



30 August 2016

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

Dear Commission

Productivity Commission Issues Paper – Consumer Law Enforcement and Administration

The Consumer Action Law Centre (**Consumer Action**) is pleased to provide comment in response to the Productivity Commission *Issues Paper – Consumer Law Enforcement and Administration (Issues Paper)*.

The Productivity Commission study of Australia’s consumer protection framework will provide an important supplement to the review of the Australian Consumer Law (**ACL**) currently being undertaken by Consumer Affairs Australia and New Zealand (**CAANZ**). While substantive law reform is needed to strengthen consumer protection in Australia, significant gains can also be made by improving the administrative and enforcement arrangements that have existed since the ACL took effect in January 2011.

The Issues Paper asks two fundamental questions:

1. How well is the multi-regulator model working and how could it be improved?, and;
2. How effective are the specialist safety regimes, and how well do they interface with the ACL?

In relation to the first question, Consumer Action believes there is significant potential for greater communication, coordination and consistency amongst ACL regulators. Given the broad remit and relatively low funding of ACL regulators, it is essential that they work cohesively and efficiently to maximise resources and ensure that the ACL plays the role it was designed to fulfil—not just in the interests of individual consumers, but also in the interests of the broader economy and society.

While Consumer Action remains broadly supportive of the multi-regulator model, we do see a significant distinction between the national and state based regulators—state based regulators are generally less proactive in enforcing the ACL, report less useful enforcement data and make less

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use of the media to publicise their actions. That said, a lack of easily available and consistently reported enforcement data makes thorough assessment of regulators difficult.

Through the course of this submission, we draw heavily on our 2013 report, *Regulator Watch – The Enforcement Performance of Australian Consumer Protection Regulators (Regulator Watch)*. While we would have preferred to draw on more current data, we have found that many of the issues identified in Regulator Watch persist—and therefore the recommendations made in that report remain relevant and speak directly to the points raised in the Issues Paper. To that end, we attach a copy of Regulator Watch as **Appendix A** to this submission.

The key recommendations made in Regulator Watch were:

- The quantity of enforcement work could be increased across all ACL regulators.
- With the exception of the Australian Securities and Investments Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**), the reporting of enforcement work is poor—particularly in the ACT, NT, QLD, SA and TAS. This should be improved, as full and transparent reporting enables third parties to assess the effectiveness of regulation, and improves regulator accountability.
- Regulators should develop processes to better work with vulnerable and disadvantaged consumers—particularly as witnesses.
- Regulators could make better use of the media to improve the profile and visibility of regulation, and create a culture of compliance.
- Regulators should improve their mechanisms for reporting to consumer organisations, to regularly and routinely report on outcomes of complaints made by or through those organisations.
- Regulators and the governments to which they are accountable should ensure that model litigant policy does not interfere with regulators’ ability to use their enforcement powers to protect consumers, and where appropriate, test the law.

Beyond the recommendations made in Regulator Watch, we have concerns that the Australian Consumer Law Intelligence Network Knowledge (**ACLINK**) is not working as effectively as it could, with information and data not being automatically shared. To that end, we are hopeful that the National Sentinel Pilot Program: Automotive Industry, will produce a useful analytics platform which can then be applied across other areas of enforcement, and enable better coordination between ACL regulators.

We also note the New South Wales Office of Fair Trading (**NSW OFT**) complaints register, which has only recently been published.¹ Early indications suggest that the register has had a significant impact on some businesses. In our view, ‘naming and shaming’ problematic traders to better inform consumers should encourage a culture of compliance, and the concept should be adopted by all

¹ See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/Public_Register/FT_Public_Register.htm

ACL regulators—for compilation in a national register. A well-functioning market depends upon well-informed consumers who are able to make rational choices in their own best interests. A national complaints register, well publicised, could assist in achieving that outcome.

In a similar vein Consumer Action strongly recommends that consideration be given to the notion of a ‘super complaints’ power for bodies who are deemed to represent the interests of consumers. This would expand the influence of the ACL by empowering consumer advocates to act on behalf of consumers, thus overcoming the barriers that often prevent consumers from pursuing legitimate complaints. Stronger, more informed and more proactive action on behalf of consumers could act to address the power asymmetry that tends to characterise many consumer markets—improving the effectiveness of the ACL, in the process.

In relation to the various specialist safety regimes and their interaction with the ACL, Consumer Action is concerned that Australia’s product safety regimes are generally too reactive and often require serious harm—such as a fatality, serious injury or significant property damage—before regulators intervene. Major reform is required in this area of Australia’s consumer protection framework and we reiterate recommendations made in our submission to the CAANZ *Australian Consumer Law - Issues Paper* in May this year. In that submission, Consumer Action called for:

- the introduction of a general safety provision into the ACL,
- a mandatory requirement to publicly report serious injury or illness caused by products,
- incorporation of voluntary standards into mandatory product safety standards, and;
- clearer consumer protection objectives for industry-specific regulators—including better protocols for collaboration between regulators.

Inconsistency between various state jurisdictions and poor communication between regulators can result in slow moving intervention, such as that seen earlier this year in relation to hover boards. In that example, the then Victorian Consumer Affairs Minister, Jane Garrett, called for an interim national ban on sales of the product on 5 January²—yet a national ban was not applied by the Federal Assistant Treasurer until 18 March³, despite the destruction of two homes through fires caused by the devices.

Beyond safety regulators, industry-specific regulators can create problems for the effective administration and enforcement of consumer law. Our experience is that where industry-specific regulators regulate particular sectors, they can tend to focus on “process” matters (i.e. registration, licensing, auditing) rather than consumer outcomes. Similarly there can be a bias towards working with industries when enforcement action may be more effective. The Productivity Commission could investigate the effectiveness of regulator performance frameworks as a means to overcome this bias. Our concern is that these frameworks tend to focus on the cost of regulation for industry, rather than the outcomes for consumers.

Finally, while the Issues Paper does not touch on the issue, the Commission should examine the role of individual complaints-handling and dispute resolution by, in particular, the state fair trading agencies. There is a lack of transparency about outcomes for individuals of complaints-handling.

² See: <http://www.abc.net.au/news/2016-01-06/hoverboard-safety-blitz-as-victoria-floats-possible-ban/7069944>

³ See: <http://kmo.ministers.treasury.gov.au/media-release/027-2016/>

This can be contrasted with sectors which have industry ombudsman schemes to manage individual complaints.

Our further comments are outlined below.

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

More enforcement action, and better reporting

Consumer Action is concerned that levels of consumer protection in Australia are not as high as they could be, and that state-based regulators in particular are failing to fulfil the potential of the ACL and the multi-regulator model.

While under-resourcing is a significant issue (and should not be dismissed lightly), there is capacity for the culture of enforcement to be strengthened at many ACL regulators—particularly in terms of how much enforcement work is undertaken, and the manner in which it is reported. By failing to adequately report their activity, regulators fail to optimise the culture of compliance that they should be encouraging. More thorough and consistent reporting would make regulators more accountable to industry, consumer advocates and the public generally.

Similarly, Consumer Action believes that (with the exception of the ACCC and ASIC), most ACL regulators should make far better use of the media to publicise their actions and enforcement activity. The potential of media coverage to raise the profile of the consumer protection framework cannot be over-stated, and can go some way towards filling the shortfall in regulator resourcing.

It appears that some ACL regulators do not have a practice of issuing press releases when they commence or conclude litigation. For example, during 2015 Consumer Affairs Victoria took legal action against The Good Guys, with a significant judgment handed down in February 2016. Despite this, CAV has not appeared to make any public statements about this litigation on its website. This can be contrasted with the approach of the ACCC or ASIC, whose practice it is to issue a media release at the initiation and conclusion of any legal action. Issuing media releases can help ensure that the public understand the consumer law provisions, and the concerns of regulators about particular practices. We note that the ACCC has recently consulted on the establishment of a media code of conduct, to provide certainty among stakeholders of its approach to publicity of investigations, legal action and other activities. This media code is balanced and sensible, and should be adopted by all consumer regulators. Stronger use of the media would more effectively leverage the deterrent potential of the ACL, and would promote a culture of compliance.

In Regulator Watch, Consumer Action recommended that regulators report information that was:

- comprehensive,
- frequent and timely,
- consistent, and
- accessible.⁴

⁴ Renouf, Gordon and Teena Balgi, *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, Consumer Action Law Centre, March 2013, p. 46

Regulator Watch recommended that at a minimum, all regulators should report a “big picture” overview of enforcement actions, (including the total number of actions for each enforcement power granted to the regulators), and the total number of actions for each of the main types of wrongdoing identified by the ACL. Regulators should also report the total number of actions per regulated industry, and provide cross tabulation of these respective totals. When reporting on litigation the report should include the number of litigation matters commenced during the period, and reporting should also provide qualitative information about court cases (other than high volume, minor or routine matters), in addition to any other significant action (such as an enforceable undertaking with a medium or large business). This would include—at least—the type of action taken, the section of law breached, the size and type of the defendant and the quantum involved.

Ideally, CAANZ would develop a standard reporting template that could be used by all ACL regulators, which would enable easy and effective comparisons to be made. While CAANZ has issued annual progress reports of the implementation of the ACL,⁵ including highlights of enforcement and other regulator activities, this reporting does not appear to be comprehensive. More comprehensive and standard reporting would have value both in identifying where enforcement activity needs to be bolstered (potentially through the provision of additional resourcing), in identifying geographical trends in business misconduct, and also in facilitating knowledge sharing between ACL regulators.

Consumer Action notes the National Sentinel Pilot Program currently being undertaken in New South Wales, with a focus on the automotive industry. The NSW OFT web-site describes Project Sentinel as:

Project Sentinel is a NSW initiative designed to deliver an operational analytics platform which transforms and integrate multiple sources of data into a single user friendly environment and provide a range of analytic tools to develop understanding and meaning from the data. Project Sentinel seeks to deliver an analytics platform that would greatly improve regulators’ ability to share information and identify consumer issues in the marketplace at a national level. ACL Regulators have agreed to a proof-of-concept trial of the operational analytics platform developed by the NSW Project – this trial, known as the National Sentinel Pilot Program, seeks to assess non-compliance in the automotive industry at the national level. If successful, the ACL Regulators have agreed to consider developing a shared operational analytics capability.⁶

Consumer Action is strongly supportive of this initiative, and (depending on the success of the pilot), it may form the basis for a common reporting framework across all areas of consumer law—enabling far greater communication and collaboration between the various ACL regulators.

The effectiveness of the “single law, multiple regulator” model ultimately depends upon that law being consistently applied across the various regulators, both in terms of the circumstances in which it is applied and how it is used—which in turn requires effective knowledge sharing. While the Australian Consumer Law Intelligence Network Knowledge (**ACLINK**) has been established to

⁵ See: <http://consumerlaw.gov.au/the-australian-consumer-law/implementation-2/>

⁶ See: http://www.fairtrading.nsw.gov.au/ftw/About_us/Our_compliance_role/Our_compliance_priorities/ACL_national_compliance_projects.page

serve that purpose, there does not appear to be a positive requirement for regulators to share information via ACLINK⁷—and without some form of automated positive sharing requirement the system is unlikely to deliver optimum results. Certainly, the recommended reporting framework would provide useful information to be disseminated amongst regulators, through ACLINK.

The Australian National Audit Office (**ANAO**) also recently recommended that the ACCC examine the merit of regularly obtaining complaints data feeds from other ACL regulators.⁸ The ACCC has endorsed this recommendation and we encourage the Commission to consider how ACL regulators can bolster future information sharing between agencies.

In our view, regulator reports should be provided by all regulators at least quarterly (the NSW OFT and ACCC already publish quarterly bulletins of enforcement statistics, demonstrating that this requirement can be met),⁹ and should be readily available to the public and easily available on regulator web-sites—both in a comprehensive and summary form. As it currently stands, the reporting practices of the ten ACL regulators vary greatly. This was the case in 2013 when *Regulator Watch* was written, and has not improved in the period since. As far as Consumer Action can ascertain, levels of enforcement have either plateaued or declined since 2013. We are currently compiling our findings and will forward as a separate **Appendix B to this submission, in the coming days**. The lack of transparent, publicly available and consistently reported data has made this task difficult.

Achieving a common ACL regulator enforcement activity reporting template through CAANZ, (potentially derived from Project Sentinel), and making that enforcement information publicly available at least quarterly would make it easier for third parties to assess and compare the effectiveness of the various regulators—and should also enhance collaboration and communication between the ACL regulators themselves. This would particularly be so, if ACLINK was used to automatically share data. This in turn would enhance ACL agencies' capacity to act both together and individually to achieve compliance with the ACL, as envisaged by the Compliance and Enforcement Guide prepared by CAANZ.

Complaints register

At the time of writing the NSW OFT complaints register has only recently gone live, its first data set describes complaints received by the NSW OFT in July 2016. The complaints register is an online resource with a dedicated webpage¹⁰, describing itself in the following terms:

The NSW Fair Trading Complaints Register provides information about businesses that are the subject of 10 or more complaints received by Fair Trading in a calendar month. The Register is updated monthly and only includes complaints considered by Fair Trading to have been made by a real person, relating to a real interaction with a business.

⁷ Renouf, Gordon and Teena Balgi, *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, Consumer Action Law Centre, March 2013 p 40.

⁸ See: https://www.anao.gov.au/sites/g/files/net1661f/ANAO_Report_2015-2016_23.pdf

⁹ Renouf, Gordon and Teena Balgi, *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, Consumer Action Law Centre, March 2013 p. 48

¹⁰ See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/Public_Register/FT_Public_Register.htm

As you browse through the Complaints Register, you'll find the following information about the businesses listed:

- the name of the business
- the number of complaints NSW Fair Trading has received about the business in the last month
- the product groups complained about – click on the business name to display the types of products Fair Trading has received complaints about for that business.

For privacy reasons, the Register does not disclose any detailed information on a specific complaint, nor name any person who has made a complaint. Detailed information on how the Complaints Register works can be found in the Guidelines (PDF size: 240kb).¹¹

The Guidelines referred to above clearly articulate the purpose of the complaints register, and provide practical advice for consumers on how the complaints register works, and how it is best used. Usefully, the Guidelines also describe how the NSW OFT deals with complaints, and is clear about the limitations of the data provided.

Under the heading, *Why have a public Complaints Register?*, the Guidelines state:

NSW Fair Trading currently receives over 45,000 complaints each year and holds a wealth of information about businesses (also known as traders) operating in the marketplace. Section 9 of the Fair Trading Act 1987 gives the Commissioner for Fair Trading power to provide information and advice to consumers, enforce fair trading laws, and receive and deal with complaints relating to the supply of goods or services.

Making some complaints information publicly available is likely to provide an incentive for businesses to deliver better customer service, and help consumers make informed decisions about where to shop.

The Complaints Register is also part of the NSW Government's commitment to open data, which recognises that information is crucial for the economy and community to function efficiently. In the digital economy, open data is a driver of economic growth and innovation.

Data in the Complaints Register can be used to:

- improve services
- inform the community about trends in the market
- create new business models; and
- devise innovative ways to help consumers gain better value in the marketplace.¹²

In addition to those dot points, Consumer Action would add that the complaints register serves an important purpose in warning consumers of traders who may be predatory or exploitative, or otherwise causing ongoing consumer detriment.

Early indications suggest that the NSW OFT complaints register is having a significant experience on some business, to the benefit of consumers. Since March 2016, there has been a 43 percent

¹¹ See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Complaints_Register_Guidelines.pdf

¹² See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Complaints_Register_Guidelines.pdf

reduction in complaints about traders who were routinely reaching the threshold for the register.¹³ This suggests that the initiative ought to be replicated by all ACL regulators. It would then be a simple step to collate data into a national complaints register providing monthly comprehensive data nationwide—and putting industry on notice that if complaints pre-dominate, then this will be publicly known. A national complaints register could also leverage the collective resources of the various ACL regulators, enabling the register to be widely promoted and generating a higher profile for the concept of consumer complaints generally.

Super complaints

Super complaints are a statutory concept which originated in the UK enabling organisations deemed to be representative of consumer interests to lodge complaints on behalf of classes of consumers, and have those complaints fast-tracked within the relevant regulator.

Super complaints are defined in section 11(1) of the UK's *Enterprise Act 2002*, as complaints submitted by a designated consumer body alleging that “*any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers*”.

Complaints may address the conduct of suppliers or traders, or customers of those suppliers or traders which negatively affect consumer interests—or the structure of the market itself, including any aspect of that structure.

Super complaints may only be lodged by bodies designated by the Secretary of State for Business, Innovation and Skills (**Secretary**) under section 11(5) of the *Enterprise Act 2002* (UK). Section 11(6) of the *Enterprise Act 2002* (UK) further requires that the Secretary must designate a body eligible to make super complaints “*only if it appears to him to represent the interests of consumers of any description*”. Bodies approved to make super complaints in the UK include Which?, the National Consumer Council, Citizens Advice, Energywatch, the Consumer Council for Water, Postwatch, CAMRA and the General Consumer Council for Northern Ireland.

Super complaints can result in a number of outcomes including regulators taking enforcement action under competition or consumer law, launching market studies, recommending government action or action by another regulator or organisation, brokering voluntary changes with industry or finding the complaint requires no action—amongst others. Importantly, the government must respond within 90 days to the regulator; this is a particularly helpful aspect if the regulator's analysis is that the matter requires government action to remedy the consumer problem.

Since it was first introduced, the super complaint concept has been extended in the UK to apply to the finance sector through the *Financial Services and Markets Act 2000* (UK) (**FSMA**). The FSMA stipulates that designated consumer bodies may complain to the UK Financial Conduct Authority (**FCA**) about features of the UK financial services market which may significantly damage the interests of consumers. In March 2013 HM Treasury issued a thirteen page document titled *Guidance for bodies seeking designation as super-complainants to the Financial Conduct*

¹³ Personal communication.

*Authority*¹⁴, and received and approved applications from the Consumer Council Northern Ireland, Citizens Advice, The Federation of Small Businesses and Which?.

In Australia, there has been a trial of the super-complaints process. In 2012, CHOICE entered into an 18-month super-complaints trial with NSW Fair Trading via a memorandum of understanding. CHOICE lodged two super complaints under the trial—the first in March 2012 into commercial electricity switching sites in NSW¹⁵ and the second in August 2013 into free-range egg claims in NSW.¹⁶ The trial appears to have been effective at driving policy debate around some intractable or difficult consumer issues. In particular, the trial helped put the issues on the national consumer affairs agenda. A national super-complaints process would help ensure consumer problems progress at the national level, where they can risk stalling and not producing consumer benefit.

It has been suggested that given consumer organisations have strong working relationships with consumer regulators, that a super-complaints process is not necessary. While we agree that consumer regulators generally do respond to issues identified by consumer organisations, a super-complaints process can institutionalise this and provide transparency around these sort of investigations and consequent remedies. The public nature may also enhance the strategic market analysis undertaken by regulators.

Consumer Action is strongly supportive of the concept of super complaints and believe it could be adopted both through the ACL, and the ASIC Act. Enabling consumer advocacy organisations to act on behalf of consumers in this manner could provide an important counter-weight to the asymmetries that exist in many markets, and would better leverage Australia's consumer protection regime for the benefit of consumers. Super complaints would also address the resourcing constraints that currently limit ACL regulators, by enabling consumer advocacy organisations to take up the proactive 'issue spotting' and market monitoring work—and then feed that through to regulators for assessment and enforcement.

2. How effective are the specialist safety regimes, and how well do they interface with the ACL?

In Consumer Action's view the specialist safety regimes and the approach to product safety generally represent a major weakness in Australia's consumer protection framework. This area requires significant reform, most notably the introduction of a general safety provision into the ACL, a mandatory requirement to publicly report serious injury or illness caused by products, incorporation of voluntary standards into mandatory product safety standards, and clearer consumer protection objectives for industry-specific regulators—including better protocols for collaboration between regulators. The lack of a genuinely cohesive approach to product safety between the various ACL regulators results in slow moving and anomalous responses—such as that in relation to hover-boards in early 2016, as identified earlier in this submission.

¹⁴ See: <https://www.gov.uk/government/publications/guidance-for-bodies-seeking-designation-as-super-complainants-to-the-financial-conduct-authority>

¹⁵ See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Problems_with_electricity_switching_sites.pdf

¹⁶ See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Choice_super_complaint_on_free-range_egg_claims.pdf

Consumer Action has had the benefit of reviewing CHOICE's submission to the Issues Paper, and strongly endorses the comments made by CHOICE regarding the specialist safety regimes and their interface with the ACL.

Further, we reproduce below a portion of our submission to CAANZ in response to the *Australian Consumer Law – Issues Paper*, published by them in March 2016. While the CAANZ review had a different focus, it did overlap to some extent with this Issues Paper on the matter of product safety.

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1. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of businesses in today's marketplace?

General safety provision

Consumer Action supports a general safety provision to be included in the ACL, to require all consumer goods to be reasonably safe. We believe that such a provision would enable a more proactive approach by industry to ensure products are safe. While there is a consumer guarantee that requires products to be safe (the guarantee applies to both retailers and manufacturers), 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. A general safety provision would provide an incentive for all suppliers to consider the safety of their products across the supply chain, including design, production and distribution.

A similar idea has been proposed by the Financial System Inquiry (FSI) in relation to the safety and fairness of financial products.¹⁷ The FSI recommended the introduction of a principles-based product design and distribution power which would require suppliers to consider a range of factors when designing products and distribution strategies. In addition to commercial considerations, issuers and distributors will be required consider the type of consumer whose financial needs would be addressed by buying the product and the channel best suited to distributing the product.

The FSI stated that the obligation would cover:

- *During product design, product issuers should identify target and non-target markets, taking into account the product's intended risk/return profile and other characteristics. Where the nature of the product warrants it, issuers should stress-test the product to assess how consumers may be affected in different circumstances. They should also consumer-test products to make key features clear and easy to understand.*
- *During the product distribution process, issuers should agree with distributors on how a product should be distributed to consumers. Where applicable, distributors should have controls in place to act in accordance with the issuer's expectations for distribution to target markets.*
- *After the sale of a product, the issuer and distributor should periodically review whether the product still meets the needs of the target market and whether its risk profile is*

¹⁷ Financial System Inquiry, December 2014, Recommendation 21, available at: <http://fsi.gov.au/publications/final-report/chapter-4/accountability/>.

consistent with its distribution. The results of this review should inform future product design and distribution processes.

A general safety provision could draw on similar concepts to require suppliers to consider the entire supply chain of their products, to ensure that safety is considered at every step.

To 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.” The ACCC has recently taken action against Woolworths in relation to the supply of unsafe goods, relying on an argument that Woolworths engaged in misleading conduct by representing a number of its home-brand products were safe.¹⁸ This was because Woolworths had become aware that various products were unsafe, but it continued to offer them for sale. While this was an innovative argument and action, a general power for the regulator to take action in relation to products that “will or may cause injury” would enable the regulator to be more proactively—it would also ensure the obligation is on the business to ensure it only had safe products for sale.

Mandatory reporting

Sections 131 and 132 of the ACL require a supplier to report incidents where consumer goods have been associated with a death or serious injury or illness of any person. Serious injury or illness is defined to be an acute physical injury or illness requiring medical or surgical treatment by, or under the supervision of, a qualified doctor, nurse or paramedic.

Section 132A of the ACL should be repealed. This provision provides that mandatory product safety reports are confidential, unless the reporter consents to disclosure. Confidentiality undermines the public interest—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 consumer goods.

Consumer Action submits that these mandatory reporting requirements should be strengthened to include a broader range of harm, for example, near misses or other illness or injury that does not require medical treatment. This would ensure the regime acts proactively to prevent harm that might be caused to others.

Incorporation of voluntary standards

Consumer Action also supports better incorporation of voluntary standards into mandatory product safety standards. We agree that this would reduce confusion for suppliers, and ensure that the content of standards are up-to-date.

2. Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be more effective, and how? Should protocols or other arrangements be established between the ACL and specialist regulators?

Consumer Action submits that the dispersal of regulatory responsibilities between state and Commonwealth agencies creates inconsistency and weakens the enforcement of product safety

¹⁸ *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44.

laws. More must be done to ensure regulators communicate better and have the capacity to enforce the same law.

One of the challenges with industry-specific regulators compared to the general consumer law regulators is that they can become too easily focused on industry assistance, rather than consumer outcomes. An example of this is the former Building Commission in Victoria, which was responsible for Victoria's building consumer protection framework. The Building Commission was subject to a number of critical assessments by the Victorian Auditor-General and other oversight bodies over a long period of time. Media and other reports also aired allegations of serious failures of corporate governance, corruption¹⁹ and also that Commission funds have been spent on corporate entertainment for major building firms, suggesting the Commission has been captured by the businesses it should be regulating.²⁰ Following this, the Commission was abolished and replaced with the Victorian Building Authority.

To protect against this sort of outcome, governments should more clearly set consumer protection objectives for industry-specific regulators, and take measures to adopt performance frameworks that focus on regulators' ability to deliver good consumer outcomes.

We would also encourage better protocols and cooperation between regulatory authorities. We acknowledge that this is difficult work, and where there are gaps or overlaps between regulators, there can be a tendency for an organisation to focus on its core work rather than address the risk caused by the gap or overlap. One way to address this would be to ensure that all regulators have the same level of compliance and enforcement powers and authority to deal with likely consumer detriment. Another way to address this is to put greater expectation on regulators to enhance consumer outcomes. The Federal Government's existing regulator performance framework, a 'cutting red tape' initiative, has its focus on reducing regulatory burden on industry participants—it has no focus on consumer outcomes.²¹ We submit that governments should reform regulatory performance frameworks to promote consumer outcomes—regulators should have the resources, power and culture to effectively protect consumers, and they should report publicly on their impact for consumer.”

Regulation of vocational training and the VET-FEE HELP scheme is another example of industry-specific regulation not being aligned with consumer regulation. Over recent years, Consumer Action has dealt with many complaints about the conduct of some private colleges. Through this work it became apparent to us that the industry-regulator, the Australian Skills & Qualifications Authority (**ASQA**), did not have sufficient mechanisms to respond to non-compliance by private VET providers and education brokers. For example, it appeared to have insufficiently flexible powers to suspend, ban or cancel the registration of particular providers.

It appears also that ASQA focused its regulatory effort on registration and auditing providers. We understood that, at the height of the VET scandal, ASQA was auditing agencies once every five

¹⁹ 'Building watchdog shambles', The Age, 4 April 2012; 'Fees queried in new claims', The Age, 19 May 2012.

²⁰ 'Builders winned, dined by regulator', The Age, 5 April 2012.

²¹ Australian Government, 'Regulator Performance Framework', available at: <https://cuttingredtape.gov.au/resources/rpf/kpis>.

years, allowing unscrupulous operators to fly under ASQA's radar.²² Moreover, there was (and remains) a division in the regulation of vocational training from the regulation of VET-FEE HELP providers. Rather than ASQA, the Commonwealth Department of Education was responsible for the latter. This appeared to add unnecessary complexity to the regulatory framework, and dilute regulatory effort.

It is instructive that 'cleaning up' of the sector required enforcement action to be undertaken by the ACCC. During late 2015 and early 2016, the ACCC took four actions against private colleges.²³ Unlike industry-specific regulators, the ACCC had the necessary enforcement culture to take action. It would appear that consumer protection and the efficiency of regulators could be enhanced if industry-specific regulators similarly adopted a culture of 'action' in the face of substantial consumer detriment.

Dispute resolution and ACL regulators

State-based regulators commonly conduct individual level dispute resolution, in addition to general compliance and enforcement activities. By contrast, ASIC and the ACCC do not undertake this function. As part of its study, we encourage the Commission to consider the effectiveness and efficiency of this function.

Our observation is that dispute resolution activities can be highly variable between regulators, and change in importance for particular agencies over time. For example, CAV finalised over 12,500 disputes in 2009-10,²⁴ and this has come down to 9,395 in 2013-14.²⁵ It does not appear that CAV reported the number of finalised resolutions in its 2014-15 annual report (it did note 1,318 building disputes were finalised), but the annual report did note that the Victorian Auditor-General recommended a review of dispute resolution services.²⁶ We understand that this has resulted in a change of model to 'frontline resolution'.

Consumer Action encourages all dispute resolution services to be more transparent, by being subject to regular and public evaluations, so as to contribute to quality outcomes and efficient resolution of problems. To this end, Consumer Action has supported industry ombudsman schemes from a public interest and outcomes perspective. In our view, these schemes contain a number of useful features which contribute to strong justice outcomes, including:

- industry ombudsman schemes are typically a condition of holding a relevant licence, so all businesses in an industry must participate in the scheme;

²² Dodd, 'Private colleges will hold talks over ratings downturn', Australian Financial Review, 30 October 2014, Sydney; Yu and Oliver, 'The capture of public wealth by the for-profit VET sector', Workplace Research Centre, University of Sydney, January 2015, p.18, available at: <http://www.aeufederal.org.au/Publications/2015/WRCAEU2015.pdf>

²³ Loussikian, Kylar. *ACCC lawsuit targets Australian Institute of Professional Education*, The Australian, April 1 2016 available at: <http://www.theaustralian.com.au/higher-education/accc-lawsuit-targets-australian-institute-of-professional-education/news-story/14f31d01b7e146e3bbfb7d879061eb35>

²⁴ Victorian Auditor General's Report; Consumer Protection, April 2013, p 22 available at: <http://www.audit.vic.gov.au/publications/2012-13/20130417-Consumer-Protection/20130417-Consumer-Protection.pdf>

²⁵ Consumer Affairs Victoria Annual Report 2013-14 available: <https://www.consumer.vic.gov.au/annual-report/previous-annual-reports>

²⁶ Consumer Affairs Victoria Annual Report 2014-15 available: <https://www.consumer.vic.gov.au/annual-report/previous-annual-reports>

- industry ombudsman schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes;
- industry ombudsman schemes typically have independent boards with 50 per cent representation from consumers so the dispute resolutions processes are fair and balanced;
- the ombudsman scheme process provides flexible solutions to disputes but also has ‘teeth’ because the Ombudsmen can make findings binding upon the trader;
- Ombudsmen are typically required to investigate and report on systemic problems, meaning that they not only provide solutions for individual disputes but also help bigger problems be solved at their source; and
- Ombudsmen keep detailed records and make detailed reports that assists the advancement of consumers’ interests

This might be contrasted with the dispute resolution roles of fair trading offices where they are unable to make a binding decision, and there appears to be little transparency about outcomes or systemic issues identified through the process.

The Productivity Commission’s study could consider the role of individual dispute resolution within and ACL regulator’s mandate. In our view, complaint or dispute resolution (such as through an ombudsman scheme) and compliance, monitoring and enforcement of laws (by a regulator) are related but separate functions. Regulators with responsibility for compliance monitoring and enforcement do need to be aware of areas of consumer complaint in order to prioritise activities and deal with industry problems. However, effective dispute resolution (such as through ombudsman schemes) has a primary objective of resolving individual complaints efficiently and effectively for both parties—this may not be the primary objective of regulators

In our submission to the CAANZ review, we proposed the establishment of a Retail Ombudsman for Australia, which could play an important dispute resolution service for Australia as well as aid regulators through identifying systemic issues for further compliance or enforcement activity.²⁷

Please contact Zac Gillam, Senior Policy Officer
if you have any questions about this submission.

²⁷ We have recently also published an independent review of consumers’ experience of the Victorian Civil and Administrative Tribunal (VCAT) which details consumer experience of dispute resolution which we recommend to the Commission, available: <http://consumeraction.org.au/review-tenants-consumers-experience-victorian-civil-administrative-tribunal/>

Yours sincerely

CONSUMER ACTION LAW CENTRE

Gerard Brody
Chief Executive Officer

Zac Gillam
Senior Policy Officer

Attach:

Appendix A – Renouf, Gordon and Balgi, Teena. *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, Consumer Action Law Centre, March 2013.

Appendix B – Consumer Action summary of recent enforcement activity by ACL regulators. To be provided by **5pm Friday 2 September**.