

# Australian Consumer Law Review

Final Report



March 2017

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Langton Crescent Parkes ACT 2600  
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## MESSAGE FROM THE CHAIR

On behalf of Consumer Affairs Australia and New Zealand (CAANZ), I am pleased to present this final report on the Australian Consumer Law (ACL) Review for the consideration of consumer affairs ministers.

The key finding of the review is that the introduction of the ACL has been good for both consumers and business. Consumers are more empowered, business compliance costs have reduced and there are fewer disputes. In short, this important microeconomic reform has provided substantial benefit to Australia.

This process has strengthened the resolve of CAANZ to continuously improve the ACL. Five years of experience has identified opportunities for reform, in particular by strengthening the consumer guarantees and product safety protections and ensuring the ACL and its penalties for non-compliance keep pace with contemporary circumstances.

CAANZ acknowledges that aspects of the ACL need further consideration. An ambitious forward research program is proposed for areas such as unsolicited selling, digital products, services, unfair trading and fundraising. This program ensures the ACL remains relevant to changing circumstances in the Australian marketplace.

The success of the ACL is attributable to more than the law itself. The joint efforts of Commonwealth, state and territory consumer affairs agencies in administering and enforcing the ACL have been central to its success. We have pooled resources and intelligence, leveraged networks and communications tools and developed coordinated approaches to identify and address consumer harms. While our national collaboration sometimes operates in the background, it is at the core of the ACL. We therefore welcome the report by the Productivity Commission examining the enforcement and administration of the ACL to complement the review.

The CAANZ review of the ACL has been extensive. Over 130 face-to-face consultations were held with stakeholders across Australia. This included individual consumers and businesses, consumer advocates, industry bodies, legal practitioners, community legal centres and academics. More than 160 submissions to the ACL Review Issues Paper and over 100 submissions to the ACL Review Interim Report were also received. We commissioned research including the Australian Consumer Survey 2016 and a Queensland University of Technology (QUT) study of overseas consumer laws. To tap into the breadth of innovative thinking in the consumer policy space we posted three policy ‘challenges’ on the online platform, Mindhive.<sup>1</sup> We are deeply grateful to those who gave their time and considered comment during the review. The feedback received was vital in informing the findings and proposals.

The ACL Review Secretariat has done exceptional work in leading this review process. On behalf of CAANZ, I thank Aidan Storer who led the work of the Secretariat up until January 2017, Kathryn McCrea who has been project manager since that time, and Secretariat officers Elyse Cain, Julia Muse, Susan Zhao, Azrienne Rahman and Francisco Huevo. They have travelled across Australia to hear and understand the views of consumers and businesses, and patiently worked with CAANZ officials to deliver this important review. We are indebted to them.



Simon Cohen  
Chair, Consumer Affairs Australia and New Zealand

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<sup>1</sup> Mindhive is an online platform for crowd-sourcing innovative policy solutions from experts in various fields including business, government, academia and the community.

# ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission
ACT	Australian Capital Territory
CAF	Legislative and Governance Forum on Consumer Affairs
CAANZ	Consumer Affairs Australia and New Zealand
CCA	<i>Competition and Consumer Act 2010</i>
CDRAC	Compliance and Dispute Resolution Advisory Committee
COAG	Council of Australian Governments
CPSC	Consumer Product Safety Commission
Cth	Commonwealth
EIAC	Education and Information Advisory Committee
Ibid.	in the same source
IGA	Intergovernmental Agreement for the Australian Consumer Law
ISO	International Organization for Standardization
NSW	New South Wales
NT	Northern Territory
para	paragraph
PRAC	Policy and Research Advisory Committee
QUT	Queensland University of Technology
Qld	Queensland
SA	South Australia
UK	United Kingdom
USA	United States of America
VCAT	Victorian Civil and Administrative Tribunal
Vic	Victoria
WA	Western Australia

# 1. OVERVIEW

## 1.1. About the Review of the Australian Consumer Law

On 1 January 2011, the Australian Consumer Law (ACL) commenced operation as Australia's first nation-wide consumer protection law. It represents a landmark national reform, establishing for the first time a common set of consumer rights and obligations.<sup>2</sup>

Well-informed, confident consumers are a key element of an efficient economy. The ACL provides individual consumers with the rights and remedies they deserve and ensures that markets for goods and services are efficient and sustainable, benefiting all Australians.

As part of a commitment to continuous improvement of Australia's consumer protection regime, in June 2015 consumer affairs ministers, through the Legislative and Governance Forum on Consumer Affairs (CAF), asked Consumer Affairs Australia and New Zealand (CAANZ) to initiate a broad-reaching review of the ACL.

The intent of the review was to assess the effectiveness of the ACL provisions, including the ACL's flexibility to respond to new and emerging issues and the extent to which the national consumer policy framework had met the objectives set by the Council of Australian Governments (COAG) when it established the *Intergovernmental Agreement for the Australian Consumer Law* (IGA) in 2009. Ministers specified that the review also consider the application of ACL provisions that are mirrored in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act).

Through CAANZ, senior consumer law officials from Commonwealth, state and territory agencies have developed a range of reforms for ministerial consideration to improve the efficiency and effectiveness of the ACL.

The review draws on significant public consultation, findings of consumer and business opinion from the Australian Consumer Survey 2016, an examination of relevant overseas developments and a variety of ongoing related reforms at all levels of government. This report builds on the key themes, findings and options from stakeholder consultations summarised in the ACL Review Interim Report released in October 2016.<sup>3</sup>

An outline of the review process, including supporting projects, is provided at **Appendix A**. The Terms of Reference are at **Appendix B**. **Appendix C** provide a description of the ACL governance framework. **Appendices D** and **E** list, respectively, non-confidential submissions received and stakeholder roundtables and meetings.

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2 The ACL is Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and is applied in each state or territory via each jurisdiction's application laws.

3 ACL Review Interim Report. At: [www.consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/interim-report/](http://www.consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/interim-report/).

## Acknowledgements

CAANZ would like to thank everyone who contributed time and effort to the ACL Review, whether through making a submission or providing an online comment, participating in face-to-face consultations or being part of the Australian Consumer Survey 2016. The input has provided CAANZ with crucial insights into how the ACL is working and what could be improved.

## 1.2. Guide to the final report

CHAPTER	TOPIC	KEY AREA
1.	Overview	<p>List of CAANZ's reform proposals to ministers.</p> <p>An explanation of CAANZ's approach to assessing the effectiveness of the ACL and developing the package of reforms.</p> <p>Key themes from the review: vulnerable and disadvantaged consumers, small business protections and appropriate levels of regulation.</p> <p>Opportunities created by related reviews.</p>
2.	The legal framework	<p>Findings, objectives and proposals relating to the ACL provisions on:</p> <ul style="list-style-type: none"> <li>• consumer guarantees</li> <li>• product safety</li> <li>• unconscionable conduct</li> <li>• unfair contract terms</li> <li>• unsolicited consumer agreements</li> <li>• purchasing online</li> <li>• scope of the ACL</li> <li>• other amendments.</li> </ul>
3.	Administration and enforcement	<p>Findings and proposals to enhance the effectiveness of the ACL's implementation, administration and enforcement.</p>
4.	Looking to the future	<p>Priority issues for future examination, including recommended timing.</p>
5.	Implementation	<p>Outlines proposals and a staged implementation process for the reform package presented for ministers' decision.</p>
	Appendices	<p>Appendix A: The review process</p> <p>Appendix B: Terms of Reference</p> <p>Appendix C: ACL governance framework</p> <p>Appendix D: List of non-confidential submissions</p> <p>Appendix E: Stakeholder roundtables and meetings</p>



## 1.3. CAANZ findings and proposed package of reforms

The ACL Review found that, on the whole, the introduction of a generic consumer law has benefited consumers and traders and that the law itself is generally ‘fit for purpose’. In particular, the introduction of the ACL has helped empower consumers, lower the incidence of consumer problems and ease the regulatory burden on traders.

While the introduction of the ACL has been an important microeconomic reform benefiting consumers and traders, the review has also identified areas where the law should be improved.

In this report, CAANZ identifies for ministers’ consideration a package of reforms in pursuit of best practice consumer law and policy [see **Table 1**]. These reforms comprise legislative proposals, non-legislative actions by regulators and a program of further research and policy development.

CAANZ considers that this package of reforms will strengthen and clarify the law, help consumers and traders better understand their rights and obligations, improve outcomes across Australian markets and help to future-proof the ACL.



### Legislative proposals (Proposals 1-19)

Legislative proposals relate to areas of the ACL where CAANZ has identified that the law could be improved. The proposals address general and specific protections in the ACL, as well as other areas of administration and enforcement.

The proposals vary in scope and complexity. Some are straightforward and, subject to usual government process, should be relatively simple to implement should ministers agree. Others require further policy development, stakeholder engagement and regulatory impact analysis [see **Chapter 5, ‘Implementation’**].



### Non-legislative actions (Actions)

The report identifies four non-legislative actions to be undertaken by regulators and other consumer policy agencies to improve transparency, clarify the intent of the law and promote greater public understanding of the law. As these actions do not require legislative change, they do not necessarily require formal ministerial approval and can commence as priorities for regulators.



### Looking to the future

The report identifies seven priority areas for further investigation where CAANZ is not yet in a position to make specific reform proposals. In **Chapter 4, ‘Looking to the future’**, CAANZ proposes timeframes for the commencements of these projects, potentially either as part of CAF’s current work program or in CAF’s next Strategic Agenda for 2018-21.

## Ongoing commitment to best practice

In addition to these proposals, CAANZ reiterates a commitment to promoting positive consumer outcomes across a range of activities. These include:

- sharing knowledge and experience with specialist regulators to inform their activities (particularly in relation to unsolicited telemarketing calls)
- encouraging greater consumer access to data
- improving the accessibility of information about the ACL to empower consumers and traders to resolve disputes
- developing education and compliance campaigns targeting the needs of vulnerable consumers
- engaging with stakeholder bodies to leverage their knowledge and experience in the development of consumer policy and research.

Details of CAANZ’s renewed focus on these areas are provided in **Chapter 2.5, ‘Unsolicited consumer agreements’** for the first issue and **Chapter 3.1, ‘The ACL in practice’**, for the others.

**Table 1: Package of reforms**

CHAPTER 1: OVERVIEW	
<b>Looking to the future</b> Australian Consumer Survey	Commission a third Australian Consumer Survey in 2021 to assist with monitoring and review of the ACL.
CHAPTER 2: THE LEGAL FRAMEWORK	
2.1 Consumer guarantees	
<b>Proposal 1:</b> Rights to refunds and replacements	Specify that where a good fails to meet the consumer guarantees within a short specified period of time, a consumer is entitled to the remedies of a refund or replacement without needing to prove a ‘major failure’.
<b>Proposal 2:</b> Multiple non-major failures	Clarify that multiple non-major failures can amount to a major failure.
<b>Proposal 3:</b> Extended warranties	Enhance disclosure in relation to extended warranties by requiring: <ul style="list-style-type: none"> <li>• agreements for extended warranties to be clear and in writing</li> <li>• additional information about what the ACL offers in comparison</li> <li>• a cooling-off period of ten working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed orally and in writing.</li> </ul>
<b>Proposal 4:</b> Warranty against defects	Clarify the mandatory text requirements for warranties against defects by developing text specific to services and services bundled with goods.

## 2.1 Consumer guarantees (continued)

<p><b>Proposal 5:</b> Goods damaged or lost in transit</p>	Clarify the scope of the exemption from the consumer guarantees for the transport or storage of goods where those goods are damaged or lost in transit.
<p><b>Action</b> Guidance on 'unsafe' and 'reasonable durability'</p>	Work with stakeholders (including tribunals) to provide more specific guidance on both 'unsafe' goods and 'reasonable durability'.
<p><b>Looking to the future</b> Fit-for-purpose consumer guarantees</p>	Examine whether the current consumer guarantees are fit-for-purpose for purely digital products, certain market practices and emerging technologies.

## 2.2 Product safety

<p><b>Proposal 6:</b> General safety provision</p>	<p>Introduce a general safety provision that would require traders to ensure the safety of a product before it enters the market including:</p> <ul style="list-style-type: none"> <li>• a flexible and less prescriptive approach to compliance by reference to product safety standards (for example, a 'safe harbour' defence to a breach of the general safety provision)</li> <li>• a penalty regime for breaches of the general safety provision, consistent with the ACL penalties regime.</li> </ul>
<p><b>Proposal 7:</b> Voluntary recalls</p>	<p>Clarify and strengthen voluntary recall requirements by:</p> <ul style="list-style-type: none"> <li>• introducing a statutory definition of 'voluntary recall'</li> <li>• increasing penalties for failure or refusal to notify a voluntary recall, proportionate to other ACL penalties.</li> </ul>
<p><b>Proposal 8:</b> Powers to obtain information</p>	Strengthen ACCC powers to obtain information about product safety, by broadening the power to apply to any person (including a consumer) likely to have relevant information, rather than only the supplier.
<p><b>Action</b> Mandatory reporting</p>	<p>Make clearer traders' mandatory reporting obligations by clarifying through regulator guidance:</p> <ul style="list-style-type: none"> <li>• existing reporting requirements (including timeframes)</li> <li>• reporting triggers on the meaning of 'serious injury or illness' and 'use or foreseeable misuse'.</li> </ul>
<p><b>Action</b> Product bans and recalls</p>	Explore options to streamline processes for implementing product bans and compulsory recalls, taking into account findings of the Productivity Commission's study of <i>Consumer Law Enforcement and Administration</i> .
<p><b>Looking to the future</b> Product safety data</p>	Promote enhanced collection and dissemination of product safety data, taking into account findings of the Productivity Commission's study of <i>Consumer Law Enforcement and Administration</i> and initiatives undertaken by other regulatory regimes.

## 2.3 Unconscionable conduct

<b>Proposal 9:</b> Publicly-listed companies	Extend the ACL (and ASIC Act) unconscionable conduct protections to publicly-listed companies.
<b>Looking to the future</b> Unfair trading	Explore how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices.

## 2.4 Unfair contract terms

<b>Proposal 10:</b> Insurance contracts	Apply unfair contract terms protections to contracts regulated by the <i>Insurance Contracts Act 1984</i> (Cth).
<b>Proposal 11:</b> Powers to obtain information	Enable regulators to use existing investigative powers to better assess whether or not a term may be unfair.

## 2.5 Unsolicited consumer agreements

<b>Proposal 12:</b> Threshold requirements for unsolicited consumer agreements	Ensure that the unsolicited selling provisions operate as intended by clarifying that the provisions: <ul style="list-style-type: none"> <li>• can apply to public places</li> <li>• capture suppliers in their negotiations with consumers where the suppliers obtain from a third party (sometimes referred to as a 'lead generator') a consumer's contact details or permission to be contacted.</li> </ul>
<b>Looking to the future</b> Unsolicited selling	Undertake an economy-wide study to examine the role, nature and impact of unsolicited selling in the Australian economy, to inform future policy development.

## 2.6 Purchasing online

<b>Proposal 13:</b> Pre-selected options	Enhance price transparency in online shopping by requiring that any additional fees or charges associated with pre-selected options are included in the headline price.
<b>Proposal 14:</b> Online auctions	Modernise the 'sale by auction' exemption from the consumer guarantees by ensuring the consumer guarantees apply to all online auctions.

## 2.7 Scope of the ACL

<b>Proposal 15:</b> Definition of 'consumer'	Increase the \$40,000 threshold in the definition of 'consumer' to \$100,000.
<b>Proposal 16:</b> Financial products	Amend the ASIC Act to clarify that all ACL-related consumer protections that already apply to financial services also apply to financial products.
<b>Action</b> Charities, not-for-profit organisations and fundraisers	Clarify through regulator guidance the current application of the ACL to the activities of charities, not-for-profit entities and fundraisers.

## 2.7 Scope of the ACL (continued)

<b>Looking to the future</b> Charities, not-for-profit organisations and fundraisers	Assess the effectiveness of the proposed guidance on not-for-profit fundraising, further regulator actions, and whether any amendment to the ACL is necessary.
<b>Looking to the future</b> Review of exemptions under the ACL	Review current exemptions, with a view to removing those that are no longer in the public interest.

## 2.8 Other amendments

<b>Amendment (a)</b>	Amend the definition of 'unsolicited services' in section 2 of the ACL to allow the false billing provisions (sections 40 and 162) to apply to false bills for services not provided.
<b>Amendment (b)</b>	Amend section 12DC of the ASIC Act to address terminology inconsistent with other consumer protection provisions in the ASIC Act and that may unintentionally narrow the scope of the provision.
<b>Amendment (c)</b>	Amend section 76 of the ACL (or the regulations) to clarify that disclosure requirements for unsolicited consumer agreements do not apply to certain exempt agreements.

## CHAPTER 3: ADMINISTRATION AND ENFORCEMENT

### 3.1 The ACL in practice

<b>Proposal 17:</b> Private action	Ease evidentiary requirements for private litigants through an expanded 'follow-on' provision enabling them to rely on admitted facts from earlier proceedings.
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### 3.2 Penalties and remedies

<b>Proposal 18:</b> Maximum financial penalties	<p>Increase maximum financial penalties available under the ACL by aligning them with the penalty regime under the competition provisions of the <i>Competition and Consumer Act 2010</i>:</p> <ul style="list-style-type: none"> <li>• for companies, the greater of: <ul style="list-style-type: none"> <li>– the maximum penalty (of \$10 million), or</li> <li>– three times the value of the benefit the company received from the act or omission, or</li> <li>– if the benefit cannot be determined, 10 per cent of annual turnover in the preceding 12 months.</li> </ul> </li> <li>• for individuals, \$500,000.</li> </ul>
<b>Proposal 19:</b> Community service orders	Allow third parties to give effect to a community service order where the trader in breach is not qualified or trusted to do so.

## 1.4. Approach to the review

This review reaffirms CAANZ's commitment to best practice in consumer law. This was reflected in the timing and scope of the review. While the ACL remains relatively new, CAANZ saw value in providing a high-level and wide-ranging preliminary assessment of the law to understand how it is operating in practice and to identify areas where the law could be improved and better positioned for the future.

In keeping with a commitment to understand how the ACL is operating in practice and relative to international best practice, CAANZ commissioned the Australian Consumer Survey 2016 and a study of international consumer laws.

Best practice also guided how CAANZ assessed the law. In particular, CAANZ was guided by the overarching objective of the ACL set out in the IGA:

to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.<sup>4</sup>

In the areas where intervention is required to ensure that the ACL better meets this objective and addresses consumer harms, CAANZ has put forward legislative proposals for reform. Examples include:

- the proposed introduction of a general safety provision to establish a more proactive product safety regime [**Chapter 2.2**]
- amendments to the consumer guarantees to facilitate dispute resolution [**Chapter 2.1**]
- amendments for greater transparency in the sale of extended warranties and in online pricing [**Chapters 2.1 and 2.6**]
- extending the unfair contract terms provisions to insurance contracts [**Chapter 2.4**]
- increased financial penalties for breaches of the law [**Chapter 3.2**].

In other areas, CAANZ has noted feedback on issues in the market and considers that it would be better to assess any legislative changes when the law has matured and public understanding has developed. Nevertheless, these areas have been identified in the interim as priorities for regulator actions and guidance to promote greater certainty and clarity.

There are areas where CAANZ has considered international developments elsewhere but considers that further work is needed to identify if, and how, they would operate in the Australian context. Some of these are outlined in **Chapter 4, 'Looking to the future'**.

Looking ahead, CAANZ sought to reaffirm the role of the ACL as a generic consumer protection law that applies economy-wide and sets out the foundational and underlying principles that should apply in all sectors of the economy. Accordingly, CAANZ seeks to maintain the ACL as a flexible, generic and principles-based law to be complemented, where needed, by more detailed and industry-specific provisions in other laws.

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4 IGA, para C.

CAANZ also acknowledges that best practice requires regulators to regularly monitor and assess how the law operates in practice. In addition to CAANZ's ongoing research and policy work and the proposed program of further work following this review, CAANZ supports a continuation of the five-yearly Australian Consumer Survey [see **Chapter 4, 'Looking to the future'**].



**Commission a third Australian Consumer Survey in 2021 to assist with monitoring and review of the ACL.**

## 1.5. Common themes from the review

### 1.5.1. Vulnerable and disadvantaged consumers

One of the six operational objectives of the national consumer policy framework is to meet the needs of consumers who are most vulnerable or at a great disadvantage.<sup>5</sup> While the review found the ACL is generally working well, there is evidence that vulnerable and disadvantaged consumers continue to face challenges in understanding and enforcing their consumer rights.

For example, the Australian Consumer Survey 2016 reported that consumers who speak a language other than English at home were more likely to report experiences of:

- unclear or unfair contract terms (16 per cent compared to 10 per cent of those who speak English at home)
- high-pressure sales tactics (7 per cent compared to 4 per cent of those who speak English at home).<sup>6</sup>

ACL regulators prioritise work to engage with, inform and protect vulnerable consumers. They work through the CAANZ Education and Information Advisory Committee (EIAC) and the Compliance and Dispute Resolution Advisory Committee (CDRAC) to adopt consistent approaches for raising awareness among vulnerable and disadvantaged consumers and taking action on their behalf.<sup>7</sup>

ACL regulators also foster close relationships with stakeholder groups to assist vulnerable consumers. Recent regulator activities focused on key areas such as property spruiking, training providers and travelling con-men. Further information on these activities is set out in CAANZ's annual reports on the implementation of the ACL.<sup>8</sup>

In developing the proposed reforms in this report, CAANZ has sought to empower vulnerable or disadvantaged consumers while maintaining the generic nature of the ACL and not limiting the activities of consumers or traders generally.

As noted in **Chapter 3.1, 'The ACL in practice'**, CAANZ considers it is essential to build on our strong relationships with stakeholders engaging with vulnerable and disadvantaged consumers. These groups make valuable contributions to identifying key areas for change and empowering consumers.

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5 Ibid.

6 Australian Consumer Survey 2016, page 7.

7 See Appendix C for a description of the ACL governance framework.

8 At: [www.consumerlaw.gov.au/the-australian-consumer-law/implementation-2/](http://www.consumerlaw.gov.au/the-australian-consumer-law/implementation-2/).

CAANZ has also identified priority projects for future work where additional reforms may be required to further advance the objective of meeting the needs of vulnerable or disadvantaged consumers [see **Chapter 4, 'Looking to the future'**].

## 1.5.2. Small business protections

A feature of the ACL compared with overseas regimes is that its protections extend to business-to-business transactions in some circumstances. Businesses, and particularly small businesses, should have similar protections to consumers under the ACL in most circumstances as they often behave like individual consumers and may lack the time and resources to assert their consumer rights. The ACL has been recently amended to include small business protections against the use of unfair contract terms in standard-form contracts.<sup>9</sup>

CAANZ values the broad scope and economy-wide reach of the ACL. This is reflected in a number of proposals that will maintain or extend the scope of the ACL and benefit small business, including:

- amending the definition of 'consumer' [see **Chapter 2.7, 'Scope of the ACL'**]
- removing exemptions from the unconscionable conduct and unfair contract terms provisions [see **Chapter 2.3, 'Unconscionable conduct'** and **Chapter 2.4, 'Unfair contract terms'** respectively].

CAANZ considered the views of small business through the Australian Consumer Survey 2016. It found that while the ACL has had positive outcomes for small business, small businesses are less likely than large businesses to consider that the government provides adequate information and advice to help compliance or that the ACL adequately protects the rights of businesses.

A number of proposals in this report will go some way to addressing this uncertainty and the compliance burdens faced by small business as both traders and consumers. These include proposals relating to the consumer guarantees, product safety, unsolicited consumer agreements and unfair contract terms.

## 1.5.3. Appropriate levels of regulation

Effective consumer policy must balance the objectives of consumer protection, market efficiency and productivity, while avoiding unnecessary regulation or complexity. Throughout the review process, CAANZ has promoted best practice regulation.

CAANZ identified areas of concern about the adequacy of existing regulation but concludes that in some circumstances, lighter touch regulation should be tested before highly interventionist approaches are considered. This includes, for example, options considered but not progressed relating to the scope of unfair contract terms and to the regulation of online purchasing.

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9 Under the new law, a small business will be able to have an unfair term in a standard form contract declared void by a court if, at the time of agreeing to the contract, it had fewer than 20 employees and the contract did not exceed \$300,000 (or \$1 million for contracts longer than 12 months). The new law was developed in close consultation with stakeholders and came into force on 12 November 2016 following a 12-month transition period. A review of the extension of unfair contract terms to small business will commence within two years.



CAANZ also considered whether issues should be addressed through substantive changes to existing protections or through guidance or enhanced enforcement. This is reflected, for example, in proposals that give regulators access to appropriate enforcement and compliance tools [see **Chapter 2.2, 'Product safety'**, **Chapter 2.4, 'Unfair contract terms'** and **Chapter 3.2, 'Penalties and remedies'**]. In other areas, CAANZ proposes to address issues primarily through further case law and continued guidance [see **Chapter 2.3, 'Unconscionable conduct'**].

CAANZ also seeks to improve clarity of the law in some areas through non-legislative action, noting that enhanced clarity not only empowers consumers but also helps traders reduce the compliance costs associated with understanding their responsibilities under the law [see **Chapter 2.1, 'Consumer guarantees'**, **Chapter 2.2, 'Product safety'** and **Chapter 2.7, 'Scope of the ACL'**].

In proposing reforms to product safety standards CAANZ seeks to reduce compliance burdens and give traders more flexibility in how they comply [see **Chapter 2.2, 'Product safety'**].

## 1.6. Opportunities offered by other reviews

CAANZ recognises the need for ongoing engagement with related regulatory regimes to deliver the best possible outcomes for consumers and traders under the ACL. In addition to the ACL Review, a range of other inquiries relevant to Australian consumers are underway or were recently completed.

CAANZ members actively monitor and participate in these reviews, and look for opportunities to leverage findings and outcomes to improve the consumer policy framework.

Recent relevant reviews include:

- the Productivity Commission inquiry into improving the availability and use of public and private sector data, reporting in March 2017.
- the Australian Government review into the financial sector dispute resolution and complaints framework due to report in March 2017. A second report on additional matters relating to a last resort compensation scheme and issues with access to redress for past disputes is due in June 2017.
- the review of the ASIC enforcement regime, including penalties, due to report to the Australian Government in the second half of 2017.
- the Productivity Commission inquiry into increasing the application of competition, contestability and informed user choice to human services, reporting in October 2017.
- the ACCC market study of new car retailing, with draft findings to be published in mid-2017 ahead of a final report in late 2017.
- the Australian Small Business and Family Enterprise Ombudsman inquiry into small business loans, released in February 2017.
- the review of the small amount credit contract laws, with the Australian Government response released in November 2016.
- the Victorian Department of Justice and Regulation review into access to justice in Victoria, which reported to the Victorian Attorney-General in August 2016.

- the Western Australia Joint Standing Committee on Delegated Legislation inquiry into access to Australian Standards adopted in delegated legislation, which reported in June 2016 and to which the Western Australian Government responded in September 2016.
- implementation of the Australian Government responses to the Competition Policy Review, released in November 2015, and the Financial System Inquiry, released in October 2015.
- ongoing implementation of government commitments following the Productivity Commission's report into access to justice arrangements, delivered in December 2014.

CAANZ supports all appropriate efforts to enhance consumer outcomes in other reviews. For example, **Chapter 3.1, 'The ACL in practice'** details CAANZ's commitment to improve consumer access to data. CAANZ will work closely with all relevant bodies across jurisdictions to ensure that the consumer policy framework contributes to broader efforts to deliver greater consumer access to, and use of, data.

CAANZ will also consider and leverage insights from other reviews about the broader context in which the ACL operates, such as the reviews on access to justice and access to Australian Standards.

## 2. THE LEGAL FRAMEWORK

### 2.1. Consumer guarantees

The flexible and economy-wide application of the consumer guarantees provisions has allowed traders to lower their compliance costs and helped traders and consumers resolve disputes.

The consumer guarantees framework sets out certain standards for goods and services, when there is a failure to comply with the standards, and how failures should be remedied.

The consumer guarantees are framed as broad principles (for example, goods must be of ‘acceptable quality’). The guarantees are the most common area where consumers and traders interact with the ACL.

Under the consumer guarantees, the remedies available to consumers (such as a refund, replacement or repair) depend on which guarantee has not been complied with and the extent to which the guaranteed standards have not been met. This allows the law to be flexible and responsive to the particular nature of the issues that arise in each case.

This review found there is a case for amending the law to help consumers:

- assert their rights to refunds and replacements in certain circumstances
- receive transparent and adequate disclosure about their rights when offered additional warranties by the retailer or manufacturer.

There is also a case for clarifying exemptions from consumer guarantees for transportation or storage services so that the exemption operates as intended in relation to goods damaged or lost in transit.

While the review prioritised issues of remedies and disclosure of consumer rights under the ACL, other issues merit exploration after this review. These include how the provisions apply to:

- purely digital products
- some services (for example, enduring services)
- particular market practices (including non-disclosure agreements and the cost of returning and assessing goods)
- emerging technologies.

These are discussed in Chapter 4, ‘Looking to the future’.

#### Proposals

1. Specify that where a good fails to meet the consumer guarantees within a short specified period of time, a consumer is entitled to the remedies of a refund or replacement without needing to prove a ‘major failure’.

### Proposals (continued)

2. Clarify that multiple non-major failures can amount to a major failure.
3. Enhance disclosure in relation to extended warranties by requiring:
  - agreements for extended warranties to be clear and in writing
  - additional information about what the ACL offers in comparison
  - a cooling-off period of ten working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed and in writing.
4. Clarify the mandatory text requirements for warranties against defects by developing text specific to services and services bundled with goods.
5. Clarify the scope of the exemption from the consumer guarantees for the transport or storage of goods where those goods are damaged or lost in transit.

### Non-legislative action

Work with stakeholders (including tribunals) to provide more specific guidance on both 'unsafe' goods and 'reasonable durability'.

### Looking to the future

Examine whether the current consumer guarantees are fit-for-purpose for purely digital products, certain market practices and emerging technologies.

## 2.1.1. Objectives

These proposals aim to:

- address uncertainties in the application of the law regarding 'major failure' that create barriers to parties resolving disputes earlier, quickly and economically
- ensure that traders provide adequate disclosure about the ACL and its interaction with warranties, and that consumers are aware of their ACL rights
- ensure that the provisions relating to transportation or storage services are effective and operating as intended.

## 2.1.2. Findings

The consumer guarantees in the ACL set out standards for goods and services supplied to consumers, remedies available to consumers when goods and services do not meet those standards and the rights and obligations of both consumers and traders.<sup>10</sup>

The consumer guarantees include requirements that goods must be of 'acceptable quality', fit-for-purpose and are as described [see **Information Box 1**]. The consumer guarantees generally replace a former patchwork of implied warranties that exist in Commonwealth, state and territory laws for consumer transactions.

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<sup>10</sup> ACL, Part 3-2, Division 1.

The consumer guarantees apply where a consumer purchases goods and services ordinarily acquired for personal, domestic or household use. This includes where a trader as a business consumer purchases goods and services not exceeding \$40,000 (excluding stock for resupply and goods to be transformed or used up in manufacturing).<sup>11</sup> It is proposed that this threshold be increased to \$100,000 [see **Proposal 15** in Chapter 2.7, 'Scope of the ACL'].

The consumer guarantees do not apply to goods and services sold by auction where the auctioneer acts as the agent of the trader, but it is proposed to remove this exemption in the online context [see **Proposal 14** in Chapter 2.6, 'Purchasing online'].

Much of the feedback in the review was about goods in particular. Where a good fails to meet the standards established by the consumer guarantees, a consumer is entitled to choose a refund or replacement when the failure is major. The consumer may also negotiate other remedies, such as a repair.

For 'non-major failures' (all other failures to meet the standards) the trader may choose the remedy, such as a refund, replacement or repair.<sup>12</sup> This flexibility within the law takes into account the specific circumstances of each case.

### Information Box 1: 'Acceptable quality' and the consumer guarantees for goods

One of the ACL guarantees requires that goods sold in trade or commerce are of acceptable quality.<sup>13</sup> A good is of 'acceptable quality' where a reasonable consumer, with full knowledge of the nature and extent of any issues (including latent issues), would find the good to be safe, durable, free from defects, acceptable in appearance and finish and fit for the purposes for which that kind of product is commonly supplied, taking into account:

- the nature and price of the goods
- any statements on the packaging
- representations from the supplier or manufacturer
- any other relevant circumstance relating to the supply of goods.<sup>14</sup>

In addition, the ACL also guarantees that goods must be fit for any specific purpose disclosed to the supplier (or someone involved in the negotiation process) and match any description, sample or demonstration model where the good is sold by reference to that description, sample or model.

A 'major failure' occurs if the good:

- would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure ('the reasonable consumer test')
- departs in one or more significant respects from a description, sample or demonstration model

11 ACL, section 3.

12 ACL, Part 5-4.

13 ACL, section 54.

14 ACL, section 54(2) and (3).

### Information Box 1: 'Acceptable quality' and the consumer guarantees for goods (continued)

- is substantially unfit for a purpose for which the goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose
- is unfit for any disclosed purpose and cannot, easily and within a reasonable time, be remedied to make it fit for such a purpose
- is not of 'acceptable quality' because it is unsafe.<sup>15</sup>

If the good meets the guaranteed standard (having regard to what is reasonable) there is no right to a remedy under the ACL. ACL remedies do not apply to fair wear and tear, changes of mind, defects that were drawn to the consumer's attention nor where the consumer inspected the good and should reasonably have noticed the defect.

Generally, the review found that the flexible and economy-wide approach taken to consumer guarantees within the ACL has helped provide clearer standards for traders, as well as consistent messaging about rights and responsibilities. This has improved outcomes for both consumers and traders. For example, the Australian Consumer Survey 2016 found that the estimated:

- incidence of consumer problems had decreased from an average of 5.25 complaints per month in 2011 to 3.44 per month in 2016<sup>16</sup>
- annual cost to business in dealing with consumer problems had decreased by \$3.53 billion from \$21.56 billion in 2011 to \$18.03 billion in 2016.<sup>17</sup>

Accordingly, where reforms to the consumer guarantees are needed, CAANZ prefers to make changes that apply economy-wide to maintain consistency and avoid bespoke or industry-specific variations. Most consumer and industry peak bodies supported generic, economy-wide approaches to law reform and emphasised the importance of flexibility so that the law can keep pace with changes in the marketplace.

The CAANZ view is that while the introduction of the consumer guarantees has been beneficial overall, the review found uncertainty about the durability of goods and what constitutes a 'major failure' of the guarantee when goods are not of 'acceptable quality'.

### Asserting rights to refunds and replacements where goods are not of acceptable quality

The distinction between the available remedies for major and non-major failures recognises that the remedies available should be proportionate to the nature and extent of the failure. While consumers may want refunds or replacements for a faulty good, such remedies may be more expensive for traders than repairs. The distinction also acknowledges differences for each particular good such as variations in price ranges, purposes and condition, and how and where they have been used.

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15 ACL, Part 5-4, Division 1.

16 Australian Consumer Survey 2016, page 7.

17 Australian Consumer Survey 2016, page 85.

While many traders provide good customer service and fix faults by mutual agreement with customers, there are circumstances where a generic and flexible approach may create unnecessary impediments to consumers accessing remedies.

One of the most common and consistent issues raised throughout the review was the difficulty consumers faced when trying to assert a 'major failure' to meet the standards, particularly in relation to acceptable quality.

Further, while the ACL establishes a 'reasonable consumer test' [see **Information Box 1**], some stakeholders contend that certain traders approach consumer claims not from the perspective of whether a reasonable consumer would have bought a good if they had known the full nature and extent of the failure at the time of purchase, but according to the trader's own specifications for failure.

This difficulty was raised especially in relation to higher-cost goods such as motor vehicles and whitegoods where refunds are potentially more costly for suppliers than repairs. It was noted that there is little incentive for consumers to take cases to courts or tribunals for low-value goods to test claims of major failure. The application of the law remains uncertain in the absence of case law on these issues.

Some of the barriers that consumers face in enforcing their consumer guarantee rights are beyond the scope of the review, such as the cost of tribunal fees and compiling evidence, and tribunal monetary limits.

However, the nature of some product faults and the case-by-case application of the 'reasonable consumer' test in the ACL also contribute to the uncertainty regarding the remedy to which consumers are entitled and might prevent some consumers receiving refunds to which they are entitled.

This can weaken consumer confidence when purchasing products. It can also result, for example, in consumers with a faulty motor vehicle or whitegood being 'trapped' in cycles of failed repairs that render the item unusable for long periods of time. These failed repairs may involve multiple repairs of different faults or failed attempts at repair.

In this situation, consumers do not get what they paid for and can incur significant expense and inconvenience, effectively adding to the cost of the good. As the cycle of repairs continues, the consumer may find they have few options other than to continue to deal and negotiate with a trader they no longer trust.

The time spent navigating through the consumer guarantee provisions can result in unnecessary and disproportionate use of time and resources (not only for the parties, but for regulators and the legal system) and can also result in inconsistent outcomes.

The review identified two circumstances where refund rights should be readily available. This is where a good is unsafe and where a good fails to comply with the consumer guarantees within a short specified period (such as 30 days after purchase or delivery).

### Unsafe goods

**Information Box 1** outlines how a major failure includes situations where goods are not of acceptable quality because they are unsafe.

Some suppliers and manufacturers are not always clear about their obligations under the consumer guarantee provisions. The experience of regulators is that even large and well-resourced companies do not necessarily provide consumers with correct information about available remedies. This is an area where more detailed discussion and examples are likely to be helpful.



### Work with stakeholders to provide more specific guidance on 'unsafe' goods.

This guidance could also clarify how to apply the ACL to other circumstances where a potential safety issue may not eventuate for some time or where it may not render the good as a whole unsafe (for example, where an interior car light does not function but does not necessarily make the car as a whole unsafe).

#### Failure within a short timeframe

In relation to goods that fail quickly, there is strong community expectation (partly reflected in many voluntary store policies) that most goods sold in trade or commerce should last longer than a few days or weeks. Arguably this is a very short timeframe but can be seen as well within the period that a reasonable consumer would expect any good sold in trade or commerce to last (unless specific issues were drawn to their attention before purchase).

The Australian Consumer Survey 2016 found that the most common type of problem experienced by consumers in relation to goods and services in the last two years was faulty, unsafe or poor quality products (30 per cent of all types of problems).<sup>18</sup> The survey also found that where a consumer problem occurred, it was common for the problem to be noticed within the first week or month of purchase. For example:

- non-electrical household goods such as furniture - 46 per cent of problems were detected in the first week and another 16 per cent within the first month
- electronics and electrical products - 43 per cent of problems were detected in the first week and another 15 per cent within the first month
- motor vehicles (including fuel) - 41 per cent of problems were detected in the first week and another 16 per cent within the first month
- sporting goods - 35 per cent of problems were detected in the first week and another 22 per cent within the first month.<sup>19</sup>

The ACL Review Interim Report noted that the United Kingdom (UK) introduced refund entitlements for consumers where goods fail to meet certain standards within 30 days.<sup>20</sup> One of the key reasons for its introduction was to address concerns that consumers with goods that fail very quickly can become 'trapped' in cycles of failed repairs. The English and Scottish Law Commissions also considered that a short period of time with clear refund entitlements would be easier for consumers

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18 Australian Consumer Survey 2016, page 42.

19 Australian Consumer Survey, page 44.

20 ACL Review Interim Report, pages 55-6.



and traders to understand, particularly as a refund within this period accords with community expectations about goods that fail quickly.<sup>21</sup>

Although a generic case-by-case approach is suitable in most circumstances, it is important that the law is clear on the rights of consumers and traders. This ensures that the time and resources consumers and traders spend resolving disputes are not wasted.

Most failures occurring within a very short period of just a few days or weeks after purchase are currently likely to be classed as major failures to comply with the consumer guarantees. It is inherently likely to be a major failure because a reasonable consumer would not have purchased the good had they known it would fail quickly.

Accordingly, CAANZ considers that the consumer guarantee remedies of a refund or replacement should apply to a short specified time period, such as 30 days.



**Proposal 1: Specify that where a good fails to meet the consumer guarantees within a short specified period of time, a consumer is entitled to the remedies of a refund or replacement without needing to prove a ‘major failure’.**

This proposal entitles consumers to their choice of remedy (a refund, replacement or repair) where a good fails to meet the consumer guarantees within a short period of time after purchase or delivery. This excludes perishable foods (such as food and drink) and consumable goods that can be used up (such as certain cosmetic products). Further analysis will be undertaken to develop options relating to the specified period of time and other implementation issues.

This proposal creates a time-limited right for a consumer to choose a refund or replacement or opt for a repair without the need to demonstrate a major failure. While a major failure is not required within that period, the good must still have failed to comply in some way with one or more of the consumer guarantees.

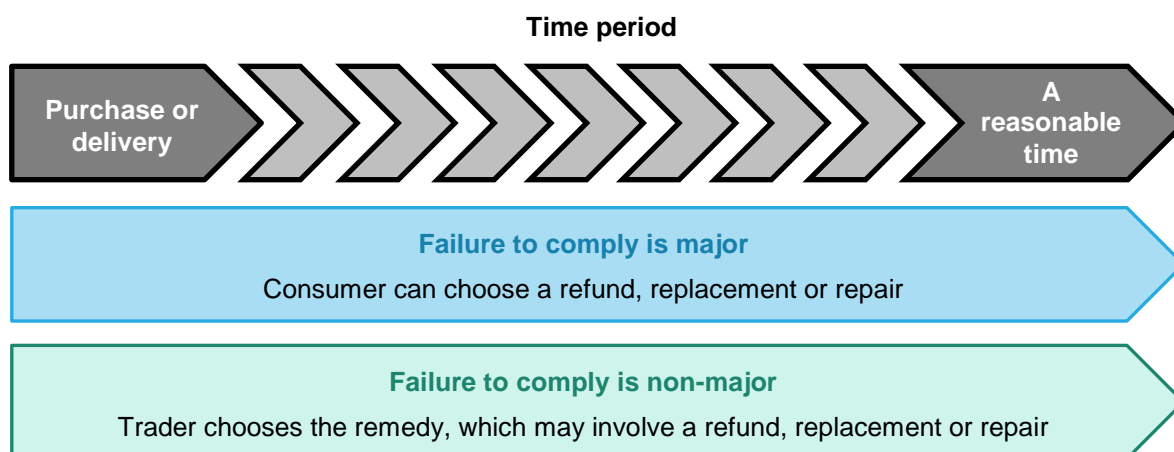
Outside of the short specified time period, the existing distinction between major and non-major failures remains appropriate to ensure fairness to traders. This is because the longer a consumer has a good, the more reasonable it is to take into account the consumer’s use of the good and differences in the nature of the good.

Clear information is required to ensure that consumers and traders understand that the proposal is intended to enhance and strengthen existing rights, not replace them. It also provides a simpler approach to remedies for early goods failures.

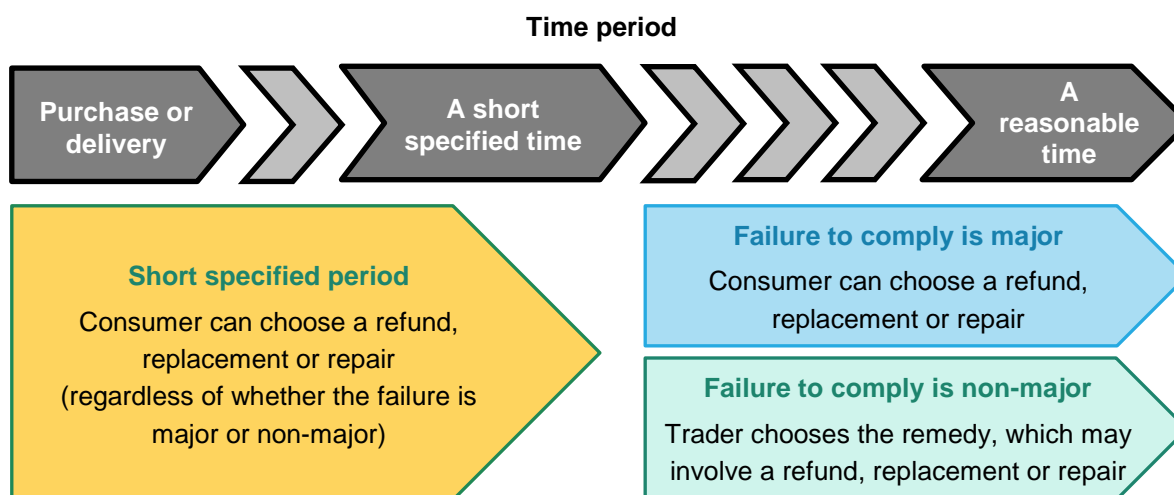
<sup>21</sup> ACL Review Interim Report, page 55.

Figure 1: Illustration of Proposal 1

**Current ACL rights where there is a failure**



**Proposed ACL rights where there is a failure**



This proposal captures what are currently major failures and non-major failures. It does not impose new obligations on traders in the event of major failures. It gives consumers more confidence to assert their right to avoid cycles of failed repairs. For non-major failures, this proposal imposes new obligations on traders if the good fails in the short time period. It gives consumers a choice of refund, replacement or repair in circumstances where the trader would previously have chosen the remedy. Careful consideration as to how the proposal would be framed is required to balance trader compliance costs and consumer rights.

These costs could be mitigated by several factors:

- Not all consumers will choose a refund or replacement. While they have a right to these remedies, consumers can choose to agree to a repair. Where the issue can be easily fixed and the good as a whole still functions well, a consumer may prefer a repair rather than return the good and do without it or find a substitute.
- Not all goods are cheaper to repair than to replace or refund. For these kinds of goods, it is likely that a refund or replacement is the preferred remedy of choice for the trader and the consumer.

- Additional costs will not be imposed on traders who already have voluntary returns policies or ‘no questions asked’ policies within a short period. Stakeholders indicated that such policies are not uncommon but are discretionary or inconsistent between traders and even among stores run by the same trader.
- The time period would be limited to a short period. A trader would still be free to choose a preferred remedy for non-major failures outside this period.

The costs associated with non-major failures are expected to be offset in part by reduced costs where the consumer is currently entitled to a refund or replacement but the parties unnecessarily spend time and money before reaching this conclusion.

On balance, the benefits are considered to outweigh the costs. A clearer, simpler right to a refund or replacement within the initial purchase period would:

- prevent consumers from negotiating cycles of repeated repair attempts, noting that many goods (such as motor vehicles or whitegoods) can be very important to a consumer’s daily activities and wellbeing
- encourage consumers to search for goods from a range of traders (including smaller and lesser-known traders) and to try new products, promoting competition in the market
- provide incentives for manufacturers who have quality control processes that reduce the supply of products that have issues soon after purchase
- provide incentives for traders to have better repair processes (if they want a consumer to choose a repair option)
- encourage consumers to raise issues with traders promptly where an early problem occurs rather than return goods that have had prolonged use. Some retailers identified the return of heavily-used goods as an ongoing issue in negotiating an agreed remedy with customers
- help businesses when they are making purchases that fit within the definition of ‘consumer’
- potentially assist retailers when negotiating indemnification under the ACL from manufacturers for goods returned due to poor manufacture. Many retailers indicated that they can struggle to convince a manufacturer that a major failure occurred. A flow-on effect of this proposal is that it may go some way to addressing this concern where refunds are provided within the specified period as the retailer would not need to establish a major failure.

### Multiple failures

Tribunals have often differed in deciding whether multiple non-major failures can collectively amount to a major failure.<sup>22</sup> For example, a car could have many minor issues that may or may not be related to the same problem, but a reasonable consumer would not have purchased it had they known the totality of the issues at the outset. In this case, the language of the ACL may not be sufficiently clear. The singular use of ‘major failure’ in the law may contribute to differing interpretations.

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22 ACL Review Interim Report, page 54, details stakeholder concerns regarding multiple non-major failures.

Accordingly, CAANZ considers that the law should be amended to clarify that multiple non-major failures can collectively amount to a major failure to comply with the consumer guarantees. Industry-specific laws relating to multiple failures are not proposed [see **section 2.1.3**].



### **Proposal 2: Clarify that multiple non-major failures can amount to a major failure.**

The failures need not occur in a similar period of time, relate to the same issue or result in the same problem. Courts and tribunals hearing disputes would retain their current capacity to consider all the factors and determine whether a reasonable consumer would have bought the good had they known about the faults at the time of purchase.

This clarification will not impose major compliance costs as the proposal reflects the legislative intention of the ACL and existing interpretation by regulators.

Clarity in the law will help all parties resolve disputes promptly. This proposal:

- clarifies the law so that a consumer may establish a major failure where, for example, there are multiple issues with a vehicle that, collectively, would be sufficient to deter a reasonable consumer from buying it. The proposal may address concerns regarding ‘lemon’ vehicles
- reduces costs and time spent by consumers and traders in disputes about multiple non-major failures. Changes to the law should assist suppliers in making claims against manufacturers who have supplied the faulty goods
- improves the quality and safety of goods in the market and reduces search costs for both individual and business consumers given that it can be difficult to assess the quality of goods beforehand.

### **The common lifespan of specific goods**

Throughout the review, stakeholders expressed a desire for guidance on how durable a good should be to meet the standard of ‘acceptable quality’. This relates particularly to new whitegoods and electrical appliances.

The generic and flexible approach of the law remains important to provide fairness to traders and ensure goods align with consumer expectations. But there is a need for more consistent outcomes in comparable consumer guarantee cases.



### **Work with stakeholders (including tribunals) to provide more specific guidance on ‘reasonable durability’.**

This could include clarifying the relevant factors to consider and examples of how the ‘reasonable consumer’ test would apply to common types of products, drawing on court and tribunal decisions and other relevant information. There is also merit in exploring the feasibility of specific guidance that estimates the reasonable timeframes for common electrical and whitegoods and, potentially, within specific price ranges.

However, there are practical risks to be managed. Guidance that is overburdened with qualifiers and disclaimers is unlikely to be helpful, but consumers should understand that estimates provided are a guide only and that their rights will depend on the specific circumstances for each good and each transaction. These specific circumstances include:

- how, when and where the good is used
- whether the good is new or second-hand, premium or entry level
- whether the good is a ‘smart’ or hybrid product that combines different functions or blurs traditional product categories
- market conditions that may affect a good’s practical lifespan (as is the case of analogue televisions that cannot pick up digital signals).

There are risks that any time estimate could overstate or understate the reasonable lifespan. In particular, specifying an estimated lifespan that applies to all goods in a particular class risks setting the bar too low. For example, a class of goods within a specific price range could still involve a diverse range of products with a corresponding range of reasonable lifespans.

The feasibility and design of guidance on durability needs to be explored in close consultation with stakeholders to adequately address and manage these risks.

## Transparent and adequate disclosure about ACL rights

### Extended warranties

Some traders sell extended warranties to complement the goods they sell. For an additional fee, they agree to refund, repair or replace parts if a defect occurs within a specified time period. Such warranties are not generally regulated as financial products.

These warranty products can provide a ‘fast track’ dispute resolution service that does not require consumers to demonstrate a breach of the ACL. However, many consumer stakeholders suggest the lack of clear information can prevent consumers from comparing the product with the ACL to determine if the extended warranty provides value for money.

These warranties, like ‘free’ or voluntary warranties against defects, are subject to the ACL, including its provisions on unfair contract terms, misleading or deceptive conduct and false or misleading representations. However, despite regulator efforts in education, compliance and enforcement, misrepresentations made by sales staff are an ongoing issue. For example, a series of ‘shadow shopping’ exercises in the electrical retail sector was conducted by CHOICE in late 2013. It was repeated across the same retailers in August 2015. In the repeated exercise, 48 per cent of sales staff failed to give accurate information about warranty rights.<sup>23</sup>

It can be difficult for regulators to establish a breach in court even where the verbal statements of sales staff have been recorded. This is because there may be other relevant factors, for example, the trader has made brochures about consumer guarantees available at the point of sale.<sup>24</sup> However,

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23 CHOICE submission to the ACL Review Interim Report, page 20.

24 ACL Review Interim Report, Case Study 2, page 67.

the availability of brochures is unlikely to assist consumers when they are subject to sales tactics before having a chance to read the brochures, or where statements from sales staff contradict the material in the brochure.

Misrepresentations by sales staff have the potential to induce consumers to purchase products they may not otherwise have bought and may prevent them from knowing and accessing their legal rights.

Accordingly, CAANZ considers that legislative change is needed to ensure consumers receive adequate disclosure and can make informed purchasing decisions about extended warranties.

**Proposal 3: Enhance disclosure in relation to extended warranties by requiring:**



- **agreements for extended warranties to be clear and in writing**
- **additional information about what the ACL offers in comparison**
- **a cooling-off period of ten working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed and in writing.**

The disclosure obligations are broadly modelled on an approach taken in New Zealand, which was detailed in the ACL Review Interim Report and received general support from stakeholders during the review.<sup>25</sup>

The elements of the proposed regime are outlined in **Table 2**.

**Table 2: The elements of disclosure for extended warranties**

ELEMENT	DETAILS
Cooling-off right	<p>Traders would be required to provide a cooling-off period of ten working days from the time the consumer receives the written agreement.<sup>26</sup></p> <p>The cooling-off right means that a warranty would have effect from the time the agreement is made. A consumer may cancel the agreement and receive a refund within ten working days.</p>

25 The New Zealand regime requires disclosure of a number of matters, including a comparison of the consumer’s rights under New Zealand law and the protections offered by the warranty. It also creates a five-day cooling off period. For more details, see the ACL Review Interim Report, page 68.

26 The proposed cooling-off period for extended warranties will be consistent with the existing ten-day period for unsolicited consumer agreements under the ACL. The proposed ten-day period is longer than New Zealand’s five-day period. However, New Zealand’s period is consistent with the cooling-off right for unsolicited consumer agreements under its *Fair Trading Act 1986*.

Table 2: The elements of disclosure for extended warranties (continued)

ELEMENT	DETAILS
Cooling-off right (continued)	However, where a trader does not meet all their disclosure obligations below (for example, they do not provide any disclosure or provide only a generic brochure about the ACL), then the cooling-off period would be extended to an unlimited time.
Oral disclosure	Traders would be required to provide oral advice, where reasonably practicable, about the consumer's cancellation rights before entering into a contract.
Written disclosure	Traders would be required to provide a written agreement containing: <ul style="list-style-type: none"> <li>• all the terms and conditions, including: <ul style="list-style-type: none"> <li>– the rights and obligations of the warrantor and the consumer</li> <li>– the duration and expiry date of the agreement (including whether or not the agreement expires when a claim is made)</li> <li>– the total price payable under the agreement</li> <li>– the date of the agreement</li> </ul> </li> <li>• information on the front page of the agreement, including: <ul style="list-style-type: none"> <li>– a summary that compares the key features and benefits of the relevant consumer guarantees and the protections provided by any extended warranty agreement (this may be in the form of a table or diagram)</li> <li>– a short prescribed statement that the agreement does not override the ACL consistent with the text for warranties against defects [see <b>Proposal 4</b>]</li> <li>– the warrantor's name, street address, telephone number and email address.</li> </ul> </li> </ul>

This proposal involves compliance costs (primarily transitional) for traders in developing and providing the additional information. Traders should ensure that comparisons do not mislead consumers about the existence of consumer rights beyond those in the ACL (for example, state-based legislation setting specific standards for motor vehicles).

These costs are likely to be outweighed by the benefits gained by helping consumers compare extended warranties with existing legal rights. It also gives consumers time to reconsider their decision away from the sale transaction. This allows them to 'decouple' the purchase of the warranty from the purchase of the good and to consider its independent merits. Behavioural economics suggests that the immediate prior purchase of a more expensive good can tend to increase a consumer's emotional investment. Consumers are more inclined to purchase an add-on product (for example, an extended warranty) if it looks inexpensive relative to the price of the good.

Retail stakeholders have indicated that many extended warranties offer real and legitimate benefits over ACL rights. These include greater coverage of protections, certainty of remedies and streamlined processes. Accordingly, it is not anticipated that clearer explanations of these benefits would diminish the availability or desirability of these warranties in the market.

If adopted, the compliance costs could also be mitigated by:

- support from regulators, including guidance on and examples of how the ACL may be summarised in the required comparison. For example, it may be appropriate to summarise the period of coverage under the ACL (outside of the proposed short timeframe in Proposal 1) as 'a reasonable time (given the nature and use of the particular good)'

- a sufficient transition period. The period adopted in New Zealand was five months but a longer period could allow traders to update their warranty documents at the time they would have scheduled a review as standard business practice
- reduced compliance costs associated with complying with other provisions of the ACL. For example, the regulator guidance and the new comparison in the warranty document can help traders educate staff on how to make correct representations that do not mislead consumers.

### Warranties against defects

A 'warranty against defects' is generally supplied free-of-charge with a good by the manufacturer. It is offered voluntarily as a competitive advantage over other products. It is also variously referred to as a 'voluntary warranty', 'express warranty' or 'manufacturer's warranty'.

Regulation 90 of the Competition and Consumer Regulations 2010 (Cth) sets out requirements for warranties against defects for goods and services, including that the warranty documentation include a mandatory statement about the ACL, being:

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

The mandatory text alerts consumers to the ACL and acts as a reminder to local and international traders (and frontline staff handling warranty claims) of their obligations to not mislead consumers in warranty documents and that they cannot 'contract out' of the consumer guarantees.

The mandatory text may be the only indication in a warranty document that the ACL applies to the purchase. Some stakeholders were concerned that warranty documents can contain other clauses that purport to limit a consumer's rights or do not make clear that other rights apply.

While suppliers of goods and services are obliged to use the mandatory text, the current drafting refers only to goods. As such, it is impractical for service providers to comply and, in practice, regulators cannot require or enforce the provision against service providers. This means that the law does not operate as intended in providing information to consumers.

Some industry groups raised concerns that including the mandatory text imposes costs on traders because it is too long and specific to Australia. Some also suggested the text is unclear.

However, the mandatory text is considered appropriate as a paraphrasing of the law and is not intended to be an expansive or highly technical statement.

Accordingly, CAANZ considers that the mandatory text should be clarified with respect to services and services bundled with goods by prescribing alternative mandatory text for warranties against defects so that service providers can practically and effectively comply with disclosure obligations.



**Proposal 4: Clarify the mandatory text requirements for warranties against defects by developing text specific to services and services bundled with goods.**



Similar to the current mandatory text for goods, the proposed text would be a short statement referring to:

- the warranty agreement not excluding or modifying consumer guarantee rights under the ACL.
- the remedies available for non-major failures (having the problem rectified within a reasonable time and, if this is not done, a refund of the unused portion or recovery of reasonable costs in having the problem fixed by another person).
- the remedies available for a major failure (a refund of the unused portion, or compensation for the difference in value and compensation for any reasonable foreseeable loss or damage).

This proposal addresses an unintentional gap in the ACL and helps service providers comply with obligations that already exist but are currently not practicable to comply with nor reasonable to enforce. Some stakeholders noted that the costs are mainly transitional (to update warranty documents) with some ongoing printing costs.

### Transportation and storage of goods

The consumer guarantees for services include a requirement that services be provided with due care and skill. However, there is an exemption for service contracts relating to the transportation and storage of goods where ‘the person for whom the goods are transported or stored’ is acting for business purposes.<sup>27</sup> The intention was that if the buyer or intended recipient is a business, an exemption for the shipper is appropriate because the buyer should have insurance or other contractual protections.

When a consumer orders a good, for example online or by mail order, the trader makes the arrangements for delivery and the consumer usually has no choice of shipper.

The High Court of Australia has interpreted ‘the person for whom the goods are transported or stored’ as including either a buyer *or seller* (the consignor or the consignee) acting for a business purpose.<sup>28</sup> This means that the exemption applies if either party acts for a business purpose so an individual consumer would have consumer guarantee rights against a shipper if they purchased from a seller who is a private individual (who is not acting in trade or commerce). However, that same consumer would not have those rights against the shipper when purchasing from a trader, such as a major online retailer. This is generally inconsistent with the intention of the ACL to regulate conduct in trade or commerce.

Where the consumer guarantees do not apply, a consumer has no rights against the shipper other than negligence. It may also be difficult for a consumer to demonstrate that the shipper owed them a legal duty of care. This can result in the consumer bearing the transportation or storage risk despite having no choice of the shipper.

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<sup>27</sup> ACL, section 63.

<sup>28</sup> *Wallis v Downard-Pickford (North Queensland) Pty Ltd* [1994] HCA 17.

Submissions to the review noted this issue and supported clarification that the exemption does not apply where the seller is a trader, especially considering the growing popularity of online shopping. CHOICE, for example, conducted a national survey in July 2016 about parcel deliveries. The survey indicated that of the 643 people who had had parcels delivered in the previous 12 months:

- more than 50 per cent had experienced a problem
- 23 per cent of problems related to unreasonable delay
- 14 per cent of problems related to parcels going missing or never arriving.<sup>29</sup>

CAANZ considers that the scope of the exemption should be clarified so that it applies only where the business is the buyer, rather than the seller or intermediary. This ensures that the provisions are consistent with the underlying intention.



### Proposal 5: Clarify the scope of the exemption from the consumer guarantees for the transport or storage of goods where those goods are damaged or lost in transit.

The amendment means individual consumers:

- do not bear the full risk in circumstances where they have no control over the shipper
- do not have to rely on traders to raise issues with the shipper or transporter; they are able to employ rights and remedies directly against the third party.

Goods damaged in storage or in transit attract costs for shippers and storage companies in providing remedies to consumers. However, the risks (and associated costs) of poorly-performed shipping and transportation are currently borne by either the trader or the consumer. This proposal transfers some of that risk to the providers of the service.

There may be costs for shippers and transporters to review their practices to ensure they meet the consumer guarantee of due care and skill. Many shippers and transporters already undertake quality control measures to meet contractual obligations.

### Issues for future exploration

While acceptable quality for goods was a priority topic reflecting stakeholder concern, there are other consumer guarantee issues that merit future review. The topics to be reviewed include digital content, enduring services, issues with returning goods and emerging market practices. **Chapter 4, 'Looking to the future'** provides discussion on the areas warranting exploration as priorities following this review.



### Examine whether the current consumer guarantees are fit-for-purpose for purely digital products, certain market practices and emerging technologies.

<sup>29</sup> CHOICE, *Signed, sealed, undelivered*, last updated 9 November 2016. At: [www.choice.com.au/shopping/shopping-for-services/services/articles/parcel-delivery-and-postal-issues#parcel-survey](http://www.choice.com.au/shopping/shopping-for-services/services/articles/parcel-delivery-and-postal-issues#parcel-survey).

## 2.1.3. Other options and issues considered

### Industry-specific laws for motor vehicles

The proposed package of legislative amendments and enhanced guidance has been developed in part to respond to particular concerns about motor vehicles. CAANZ has given careful consideration to other options to address aspects such as ‘lemon’ laws as used in other countries. These prescribe the number of repair attempts or time out of service that would trigger a right to refund.

Industry stakeholders representing manufacturers and car dealers suggest there is not a high incidence of problems relative to the 1.1 million new vehicles sold each year.<sup>30</sup> However, the review found that the impact of a ‘lemon’ vehicle is very significant for affected individuals. Some of these impacts were described in the November 2015 report from the Queensland Parliament Legal Affairs and Community Safety Committee.<sup>31</sup>

Consumer guarantees already provide remedies for faulty vehicles [see **section 2.1.1**] but there are particular concerns about how consumers enforce their rights and avoid being trapped in cycles of repeated or failed repair attempts.

CAANZ proposes amendments and enhanced guidance to help consumers understand and choose a remedy quickly if things go wrong after taking delivery of the vehicle or when the vehicle has multiple and ongoing issues.

The changes proposed to assist consumers asserting their rights to remedies will help both consumers and traders resolve issues and avoid some of the definitional issues that would be created by prescriptive ‘lemon’ laws that rely on a set number of repair attempts or time spent being serviced.

Under prescriptive ‘lemon’ laws, issues arise when setting exact numbers of repairs or time spent off the road. For example:

- A repairer may need time to ‘trouble shoot’ what may be a single problem. There could be disputes about whether this is a single failure.
- There could be disputes about what constitutes time spent in servicing. Not all time spent in servicing relates directly to the actual repair process, such as when the repairer is waiting for parts to be manufactured or delivered.
- A vehicle may require multiple repairs but the repairs may have happened over a long period of time. It could be difficult to determine fair and reasonable limitations.
- Setting specific repair and servicing thresholds could create unintended incentives for traders to avoid handling disputes or offering repairs so they do not reach the upper threshold for the number of repairs or time spent in service.

30 For example, submissions to the ACL Review Interim Report from the Australian Automotive Dealer Association. Page 2, and Federal Chamber of Automotive Industries, page 5.

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

An advantage of a generic and flexible approach, compared to an industry-specific approach, is that it helps consumers access remedies across a range of goods or sectors, including low-cost goods where consumers often lack incentives to take court action. The findings of the Australian Consumer Survey 2016 showed that some of the most common products where consumer problems arise include telecommunications products and electrical goods.<sup>32</sup>

CAANZ will continue to monitor issues relating to the motor vehicle sector to assess the effectiveness of the law. Where needed, the proposed changes to the ACL will include targeted compliance and education activities.<sup>33</sup>

## Other economy-wide approaches

The ACL Review Interim Report received feedback on whether a major failure should be considered likely or probable if the problem still persists after one attempt at repair or replacement. There are complexities in defining a failed repair or replacement, particularly if part of a good (such as a battery) has a repeated and recurring problem and the timeframe for a refund right is not limited. There may also be unintended consequences if some traders refuse to acknowledge issues to avoid triggering the 'one failed repair or replacement' threshold. In contrast, **Proposal 1** builds in incentives for traders to offer quality repair processes if they want to encourage consumers to choose a repair over a refund.

Another suggestion considered, but not proposed, is to reverse the onus of proof currently on consumers to prove a major failure. The trader would need to provide evidence that a fault did not exist at the time of sale. For both civil and criminal legal claims, defendants are not generally required to prove their innocence. This is considered an important legal right that should only be altered where there are strong justifications.

The CAANZ view is that rather than reversing the onus of proof, a clarification of 'major failure' should first be tested, together with the proposal to allow consumers to rely on agreed facts from earlier legal proceedings [see **Chapter 3.1, 'The ACL in practice'**].

## Exemptions for second-hand vehicles

Some stakeholders sought exemptions from the ACL consumer guarantees for second-hand vehicles, arguing that second-hand vehicle dealers often do not have any direct or contractual relationship with manufacturers. It was said that second-hand motor vehicle dealers find it difficult to seek indemnification from manufacturers where the vehicle is out of the manufacturer's warranty period. Stakeholders proposed that it would be preferable to rely solely on state and territory provisions that are specific to second-hand vehicles, particularly if these laws were harmonised. These laws set out minimum expectations and remedies for second-hand vehicles sold by licensed vehicle dealers based on time or distance travelled.

Exemptions from the ACL undermine its economy-wide application [see **Chapter 2.7, 'Scope of the ACL'**]. It is likely that retailers of other second-hand goods may not have direct relationships with manufacturers and it is not clear why any particular second-hand industry should be excluded from an economy-wide ACL.

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32 Australian Consumer Survey 2016, page 40.

33 Monitoring will be informed by the ACCC current market study into new car retailing. Draft findings for that study are due to be published in mid-2017 ahead of a final report in late 2017.

Many industries operate under industry-specific rules including licensing and registration schemes. Compliance with these schemes is compatible with the ACL. Beyond the statutory periods of protection established by state or territory law, a consumer must still demonstrate a failure or major failure to comply with the guarantees to be entitled to a remedy. Fair wear and tear does not constitute a failure or entitle a consumer to a remedy under the ACL.

While new exemptions are not warranted, the enhanced guidance on reasonable durability could include further discussion about the nature of second-hand goods and relevant factors to consider (such as age, price and condition) to help retailers manage customer expectations at the pre-sales stage.

CAANZ considers that the ACL should continue to apply to second-hand vehicles supplied in trade or commerce.

### Opt-in process for extended warranties

Some stakeholders suggested that a disclosure regime should be combined with an opt-in process, instead of a cooling-off right. This would require a consumer to confirm the extended warranty agreement within a limited time before entering into the agreement.

An opt-in period means a consumer who wanted the extended warranty in addition to ACL rights (after assessing the information required by the disclosure regime) would not have coverage if they neglected to opt-in, or may not have immediate coverage if they are slow to opt-in.

CAANZ does not support an opt-in option at this stage. It is a highly interventionist approach generally reserved for particularly harmful conduct where lighter touch regulation would be (or have been) inadequate. ACL regulators will continue to take enforcement and compliance actions as appropriate.

### A generic or streamlined statement for warranties against defects

Industry stakeholders suggested that the requirement for warranties against defects might be removed altogether to reduce costs. Also, for multinational companies, stakeholders suggested that the mandatory text should not refer specifically to the ACL (that is, it should be a generic statement only, that 'consumer laws may apply in your country').

If reference to the ACL was to be maintained, some stakeholders suggested reducing costs through a shorter streamlined statement that refers consumers to a website for further information. However, others noted that most of the significant costs for the existing statement are transitional costs in updating the documents rather than the ongoing costs of printing the additional lines taken up by the mandatory text. Any changes to this text could impose new transitional costs.

Further, as a link requires consumers and frontline staff handling warranties to take the extra step of researching the name and nature of the applicable provisions, it would be less helpful than the existing information provided.

Other alternatives suggested included information at the point of sale. However, alternative modes of information are not considered adequate in countering any clauses that are in the warranty document itself and that purport to limit a consumer's rights, particularly as a consumer may not have need to refer to the warranty until an issue arises.

CAANZ does not support changing the existing statement for goods to a streamlined or generic statement. Such changes would convey significantly less information than is currently the case and fail to fulfil the objective of ensuring consumers and traders remain aware of the ACL and that the ACL cannot be excluded by the warranty.

## 2.2. Product safety

The introduction of a single, national product safety regime under the ACL has provided a clearer and more cohesive approach to dealing with unsafe products.

However, the overall legislative framework is weighted towards post-market controls (requiring consumers and regulators to take action after a safety incident has occurred) rather than pre-market controls (requiring traders to take more proactive steps before introducing products into the Australian market).

This framework and allocation of risks between consumers and traders is outdated compared to overseas product safety models, in that it does not place a clear onus on traders to ensure the safety of products before they enter the market.

Given the increasingly complex and global modern economy, the existing incentives for traders to supply safe products should be strengthened through a general protection in the ACL. This would facilitate the modernisation of other aspects of the regime. For example, providing a flexible and less prescriptive approach to compliance by reference to product safety standards would allow traders to choose the most appropriate way to comply.

There is also a case for enhancing and clarifying other aspects of the product safety framework. This could be done by reducing the regulatory burden by clarifying traders' mandatory reporting and voluntary recall obligations, as well as strengthening regulatory powers to obtain information about product safety risks.

Other areas to explore further following the completion of the Productivity Commission study of *Consumer Law Enforcement and Administration* include:

- options to streamline the implementation of product bans and compulsory recalls across jurisdictions
- ways to improve the quality of information made available to consumers about safety risks, including options to promote the enhanced collection and dissemination of product safety data. This issue is discussed in Chapter 4, 'Looking to the future'.

### Proposals

6. Introduce a general safety provision that would require traders to ensure the safety of a product before it enters the market including:
  - a flexible and less prescriptive approach to compliance by reference to product safety standards (for example, a 'safe harbour' defence to a breach of the general safety provision)
  - a penalty regime for breaches of the general safety provision, consistent with the ACL penalties regime.

### Proposals (continued)

7. Clarify and strengthen voluntary recall requirements by:
  - introducing a statutory definition of 'voluntary recall'
  - increasing penalties for failure or refusal to notify a voluntary recall, proportionate to other ACL penalties.
8. Strengthen ACCC powers to obtain information about product safety, by broadening the power to apply to any person (including a consumer) likely to have relevant information, rather than only the supplier.

### Non-legislative actions

Make clearer traders' mandatory reporting obligations by clarifying through regulator guidance:

- existing reporting requirements (including timeframes)
- reporting triggers on the meaning of 'serious injury or illness' and 'use or foreseeable misuse'.

Explore options to streamline processes for implementing product bans and compulsory recalls, taking into account findings of the Productivity Commission study of *Consumer Law Enforcement and Administration*.

### Looking to the future

Promote enhanced collection and dissemination of product safety data, taking into account findings of the Productivity Commission study of *Consumer Law Enforcement and Administration* and initiatives undertaken by other regulatory regimes.

## 2.2.1. Objectives

These proposals aim to:

- refocus the product safety provisions of the ACL to ensure the appropriate allocation of risk and incentives and to bring the provisions in line with developments in overseas product safety models
- increase flexibility for traders by introducing a less prescriptive approach to compliance with product safety standards
- reduce regulatory burdens on traders by clarifying their mandatory reporting and voluntary recall obligations
- strengthen regulator powers to obtain information about safety risks to make regulatory response mechanisms more efficient and effective.



## 2.2.2. Findings

One of the overarching objectives of the ACL is to ensure that goods and services are safe.<sup>34</sup> Consumers expect that the products they purchase will meet at least a minimum standard of safety and will not cause serious injury, illness or death or result in serious property damage.

The ACL currently seeks to achieve this objective through two complementary sets of laws governing product liability:

- the product safety regime, which prescribes safety standards for certain high-risk products and provides a framework for identifying unsafe or potentially unsafe goods and product-related services (collectively ‘products’), preventing and stopping their supply, and removing them from the market.
- the defective goods regime, which provides consumers with redress where goods have a safety defect, including the right to compensation where the defect causes loss or damage.

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

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

These laws are jointly administered and enforced by state and territory ACL regulators and the ACCC, which use intelligence-led approaches to identify and address safety risks.

### Appropriateness of safety obligations placed on traders

Taken together, the two sets of laws are sometimes seen as constituting an implied duty on traders to not supply unsafe products [see **Table 3**]. However, the ACL does not, like some overseas laws, place a clear onus on traders to ensure the safety of products before they enter the market.

As the existing controls are weighted more towards post-market rather than pre-market mechanisms, products are able to freely enter the Australian market. Once they are in circulation, market surveillance, mandatory reports, consumer complaints and injury data are used to detect whether a product is unsafe or has not met a prescribed safety standard.

Products that prove to pose a risk to health and safety are then removed from the market, usually ‘after the fact’, that is, after a safety incident has occurred. This would generally involve serious injury, illness or death of a consumer, or destruction of property.

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<sup>34</sup> *Intergovernmental Agreement for the Australian Consumer Law*, page 3. At: [www.consumerlaw.gov.au/files/2015/06/acl\\_iga.pdf](http://www.consumerlaw.gov.au/files/2015/06/acl_iga.pdf).

**Table 3: Current product safety framework**

	PRE-MARKET CONTROLS	POST-MARKET CONTROLS
<b>Implied duty to not supply unsafe goods</b>	<p><b>Prescribed safety and information standards</b></p> <p>Standards for certain high-risk products that seek to prevent or reduce injury by specifying the way products are made, what they contain, any tests they need to pass, and warnings and instructions to be included.</p>	<p><b>Voluntary recalls</b></p> <p>Trader-led action to remove unsafe products from the market.</p> <p><b>Compulsory recalls</b></p> <p>Regulator-initiated action to remove unsafe products from the market (for example, where a trader has refused or failed to take voluntary action or where the risk of harm requires regulator intervention).</p> <p><b>Safety warning notices</b></p> <p>Regulator-initiated notices stating that the safety aspects of a product are under investigation and warning of the risks associated with its use.</p> <p><b>Interim and permanent bans</b></p> <p>Regulator-initiated action to prevent the sale and supply of unsafe products.</p> <p><b>Liability for loss or damage</b></p> <p>Consumer or third party-initiated court action to recover compensation from a trader for injury, illness or property damage caused by an unsafe product.</p>

### Developments in product safety

A number of overseas models place a clear onus on traders to ensure the safety of their products before they enter the market in the form of a ‘general safety provision’. For example, the UK General Product Safety Regulations 2005 state that no producer shall place a product on the market or supply a product unless it is a safe product.

Similarly, the *Canada Consumer Product Safety Act* prescribes a general prohibition against the manufacture, import, advertisement or sale of consumer products that are a danger to human health or safety.

In 2006, the Productivity Commission released a study evaluating Australia’s consumer product safety system and the benefits and costs of reform options, including a general safety provision.<sup>35</sup> At the time, the Productivity Commission concluded that the overall benefits of a general safety provision were likely to be limited.

More than a decade later, the market for consumer goods has experienced significant change, driven by factors such as globalisation, the emergence of online shopping and the proliferation of low-cost products manufactured overseas.

35 Productivity Commission, *Review of the Australian Consumer Product Safety System*, 2006. At: [www.pc.gov.au/inquiries/completed/product-safety/report/productsafety.pdf](http://www.pc.gov.au/inquiries/completed/product-safety/report/productsafety.pdf).

The trend towards direct sourcing of less expensive products from overseas by retailers of ‘fast moving consumer goods’ (goods that sell quickly and for a relatively low cost) presents regulators with enforcement and compliance challenges and creates unique challenges for traders trying to comply with the ACL.

This is supported by the findings of the Australian Consumer Survey 2016 that found the most common type of consumer problems related to faulty, poor quality or unsafe products (30 per cent).<sup>36</sup> Problems were more likely to occur in relation to:

- electronics / electrical goods
- food and drinks
- non-electrical household goods
- clothing, footwear, cosmetics or other personal products.

### Allocation of risks and incentives

The weighting towards post-market controls and the lack of a clear onus on traders to ensure safety means consumers bear a disproportionate burden of risk for product safety. Consumers must make assessments about the safety of the products they purchase and alert traders and regulators through complaints when things go wrong.

This can be difficult for consumers to do where they lack information and understanding about product safety hazards. Traders usually have greater access to information about the characteristics and inherent risks of their products through product testing and market intelligence. It is also difficult for consumers to identify and evaluate the risks where the hazards are hidden.

In such circumstances, consumers have a tendency to underestimate risk, making them more likely to buy ‘risky’ products. This tendency is reinforced by an often-held incorrect assumption that there is already a general safety provision or broad pre-market controls that apply to all products before they are made available for sale in Australia. As a result, consumers are more likely to be exposed to risks they would not otherwise have been prepared to take and have little control over.

Similarly, without a clear onus, traders are likely to underestimate the risk of their products causing harm to consumers. Consumers must first be harmed before consequences can flow to traders such as the threat of possible liability for loss or damage caused by their products or reputational damage.

**Chapter 3.1, ‘The ACL in practice’** details the barriers to consumers seeking redress under the ACL. Initiating court action to seek compensation for loss or damage can be costly and difficult for consumers, especially where foreign goods or parties are involved.

Uncertainty about the likelihood of an adverse compensation claim and payout also makes it difficult for traders to quantify the exact nature of future liability. While many companies may take active steps to minimise the risk of consumer harm, there may be a rational trade-off between making a profit and lower levels of safety, particularly where consequences and full costs to consumers are uncertain.

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36 Australian Consumer Survey 2016, page 42.

As such, primary responsibility for detecting and removing unsafe products is disproportionately placed on government. Regulators need to identify, assess and regulate product hazards and take action to rectify safety concerns.

To shift incentives and the allocation of risk under the ACL, CAANZ considers that a general safety provision should be introduced that requires traders to ensure the safety of a product before it enters the market.

**Proposal 6: Introduce a general safety provision that would require traders to ensure the safety of a product before it enters the market including:**



- a flexible and less prescriptive approach to compliance by reference to product safety standards (for example, a ‘safe harbour’ defence to a breach of the general safety provision)
- a penalty regime for breaches of the general safety provision, consistent with the ACL penalties regime.

This proposal could be achieved by imposing an overarching general obligation on traders (including manufacturers, suppliers and retailers) to ensure the safety of their products.

Compliance with the provision could be measured by reference to compliance with product safety standards [see discussion of a ‘safe harbour’ defence].

The obligation could be supported by a pecuniary penalty or offence provision with penalties attracting a maximum financial penalty consistent with the ACL’s penalties regime [see **Proposal 18** in Chapter 3.2, ‘Penalties and remedies’].

A general safety provision would place a clear onus on traders to ensure the safety of the products they introduce into the Australian market. It would shift responsibility for managing product safety risks from consumers and regulators to traders who are better placed to control those risks at the design and manufacturing stage of a product’s life.

In 2006, the Productivity Commission noted that a general safety provision would likely result in increased costs for traders, such as the costs of greater investment in design, manufacture and labelling, as well as testing and certifying products as compliant. These costs were expected to be passed onto consumers through higher prices, products being withdrawn from sale, or products being substituted with less safe alternatives.

Some traders also noted that there would be costs in keeping records in the event that they need to provide evidence to regulators about the safety of their products.

However, a general safety provision would also lift the profile of product safety in the community and would result in a shift in attitudes to safety. It would result in increased awareness by traders of their overall responsibilities for consumer safety and shift the mindset and culture within the business community.

The Productivity Commission also noted that a general product safety provision would:

- facilitate a ‘cultural change’ by creating stronger incentives for traders not to place unsafe goods on the market

- provide more effective pre-emptive action by regulators without the need for a product to have caused an injury
- result in the need for fewer mandatory standards, in turn giving traders greater flexibility in terms of how they meet their safety obligations
- shift the onus for managing product safety away from government and onto traders, resulting in reduced administration costs over time
- create a more level playing field for traders by setting a ‘minimum’ safety standard across the board
- increase the reputation and image of Australian products overseas.<sup>37</sup>

Feedback from product innovators during the ACL Review indicated that greater investment in safety at the design stage could create more ‘in demand’ product offerings for consumers. Some traders also suggested that innovative safety features can become unique selling points and allow traders to differentiate their products leading to competitive advantages.

A general safety provision would also facilitate the inclusion of a flexible and less prescriptive approach to compliance by reference to product safety standards. This would give traders greater flexibility in terms of how they meet their safety obligations. It would reduce barriers, costs and delays for traders, facilitate innovation of new and improved products, increase the supply of products into Australia, and improve the overall competitiveness of Australian products overseas.

Further, including a maximum financial penalty consistent with other ACL penalties would allow courts to decide the most appropriate penalty taking into account the gravity and circumstances of the breach. This would act as a significant deterrent against traders placing unsafe products on the market.

## Design and implementation issues

As flagged by the Productivity Commission in 2006, the overall benefits and costs will depend largely on the nature of the obligation and how it is implemented, administered and enforced. Accordingly, further work with stakeholders is required on the design of a general safety provision, including appropriate transitional arrangements.

The design and implementation phase would also take into account potential barriers to compliance. For example, some traders were concerned that the concept of ‘safety’ might not be sufficiently clear, or that they would not be able to assure themselves of the safety of their products where a manufacturer or importer is unwilling to provide commercially sensitive information.

Based on feedback to the guiding principles and overseas approaches discussed in the ACL Review Interim Report, CAANZ has identified a range of design issues for further consultation. These include the scope of the provision, the incentives and consequences, how risks should be allocated within the supply chain, and how the provision could meet its objectives while minimising costs for traders.

Design issues for further consultation are outlined in **Table 4**.

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<sup>37</sup> Productivity Commission, *Review of Australian Consumer Product Safety System*, 2006.

**Table 4: Design issues for further consultation**

GUIDING PRINCIPLE	ISSUES TO CONSIDER
Clarity of the law	<ul style="list-style-type: none"> <li>• How the general safety provision would be inserted as an overarching provision, for example, by inserting it at the beginning of Part 3-3 of the ACL.</li> <li>• Whether the duty should be cast as either a positive or negative duty (to supply safe products or not supply unsafe products) to enable more efficient enforcement of the provision or provide greater clarity to traders on the nature of their obligations.</li> <li>• Whether 'safe' or 'unsafe' should be defined, or left undefined, with a requirement that the duty holder took 'all reasonable steps' to ensure the safety of the product.</li> <li>• Whether what is 'reasonable' should be determined by reference to:               <ul style="list-style-type: none"> <li>– the nature of the product and potential risks it poses to consumers</li> <li>– the definition of 'safety defect' under section 9 of the ACL, or</li> <li>– any requirements in an appropriate product safety standard [see a '<b>safe harbour</b>' defence].</li> </ul> </li> </ul>
Efficient allocation of risk	<ul style="list-style-type: none"> <li>• Whether and how risks could be efficiently allocated between duty holders to take into account their specific circumstances.               <ul style="list-style-type: none"> <li>– For example, manufacturers and importers could have a more extensive duty as compared to suppliers and retailers because they have greater control over product hazards at the design and manufacturing stage and have greater access to information about inherent product risks.</li> <li>– One way to achieve this could be by describing what is reasonable by reference to whether the supplier or retailer 'exercised due diligence' in determining the safety of the product before making it available for supply.</li> </ul> </li> </ul>
Deterrent effect on breaches	<ul style="list-style-type: none"> <li>• What penalties should apply for a failure to comply.               <ul style="list-style-type: none"> <li>– This could be the same maximum financial penalty available for other breaches of the ACL, allowing the court to determine the most appropriate penalty based on the gravity and circumstances of the breach.</li> </ul> </li> </ul>
Incentives for compliance	<ul style="list-style-type: none"> <li>• Whether a partial or full defence against a breach should apply for traders who undertake voluntary recall action to address the safety of their products.</li> <li>• Whether a 'safe harbour' defence to a breach should apply for traders who have complied with requirements of an appropriate product safety standard.</li> </ul>

### 'Safe harbour' defence

Compliance with the general safety provision could be achieved in the form of a 'safe harbour' defence, which would give traders an automatic defence to a breach of the general safety provision if they have complied with an appropriate product safety standard. This would facilitate the inclusion of a flexible and less prescriptive approach to compliance by reference to product safety standards.

Where a mandatory standard exists under the ACL, traders would still be required to comply with its requirements. In the absence of a mandatory standard, traders could choose to rely on a voluntary standard or another comparable means of compliance.

Compliance could be flexible, in the sense that traders could choose the most appropriate way to comply. In this way, traders would be free to choose between requirements in Australian standards and appropriate international, regional or other national standards. Alternatively, traders could show their approach meets industry best practice through the use of a risk assessment or other best-practice approach.

This is consistent with some overseas models like those in Malaysia and Singapore. In these countries, traders must comply with any prescribed safety standards but, where there are no prescribed requirements, are free to follow requirements in voluntary standards (whether their own national standards, international or regional standards or standards from other countries).

A ‘safe harbour’ defence could also overcome stakeholder concerns discussed in the ACL Review Interim Report relating to compliance with mandatory standards, including costs and confusion arising from inconsistency between mandatory standards and voluntary standards as well as impacts on innovation arising from compliance with highly prescriptive requirements.<sup>38</sup>

Some stakeholders also raised concerns with the accessibility of standards, noting that the current process for making voluntary standards enforceable can add to business costs where there are associated fees.

The exact scope and breadth of a ‘safe harbour’ defence and the role of product safety standards in encouraging compliance with the general safety provision will need to be determined during further consultation on the design and implementation of the proposal.

## Effectiveness of existing regulatory response mechanisms

In addition to the need for a general safety provision, the ACL Review also found there is a case for enhancing and clarifying other aspects of the product safety framework. This includes streamlining the regulatory process to reduce compliance costs for traders and improving the efficiency and effectiveness of regulatory response mechanisms to better address safety risks.

### Voluntary recalls

The voluntary recall provisions of the ACL require a trader to notify the Commonwealth Minister of a recall. This ensures that information can be coordinated and distributed as widely as possible. If consumers are not made aware that a product has been recalled, they are likely to continue using it and be unknowingly exposed to the risk of serious injury, illness or death.

However, the ACL does not always deter traders from failing or refusing to notify a recall. This is because the current provisions give traders flexibility in determining whether their remedial action triggers the notification requirements. Also, the penalty for failing to notify is generally lower than the cost of undertaking an actual recall.

Traders can face costs associated with identifying and notifying affected consumers, rectifying the problem, and refunding consumers. Publicity arising from a recall can also cause significant brand and reputational damage.

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38 ACL Review Interim Report, pages 84-90.

Currently, it is open to traders to craft their remedial action to not trigger the notification requirements. This is because the ACL does not define a 'voluntary recall', making it difficult to distinguish between an actual recall of products and other remedial actions (such as manufacturer-initiated servicing and repairs). These other actions might, in a loose sense, be seen as a recall activity, but may not necessarily trigger the notification requirements.

The current penalty for failing or refusing to notify a recall is \$16,500 for a company and \$3,300 for an individual,<sup>39</sup> which is less than the costs traders usually face in undertaking a recall action. For the penalty to be an effective deterrent, it should be greater than the benefit to a trader of failing or refusing to notify, and commensurate with the effects on consumers if products are not recalled.

As such, CAANZ considers that the voluntary recall provisions should be clarified and strengthened by introducing a definition of 'voluntary recall' and increasing penalties for a failure or refusal to notify a voluntary recall.



### **Proposal 7: Clarify and strengthen voluntary recall requirements by:**

- **introducing a statutory definition of 'voluntary recall'**
- **increasing penalties for failure or refusal to notify a voluntary recall, proportionate to other ACL penalties.**

This would involve inserting a definition into the relevant section of the ACL. For example, this could be a definition consistent with the definition of a 'product recall' developed by the International Organization for Standardization (ISO), such as the ISO 10393:2013 *Consumer product recall – Guidelines for suppliers*:

A recall is corrective action taken post production to address consumer health or safety issues associated with a product.

This proposal would also involve amending the pecuniary penalty and offence provisions of the ACL to increase maximum financial penalties for failing or refusing to notify a voluntary recall. The maximum penalty would need to be proportionate to the maximum financial penalties available for other ACL provisions [see **Proposal 18** in Chapter 3.2, 'Penalties and remedies'].

This proposal:

- clarifies the voluntary recall provisions of the ACL and deters traders from failing or refusing to notify a voluntary recall by increasing the risks of not notifying a recall
- addresses uncertainty around the meaning of 'voluntary recall', plus clarifies the actions that traders must take to remove unsafe products from the market and the distinction between an actual recall and other remedial action
- increases consumer awareness of safety issues and the steps traders should take to rectify the problem

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<sup>39</sup> ACL, section 224. Note section 201 sets the maximum penalty for a breach of the comparable criminal offence provision at \$16,650 for a company and \$3,330 for an individual.



- gives traders the flexibility to tailor recall actions to the specific product and circumstances of the safety risk, noting stakeholder feedback that it can be complex and difficult to comply with more prescriptive approaches (such as specifying the criteria for a 'satisfactory action').

### ACCC powers to obtain information about product safety

Currently, the ACCC has the power to obtain information, documents and evidence about unsafe products from suppliers only.<sup>40</sup> The ACCC uses this power to seek concrete and detailed information from suppliers to augment initial and often incomplete information about product safety hazards that might come from complaints, mandatory reports or overseas reports.

At times, the information from suppliers may be incomplete or incorrect and must be verified against information held by other parties, such as test laboratories, safety consultants and consumers.

As the compulsory information-gathering powers do not extend to third parties who may have additional information about a product, the ACCC can only receive this information voluntarily. This may not always be possible or appropriate, particularly where the individual may be subject to legal or confidentiality restrictions.

In these circumstances, the only way for the ACCC to obtain the information is to compel the person to provide it, but the narrow drafting of the provisions does not allow for this. This is inconsistent with the ACCC's information-gathering powers for other ACL provisions.

The practical impact can be seen in a recent example of a product safety investigation involving protracted negotiations for information. In this case, the supplier had provided information that conflicted with another source and claimed that it did not hold relevant information. The key safety information was held by an independent product certification body and could not be released due to confidentiality restrictions. If the ACCC had been able to compel information from the third party it would have been able to complete its safety investigation earlier and ensure that the supplier alerted the affected consumers sooner.

Power to compel information from third parties could also assist where a product supplier or insurance company has entered into a non-disclosure agreement or binding confidentiality agreement with a consumer that prevents consumers from publicising the outcomes of a settlement or from providing information to the ACCC. Consumer information about product failure, associated injury or property damage can help regulators respond quickly to emerging safety hazards and alert consumers.

Accordingly, CAANZ considers that ACCC powers to obtain information about product safety should be strengthened by broadening the power to apply to any person (including consumers) likely to have relevant information, rather than only the supplier.

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40 CCA, section 133D.



**Proposal 8: Strengthen ACCC powers to obtain information about product safety, by broadening the power to apply to any person (including a consumer) likely to have relevant information, rather than only the supplier.**

This would promote consistency between the ACCC's compulsory information-gathering powers for product safety investigations and its existing powers for enforcing other ACL provisions.

For example, the proposal could be implemented by amending the ACCC's information-gathering power under the CCA<sup>41</sup> so that it would apply to 'any person engaged in trade or commerce or acquiring consumer goods in trade or commerce'.

As this proposal is not widening ACCC powers, but addressing an inconsistency between existing powers, traders would not be exposed to any new powers beyond what they would already be subject to under regulator investigations for other ACL matters.

### Mandatory reporting

Some traders reported uncertainty as to when to make a mandatory report. Under the ACL, traders are required to report death, serious injury or illness caused by the use or foreseeable misuse of a product to the regulator within two days of becoming aware of a safety incident.<sup>42</sup>

However, it was said that the terms 'serious injury or illness' and 'use or reasonably foreseeable misuse' are general in nature, difficult to apply in practice and could capture minor injuries (such as minor cuts, burns and abrasions).

There is also uncertainty about the time that a trader should take to investigate a safety incident before making a report that stems from the lack of specific guidance on this matter.

The ACCC's *Guide to the mandatory reporting law in relation to consumer goods* currently only outlines the type of information that should be provided in a report and how the two-day timeframe works in practice (for example, what a trader should do if an incident occurs over a weekend or public holiday).

Accordingly, CAANZ will update the guide to include practical guidance on how to apply the mandatory reporting triggers to real-life scenarios, including examples and case studies. CAANZ will also update the guide with information on the level of detail that a trader should include in a mandatory report and practical steps that traders should take in investigating a safety incident.



**Make clearer traders' mandatory reporting obligations by clarifying through regulator guidance:**

- existing reporting requirements (including timeframes)
- reporting triggers on the meaning of 'serious injury or illness' and 'use or foreseeable misuse'.

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41 CCA, section 133D.

42 ACL, sections 131 and 132.

## Product bans and compulsory recalls

Effective and timely mechanisms for product bans and compulsory recalls are essential to a successful product safety regime. Decisions to issue a product ban or recall in response to a safety risk are taken by the Commonwealth, state or territory minister responsible for product safety within their jurisdiction. This can require regulators to negotiate a variety of complex processes and provide advice before the minister can take action to deal with an unsafe product. These processes can cause significant delay, preventing prompt action to address safety risks.

CAANZ considers that there are a number of options to streamline these processes, noting that any reforms should be informed by the outcomes of the Productivity Commission study of *Consumer Law Enforcement and Administration* and the other product safety reforms in this chapter.

Possible options include (but are not limited to):

- giving regulators powers to issue an ‘administrative order’ initiating a product safety action, where a failure to comply would give rise to injunctive relief. Such an approach could complement, or replace, current requirements for ministerial decision.
- exempting interim bans and compulsory recalls from the Australian Government’s regulatory impact assessment requirements. Permanent product bans would continue to be subject to the existing regulatory impact assessment requirements.

Accordingly, CAANZ proposes a priority project in 2017-18, drawing on outcomes of this review and the Productivity Commission study, to explore options to streamline interim ban and compulsory recall processes.



**Explore options to streamline processes for implementing product bans and compulsory recalls, taking into account findings of the Productivity Commission study of *Consumer Law Enforcement and Administration*.**

## Product safety information

Reliable and timely information about emerging safety risks helps consumers make informed purchasing decisions. It can also help consumers who have purchased a hazardous product to manage risks.

In Australia, information about emerging safety risks is currently made available to consumers through safety warning notices, interim and permanent product bans and voluntary and compulsory recall notices made publicly available on the Product Safety Australia website.<sup>43</sup>

Some stakeholders raised concerns about the availability of information to consumers on product safety risks, including the need for greater information on emerging safety risks, voluntary recalls and mandatory reports.

One option proposed by stakeholders was to remove the confidentiality of mandatory reports and make them publicly available. It was argued that this would increase public awareness of product safety risks.

<sup>43</sup> Available at: [www.productsafety.gov.au](http://www.productsafety.gov.au).

However, mandatory reports can contain sensitive information including personal details of consumers and their injuries and illnesses. They can also contain incomplete or initial information about the circumstances surrounding a safety incident that may be damaging for the trader or brand and could create a disincentive for traders to report incidents to the ACCC.

The ACL Review Interim Report canvassed feedback on an alternative option to provide public access to de-identified data on safety incidents, preserving the confidentiality protection for mandatory reports. This would involve public reporting of safety incidents by product type, by the types of injuries or illnesses sustained and/or about the general circumstances regarding the use or foreseeable misuse of classes of products. **Information Box 2** describes the mechanism used in the United States of America (USA).

### **Information Box 2: Product safety information in the USA**

In the USA, manufacturers, distributors and retailers of consumer products are required to notify the Consumer Product Safety Commission (CPSC) where a product does not comply with product safety laws, where there is a risk of harm to consumers or where a product has caused injury, illness or death. In Australia this is known as ‘mandatory reporting’.

The CPSC generally treats this information as confidential and will only disclose it where it is fair and reasonable to do so. For example, where it has filed a legal complaint alleging a product presents a substantial hazard, published a public health or safety finding, or where the trader consents to its disclosure.

In addition, the CPSC is required to maintain a publicly available consumer product safety information database containing reports of harm relating to the use of consumer products. The database contains information on the risk of harm and any injury, illness or death resulting from a product, and usually includes the product model or serial number.

Information in the database is not sourced from traders’ notifications (that is, mandatory reports). Instead, information is sourced from reports made by consumers, government agencies, healthcare professionals, child service providers and public safety entities and is supplemented with public notices made voluntarily or compulsorily by a trader about a product hazard, recall or other corrective action.

Before a report is added to the database, a trader has the right to review the report to assess the accuracy and confidentiality of the information. The trader can request that portions of the report remain confidential, subject to the CPSC’s determination that the information contains trade secrets. The trader can also provide comments on the report to be included in the database.

However, CAANZ remains concerned that de-identified data could still lead to misunderstandings and misrepresentations about the risks associated with certain products types. For example, some products may attract a higher number of reported incidents because they are more popular. This could lead to market distortions if consumers avoid purchasing such products.

Notwithstanding these practical challenges, improving consumer access to and uptake of product safety information is a priority for CAANZ. For this reason, CAANZ will continue to look for opportunities to improve information for consumers about product safety risks and the ACL more generally [see **Chapter 4, ‘Looking to the future’**].



**Promote enhanced collection and dissemination of product safety data, taking into account findings of the Productivity Commission's study of *Consumer Law Enforcement and Administration* and initiatives undertaken by other regulatory regimes.**

### 2.2.3. Other options and issues considered

#### **Increase mandatory reporting timeframes**

Industry stakeholders sought an increase in the mandatory reporting timeframe from two days to four, 10 or 15 days. Some traders considered that the two-day timeframe for making a mandatory report was insufficient to allow a trader to conduct appropriate due diligence and assure the regulator that appropriate steps were being taken. These stakeholders indicated that a trader requires adequate staff, resources and time to contact the consumer, gather evidence and develop a risk assessment and action plan.

However, the purpose of mandatory reports is to provide regulators with initial information about an incident so that they can quickly identify and respond to the risk and ensure that traders continually monitor the safety of their products.

When traders become aware of an incident they are only required to provide basic information available at the time to identify the product and outline the nature of the incident, as well as any actions taken or proposed to address the risk. Additional information can always be provided to the regulator after making a mandatory report or when new information comes to hand. The current framework does not preclude an ongoing dialogue between regulators and traders.

CAANZ considers that the two-day timeframe should remain. As mandatory reporting is intended to provide early warnings of emerging product safety risks, time is of the essence. The requirement to report within two days of becoming aware of a safety incident remains an appropriate trade-off between the speed and detail of the reports.

## 2.3. Unconscionable conduct

The unconscionable conduct provisions of the ACL seek to prevent harsh or oppressive trading practices that go against good conscience and are clearly unfair and unreasonable.

Stakeholders raised concerns that the interpretation of the provisions leads to some uncertainty about how they apply and whether particular conduct is unconscionable according to the principles used by the courts.

Despite differing court interpretations of the provisions, the broad, principles-based law is working as intended and should remain unchanged. This would maintain a level of flexibility in its application and allow the courts to continue developing the law on a case-by-case basis in line with society's changing norms and values.

Nevertheless, there is a case to extend the protections to all traders by removing the exclusion for publicly-listed companies. This exclusion departs from the generic nature of the ACL and its rationale is unclear, as public listing is not necessarily a reflection of a trader's ability to withstand unconscionable conduct.

There was significant stakeholder interest in the introduction of a general prohibition against unfair trading. At this stage, it is unclear how such a prohibition would interact with existing provisions of the ACL. As such, CAANZ proposes to explore how an unfair trading prohibition could be adopted in the Australian context. This topic is discussed further in Chapter 4, 'Looking to the future'.

### Proposal

9. Extend the ACL (and ASIC Act) unconscionable conduct protections to publicly-listed companies.

### Looking to the future

Explore how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices.

### 2.3.1. Objectives

This proposal aims to:

- allow the interpretation of 'unconscionable conduct' to continue to evolve
- strengthen the application of unconscionable conduct provisions by extending protections to publicly-listed companies.

## 2.3.2. Findings

The unconscionable conduct provisions provide broad and flexible protections against harsh or oppressive trading practices that go against good conscience and are clearly unfair and unreasonable. The ACL achieves this by prohibiting a person, in trade or commerce, from engaging in unconscionable conduct. A similar prohibition is found in the ASIC Act in relation to financial services.<sup>44</sup>

The ACL does not define ‘unconscionable conduct’ and its application has evolved significantly from its origins in the principles of equity as recognised by the courts.

This process has led to some uncertainty in how the provisions apply, and whether particular conduct is unconscionable according to the principles used by the courts. Some stakeholders suggested that this has affected the consistent application of the law across different courts and reduced the provisions’ deterrent effects and usefulness for consumers.

However, despite some differences in interpretation, the meaning of unconscionable conduct is continuing to develop in the direction intended by lawmakers. Recent case law has signalled a judicial move away from the previous requirement for ‘moral obloquy’, or moral tainting, towards an approach where unconscionability is determined by reference to the ‘norms of society’.<sup>45</sup>

Defining unconscionable conduct in the law risks removing the flexibility of the provisions that allows the courts to continue developing the law on a case-by-case basis in line with society’s changing norms and values.

Uncertainty about unconscionable conduct will be reduced as the courts continue to apply the legal principles to specific circumstances and, in doing so, develop precedents that can be applied to similar cases. To facilitate this broader development of the law, ACL regulators will continue to take court action to address unconscionable conduct as it arises.

For these reasons, CAANZ is not proposing to clarify the interpretation of unconscionable conduct.

### Publicly-listed companies

The unconscionable conduct provisions of the ACL (and corresponding provisions of the ASIC Act) do not extend to publicly-listed companies. This means that some listed companies who should be protected, are not currently protected (for example, small companies that lack the bargaining power to protect their own interests).

The prohibition against unconscionable conduct was originally available to consumers only. It was later extended to business transactions, excluding publicly-listed companies, where the value of the transaction was less than \$1 million. This was increased up to \$3 million (in 2001), \$10 million (in 2007) and then removed entirely (in 2011). However, the exclusion of publicly-listed companies remained in place.

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44 ASIC Act, Part 2, Division 2, Subdivision C.

45 For example, *ACCC v Lux Distributors* [2013] FCAFC 90; *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405; and *ACCC v South East Melbourne Cleaning (Coverall Cleaning)* [2015] FCA 25.

The exclusion sought to confine the unconscionable conduct protections to those traders likely to lack the size and bargaining power to protect their own interests. Public listing was seen as a reasonable indication of a trader's size and ability to protect its own interests.

However, public listing is not necessarily a reflection of a trader's size, level of resourcing or its ability to withstand unconscionable conduct. Where there is a significant imbalance in bargaining power, a publicly-listed company could find itself subjected to conduct that meets the threshold of unconscionable conduct.

Further, the provisions already protect some privately-operated companies that may be larger or better resourced than some publicly-listed companies. This creates inconsistent levels of protection for traders of comparable size and resources.

Accordingly, CAANZ proposes that the unconscionable conduct provisions in the ACL and the ASIC Act should be extended to publicly-listed companies.



### **Proposal 9: Extend the ACL (and ASIC Act) unconscionable conduct protections to publicly-listed companies.**

This would improve both the clarity and generic application of the unconscionable conduct provisions as they would apply equally to all traders, as well as supporting the ACL's objective of fostering effective competition and fair trading.

Some stakeholders noted that publicly-listed companies could potentially use the provisions against their suppliers or landlords, which may be small businesses. However, whether conduct is unconscionable will continue to be influenced by the relationship between the parties and the nature of the complainant, including its ability to protect its own interests. A publicly-listed company would need to demonstrate circumstances that go beyond 'sharp' commercial practices to establish that it was the victim of unconscionable conduct. This would prevent well-resourced parties from seeking to rely on the provisions to resolve what may be ordinary commercial disputes.

## **2.3.3. Other options and issues considered**

### **General prohibition against unfair trading**

The QUT study<sup>46</sup> found that comparable jurisdictions (UK, USA, Canada and Singapore) adopt a combination of general and specific protections in relation to unconscionable, misleading and unfair trading practices. For example, the USA *Federal Trade Commission Act* prohibits 'unfair or deceptive acts or practices in or affecting commerce'.

Stakeholders provided examples of common features of unfair practices in business models that:

- take advantage of consumers being unable or failing to appreciate the unexpected consequences of a contract

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<sup>46</sup> Queensland University of Technology study of overseas consumer laws commissioned as part of this review. See **Appendix A**.



- exploit vulnerable consumers by charging fees or costs that far exceed the cost of providing the service
- take advantage of vulnerable consumers who cannot access alternative products or are unaware of alternatives available to them.

Noting the evidence of persistent unfair business practices, CAANZ is committed to investigating further whether a prohibition of unfair trading would provide additional protections beyond those currently in the ACL, and how it could be implemented in Australia.

At this stage, it is unclear the extent to which these practices are already captured by existing protections contained in the ACL, including misleading or deceptive conduct, unconscionable conduct, unfair contract terms, pyramid selling and unsolicited selling. As such, the value of an additional general unfair trading prohibition is uncertain at this point in time.

Considering the potential to more effectively address market-wide or systemic 'predatory' practices, CAANZ sees merit in further assessing the extent and degree of overlap between a general unfair trading prohibition and existing ACL protections with the view to enhance the law without unnecessary duplication. As a priority, CAANZ will explore how an unfair trading prohibition could be adopted in the Australian context [see **Chapter 4, 'Looking to the future'**].



**Explore how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices.**

## 2.4. Unfair contract terms

The ACL protects against the use of unfair terms in standard form contracts by enabling courts to declare an unfair term void, with the contract continuing to operate where possible. There are corresponding protections in the ASIC Act in relation to financial services contracts.

Generally, these provisions continue to provide important and effective protections that are supported by other sections of the ACL, such as provisions against false or misleading representations and those relating to redress for non-party consumers. These enable regulators to address the repeated or widespread use of unfair terms in an industry or by a particular business.

Nevertheless, there is a case for improving the consistency of these protections by extending them to standard form insurance contracts and strengthening the ability for regulators to properly enforce the provisions.

### Proposals

10. Apply unfair contract terms protections to contracts regulated by the *Insurance Contracts Act 1984* (Cth).
11. Enable regulators to use existing investigative powers to better assess whether or not a term may be unfair.

### 2.4.1. Objectives

These proposals aim to:

- address inconsistencies in the level of protection provided across all standard form contracts
- ensure the provisions are operating as intended and regulators can effectively enforce them.

### 2.4.2. Findings

#### Unfair terms in insurance contracts

Throughout this review, a range of stakeholders expressed concern that consumers (and small businesses)<sup>47</sup> who are party to standard form insurance contracts are not covered by the unfair contract terms protections. This exclusion is given effect by section 15 of the *Insurance Contracts Act 1984* (Cth) that precludes the ASIC Act's unfair contract terms provisions (that mirror those in the ACL) from applying to insurance contracts.<sup>48</sup>

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47 A recent amendment to the ACL extends the unfair contract term protections to small businesses where, at the time of agreeing to the standard form contract, the business has fewer than 20 employees and the contract does not exceed \$300,000 (or \$1 million for contracts longer than 12 months). The new law came into force on 12 November 2016.

48 The rationale for this exclusion has generally been that the Insurance Contracts Act contains its own protections for consumers and that insurance contracts may have unique characteristics that make them unsuited to the unfair contract terms protections.

While the Insurance Contracts Act contains its own protections for consumers (such as the duty to act in the 'utmost good faith' and specific disclosure requirements), they are not the same as the ACL protections and have not been shown to provide equal or greater consumer protection.

Some stakeholders suggested that the Insurance Contracts Act has not allowed the courts and dispute resolution bodies to adequately deal with the specific matter of unfair terms in insurance contracts. Stakeholders also raised concerns that this has led to unfair practices in the insurance industry.<sup>49</sup>

A 2012 Australian Government estimate placed the cost to consumers of unfair contract terms in general insurance at up to \$10 million per annum.<sup>50</sup> However, the actual detriment may be underestimated as consumers are likely to under-report issues and the existing data does not specifically identify and report on the impact of unfair contract terms in the insurance context.

The current exclusion means that consumers party to insurance contracts do not have access to the same rights and remedies as for all other standard form contracts. This is at odds with the underlying intention that the ACL operate as a generic, economy-wide law that minimises exemptions where possible, particularly where those exemptions are no longer considered appropriate or in the public interest.

Accordingly, CAANZ proposes that the unfair contract terms protections be applied to insurance contracts to strengthen, clarify and harmonise the rights and remedies available to consumers and increase options for redress.<sup>51</sup>



### **Proposal 10: Apply unfair contract terms protections to contracts regulated under the *Insurance Contracts Act 1984* (Cth).**

This proposal brings the unfair contract terms protections in line with regulatory approaches in the UK and New Zealand where insurance contracts are not excluded from the unfair contract terms regimes.

Generally, most stakeholders supported applying unfair contract terms protections to standard form insurance contracts, although the insurance industry opposed such a change. Some industry stakeholders noted that the proposal may affect the scope of insurance policy coverage (due to uncertainty about the terms that would be captured) and the availability of reinsurance (due to greater exposure to potential liability). It was said this could, in turn, lead to higher premiums for consumers.

49 ACL Review Interim Report, pages 119-122.

50 In 2012, the Australian Government estimated from the available data on insurance claims (based on data from the Financial Ombudsman Service) that roughly 75 to 150 consumers per year suffer disadvantage as a result of unfair contract terms in general insurance, equating to between \$5-10 million per annum. See: Australian Government, *Regulation Impact Statement: Unfair terms in insurance contracts*, November 2012, pages 19-20 and 29. At: <http://ris.pmc.gov.au/sites/default/files/posts/2013/01/03-Unfair-Contract-Terms-in-Ins.pdf>.

51 CAANZ acknowledges that while consumer affairs ministers can endorse this proposal, the decision to implement it ultimately lies with the Commonwealth Minister responsible for administering the ASIC Act and the Insurance Contracts Act.

However, these concerns have not been substantiated by quantitative estimates. Also, in other sectors across the economy and in overseas jurisdictions such as the UK and New Zealand, the general compliance costs associated with unfair contract terms protections have not appeared to pose a significant barrier to most traders in continuing their business.

Nevertheless, during implementation of this proposal, there may be a role for regulator guidance or legislative clarity in consultation with stakeholders to provide certainty about how the protections would apply in the insurance context. For example, this may clarify how certain exemptions would operate in the insurance context, such as those for:

- the 'main subject matter' of a contract
- terms that are reasonably necessary to protect the advantaged party's legitimate interests.

### Barriers to regulator enforcement

The ACL operates under a 'one law, multiple regulator' model which envisages all ACL regulators having powers to investigate and enforce all breaches of the ACL (with ASIC having similar powers in relation to the ASIC Act).

However, some regulators are restricted in their ability to investigate compliance and take enforcement action with respect to unfair contract terms.<sup>52</sup> This is because the application laws of some jurisdictions are worded so that the investigative powers are triggered by 'contraventions' or 'possible contraventions' of the law.<sup>53</sup>

Since the unfair contract terms provisions set out possible consequences of using unfair terms (such as declaring a term void) rather than *prohibit* their use, there are no prohibitions for a person to breach or contravene. This means that some regulator investigative powers may not be triggered.

This creates practical challenges when a regulator is not able to collect evidence as to whether a term is unfair and particularly whether the term is reasonably necessary to protect the legitimate interests of the trader. Whether a term is in a trader's legitimate interest is crucial to establishing whether the term is unfair and whether enforcement action may be warranted.

Regulators collect information and evidence to fully assess the merits of a case and take further action only where it is warranted. This saves unnecessary litigation costs for traders, the courts and the government. However, when investigating unfair contract terms some regulators must rely on parties to provide the information voluntarily, which is not always possible or reliable. The alternative is to rely on discovery through the court process. This could result in court proceedings being instigated unnecessarily where traders did have legitimate interests in using the contract term.

Accordingly, CAANZ proposes that regulators should be allowed to use existing powers to obtain information and evidence to determine whether a standard form contract term is unfair.

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52 This is specifically the case for the ACCC, ASIC, NSW Fair Trading and Consumer Affairs Victoria.

53 See: *Competition and Consumer Act 2010* (Cth), section 155; *Australian Securities and Investments Commission Act 2001* (Cth), section 13; *Fair Trading Act 1987* (NSW), section 20; and the *Australian Consumer Law and Fair Trading Act 2012* (Vic), section 126.



## Proposal 11: Enable regulators to use existing investigative powers to better assess whether or not a term may be unfair.

This proposal ensures the legislative intentions of enforcement powers can be achieved. It would be implemented by minor drafting amendments to the relevant application laws to align regulators' existing powers.<sup>54</sup>

In considering this proposal, CAANZ was conscious of some stakeholder concerns about increased regulatory burden. However, traders would not be exposed to any new powers for regulators beyond those they would already be subject to under regulator investigations for other ACL matters. It should also reduce the likelihood of traders being involved in potentially unnecessary court proceedings.

Decisions to issue notices under their respective investigative powers are not taken lightly by regulators. For example, before the ACCC uses its compulsory information-gathering powers, it must consider:

- whether relevant information, documents or evidence are otherwise available
- where there is risk that the information, documents or evidence may be compromised in the absence of that information gathering
- whether the information, documents or evidence are necessary to the investigation
- the time and cost implications for the ACCC and the party required to provide the information.<sup>55</sup>

Regulators are not permitted to engage in 'fishing expeditions' for information and would continue to use their investigative powers appropriately and in accordance with legal professional rules and obligations. In addition to these obligations, model litigant obligations at Commonwealth, state and territory levels bind all governments in how they handle claims and conduct themselves before, during and after litigation.

This proposal would also strengthen regulators' ability to achieve broader industry compliance through enforcement and representative actions on behalf of multiple affected persons. Both of these outcomes would go some way to addressing the repeated or widespread use of unfair terms in an industry or by a particular business.<sup>56</sup>

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54 For example, this proposal would encompass the former 'technical option' proposed in the ACL Review Interim Report to amend section 13(1) of the ASIC Act to allow potential unfair contract terms to trigger ASIC investigative powers.

55 ACCC, *The Australian Competition and Consumer Commission's accountability framework for investigations*, 2013, at: [www.accc.gov.au/system/files/ACCC's%20accountablility%20framework%20for%20investigations.pdf](http://www.accc.gov.au/system/files/ACCC's%20accountablility%20framework%20for%20investigations.pdf).

56 For further details of concerns raised by stakeholders see ACL Review Interim Report, pages 126-30.

### 2.4.3. Other options and issues considered

#### Prohibit the use of terms previously declared unfair by the courts

Throughout the review, some stakeholders raised concerns about systemic unfair contract terms involving repeated or widespread use within an industry or by a particular business.

In response, the ACL Review Interim Report canvassed an option to prohibit the use of terms previously declared unfair by the courts to deter traders from using unfair contract terms. It also noted that any regulatory intervention must be proportionate to the level of consumer harm and avoid any unintended consequences.

Following stakeholder feedback, the review found that a broad prohibition of terms previously declared unfair would undermine the nature and intent of the provisions. Importantly, the provisions establish when a term is unfair in the context of the contract and parties on a case-by-case basis, acknowledging that what may be unfair in one context is not necessarily unfair in another.

Some stakeholders suggested a narrower prohibition to prevent a business using unfair terms for a similar class of consumers. However, regulators are already able to seek court declarations covering a class of affected consumers not party to the proceedings (non-party consumers) who have suffered, or are likely to suffer, loss or damage in relation to a declared unfair term.<sup>57</sup>

Further, a trader who seeks to enforce or rely on an unfair contract term when it has been declared unfair by a court would be misrepresenting the true position to the consumer. This could breach the ACL prohibition of false or misleading representations,<sup>58</sup> meaning the associated remedies, including monetary penalties, would apply.

The review found that strengthening the ability for regulators to investigate issues and bring enforcement actions would constitute a more proportionate and effective response to concerns about systemic unfair contract terms.

#### Expand the legislative examples of potentially unfair terms

The ACL Review Interim Report also flagged expanding the list of terms outlined in the ACL that may be unfair (the 'grey list'),<sup>59</sup> in response to examples of potentially unfair terms provided by stakeholders.

However, the 'grey list' is intentionally broad and indicative in nature. In many cases, the examples would already be captured, or would be considered unfair if they were subjected to the 'unfairness test' set out in the ACL and tested by the courts.<sup>60</sup>

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57 ACL, section 239.

58 ACL, section 29(1)(m).

59 ACL, section 25.

60 ACL, section 24.

While the review did not find that there is a case for expanding the 'grey list' at present, the ACL allows for the making of regulations at any time that set out types of terms, or terms that have a certain effect, that may be unfair. Before an example is added, the ACL requires the following factors be considered with sufficient supporting evidence:

- the detriment the term would cause to consumers
- the impact the term has on businesses generally
- the public interest.<sup>61</sup>

## Contracts as a whole

Some stakeholders suggested that some contracts should be considered unfair as a whole, as distinct from individual terms within the contract. These concerns were generally related to contracts that are lengthy, complex, not easily accessible or of poor value.

The ACL Review Interim Report considered this issue and identified a number of practical challenges associated with extending the unfair contract terms protections to contracts as a whole, particularly if the entire contract is voided. Further, there may be some implications that would be difficult to gauge, for example, the impact on other consumers who are party to a similar standard-form contract and on market behaviour more generally.

Concerns about contracts as a whole also raise broader issues of transparency, established principles of contract law and unfair trading practices. These are issues that may require further exploration by CAANZ after this review [see also **Chapter 4, 'Looking to the future'**, for discussion about 'unfair trading' as a priority topic for future work by CAANZ].

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61 ACL, section 25(2).

## 2.5. Unsolicited consumer agreements

The ACL contains specific consumer rights and trader obligations for uninvited transactions away from a trader's premises (such as unsolicited door-to-door and telephone sales). These provisions recognise that consumers in unexpected transactions do not have the opportunity to consider their options before being subject to a sales pitch.

While there was a wide range of views on the effectiveness of the protections for consumers and the compliance burdens for traders, CAANZ is convinced that pressure selling and consumer detriment occurs in at least some industry sectors. Given the impacts of pressure selling on vulnerable and disadvantaged consumers, the core protections should not be diluted.

Aware of the level of consumer detriment caused by unsolicited selling in some sectors, CAANZ remains concerned that some degree of additional intervention may be required. That said, while harm is occurring in some sectors, there is little existing information about the extent to which other sectors use unsolicited selling techniques. Accordingly, it is not clear whether other sectors experience similar problems. This makes it difficult to assess the impacts of any economy-wide reforms on legitimate, rather than problematic, traders.

The preferred approach at this time is to maintain the current balance of protections and initiate an economy-wide study of unsolicited selling to further inform policy consideration [see Chapter 4, 'Looking to the future'].

In the interim, there is a case for clarifying definitions in the provisions to ensure they operate as intended. CAANZ will also continue to liaise with relevant communications agencies to support greater transparency for unsolicited telephone sales.

### Looking to the future

Undertake an economy-wide study to examine the role, nature and impact of unsolicited selling in the Australian economy, to inform future policy development.

### Proposal

12. Ensure that the unsolicited selling provisions operate as intended by clarifying that the provisions:
  - can apply to public places
  - capture suppliers in their negotiations with consumers where the suppliers obtain from a third party (sometimes referred to as a 'lead generator') a consumer's contact details or permission to be contacted.

### 2.5.1. Objectives

The proposal aims to:

- avoid diluting the core protections for vulnerable and disadvantaged consumers



- address ambiguities in the drafting of the provisions to provide clarity and ensure they operate as intended.

## 2.5.2. Findings

### The cooling-off right

Suppliers of products may deal or negotiate directly with consumers in unsolicited sales or use third-parties to deal on their behalf. The unsolicited selling provisions apply to agreements for the supply of goods or services in trade or commerce where three thresholds are met:<sup>62</sup>

- a consumer and dealer make an agreement by telephone, or in each other's presence at a place other than the supplier's business or trade premises (whether or not they are the only negotiations that precede the making of the agreement)
- the consumer did not invite the dealer to come to that place, or make a telephone call, for the purposes of negotiating that supply
- the price is more than \$100 or could not be determined at the time of the agreement.

The relevant protections include a cooling-off period of ten business days for consumers.<sup>63</sup> When the ACL was introduced, it prohibited traders from supplying or seeking payment for goods and services during the cooling-off period.<sup>64</sup> However, the restrictions were loosened in 2012 to permit the supply of goods (but not services) priced \$500 or less, following industry concerns about the restrictions.<sup>65</sup> Traders are also required to follow documentation requirements and restrictions on trading hours.

The restrictions on payment and supply recognise that consumers who part with their money and accept the good have entrenched their commitment to the transaction and are therefore less likely to exercise their cooling-off rights, even if they are inclined to do so. Psychological barriers (such as commitment and consistency biases) as well as a range of personal and cultural factors can hold consumers back from admitting a mistake or reversing a decision. Also, a consumer seeking to cancel an agreement may find it more difficult to contact the supplier and obtain a refund. The consumer may also have had contact only with a dealer who may be a third party acting for the supplier, rather than the actual supplier.

Stakeholders had differing views on the effectiveness of the current provisions.<sup>66</sup> From a consumer perspective, there were calls for more substantial reforms to protect vulnerable consumers. In this context, submissions pointed to reports and case studies suggesting that the cooling-off right is unlikely to help someone who may not even realise they entered into an agreement until their first bill arrives, which may be some months later.

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62 ACL, section 69.

63 ACL, section 82(3).

64 ACL, section 86.

65 Competition and Consumer Regulations 2010, regulation 95.

66 See ACL Review Interim Report, pages 138-46, for more details of stakeholder views on the current provisions.

It was also said that some dealers use the cooling-off period as a marketing tool to make the transaction seem less risky to the consumer. High-pressure sales tactics can also be combined with powerful inducements such as ‘free laptops’.

From an industry perspective, some stakeholders called for substantial deregulation. It was suggested that the provisions were too broad in covering public places. Some industry stakeholders stated that the restrictions on payment and supply in the cooling-off period were onerous, anti-competitive and prevented consumers from testing the products.

Other industry stakeholders, however, sought only minor changes, such as greater flexibility in the documentation requirements and trading hours.

CAANZ has given detailed consideration to the case for reforming the cooling-off provision. The ACL Review Interim Report canvassed feedback on maintaining the current provisions, as well as three options to reform the core cooling-off protection. The report also noted a range of other suggestions put forward by stakeholders, including an outright ban on unsolicited sales (see **section 2.5.3**).

### The need for more information

The ACL Review Interim Report noted some existing data on the unsolicited selling industry, including the August 2012 research commissioned by the ACCC on door-to-door sales.<sup>67</sup>

However, while stakeholder feedback included evidence of harm in some sectors, there is still limited economy-wide information on:

- the use of all unsolicited selling techniques and the incidence of harm across different techniques
- the core consumer demographics across different industries that use unsolicited selling
- the level of customer satisfaction (compared with the total volume of sales) across all sectors
- the role and contribution of unsolicited selling to the Australian economy and to consumer choice and competition, including in remote areas
- the structure of different businesses and remuneration models, and incentives and drivers of poor conduct across different sectors and selling techniques.

This lack of information makes it difficult to assess whether substantial changes to the law (both regulatory and deregulatory) are justifiable across the economy, or whether more targeted actions would help address consumer harm or some of the root causes of poor conduct.

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67 See ACL Review Interim Report pages 135-6 and Box 22. Frost & Sullivan, *Research into the door-to-door sales industry in Australia*, August 2012, at: [www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf](http://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf).

While further data would help determine the most appropriate approach, overall CAANZ is convinced that consumer detriment and pressure selling occur in at least some sectors and particularly affect vulnerable consumers.<sup>68</sup>

This is consistent with the experience of regulators both before and after the introduction of the ACL, including recent experiences with vocational education and training providers targeting indigenous communities and other prospective students.

This is also consistent with feedback from dispute resolution services and community legal centres that deal regularly with complaints about unsolicited selling. These bodies provided a range of case data and case studies in their submissions throughout the review process.

Given the effects of pressure selling and other tactics on vulnerable and disadvantaged groups, the core ACL protections should not be diluted. Noting the level of consumer detriment caused by unsolicited selling in some sectors, CAANZ remains concerned that some degree of additional intervention may be required. To inform future policy development, CAANZ proposes to maintain the current provisions and undertake further research as a priority.



### **Undertake an economy-wide study to examine the role, nature and impact of unsolicited selling in the Australian economy, to inform future policy development.**

This study will help CAANZ assess how vulnerable and disadvantaged consumers could be better protected, how best to promote conscious and informed consumer choices, and how to address the root causes of poor conduct by traders. This includes consideration of an opt-in approach as well as other approaches [see section 2.1.3 below and **Chapter 4, 'Looking to the future'**].

## **Clarify the application of the law**

### **Public places**

The unsolicited selling provisions are intended to apply to places away from the supplier's business or trade premises, including public places. The provisions were drafted broadly so that the law remains flexible enough to capture new and emerging unsolicited selling practices, including online practices.

The Explanatory Memorandum for the ACL explicitly refers to the provisions applying to 'suppliers who do not have an established place of business', such as those 'trading in public places'.<sup>69</sup>

The current breadth of these provisions should be maintained, as a consumer can be just as vulnerable in a public place (such as outside a Centrelink office) as they are in their home or workplace. They face the same risk of being subjected to high-pressure sales tactics and the transaction can be just as unexpected. It is not clear that there is a principled basis for narrowing the scope of the current protections or diluting their core protections.

<sup>68</sup> Consumers particularly at risk include those who are elderly, unemployed, newly arrived in Australia, low income, indigenous (particularly in remote areas) and young (including minors acting without parental consent).

<sup>69</sup> Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010, at [2.10].

However, there may be some uncertainty about the application of the provisions following judicial comments in a Federal Court decision, which suggested that public places are not covered.<sup>70</sup> In particular, Justice Reeves suggested that the second threshold requirement for the provisions (that the consumer did not invite the trader to that place) refers to a location where an invitation is normally needed, such as a consumer's home, rather than an area 'to which the general public has access'.

Some confusion about the second threshold may flow from the drafting of the threshold requirements. On the face of it, the second threshold may appear to require consideration of whether a supplier needs permission to enter a place. This would appear to be illogical when applied to a supplier's own store or a place that the general public can access.

However, this illogicality is avoided if the second threshold is considered only after the first threshold is established (that the agreement was made by telephone or in each other's presence at a place other than the supplier's business or trade premises). This means that the question of whether or not a sale is invited is considered only in the context of sales that occurred off-premises (and not in a supplier's store, for example). This approach also gives the law its intended effect in capturing a range of public places.

It is not clear whether Justice Reeves' comments form a legal precedent on the interpretation of the second threshold as His Honour found, in any case, that a consumer had sought or requested the service in each transaction under consideration. Accordingly, the resulting agreements were not unsolicited. Nevertheless, to address any uncertainty about the policy intention, CAANZ proposes to clarify that the provisions do apply to public places so that they operate as intended.

### The use of third parties

In some of the case studies provided in submissions, consumers appear to have been contacted by a supplier after providing their contact details to a third party or apparent third party. For example, consumers are contacted by a vocational education training provider after providing their details to a job advertisement board operated by that training provider.

Further, the experience of some regulators is that there is an emerging practice in the face-to-face context where a supplier uses a third-party company to generate 'leads' in the field. The third party visits consumers at home to obtain general information as well as the consumer's written consent for the supplier to contact them to discuss the purchase of products. The third party may also obtain a range of information about the consumer's circumstances, such as a description and photographs of existing products of that nature in a consumer's home. The third party then passes this information on to the supplier. The supplier then contacts the consumer and considers that they are not bound by the unsolicited selling provisions as their negotiations have not been uninvited.

However, the provisions specifically cover negotiations by 'dealers' (who may or may not be the supplier), recognising that suppliers often engage third parties to negotiate in the field.

While the provisions already cover third-party dealers, there is an emerging risk that any confusion in this area may encourage suppliers to adopt narrow interpretations of the provisions that intentionally circumvent the intended operation of the law.

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70 *ACCC v ACN 099 814 749 Pty Ltd* [2016] FCA 403 (Reeves J) at [137].

As such, CAANZ proposes that the application of the provisions to third-party involvement should be clarified to address the use of 'lead generators'.

**Proposal 12: Ensure that the unsolicited selling provisions operate as intended by clarifying that the provisions:**



- can apply to public places
- capture suppliers in their negotiations with consumers where the suppliers obtain from a third party (sometimes referred to as a 'lead generator') a consumer's contact details or permission to be contacted.

This proposal would not alter the intended operation of the provisions but clarify their operation by:

- clarifying the definition of an 'unsolicited consumer agreement'<sup>71</sup> so that:
  - the first threshold requirement (an agreement is made in a place away from a supplier's business or trade premises) remains unchanged
  - if the place is away from a supplier's business or trade premises, the second threshold is that the consumer did not invite the dealer there, whether or not any person's permission is required to enter that place
  - the third threshold (over \$100 or the price cannot be ascertained at the time of sale) remains unchanged.
- making clear that the provisions capture third parties acting for a particular supplier or collating consumer contact details to be sold to a supplier or suppliers at a later date.

The amendment to clarify application to public places would involve some minor drafting changes, potentially with a legislative note. This change would be consistent with the Explanatory Memorandum for the ACL and ensure that the provisions can continue to capture new and emerging forms of unsolicited selling, including online. The amendment is also consistent with the approach of regulators since the introduction of the ACL and with existing guidance material. It is not expected, therefore, to add to any compliance costs but to avoid any uncertainty for the sector as to its obligations.

The second aspect of the proposal is also consistent with the legislative intent, noting that the definition of:

- a 'dealer' includes someone who is not the intended supplier of the goods or services<sup>72</sup>
- a 'negotiation' includes negotiations whether or not the terms of an agreement or proposed agreement 'are open to any discussion or dealing'.<sup>73</sup>

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71 ACL, section 69.

72 ACL, section 71.

73 ACL, section 72.

The proposal is not expected to add to any compliance costs but to avoid any narrow interpretations that could be used as a 'loophole' to circumvent the provisions or deny consumers a cooling-off right.

### **Unsolicited telephone calls**

ACL regulators have observed that many traders record unsolicited telephone calls when obtaining a consumer's consent to a transaction. Additionally, energy retailers are required to maintain records of all marketing activities, including telephone activities, under the National Energy Retail Rules.

However, the records may not include representations about the product or the sales pitch, meaning a consumer taking action against a trader cannot use the record as evidence of any false or misleading representation, for example.

It is particularly important in the context of unsolicited telephone calls that traders are clear about the product being offered. A consumer cannot see or inspect a sample at the time. As they may not receive written documentation for several days, it can be difficult for them to check that the paperwork corresponds with their recollection of the transaction.

Further, as a trader does not actually see the consumer they are dealing with, it is all the more important that they have an incentive to take adequate steps to ensure that a consumer gives, and is capable of giving, informed consent.

Accordingly, CAANZ considers that there is a strong case for requiring all unsolicited phone calls to be recorded in full, and will continue to liaise with the relevant communications agencies responsible for specific regulation in this area, including the Telecommunications Consumer Protections Code.

## **2.5.3. Other options and issues considered**

### **Ban on door-to-door and telephone sales**

A number of stakeholders initially called for a ban on some or all forms of unsolicited selling. Some also suggested that this was justified as the industry is already in decline.

However, a ban on any business model is an extreme form of intervention that is generally reserved for significant and widespread misconduct where all other forms of regulation have failed.

The broader effects on the Australian economy would also need to be better understood given its likely effects on the livelihoods of legitimate traders. Industry stakeholders noted that their membership and participation in unsolicited selling is growing rather than declining.

The benefits of any enhanced consumer protections would also need to be considered in light of the sector's economic contributions. Unsolicited selling can, for example, provide access to goods and services in remote areas.

Unsolicited selling can also provide flexible employment to those who may not be able to participate in other forms of employment due to other commitments, such as parenting or caring responsibilities, or the high barriers to entry associated with 'bricks and mortar' retailing.

There is little current information on the extent to which a broad prohibition would affect legitimate traders and their livelihoods, given the limited information on the extent of unsolicited selling across all industry sectors. It is also not clear how removing unsolicited selling from the market would affect consumer choice in terms of the products offered by legitimate traders.

### Opt-in period

At the Interim Report stage of the review, a number of the stakeholders who initially suggested a ban indicated that, if a ban was not implemented, they would support an 'opt-in' approach in place of the cooling-off right.

The ACL Review Interim Report raised an option that requires a consumer to 'opt-in' after the sale, within a certain time period (such as 48 hours) before a sale is concluded. This would mean no payment or supply would be permitted until the consumer opts in. One possibility is that the trader would not be allowed to contact the consumer during the opt-in period so that it is the consumer who must initiate contact.

This would allow consumers to reconsider their decision without having committed themselves to the transaction. It would also reverse the current 'default' position with a cooling-off right, which is that the transaction remains valid until it is cancelled.

CAANZ accepts that there is a wide and significant body of research on behavioural biases, including a strong tendency for consumers to remain with the status quo or 'default' option and to be consistent with their previous decisions.

Accordingly, the 'opt-in' approach is likely to result in fewer transactions being completed than the current 'cooling-off' approach. While this may benefit vulnerable and disadvantaged consumers, it is also likely to result in a significant decline in overall sales. The full economic and social impact of this decline on legitimate traders is unclear as such traders may not have drawn the attention of regulators.

There may also be a range of behavioural factors, business methodologies, governance issues and remuneration structures (such as commissions-based models) that contribute to poor conduct by unsolicited sellers. Accordingly, the appropriateness of an opt-in proposal is best considered in light of the proposed economy-wide study. The study's findings on the economic contribution of legitimate traders, as well as the drivers and incentives relating to poor conduct, would help CAANZ assess:

- the appropriateness of an opt-in approach
- whether it should apply to some or all sales
- the length and design of an opt-in period
- whether there are other options that would target consumer detriment or the root causes of poor conduct while having less impact on legitimate traders and consumer choice.

## Other reforms to the core protections

The ACL Review Interim Report raised two other options to introduce:

- additional rights (such as an extended termination right) for certain transactions. Examples included goods over \$500 or enduring service contracts that may involve financial investments and complex terms and conditions
- a combined opt-in approach, or the option above, for high-risk transactions, while easing restrictions on low-risk transactions (such as the restriction on supplying goods and services during the cooling-off period, documentation requirements and the permitted trading hours).

Following stakeholder feedback, these options are not proposed. CAANZ notes the practical difficulties of imposing substantial new obligations for 'high-risk' transactions, as the risk may depend more on the conduct and the consumer in question than on the type of product.

There are also likely to be difficulties in defining 'enduring service contracts' to capture appropriate services. 'Long' contracts can range from indefinite and recurring services (such as telecommunications services) to long but one-off contracts with multiple components (such as a building contract).

While the combined approach would take into account concerns from industry stakeholders, some of the same risks associated with the other options would also apply. Overall, there was little support for these proposals compared to a ban or opt-in approach.



## 2.6. Purchasing online

The ACL applies equally across all forms of technology, providing consumers with equal rights and protections regardless of whether they are purchasing online or in a physical store.

Overall, the generic and flexible nature of the ACL has been a key strength in enabling the law to adapt to, and address, new developments in the rapidly-changing online environment. Relevant regulator guidance (including existing guidance on comparator websites and online reviews) has been well received and continues to be an important tool in supporting awareness and compliance in the online environment.

Nevertheless, there is a case for improving transparency and clarity in relation to specific pricing practices and online auctions to address concerns about potentially misleading practices and further modernise the law.

### Proposals

13. Enhance price transparency in online shopping by requiring that any additional fees or charges associated with pre-selected options are included in the headline price.
14. Modernise the 'sale by auction' exemption from the consumer guarantees by ensuring the consumer guarantees apply to all online auctions.

### 2.6.1. Objectives

These proposals aim to:

- strengthen the law to address online pricing practices where there is a lack of transparency in the headline prices presented to consumers, providing greater clarity to traders and consumers and enhancing price competition
- modernise the law to apply consumer guarantees to goods purchased through online auctions.

### 2.6.2. Findings

The review generally found that the ACL is sufficiently flexible to address emerging issues, including dynamic developments in the online environment. Recent research also indicates the ACL is broadly in line with policy approaches to e-commerce in comparable countries.<sup>74</sup>

Regulator guidance supports awareness and compliance in the online environment. This includes the specific guides on comparator websites and online reviews that were developed to address a number of concerns around industry compliance with the ACL. CAANZ will continue to monitor the effectiveness of regulator guidance in the context of further developments in the online environment.

<sup>74</sup> See ACL Review Interim Report, pages 190-1, for further discussion of these findings.

## Price transparency in pre-selected options

The ACL requires traders to display the minimum quantifiable single price for a good or service in a prominent way.<sup>75</sup> Traders are also guided on how to conduct their business transparently through the ACL's provisions on misleading or deceptive conduct and false or misleading representations, and regulator guidance on these areas.

However, it has become an increasingly common practice in online payment systems to include pre-selected options. These options are associated with additional fees and charges that are not necessarily reflected in the minimum single price (or 'headline price' visible to the consumer upfront). This contributes to the wider practice of 'drip pricing', where fees are incrementally 'dripped' or revealed over the course of a booking or payment process.

This is a potentially misleading practice that can be problematic for consumers if they are unaware of the pre-selected options and do not have adequate opportunity to 'opt out' of them before proceeding to final payment.

Stakeholder feedback suggests this practice causes particular issues for consumers who are time-poor or unfamiliar with online payment processes, are from culturally or linguistically diverse backgrounds or have vision impairments.

Following engagement with the airline industry in late 2016, the ACCC achieved some success in persuading some airlines to cease using pre-selected options in their booking systems.<sup>76</sup> However, this result does not apply across all industries. To address this practice going forward, regulators would need to continue relying on voluntary compliance or proving instances of misleading conduct on a case-by-case basis.

Accordingly, CAANZ proposes to enhance price transparency in pre-selected options so that consumers are made aware from the start of the online payment process of the total possible amount they would pay if they do not opt out of the pre-selected options.



### **Proposal 13: Enhance price transparency in online shopping by requiring that any additional fees or charges associated with pre-selected options are included in the headline price.**

This proposal may require some traders to amend their existing websites and related pricing displays by adjusting the headline price or removing pre-selections. However, this would likely fall within existing technological capabilities and normal business practice regarding general changes to websites. Given sufficient transition periods, the associated costs are not envisaged to be significant. In addition, the proposal provides more clarity to traders about what is expected of them under the ACL regarding price transparency.

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75 ACL, section 48.

76 At: [www.accc.gov.au/media-release/another-airline-stops-pre-selecting-optional-extras](http://www.accc.gov.au/media-release/another-airline-stops-pre-selecting-optional-extras).

This proposal may result in the headline or advertised price appearing higher than the minimum price (that is, what the core product would cost without any extras or pre-selected options). While this may ‘put some consumers off’, traders should also be prepared to present or display pricing options to consumers in a manner that stimulates price competition while remaining transparent and compliant with the ACL.

The proposal also recognises that the use of pre-selected options can be a reasonable business practice when they are not presented in a misleading manner, such as when businesses specifically offer and advertise bundled goods or services that include pre-selected options for buyers’ convenience.

Accordingly, this approach is more appropriate and proportionate than banning the use of pre-selected options outright. This alternative was considered in the ACL Review Interim Report and has been introduced in the European Union [see **section 2.6.3** below for further discussion of this alternative].

## Online auctions

A number of the consumer guarantees do not apply to goods sold by auction, where the auction is conducted by an agent on behalf of the trader.<sup>77</sup> This includes, for example, the guarantee that goods are of acceptable quality.

The basis for the exemption was that many auctions traditionally occur in a physical location where consumers have the opportunity to inspect the goods in person prior to purchase. Further, these auctions have traditionally been seen as circumstances where the principle of ‘buyer beware’ applies. Bidders can, for example, choose not to bid or to alter their bid in response to the condition of the goods and the level of market interest on the day.

As currently drafted, the ‘sale by auction’ exemption means that most operators of online auction websites are unlikely to be considered as acting as agents on behalf of the trader.<sup>78</sup> This is because most online platforms operate as a ‘virtual marketplace’ where the website operator sets rules and guidelines for users, but leaves it to individual consumers and traders to deal directly with each other. In this case, the website operator is unlikely to be directly involved in the bidding process or be an agent for the trader, and the consumer guarantees would apply.

In contrast, an exemption from the consumer guarantees would generally apply to an online version of a traditional auction. This could involve a website operator gathering interested buyers online instead of in person, with an auctioneer acting as an agent on behalf of the trader. In these cases, the consumer guarantees are unlikely to apply.

However, regardless of who is conducting an online auction, a consumer purchasing online is unlikely to have the opportunity to properly inspect the goods in person (unlike traditional auctions held at physical locations).

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77 Section 2 of the ACL defines a ‘sale by auction’, in relation to the supply of goods by a person, as one that is conducted by an agent of the person, whether acting in person or by electronic means.

78 The Explanatory Memorandum for the Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 states that the relevant consumer guarantees ‘do apply to sales made by businesses on the internet by way of online ‘auction’ websites when the website operator does not act as an agent for the seller’ (at [7.16]).

Consultations also indicate there can be uncertainty and unnecessary complexity in determining what an online auction is and what type it might be, by whom it is being conducted and therefore whether the 'sale by auction' exemption or consumer guarantees apply.

Accordingly, CAANZ proposes to modernise the 'sale by auction' exemption to ensure that if a person or trader is supplying goods in trade or commerce in the online environment, the consumer guarantees apply regardless of whether the goods are being sold through an online auction.



### **Proposal 14: Modernise the 'sale by auction' exemption from the consumer guarantees by ensuring the consumer guarantees apply to all online auctions.**

This could be implemented through a minor amendment to the 'sale by auction' definition.<sup>79</sup>

Overall, this proposal would impose low compliance costs. Most online traders are not currently captured by the exemption, including those operating 'virtual marketplaces' with no direct involvement in the bidding process. However, there may be a moderate increase in compliance costs for the minority of traders that use an agent to conduct online auctions, given the potential volume and value of the transactions that would be captured.

Looking beyond auctions in the online environment, **Chapter 4, 'Looking to the future'** discusses further review of exemptions that may not be in the public interest. This could include reviewing the 'sale by auction' exemption as it applies to traditional auctions conducted in physical locations.

## 2.6.3. Other options and issues considered

### **Prohibiting the practice of pre-selected options**

The ACL Review Interim Report sought feedback on an option to prohibit the practice of pre-selected options altogether, similar to the approach adopted by the European Union in 2011.<sup>80</sup> Stakeholder views on this option were mixed.

On balance, the proposal to enhance disclosure in the headline price would be a more proportionate approach to price transparency issues than imposing an outright ban. This would also be consistent with a broader regulatory approach that seeks to avoid prohibiting practices where less interventionist approaches would address the issue.

### **Inclusion of common contingent fees in minimum price**

The ACL Review Interim Report noted some stakeholder concerns that traders may advertise a minimum price based on a payment option that is cheaper than other options, but is not often used in practice. Accordingly, the displayed price would not represent the minimum price for the majority of consumers.

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<sup>79</sup> ACL, section 2.

<sup>80</sup> The ban is given effect by Directive 2011/83/EU, Article 22 of which requires the express consent of the consumer for any additional payment on top of the main contractual obligation.

Some stakeholders therefore suggested that the pricing provisions should require that the minimum price include contingent fees commonly paid by consumers (such as delivery fees and credit card surcharges).

However, the review found there would be potential challenges for traders in determining what the majority of consumers are likely to pay in contingent fees. Given the complexity of complying with such a requirement, it would be a disproportionate response to the level of consumer detriment reported.

### **Online reviews and comparator websites**

Some stakeholders suggested specific disclosure requirements for online traders on how reviews and comparisons are made, edited and sourced, due to concerns that undisclosed commercial arrangements behind these processes could mislead consumers.

However, stakeholders generally acknowledged that the current ACCC guidance on online reviews and comparator websites provides practical assistance to help traders comply with the ACL's existing obligations regarding misleading behaviour.

Further, the QUT study indicates Australia's approach to disclosure and transparency in the online environment is broadly consistent with approaches in comparable jurisdictions. This includes having a mix of regulation, industry self-regulation and regulator guidance.

Accordingly, the review found that the current approach in this area remains appropriate. CAANZ will continue to monitor and explore whether further guidance on disclosure in the online environment would assist traders to comply.

## 2.7. Scope of the ACL

A key strength of the ACL is its generic nature, applying across all sectors of the economy. This includes the conduct of financial service providers (through mirrored protections in the ASIC Act) and the conduct of charities, not-for-profit entities and fundraisers (where the conduct is commercial or professional in nature).

An important distinguishing feature of the ACL's scope compared to many overseas consumer protection frameworks is that some protections also apply to businesses.

This approach is considered best practice, and small businesses in particular have used and relied on the ACL's protections.

Nevertheless, the review found that there is a case for enhancing and clarifying the scope of the ACL in several key areas:

- The monetary threshold that determines whether certain ACL protections apply to businesses has not changed in three decades. Consequently, the scope of purchases protected by the ACL has eroded over time due to the impact of inflation.
- It is not sufficiently clear in the drafting of the ASIC Act that its existing protections that mirror certain ACL protections apply to financial products as well as financial services.
- There are considerable challenges and uncertainty that the charitable, not-for-profit and fundraising sector faces in identifying when and how its conduct will be captured by the ACL.

CAANZ also notes that the ACL includes a number of exemptions. While several major exemptions were examined during the review, other exemptions should be reviewed as they become priorities to assess whether they remain in the public interest [see Chapter 4, 'Looking to the future'].

CAANZ will continue to monitor broader issues about the scope of the ACL as markets evolve.

### Proposals

15. Increase the \$40,000 threshold in the definition of 'consumer' to \$100,000.
16. Amend the ASIC Act to clarify that all ACL-related consumer protections that already apply to financial services also apply to financial products.

### Non-legislative action

Clarify through regulator guidance the current application of the ACL to the activities of charities, not-for-profit entities and fundraisers.

### Looking to the future

Assess the effectiveness of the proposed guidance on not-for-profit fundraising, further regulator actions, and whether any amendment to the ACL is necessary.

Review current exemptions, with a view to removing those that are no longer in the public interest.

## 2.7.1. Objectives

These proposals aim to:

- ensure that the ACL's intended level of protection for business purchases is accurately reflected by amending the \$40,000 threshold to broadly account for inflation since 1986
- ensure that the law is operating as intended by clarifying the current application of provisions in the ASIC Act for the financial services sector which correspond with protections in the ACL for other sectors
- provide clarity on the scope and application of the ACL to the activities of charities, not-for-profit entities and fundraisers.

## 2.7.2. Findings

### Protections for business purchases

Many of the ACL's protections (and the comparable ASIC Act protections) apply only when goods or services are supplied to a 'consumer' as defined in the ACL and ASIC Act.<sup>81</sup> These include the consumer guarantees, unsolicited consumer agreement provisions, lay-by provisions and linked credit contracts.<sup>82</sup>

The ACL definition of 'consumer' is drafted broadly so that it captures both:

- goods and services ordinarily acquired for personal, domestic or household use (without a monetary limit)
- goods or services for any use not exceeding \$40,000. Exceptions include business stock or goods to be used up or transformed in manufacturing, and used to treat or repair other goods or fixtures on land.

This means, for example, that a restaurant purchasing a \$30,000 commercial oven would be protected by the consumer guarantees, as would an individual purchasing that commercial oven for personal use at home.

The definition was intended to be broad and recognises that many businesses may require protection. In particular, small businesses can be as time poor as ordinary consumers and lack knowledge and expertise about products they buy.

However, the level of protection has been eroded over time as the \$40,000 threshold has not changed since 1986, when the threshold was raised from \$15,000 to \$40,000 to recognise inflation since 1977. The decline in the real value of the threshold means that certain business purchases that were once covered under the ACL are not any more, such as client record systems, certain farm equipment, air-conditioning units for industrial buildings, water tanks and some vehicle purchases. As noted in the ACL Review Interim Report, the implications can be particularly significant for small businesses, where a defective good or service may result in lost productivity.

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81 ACL, section 3 and ASIC Act, section 12BC.

82 For a summary of persons protected under the ACL, see ACL Review Interim Report, page 22, Table 1.

Accordingly, CAANZ proposes to increase the threshold in the definition of consumer to ensure that the original level of coverage for many business purchases will be largely restored in real terms.



### **Proposal 15: Increase the \$40,000 threshold in the definition of 'consumer' to \$100,000.**

The \$100,000 amount broadly reflects the effects of inflation since the \$40,000 threshold was set. CAANZ will monitor the need for any future revisions to the \$100,000 threshold.

This proposal would not apply retrospectively. It would apply only to purchases made after the proposal is implemented.

Traders may face additional costs in cases where they are required to provide remedies for faulty goods or services that they would not otherwise have needed to provide under a lower threshold or a voluntary store policy.

However, business consumers themselves would also benefit from wider protections when purchasing goods and services. The proposal would assist efficient economic transactions by assuring business consumers of certain minimum standards for the goods and services they buy up to the value of the increased threshold, reducing their search costs and allowing them to 'get on with business'.

A flow-on benefit of this proposal is that it would also capture ordinary consumer purchases of commercial products above the current \$40,000 threshold, such as commercial glass for installation in a home.

The review process raised broader issues about the definition of 'consumer', including whether it should continue to be limited to consumers 'acquiring' (purchasing) goods or services 'in trade or commerce'. As markets change, consumers may increasingly provide personal information in exchange for products or receive free or trial products from traders. These broader issues will be monitored as markets and community expectations about what constitutes a 'consumer' continue to evolve.

## **Financial products under the ASIC Act**

The current drafting of the ASIC Act creates uncertainties about the scope of its provisions that are intended to mirror certain ACL provisions, such as the protections against unconscionable conduct, misleading or deceptive conduct, and harassment and coercion.<sup>83</sup>

The mirroring of these protections reflects the operational arrangements at the national level whereby ASIC has responsibility for financial services and credit, and the ACCC has responsibility for the ACL.<sup>84</sup> Accordingly, financial services and products are excluded from the ACL at the national level (without affecting state and territory regulators).<sup>85</sup>

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83 ASIC Act, Part 2, Division 2.

84 These arrangements do not affect the jurisdiction of state and territory regulators in relation to financial services under their local application laws.

85 CCA, section 131A.



The mirrored protections explicitly cover ‘financial services’ and indirectly apply to conduct related to financial products. This is because ‘financial services’ has a broad definition. However, the absence of an express reference to financial products creates unnecessary uncertainty and is inconsistent with the ACL, which generally applies to both goods and services. CAANZ considers that clarification is required.



### **Proposal 16: Amend the ASIC Act to clarify that all ACL-related consumer protections that already apply to financial services also apply to financial products.**

The affected provisions in the ASIC Act relate to:

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

There are unlikely to be significant additional compliance costs, as the proposal clarifies the existing broad definition of ‘financial services’. The proposal is also consistent with ASIC’s existing approach to compliance and enforcement.

### **Activities of not-for-profits, charities and fundraisers**

The ACL generally applies to conduct ‘in trade or commerce’. The definition of this phrase includes ‘any business or professional activity (whether or not carried out for profit)’.<sup>86</sup> In many cases, the activities of fundraisers in seeking donations are captured by those general provisions of the ACL that do not require a supply of goods or services.<sup>87</sup> These provisions include unconscionable conduct and misleading or deceptive conduct.

However, CAANZ acknowledges there are legal complexities in this area particular to charitable and not-for-profit fundraising. For example, the sector can face difficulties in determining whether their conduct is ‘in trade or commerce’ and captured by the ACL. The uncertainty around the legal test for ‘in trade or commerce’ includes whether it focuses on:

- the nature of the relationship between the fundraiser and donor, as some case law suggests, or

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<sup>86</sup> ACL, section 2.

<sup>87</sup> Some specific protections (such as those relating to consumer guarantees and unsolicited consumer agreements) require a supply of goods or services to trigger the ACL’s application.

- the scale and sophistication of the fundraising activity, similar to the approach for determining whether peer-to-peer sales are ‘in trade or commerce’.

In part, this is due to a lack of specific guidance and limited case law in the fundraising context, particularly in relation to a ‘pure’ donation (without any supply of goods or services).

Further, even where the provisions apply, the sector can face difficulties in translating the provisions from the ‘consumer and supplier’ context to the ‘donor and fundraiser’ context.

These uncertainties may also have led to a reported misconception among professional advisers that the ACL would not apply. It is clear from the feedback provided by the charitable, not-for-profit and fundraising sector that it faces widespread uncertainty in determining how the ACL applies in practice.<sup>88</sup>

There was also a strong level of agreement within the sector that uncertainties contribute to a lack of informed and proactive (rather than incidental) compliance by the sector, a lack of regulatory focus on compliance and enforcement in the sector, and minimal awareness and use among consumers of their rights under the ACL.

Some parts of the sector also suggested that the ACL should be amended so that the generic protections in particular apply expressly to fundraising. It was said that this would provide the reassurance needed to help state and territory governments reform their local fundraising laws, potentially in conjunction with enhanced self-regulatory regimes. Some stakeholders had strong views that these local laws were inconsistent, not suited to cross-border activities, online activities and crowdsourcing, and hinder the work of the not-for-profit sector.

CAANZ notes the immediate need for regulatory guidance on the extent to which the ACL covers the activities of the sector and how regulators will approach compliance and enforcement. Accordingly, CAANZ proposes to develop regulatory guidance as a priority project for 2017.



### **Clarify through regulator guidance the current application of the ACL to the activities of charities, not-for-profit entities and fundraisers.**

As a follow-up project commencing in 2019-20, CAANZ will work closely with the sector to assess the effectiveness of that guidance in addressing the concerns raised [see **Chapter 4, ‘Looking to the future’**].



### **Assess the effectiveness of the proposed guidance on not-for-profit fundraising, further regulator actions, and whether any amendment to the ACL is necessary.**

That process would be informed by the practical experiences of the sector in using the proposed guidance to identify if further clarity related to the ACL is needed and how any interpretative issues manifest. The project will also look at how this could inform whether any future reforms are needed to enable the sector to work more effectively to the benefit of the Australian community.

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<sup>88</sup> For more information on how the ACL applies to charitable, not-for-profit and fundraising sector, see ACL Review Interim Report, Box 1 ‘Application of the ACL to the activities of charities and not-for-profits’, pages 16-17.

## Exemptions from the law

As noted in the ACL Review Interim Report, the current scope and coverage of the ACL is influenced by its history and development. The consolidation of the Commonwealth, state and territory consumer protection and fair trading laws is reflected in the law as it is currently written. In some cases, this may have translated into exemptions from the ACL that are no longer in the public interest, particularly given the objective of providing a generic, economy-wide law.

This review explicitly considered some of those exemptions (for example in relation to transport of goods; online auctions and consumer guarantees; publicly listed companies and unconscionable conduct; and insurance contracts and unfair contract terms provisions). However, others remain. CAANZ considers that examination of remaining exemptions is necessary to ensure they do not undermine the intended scope of the law [see **Chapter 4, 'Looking to the future'**].



**Review current exemptions, with a view to removing those that are no longer in the public interest.**

### 2.7.3. Other options and issues considered

#### Linking the consumer monetary threshold to increases in the Consumer Price Index

Some stakeholders suggested linking the threshold in the definition of consumer (currently \$40,000) to increases in the consumer price index.

This approach is not proposed as it would also result in relatively frequent changes to the threshold, creating compliance costs for traders in educating staff each time the threshold changes.

This can also impact on public understanding of the law, noting that changes to thresholds require time to be communicated, learnt and understood. A constant 'round' figure such as \$100,000 is likely to be easier for consumers and small businesses to recall than an amount that regularly increases by small increments. Given that the ACL imparts rights that are intended to be used directly by consumers and traders, it is important they understand the scope of the law.

## 2.8. Other amendments

**Table 5** below sets out proposals that generally do not relate to any of the core provisions discussed in more detail in this report.

Taking into account stakeholder feedback, CAANZ considers that the proposals outlined below and raised in the ACL Review Interim Report require further action, and are unlikely to have significant policy implications or unintended consequences.

**Table 5: Other amendments**

AMENDMENT	DETAILS
<p><b>Amendment (a)</b></p> <p>Amend the definition of ‘unsolicited services’ in section 2 of the ACL to allow the false billing provisions (sections 40 and 162) to apply to false bills for services not provided.</p>	<p>Current interpretations of the false billing provisions make it difficult to enforce against suppliers of unrequested <i>and unsupplied</i> services, even where the supplier has falsely represented that they have supplied services to the recipient.</p> <p>Section 40 of the ACL seeks to ensure that a trader cannot demand payment for a service a consumer did not request. It prohibits a person in trade or commerce from:</p> <ul style="list-style-type: none"> <li>• asserting a right to payment for ‘unsolicited services’, or</li> <li>• sending an invoice or other document setting out a payment amount, without a prominent warning indicating ‘This is not a bill. You are not required to pay any money.’</li> </ul> <p>However, regulators have been unable to rely on the false billing provisions in some circumstances, for example, in the context of notices issued by resellers of registered domain names to traders with registered domain names, falsely representing that the notice and associated fee is for renewal of that domain name when in fact, it is for a variation on that domain name.</p> <p>Justice Finkelstein in <i>.au Domain Administration Ltd v Domain Names Australia Pty Ltd</i> [2004] FCA 424 found that the false billing provisions in these circumstances do not apply, as they apply only to services that <i>have been</i> provided, not services <i>to be</i> provided.</p> <p>The problem arises because the current definition of unsolicited services in section 2 uses the past tense (‘services <i>supplied</i>’). The definition of ‘services’ throughout the ACL is broader and includes ‘any rights ..., benefits, privileges or facilities that are, or <i>are to be</i>, provided, granted or conferred’. An amendment to the definition of ‘unsolicited services’ to include services supplied or offered for supply would address that drafting oversight.</p>
<p><b>Amendment (b)</b></p> <p>Amend section 12DC of the ASIC Act to address terminology inconsistent with other consumer protection provisions in the ASIC Act and that may unintentionally narrow the scope of the provision.</p>	<p>Those sections of the ASIC Act that mirror provisions in the ACL largely use language imported from the ACL. This means that, at times, the language is inconsistent with that used more generally in the ASIC Act, and may also unintentionally limit the application of certain provisions.</p> <p>Specifically, section 12DC(1) of the ASIC Act relates to false or misleading representations in relation to financial products that involve land. It refers to representations in connection with ‘the sale or grant, or the ‘possible sale or grant’ of a financial product that consists of, or includes, an interest in land. This is a new concept in the ASIC Act, and is not consistent with conduct that is defined to be a financial service in section 12BAB.</p> <p>Amending the provision to refer to ‘supply or possible supply’ of a financial product would make it more consistent with the other provisions of the ASIC Act (such as section 12DB).</p>

**Amendment (b)**  
(continued)

Additionally, section 12DC(1) also refers to a financial product 'that consists of, or includes, an interest in land'. This may be interpreted that the financial product should consist of or include the interest in relation to land at the time the representation is made, which could limit the application of the section.

An amendment to the provision would clarify that the provision also applies to a situation where the representation occurred prior to the acquisition of a property, for example, in:

- promoting a registered or unregistered managed investment scheme that will invest in property, or
- recommending an investment in real property using a self-managed super fund structure where no fund is yet established.

**Amendment (c)**

Amend section 76 of the ACL (or the regulations) to clarify that disclosure requirements for unsolicited consumer agreements do not apply to certain exempt agreements.

Due to a drafting error, suppliers of energy and gas are required to disclose cooling-off rights in an unsolicited consumer agreement even in circumstances where those rights do not apply.

Section 86 of the ACL prohibits the supply of goods or services under an unsolicited consumer agreement, or accepting or requiring payment, within 10 business days (the 'cooling-off' period).

However, an exemption to section 86 applies to agreements for new supplies of electricity or gas services to premises (where the service is not connected to the premises, or is connected and no electricity or gas is being supplied by the supplier). This is to ensure that there is no delay in the delivery of this essential service.

Notwithstanding this exemption, section 76 still requires suppliers to disclose to consumers all their cooling-off rights, including (as prescribed by Regulation 83) the prohibition of supply under section 86. Consequently, consumers may be confused by information about rights and obligations that do not apply in their particular circumstances.

## 3. ADMINISTRATION AND ENFORCEMENT

### 3.1. The ACL in practice

The practical success of the ACL is built on consumers and traders not only knowing the law, but being able to apply it so that, wherever possible, they can resolve disputes early. For more complex disputes, parties also need to be able to navigate the dispute resolution pathways and civil justice systems to enforce their rights and access appropriate remedies.

A recurring issue raised in the review was the difficulty that consumers and small businesses face in accessing remedies. Many of the issues relate to evidentiary rules and broader processes in civil justice systems and are beyond the scope of the consumer law and this review process.

Nevertheless, the ACL could help ease the evidentiary burden for litigants if claimants could use admissions made by traders in previous court cases as evidence in their own cases.

CAANZ notes that while existing guidance materials are generally well received, many stakeholders emphasised the need to continually improve public awareness. Accordingly, CAANZ will continue to prioritise informing the public about the ACL and particularly consumer and business groups with more specific needs.

Further, CAANZ is committed to working with government and non-government stakeholders to promote greater consumer access to data as a powerful means of informing and empowering consumers.

More broadly, the ongoing success of the ACL requires continued engagement with stakeholders to understand the effects of the law. To this end, CAANZ will explore further ways to engage with stakeholders on future research and policy development, including a range of areas that warrant further investigation after this review [see Chapter 4, 'Looking to the future'].

#### Proposal

17. Ease evidentiary requirements for private litigants through an expanded 'follow-on' provision enabling them to rely on admitted facts from earlier proceedings.

#### 3.1.1. Objectives

This proposal aims to:

- address uncertainties in the scope of the 'follow-on' provisions that create barriers to parties resolving disputes and accessing appropriate remedies
- address an inconsistency that would otherwise arise between comparable provisions in consumer law and the competition law.

## 3.1.2. Findings

### Access to remedies at courts and tribunals

Regulators' enforcement actions are guided by the broader public interest rather than the needs of a specific individual. This means that even where a regulator has taken action on a particular matter, individual consumers or businesses may still want to seek compensation from a trader for a particular harm.

A consumer or business in this situation may access dispute resolution bodies that can help the parties resolve the issues, such as ombudsman bodies and conciliation services offered by state and territory ACL regulators. However, claimants may also need to escalate complex or intractable disputes to a court or tribunal for a legally binding decision.

The ACL Review Interim Report acknowledged that many concerns were raised about access to remedies at courts and tribunals. However, many of these issues relate to the processes and evidentiary rules established in each jurisdiction's civil justice system. These are beyond the scope of this review.

Under civil law processes, it is generally the person making a claim who must prove the claim on the balance of probabilities (the civil standard of proof). However, private litigants can find court and tribunal processes lengthy and costly. Compared to the trader, the claimant may have less knowledge and information about the product at their disposal. This is particularly true if previous issues with the product have been settled with other claimants using agreements requiring them not to disclose the issue to others.

The ACL mitigates some of this evidentiary burden by allowing a litigant to use a court's findings of fact from previous court proceedings as *prima facie* (non-conclusive) evidence of that fact in their own case.<sup>89</sup>

In practice, however, the facts established in previous cases may not have been found or determined by a court, but admitted or agreed by the trader. The existing case law suggests that the follow-on provisions may not extend to these admissions.

A similar 'follow-on' provision is found in the competition law.<sup>90</sup> Following a recommendation by the Competition Policy Review,<sup>91</sup> the Australian Government recently agreed to extend the provision to allow private parties to rely on admissions of fact made in another proceeding.<sup>92</sup>

An extension in the competition law without a corresponding extension in the ACL would result in an inconsistency in areas where the rationale for the 'follow-on' provisions is essentially the same.

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89 CCA, section 137H and similar provisions in other state and territory application laws.

90 CCA, section 83.

91 See Competition Policy Review Final Report, Recommendation 41. At: [www.competitionpolicyreview.gov.au/final-report/](http://www.competitionpolicyreview.gov.au/final-report/).

92 See the Australian Government response to the Competition Policy Review Final Report, page 32. At: [www.treasury.gov.au/PublicationsAndMedia/Publications/2015/CPR-response](http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/CPR-response).

Accordingly, CAANZ proposes that the ‘follow-on’ provision be extended in the consumer law context to enable private litigants to rely on admissions by the defendant as well as facts established in earlier proceedings as evidence in their own case. Agreed facts from earlier proceedings will remain available to private litigants and other third parties through usual court and tribunal processes.



### **Proposal 17: Ease evidentiary requirements for private litigants through an expanded ‘follow-on’ provision enabling them to rely on admitted facts from earlier proceedings.**

This proposal requires amendment to the CCA<sup>93</sup> and parallel amendments by state and territory governments to their ACL application laws.

There is a risk that the proposal may deter defendants from admitting facts in a court proceeding. However, defendants will still have incentives to admit certain facts to save time and costs in not contesting what is undisputed or asserting what is indefensible. The courts will also retain discretion as to whether *prima facie* evidence is sufficient to prove the alleged conduct and to hear arguments to the contrary.

Conversely, there may be a risk that defendants will be more inclined to admit facts as part of pre-court settlement (which is beyond the scope of any follow-on provision). However, while the follow-on provisions may be a factor, decisions about settling before court are likely to be influenced by other issues, such as the legal merits of the defendant’s case, their level of time and resources and reputational concerns.

As the Competition Policy Review found, the benefits of enhanced access to remedies are likely to outweigh the risks. To the extent that the ACL can address some of the significant evidentiary difficulties for litigants, the proposal is considered a proportionate response and one that would promote consistency with comparable ‘follow-on’ provisions.

## **Consumer information, research, data and policy development**

The existing guidance provided by regulators about the ACL and how it operates is generally well received. There were positive findings from the Australian Consumer Survey 2016 about the level of public awareness of the ACL. For example, the vast majority of consumers (90 per cent) are aware that laws exist to protect consumer rights when purchasing products or services.<sup>94</sup>

### **Consumer information**

However, while many consumers know they have rights, they may lack understanding about how to use those rights when a dispute occurs.

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93 CCA, section 137H.

94 Australian Consumer Survey 2016, page 21.



Stakeholders provided feedback on specific areas that may require additional attention from ACL regulators. For example:

- many stakeholders noted that certain vulnerable groups may have more specific needs (such as videos using sign language) and small businesses are especially time-poor
- some stakeholders stated that guidance material could be easier to find, including a clearly-formatted standalone version of the ACL that can be downloaded directly (rather than as a schedule to a much larger piece of legislation)
- some stakeholders also suggested a need for greater public information and engagement about regulator actions; others argued for dedicated funding for consumer research.

CAANZ regularly reviews the accessibility and effectiveness of its guidance material for consumers and traders. CAANZ will continue to pursue opportunities that:

- expand the available channels of communication and tailor them to target audiences
- use technology and other tools to direct parties to existing resources about dispute resolution
- expand the availability of public information about the ACL and regulator activities.

Following feedback during the review process, CAANZ is well placed to refer to its standing Advisory Committee areas for specific and renewed focus, particularly where stakeholders showed uncertainty or indicated that the reach and accessibility of guidance could be improved.

CAANZ will also refresh the format of its annual implementation reports to improve user-friendliness. These reports are available from the ACL website, [consumerlaw.gov.au](http://consumerlaw.gov.au). They outline the coordinated activities of ACL regulators in policy and research, education and information, and compliance and enforcement.

In relation to suggestions to co-locate materials, the ACL guides are published as a suite on the ACL website. Additional information on regulator websites may be customised to reflect the priorities of each jurisdiction and the effects of other relevant laws in those jurisdictions. Nevertheless, CAANZ will look for ways to co-locate information where this would be helpful.

A strong business case has not been made for the creation and maintenance of a standalone version of the ACL. Some stakeholders noted that it is most likely legal practitioners, rather than consumers or traders, who would read the provisions (rather than guidance materials). The ACL is available online and lawyers may also subscribe to services providing annotated legislation.

### Engaging with stakeholders

CAANZ will also continue to explore ways to engage stakeholders in future research and policy development as their experiences are particularly important in understanding how the law operates in practice. This cooperation extends to the ongoing work program of CAANZ, its Advisory Committees and the individual ACL regulators, as well as the priority projects outlined in **Chapter 4, 'Looking to the future'**.

For example, the Victorian Government announced funding in December 2016 for a \$4.95 million not-for-profit Consumer Policy Research Centre to:

- undertake research and policy development on consumer protection issues for the public benefit
- monitor grassroots consumer issues, focusing on issues for disadvantaged consumers and regional and rural Victorians.<sup>95</sup>

As noted in **Chapter 1, 'Overview'**, CAANZ also sees significant value in investing in the Australian Consumer Survey as a means of providing public information about the ACL and the activities of regulators, and as an evidence base for future policy development.

### Consumer access to data

CAANZ reiterates the importance of consumers having greater access to their personal transaction data and data about consumer products more generally. Greater access to data has the potential to empower consumers in increasingly complex market-based decisions, drive better consumer outcomes and improve overall economic efficiency.

CAANZ welcomes, and will follow closely, the developments in consumer data arising from the recommendations of the Competition Policy Review and Financial System Inquiry, as well as the Productivity Commission's current inquiry on data availability and use. CAANZ will continue to participate in intergovernmental processes and work with other agencies to contribute to these broader and ongoing efforts to improve consumer access to, and use of, data.

### 3.1.3. Other options and issues considered

CAANZ considered submissions that raised other ways to assist private parties before a dispute is escalated to a court or tribunal and other issues related to access to remedies. In **Chapter 2.1, 'Consumer guarantees'**, CAANZ considered that a reversal of the onus of proof in relation to breaches of the ACL as a means of easing evidentiary difficulties for private litigants is not justified.

#### Partial ban on non-disclosure clauses or agreements

Some consumer groups expressed concern about the appropriateness of non-disclosure clauses or agreements as part of settlements between parties where a consumer has an existing right to remedies under the consumer guarantee provisions of the ACL. These groups were concerned that non-disclosure clauses could prevent claimants discussing their problem publicly and with regulators, limiting the amount of public information about common concerns (particularly product safety concerns).

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<sup>95</sup> Premier of Victoria, the Hon. Daniel Andrews MP (9 December 2016) Media Release: *New Research Centre To Help Protect Consumers*. At: [www.premier.vic.gov.au/new-research-centre-to-help-protect-consumers/](http://www.premier.vic.gov.au/new-research-centre-to-help-protect-consumers/).

Traders cannot ‘contract out’ of the ACL by offering settlement agreements with lesser remedies than the ACL, although they may offer remedies that exceed the ACL. The ACL voids any contractual provisions that exclude, modify or restrict the consumer guarantees. Non-disclosure provisions in standard-form contracts may also be found unfair and declared void under the unfair contract terms protections of the ACL where the provision is not reasonably necessary to protect the trader’s legitimate interests.

The effect of non-disclosure agreements on information provided to regulators is limited to some extent. Non-disclosure clauses should not prevent a consumer from contacting regulators, and may be misleading, deceptive or unconscionable if they seek to do so.

Personal information held by regulators about consumers and their identity is protected by privacy laws. Some jurisdictions also have explicit protections in their application laws that protect anyone complaining to a regulator from civil actions as a result of their disclosure.

The ACCC will have strengthened powers to compel information about product safety from any person (including a consumer) under the proposal outlined in **Chapter 2.2, ‘Product safety’**.

Some consumers may still wish to agree to non-disclosure in exchange for more favourable terms or earlier settlement. This is particularly where the negotiation is based on the costs of taking the issue to court rather than the merits of the consumer’s claim where it is legitimately uncertain or disputed. Nevertheless, while there are benefits for individuals, non-disclosure agreements may reduce the level of information that is available to other consumers about goods in the market.

There are sufficient concerns about the wider impacts of non-disclosure agreements to warrant close monitoring of their use and impact to determine whether future legislative change is required [see **Chapter 4, ‘Looking to the future’**].

## Specialist tribunal for motor vehicles

Some consumer groups and academics suggested a specialist tribunal for motor vehicles, noting many of the consumer guarantee issues raised related to the motor vehicle sector [see **Chapter 2.1, ‘Consumer guarantees’**].

While ACL regulators do not administer the legislation that establishes and governs courts and tribunals in each jurisdiction, regulators closely follow the developments from:

- the Australian Government 2014 response to the Productivity Commission report into access to justice arrangements
- the Victorian Department of Justice and Regulation report to the Victorian Attorney-General into access to justice in Victoria.

Regulators will continue to monitor consumer problems relating to motor vehicles in light of the ACCC market study on new car retailing [see **section 1.6**], as well as any changes that may flow from reforms to the consumer guarantees [see **Chapter 2.1, ‘Consumer guarantees’**].

## Retail Ombudsman

Some submissions called for the establishment of a Retail Ombudsman modelled on the scheme established in the UK in January 2015. The UK scheme applies to most sectors, but excludes the motor vehicle sector. The decisions of the UK Retail Ombudsman are not legally binding but traders may voluntarily agree to be bound by Ombudsman decisions. In some circumstances, membership of a particular scheme or professional association may require this.

Such a scheme can provide free or low-cost services to assist and advise consumers who may not have the knowledge, time or resources to take issues to a tribunal.

CAANZ would support industry-led initiatives for dispute resolution schemes that leverage the buy-in, expertise and engagement of the relevant sectors. There would be significant merits to such schemes as the engagement and buy-in of retailers is essential for wide participation, credibility and improved consumer outcomes.

CAANZ intends to follow the developments in the UK closely [see **Chapter 4, 'Looking to the future'**]. However, it is premature to assess:

- whether the UK scheme will attract a significant membership from retailers across all the industries that it covers, or whether its voluntary nature results in a low participation rate
- whether the UK Retail Ombudsman will have the necessary resources to keep abreast of demand, and the level of resourcing required
- whether a generalist body would develop sufficient expertise across a vast range of products, noting that ombudsman schemes that have been successful in Australia to date have been specialist in nature and are often funded by a particular industry under a licensing scheme
- how such a scheme would fit into the Australian context, noting ongoing developments in the broader civil justice landscape as a result of recent reviews. There may also be flow-on effects to the role of existing dispute resolution services offered by state and territory ACL regulators.

## 3.2. Penalties and remedies

The ACL contains a mix of graduated penalties and remedies to ensure proportionate and flexible risk-based enforcement, and to rectify consumer harm. These include a range of civil and criminal sanctions including infringement notices, financial penalties, injunctions, disqualification orders, compensation orders and non-punitive orders such as community service orders.

While the overall mix of penalties and remedies is effective, the maximum financial penalties available for a breach or attempted breach of the ACL (and corresponding penalties in the ASIC Act) are insufficient to deter highly profitable non-compliant conduct and can be seen by some entities as ‘a cost of doing business’. They are also inconsistent with penalties available under the competition provisions of the CCA, to which the ACL is a schedule.

Further, non-punitive orders such as community service orders can be ineffective in circumstances where the trader in breach is not qualified or trusted to give effect to an order.

As such, there is scope to strengthen ACL penalties and remedies by increasing the maximum financial penalty to sufficiently deter highly profitable conduct contrary to the ACL and to improve the scope of community service orders by allowing third parties to give effect to those orders.

### Proposals

18. Increase maximum financial penalties available under the ACL by aligning them with the penalty regime under the competition provisions of the CCA:
  - for companies, the greater of:
    - the maximum penalty (of \$10 million), or
    - three times the value of the benefit the company received from the act or omission, or
    - if the benefit cannot be determined, 10 per cent of annual turnover in the preceding 12 months.
  - for individuals, \$500,000.
19. Allow third parties to give effect to a community service order where the trader in breach is not qualified or trusted to do so.

### 3.2.1. Objectives

These proposals aim to:

- strengthen the ACL penalties and remedies regime by making maximum financial penalties sufficient to deter highly profitable conduct that breaches the ACL
- align ACL penalties with the competition provisions of the CCA
- improve the utility and effectiveness of non-punitive orders by allowing third parties to give effect to those orders.

## 3.2.2. Findings

### Maximum financial penalties available under the ACL

Currently, maximum financial penalties available under the ACL (\$1.1 million for companies) are insufficient to deter future breaches, particularly where the non-compliant conduct may be highly profitable or the company is large. For example, the \$10 million penalty imposed against Coles for unconscionable conduct in dealings with 200 of its suppliers was referred to by Justice Gordon as insufficient for a company with annual revenue in excess of \$22 billion.<sup>96</sup> While maximum penalties under the ASIC Act are slightly higher (\$1.7 million for companies), they are also too low to act as an adequate deterrent.

In some cases, the benefits gained from a breach can generate profits greater than the value of the fine imposed. If penalties are too low, traders might be prepared to factor the risk of a low penalty into its pricing structures as a 'cost of doing business' rather than a deterrent. Penalties must be sufficiently high that a trader, acting rationally and in its own best interest, would not be prepared to treat the risk of such a penalty as a business cost.

The ACL penalty regime is inconsistent with the penalty regime for the competition provisions of the CCA, where the maximum financial penalty is considerably higher than the ACL and takes into account the size of the business and the benefit gained from the breach. It is unclear why there should be different maximum penalties for breaches of the competition and consumer provisions of the CCA as both can significantly affect consumer wellbeing, competition in the market and economic efficiency overall.

Accordingly, CAANZ proposes that maximum financial penalties should be increased.



### **Proposal 18: Increase maximum financial penalties available under the ACL by aligning them with the penalty regime under the competition provisions of the CCA.**

This proposal is expected to significantly increase the deterrent effect of the ACL provisions. Higher penalties would put a higher price on contraventions to sufficiently deter repetition by traders and by others who might be tempted to contravene the ACL.

This could be achieved by amending the ACL to include a 'maximum pecuniary penalty' provision similar to that in the CCA.<sup>97</sup> The new provisions would specify the following maximum financial penalty:

- for companies, the greater of:
  - \$10,000,000 or
  - if the court can determine the value, three times the value of the benefit the company obtained from the act or omission, or

<sup>96</sup> *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (Gordon J), at [106].

<sup>97</sup> CCA, section 76(1A).

- if the court cannot determine the value, 10 per cent of annual turnover during the period of 12 months (ending at the end of the month in which the act or omission occurred).
- for individuals, \$500,000.

The maximum penalties in the ASIC Act provisions should be similarly increased to ensure they operate as an effective deterrent and deliver outcomes consistent with the ACL.<sup>98</sup> CAANZ notes the ongoing Australian Government review of ASIC enforcement powers, including penalties, and asks that the matter of ASIC Act penalties be considered by the Australian Government in the context of that review.<sup>99</sup>

Potential drawbacks of this proposal include difficulties in determining annual turnover or the exact amount of benefit gained from the conduct. Some stakeholders suggested this would introduce uncertainty or complexity into the law and make it difficult for traders to determine the exact nature of liability under the law. **Information Box 3** provides a hypothetical example of how the proposed penalty regime would work.

Some stakeholders emphasised the importance of having penalties that are proportionate to the offence rather than the size of organisation. They suggested that the penalty would disproportionately affect small businesses that are less able to absorb significant penalties than larger businesses.

Under the proposed penalty regime, it would still be up to the courts to determine any appropriate financial penalty in a flexible and proportionate way. This takes into account:

- the non-exhaustive factors set out in the ACL (the nature and extent of the act or omission, the circumstances in which the act or omission took place, and whether the person has previously engaged in similar conduct)<sup>100</sup>
- general principles on assessing pecuniary penalties allowing courts to consider factors such as a company's size and market power, its corporate culture, the degree of cooperation with regulators, the deliberateness of the contravention and period over which it extended, and whether the contravention arose out of the conduct of senior management or at a lower level.<sup>101</sup>

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98 This could be achieved through amendment to Part 2, Division 2, Subdivision G of the ASIC Act.

99 The Australian Government's review of ASIC enforcement regime is considering penalties in the broader context of the enforcement options available to ASIC under the corporations law, including the civil penalty regime, the use of infringement notices for less serious contraventions and the possibility of establishing a financial system disciplinary regime.

100 ACL, section 224.

101 ACL, section 246.

### Information Box 3: Hypothetical example of application of Proposal 18

An ACL regulator takes successful court action against a firm for false and misleading representations. Evidence shows the firm generated a \$15 million benefit as a result of the representations.

Under the current ACL penalty framework, the regulator would be restricted to seeking a maximum penalty of \$1.1 million for each breach of the ACL. While a court may award penalties in relation to multiple breaches, in practice, the benefit gained as a result of breaching the ACL can be greater than the value of the penalty imposed.

If the ACL penalties were to mirror those that apply to breaches of the competition provisions of the CCA, the maximum penalty the court could impose would be the highest of:

- \$10 million, or
- three times the value of the benefit attributable to the breach, or
- if the benefit cannot be determined, 10 per cent of annual turnover in the 12 months ending at the end of the month in which the breach occurred.

If the value of the benefit attributable to the breach (or breaches) can be determined by a court, the maximum penalty will be the greater of three times the benefit or \$10 million. In this example, the maximum would be \$45 million.

However, if the value of the benefit cannot be determined, a court will calculate 10 per cent of the trader's annual turnover and the maximum penalty will be the higher of this amount and \$10 million.

While the maximum penalty in this hypothetical example is \$45 million, the court will make an assessment as to what penalty should be ordered having regard to the statutory principles within the ACL and general principles for assessing pecuniary penalties.

### Community service orders

The ACL allows regulators to apply to a court for community service orders as a remedy for breaches.<sup>102</sup> These orders require the trader to perform a service, for example, a trader who has made false representations may be required to educate its staff through a training video that explains the ACL advertising obligations.

However, a community service order of this type requires positive action from the trader to perform the service specified. There may be circumstances in which a trader is not qualified or trusted to give effect to an order (such as where a trader's conduct shows a blatant disregard for the law, a trader has a history of mistreating consumers, or it is evident that the trader does not clearly understand their legal obligations).

For example, it may not always be appropriate for a trader who has caused financial harm to low-income or vulnerable consumers to provide financial counselling to those consumers.

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102 ACL, section 246.



Currently, it is unclear whether a community service order can require the trader to pay a third party to perform this service on their behalf, even when it may be a more appropriate outcome. This means regulators are less likely to consider a community service order as an appropriate remedy in circumstances where the trader is not qualified or trusted to carry out the order. Additionally, courts cannot make an order against a third party requiring them to perform the service on behalf of the trader. Courts have civil legal principles that mean they can only make an order against a party to the proceedings.

As part of reforms implemented with the introduction of the *Consumer Rights Act 2015* (UK), the UK has broad and flexible measures under which the regulator is able to apply to courts for non-punitive orders to be carried out by third parties where the order is for redress, compliance or consumer information.

As such, CAANZ proposes that the ACL be amended to allow regulators to apply to a court for a community service order nominating a third party to give effect to the order where appropriate.



### **Proposal 19: Allow third parties to give effect to a community service order where the trader in breach is not qualified or trusted to do so.**

One of the main benefits of this proposal is that it would allow the regulator to utilise community service orders as a remedy for a breach of the ACL in more circumstances. It would also avoid any real or perceived conflict of interest or the occurrence of possible further harm to consumers resulting from the discharging of a community service order.

Some stakeholders thought it was already open to the court to make such an order. However, the current drafting of the provision does not clearly provide for this or spell out the circumstances in which a court would be able to do so.

Other concerns related to traders choosing the cheapest option for giving effect to an order, rather than the most effective. As such, the proposal may be best implemented by allowing the regulator to apply to the court nominating the third party.

## 3.2.3. Other options and issues considered

### **Penalty of imprisonment**

Currently, the ACL does not include a penalty of imprisonment for breaches of its provisions. This may create difficulties for ACL regulators in enforcing the law in particularly egregious circumstances. For example, regulators are currently unable to seek a penalty of imprisonment where a trader wrongly accepts payment from a consumer and does not, at the time, intend to supply the good or service.<sup>103</sup>

A penalty of imprisonment for these situations may be appropriate where:

- the defendant has a criminal history

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<sup>103</sup> ACL, section 158.

- the defendant has taken money from multiple consumers under the guise of a legitimate business and then used that money for their own purposes with no intention of providing the services
- the defendant is impecunious or declared bankrupt and, even if a court made orders for compensation, there is no prospect of the consumers actually recovering any of their money
- monetary penalties will be of no consequence because priority is given to compensation.

While some of these issues could be resolved under criminal law by other agencies, ACL regulators enforcing the ACL cannot seek imprisonment as a penalty.

Imprisonment is a possible penalty for a breach of the ACL in New South Wales, where its enabling legislation gives its courts the power to imprison an individual on a second or subsequent conviction for certain ACL offences.

The Productivity Commission study, *Consumer Law Enforcement and Administration*, is assessing differences in the enforcement powers of ACL regulators across jurisdictions and examining the ACL enforcement 'toolkit'.

As part of its ongoing work program, CAANZ will continue to monitor the effects of enforcement activities (particularly as a deterrent). CAANZ will consider if there are circumstances where a penalty of imprisonment is justified, noting that there may be some practical difficulties in introducing a common penalty in the ACL.

## Contributory fault

For actions taken at the Commonwealth level, the CCA allows damages in relation to misleading or deceptive conduct to be reduced to take into account a claimant's contributory fault,<sup>104</sup> for example, where they have not taken reasonable care and contributed to their loss.

However, the High Court of Australia has held that where state or territory legislation does not provide independently for contributory fault in response to misleading conduct claims, contributory fault is not available.<sup>105</sup> This means that a court cannot, for example, take into account that a consumer took a considerable risk in purchasing a motor vehicle before inspecting it.<sup>106</sup>

CAANZ considers that the rights of litigants under the ACL should apply uniformly, regardless of whether litigation is brought under Commonwealth law or under the law of any state or territory. CAANZ will continue to assess the consistency of ACL outcomes, including whether contributory fault should apply in the states and territories.

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104 ACL, section 137B.

105 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41.

106 See, for example, *Khattab v Grays (Vic) Pty Limited (Civil Claims)* [2017] VCAT 135.

## Penalties for misleading or deceptive conduct

A breach of the ACL's general prohibition of misleading or deceptive conduct<sup>107</sup> gives rise to a remedy, but not to a criminal sanction or financial penalty. Penalties are only available for a breach of complementary provisions prohibiting false or misleading representations that prohibit a specific range of prescribed practices, including those concerning the price or quality of goods.<sup>108</sup>

Some stakeholders questioned the basis for differing approaches to the available penalties and remedies for a breach of these provisions. Although the provisions overlap, they serve different purposes. Parliament clearly intended for the prohibition of misleading or deceptive conduct to create a broad norm of conduct (as opposed to prohibiting specific actions) with a range of remedies (but not penalties) available for a breach.<sup>109</sup>

It is unclear that the anticipated benefits of attaching financial penalties to the prohibition of misleading or deceptive conduct would outweigh the associated risks and costs. In particular, there is a risk that higher penalties may result in a more cautious judicial approach to interpretation of the general prohibition of misleading or deceptive conduct, given that the foundational principles of civil and criminal law require a court to interpret penalty provisions strictly.

## Phoenix companies

In the event that a company collapses, a 'phoenix' company can emerge, inheriting the same or similar assets and trading activities as the former company so that it can resume operations while avoiding liability. This can have wide-ranging harmful effects, including leaving consumers and suppliers out of pocket. It also damages the competitive process by giving the phoenix company a competitive advantage.

Some stakeholders raised concerns with the impact of phoenix companies on the ability of consumers to seek redress and regulators to enforce breaches of the ACL.

'Phoenixing' was considered out of scope for this review as it is primarily addressed by other regulatory frameworks, for example, the *Corporations Act 2001* (Cth). Further, it is not clear from stakeholder feedback to date that amending the ACL would be the most appropriate or comprehensive mechanism to address these harmful effects.

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107 ACL, section 18.

108 ACL, section 29.

109 Explanatory Memorandum for the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, at [3.10].

## 4. LOOKING TO THE FUTURE

The ACL Review has identified several topics that require further attention. While CAANZ is not yet in a position to put firm proposals to ministers, these topics will form the basis of priority projects commencing from 2017-18.

Some topics will require further exploration or research so that CAANZ can determine whether and how the operation of the ACL in these areas could be improved. This will give CAANZ an opportunity to:

- identify and collect additional information on the nature and extent of a topic and how it should best be addressed
- appropriately examine complex issues
- co-operate with broader or parallel reviews examining related issues
- monitor an issue as it continues to emerge or evolve.

These projects will reinforce CAANZ's pursuit of best practice, and could form part of CAANZ's current work programs or CAF's Strategic Agenda for 2018-21.

### Topics for priority projects

#### Commencing in 2017-18

Undertake an economy-wide study to examine the role, nature and impact of unsolicited selling in the Australian economy, to inform future policy development.

Promote enhanced collection and dissemination of product safety data, taking into account findings of the Productivity Commission's study of *Consumer Law Enforcement and Administration* and initiatives undertaken by other regulatory regimes.

#### Commencing in 2018-19

Explore how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices.

Explore whether the current consumer guarantees are fit-for-purpose for purely digital products, certain market practices and emerging technologies

#### Commencing in 2019-20

Assess the effectiveness of the proposed guidance on not-for-profit fundraising, further regulator actions, and whether any amendment to the ACL is necessary.

#### Commencing in 2020-21

Commission a third Australian Consumer Survey in 2021 to assist with monitoring and review of the ACL.

#### Ongoing as priorities arise

Review current exemptions, with a view to removing those that are no longer in the public interest.

## 4.1. Unsolicited selling

In **Chapter 2.5, 'Unsolicited consumer agreements'** CAANZ proposed an economy-wide market study of unsolicited selling to commence in 2017-18. The study will inform future decisions in this area. Given the level of consumer detriment caused by unsolicited selling in some sectors, CAANZ remains concerned that some degree of additional intervention may be required.

A market study will allow CAANZ to:

- explore in more detail the diversity of stakeholders views on the regulation of unsolicited selling
- understand the nature of unsolicited sales business models (including possible incentives for poor conduct)
- identify the benefits of unsolicited selling for consumers and businesses
- document the use of unsolicited sales practices across the economy and the relative incidence of consumer harm, including identifying high and low-risk sectors
- determine how any changes to the balance of current provisions, which apply generically across all sectors, could be structured to address ongoing problematic practices without placing unreasonable burdens on legitimate traders
- further assess the effectiveness of the current cooling-off provisions and, if necessary, consider alternative approaches raised in the ACL Review, such as an opt-in mechanism.

## 4.2. Product safety data

CAANZ sees great benefit in the collation and publication of data relating to public safety.

Further to ideas explored in **Chapter 2.2, 'Product safety'**, CAANZ will continue to examine ways in which product safety data collected under the ACL could be published to inform the Australian public [see **section 4.8** below].

The Productivity Commission has noted greater information sharing contributes to faster identification of and responses to product safety concerns.<sup>110</sup>

CAANZ also sees significant advantages in the development of a broader mechanism to collate and share product safety and injuries and illness data collected by ACL regulators, hospitals and specialist regulatory regimes in workplace, food and product safety.

Any national database of incidents would offer greater opportunities for regulators and jurisdictions to monitor issues, analyse risks, and prioritise education, compliance and enforcement activities. It could also allow public access to information, where appropriate. CAANZ is aware of significant challenges with developing, running and funding such a database and any work would need to be subject to a business case.

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<sup>110</sup> Productivity Commission Draft Report, *Consumer Law Enforcement and Administration*, December 2016, page 13. At: [www.pc.gov.au/inquiries/current/consumer-law/draft/consumer-law-draft.pdf](http://www.pc.gov.au/inquiries/current/consumer-law/draft/consumer-law-draft.pdf).

CAANZ will work with relevant government and non-government stakeholders to promote enhanced collection and dissemination of product safety data.

### 4.3. Unfair trading

As noted in **Chapter 2.3, 'Unconscionable conduct'**, issues have arisen about whether the ACL should be extended to address market-wide or systemic unfair conduct by banning 'unfair' business practices.

Noting the evidence of persistent unfair business practices, CAANZ is committed to investigating further whether a prohibition of unfair trading would provide additional protections beyond those currently in the ACL, and how it could be implemented in Australia. This includes considering whether the objective may be achieved within the Australian consumer protection framework by amending the existing ACL provisions or by introducing an additional prohibition that seeks to prevent unfair traders from entering the market.

Commencing in 2018-19, the project would examine how any additional protections required could be offered without unnecessarily duplicating existing protections.

### 4.4. Fit-for-purpose consumer guarantees

Overall, the review found that the flexible and generic nature of the ACL consumer guarantees regime is a key strength, but that there is significant concern about 'acceptable quality' and how traders disclose the consumer guarantees.

While the review generally prioritises these issues given the level of stakeholder concern, there remain some other areas that merit further exploration, including the:

- **Application of the ACL to purely digital products ('digital content')** – Stakeholder feedback suggested that digital content is challenging traditional concepts of consumers and traders, the traditional distinction between goods and services, ownership rights, the remedies that are expected by consumers and what 'fit-for-purpose' means in this context. Some of these issues were recognised by the UK in recent changes to its consumer law to address the unique characteristics of digital content. CAANZ sees merit in further exploring whether the ACL consumer guarantee provisions should be specifically tailored for digital content.
- **Application of the ACL to services, particularly enduring service contracts** – While the current consumer guarantee of due care and skill may work well in some areas, particularly for tradesperson services, it is not necessarily well suited to other services. The existing remedies may not be suitable for contracts for these types of services. Services that warrant specific attention from CAANZ in the near future include:
  - enduring services such as mobile phone plans (for example, coverage issues) and internet plans (for example, broadband speeds)
  - air travel (including the cancellation or rescheduling of flights).

- **Interaction of the ACL with non-disclosure agreements** – As discussed in **Chapter 3.2, ‘Penalties and remedies’**, non-disclosure agreements may have an appropriate role in the resolution of some disputes. However, ACL regulators will continue to monitor their use and take appropriate action where their use breaches the ACL. In addition, CAANZ will monitor the need for any legislative change to address any effects on consumer access to information to inform purchasing decisions.
- **Barriers to enforcing consumer guarantees** – ACL regulators have identified recent practices that may impede consumer claims, such as the practice of referring a product to a manufacturer or third party to determine the cause of a problem. This may result in the consumer being liable for a fee to cover the cost of the assessment, which may deter a consumer from pursuing a claim where the cost of assessment is high relative to the value of the good. While it may sometimes be appropriate to charge an assessment fee, this would only be under very specific conditions (for example, where the consumer may have caused the problem, the fee is refunded if the good is found not to be of acceptable quality, and the fee is proportionate and not used as a disincentive to pursue a claim). Regulators will look to reinforce these principles through education and possible enforcement action. However, a review of these issues and the need for law reform may also be necessary.
- **Application of the ACL to emerging technologies and new markets leveraging those technologies** – The ACL generally has the flexibility to address problematic practices resulting from new technologies as they emerge. However, CAANZ will continue to monitor how the consumer guarantees are working in practice as these technologies change the way market participants interact with one another, for example in the sharing economy.

CAANZ will continue to monitor developments in these areas, and proposes that a project (or series of projects) commence in 2018-19 to examine in more detail the nature of these markets and their interaction with the ACL and consumer guarantees.

## 4.5. Fundraising and the ACL

In response to significant industry and stakeholder uncertainty, in **Chapter 3.1, ‘The ACL in practice’** CAANZ proposes issuing regulator guidance as soon as possible to clarify the current application of the ACL to not-for-profit fundraising activities.

Once sufficient time has elapsed, CAANZ will assess the effectiveness of that guidance and any relevant regulator actions. The project will also look at how this could inform whether any future reforms are needed to enable the sector to work more effectively to the benefit of the Australian community.

CAANZ proposes to commence this assessment in 2019-20. Drawing on that analysis, CAANZ will also assess whether any amendment to the ACL is necessary.

## 4.6. A third Australian Consumer Survey

The ACL Review found the Australian Consumer Survey 2016 to be a valuable tool for evaluating consumer and business awareness of the law and their experience with consumer problems. Its findings were benchmarked against the findings of the Australian Consumer Survey 2011 and helped inform both the ACL Review Interim Report and this report.

Consistent with CAANZ's commitment to achieving international best practice in consumer policy development, CAANZ supports a continuation of this survey. Findings of the next survey will help determine whether and when another review of the ACL is warranted or if targeted reform projects would be preferable.

## 4.7. Review of exemptions under the ACL

The ACL contains a number of exemptions, many of which were carried over from the former Trade Practices Act.<sup>111</sup> CAANZ considers that exemptions in the ACL risk undermining the benefits of a nationally consistent approach to consumer protection.

The ACL Review assessed some priority exemptions, with CAANZ proposing to extend the unconscionable conduct protections to publicly-listed companies and apply the unfair contract terms protections to standard form insurance contracts.

Other exemptions will be reviewed as priorities arise, with a view to removing exemptions that are no longer in the public interest.

## 4.8. Ongoing monitoring of other consumer issues

In addition to the above projects, and as part of its ongoing work program, CAANZ will continue to engage with consumer issues raised in the ACL Review and take action when necessary. Relevant issues include:

- the operation and effectiveness of the UK Retail Ombudsman in improving consumer access to remedies
- broader issues of transparency and established principles of contract law in relation to the fairness of contracts as a whole
- consumer access to complaints data, including in relation to product safety
- the effectiveness of the ACL protections as greater consumer choice and contestability are introduced into the delivery of human services.

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111 The TPA was the precursor to the CCA and incorporated some fair trading and consumer protection provisions. The ACL Review Interim Report (page 28) flagged some specific exemptions, including the 'carve out' of architects and engineers from the consumer guarantee that services must be fit for a specified purpose, the exemption from most consumer guarantees for goods purchased at public auction where the auctioneer is the owner's agent, and the exemption from unsolicited consumer agreement provisions for business contracts and agreements made in the course of a party plan event.



## 5. IMPLEMENTATION

### 5.1. The implementation process

This report outlines a reform package for consumer affairs ministers of Commonwealth, state and territory governments to consider. The package includes high-level commitments, policy proposals and possible legislative amendments. A coordinated and cohesive plan is required to implement a package of this breadth.

Consumer affairs ministers and their governments will individually consider CAANZ proposals before they meet in late 2017 to determine the consolidated position for CAF. Once CAF has agreed to a package of reforms, CAANZ, in consultation with stakeholders, will implement the agreed reforms.<sup>112</sup>

#### 5.1.1. A staged implementation

The reform package will comprise:

- I. Legislative reforms that are well-developed and do not require formal regulatory impact assessment – if agreed by ministers, these reforms would be implemented first.<sup>113</sup>
- II. Reforms that require further development ahead of preparing legislative proposals – CAANZ has identified a preferred policy approach and will seek CAF’s agreement in principle to undertake work and policy design on these reforms (including regulatory impact assessment). Fully developed proposals will be put to ministers at a later date for decision.
- III. Non-legislative actions that ACL regulators and consumer affairs agencies can develop and implement in the short term – these actions improve the effectiveness and understanding of the current law.

Key themes and priorities for the future work agenda of CAANZ are identified in **Chapter 4, ‘Looking to the future’**. These key areas will form the basis of the CAF’s Strategic Agenda for 2018-21.

The reform package to be put to ministers will also factor in the recommendations and findings from the Productivity Commission’s final report of its study *Consumer Law Enforcement and Administration*, which is expected to be released around the same time as this report.

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112 Unless explicitly stated otherwise in this report, proposals to amend the ACL imply a corresponding amendment to any mirrored provision in the ASIC Act. In addition to agreement by CAF, proposed legislative changes will also require the agreement of the Commonwealth Minister responsible for the ASIC Act. Amendment of the Insurance Contracts Act would similarly require the agreement of the responsible Commonwealth Minister.

113 Regulatory impact assessment requirements have been determined by the Commonwealth Office of Best Practice Regulation

**Table 6: Reform proposals by implementation category**

I - Well-developed legislative proposals that do not require regulatory impact assessment	
<b>Consumer guarantees</b>	
<b>Proposal 4</b> Warranties against defects	Clarify the mandatory text requirements for warranties against defects by developing text specific to services and services bundled with goods.
<b>Product safety</b>	
<b>Proposal 7</b> Voluntary recalls	Clarify and strengthen voluntary recall requirements by: <ul style="list-style-type: none"> <li>• introducing a statutory definition of ‘voluntary recall’</li> <li>• increasing penalties for failure or refusal to notify a voluntary recall, proportionate to other ACL penalties.</li> </ul>
<b>Proposal 8</b> Powers to obtain information	Strengthen ACCC powers to obtain information about product safety, by broadening the power to apply to any person (including a consumer) likely to have relevant information, rather than only the supplier.
<b>Unconscionable conduct</b>	
<b>Proposal 9</b> Publicly-listed companies	Extend the ACL (and ASIC Act) unconscionable conduct protections to publicly-listed companies.
<b>Unfair contract terms</b>	
<b>Proposal 11</b> Powers to obtain information	Enable regulators to use existing investigative powers to better assess whether or not a term may be unfair.
<b>Unsolicited consumer agreements</b>	
<b>Proposal 12</b> Threshold requirements for unsolicited consumer agreements	Ensure that the unsolicited selling provisions operate as intended by clarifying that the provisions: <ul style="list-style-type: none"> <li>• can apply to public places</li> <li>• capture suppliers in their negotiations with consumers where the suppliers obtain from a third party (sometimes referred to as a ‘lead generator’) a consumer’s contact details or permission to be contacted.</li> </ul>
<b>Purchasing online</b>	
<b>Proposal 13</b> Pre-selected options	Enhance price transparency in online shopping by requiring that any additional fees or charges associated with pre-selected options are included in the headline price.
<b>Scope of the ACL</b>	
<b>Proposal 16</b> Financial products	Amend the ASIC Act to clarify that all ACL-related consumer protections that already apply to financial services also apply to financial products.

Other amendments	
<b>Amendment (a)</b>	Amend the definition of ‘unsolicited services’ in section 2 of the ACL to allow the false billing provisions (sections 40 and 162) to apply to false bills for services not provided.
<b>Amendment (b)</b>	Amend section 12DC of the ASIC Act to address terminology inconsistent with other consumer protection provisions in the ASIC Act and that may unintentionally narrow the scope of the provision.
<b>Amendment (c)</b>	Amend section 76 of the ACL (or the regulations) to clarify that disclosure requirements for unsolicited consumer agreements do not apply to certain exempt agreements.
The ACL in practice	
<b>Proposal 17</b> Private action	Ease evidentiary requirements for private litigants through an expanded ‘follow-on’ provision enabling them to rely on admitted facts from earlier proceedings.
Penalties and remedies	
<b>Proposal 18</b> Maximum financial penalties	<p>Increase maximum financial penalties available under the ACL by aligning them with the penalty regime under the competition provisions of the <i>Competition and Consumer Act 2010</i>:</p> <ul style="list-style-type: none"> <li>• for companies, the greater of: <ul style="list-style-type: none"> <li>– the maximum penalty (of \$10 million), or</li> <li>– three times the value of the benefit the company received from the act or omission, or</li> <li>– if the benefit cannot be determined, 10 per cent of annual turnover in the preceding 12 months.</li> </ul> </li> <li>• for individuals, \$500,000.</li> </ul>
<b>Proposal 19</b> Community service orders	Allow third parties to give effect to a community service order where the trader in breach is not qualified or trusted to do so.
II - Legislative proposals requiring further development and/or regulatory impact assessment	
Consumer guarantees	
<b>Proposal 1</b> Rights to refunds and replacements	Specify that where a good fails to meet the consumer guarantees within a short specified period of time, a consumer is entitled to the remedies of a refund or replacement without needing to prove a ‘major failure’.
<b>Proposal 2</b> Multiple non-major failures	Clarify that multiple non-major failures can amount to a major failure.
<b>Proposal 3</b> Extended warranties	<p>Enhance disclosure in relation to extended warranties by requiring:</p> <ul style="list-style-type: none"> <li>• agreements for extended warranties to be clear and in writing</li> <li>• additional information about what the ACL offers in comparison</li> <li>• a cooling-off period of ten working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed orally and in writing.</li> </ul>

### Consumer guarantees (continued)

<b>Proposal 5</b> Goods damaged or lost in transit	Clarify the scope of the exemption from the consumer guarantees for the transport or storage of goods where those goods are damaged or lost in transit.
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### Product safety

<b>Proposal 6</b> General safety provision	<p>Introduce a general safety provision that would require traders to ensure the safety of a product before it enters the market including:</p> <ul style="list-style-type: none"> <li>• a flexible and less prescriptive approach to compliance by reference to product safety standards (for example, a 'safe harbour' defence to a breach of the general safety provision)</li> <li>• a penalty regime for breaches of the general safety provision, consistent with the ACL's penalties regime.</li> </ul>
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### Unfair contract terms

<b>Proposal 10</b> Insurance contracts	Apply unfair contract terms protections to contracts regulated by the <i>Insurance Contracts Act 1984</i> (Cth).
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### Purchasing online

<b>Proposal 14</b> Online auctions	Modernise the 'sale by auction' exemption from the consumer guarantees by ensuring the consumer guarantees apply to all online auctions.
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### Scope of the ACL

<b>Proposal 15</b> Definition of 'consumer'	Increase the \$40,000 threshold in the definition of 'consumer' to \$100,000.
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## III - Non-legislative regulator actions

### Consumer guarantees

<b>Guidance on 'unsafe' and 'reasonable durability'</b>	Work with stakeholders (including tribunals) to provide more specific guidance on both 'unsafe' goods and 'reasonable durability'.
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### Product safety

<b>Mandatory reporting</b>	<p>Make clearer traders' mandatory reporting obligations by clarifying through regulator guidance:</p> <ul style="list-style-type: none"> <li>• existing reporting requirements (including timeframes)</li> <li>• reporting triggers on the meaning of 'serious injury or illness' and 'use or foreseeable misuse'.</li> </ul>
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<b>Product bans and recalls</b>	Explore options to streamline processes for implementing product bans and compulsory recalls, taking into account findings of the Productivity Commission's study of <i>Consumer Law Enforcement and Administration</i> .
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## Scope of the ACL

**Charities,  
not-for-profit  
organisations and  
fundraisers**

Clarify through regulator guidance the current application of the ACL to the activities of charities, not-for-profit entities and fundraisers.

## 5.2. Activities to support implementation

CAANZ has established governance arrangements to support the decision-making and implementation process once this report is delivered to ministers in March 2017.

Committees of consumer policy officers and ACL regulators will provide strategic direction throughout the implementation process, including risk management. These committees will also conduct any regulatory impact analysis required.

Stakeholders have played a key role in the review of the ACL and will continue to be involved in the implementation of the reforms.

## 5.3. Review of the intergovernmental agreement for the ACL

The 2009 *Intergovernmental Agreement for the Australian Consumer Law* (IGA) underpins the ACL and the national consumer policy framework.<sup>114</sup> Among other things, the IGA establishes the process for amending the consumer legislation.

The Terms of Reference for the ACL Review state that CAANZ will review the operation and terms of the IGA. It is expected the review of the IGA will be conducted following the delivery of the ACL Review Final Report and the Productivity Commission study of *Consumer Law Enforcement and Administration*.

<sup>114</sup> Intergovernmental Agreement for the Australian Consumer Law, 2009. At: [www.consumerlaw.gov.au/files/2015/06/acl\\_iga.pdf](http://www.consumerlaw.gov.au/files/2015/06/acl_iga.pdf).



# APPENDIX A: THE REVIEW PROCESS

## The ACL

The ACL gives effect to agreements by COAG in July and October 2008 to create a single national consumer law for Australia, including a national product safety law and improved enforcement, cooperation and information sharing arrangements between Commonwealth, state and territory agencies. A range of consumer protections were mirrored in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) to establish similar protections for financial services.

## Establishing the review of the ACL

This is the first broad review of Australia’s national consumer law. CAANZ is reporting to consumer affairs ministers following a year-long process established by terms of reference agreed by CAF in June 2015.

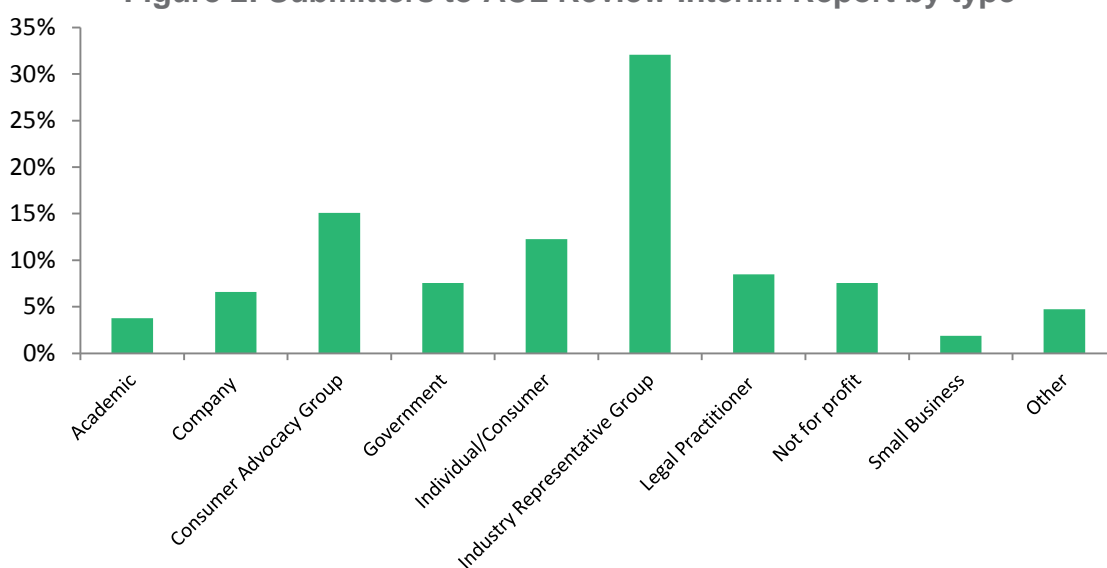
The terms of reference of the ACL Review establish the scope and conduct of the review and can be found at **Appendix B** to this report.

## Public consultation

Public consultation formed a core component of the review. To elicit stakeholder feedback, CAANZ released an Issues Paper in March 2016 that received more than 160 submissions. Feedback on that paper informed the ACL Review Interim Report, which was released in October 2016 and received 106 submissions. All non-confidential submissions to the ACL Review are available from the ACL website [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au). **Appendix D** lists non-confidential submissions in response to the ACL Review Interim Report.

A breakdown of stakeholder submissions to the ACL Review Interim Report by submitter type is provided in **Figure 2**.

**Figure 2: Submitters to ACL Review Interim Report by type**



During consultation on the ACL Review Issues Paper and Interim Report, face-to-face meetings were held with more than 130 stakeholder groups in Adelaide, Brisbane, Canberra, Darwin, Hobart, Melbourne, Perth and Sydney.

**Appendix E** lists the stakeholders involved in these meetings, including businesses and industry peak bodies, consumer advocates, community legal centres, dispute resolution bodies, legal practitioners, academics and government agencies.

The review also encouraged innovative thinking by posting three policy ‘challenges’ on the online platform, Mindhive ([mindhive.org.au](http://mindhive.org.au)) during October-December 2016:

- digital content and consumer protection
- product innovation and safety regulation
- increasing awareness of consumer rights.

The insightful responses to the policy challenges contributed to the development of CAANZ’s findings and proposals.

## Supporting projects

### Australian Consumer Survey 2016

The Australian Consumer Survey 2016, conducted by EY Sweeney, is the second national survey of consumer and business awareness and understanding of Australia’s consumer laws and experience in dealing with consumer issues. More than 5,400 consumers and 1,200 businesses were surveyed, with the results benchmarked against the 2011 survey to identify trends since the ACL was introduced. The report is available at: [consumerlaw.gov.au/australian-consumer-survey/](http://consumerlaw.gov.au/australian-consumer-survey/).

Findings from the survey indicated that the introduction of the ACL has generally been positive for both consumers and businesses. However, the survey also found that consumers are now less confident that businesses will do the right thing and not mislead or cheat consumers (64 per cent compared to 71 per cent in 2011).<sup>115</sup> More detail about the findings of the survey is available in the ACL Review Interim Report.

#### Information Box 4: Key findings of the Australian Consumer Survey 2016<sup>116</sup>

- Consumer and business awareness of Australia’s consumer laws remain high (at 90 and 98 per cent respectively).
- Consumers and businesses are experiencing a lower incidence of consumer problems (an average of 3.44 per month compared to 5.15 per month in 2011).

<sup>115</sup> Australian Consumer Survey 2016, page 28.

<sup>116</sup> Ibid, pages 6-9.



#### Information Box 4: Key findings of the Australian Consumer Survey 2016 (continued)

- Consumers feel more empowered to resolve disputes (82 per cent compared to 75 per cent in 2011), are more satisfied with the adequacy of regulators' information and advice (54 per cent compared to 38 per cent in 2011), and are more likely to believe the law provides adequate protection (54 per cent compared to 50 per cent in 2011).
- More businesses believe the ACL's introduction has had a positive impact on their compliance with the law (56 per cent compared to 42 per cent in 2011) and are more likely to agree consumer disputes result in a fair outcome (70 per cent compared to 50 per cent in 2011).
- The annual cost for businesses in dealing with consumer problems has decreased by \$3.5 billion (\$18.03 billion compared to \$21.56 billion in 2011).

The survey's findings provided important input into the ACL Review, offering valuable insights on issues such as consumer and business awareness of the law, the impact of regulator guidance, and pathways to resolving consumer problems. It highlighted that while there have been a number of positive trends since the introduction of the ACL, there is room for improvement. ACL regulators have been looking closely at the findings relating to their jurisdictions.

### Comparative analysis of overseas consumer policy frameworks

To better understand overseas developments in consumer policy, CAANZ commissioned Queensland University of Technology (QUT) to undertake a study into consumer policy frameworks in Canada, the European Union, New Zealand, Singapore, the UK and the USA. The study's report, which was released in April 2016 and is available at [consumerlaw.gov.au/review-of-the-australian-consumer-law/projects/](http://consumerlaw.gov.au/review-of-the-australian-consumer-law/projects/), made several broad observations:

- There is a high level of convergence between Australia's consumer policy framework and comparable jurisdictions, with most adopting a combination of general and specific protections with regard to unconscionable and highly unfair trading practices.
- The common regulatory approach to protecting consumers in e-commerce is to modify existing regulatory frameworks rather than adopt a different model. In this regard, jurisdictions have adopted similar approaches in relation to product quality, misleading pricing practices, fake reviews and fraud.
- Institutional structures for the administration and enforcement of consumer laws vary between jurisdictions, with differences in the level of private action, regulator activity and the roles played by non-government consumer groups.

- Access to justice is integral to a consumer policy framework's success in providing effective consumer protection. It requires a combination of strategies that must be assessed from the perspectives of both traders and consumers. They commonly include:
  - the form and content of legislation
  - information and education
  - assistance and advice
  - alternative dispute resolution
  - regulatory oversight and enforcement.

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

To independently assess opportunities to improve the ACL's 'multiple regulator' model, the Productivity Commission was commissioned to undertake a research study that assessed whether the institutional and administrative structures are effective in supporting a single national consumer policy framework and to make findings on how the model could be strengthened.

The Productivity Commission sought submissions on an Issues Paper released in July 2016 and a Draft Report released in December 2016. It will provide a final report to the Australian Government in March 2017, at approximately the same time this report is delivered to consumer affairs ministers.

Ministers will consider a package of proposals that take into account the findings of both this review and the Productivity Commission study when they meet later in 2017.

# APPENDIX B: TERMS OF REFERENCE FOR THE REVIEW OF THE AUSTRALIAN CONSUMER LAW

## Scope of the review

There will be three aspects to the review of the ACL:

1. The review will assess the effectiveness of the provisions of the ACL, whether these provisions are operating as intended, and address the risk of consumer and business detriment at an appropriate level of regulatory burden. These provisions include but may not be limited to:
  - general prohibitions against misleading or deceptive conduct, unconscionable conduct and unfair terms in consumer contracts
  - prohibitions against specific 'unfair practices', including bait advertising, referral selling, unsolicited supplies of goods and services, pyramid selling and component pricing
  - the system of statutory consumer guarantees
  - the national product safety framework
  - enforcement powers, penalties and remedies applying under the ACL.
2. The review will also consider the extent to which the national consumer policy framework has met the objectives articulated by COAG. This will include:
  - assessing whether the existing institutional, administrative and regulatory structures underpinning the ACL, such as the 'multiple regulator model' and the coordinated enforcement, education, policy, research and advocacy approach of the Commonwealth and states and territories, are effective and efficient in supporting a single national consumer policy framework
  - considering the interface between the national consumer policy framework and other legislation, its jurisdiction and reach, including whether there are legislative gaps, duplication or inconsistencies with industry-specific and other laws, including opportunities to reduce unnecessary compliance costs on businesses, individuals and the community while maintaining adequate levels of consumer protection
  - examining changes in consumer and business awareness of their respective rights, protections and obligations, including access to information about dispute resolution and consumer issues, since the implementation of the ACL.
3. The review will assess the flexibility of the ACL to respond to new and emerging issues to ensure that it remains relevant into the future as the overarching consumer policy framework in Australia.

## Conduct of the review

The review will be conducted by CAANZ. In conducting the review, CAANZ will:

- undertake a public consultation process, including with government organisations, consumer representatives, businesses, the public and the Commonwealth Consumer Affairs Advisory Council to seek their views and experiences of the national consumer policy framework
- undertake the second Australian Consumer Survey to assess consumer and business experience of the ACL nationally since its implementation
- commission an independent assessment of the opportunities to improve the 'multiple regulator' model, including seeking stakeholder feedback and applying a performance evaluation framework that is consistent with the Memorandum of Understanding agreed by ACL regulators
- examine the effectiveness of national guidance for businesses and consumers on the application, enforcement and administration of the ACL.

CAANZ will also:

- consider relevant developments in consumer policy overseas since the ACL was implemented
- take into account relevant findings from other reviews including the Competition Policy Review and the Financial System Inquiry
- will have regard to the application of consumer protection provisions as mirrored in the ASIC Act
- review the IGA's operations and terms on behalf of COAG.<sup>117</sup> CAANZ will provide to the Legislative and Governance Forum on Consumer Affairs an interim report in the second half of 2016 and a final report by March 2017. The final report will make findings and identify options to improve the efficiency and effectiveness of the ACL.

*Legislative and Governance Forum on Consumer Affairs*

*12 June 2015*

## Background

The ACL is the uniform Commonwealth, state and territory consumer protection law that commenced on 1 January 2011.<sup>118</sup> The *Australian Securities and Investments Commission Act 2001* (the ASIC Act) generally mirrors the consumer protection provisions applying to financial products and services.

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<sup>117</sup> 2009 Intergovernmental Agreement for the Australian Consumer Law, para 51.

<sup>118</sup> Schedule 2 of the Competition and Consumer Act 2010 and applied by the Commonwealth and in each state and territory.

On 2 October 2008, the COAG agreed to a new consumer policy framework, drawing on the recommendations of the Productivity Commission in its 2008 *Review of Australia's Consumer Policy Framework* and best practice in state and territory consumer laws, including a provision regulating unfair contract terms.<sup>119</sup>

On 2 July 2009, COAG signed the *Intergovernmental Agreement for the Australian Consumer Law* (IGA), underpinning the establishment of a national consumer law. It created a national consumer policy framework consisting of a national consumer protection law, a national product safety regulatory and enforcement regime, and improved enforcement, cooperation and information sharing arrangements between Commonwealth, state and territory agencies.<sup>120</sup>

The IGA states that the objective of the national consumer policy framework is '*to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly*'.<sup>121</sup>

This overarching objective is supported by six operational objectives:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition
- to ensure that goods and services are safe and fit for the purposes for which they were sold
- to prevent practices that are unfair
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage
- to provide accessible and timely redress where consumer detriment has occurred
- to promote proportionate, risk-based enforcement.<sup>122</sup>

The IGA provides that the enforcement and administration arrangements of the ACL will be reviewed within seven years of its commencement.<sup>123</sup> It also provides that the parties to the agreement will review its operations and terms after it has operated for seven years.<sup>124</sup>

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119 COAG Communique, 2 October 2008.

120 IGA, para E.

121 IGA, para C.

122 IGA, para D.

123 IGA, clause 23.

124 IGA, clause 51.

## APPENDIX C: ACL GOVERNANCE FRAMEWORK

To support the ACL, Australia's governments and consumer agencies have made formal agreements and administrative arrangements to provide for a cooperative and coordinated approach to the enforcement and policy development of the ACL.

The Legislative and Governance Forum on Consumer Affairs (CAF) is the peak governance body for the ACL and consists of all Commonwealth, state and territory and New Zealand ministers responsible for fair trading and consumer protection laws. CAF was formerly known as the Ministerial Council on Consumer Affairs.

CAF's role is to administer the ministers' collective responsibilities under the IGA, including considering consumer affairs and fair trading matters of national significance and mutual interest and developing a consistent approach to those issues where possible.

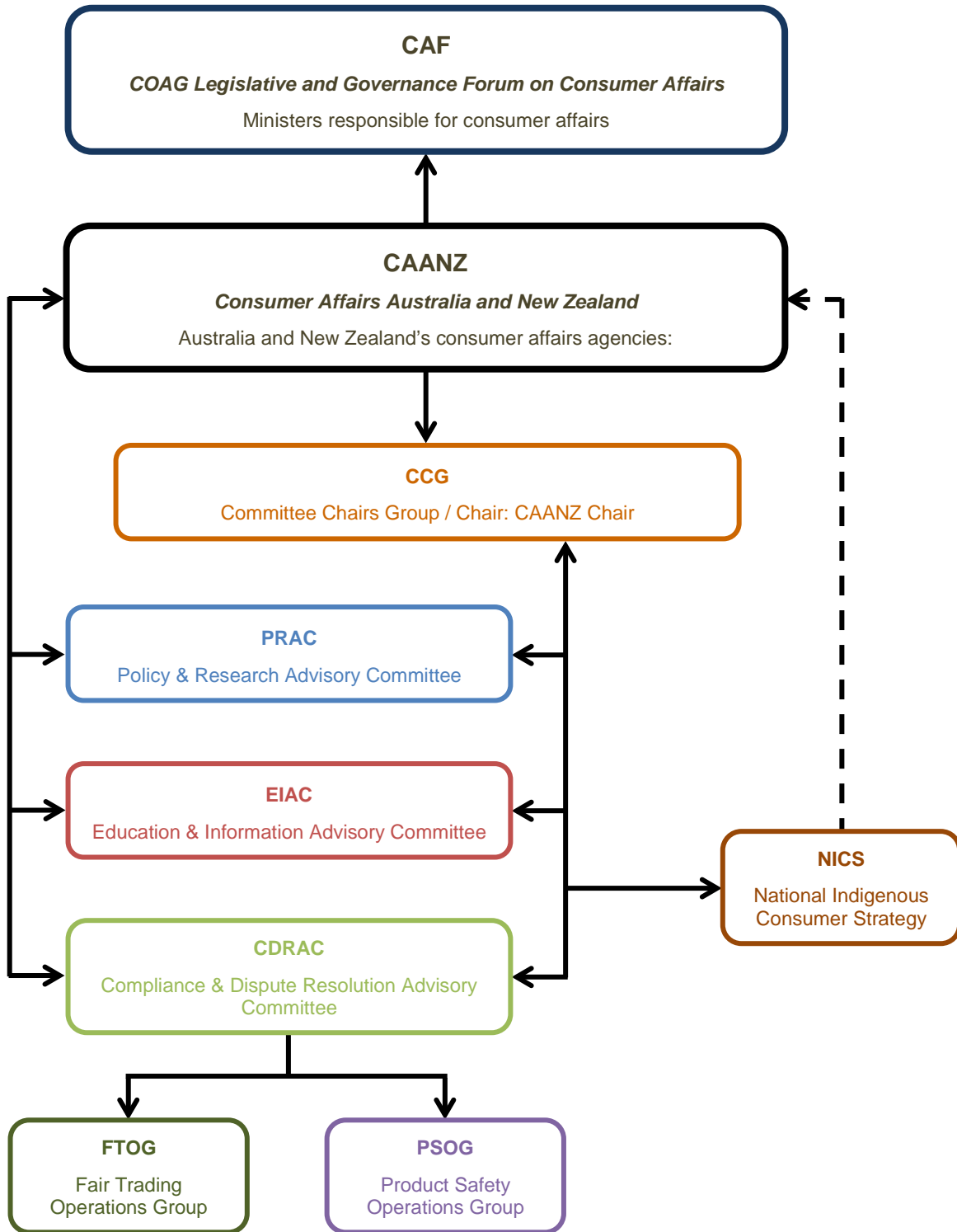
CAF is supported by CAANZ (formerly known as the Standing Committee of Officials on Consumer Affairs) as the principal national forum for day-to-day policy and enforcement cooperation and coordination between consumer agencies. Its membership comprises the most relevant senior officer of Commonwealth, state, territory, and New Zealand government agencies responsible for consumer affairs or fair trading. CAANZ receives advice, information and other support from three committees:

- The Policy and Research Advisory Committee (PRAC) focuses on the development of common policy approaches to national consumer issues, particularly as they relate to the ACL, and on coordinating the development of any amendments to the ACL. PRAC also conducts national consumer policy research.
- The Education and Information Advisory Committee (EIAC) focuses on national cooperation and coordination of education and information activities relating to the ACL and consumer issues more generally.
- The Compliance and Dispute Resolution Advisory Committee (CDRAC) focuses on national cooperation and coordination of compliance, dispute resolution and enforcement activities relating to the ACL.

From time to time, CAANZ may create other specific operations groups to aid it in achieving its objectives. CAANZ has established a Fair Trading Operations Group (FTOG), a Product Safety Operations Group and the National Indigenous Consumer Strategy Reference Group (NICS) as specific operations groups.

The current ACL governance framework is outlined in Figure 3.

Figure 3: ACL governance arrangements



# APPENDIX D: LIST OF NON-CONFIDENTIAL SUBMISSIONS TO THE ACL REVIEW INTERIM REPORT

## A

Accord Australasia Ltd  
Ai Group (The Australian Industry Group)  
Allan, Joshua  
Allens  
Arnold Bloch Leibler  
Australian Automobile Association  
Australian Automotive Aftermarket Association  
Australian Automotive Dealer Association Ltd.  
Australian Charities and Not-for-profits Commission  
Australian Communications Consumer Action Network  
Australian Finance Conference  
Australian Food and Grocery Council  
Australian Furniture Association  
Australian Institute of Company Directors  
Australian Labor Party  
Australian Lottery and Newsagents' Association  
Australian Retailers Association  
Australian Small Business and Family Enterprise Ombudsman  
Australian Toy Association

## B

Bebbington, Bruce  
Business Council of Australia

## C

Cancer Council Queensland

Caravan & Camping Industry Association NSW  
Caravan Industry Association of Australia  
Chamber of Commerce & Industry Queensland  
CHOICE  
Communications Alliance Ltd  
Consult Australia  
Consumer Action Law Centre  
Consumer Credit Legal Service (WA) Inc.

Consumers SA (Consumers' Association of South Australia Inc.)

Cooper Grace Ward

COTA SA

## D

Daly, Dr Angela and Dr Amanda Scardamaglia

DF Mortimer & Associates Pty Ltd

Direct Selling Australia

## E

Energy & Water Ombudsman NSW

Ethnic Communities' Council of NSW

## F

Federal Chamber of Automotive Industries

Financial Rights Legal Centre

Fundraising Institute Australia

## G

Gaskell, Professor Nicholas, TC Beirne School of Law, University of Queensland

Greatorrex, Gail

Gordon, Jeremy



Governance Institute of Australia

## H

Housing Industry Association

## I

Industry Training Consultants

Institute of Public Accountants

Insurance Council of Australia

Interactive Games & Entertainment Association

## J

Joint submission from Friends of the Earth, MADGE, Gene Ethics, National Toxics Network, Food Intolerance Network, Australian Food Sovereignty Alliance

Joint submission from Indigenous Consumer Assistance Network, Indigenous Remote Communications Association, WEstjustice, National Welfare Rights Network, Financial Counselling Australia, Redfern Legal Centre, CHOICE, Financial Rights Legal Centre, Consumer Federation of Australia, Consumer Action Law Centre

Justice Connect Not-for-profit Law

## L

Law Council of Australia

Law Council of Australia - Competition and Consumer Committee

Law Council of Australia - SME Business Law Committee, Australian Consumer Law Committee and Not-for-profit Legal Practice and Charities Committee

Law Institute of Victoria

Law Society of New South Wales

Law Society of Western Australia

Legal Aid New South Wales

Legal Aid Queensland

Lemon Caravans & RVs in Aus

Lemon Laws 4 Aus

Lewins, Dr Kate, School of Law, Murdoch University

## M

Master Electricians Australia

Mazda Australia Pty Ltd

Motor Trades Association of Australia

Motor Trades Association of Queensland

Motor Trades Association of South Australia

## N

Nottage, Dr Luke, University of Sydney

## O

Obesity Policy Coalition

Office of Multicultural Interests Western Australia

## P

Public Fundraising Regulatory Association

## Q

Queensland Consumers Association

Queensland Law Society

## R

Redfern Legal Centre

Retail Council

Robinson, Michael

Rodan + Fields

## S

Sales Assured Ltd

Samsung Washing Machine Recall Consumer Support Group

Seddon, Dr Nick

Shopping Centre Council of Australia

Sise, Peter

Slow Food Australia

Small Business Development Corporation

Spier Consulting – Legal

## T

Telecommunications Industry Ombudsman

Top End Women's Legal Service Inc.

Trade Services Council

TSO Mechanical

Victorian Automobile Chamber of Commerce

WorldVentures Marketing Pty Ltd

## **W**

Wilkins, Richard

# APPENDIX E: STAKEHOLDER ROUNDTABLES AND MEETINGS

## A

AirBnB

Australian Automotive Aftermarket Association

Australian Charities and Not-for-profit Commission

Australian Communications and Media Authority

Australian Industry Group

Australian Institute of Conveyancers WA

Australian Institute of Public Directors

Australian Retailers Association

Australian Small Business and Family Enterprise Ombudsman (Cth)

## B

Baker & Mackenzie

Baxter, Tom, Lecturer University of Tasmania

Bond, Carolyn AO

Bunnings Group Limited

Business Council of Australia

## C

Canberra Business Chamber

Cancer Queensland

Carolyn Bond AO

CCL Consultants

Chartered Accountants Australia and New Zealand

Christensen, Professor Sharon, Queensland University of Technology

CHOICE

Commonwealth Ombudsman

Community Council

Consult Australia

Consumer Action Law Centre

Consumer Advisory Committee (WA)

Consumer Credit Legal Service (WA) Inc.

Consumer Electronics Suppliers Association

Consumer Regulator Forum (Qld)

Consumer Utilities Action Centre

Consumers SA

Corones, Professor Stephen, Queensland University of Technology

Council of Social Services (ACT)

Council of Social Services (NSW)

Council of Social Services (SA)

Council of the Ageing (NT)

Council of the Ageing (SA)

CPA Australia

## D

Daly, Dr Angela, Queensland University of Technology

Darwin Community Legal Service

Dell Australia

Department of Communications and the Arts (Cth)

Department of Economic Development, Jobs, Transport and Resources (Vic)

Department of Health (Cth)

Department of Industry, Innovation and Science (Cth)

Department of Infrastructure and Regional Development (Cth)

Department of Justice and Regulation (Vic)

Department of Justice Tasmania

Department of the Environment and Energy (Cth)

Direct Selling Australia

Disability Rights Advocacy Service

Duggan, Thomas SC

## E

Energy and Water Ombudsman Victoria

Ethnic Communities Council of NSW

## F

Federal Chamber of Automotive Industries

Federation of Community Legal Centres Victoria

Financial Planning Association

Financial Rights Legal Centre

First Nations Foundation

Food Safety Australia and New Zealand

Fundraising Institute of Australia

## G

Governance Institute of Australia

Groupon

## H

Hardy, Dr Tess, Melbourne University

Hobart Community Legal Service

## I

Independent Supermarket Retailers Guild of South Australia

Insurance Council of Australia

## J

Jaguar Land Rover Australia

JB Hi-Fi Ltd

Justice Connect Not-for-profit Law

## K

Kidsafe SA

Kidsafe WA

## L

Law Council of Australia - Competition and Consumer Committee

Law Council of Australia - SME Business Law Committee

Law Institute of Victoria

Law Society of NT

Law Society of SA

Law Society of WA

Law Society Queensland

Legal Aid Commission of NT

Legal Aid Hobart

Legal Aid NSW

Legal Aid Queensland

Legal Services Commission of SA

Lewins, Dr Kate, Associate Professor, Murdoch University Law School

LG Electronics Australia Pty Ltd

## M

Master Electricians Australia

Melbourne University

Minifie, Dr Jim, Grattan Institute

Motor Trades Association NSW

Motor Trades Association NT

Motor Trades Association of Australia

Motor Trades Association of the ACT

Motor Trades Association Queensland

Motor Vehicle Industry Advisory Committee WA

## N

National Retail Association

No Interest Loan Network of Tasmania

NSW Business Chamber

NSW Civil and Administrative Tribunal

NSW Department of Finance, Science and Innovation

NSW Fair Trading Legal

## O

Office for the Ageing SA

Office of the NSW Small Business Commissioner

## P

Paterson, Associate Professor Jeannie, Melbourne University

People with Disabilities WA

Public Fundraising Regulatory Association

## Q

Queensland Consumer Association

Queensland Office of Fair Trading Stakeholder Forum

## R

Real Estate Institute of NSW

Real Estate Institute of Western Australia

Redfern Legal Centre

Retail Council

## S

Senior Rights Service

Shopping Centre Council of Australia

Small Business Commissioner (SA)

Small Business Commissioner (Victoria)

Small Business Development Corporation (WA)

Smith, Dr Rhonda, Melbourne University

Standards Australia

Steinwall, Ray, Novartis

Super Retail Group

## T

Tasmanian Small Business Council

TECO Australia Pty Ltd

Telecommunications Industry Ombudsman

Therapeutic Goods Administration

## U

Uber

Unit Owners Association of Queensland

UnitingCare Wesley Bowden

## V

Victorian Automobile Chamber of Commerce

Victorian Chamber of Commerce and Industry

## W

WA Department of Commerce