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### **Publications enquiries**

Media and Publications, phone: (03) 9653 2244 or email: [maps@pc.gov.au](mailto:maps@pc.gov.au)

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# OVERVIEW

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## Key points

- Despite the adoption of a single Australian Consumer Law (ACL) in 2011, Australia's consumer protection framework remains complex.
  - Two commonwealth and eight state and territory regulators administer and enforce the ACL.
  - Numerous specialist safety regulatory regimes complement the ACL.
  - Redress is provided via tribunals, courts and ombudsmen, and most ACL regulators.
- The multiple-regulator model for the ACL appears to be operating reasonably effectively given the intrinsic challenges in having 10 regulators administer and enforce one law.
  - The ACL regulators communicate, coordinate and collaborate with each other through well-developed governance arrangements.
  - Some regulators have been criticised for undertaking insufficient enforcement. Limited resources partly explain this, but regulator culture may also play a role.
  - However, the limited evidence available on regulators' resources and performance makes definitive assessments difficult.
- There is scope to strengthen the ACL's administration and enforcement, including through:
  - developing a national database of consumer intelligence
  - ensuring that data on consumer complaints published by ACL regulators are meaningful
  - providing all state and territory ACL regulators with the full suite of enforcement tools
  - increasing maximum financial penalties for breaches of the ACL
  - exempting interim product bans from commonwealth regulatory impact assessments
  - centralising powers for interim product bans and compulsory recalls in the ACCC
  - improving the transparency of the resourcing and performance of the ACL regulators.
- The ACL regulators and specialist safety regulators generally understand the delineation of their remits and interact effectively, notwithstanding a handful of problematic cases. Consumers and suppliers are not always clear about which regulator to contact but they are typically redirected to the right regulator in a timely manner.
- Interactions between ACL and specialist safety regulators could be enhanced through:
  - greater information sharing between ACL and specialist regulators
  - addressing deficiencies in the tools and remedies available to specialist regulators
  - regular national forums of building and construction regulators
  - greater national consistency in the laws underpinning electrical goods safety.
- State and territory governments should tackle the current impasse on standardising electrical goods safety laws.
- Governments should enhance ACL consumer redress, including by:
  - reviewing the bodies and powers for delivering ACL alternative dispute resolution services
  - implementing the Commission's *Access to Justice Arrangements* recommendations.
- Previous Commission proposals to address gaps in consumer policy research and advocacy should be revisited. There are also grounds for enabling designated advocacy groups to make 'super complaints' to ACL regulators, subject to appropriate guidelines.

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# Overview

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

This Productivity Commission study examines the arrangements for administering and enforcing the ACL. It has been undertaken in parallel with a separate review of the content of the ACL, conducted by Consumer Affairs Australia and New Zealand (CAANZ).

## The study’s scope

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

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

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

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

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## Box 1      **The regulatory landscape for consumer protection**

### **The Australian Consumer Law**

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

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

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

### **The ACL regulators**

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

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

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

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

### **The specialist consumer protection regimes**

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

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



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## The Commission's approach

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

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

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

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

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

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

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

## The effectiveness of the multiple-regulator model

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

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

This is not to deny that there are potential inconsistencies and other deficiencies in the way the ACL is being administered and enforced. There are also questions about the level of resources that governments provide for the administration and enforcement of the ACL. And there are some broader concerns about aspects of the consumer protection landscape (some of which are being addressed by the parallel CAANZ review of the ACL).

However, from the available evidence on the multiple-regulator model itself, the model appears to the Commission to be operating reasonably effectively given the intrinsic challenges in having 10 regulators administer and enforce one law.

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

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

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

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

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

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

Most of the concerns appear to stem from differences across the state and territory regulators. Business groups are concerned that variations in interpreting and administering

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the law can increase the complexity of doing business in multiple states and territories. For consumer groups, the prime concern is that differences in consumer protection and redress can disadvantage consumers in some states or territories relative to others.

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

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

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

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

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

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

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

Some consumer representatives contended that state and territory ACL regulators in particular undertake insufficient prosecutions of breaches of the ACL. The Commission has insufficient information to determine the extent to which this is the case. However, large numbers of punitive enforcement actions are not necessarily an indicator of regulatory success: they could for example reflect the ineffectiveness of a regulator's

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educational and regulatory guidance activities. That said, the quantum of prosecutions and other high-level enforcement action is clearly limited by available resources, and a risk averse regulator culture may also play a role in some cases.

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

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

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

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

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

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

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

The ACL and specialist safety regulators generally interact effectively to ensure consumer and supplier concerns that are subject to both sets of regulations are dealt with in a comprehensive, coordinated and consistent manner. Regulators often adopt a 'lead' or 'home' regulator approach, which helps to reduce problems that could otherwise arise

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when ACL and specialist regulators need to interact about product safety incidents and recalls. There are also forums in most regulatory arenas to share knowledge and foster cooperation.

Study participants drew attention to a handful of cases where the interaction of ACL and specialist safety regimes has been wanting. In these cases, almost all of which relate to electrical goods and building products, regulators' coordination and consistency of approach have been poor. However, to put them in context, these cases represent a very small share of the approximately 1200 product safety recalls since January 2015.

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

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

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

The Commission has identified several potential reforms or actions that could strengthen administration and enforcement of the ACL and support the national consumer policy framework. Some involve revisiting earlier proposals from the Commission's 2008 consumer policy framework review that remain, or have again become, pertinent. Others are newer and, in some cases, need further development, refinement and testing.

### **Work towards a national database of consumer intelligence**

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

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

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

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

### **Ensure publicly available data on consumer complaints is meaningful**

There are also grounds for making data on consumer complaints public, to enhance consumers’ decision making and to encourage poorly performing businesses to lift their game. The recently introduced NSW Fair Trading Complaints Register is aimed at these objectives, but business groups have raised a number of concerns about its design.

Publicising complaints data needs to be done in a careful and comprehensive way to ensure its usefulness to consumers and to minimise unwarranted effects on businesses. Ideally, any public register of consumer complaints and incidents, whether instituted at the national level or at a state and territory level, should:

- list only complaints that have been filtered to ensure their legitimacy
- provide detailed information about the complaint or incident
- include information on the resolution or outcome of the complaint
- where feasible, place complaints and incidents in context, for example by weighting them against sales volume.

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Relinquish state and territory powers to issue recalls and interim bans**

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

The states and the ACT have only rarely exercised their powers under the ACL to order compulsory recalls or impose interim bans. This has a range of possible explanations. It could reflect successful cooperation and coordination between jurisdictions, allowing

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information about unsafe products to be shared, leading to a default of a national regulatory response through the ACCC without the need for the states and territories to take interim action. It could also reflect the national market for consumer goods, in which product safety issues typically arise in all jurisdictions simultaneously, requiring a national response.

Although the ACL regulators have argued that the present allocation of powers enhances cooperation in product safety matters, the Commission sees merit in centralising the powers to issue recalls and interim bans in the commonwealth. This would make clear that it is the ACCC's responsibility to immediately respond to all product safety incidents that may warrant a compulsory recall or ban. As part of this reform, CAANZ should consider whether the states and the ACT require an additional (formal) mechanism to request that the ACCC impose an interim ban on a particular product.

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

The continuing application of the ACCC's normal industry consultation procedures to national interim bans would help ensure that such bans are justified and appropriately tailored, and an exemption from the commonwealth's regulatory impact assessment requirements would ensure that they can be imposed promptly.

## **Address resourcing issues transparently**

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

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

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

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



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## Embrace richer performance reporting

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

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

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

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

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

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

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

In the Commission's view, there are sound public accountability and regulatory efficiency grounds for the ACL regulators to publish a more granular, meaningful and comparable array of performance metrics and information on their operations. Many of the concerns raised by the ACL regulators can be addressed by effective communication strategies that would accompany enhanced reporting.

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

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This report sets out some options for improving ACL regulator performance information within the tiered framework. There are some complex knots to untangle in determining, for example, whether to report using a narrow ACL lens, a broader consumer protection lens or several lenses. The Commission considers that CAANZ is well placed to take on the challenge of improving reporting by ACL regulators.

## **Enhance ACL–specialist regulator interaction and regulatory consistency**

The study has identified several ways to enhance the interaction between ACL and specialist safety regulators.

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

The Commission recognises that acting on the last two observations would involve reforming the nature and powers of specialist regulatory regimes themselves. These options would need to be considered on their own merits, and, in that broader assessment, the benefits of improving the ACL–specialist interface may not be the key consideration.

That said, acting to achieve nationally consistent standards or to ensure that specialist regulators have adequate powers *would* have significant public policy benefits in many cases.

The prospective benefits of sound and nationally-consistent regulation were the basis for the Commission’s 2008 recommendation for a COAG-led process to review and reform industry-specific consumer regulation. Among its other tasks, this process was to identify unnecessary divergences in state and territory regulation, and consider the case for transferring policy and enforcement responsibilities to the commonwealth. Although administrative changes have made it difficult to determine how far the reform advanced, it appears that matters in the relevant Commission recommendation are ‘unfinished business’. There remain some important differences between jurisdictions’ regulations, particularly in relation to electrical goods, and building and construction. There is a case to revitalise or follow through on efforts to reform these regulations.

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## Close gaps in consumer redress

A well-functioning consumer redress system is essential for the effective operation of the ACL. It underpins consumer confidence and sends a signal to businesses about the need to comply with consumer laws.

Yet the experiences of many consumers suggest that the consumer redress system is not as effective as it should be. The study has heard concerns with elements of redress at most points in the system (which comprises the ACL regulators, ombudsmen, tribunals and courts). In many cases, consumers believe that they are not able to receive a fair hearing, or they may face significant financial and time costs associated with seeking redress. In some cases, consumers do not believe it is worth pursuing a complaint at all. While this study has only received a limited number of submissions on consumer redress issues, similar concerns have been raised in previous forums, including the Commission's 2014 *Access to Justice Arrangements* inquiry.

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

There is also a need to consider improvements to the alternative dispute resolution (ADR) services provided specifically in relation to the ACL. The Commission's 2008 report noted the importance of effective and properly resourced government-funded ADR mechanisms, to deal in a consistent manner with consumer complaints (where those complaints are not covered by an industry-based ombudsman). The state and territory ACL regulators currently provide some ADR services, but they have limited powers and a lack of granular data makes it hard to judge their effectiveness.

In line with a recommendation from the Commission's 2008 report, governments should review consumer ADR mechanisms to assess the nature and structure of ADR arrangements, areas of need and the appropriate institutions to deliver ADR services. Such a review would need to consider the implications of differences in jurisdictions' legal systems for the design of ADR mechanisms. Where state and territory ACL regulators are to continue to provide ADR services, consideration should be given to options for expanding their powers, including enabling them to compel businesses to cooperate with the dispute resolution process.

The Commission's recommendation to improve performance reporting by ACL regulators, which should include the performance of their ADR services, would also provide a clearer picture of, and incentives to lift, the effectiveness of the regulators' redress services.

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## **Increase consumer research and empower consumer representatives**

The soundness of consumer policy depends partly on its evidence base and, in this respect, consumer policy research and well-informed consumer advocates have the potential to enhance the robustness of policy development.

The 2008 review observed gaps in the ability of consumer research to meet the needs of policy makers, and of consumer advocacy groups to engage in the policy development process. Throughout this study, the Commission has heard that gaps persist, and that they remain problematic. It considers that there remains a case for increasing government funding for consumer research and advocacy, as recommended in 2008.

There would also be merit in enabling designated consumer groups to make a ‘super complaint’ on behalf of classes of consumers, with the complaint to be fast-tracked by the relevant ACL regulator. Super complaint processes help ensure that cases of consumer detriment are brought to the attention of, and addressed by, regulators. A set of operating principles — including the criteria for designating consumer bodies, evidentiary requirements, and the process by which a regulator should respond — is an important prerequisite for any super complaint process.

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# Recommendations and findings

The Commission has made a range of recommendations and findings which should be considered by the Legislative and Governance Forum on Consumer Affairs in conjunction with the recommendations from the parallel study of the ACL undertaken by CAANZ.

## Assessments of the multiple-regulator model

### FINDING 3.1

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

### FINDING 3.2

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

### FINDING 3.3

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

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## The generic national product safety regime

### RECOMMENDATION 4.1

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

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

### FINDING 4.1

The commonwealth government's regulation impact assessment requirements can impede the timely implementation of national interim product bans. There would be merit in exempting interim product bans from the requirements. Permanent product bans should continue to be subject to the existing regulatory impact assessment requirements.

## Performance reporting

### RECOMMENDATION 4.2

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

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

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## Databases on consumer complaints and incidents

### FINDING 4.2

A national database of consumer complaints and product safety incidents for use by consumer regulators has merit. It would enable better identification and analysis of consumer hazards and risks, and help focus ACL regulators' compliance and enforcement activity. CAANZ could be tasked to examine the impediments to establishing such a database, its likely benefits and costs, and, subject to the findings of that analysis, develop a plan to implement such a system.

### FINDING 4.3

There are grounds for making data on consumer complaints public, but this should be done in a careful and comprehensive way to ensure its usefulness to consumers and minimise unwarranted effects on businesses. Ideally, any public register of consumer complaints and incidents should incorporate:

- appropriate vetting of complaints before publication
- detailed information about the complaint or incident
- information on the resolution or outcome of the complaint
- where feasible, a mechanism to place complaints and incidents in context.

Development of a public register should involve consultation with consumers and business, and there should be subsequent reviews of its effects and effectiveness.

## Enforcement tools and penalties

### FINDING 4.4

There is scope to improve consistency in infringement notice powers and other remedies that the states and territories have introduced to augment the ACL 'toolkit'.

### FINDING 4.5

Maximum financial penalties available under the ACL are small relative to the benefits that a business can accrue by breaching the ACL.

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## Interaction between ACL and specialist regulators

### FINDING 5.1

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

- instituting formal arrangements to guide cooperation and coordination between building regulators and ACL regulators, and between the ACCC and some national specialist safety regulators
- expanding the regulatory tools and remedies available to specialist safety regulators
- introducing greater consistency in legislation underpinning the specialist safety regime for electrical goods.

## Industry-specific consumer regulation

### FINDING 6.1

The Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework* called for a process to review and reform industry-specific consumer regulation that would, among other things, identify unnecessary divergences in state and territory regulation and consider the case for transferring policy and enforcement responsibilities to the commonwealth government. While there has been some progress in implementing this recommendation, reform has been limited or has stalled in some important areas, including the safety regimes for building and construction and for electrical goods.

### RECOMMENDATION 6.1

State and territory governments should move to agree on nationally consistent laws on electrical goods safety.



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## Consumer redress

### RECOMMENDATION 6.2

Australian governments should establish an independent review of consumer alternative dispute resolution (ADR) mechanisms. Among other things, the review should:

- assess the nature and structure of current arrangements, areas of unmet need and the appropriate institutions to deliver services
- take account of differences in jurisdictions' legal systems for the design of ADR mechanisms
- have regard to recommendation 9.2 from the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework* regarding the need for effective and properly resourced ADR mechanisms to deal consistently with consumer complaints not covered by industry-based ombudsmen
- where state and territory ACL regulators are to continue to provide ADR services, consider options for expanding the ACL regulators' powers, including the authority to compel businesses to cooperate with the dispute resolution process.

Enhanced reporting of the ACL regulators' ADR services (as part of the performance reporting framework outlined in finding 4.2) should inform the review.

## Consumer policy research and advocacy

### FINDING 6.2

In its 2008 *Review of Australia's Consumer Policy Framework*, the Commission identified material gaps in consumer input in policy processes. As such gaps remain and can hamper sound policy decision making, there are grounds to revisit recommendation 11.3 from the 2008 report — that the commonwealth government should provide additional public funding to support consumer research and advocacy.

### FINDING 6.3

There are grounds for enabling designated consumer bodies to lodge 'super complaints', on behalf of classes of consumers, with such complaints to be fast-tracked by the relevant regulator. Instituting sound operational principles — including the criteria for designating consumer bodies, evidentiary requirements to support a complaint, and the process by which a regulator should respond — is an important prerequisite for an efficient super complaints process.