices including pyramid selling, unsolicited supplies of goods and services, component pricing and the provision of bills and receipts
- an integrated and harmonised legal framework for unsolicited selling, including door-to-door selling
- a national law for consumer product safety
- a system of statutory consumer guarantees
- strengthened enforcement and consumer redress provisions.

In many ways, the current scope and coverage of the ACL reflects its history and development. The ACL simplified and consolidated existing consumer protection and fair trading laws, both nationally and in each state and territory.

In particular, the ACL reflects the reforms agreed to by the Council of Australian Governments (COAG) and recommendations of the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*. The ACL was intended to build on and improve the generic consumer protections set out in the former *Trade Practices Act 1974* (Cth) (the TPA), which was also reflected in large part by state and territory laws.

The ACL is complemented by other legislation at Commonwealth, state and territory levels where additional protections, specific to certain industries or sectors, are required.

As outlined in **Chapter 3.1, 'Implementing the Australian Consumer Law and its objectives'**, stakeholders generally agree that the ACL's overarching and operational objectives are appropriate. For example, the Law Council of Australia's Competition and Consumer Committee noted that Australia's consumer policy framework is robust and well-developed, including when assessed against overseas consumer policy frameworks.⁵

Nevertheless, some stakeholders raised specific issues about what conduct is captured by the ACL, who is protected by the ACL (and in what circumstances), and whether existing exemptions from the ACL are still in the public interest.

5 Submission from Law Council of Australia's Competition and Consumer Committee, page 1.

1.2.2 What conduct is covered by the ACL?

The ‘in trade or commerce’ threshold

A common theme across the ACL is that it imposes obligations on suppliers engaging ‘in trade or commerce. The ACL therefore distinguishes commercial from non-commercial transactions (such as gifts and donations). In this regard, the ACL regulators act as market regulators.

The definition of ‘trade or commerce’ is broadly defined in section 2 of the ACL to mean ‘trade or commerce within Australia, or between Australia and places outside Australia, and includes any business or professional activity (whether or not carried on for profit).’

Some protections of the ACL (such as the consumer guarantees) also require a ‘supply of goods or services’ to be undertaken in trade or commerce.

In this regard, the ACL applies to many activities undertaken by charities and not-for-profits. They, like businesses, often supply goods and services for payment. Where they do not supply a good or service to a consumer, such as where they only solicit a donation, the application of the ACL depends on the particular activities or transaction, and the nature of the relationship between the supplier and the consumer [see **Box 1** below]. The value of the transaction may also be relevant. For example, the unsolicited consumer agreements provisions only apply to the sale of goods or services where the total price paid or payable is more than \$100.

Under section 5 of the ACL, donations where no sales are involved (including donations received by a third party or contractor acting on the charity’s behalf) do not involve supplies of goods or services unless the donation is for a promotional (marketing) purpose. However, fundraisers (whether charitable or not) may have obligations under other provisions of the ACL where the relevant conduct occurs in trade or commerce, such as misleading or deceptive conduct.

A number of stakeholders indicated an awareness that the ACL can apply to a range of activities undertaken by charities. For example, Prolegis Lawyers submitted that:

[t]here are a number of circumstances where the conduct of a charity may fall within the purview of the ACL already. For example, charities partner with corporations to undertake fundraising campaigns through product sales. There are also many national fundraisers run by major charities that involve the sale of tokens (badges, pens and the like).⁶

A coalition of stakeholders released a joint statement on fundraising reform in September 2016. It included legal advice that the ACL already applies to most ordinary not-for-profit fundraising, but suggested that the ACL’s coverage of fundraising be clarified and improved.⁷

Nevertheless, some stakeholders indicated that there are some ‘grey areas’ of uncertainty about how this definition applies to activities commonly undertaken by charities and not-for-profit entities.⁸

6 Submission from Prolegis Lawyers, page 2.

7 *Statement on Fundraising Reform*, page 3, at: www.justiceconnect.org.au/sites/default/files/Joint%20statement%20on%20fundraising%20reform_0.pdf.

8 For example, submissions from: Australian Charities and Not For Profits Commission; Community Council of Australia; Justice Connect Not-for-Profit Law; Law Institute Victoria; and Unit Owners Association of Queensland Incorporated.

For example, Justice Connect Not-for-profit Law submitted that it is:

unreasonable and totally impractical that, in order to understand whether consumer protections apply to the conduct of a not-for-profit, a consumer must investigate and understand whether the organisation they are interacting with is doing so in a way that attracts the operation of the ACL: surely a consumer cannot be expected to understand whether goods or services are being provided to them at such a discount that the provision could not be said to be in 'trade or commerce', or the goods or services are being supplied to them by a volunteer rather than a professional so that they are not being provided in 'trade or commerce', or whether the relationship between a member and a not-for-profit could be said to be in 'trade or commerce'?⁹

It provided some examples of uncertainty in their view,¹⁰ including where a not-for-profit:

- provides subsidised gardening services to elderly people in a particular region. The not-for-profit is able to subsidise the price of the services as it receives a range of philanthropic and/or government grants. Are the services provided in trade or commerce?
- fundraises through a commercial third party provider. Is the conduct of the party fundraiser on behalf of the charity in trade or commerce? What if the same fundraising campaign was undertaken by volunteers rather than professionals? If the volunteers engage in misleading and deceptive conduct, is this in contravention of the ACL?

To address uncertainty, Justice Connect Not-for-profit Law suggested including indicia in the definition of 'in trade or commerce', for assessing the activities undertaken by, or on behalf of, a not-for-profit. It also supported a national education program to assist the sector and the consumer to understand how the ACL applies, using funds from penalties issued for ACL breaches in relation to not-for-profit activities.¹¹

CAANZ notes that there is some judicial guidance on the scope of the definition of 'in trade or commerce' that would be relevant in these circumstances [see **Box 1** below]. CAANZ further notes that where an entity sells goods or services to a consumer, the fact that it also receives funding from other sources is not relevant to whether it is acting in trade or commerce.

Box 1: Application of the ACL to the activities of charities and not-for-profits

The test for determining whether conduct or the supply of goods or services is in 'trade or commerce' under the CCA was established by the High Court in *Concrete Constructions Pty Ltd v Nelson* (1990) 169 CLR 594.¹² The same test is applied in determining whether conduct is 'in trade or commerce' within the ACL meaning of that term, noting that it explicitly includes any professional or business activity (whether or not carried on for profit).

9 Submission from Justice Connect Not-for-Profit Law, page 6.

10 Ibid, page 4.

11 Ibid, page 2.

12 *Concrete Constructions Pty Ltd v Nelson* (1990) 169 CLR 594 (Mason CJ, Deane, Dawson and Gaudron JJ), applied in *Village Building Co Ltd v Canberra International Airport* [2004] FCAFC 240.

Box 1: Application of the ACL to the activities of charities and not-for-profits (continued)

In *Concrete Constructions*, the High Court applied a narrow interpretation of the phrase ‘in trade or commerce’. The focus must be on the *particular* activities or transaction in question, rather than whether the entity is generally engaged in trading or commercial activities. It is not sufficient that the conduct ‘relates to’ or is ‘in connection with’ trade or commerce. Rather, the transaction must be of a trading or commercial character *in and of itself*. Whether the entity engaging in the conduct is a not-for-profit or obtains a profit from its activities is generally not relevant to the question of whether a transaction is in ‘trade or commerce’.¹³

The terms ‘trade’ and ‘commerce’ are given their ordinary meaning and refer to operations of a commercial nature in which a trader provides goods or services to a customer for reward.¹⁴ The terms also include transactions involving intangibles, such as banking and financial transactions (such as lending money at a rate of interest). Transactions that are in ‘trade or commerce’ are often regular or repeated in nature, however the frequency of the transaction(s), while relevant, is not determinative.

Also important is the *nature of the relationship* between the entity engaging in the conduct or making the representation, and the persons to whom the conduct was directed or the representations made. That relationship must be of a trading or commercial nature, and the conduct of the entity must have occurred *in the course of that relationship*.¹⁵

So for example, a not-for-profit is likely to be engaging in conduct that is ‘in trade or commerce’ if it sells goods (such as cakes) or provides services in exchange for payment as part of its fundraising activities. Thus, if a not-for-profit makes a false or misleading representation in relation to those goods or services (for example, that the biscuits for sale are gluten-free, when that is not the case), it risks contravening certain provisions of the ACL.

On the other hand, a not-for-profit is unlikely to be engaging in conduct that is ‘in trade or commerce’ if it is only soliciting donations (money or other goods), where the persons soliciting donations on behalf of the not-for-profit are acting as volunteers.

In CAANZ’s view, the test set out in *Concrete Constructions* would apply as follows to the examples noted above by Justice Connect Not-for-profit Law:

- in the first scenario (the gardening services), the not-for-profit is likely to be engaging in conduct in trade or commerce because it is supplying a service to the consumer in exchange for payment, even though the price is subsidised
- in the second scenario (soliciting donations), it is arguable that the transaction between the fundraiser and the consumer is ‘in trade or commerce’ if the third-party fundraiser is fulfilling their commercial contractual obligations. Similarly, where a charity employee carries out fundraising in their capacity as an employee (rather than as a volunteer), this transaction is also likely to be regarded as in trade or commerce. However, this area of law is undeveloped and could be clarified through further cases.

While some stakeholders raised issues regarding ‘in trade or commerce’, CAANZ notes that the current definition is a fundamental concept that underpins the ACL and its objectives. A change to its threshold would affect not only not-for-profits, but would have economy-wide impacts. CAANZ also

13 Full Court of the Federal Court in *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants* [2002] 122 FCR 110, (Black CJ, Heerey and Tamberlin JJ), at [47].

14 *Ku-ring-gai Co-op Building Society (No 12) Ltd* (1978) 22 ALR 621, Bowen CJ at 625.

15 *Gluek v Stang* [2008] FCA 148.

notes that stakeholders generally agree that the ACL's overarching and operational objectives are appropriate (see **Chapter 3.1, 'Implementing the ACL and its objectives'**).

CAANZ therefore considers that the current definition does not need be reviewed at this time but its relevance and appropriateness will continue to be monitored in light of market changes, including in the 'sharing' economy (see **Chapter 4.1, 'Purchasing online'**).

Nevertheless, views are sought on the more specific issue of whether there is a regulatory gap with regard to consumer protection and fundraising activities that should be addressed through regulatory intervention.

1.2.3 Fundraising activities and the ACL

In addition to complying with the ACL, fundraisers may also need to comply with other relevant Commonwealth, state and territory laws. All states and territories, except the Northern Territory, have their own specific legislation governing fundraising activities by not-for-profits and charities. Some fundraising acts contain similar consumer protection provisions to the ACL, for example, among other things, the:

- *Collections for Charitable Purposes Fundraising Act 1939* (SA) prohibits false and misleading statements, and dishonest, deceptive or misleading conduct
- *Fundraising Act 1998* (Vic) prohibits misleading or deceptive statements while conducting or participating in a fundraising appeal.

In the context of fundraising, misleading or deceptive statements refer to the accuracy of statements about where donated funds will be directed, and not to the merits, desirability or validity of any cause itself.

Some stakeholders argued for an extension of certain provisions of the ACL to defined fundraising activities, not only to improve the clarity of the ACL's application, but also to facilitate potential reductions in regulatory burdens and overlap for the not-for-profit sector.¹⁶

In this regard, the Australian Charities and Not-for-profits Commission noted research in 2016 by Deloitte Access Economics which found that state and territory regulation of charities (including fundraising regulation) imposed costs to registered charities of over \$15 million a year.¹⁷

It also submitted that a consolidated approach under the ACL would enhance public trust and confidence in the sector and 'provide a national and consistent protection against the worst fundraising practices'. While such a national approach would 'initially complement' existing regulation, the Australian Charities and Not-for-profits Commission suggested that 'in time this may enable states and territories to reduce the scope of their own regulation, with associated benefit for charities and NFPs'.¹⁸ However, before any changes are made, it also noted that consultation should

16 For example, submissions from: Australian Charities and Not-for-profits Commission; Justice Connect Not-For-Profit Law; Prolegis Lawyers; Chartered Accountants Australia and New Zealand; Law Council of Australia's Legal Practice Section; Queensland Law Society; Governance Institute of Australia; and CPA Australia.

17 Submission from the Australian Charities and Not-for-profits Commission, page 4. See also Deloitte Access Economics for the Australian Charities and Not-for-profits Commission, *Cutting red tape: Options to align state, territory, and Commonwealth charity regulation*, Final report, February 2016, at: www.acnc.gov.au/ACNC/ACNC/Publications/Reports/CuttingRedTape.aspx.

18 Ibid.

be undertaken with the sector and existing regulators.¹⁹

The Australian Charities and Not-for-profits Commission further noted a national approach ‘would merely require charities to refrain from certain types of conduct’ and would not affect their role in registering charities and monitoring compliance with, for example, record-keeping and reporting requirements, as required under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).²⁰ The governance standards under that Act require charities to work towards their charitable purpose, be accountable to their members, and refrain from committing serious offences under Australian law.

Some stakeholders suggested including a broad definition of ‘fundraising activities’ in the ACL and specifically applying certain provisions to these activities. These could include the provisions, for example, on misleading or deceptive conduct, unconscionable conduct and harassment or coercion.²¹

There were mixed views about whether more specific protections, such as the unsolicited consumer agreement provisions, should apply to all fundraising activity. Some stakeholders noted that the unsolicited consumer agreements provisions may already apply in most cases, and some supported an explicit provision.²² For example, the Australian Charities and Not-for-profits Commission noted that:

[t]he same factors that might put a member of the public at a disadvantage during a sales process for goods and services would also apply to requests for donations from companies collecting on behalf of charities, and so we believe the extension of the ACL to fundraising activities would have merit.²³

It also considered that, before any changes were made, consultation with the sector and relevant regulators should be undertaken to determine the thresholds and circumstances in which the provisions should apply.²⁴

On the other hand, the Public Fundraising Regulatory Association noted that extending the provisions to either charitable or commercial fundraisers would:

firstly inhibit the ability of charities to ‘ask the question’ of prospective donors. This is due to the restrictive requirements under the provisions, many of which are inconsistent with existing charitable fundraising laws. Secondly, this would impose a significant regulatory impost on a sector that is already subject to comprehensive regulation in State and Territory jurisdictions, as well as local government restrictions, with councils often imposing additional requirements on face to face fundraising activity.²⁵

Cancer Council Queensland submitted that the unsolicited consumer agreement provisions should not apply, noting that:

19 Ibid, page 3.

20 Ibid, page 5. Also raised in submission from Prolegis Lawyers.

21 For example, submissions from: Australian Institute of Company Directors; and Justice Connect Not-For-profit Law.

22 For example, submissions from: Australian Charities and Not-for-profits Commission; CPA Australia; Fundraising Institute of Australia; Cancer Council Queensland; Public Fundraising Regulatory Association; and Prolegis Lawyers.

23 Submission from Australian Charities and Not-for-profits Commission, page 6.

24 Ibid, page 3.

25 Submission from Public Fundraising Regulatory Association, page 8.

[n]o distinction should be made between situations where the charity itself through its employees (rather than a commercial company on its behalf) is collecting donations by way of an unsolicited agreement. From the perspective of the donor there is very little, if any, difference. Applying a separate set of rules depending on whether the fundraising is conducted by an external organisation or 'in house' would impose extra and unnecessary regulatory burden on the sector.²⁶

CAANZ notes stakeholders' desire for more clarity regarding the ACL's application to fundraising activities. CAANZ also notes the desire from some stakeholders to extend provisions of the ACL to explicitly capture fundraising activity, but notes that the ACL is likely to already cover a range of fundraising activity [see **Box 1** above]. CAANZ considers that further guidance on the application of the ACL to the activities of charities and not-for-profits would enhance consumer awareness of their rights and provide greater certainty to the sector. Further case law may also assist in providing greater clarity.

Where this is not considered sufficient to address the concerns raised, CAANZ seeks evidence from stakeholders as to the extent of any regulatory gap and related consumer detriment that would warrant regulatory intervention. The objective should be to consider what conduct should be covered by the ACL, noting that the sector engages in a growing range of activities and increasingly adopts operating models based on commercial practices, rather than to introduce new protections or obligations on the not-for-profit sector.

CAANZ notes that potential options to reduce the regulatory burdens imposed by local fundraising laws were identified by the Fundraising Reform Regulatory Working Group of senior state and territory officials in June 2016, and presented to fair trading Commissioners for their consideration. CAANZ also notes that several jurisdictions are taking steps to ease the regulatory burden on the sector, however, there is not yet clear evidence that extending the ACL to fundraising activities is necessary for these reforms.

For consultation

Option 1 — Clarify the current application of the ACL to the activities of charities, not-for-profits and fundraisers, and investigate whether there are regulatory gaps that warrant intervention

Views are sought on whether further regulator guidance would help clarify the ACL's application to the activities of charities, not-for-profits and fundraisers.

Views are also sought on whether there are regulatory gaps with regard to fundraising activities and consumer protection, as well as evidence of the extent of consumer detriment that would warrant regulatory intervention. Further to this, information is sought on whether extending the ACL to all defined fundraising activities is a necessary or desirable to facilitate potential state and territory fundraising reforms.

Further questions

1. Would further regulator guidance on the ACL's application to the activities of charities, not-for-profits and fundraisers help raise consumer awareness and provide greater clarity to the sector?

26 Submission from Cancer Council Queensland submission, page 2.

Further questions (continued)

- If so, what should be included in this guidance?
2. Are there currently any regulatory gaps with regard to the conduct of fundraising? If so:
 - What is the extent of harmful conduct or consumer detriment that falls within these regulatory gaps or 'grey areas', and does it require regulatory intervention?
 - Would generic protections, such as the ACL, provide the level of regulatory detail necessary to address identified areas of detriment? What would be the benefits and costs of this approach?
 - Would there be any unintended consequences, risks and challenges from extending the application of the ACL to address regulatory gaps for fundraising activities? If so, how could they be addressed?
 3. Would extending the ACL to all fundraising activities be necessary or desirable to facilitate potential reforms of state and territory fundraising regulation?

1.2.4 Who is protected under the ACL?

The person or entity that is protected under the ACL varies depending on the particular provision in question.

Some provisions apply to both **individuals and businesses**, while others are limited to a **defined class of 'consumer'**. Where the scope of a provision extends beyond a 'consumer', it is typically where broader protections in the marketplace are considered necessary.

The Explanatory Memorandum for the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 noted that:

[f]or many purposes the provisions of the ACL apply to all persons and are not limited to a defined class of consumers. However, for some purposes, provisions apply with respect to a defined class of consumer on the basis that it is not appropriate to extend the protection afforded by the relevant provision more broadly.²⁷

Multiple definitions

The **definition of 'consumer'** in section 3 of the ACL is relevant to the broadest range of provisions in the ACL. In particular, it applies to consumer guarantees, unsolicited consumer agreements, lay-by agreements and some specific protections (for example, itemised bills and continuing credit contracts).

Section 3 defines as a 'consumer' someone who purchases one of the following:

- a good for personal, domestic, or household use (a consumer purchase in a lay sense)
- a good under \$40,000 (regardless of whether it is for personal or a business use)
- a vehicle or trailer acquired for use principally in the transport of goods on public roads.

²⁷ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010, at [2.10].

It does not cover goods that are:

- for use as business stock (that is, for re-supply)
- to be used up or transformed, in trade or commerce, in the course of a production or manufacturing process, or in the course of repairing or treating other goods or fixtures on land.

Other provisions of the ACL, such as the prohibition on **misleading or deceptive conduct** or **unconscionable conduct** are not limited to ‘consumer’ transactions, as defined in section 3. Rather, they protect any person, including businesses (other than publicly listed companies for unconscionable conduct).

The **unfair contract terms** protections protect an individual who enters into a standard-form contract for the acquisition of goods, services, or interests wholly or predominantly for personal, domestic, or household use or consumption.²⁸ From 12 November 2016, these protections will extend to small businesses entering into standard form contracts where they have fewer than 20 employees, and the contract does not exceed \$300,000 (or \$1 million if the contract is for longer than 12 months).

In the context of **product safety**, the ACL protects those who buy and use ‘consumer goods’, which are defined as ‘goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption’ if a recall notice has been issued, or a person has voluntarily taken action to recall the goods.²⁹ This includes goods that have become fixtures after they were supplied.

Table 1 below provides examples of who is protected under some of the ACL provisions where goods or services are supplied in trade or commerce.

Table 1: Persons protected under the ACL

ACL protections	Any person (including businesses) protected	‘Consumers’ (as defined in section 3) protected	Other definition of person protected
Misleading or deceptive conduct	Yes	–	–
False or misleading representation	Yes	–	–
Unconscionable conduct	Yes, other than publicly listed company	–	–
Consumer guarantees	–	Yes, with some exceptions (for example, goods purchased at public auction where the auctioneer is the owner’s agent)	–

28 ACL, section 23(3).

29 Ibid, section 2.

Table 1: Persons protected under the ACL (continued)

ACL protections	Any person (including businesses) protected	'Consumers' (as defined in section 3) protected	Other definition of person protected
Unsolicited consumer agreement provisions	–	Yes, with exceptions in the regulations for business-to-business sales and party plan events (for example, 'Tupperware parties')	–
Lay-by provisions	–	Yes	–
Product safety	–	–	Applies generally to 'consumer goods' as defined in section 2 so protects users and buyers of those goods
Unfair contract terms	–	–	Individuals who enter into a standard-form contract for the acquisition of goods, services, or interests wholly or predominantly for personal, domestic, or household use or consumption Businesses with <20 employees who enter into standard form contracts of no more than \$300,000 (or \$1 million if it is more than 12 months long)

Some stakeholders indicated support for the existing approach.³⁰ The Insurance Australia Group submitted that:

[t]he ACL's treatment of 'consumer' is appropriate. It is appropriate that the person or type of business protected under the ACL varies depending on the provision in question, as some provisions should apply more broadly than others.³¹

30 For example, submissions from: Australian Retailers Association; and Insurance Australia Group.

31 Submission from Insurance Australia Group, page 4.

Other stakeholders considered that having multiple concepts of consumer within the ACL is unnecessarily complex.³² For example, Minter Ellison submitted that:

[t]he review should consider a simplified approach to defining the concept of a 'consumer' to whom protection is afforded under the ACL and removing inconsistency and unnecessary complexity in defined terms....The use of different definitions creates unnecessary complexity. To a business or consumer attempting to understand their rights and obligations under the law, the differences in definitions and coverage is potentially confusing.³³

CAANZ notes that the differing scope of the protections is designed to ensure proportionate responses to consumer issues, and to reflect the nature and severity of different types of conduct. Nevertheless, CAANZ notes that there may be scope to consider some of the specific definitions and whether they remain appropriate now and into the future, particularly in relation to the \$40,000 threshold for the definition of 'consumer' in section 3.

The \$40,000 threshold for the definition of 'consumer'

The \$40,000 threshold is intended to protect businesses and individuals for certain purchases of goods or services, regardless of whether it is for personal or home use. This can cover, for example, a business purchasing commercial sliding glass doors for their office, or a consumer purchasing such glass doors for their home, provided the purchase price does not exceed the threshold.

Some submissions highlighted that many **small and medium businesses** rely on, and benefit from, the ACL's protections for purchases of goods or services.³⁴

The current threshold has its origins in the \$15,000 threshold introduced into the TPA in 1977, following the Swanson Review of that Act.³⁵ That review considered that the definition should capture a range of business transactions, particularly purchases by small businesses.³⁶ In 1986, the threshold was increased to \$40,000 to take into account inflation since its introduction. The threshold has not changed since that time.

In 2010, the Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 sought to remove the threshold, but it was reintroduced following amendments in the Senate.

Stakeholders expressed a range of views on the \$40,000 threshold and whether it should be maintained, removed or increased.

32 For example, submissions from: Baker & McKenzie; Allens; Professor Luke Nottage; Australian Finance Conference; and Minter Ellison.

33 Submission from Minter Ellison, pages 6-7.

34 For example, submissions from: Australian Small Business and Family Enterprise Ombudsman; Office of the NSW Small Business Commissioner; Small Business Commissioner SA; and Small Business Development Corporation.

35 At: www.australiancompetitionlaw.org/reports/pdf/swanson1976.pdf.

36 Report to The Minister for Business and Consumer Affairs, Trade Practices Act Review Committee, Commonwealth of Australia, 1976, page 64, at: www.australiancompetitionlaw.org/reports/pdf/swanson1976.pdf.

Maintaining the threshold at \$40,000

Some stakeholders supported maintaining the \$40,000 threshold.³⁷ One of the reasons cited was that most goods purchased for ‘personal, domestic or household consumption’ are within this threshold.³⁸

For example, Energy Australia submitted that the:

current terms appropriately reflect a policy objective of limiting the extent of consumer protection under certain ACL provisions (such as consumer guarantees and unsolicited consumer agreements) to exclude most commercial transactions.

[W]e consider the \$40,000 threshold for consumer purchases to still be a relatively high but appropriate proxy that captures lower value goods or services that are acquired for personal, domestic or household use/consumption, but would not be considered to be ordinarily acquired for those purposes.

Increasing this threshold would risk capturing more goods and services acquired for business or commercial use by medium to large businesses, without a clear policy basis for extending the relevant consumer protections to those transactions.³⁹

In contrast, stakeholders who considered that the \$40,000 threshold is inadequate argued that many types of goods or services purchased by small business would exceed this threshold.⁴⁰

Western Australia’s (WA) Small Business Development Corporation submitted that the threshold:

is very significant to and greatly disadvantages small business consumers, as they cannot get redress through the ACL for their acquisition of any goods or services of a greater value than \$40,000 that are not of a kind normally used for personal, domestic or household purpose.

There are many types of goods and services procured by small business that do not meet the fore-mentioned definition. For example, the cost of a service to introduce a client record management system would exceed the \$40,000 threshold and would not be considered a domestic product.⁴¹

The implications for small businesses can be significant, particularly as a defective good or service can result in lost productivity as the business attempts to remedy the failure. A range of issues relevant to small business are highlighted in **Chapter 1.3, ‘Small business’**.

CAANZ notes that maintaining the threshold would not impose any additional regulatory burden on businesses, but also that the threshold has remained unchanged while the cost of many goods and

37 For example, submissions from: Insurance Australia Group; Energy Australia; Communications Alliance; and Queensland Law Society.

38 Submission from Communications Alliance, page 16.

39 Submission from Energy Australia, page 3.

40 For example, submissions from: Australian Small Business and Family Enterprise Ombudsman; Office of the NSW Small Business Commissioner; Small Business Commissioner SA; and Small Business Development Corporation.

41 Submission from Small Business Development Corporation, page 8.

services has increased over time. Accordingly, goods or services that may have been captured in previous years may not fall within the \$40,000 threshold today.

Removing the monetary threshold

Some stakeholders argued that those making purchases for their business do not require the same level of legal protections as individual consumers, and that only goods or services acquired for personal or domestic use should be protected under the ACL.⁴² At issue is whether the ACL's protections should only apply to individual consumers.

Allens submitted that:

[t]he definition of consumer could be improved to provide greater clarity and to ensure that the ACL provides basic rights to those that ought to be protected (namely consumers), without applying more broadly to those that do not need protecting (big business).⁴³

Some stakeholders also considered that the monetary threshold is arbitrary and that there is no principled basis for why the ACL should be extended to a person acquiring goods or services for \$40,000, but not for \$41,000.⁴⁴

The Law Council of Australia's Competition and Consumer Committee submitted that the threshold should be removed with the definition of 'consumer' amended to only apply to purchases of goods or services that are intended to be used for, or are of a kind likely to be used for, personal, domestic or household use or consumption.⁴⁵ It noted that the:

current test relies only on an objective assessment of the nature of the goods and does not take into account the subjective intended use of the goods in question... For example, assume an individual acquires an elevator for \$50,000 for use in their home following an accident. The elevator is ordinarily acquired for commercial use. As the elevator is not of a kind ordinarily acquired for personal, domestic or household use or consumption, the purchaser would not fall within the definition of 'consumer' in section 3 and no[t] be afforded the protections of the ACL.⁴⁶

CAANZ notes that removing the \$40,000 threshold would exclude business purchases from many current protections. This would represent a significant policy change that would be inconsistent with recent government decisions to increase protections for small businesses, including in relation to unfair contract terms and access to dispute resolution.

Also, removing the monetary threshold while leaving the definition of 'consumer' unchanged would remove current protections for individuals purchasing goods or services that are not ordinarily acquired for personal or domestic use, but are in fact purchased for personal use.

42 For example, submissions from: Energy Australia, Communications Alliance; Federal Chamber of Automotive Industries; Allens; and Law Council of Australia's Competition and Consumer Committee.

43 Submission from Allens, page 10.

44 For example, submissions from: Allens; Australian Industry Group; and Law Council of Australia's Competition and Consumer Committee.

45 Submission from Law Council of Australia's Competition and Consumer Committee, pages 16-20.

46 Ibid, pages 13-14.

Increasing the monetary threshold

A large number of stakeholders called for the \$40,000 threshold to be increased to \$100,000, noting that the current threshold has not changed since 1986.⁴⁷

When the threshold was last increased from \$15,000 to \$40,000 in 1986, the Explanatory Memorandum noted that the increase would ‘restore the protection given by the Act to consumer and small business purchasers’.⁴⁸

Examples of additional goods or services purchased by businesses that are unlikely to be captured by the current threshold include:

- a catering company or bakery purchasing a new commercial oven
- forklifts and bobcats
- agricultural and brewery equipment⁴⁹
- commercial size refrigeration systems
- a package of solar generation, battery storage and energy efficiency services⁵⁰
- a variety of popular commercial vans acquired for a tradesperson to travel to and from jobs (as opposed to transporting goods).⁵¹

Other issues

The Law Council of Australia’s Competition and Consumer Committee commented on uncertainty about whether the \$40,000 threshold is intended to apply to each unit of goods acquired or more broadly to the total amount paid under a contract for a large number of those same units.⁵²

CAANZ will continue to monitor the clarity of the definition and the need for further guidance.

For consultation

Option 2 — Increase the \$40,000 threshold in the definition of ‘consumer’

In light of stakeholder views to date, further feedback is sought on increasing the \$40,000 threshold, for example, by increasing it to \$100,000 and linking to the Consumer Price Index, to allow the threshold to adjust for inflation over time without the need for legislative amendment.

Another suggestion was to increase the threshold to \$300,000 to align with the small business unfair contract term protections.⁵³

47 For example, submissions from: Small Business Development Corporation; Small Business Commissioner SA; NSW Business Chamber; Redfern Legal Centre; Law Society of NSW; SME Business Law Committee of the Law Council of Australia; Motor Trades Association of Australia; Bruce Bebbington; and Duncan Ramsey.

48 Explanatory Memorandum, *Trade Practices Revision Act 1986*, at [13].

49 Submission from Small Business Development Corporation, page 8.

50 Submission from Energy and Water Ombudsman NSW, page 3.

51 Submission from SA Small Business Commissioner, page 5.

52 Submission from the Law Council of Australia’s Competition and Consumer Committee, page 12.

53 Submission from Telecommunications Industry Ombudsman, page 22.

CAANZ notes that increasing the threshold will have a regulatory impact on businesses, with the protections extended to a range of goods or services that were not previously captured.

Further questions

4. Should the \$40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?
5. What goods or services would be captured that are not already?

1.2.5 Exemptions under the ACL

A number of exemptions exist within the ACL, with many having been carried over from provisions of the former TPA.

Some exemptions apply in respect of the ACL's general protections. For example, the prohibition against unconscionable conduct does not extend to supply to a publicly listed company. Other exemptions apply under other Acts, for example, the *Insurance Contracts Act 1984* (Cth) excludes the application of other legislation (including the ACL) to insurance contracts regulated under that Act. Sales by auction where the auctioneer is an agent of the seller are also exempt from the consumer guarantees.

These exemptions are considered in **Chapter 2.3, 'Unconscionable conduct'**, **2.4, 'Unfair contract terms'**, and **4.1, 'Purchasing online'**, respectively.

There are also a number of exemptions in the definition of 'consumer' in section 3 that are relevant to a number of the ACL provisions, including the consumer guarantees. For example, WA's Small Business Commissioner has suggested that the definition should not exclude goods acquired for re-supply, or to be used up or transformed in the course of a production or manufacturing process.⁵⁴

A number of specific exemptions apply, for example, to:

- architects and engineers, who are 'carved out' from the consumer guarantee that services must be fit for a specified purpose⁵⁵
- goods purchased at a public auction where the auctioneer is the owner's agent are excluded from most of the consumer guarantees
- business contracts, and to agreements made in the course of a party plan event (such as a 'Tupperware' party). These are exempt from the unsolicited consumer agreement provisions.

Some stakeholders suggested that a comprehensive review of all exemptions under the ACL should be undertaken to determine whether these exemptions are in the public interest.⁵⁶

CAANZ notes that given the general, economy-wide application of the ACL, each 'carve out' or exemption has the potential to undermine the benefits of a nationally consistent approach to consumer protection. However, given the number of exemptions that currently exist in the ACL,

54 For example, submission from Small Business Development Corporation, page 10.

55 On this issue, Australian Institute of Architects, Consult Australia and Engineers Australia submitted that the current exemption should not be removed.

56 For example, submissions from: Australian Newsagents' Federation; and Hank Spier.

priority will be given to considering specific exemptions highlighted in feedback to date, with a broader review of exemptions a potential issue for future attention.

Further questions

6. Are there other priority exemptions that are not discussed in this chapter that should be considered? If so, what are these and why should they be considered?

1.2.6 Interaction between the ACL and ASIC Act

Financial products and services are explicitly excluded from provisions of the ACL (as applied at a Commonwealth level) by section 131A of the CCA.⁵⁷

Consumer protection for financial services (and indirectly, conduct related to financial products) is provided by Part 2 Division 2 of the ASIC Act which mirrors a number of ACL provisions. The ACL defines 'financial products' and 'financial services' by reference to the meanings given by the relevant sections of the ASIC Act (in this case, sections 12BAA and 12BAB).⁵⁸

Other laws relevant to financial services include the *National Consumer Protection Credit Act 2009* (Cth) and *Corporations Act 2001* (Cth).

ASIC has had responsibility for consumer protection at the Commonwealth level in relation to financial services since 1998⁵⁹ and credit since 2002.⁶⁰ ASIC and the ACCC, as the Commonwealth regulators for the ASIC Act and ACL respectively, operate under a Memorandum of Understanding (MOU).

The MOU sets out a framework for cooperation between the two agencies, and provides that matters may be referred and/or powers delegated to the other agency to promote effective and efficient handling of some matters.⁶¹

CAANZ notes that while some stakeholders considered the interaction between the ACL and ASIC Act is appropriate,⁶² others raised two main issues concerning:

- the lack of clarity in determining which legislation (that is, the ACL or ASIC Act) applies to some products and services

57 This exclusion does not apply at the state or territory level, as financial products and services are covered by the ACL as it applies as a law of the states and territories.

58 The *Corporations Act 2001* (Cth) also defines 'financial products' with specific inclusions and exclusions as well as defining when a person provides 'financial service'. The ASIC Act relies on the Corporations Act definitions for those provisions that do not deal with consumer protection.

59 As recommended by the Financial System Inquiry (the Wallis Committee Report 1997), consumer protection provisions comparable to those in Parts IVA and V of the former TPA were inserted into the ASIC Act and restricted to 'financial services'. The purpose of this was to ensure that the ASIC Act 'replicated' the consumer protection provisions of the TPA.

60 ASIC gained responsibility for all aspects of the regulation of consumer credit in 2010 with the commencement of the *National Consumer Credit Protection Act 2009* (Cth).

61 *Memorandum of Understanding between the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission*, clauses 9 and 10.

62 For example, submissions from: Queensland Law Society; Suncorp; Law Society New South Wales; and Australian Finance Conference.

- the appropriateness of having differences in the application of the ACL as it applies to financial services compared to other goods and services.⁶³

Determining whether the ACL or the ASIC Act applies

Many stakeholders commented that the mechanism to determine what constitutes a ‘financial product’ or ‘financial service’, and whether the ACL or ASIC Act applies, is complex. For example, Consumer Action Law Centre submitted that:

[o]ur solicitors report that the construction of the ASIC Act and the ACL, and the way the nexus between them is expressed, can make it difficult to assess which legislation a product or service may be covered by. The ACL is not clear on the issue, as the exclusion of financial services is located in the body of the Competition and Consumer Act (section 131A), not in the ACL itself. The definition of a financial product or service must then be determined with reference to the ASIC Act and its Regulations.⁶⁴

CAANZ also notes that the question of which legislation applies and, accordingly, whether the ACCC or ASIC has jurisdiction to investigate a particular matter has previously been contested in court.⁶⁵ This can result in additional costs, delays and uncertainties in court proceedings and regulator action.

Baker & McKenzie submitted that the:

[c]ourts have struggled with the interpretation of the ASIC Act provisions defining “financial product” and “financial service” and have been critical of the complexities created by the provisions in determining which law — the ACL or the ASIC Act — should properly be applied in the particular circumstances. Justice Rares was particularly critical in his judgement in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (In Liq)* [2012] FCA 1028.⁶⁶

Baker & McKenzie also suggested removing the exclusion of financial services at the Commonwealth level from the ACL, and submitted that:

[i]n circumstances where the provisions of two separate regulatory schemes — the ACL and the ASIC Act — largely replicate each other, making it necessary for consumers to work out which regime might apply to the particular wrong for which they seek redress, and adding an inordinate level of complexity and cost to the process, we submit that the explicit exclusion from the ACL of financial services should be removed.⁶⁷

While there is complexity around the definitions of ‘financial product’ and ‘financial service’, and the complexities of these products and services themselves, CAANZ notes that the MOU allows the ACCC

63 For example, submissions from: QUT Commercial and Property Law Research Centre; Redfern Legal Centre; Consumer Action Law Centre; Baker & McKenzie; Thomas Middleton; Legal Aid NSW; Financial Rights Legal Centre; Governance Institute of Australia; and Consumer Credit Legal Services WA.

64 Submission from Consumer Action Law Centre, page 41.

65 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (In Liq)* [2012] FCA 1028; *ASIC v Accounts Control Management Services Pty Ltd* [2012] FCA 1164; and *ACCC v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393.

66 Submission from Baker & McKenzie, page 12.

67 *Ibid*, page 13.

and ASIC to delegate respective parts of their jurisdiction to the other regulator to ensure that there is no regulatory gap.

This MOU is intended to promote consumer protection and ensure that products or services that do not neatly 'fit' under either the ACL or the ASIC Act are capable of being investigated by the most appropriate regulator under its framework and reciprocal delegations.

Areas where reciprocal delegations are in place include:

- credit repair and debt collection
- consumer leases
- extended warranties
- for-profit budgeting services for those in financial difficulty.

In some areas, the ACCC and ASIC also coordinate their efforts and work on joint initiatives, such as the 2016 guide, *Debt collection guideline for collectors and creditors*.

CAANZ observes that it is still appropriate for the division of enforcement responsibilities between the ACCC and ASIC to continue being governed at an administrative level under the MOU, and that those regulators may wish to consider steps to raise awareness of their efforts to address uncertainty in this area.

CAANZ also observes that both regulators should continue to work together to ensure there is no gap in consumer protection for all products and services.

Consumer protection for financial products and services

Some stakeholders expressed concern that while the consumer protections in the ASIC Act largely mirror the relevant provisions in the ACL, there are some key ACL protections that have not been carried over to apply to financial products and services (although some of these may be captured in other legislation). These include:

- consumer guarantees⁶⁸
- unsolicited consumer agreements
- single pricing
- proof of transaction.⁶⁹

Nicola Howell submitted that:

the generally applicable consumer protections should apply to financial services in the same way that they apply for all other goods and services in the economy. There should not be a differentiation in the broad consumer law standards applicable to financial

⁶⁸ Submission from Industry Super Australia, page 8.

⁶⁹ For example, submissions from: QUT Commercial and Property Law Research Centre; Legal Aid NSW; Redfern Legal Centre; Consumer Credit Legal Service WA; and Consumer Action Law Centre.

services when compared to other goods and services, unless there is a strong, evidence-based policy justification for any divergence.⁷⁰

In contrast, Suncorp noted that overall it:

has not observed any significant issues that would necessitate changes to the application of the ACL to financial services.

Any move to change the application of the ACL to financial services must be based on clear evidence of a problem that is not resolved by the current regulatory regime.⁷¹

On balance, CAANZ notes that industry-specific obligations have generally become more rigorous in the financial services sector. It may be arguable that consumers have an equivalent or even a greater level of protection with respect to financial services and products.

In particular, CAANZ notes reforms at the Commonwealth level to require financial advisers to act in the best interests of their clients, and the upcoming implementation of recommendations made by the 2015 Financial System Inquiry to strengthen product issuer and distributor accountability. These reforms will introduce obligations for product issuers, which will include identifying target markets for their products and controls to ensure their products are reaching their desired target markets.⁷²

Consumers also have access to external dispute resolution schemes.⁷³ Current reviews of the financial system's external dispute resolution and complaints handling processes are noted in **Chapter 3.1, 'Implementing the ACL and its objectives'**.

Nevertheless, CAANZ observes that there may be scope to clarify the application of the ASIC Act to cover financial products. Currently, many of the key consumer protection provisions in the ASIC Act only apply to 'financial services', such as protections against unconscionable conduct, misleading or deceptive conduct, and harassment and coercion.⁷⁴ This is inconsistent with the ACL, where these provisions generally apply to both 'goods and services'.

For consultation

Option 3 — Expressly apply all consumer protections for financial services to financial products

While the term 'financial services' has a broad definition in the ASIC Act and may extend to most conduct in relation to financial products, views are sought on whether this could be made more explicit to:

- address any lack of clarity
- increase consistency with the corresponding provisions in the ACL

70 Submission from Commercial and Property Law Research Centre, QUT, page 31.

71 Submission from Suncorp, page 1.

72 Australian Government, *Improving Australia's Financial system: Government response to the Financial System Inquiry*, 2015, page 19.

73 This includes the Financial Services Ombudsman, Credit and Investments Ombudsman, and the statutory Superannuation Complaints Tribunal.

74 ASIC Act, sections 12CA, 12CB, 12DA and 12DJ.

- ensure that any consumer protections for financial services would also apply to financial products.

Under this option, the protections relating to the following conduct in the ASIC Act would be explicitly applied to financial products:

- misleading or deceptive conduct
- false or misleading representations
- offering rebates, gifts, prizes, etc.
- certain misleading conduct in relation to financial services
- bait advertising
- referral selling
- accepting payment without intending or being able to supply
- harassment and coercion.

This option would increase the consistency of consumer protections across financial services and products within the ASIC Act. Nevertheless, CAANZ seeks views on whether there are any unintended consequences to this option.

Further questions

7. Should the ASIC Act be amended to explicitly apply its consumer protections to financial products?
8. What would suppliers of financial products need to change to achieve compliance, and what benefits or impacts would there be for businesses and consumers?
9. Are there any unintended consequences, risks or challenges in doing so?

1.3 Small business

This chapter highlights stakeholder views on small business issues from consultation on the Issues Paper, as well as through the Australian Consumer Survey 2016 and other research. It also highlights areas of the Interim Report that are likely to be of particular interest to small business.

Small businesses are encouraged to respond to the consultation questions in each of the relevant chapters.

Key observations

Despite its name, the ACL includes a number of protections that extend beyond individual consumers. The ACL recognises that businesses, particularly small businesses, can also behave as ‘consumers’ or are otherwise considered to warrant protections under the law, for example, against unconscionable conduct, and from November 2016, against unfair contract terms in standard form contracts.

The QUT study found that a key difference between Australia and comparable countries reviewed in the study is the extent to which Australia’s consumer protections extend to **business-to-business transactions**.

Small business stakeholders were strongly of the view that small businesses should have similar protections **as consumers** as they often behave like individual consumers and can often lack the time and resources to protect their own interests.

Some stakeholders called for further protection under the ACL, but there were a range of views on this topic with other stakeholders suggesting the protections should be maintained or even reduced.

In terms of small businesses fulfilling their obligations under the ACL, the **Australian Consumer Survey 2016** found that the introduction of the ACL has impacted positively on businesses’ compliance with the law and understanding of their obligations and responsibilities.

However, it also found that small businesses are less likely than large businesses to agree that governments provide adequate information and advice to help businesses comply with the ACL. Small businesses are also more likely than medium-to-large businesses to disagree that the ACL adequately protects the rights of businesses.

ISSUES FOR SMALL BUSINESSES

The issues raised in submissions and consultations were broad ranging, and include:

- small business views about the **\$40,000 threshold** (see **Chapter 1.2, ‘Scope and coverage of the ACL’**)
- barriers for small businesses in enforcing their rights and accessing remedies (see **Chapters 3.1, ‘Implementing the ACL and its objectives’**; and **3.2, ‘Penalties and remedies’**)
- issues raised from a small business perspective on **specific aspects of the ACL** (see **Chapters 2.1, ‘Consumer guarantees’**; **2.2, ‘Product safety’**; and **2.5, ‘Unsolicited consumer agreements’**).

1.3.1 The ACL and small business

Some ACL provisions have been introduced with the **protection of small business** interests in mind.

For example, the Trade Practices Amendment (Fair Trading) Act 1998 amended the TPA to include a new section 51AC prohibiting **unconscionable conduct in business transactions**. This section protected businesses (other than publicly listed companies), and was introduced following concerns that existing statutory protections did not adequately protect small businesses against unfair or exploitative conduct.

This protection was introduced with criteria to assist the court in determining whether a corporation engaged in unconscionable conduct having regard to the bargaining position of the parties. As the provision targeted small business, it was originally limited to transactions that did not exceed \$1 million, but this monetary threshold was increased over the years (to \$3 million in 2011, and \$10 million in 2007) and was removed entirely in 2011.⁷⁵

From 12 November 2016, the protections available to consumers in respect of unfair contract terms will be extended to small business standard form contracts, where:

- at least one of the parties is a small business (employs less than 20 people)
- the upfront price payable under the contract is no more than \$300,000 or \$1 million if the contract is for more than 12 months.

This extension recognises that small businesses, like consumers, are vulnerable to unfair terms in standard form contracts, as they are often offered contracts on a ‘take it or leave it’ basis and can lack the resources to understand and negotiate contract terms.⁷⁶

1.3.2 Business perspectives on the Australian Consumer Law

The Australian Consumer Survey 2016 surveyed 1,210 businesses. It presents some findings by state and business size (small, medium and large) using the approach adopted by the Australian Bureau of Statistics.

Across a number of indicators, the perception by businesses of Australia’s consumer laws has improved since the ACL’s introduction. However, large businesses were more likely than small businesses to have positive perceptions [see **Box 2** below].

Box 2: Australian Consumer Survey 2016 — Business perceptions

In relation to businesses’ perceptions of the ACL, the survey found a number of positive shifts since the law’s introduction, for example:

- 84 per cent of businesses agreed the government provides adequate access to services that help consumers to resolve disputes with businesses (compared with 62 per cent in 2011)
- 70 per cent agreed most disputes between consumers and businesses end up with a fair outcome (compared with 50 per cent in 2011)
- 68 per cent agreed the government is doing enough to ensure businesses comply with the ACL (54 per cent in 2011).

75 Second Reading Speech, Trade Practices Amendment (Fair Trading) Bill 1997.

76 Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015, at [1.2].

Box 2: Australian Consumer Survey 2016 — Business perceptions (continued)

Business respondents were more likely to believe the ACL has had a positive impact on:

- their understanding of their obligations and responsibilities (57 per cent in 2016, compared to 44 per cent in 2011)
- their compliance with the ACL (56 per cent in 2016, compared to 42 per cent in 2011)
- consumers' understanding of their rights and responsibilities (50 per cent in 2016, compared to 36 per cent in 2011)
- the investment required to comply with the ACL (28 per cent in 2016, compared to 16 per cent in 2011).

However, the survey also found that business perceptions varied by business size, for example:

- 70 per cent of small businesses and 71 per cent of medium businesses agreed the government provides adequate information and advice to help them comply with the ACL (compared to 84 per cent of large businesses)
- 67 per cent of small businesses agreed that the ACL favours consumers over businesses (compared to 53 per cent of medium and large businesses)
- 29 per cent of small businesses disagreed that the ACL adequately protects the rights of businesses (compared to 18 per cent of medium and large businesses).

As outlined in **Chapter 3.1, 'Implementing the ACL and its objectives'**, while many stakeholders supported the existing guidance material on the ACL, some stakeholders indicated that information could be more tailored to accommodate the specific needs of target audiences, including time-poor businesses.

The importance of small business awareness and access to information about the ACL was also raised by stakeholders, including the Australian Small Business and Family Enterprise Ombudsman. The latter also indicated the importance of communications material that meets the specific needs of small businesses.⁷⁷

Small businesses also raised a number of specific issues discussed below, including:

- the treatment of small businesses as consumers, including the \$40,000 threshold for the definition of 'consumer' in section 3
- barriers for small business in accessing remedies, and the need for alternative dispute resolution
- small business perspectives on specific provisions of the ACL.

77 Submission from the Australian Small Business and Family Enterprise Ombudsman, page 2.

1.3.3 Small businesses as consumers

There was strong support from small business stakeholders that small businesses should have similar protections as consumers as they often resemble individual consumers in terms of their resources and sophistication when transacting.⁷⁸

For example, the Australian Small Business and Family Enterprise Ombudsman submitted that, as a matter of principle, there are sound reasons for extending protections in the ACL to business-to-business dealings.

It referred to data from the Australian Bureau of Statistics' Counts of Australian Business showing that 61 per cent of all businesses in Australia in 2016 had no employees, with a further 28 per cent having one to four employees, the size of many individual consumers' households.⁷⁹

WA's Small Business Development Corporation noted the 'dual role' of small businesses. They:

act as a supplier or manufacturer of goods and services to other businesses or individual consumers. In this role, they need education about their obligations to consumers. Where they are the supplier of goods manufactured by another business, they need information on how to deal with disputes arising between them and the manufacturer.

Small businesses are also a consumer of goods and services ("small business consumers") and in this role they need education and support in order to feel confident and empowered to participate in the market. Arguably, small businesses participate in a larger number of transactions and spend a larger amount of money than individual consumers and potentially have a greater impact on the market. Therefore, it is appropriate to recognise the importance of their role as a consumer... and protect their interests.⁸⁰

Some small business stakeholders indicated that it can be a difficult and technical exercise to determine when a business is protected under the ACL. As discussed in **Chapter 1.2, 'Scope and coverage of the ACL'**, the person or entity that is protected depends on the provision in question.

The Office of the New South Wales (NSW) Small Business Commissioner suggested that developing a clear, single overarching definition of 'consumer' applying to the entire ACL would reduce uncertainty, together with supporting guidelines.⁸¹

Similarly, the Australian Small Business and Family Enterprise Ombudsman noted the value in attempting to harmonise the scope of the protections in the ACL.

The \$40,000 threshold

This issue is explored in detail in **Chapter 1.2, 'Scope and coverage of the ACL'**.

A number of stakeholders, including small businesses stakeholders, provided views on the \$40,000 threshold for the definition of 'consumer' in the ACL.⁸²

78 For example, submissions from: SA Small Business Commissioner; Australian Small Business and Family Enterprise Ombudsman; and Small Business Development Corporation.

79 Submission from the Australian Small Business and Family Enterprise Ombudsman, page 3.

80 Submission from Small Business Development Corporation, pages 3-4.

81 Submission from Office of the NSW Small Business Commissioner, page 1.

Stakeholders highlighted the reliance of many small and medium businesses on the ACL's protections for purchases under that threshold,⁸³ with some stakeholders calling for the threshold to be increased in order to cover many common business purchases.

For example, WA's Small Business Development Corporation submitted that the implications for small businesses can be significant, particularly as the 'purchase of such goods or services represent a large investment for small businesses and failure of the supplier/service provider to deliver an acceptable product or service can have dire consequences for that small business'.⁸⁴

The potential for lost productivity means that the quantum of damage a small business can suffer as a result of defective goods could actually be higher than that suffered by an individual consumer.

Various stakeholders suggested increasing the \$40,000 threshold to take into account inflation since the threshold was last increased in 1986.⁸⁵

The Law Council of Australia's SME Business Law Committee noted that:

there are arguments for increasing this threshold from \$40,000 to a higher threshold, given that the current threshold was set in 1986. If the amount were adjusted for inflation it would be around \$100,000 in today's terms. A higher threshold would provide significant benefits to small businesses which are purchasing high value specialised equipment.⁸⁶

However, as highlighted in **Chapter 1.2, 'Scope and coverage of the ACL'**, there were a range of views on this issue, with some stakeholders calling for the threshold to be maintained or even removed so as to reduce the level of ACL protections for goods or services acquired for business use. For example, the Federal Chamber of Automotive Industries submitted that ordinary passenger vehicles should not be protected by the ACL if the vehicle was actually purchased for use in a business context, such as vehicles to be used as taxis and light commercial vehicles.⁸⁷

1.3.4 Small business access to remedies

Private legal actions

Some stakeholders provided positive feedback on guidance available on the ACL (see **Chapter 3.1, 'Implementing the ACL and its objectives'**). For example, WA's Small Business Development Corporation noted that small business consumers can use this guidance when trying to negotiate an outcome during a dispute with a larger business.⁸⁸

82 Section 3 of the ACL.

83 For example, submissions from: SA Small Business Commissioner; Law Council of Australia's SME Business Law Committee; Office of the NSW Small Business Commissioner; and Small Business Development Corporation.

84 Submission from Small Business Development Corporation, page 8.

85 For example, submissions from: Redfern Legal Centre; Law Society of NSW; Law Council of Australia's SME Business Law Committee; and Motor Trades Association of Australia.

86 Submission from SME Business Law Committee, Law Council of Australia, page 3.

87 Submission from Federal Chamber of Automotive Industries, page 5.

88 Submission from Small Business Development Corporation, page 5.

Nevertheless, some stakeholders noted the difficulties for small businesses in enforcing the ACL through private legal action, similar to the challenges faced by individual consumers. These include the cost and time associated with undertaking private actions as well as the monetary limits on the claims that some tribunals may hear.⁸⁹

For example, the SA Small Business Commissioner noted that while:

this sort of issue is troublesome for an individual consumer, the time that a small business owner needs to take away from their small business to bring such litigation, and then enforce a remedy, can only result in further losses for that business.⁹⁰

The Law Council of Australia's SME Business Law Committee also noted the 'formal' nature of tribunals, and that:

[h]istorically, these tribunals... 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... [a]n effort must be made to ensure that these Tribunals remain informal and low cost options, and do not become quasi-courts.⁹¹

The Office of the NSW Small Business Commissioner also noted the lack of clarity about when a 'business consumer' can access the Civil and Administrative Tribunal in NSW to make a claim under the ACL. Many business consumer matters are pursued in the small claims division, which only has jurisdiction to hear claims valued at up to \$10,000.⁹²

WA's Small Business Development Corporation noted that a small business that is unable to resolve a dispute swiftly with a supplier can suffer a significant detriment if the dispute impacts their cash flow and financial viability.⁹³

Alternative dispute resolution

Some stakeholders also indicated that access to **alternative or appropriate dispute resolution** was often a more time and cost-effective option for most disputes than legal actions. This was supported by findings in the Australian Consumer Survey 2016, which found that businesses were generally aware of, and positive about, dispute resolution services [see **Box 3** below].

CAANZ notes that specific issues about the operation of state-based tribunals are broader issues relating the civil justice systems in each jurisdiction. However, as noted in **Chapter 3.1, 'Implementing the ACL and its objectives'**, these are currently the subject of other review processes.

89 For example, submissions from: the Australian Small Business and Family Enterprise Ombudsman; SME Business Law Committee of the Law Council of Australia; and Small Business Development Corporation.

90 Submission from the SA Small Business Commissioner, page 7.

91 Submission from SME Business Law Committee of the Law Council of Australia, page 11.

92 Submission from the Office of the NSW Small Business Commissioner, page 2.

93 Submission from Small Business Development Corporation, page 5.

Box 3: Australian Consumer Survey 2016 — Dispute resolution

In relation to dispute resolution services, the survey found that:

- 66 per cent of business respondents were aware of dispute resolution services, compared to 59 per cent in the 2011 survey.
- 29 per cent of businesses who were aware of dispute resolution services had participated in these services with a consumer (compared with 24 per cent in 2011).
- for those who had participated in dispute resolution services, 74 per cent found the process to be at least moderately effective (compared with 63 per cent in 2011).
- 53 per cent of business respondents reported that they would be 'very likely' to participate in dispute resolution services if they were unable to resolve a consumer issue (compared with 43 per cent in 2011).
- of business respondents who had previously participated in dispute resolution, 67 per cent reported that they would be 'very likely' to participate in the future, and 20 per cent that there would be somewhat likely to do so.

The reasons for not participating in dispute resolution varied. Of those businesses respondents who were unlikely to participate in dispute resolution:

- 32 per cent preferred to resolve issues without third-party involvement or had expected to resolve the issue before it had reached that stage (compared with 22 per cent in 2011).
- 18 per cent reported that they have never experienced issues so did not see the need to participate.
- 13 per cent believed the process is not effective based on previous experience, with 4 per cent considering the process is biased towards the consumer.

CAANZ observes the importance of services available at the national, state and territory level to assist small businesses to resolve disputes. These include:

- online referral tools, such as the 'Dispute Support' service provided by the Australian Small Business and Family Enterprise Ombudsman⁹⁴
- the direct assistance provided by:
 - state and territory ACL regulators
 - state small business commissioners (including mediation and dispute services)
 - the Australian Small Business and Family Enterprise Ombudsman, which works with Commonwealth, state and territory agencies as an advocate on issues affecting small business, and directly assists small businesses, for example, by requiring alternative dispute resolution.

The ACCC, while it does not provide individual dispute resolution or mediation services, supports small businesses through:

- online education and training

94 At: www.asbfeo.gov.au/disputesupport.

- an information network
- specialist publications and referrals to mediation services.

State and territory consumer agencies also provide support to small businesses. For example, Consumer Affairs Victoria (CAV) has a dedicated Business InfoLine as well as an online small business newsletter that informs businesses about new resources, such as updated guides on the ACL and information sessions.

CAANZ also notes that issues about access to remedies by small businesses were considered by the recent Competition Policy Review. The review recommended that the ACCC take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement. It also recommended that small business commissioners, small business offices, and ombudsmen work with business stakeholder groups to raise awareness of their advice and dispute resolution services.⁹⁵

The Australian Government provided in-principle support to this recommendation, including asking the ACCC to consider how it can more actively connect small businesses to alternative dispute resolution schemes where appropriate. The ACCC has responded to this recommendation by improving its referral processes for small businesses to ensure effective referrals to other agencies, including those that can provide alternative dispute resolution services.

1.3.5 Small business perspectives on specific provisions of the ACL

Consumer guarantees

Some stakeholders noted that the definition of ‘consumer’ in section 3 of vehicles does not cover:

- vehicles that are not used principally in the transport of goods
- goods acquired for the purpose of re-supply
- goods to be used up in transformed in the course of a process of production or manufacture.

The exclusion of goods acquired for re-supply can particularly affect small business retailers who buy a product from a supplier or manufacturer, and do not have a remedy under the ACL’s consumer guarantee provisions where there is an issue with the goods.⁹⁶

Submissions also raised issues about the lack of clarity about what constitutes a ‘major failure’ to comply with the consumer guarantees as a common concern for small businesses.⁹⁷

Issues with consumer guarantees are considered in **Chapter 2.1, ‘Consumer guarantees’**.

95 Competition Policy Review, Final Report, March 2015, recommendation 53.

96 Submission from Small Business Development Corporation, pages 9-10.

97 Submission from SA Small Business Commissioner, page 7.

Unsolicited consumer agreements

Business contracts are currently exempt from the ACL's unsolicited consumer agreement provisions.⁹⁸ CAANZ notes that, while this exemption was raised in the Issues Paper, only a small number of stakeholders commented in their submission.

In supporting the removal of the exemption for small businesses, the SA Small Business Commissioner submitted that a 'small business person may be equally as vulnerable as a non-business consumer' and that 'these types of contract have become a regular source of complaint... from small businesses'.⁹⁹

In contrast, the Law Council of Australia's Competition and Consumer Committee submitted that:

[e]xtending the provisions to business contracts is unnecessary, and concerns around vulnerability and disadvantage are less relevant in a business context. Unless there is an identified harm to businesses who choose to enter into unsolicited agreements that is not being addressed under the existing laws, then there is no reason to amend the law.¹⁰⁰

Other issues

Other issues raised included:

- the difficulty for small businesses in navigating and understanding the Australian standards regulation in the **productive safety** context (see **Chapter 2.2, 'Product safety'**).
- challenges and uncertainties for small business in bringing **unconscionable conduct** cases in their business dealings (see **Chapter 2.3, 'Unconscionable conduct and unfair trading'**).
- the impacts of the **sharing economy** on incumbent businesses (see **Chapter 4.1, 'Purchasing online'**).¹⁰¹

98 Regulation 81 of the *Competition and Consumer Regulations 2010* (Cth).

99 Submission from SA Small Business Commissioner, page 8.

100 Submission from the Law Council of Australia's Competition and Consumer Committee, pages 2-3.

101 For example, submissions from: the Australian Small Business and Family Enterprise Ombudsman; and Office of the NSW Small Business Commissioner.

2. THE LEGAL FRAMEWORK

2.1 Consumer guarantees

Stakeholders generally suggested that the introduction of a national consistent set of consumer guarantee rights has improved awareness of the law, lowered compliance costs and improved the resolution of disputes. Stakeholders provided a range of views, in particular on:

- the clarity of the consumer guarantees provisions with regard to ‘acceptable quality’ (including calls for the introduction of a ‘lemon’ law for motor vehicles)
- how businesses should disclose to consumers their consumer guarantee rights.

CAANZ seeks your views on the following overarching questions:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?
- What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements? Are there any unintended consequences?

Key observations

The consumer guarantees set out what a consumer can expect of goods and services purchased, including their quality.

CAANZ notes that stakeholders, and the findings of the Australian Consumer Survey 2016, suggest that the introduction of a **consistent set of rights** across Australia in 2011 has increased awareness of the law, lowered compliance costs for businesses and improved the resolution of disputes between consumers and traders. Also, CAANZ notes that the consumer guarantees are often supported by voluntary store policies, which may offer protections that meet or exceed legal obligations.

Stakeholders generally focussed on two key issues:

- the clarity of the consumer guarantee that goods are of ‘acceptable quality’
- how businesses should disclose to consumers their rights under the ACL.

Acceptable quality

While there was support for ‘acceptable quality’ remaining a flexible principles-based test, stakeholders commented on the lack of clarity about:

- the **reasonable durability** of a good, and whether it is feasible to provide specific guidance on how long a certain type of good should last

Key Observations (continued)

- **accessing refunds**, and whether the definition of a ‘major failure to comply’ should be amended to make it clearer for both businesses and consumers, and easier for consumers (and businesses exercising their consumer rights) to prove. Some stakeholders suggested generic changes to the law that would apply to all goods, while others suggested industry-specific approaches (sometimes referred to as ‘lemon laws’).

CAANZ notes that regulators will be well placed at the end of this review process to enhance regulator guidance on acceptable quality, based on the feedback received. While there are practical implementation issues with estimating the lifespan of goods, CAANZ notes that there may be scope to expand guidance material with further examples of the key factors to consider.

CAANZ also notes that while many issues about refunds were raised in the context of **new motor vehicles** and **whitegoods**, there are benefits to maintaining a generic approach to consumer guarantees. Generic guarantees can be flexibly applied to individual circumstances, allowing the law to keep pace with changes in the market.

For this reason, industry-specific approaches are generally only preferable where it is demonstrated that generic approaches (such as the options below) have failed to adequately address problems in sectors of concern. CAANZ also notes that some stakeholders raised practical issues about if, and how, any industry-specific laws should be defined.

CAANZ further notes that industry-specific issues can be targeted through **compliance and enforcement activities**, and that this could be informed by the findings of the current ACCC market study into new car retailing. Activities may include regulators working with the industry to improve compliance (such as through best practice guidelines, or codes of conduct on providing refunds).

Disclosure of ACL rights

Stakeholders also raised issues about how consumers are informed by businesses about their ACL rights. In particular, they commented on:

- **manufacturers’ warranties** against defects and whether the mandatory text about the ACL is clear and effective in alerting consumers to the ACL
- **extended warranties** offered by retailers (which provide coverage over and above the manufacturer’s warranty), and whether their relationship with the ACL is clearly disclosed.

OTHER ISSUES WERE RAISED ABOUT:

- the **scope of the provisions** (such as their application to financial services and products, and the \$40,000 threshold for purchases for non-personal use) are discussed in **Chapter 1.2, ‘Scope and coverage of the ACL’**.
- **dispute resolution processes** are discussed in **Chapter 3.1, ‘Implementing the ACL and its objectives’**. It should be noted that many of these issues extend beyond the scope of the ACL and have implications for the broader justice system in each state and territory, and are being considered in other reviews.
- **specific issues in the online context**, including digital content and online auctions, are discussed in **Chapter 4.1, ‘Purchasing online’**.

Key Observations (continued)**OPTIONS**

1. Clarify the law on what constitutes a ‘major’ failure. For example, this could involve specifying that:
 - a safety issue will trigger a ‘major failure’, or will do so if it is not resolved by a repair or replacement
 - multiple ‘non-major failures’ can trigger a ‘major failure’.
2. Amend the current requirements regarding manufacturers’ warranties against defects, by:
 - reviewing and simplifying the mandatory text to be included with a manufacturer’s warranty (with appropriate transition arrangements to minimise regulatory burdens), or
 - exploring alternative ways to inform consumers about their ACL rights when manufacturers offer a warranty.
3. Enhance transparency regarding extended warranties, for example, by:
 - establishing disclosure requirements, and requirements for agreements to be clear and in writing
 - introducing protections that allow consumers more time to reconsider their decision, such as a cooling-off period.

2.1.1 Impact of the consumer guarantees provisions

When consumers buy goods and services that break too easily, do not work, or do not perform as generally expected, the ACL provides consumers with rights, known as consumer guarantees.

Stakeholders generally suggested that the introduction of a national system of consumer guarantees has provided more clarity and consistency for all parties. For example, CHOICE submitted that ‘[t]he consumer guarantees themselves are well-written laws that empower consumers seeking remedies in most industries’,¹⁰² while the Retail Council submitted that it is ‘comfortable with the overall intent of the general and specific protections in the ACL.’¹⁰³

The Retail Council also stated that ‘[n]o retailer wants to have customers that are unhappy with the service or products they received’.¹⁰⁴ Several industry groups noted in consultations that stores often have voluntary store policies that may go further than a business’s legal requirements, and can also offer competitive advantages for traders in creating goodwill and repeat custom.

The NSW Business Chamber noted the:

considerable amount of effort and resources that has gone into educating consumers and businesses about their rights and responsibilities, including the consumer guarantees framework. While there is still work to do, fundamentally altering the framework would undermine these efforts.¹⁰⁵

¹⁰² Submission from CHOICE, page 23.

¹⁰³ Submission from Retail Council, page 7.

¹⁰⁴ Ibid, page 4.

¹⁰⁵ Submission from NSW Business Chamber, page 7.

Further, Associate Professor Jeannie Paterson and Professor Elise Bant from Melbourne University commented that the consumer guarantees are ‘expressed in relatively clear’ terms. They also noted the ‘variety of’ educational tools and ‘active’ enforcement against traders who mislead consumers about the consumer guarantees. Nevertheless:

some simple amendments might be made to make the regime more accessible to consumers seeking to enforce their rights to a remedy and to improve the clarity of the regime for consumers and traders alike, without upsetting the overall balance and flexibility of the regime.¹⁰⁶

The findings of the Australian Consumer Survey 2016 suggest that the introduction of the ACL has increased awareness of consumer rights, reduced compliance costs for businesses, and helped consumers and traders resolve problems themselves [see **Box 4** below].

Box 4: Australian Consumer Survey 2016 — consumer problems

In relation to **experiences with consumer problems**, the survey found that in 2016:

- The most common types of consumer problems related to faulty, poor quality, unsafe or poor quality products (30 per cent), poor customer service (26 per cent), and incorrect or misleading information (24 per cent).
- 82 per cent of consumers took action to resolve their consumer problem, up from 75 per cent in 2011.
- 84 per cent of resolved cases were settled directly between the consumer and the trader.
- The incidence of consumers experiencing at least one problem related to the purchase of a product or service in the last two years has fallen (59 per cent, compared to 74 per cent in 2011), with decreases evident across all states and territories.
- Of the 16 categories of products for which there is data to compare, 11 categories showed a statistically significant decrease in the incidence of consumer problems since 2011.
- The annual cost for businesses in dealing with consumer problems has decreased by \$3.5 billion (\$18.03 billion compared to \$21.56 billion in 2011).

Although it is acknowledged that consumers were only asked to recall problems within the last two years for each survey, these findings are indications that generally, the introduction of the ACL has helped improve trader behaviour and dispute resolution, and reduce regulatory burdens for businesses.

Nevertheless, while stakeholders found that the overall framework of the consumer guarantees regime was appropriate, there was a substantial amount of specific feedback on the consumer guarantee that goods are of ‘acceptable quality’. In particular, stakeholders raised comments about:

- uncertainty about the **reasonable durability** of a good
- issues with **accessing refunds**, particularly in determining whether a failure to comply is ‘major’, and therefore triggers a refund entitlement.

106 Submission from Associate Professor Jeannie Paterson and Professor Elise Bant, Melbourne University, page 2.

2.1.2 'Acceptable quality' for goods

Under the ACL, both suppliers and manufacturers guarantee that a good sold is of 'acceptable quality'. This includes goods that are new, second-hand, leased and hired.

The protections apply to consumers, but they also apply to businesses, including small businesses, where they purchase:

- goods costing more than \$40,000 and which are normally used for personal, domestic, or household purposes
- a vehicle or trailer used mainly to transport goods on public roads (of any price).

The provisions do not apply where a business purchases goods to:

- re-supply them (that is, as stock)
- transform them through processing, production or manufacture, or
- to repair or treat other goods or fixtures on land.

As noted in existing guidance material, *Consumer guarantees: A guide for businesses and legal practitioners*, the test for acceptable quality is whether a reasonable consumer, fully aware of a product's condition (including any hidden defects) would find it:

- fit for all the purposes for which products of that kind are commonly supplied — for example, a toaster must be able to toast bread
- acceptable in appearance and finish — for example, a new toaster should be free from scratches
- free from defects — for example, the toaster's timer knob should not fall off when used for the first time
- safe — for example, sparks should not fly out of the toaster
- durable — for example, the toaster must function for a reasonable time after purchase without breaking down.

The test for durability is not based on any average of typical lifespan, but on what is reasonable in the specific circumstances. This takes into account a range of factors, including:

- the nature of the product — for example, a major appliance such as a fridge is expected to last longer than a toaster
- the price paid for the product — for example, a cheap toaster is not expected to last as long as a top-of-the-range one
- representations made about the product — for example, in any advertising, on the manufacturer's or retailer's website or in the instruction booklet
- representations made to the consumer about the product before purchase
- any other relevant facts, such as the way the consumer has used the product or whether the product has been subject to a voluntary or mandatory recall.

Reasonable durability

ACL regulators have published guidance material on reasonable durability on their websites, and about 'acceptable quality' more broadly in *Consumer guarantees: A guide for businesses and legal practitioners*, last updated in March 2016.¹⁰⁷

In 2013, regulators also published *Electrical & whitegoods — an industry guide to the Australian Consumer Law*.¹⁰⁸ This guide includes the example on toasters noted above.

The current test for durability is flexible, principles-based, and designed to account for the specific circumstances of each good. This is to avoid treating goods alike when they may be new, second-hand (or 'seconds'), entry level, premium, or intended for a specific type or intensity of use. This principles-based approach allows courts and tribunals to determine the reasonable durability based on the specific facts of each case and each product.

However, some stakeholders commented on the uncertainty of this approach. For example, CHOICE noted that:

the expected longevity of a product is an important factor that consumers weigh up when choosing to buy one product over another, and they should be able to rely on representations from the manufacturer or retailer when making this decision.¹⁰⁹

CHOICE submitted that more specific guidance should be provided on how long goods should last:

Consumers who have purchased expensive whitegoods that fail at the seven or eight year mark, for instance, are in our experience less able to confidently negotiate a remedy with the business. Some of these consumers have chosen to pursue their right to remedies in court or tribunals, but this can be an expensive and time-consuming option. The confusion over durability should be addressed through the provision of clear guidance on how long a product can be expected to last. The ACCC should provide overarching guidance, including a series of examples in common product categories. Manufacturers and retailers should be encouraged to provide direct representations about individual products.¹¹⁰

Other stakeholders noted the intended flexibility of the test. For example, the Retail Council noted that the '[reasonable] timeframe will vary from product to product and so is not explicitly defined in the ACL', with different customer expectations being 'most prevalent in purchases of household appliances and furniture'.¹¹¹

Similarly, the Australian Chamber of Commerce and Industry noted that:

some uncertainty is inevitable given the consumer guarantee framework must be principles based to provide the flexibility needed to adapt appropriately to transactions involving different goods and services ...

107 At: www.consumerlaw.gov.au/files/2015/09/consumer_guarantees_guide.pdf.

108 At: www.accc.gov.au/publications/electrical-whitegoods-an-industry-guide-to-the-australian-consumer-law.

109 Submission from CHOICE, page 8.

110 Submission from CHOICE, page 12.

111 Submission from Retail Council, page 7.

However, it is important to recognise that different consumers have different expectations and the concept of a representative reasonable consumer is just a necessary legal fiction.¹¹²

The NSW Business Chamber submitted that with a principles-based approach:

it is inevitable that there will be a degree of uncertainty as to how the law applies in specific circumstances. But a more prescriptive approach would increase uncertainty and complexity for buyers and sellers.

A classic example of this is to consider the time period for which a consumer good should function. Even if different time periods were classified for different types of goods there would be significant variances within those categories — for example, should a \$10 toaster be expected to last as long as a \$200 toaster? While it can be argued that the concepts of ‘major’ and ‘minor’ failure and the subsequent implication for whether a consumer has the right to demand a refund is confusing, it is not clear that a better approach exists.¹¹³

The Retail Council noted some of the practical challenges of providing guidance on the expected durability of different products. It submitted that the:

large number of different products available, and new products constantly coming on the market, means that developing a definitive list of what constitutes a reasonable time period that a product failure is covered by the ACL is not practical.¹¹⁴

The Consumer Electronics Suppliers Association also highlighted practical challenges, noting that

products purchased today may not be able to utilize newer technology in say three years’ time. Analogue television receivers in the past could last for many years however digital television is a rapidly changing technology so that a television purchased say three years ago may not be able to receive new broadcast service available today. This is no “fault” of the goods or the broadcasters[.]¹¹⁵

Further, as noted in **Chapter 4.1 ‘Purchasing online’**, there are a range of digital products that may blur traditional product categories, including ‘smart’ products such as computerised fridges. Other products may be a good or a service (triggering different consumer guarantees), and need to be assessed on a case-by-case basis.

CAANZ notes that the practical challenges with estimating the lifespan of goods, and notes that it is not generally helpful to have guidance material that is overladen with qualifications and disclaimers.

Nevertheless, CAANZ notes that there may be opportunities to enhance the reach and efficacy of existing guidance materials without being overly prescriptive, and to update them as part of ongoing processes to improve guidance material. This may include an expanded or dedicated section on durability in the general guide on consumer guarantees, together with more examples or visual aids.

112 Submission from Australian Chamber of Commerce and Industry, page 8.

113 Submission from NSW Business Chamber, page 7.

114 Submission from Retail Council, page 8.

115 Submission from Consumer Electronics Suppliers Association, page 4.

There may also be scope to include more general guidance about ‘acceptable quality’ to address other areas of uncertainty raised by stakeholders, including;

- the costs of technicians (in order, for example, to replace a product that is installed in a consumer’s home)
- the cost of returning goods rejected by the consumer
- sending consumers to the manufacturer
- supply chain issues
- consequential losses
- factors for determining a reasonable time for providing a remedy.¹¹⁶

Some of these issues are already included in the guide for electrical and whitegoods, but could be added to the general guide and discussed in a wider context. CAANZ also notes that the general guide does not currently include some of the detail of the electrical and whitegoods guide, such as the flowchart of key factors.

CAANZ notes that regulators will continue to monitor statements made by manufacturers about durability, and seeks views on what more, if anything, should be done to encourage businesses to provide consumers with more information about the durability of their products.

Further questions

10. Could the issues about the durability of goods be addressed through further guidance and information?
11. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance, for example, the cost of returning rejected goods and what may constitute a ‘significant’ cost?
12. If they are not suited to this approach, why not? For example, do the issues (such as the costs of technicians or returning a good) require legislative clarification, or should the status quo remain to ensure a high level of flexibility?
13. What more, if anything, can be done to encourage businesses to provide more information about the durability of their products? What, if any, further guidance on durability is feasible while still allowing important differences between goods of a certain type to be recognised?

2.1.3 Barriers to accessing refunds

CAANZ observes that many stakeholders discussed the evidentiary barriers to accessing remedies. Many of these issues related to the court and tribunal processes established in the broader civil justice systems of each state and territory.

116 For example, submissions from: Consumer Electronic Suppliers Association of Australia; Australian Furniture Removers Association; Australian Industry Group; Baker & McKenzie; Australian Retailers Association; Caravan Camping and Touring Industry and Manufactured Housing Industry Association of NSW; and Commercial Vehicle Industry Association of Australia.

These issues are briefly noted below as part of the overarching context in which the requirement for a ‘major failure’ operates. However, many of the evidentiary issues extend beyond the scope of the ACL and are the subject of other reviews and existing streams of work [see **Chapter 3.1, ‘Implementing the ACL and its objectives’**].

Evidentiary issues

Generally, the legal onus is on a party making a civil claim to prove that claim ‘on the balance of probabilities’. A consumer must therefore show that the failure existed, or was latent, at the time of delivery or supply, and that the failure amounted to a ‘major’ (rather than non-major) failure. This may involve costs for consumers who may need experts to provide evidence.

The major / non-major distinction recognises that refunds are often the remedy of choice for consumers, particularly where they would not have bought the good had they known of the issue.

However, the distinction also balances access to refunds with the costs for traders, recognising that many traders have commercial incentives to provide good customer service. For example, the Australian Industry Group noted that its members (which include manufacturers) ‘have clear interests in maintaining positive relationships with retailers and consumers’.¹¹⁷

The distinction also acknowledges that a fault may be due to the consumer’s heavy use, fair wear and tear, or inappropriate use, an issue also noted by industry stakeholders.¹¹⁸

CHOICE noted that the level of public information and evidence available to consumers is diminished where confidentiality (or non-disclosure) agreements are used. Such agreements may provide consumers with compensation or some other remedy on the condition that the consumer does not disclose the issue. CHOICE submitted that, in the context of motor vehicles, there is already a ‘power imbalance’ between consumers and traders and that ‘[d]enying them the right to talk about their problems and share knowledge with regulators, advocates and other consumers exacerbates this.’¹¹⁹

Non-disclosure agreements

CHOICE recently surveyed 1,505 new car buyers and found that 16 percent of consumers who raised problems over the last four years had signed a confidentiality agreement with a trader in order to receive a repair or refund.¹²⁰

CHOICE suggested banning non-disclosure agreements for settlement that do not offer more than existing ACL rights, noting that it is an ‘affront’ for a company to prevent injured consumers from discussing their injuries.¹²¹

CAANZ notes that suppliers cannot ‘contract out of’ the consumer guarantees under the ACL.¹²² Contractual provisions that seek to do so are void, although suppliers may offer protections that exceed the ACL.

117 Submission from Australian Industry Group, page 1.

118 For example, submissions from: Australian Furniture Removers Association; and Consumer Electronics Suppliers Association.

119 Submission from CHOICE, page 24.

120 CHOICE, *Turning lemons into lemonade: consumer experiences in the new car market*, 15 March 2016, page 12.

121 Submission from CHOICE, page 29.

122 Section 64(1) of the ACL provides that a term of a contract is void to the extent that the term purports to, or has the effect of, excluding, restricting or modifying the consumer guarantees. If a consumer guarantee applies, section 67

While some confidentiality agreements may restrain, or be seen to restrain, consumers from making complaints to regulators and reduce the level of information that is available to regulators, some of these issues have been dealt with in the application laws of various jurisdictions [see **Box 5** below]. The use of confidentiality or non-disclosure clauses in standard form contracts is also discussed in **Chapter 2.4, 'Unfair contract terms'**.

Box 5: Disclosure and immunity provisions

Some jurisdictions have specific provisions in on disclosure and immunity in their local legislation that applies the ACL as a law of those jurisdictions.

For example, in Queensland's *Fair Trading Act 1989*:

- section 107 specifies that the Act has effect despite any provision in any contract or agreement that purports to provide otherwise, whether expressly or impliedly
- section 109 protects a person who makes a complaint to the Queensland Office of Fair Trading from any liability because of that disclosure.

In Victoria, section 229 of its *Australian Consumer Law and Fair Trading Act 2012* specifies that a person is not liable for damage or injury suffered by another person merely because they, in good faith:

- made a complaint to CAV, or
- provided a document, information, or evidence to CAV or the Victorian Civil and Administrative Tribunal about a breach or potential breach.

While some evidentiary issues are beyond the scope of the ACL itself, many consumer stakeholders noted that, given these difficulties, there is a need for the ACL to be clearer on what constitutes a 'major' failure. Issues about the clarity of 'major' failure were also raised by a number of industry stakeholders.¹²³

2.1.4 Lack of clarity about 'major failures'

Stakeholders provided various examples of where they saw unnecessary complexity in determining whether or not a failure to comply is 'major', including where:

- a good is unsafe
- there are multiple non-major failures to comply with the consumer guarantees
- a repair or replacement cannot resolve the problem
- a good is 'dead on arrival', or fails very quickly in its product life.

prevents suppliers from trying to exclude their liability by using a contractual term that applies the law of another country.

123 For example, submissions from: Australian Retailers Association; Retail Council; Australian Industry Group; Australian Automotive Dealer Association; and Caravan Industry Association of Australia.

Where a good is unsafe

A 'major failure' is defined to include a scenario where a good 'fails to be of acceptable quality because it is unsafe'.¹²⁴ However, CAANZ notes some uncertainty in the market about this provision, given that:

- the definition of 'acceptable quality' requires a good's safety be determined by the standards of a reasonable consumer,¹²⁵ and it is not clear whether some safety concerns are still 'acceptable' to the reasonable consumer, noting that the ACL does not explicitly require goods to be safe (see **Chapter 2.2, 'Product safety'**)
- existing safety standards may only apply to parts of a good, but the consumer guarantees are directed at goods as a whole
- even large retailers do not necessarily provide accurate information about refunds where the goods are subject to a safety recall [see **Case study 1** below].

Due to the use of non-disclosure agreements, CHOICE stated that it does 'not believe that case law is likely to settle this matter', and that it is 'difficult to determine how many other recalls may have misled consumers about their refund rights'.¹²⁶

It is unclear, however, whether stakeholders thought that there should be distinctions between unsafe products that may cause imminent harm, and products that are technically 'unsafe' if the safety issue is left untreated over time.

CHOICE also commented on the information that traders should provide in voluntary and mandatory recalls. This is discussed in **Chapter 2.2 'Product Safety'**.

Case study 1: Recall of Samsung washing machines

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.

124 ACL, section 260(e).

125 ACL, section 54(2).

126 Submission from CHOICE, page 35.

Where there are multiple non-major failures

While the ACL currently allows consumers a reasonable time to reject the good where the supplier fails or refuses to provide a remedy,¹²⁷ Professor Stephen Corones from Queensland University of Technology noted that this can be difficult to apply. What is 'reasonable' depends on the nature of the goods and other factors, including the amount of use that is reasonable before a failure becomes apparent.¹²⁸

The evidentiary difficulties for consumers to prove a major failure at the time of delivery are even more complex where there have been multiple repairs, and there is a time lag between the last repair and the problem re-emerging.

The Queensland Law Society supported:

augment[ing] the existing consumer guarantees regime, to provide that in certain circumstances a series of 'minor' failures (for example, a certain number of minor failures within a defined period) would be deemed to constitute a 'major' failure. The result of this addition would be that the consumer could choose between the existing remedies of repair, refund or replacement.

The Society submits that a modest change of this sort will provide useful and appropriate protection to consumers, whilst minimising the nature and extent of any changes to the ACL (including compliance costs for businesses).¹²⁹

Associate Professor Paterson and Professor Bant noted that the:

[tr]ibunals differ as to whether a series of failures occurring at a similar time and which do not individually amount to a major failure may collectively constitute a major failure giving rise to a right to reject. In many cases the arguments has been accepted but there remain a number of decisions going the other way. The issue could easily be clarified by legislation that provides that courts may consider a combination of defects occurring in a short period of time in deciding whether there has been a major failure.¹³⁰

CHOICE seemed to suggest that the issue of multiple failures was one of clarification rather than change. It supported 'guidance confirming that a series of minor defects can constitute a major defect', which 'could be released by the ACL regulators, or incorporated into the legislation'.¹³¹

127 ACL, section 262.

128 Submission from QUT Commercial and Property Law Research Centre, page 4.

129 Submission from Queensland Law Society, page 6.

130 Submission from Associate Professor Jeannie Paterson and Professor Elise Bant, Melbourne University, page 4, and footnotes citing, as cases where the Victorian tribunal did not accept that multiple non-minor failure could constitute a major failure: *Marwood v Agrison Pty Ltd* [2013] VCAT 1549; and *Australia Rong Hua Fu Pty Ltd v Ateco Automotive Pty Ltd (Civil Claims)* [2015] VCAT 756.

131 Submission from CHOICE, page 27.

The cycle of failed repairs — where a repair or replacement cannot resolve the problem

Associate Professor Paterson and Professor Bant noted that the current regime, with its distinction between major and non-major failures:

aims to strike a fair balance between the interests of consumers and traders. If a consumer can obtain a repair or replacement of goods not of acceptable quality, the consumer will often be satisfied without the need for a refund. The situation is quite different where goods continue to break despite being repaired or replaced. Such a pattern of defects suggests that the goods are not of acceptable quality and moreover that the consumer has purchased a “lemon”.¹³²

They further submitted that consumers ‘should not have to put up with multiple attempts at repair’, noting provisions in the UK that allow refunds after a failed or impossible repair or replacement [see **Box 6** below].¹³³

The UK provisions were intended to prevent consumers from being trapped in what their Law Commission and Scottish Law Commission called a ‘cycle of failed repairs’.¹³⁴ The Commissions noted that it is inappropriate to deny refunds where a ‘product has actually proved to be dangerous or where the consumer can show that the retailer has behaved so unreasonably as to undermine trust between the parties’.¹³⁵ In these circumstances, a consumer should not be required to negotiate repairs, or ongoing repairs, with a trader they no longer trust.

Box 6: UK rights to refunds (rejections) after a failed repair or replacement

Under the UK’s *Consumer Rights Act 2015*, a consumer has a 30-day short-term right to reject a good that does not meet the contractual terms. The Act provides that ‘satisfactory quality’, among other things, is a term of the contract. This right does not apply to perishable goods.

The UK’s Law Commissions proposed a 30-day period because it is easier to understand, communicate, and apply than the concept of ‘reasonable’ time.¹³⁶

After the 30-day right to reject expires, the consumer may still reject the good after one failed repair or replacement (a final right to reject).¹³⁷

A failed repair or replacement includes situations where:

- after one repair or replacement, the good fails to conform with the contract, noting that the Act provides that ‘satisfactory quality’, among other things, is a term of the contract

132 Submission from Associate Professor Jeannie Paterson and Professor Elise Bant, Melbourne University, page 3.

133 Ibid, page 3.

134 The Law Commission and Scottish Law Commission, *Consumer remedies for faulty goods* (Law Com No 317 and Scot Law Com No 216), November 2009, page 21, at: http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc317_Consumer_Remedies_Faulty_Goods.pdf.

135 Ibid, page 80.

136 Ibid, pages 21 and 28.

137 *Consumer Rights Act 2015* (UK), sections 22 and 24(5).

Box 6: UK rights to refunds (rejections) after a failed repair or replacement (continued)

- the consumer cannot ask for a repair or replacement because it is impossible, or because one would be disproportionate to the cost of the other. Either remedy is disproportionate to the other if it imposes costs on the trader which, compared to the other remedy, are unreasonable, taking into account:
 - the value which the goods would have if they conformed to the contract
 - the significance of the lack of conformity
 - whether the other remedy could be effected without significant inconvenience to the consumer
- the consumer has requested a repair or replacement but the trader has failed to do so within a reasonable time, or without causing significant inconvenience to the consumer, taking into account the nature of the goods, and the purpose for which they were acquired.¹³⁸

The Act does not affect a consumer's right to seek other remedies for a breach, including damages, provided there is no double recovery for the same loss.¹³⁹

'Dead on arrival' — where goods never really worked

The findings of the Australian Consumer Survey 2016 suggest that most consumer problems manifest within the first month after purchase [see **Box 7** below].

Comments made by individual consumers through the ACL website, www.consumerlaw.gov.au, included concerns about expensive goods failing quickly, such as new motor vehicles that were unusable the next day, or even within a few weeks, and then being subject to ongoing cycles of repairs.

Some stakeholders suggested that where a good essentially never worked, or failed so early in their product lifespan that no reasonable consumer would have bought it, then there is (or inherently likely to be) a 'major' failure. This is, in part, recognised by store 'dead on arrival' policies that allow for refunds within a limited time period.

Box 7: When do most problems occur?

The Australian Consumer Survey 2016 found that where consumers identified a consumer problem of some kind, 58 per cent of problems were identified in the first month after purchase.

Consumer problems related to food/drink, clothing, footwear, cosmetics or other personal products were more likely to be identified within 24 hours of purchase, whereas consumer problems related to services (such as utility services and Internet Service Providers) were more likely to be identified more than a year after purchase.¹⁴⁰

138 Ibid, section 23.

139 In joint view of English and Scottish Law Commissions, damages remain important as by the time consumers go to court they often have had to arrange for repair or replacement themselves. See: The Law Commissions, *Consumer remedies for faulty goods*, 2009, (Law Com No 317; Scot Law Com No 216), November 2009 page 45.

140 EY Sweeney, *Australian Consumer Survey 2016*, page 44.

Associate Professor Paterson and Professor Bant submitted that:

[g]enerally well-functioning goods do not usually exhibit a defect within a short time of purchase. Accordingly, where goods do exhibit a fault within a very short time after purchase, consumers should not be required to submit the goods for repair but should be free to reject the goods and walk away from the transaction if they so choose. A model for this approach is found in the United Kingdom’s Consumer Rights Act 2015.¹⁴¹

Baker & McKenzie noted that the UK approach could also deal with industry concerns about consumers raising problems after prolonged use. It submitted that

[w]here a consumer has enjoyed the use and benefit of a product over a significant time, it is not fair or appropriate that they be able to demand a full refund or replacement of the product.

It noted that a ‘better option’ would be to create a limited right for full refunds or replacements with other remedies available outside that timeframe, and that this has been ‘extensively and considered and acknowledged’ in the UK (see **Box 6** above).¹⁴²

2.1.5 Industry-specific concerns

The two sectors that were the subject of most stakeholder concern were new motor vehicles, and to a lesser extent, whitegoods.

Nearly half of the comments from individuals through the ‘comments’ field on the ACL website were about consumer guarantees, and most of these related to calls for ‘lemon laws’ for motor vehicles. This was the most commonly raised issue from individual consumers.

Some individuals noted problems with a cycle of failed repairs. Others raised safety issues, noting that they were too frightened to drive the cars, and the emotional and financial damage incurred not only by having an unusable car, but in trying to seek redress.

These concerns were also noted by Lemon Laws 4 Aus, who submitted that when a consumer:

decides not to burden themselves with unnecessary stress and chooses to instead sell or trade out of an unsafe, unreliable lemon vehicle, in many instances it is the consumer, not the supplier, who will incur a financial loss from this exchange.

Unfortunately, when lemon vehicles are then presented into the second hand market ... these lemon vehicles will become an emotional and financial burden on the next unsuspecting purchaser.¹⁴³

The Australian Automotive Aftermarket Association noted that while it may be ‘a debatable point’ as to how ‘widespread’ the problems are, there are ‘individual reports’ of:

numerous repairs over lengthy periods of time [that] incur significant cost to the consumer in financial loss and health outcomes. These stories are often harrowing, are

¹⁴¹ Submission from Associate Professor Jeannie Paterson and Professor Elise Bant, Melbourne University, page 3.

¹⁴² Submission from Baker & McKenzie, page 4.

¹⁴³ Submission from Lemon Laws 4 Aus, page 2.

of great concern, and even if these are isolated cases, the reason that they receive so much attention is the fear that it could be happen to any consumer.¹⁴⁴

CHOICE also noted particular difficulty with returning whitegoods after the seven or eight-year mark.¹⁴⁵

Is there a need for industry-specific laws?

Some stakeholders have suggested specific refund rights for motor vehicles.¹⁴⁶ For example, Legal Aid Queensland submitted that:

the ACL should be amended to include a definition that defines a new car as a lemon and not of acceptable quality in the following circumstances:

- (i) It has been off the road and in repair for a total of five week across a two-year period; or
- (ii) A total of five non-scheduled repairs required across the two year period; or
- (iii) A total of two safety related non-scheduled repairs in the two year period.¹⁴⁷

Legal Aid NSW supported industry-specific laws together with a reversed onus of proof (so that the trader would be required to prove the alleged fault did not exist at the time of supply or delivery). It noted, however, the need to distinguish second-hand from new cars through a 'limit' (based on age or distance travelled).¹⁴⁸

Professor Corones suggested that 'three attempts at repairs', or else 'three months' to provide a remedy, should be the upper limit for failed repairs and replacements for motor vehicles.¹⁴⁹

In contrast, a number of industry stakeholders raised concerns about industry-specific regulation for motor vehicles.¹⁵⁰ For example, the Australian Automotive Dealers Association noted that there is 'no agreed definition' of 'lemon' vehicles in the US. It did not consider it 'possible to draft a definition that provides sufficient certainty for consumers, businesses and Tribunals as to the problem that is intended to be addressed'.¹⁵¹

Similarly, the Motor Trade Association of South Australia noted that:

whether a fault occurs because of product failure or because of poor use; unreasonable expectation; natural wear and tear or inappropriate vehicle selection for a given task is

144 Submission from Australian Automotive Aftermarket Association, page 12.

145 Submission from CHOICE, page 12.

146 For example, submissions from: Lemon Laws 4Aus; Legal Aid NSW; Legal Aid Queensland; and Legal Services Commission of SA.

147 Submission from Legal Aid Queensland, page 12.

148 Submission from Legal Aid NSW, pages 13-14.

149 Submission from the Commercial and Property Law Research Centre, Queensland University of Technology, page 5.

150 For example, submissions from: Motor Trades Association of Queensland; Motor Trade Association of WA; Motor Traders' Association of NSW; Motor Trades Association of Australia; Motor Trade Association of SA; Victorian Automobile Chamber of Commerce; and Australian Automotive Dealers Association Ltd.

151 Submission from Australian Automotive Dealers Association Ltd, page 7.

highly subjective and has a material impact on the performance of a vehicle and on the efficacy of any repairs.¹⁵²

Other definitional issues were raised in consultations, such as how to:

- count multiple repairs, particularly where a mechanic can only identify a problem by elimination or 'trouble shooting'
- calculate the time spent in servicing, particularly where an issue is outside a repairer's control, for example, when parts may need to be imported
- take into account widely disparate price points and characteristics of different cars, and car parts, noting the risk that a blanket standard could become a 'lowest common denominator'. If so, the industry-specific requirements may not offer any, or much, protection beyond existing protections, including manufacturers' warranties.

The Motor Trade Association of Western Australia noted that the ACL already provides 'a substantial set of remedies', and that a vehicle is not generally an 'impulse buy'.¹⁵³

The Victorian Automobile Chamber of Commerce raised concerns as to the likely cost to business if such an approach was adopted. It noted that the automotive industry

contains approximately 65,000 businesses nationally, the vast majority of which (95%) are small and family owned and operated businesses.

For the year ended June 2015, aggregate employment for the industry was recorded at 362,000 persons. In gross domestic product (GDP), the automotive industry as a whole accounted for approximately \$38.5 billion or 2.5% of Australia's annual GDP in current prices in 2014-15.

The industry is very competitive with small profit margins, consumer behaviour limits [the] capacity of industry to raise prices, large multi-nationals (insurance companies, the oil industry, supermarkets, vehicle manufacturers) heavily influence consumer behaviour and/or price. The cost of doing business is high due to the ongoing regulatory creep and the rapid technology advances requiring high-level skills and expensive technology in the repair service process.¹⁵⁴

Consumer advocates expressed different views on how to address the issue. For example, Consumer Action Law Centre supported a reversed onus of proof for all defective goods,¹⁵⁵ while CHOICE preferred a greater focus on compliance:

- developing guidance confirming that a series of minor failures can constitute a major failure
- fast-tracking complaints about motor vehicle issues for resolution and investigation
- publishing complaints on a central database, and reporting annually on the industry's 'progress towards compliance'.

152 Submission from Motor Trade Association of South Australia, page 10.

153 Submission from the Motor Trade Association of Western Australia, pages 4 and 7.

154 Submission from the Victorian Automobile Chamber of Commerce, page 3.

155 Submission from Consumer Action Law Centre, page 26.

CHOICE further submitted that if a compliance approach ‘fails to resolve the problems in the industry within two years, governments should introduce industry-specific lemon laws’.¹⁵⁶

WEstjustice Western Community Legal Centre called for ‘lemon laws’ for all new motor vehicles within two years of sale,¹⁵⁷ while the Ethnic Communities Council of NSW was ‘unsure’ about ‘lemon’ laws. It pointed to growing concerns in other sectors, such as the energy sector.¹⁵⁸

The Queensland Law Society submitted that:

the ACL should maintain its principle-based approach to consumer laws, and apply them consistently across the economy... [I]f any additional protection against the purchase of ‘lemons’ is proposed to be introduced, those protections should apply broadly rather than to specific industries (for example, motor vehicles).¹⁵⁹

Further, the findings of the Australian Consumer Survey 2016 suggest that the issues with defective goods are not limited to the motor vehicle industry, with many other product categories having higher incidences of consumer problems [see **Box 8** below].

Box 8: Research into the incidence of ‘lemon’ motor vehicles

The **Queensland Parliament’s Legal Affairs and Community Safety Committee**, in its November 2015 report, found that ‘[w]hile there was insufficient evidence presented to the committee to enable it to draw a conclusion that ‘lemons’ are a prevalent issue, what was very clear is that where a consumer has purchased what they perceive is a lemon, it is of great significance to that individual, with significant health and financial costs.’¹⁶⁰

CHOICE, in its March 2016 report, found that:

- 66 per cent of its survey respondents reported a problem with their new car within five years
- 52 per cent of all the survey respondents reported only minor problems that did not prevent use of their car
- 14 per cent faced a major problem or a combination of major and minor problems.¹⁶¹

The **Australian Consumer Survey 2016** found that 8 per cent of respondents who purchased a motor vehicle within the last two years reported a consumer problem of any kind, down from 16 per cent percent in 2011.¹⁶² This was despite the ‘motor vehicle’ category being expanded in the 2016 survey to include problems with fuel. Of the reported problems:

- 44 per cent had been resolved
- 15 per cent resolved but not to the consumer’s satisfaction

156 Submission from CHOICE, pages 23-24.

157 Submission from WEstjustice Western Community Legal Centre, page 24.

158 Submission from Ethnic Communities Council of NSW, page 4.

159 Submission from Queensland Law Society, pages 5-6.

160 Queensland 55th Parliament, Legal Affairs and Community Safety Committee, *Report No 17: ‘Lemon’ Laws — Inquiry into consumer protections and remedies for buyers of new motor vehicles*, November 2015, page xi, at: www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2015/5515T1704.pdf

161 *Turning lemons into lemonade: Consumer experiences in the new car market*, CHOICE, 15 March 2016, page 5, at: www.choice.com.au/~media/93fca6f74556402390197f4f1ed57955.ashx.

162 EY Sweeney, *Australian Consumer Survey 2016*, page 40.

Box 8: Research into the incidence of 'lemon' motor vehicles (continued)

- 30 per cent were unresolved, and
- 10 per cent in the process of being resolved.¹⁶³

The survey also found 15 categories of products that appeared to have a higher incidence of problems than motor vehicles in 2015. Some of these are also important for consumer wellbeing, including:

- **telecommunications products or services** — 26 per cent of consumers who purchased in this category in the last two years reported a problem (down from 31 per cent in 2011)
- **electronics / electrical goods** — 19 per cent of consumers who had purchased in this category in the last two years reported a problem (down from 26 per cent 2011)
- **utility services** — 15 per cent of consumers who had purchased in this category in the last two years reported a problem (down from 33 per cent percent in 2011).¹⁶⁴

CAANZ notes the wide range of stakeholder views on this issue, as well as the many benefits provided by having a nationally consistent, generic consumer law.

Generally, industry-specific regulation would only be preferable to a generic approach where it can be demonstrated that there are issues particular to that industry, and that generic approaches (such as **Option 1** below) would not adequately address the problem.

CAANZ observes that while whitegoods and motor vehicles were the focus of many submissions, issues with defective goods do not appear to be limited to those industries. Also, it is not clear that an industry-specific law would address the issues raised any more effectively than through generic enhancements to the consumer guarantees.

CAANZ notes that even if the case cannot be made for an industry-specific approach to legislative changes at this time, CAANZ will continue to monitor this issue, as well as the need for industry-specific compliance, enforcement and education activities. This may include regulators working with the specific industries to improve compliance levels, for example, through best practice or codes of conduct with regard to providing refunds.

CAANZ also notes that, on 17 June 2016, the ACCC announced a broad-ranging market study into the new car retailing industry in Australia, examining:

- consumer guarantees, warranties and new cars
- fuel consumption, carbon dioxide and noxious emissions, and car performance
- post-sale service arrangements
- access to repair and service information and data.

An issues paper will be released for consultation in October 2016, ahead of a draft report of findings in mid-2017. The ACCC expects to publish a final report in late 2017. These findings may inform the development of future compliance, enforcement and education activities.

163 Ibid, page 49.

164 Ibid, page 40.

Further questions

14. Can issues raised in particular industries be adequately addressed by generic approaches to law reform, such as Option 1 below, in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?
15. What kinds of industry-specific compliance and education activities should be prioritised in the context of finite resources?

For consultation

Option 1 — Clarify the law on what can trigger a ‘major failure’

Views are sought on a generic option that would apply across industries, and maintain the consistency of the consumer guarantees. This would involve identifying circumstances where there is a high inherent likelihood that a reasonable consumer would not have purchased the good (and therefore a ‘major failure’ to comply), but despite this likelihood, spent a disproportionate amount of time and resources determining whether there was a ‘major’ failure.

For example, the ACL could specify that:

- a safety issue will trigger a ‘major failure’, or will do so if a repair or replacement does not resolve the issue (given that some safety issues may not pose immediate risks)
- multiple ‘non-major failures’ can trigger a ‘major failure’.

Another approach, noted by the Australian Automotive Dealers Association, is to include specific legislative examples of ‘major failure’.¹⁶⁵

Consideration would need to be given to how these amendments would interact with the product safety regime (see **Chapter 2.2, ‘Product safety’**), and whether any exceptions or qualifications are required to ensure that the law remains reasonably flexible.

This option may:

- clarify the law and reduce the number or length of disputes, creating time and cost savings for consumers, businesses, regulators, and the legal system
- encourage traders to have better quality control processes to prevent issues arising in the first place, and to have better repair and replacement processes
- encourage consumers to raise problems sooner rather than later with traders because they are clearer about what they can expect and do not wait until their continued use of the good has exacerbated the original problem.

On the other hand, this option may result in traders incurring costs over and above their current costs in providing refunds, depending on the coverage of their existing store policies.

165 Submission from Australian Automotive Dealer Association, page 12.

This option will not directly address the evidentiary barriers or the lack of transparency in non-disclosure agreements. However, it may help consumers with disputes about some of the 'worst' goods, such as vehicles that are unusable and unfixable.

Further questions

16. In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a 'major' failure? If so:
 - What are these circumstances, and should they be defined, or deemed, to be major failures? For example, should there be discretion for courts to determine the number of 'non-major failures' or type of safety defect that would trigger a 'major failure'?
 - Are there any relevant exceptions or qualifications?
17. What are the costs associated with businesses providing refunds in circumstances that are above the costs associated with existing business policies on refunds? What impacts would this have on consumers?
18. Are there any unintended consequences, risks or challenges that need to be considered? For example, how would they affect current business policies regarding refunds?

2.1.6 Disclosure of rights under the ACL

Stakeholders raised issues about the disclosure of rights under the ACL, particularly in relation to warranties against defects and extended warranties.

Warranties against defects

A warranty against defects (also known as a 'manufacturer's warranty' or 'express warranty') is generally supplied free of charge with a product. It is offered voluntarily and as a competitive advantage over other products.

Regulation 90 of the *Competition and Consumer Regulations 2010* (Cth) sets out requirements for warranty documents, including that they be transparent and include the following mandatory text:

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

Regulators generally envisage, and treat, this statement as applying to goods (and to goods that are bundled with services). This text may be the only indication in the document that a consumer has rights under the ACL.

While stakeholders generally commented on the mandatory text as an initiative aimed at consumers, the mandatory text was also intended to act as an ongoing reminder to local and international businesses of their obligations not to mislead consumers in warranty documents, and that they cannot 'contract out' of the consumer guarantees.

In discussing the transparency of contracts, Associate Professor Paterson and Professor Bant noted that:

[t]raders may recognise that they cannot contract out of most consumer guarantee obligations, yet muddy this reality with the qualification on an otherwise overly broad exclusion clause that consumers' rights are limited "to the extent permitted by law". Or they may include a statement that the consumer has rights under the law, but only towards the back of the document and bookended by restrictive provisions about the method of return of faulty goods and asserting various limitations on the trader's liability for defects. In these circumstances, it is difficult for consumers to understand that the ACL prevails or to convince the trader that this is the case.¹⁶⁶

On the other hand, a number of legal and industry stakeholders noted practical and implementation issues with the current provisions.¹⁶⁷ Baker & McKenzie submitted that the current requirements:

- 'inaccurately reflect the ACL consumer guarantee requirements' by referring only to goods and not services, and fails to distinguish between remedies available to a consumer against a manufacturer from those of a supplier
- 'have been difficult to interpret and apply'
- 'impose Australian-specific requirements which has raised several practical challenges for global suppliers'.

Baker & McKenzie suggested 'reviewing if the warranty against defects requirements provide sufficient benefit to consumers to retain. If retained, the requirements should be revised to address the concerns identified'.¹⁶⁸

The Consumer Electronics Suppliers Association submitted that the mandatory text is:

not a problem in many products and is desirable especially for medium and high cost goods where providing the prescribed form is less of a problem.

However... in Australia we are operating in an ever-changing market with rapid technological change with trade liberalization. This means an ever-increasing supply of products designed for global markets. Requiring specific requirements, not related to safety, for Australia is a regulatory cost burden on manufacturers.¹⁶⁹

It suggested 'a relaxation of the prescribed form requirements for lower cost items, especially with increased consumer awareness of the requirements of the ACL'.¹⁷⁰

The Australian Toy Association envisaged further changes such as 'alternative ways to let consumers know of their rights under the ACL', or making the text into a 'more generic version' that 'could

166 Submission from Associate Professor Jeannie Paterson and Professor Elise Bant, University of Melbourne Law School, page 5.

167 For example, submissions from: NSW Business Chamber; Baker & McKenzie; Consumer Electronics Suppliers Association; Australian Toy Association.

168 Submission from Baker & McKenzie, pages 6.

169 Submission from Consumer Electronics Suppliers Association, page 4.

170 Ibid, page 4.

apply to multiple markets'. It noted that because the text is specific to Australia, documents must be 'specifically produced or reworked', and this requirement is 'too burdensome'.¹⁷¹

CAANZ notes that while there is no clear stakeholder indication that the original rationale for the text has changed since the ACL's introduction, there may be opportunities to simplify or clarify the text, and reduce the compliance costs for manufacturers.

For consultation

Option 2 — Amend the current requirements regarding manufacturers' warranties against defects

Views are sought on whether, and how, current 'warranty against defects' requirements should be amended.

One approach is to review and streamline the mandatory text about ACL rights that must be included with products covered by a manufacturer's warranty against defects. This could include, for example:

- a shorter statement (indicating the document does not override the ACL), possibly with a link to a website for further information
- allowing the shortened text to be used instead of the current notice, and after an appropriate transition period, removing the current text.

Another approach would be to explore alternative ways to notify consumers about their consumer guarantee rights when a manufacturer's warranty is offered.

Further questions

19. Is there a need to amend current requirements for the mandatory notice for warranties against defects? If so:
 - How should the text be revised to ensure that consumers are provided with a meaningful notice about the consumer guarantees?
 - Would it, in practice, reduce ongoing costs for business or were they largely incurred when the requirement was introduced?
 - Would it require any transitional arrangements and, if so, what are the preferred arrangements and why?
20. Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirement?

Extended warranties

Some retailers offer extended warranties where they agree to repair or replace goods, or their parts, if a defect occurs within a specified time period. Unlike a manufacturer's warranty, which comes with the product, the extended warranty is only available at an additional cost to the consumer.

¹⁷¹ Submission from Australian Toy Association, pages 6-7.

Extended warranties offered by retailers are generally unlikely to be regulated as financial products unless they are offered by a third party (who is neither the retailer nor manufacturer of the good).¹⁷²

The Australian Retailers Association noted that:

retailers feel more comfortable in refunding and rectifying when extended warranties apply. This is due to perceived and actual issues regarding indemnification between suppliers and manufacturers. While we recognise consumer groups have had concerns in regard to the upselling of warranties, we ask the review panel also consider the benefit these warranties provide both the retailer and the consumer in efficiently resolving product issues.¹⁷³

On the other hand, a range of stakeholders highlighted the difficulty for consumers in assessing the value of extended warranties.¹⁷⁴ For example, the Australian Industry Group noted that its:

manufacturer members have seen retailers sell consumers extended warranties that appear to create no rights beyond manufacturers' existing obligations. Retailers should be required to clearly explain to consumers the specific additional value that they will provide under extended warranties.¹⁷⁵

Consumer Action Law Centre submitted that extended warranties are 'analogues to junk insurance policies, as they offer very little (if any) real value'.¹⁷⁶

CHOICE acknowledged that consumers do not tend to face 'substantial difficulties' in obtaining remedies under extended warranties. However, it considered that consumers are 'often up-sold into extended warranties' without 'clear information' on what they offer over and above the ACL'.¹⁷⁷ CHOICE also noted that its 'shadow shopping' exercises found that while business practices have improved, there is still inaccurate information being given to customers [see **Box 9** below].

Box 9: CHOICE's 'shadow shopping' exercises

In late 2013, CHOICE 'shadow shopped' 80 stores from three major electrical product retailers across every state and territory about extended warranty rights. CHOICE asked sales staff if the store had any responsibility in the event that the expensive TV a consumer wanted to purchase broke down after the manufacturer's one-year warranty period. CHOICE concluded that 85 per cent of the salespeople it talked to at that time 'got it wrong'.

CHOICE repeated its shadow shop in August 2015 across the same retailers. Among 109 stores, CHOICE indicates that the results were 'better', with 'some' sales staff having a 'good understanding' of the ACL.¹⁷⁸

172 ASIC's information sheet, INFO 198, at: www.asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/licensing-certain-service-providers/extended-warranties/.

173 Submission from Australian Retailers Association, pages 4-5.

174 For example, submissions from: Legal Aid NSW; Australian Communications Consumer Action Network; Consumer Credit Legal Service WA; Associate Professor Jeannie Paterson and Professor Elise Bant at the University of Melbourne Law School; CHOICE; Australian Industry Group; and Consumer Action Law Centre.

175 Submission from Australian Industry Group, page 3.

176 Submission from Consumer Action Law Centre, page 28.

177 Submission from CHOICE, pages 6 and 13.

178 Submission from CHOICE, page 29-30.

Box 9: CHOICE's 'shadow shopping' exercises (continued)

However, CHOICE concluded that 48 per cent of sales staff failed to give shadow shoppers accurate information about their warranty rights. For example, there were statements such as:

- 'If the TV breaks down outside of the manufacturer's warranty you're on your own unless you have an extended warranty.'
- 'Legally, after one year we can't do anything.'

Although there are provisions against misleading or deceptive conduct, Consumer Action Law Centre referred to the recent Federal Court decision in *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* [2016] FCA 22 as an example of how difficult it can be to prove that salespeople were misleading.¹⁷⁹

Among other things, the Federal Court in that case noted that although the sales staff did not inform mystery shoppers about their rights when asked what would happen if a television had a fault, brochures on the ACL were available in store [see **Case study 2** below].

Case study 2: CAV's enforcement action against The Good Guys

In February 2016, CAV initiated legal action against retail chain, The Good Guys, alleging that a number of stores had breached the ACL by engaging in misleading and deceptive conduct when promoting extended warranties for its goods.

CAV conducted five store visits by CAV inspectors, during which they posed as customers interested in purchasing a television. The inspectors covertly recorded four of the five conversations with sales staff.

CAV alleged that during these approaches, the salespeople made a number of misrepresentations by:

- implying that:
 - if a consumer does not get the extended warranty product, the consumer would not be covered if the power source develops a fault or defect (even though the consumer may have a remedy or rights under the ACL)
 - without the extended warranty, a customer would have no remedy or against The Good Guys (even though the consumer may have a remedy or rights under the ACL)
 - a customer has no recourse to The Good Guys if a problem with the television develops and should not bother to call The Good Guys (even though the ACL imposes obligations on suppliers as to consumer guarantees and remedies)
- representing that retailers are not obliged to provide refunds for defective consumer goods (even though retailers may be obliged to do so in some circumstances)
- failing to refer to ACL rights when purporting to inform and explain to potential consumers their rights in the event of a breakdown or defect in the goods.

179 Submission from Consumer Action Law Centre, page 29.

Case study 2: CAV's enforcement action against The Good Guys (continued)

However, the Court noted that much of the in-store conversations were couched in words that 'were vague and general,' making it difficult to conclude the statement was an inaccurate description of the consumer's position, or that the salesperson was purporting to inform and explain to potential consumers their rights.

The Court also considered that the entire course of conduct include The Good Guys making an extended warranty brochure available in each of the five stores. That brochure included a description of rights and remedies under the consumer guarantees.

Stakeholders suggested various ways to improve disclosure about ACL rights including:

- requiring a notice or factsheet at the point of sale¹⁸⁰
- requiring disclosure requirements, and requiring salespeople to 'cease to negotiate when a consumer explicitly declines the add-ons'¹⁸¹
- a cooling-off provision¹⁸²
- adopting the New Zealand model,¹⁸³ potentially with an opt-in process instead of a cooling-off right [see **Box 10** below].¹⁸⁴

Box 10: Extended warranty provisions in New Zealand

Under Part 4A of New Zealand's Fair Trading Act 1986, retailers offering extended warranties are required to:

- provide an agreement at the time of purchase that is in writing, legible, in plain language, presented clearly, includes all the terms and conditions (including total price, duration and expiry date) and the consumer's cooling-off rights. The front page must include:
 - a summarised comparison between the relevant consumer guarantees and the protections provided by the extended warranty agreement
 - a summary of the consumer's rights and remedies under the Act
 - the warrantor's name, street address, telephone number, and email address
- a cooling-off period of five working days from the time the consumer receives the agreement, or for an unlimited time if the supplier has not met all its disclosure requirements.

CAANZ notes that while there are important benefits to extended warranties and the greater consumer choices that they offer, there are also opportunities to consider ways to address the concerns raised.

180 For example, submissions from: Legal Aid NSW; Associate Professor Jeannie Paterson and Professor Elise Bant, Melbourne University.

181 Submission from Consumer Credit Legal Service WA, page 11.

182 For example, submissions from: Consumer Credit Legal Service WA; and Legal Aid Queensland.

183 For example, submissions from: CHOICE; and Australian Communications Consumer Action Network.

184 Submission from Australian Communications Consumer Action Network.

For consultation

Option 3 — Enhance transparency regarding extended warranties

Views are sought on enhancing transparency through disclosure and other requirements, including:

- generic information at the point of sale, such as a standard notice about the ACL
- generic requirements for warranty documents, such as transparency and a plain language summary of key terms
- specific requirements (such as a comparison between what is offered by the warranty and the ACL)
- a cooling-off period to allow consumers to absorb the information provided and to reconsider their decision away from the pressure of a sales negotiation. This is particularly the case where consumers may have received verbal representations that differ from the written agreement.

While this option may allow consumers to make more informed decisions, there are likely to be compliance costs for businesses. The costs are also likely to be higher if specific, as well as general, information is required.

Alternatively, there could be an opt-in process requiring a consumer to confirm the agreement within a limited time before being required to pay, but as a consequence a consumer may not be entitled to immediate coverage. Generally, the more interventionist a regulatory approach is, the greater the need for evidence that other forms of regulation would be (or have been) inadequate.

Further questions

21. Is there a need for greater regulation of extended warranties? If so:
 - is enhanced disclosure adequate or is more required?
 - what are the costs of providing general and specific disclosure for businesses? Would disclosure change, in practice, outcomes for consumers?
 - what has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)?
22. What guidance and transition arrangements would businesses need?
23. Are there any unintended consequences, risks, or challenges that need to be considered?
24. Are there other ways to address the stakeholder concerns raised, without removing choice and flexibility for consumers?

2.2 Product safety

Stakeholders generally indicated that having a single, national product safety regime provides for a clearer and more cohesive approach to dealing with unsafe products. However, there were concerns that the regime is reactive and outdated, and that existing regulatory response mechanisms could be more effective.

In particular, stakeholders provided views on whether:

- sufficient obligations are placed on businesses to ensure the safety of their products
- processes for making and updating safety standards are timely and responsive enough
- other regulatory responses to safety risks are adequately responsive, provide enough information for consumers, and avoid unnecessary burdens on business.

CAANZ seeks your views on the following overarching questions:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?
- What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements? Are there any unintended consequences?

In preparing your submission, you are encouraged to refer to the principles identified in [Chapter 1.1 'Overview'](#).

Key observations

Stakeholders were generally of the view that the introduction of a single, national product safety regime has created a clearer and more cohesive framework that offers a range of protections against unsafe products. This includes liability for loss or damage resulting from unsafe products, processes for reporting safety incidents and removing unsafe products from the market, and requirements for certain products to comply with prescribed safety standards.

However, CAANZ notes stakeholder concerns that the regime's approach is largely reactive and that elements of the framework are becoming outdated, relative to overseas jurisdictions and other regulatory regimes. Specifically, there were concerns that:

- the **regime as a whole** may not place sufficient onus on businesses to ensure that the products they introduce into the Australian market are safe, and may not be sufficiently flexible to deal with safety risks where there is no relevant safety standard and harm is yet to occur
- the processes for making and updating **mandatory safety standards** are not keeping pace with industry developments, or are not sufficiently flexible
- **other regulatory responses** to safety risks (such as mandatory reporting requirements, bans and recalls) may not be adequately responsive, provide enough information for consumers, and avoid unnecessary burdens on business.

Key Observations (continued)

Additionally, stakeholders have raised concerns about differences in approach between jurisdictions and specialist regulators in addressing safety risks. This issue is currently being examined by the Productivity Commission in its study of the administrative and enforcement arrangements underpinning the ACL.

OPTIONS

1. Introduce a general prohibition against the supply of unsafe goods ('general safety provision').
2. Introduce a performance-based approach to compliance with product safety standards.
3. Address concerns with regulatory response mechanisms by:
 - a. clarifying mandatory reporting triggers through greater regulator guidance on the meaning of 'serious injury or illness' and 'use or foreseeable misuse'
 - b. increasing the mandatory reporting timeframe (such as from two to four days) and requiring immediate notification of a death or serious injury or illness
 - c. introducing a statutory definition of a 'voluntary recall' specifying the criteria for a 'satisfactory action', and increasing penalties for failure to notify a recall
 - d. streamlining the processes for implementing product bans and mandatory recalls
 - e. improving the quality of information made available to consumers about safety risks.

2.2.1 Australia's product safety regime

In Australia, there are two complementary sets of laws in the ACL governing product liability:

- the **product safety** regime, which provides a framework for identifying, preventing, stopping the supply of, and removing goods and product-related services (collectively, 'products') that are unsafe or potentially unsafe
- the **defective goods** regime, which provides consumers with redress where goods have a safety defect, including the right to compensation where the defect causes loss or damage.

Together, these regimes create a number of legal consequences for businesses that supply unsafe products in Australia, including:

- having unsafe products removed from the market
- being held liable for loss or damage
- having penalties imposed for breaches of certain provisions (such as failing to comply with a mandatory safety standard, or failing to notify a voluntary recall).

Australia's approach to product safety is based on the principle of **harm minimisation**, where products are only removed from the market once they prove to pose a risk to safety. This relies on a suite of 'post-market controls' such as mandatory reporting requirements to the ACCC, and recalls and bans to stop the supply of unsafe products and rectify safety defects.

'Pre-market controls' such as minimum safety standards, product design rules and general safety obligations, are less explicit in the regime.

Stakeholders generally focussed on three main aspects of product safety regime:

- whether the **regime as a whole** places sufficient onus on businesses to supply safe products, and is flexible enough to deal with safety risks where there is no relevant safety standard or harm has not yet occurred, or whether a **general safety provision** is required
- the role of **mandatory standards**, and whether the processes for making and updating them are appropriate and responsive
- feedback on the effectiveness of **other regulatory response mechanisms** (mandatory reporting requirements, bans and recalls) including their timing, flexibility, clarity, and compliance burdens.

2.2.2 Recent market developments affecting product safety

Since the 2006 *Review of the Australian Consumer Product Safety System* [see **Box 12** below], the market for consumer goods has undergone significant change, driven by factors such as:

- globalisation
- the emergence of online shopping
- the proliferation of low-cost products manufactured overseas.

Such market changes can make it difficult to manage product safety risks. For example, the Australian Communications and Media Authority highlighted that new and emerging supply models, including online supply, present regulators with enforcement and compliance challenges.¹⁸⁵

Similarly, Product Safety Solutions highlighted the trend towards direct sourcing of less expensive products from overseas by retailers of 'Fast-Moving Consumer Goods' (goods that sell quickly and for a relatively low cost). It submitted that:

[s]uch trends make it all the more difficult for governments to monitor and influence the safety of products on an operational basis. They also create challenges for individual businesses trying to ensure safety as a 'voluntary' measure.¹⁸⁶

It also submitted that such trends 'create challenges for individual business trying to ensure safety as a 'voluntary' measure.¹⁸⁷

CHOICE submitted that the 'abnormally high rate of product recalls in Australia may, in part, be driven by the absence of a general safety provision' and provided a table comparing rates of recalls in Australian and the UK, which has a general safety provision [see **Table 2** below].¹⁸⁸

There were 670 product recalls in Australia in 2015-16, up from 596 in 2014-15.¹⁸⁹ The ACCC's recall statistics highlight the main areas where recalls are undertaken [see **Figure 2** below].

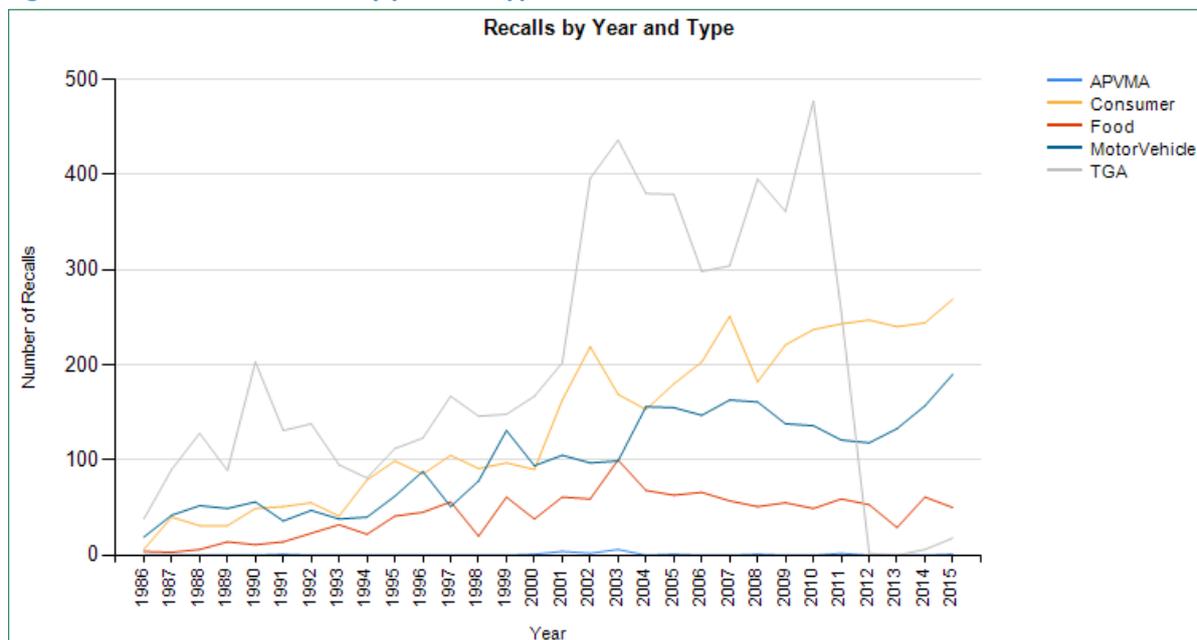
185 Submission from Australian Communications and Media Authority, page 8.

186 Submission from Product Safety Solutions, page 2.

187 Ibid, page 2.

188 Submission from CHOICE, page 38.

189 At: www.accc.gov.au/media-release/check-your-home-for-recalled-products.

Figure 2: Recalls in Australia by product type¹⁹⁰

NB: The ACCC stopped collecting private Therapeutic Goods Administration (TGA) recalls in 2012 and since that time, only reports and publishes non-prescription public recalls on the Product Safety Australia website.

Table 2: Consumer product recalls — Australia and the UK (provided by CHOICE)¹⁹¹

	Consumer goods	Motor vehicles	Food	Pharmaceuticals	Total
Australia 2013-14	267	158	64	7	496
Australia 2014-15	306	230	54	6	596
UK 2013-14*	141	30	56	18	245
UK 2014-15*	179	39	84	8	310

*Covers the year 1 November — 31 October based on information from the Trading Standards Institute, the Food Standards Agency, RAPEX and the Medicines and Healthcare products regulatory agency.

The Australian Consumer Survey 2016 surveyed areas where consumer problems were most likely to arise and found that the safety of a product is one of the more common causes of consumer complaint [see **Box 11** below].

Box 11: Australian Consumer Survey 2016 — product safety

The survey found that:

- The most common types of consumer problems related to faulty, poor quality, or unsafe products (30 per cent). Of these products, 50 per cent were faulty or damaged, 34 per cent did not work as expected and 10 per cent were unsafe.

¹⁹⁰ By the following products: recalls by the Australian Pesticides and Veterinary Medicines Authority (APVMA); consumer products; food; motor vehicles; and recalls by the Therapeutic Goods Administration.

¹⁹¹ Submission from CHOICE, pages 38-39.

Box 11: Australian Consumer Survey 2016 — product safety (continued)

- Problems with faulty, poor quality, or unsafe products were more likely to occur in relation to:
 - electronics/electrical goods
 - food and drinks
 - non-electrical household goods
 - clothing, footwear, cosmetics or other personal products.

2.2.3 General safety provision

Concerns with the effectiveness of the current product safety regime have led to calls for the introduction of a ‘general safety provision’ into the ACL, a proposal that has previously been considered in Australia [see **Box 12** below].

Box 12: Previous consideration of a general safety provision in Australia

A general safety provision was first canvassed in 2004 as part of the Review of the Australian Consumer Product Safety System by the then **Ministerial Council on Consumer Affairs** (now the Legislative and Governance Forum on Consumer Affairs).

Its discussion paper at the time sought input on ways to achieve ‘a more proactive and efficient product safety system’. In particular, it sought feedback on reform options including:

- having unsafe products removed from the market
- introducing a general safety provision
- redefining unsafe products to cover services and second-hand goods
- strengthening monitoring, reporting and recall obligations
- harmonising legislation and enforcement and administration.¹⁹²

This paper was followed by an options paper in 2005, which found that:

- There is an opportunity for greater harmonisation of product safety laws and the administration of those laws between jurisdictions.
- A general safety provision involves numerous complex policy choices and it remains unclear whether it would be an appropriate change to current arrangements.
- It appears that product safety information and research could be improved in a cost-effective manner.¹⁹³

192 Ministerial Council on Consumer Affairs, *Review of the Australian Consumer Product Safety System*, 2004, pages 3- 9.

193 *Ibid*, page 3.

Box 12: Previous consideration of a general safety provision in Australia (continued)

To inform the Ministerial Council on Consumer Affairs, the **Productivity Commission** was tasked with undertaking a study to evaluate Australia's consumer product safety system and the benefits and costs of reform options.¹⁹⁴ In its 2006 report, the Productivity Commission noted a number of benefits of a general safety provision, namely that it would:

- facilitate a 'cultural change' by creating stronger incentives for manufacturers and suppliers not to place unsafe goods on the market
- provide more effective pre-emptive action by regulators without the need for a product to have caused an injury
- result in the need for fewer mandatory standards, in turn giving businesses greater flexibility in terms of how they meet their safety obligations
- shift the onus for managing product safety away from government and onto business, resulting in reducing administration costs over time
- create a more level playing field for business by setting a 'minimum' safety standard across the board
- increase the reputation and image of Australian products overseas.

The Productivity Commission noted that the costs associated with a general safety provision would depend on the nature of the obligation and how it is implemented, administered and enforced, but would likely result in increased costs for business.

The costs of greater investment in design, manufacture and labelling, as well as testing and certifying products as compliant, were expected to be passed onto consumers through higher prices, products being withdrawn from sale, or products being substituted with less safe alternatives.

The Productivity Commission expected a modest decrease in government's administration costs due to the onus on safety being shifted to business, with regulators undertaking more pre-emptive market surveillance, intelligence gathering and enforcement. The Productivity Commission also highlighted the need for guidance on how businesses can comply with a general safety provision.

Nevertheless, the Productivity Commission concluded that the overall benefits of a general safety provision were likely to be limited. Among other things, this finding was based on an assumption that the provision:

- would only change behaviour in a small subset of businesses
- would not change anything for those already complying and those that will never comply.

The Productivity Commission was therefore not convinced that a general safety provision would generate a net benefit over and above the existing approach.

194 Productivity Commission, *Review of the Australian Consumer Product Safety System*, 2006, at: www.pc.gov.au/inquiries/completed/product-safety.

Is a general safety provision now warranted?

Some stakeholders indicated that Australia's product liability laws provide an appropriate level of protection for consumers, highlighting that the combined effect of the two regimes as creating an implied duty on suppliers to not supply unsafe products into the market, as well as the deterrence effect that a product ban or recall can have given its potential to cause damage to reputation and brand image.¹⁹⁵

The Australian Food and Grocery Council submitted that:

[t]he product liability regime provides that you must only market products that have the degree of safety that the community expects, and there are consequences if you do not.¹⁹⁶

Many consumers assume (incorrectly) that Australia's product liability laws impose a clear obligation on suppliers not to supply unsafe products, and that because a product is offered for sale in Australia it has met minimum safety standards. These consumers are often surprised to learn that not all products are inspected and tested before being available for sale in Australia.

Some stakeholders claimed that, in recent years, Australians have become more exposed to unsafe products and to a greater number of safety incidents. For example, CHOICE submitted that:

Australian consumers have recently experienced an intense period of exposure to unsafe products. Product recalls are likely to have impacted all of us, households and businesses alike, in the everyday activities that we typically assume will not harm us... It's not just the ubiquity of the recalls, but also the scale that is new.¹⁹⁷

Some stakeholders argued that Australia's product liability laws are insufficient to place a clear obligation on suppliers to ensure the safety of their products.¹⁹⁸ In their view, the laws do not place sufficient onus on manufacturers and retailers to supply safe products, or provide the right incentives for suppliers to consider the safety of their products or to give safety a priority over other factors.

These stakeholders also considered that the current product safety regime is too reactive and outdated to meet the high safety expectations of consumers. This is because the ACL's provisions only apply once new products have entered the market and are in the hands of consumers. In these circumstances, it is generally only after a serious injury, illness, or death has resulted from use of a product that there are interventions to remove that product from the market.

195 For example, submissions from: Allens; Australian Food and Grocery Council; Australian Chamber of Commerce and Industry; Communications Alliance; Law Council of Australia's Competition and Consumer Committee; and Queensland Law Society.

196 Submission from Australian Food and Grocery Council, page 4.

197 Submission from CHOICE, page 28.

198 For example, submissions from CHOICE; Consumer Action Law Centre; Product Safety Solutions; and Professor Luke Nottage.

For example, CHOICE submitted that the:

product safety regime is largely reactive; recalls are conducted and investigations initiated only after it becomes apparent that a product poses a risk to consumers' safety.¹⁹⁹

Product Safety Solutions noted that '[m]andatory standards and bans exist for a modest number of product categories, but these essentially entail a reactive approach to consumer safety.'²⁰⁰

Consumer Action Law Centre submitted that under the defective goods regime, suppliers 'have the option of taking the risk that even if the product is defective, no-one will be harmed and also want to sue'.²⁰¹

Professor Luke Nottage submitted that the requirement that a consumer initiate court action to sue for compensation where harm has resulted from an unsafe product is too costly and difficult for many consumers. In his view, court actions have 'become a less attractive option' as they are uncertain and can take many years, especially where foreign goods or parties are involved.²⁰²

Advocates for a general safety provision argue that it would be more effective in ensuring businesses meet their safety obligations under the law.²⁰³ In particular, they suggest it would clarify suppliers' obligations and ensure that responsibility for managing safety risks was in the hands of those best placed to manage those risks.

This argument is based on the premise that suppliers have a strong incentive to ensure the safety of the products they supply — from product design, through to the manufacturing, marketing, distribution and after-market stages.²⁰⁴ The obligation created by a general safety provision would be a more proactive way to address safety issues, particularly in the absence of any relevant safety standards or specific regulation [see **Case study 3** below].

Case study 3: Addressing safety risks posed by small powerful magnets — Australia's and Canada's experience

In November 2012, the Commonwealth Minister imposed a permanent ban on small high-powered magnets in toy products sold in Australia. The ban was imposed to address the serious dangers of children ingesting the magnets.

Before imposing the ban, the Minister was required to notify suppliers by publishing a proposed ban notice and to provide them with the opportunity to request a conference. The ACCC held a conference with numerous suppliers and accepted written submissions on the proposed ban, a process that informed the ACCC's advice to the Minister to impose a permanent ban. While this extensive regulatory process occurred, the states and territories imposed interim bans to address the immediate safety risks.

199 Submission from CHOICE, page 38.

200 Submission from Product Safety Solutions, page 1.

201 Submission from Consumer Action Law Centre, page 30.

202 Submission from Professor Luke Nottage, pages 6-7.

203 For example, submissions from CHOICE; Consumer Action Law Centre; and Professor Luke Nottage.

204 For example, submissions from CHOICE; Consumer Action Law Centre; and Product Safety Solutions.

Case study 3: Addressing safety risks posed by small powerful magnets — Australia’s and Canada’s experience

Canada adopted a different approach. In 2013, Health Canada was able to directly stop the manufacturing, import, sale or advertising of specific toys containing small powerful magnets in Canada. While there was no specific regulation for the use of small powerful magnets in toys, a general prohibition on unsafe consumer products in the Canada Consumer Product Safety Act allowed for immediate removal of these products from the marketplace.²⁰⁵

This action was taken when incidents of children ingesting the magnets had continued despite Health Canada issuing several public warning notices about the magnets, and action taken by manufacturers to include package warnings and instructions for safe use.²⁰⁶

CHOICE submitted that:

reimagining the law so that it places an onus on manufacturers and retailers to proactively ensure the safety of their products before they reach the market would lead to safer products and fewer recalls ... One advantage of a GSP [general safety provision] is that it can provide uniform and comprehensive cover of a wide range of consumer products, with associated penalties, and is therefore likely to reduce the incidence of unsafe products appearing on the marketplace. If a GSP is likely to drive down the incident of product recalls — and we believe it is likely to do that — then a GSP will deliver significant benefits for businesses, consumers and the community.²⁰⁷

Product Safety Solutions submitted that:

[a] key element in product safety policy is the message that’s conveyed to the business community. Without a GSP, suppliers of most products are far less aware of safety and have far less incentive to give safety priority over business costs and other practical factors... Having a GSP in the ACL could engender a much higher awareness of product safety across all suppliers and provide clear motivations to only design, source and supply safe products.²⁰⁸

In contrast, stakeholders who did not support a general safety provision argued that it would add to compliance costs without providing any clear benefit. For example, the Law Council of Australia’s Competition and Consumer Committee submitted that a general safety provision would ‘simply result in unnecessary duplication and an increased compliance burden for businesses, without any increase in protection for consumers.’²⁰⁹

Communications Alliance submitted that a ‘blanket ban on the supply of unsafe goods’:

would create uncertainty and compliance difficulties for suppliers... uncertainty and greater compliance costs could provide a strong disincentive to develop and supply new

205 *Canada Consumer Product Safety Act* (S.C. 2010, c. 21), sections 7(a) and 8(a).

206 Health Canada, Canada 2013, Information for Manufacturers, Importers, Distributors and Retailers of Products Containing Small, Powerful Magnets, viewed 14 July 2016, at: www.hc-sc.gc.ca/cps-spc/advisories-avis/info-ind/magnets-aimants-eng.php.

207 Submission from CHOICE, page 38.

208 Submission from Product Safety Solutions, page 2.

209 Submission from the Law Council of Australia’s Competition and Consumer Committee, page 53.

and innovative goods and services ... This would have a particularly negative impact on certain industries (such as telecommunications) where technology is rapidly advancing and offering consumers an increasing range of options.²¹⁰

It also submitted that a general prohibition 'would create uncertainty and compliance difficulties for suppliers' as to whether their goods are safe where no standard for safety exists.²¹¹

For consultation

Option 1 — Introduce a general prohibition against the supply of unsafe goods ('general safety provision')

As discussed above, CAANZ notes the stakeholders identified a wide range of benefits and costs associated with introducing a general safety provision.

To assess whether the case has been made for a general safety provision, CAANZ has identified the following principles for doing evaluating the effectiveness of a product safety regime:

- The law should be clear.
- The law should efficiently allocate risk to the party best able to manage those risks.
- A product safety regime should have levers and incentives that encourage businesses to comply.
- The law should have adequate penalties to deter future breaches by a business, and by businesses more generally.
- The benefits of a product safety regime should outweigh the costs.

Table 3 below suggests key principles, and possible issues to consider, for an effective product safety regime. In particular, CAANZ seeks views on:

- whether these principles are appropriate and relevant for a product safety regime
- whether a regime with a general safety provision would better meet these principles than the current regime, and if so, how. Potential models for any general safety provision, if warranted, are discussed below.

210 Submission from Communications Alliance, page 22.

211 Ibid, page 22.

Table 3: Principles for a product safety regime

Key principle	Issues to consider
<p>Clarity of the law</p>	<p>A product safety regime should be clear so that consumers and businesses can understand and apply their rights and obligations. Issues to consider include:</p> <ul style="list-style-type: none"> • whether a regime should impose a positive duty (that is, only supply safe products) or a negative duty (not to supply unsafe goods) • how to clearly define ‘safe’ (or ‘unsafe’) products in a way that takes into account existing definitions in the product safety and defective goods provisions • how to make clear the interaction between the product safety regime and other specialist regulatory regimes, including whether there should be any exclusions or exceptions from the general safety provision to avoid regulatory duplication.
<p>Efficient allocation of risk</p>	<p>To be effective, a product safety regime should enable risk to be allocated to the party best able to manage those risks. Consideration should be given to whether the duty should be the same or different across various members of the supply chain (for example, designers, manufacturers, importers, suppliers and retailers), taking into account relative levels of knowledge and/or control over safety matters.</p> <p>Ideally, the duty placed on each member of the supply chain should be targeted to the specific circumstances of the duty holder.</p>
<p>Incentives for compliance</p>	<p>A product safety regime should contain levers and incentives that encourage businesses to comply with the law.</p> <p>Issues to consider include:</p> <ul style="list-style-type: none"> • whether requirements should be prescriptive (setting out a strict means of compliance) or performance-based (with inbuilt flexibility for businesses to choose the most appropriate course of action) • how compliance would be required and assessed, including the role of safety standards²¹² • whether regulators should undertake a more proactive role, for example, by providing guidance on emerging safety risks.
<p>Deterring breaches of the law</p>	<p>As discussed in Chapter 3.2, ‘Penalties and Remedies’, the adequacy of penalties is relevant to whether there is sufficient deterrence against future breaches, together with effective compliance and enforcement arrangements.²¹³</p> <p>Issues to consider include:</p> <ul style="list-style-type: none"> • what penalties and remedies (if any) should be available for a breach of the provision • whether the regulator alone or third parties should be able to enforce any general safety provision

212 For example, Standards Australia and Professor Luke Nottage submitted that safety standards could still play a role under a general safety provision.

213 For example, Consumer Action Law Centre submitted that ‘[t]o be effective, a general safety provision should be accompanied by a power by the regulator to take enforcement action in relation to products that “will or may cause injury’ (page 31).

Table 3: Principles for a product safety regime (continued)

Deterring breaches of the law (continued)	<ul style="list-style-type: none"> • how the provisions would interact with other ACL protections, for example, whether a breach should allow for a defective goods action by a harmed consumer • the appropriate role of regulators, for example, whether they should move their focus from product recalls and bans to more pre-emptive market surveillance, intelligence gathering and enforcement.
Benefits outweigh the costs	<p>As the Productivity Commission noted in its 2006 review [see Box 12 above], it is crucial that the anticipated benefits of a product safety regime outweigh the associated costs.</p> <p>Issues to consider include the:</p> <ul style="list-style-type: none"> • clear identification of benefits, and costs associated with compliance and enforcement • design and implementation of any changes to the product safety regime • appropriate transition arrangements for any reforms.

Potential models for a general safety provision

Stakeholders suggested a number of models for a potential general safety provision, such as introducing a provision that:

- would apply where an unsafe product is ‘knowingly’ supplied²¹⁴
- is based on the **Singaporean model**, whereby compliance with an international safety standard meets the requirement to supply safe goods²¹⁵
- is similar to the **EU General Product Safety Directive**, which allows businesses to demonstrate compliance by reference to a trusted international standard or Australian Standard²¹⁶
- is similar to the **product design rules** recommended by the Financial Systems Inquiry. This would require suppliers to consider the entire supply chain of their products to ensure that safety is considered at every step.²¹⁷

Outlines of the regimes in the UK, Canada and Singapore are provided in **Boxes 13 to 15** below.

Box 13: The UK’s product safety regime

General product safety in the UK is regulated by the General Product Safety Regulations 2005 (the Regulations) that came into force on 1 October 2005, and apply to both new and second hand consumer products. The Regulations state that no producer shall, unless the product is a safe product:

- place a product on the market
- offer or agree or expose or possess a product for placing on the market

214 Submission from Product Safety Solutions, page 1.

215 Submission from Professor Luke Nottage, page 8.

216 Submission from CHOICE, page 39.

217 Submission from Consumer Action Law Centre, page 31.

Box 13: The UK's product safety regime (continued)

- offer or agree to supply a product, or
- supply a product.

A distributor must exercise due care to ensure safety by not selling dangerous products, providing information to purchasers, maintaining traceability and cooperating with enforcement authorities.

Where a product is not subject to a specific provision the Regulations presume conformity where certain technical standards are met. This includes, for example, a voluntary national standard of the UK that gives effect to a European standard (published in the Official Journal of the European Union). Where a product is not covered by these standards, the Regulations list criteria by which conformity will be assessed. These include, for example, other national standards drawn up in the UK, product safety codes of good practice in the relevant sector and reasonable consumer expectations concerning safety.

A defence applies where a person is able to show that they took all reasonable steps, and exercised all due diligence, to avoid committing the offence. A defence is also available for antiques where a producer or distributor is able to demonstrate that they clearly informed, or intended to inform, the consumer that the product was an antique.

The principal responsibility for day-to-day enforcement of the Regulations lies with local authorities. Breaches of the Regulations may attract fines of up to £20,000 and/or a term of imprisonment of up to 12 months.

In February 2016, an independent review of the effectiveness of the UK's system of consumer product recalls recommended several changes to improve the administration and enforcement of the recall system. It nevertheless acknowledged that the:

*view from business and trade associations is that the regulatory regime is robust enough to ensure overwhelmingly most products are safe through specific product safety regulations, harmonised technical standards and the general safety requirement in our laws.*²¹⁸

Box 14: Canada's product safety regime

The *Canada Consumer Product Safety Act* commenced on 15 December 2010.

The Act, administered by Health Canada, sets out specific regulations regarding mandatory recalls and reporting, the safety of consumer products, hazards and document and record keeping requirements. It generally applies to all consumer products, with the exception of those listed in Schedule 1 (for example, motor vehicles and pest control products).

The Act prescribes a general prohibition against the manufacture, import, advertisement or sale of consumer products that are:

- a danger to human health or safety
- subject to a mandatory or voluntary recall, or
- subject to a measure or order that has not been complied with.

218 Lynn Faulds Wood, *UK Consumer product recalls: An independent review*, February 2016, page 17, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509125/ind-16-4-consumer-product-recall-review.pdf.

Box 14: Canada's product safety regime (continued)

The general prohibition covers the whole supply chain and places obligations on all parts to ensure the provision of safe consumer goods. Schedule 2 contains a number of consumer goods that are prohibited outright, while other prohibitions prevent the manufacture, importation, advertisement or sale of consumer goods that are prohibited or do not meet the regulatory requirements.

Regulatory responses available under the Act include mandatory recalls, corrective measures, and administrative monetary penalties of up to CDN\$25,000 per day for companies that contravene orders made under the Act (such as refusing to comply with a recall order).

It is a criminal offence to contravene the general product safety prohibitions, punishable by a fine of up to CDN\$5 million and/or imprisonment for up to two years.²¹⁹ Due diligence is a defence to criminal prosecution but not civil action.

Box 15: Singapore's product safety regime

The *Consumer Protection (Consumer Goods Safety Requirements) Regulations 2011* (the Regulations) came into effect on 1 April 2011. It sets out safety requirements for general consumer goods, except for those within the remit of other regulations or regulating agencies.

- Products covered include toys, children's products, apparel, sports and recreation products, furniture, mattresses and bedding and do-it-yourself tools.
- Exclusions include 45 categories of household electrical, electronic and gas appliances and accessories that are regulated by the *Consumer Protection (Safety Requirements) Registration Scheme* and require registration with SPRING Singapore, the relevant safety authority, prior to sale in the market.

Goods covered by the Regulations are required to meet the listed safety standards (such as those published by the International Organization for Standardisation). Where no applicable standard applies, compliance with other applicable regional or national standards will be accepted.

The Regulations empower the Singaporean agency to issue a public warning notice, and remove and ban unsafe consumer goods from the market. Failure to comply with a directive may result in a fine not exceeding SGD\$10,000 and/or imprisonment for a term not exceeding two years.

Singapore's approach to product safety has been adopted by Malaysia.

Further questions

25. What are the key principles for an effective product safety regime?
26. Would a general safety provision in the ACL better meet those principles? Why, or why not?
27. Would a general safety provision provide an effective and proportionate response to concerns raised about the current regime?
 - What costs would it impose on business, for example, what processes or practices would need to be changed?
 - What impacts would it have on safety outcomes for consumers?

²¹⁹ *Canada Consumer Product Safety Act*, S.C. 2010, c. 21, s 41.

Further questions (continued)

- What, if any, transitional arrangements would be required for businesses?
 - Are there any unintended consequences of a general safety provision?
28. Are there any current overseas models, or features of models, that should be considered in any general safety provision? If so, why? Would adaptation be required for the Australian context?

2.2.4 Effectiveness of mandatory safety standards

Safety standards

Under the ACL, the Commonwealth Minister may make or declare a mandatory safety standard where there is evidence of a risk of serious injury, illness or death associated with a product. These standards seek to prevent or reduce the risk of injury by specifying various safety requirements for certain products, such as the way they are made, what they contain, any tests they need to pass, and warnings and instructions to be included.

The Commonwealth Minister can also ‘declare’ a voluntary standard prepared by Standards Australia, or by another association prescribed in the regulations, to be an enforceable safety standard under the ACL.

Stakeholders provided feedback on four main issues with regard to the making and updating of mandatory safety standards:

- the timeliness of processes for making and updating standards
- the use of international standards
- accessing mandatory standards
- the role of mandatory standards, and whether a ‘performance based’ approach to compliance should be adopted (that is, set out mandatory outcomes, rather than prescribe how to comply).

2.2.5 Making and updating mandatory safety standards

Mandatory safety standards are reviewed from time to time to assess whether they are effective, up to date and remain relevant. Recently, the ACCC announced that a number of mandatory standards are being reviewed to determine whether they should be retained, amended (for example, by adopting an international standard) or revoked, with public consultation papers being progressively released through the Product Safety Australia website.²²⁰

Some stakeholders raised concerns with the timeliness of current processes to make and update mandatory standards.²²¹ For example, CHOICE submitted that:

improvements could be made to the process by which existing mandatory standards are reviewed, the way in which consideration of new mandatory standards takes place and the compliance and enforcement of mandatory standards.²²²

220 At: www.productsafety.gov.au/about-us/consultations.

221 For example, submissions from: Allens; Australian Toy Association; and CHOICE.

Submissions highlighted concerns that some mandatory standards have been superseded by voluntary standards on the same topic, and in some cases, by two iterations of that voluntary standard.²²³

CHOICE was concerned that mandatory standards for strollers, cots for household use and folding cots reference superseded Australian Standards. It noted that this ‘causes confusion for manufacturers, retailers and consumers’ and ‘means that opportunities to provide better safety standards are being missed.’²²⁴

The Australian Toy Association submitted that where a mandatory and voluntary standard are inconsistent:

responsible suppliers will actually ensure compliance with the current standard, but face extra costs to conduct incremental testing to the old requirements just to ensure that there is no technical breach of the law.²²⁵

It also noted that the use of superseded standards in Australia can create ‘a risk that less scrupulous suppliers could legally dump product in Australia that is known to be unsafe and rejected in other markets’,²²⁶ and suggested introducing a ‘simple, cost effective process that ensures that regulations referencing National Standards are updated to reflect new versions of the National Standard’.²²⁷

Similarly, CHOICE submitted that the:

publication of an updated Australian Standard referenced in any mandatory standards should prompt an immediate review of those mandatory standards. That review should be conducted in a transparent manner and provide for the participation of stakeholders.²²⁸

Allens and the Australian Toy Association suggested that one way to overcome the problem is to allow for the automatic adoption of updated or revised voluntary standards. The US approach was cited, whereby the Consumer Product Safety Commission has 90 days in which to consider a revision to a voluntary standard and decide whether or not it is acceptable, after which the revised standard becomes the regulated requirement.²²⁹

However, CHOICE cautioned that such an approach ‘may not be possible as mandatory standards for consumer goods usually refer to a very limited number of key clauses in an existing standard plus any additional requirements’.²³⁰

Allens submitted that if automatic adoption was to be introduced, the law would need to provide ‘reasonable transitional periods to allow suppliers to become compliant’.²³¹

222 Submission from CHOICE, pages 29-30.

223 For example, submission from: Australian Toy Association; and CHOICE.

224 Submission from CHOICE, page 30.

225 Submission from Australian Toy Association, page 2.

226 Ibid, page 2.

227 Ibid, page 3.

228 Submission from CHOICE, page 30.

229 Submission from Australian Toy Association, page 3.

230 Submission from CHOICE, page 30.

231 Submission from Allens, page 29.

The Law Society of NSW recommended adopting the approach used for therapeutic goods:

[T]he model approach set out in the Therapeutic Goods Act 1989 (Cth) for updating mandatory standards... allows for the underlying referenced standard to automatically update when a change is made to the voluntary standard.²³²

Standards Australia and the Australian Toy Association noted that an alternative approach adopted within the European Union is to publish lists of current versions of standards. Compliance with those standards creates a presumption of conformity with the European Union's General Product Safety Directive.

2.2.6 Use of international standards

Currently, the only safety standards the Commonwealth Minister can declare as mandatory are those made by Standards Australia. Where the Minister wishes to apply an international standard in Australia, he or she must declare a separate mandatory standard which requires repeating all the specifications, requirements and testing that is documented in the international standard. This process is time consuming, can create uncertainty for industry and potentially delay the introduction of beneficial standards developments into Australia.

In this context, it is important to distinguish between:

- **international standards**, such as those set by the International Standards Organisation
- **regional standards**, such as standards set by the European Committee for Standardisation
- **other national standards**, such as UK or US national standards.

While stakeholders generally did not make these distinctions in their submissions, the ACCC's criteria for accepting 'trusted' international standards apply equally to international, regional and other national standards. These criteria are used to determine whether the international standard is 'published or developed by a legitimate standards body or government agency from an economy or nation with comparable economic and regulatory processes to Australia'.²³³

A number of stakeholders supported the use of trusted international standards.²³⁴ For example, the Australian Chamber of Commerce and Industry noted that this would 'reduce costs and delays for businesses, increase the supply of products into the Australian market and allow regulatory authorities to focus on higher priorities'.²³⁵

However, some stakeholders urged caution regarding the use of international standards. For example, the Australian Communications and Media Authority submitted that:

for an increased reliance on international standards to be effective, Australian interests and requirements will need to be reflected in the development of those international standards.²³⁶

232 Submission from Law Society of NSW, page 4. Section 63(4)(b) of the *Therapeutic Goods Act 1989* (Cth) allows for a referenced standard to automatically update by applying, adopting or incorporating, with or without modification, any matter contained in an instrument as that instrument is in force from time to time.

233 ACCC, *International standards for the safety of consumer products: criteria for acceptance*, 2015, page 4.

234 For example, submissions from: Australian Chamber of Commerce and Industry; Consumer Electronics Suppliers Association; Standards Australia; Allens; and Australian Communications and Media Authority.

235 Submission from Australian Chamber of Commerce and Industry, page 10.

236 Submission from Australian Communications and Media Authority, page 9.

The Consumer Electronics Suppliers Association suggested that there should be a mechanism for regulators to raise deficiencies with responsible standards bodies for review,²³⁷ while the Australian Chamber of Commerce and Industry submitted that ‘there must be a formal process to involve business in the decision about whether a standard should be made enforceable’. It also noted that:

the declaration of a standard as enforceable should be subject to a proper regulatory impact assessment, and then opened for public comment. As with other regulatory changes, the declaration of any new standard should be supported by information for affected businesses and subject to appropriate lead in periods.²³⁸

2.2.7 Accessing mandatory standards

Several stakeholders raised concerns about the accessibility and cost of safety standards that are made mandatory in Australia.²³⁹

Groupon submitted that standards ‘are often hard to locate and costly to access in their entirety.’²⁴⁰ Similarly, the Australian Chamber of Commerce and Industry submitted that voluntary standards, including international standards, ‘cost money to access’, and that:

[m]aking a standard enforceable can therefore add to business costs in situation where there is already substantive compliance with the standard. Moreover, by making a standard enforceable, the ACCC would be granting a monopoly right to the standard maker, which potentially further adds to the cost faced by business.²⁴¹

Allens suggested that one way to overcome accessibility problems would be for the regulator to issue ‘guidelines on the interpretation of the relevant standards, including practical examples of how they may be applied’.²⁴² Standards Australia noted that in the Netherlands, concerns about the accessibility of standards are addressed by the government taking action to ‘make mandatory standards freely available to the public by pre-paying for public access/viewing’.²⁴³

While these issues extend beyond the scope of the ACL and its regulators, CAANZ notes that the accessibility of Australian Standards was recently considered by the Western Australia Parliament’s Joint Standing Committee on Delegated Legislation. In its June 2016 report, the Committee recommended that Western Australia raise, for intergovernmental consideration, a fully-funded model for online access when the commercial agreement with SAI Global expires.²⁴⁴

237 Submission from Consumer Electronics Suppliers Association, page 5.

238 Submission from Australian Chamber of Commerce and Industry, page 10.

239 Australian Standards (produced by Standards Australia, or by a body accredited by it). These standards are subject to a commercial agreement between Standards Australia and SAI Global, allowing SAI Global exclusive rights to distribute and publish Australian Standards.

240 Submission from Groupon, page 6.

241 Submission from Australian Chamber of Commerce and Industry, page 10.

242 Submission from Allens, page 29.

243 Submission from Standards Australia, page 7.

244 Western Australia Parliament Joint Standing Committee on Delegated Legislation, *Report 84: Access to Australian Standards adopted in delegated legislation*, June 2016, Recommendation 12, at: [www.parliament.wa.gov.au/parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/416D0BF968BDB17048257FDB0009BEF9/\\$file/dg.asa.160616.rpf.084.xx.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf).

2.2.8 Performance-based approach to compliance with standards

Some stakeholders suggested Australia should rethink its approach to how product safety standards are used, such as by making compliance ‘performance-based’ rather than prescriptive.

For example, Standards Australia suggested using standards to demonstrate compliance with policy objectives by having the ACL set performance requirements. Compliance could then be demonstrated by use of ‘technical standard, expert determination, or by assessment through government processes’, allowing for multiple technical specifications to be referenced, as well as ‘choice in the way compliance is demonstrated.’²⁴⁵

Professor Luke Nottage notes that Singapore allows for compliance to be demonstrated against a range of international, regional and national standards:

Singapore generally requires all consumer goods to comply with ISO, EU or American standards (otherwise national or regional standards). Already there is some evidence of safety improvements, for example, for toys.²⁴⁶

In its submission, Master Electricians Australia provided an example of how a performance-based approach could be used to ensure that all electrical products imported into Australia are safe, by adopting a ‘hierarchy of measures’:

The article must display evidence that it complies with the relevant Australian standard

OR

If no evidence is provided of compliance with the Australian standard, accreditation from the National Association of Testing Authorities (NATA) must be supplied;

OR

In the absence of evidence of compliance with the Australian Standard or NATA accreditation, the article has been verified as safe through independent engineering testing either overseas or onshore.²⁴⁷

Another potential model for performance-based standards is from Australia’s work health and safety regulatory framework [see **Box 16** below].

Box 16: Performance-based standards — Work health and safety

Under Australia’s work health and safety regulatory framework, a general duty is placed on persons conducting a business or undertaking to, as far as reasonably practicable, ensure the health and safety of workers.

This duty attaches equally to all members of the supply chain including designers, manufacturers, importers and suppliers. ‘Health and safety’ not defined in the law and is understood by reference to what is ‘reasonably practicable’ in the circumstances.

²⁴⁵ Submission by Standards Australia, page 3.

²⁴⁶ Submission from Professor Luke Nottage, page 8.

²⁴⁷ Submission from Master Electricians Australia, page 2.

Box 16: Performance-based standards — Work health and safety

This duty is complemented by Codes of Practice and Guidelines setting out minimum performance-based requirements for compliance with the general duty. These requirements address specific risks and hazards associated with work and the workplace, rather than prescribe specific types of workplace products or equipment. For example, guidelines are in place for electrical work and use of hazardous materials and chemicals in the workplace.

Where appropriate, the codes and guidelines also reference relevant voluntary standards that can be used to show compliance.

Persons conducting a business or undertaking can follow the rules in the codes and guides, or can create their own processes to meet the general duty. Either way, there is a requirement to conduct a risk assessment of all work processes.

For consultation**Option 2 — Introduce a ‘performance-based’ approach to compliance with product safety standards**

Stakeholder views are sought on an option to review mandatory safety standards and, where appropriate, replace these with a ‘performance-based’ approach to compliance. This option could be designed in several different ways depending on whether it would operate alongside a general safety provision, for example:

- a business could comply with a mandatory standard where one exists. Where a mandatory standard does not exist, a business could be ‘deemed to comply’ if its product meets a voluntary standard (either Australian or International) or another comparable means of compliance
- compliance with a voluntary or mandatory standard could be treated as a ‘safe harbour’ defence to a breach of the general safety provision. To support compliance with the general safety provision under a ‘performance-based’ approach, regulators could issue guidance, notices or directives or develop codes of practice.

CAANZ notes that any change to the current approach would not be taken in isolation from current work by the Australian Government to address the impact of product standards on competition and innovation. As noted by the Final Report for the Competition Policy Review:

Given that product standards (requirements that goods have certain characteristics) can raise barriers to entry, especially where they are referenced in law (either directly or indirectly) and mandate particular technologies or systems rather than performance outcomes, it is appropriate that they be subject to review. Standards that are not mandated by government should also be reviewed periodically to ensure they do not restrict competition unnecessarily. For example, an Australian Standard that differs unnecessarily from an international standard could limit import competition.²⁴⁸

Recommendations 10 and 11 of the Competition Policy Review identified mandatory product standards as a priority area for review and recommended that Australian Standards be subject to

²⁴⁸ Competition Policy Review, Final Report, March 2015, page 45.

periodic review against a public interest test. The Australian Government supported both recommendations, and noted it was willing to consider payments to states and territories for regulatory reviews of standards, and that it would encourage Standards Australia to introduce a net benefit test when assessing whether to reconfirm standards.²⁴⁹

The Australian Government is currently working with Standards Australia and state and territory governments to implement these recommendations. In April 2016, COAG agreed that Commonwealth, state and territory Treasurers should develop a new competition and productivity-enhancing reform agreement for COAG's consideration. The draft agreement should incorporate shared national and state-specific competition and productivity reforms.²⁵⁰

Further questions

29. Should a 'performance-based' approach to product safety standards be introduced?
- What changes would businesses need to implement, and what are the associated costs? What impacts would a 'performance-based' approach have for consumers?
 - Are there any unintended consequences, and how could these be addressed?
30. How could the approach be designed? For example:
- Are there any current domestic or overseas models, or features of models, that should be considered?
 - How would it interact with other elements of the current regime, or with a general safety provision?
 - What, if any, transitional arrangements would be required for businesses?

2.2.9 Effectiveness of other regulatory response mechanisms

Stakeholders provided different views on the effectiveness of current regulatory responses to product safety risks.

Industry stakeholders generally called for the streamlining of regulatory processes to reduce compliance costs, while other stakeholders sought changes to better address safety risks. In particular, issues were raised about:

- current requirements for **mandatory reporting** by businesses of any product-related death, or serious injury or illness resulting from a product, especially with regard to their flexibility and reporting timeframes
- the complexity and uncertainty surrounding **compulsory recalls** and **interim and permanent bans**, and differences that can arise between jurisdictions
- the level of **transparency and information sharing** with interested stakeholders and the public about the outcome of a complaint, notification or report.

249 Australian Government response to the Competition Policy Review, 2015, pages 12-13.

250 COAG Meeting Communiqué, 1 April 2016, page 2.

2.2.10 Mandatory reporting requirements

Mandatory reporting is an important way in which regulators gather information and intelligence on product safety concerns in the market. Suppliers must report deaths or serious injury or illness where they were caused by the use, or foreseeable use, of a product.

There were a range of views on the triggers for mandatory reporting. Some stakeholders suggested that ‘serious injury or illness’ and ‘use and foreseeable use’ captures too many reportable incidents,²⁵¹ while some others suggested that it does not go far enough in capturing ‘near misses’.²⁵²

Other issues raised included the timeframe in which mandatory reports must be made.

Serious injury or illness

Some stakeholders were concerned that the triggers for making a mandatory report (death or serious injury or illness) are confusing and increase compliance costs for business, or are inconsistent with other regulatory approaches in Australia and overseas.²⁵³

The ACL’s definition of ‘serious injury or illness’ is ‘an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place)’.²⁵⁴

Some stakeholders suggested that this definition can capture even minor injuries (such as minor cuts, burns and abrasions).²⁵⁵ Baker & McKenzie submitted that ‘the giving of treatment, no matter how minor, by a medical practitioner or nurse is enough to satisfy the seriousness criterion’. It noted that suppliers are commonly told only that the consumer ‘went to the doctor’, making it difficult for the supplier to determine the seriousness of an injury and whether a mandatory report is required.²⁵⁶

Allens submitted that:

[i]n the absence of clarity, and given the serious consequences of failing to comply with the mandatory reporting requirements, businesses may choose to apply the most conservative interpretation to ensure compliance, which can lead to over-reporting, thereby increasing compliance costs.²⁵⁷

The Australian Food and Grocery Council submitted that the trigger should be amended to require death or hospital admission, a change that ‘would “declutter” the system and allow for attention to be focussed on serious safety issues’.²⁵⁸

251 For example, submissions from: Australian Toy Association; and Retail Council.

252 For example, submissions from: Professor Luke Nottage; and CHOICE.

253 For example, submissions from: Accord Australia; Allens; Australian Food and Grocery Council; Australian Toy Association; Baker & McKenzie; Business Council of Australia; and Retail Council.

254 ACL, section 2.

255 For example, submissions from: Allens; Baker & McKenzie; and Australian Food and Grocery Council.

256 Submission from Baker & McKenzie, page 21.

257 Submission from Allens, page 31.

258 Submission from Australian Food and Grocery Council, page 6.

Baker & McKenzie submitted that:

there is significant advantage in having a “seriousness” test which is both objective and also does not place a disproportionate compliance burden on suppliers by requiring reporting of minor incidents which do not provide a corresponding benefit in terms of consumer safety. It is submitted that the “admission to hospital” test strikes the right balance.²⁵⁹

Accord Australasia suggested that this change would bring the definition in line with comparable regulatory frameworks, noting that suppliers of certain products must report to the Therapeutic Goods Administration ‘serious adverse events’ including, among things, admission to hospital’.²⁶⁰

Baker & McKenzie cited the approach used in food safety reporting regimes in the Australian Capital Territory, South Australia (SA) and Tasmania, which require that a medical practitioner, rather than a supplier, report food-related illness or death.²⁶¹

CAANZ notes that the definition of ‘serious injury or illness’ was inserted into the ACL in order to capture all serious injuries and illnesses regardless of where treatment was received. Accordingly, a narrower test of ‘hospital admission’ may not capture all relevant injuries and illnesses to which a reporting requirement should attach.

CAANZ also notes that to provide the information currently required for a mandatory report,²⁶² a medical practitioner would need to draw detailed conclusions about the:

- identity of the product
- quantity of products in circulation
- circumstances of the death, injury or illness
- steps taken to address the safety risks.

CAANZ notes that regulators already receive valuable safety information from the health system which is complemented by intelligence sourced from mandatory reports. To maximise the quality of information received from the health system, regulators should continue efforts to strengthen their relationships with hospital and medical clinics.

Use or foreseeable misuse

The term ‘use or foreseeable misuse’ is not defined in the ACL and is instead given its ordinary meaning.

In discussing the breadth and application of the term, Allens submitted that the test for determining ‘use or foreseeable misuse’ is ‘difficult for businesses to apply to real-life scenarios’. To address this, Allens suggested that the regulator issue guidance on the meaning of ‘use or foreseeable misuse’ to ensure greater clarity for business in complying with the law.²⁶³

259 Submission from Baker & McKenzie, page 21.

260 Submission from Accord Australasia, page 6.

261 Submission from Baker & McKenzie, page 19.

262 Section 131(5) of the ACL.

263 Submission from Allens, page 31.

‘Near misses’

In contrast, some stakeholders submitted that the triggers for a mandatory report are too narrow and do not cover known safety risks, illnesses or injury that do not require medical treatment, or ‘near misses’.²⁶⁴

A ‘near miss’ is a safety incident where death or serious injury or illness did not actually occur, but there is a ‘serious risk’ that death or serious injury or illness could result from the use, or foreseeable misuse, of a product. An example is where a toy containing small moving parts (which carry an inherent safety risk) can propel the moving part at high speed, but has yet to cause any injury. Nevertheless, there is a risk of death or serious injury or illness, such as choking or damage to the eye.

Professor Luke Nottage submitted that:

Australia should add a disclosure obligation on suppliers for “near misses” and other serious health risks associated with their consumer products (so [we can] better align and share info with overseas regulators, including the USA, EU, Canada and Japan).²⁶⁵

Consumer Action Law Centre suggested that including near misses and known safety risks ‘would ensure the regime acts proactively to prevent harm that might be caused to others’.²⁶⁶

However, as discussed above, CAANZ notes there are existing uncertainties about how to determine ‘use or foreseeable misuse’.

For consultation

Option 3a — Clarifying the mandatory reporting triggers through greater regulator guidance on the meaning of ‘serious injury or illness’ and ‘use or foreseeable misuse’

Views are sought on clarifying the mandatory reporting triggers through regulator guidance on the meaning of ‘serious injury or illness’ and ‘use or foreseeable misuse’, noting the value of mandatory reports as a source of information and intelligence for regulators.

Regulator guidance could, for example, clarify the circumstances in which a mandatory report should be made. The guidance could include:

- whether there is an obligation to make a report for a minor injury that requires medical treatment (such as minor cuts, burns and abrasions)
- what constitutes ‘use or foreseeable misuse’ in certain circumstances, such as whether it includes all possible uses and misuses for a product, or only a smaller subset.

Further questions

31. Should the mandatory reporting triggered be clarified? If so:

- How should this be achieved?

²⁶⁴ For example, submissions from: Professor Luke Nottage; and Consumer Action Law Centre.

²⁶⁵ Submission from Professor Luke Nottage, page 4.

²⁶⁶ Submission from Consumer Action Law Centre, page 31.

Further questions (continued)

- What changes would businesses need to implement to their current reporting processes, and what impact would this have on their compliance costs?
- How would this affect the information that is available to regulators, and product safety outcomes for consumers?

2.2.11 Timeframe for making a mandatory report

Under the ACL, a mandatory report must be made within two days of the supplier becoming aware of a death or serious injury or illness resulting from the use or foreseeable misuse of a product.²⁶⁷

A number of industry stakeholders expressed concern that this timeframe is too short to provide a report to the regulator, let alone a report that is meaningful and useful.²⁶⁸ For example, the Retail Council submitted that '[t]he current time period does not sufficiently balance the need to quickly address safety concerns against the need for retailers to have sufficient time to conduct internal reporting and investigations'.²⁶⁹

Concerns were raised that the current timeframe is insufficient to allow for a business to conduct appropriate due diligence, which requires adequate staff resources and time to contact the consumer, gather evidence, and respond with a risk assessment and action plan to assure the regulator that appropriate steps are being taken.

The Australian Toy Association noted that:

[w]ithin this period, the supplier should get a proper understanding of what happened, the relationship of the consumer product to the incident and the treatment provided to know whether the incident is actually reportable or not.

In most cases, it is not possible to gather the required information within the period allowed. For example, it may take more than 48 hours just to make contact with the consumer, particularly in the case that the supplier has learnt of an incident by social media. In order to comply with the reporting requirement, suppliers take the conservative approach of reporting everything and then completing the investigation afterwards. This leads to a lot of incomplete, inaccurate and possibly unnecessary reports and also creates extra effort in managing the process.²⁷⁰

Some stakeholders also indicated that complications can arise where a supplier learns of the incident via social media, or on weekends when it may be difficult to follow up with the customer or undertake specialist investigations.²⁷¹

267 ACL, section 131(1).

268 For example, submissions from: Accord Australasia; Australian Food and Grocery Council; Australian Toy Association; Business Council of Australia; and Retail Council.

269 Submission from Retail Council, page 9.

270 Submission from Australian Toy Association, page 8.

271 For example, submissions from: Australian Toy Association; Retail Council; and Business Council of Australia.

Accord Australasia submitted that:

[t]he current reporting requirements promote a “knee-jerk” reaction to incidences and do not allow any time for analysis to separate out incidents that may have potential significant regulatory concerns to those that may not. The system results in over-reporting and duplication.²⁷²

It suggested that the mandatory reporting requirement is inconsistent with the notification requirements for a voluntary recall, which allow a supplier to ‘undertake an adequate risk assessment and develop a risk management strategy prior to notification of the action’.²⁷³

The Australian Food and Grocery Council submitted that within the current timeframe, a manufacturer often undertakes ‘only the most basic fact checking investigation... usually well before any conclusions of causation can be determined’.²⁷⁴ The Business Council of Australia suggested that the timeframe leads to unnecessary reports and that extra time would improve the quality of investigations and resulting information provided to regulators.²⁷⁵

Several options for increasing the mandatory reporting timeframe were suggested:

- four days (double the current two day timeframe)²⁷⁶
- 10 days, in line with requirements in jurisdictions such as Canada²⁷⁷
- 15 days, to bring the reporting requirements in line with the *Therapeutic Goods Act 1989* (Cth).²⁷⁸

For consultation

Option 3b — Increasing the mandatory reporting timeframe and requiring immediate notification of a death or serious illness or injury

Views are sought on increasing the current mandatory reporting timeframe, for example, from two to four days.

In considering the optimal timeframe, CAANZ notes the importance of balancing the needs of industry to collect and report meaningful information with the needs of the regulator to quickly identify and address safety risks.

Where a longer period is provided by other regulatory frameworks, such as the 15-day period under the *Therapeutic Goods Act 1989*, this is often balanced with a requirement for suppliers to immediately notify the regulator of the incident. Immediate notification could potentially involve a supplier providing the regulator with basic information from the original incident, such as the identity of the product and the nature of the death or serious injury or illness.

272 Submission from Accord Australasia, page 5.

273 Ibid, page 6.

274 Submission from Australian Food and Grocery Council, page 6.

275 Submission from Business Council of Australia, page 6.

276 For example, submissions from: Australian Toy Association; and Retail Council.

277 Submission from Accord Australasia, page 5.

278 Submission from Australian Food and Grocery Council, page 6.

A more fulsome report could then be prepared during the required timeframe that contains all the reportable information required under the ACL about the quantities of the goods, circumstances of the death serious injury or illness and any actions taken by the supplier.

Further questions

32. Should the current timeframe for making a mandatory report be extended? If so:

- What time period should apply?
- Should it be accompanied by other requirements, for example, immediate notification?
- What changes to businesses processes would be needed, and what would be the impact on compliance costs?
- What, if any, transitional arrangements would be needed?
- Are there any unintended consequences, and how could these be addressed?

2.2.12 Product bans and recalls

Product recalls remove unsafe products from the market and can be initiated voluntarily by suppliers or in response to an order by the Minister. **Product bans** prevent the supply of products where there is a risk it may cause death or serious injury or illness.

Stakeholders raised a number of concerns regarding the effectiveness of the current approach to product recalls and bans, including the:

- effectiveness of voluntary recalls
- complexity and uncertainty surrounding product bans and mandatory recalls
- the speed with which regulators can remove and prevent the supply of unsafe goods in the market.

Voluntary recalls

The ACL requires a supplier who voluntarily recalls a product on safety grounds to notify the Commonwealth Minister within two days of the recall.²⁷⁹ A notice of the voluntary recall is then published on the Product Safety Australia website, www.productsafety.gov.au/recalls. If the supplier has also supplied the product outside Australia, the supplier must notify the Minister within 10 days.

The voluntary recall notice must set out identifying information about the product, such as:

- the nature of the defect
- circumstances for use or foreseeable misuse
- whether the good complies with a safety standard
- whether a product ban is in place for the good.

²⁷⁹ ACL, section 128.

Failure to comply with the requirement to notify a voluntary recall can result in a penalty of \$16,650 for a company, and \$3,300 for an individual.

The ACCC has issued guidance to suppliers on conducting a product safety recall, which sets out the steps that a supplier should undertake for a voluntary recall. The guide broadly defines a voluntary recall as occurring:

when the supplier of a consumer product initiates the recall and voluntarily takes action to remove the goods from distribution, sale, and/or consumption.²⁸⁰

Some stakeholders expressed concern that, other than specifying the timing and content of the notice, the ACL does not provide any further details of what a supplier must do to remove unsafe products from the market.²⁸¹

For example, Professor Luke Nottage noted that ‘recall’ is not defined in the law, so it is not clear what would constitute a ‘satisfactory action’ for a voluntary recall. He submitted that, to address uncertainty, ‘there should be a statutory definition (not just ACCC Guidelines) of voluntary ‘recalls’ (triggering a notification duty to the regulator)’.²⁸²

CHOICE submitted that the only consequence of not conducting a recall appropriately is that:

[i]f the responsible Minister forms the view that a business has not taken satisfactory action to prevent goods causing injury to any person, then the business may be subject to a mandatory recall, which carries a higher regulatory burden. However, given the nature of recalls that have been the subject of a mandatory recall, it would have to be a fairly spectacular, extraordinary or very public failure to attract Ministerial intervention.²⁸³

CHOICE suggested that there is a ‘fundamental conflict of interest’ whereby suppliers do not issue a voluntary recall notice because they do not want to draw attention to their recall, and that the associated reputational and brand damage creates a disincentive for suppliers to publicise their recall.²⁸⁴

As discussed in **Chapter 3.2, ‘Penalties and remedies’**, stakeholders have raised the issue of whether ACL penalties are sufficient to deter future breaches. This could include the current penalty of \$16,650 for a company that fails to comply with the requirement to notify a voluntary recall, particularly where a company considers the potential damage to reputation associated with a voluntary recall is likely to be more costly than the financial penalty.

280 ACCC, Consumer Product Safety Recall Guidelines: What a supplier should do when conducting a product safety recall, 2015, page 5, at: www.productsafety.gov.au/publication/consumer-product-safety-recall-guidelines.

281 For example, submission from: CHOICE; and Professor Luke Nottage.

282 Submission from Professor Luke Nottage, page 4.

283 Submission from CHOICE, page 33.

284 Ibid, page 34.

For consultation

Option 3c — Introducing a statutory definition of a voluntary recall, and increasing penalties for failure to notify a recall

Views are sought on introducing a statutory definition of a voluntary recall that would specify the criteria for conducting a 'satisfactory action'. This option would seek to provide greater clarity for businesses on how to take adequate steps so that a mandatory recall is not required.

To encourage compliance with the voluntary recall provisions, stakeholder views are also sought on whether the current penalty for non-compliance should be increased.

A statutory definition of voluntary recall could, for example, be consistent with ISO 10393:2013 *Consumer product recall — Guidelines for suppliers*, which defines a product recall as 'corrective action taken post production to address consumer health or safety issues associated with a product'.

Also, the criteria for conducting a 'satisfactory action' could include the following actions listed in the ACCC's *Consumer Product Safety Recall Guidelines*:

- conduct a comprehensive risk analysis of the safety-related hazard
- stop distribution of a product that has been identified for recall
- cease production or modify the manufacturing process
- remove the unsafe product from the marketplace
- notify the relevant regulator/s
- notify the public
- notify international product recipients
- notify others in the domestic supply chain
- facilitate the return of recalled products from consumers
- store and dispose of recalled products safely
- draw up a written recall strategy/plan
- maintain records and establish procedures that will facilitate a recall (records should be in a form that can be quickly retrieved)
- provide progress reports on the conduct of the recall to relevant regulators.²⁸⁵

Other factors to consider in the criteria for a voluntary recall could include the adequacy of the suppliers' communication strategy, and a requirement to provide a photo or other information such as the quantity of goods being recalled.

²⁸⁵ ACCC, *Consumer Product Safety Recall Guidelines: What a supplier should do when conducting a product safety recall*, 2015, at: www.productsafety.gov.au/publication/consumer-product-safety-recall-guidelines.

Further questions

33. Should a statutory definition of a voluntary recall be introduced? Would this address the concerns raised? If so:
- How should a voluntary recall be defined?
 - What factors or criteria should be included?
34. Should the penalty for a failure to notify a recall be increased and, if so, to what amount?

Product bans and mandatory recalls

Interim and permanent product bans and mandatory recalls are administered at the federal and state and territory level under the 'one law, multiple regulator' model. Under this model:

- **mandatory recalls** can be issued by the Commonwealth, state or territory Minister where a product is shown to present a risk to safety.
- **interim product bans** can be issued by the Commonwealth, state or territory Minister to prevent the supply of an unsafe good. They last for 60 days, but may be extended by 30 days
- **permanent product bans** can be issued by a Commonwealth Minister to prevent the supply of an unsafe good in the market.

While stakeholders generally considered that having a single, national product safety regime has provided a clearer and more cohesive framework, a number of areas of complexity and uncertainty were highlighted.

Some stakeholders noted the inconsistencies that can arise between the interaction of the ACL and **specialist regulatory regimes**.²⁸⁶ Others noted that the number of regulators involved can create confusion amongst customers and retailers which can lead to unnecessary delays.²⁸⁷

The Australian Toy Association submitted that this:

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.²⁸⁸

The Retail Council submitted that:

[d]ifferent responses to product safety matters from different jurisdictions also creates the potential of a competitive disadvantage if a retailer in one state is prohibited from selling a product but a competitor in another state can continue to sell the item.²⁸⁹

286 For example, submissions from: Australian Toy Association; Business Council of Australia; Consumer Action Law Centre; and Retail Council.

287 For example, submissions from: Retail Council; and Master Electricians Australia.

288 Submission from Australian Toy Association, page 5.

289 Submission from Retail Council, page 10.

Citing the recent issue of house fires linked to the recharging of hoverboards, the Retail Council further submitted that:

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.²⁹⁰

The Australian Toy Association submitted that such issues were compounded by 'separate electrical requirements by the States and Territories', and the different jurisdictions of energy regulators, noting that 'extra low voltage equipment is covered by the Victoria Electrical Safety Act, but not by the NSW version.'²⁹¹

CAANZ notes that broader issues about the administration and enforcement of the ACL under the 'one law, multiple regulator' model are being assessed by the Productivity Commission, which is due to report to Ministers in March 2017. This study will, among other things, consider the interaction between ACL regulators, and between ACL and specialist regulators, in enforcing and administering the product safety regime.

Nevertheless, there may be opportunities to streamline processes for implementing product bans and recalls under the ACL to address concerns raised by some stakeholders.²⁹²

Currently, decisions to issue a product ban or recall in response to a safety risk are taken by the Commonwealth, state or territory Minister responsible for product safety within their jurisdiction. This requires regulators to negotiate a variety of complex processes and provide advice before the Minister can take action to deal with an unsafe product, such as issuing a safety warning notice, interim or permanent ban, or compulsory recall [see **Case study 4** below].

There were concerns that this process can take time and can cause significant delay, and therefore does not allow for prompt action to be taken in all circumstances to address safety risks.

Case study 4: Regulatory response to safety risks posed by hoverboards

In late 2015, the ACCC identified hoverboards as posing a safety risk to consumers following reports that the product had caused house fires overseas. The ACCC issued a warning notice on 10 December 2015, alerting consumers to the potential risks of injury and fire.

On 4 January 2016, the first known Australian hoverboard-related house fire occurred in Victoria, destroying the residence. On 12 January, the then Commonwealth Minister for Small Business and Assistant Treasurer published a safety warning notice announcing that the ACCC was investigating the risks associated with these products.

290 Ibid, page 10.

291 Submission from Australian Toy Association, page 13.

292 For example, submissions from: Retail Council; and Master Electricians Australia.

Case study 4: Regulatory response to safety risks posed by hoverboards (continued)

Between 31 January and 4 March 2016, four house fires were started by hoverboards — three in NSW and one in Tasmania, of which two houses were destroyed. The ACCC commenced consideration of regulatory options to reduce the risks posed to consumers, including the development of a draft Regulation Impact Statement (RIS) for consultation. A RIS assesses the costs and benefits of a proposed regulatory action.

The responsible Minister subsequently imposed an immediate 60-day interim ban on hoverboards that prevented their supply unless they met specific safety requirements. The interim ban was extended for an additional 30 days on 18 May, and again on 17 June 2016. Each extension involving developing a draft RIS and publishing it on the Federal Register of Legislation, with an explanatory statement.

In late June 2016, the ACCC submitted a final RIS for assessment by the Office of Best Practice Regulation. This was followed by a recommendation to the Minister, supported by the RIS, to make a mandatory safety standard for hoverboards that would remain in place for two years.

The Minister issued a declaration 5 July 2016, with the standard coming into effect when the most recent interim ban lapsed.

For consultation

Option 3d — Streamlining the processes for implementing product bans and mandatory recalls

Views are sought on ways streamline current processes for implementing product bans and recalls.

For example, regulators could be given powers to issue an ‘administrative order’ to initiate a product safety action, where a failure to comply would give rise to injunctive relief. Such an approach could complement, or replace, current requirements for Ministerial decision.

CAANZ notes that streamlining complex bureaucratic processes could potentially reduce delays in regulatory responses to safety risks, but that this needs to be balanced with the need for appropriate checks and balances.

Further questions

35. Should current processes for implementing product bans and recalls be streamlined? If so:

- How should they be streamlined?
- What would be the associated benefits and costs?
- Are there any unintended consequences, risks or challenges that need to be considered?

2.2.13 Public information about unsafe products

Information about product safety risks and current product bans and recalls is made publicly available on the Product Safety Australia website, www.productsafety.gov.au.

However, some stakeholders expressed concern about how widely safety information is communicated to consumers.²⁹³

Safety warning notices

Currently, the ACL includes a ‘product under investigation’ power in the form of a safety warning notice issued by the regulator. This notice states that the safety aspects of a particular good are under investigation and warns of the risks associated with its use. Notices are published on the Product Safety Australia website when an investigation commences — for example, this power was used in response to the safety risks posed by hoverboards [see **Case study 4** above].

It has been suggested that the ‘product under investigation’ power should allow for a regulator to publicly announce that a product is under examination while testing and decisions are made about a recall or ban.

Such a proposal suggests that consumers are not being provided with the safety information they need to make informed decisions about the products they are using or buying. In CAANZ’s view, this indicates that some consumers are not aware of role played by safety warning notices, or that these notices are not reaching consumers in a timely manner.

More information about voluntary recalls

CHOICE called for a new legislative obligation on businesses conducting voluntary recalls to use all reasonable means available to communicate to the affected consumer community about the product safety issue and remedies available. It submitted that:

[a] benefit of this approach is that it would incentivise businesses to build tailored communication channels with customers, including for example retaining contact details. This approach should put an end to the practice of simply publishing a newspaper advertisement as a sufficient basis of communicating to consumers about product recalls. CHOICE research has found that people expect to find out about products in a far wider range of communications.²⁹⁴

CHOICE further submitted that businesses conducting voluntary recalls should be obliged to publish regular results about the outcomes of any active product recall, as:

consumers have a right to know whether what suppliers are doing is working well enough to remove unsafe products from the marketplace. This additional information would facilitate a more meaningful public debate about when a mandatory recall should be triggered.²⁹⁵

Currently, the Product Safety Australia website lists voluntary recall notices that suppliers are required to prepare. These notices list all the relevant information associated with the recall, including the nature of the defect, risks associated with use and the steps to be taken to address the risk.

293 For example, submissions from: CHOICE; Consumer Action Law Centre; and Professor Luke Nottage.

294 Submission from CHOICE, page 34.

295 Ibid, pages 34-35.

The ACCC's guidelines on voluntary recalls require suppliers to implement a recall strategy which includes measures to ensure effective communication with consumers about the recall.²⁹⁶

Register of customer details

To facilitate subsequent recalls, some industry stakeholders have supported the introduction of an obligation on suppliers to keep a register of customer details for major purchases.²⁹⁷

Master Electricians Australia submitted that:

[i]ntroducing a register would assist regulators to identify the location of any equipment of this type that was later subject to a recall. This would facilitate a ready means to contact those at risk to ensure they take the steps to remove the product from their homes.

A mandatory system of this type would also provide more effective support to suppliers when they are required to withdraw unsafe or non-compliant product[s] from the market.

... [T]he register would also provide a level playing field for all suppliers of high risk products, including Australian based online suppliers.²⁹⁸

Consumer Electronics Suppliers Association suggested an alternative approach:

Perhaps consumers should be encouraged to record their details (address/phone number/email address) with the supplier at the time of purchase and the supplier required by law to provide those details to a regulator at the time of a recall. A number of suppliers already collect consumer information but are reluctant to provide the information externally because of privacy concerns.²⁹⁹

CAANZ notes that this issue has been raised in the context of electrical safety and it is not clear that there is a strong case for introducing a mandatory register for consumer products more broadly, noting that such a register may have substantial compliance costs and raise privacy concerns. An industry-driven, self-regulatory approach may be a more appropriate response.

Publishing mandatory reports

Currently, mandatory reports of product-related deaths or serious injury or illness made by suppliers to the ACCC are protected by a confidentiality provision in the ACL.³⁰⁰ These reports can contain sensitive information including personal details of consumers and their injuries and illnesses.

Some stakeholders suggested that these reports should be made publicly available. For example, Consumer Action Law Centre submitted that 'mandatory reports should be placed on a public register, so that the public and other safety regulators can be aware of safety risks associated with

296 ACCC, *Consumer Product Safety Recall Guidelines: What a supplier should do when conducting a product safety recall*, 2015, available at: www.productsafety.gov.au/publication/consumer-product-safety-recall-guidelines.

297 For example, submissions from: Master Electricians Australia; Consumer Electronics Suppliers Association; and Ethnic Communities Council of NSW.

298 Submission from Master Electricians Australia, page 3.

299 Submission from Consumer Electronics Suppliers Association, page 5.

300 ACL, section 132A.

consumer goods'.³⁰¹

Professor Luke Nottage suggested relaxing the confidentiality requirement and making information about safety incidents more widely accessible to specialist regulators, consumers and researchers to allow them to gauge the effectiveness of the regime.³⁰²

The Australian Toy Association provided a business perspective, noting that:

[t]he provision of the data would need to be managed in a way to ensure that it is accurate and respected the confidentiality of the parties making [the] report, but a robust set of data on injuries associated with consumer products would be helpful in various risk management activities such as Standards development and product selection.³⁰³

CAANZ notes that lifting the confidentiality requirements for mandatory reports could create a disincentive for businesses to report incidents to the ACCC.

For consultation

Option 3e — Improving the quality of information made available to consumers about safety risks

Views are sought on ways to improve the quality of information available to consumers regarding product safety risks.

For example, de-identified data on safety incidents could be made publicly available (which would not require lifting the confidentiality protection for mandatory reports). Alternatively, there could be public reporting of safety incidents by product type, by the types of injuries or illnesses sustained, and/or about the general circumstances regarding the use or foreseeable misuse of classes of products.

Further questions

36. Is there scope to improve the quality of information available to consumers on safety risks? If so:
- What are the benefits of increased information, and what costs, risks or challenges need to be considered?
 - What information is most helpful to consumers, and how should it be used? In a context of finite resources, what information should be prioritised?
 - How could this be achieved? For example, in what format should information be provided?

301 Submission from Consumer Action Law Centre, page 31.

302 Submission from Professor Luke Nottage, page 3.

303 Submission from Australian Toy Association, page 8.

2.3 Unconscionable conduct and unfair trading

Stakeholders generally suggested that as a broad, principles-based general protection, the unconscionable conduct provisions are working as intended, but there were different views on how the provisions are being interpreted. Stakeholders also provided views on:

- whether publicly listed companies should be excluded from the provisions
- whether a general prohibition against unfair trading should be introduced.

CAANZ seeks your views on the following overarching questions:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?
- What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements? Are there any unintended consequences?

Key observations

The ACL contains a range of flexible economy-wide prohibitions against unfair conduct, including prohibitions against misleading or deceptive conduct and unconscionable conduct. The ACL also contains specific prohibitions such as those prohibiting false or misleading representations, certain unsolicited supplies, and harassment and coercion.

CAANZ notes that feedback from stakeholders, including the experience of ACL regulators, indicates that the unconscionable conduct provisions are working as intended in addressing conduct that is not easily addressed by the more specific protections. As it is a broad principles based provision, its legal test is determined by the courts and applied on a case-by-case basis.

Nevertheless, there were diverse stakeholder views on the **interpretation of the unconscionable conduct** provisions. For example:

- Some stakeholders suggested that the law's incremental development can result in a lack of clarity, affect the consistent application of the law across jurisdictions, lower the deterrent effect, and act as a barrier to consumers accessing remedies.
- Other stakeholders noted the benefits of a principles-based approach in allowing the law to evolve in response to changing values and issues rather than remain static or restricted by legislative definition.

Some stakeholders also questioned why **publicly listed companies should be excluded from the scope of the provisions**, arguing that they are not necessarily 'big' companies or less vulnerable in protecting their interests from the unconscionable conduct of other businesses.

Separately, some stakeholders called for a new **general prohibition against unfair trading** with a lower threshold than unconscionability to address business models that are inherently 'unfair'. The EU Directive on Unfair Commercial Practices (the Directive) was commonly cited as an example.

Key Observations (continued)

CAANZ observes that:

- the QUT study and various stakeholders noted that the EU's unfair trading prohibition is supported by general protections similar to those in the ACL (such as the prohibition against misleading or deceptive conduct) with enforcement mostly occurring at that level
- some stakeholders raised concerns that adopting a new prohibition against unfair trading in the Australian context without sufficient evidence to justify its necessity and appropriateness may generate uncertainty and costs for both consumers and business.

CAANZ notes that greater clarity on unconscionable conduct is anticipated as the case law develops, and that is not clear that there is a current regulatory gap that warrants the introduction of a general and economy-wide prohibition against unfair trading. Nevertheless, there may be opportunities to consider whether the exemption for publicly listed companies is still in the public interest.

OPTIONS

1. Maintain the existing unconscionable conduct provisions and allow the case law to develop.
2. Extend the unconscionable conduct provisions to publicly listed companies.

2.3.1 Unconscionable conduct

The ACL prohibits a person, in trade or commerce, from engaging in 'unconscionable conduct'. A similar prohibition is found in the ASIC Act in relation to financial services.³⁰⁴

The unconscionable conduct provisions seek to prevent trading practices that are so harsh or oppressive that they go against good conscience, and are clearly unfair and unreasonable. They apply to the conduct of any individual or business engaging in trade or commerce, except where the person affected by the conduct is a **publicly listed company**. Its application is therefore broad and flexible, and protects not only consumers but a range of businesses, including franchisees, small and medium enterprises, and suppliers to other businesses.

Where a breach of the unconscionable conduct provisions is found, the courts may order a range of penalties and remedies under the ACL, and other common law remedies.

A statutory protection against unconscionable conduct was introduced in 1986 into the former TPA. Section 52A of the TPA prohibited a person from engaging in conduct in connection with the supply of goods or services to a person that is, in all the circumstances, unconscionable.

Since 1986, the statutory protections have been expanded through various amendments, including amendments to prohibit unconscionable conduct within the meaning of the unwritten law of the states and territories,³⁰⁵ and extend the protections to corporations (other than publicly listed companies).³⁰⁶

In 2011, the ACL was introduced and the former TPA repealed. The ACL prohibits unconscionable conduct within the meaning of the unwritten law³⁰⁷ and includes a broader provision that is 'not

304 ASIC Act, Part 2, Division 2, Subdivision C.

305 Section 51AA was introduced in 1992.

306 Section 51AC was introduced in 1998.

307 ACL, section 20.

limited' to the unwritten law. It also protects corporations other than publicly listed companies,³⁰⁸ and further, it allows courts to consider 'a system of conduct or pattern of behaviour, whether or not a particular individual has been disadvantaged by the conduct or behaviour'.³⁰⁹

The provisions set out a range of factors to which the court may have regard, including, among other things:

- the relative bargaining power of the parties
- whether any undue influence or pressure, or any unfair tactics were used against the customer
- the amount for which (and the circumstances under which) the customer could have acquired identical or equivalent goods or services from a person other than the supplier
- the extent to which the supplier's conduct towards the customer was consistent with their conduct towards like customers
- the requirements of any applicable industry code
- the extent to which the supplier unreasonably failed to disclose any intended conduct of the supplier that might affect the interests of the customer, and any risks to the customer arising from the supplier's intended conduct that the supplier should have foreseen would not be apparent to the customer)³¹⁰

The ACL does not define 'unconscionable conduct' and its application has evolved significantly from its origins in the principles of equity as recognised by the courts.

More recently, the Competition Policy Review examined these provisions in relation to small businesses. It noted that the recent Federal Court decisions in actions brought by the ACCC against Coles indicate that the current unconscionable conduct provisions appear to be working as intended.³¹¹

Previous inquiries have examined the issue of developing a statutory definition of unconscionable conduct, including a 2008 Senate Economics Committee report.³¹² The Committee did not recommend a definition of unconscionable conduct as it considered such a definition could create more uncertainty and confusion for the courts and adversely affect consumers and businesses.

2.3.2 Are the provisions working effectively?

Some stakeholders submitted that the meaning of unconscionable conduct is uncertain because it is not defined in legislation, and this can affect the consistent application of the law across different courts, and reduce the provisions' deterrent effect and usefulness for consumers.

308 Ibid, section 21 (4)(a).

309 Ibid, section 21(4)(b).

310 Ibid, section 22.

311 Competition Policy Review, Final Report, March 2015, page 356.

312 Senate Economics Committee report, *'The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974'*, 2008.

Redfern Legal Centre submitted that the ACL's provisions:

remain difficult to understand and interpret, for both consumers and business alike. The absence of a clear definition of unconscionable conduct, through statute or precedent, remains a significant gap and limits the effectiveness of this provision. Incidents of unconscionable conduct are the most egregious breaches of ACL rights, yet the most difficult to prosecute or enforce.³¹³

Stakeholders also commented that outside of the legal realm, the term 'unconscionable' is not well understood. This can impact both businesses and consumers because businesses are not aware of how and the extent to which the law governs the way in which they transact, and consumers may be less likely to assert their rights.³¹⁴

Stakeholders also suggested difficulties in demonstrating that particular conduct meets the standard of unconscionable conduct as defined by the courts.³¹⁵ The courts typically attribute unconscionable conduct with its ordinary meaning as conduct that is against conscience and it is reasonably clear from the case law that an act is not unconscionable if it is merely unfair, unjust, wrong or unreasonable.

Stakeholders suggested that this high threshold makes it difficult for regulators to take enforcement action against businesses that test the boundaries. Consumer Action Law Centre submitted that:

[w]hile the protection against unconscionable conduct is useful, it has serious flaws and leaves Australian consumers exposed to unfair, predatory business practices which border on scams — yet are not caught by the high threshold of misconduct that proving unconscionable conduct requires.³¹⁶

Redfern Legal Centre also considered that the provisions relating to a system of conduct or pattern of behaviour do not go far enough. It noted that the provisions have rarely been used, and that it would be difficult to use where an individual was not identified as being disadvantaged.³¹⁷

On the other hand, some other stakeholders commented that the unconscionable conduct provisions are working as intended and that the case law is continuing to develop in the direction intended by lawmakers.³¹⁸ Some also noted 'unconscionability' is a broad term that is assessed on a case-by-case basis, and therefore it may not be possible or desirable to provide a comprehensive statutory definition.³¹⁹

For example, the Law Council of Australia's Competition and Consumer Committee submitted that:

[t]he jurisprudence on the construction to be given to the unconscionable conduct provisions continues to grow with meaningful and ongoing development of the concept...It would be counterproductive to interrupt that judicial progress to amend the

313 Submission from Redfern Legal Centre, page 8.

314 For example, submissions from: Melbourne Social Equity Institute; CHOICE; and Consumer Action Law Centre.

315 For example, submissions from: Redfern Legal Centre; Financial Rights Legal Centre; and Consumer Action Law Centre.

316 Submission from Consumer Action Law Centre, page 10.

317 Submission from Redfern Legal Centre, page 9.

318 For example, submissions from: Shopping Centre Council of Australia; Allens; Law Institute Victoria; and Law Council of Australia's Competition and Consumer Committee.

319 For example, submission from: Consumer Credit Legal Service WA; Insurance Australia Group; Allens; and Law Council of Australia's Competition and Consumer Committee.

law in an effort to provide any greater clarity regarding the meaning of ‘unconscionable’.³²⁰

The Shopping Centre Council of Australia submitted that:

[t]he statutory interpretation of the unconscionable conduct provisions continues to evolve and the courts should be given a reasonable opportunity to test whether these amendments have satisfied previous claims that the provisions are difficult to interpret.³²¹

Recent case law has also signalled a judicial move away from the requirement for ‘moral obloquy’, or moral tainting, and towards an approach where unconscionability is determined by reference to the ‘norms of society’,³²² particularly following the decision of *ACCC v Lux Distributors* [2013] FCAFC 90 in August 2013.

In that case, the Full Federal Court declared that Lux had engaged in unconscionable conduct in relation to the sale of vacuum cleaners to three elderly consumers in their homes. While noting that moral tainting may be a relevant consideration, the Court ruled that it is ‘conduct against conscience by reference to the norms of society that is in question’.

This decision was viewed favourably by a number of stakeholders,³²³ and its approach has been followed in a number subsequent of Federal Court judgements and the High Court has not ruled otherwise [see **Case studies 5 and 6** below].³²⁴

The experience of ACL regulators, such as the ACCC, indicates that this broad understanding of the meaning of ‘unconscionable’ has allowed them to address many types of egregious conduct, from vulnerable consumers subjected to pressure selling tactics, through to retailers using threats to demand payments from suppliers.

On balance, CAANZ considers that a case has not yet been made for amending the unconscionable conduct provisions, but will continue to monitor the development of the law. CAANZ notes that development of the law through the courts provides flexibility and allows concepts to be developed and refined in response to changing societal values.

Case study 5: *ACCC v Clinica Internationale Pty Ltd (No 2)* [2016] FCA 62

Clinica offered migrants training and sponsored employment in the cleaning industry under a program it claimed would lead to permanent residency. Approximately 90 migrants paid fees totalling more than \$760,000 to participate in the program, with many paying over \$10,000 each.

In most cases, they were newly arrived migrants on temporary visas with limited commercial experience and who needed to obtain permanent residency within a short period of time in order to be permitted to stay in Australia.

320 Submission from the Law Council of Australia’s Competition and Consumer Committee, page 30.

321 Submission from Shopping Centre Council of Australia, page 9.

322 For example, *ACCC v Lux Distributors* [2013] FCAFC 90; *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405; and *ACCC v South East Melbourne Cleaning (Coverall Cleaning)* [2015] FCA 25.

323 For example, submissions from: Allens; Law Council of Australia’s Competition and Consumer Committee; and Energy Australia.

324 Also *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405; and *ACCC v South East Melbourne Cleaning (Coverall Cleaning)* [2015] FCA 25.

Case study 5: *ACCC v Clinica Internationale Pty Ltd (No 2) [2016] FCA 62*

Following admissions made by Clinica (and a director and sole shareholder of Clinica), the Federal Court held that Clinica engaged in unconscionable conduct by offering the program to vulnerable migrants in circumstances where it was on notice for a substantial period of the program about the lack of jobs and the inability of those jobs to lead to permanent residency.

Justice Mortimer quoted the *Lux* decision in noting that ‘the task of the Court is the evaluation of the facts by reference to a normative standard of conscience ... [being] the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure’.

Justice Mortimer found that ‘given the features of Clinica’s conduct... in no way can it be said there was any honesty or fairness by Clinica towards [the participants]. Instead, there was deception, duplicity, harassment and considerable undue pressure’.

Case study 6: *Paciocco v Australia and New Zealand Banking Group Limited [2016] HCA 28 (Paciocco)*

On 27 July 2016, the High Court in *Paciocco* dismissed two appeals from the Full Court of the Federal Court of Australia. The majority of the High Court held:

- in the first appeal that late payment fees charged by Australia and New Zealand Banking Group Limited on consumer credit card accounts were not unenforceable as penalties
- in the second appeal that the imposition of late payment fees did not contravene statutory prohibitions against unconscionable conduct, unjust transactions and unfair contract terms.

The High Court considered, among other things, whether late payment fees charged by a bank were unconscionable (under the unconscionable conduct provisions of the ASIC Act), on appeal from the Full Federal Court.

In the Full Federal Court, Chief Justice Allsop, with whom Justices Besanko and Middleton agreed, provided an analysis of statutory unconscionability which confirmed that while the existence of ‘moral obloquy’ is a relevant consideration, it is not determinative in an assessment of unconscionable conduct, and should not distract from an examination of whether the conduct departs from the accepted norms and values of society (the *Lux* test).

The principles governing unconscionable conduct were not disputed by the parties in the appeal to the High Court, only the application of the principles to the particular facts.

On the issue of statutory unconscionability, the majority decision of Justice Keane, with whom Chief Justice French and Justice Kiefel agreed, did not refer to either the *Lux* or moral obloquy tests.

Justice Gageler acknowledged there was no substantial controversy between the parties as to the content of the statutory norms under consideration and referred without dissent to Chief Justice Allsop’s ‘extensive consideration of principle’ of the statutory norms, but noted in passing that the ‘ordinary meaning’ of the term ‘unconscionable’ requires a ‘high level of moral obloquy’.

Justice Keane quoted Chief Justice Allsop’s findings that there was no unconscionability on the facts, noting:

- the lack of vulnerability and predation
- clear disclosure of the bank fees by ANZ
- people’s ability to avoid the fees or terminate the accounts
- that a finding of unconscionability would have required the court to be a ‘price regulator’.

For consultation

Option 1: Maintain the existing unconscionable conduct provisions and allow the case law to develop

Views are sought on allowing the courts to continue to develop and clarify the concept as appropriate in response to changing societal values.

This option would not provide the legislative certainty which other stakeholders have sought. However, it does acknowledge that ‘unconscionability’ is a broad concept requiring an evaluative assessment on a case-by-case basis. It also acknowledges the risks associated with seeking to include any statutory definition or to codify the principles as established in *Lux*. In particular, moral and societal values have the capacity to change over time and the courts may further develop the concept beyond *Lux*.

Further questions

37. Is allowing the law on unconscionable conduct to develop an appropriate and proportionate response to the issues raised, and to future issues that may arise?
38. What are the consequences, risks and challenges of maintaining the status quo, compared with changing the law or codifying existing principles? Are there any better approaches that would address the issues raised while allowing concepts to develop in a flexible way?

2.3.3 Unconscionable conduct and publicly listed companies

Section 21 of the ACL prohibits a person from engaging in unconscionable conduct with a person in connection with the supply or acquisition of goods or services, other than a listed public company. The Issues Paper asked whether the protections against unconscionable conduct should extend to all businesses, including publicly listed companies.

The prohibition against unconscionable conduct was originally available to consumers only, but was later extended to business transactions, excluding publicly listed companies, where the value of the transaction was less than \$1 million. This was increased to up to \$3 million (2001), \$10 million (2007) and then removed entirely (2011), although the exclusion of publicly listed companies has remained in place.

CAANZ notes that different views were expressed about whether this exemption should be removed. For example, the Law Council of Australia’s Competition and Consumer Committee suggested that there is limited justification for excluding publicly listed companies from these protections. It noted that the prohibition imposes a normative standard of behaviour in commercial dealings and that:

[t]his normative standard should apply to allow business dealings, regardless of whether an entity is dealing with a consumer, a small business, or a private or public company ... It appears to be an arbitrary application of the normative standard sought to be applied to delimit the ability of those parties to seek recourse in relation to such conduct by the listing status of an entity.³²⁵

325 Submission from the Law Council of Australia’s Competition and Consumer Committee, page 34.

In contrast, Allens noted that the purpose of the extension to business transactions was to protect small businesses, who were considered to be disadvantaged in a similar way to consumers in their dealings with larger companies, and that the provisions are not intended to prevent 'sharp' business practices. It submitted that:

[I]isted public companies are not vulnerable and do not lack bargaining power. To enable them to rely on the unconscionable conduct definitions would, by definition, substantially lower the threshold as to what conduct properly amounts to unconscionable dealing.³²⁶

The Shopping Centre Council of Australia submitted that public listing remains a reasonable, albeit imperfect, proxy for business size, and that if the exclusion was to be removed, then a monetary threshold on the size of the transactions captured by this provision should be reinstated (for example, a threshold set at \$3 million).³²⁷

Stakeholders not in support of extending the protections to publicly listed companies argued that they have the ability to protect their own interests.³²⁸ The Shopping Centre Council of Australia noted that they:

are, by definition, sophisticated businesses which have media and public prominence, financial resources and access to capital. Such companies have plenty of opportunities, by commercial and other means, to respond to actions which they consider might be unconscionable. Such companies do not need the protection of Parliament in their commercial dealing... If the listed public company exclusion is removed there would be nothing to prevent, say, Woolworths or Coles using these provisions to provisions to bring unconscionable conduct actions against a supplier or a landlord.³²⁹

Without commenting specifically on publicly listed companies, some stakeholders suggested reviewing all limitations to the ACL's protections, and potentially removing those that are not, or are no longer, in the public interest.³³⁰

For consultation

Option 2 — Extend the unconscionable conduct provisions to publicly listed companies

Views are sought on extending the protections against unconscionable conduct to publicly listed companies which are currently excluded from the protections, noting the rationale for the exclusion is unclear.

The fact that a company is publicly listed is not necessarily a reflection of its size, level of resourcing or its ability to withstand unconscionable conduct. In certain business relationships, where this is a significant imbalance in bargaining power, a publicly listed company could find itself subjected to conduct which goes beyond 'sharp' practices and meets the threshold of being unconscionable.

326 Submission from Allens, page 23.

327 Submission from Shopping Centre Council of Australia, pages 4 and 9.

328 For example, submissions from: Red Energy and Lumo Energy; and Shopping Centre Council of Australia.

329 Submission from Shopping Centre Council of Australia, page 9.

330 For example, submissions from Australian Newsagents' Federation; and Hank Spier.

However, consideration would need to be given to ensuring the extent to which publicly listed companies should be protected, noting the potential compliance costs and the extent to which publicly listed companies should be expected to undertake their own due diligence processes.

Further questions

39. Is it appropriate to continue to exclude publicly listed companies from the unconscionable conduct provisions and, if so, why?
40. Should the unconscionable conduct provisions be extended to publicly listed companies?
 - What are the benefits for publicly listed companies?
 - What changes would other business need to make to their existing business practices and what are the associated costs?
 - Should the protections be extended to all publicly listed companies, or are some exceptions appropriate?
 - Are there any unintended consequences, and how could these be addressed?

2.3.4 Unfair trading

Some stakeholders submitted that the law should prohibit not just unconscionable conduct, but also prohibit a lower threshold of 'unfair' conduct by introducing a new general prohibition in the ACL.³³¹ A general unfair trading prohibition could prospectively address market-wide or systemic conduct, rather than rely on individual circumstances or breaches of the law. It could also potentially address systemic unfair contract terms (or unfair contracts as a whole).

Stakeholders calling for a general unfair trading prohibition suggested that it is needed to protect consumers from practices that take advantage of consumers' lack of knowledge or alternatives. Consumer Action Law Centre submitted that:

[b]usiness practices that would be caught by a general prohibition on unfair trading practices are those which prey on financial, behavioural or emotional vulnerabilities to sell unsuitable products with very little (if any) real value. Often these products are also sold with confusing contracts.³³²

Examples given of 'unfair' or 'predatory' practices include those used in areas such as debt management (such as credit repair services, and for-profit debt negotiation), car towing services, publicity firms, vendor terms home sales, and hair loss solutions.³³³

Some common features of these practices include:

- business models that take advantage of the consumer being unable or failing to appreciate the unexpected consequences of a contract

331 For example, submissions from: Consumer Action Law Centre; CHOICE; Legal Aid NSW; Redfern Legal Centre; Financial Rights Legal Centre; WEstjustice Western Community Legal Centre; Justice Connect Referral Service; and Industry Super Australia.

332 Submission from Consumer Action Law Centre, page 36.

333 Submission from Consumer Action Law Centre, pages 36-40.

- business models that exploit consumers in vulnerable situations by charging fees or costs which far exceed the cost of providing the service
- business models that take advantage of consumers in vulnerable circumstances who cannot access alternative products or are unaware of alternatives available to them.³³⁴

Financial Counselling Australia outlined business practices experienced by their clients, including practices that specifically target consumers in Aboriginal communities in their product design and sales techniques. These include offering inducements to members of the community, such as free laptops or money to sign up family members who then sell over-priced products within the community such as first-aid kits and computers.³³⁵

Similarly, Legal Aid NSW noted that their casework experience indicates that predatory traders consistently refine their business models and marketing to target and take advantage of vulnerable communities. It submitted that there is a level of predictability in the conduct and tactics adopted by predatory traders that would make these businesses identifiable to a regulator which could then focus on early intervention strategies.³³⁶

International approaches

The QUT study found a high level of convergence between the consumer policy frameworks of Australia and the comparable jurisdictions (UK, US, Canada and Singapore). Most of these jurisdictions, like Australia, adopted a combination of general and specific protections in relation to unconscionable and highly unfair trading practices.

Some stakeholders pointed, however, to the approach taken by the EU's Unfair Commercial Practices Directive (the Directive) that has, for example, been implemented in the UK.

The EU Directive has a three-tiered approach comprising:

- a first-tier general prohibition against unfair commercial practices
- second-tier prohibitions against misleading and aggressive practices
- a third-tier blacklist of specific practices that are prohibited in all circumstances, for example, falsely stating that a product will only be available for a limited time, and falsely using a quality mark without authorisation, among others [see **Box 17** below].

The standard of 'unfair conduct', rather than 'unconscionable conduct' is also adopted in the US *Federal Trade Commission Act*. An area or practice will be considered to be unfair if it causes, or is likely to cause, substantial injury to consumers that is not outweighed by countervailing benefits to consumers or to competition, and that cannot be reasonably avoided by consumers.

334 Submission from Legal Aid Queensland submission, page 13.

335 Submission from Financial Counselling Australia, page 13.

336 Submission from Legal Aid NSW, page 15.

Box 17: EU's Unfair Commercial Practices Directive

The EU Directive was adopted on 11 May 2005. It is the overarching piece of EU legislation regulating unfair commercial practices in business-to-consumer commercial practices and in all sectors, acting as a 'safety net' that fills the gaps which are not addressed by EU sector-specific transactions.

The Directive uses a tiered structure, with a general prohibition on unfair commercial practices and a prescriptive list of examples of unfair conduct.

The general prohibition provides that a commercial practice is unfair if it is contrary to the requirements of professional diligence and it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer.

The Directive identifies three categories of commercial practices that fall within the concept of unfair — misleading commercial practices, aggressive commercial practices, and a 'blacklist' of 31 commercial practices regarded in all circumstances as unfair.

If conduct does not fall within one of the practices prohibited in the blacklist or meet the definition of misleading or aggressive, the conduct can still be assessed on its merits and found to be unfair using the general test. As such, the general test acts as a safety net.

In order to be considered unfair and therefore prohibited, it is sufficient that a commercial practice fulfils only one of these tests.³³⁷

While there is support from some stakeholders, other stakeholders argued that a case should be made that these unfair practices cannot be addressed by the existing provisions of the ACL before introducing a new general prohibition.³³⁸

Some stakeholders noted that international approaches needed to be understood in terms of their specific contexts, and that they may have limited relevance in the Australian context. In this regard, Baker & McKenzie submitted that:

[t]he Directive adopts a very specific, "European" conception of unfairness. Accordingly, its implementation has had a substantial impact on the common law Members States, with the introduction of vague legal concepts which have their origin in European Court of Justice jurisprudence. The introduction of such concepts into Australian law has the potential to similarly cause confusion and increase compliance burdens for business.

It also indicated that in their experience of their London and European offices, most (if not all) practices that are 'unfair' would be captured by the second-tier prohibitions, and it is not clear what the first tier adds to the level of consumer protection.³³⁹

Similarly, the QUT study found that the UK regulator has relied on the second-tier protections, rather than the first-tier general prohibition, when enforcing the Directive as implemented in their *Unfair Trading Regulations 2008*.³⁴⁰

337 www.ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm.

338 Submissions from: Queensland Law Society; Retail Council; Insurance Council of Australia; and Business Council of Australia.

339 Submission from Baker & McKenzie, page 11.

340 QUT, *Comparative analysis of overseas consumer policy frameworks*, 2016, page 72.

Some stakeholders noted similar provisions in the ACL to the second-tier prohibitions. For example, Allens submitted that:

[t]he existing provisions of the ACL contain both broad and flexible prohibitions and specific prohibitions on particular forms of unfair commercial conduct. It is not clear what introducing a general prohibition on unfair commercial practices would add to the existing ACL protections. Introducing additional protections would only create duplication in the ACL.³⁴¹

Similarly, some legal stakeholders also noted that each form of ‘black listed’ conduct in the Directive is likely to already fall within one or more the prohibitions contained in the ACL.³⁴² The QUT study also found that Australia has similar protections addressing misleading conduct, unconscionable conduct, unfair terms, pyramid selling, and door-to-door selling operated in Australia and comparable countries such as the UK.³⁴³

The Business Council of Australia considered that insufficient evidence has been put forward of an existing or foreseeable regulatory gap in the current law. It argued that, without sufficient supporting evidence, the introduction of a general catch-all provision has the potential to generate uncertainty and cost for consumers and business.³⁴⁴

On balance, CAANZ notes that there is likely to be a substantial degree of overlap between these international models and Australia’s existing protections. Any new general prohibition within the ACL needs to be carefully considered and supported by evidence that there is a gap in the current law that needs to be addressed, and that an economy-wide approach would be the appropriate response.

Further questions

41. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?
42. Is there further evidence of a gap in the current law that justifies an economy-wide approach?

341 Submission from Allens, page 23.

342 For example, submissions from: Competition and Consumer Committee of the Law Council of Australia; and Allens.

343 QUT, *Comparative analysis of overseas consumer policy frameworks*, 2016, pages 9-10.

344 Submission from Business Council of Australia, pages 7-8.

2.4 Unfair contract terms

Stakeholders generally suggested that the unfair contract terms provisions are an important and effective protection against the use of unfair terms in standard form consumer contracts. Stakeholders provided a range of views, particularly on whether:

- the provisions should be extended to insurance contracts
- ‘contracts as a whole’ should be capable of being considered unfair
- the available remedies are sufficient to deter businesses from using unfair terms
- the current provisions adequately address systemic unfair terms.

CAANZ seeks your views on the following overarching questions:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?
- What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements?

Key observations

CAANZ observes that stakeholders generally consider the unfair contract terms provisions for **standard form consumer contracts** as an important and effective ACL protection. These provisions allow a court to declare an unfair term void and for the contract to continue to operate if it can do so without the unfair term.

Businesses have generally sought to adapt to these provisions, with the ACCC’s 2013 industry review of standard form contracts indicating positive levels of business compliance and cooperation.

However, some stakeholders raised a number of specific issues regarding the scope and application of the provisions. In particular, there were various views on whether:

- **insurance contracts should** be made subject to the same unfair contract terms protections as other standard form consumer contracts;
- **‘contracts as a whole’** should be declared void where they lack accessibility or transparency, or because of their ‘poor value’ offering
- the available remedies are sufficient to deter businesses from using unfair terms, and adequately address **systemic unfair contract terms**.

CAANZ notes that voiding entire contracts (including terms that may not be specifically unfair) would have significant consequences for all parties to the contract. Some of the concerns raised about the unfairness of ‘contracts as a whole’ are also interconnected with broader issues of transparency and principles of contract law that would require further exploration.

Nevertheless, on the feedback to date, there are opportunities to further explore issues around the consistent treatment of insurance and other contracts, and ways to address the systemic or frequent use of unfair terms.

Key Observations (continued)

CAANZ notes that the extension of unfair contract terms protections to small business standard form contracts will take effect from 12 November 2016 and will be reviewed within two years of commencing.

OPTIONS

Insurance contracts

1. Apply unfair contract terms protections to contracts regulated under the *Insurance Contracts Act 1984*.

Systemic unfair contract terms

2. Prohibit the use of terms previously declared unfair by the courts.
3. Expand the list of the kinds of terms that may be unfair (section 25 of the ACL).
4. Enable regulators to compel evidence from businesses to investigate whether or not a term may be unfair.

2.4.1 Unfair contract terms

National protections against unfair contract terms for standard form consumer contracts were introduced in 2011 as part of the ACL. The provisions allow a court to declare an unfair term void and for the contract to continue to operate if it can do so without the unfair term.³⁴⁵ Terms are exempt where they:

- define the main subject matter of the contract, or
- set the upfront price payable under the contract, or
- is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.³⁴⁶

A term is 'unfair' if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract
- is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.³⁴⁷

In considering whether a term is unfair, a court must consider (among any other relevant matters) the extent to which the term is transparent, and the contract as a whole. A non-exclusive list of examples of unfair terms is provided, many of which involve the unilateral exercise of certain powers by one party and not another.³⁴⁸

³⁴⁵ ACL, section 23.

³⁴⁶ Ibid, section 26.

³⁴⁷ Ibid, section 24.

³⁴⁸ Ibid, section 25.

From 12 November 2016, these provisions will be extended to small businesses entering into standard form contracts, and will be reviewed within two years of commencing (see **Chapter 1.3, 'Small business'**).

Most stakeholders generally considered the protections as valuable. For example, Consumer Action Law Centre noted that they assist in 'promoting consumer confidence and increased market participation... in addressing sub-optimal contracts'.³⁴⁹

Nevertheless, there were views on a number of issues, and particularly whether:

- **insurance contracts** should be subject to the same protections
- **'contracts as a whole'** should be declared void due to their lack of accessibility or transparency, or because of their 'poor value' offering
- the **available remedies** are sufficient to deter businesses from using unfair contract terms, and particularly the **systemic or frequent use of unfair terms**.

A few stakeholders also raised threshold or definitional issues about the provisions. For example, it was suggested the provisions should extend to 'negotiated' as well standard form contracts,³⁵⁰ and that it was not always clear what level of negotiation would transform a standard form contract into a negotiated.³⁵¹

2.4.2 Unfair terms in insurance contracts

Insurance Contracts Act 1984 (Cth)

The *Insurance Contracts Act 1984* precludes insurance contracts regulated under that legislation from being the subject of relief under any other Act, on the ground that the contract is harsh, oppressive, unconscionable, unjust, unfair or inequitable. This means that the ASIC Act's unfair contract terms provisions, which mirror those in the ACL, do not apply to such contracts.³⁵²

The rationale for this exclusion has generally been that the Insurance Contracts Act contains its own protections for consumers and that insurance contracts may have unique characteristics that make them unsuited to the unfair contract terms protections. This rationale was last reconsidered in 2013 [see **Box 18** below].

The Insurance Contracts Act imposes a number of requirements on insurers, including a requirement for contracting parties to act with the 'utmost good faith' and for the insurer to clearly inform the insured party (or consumer) of any 'non-standard' or 'unusual' contract terms. Insurers cannot rely on or enforce any terms that do not comply with these requirements. Further, any term that varies the operation of the Insurance Contracts Act or the contract to the detriment of the insured party is void.

Holders of an Australian Financial Services Licence are also required to join an ASIC-approved external dispute resolution scheme under the *Corporations Act 2001* (Cth).

349 Consumer Action Law Centre, Submission to the Commonwealth Government options paper on unfair terms in insurance contracts, 2010, page 4.

350 For example, submission from Philip H Clarke.

351 For example, submissions from: Shopping Centre Council of Australia; and Philip H Clarke.

352 Insurers are regulated by ASIC and are also subject to relevant provisions under the ASIC Act.

In any case, industry stakeholders have argued that insurance contracts are ‘risk management products’ that are inherently different to other types of contracts. While exclusions from insurance policies could be seen as ‘unfair’, it has been said that exclusions are exempt terms because, in defining the scope of the insurance contract, they set out the contract’s main subject matter.³⁵³

Box 18: Insurance Contract Amendment (Unfair Terms) Bill 2013

The Senate Economics Legislation Committee inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the Bill containing legislation to introduce the ACL) considered, among other things, that section 15 of the Insurance Contracts Act would exclude insurance contracts from being subject to the unfair contract terms provisions to be inserted into the ASIC Act.

The Committee found that consumers are not provided with adequate protection in insurance contracts under existing law and recommended that the Government address insurance contract legislation to ensure that the Insurance Contracts Act provides an equivalent level of protection for consumers to that provided by the ACL.

In 2013, the then Minister for Financial Services, the Hon Bill Shorten MP, introduced the Insurance Contract Amendment (Unfair Terms) Bill 2013 (the 2013 Bill) into the Parliament. The 2013 Bill proposed an unfair contract terms regime that would be equivalent to that in the ASIC Act but modified appropriately for general insurance contracts. For example:

- an insurer would breach the ‘utmost good faith’ requirement if a term is declared unfair or they attempt to rely on the unfair term
- regarding the unfairness test, a term would be reasonably necessary if it reflects the underwriting risk accepted by the insurer
- the unfair contract terms regime would not apply to life insurance contracts. The rationale for this carve-out was that as life insurance contracts are not renewed annually (and therefore would not fall under the new law for some time) and the majority are obtained by third parties through superannuation, applying UCT protections to life insurance contracts was to be considered in the future.

The 2013 Bill lapsed when Parliament was dissolved before the 2013 federal election.

Should unfair contract terms protections be extended to insurance contracts?

Some stakeholders submitted that the Insurance Contracts Act provides sufficient consumer protections as well as serious consequences for a breach, noting ASIC’s powers to vary, suspend or cancel’s an insurer’s Australian Financial Service licence.³⁵⁴

The Insurance Council of Australia submitted that:

the protections under the [Insurance Contracts] Act, together with the additional protections provided under the Corporations Act 2001 (Corporations Act) and through the Financial Ombudsman Service and the General Insurance Code of Practice, provide a

353 For example, Insurance Council of Australia, Submission to the Commonwealth Government draft Regulation Impact Statement on unfair terms in insurance contracts, 2012.

354 For example, submissions from: the Insurance Council of Australia; Insurance Australia Group; Suncorp; and Philip H Clarke.

strong level of protection to consumers from UCT[s] in relation to insurance they purchase.³⁵⁵

It further noted that ‘almost all general insurers’ choose to be members of the Financial Ombudsman Service, which can review contract terms that might be unfair.³⁵⁶

However, other stakeholders suggested that the limited scope of the duty of ‘utmost good faith’ has not allowed the courts and the Financial Ombudsman Service to adequately deal with the specific matter of unfair terms in insurance contracts.³⁵⁷ For example, the Financial Rights Legal Centre submitted that:

the duty of utmost good faith has neither prevented the spread of unfair terms in insurance contracts nor has it provided the courts or external resolution schemes with any power to provide a remedy to consumers when an unfair term has been used.³⁵⁸

Consumer Action Law Centre submitted that:

the Insurance Contracts Act 1984 (Cth) simply does not provide equivalent protections, and ought to be amended to mirror the unfair contract terms provisions of the ASIC and ACL Acts.³⁵⁹

Accordingly, some stakeholders expressed concern that insurance contracts were excluded from the unfair contract terms protections under the ASIC Act.³⁶⁰ For example, Redfern Legal Centre submitted that this has led to ‘wide scale unfair practices which disproportionately affect vulnerable consumers.’³⁶¹

Stakeholders also highlighted possible unfair terms used in contracts for funeral, pet, travel and car insurance [see **Box 19** below].³⁶²

CAANZ notes that the Productivity Commission’s 2008 *Review of the Australian Consumer Policy Framework* supported a regulatory approach that would address unfair contract terms economy-wide.

Several other reviews have called for unfair contract terms protections to be applied to insurance contracts, including the 2011 Natural Disaster Insurance Review,³⁶³ and a 2012 House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the operation of the insurance industry during disaster events.³⁶⁴

355 Submission from Insurance Council of Australia, page 3.

356 Submission from Insurance Council of Australia submission, pages 6-7.

357 For example, submissions from: the Financial Rights Legal Centre; Consumer Action Law Centre; Legal Aid NSW; Redfern Legal Centre; QUT Commercial and Property Law Research Centre; and Australian Communications Consumer Action Network.

358 Submission from Financial Rights Legal Centre, page 6.

359 Submission from Consumer Action Law Centre, page 13.

360 For example, submissions from: Professor Luke Nottage; Legal Aid NSW; Redfern Legal Centre; Australian Communications Consumer Action Network; Financial Rights Legal Centre, and Consumer Action Law Centre.

361 Submission from Redfern Legal Centre, page 6.

362 For example, submissions from: the Financial Rights Legal Centre; Consumer Credit Legal Service WA; and CHOICE.

363 Commonwealth of Australia, *Natural Disaster Insurance Review: Final Report*, 2011, recommendation 37.

364 House of Representatives Standing Committee on Social Policy and Legal Affairs, *In the Wake of Disasters*, 2012, recommendation 4.

In 2012, the Australian Government estimated that 75 to 150 consumers per year suffer disadvantage as a result of unfair contract terms in general insurance.³⁶⁵ CAANZ also notes that Australian Financial Service Licence suspensions and cancellations are not typically used to address breaches of the Insurance Contracts Act.

These reviews and developments suggest that it is appropriate to again consider whether insurance contracts should be subject to similar unfair contract terms protections as other types of standard form consumer contracts.

Box 19: Possible unfair terms in insurance contracts — Some examples

The Financial Rights Legal Centre provided the following examples in its submission:

- **Car insurance** contract — ‘If your claim has been investigated and you withdraw your claim or we refuse to accept it, you may have to pay any costs incurred for the investigation of your claim’.
- **Pet insurance** contract — ‘We will only accept notices of cancellation given in writing and signed by you. We will not accept cancellation requests by telephone or email unless agreed to by us’.³⁶⁶

CHOICE provided a **travel insurance** example in its submission:

*[In 2015] Victoria Legal Aid brought a significant case to the Victorian Civil and Administrative Tribunal on behalf of a consumer whose travel insurance claim was denied by her insurer after she was hospitalised with depression at age 17 and cancelled an overseas school trip on advice from her doctor. The consumer had no pre-existing mental health conditions when she took out the insurance, but her \$4,292 claim for travel expenses was denied by the insurer on the grounds of its general exclusion for mental health-related claims. Victoria Legal Aid argues that blanket exclusions on mental illness claims are not justifiable — if the prohibition on unfair contract terms applied in this instance, the business may not have been able to include the exclusion in its contract.*³⁶⁷

For consultation

Option 1 — Apply unfair contract terms protections to contracts regulated under the Insurance Contracts Act 1984

Views are sought on applying unfair contract terms protections in the ASIC Act to contracts regulated under the Insurance Contracts Act. This could involve narrowing or removing the exemption in the Insurance Contracts Act against the application of the other laws (including the ASIC Act).

CAANZ notes that this option would provide consumers with a similar level of protection against unfair terms in insurance contracts as with other standard form consumer contracts, and could potentially provide greater clarity to consumers about their rights and options for redress.

365 Australian Government, *Regulation Impact Statement: Unfair terms in insurance contracts*, November 2012, page 19.

366 Submission from Financial Rights Legal Centre, page 7.

367 Submission from CHOICE, page 19.

However, consideration would also need to be given to any unintended consequences or impacts, and whether guidance on the ‘main subject matter’ of an insurance contract would be required.³⁶⁸

Further questions

43. Should the ASIC Act’s unfair contract terms protections be applied to contracts regulated under the Insurance Contracts Act? If so:
- How should it be designed? For example, should it apply to all types of insurance contracts, or are some exemptions appropriate? Would any changes to the definition of ‘main subject matter’ be required? Would the same types of terms be considered ‘unfair’?
 - Would this result in any likely changes to the insurance contracts that are offered to consumers? For example, to what extent would this option address the issues or examples of unfair terms raised by stakeholders?
 - What would be the compliance costs of changing insurance contracts, and how would these affect consumers?
 - What, if any, transitional arrangements would be required?
 - Are there any unintended consequences, and how could these be addressed?

2.4.3 Contracts as a whole

Currently, a court must take into account the contract as a whole and the transparency of a term to determine whether a particular term is unfair. Section 243 of the ACL also empowers the court to make an order declaring the whole or any part of a contract void in relation to terms that have been declared unfair.

A contract can usually continue to operate if it can do so without the unfair term. Typically, a whole contract will only be declared void by the court if the contract is deemed unable to continue operating without the unfair term/s. CAANZ notes that section 243 is generally not used to address contracts that may be unfair as a whole due to factors other than specific unfair terms.

However, some stakeholders submitted that some standard form contracts as a whole can be unfair and should therefore be captured under the unfair contract terms protections, arguing that only being able to void specific unfair terms will often not address the inherent ‘unfairness’ of the contract.³⁶⁹

Consumer Action Law Centre submitted that:

[t]he power to have a contract with unfair terms deemed unfair as a whole would be a valuable tool for regulators seeking to challenge systemically unfair business practices.³⁷⁰

Examples of contracts that are unfair as a whole, given by Consumer Action Law Centre, CHOICE and the Australian Communications Consumer Action Network, include where:

³⁶⁸ While not commenting in the context of insurance contracts in particular, the submission from Arnold Bloch Leibler suggested that there should be more definitional clarity around the term, ‘main subject matter’.

³⁶⁹ For example, submissions from: Consumer Action Law Centre; CHOICE; Legal Aid NSW; and Australian Communications Consumer Action Network.

³⁷⁰ Submission from Consumer Action Law Centre, page 14.

- the combined effect of various contract terms amounts to unfairness, even though the individual terms may not be unfair when considered in isolation
- contracts are overly lengthy, complex or overuse jargon
- contracts are hard to access or not publicly available, for example, in online booking systems where the transaction ‘times out’ after a short period and does not provide sufficient time to review the terms and conditions, or where the terms and conditions are presented to the consumer over the phone
- contracts are of such poor value that they could in their entirety be considered unfair.

In contrast, some stakeholders submitted that including a provision relating to contracts as a whole is unnecessary as the current protections are sufficient, or that it would be ‘unworkable’ and further undermine freedom of contract.³⁷¹

For example, the Law Council of Australia’s Competition and Consumer Committee noted that the ACL already provides for terms to be construed in the context of the contract as a whole, and includes other relevant protections, including the prohibition against unconscionable conduct. It further noted that:

the courts have established that the standard of unconscionable conduct is higher than that of unfairness, although whether ‘unfair tactics’ were used is expressly a matter to which a Court may have regard... [T]his is the appropriate approach to be taken to assessing a bargain as a whole. In circumstances where an element of unfairness exists in a bargain as a whole, such unfairness will not automatically render a contract unconscionable but rather will form the ‘indicia of unconscionability’.³⁷²

CAANZ notes that enabling the courts to consider whether the contract is unfair as a whole would also enable entire contracts to be declared void on the basis of general unfairness. There would likely be significant practical challenges in implementing this, particularly in establishing a general ‘unfairness test’ for entire contracts that is clear and able to be applied consistently, minimising compliance costs and uncertainty for contracting parties.

CAANZ is also not aware of any comparable overseas consumer policy framework that has adopted this approach. There may also be implications of voiding an entire contract that are difficult to gauge, for example, its impact on other consumers who are party to a similar standard form contract, and on market behaviour more generally.

Beyond the practical challenges of declaring an entire contract unfair and void, CAANZ observes that the provisions require courts to consider the contract as a whole, and the extent to which a term is transparent. CAANZ observes that these requirements, combined with other protections, such as prohibitions against unconscionable conduct, misleading or deceptive conduct, and false or misleading representations, and the cooling-off period for unsolicited consumer agreements, are generally able to address contracts that might be considered to be unfair as a whole.

371 For example, submissions from: Housing Industry Association; Shopping Centre Council of Australia; and Customer Owned Banking Association.

372 Submission from the Law Council of Australia’s Competition and Consumer Committee, page 36 -37.

CAANZ also notes that many of the issues relating to general unfairness were also linked to wider issues about the general transparency of contracts.

2.4.4 Transparency

Some stakeholders submitted on the importance of general transparency of contracts,³⁷³ such as whether contracts are:

- written using plain language
- legible
- presented clearly
- readily accessible.

As noted by Associate Professor Jeannie Paterson and Professor Elise Bant:

[i]f things go wrong with purchased goods, consumers often turn to their contracts, whether in hard copy or displayed online on the trader's website, to identify their rights of redress.³⁷⁴

CHOICE submitted that contractual transparency is important, noting that contracts that are 'dense and complex' as a whole can be 'inaccessible' for ordinary consumers.³⁷⁵

A lack of transparency can be particularly challenging for vulnerable consumers and those from culturally diverse backgrounds. The Australian Consumer Survey 2016 found that 'consumer respondents who speak a language other than English at home were more likely to report experiencing problems with unclear or unfair contract terms'.³⁷⁶

Transparency is also an important element in consumers understanding how the individual terms of their contract interact with each other and what their combined effect is.

Some stakeholders submitted that the unfair contract terms provisions should expressly require contracts and contract terms to be transparent, similar to the approach in the UK [see **Box 20** below].³⁷⁷ Associate Professor Paterson submitted that:

[t]his type of provision would address the problem of consumer contracts that are written in unintelligible or legalistic language that risks confusing consumers about their rights under the ACL.³⁷⁸

373 For example, submissions from: CHOICE; Philip H Clarke; and Associate Professor Jeannie Paterson and Professor Elise Bant, Melbourne University.

374 Submission from Associate Professor Jeannie Paterson and Professor Elise Bant, Melbourne University, page 4.

375 Submission from CHOICE, page 12.

376 EY Sweeney, *Australian Consumer Survey 2016*, page 42.

377 For example, submissions from: Philip H Clarke; and Associate Professor Jeannie Paterson and Professor Elise Bant, Melbourne University.

378 Submission from Associate Professor Jeannie Paterson and Professor Elise Bant, Melbourne University, page 5.

However, Peter Sise queried whether the existing, and narrower, requirement to consider transparency in determining whether a term meets the test for unfairness is appropriate and relevant.³⁷⁹

The transparency issue was explored in the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*, which cited several arguments against adopting a broad 'comprehensibility' requirement for contracts, primarily that it may:

- lead to (potentially vexatious) claims by careless parties that they had not understood a contract
- not change consumers' propensity to read contracts enough to justify a mandated approach
- be difficult to define.³⁸⁰

CAANZ notes that stakeholder concerns regarding the unfairness of 'contracts as a whole' raises broader issues of transparency and established principles of contract law that may require further exploration in future. Further, some of the feedback to date about transparency and unfairness as a whole could be dealt with by reducing the systemic use of unfair terms.

Box 20: Transparency requirements for consumer contracts

Prior to the introduction of the ACL in 2011, unfair contract terms were regulated by the *Fair Trading Act 1999* (Vic) from 2003. This Act was repealed after the ACL commenced operation. Section 163 of this Act required consumer documents (which included consumer contracts) to be:

- easily legible
- in minimum 10 point font if printed or typed
- clearly expressed.

The UK *Consumer Rights Act 2015* also contains transparency requirements for consumer contracts that specifically address contract terms (not the contract as a whole). Section 68 of the Consumer Rights Act requires a written term of a consumer contract to be transparent, meaning it must be:

- expressed in plain and intelligible language
- legible.

The ACL provisions on unsolicited consumer agreements, where specific regulation is considered necessary, require that such agreement be 'printed clearly or typewritten' and 'transparent'.³⁸¹

2.4.5 Systemic unfair contract terms

CAANZ notes that the 2013 industry review of standard form contracts conducted by the ACCC 'found a good level of cooperation from businesses, leading to substantial changes by businesses to their standard form contracts'.³⁸² The report noted that:

379 For example, submission from Peter Sise.

380 Productivity Commission Inquiry Report, *Review of Australia's Consumer Policy Framework*, Volume 2, April 2008, pages 146-147.

381 Section 79 of the ACL.

382 ACCC, *Unfair contract terms: industry review outcomes*, March 2013, page 5.

[p]articularly, significant changes were achieved in relation to standard form contracts of major airlines, with 79 per cent of problematic terms identified by the ACCC amended or deleted as a result of the review.³⁸³

However, not all businesses fully cooperated with the ACCC during the review, with some choosing not to change their standard form contracts to address problematic terms identified by the ACCC.³⁸⁴

Some stakeholders also noted concerns that unfair terms are still being used systemically.³⁸⁵ For example, CHOICE submitted that while the provisions 'remain important at a conceptual level, in practice they often fail to deliver the fairness promised.'³⁸⁶

Both stakeholders and the experience of regulators indicated a number of potential issues about the effectiveness of the provisions to deal with systemic unfair contract terms, including:

- whether the provisions have a sufficient deterrent effect in the absence of a **monetary penalties**
- whether the provisions could better facilitate **representative actions** by regulators
- whether the legislative examples of unfair terms could be expanded.

2.4.6 Monetary penalties

Consumer advocates and community legal centres argued that attaching a monetary penalty to the unfair contract terms provisions would be a more effective deterrent than the current remedy of voiding unfair terms, and encourage businesses to proactively remove unfair contract terms from their standard terms and conditions.³⁸⁷ Redfern Legal Centre submitted that:

implementing a broader scheme of financial penalties and pecuniary redress for consumers affected by unfair contract terms. Where the termination fees imposed by contracts amount to unfair penalties, the law should impose a broader deterrent, and empower courts and tribunals, beyond simply declaring that such a term is void.³⁸⁸

The Consumer Credit Legal Service WA noted that for the business that the unfair term favours:

the only potential loss suffered is the advantage forgone as opposed to actual loss which penalises the business... Hence, there is large incentive to use unfair contract terms as the potential gain is much larger than the potential loss and there is a low risk of incurring that loss.³⁸⁹

Some stakeholders also suggested that the lack of a monetary penalty as a possible outcome adds to the existing barriers for consumers in accessing remedies at courts and tribunals.³⁹⁰

383 Ibid, page 1.

384 Ibid, page 2.

385 For example, submissions from: CHOICE; and Consumer Action Law Centre.

386 Submission from CHOICE, page 8.

387 For example, submissions from: Legal Aid NSW; Redfern Legal Centre; Consumer Credit Legal Service WA; CHOICE; and Consumer Action Law Centre.

388 Submission from Redfern Legal Centre, page 11.

389 Submission from Consumer Credit Legal Service WA, page 7.

390 For example, submissions from: Financial Rights Legal Centre; Legal Aid NSW; Redfern Legal Centre; and Consumer Credit Legal Service WA.

However, other stakeholders suggested that the absence of a monetary penalty is appropriate, noting the uncertainty surrounding the term ‘unfair’ and the perceived subjectivity of the court’s interpretation of this term.³⁹¹ Baker & McKenzie submitted that:

it would be inappropriate to expose businesses to the risk of pecuniary penalties for the inclusion of an unfair term in a consumer or small business standard form contract. The law should be clear and certain in its application before exposing a person to the risk of pecuniary penalty. This threshold is not met in relation to unfair contract terms as there is significant room for judgment as to whether or not a term may be unfair in all the circumstances.³⁹²

CAANZ also notes that the absence of a monetary penalty reflects the fact that a term is not invalid until a court has declared it void, and so there is no breach of the ACL as such. This also recognises that penalties are not generally imposed on businesses where their upfront obligations are uncertain.

However, this rationale may not apply where a court has already declared a term to be unfair, and a business continues to use it in their standard form contracts. Accordingly, there may be scope to consider whether a prohibition, potentially with a monetary penalty attached, should apply in this situation. This is the approach currently taken in New Zealand [see **Box 21** below].

Box 21: Prohibiting use of declared unfair contract terms — New Zealand

From 17 March 2015, the *New Zealand Fair Trading Act 1986* included new provisions dealing with terms in standard form consumer contracts. The new provisions enabled the New Zealand Commerce Commission to apply to the court for a declaration that a contract term is unfair.

The provisions also prohibit businesses from including any term declared unfair in their standard form contracts, or from applying, enforcing or relying on the term. Consequences for breaching these provisions can include:

- a fine of up to 600,000 NZD per breach (in the case of a company) or 200,000 NZD per breach (in the case of an individual)
- an injunction order to stop the use or enforcement of the term
- an order to pay damages or refund money.

For consultation

Option 2 — Prohibit the use of terms previously declared unfair by the courts

Views are sought on prohibiting the use of declared unfair terms in standard form contracts, with an attached monetary penalty for a breach, similar to the approach in New Zealand [see **Box 21** above].

Where a term has already been tested by the courts and declared to be unfair, it may not be unreasonable to expect that businesses should remove that term from their standard form

³⁹¹ For example, submissions from: Shopping Centre Council of Australia; Insurance Australia Group; Baker & McKenzie; and Allens.

³⁹² Submission from Baker & McKenzie, page 2.

contracts. Failure to do so could not be attributed to any uncertainty as to whether or not the term is unfair, due to the court's declaration.

This option may therefore balance stakeholder concerns about the lack of monetary penalties with business needs for certainty. This may also facilitate regulator actions against traders who continue to use unfair contract terms.

Nevertheless, consideration would need to be given to how this option would be implemented in practice, for example, where a particular contract term has been declared unfair:

- whether the prohibition should apply to similar terms contained in a contract of substantially the same nature, where the term serves a similar function and has the same effect
- how businesses would be made aware of the declared unfair term and how the declaration applies to their own standard form contracts.

Consideration would also need to be given to any risks or unintended consequences.

Further questions

44. Should the use of terms previously declared 'unfair' by a court be prohibited? If so:

- What should be the extent of the prohibition? For example, would it only apply to identical or similar standard form contracts, within a particular sector, or more broadly?
- Would this increase the deterrent effect of the unfair contract terms provisions?
- What penalties and remedies should apply?
- What, if any, transitional arrangements would be required? How should business be made aware of contract terms that have been declared 'unfair'?
- Are there any unintended consequences, challenges or risks that need to be considered?

2.4.7 Representative actions by regulators

Where the same standard contract term has been offered to multiple consumers, and none of these separately enforce the protections, the unfair term will still be in effect.

However, regulators may take representative actions on behalf of multiple affected persons to avoid the need for individual actions. In particular, the regulator may apply to the court:

- an injunction where a person is applying or relying on a term that has been declared unfair
- a compensation order on behalf of one or more persons who have suffered, or are likely to suffer loss or damage due to a person applying or relying on a declared unfair term
- an order to redress the loss or damage suffered by non-party consumers where a declared unfair term has caused or is likely to cause loss or damage to a class of persons (including those not party to the term).

While these provisions can help address systemic unfair terms to some extent, regulators currently have limited ability to use representative actions due to practical challenges, for example, in collecting evidence that a wide range of consumers are likely to suffer loss or damage, where the loss or damage has not yet occurred.

Further, as the unfair contract terms provisions allow courts to void terms (so that they cannot be enforced), rather than prohibit businesses from using such terms, there is no breach resulting from a use of a term that is subsequently declared void.

As there is no breach, regulators are unable to use certain powers, such as issuing infringement notices, or powers to monitor compliance, or investigate breaches or possible breaches.

CAANZ observes that this makes obtaining evidence about the fairness or otherwise of a term challenging for regulators. For example, regulators may not be able to gather any information about whether a term was reasonably necessary to protect a business's legitimate interests, or whether a termination fee in a contract reflects the cost to businesses of early termination.

Where regulators cannot compel information about whether or not a term may be unfair, regulators do not have information to determine whether, and what, action might be appropriate.

For consultation

Option 3 — Enable regulators to compel evidence from businesses to investigate whether or not a term may be unfair

This option would allow regulators to investigate potential breaches of the unfair contract terms provisions in a way that is consistent with the intention for the ACL to be enforced by multiple regulators who can investigate breaches and possible breaches of the law.

Investigation (or compulsory evidence) powers are intentionally broad and cover possible breaches to allow regulators to investigate matters fully and assess whether (and what kind of) compliance and enforcement action should be taken. This also recognises the savings in litigation costs to businesses, the courts and the government when an investigation does not show evidence of a breach.

This option would therefore strengthen the enforcement toolkit for regulators to investigate systemic unfair contract terms, assess the merit of taking enforcement action and seek redress where, and if, appropriate. Nevertheless, views are sought on whether there are any unintended consequences.

Further questions

45. Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be appropriate enforcement tool? If so, what should be the scope of this power?
46. Are there any unintended consequences, challenges or risks that need to be considered?

2.4.8 Legislative examples of unfair terms

The ACL currently contains a 'grey list' of legislative examples of terms that may be unfair. This list is a valuable guide for consumers, businesses, regulators and the courts to assess the unfairness of a number of terms across a wide range of standard form contracts.

A number of stakeholders highlighted further examples of contract terms (including those that are common in certain industries) that should be considered unfair,³⁹³ such as those that:

- allow new or increased charges not originally in the contract
- automatically renew the contract unless otherwise notified by the consumer
- impose large cancellation fees for a termination / breach of contract that are disproportionate to the actual loss experienced by the business
- make confidentiality or non-disclosure a condition of resolving a dispute with a business
- exclude or restrict liability for death or personal injury resulting from negligence (noting that section 64 of the ACL already has a similar function in relation to consumer guarantees)
- make the contract the ‘entire agreement’ between the parties (and which exclude, for example, verbal representations made by the seller)
- make it mandatory for the parties to the contract to undergo private arbitration for disputes, often in a country other than the consumer’s country of residence.

Stakeholder views are sought on whether any of the above examples, or other contract terms, should be added to the ‘grey list’. CAANZ notes the legislation requires that before a term can be added the following factors must be taken into consideration:

- the detriment that the term would cause to consumers
- the impact that term has on businesses generally
- the public interest.

For consultation

Option 4 — Expand the legislative examples of unfair terms

Adding legislative examples to the ‘grey list’ may provide more guidance for businesses and consumers on what may be unfair without necessarily being prescriptive, as the test for unfairness must still be met on a case-by-case basis.

Nevertheless, the merits of any addition should be considered carefully, as well as any risks and unintended consequences. Consideration would also need to be given to the extent that each example may already be governed by existing laws, such as principles of contract law in relation to penalties.

Further questions

47. Should the ‘grey list’ of examples of unfair contract terms be expanded? If so:

³⁹³ For example, submissions from: Consumer Action Law Centre; Associate Professor Kate Lewins; Professor Luke Nottage; Queensland Consumers Association; Energy and Water Ombudsman NSW; and Energy and Water Ombudsman Victoria.

- What examples should be added?
- Would this help address systemic issues or provide greater clarity for businesses and consumers?
- Are there any unintended consequences, risks or challenges that should be considered?

2.5 Unsolicited consumer agreements

Stakeholders generally agreed that unsolicited selling should be regulated but raised different issues about the effectiveness of current provisions, in particular:

- whether the level of regulation is appropriate
- whether the provisions provide vulnerable and low-income consumers with adequate protections regarding high-pressure sales tactics
- clarity in how the provisions apply to certain sales practices.

CAANZ seeks your views on the following overarching questions:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?
- What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements? Are there any unintended consequences?

Key observations

The ACL includes specific protections for unsolicited sales made away from the supplier's business or trade premises. It recognises that, when a consumer is in a situation where they are not expecting to enter into an agreement to purchase a good or service, they can be more vulnerable to unfair sales practices.

The current provisions regulating unsolicited sales apply broadly, and are not limited to particular locations that are away from a supplier's premises (such as in person, telephone or online).

While stakeholders generally agreed that unsolicited selling should be regulated, CAANZ notes that a number of stakeholders raised different concerns about the current provisions:

- industry stakeholders submit that unsolicited selling is **over-regulated**, and that the restriction on seeking payment for products under \$500 is anti-competitive
- consumer stakeholders claim that high-pressure sales tactics are harming **vulnerable and low-income consumers**, noting that:
 - many sales agreements involve complex and enduring services or higher-value goods that can be hard for vulnerable consumers to understand or to finance
 - the current cooling-off period of 10 business days does not effectively protect vulnerable consumers (who may not understand the terms of the agreement, or even that they have made an agreement)
 - unsolicited in-home sales (by door-knocking and telephone) are particularly harmful for vulnerable consumers, and should be banned.

CAANZ notes the lack of stakeholder consensus on how unsolicited selling should be regulated, and gaps in the available evidence across all industries and locations (including in person, door-to-door, telephone, and online sales) regarding the incidence of consumer harm caused by unsolicited sales.

Key Observations (continued)

In this context, CAANZ considers there are risks with **changing the current balance** of the provisions in the absence of a robust evidence base. CAANZ notes that the current breadth of the provisions is technology neutral and enables the law to adapt to changes in the market, and capture **new and emerging sales practices**. CAANZ also notes that a range of **other ACL provisions** can also apply to unsolicited sales, including protections against unconscionable conduct, false or misleading representations, and unfair contract terms.

CAANZ will continue to monitor developments in this sector. If it can be demonstrated that further intervention is necessary to protect vulnerable consumers, CAANZ notes that to outright ban any particular selling method or location, it would need to be demonstrated that all lesser forms of regulation are, or would be, ineffective.

OTHER ISSUES

Stakeholders also suggested areas for greater clarity through technical or drafting amendments, including the definition of an 'unsolicited consumer agreement'.

Other issues about:

- whether the obligations extend to professional fundraisers is discussed in **Chapter 1.2, 'Scope and Coverage of the ACL'**
- whether the protections should be extended to **businesses** is discussed in **Chapter 1.3. 'Small Business'**
- consumer leases are being considered through the Australian Government's Review of the Small Amount Credit Contract Laws.

OPTIONS

1. Maintain the current balance and breadth of the provisions (the status quo), noting the current gap in available data about the industry and the incidence of consumer problems.
2. Replace the cooling-off period with an opt-in mechanism requiring consumers to confirm the sale within a limited time before an agreement is valid for some or all agreements.
 - This may involve a requirement for traders not to initiate contact with consumers during the opt-in period.
3. Introduce additional rights and protections for consumers entering into enduring service contracts.
 - This could involve an extended cooling-off period, and a right to terminate agreements within a specific time without incurring a cancellation fee.
4. Enhance protections for high-risk transactions while reducing regulation for low-risk transactions. For example, this could involve:
 - adopting Option 2 or 3 for high-risk transactions (such as those involving high-value goods and services over \$500, or enduring service contracts)
 - removing the current restrictions on businesses seeking or accepting payment for low-risk transactions (such as goods and services under \$500).

2.5.1 Breadth of the law

CAANZ notes that the definition of an ‘unsolicited consumer agreement’ is intentionally broad, covering agreements for the supply of goods or services, in trade or commerce, where:

- the agreement was a result of telephone or in-person negotiations between a dealer and consumer at a place away from the supplier’s business or trade premises
- the consumer did not invite the dealer to come to that place, or make a telephone call, for the purposes of negotiating that particular supply
- the price is more than \$100, or could not be ascertained at the time of the agreement.³⁹⁴

These provisions are not restricted to any particular location away from business or premises, such as in-person (whether at a home, workplace, or in public), by telephone, or online. Sales that are currently exempt from the provisions include business contracts and those occurring at party plan events such as ‘Tupperware parties’.

The breadth of the unsolicited selling provisions was highlighted by the Explanatory Memorandum for the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, which indicated that the new:

provisions apply to all forms of unsolicited direct selling which take place in a non-retail context, regardless of whether a supplier has a traditional ‘bricks and mortar’ business or trade premises. The provisions apply to suppliers who do not have an established place of business but whose business models involve, for example, selling from trucks or the back of car boots, or trading in public places.³⁹⁵

2.5.2 The unsolicited selling industry

CAANZ observes that currently there are gaps in the available data about the unsolicited selling industry, which overlaps with, but is distinct from, direct selling.

Direct selling is a more generic description that commonly refers to all sales of products or services away from a fixed store, whether solicited or not. Direct selling usually includes sales in small group settings, including party plan events that are exempt from the unsolicited selling provisions.

The ACCC commissioned independent research on door-to-door sales in Australia in 2011, but this was not intended to cover the full spectrum of unsolicited selling across all industry sectors and in all locations away from a supplier’s business premises (including public places, online, and over the phone) [see **Box 22** below].

Accordingly, there is little data on the wider unsolicited selling industry, including the number of unsolicited sales, the demographics of consumers, and the level of satisfaction with the products sold.

³⁹⁴ ACL, section 69.

³⁹⁵ Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, at [8.12]: www.parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4335%22.

Box 22: Research by Frost & Sullivan on door-to-door sales

In August 2012, Frost & Sullivan produced an independent report for the ACCC, *Research into the door-to-door sales industry in Australia*.³⁹⁶

It estimated from its research interviews that 1,308,000 door-to-door sales occurred in Australia in 2011. The most common industries in which sales occurred were:

- energy (electricity and gas) — 1,000,000 sales
- pay TV — 34,000 sales
- telecoms — 138,000 sales
- solar panels — 52,000 sales
- media subscriptions — 24,000 sales
- other (home insulation, appliances, educational software, et cetera) — 60,000 sales.

Based on approximately 8.4 million households in Australia, this equates to an average of one door-to-door sale for every 6.5 households in 2011. In practice, the average would be higher in New South Wales and Victoria where door-to-door sales of energy are most prevalent.

Nevertheless, the existing information suggests that the industry is not a narrow one, and is wide-ranging in the products that it supplies and the customers it services. It also shows that trends in the market have changed over time, and that there is more to be known about this industry.

Some stakeholders noted the developments in the industry over the last few decades from its origins in travelling salespeople, to the rise of multi-level marketing, and more recently, online and social media transactions.

Sales Assured pointed to a trend of declining complaints to the Energy and Water Ombudsman Victoria about face-to-face marketing in the energy sector (from 447 in the October-December 2012 period, down to 97 in the October-December 2015 period).³⁹⁷

This trend occurred in the context of multiple enforcement actions by the ACCC against door-to-door energy retailers. In 2013, Origin, Energy Australia and AGL stopped all door-to-door sales marketing activities.

While the Direct Selling Industry also indicated that door knocking has 'declined' over the years,³⁹⁸ other stakeholders suggested that as the market for door-to-door sales shrinks, it is increasingly the vulnerable that are targeted, whether through door-to-door selling or other means.

Consumer Action Law Centre cited a recent practice by vocational education and training (VET) providers of 'harvesting' consumers' contact details through job search web-sites, and provided an example [see **Box 23** below].³⁹⁹

396 Frost & Sullivan, *Research into the door-to-door sales industry in Australia*, August 2012, at: www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf.

397 Submission from Sales Assured, page 4.

398 Submission from Direct Selling Australia, page 1.

399 Submission from Consumer Action Law Centre, page 21.

In December 2015, the ACCC brought proceedings against Acquire Learning for unconscionable conduct in signing consumers up to courses without considering their suitability or how they would improve the consumer's employment prospects.

Box 23: Unsolicited selling online (example provided by Consumer Action Law Centre)

Sarah* had been applying online for jobs via a job advertisement board operated by Acquire Learning. Sarah received a telephone call from an Acquire Learning representative offering to enrol her in a Diploma of Management. The representative sent Sarah an email whilst on the telephone, and told her to click on various links to sign her up to a course that was government funded and would help her obtain a job.

Sarah was told by the sales representative not to read the email. Sarah says the sales representative did not ask any questions about her ambitions or capabilities. Sarah did not commence the course, but later received notification of a VET FEE-HELP debt of over \$23,000.

* Name changed for privacy purposes.

Consumer Action Law Centre also noted broader changes in the market, and that it was:

particularly concerned that with the trend towards deregulating human services (such as through the National Disability Insurance Scheme (NDIS), and in the aged care sector), many vulnerable Australians could be left exposed to the pitfalls of unsolicited sales—especially in home and door to door sales—if the ACL is not strengthened to protect them.⁴⁰⁰

While the impacts of market changes and emerging trends are still emerging, CAANZ notes that the broad reach of the current provisions is technology neutral and will remain important in addressing new and emerging forms of unsolicited selling. The current provisions are supported by a range of other protections, including misleading or deceptive conduct, unconscionable conduct, false or misleading representations, unfair contract terms, and the consumer guarantees. The provisions are also supported through education and compliance activities [see **Case study 7** below].

Case study 7: Minimising consumer harm from unlawful door-to-door trade in Wujal Wujal

In early 2016, the ACCC, Queensland Office of Fair Trading, and Indigenous Consumer Assistance Network launched a joint Australia-first partnership to prevent consumer harm from door-to-door sales in Wujal Wujal in remote Far North Queensland.

The initiative included road signage at the entrances into the community, reminding door-to-door traders of their legal obligations, and that they cannot approach houses with do-not-knock notices.

The signage is also intended to help Wujal Wujal residents to understand and assert their rights under the ACL.⁴⁰¹

400 Ibid, page 61.

401 ACCC media release, *Wujal Wujal community puts door-to-door traders on notice*, 22 April 2016, at: www.accc.gov.au/media-release/wujal-wujal-community-puts-door-to-door-traders-on-notice.

CAANZ therefore notes that there are some benefits to maintaining the current balance of the provisions, pending a stronger evidence base for reform. In addition to the lack of available data on the full spectrum of unsolicited selling, CAANZ also notes that the lack of stakeholder consensus on how the provisions would be reformed.

2.5.3 Effectiveness of the current provisions

Stakeholders generally accepted the need to regulate unsolicited selling in some way. For example, the peak body for Australian financial counsellors, Financial Counselling Australia, noted that for:

many years it has been recognised that certain types of selling can significantly disadvantage consumers and can lead some people into purchasing goods or services that they would not have done had they had the opportunity to think through the decision without any pressure.⁴⁰²

Consumer Action Law Centre submitted that unsolicited sales:

are inherently at odds with rational choice theory, as they involve the trader making an unrequested approach to a consumer who is not necessarily looking to buy the good—and is therefore not taking steps to inform themselves of their options in the market. Unsolicited sales staff are often highly trained and motivated by commission-based payment structures. Sales staff are not concerned that the good or service should be appropriate or affordable for the consumer, but simply that the sale be closed. Often, the salesperson involved is not directly employed by the company selling the good or service, but is instead employed by a direct selling company—and this creates a further disconnect between the consumer and the good or service on offer. Such salespeople have no incentive to conduct themselves fairly[.]⁴⁰³

From an industry perspective, Direct Selling Australia acknowledged that the:

long accepted rationale for controlling unsolicited selling is a need to protect consumers from poor purchasing decisions because of high pressure selling and information asymmetry issues arising from an uninvited sales presence in their home, workplace and latterly over their telephone. Typically, this control centred on “cooling-off” rights with associated notice and remedial policy allowing consumers to reconsider decisions and avoid purchases. DSA accepts the potential for vulnerability in these circumstances and notes that cooling-off rights have been a membership requirement for decades.⁴⁰⁴

The Law Council of Australia’s Competition and Consumer Committee noted that distinguishing between unsolicited and solicited sales is the ‘the most appropriate method to protect consumers against aggressive and high-pressure selling techniques’.⁴⁰⁵

While there is a general sense that consumers should be protected from uninvited sales, there were differing views about how to reform the provisions. Industry stakeholders raised various concerns

402 Submission from Financial Counselling Australia, page 4.

403 Submission from Consumer Action Law Centre, pages 18-9.

404 Submission from Direct Selling Australia, page 2.

405 Submission from the Law Council of Australia’s Competition and Consumer Commission, page 2.

about over-regulation, while consumer and community groups raised concerns about vulnerable and disadvantaged consumers.

2.5.4 Concerns about the level of regulation

Unsolicited selling was regulated in the states and territories prior the introduction of the ACL, and has traditionally been seen as an industry that not only poses risks to consumers, but which also offers a range of benefits. For example, it can:

- promote and facilitate access to goods and services in remote areas
- provide flexible employment that those who may not be able to participate in other forms of employment due to other commitments (such as parenting or caring responsibilities), and the high barriers to entry associated with 'bricks and mortar' retailing
- help businesses to generate sales, particularly where potential customers may otherwise be difficult to identify (for example, real estate agents have long used unsolicited techniques to connect with potential property sellers)
- increase the range of consumer choices that are available, and allow consumers to test certain products at home.

The Direct Selling Australia referred to findings of a 2013 Deloitte report on its direct selling members, including that:

- many products are distributed by 'small and microbusiness people' and that '75 per cent are women and 62 per cent are in the lower half of the socio-economic spectrum'
- the revenue from its members' wholesale revenues in 2012 was estimated by Deloitte Access Economics to exceed \$1.1 billion.⁴⁰⁶

In this context, CAANZ notes that the direct selling industry is broader than the activity that is regulated under the ACL, with party plan events (such as 'Tupperware parties') currently exempt from the ACL.

Direct Selling Australia's website highlights that its members mostly sell complementary healthcare products (33 per cent of sales), and cosmetics and personal care products (22 per cent).⁴⁰⁷ Its members, who may engage in unsolicited and/or solicited selling:

- have agreed to adhere to the association's Code of Practice and Code of Ethics
- receive extensive guidance through the association's *Legal Compliance and Risk Management Guide*, last updated in 2016. This covers a range of topics from the ACL to dispute resolution, unwelcome commercial approaches, information privacy, and digital interactions. It also refers to industry-specific regulation for therapeutic goods, cosmetics, food, and dangerous goods.

Industry stakeholders generally accepted the need for regulation but raised three main issues, namely the:

406 Deloitte Access Economics, Social and economic impacts of direct selling, Direct Selling Association of Australia Inc., December 2013, page v.

407 At: www.directselling.org.au/statistics-research/.

- **scope** of the current provisions
- restrictions on payment and supply during the cooling-off period
- requirements regarding **documentation** and **trading hours**.

Scope of the current provisions

Direct Selling Australia submitted that:

(t)here are many aspects of the unsolicited consumer agreement provisions that make them anti-competitive, unnecessarily complex and difficult to enforce. They have adversely affected the direct selling industry, particularly for sales under network marketing models that are most affected by their controls. The application of the provisions to transactions not considered store selling doesn't recognise potential consumer detriment in a fair and competitively neutral way across all retailing.⁴⁰⁸

Direct Selling Australia preferred the approach taken in New Zealand, which limits the application of its unsolicited selling provisions to sales in the home, workplace and over the phone [see **Box 24** below]. It submitted that these locations are:

where compliance activity is focused and it remains the source of commentary on consumer detriment. DSA believes that unsolicited selling protection should be confined to these transactions.

For regulatory and compliance flexibility it prefers an interpretative principle based approach. But for specific regulation the New Zealand experience is instructive. Compared with the ACL, DSA argues it is more effective, pursues a level playing field, reduces regulatory burden and offers a better compliance and enforcement capability.⁴⁰⁹

Box 24: New Zealand's approach to uninvited direct sale agreements

Under *New Zealand's Fair Trading Act 1986*, the provisions governing 'uninvited direct sale agreements' apply only to negotiations in trade that were conducted between a supplier and a consumer:

- in each other's presence in the consumer's home or workplace, where the consumer did not invite the supplier to come to that place for the purposes of entering into negotiations
- by telephone, where the consumer did not invite the supplier to make the telephone call for the purposes of entering into negotiations.⁴¹⁰

Consumers have a cooling-off period for five working days from the day that they receive a written agreement. However, a consumer may cancel the agreement at any time if the supplier did not comply with their disclosure obligations, including requirements to provide a clear and legible written agreement.

408 Submission from Direct Selling Australia, page 1.

409 Ibid, page 3.

410 *Fair Trading Act 1986* (NZ), sections 36K-36S.

Restrictions during the cooling-off period

The restrictions on payment and supply during the cooling-off period are designed to reduce a consumer's sense of commitment and obligation to continue with a transaction that they had not sought or expected.

The ACL originally prohibited businesses, during the cooling-off period, from supplying and seeking, or requesting payment for, goods and services. However, in response to industry concerns, the *Competition and Consumer Regulations 2010* were amended to permit, from 1 January 2012, the supply of goods (but not services) priced \$500 or less during the cooling-off period.⁴¹¹

This change was to allow businesses to supply goods to consumers who wanted to test them without payment during in the cooling-off period. The rationale is that it is harder for consumers to exercise their cooling-off rights where:

- they have entrenched their commitment to the transaction by parting with their money
- may be deterred by the need to contact the supplier to obtain a refund, noting that the consumer may not have had any direct dealings with the supplier.

An alternative proposal to remove both restrictions, that is, on payment as well as supply, for goods priced \$500 or less was considered by Commonwealth, state and territory consumer affairs ministers in November 2011, but the proposal did not receive the required number of votes for agreement.

However, Ministers agreed to an additional amendment at that time to require the approved notice for terminating an unsolicited consumer agreement under section 82 of the ACL. The approved notice must now include a sentence to alert businesses and consumers to the consumer's right to keep goods where a supplier fails to collect the goods within 30 days of a contract being terminated.

Direct Selling Australia remained concerned by the amended restrictions, submitting that these unsolicited sales present 'no more risk' than purchases in retail stores. It estimated that 90 per cent of its members' transactions were for \$500 or less, and that the 'cash flow and credit implications' of delayed payments for these goods are 'effectively' a *de facto* restriction on supply.⁴¹²

Tony Davis & Associates, a law firm who provides legal services to the direct selling industry, submitted that the current restrictions result in businesses 'taking all the risk that the consumer may consume the goods, change their mind and return what's left of it'.⁴¹³

Similar issues were also raised by direct selling businesses, Rodan + Fields and WorldVentures.⁴¹⁴ The Communications Alliance also noted that the restrictions on supply prevent consumers from testing or using the product in the cooling-off period, which can be 'a major source of frustration' for their customers'.⁴¹⁵

CAANZ notes that there was a spectrum of views on the current restrictions during the cooling-off period. Some industry stakeholders submitted that they did not consider any changes to the current

411 Regulation 95 of the *Competition and Consumer Regulations 2010* (NZ).

412 Submission from Direct Selling Australia, page 3.

413 Submission from Tony Davis & Associates, page 2.

414 Submissions from Rodan + Fields, page 8; and WorldVentures, pages 4-5.

415 Submission from Communications Alliance, page 5.

prohibitions were necessary,⁴¹⁶ or that payment should be allowed for goods below \$500, but otherwise the threshold was ‘fair’.⁴¹⁷

Documentation requirements and trading hours

Various industry stakeholders supported changes to the current requirements regarding trading hours and documentation,⁴¹⁸ including requirements for documenting agreements (such as including key terms, cooling-off rights, and information about the seller), and requirements for giving these agreements to the consumer.⁴¹⁹

For example, Direct Selling Australia submitted that the documentation requirements ‘are framed against dated business models without regard to technology and consumer driven shifts in relatively small transactions’.⁴²⁰

For some industry stakeholders, these issues were the main legislative changes sought. For example, Sales Assured noted that that the ACL had had a ‘very positive effect’ and the only amendment it sought was an extension of trading hours from 6pm to 7pm on weekdays.⁴²¹

2.5.5 Concerns about vulnerable and disadvantaged consumers

Impacts on consumers

Although there is limited available evidence across all industries and locations regarding the incidence of consumer detriment resulting from unsolicited selling activities, consumer stakeholders are nevertheless concerned that it will be increasingly the vulnerable who are most affected. They noted particular risks for consumers with language barriers or disabilities, or who are:

- elderly
- unemployed
- single
- newly arrived in Australia
- Indigenous
- low income
- young (including minors acting without parental consent).

The Redfern Legal Centre submitted that the types of vulnerable consumers listed above are the ‘easiest targets’ for door-to-door sales, and that:

[t]he 2012 report commissioned by the ACCC on door-to-door sales in Australia noted anecdotal evidence from 20% of sales agents interviewed of targeting perceived “easier”

416 For example, submissions from: EnergyAustralia; and Red Energy and Lumo Energy.

417 Submission from the Law Council of Australia’s Competition and Consumer Committee, page 3.

418 For example, submissions from: Direct Selling Australia; EnergyAustralia; and Red Energy and Lumo Energy.

419 ACL, sections 78-81.

420 Submission from Direct Selling Australia, page 7.

421 Submission from Sales Assured, page 1.

or vulnerable clients including (in one case) ‘older people, single parents and the young ones who were just in their first house.’ This behaviour was sharply demonstrated recently in the vocational education training scandal in which training providers and their sales agents actively targeted housing estates and Centrelink offices.⁴²²

Consumer stakeholders argue that these kinds of consumers are less likely to understand the terms of a sales agreement, or even that they have made an agreement.

Financial Counselling Australia noted examples of transactions most commonly raised by its clients. These included a range of ongoing or expensive products including:

- services such video rental packages, freezer food plans
- products such as timeshares and ‘mortgage reduction’ schemes
- more expensive goods such as bedding, house cladding, and mathematics software.⁴²³

In its submission, the Telecommunications Industry Ombudsman analysed a sample of 50 new complaints and found that one fifth were not even aware they had switched telecommunications providers until they had received their first bill.

Six of the sample complainants were elderly, could not understand English, or had a mental health issue. A further three complaints involved transfers after the telecommunications company had spoken to a minor. While this is a small dataset, in the Ombudsman’s view, these findings were indicative of its overall experience. The Ombudsman also noted that once an unauthorised transfer occurs, there may be contractual difficulties that prevent a consumer from cancelling the agreement and returning to their original supplier.⁴²⁴

Other stakeholders noted that some traders used powerful inducements such as ‘free laptops’ to sell vocation education and training courses to vulnerable consumers (such as low-income jobseekers and Indigenous consumers) [see **Case study 8** below].

The Footscray Community Legal Centre also identified a range of issues and case studies about the vulnerability of refugees in public housing to door-knocking techniques in its 2013 report into the practice in Melbourne’s refugee communities [see **Box 25** below].

Case study 8: ‘Free’ inducements and private colleges

In early 2016, following a joint investigation by the ACCC and NSW Fair Trading into the conduct of private colleges, the ACCC and the Australian Government (for the Department of Education and Training) filed proceedings in the Federal Court against Australian Institute of Professional Education Pty Ltd (AIPE).

The ACCC and the Australian Government allege that AIPE made false or misleading representations and engaged in unconscionable conduct, in breach of the ACL.

AIPE is a provider of VET FEE-HELP Diploma courses costing from \$12,160 to \$19,600 per course. It marketed and sold these courses using face-to-face marketing, including door-to-door sales, as well as telemarketing.

⁴²² Submission from Redfern Legal Centre, page 15.

⁴²³ Submission from Financial Counselling Australia, page 4-5.

⁴²⁴ Submission from Telecommunications Industry Ombudsman, page 27.

Case study 8: 'Free' inducements and private colleges (continued)

Between 1 January 2013 and 1 December 2015, it is alleged that AIPE enrolled approximately 15,426 students into VET FEE-HELP Diploma courses and was paid over \$210.9 million by the Australian Government for those enrolments.

It is alleged that AIPE represented to prospective students that they would receive a free laptop or tablet and that the course(s) were free or were free if the consumer did not earn approximately more than \$50,000 per annum.

In fact, the laptop or tablet students received were on loan, and students enrolled in the courses incurred a VET FEE-HELP debt payable to the Australian Government. Repayment of this debt would commence if they earned more than a specified amount in a financial year (\$53,345 in the 2014-2015 income year).

In the ACCC's view, AIPE had marketed its courses to vulnerable consumers from low socio-economic backgrounds, and consumers with intellectual disabilities, and that online courses were marketed to those who could not use a computer or email.

The ACCC also alleges that AIPE engaged in a pattern of behaviour allowing sales to be made by incentives such as 'free' laptops, Wi-Fi access and mobile phone credits, involving the use of unfair tactics and failure to provide clear and accurate information about the price of courses and the nature of the FEE-HELP loan.

AIPE is among a number of other private colleges that the ACCC and the Commonwealth have instituted proceedings against, following the joint investigation with NSW Fair Trading.⁴²⁵

Box 25: Report on door-to-door selling in Melbourne's refugee communities

In 2013, the Footscray Legal Community Centre published, *Strangers are calling: The experience of door-to-door sales in Melbourne's refugee communities*.⁴²⁶

The report identified key problems experienced by the centre's refugee clients, including:

- confusion as to whether they had switched companies (and why they had received bills from a company that was not their own)
- debts incurred and legal action taken by energy companies trying to recover debts
- other disputes involving termination of contract made through door-to-door sales.

It noted that public housing residents 'felt that they were disproportionately targeted by energy companies and that door-to-door sales happened too often and too regularly in public housing', and that residents may mistake salespeople for government representatives.

It also found that public housing floor plans offer 'very little neutral space' for receiving guests, and that any 'financial interaction that requires a salesperson — a stranger — to enter the person's home should be avoided'.

425 ACCC Media Release, *ACCC takes action against AIPE following a joint investigation with NSW Fair Trading*, 31 March 2016, at:

www.accc.gov.au/media-release/accc-takes-action-against-aipe-following-a-joint-investigation-with-nsw-fair-trading.

426 Footscray Community Legal Centre, *Strangers are Calling: The experience of door-to-door sales in Melbourne's refugee communities*, 2016, at: www.footscrayclc.org.au/images/stories/A_Stranger_is_Calling.pdf.

Calls to ban unsolicited door-to-door and telephone sales

A number of stakeholders called for a total ban on unsolicited door-to-door and telephone sales on the basis they pose significant risks to vulnerable and disadvantaged consumers.⁴²⁷ Consumer Action Law Centre cited a recent Ipsos poll that found that 77 percent of consumers wanted to see door-to-door selling banned and submitted that:

[w]hile all unsolicited sales scenarios place the consumer at some level of disadvantage, in home sales—including “door to door” —set up a particularly challenging power dynamic for the consumer, and very often result in poor outcomes. While the ACL currently acknowledges this and makes some attempt to protect consumers through limiting the times at which door-to-door and salespeople and telemarketers can call and mandating a ten day cooling off period for unsolicited sales, we do not believe these protections have been successful. In-home sales, telemarketing and door-to-door selling should be banned as an inherently unfair business practice.⁴²⁸

Financial Counselling Australia submitted that the industry is currently ‘anti-competitive, because consumers are pressured into signing a contract without having considered any other similar offering’.⁴²⁹

In relation to the current **cooling-off rights** for unsolicited consumer agreements, some stakeholders noted that they are ineffective because:

- as Consumer Action Law Centre submitted to a contract law review in 2012, the cooling-off right can be used by dealers as a marketing tool to make the transaction seem less risky⁴³⁰
- a consumer might not understand the agreement or realise they have switched energy providers until they receive a bill some weeks later (and after the end of the 10-day cooling-off period)⁴³¹

Further, Consumer Action Law Centre noted that the relevant behavioural principles affecting consumer policy are well researched and understood.⁴³² Relevant principles that have been previously raised with regulators include commitment and consistency biases that hold consumers back from admitting a mistake or reversing a decision.

Other stakeholders suggested approaches that did not involve a ban. For example, the Telecommunications Industry Ombudsman suggested an ‘opt in’ mechanism.⁴³³ This would require a consumer to confirm the sale within a limited time, and without contact from the trader before

427 For example, submissions from: Consumer Action Law Centre; CHOICE; Ethnic Communities’ Council of NSW; Financial Counselling Australia; Financial Rights Legal Centre; WEstjustice Western Community Legal Centre (with exceptions for charities and government initiatives); Redfern Legal Centre; Goulburn Valley Community Legal Centre & Loddon Campaspe Community Legal Centre; and Clare Petre.

428 Submission from Consumer Action Law Centre, page 20.

429 Submission from Financial Counselling Australia, page 6.

430 Consumer Action Law Centre, Submission to the Commonwealth Attorney-General’s Department’s Review of Australian Contract Law, July 2012, page 7, at:

www.consumeraction.org.au/wp-content/uploads/2012/07/CALC-submission-scope-for-reforming-Australias-contract-law-July-2012.pdf.

431 Submission from Redfern Legal Centre, pages 15-16.

432 Submission from Consumer Action Law Centre, pages 4-5.

433 Submission from Telecommunications Ombudsman, page 33.

payment and supply could be made. However, Direct Selling Australia indicated it is strongly opposed to the introduction of an opt-in process on the basis of its 'obvious market distortion and competition issues and clear lack of evidence based support'.⁴³⁴

The Retail Council did not support prohibiting any particular retail model as this risks inhibiting innovation. It argued that the ACL should focus on the manner in which the sale is undertaken, rather than the type of store or business structure used for the selling.⁴³⁵ Similarly, the Australian Chamber of Commerce and Industry noted that reforms should 'not impact legitimate business models'.⁴³⁶

In considering the stakeholder feedback, CAANZ notes that there is lack of data about the unsolicited selling market across all industries and locations (including in public and in online sales), and a lack of stakeholder consensus on the issues to be addressed by any regulatory reform.

In this context, CAANZ observes that there are benefits to maintaining the current balance of the provisions, pending a more developed evidence base.

CAANZ also notes that the current provisions capture a wide range of selling locations and enables the law to adapt to changes in the market, and to capture new and emerging sales practices. There are also other ACL provisions that can apply to sales made in an unsolicited selling context (including provisions on unconscionable conduct, and misleading or deceptive conduct), as well as education and compliance activities.

If, however, it can be demonstrated that legislative changes are necessary to protect vulnerable consumers, CAANZ notes that any outright ban of any particular selling method or location would represent a significant regulatory intervention. Accordingly, it can generally only be justified after it is demonstrated that all other forms of regulation have failed. Stakeholders have suggested alternative forms, such as opt-in arrangements.

CAANZ notes that even if the necessary justifications for a ban cannot be established at this stage, or without further research, ACL regulators will continue to monitor developments in this area and whether further regulation or compliance activities may be warranted.

For consultation

Option 1 — Maintain the current balance and breadth of the provisions, noting the current gap in available data about the industry and the incidence of consumer problems

Views are sought on maintaining the existing balance and breadth of the current provisions, noting there are significant data gaps about unsolicited selling and a lack of stakeholder consensus on how the law could be reformed.

Under this option, regulators would continue to monitor developments in unsolicited selling, and undertake compliance and enforcement activities. This approach would maintain the existing breadth of the provisions to ensure that new and emerging forms of unsolicited selling are captured.

434 Submission from Direct Selling Australia, page 7.

435 Submission from Retail Council, page 15.

436 Submission from Australian Chamber of Commerce and Industry, page 4.

Regulators will also monitor future data needs, and revisit unsolicited selling reforms if and when there is a stronger evidence base for reform.

This option will not, however, address concerns either from industry or consumers about the current cooling-off right (although, as noted above, the restrictions on the industry have been partially amended since the introduction of the ACL).

Further questions

- 48. What are your views on maintaining the current unsolicited selling provisions? Is there another approach that would provide a more effective and proportionate response? If so, how?
- 49. Are there any unintended consequences, risks or challenges that should be considered?

Option 2 — Replace the cooling-off period with an ‘opt-in’ mechanism

An ‘opt in’ mechanism would allow the consumer to confirm the sale, without further contact by the trader, within a certain time period.

Tony Davis & Associates suggested that under an opt-in model, consumers should be allowed to accept immediate supply, and to pay the next day without further contact from the trader.⁴³⁷

Consumer Action Law Centre suggested a two-day period to opt in, noting that under ‘Clause 4.9.2 of the VET Guidelines, a VET provider must not accept a VET FEE-HELP loan form unless two business days have passed from the date and time the person has enrolled’.⁴³⁸

A potential model is illustrated below.

OPT-IN PERIOD	CONTRACTUAL PERIOD
No supply, payment or trader contact until consumer opts in	Usual rights, such as contractual rights, and consumer guarantees

The opt-in period may allow the consumer to investigate their options and reconsider their decision away from the pressure of a salesperson, but with a lesser sense of commitment. This may help consumers who did not understand their agreement or that they had made one.

However, even a restricted ‘opt in’ model may significantly reduce the number of sales made by traders, given that consumers are known to demonstrate a behavioural bias towards maintaining a default position, or could forget to opt in.

There may also be behavioural biases that work the other way, given the consumer has incurred sunk costs (in terms of the time spent dealing with the salesperson). Nevertheless, this option may still impose significant and uncertain costs on traders.

Consideration could be given to limiting costs for the industry by applying the opt-in process only to high-risk sales that pose the greatest consumer detriment (for example, enduring service contracts or high-value goods).

437 Submission from Tony Davis & Associates, page 4.

438 Submission from Consumer Action Law Centre, page 63.

Nevertheless, the costs implications for the industry of both broad and targeted reforms are uncertain, as the size of the current industry across all unsolicited selling models is not well known.

Further questions

50. Should the cooling-off period be replaced with an opt-in mechanism? If so:

- How should it be designed? For example, should it apply to all unsolicited sales or only high-risk sales? How should 'high-risk' sales be defined?
- What would be an appropriate length of the opt-in period?
- Should there be any exemptions?
- What is the likelihood that consumers would exercise an 'opt in' right? What impact would this have on sales across all sectors that engage in unsolicited selling, and what difference would this make to consumers?

Option 3 — Introduce additional rights and protections for consumers entering into enduring service contracts

While stakeholders did not generally put forward mechanisms to help consumers cancel enduring service contracts, the ineffectiveness of the current cooling-off right for these agreements was a common theme.

Potentially, an option to help consumer cancel enduring service contracts could involve:

- extending the cooling-off period beyond the current period of 10 business days. This could be a specified time or until the first bill arrives, whichever occurs earlier
- providing statutory rights to cancel contracts without a cancellation fee with a pro rata refund for any services paid for but not yet supplied.

A potential model is illustrated below.

EXTENDED COOLING-OFF PERIOD	CONTRACTUAL PERIOD WITH TERMINATION RIGHT	CONTRACTUAL PERIOD WITH USUAL RIGHTS
No supply or payment during this period	If the consumer cancels, there is no exit fee and a pro rata refund for any service paid for but not yet supplied.	Usual rights, such as contractual rights, and consumer guarantees

Potentially, this option may assist consumers who did not understand the documentation, and were not aware of the agreement until after their first bill arrives, which could be some weeks or months down the track.

It may also assist those who are pressured into the decision and then encounter financial difficulty in managing the bills or realise that the service does not meet their needs.

However, there may be some issues to be resolved, including how to define enduring contracts, and calculate refund entitlements where the service has only been partly used.

This option would also impose costs for traders. There is no current data on how often terminations occur, the extent to which cancellation fees are used, and the amount of such fees. Under existing

law, these fees can be a reasonable pre-estimate of the loss caused to the trader but cannot be punitive. These are significant gaps in data.

Consideration would also need to be given to the appropriate length of the extended opt-out and termination right periods, together with whether any exemptions are required.

Further questions

51. Should additional rights and protections apply to the unsolicited sale of enduring service contracts? If so:

- How should it be designed? For example, what rights should apply? How would ‘enduring service contract’ be defined? Are there any appropriate exemptions to consider?
- What should be the length, for example, of an extended cooling-off period? When should a termination right cease to apply?
- What, if any, transitional arrangements would be required, and which industries engaging in unsolicited selling would be most affected?
- Are there any unintended consequences, and how could these be addressed?

Option 4 — Enhance protections for high-risk transactions while reducing regulations for low-risk transactions

This option explores whether there are more effective ways to protect consumers when making decisions about significant transactions, free from the pressure of a salesperson, while addressing industry concerns about over-regulation of low-risk transactions.

For example, this option could involve adopting Option 2 or 3 in relation to ‘high-risk transactions’ (such as goods and services over \$500) or to enduring service contracts, while easing the restriction on payment for low-risk transactions, such as goods and services under \$500.

A potential model for the low-risk transactions is illustrated below.

COOLING-OFF PERIOD Both payment and supply permitted	CONTRACTUAL PERIOD Usual rights, such as contractual rights, and consumer guarantees
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Consideration could also be given to easing restrictions on when unsolicited sales could be negotiated, such as removing the blanket prohibition on Sundays.

This would provide more flexibility for the industry, noting that the prohibition may not reflect the risk, for example, that the unemployed (rather than the employed) are more likely to be at home on weekdays.

This approach could be seen as enhancing a risk-based approach in the law, which currently distinguishes between different categories of risk using a \$500 threshold.

However, one potential drawback is that distinguishing between different types of sales will likely add complexity to the law.

Further questions

52. Should an enhanced 'risk-based' approach to unsolicited consumer agreement protections be adopted? If so:
- How should it be designed? For example, what would differentiate low-risk from high-risk sales? What different set of rights and protections would apply?
 - What impacts would this have on sales across all sectors that engage in unsolicited selling, as distinct from direct selling?
 - How would this affect outcomes for consumers?

2.5.6 Other issues

Stakeholders also raised a number of other issues about unsolicited consumer agreements, including the clarity of the definition, processes for documenting telephone agreements, and a range of other drafting clarifications.

Views are sought on whether any of these should be clarified in the ACL at the same time as any legislative changes are drafted, or addressed through guidance material.

Application of the provisions to public places

While the provisions are intended to apply to places away from the supplier's business or trade premises where the public has a right to go, there were comments made in a recent Federal Court decision, *ACCC v A.C.N. 099 814 749 Pty Ltd* [2016] FCA 430, that appeared to suggest that **public places** were not covered.

As noted above, there are three thresholds for establishing an unsolicited consumer agreement:

- a negotiation takes place away from a supplier's business or trade premises
- the consumer did not invite the dealer there
- the price is more than \$100.

Justice Reeves suggested that the second threshold requirement 'refers to a location where an invitation is normally needed, such as a consumer's home, rather than an area 'to which the general public has access'.⁴³⁹ In any case, Justice Reeves found that the agreements were not unsolicited consumer agreements because the consumers, in each of the transactions in question, had sought or requested the service.

However, the Explanatory Memorandum for the ACL explicitly refers to the provisions applying to 'suppliers who do not have an established place of business', such as those 'trading in public places'. As noted earlier, the drafting of the provisions is intended to be broad and to cover areas outside the supplier's domain (rather than outside the consumer's domain, such as their home or workplace).

439 *ACCC v ACN 099 814 749 Pty Ltd* [2016] FCA 403 at [137].

CAANZ notes that some confusion about the second threshold may flow from the drafting of the threshold requirements because, on the face of it, it may appear to require consideration of whether a seller needs permission to enter a place. This would appear to be illogical when applied to a seller's own store, or a place that the general public can access.

However, the relevant principle is not whether suppliers require some right or permission to be there, but whether the transaction occurs outside the supplier's business premise, these being places where the consumer may not expect the supplier to transact with them. Considering the second threshold (whether the sale was invited) *after* the first threshold is established (that is, where the sale is off-premises) avoids the illogicality of requiring consumers to invite a seller to their own store, while giving the law its intended effect in capturing a range of public places, such as outside Centrelink offices.

Noting some uncertainty in the sector, CAANZ seeks views on whether further clarity is needed to ensure that the law is operating as intended.

Meaning of a 'business or trade premises'

A related issue is the meaning of a 'business or trade premises'. This term is not defined in the ACL, and there is a lack of case law on its meaning in the unsolicited selling context.

Tony Davis & Associates suggested that the uncertainty around its meaning may 'unintentionally' capture temporary business premises such as 'pop up' stalls and market kiosks.⁴⁴⁰

As noted in the ACL regulator guide, *Sales practices: A guide for business and legal practitioners*, regulators do not consider that consumers approaching a stall or kiosk, where the operator remains in their business premise, would be captured by the unsolicited consumer agreements provisions. A kiosk or stall is more likely to be seen as a business premise if it is partly or fully enclosed and subject to an ongoing lease that marks out the operator's allocated area.⁴⁴¹

While there may be some uncertainty about whether the provisions now apply to public places following the recent Federal Court decision, CAANZ notes that if public places are no longer covered, this would be more likely to narrow, than broaden, the intended application of the provisions.

As discussed earlier in this chapter, CAANZ observes that the provisions were intended to apply to a wide range of industries and locations in order to address new and emerging forms of unsolicited selling. Accordingly, CAANZ seeks views on whether further clarity is needed around the meaning of the term, 'business or trade premise', to ensure that the law operates as intended.

Documenting unsolicited telephone calls

Some submissions also commented on process to obtain informed consent from consumers. For example:

- the Telecommunications Industry Ombudsman suggested that telemarketers should record conversations where consent is obtained⁴⁴²

440 Submission from Tony Davis and Associates, page 1.

441 *Sales practices: A guide for businesses and legal practitioners*, last updated March 2016, page 12, at: www.consumerlaw.gov.au/consumers-and-the-acl/.

442 Submission from Telecommunications Industry Ombudsman, page 2.

- Baker & McKenzie noted that the documentation requirements are unclear in how they apply to telephone sales (particularly as to whether consumers need to sign agreements, and how agreements should be amended).⁴⁴³

A broader, and related, issue raised in complaints to regulators is whether the whole of an unsolicited telephone call should be recorded. While consent is often recorded, the source of complaint is often about other conversations about the good or service. The absence of records can make it difficult for consumers to prove that they were misled about the product.

One approach may be to include a presumption that the consumer's version of what was said over the telephone will stand unless the business can prove otherwise. However, as many stakeholders did not comment specifically on this issue, CAANZ seeks further views on how the documentation requirements for telephone calls are operating.

Other suggestions

Stakeholders also raised suggestions to:

- clarify when the cooling-off period begins and ends, including whether it should begin after a written agreement is provided⁴⁴⁴
- address issues where a consumer is contacted by a business after providing their contact details to a third party, raised in complaints to regulators and in the case against Acquire Learning [see **Box 23** above]
- provide a standard cancellation notice to help 'lower costs on small Australian businesses'⁴⁴⁵
- clarify the interaction between the provisions in the ACL and relevant regulations, and relocating certain regulations within the ACL where this would provide clarity
- clarify the law⁴⁴⁶ so that a consumer who seeks a quote from a tradesperson for repairs or replacements in an emergency is not constrained from negotiating and accepting supply immediately and during the cooling-off period.

Further questions

53. What are your views on the definitional and other issues raised above? For example:

- Does the meaning of a business premise require further clarity so that the provisions operate as intended?
- What are your views on documenting telephone sales?
- Should the exemption for emergency repairs be extended beyond a declared 'state of emergency' to other forms of emergency? If so, what circumstances should apply?

54. Can these matters be addressed through further guidance or is legislative change warranted?

443 Submission from Baker & McKenzie, pages 13-4.

444 Submission from Tony Davis & Associates, pages 4-5.

445 Submission from Tony Davis & Associates, page 4.

446 Regulation 88 of the Competition and Consumer Regulations 2010.

3. ADMINISTRATION AND ENFORCEMENT

3.1 Implementing the Australian Consumer Law and its objectives

Stakeholders generally suggested that the ACL's objectives are broadly appropriate and that consumer and business awareness of the law is improving. Stakeholders provided a range of views, in particular on:

- access to information about the ACL
- access to remedies under the ACL
- stakeholder engagement in consumer policy development.

CAANZ seeks your views on the following overarching questions:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?
- What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements? Are there any unintended consequences?

Key observations

Regulators' activities are guided by six **operational objectives**, which stakeholders continue to support. These objectives guide regulators not only in enforcing the ACL, but also supporting its effective implementation by:

- **providing information** to improve consumer and business understanding of their rights and responsibilities
- supporting both consumers and traders to **resolve disputes**
- monitoring the changing consumer landscape to help inform the development of **consumer policy**.

These activities include both coordinated national activities, and also initiatives by individual jurisdictions. These efforts also complement the **important work of stakeholders** in supporting consumers and businesses.

While there were positive findings from the Australian Consumer Survey 2016 on the level of consumer and business awareness and understanding of the law and its regulators, CAANZ notes that stakeholders raised issues about:

- **access to information** including whether the ACL and guidance material could be more accessible, and whether guidance material could be tailored to specific audiences
- **access to remedies** including barriers for consumers (and businesses exercising their consumer rights) in resolving disputes, and relevant international developments in dispute resolution

Key Observations (continued)

- **future policy development** — some stakeholders expressed a desire for more engagement in future research, and greater access to regulator data, to participate in the future development of consumer policy.

CAANZ further notes that there are opportunities for this review to consider whether the text of the ACL and related guidance could be more accessible, and to enhance existing guidance based on stakeholder feedback.

CAANZ also notes that many of the issues about access to remedies relate to the civil justice systems established in each state and territory. While these are broader issues that extend beyond the scope of the ACL itself, they are being considered in other reviews. There may also be opportunities for CAANZ to consider more specific ways that the ACL can help private litigants navigate existing justice systems.

From a research perspective, there are also opportunities to consider, and build on, the evidence base for future policy development.

Broader issues relating to the joint administration and enforcement of the ACL under the ‘one law, multiple regulator’ model are being independently assessed by the Productivity Commission, which is due to report by March 2017.

Issues relating to:

- public information about product safety are discussed in **Chapter 2.2, ‘Product safety’**
- the effectiveness of the ACL’s penalties and remedies are discussed in **Chapter, 3.2 ‘Penalties and remedies’**.

OPTIONS

Supporting access to information

1. Improve the accessibility of the ACL and related guidance material by:
 - f. exploring ways to expand the available channels of communication and to further tailor them to target audiences
 - g. considering ways to use technology and other tools to help direct parties to existing resources on dispute resolution
 - h. creating a clearly-formatted standalone version of the ACL that can be downloaded from regulator websites, and which could be co-located with other ACL-related resources.

Supporting access to remedies

2. Ease evidentiary requirements for private litigants through an expanded ‘follow-on’ provision enabling them to rely on facts and admissions established in earlier proceedings.

Developing consumer policy

3. Enhance the evidence base for the future development of consumer policy by:
 - a. exploring opportunities to expand the availability of public information about the ACL and regulator activities
 - b. considering ways to further engage stakeholders in future research.

3.1.1 Objectives of the Australian Consumer Law

The operational objectives, outlined in the Introduction section of this report, guide the activities of regulators not only in enforcing the ACL but also in supporting its effective implementation through:

- information and education
- helping parties to resolve disputes and access remedies
- developing consumer policy and research.

CAANZ observes that stakeholders generally had a positive view of the ACL's objectives. Stakeholders generally did not have substantive suggestions to amend or revise them, or the fundamental principles of the ACL, such as its underlying premise that businesses should also be protected in some circumstances.

CHOICE noted that at the time of introducing a national consumer law framework, it:

acknowledged the intention of the law to enhance the quality of consumers' experiences in the marketplace and deliver financial benefits to the entire community. Seven years on, we are happy to see that the Australian Consumer Law (ACL) has delivered on this promise in many ways.⁴⁴⁷

This is also a view shared by some industry stakeholders. For example, the Australian Retailers Association noted that the:

framework is aimed to enhance consumer protection and reduce regulatory complexity for business. ARA believes the objectives are meeting the needs of vulnerable and disadvantaged consumers, and promoting proportionate risk-based enforcement.⁴⁴⁸

Stakeholders also noted that the provisions of the ACL itself are broadly in line with its objectives. For example, the Queensland Law Society noted that the ACL 'concentrates the resources of regulators on priority areas which have been identified as having the potential to cause significant consumer harm'.⁴⁴⁹

Other stakeholders noted the need to balance each objective with the others. For example, the Victorian Automobile Chamber of Commerce noted that the objectives should remain in place, and that '[c]onsumer protection, effective competition and fair trading all have equal value and importance under the law'.⁴⁵⁰

The Australian Chamber of Commerce and Industry commented on the need to consider the compliance costs in implementing the objectives,⁴⁵¹ while Consumer Action Law Centre and the Consumers' Federation of Australia noted the need for regulators to be better resourced.⁴⁵²

447 Submission from CHOICE, page 8.

448 Submission from Australian Retailers Association, page 5.

449 Submission from the Queensland Law Society, page 8.

450 Submission from Victorian Automobile Chamber of Commerce, page 5.

451 Submission from Australian Chamber of Commerce and Industry, page 6.

452 For example, submissions from: Consumer Action Law Centre; and Consumers' Federation of Australia.

In considering the stakeholder feedback to date, CAANZ observes that there is no clear indication that the objectives themselves require change or revision at this stage.

However, future issues to consider may be the extent to which the ACL objectives should be aligned with international norms and developments. These may include, as the Law Council of Australia's Competition and Consumer Committee noted, issues such as:

the protection of consumer data and flow of information, equalisation of e-commerce and conventional commerce protections, promoting sustainable consumption and aiding consumer education on environmental, social, and economic consequences of consumer choices.⁴⁵³

Generally, stakeholder suggestions were not focussed on the objectives themselves, but how they should be implemented in practice. Three particular themes included:

- access to information
- access to remedies
- the future development of consumer policy.

3.1.2 Access to information

Currently, ACL regulators have in place a range of initiatives to support the effective implementation of the ACL, including measures to support access to information about the ACL.

Among other things, ACL regulators publish information about the ACL in the form of reports from the first and second Australian Consumer Surveys, and have collaboratively developed a series of ACL guides available from the ACL website,⁴⁵⁴ and from regulator websites. These guides were most recently updated in March 2016 and cover:

- avoiding unfair practices
- consumer guarantees
- product safety
- sales practices
- unfair contract terms

Additional guides cover:

- compliance and enforcement
- preventing unfair terms in window and floor covering agreements.

453 Submission from the Law Council of Australia's Competition and Consumer Committee, page 1.

454 At: www.consumerlaw.gov.au/consumers-and-the-acl/.

The ACCC has also published on their website:

- a consumer and business guide on warranties and refunds
- an industry guide on motor vehicles sales and repairs
- an industry guide for electrical and whitegoods
- a guide for suppliers and review platforms on online reviews
- guidance on the new country of origin labelling system
- guidelines on developing effective voluntary industry codes of conduct.

To engage and inform stakeholders, ACL regulators also publish annual implementation reports on their coordinated activities since the commencement of the ACL across the areas of:

- policy and research, including updates on new developments
- education and information, including details of key campaigns and outreach activities
- compliance and enforcement, including details of national compliance programs, engagement with businesses, and enforcement outcomes. These include both court actions and administrative actions.⁴⁵⁵

The findings of the Australian Consumer Survey 2016 suggest that there are generally positive signs about the impact of these information initiatives [see **Box 26** below].

Regulator initiatives also complement the outreach activities, pro bono assistance, and communications efforts of stakeholders. These include legal practitioners, industry peak bodies, community legal centres, and community and consumer groups, ombudsmen, and financial counsellors. Many of these stakeholders indicated that their submissions are based on the queries and issues regularly raised with them by their members or clients.

As one example of the important work of stakeholders, the 2014 survey by the National Association of Community Legal Centres indicated that nearly 60 percent of community legal centres offer generalist services (which include consumer services). The Consumer Action Law Centre in Melbourne offers a dedicated consumer law service, and 26 community legal centres indicated that they offer specialist programs in consumer credit and debt.⁴⁵⁶

Box 26: Australian Consumer Survey 2016 — awareness and understanding of the ACL

In relation to consumer and business awareness and understanding of the law, the survey found that:

- the level of consumer and business awareness of consumer protection laws remains high and unchanged since 2011 (at 90 per cent for consumers and 98 per cent for businesses), with 83 percent of businesses having heard of the ACL

455 At: www.consumerlaw.gov.au/the-australian-consumer-law/implementation-2/.

456 National Association of Community Legal Centres, *National census of community legal centres: 2014 National report*, page 18, at: www.naclc.org.au/resources/NACLC_NationalCensusofCLCs_2014_COMBINED.pdf.

Box 26: Australian Consumer Survey 2016 — awareness and understanding of the ACL (continued)

- 71 per cent of consumers believe they have at least a moderate understanding of their rights when purchasing products and services
- consumer understanding of rights when purchasing a product or service increases with age, with 74 per cent of those aged 45 years or older having at least a moderate understanding compared to 68 per cent of those aged under 45 years
- 80 per cent of businesses believe their organisation has at least a moderate understanding of their obligations under the ACL
- 84 per cent of businesses feel they have sufficient information to ensure compliance with the ACL (74 per cent in 2011).

In relation to awareness of consumer protection regulators, the survey found that:

- 54 per cent of consumers agree that government provides adequate access to information and advice, and 58 per cent agree that government provides adequate access to services to help resolve disputes (38 per cent and 49 per cent in 2011, respectively)
- 44 per cent of consumers had heard of dispute resolution services provided by regulators (47 per cent in 2011)
- 66 per cent of businesses had heard of dispute resolution services (59 per cent in 2011).

3.1.3 Barriers to accessing information

Stakeholders generally acknowledged and supported the existence of ACL guidance material and related initiatives. For example, CHOICE commented that the positive findings from the Australian Consumer Survey 2016 regarding consumer understanding are ‘due largely to the communication efforts of advocates and regulators’.⁴⁵⁷

However, many stakeholders also noted that information could be more tailored to the appropriate audience. Some industry stakeholders suggested that more industry -specific guidance would be useful, based on the positive response by their membership to stakeholders’ training materials and seminars. For example, the Australian Retailers Association supported a ‘collaborative approach to developing guidelines’,⁴⁵⁸ and in a similar vein, the Consumer Electronics Suppliers Association, noted a desire for:

more stakeholder involvement in more regular reviews of the various guidelines. We would like to see more examples of various situations and suggested means of resolving the situations contained in the guidelines. We would be pleased to provide examples of real-life situations that our members regularly encounter.⁴⁵⁹

Other stakeholders noted particular challenges for vulnerable and disadvantaged consumers to assert their rights, including the elderly, financially disadvantaged, cognitively impaired, and those with low levels of English or literacy skills. For example, the Melbourne Social and Equity Institute noted that resolving disputes:

457 Submission from CHOICE, page 11.

458 Submission from Australian Retailers Association, page 6.

459 Submission from Consumer Electronics Suppliers Association, page 1.

requires quite considerable literacy, communication and organisational skills, which may present an almost impenetrable hurdle for many vulnerable consumers, and especially consumers with mental and intellectual impairments.⁴⁶⁰

Further, the Ethnic Communities' Council of NSW submitted on the difficulties for culturally and linguistically diverse consumers in understanding the consumer law, their rights and the dispute resolution procedures available to them.⁴⁶¹

Some stakeholders in submissions and consultations suggested that guidance be issued in a variety of formats to accommodate the specific needs of vulnerable consumers, and time-poor businesses.⁴⁶² These may involve, for example:

- different channels, mediums and languages, including graphics
- provision of Easy English (with graphic aids and distinct from 'plain English')
- embedding knowledge within Aboriginal elders using a 'train the trainer' approach based on 'storytelling' techniques.

Redfern Legal Centre and Legal Services Commission of SA suggested that ACL material should be 'consolidated' in one easily-found location.⁴⁶³ The QUT study also noted the need for tailored and varied approaches. It observed that '[m]erely placing information about consumer rights on a web site will not assist consumers who do not know they have such rights or where to look for information about them'.⁴⁶⁴

These comments are also reflected in the findings of the second Australian Consumer Survey 2016 about the variety of communication channels that consumers and businesses prefer [see **Box 27** below].

Box 27: Australian Consumer Survey 2016 — accessing information about the ACL

In 2016, 29 per cent of businesses had obtained information about the ACL with 45 per cent of these having actively sought the information. Common sources of information were ACL regulators (64 per cent) and general internet searching (27 per cent).

The most common formats for receiving information were:

- electronic or hardcopy publications, brochures or guides (85 per cent)
- verbal information (46 per cent)
- seminars or information sessions (29 per cent)

Businesses' preferred method of receiving information is through electronic brochures or booklets via email (57 per cent), followed by hardcopy brochures or booklets via post (27 per cent), although large businesses are less interested in hardcopy documents (at 13 per cent).

460 Submission from Melbourne Social and Equity Institute, page 5.

461 Submission from Ethnic Communities' Council of NSW Inc., page 6.

462 See, for example, submissions from the Office of Multicultural Interests WA; Senior Rights Service; Governance Institute of Australia; Ethnic Communities Council of NSW; and Small Business Development Corporation.

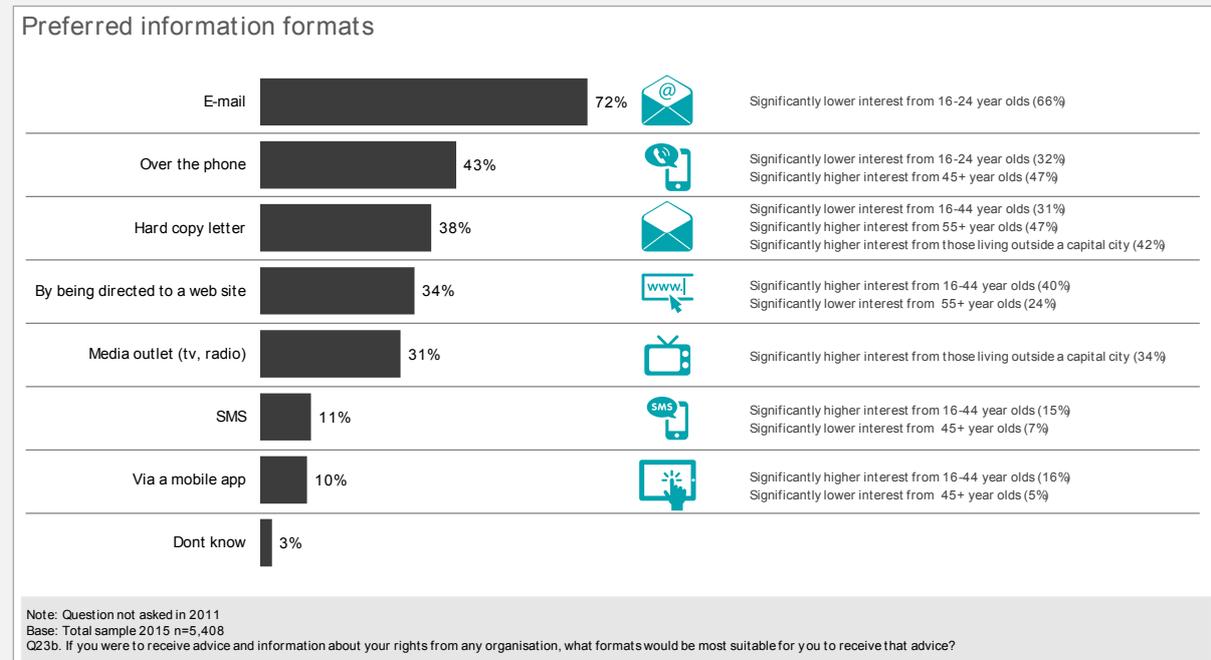
463 Submissions from: Redfern Legal Centre, page 7; Legal Services Commission of SA, page 2.

464 QUT, *Comparative analysis of overseas consumer policy frameworks*, 2016, pages 204-5.

Box 27: Australian Consumer Survey 2016 — accessing information about the ACL (continued)

Further, 43 per cent of businesses reported providing information to consumers about the ACL (a decrease from 55 per cent in 2011), primarily through signage or brochures (51 per cent) and verbal information (45 per cent).

The survey also examined consumers' preferred method of accessing information, and found that this differed depending on age group:



Finally, while there is guidance on the ACL, the accessibility of the legislation itself has emerged as a common theme in some submissions.⁴⁶⁵ For example, the Senior Rights Service submitted that an 'omnibus Act like the Australian Consumer Law can be a minefield to navigate, even for legal professionals'.⁴⁶⁶

The Law Council of Australia's Competition and Consumer Committee noted that certain provisions may need to be read together, but are located throughout the ACL. For example, the consumer guarantees are located separately from other relevant provisions, such as those on remedies and who a claim can be brought against.⁴⁶⁷

Legal Aid NSW and Consumer Action Law Centre suggested that the ACL's location in Schedule 2 of the CCA is a barrier to access, as consumers are often unaware of the structure and are unable to find the legislation.⁴⁶⁸

In this context, Consumer Action Law Centre referred to the UK *Consumer Rights Act 2015*, with various headings framed as frequently-asked questions. Legal Aid NSW referred to the New Zealand

465 For example, submissions from: Legal Aid NSW; Redfern Legal Centre; Consumer Action Law Centre; Ethnic Communities Council of NSW; and Senior Rights Service.

466 Submission from Senior Rights Service, page 7.

467 Submission from the Law Council of Australia's Competition and Consumer Committee, page 8.

468 For example, submissions from Legal Aid NSW; and Consumer Action Law Centre.

Consumer Protection website as a good example of consumer-friendly information that ‘poses questions to consumers about their problem and helps narrow down the relevant section of the legislation, or the remedy that may apply to their situation.’⁴⁶⁹

Legal Aid NSW suggested that a helpful addition to regulators’ website materials would be a separate, clearly formatted and hyperlinked version of the ACL together with a guide to the structure, perhaps similar to that provided in the ACL Review Issues Paper.⁴⁷⁰ The Law Society of WA also suggested ‘more “sign-posting” and explanatory notes’.⁴⁷¹ Similarly, Legal Aid NSW noted that:

the ACCC is an active regulator but is not in a position to resolve individual consumer disputes. A single entry point to the state and federal regulators would reduce confusion amongst consumers and promote the active sharing of intelligence between agencies.⁴⁷²

The Redfern Legal Centre supported specific guidance on the dispute resolution of a self-help triage process that directs consumers to a suite of available resources, such as template complaint letters.⁴⁷³

CAANZ notes that while ACL regulators are well placed, through existing and ongoing processes, to update the guidance material based on stakeholder obtained during this review, there may also be opportunities to improve the accessibility of the ACL and related guidance.

For consultation

Option 1 — Improve the accessibility of the ACL and related guidance material

Views are sought on ways that ACL regulators can improve accessibility, for example, by:

- expanding the available channels of communication and to further tailor them to target audiences, particularly vulnerable and disadvantaged groups identified by stakeholders
- considering ways to use technology and other tools to help direct parties to existing resources on dispute resolution
- considering the development of a clearly-formatted standalone copy of the ACL that can be downloaded from regulator websites, as suggested by some stakeholders, and which could be located together with other online resources. Potentially, these may include tools and sample letters from ACL regulators and other organisations.

This option is generic in nature and does not address specific issues of information asymmetry between traders and consumers raised in this report. These are discussed elsewhere (for example, the discussion on enhanced information from businesses to consumers about extended warranties in **Chapter 2.1, ‘Consumer guarantees’**).

However, enhancements to accessibility may be subject to resourcing priorities, as well as changing consumer needs and preferred communication channels over time. Consideration should also be

469 For example, submissions from: Legal Aid NSW; and Consumer Action Law Centre.

470 Submission from Legal Aid NSW, page 4.

471 Submission from the Law Society of Western Australia, page 5.

472 Submission from Legal Aid NSW, page 26.

473 Submission from Redfern Legal Centre, page 7.

given to whether consumers and businesses who do not generally refer directly to legislation would use a standalone version of the ACL.

Further questions

55. What enhancements to existing communication channels would be most useful, and what is the level of consumer need? In a context of finite resources, what should be prioritised?
56. To what extent would a standalone version of the ACL be used by consumers and businesses? How should it be formatted, and what additional information (if any) should it contain?
57. Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?

3.1.4 Access to remedies

CAANZ notes that the findings of the Australian Consumer Survey 2016 were generally positive about access to remedies, but time costs, delays and complexities around the processes are barriers to people accessing dispute resolution services [see **Box 28** below].

Box 28: Australian Consumer Survey 2016 — access to remedies

In relation to consumers' access to remedies, the survey found the following:

- Consumers are more likely to take action to resolve their problem (82 per cent compared to 75 per cent in 2011).
- Of resolved cases involving a consumer problem, 84 per cent of were resolved directly between the consumer and trader:
- The average number of contacts between a consumer and trader to resolve a dispute was:
 - 3 contacts for resolved cases
 - 3.5 contacts for unresolved cases.
- Reasons for not taking steps to resolve a problem include 'not worth the effort' (32 per cent), 'not worth the time' (31 per cent), 'action won't solve problem' (30 per cent), 'not worth the cost' (23 per cent), and 'not enough time' (17 per cent).
- For those who would not always make a complaint, the most common circumstance when they would make a complaint is when the product or service is of a significant value.
 - For 65 per cent of these respondents, this was an average transaction value of \$275.
- Of consumers who experienced a problem in the last two years, 47 per cent reported that the problem was resolved to their satisfaction, but 35 per cent were 'extremely dissatisfied' with the response they got from the business.
- 44 per cent of consumers and 66 per cent of businesses are aware of dispute resolution services provided by consumer protection agencies.
- If there was an issue that could not be resolved directly with the other party, 31 per cent of consumers indicated they would definitely participate in dispute resolution services, and 53 per cent of businesses indicated they would most likely participate.

Box 28: Australian Consumer Survey 2016 — access to remedies (continued)

- The main barriers for consumers in participating in dispute resolution services include a perception that it is not worth the hassle or effort, dislike of confrontations, lack of knowledge about the process, an expectation that nothing good will come from it, and lack of time.

Some of the time costs, delays and complexities that stakeholders identified relate to the processes of courts and tribunals, and have implications for the broader civil justice systems established within each state and territory.

While these raise issues extend beyond the scope of the ACL itself, they are being considered in other reviews and streams of work following the Productivity Commission's final report on Access to Justice Arrangements, published on 5 September 2014. As noted in the ACL Review Issues Paper, that report made a wide range of recommendations for changes at both the federal and state and territory levels.⁴⁷⁴

In its response to the Productivity Commission's report, the Australian Government indicated the range of work and funding commitments underway, as well current and future work to improve the funding and operation of legal assistance services.⁴⁷⁵

Other work in this area includes Victoria's Access to Justice Review, recently conducted by the Department of Justice and Regulation with the assistance of Crown Counsel Melinda Richards SC and Rachel Hunter, former Chair of Legal Aid Queensland and Director-General of the Queensland Department of Justice.⁴⁷⁶

In relation to financial services, the Australian Government recently announced two reviews, building on the Australian Government's response to the Financial System Inquiry:

- In May 2016, the Government announced a review into the current external dispute bodies in the financial sectors. The independent review panel is due to report to the Government by the end of March 2017.
- Concurrently, the Government also asked ASIC to work with the Financial Ombudsman Service to review its jurisdiction over small businesses.

CAANZ observes that a full picture of the impacts and outcomes of these reviews and resulting streams of work is still emerging. Nevertheless, there may be opportunities to consider whether there are more narrowly-defined ways in which the ACL could help private litigants in the existing justice systems.

474 CAANZ, *Australian Consumer Law Review Issues Paper*, 2016, page 48.

475 At: www.ag.gov.au/LegalSystem/Documents/Government-response-to-Productivity-Commissions-report.pdf.

476 Victorian Government, *Access to Justice Review: Report and recommendations*, August 2016, available at www.myviews.justice.vic.gov.au/accesstojustice.

Barriers to accessing remedies

A number of stakeholders commented on barriers for consumers and small businesses in initiating private legal actions.⁴⁷⁷

For example, CHOICE submitted that ‘the costs associated with taking a matter to the court or tribunal can operate to dissuade consumers from asserting their rights, particularly when the dispute is for a comparatively small amount’.⁴⁷⁸

Redfern Legal Centre also considered that the adversarial nature of the tribunal system can cause ‘significant anxiety to vulnerable consumers due to the cost, time and overall complexity of the processes’.⁴⁷⁹ Similarly, the Australian Communications Consumer Action Network noted that this can create ‘a large barrier to any consumer let alone those with low levels of education or language skills’.⁴⁸⁰

Consumer Action Law Centre noted that delays in resolving disputes create ‘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’.⁴⁸¹

Some stakeholders noted that adverse costs orders from courts and tribunals (requiring unsuccessful parties to pay the other party’s reasonable legal costs) are also a deterrent,⁴⁸² and that, even where a claimant is successful, it can be difficult for them to enforce the decision.⁴⁸³

Given the barriers associated with private actions, some stakeholders called for fundamental changes to existing dispute resolution systems, including the introduction of a Retail Ombudsman, similar to that in the UK.⁴⁸⁴ That scheme is funded by business members who volunteer to participate in the scheme [see **Box 29** below].

Consumer Action Law Centre submitted that establishing a Retail Ombudsman would be an important step towards ‘empowering consumers and promoting consumer confidence’.⁴⁸⁵

Box 29: The UK Retail Ombudsman

In January 2015, the UK established a Retail Ombudsman to help resolve consumer disputes. It is a third-party organisation authorised by the UK Government to deliver alternative dispute resolution services. It is also an initiative that implements the EU Directive on Consumer Alternative Dispute Resolution.

477 For example, submissions from CHOICE; Redfern Legal Centre; Consumer Action Law Centre; Australian Communications Consumer Action Network; Legal Aid Queensland; and Rodney Lewins.

478 Submission from CHOICE, page 43.

479 Submission from Redfern Legal Centre, page 14.

480 Submission from Australian Communications Consumer Action Network, page 5.

481 Submission from Consumer Action Law Centre, page 51.

482 For example, submissions from: Slater + Gordon Lawyers; and Professor Stephen Corones, QUT Commercial and Property Law Research Centre.

483 For example, submissions from Redfern Legal Centre; and Consumer Action Law Centre.

484 For example, submissions from: 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.

485 Submission from Consumer Action Law Centre, page 6.

Box 29: The UK Retail Ombudsman (continued)

Consumers seeking to use an ombudsman must firstly attempt to resolve the dispute with the trader who are not compelled to use the ombudsman's services, but must advise their customers of an appropriate body should the dispute not be resolved.

The Ombudsman decides according to what is fair and reasonable, having regard to:

- the law
- any relevant industry rules and codes of practice
- any contract between a registered retailer and a complainant
- any other relevant matter.

While not legally binding, traders may voluntarily agree to be bound by the decision and their membership of a particular scheme or professional association may require this.

If the Ombudsman cannot resolve the dispute, or if the consumer is unhappy with the Ombudsman's decision, the consumer may take the complaint to the relevant regulator or a court.⁴⁸⁶

Other stakeholders noted that Australia's dispute resolution context may differ from that in the UK. For example, the Australia and New Zealand Ombudsman Association noted that currently, the '[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'. It further noted that 'Australia's consumer dispute resolution framework is among the world's best... Australia does not need to look overseas for industry-based Ombudsman best practice'.⁴⁸⁷

Also, many of the stakeholders that supported a Retail Ombudsman did not comment on whether they envisaged any resulting changes to, and broader implications for, the dispute resolution function of ACL regulators and other bodies. For example, it was unclear whether stakeholders considered that consumer agencies and their resources should then concentrate their resources on education, compliance and enforcement, rather than assist in dispute resolution.

While strongly supportive of a Retail Ombudsman, the Financial Rights Legal Centre also submitted that it is 'unclear' whether the voluntary membership of the UK Retail Ombudsman by retailers 'has led to haves and have-nots in terms of access to alternative dispute resolution and justice'.⁴⁸⁸ Legal Aid NSW also noted that while it supported consideration of an ombudsman, consideration could also be given to strengthening the existing dispute resolution powers of regulators.

CAANZ notes that the UK Retail Ombudsman has only been operational since January 2015, and its resourcing needs, its reach across a large number of industry sectors in the UK, its effectiveness and expertise across a broad range of consumer products, and its role in the wider dispute resolution landscape, are still emerging. Additionally, as the wider dispute resolution landscape is the subject of multiple reviews in Australia, it is yet unclear whether a Retail Ombudsman will be warranted and what its broader implications may be.

486 At: www.theretailombudsman.org.uk/.

487 Submission from Australia and New Zealand Ombudsman Association, page 1.

488 Submission from Financial Rights Legal Centre, page 14.

Supporting access to remedies

Another barrier raised by some stakeholders was the differences in the processes and powers of courts and tribunals in Australia.⁴⁸⁹ For example, CHOICE noted that the differences between the filing fees for courts and tribunals across the country.⁴⁹⁰ The Governance Institute of Australia also called for 'greater consistency between the penalties imposed across the jurisdictions in order to provide more certainty for business'.⁴⁹¹

While there are differences between the procedures and administration rules of the broader justice systems established in each jurisdiction, CAANZ notes that the 'one law, multiple regulator' model provides ACL regulators with some flexibility to account for these differences.

This allows them to take local circumstances into consideration, including the jurisdictional powers and limits of local courts. It also allows regulators to test new approaches in their own jurisdiction before considering whether to extend them nationally as best practice.

Within the formal justice system, parties may obtain advice from legal practitioners and community legal centres. State and territory ACL regulators work alongside the formal justice system by providing voluntary conciliation services.

These services help parties to agree on outcomes without the expenses, costs and delays of a legal process, while more complex or intractable disputes can be escalated to an independent decision-maker (such as a judge, tribunal member, or a third-party arbitrator).

Within their respective dispute resolution framework, ACL regulators have tested different approaches to enhance access to remedies, including:

- SA's Commissioner for Consumer Affairs having powers to call a voluntary or compulsory conciliation conference between a business and consumer to assist parties in avoiding legal actions where possible [see **Box 30** below]
- Victoria's Consumer Law Fund, enabling undistributed funds from court-ordered ACL remedies to be used for other purposes [see **Box 31** below]
- work led by New South Wales and Victoria in engaging with the 'most complained about businesses in Australia' to improve their compliance with the ACL [see **Box 32** below].

CAANZ also notes the work of the Financial Rights Legal Centre in finalising the establishment of an independent Consumer Advocacy Trust, and independent Public Ancillary Fund to raise funds to promote the objects of that trust.

The Consumer Advocacy Trust is intended to fund applications from not-for-profit organisations 'seeking to undertake independent consumer research, policy analysis, casework and/or systemic advocacy (and related consumer education, where appropriate)', among other things consistent with the objectives of the Trust.⁴⁹²

489 For example, submissions from: CHOICE; and Consumer Credit Legal Service WA.

490 Submission from CHOICE, page 44.

491 Submission from Governance Institute of Australia, page 6.

492 Submission from Financial Rights Legal Centre, page 13.

Consumer Action Law Centre noted that this is ‘an excellent development and will provide valuable resources’.⁴⁹³

Box 30: Compulsory conciliation conferences in SA

In April 2013, Consumer and Business Services South SA implemented a new ownership model where officers manage a fair trading dispute from initial advice through to conciliation. Where traders are recalcitrant, cases are escalated to a specialist team who utilise powers under *South Australia’s Fair Trading Act 1987*.

This includes a power under section 8A of that Act for the Commissioner for Consumer Affairs to call a compulsory conference of the consumer and trader. In calling a compulsory conference, the Commissioner considers such factors, among others, as:

- the number of complaints against the business
- any conduct that may be in breach of consumer legislation
- whether the business has a poor approach to customer complaint handling.

Where the Commissioner uses this power and a trader fails to attend, they can be issued with a penalty. Where the claim exceeds \$1,000 the trader may be exposed to a penalty of up to \$10,000, and for claims of \$1,000 or less a penalty of up to \$5,000 plus an expiation fee of \$315. If a consumer fails to attend a conference without reasonable excuse, the Commissioner may refuse to take further action. Parties are not permitted legal representation except in limited circumstances.

If an agreement is reached and either party fails to meet their obligations, the Commissioner or the other party may apply to the Magistrates Court to enforce those terms.

If an agreement is not reached it is generally for the parties to decide whether to take further action. Evidence of anything said or done in the course of conciliation is only admissible in subsequent proceedings by consent of the Commissioner and all parties.

Box 31: Consumer Law Fund in Victoria

Victoria currently has in place a number of consumer trust funds, including the Consumer Law Fund, from which grants for education and other activities can be made from court-ordered ACL remedies.

Where consumers are affected by conduct in breach of the ACL, but are not named as parties in the court proceedings, an ACL regulator can ask the court to order redress on behalf of those consumers (under section 239 of the ACL). Redress could include refunds, contract variations and non-financial redress such as apologies and corrective advertising.

However, in some cases, not all of the available financial redress is distributed to the eligible non-party consumers. In Victoria, the undistributed funds from ACL court-ordered penalties, and other sources, are kept in the Victorian Consumer Law Fund.

The operation of the Fund is governed under Part 6.2, Division 5 of the Victorian *Australian Consumer Law and Fair Trading Act 2012*. On the recommendation of the Director of CAV, the Victorian Minister for Consumer Affairs may make payments out of the Fund either for:

- the purposes of improving consumer wellbeing, consumer protection, or fair trading

493 Submission from Consumer Action Law Centre, page 53.

Box 31: Consumer Law Fund in Victoria (continued)

- any other purpose consistent with the objectives of the ACL.

The fund is one of seven funds administered by Consumer Affairs Victoria. Information on these funds is published in their annual reports, available from consumer.vic.gov.au.

The Commonwealth and a number of states and territories do not have in place specific arrangements for managing surplus funds.

While many of the evidentiary issues faced by private litigants beyond the scope of the ACL, CAANZ notes that there may be opportunities to ease some of evidentiary burdens in more narrowly-defined ways. For example, the Issues Paper asked whether the existing ‘follow-on’ provisions in competition and consumer law should be expanded to enable private litigants to rely on facts and admissions established in earlier proceedings.

Consumer Action Law Centre supported a ‘follow-on’ provision for the ACL extending to admissions of fact, noting that it would be ‘an efficient use of regulator and court resources’.⁴⁹⁴ Similarly, the Law Council of Australia’s Legal Practice Section noted that the existing provision is ‘beneficial to consumers’ and that the extending follow-on provisions to admissions of fact ‘warrants support’.⁴⁹⁵

Slater + Gordon Lawyers also suggested that greater sharing of evidence from investigations [by regulators] would ‘reduce the overall cost-burden of litigation by increasing the efficiency of the discovery process’ (by which relevant information from the opposing party is gathered).⁴⁹⁶

To some extent, promoting access to information (as discussed earlier in the chapter) may also assist with addressing issues with remedies by promoting access to information. The QUT study noted that access to justice may be ‘promoted through information and education initiatives that assist consumers in better understanding their rights and obligations under the law so as to avoid disputes arising in the first place’.⁴⁹⁷

For consultation

Option 2 — Ease evidentiary requirements for private litigants through an expanded ‘follow-on’ provision enabling them to rely on facts and admissions established in earlier proceedings

Views are sought on the expanding the ‘follow-on’ provision in the ACL to help ease the evidentiary burden for private litigants.

While regulators take on enforcement action in the broader public interest, and prioritise remedies that protect the broader public or deter other breaches of the law, private litigants may seek different legal resolutions. Among other things, private litigants may seek to establish and quantify the harms they have suffered to access compensation.

Where a regulator has already established a breach of competition laws in a contested proceeding, section 83 of the CCA allows the court’s findings of fact (or determinations about the factual

494 Submission from Consumer Action Law Centre, pages 56-57.

495 Submission from Law Council of Australia’s Legal Practice Section, page 15.

496 Submission from Slater + Gordon Lawyers, pages 10-11.

497 QUT, *Comparative analysis of overseas consumer policy frameworks*, 2016, page 202.

scenario of the case) to be used as *prima facie* evidence of that fact in a ‘follow-on’ proceeding. In the ACL context, similar provisions are currently available in section 137H of the CCA and in other ACL application laws at the state and territory level.

These ‘follow-on’ provisions mean that an affected party seeking compensation does not need to re-establish the same facts, although it is currently unclear whether they extend to admissions of fact by the defendant.

Following a recommendation by the Competition Policy Review, the Australian Government recently agreed to extend section 83 of the CCA to allow private parties to rely also on admissions of fact made in another proceeding. A similar extension in the ACL would be consistent with this approach but consideration should be given to any broader impacts.

Further questions

58. What are your views on an expanded ‘follow-on’ provision, and the extent to which it would assist private litigants?
59. What, if any, unintended consequences, risks and challenges should be considered? For example, would this option affect the extent to which businesses are prepared to make admissions of fact?
60. Are there any other ways that ACL regulators can support private litigants, noting the existence of other review processes?

3.1.5 Future development of consumer policy

CAANZ also observes that the activities of regulators are only one part of the overall consumer protection landscape, and complement the important work of stakeholders, in both the private and not-for-profit sectors.

Slater + Gordon Lawyers noted that, in their experience:

those working in public enforcement roles tend to adopt the erroneous assumption that solicitors acting for private consumers are competitors rather than collaborators in the enforcement of consumer rights. In our view, it is important for regulatory organisations encourage and promote a cultural shift towards the promotion of co-operation between regulators and consumers’ legal representatives to the greatest extent permitted by law.⁴⁹⁸

While ACL regulators hold a number of existing stakeholder forums and consultative committees, as well as the annual National Consumer Congress, some stakeholders suggested greater stakeholder engagement and input on the research and data needed to inform future policy development.

Consumer Action Law Centre noted, for example, that consumer advocates play:

an important role in early identification of consumer issues in the marketplace, through complaints services, legal advice and assistance services, financial counselling and

498 Submission from Slater + Gordon Lawyers, page 9.

market monitoring. The information provided by consumer organisations to regulators can help identify emerging issues and trends of consumer concern.⁴⁹⁹

Consumer Action Law Centre suggested a number of mechanisms, including:

- better recording and reporting by regulators to consumer groups on issues raised in consultative committees
- public reporting by regulators within a limited timeframe to systemic issues or ‘super complaints’, similar to the UK model
- publication of consumer complaints data.

Similarly, Legal Aid NSW suggested that further publication of compliance and enforcement outcomes, consumer complaints data, and continued engagement between regulators and stakeholders would help support the objectives of the ACL.⁵⁰⁰ One example of this is the complaints register developed in New South Wales [see **Box 32** below].

Professor Luke Nottage also noted that consumers, Australia’s trading partners, and consumer law researchers seeking to ‘gauge the effectiveness’ of the ACL would also benefit from enhanced access to data on product-related accident reports.⁵⁰¹

Nevertheless, there are likely to be costs and challenges for regulators with harmonising different data collection processes. Additionally, some stakeholders expressed more fundamental reservations around the design of open data.

For example, the NSW Business Chamber supported the public naming of ‘particularly egregious’ traders, it cautioned that complaints data is ‘not necessarily a good proxy for customer satisfaction (in recognition that 10 complaints about minor issues could be more than offset by many more consumers that are very satisfied)’. It also suggested that complaints data may create risks of ‘unfocussed information’ that may lack sufficient context, such as the seriousness and gravity of the complaint, whether it was resolved to the complainant’s satisfaction, and the actual rate of complaints for a given business.⁵⁰²

The Insurance Australia Group submitted that ‘providing too much information can have detrimental consumer outcomes’,⁵⁰³ and the Insurance Council of Australia noted that the ‘provision of multi-sourced data that may be inconsistent can also lead to poor outcomes’.⁵⁰⁴

More generally, the Communications Alliance noted the need to periodically review the ACL.⁵⁰⁵

499 Submission from the Consumer Action Law Centre, page 55.

500 Submission from Legal Aid NSW, page 3.

501 Submission from Professor Luke Nottage, page 3.

502 Submission from NSW Business Chamber, page 11.

503 Submission from Insurance Australia Group, page 9-10

504 Submission from the Insurance Council of Australia, page 10.

505 Submission from Communications Alliance, page 19.

Box 32: Engaging with the ‘most complained about businesses’

In 2015, the CAANZ Compliance and Dispute Resolution Committee started a national project to examine the ‘most complained about businesses in Australia’, building upon a process initiated in Victoria.

A relatively small number of businesses are responsible for a large proportion of consumer disputes. This project aims to prevent consumer detriment and reduce demand on the resources of ACL regulators by identifying the businesses that are the subject to the most numbers of complaints and enquiries received by ACL regulators, engaging with them to improve their customer service practices, and facilitating a coordinated national response.

Additionally, in August 2016, NSW Fair Trading published its new Complaints Register on its website, fairtrading.nsw.gov.au, following public consultation on the design and administration of the register.

3.1.6 Access to consumer transaction data

Some stakeholders supported greater access for consumers to their transaction and purchasing history. For example, CHOICE submitted that providing consumers with:

relevant, accessible information about the products they consume and the way in which they do so would improve both the individual consumer experience and the overall competitiveness of the marketplace. Coupling the release of this information with the development of user-friendly comparator tools would reduce consumer confusion and simplify the ways in which individuals engage with the market.⁵⁰⁶

However, some stakeholders called for a cautious approach, for example:

- noting that ‘[t]he Productivity Commission inquiry into the use of public and private sector data will allow for these issues to be explored in more detail’⁵⁰⁷
- noting potential regulatory and compliance costs, and implications around privacy and commercial-in-confidence information⁵⁰⁸
- suggesting that the *Privacy Act 1988* (Cth) would be a more appropriate framework to develop improved access to data,⁵⁰⁹ and that currently the ACL’s ‘protections do not constrain consumer capacity to access their data’.⁵¹⁰

CAANZ notes that the terms of reference for the Productivity Commission’s inquiry on Data Availability and Use includes, among other things ‘[i]dentify[ing] options to improve individuals’ access to public and private sector data about themselves and examine the benefits and costs of those options’.⁵¹¹ The Productivity Commission is due to report on this inquiry in March 2017.

506 Submission from CHOICE, page 50.

507 Submission from NSW Business Chamber, page 14.

508 For example, submissions from: Insurance Australia Group; NSW Business Chamber; and Baker & McKenzie.

509 For example, submissions from: Baker & McKenzie; and Law Council of Australia’s Competition and Consumer Committee.

510 Submission from Baker & McKenzie, page 16.

511 At: www.pc.gov.au/inquiries/current/data-access/terms-of-reference.

While the Productivity Commission is best placed to consider the issues around consumers' transaction data, CAANZ seeks feedback on whether there is other data that would enhance the evidence base for future policy-making.

For consultation

Option 3 — Enhance the evidence base for the future development of consumer policy

This option would involve continued investment in public information additional to the periodic Australian Consumer Surveys and existing annual implementation reports on the coordinated activities of ACL regulators.

Views are sought on whether consideration should also be given to ways for regulators to:

- expand the availability of public information, in consultation with stakeholders
- effectively engage stakeholders in identifying future research and data needs to support consumer policy development, and potential areas of collaboration on research and information-sharing, including leveraging stakeholder research.

Consideration could also be given, in a resource-constrained environment, to ways that would:

- maximise the cost-effectiveness of any future research projects and to ensure that they create the greatest public benefit
- engage stakeholders in a way that is targeted enough to respond to specific issues and priorities, while being inclusive enough to ensure a balanced and accessible approach to collecting and sharing information.

Further questions

61. What kind of evidence base is required for future policy development, and what is the most useful way to engage stakeholders about future research and data needs?
62. Are there other ways that ACL regulators can support stakeholder engagement in policy development?
63. Are there further ways for stakeholders to contribute and share their research and data with the wider community?

3.2 Penalties and remedies

Stakeholders generally suggested that the ACL's penalties and remedies regime allows for flexible and proportionate enforcement. Stakeholders provided a range of views, in particular on:

- differences in the enforcement 'toolkit' available to regulators
- the adequacy of maximum financial penalties
- the effectiveness of non-punitive orders
- whether penalties should be attached to misleading or deceptive conduct.

CAANZ seeks your views on the following overarching questions about the effectiveness of ACL penalties and remedies:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options increase the deterrent effect of the ACL in a proportionate way? How should they be designed? Are there better alternatives?
- What are the impacts for businesses and consumers? Are there any unintended consequences?

In preparing your submission you are encouraged to refer to the principles identified in [Chapter 1.1 'Overview'](#).

Key observations

CAANZ observes that stakeholders generally consider that there is an appropriate suite of ACL penalties and remedies that allow for **flexible and proportionate enforcement** and redress for consumers.

However, stakeholders raised specific issues about the consistency of the '**enforcement toolkit**', including

- consistencies in the **penalties and remedies available** to each ACL regulator
- the application of both **civil and criminal sanctions** to breaches with different procedural and evidentiary requirements.

Stakeholders also raised issues about whether the ACL achieves a **sufficient level of deterrence**, and how it should do so, including:

- whether the **maximum financial penalties** are sufficient to deter highly profitable conduct, and should be more closely aligned with the penalty regimes of other laws
- whether **non-punitive orders** should be given a greater role in deterrence, and whether a third party should be more involved in the carrying out of community service orders where the business in breach is not qualified or trusted to do so
- whether monetary penalties should be attached to a breach of the prohibition against **misleading or deceptive conduct**.

Key Observations (continued)

In relation to **consistency**, CAANZ notes the different but complementary roles played by civil and criminal sanctions, and the ongoing work of ACL regulators to map the similarities and differences between jurisdictional frameworks and to coordinate enforcement approaches to enhance consistency in outcomes.

In relation to issues of **deterrence**, CAANZ notes that monetary penalties are not usually attached to broad norms of conduct such as misleading or deceptive conduct. However, there may be opportunities to review the current level of monetary penalties, and ways to enhance the effectiveness of non-punitive orders.

Broader issues relating to the effectiveness of the administration and enforcement arrangements underpinning the ACL are being considered by the Productivity Commission, which is due to report by March 2017.

OPTIONS

1. Increase maximum financial penalties available under the ACL, for example, by aligning them with the maximum penalty available under the competition provisions of the Competition and Consumer Act 2010:
 - for companies, the greater of:
 - the maximum penalty (of \$10,000,000), or
 - three times the value of the benefit the company received from the breach, or
 - if the benefit cannot be determined, 10 percent of annual turnover in the preceding 12 months.
 - for individuals, \$500,000.
2. Allow or require, under appropriate circumstances, third parties to give effect to a community service order where the business in breach is not qualified or trusted to do so.

3.2.1 ACL penalties and remedies

Stakeholders generally considered that the ACL contains an appropriate mix of penalties and remedies to ensure proportionate, risk-based enforcement and to rectify consumer harm.⁵¹²

For example, the Queensland Law Society submitted that the enforcement toolkit ‘concentrates the resources of regulators on priority areas which have been identified as having the potential to cause significant consumer harm’.⁵¹³ Similarly, the Law Council of Australia’s Competition and Consumer Committee submitted that:

the broader range of enforcement tools available to ACL regulators since 2010 means that they are now capable of adopting a layered approach to enforcement that involves tailoring regulatory action to the severity of specific compliance breaches.⁵¹⁴

512 For example, submissions from: Australian Retailers Association; Law Society New South Wales;; and Queensland Law Society.

513 Submission from the Queensland Law Society, page 8.

514 Submission from the Law Council of Australia’s Competition and Consumer Committee, page 58.

Nevertheless, there were two main issues raised about the ACL's penalties and remedies, including:

- issues about the **'enforcement toolkit'**, including consistency in the penalties and remedies available to each regulator, and in the civil and criminal sanctions available for a breach
- whether the ACL achieves a **sufficient level of deterrence**, including the amount of financial penalties and the role of non-punitive orders.

3.2.2 The enforcement toolkit

Penalties and remedies available to regulators

Some stakeholders highlighted the benefits of having national consumer protection legislation. For example, Legal Aid Queensland submitted that the 'one law, multiple regulator model' has allowed for 'national issues to be tackled effectively at the same time as allowing state based issues to be appropriately responded to'. It suggested that this 'combined approach is important as it encourages co-ordination between regulators while at the same time allowing a flexibility of response to issues when they arise'.⁵¹⁵

However, some stakeholders submitted that the multiple regulator model may be undermined by subtle inconsistencies in the penalties and remedies available for a breach of the ACL across jurisdictions and 'differences in enforcement patterns across regulators'.⁵¹⁶

For example, Legal Aid NSW submitted that there is a 'lack of consistency in the application and enforcement of the ACL due to the multi-regulator model', and further submitted that:

[o]ur experience is that consumers identify strongly with their state based fair trading bodies and often seek their assistance with consumer disputes. However, we see very little enforcement action taken by state based regulators, despite the large number of complaints.

Conversely, the ACCC is an active regulator but is not in a position to resolve individual consumer disputes. A single entry point to the state and federal regulators would reduce confusion amongst consumers and promote the active sharing of intelligence between agencies.⁵¹⁷

Legal Aid Queensland suggested that all ACL regulators should be provided 'with the power to issue infringement notices under the ACL and enforce ACL civil remedy orders', noting that this would improve flexibility in enforcement for state and territory regulators and allow the resources of all regulators to be more effectively managed.⁵¹⁸

CAANZ notes that, since the ACL was implemented, regulators have worked collaboratively to coordinate compliance and enforcement approaches to enhance consistency in outcomes. A number of these initiatives are reported in the annual implementation reports on the coordinated activities of ACL regulators.⁵¹⁹

515 Submission from Legal Aid Queensland, page 17.

516 For example, submissions from: Professor Luke Nottage; Governance Institute of Australia; and Legal Aid NSW.

517 Submission from Legal Aid NSW, page 25.

518 Submission from Legal Aid Queensland, page 17.

519 At: www.consumerlaw.gov.au/the-australian-consumer-law/implementation-2/.

As noted in the 2014-15 annual report, CAANZ's Policy and Research Advisory Committee has mapped the broad spectrum of penalties and remedies available to each regulator through their civil justice systems and note, where relevant, differences between these systems that affect the availability of the ACL penalties and remedies.⁵²⁰ CAANZ notes that this work, and continued collaboration between regulators, will assist regulators to coordinate enforcement approaches and achieve consistency in outcomes.

Application of civil and criminal sanctions

Some stakeholders were concerned that a single breach of the ACL can trigger both civil and criminal sanctions with different procedural and evidentiary requirements.⁵²¹

Minter Ellison submitted that this has implications for the way regulators approach enforcement, noting that:

[i]n the main, it is preferable for the regulator to bring a civil proceeding, not the least because the standard of proof required is only the balance of probabilities, as opposed to the criminal standard of beyond a reasonable doubt.⁵²²

In its submission, the Consumer Credit Legal Service WA noted that, in a recent matter, one of their clients submitted a compliant to a regulator on the basis of the six-year limitation period for making a civil claim. The compliant was not pursued because the regulator applied the three-year limitation period relating to a criminal claim. The Consumer Credit Legal Service WA suggested that the availability of criminal and civil provisions has 'the capacity to cause confusion among legal practitioners and regulatory bodies' and suggested 'that further guidance should be given by regulators as to their regulatory approach to the use of both provisions'.⁵²³

CAANZ notes that criminal sanctions have a different focus from civil sanctions and are usually sanctions of last resort. The availability of both types of sanctions recognises that not all breaches of consumer law are necessarily criminal in nature, and that the law should provide a range of graduated remedies and penalties to allow for proportionate and flexible responses to issues.

While criminal prosecution is reserved for a smaller number of significant cases, ACL regulators use the range of different compliance and enforcement tools that can be applied more broadly than criminal prosecution. These are further set out and described in the regulator guide on compliance and enforcement under the ACL.⁵²⁴

CAANZ notes that regulators will continue to monitor developments in this area, including considering whether further guidance is needed.

520 Ibid.

521 For example, submissions from: Consumer Credit Legal Service WA; and Minter Ellison.

522 Submission from Minter Ellison, page 7.

523 Submission from Consumer Credit Legal Service WA, page 4.

524 At: <http://consumerlaw.gov.au/consumers-and-the-acl/>.

3.2.3 Maximum financial penalties

Adequacy of the maximum penalties

Some stakeholders noted the particular role of civil penalties, including financial penalties, in deterrence. For example, the Law Council of Australia's Competition and Consumer Committee submitted that:

civil penalties are an increasingly important enforcement tool for ACL regulators, both to deter a particular respondent and to others more generally from engaging in contravening conduct.⁵²⁵

Despite the increasing use of civil penalties, some stakeholders submitted that the current maximum financial penalty of \$1.1 million for companies is insufficient to deter future breaches of the ACL, particularly where the conduct is highly profitable and the company is large.⁵²⁶

It was noted that, in many cases, the 'benefits to very large businesses from a breach of the ACL can be greater than the value of the fine imposed',⁵²⁷ and that 'the deterrent effect can be undermined if profit from breaching behaviour outweighs the penalty'.⁵²⁸

Submissions also included examples of court-ordered penalties that may be seen as insufficient compared with the benefits a business gained from the breach. A number of stakeholders cited Justice Gordon's comments in *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 that:

[i]t 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.⁵²⁹

In calling for the ACL's maximum financial penalties to be increased and to take into account the benefit gained from the conduct (such as profit or revenue growth), several stakeholders referred to the recent penalty handed down in *ACCC v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424 involving misleading representations in relation to Nurofen Specific Pain products.⁵³⁰

CHOICE submitted that:

the \$1.7 million fine handed down in this case is not proportionate in comparison with the profits that Reckitt Benckiser made by tricking customers into paying a premium for products that were no more effective than cheaper generic pain relief pills. Even the

525 Submission from Law Council of Australia's Competition and Consumer Committee, page 59.

526 For example, submissions from: Australian Communications Consumer Action Network; CHOICE; Consumer Action Law Centre; Consumers' Federation of Australia; Financial Counselling Australia; Legal Aid Queensland; Queensland Law Society; Small Business Commissioner SA; and the Obesity Policy Coalition.

527 Submission from Financial Counselling Australia, page 14.

528 Submission from Australian Communications Consumer Action Network, page 7. Also submissions from: CHOICE; and Consumers' Federation of Australia.

529 *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, at 106.

530 *ACCC v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424.

highest available fine under the law would have only been \$6 million, which is insufficient to deter highly profitable conduct.⁵³¹

The Consumers' Federation of Australia estimated that Reckitt Benckiser made \$63 million more than a company selling correctly marketed generic pain relief,⁵³² while Consumer Action Law Centre submitted that the penalty was manifestly inadequate given that Reckitt Benckiser is a multi-national corporation with annual revenue of \$15 billion.⁵³³

In contrast, a number of stakeholders, including some industry representatives, submitted that the current ACL penalties regime is adequate in achieving compliance,⁵³⁴ arguing that existing penalty levels are sufficient and should remain unchanged to ensure business certainty when seeking to achieve compliance. For example, Energy Australia submitted that:

civil pecuniary penalties were only introduced for breaches of consumer protection provisions from 2010 and prior to that they were not available. Reconsidering the maximum amount at this early stage of these penalties being in place would not provide an indication of their full effect.⁵³⁵

Further, some stakeholders submitted that a range of other factors would have a greater impact on deterrence.⁵³⁶

For example, the Consumer Credit Legal Service WA submitted that:

it is the likelihood of complaints by consumers and the likelihood of prosecution by regulators that increases deterrence and consequently compliance with the rights under the ACL. Simply increasing penalties or creating new penalties may not be as effective as increasing the likelihood of enforcement action being taken.⁵³⁷

Energy Australia submitted that:

[r]eputational or brand damage from contraventions of the ACL among current and potential customers and other stakeholders, for example, shareholders, has a significant deterrent effect against potential breaches.⁵³⁸

The Australian Association of National Advertisers also referred to commercial consequences associated with industry codes, such as withdrawal of non-compliant advertising and adverse media coverage. It also noted the possibility of 'significant public backlash for campaigns which breach community standards'.⁵³⁹

Allens submitted that non-punitive orders (such as those requiring a party to establish a compliance, or education and training program) can 'require a business to make substantial changes to the

531 Submission from CHOICE, pages 40-41.

532 Submission from Consumers' Federation of Australia, page 4.

533 Submission from Consumer Action Law Centre, page 47.

534 For example, submissions from: Allens; Australian Retailers Association; Australian Toy Association; Consumer Credit Legal Service WA; Energy Australia; Insurance Australia Group; Retail Council; and Shopping Centre Council of Australia.

535 Submission from Energy Australia, page 7. Also raised in submission from Law Council of Australia. which committee?

536 For example, submissions from: Allens; Insurance Australia Group; Energy Australia; Shopping Centre Council of Australia.

537 Submission from Consumer Credit Legal Service WA, pages 19-20.

538 Submission from Energy Australia, page 7.

539 Submission from Australian Association of National Advertisers, page.8.

manner in which it conducts itself'. It also noted that orders requiring corrective advertising and adverse publicity carry 'a serious risk of reputational damage'.⁵⁴⁰

Allens further submitted that 'the potential risk of being disqualified from managing corporations threatens the livelihood of managers and is likely to act as a personal deterrent', and that the unfair contract terms protections can cause 'significant disruption to business practices, potentially requiring the business to enter into new contracts with its customers'.⁵⁴¹

Alignment with other penalty regimes

A related issue raised by stakeholders is whether the ACL's maximum financial penalties should be more aligned with those under related laws, such as the ASIC Act and the competition provisions of the CCA.⁵⁴²

Some stakeholders submitted that the ACL adopt the approach used for the competition provisions of the CCA.⁵⁴³ For example, Consumer Action Law Centre submitted that the current ACL penalties are 'outdated, inadequate and require revision', and that there is 'no policy basis' for distinguishing between the ACL and competition law provisions.⁵⁴⁴

However, some stakeholders cautioned against the use of complex methods for calculating penalties, emphasising that it is important that penalties are proportionate to the offence rather than size of organisation committing the offence, and that it may be difficult in practice to determine the penalty by reference to the value of the benefit. These stakeholders also submitted that business structures can be a poor proxy for business size, or a business's ability to protect itself from egregious conduct.⁵⁴⁵

Another approach would be to align the ASCL's maximum penalties with the ASIC Act, where maximum financial penalties for breaching a consumer protection provision are expressed in 'penalty units'. These currently equate to \$1.8 million for companies and \$360,000 for individuals (more than 50 per cent higher than those available under the ACL).

As penalty units are periodically adjusted to account for inflation, they allow for maximum financial penalties to maintain their real value over time without the need for legislative amendment. Legal Aid Queensland submitted that:

a major reason for the discrepancy between the penalties under the ASIC Act and the ACL is that the penalties in the ASIC Act are expressed in penalty units whereas the penalties under the ACL are not. The consequence of this is that the maximum penalty under the ASIC Act has increased as the penalty unit has been indexed but the penalty under the ACL has remained static.⁵⁴⁶

540 Submission from Allens, page 32.

541 Ibid, page 32.

542 For example, submissions from: Australian Communications Consumer Action Network; CHOICE, Consumer Action Law Centre; Financial Counselling Australia; and Legal Aid Queensland.

543 For example, submissions from: Consumer Action Law Centre; Consumers' Federation of Australia; and Financial Counselling Australia.

544 Submission from Consumer Action Law Centre, page 48.

545 For example, submissions from: Australian Toy Association; Energy Australia; and Retail Council.

546 Submission from Legal Aid Queensland, page 16.

Some stakeholders submitted that maximum financial penalties under the ACL should be increased and an index applied.⁵⁴⁷

However, CAANZ notes that while the ASIC Act adopts penalty units, there are significant challenges in adopting penalty units in the ACL as their value is determined by each jurisdiction, which has their own, and often different, administrative rules. For example, not all jurisdictions use penalty units and those that do have different monetary values for a given unit. Therefore, introducing penalty units in the ACL would risk creating inconsistencies between jurisdictions regarding the maximum available financial penalties.

Nevertheless, CAANZ notes 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.

CAANZ also notes that the Australian Government announced in April 2016 that it will undertake ‘a review of ASIC’s enforcement regime, including penalties, to ensure that it can effectively deter misconduct’, as recommended by the Financial System Inquiry.⁵⁴⁸

For consultation

Option 1 — Increase maximum financial penalties available under the ACL

This option would involve increasing the maximum financial penalties available under the ACL, for example, by aligning them with the approach used for breaches of the competition provisions of the CCA, that is:

- for companies, the greater of:
 - the maximum penalty (of \$10,000,000)
 - three times the value of the benefit the company received from the breach, or
 - if the benefit cannot be determined, 10 percent of annual turnover in the preceding 12 months
- for individuals, \$500,000.

Other suggestions raised by stakeholders include doubling the penalty to \$2.2 million for companies and \$440,000 for individuals.⁵⁴⁹ CHOICE noted that penalties can be up to \$10 million for companies for breaches of the CCA.⁵⁵⁰

Consideration may need to be given to the way penalties may be applied by the courts and how, for example, the ‘benefit’ of a breach would be determined in a consumer law setting.

547 For example, submissions from: Australian Communications Consumer Action Network; and Consumer Action Law Centre.

548 Treasurer’s Media Release, ‘Turnbull Government bolsters ASIC to protect Australian consumers’, 20 April 2016, at: www.sjm.ministers.treasury.gov.au/media-release/042-2016/.

549 Submission from Small Business Commissioner SA, page 9.

550 Submission from CHOICE, page 40.

This option may increase the deterrent effect of the current ACL provisions, and CAANZ notes that changes to the ACL's maximum financial penalties do not automatically apply to mirrored provisions in the ASIC Act so those provisions may need to be separately addressed.

Further questions

64. Are the current maximum financial penalties adequate to deter future breaches of the ACL? Would an increase be an appropriate response to the issues raised?
 - If so, what approach should be adopted?
65. Are there alternative approaches to addressing the issues raised?
66. Are there any unintended consequences, challenges or risks that should be considered?

3.2.4 Non-punitive orders

Use of non-punitive orders

A court can impose a non-punitive order on a business found in breach the ACL, for example, to either:

- undertake a community service order
- disclose certain information
- publish an advertisement
- implement a compliance or education and training program.

These orders are designed to rectify the harm caused by the business and to prevent further harm from occurring.

Stakeholders indicated that non-punitive orders play an important role in enforcement,⁵⁵¹ whether to repair harm, minimise the risk of future harm or to improve the conduct of certain sectors of the market.⁵⁵² For example, the Queensland Law Society submitted that non-punitive orders:

provide discretion to Courts to impose orders to better deter future contraventions, as well as to potentially rectify the harm caused by a breach of the ACL. The Society believes that these non-punitive orders have been (and are being) successfully and appropriately utilised by the Courts to enforce the ACL.⁵⁵³

Some stakeholders suggested that regulators could do more to use the full scope of non-punitive orders when enforcing the law. For example, Consumer Action Law Centre submitted that regulators should include orders for non-party consumer redress in all relevant enforcement actions.⁵⁵⁴

551 For example, submissions from: Consumer Action Law Centre; Law Council of Australia; Legal Aid Queensland; Queensland Law Society; and Small Business Commissioner SA.

552 Submission from Legal Aid Queensland, page 16.

553 Submission from Queensland Law Society, page 9.

554 Submission from Consumer Action Law Centre, page 48.

The Senior Rights Service submitted that remedies should include compensation for lost amenity and penalty loading or escalation for failure to comply with orders.⁵⁵⁵

3.2.5 Effectiveness of non-punitive orders

Some stakeholders also suggested ways to improve the effectiveness of non-punitive orders, and to involve more independent parties.

For example, the Law Council of Australia's SME Business Law Committee submitted that where a compliance program has been mandated, this should include an independent review of the program, rather than a mere obligation to 'update' the program, noting that 'in many cases the ACCC looks to have compromised on the scope of the Compliance Program implemented by a company following a contravention of the ACL.'⁵⁵⁶

Some stakeholders submitted that where a business is required to carry out a community service order, but it is not qualified or trusted to give effect to that order themselves, they should be allowed or required to hire a third party to give effect to that order.⁵⁵⁷

Consumer Action Law Centre submitted that:

[t]his might be appropriate where a business causes financial harm to low-income or vulnerable consumers, and an appropriate community service order might be related to the provision of financial counselling to benefit those consumers. It would obviously be inappropriate for the business itself to deliver the financial counselling, but it would be appropriate for it to fund a local community agency to satisfy the order.⁵⁵⁸

Such a requirement would likely require the business in breach to pay for the third party to provide the community service.

In this respect, the SA Small Business Commissioner cautioned that such orders should only be made by courts 'if it is appropriate in the circumstances, and the court is satisfied the required action relates to conduct that breached the ACL'.⁵⁵⁹

The Law Council of Australia's SME Business Law Committee submitted that:

leave of the Court should be required in these circumstances and there should be relevant factors for the Court to consider in making such an order (including costs and resources in the business giving effect to the order itself).⁵⁶⁰

CAANZ notes that regulators will continue to consider the full spectrum of penalties and remedies that may be available for a potential breach, and notes that there are opportunities to consider improvements to the operation of non-punitive orders.

555 Submission from Senior Rights Service, page 11.

556 Submission from Law Council of Australia's SME Business Law Committee, page 10.

557 For example, submissions from: Consumer Action Law Centre; Law Council of Australia's Competition and Consumer Committee; Legal Aid Queensland; Queensland Law Society; and Small Business Commissioner SA.

558 Submission from Consumer Action Law Centre, page 48.

559 Submission from Small Business Commissioner SA, page 9.

560 Submission from Law Council of Australia's SME Business Law Committee, page 11.

For consultation

Option 2 — Allow or require traders to use third parties to give effect to a community service order

Views are sought on allowing or requiring the trader, under appropriate circumstances, to use or fund third parties to give effect to a community service order imposed on a business in breach of the ACL where the business is not qualified to do so.

For example, a court could order that a business pay a third party to give effect to a community service order where:

- that business has failed to implement the order, or
- in circumstances where it is not appropriate for them to implement the order (such as where the business has financially harmed vulnerable consumers and is required to provide financial counselling to vulnerable consumers as a part of the order).

Alternatively, or additionally, a third party could be used to review the compliance program ordered against a business, especially where a business has failed to update a compliance program in line with the court order.

While this may allow for greater flexibility for businesses in implementing non-punitive orders, and provide for some independent involvement, consideration would also need to be given to appropriate checks and balances, the costs imposed, and the types of third parties that would be appropriate.

Further questions

67. Should traders be allowed or required to use or fund third parties to give effect to a community service order? If so:

- How should this arrangement be designed? For example, under what circumstances would it apply? Which third parties should be allowed to give effect to a community service order? What requirements should be placed on them?
- What would be the benefits of such an arrangement for the party in breach, and for consumers?
- Are there any unintended consequences, challenges or risks that need to be considered?

68. Are there other types of non-punitive orders to which this could apply?

3.2.6 Misleading or deceptive conduct

As recognised in the Explanatory Memorandum for the ACL, the prohibition against misleading or deceptive conduct (section 18) is intended to create a general obligation or norm of conduct not to mislead or deceive.⁵⁶¹

561 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2), at [3.5].

Currently, a breach of section 18 can give rise to a remedy, but not to a criminal sanction or financial penalty. Nevertheless, the general protection is complemented by the prohibition against false or misleading representations (in section 29). As this provision specifically prohibits a range of prescribed practices, including those that go to the price or quality of goods, a financial penalty is available in the event of a breach.

While these provisions can overlap with regard to the conduct in question, it is generally acknowledged that they serve different purposes.

However, some stakeholders considered that these differences do not warrant a different approach to the available penalties and remedies.⁵⁶² For example, Minter Ellison submitted that:

[t]here is no practical distinction between the level of wrongdoing or harm to consumers targeted by the prohibitions in sections 18 and 29 as currently drafted. Accordingly, the basis for applying different remedies is not clear. The use of different language in those provisions ('false or misleading' versus 'misleading or deceptive') is not serving adequately to distinguish which conduct should or should not be penalised.

Minter Ellison nevertheless noted that it is 'generally accepted' that 'not all misleading or deceptive conduct should be amendable to a penalty in addition to civil liability for resulting loss or damage', and suggested that the ACL 'contain principles which determine whether misleading or deceptive conduct rises to the level of seriousness or culpability whereby pecuniary penalty is warranted.'⁵⁶³

CHOICE submitted that:

misleading and deceptive conduct harms consumers and their confidence in the market in exactly the same way that false and misleading representations do. This conduct should be punishable by fines in the same way that a breach of the specific protections, or the prohibition against unconscionable conduct, is'.⁵⁶⁴

In contrast, some stakeholders submitted that the current framework for misleading or deceptive conduct is appropriate, as the provision already enables affected parties to recover damages according to established legal principles.⁵⁶⁵ Baker & McKenzie submitted that:

there is no suggestion that the provisions... are in any way inadequate such that there are categories of misleading or deceptive conduct that should but are not subject to a potential pecuniary penalty.⁵⁶⁶

Some stakeholders highlighted the inappropriateness of attaching a financial penalty to a broad norm of conduct. The Law Council of Australia's Competition and Consumer Committee noted the legislative history and intention to create a broad norm of conduct in the market that should have available a range of remedies, but not penalties, for a breach.⁵⁶⁷

562 For example, submissions from: Minter Ellison; CHOICE; and Legal Aid Queensland.

563 Submission from Minter Ellison, page 5.

564 Submission from CHOICE, page 42.

565 For example, submission from: Allens, and Baker & McKenzie.

566 Submission from Baker & McKenzie, page 2.

567 Submission from the Law Council of Australia's Competition and Consumer Committee, pages 28-29.

The Committee further submitted that:

it is still generally accepted that prohibitions which expose a person to a penalty should be expressed in specific terms. This is to enable all individuals and corporations readily to identify the specific conduct which will expose them to a penalty... a person should only be exposed to a penalty where it is clear from the language of the relevant prohibition.⁵⁶⁸

Similarly, Baker & McKenzie submitted that penalties should not be attached to section 18 because the prohibition 'creates of a norm of commercial conduct and applies in a very wide range of business and consumer circumstances'.⁵⁶⁹

The Law Council of Australia's Competition and Consumer Committee suggested that:

if there are categories of false representation which should be, but are not currently, subject to pecuniary penalty, those categories should be identified...The possibility that there are such categories is not, however, a proper basis for imposing penalties for breach of a prohibition which was drafted in the most general terms and never intended to be subject to penalties.⁵⁷⁰

The NSW Business Chamber commented on potential unintended consequences, noting that attaching penalties to section 18 may:

capture acts of silence or omission (to the extent captured in the provision). This would create considerable uncertainty for businesses in doubt as to what information should be provided to a consumer. While it should be relatively apparent whether a representation is false or misleading, such an assessment becomes a much more complex task if also required to consider representations that haven't been made (and whether the absence of such a representation is misleading).

Even if penalties were only applicable in the most obvious of cases, some businesses may seek to ensure compliance by providing more information than is optimal for consumers.⁵⁷¹

Based on stakeholder feedback to date, CAANZ considers that it is unclear that the anticipated benefits of attaching financial penalties to the prohibition against misleading or deceptive conduct would outweigh the associated risks and costs. This includes the risk that higher penalties may result in a more cautious judicial approach to interpretation of section 18, noting that the foundational principles of civil and criminal law require a court to interpret penalty provisions strictly.

3.2.7 Other issues

Other issues that were raised by stakeholders included feedback on phoenix companies, and a suggestion that the ACL include imprisonment as a penalty in certain circumstances.

568 Ibid, page 30.

569 Submission from Baker & McKenzie, page 2.

570 Submission from the Law Council of Australia's Competition and Consumer Committee, page 30.

571 Submission from NSW Business Chamber, pages 5-6.

Phoenix companies

The Issues Paper sought stakeholder views on the appropriateness of civil penalties and remedies in the context of ‘phoenix’ companies.

A ‘phoenix’ company can emerge in the event that a company collapses, inheriting the same or similar assets, trading activities and trading name as the former company so that it can resume operations while avoiding liability.

‘Phoenixing’ can have wide-ranging harmful effects, including leaving consumers and suppliers out of pocket, and damaging the competitive process by giving the phoenix company a competitive advantage.

A few stakeholders commented on ‘phoenix’ companies in their submissions. For example, the SA Small Business Commissioner submitted that there should be an increase to penalties for companies that phoenix ‘to support and drive the necessary deterrence’,⁵⁷² and the Strata Community Australia Queensland submitted that phoenix company provisions should be tightened to improve consumer confidence in new strata developments.⁵⁷³

CAANZ notes that ‘phoenixing’ is primarily addressed by other regulatory frameworks, for example, the *Corporations Act 2001* (Cth), and it is not clear from stakeholder feedback to date that amending the ACL would be the most appropriate mechanism to address any of its harmful effects.

Including a penalty of imprisonment in the ACL

Currently, the ACL does not include a penalty of imprisonment for breaches of its provisions.

Consumer Action Law Centre submitted that imprisonment may be appropriate for repeated or egregious contraventions of the ACL. It noted that imprisonment is currently available for breaches of consumer laws in:

- Canada (up to 14 years)
- Japan (up to five years)
- the UK (up to two years)
- Korea (up to three years).⁵⁷⁴

It further commented that:

while breaches of a number of the ACL provisions can result in criminal offences—for example, the making of false or misleading representations, consumer guarantees, the product safety regime and the unsolicited sales provisions—the court can only award financial penalties, not jail time. The maximum value of criminal fines are the same as

572 Submission from SA Small Business Commissioner, page 9.

573 Submission from Strata Community Australia Queensland, page 2.

574 Submission from Consumer Action Law Centre, page 45-46.

civil pecuniary penalties and, as such, the regulator generally seeks pecuniary penalties due to the lower standard of proof.⁵⁷⁵

Some stakeholders did not support the introduction of a penalty of imprisonment, arguing that such a level of deterrence is not justified for a breach of the ACL.⁵⁷⁶

Currently, imprisonment for a breach of the ACL is only available in NSW, where its legislation gives the courts the power to imprison an individual on a second or subsequent conviction for certain ACL offences for three years in a District Court, or two years in a Local Court [see **Case study 9** below].

In the CCA, the only competition provision for which a penalty of imprisonment applies is for a breach of the criminal cartel provisions, which provides for a sentence of up to 10 years imprisonment. This penalty was introduced to provide sufficient deterrence for people likely to engage in cartel conduct.

CAANZ notes that the differences in how ACL penalties and remedies are set and applied in each jurisdiction would create practical challenges for introducing a penalty of imprisonment in the ACL.

Case study 9: Prison sentence for breaches of NSW Crimes Act, Home Building Act and the ACL

In January 2016, Penrith Local Court sentenced tradesman Steven Miller to 32 months' imprisonment (with a non-parole period of 24 months) after pleading guilty to two fraud charges under the Crimes Act 1900 (NSW), numerous offences against the Home Building Act 1989 (NSW) and the ACL. The non-Crimes Act offences for which the defendant was imprisoned included unlicensed contracting, receiving payments under contract without home warranty insurance and accepting payments but failing to provide the services.

In welcoming the prosecution, Fair Trading Acting Commissioner, John Tansey, noted that Fair Trading had issued public warnings against Mr Miller in 2012 and 2014, and that in 2014 he had been prosecuted for breaching the ACL and Home Building Act. Mr Tansey said that the custodial sentence reflected the serious nature of the offences which left multiple consumers thousands of dollars out of pocket.

The sentence was amended to 26 months (with a non-parole period of 18 months) following an appeal to the District Court in April 2016.

575 Ibid, page 45-46.

576 For example, submissions from: Energy Australia; and Queensland Law Society.

4. EMERGING CONSUMER POLICY ISSUES

4.1 Purchasing online

Stakeholders and other research suggest that the ACL is sufficiently flexible to addressing emerging issues, including those relating to online purchasing. Stakeholders provided a range of views, in particular on:

- how the ACL applies activity in the ‘sharing’ economy
- disclosure and transparency in online shopping
- the application of consumer guarantees to digital products and online auctions.

CAANZ seeks your views the following overarching questions about the ACL’s effectiveness in dealing with online purchases and in a technology-neutral way:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?
- What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements? Are there any unintended consequences?

In preparing your submission you are encouraged to refer to the principles identified in [Chapter 1.1 ‘Overview’](#).

Key observations

Generally, stakeholders and recent research suggest that the ACL is:

- sufficiently flexible to address emerging issues, including dynamic developments in the ‘sharing’ economy and online environment
- broadly in line with policy approaches adopted in comparable countries regarding the regulation of e-commerce and peer-to-peer transactions.

However, some stakeholders indicated that in some circumstances it may be unclear when a ‘sharing’ economy activity is conducted ‘in trade or commerce’, suggesting that the definition and its application should continue to be monitored and may need to be revisited in the future.

CAANZ also observes that most stakeholders are aware that traders engaging in online shopping (including those in the ‘sharing’ economy) must comply with obligations under the ACL. For example, 63 per cent of consumer respondents to the Australian Consumer Survey 2016 indicated they were aware they have equal rights in both physical and online transactions.

However, some stakeholders raised issues about:

- uncertainty in **how** the ACL applies to sellers and platform operators in the ‘**sharing**’ economy

Key Observations (continued)

- issues relating to **online shopping** including:
 - the disclosure and transparency of processes underpinning online reviews and comparator websites, and pricing and safety information at the point of sale
 - specific issues about the application of consumer guarantees, including issues about whether there should be a tailored regime for digital content, and whether the exemption for sales by auction should continue to apply in the online context.

CAANZ notes that the ACL is generally broad enough to capture emerging issues, and that many of the issues raised are covered by a range of ACL provisions (including misleading or deceptive conduct, false or misleading representations, and pricing provisions). CAANZ also notes relevant regulator guidance (including existing guidance on comparative websites and online reviews, and upcoming guidance on the ‘sharing’ economy).

Nevertheless, there may be opportunities to improve transparency and clarity in some specific areas such as pricing and online auctions.

Further, CAANZ will continue to assess the effectiveness of existing guidance, including the need for examples of best practice compliance, and continue to monitor emerging issues to ensure that the ACL provisions remain ‘fit for purpose’ into the future.

Other stakeholder issues about consumer access to their transactional data, and access to remedies for goods purchased online, are discussed in **Chapter 3.1, ‘Implementing the ACL and its objectives’**.

OPTIONS

1. Introduce measures to enhance transparency in online shopping, for example, to:
 - prohibit the practice of pre-selected options, or
 - require that any additional fees or charges associated with a pre-selected option are included in the headline price.
2. Review the sale by auction exemption with regard to consumer guarantees as it applies to goods sold by online auction.

4.1.1 Can the ACL respond to new and emerging issues?

The ACL regulates business-to-consumer and business-to-business transactions through a combination of:

- foundational principles that set out standards of behaviour, such as the general prohibition against misleading or deceptive conduct
- specific protections, such as consumer guarantees and the unfair practices provisions.

All persons engaging in trade or commerce in Australia, including those operating online and using emerging business models, are subject to obligations under the ACL.

It is intended that the ACL be flexible enough to capture a broad range of transactions and to respond to emerging issues and business models. In this regard, CHOICE noted the ACL is ‘in many ways a flexible, adaptable law...sufficiently flexible to deal with problems arising due to new services, or old services delivered in new ways.’⁵⁷⁷

⁵⁷⁷ Submission from CHOICE, page 49.

Similarly, the Law Council of Australia's Competition and Consumer Committee submitted that:

[i]n each of the areas of online shopping and emerging business models, the Committee considers that the existing provisions of the ACL are already adequately capable of addressing these issues.⁵⁷⁸

CAANZ also notes that:

- the QUT study found that Australia's regulatory approach to online purchasing is broadly in line with consumer policy frameworks in comparable countries [see **Box 33** below]
- there have been a number of enforcement actions relating to online trading [see **Box 34** below].

Stakeholders and relevant findings from the QUT study generally suggested that the ACL is sufficiently flexible to address emerging issues, including the 'sharing' economy and other developments in online purchasing.

Nevertheless, CAANZ notes that stakeholders also commented on:

- the clarity of the ACL in its application to the **'sharing' economy**
- disclosure and transparency of relevant information in **online shopping**
- uncertainty about the application of the **consumer guarantees** in the online context.

CAANZ will continue to monitor developments in the online marketplace while seeking stakeholder views on whether there could be further clarity, guidance or possibly minor regulatory change in the areas noted by stakeholders.

Box 33: Comparative analysis of overseas consumer policy frameworks — 'sharing' economy

In relation to the **'sharing' economy**, the study found that:

- Regulators in most jurisdictions are yet to develop clear policies in the sharing economy and have generally resorted to existing consumer protection provisions when problems arise.
- Most jurisdictions have adopted a cautious approach to intervention in the sharing economy and peer-to-peer transactions.
- Particular emerging issues in the sharing economy include:
 - whether platform operators should bear the responsibility for user conduct
 - how consumer guarantees apply to peer-to-peer transactions
 - what balance is needed between government regulation and industry self-regulation to encourage innovation.
- There is some uncertainty as to how the ACL definitions of 'supply' and 'trade or commerce' apply in the sharing economy.

578 Submission from the Law Council of Australia's Competition and Consumer Committee, page 4.

Box 33: Comparative analysis of overseas consumer policy frameworks — ‘sharing’ economy (continued)

In relation to **digital goods and content**, the study found that:

- While most jurisdictions provide protections for the purchase of digital goods, the UK is the only jurisdiction to apply specific protections for digital content [see **Box 34** below].
- There is some uncertainty as to how the ACL consumer guarantees apply to digital content.

In relation to **online shopping**, the study found that:

- All of the surveyed jurisdictions, including Australia, provide equal protections for physical and online transactions.
- Australia’s regulatory approach to online reviews (comprising general and specific protections, industry guidance and consumer education) is comparable with other jurisdictions.
- There is a high level of similarity in how jurisdictions (including Australia) regulate unfair pricing practices in the online environment (primarily through protections against misleading conduct).
- There is some uncertainty as to how consumer guarantees apply to goods sold by online auction.

Box 34: Regulator enforcement in the online environment

All physical and online forms of trading (including those through the ‘sharing’ economy) are subject to relevant provisions under the ACL.

Some examples of ACL regulators’ enforcement activities in the online environment are:

Reviews and testimonials

- During 2013, NSW Fair Trading led a national project to identify traders who use fake online reviews and testimonials as a promotional tool. ACL regulators reviewed 290 traders in 20 market sectors and issued substantiation notices to 38 businesses. Several traders then agreed to remove unsubstantiated testimonials from their websites.

Online pricing practices

- In 2014, the ACCC took Jetstar Airways Pty Ltd (Jetstar) and Virgin Australia Airlines Pty Ltd (Virgin) to court alleging that each airline failed to adequately disclose a booking and service fee during the online booking process. The Federal Court held Jetstar and Virgin contravened the ACL by engaging in misleading or deceptive conduct and making false or misleading representations about the price of particular advertised fares. The court considered Jetstar and Virgin failed to adequately disclose their respective booking and service fees on:
 - Jetstar’s website in 2013 and mobile site in 2014;
 - Virgin’s mobile site in 2014.⁵⁷⁹

⁵⁷⁹ ACCC v Jetstar Airways Pty Ltd [2015] FCA 1263.

Box 34: Regulator enforcement in the online environment (continued)

- On 13 October 2015, the ACCC accepted court enforceable undertakings from Airbnb Ireland and Vacaciones eDreams, SL, following concerns the companies had engaged in misleading or deceptive conduct and made misleading representations by failing to adequately disclose mandatory fees on their online booking platforms. Both companies acknowledged these concerns and cooperated with the ACCC during the investigation. They have since undertaken to improve their pricing practices and compliance with the ACL.

Internet domain names

- Regulators are aware of complaints from small businesses receiving unsolicited invoices or emails to renew an internet domain name.
- In June 2015, the Director of Consumer Affairs Victoria commenced proceedings in the Federal Court of Australia against Domain Register Pty Ltd (Domain Register). It is alleged that Domain Register engaged in conduct that was misleading or deceptive, or that was likely to mislead or deceive, and that Domain Register sent invoices or documents to small businesses which set out a charge for the supply of unsolicited services and did not contain a compliant warning statement in circumstances where Domain Register did not have a reasonable cause to believe that there was a right to the charge. The proceeding is listed for hearing commencing on 12 December 2016.

4.1.2 The 'sharing' economy

While there is no single definition for the 'sharing' economy (also known as the 'collaborative' or 'peer-to-peer' economy), the QUT study noted that it generally comprises:

online platforms that help people share access to assets, resources, time and skills... which allow buyers and sellers (both individual and businesses) to provide goods and services at lower costs. Many 'suppliers' of goods or services via peer-to-peer platforms are individuals who are no[t] engaged in traditional business activities but are 'sharing' their existing assets for monetary gain.⁵⁸⁰

CAANZ notes that the question of how consumer laws apply in this context is not necessarily new, as sales platforms and peer-to-peer transactions have existed in various forms for some time. However, as rapidly-changing technology now enables these transactions to occur more conveniently and frequently, they are much more prevalent today.

To be obligated under the ACL, a person or business must be a supplier acting in trade or commerce. However, some stakeholders commented on the complexity of applying this test in the context of the 'sharing' economy.⁵⁸¹

For example, Professor Sharon Christensen from the QUT submitted that:

[t]he primary difficulty in the context of a peer-to-peer transaction is whether existing laws apply to the platform operator as well as the seller of the goods or services who may be an individual not engaged in trade or commerce.⁵⁸²

⁵⁸⁰ QUT, *Comparative analysis of overseas consumer policy frameworks*, 2016, page 138.

⁵⁸¹ For example, submissions from: Baker & McKenzie; Consumer Action Law Centre; NSW Business Chamber; and QUT Commercial and Property Law Research Centre.

CAANZ notes that, generally, if a party (such as an individual, business or platform operator) is selling goods or services in exchange for money, they are a ‘supplier’.

Nevertheless, some stakeholders submitted that **platform operators** should be treated (or clearly treated) as ‘suppliers’ of goods and services provided by sellers, and that their responsibility to provide services with due care and skill should also be clarified.⁵⁸³ In contrast, some stakeholders submitted that there should be a limit to platform operators’ liability and therefore they should not be treated as ‘suppliers’ under the ACL.⁵⁸⁴

In relation to **sellers** in the ‘sharing’ economy, Professor Christensen noted some uncertainty in determining when an individual’s selling activities transition from a personal nature into a commercial nature.

In contrast, the Law Council of Australia’s Competition and Consumer Committee submitted cautioned against adopting a prescriptive approach, as:

defining types of personal transactions which would be excluded from the ACL is likely too prescriptive and would introduce an unwarranted level of inflexibility. Instead, the Committee favours the continued use of a broad rule of general application, supported by the publication of interpretative guidelines by the ACCC.⁵⁸⁵

Similarly, the Australian Industry Group submitted that the ACL ‘should not be changed or operate in such a way that would constrain further product development and innovation.’⁵⁸⁶

The NSW Business Chamber submitted that a:

growing diversity of industries and businesses that have embraced ‘sharing’ as part of their business model has made redundant any efforts to study the ‘sharing economy’ as a singular homogeneous entity. A ‘one size fits all’ approach will neither effectively nor efficiently address the issues associated with the sharing economy, or the concerns of consumers.⁵⁸⁷

Some stakeholders suggested addressing the uncertainties through more guidance and clarity from regulators.⁵⁸⁸

CAANZ notes the ACCC is currently preparing guidance material for consumers, sellers and platform operators in the ‘sharing’ economy on their rights and responsibilities under the ACL. This may provide greater clarity for stakeholders without creating economy-wide changes to the current definition of ‘in trade or commerce’.

582 Submission from QUT Commercial and Property Law Research Centre, page 30.

583 For example, submissions from: Consumer Action Law Centre; and Australian Communications Consumer Action Network.

584 For example, submissions from: eBay; Baker & MacKenzie; and the Law Council of Australia’s Competition and Consumer Committee.

585 Submission from the Law Council of Australia’s Competition and Consumer Committee, page 73.

586 Submission from Australian Industry Group, page 6.

587 Submission from the NSW Business Chamber, page 13.

588 For example, submissions from: Baker & MacKenzie, the Australian Communications Consumer Action Network, Energy & Water Ombudsman, Consumer Action Law Centre, and Motor Trades Association of Australia.

CAANZ also notes that a guidance approach is generally consistent with international approaches, with the EU recently issuing new guidelines aimed at supporting consumers, businesses and governments in engaging with the ‘sharing’ economy.⁵⁸⁹

The QUT study also found that most jurisdictions have taken a ‘cautious approach’ to intervening in the ‘sharing’ economy, and that:

most commentators recommend a flexible regulatory regime which is capable of dealing with unique issues that arise from each platform type, provides adequate protection for consumers but does not create barriers to innovation and further development of the sharing economy.⁵⁹⁰

Further, CAANZ notes that participants in the ‘sharing’ economy have adopted a range of self-regulatory measures, such as the use of rating and peer review systems by platforms. The recent report into the ‘sharing’ economy from the Grattan Institute suggests that there are incentives for sellers to be trustworthy and reliable, and for platforms to design review systems that control peer misbehaviour [see **Box 35** below].

Nevertheless, CAANZ notes the importance of having clarity on how the ACL applies to the ‘sharing’ economy, and will continue to monitor market developments in this area and, where appropriate, take steps to address any uncertainty.

Box 35: Grattan Institute study into ‘sharing’ economy and government regulation

In April 2016, the Grattan Institute released its report on the peer-to-peer (or ‘sharing’) economy, which outlined the key features of this emerging market and examined the role of governments in areas such as consumer protection, competition and taxation policy.

Among its key findings, the report found that:

- Australia’s consumer laws are mostly fit to deal with the peer-to-peer economy.
- A key challenge for consumer law is defining the responsibility of platforms when their role is partly that of a producer and partly an intermediary.
- Peer-review systems provide a strong incentive for suppliers to be trustworthy and reliable, and for platforms to design review systems that control peer ‘misbehaviour’ such as misleading advertising, failure to deliver, or fraud.
- Peer-to-peer platforms may further benefit from:
 - a voluntary code of conduct
 - regulator guidelines for platform operators and suppliers about their responsibilities under the ACL
 - consideration of the peer-to-peer economy in the ACL Review.⁵⁹¹

589 European Union, *A European agenda for the collaborative economy*, June 2016, at: www.eesc.europa.eu/resources/docs/com2016-356-final.pdf.

590 QUT, *Comparative analysis of overseas consumer policy frameworks*, 2016, page 142.

591 Grattan Institute, *Peer-to-peer pressure: Policy for the sharing economy*, 2016, at: www.grattan.edu.au/report/peer-to-peer/.

4.1.3 Online shopping

The Australian Consumer Survey 2016 found that the majority of Australian consumers were aware that the ACL provides consumers with equal rights and protections, regardless of whether they are purchasing online or in a physical store.

This equal treatment is consistent with the principle of ‘technological neutrality’, which means that ‘the law should not discriminate between different forms of technology’.⁵⁹²

Technological neutrality was recognised as a key legislative principle in the development of the *Electronic Transactions Act 1999* (Cth), and similar state and territory legislation. These laws set out a general rule that a transaction is not invalid merely because it occurred by electronic communications. These laws also provide rules to interpret legislation in a technologically-neutral way.

More recently, the Australian Government’s response to the Financial System Inquiry agreed to embed the principle in the development of future legislation and regulation in the financial sector.⁵⁹³

However, a number of stakeholders raised concerns about whether they are more vulnerable when purchasing online, highlighting issues about:

- **transparency and disclosure** of processes relating to online reviews and comparator websites, and pricing and safety information at the point of sale
- specific issues about the **application of consumer guarantees** in the online context.

4.1.4 Transparency and disclosure issues

Online reviews and comparator websites

Some stakeholders suggested that the ACL could impose specific disclosure requirements for online reviews and comparator websites.⁵⁹⁴

However, other stakeholders acknowledged that the current ACCC guidance on online reviews and comparator websites provides practical assistance to help businesses comply with the ACL.⁵⁹⁵

The QUT study also indicated that Australia’s approach to disclosure and transparency in the online environment is broadly consistent with approaches in comparable jurisdictions.

This includes having a mix of regulation (such as provisions against misleading or deceptive conduct, and false or misleading representations), industry self-regulation and consumer guidance. The study noted that ‘[w]hether greater information disclosure obligations correspond to more effective consumer protection is yet to be determined’.⁵⁹⁶

592 Explanatory Memorandum to the Electronic Transactions Bill 1999 (Cth), page 2. The Bill removes a number of legal obstacles to the use of electronic communications for the communication of legally significant information, creating a more consistent regulatory environment for electronic commerce.

593 *Improving Australia’s Financial System: Government Response to the Financial System Inquiry*, Australian Government, 2015, recommendation 39.

594 For example, submission from Legal Aid Queensland.

595 For example, submissions from: Consumer Action Law Centre; and Competition and Consumer Committee of the Law Council of Australia.

596 QUT, *Comparative analysis of overseas consumer policy frameworks*, 2016, page 98.

Other international developments also suggest a high level of cooperation and convergence among different countries in how they approach consumer protection in the e-commerce environment [see **Box 36** below].

Further, CAANZ will continue to monitor and explore whether further guidance on disclosure would assist businesses to comply. This may include highlighting examples of best practice, on disclosure and transparency in the online environment across a range of digital formats (including mobile technology).

Box 36: International developments regarding regulation of online shopping

Several recent international developments indicate a high level of cooperation and convergence among different countries in how they approach consumer protection in online shopping and e-commerce.

In July 2016, the International Consumer Protection and Enforcement Network (ICPEN) released a set of guidelines to help market participants (for example, administrators, traders, marketing professionals and bloggers) involved in the collection, moderation and publication of online reviews and endorsements to act appropriately and transparently.⁵⁹⁷ ICPEN is an information network of consumer protection authorities representing 60 global economies, including Australia.

In May 2016, the Organisation for Economic Co-operation and Development released its revised OECD Recommendation of the Council on Consumer Protection in E-commerce. It provides countries with guidance on adapting their consumer policy frameworks to the current environment while stimulating innovation and competition in the market. It also recommends some general principles regarding adequate information, transparency and disclosure in areas such as digital content, mobile platforms and 'consumer-to-consumer' transactions.⁵⁹⁸

4.1.5 Pricing and safety information

Stakeholders indicated particular concern about the transparency of online reviews and comparator websites, such as failure to disclose commercial arrangements with 'recommended' businesses, as well as concerns about the disclosure of pricing and safety information at the point of sale.⁵⁹⁹

Section 48 of the ACL requires traders to display the minimum quantifiable single price for a good or service in a prominent way. However, stakeholders noted where:

- a trader advertises a minimum price based on an **infrequently used payment option** that does not represent the minimum price for the majority of consumers
- **pre-selected options** with additional fees or charges are not reflected in the minimum price and would require consumers to 'opt out' of the option for the minimum price to apply at the final stage of online payment

597 At: www.icpen.org/for-consumer-experts/what-we-do/industry-participant-guidance.

598 OECD Consumer Protection in E-commerce: OECD Recommendation, OECD Publishing, Paris, 2016, at: www.dx.doi.org/10.1787/9789264255258-en.

599 For example, submissions from: CHOICE; Groupon; MTA NSW; MTAA; Australian Association of National Advertisers; Office of the NSW Small Business Commissioner; QUT Commercial and Property Law Research Centre; and Legal Aid Qld.

- **‘drip pricing’** — where fees are incrementally ‘dripped’ over the course of a booking or purchasing process. Issues with transparency can be compounded where options (with additional or higher fees) are pre-ticked or pre-selected during the booking or purchasing process
- **‘surge pricing’** — where pricing is increased in response to surges in demand for the product. This is sometimes said to allow for greater reliability and availability for those who are willing to pay more.

Consumer Action Law Centre submitted that:

[c]urrently, the true cost of goods and services can be hidden through the process of optional “add-ons”, which are only revealed through the course of the online shopping process ... If traders were required to advertise the “usual” or “common” final purchase price of the good, then consumers could make their choice earlier in the process.⁶⁰⁰

CHOICE submitted that pre-selected options:

are designed to trick the consumer into purchasing unnecessary components, or are used to disguise the true cost of the product.

CHOICE finds the practice of pre-selecting optional extras problematic for both consumers who have limited time to make a purchase as well as consumers from culturally and linguistically diverse communities who may have difficulty navigating complex bookings.⁶⁰¹

Some stakeholders suggested amending the pricing provisions to:

- have a positive obligation to disclose all components of a price upfront, including pre-selected options⁶⁰²
- specify that the minimum price requirement includes contingent fees commonly paid by consumers (such as delivery fees, and credit card surcharges) or all optional fees and charges.⁶⁰³

Concerns were also raised about the availability of product safety information for products sold online, with suggestions that this information should be required to accompany online descriptions of products and at the point of sale.⁶⁰⁴

However, other stakeholders highlighted the challenges for traders in providing point-of-sale information in mobile formats. For example, Groupon submitted that:

[w]ithin Groupon’s newsletters... there is a restriction as to the amount of information that can be displayed in reference to an individual deal. It is therefore not always feasible to display the full price in the newsletter.⁶⁰⁵

600 Submission from Consumer Action Law Centre, page 66.

601 Submission from CHOICE, page 46.

602 For example, submissions from: QUT Commercial and Property Law Research Centre; CHOICE; and Consumer Action Law Centre.

603 For example, submissions from: Consumer Action Law Centre; and QUT Commercial and Property Law Research Centre.

604 For example, submissions from: Consumer Action Law Centre; Australian Toy Association; and Australian Tattooists Guild.

Some stakeholders also noted the ACL is already capable of addressing the issues raised. For example, the Law Council of Australia's Competition and Consumer Committee submitted that the ACL is 'already sufficiently capable of addressing the form and content of online point of sale information'.⁶⁰⁶ Other stakeholders noted that the ACL's provisions on misleading or deceptive conduct, false or misleading representations and pricing are sufficient.⁶⁰⁷

While some stakeholders suggested changes to the pricing provisions, CAANZ notes that there may be challenges in determining what the majority of consumers are likely to pay in contingent fees. CAANZ also notes that the pricing and disclosure provisions are complemented by general protections in the ACL that have been flexible enough to capture poor disclosure [see **Box 35** above].

Nevertheless, there may be opportunities to consider more targeted approaches to address the specific issue of pre-selected options.

For consultation

Option 1 — Introduce measures to enhance transparency in online shopping.

This option could involve an outright prohibition on using pre-selected options during booking or payment processes that incur additional fees at the final booking or payment stage, an approach taken by the European Union.⁶⁰⁸

However, an alternative approach could be to require any additional fees or charges associated with pre-selected options to be included in the upfront price. In this regard, Consumer Law Action Centre submitted that

[I]f the trader does not declare it as a cost of purchase at the beginning of the sales process (that is, in the advertising), then they would not be able to surprise the consumer by adding it later in the process.⁶⁰⁹

This approach would ensure that consumers are made aware from the beginning of the total possible price they would pay if they do not opt-out of pre-selected options associated with their purchase.

This may require some traders to amend their existing websites, but would also provide more clarity on what is expected of them under the ACL. This would also avoid a lack of clarity about any final pricing changes if a consumer is unaware of the pre-selected options and the opportunity to opt out of them.

605 Submission from Groupon, page 5.

606 Submission from the Law Council of Australia's Competition and Consumer Committee, page 69.

607 For example, submissions from: Dr Angela Daly and Dr Amanda Scardamaglia; Australian Association of National Advertisers; Communications Alliance; Insurance Australia Group; and eBay.

608 EU Directive on Consumer Rights (2011/83/EC), adopted 13 June 2014, Article 22, at: www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1.

609 Submission from Consumer Action Law Centre, page 66.

Further questions

69. Are current measures sufficient to ensure price transparency in online shopping?
70. Should measures to address pre-selected options during booking or payment processes be adopted? If so:
- How should these be designed? For example, should pre-selected options be prohibited, or should any associated fees or charges be required to be included in the upfront price?
 - Are the changes that would be required for websites and booking processes significant? What would be the costs of such changes? What transitional arrangements, if any, would be required?
 - Are there any unintended consequences, and how could these be addressed?

4.1.6 Application of the consumer guarantees in the online environment

Stakeholders generally raised two specific issues about the application of the consumer guarantees in the online environment, namely:

- whether the consumer guarantees should be more tailored for **digital content** (data produced and supplied in digital form, such as music downloads)
- whether an exemption for **sales by auction** should continue to apply in the online environment.

Digital content

As digital technology grows and evolves, everyday objects are increasingly likely to have network connectivity (a development sometimes described as the ‘internet of things’). Today’s consumers are also buying a greater number and variety of digital content and devices. These developments have raised questions about how the ACL’s provisions, and in particular **consumer guarantees**, apply to digital content.⁶¹⁰ Specifically:

- whether digital content can be readily categorised as either a good or a service (which determines which consumer guarantees applies), noting that software may often include post-sales services and updates, and ‘smart’ products may blur traditional distinctions
- how the consumer guarantees would apply to ‘smart’ products, where hardware devices rely on online operating systems that get upgraded and may no longer support the functionality of the hardware
- whether the ACL is able to respond to new ways in which digital goods and services are sold, including via mobile services (such as third-party content billed to mobile accounts)
- what would constitute a ‘major failure’ to comply, and the remedies that should apply, noting that digital content cannot often be physical returned. In many cases, consumers tend to expect repairs, updates and patches. These remedies may promote ongoing development and

⁶¹⁰ For example, submissions from: Interactive Games and Entertainment Association; Australian Communications Consumer Action Network; QUT Commercial and Property Law Research Centre; and Telecommunications Industry Ombudsman.

innovation as digital products tend not to be ‘perfect’ on their first release, and usually benefit from user experience.

Some stakeholders submitted that there should be a tailored regime for digital content, citing the approach adopted in the UK [see **Box 37** below].⁶¹¹ The Australian Communications Consumer Action Network submitted that:

it may be time to consider what rights and responsibilities consumers should have for hybrid digital/physical products, including whether the current consumer guarantees and unfair contract terms regimes are adequate, or sufficiently tailored to digital content.⁶¹²

However, consistent with views about the ‘sharing’ economy, a number of stakeholders submitted that the ACL needs to remain flexible in addressing the evolving nature of goods and services. For example, the NSW Business Chamber urged:

a cautious approach — it is not clear that consumer policy has a role in shaping how goods and services evolve over time...The existing consumer guarantee framework should be capable of dealing with circumstances where digital services are not provided as a reasonable consumer would expect[.]⁶¹³

The Communications Alliance submitted that:

[r]eforms in this area must be appropriate, and must not create uncertainty or disproportionate compliance costs that could deter innovation and negatively impact the evolution of the digital economy and supply of new goods and services for consumer benefit.⁶¹⁴

CAANZ notes that the ACL definition of ‘goods’ already includes computer software. In *ACCC v Valve Corporation (No 3)* [2016] FCA 196, the Federal Court found that Valve’s supply of electronic games that were able to be played ‘offline’ was a supply of goods. While the Court found that non-executable data was not software, there was software that made the non-executable data work. This software which was fundamental to what Valve supplied to its consumers (the provision of games).

While many stakeholders considered the ACL to be flexible enough to adapt to emerging issues, the increasing availability of ‘smart’ products and streamed content (where there is no executable data) indicates that CAANZ should continue to monitor this area closely.

611 For example, submissions from: Australian Communications Consumer Action Network; Interactive Games and Entertainment Association; and QUT Commercial and Property Law Research Centre.

612 Submission from the Australian Communications Consumer Action Network, page 13.

613 Submission from NSW Business Chamber, page 8.

614 Submission from the Communications Alliance, page 24.

Box 37: UK's treatment of digital content

In line with the EU Directive on Consumer Rights (2011/83/EC), the UK law defines 'digital content' in the *Consumer Rights Act 2015* as a category distinct from goods or services. It also includes a specific right to withdraw from purchases of digital content, such as music video downloads, until the actual downloading begins.⁶¹⁵

Under the Consumer Rights Act remedies, consumers have a right to a repair or replacement. A reduction in price (rather than a refund) is available where:

- a repair or replacement is impossible, or
- the repair or replacement has not occurred within a reasonable time and without significant inconvenience to the consumer.

However, in recognition of the need to protect the interests of copyright holders, a refund for digital content (as an immediate remedy) is available where the breach relates to the warranty that the trader has the right to supply the digital content.

Further, if digital content causes damage to a consumer's device or to their other digital content, and the damage would not have occurred if the trader had exercised reasonable care and skill, the consumer is entitled to compensation for the damage or to have it repaired.

Online auctions

A number of the **consumer guarantees** (including the guarantee for acceptable quality) do not apply to goods sold by auction. This was on the basis that traditionally, many auctions occurred in specific contexts, and where consumers may inspect the goods in person prior to purchase.

The ACL defines 'sale by auction', in relation to the supply of goods by a person, as 'a sale by auction that is conducted by an agent of the person (whether the agent acts in person or by electronic means)'.⁶¹⁶

The Explanatory Memorandum for the ACL sought to clarify how the ACL applies to online auctions by stating that it would 'apply to sales made by businesses on the internet by way of online 'auction' websites when the website operator does not act as an agent for the seller'.⁶¹⁷

However, stakeholders indicated that there is still some uncertainty as to whether consumer guarantees would apply to goods purchased through an online auction site, particularly where the site offers a 'Buy It Now' option.⁶¹⁸ Professor Christensen submitted that:

[e]ven though some online auctions may not fall within the definition of 'sale by auction' there are cogent reasons for removing the distinction in the context of online transactions and maybe for all transactions.⁶¹⁹

The QUT study observed that:

615 Provided under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

616 Section 2 of the ACL.

617 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010, page 184.

618 For example, submissions from: QUT Commercial and Property Law Research Centre; Consumer Action Law Centre.

619 Submission from QUT Commercial and Property Law Research Centre, page 21.

[w]hether an online auction, such as those that occur through eBay is actually an auction in accordance with the definition is also unclear. Unlike a face-to-face auction, eBay does not actually sell the goods as agent for the seller, but merely provides an online platform for the seller to obtain bids from consumers and facilitates acceptance of a price. On this basis, a seller via eBay or similar website may not be engaged in a sale by auction.⁶²⁰

CAANZ notes that there are opportunities to consider whether the exemption for online auctions remains appropriate in the online context.

For consultation

Option 2 — Remove the ‘sale by auction’ exemption for consumer guarantees in the online environment

Feedback is sought on whether and how the ‘sale by auction’ exemption for consumer guarantees in the online environment should be clarified, including whether it should be narrowed in scope, or removed altogether for the online environment.

This may provide more clarity for both businesses and consumers, but consideration would need to be given to:

- whether the rationale for the exemption is still valid in some online circumstances,
- compliance costs for any currently-exempt platforms (that act as agents for sellers)
- whether there are any unintended impacts.

Further questions

71. Should the sale-by-auction exemption for consumer guarantees be amended with regard to sales by online auction sites? If so:

- How should this be designed? For example, should the exemption be clarified, narrowed or removed altogether?
- Would it require online auction sites to change their existing processes and policies substantially, and if so, what are the costs of doing so and any transitional arrangements that may be required? What are the impacts for consumers?
- Are there any unintended consequences, and how could these be addressed?

620 QUT, *Comparative analysis of overseas consumer policy frameworks*, 2016, page 86.

5. OTHER ISSUES

Table 4 below sets out issues and options which do not directly relate to one of the key areas, or are more technical in nature, but require further consultation, for example, to clarify:

- whether an amendment to the ACL, or to regulators' activities, is required or justified, and any evidence for this
- whether there are more significant policy implications that warrant prioritisation
- any issues with the proposed options, and whether they are workable in practice, including their impacts and any implementation issues
- whether there are more effective approaches to addressing the issue.

Table 4: Other issues

Issue	Details
1. Amend the definition of 'unsolicited services' in section 2 of the ACL to allow the false billing provisions (sections 40 and 162) to apply to false bills for services not yet provided	The current definition refers to services 'supplied' (in the past tense), making it difficult to enforce false billing provisions against suppliers of unrequested and unsupplied services, even where the supplier has falsely represented that they have supplied services to the recipient (refer to the decision of Justice Finkelstein in <i>au Domain Administration Ltd v Domain Names Australia Pty Ltd</i> [2004] FCA 424).
2. Amend the ACL to give private litigants standing to apply to the court for a director's disqualification order under section 248 of the ACL ⁶²¹	The ACL could be amended to give private litigants standing to apply to the courts for a director's disqualification order (currently, only regulators have this power). Currently, consumers/victims may be left without a remedy where a corporation contravenes the ACL and goes into liquidation.
3. Broaden the definition of pyramid schemes in section 45(1) of the ACL to include similar multi-level marketing schemes ⁶²²	The definition of 'pyramid scheme' could be broadened to include multi-level marketing schemes where a successful return is unrealistic. This would ensure that the current definition of 'pyramid scheme' is not too narrow and that it captures multi-level marketing schemes which are arguably similar to pyramid selling but involve other benefits and transactions, such as loyalty programs (see decision of Justice Flick in <i>ACCC v Lyonesse Australia Pty Ltd</i> [2015] FCA 1129).

⁶²¹ Submission from Thomas Middleton, page 1.

⁶²² Submission from Consumer Action Law Centre, page 23.

Issue	Details
<p>4. Address inconsistency between state, territory and Commonwealth laws in defence of contributory fault for misleading or deceptive conduct claims⁶²³</p>	<p>The defence for contributory fault for misleading or deceptive conduct claims is made available by section 137B of the CCA, but it is not available under state and territory application legislation.</p>
<p>5. Amend inconsistency between section 68(3) of the ASIC Act, section 1349 of the Corporations Act 2001, and sections 224 and 248 of the ACL⁶²⁴</p>	<p>Section 68(3) of the ASIC Act provides that evidence that a person has made a statement or has signed a record is not admissible in a criminal proceeding, or a proceeding for the imposition of a penalty.</p> <p>The ACL could be amended so that the evidential immunity afforded by section 68(3) of the ASIC Act does not apply to sections 224 and 248 of the ACL (relating to financial penalties).</p> <p>This could be done by applying a counteracting provision similar to section 1349 of the Corporations Act.</p> <p>Potentially, this could also apply in the competition context to section 86E of the CCA (relating to orders disqualifying a person from managing a corporation).</p>
<p>6. Clarify the consumer guarantees in relation to goods lost or damaged in transit</p>	<p>Section 63 of the ACL prevents consumer guarantees from applying to services ‘supplied under a contract for the purposes of a business, trade, profession, or occupation carried on or engaged in by the person for whom the goods are transported and stored.’</p> <p>Because of the reference to ‘any person’, this section has been interpreted by the High Court in <i>Wallis v Downard-Pickford (North Queensland) Pty Ltd</i> [1994] HCA 17 as applying not only where the buyer is carrying on a business, but also where the seller of the goods (consignor) is carrying on a business.</p> <p>This means that consumers ordering goods from a business are not protected by guarantees that the shipping or transportation services are carried out with due care and skill, and are fit for purpose, despite having no control over the transportation process, or choice of transporter.</p> <p>Does the current interpretation allow for an appropriate allocation of risk between the seller of the goods, the transporter and the consumer? Should the exemption be removed or clarified so that it only applies where the buyer is acting for a business purpose?</p>

623 Submission from Nick Seddon, pages 2-3.

624 Submission from Thomas Middleton, page 1.

Issue	Details
7. Power to obtain information for product safety	<p>Section 133D of the CCA allows the ACCC to issue disclosure notices requiring suppliers of consumer goods in trade or commerce to provide information in relation to product safety issues.</p> <p>Broadening this provision to any person engaged in trade or commerce or acquiring consumer goods in trade or commerce, including individuals and bodies corporate would help improve the effectiveness of the ACCC's regulatory response to consumer product safety risks.</p>
8. Amend section 12DC of the ASIC Act to address inconsistencies with other consumer protection provisions in the ASIC Act	<p>Section 12DC(1) refers to representations in connection with 'the sale or grant, or the possible sale or grant' of a financial product that includes an interest in land. This is a new concept in the ASIC Act, and is not consistent with conduct that is defined to be a financial service in section 12BAB. Amending the provision to refer to 'supply or possible supply' would make it more consistent with the other provisions of the ASIC Act (such as section 12DB). Additionally, the provision should be clarified to ensure that it applies to representations made before the relevant interest in land is acquired.</p>
9. Amend section 13(1) of the ASIC Act to allow potential unfair contract terms to trigger ASIC's investigative powers	<p>Section 13(1) of the ASIC Act outlines the general powers of investigation granted to ASIC. By amending section 13(1) of the ASIC Act, ASIC would have its investigative powers triggered when there is a potential unfair contract term.</p>
10. Amend section 76 of the ACL (or the regulations) to clarify that disclosure requirements for unsolicited consumer agreements do not apply to exempt new agreements for the supplies of electricity or gas services	<p>Regulation 89, made under section 94 of the ACL, excludes the application of section 86 to agreements for new supplies of electricity or gas services to premises (where the service is not connected to the premises, or is connected and no electricity or gas is being supplied by the supplier).</p> <p>Despite this exemption, the requirement in section 76 to disclose cooling-off rights to a prospective consumer is stated to apply to all contracts. Consequently, consumers may be confused by information about rights and obligations that do not apply in their particular circumstances.</p>

APPENDIX A: TERMS OF REFERENCE

Scope of the review

There will be three aspects to the review of the Australian Consumer Law (ACL):

The review will assess the effectiveness of the provisions of the ACL, whether these provisions are operating as intended, and address the risk of consumer and business detriment at an appropriate level of regulatory burden. These provisions include but may not be limited to:

- general prohibitions against misleading or deceptive conduct, unconscionable conduct and unfair terms in consumer contracts
- prohibitions against specific ‘unfair practices’, including bait advertising, referral selling, unsolicited supplies of goods and services, pyramid selling and component pricing
- the system of statutory consumer guarantees
- the national product safety framework, and
- enforcement powers, penalties and remedies applying under the ACL.

The review will also consider the extent to which the national consumer policy framework has met the objectives articulated by the Council of Australian Governments (COAG). This will include:

- assessing whether the existing institutional, administrative and regulatory structures underpinning the ACL, such as the ‘multiple regulator model’ and the coordinated enforcement, education, policy, research and advocacy approach of the Commonwealth and states and territories, are effective and efficient in supporting a single national consumer policy framework
- considering the interface between the national consumer policy framework and other legislation, its jurisdiction and reach, including whether there are legislative gaps, duplication or inconsistencies with industry-specific and other laws, including opportunities to reduce unnecessary compliance costs on businesses, individuals and the community while maintaining adequate levels of consumer protection, and
- examining changes in consumer and business awareness of their respective rights, protections and obligations, including access to information about dispute resolution and consumer issues, since the implementation of the ACL.

The review will assess the flexibility of the ACL to respond to new and emerging issues to ensure that it remains relevant into the future as the overarching consumer policy framework in Australia.

Conduct of the review

The review will be conducted by Consumer Affairs Australia and New Zealand (CAANZ). In conducting the review, CAANZ will:

- undertake a public consultation process, including with government organisations, consumer representatives, businesses, the public and the Commonwealth Consumer Affairs Advisory Council (CCAAC) to seek their views and experiences of the national consumer policy framework
- undertake the second Australian Consumer Survey to assess consumer and business experience of the ACL nationally since its implementation
- commission an independent assessment of the opportunities to improve the ‘multiple regulator’ model, including seeking stakeholder feedback and applying a performance evaluation framework that is consistent with the Memorandum of Understanding agreed by ACL regulators, and
- examine the effectiveness of national guidance for businesses and consumers on the application, enforcement and administration of the ACL.

CAANZ will also:

- consider relevant developments in consumer policy overseas since the ACL was implemented
- take into account relevant findings from other reviews including the Competition Policy Review and the Financial System Inquiry
- will have regard to the application of consumer protection provisions as mirrored in the ASIC Act, and
- review the IGA’s operations and terms on behalf of the Council of Australian Governments.⁶²⁵

CAANZ will provide to the Legislative and Governance Forum on Consumer Affairs an interim report in the second half of 2016 and a final report by March 2017. The final report will make findings and identify options to improve the efficiency and effectiveness of the ACL.

Legislative and Governance Forum on Consumer Affairs
12 June 2015

625 Council of Australian Governments (COAG), *2009 Intergovernmental Agreement for the Australian Consumer Law (IGA)*, paragraph 51.

Background

The Australian Consumer Law (ACL) is the uniform Commonwealth, state and territory consumer protection law that commenced on 1 January 2011.⁶²⁶ The *Australian Securities and Investments Commission Act 2001* (the ASIC Act) generally mirrors the consumer protection provisions applying to financial products and services.

On 2 October 2008, COAG agreed to a new consumer policy framework, drawing on the recommendations of the Productivity Commission in its 2008 *Review of Australia's Consumer Policy Framework* and best practice in state and territory consumer laws, including a provision regulating unfair contract terms.⁶²⁷

On 2 July 2009, COAG signed the *Intergovernmental Agreement for the Australian Consumer Law* underpinning the establishment of a national consumer law. It created a national consumer policy framework consisting of a national consumer protection law, a national product safety regulatory and enforcement regime, and improved enforcement, cooperation and information sharing arrangements between Commonwealth, state and territory agencies.⁶²⁸

The Intergovernmental Agreement states that the objective of the 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'*.⁶²⁹

This overarching objective is supported by six operational objectives:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition
- to ensure that goods and services are safe and fit for the purposes for which they were sold
- to prevent practices that are unfair
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage
- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate, risk-based enforcement.⁶³⁰

The IGA provides that the enforcement and administration arrangements of the ACL will be reviewed within seven years of its commencement.⁶³¹ It also provides that the Parties to the agreement will review its operations and terms after it has operated for seven years.⁶³²

626 Schedule 2 of the *Competition and Consumer Act 2010* and applied in each state and territory.

627 COAG Communique, 2 October 2008.

628 IGA, paragraph E.

629 IGA, paragraph C.

630 IGA, paragraph D.

631 IGA, clause 23.

632 IGA, clause 51.

APPENDIX B: CONSOLIDATED LIST OF QUESTIONS

CAANZ seeks your views on the following overarching questions throughout this Interim Report:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?
- What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements? Are there any unintended consequences?

In relation to penalties and remedies, CAANZ seeks your views on the following questions:

- Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?
- Would the options increase the deterrent effect of the ACL in a proportionate way? How should they be designed? Are there better alternatives?
- What are the impacts for businesses and consumers? Are there any unintended consequences?

1.2 Scope and coverage of the ACL (pages 12-33)

1.2.3 Fundraising activities and the ACL

1. Would further regulator guidance on the ACL's application to the activities of charities, not-for-profits and fundraisers help raise consumer awareness and provide greater clarity to the sector?
 - If so, what should be included in this guidance?
2. Are there currently any regulatory gaps with regard to consumer protection and fundraising activities? If so:
 - What is the extent of harmful conduct or consumer detriment that falls within these regulatory gaps or 'grey areas', and does it require regulatory intervention?
 - Would generic protections, such as the ACL, provide the level of regulatory detail necessary to address identified areas of detriment? What would be the benefits and costs of this approach?
 - Would there be any unintended consequences, risks and challenges from extending the application of the ACL to address regulatory gaps for fundraising activities? If so, how could they be addressed?
3. Would extending the ACL to all fundraising activities be necessary or desirable to facilitate potential reforms of state and territory fundraising regulation?

1.2.4 Who is protected under the ACL?

4. Should the \$40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?
5. What goods or services would be captured that are not already?

1.2 Scope and coverage of the ACL (continued)

1.2.5 Exemptions under the ACL

6. Are there other priority exemptions that are not discussed in this chapter that should be considered? If so, what are these and why should they be considered?

1.2.6 Interaction between the ACL and ASIC Act

7. Should the ASIC Act be amended to explicitly apply its consumer protections to financial products?
8. What would suppliers of financial products need to change to achieve compliance, and what benefits or impacts would there be for businesses and consumers?
9. Are there any unintended consequences, risks or challenges in doing so?

2.1 Consumer guarantees (pages 43-69)

2.1.2 'Acceptable quality' for goods

10. Could the issues about the durability of goods be addressed through further guidance and information?
11. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance? For example, the cost of returning rejected goods, including what may constitute 'significant' cost?
12. If they are not suited to this approach, why not? For example, do the issues (such as the costs of technicians or returning a good) require further legislative clarification, or should the status quo remain to ensure a high level of flexibility?
13. What more, if anything, can be done to encourage businesses to provide more information about the durability of their products? What, if any, further guidance on durability is feasible while still allowing important differences between goods of a certain type to be recognised?

2.1.4 Lack of clarity about 'major failures' & 2.1.5 Industry-specific concerns

14. Can issues about the acceptable quality of goods that are raised in particular industries be adequately addressed by generic approaches to law reform, in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?
15. What kinds of industry-specific compliance and education activities should be prioritised in the context of finite resources?
16. In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a 'major' failure? If so:
 - What are these circumstances, and should they be defined, or deemed, to be major failures? For example, should there be discretion for courts to determine the number of 'non-major failures' or type of safety defect that would trigger a 'major failure'?
 - Are there any relevant exceptions or qualifications?
17. What are the costs associated with businesses providing refunds in circumstances that are above the costs associated with existing business policies on refunds? What impacts would this have on consumers?

2.1 Consumer guarantees (continued)

18. Are there any unintended consequences, risks or challenges that need to be considered? For example, how would they affect current business policies regarding refunds?

2.1.6 Disclosure of rights under the ACL

19. Is there a need to amend current requirements for the mandatory notice for warranties against defects? If so:

- how should the text be revised to ensure that consumers are provided with a meaningful notice about the consumer guarantees?
- would it, in practice, reduce ongoing costs for business or were they largely incurred when the requirement was introduced?
- would it require any transitional arrangements and, if so, what are the preferred arrangements and why?

20. Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirement?

21. Is there a need for greater regulation of extended warranties? If so:

- is enhanced disclosure adequate or is more required?
- what are the costs of providing general and specific disclosure for businesses? Would disclosure change, in practice, outcomes for consumers?
- what has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)?

22. What guidance and transition arrangements would businesses need?

23. Are there any unintended consequences, risks, or challenges that need to be considered?

24. Are there other ways to address the stakeholder concerns raised, without removing choice and flexibility for consumers?

2.2 Product safety (pages 70-104)

2.2.3 General safety provision

25. What are the key principles for an effective product safety regime?

26. Would a general safety provision in the ACL better meet those principles? Why, or why not?

27. Would a general safety provision provide an effective and proportionate response to concerns raised about the current regime?

- What costs would it impose on business, for example, what processes or practices would need to be changed?
- What impacts would it have on safety outcomes for consumers?
- What, if any, transitional arrangements would be required for businesses?
- Are there any unintended consequences of a general safety provision?

28. Are there any current overseas models, or features of models, that should be considered in any general safety provision? If so, why? Would adaptation be required for the Australian context?

2.2 Product safety (continued)

2.2.8 Performance-based approach to compliance with standards

29. Should a 'performance-based' approach to product safety standards be introduced?
- What changes would businesses need to implement, and what are the associated costs? What impacts would a 'performance-based' approach have for consumers?
 - Are there any unintended consequences, and how could these be addressed?
30. How could the approach be designed? For example:
- Are there any current domestic or overseas models, or features of models, that should be considered?
 - How would it interact with other elements of the current regime, or with a general safety provision?
 - What, if any, transitional arrangements would be required for businesses?

2.2.10 Mandatory reporting requirements

31. Should the mandatory reporting triggered be clarified? If so:
- How should this be achieved?
 - What changes would businesses need to implement to their current reporting processes, and what impact would this have on their compliance costs?
 - How would this affect the information that is available to regulators, and product safety outcomes for consumers?
32. Should the current timeframe for making a mandatory report be extended? If so:
- What time period should apply?
 - Should it be accompanied by other requirements, for example, immediate notification?
 - What changes to businesses processes would be needed, and what would be the impact on compliance costs?
 - What, if any, transitional arrangements would be needed?
 - Are there any unintended consequences, and how could these be addressed?

2.2.12 Product bans and recalls

33. Should a statutory definition of a voluntary recall be introduced? Would this address the concerns raised? If so:
- How should a voluntary recall be defined?
 - What factors or criteria should be included?
34. Should the penalty for a failure to notify a recall be increased and, if so, to what amount?
35. Should current processes for implementing product bans and recalls be streamlined? If so:
- How should they be streamlined?
 - What would be the associated benefits and costs?
 - Are there any unintended consequences, risks or challenges that need to be considered?

2.2 Product safety (continued)

2.2.13 Public information about unsafe products

36. Is there scope to improve the quality of information available to consumers on safety risks? If so:
- What are the benefits of increased information, and what costs, risks or challenges need to be considered?
 - What information is most helpful to consumers, and how should it be used? In a context of finite resources, what information should be prioritised?
 - How could this be achieved? For example, in what format should information be provided?

2.3 Unconscionable conduct and unfair trading (pages 105-116)

2.3.2 Are the provisions working effectively?

37. Is allowing the law on unconscionable conduct to develop an appropriate and proportionate response to the issues raised, and to future issues that may arise?
38. What are the consequences, risks and challenges of maintaining the status quo, compared with changing the law or codifying existing principles? Are there any better approaches that would address the issues raised while allowing concepts to develop in a flexible way?

2.3.3 Unconscionable conduct and publicly listed companies

39. Is it appropriate to continue to exclude publicly listed companies from the unconscionable conduct provisions and, if so, why?
40. Should the unconscionable conduct provisions be extended to publicly listed companies?
- What are the benefits for publicly listed companies?
 - What changes would other business need to make to their existing business practices and what are the associated costs?
 - Should the protections be extended to all publicly listed companies, or are some exceptions appropriate?
 - Are there any unintended consequences, and how could these be addressed?

2.3.4 Unfair trading

41. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?
42. Is there further evidence of a gap in the current law that justifies an economy-wide approach?

2.4 Unfair contract terms (pages 117-132)

2.4.2 Unfair terms in insurance contracts

43. Should the ASIC Act's unfair contract terms protections be applied to contracts regulated under the Insurance Contracts Act? If so:
- How should it be designed? For example, should it apply to all types of insurance contracts, or are some exemptions appropriate? Would any changes to the definition of 'main subject matter' be required? Would the same types of terms be considered 'unfair'?
 - What this result in any likely changes to the insurance contracts that are offered to consumers? For example, to what extent would this option address the issues or examples of unfair terms raised by stakeholders?

2.4 Unfair contract terms (continued)

- What would be the compliance costs of changing insurance contracts, and how would these affect consumers?
- What, if any, transitional arrangements would be required?
- Are there any unintended consequences, and how could these be addressed?

2.4.6 Monetary penalties

44. Should the use of terms previously declared 'unfair' by a court be prohibited? If so:

- What should be the extent of the prohibition? For example, would it only apply to identical or similar standard form contracts, within a particular sector, or more broadly?
- Would this increase the deterrent effect of the unfair contract terms provisions?
- What penalties and remedies should apply?
- What, if any, transitional arrangements would be required? How should business be made aware of contract terms that have been declared 'unfair'?
- Are there any unintended consequences, challenges or risks that need to be considered?

2.4.7 Representative actions by regulators

45. Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be appropriate enforcement tool? If so, what should be the scope of this power?

46. Are there any unintended consequences, challenges or risks that need to be considered?

2.4.8 Legislative examples of unfair terms

47. Should the 'grey list' of examples of unfair contract terms be expanded? If so:

- What examples should be added?
- Would this help address systemic issues or provide greater clarity for businesses and consumers?
- Are there any unintended consequences, risks or challenges that should be considered?

2.5 Unsolicited consumer agreements (pages 133-152)

2.5.4 Concerns about the level of regulation & 2.5.5 Concerns about vulnerable and disadvantaged consumers

48. What are your views on maintaining the current unsolicited selling provisions? Is there another approach that would provide a more effective and proportionate response? If so, how?

49. Are there any unintended consequences, risks or challenges that should be considered?

50. Should the cooling-off period be replaced with an opt-in mechanism? If so:

- How should it be designed? For example, should it apply to all unsolicited sales or only high-risk sales? How should 'high-risk' sales be defined?
- What would be an appropriate length of the opt-in period?
- Should there be any exemptions?
- What is the likelihood that consumers would exercise an 'opt in' right? What impact would this have on sales across all sectors that engage in unsolicited selling, and what difference would this make to consumers?

2.5 Unsolicited consumer agreements (continued)

51. Should additional rights and protections apply to the unsolicited sale of enduring service contracts?

If so:

- How should it be designed? For example, what rights should apply? How would 'enduring service contract' be defined? Are there any appropriate exemptions to consider?
- What should be the length, for example, of an extended cooling-off period? When should a termination right cease to apply?
- What, if any, transitional arrangements would be required, and which industries engaging in unsolicited selling would be most affected?
- Are there any unintended consequences, and how could these be addressed?

52. Should an enhanced 'risk-based' approach to unsolicited consumer agreement protections be adopted? If so:

- How should it be designed? For example, what would differentiate low-risk from high-risk sales? What different set of rights and protections would apply?
- What impacts would this have on sales across all sectors that engage in unsolicited selling, as distinct from direct selling?
- How would this affect outcomes for consumers?

53. Can these matters be addressed through further guidance or is legislative change warranted?

3.1 Implementing the Australian Consumer Law and its objectives (pages 153-172)

3.1.3 Barriers to accessing information

54. What enhancements to existing communication channels would be most useful, and what is the level of consumer need? In a context of finite resources, what should be prioritised?

55. To what extent would a standalone version of the ACL be used by consumers and businesses? How should it be formatted, and what additional information (if any) should it contain?

56. Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?

3.1.4 Access to remedies

57. What are your views on an expanded 'follow-on' provision, and the extent to which it would assist private litigants?

58. What, if any, unintended consequences, risks and challenges should be considered? For example, would this option affect the extent to which businesses are prepared to make admissions of fact?

59. Are there any other ways that ACL regulators can support private litigants, noting the existence of other review processes?

3.1.6 Access to consumer transaction data

60. What kind of evidence base is required for future policy development, and what is the most useful way to engage stakeholders about future research and data needs?

61. Are there other ways that ACL regulators can support stakeholder engagement in policy development?

62. Are there further ways for stakeholders to contribute and share their research and data with the wider community?

3.2 Penalties and remedies (pages 173-187)

3.2.3 Maximum financial penalties

63. Are the current maximum financial penalties adequate to deter future breaches of the ACL? Would an increase be an appropriate response to the issues raised?

- If so, what approach should be adopted?

64. Are there alternative approaches to addressing the issues raised?

65. Are there any unintended consequences, challenges or risks that should be considered?

3.2.5 Effectiveness of non-punitive orders

66. Should traders be allowed or required to use third parties to give effect to a community service order? If so

- How should this arrangement be designed? For example, under what circumstances would it apply? Which third parties should be allowed to give effect to a community service order? What requirements should be placed on them?
- What would be the benefits of such an arrangement for the party in breach, and for consumers?
- Are there any unintended consequences, challenges or risks that need to be considered?

67. Are there other types of non-punitive orders to which this could apply?

4.1 Purchasing online (pages 188-202)

4.1.5 Pricing and safety information

68. Are current measures sufficient to ensure price transparency in online shopping?

69. Should measures to address pre-selected options during booking or payment processes be adopted? If so:

- How should these be designed? For example, should pre-selected options be prohibited, or should any associated fees or charges be required to be included in the upfront price?
- Are the changes that would be required for websites and booking processes significant? What would be the costs of such changes? What transitional arrangements, if any, would be required?
- Are there any unintended consequences, and how could these be addressed?

4.1.6 Application of the consumer guarantees in the online environment

70. Should the sale-by-auction exemption for consumer guarantees be amended with regard to sales by online auction sites? If so:

- How should this be designed? For example, should the exemption be clarified, narrowed or removed altogether?
- Would it require online auction sites to change their existing processes and policies substantially, and if so, what are the costs of doing so and any transitional arrangements that may be required? What are the impacts for consumers?
- Are there any unintended consequences, and how could these be addressed?

APPENDIX C: NON-CONFIDENTIAL SUBMISSIONS

Accord Australasia	Bebbington, Mr Bruce
Advertising Standards Bureau	Blums, Mr Andris
Airline Customer Advocate	Bonwick, Mr Monte
Allens	Business Council of Australia
Anonymous 1	Cancer Council Queensland
Anonymous 2	Caravan Camping and Touring Industry and Manufactured Housing Industry Association of NSW
Anonymous 3	Caravan Industry Association of Australia
Arnold Bloch Leibler	Clamers, Mr Alan
Australia and New Zealand Ombudsman Association	Chartered Accountants Australia and New Zealand
Australian Association of National Advertisers	CHOICE
Australian Automotive Aftermarket Association	Clarke, Mr Philip H
Australian Automotive Dealer Association	Commercial and Property Law Research Centre, Queensland University of Technology
Australian Chamber of Commerce and Industry	Commercial Vehicle Industry Association of Australia
Australian Charities and Not-for-Profits Commission	Communications Alliance
Australian Communications and Media Authority	Community Council for Australia
Australian Communications Consumer Action Network	Consult Australia
Australian Finance Conference	Consumer Action Law Centre
Australian Food and Grocery Council	Consumer Credit Legal Service WA
Australian Furniture Removers Association	Consumer Electronics Suppliers Association
Australian Industry Group	Consumers' Federation of Australia
Australian Institute of Architects	CPA Australia
Australian Institute of Company Directors	Customer Owned Banking Association
Australian Newsagents' Federation	Daly, Dr Angela and Scardamaglia, Dr Amanda
Australian Retailers Association	Direct Selling Australia
Australian Small Business and Family Enterprise Ombudsman	eBay
Australian Tattooists Guild	Energy and Water Ombudsman NSW
Australian Toy Association	Energy and Water Ombudsman Victoria
Baker & McKenzie	EnergyAustralia
	Engineers Australia
	Ethnic Communities Council of NSW

Federal Chamber of Automotive Industries
 Financial Counselling Australia
 Financial Rights Legal Centre
 Fundraising Institute of Australia
 Goulburn Valley Community Legal Centre and
 Loddon Campaspe Community Legal Centre
 Governance Institute of Australia
 Groupon
 Guenther, C and Lyons, M J
 Housing Industry Association
 Howlett, Ms Gwendolyn
 Industry Super Australia
 Insurance Australia Group
 Insurance Council of Australia
 Interactive Games and Entertainment
 Association
 Justice Connect Not-for-profit Law
 Justice Connect Referral Service
 Law Council of Australia
 Law Council of Australia Legal Practice Section
 Law Institute Victoria
 Law Society of NSW
 Law Society of WA
 Legal Aid NSW
 Legal Aid Queensland
 Legal Services Commission of SA
 Lemon Laws 4 Aus
 Lewins, Ms Kate
 Lewis, Mr Rodney
 Master Electricians Australia
 Melbourne Social Equity Institute
 Melbourne University — Associate Professor
 Jeannie Paterson and Professor Elise Bant
 MGA Independent Retailers
 Middleton, Mr Thomas
 MinterEllison
 Motor Trade Association of SA
 Motor Trade Association of WA
 Motor Traders' Association of NSW
 Motor Trades Association of Australia
 Motor Trades Association of Queensland
 Norton Gledhill
 Nottage, Mr Luke
 NSW Business Chamber
 Obesity Policy Coalition
 Office of the NSW Small Business
 Commissioner
 Office of Multicultural Interests WA
 Petre, Ms Clare
 Product Safety Solutions
 Prolegis Lawyers
 Public Fundraising Regulatory Association
 Public Transport Ombudsman Victoria
 Queensland Consumers Association
 Queensland Law Society
 Ramsay, Mr Duncan
 Real Estate Institute of New South Wales
 Red Energy and Lumo Energy
 Redfern Legal Centre
 Retail Council
 Robertson, Mr James
 Robinson, Dr Dorothy
 Rodan + Fields
 Sales Assured
 Seddon, Mr Nick
 Senior Rights Service
 Shopping Centre Council of Australia
 Sise, Mr Peter
 Slater + Gordon Lawyers
 Small Business Commissioner SA
 Small Business Development Corporation
 Smith, Mr Neil
 South Australian Independent Retailers

Spier, Mr Hank
Standards Australia
Strata Community Australia (Qld)
Suncorp
Telecommunications Industry Ombudsman
Tony Davis & Associates
Uber Australia
Unit Owners Association of Queensland

Incorporated
Victorian Automobile Chamber of Commerce
Victorian Caravan Parks Association
Victorian Small Business Commissioner
WEstjustice Western Community Legal Centre
Wood, Mr Ashton
WorldVentures
Wright, Mr David

APPENDIX D: STAKEHOLDER ROUNDTABLES AND MEETINGS

Australian Industry Group	Federation of Community Legal Centres Victoria
Business Council of Australia	First Nations Foundation
Carolyn Bond AO	Groupon
Canberra Business Chamber	Dr Tess Hardy, Melbourne University
CCL Consultants	Independent Supermarket Retailers Guild of South Australia
CHOICE	Kidsafe SA
Professor Sharon Christensen, Queensland University of Technology	Kidsafe WA
Consumer Action Law Centre	Law Council of Australia Competition and Consumer Committee
Consumer Advisory Committee (WA)	Law Institute of Victoria
Consumer Credit Legal Service (WA)	Law Society of NT
Consumer Regulator Forum (Qld)	Law Society of SA
Consumer Utilities Action Centre	Law Society of WA
Council of Social Services (ACT)	Legal Aid NSW
Council of Social Services (NSW)	Legal Aid Commission of NT
Council of Social Services (SA)	Legal Aid Queensland
Council of the Ageing (NT)	Legal Services Commission of SA
Professor Stephen Corones, Queensland University of Technology	Melbourne University
Darwin Community Legal Service	Dr Jim Minifie, Grattan Institute
Dell Australia	Motor Trades Association of the ACT
Department of Infrastructure and Regional Development (Cth)	Motor Trades Association NSW
Department of Economic Development, Jobs, Transport and Resources (Vic)	Motor Trades Association NT
Department of Health (Cth)	Motor Vehicle Industry Advisory Committee WA
Department of Industry, Innovation and Science (Cth)	National Retail Association
Department of Justice and Regulation (Vic)	Office for the Ageing SA
Direct Selling Australia	Associate Professor Jeannie Paterson, Melbourne University
Disability Rights Advocacy Service	People with Disabilities WA
Thomas Duggan SC	Queensland Office of Fair Trading Stakeholder Forum
Financial Rights Legal Centre	Real Estate Institute of NSW
Food Safety Australia and New Zealand Energy and Water Ombudsman Victoria	Real Estate Institute of Western Australia

Retail Council

Redfern Legal Centre

Senior Rights Service

Australian Small Business and Family
Enterprise Ombudsman (Cth)

Office of the NSW Small Business
Commissioner

Small Business Commissioner (SA)

Small Business Commissioner (Victoria)

Small Business Development Corporation
(WA)

Dr Rhonda Smith, Melbourne University

Standards Australia

Ray Steinwall, Novartis

Super Retail Group

Therapeutic Goods Administration

Uber

UnitingCare Wesley Bowden

Victorian Automobile Chamber of Commerce