30 January 2017

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

Dear Commission

Productivity Commission Draft Report – Consumer Law Enforcement and Administration

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

As the Draft Report identifies, in many respects the multi-regulator model of the Australian Consumer Law (**ACL**) is working well. At the same time, there is room for considerable improvement. Effective administration and enforcement of the ACL is central to the cultural, social and economic impact of the legislation—both in terms of how businesses operate and relate to consumers—and also to how consumers relate to business, and perceive their own rights. Consumer Action is concerned that community awareness of the ACL remains low, that consumers do not feel empowered and generally lack basic knowledge of the regulatory framework. This in turn prevents the ACL from having the impact on the market that it is designed to have.

The 2016 ACL survey commissioned by Federal Treasury on behalf of Consumer Affairs Australia and New Zealand (**CAANZ**) highlighted the extent to which the ACL has failed to gain traction in the public mind, and the lack of faith that consumers have in its enforcement.[1] While consumers are generally aware that consumer law exists (90%), comparatively few believe that the law adequately protects them (54%). A mere 45% believe that the government is proactive is preventing breaches, and only 51% believe that businesses which treat consumers unfairly will be detected. Barely half of consumers (54%) felt that the government provides adequate information about consumer rights and responsibilities, and only 58% felt that the government provides adequate access to dispute resolution services. Finally, a mere 42% of consumers believe that businesses which treat consumers unfairly will be adequately penalised. Collectively, these measures indicate a lack of community confidence in consumer protection.

More effective enforcement and administration of the ACL could do much to improve these measures and enhance the impact of the ACL. Perhaps as much as deficiencies in the content of

[1] ACL Survey infographic summary, available at: http://consumerlaw.gov.au/files/2016/05/Infographic.pdf

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the ACL, the current approach to administration and enforcement fails to maximise that impact. In seeking to improve this situation, it is worth defining the necessary conditions for success.

Effective enforcement and administration of the ACL requires proactive regulators working collaboratively and with high visibility in an environment of well-informed consumers who understand their rights, and know how to assert them. This should be the ideal to which reform aspires, and our response to the Draft Report is framed with that goal in mind.

Consumer Action recommends:

- Consistent and transparent reporting of regulator activity to enable meaningful assessment of regulator impact, both for the purpose of cross-jurisdictional comparison and also to track progress over time.
- A publicly-available national database of complaints to better inform consumers of problematic business operators and improve business accountability, which would contribute to creating a positive culture of compliance.
- A Retail Ombudsman to improve consumer access to meaningful and nationally consistent dispute resolution, while providing consistent and useful data for potential regulator enforcement action.
- A super complaints power for appropriate consumer advocacy organisations, to drive reform from grassroots community concerns rather than from within the regulatory bureaucracy.
- Funded consumer advocacy and research to strengthen the evidence base for reform, and ensure that the consumer view is appropriately represented in relevant policy debates and development.

While our submission expands significantly on the above points, we have structured the document as a direct response to the key findings, recommendations and information requests highlighted in the Draft Report.

Our views are outlined in detail below.

1. Assessments of the multiple-regulator model

Draft Finding 3.1

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

Consumer Action strongly agrees with this finding, and emphasised this point strongly throughout our submission to the Productivity Commission *Issues Paper – Consumer Law Enforcement and Administration* (**Issues Paper**).

In our submission to the Issues paper we drew heavily on our 2013 report, *Regulator Watch – The Enforcement Performance of Australian Consumer Protection Regulators* (**Regulator Watch**) which made the following recommendations relevant to this finding:

- *With the exception of the Australian Securities and Investments Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**), the reporting of enforcement work is poor—particularly in the ACT, NT, QLD, SA and TAS. This should be improved, as full and transparent reporting enables third parties to assess the effectiveness of regulation, and improves regulator accountability.*

- *Regulators should improve their mechanisms for reporting to consumer organisations, to regularly and routinely report on outcomes of complaints made by or through those organisations.*

Further, we attached more recent research[2] to our submission to the Issues Paper which showed that in the years since Regulator Watch was compiled, the quality of reporting of enforcement work has not improved.

Consumer Action is aware of the 8 November 2016 response provided by the Chair of the Compliance and Dispute Resolution Advisory Committee (**CDRAC**) to the Productivity Commission, outlining the difficulties in providing consistent and transparent reporting of enforcement, resourcing and complaints data across the various ACL regulators.[3]

The CDRAC summarised the difficulties (and shortcomings) in providing such data in the following terms:

- Measures of enforcement activity can be skewed, as different agencies may take the lead on a particular issues. While the lead agency is assisted by other agencies, it will be the lead agency that appears active on the basis of enforcement statistics—even though many agencies may be involved in the work.

- Agencies rely on a range of tools and functions such as consumer education, trader engagement programs and marketplace statements such as public warnings. These do not appear as enforcement statistics, but are nevertheless important and again can result in a skewed representation of how active an agency may be—depending on the degree to which they utilise these other tools and functions in exercising their regulatory functions.

- Complaints handling and dispute resolution data can be difficult to provide, as legislative over-lap can make it difficult to identify ACL specific matters. A matter may commence as an ACL matter but then be categorised otherwise, or vice versa.

[2] This was attached as (Appendix B) to Consumer Action's submission to the Issues Paper.
[3] Available at: http://www.pc.gov.au/inquiries/current/consumer-law/regulators-information

- Providing data on resourcing is difficult as staff are not engaged on an 'ACL specific' basis, but are instead engaged to perform functions across various pieces of legislation, both national and state-based.

- Much of what the state based regulators do could be regarded as supportive and complementary to the activities of the Australian Competition and Consumer Commission (**ACCC**). While the ACCC may undertake significant enforcement work, the ACCC itself acknowledges that this is ably aided by the conciliation and complaint resolution functions of the state based regulators—and again, this can skew the statistics.

While Consumer Action acknowledges these difficulties, we do not believe they are insurmountable. For instance, degrees of collaboration can be explained—so that where there has been a lead agency on a particular issue being supported by others, this can be described when providing the data. This can be the case whether the lead agency is the ACCC, or another state based agency.

The concept of 'enforcement' can be widened to take into account other tools, such as consumer education, trader engagement programs and marketplace statements such as public warnings—to ensure that this activity does not go unrecognised. However, we would also encourage regulators to consider how they evaluate the effectiveness of such tools.

Resourcing levels of respective agencies need not be designated as ACL specific—simple breakdowns into enforcement areas, complaints handling and other divisions would be sufficient to identify areas of relative funding adequacy, versus those where funding may be insufficient, particularly when compared to agencies in similar sized jurisdictions.

In relation to complaints handling and dispute resolution, Consumer Action is strongly supportive of establishing a Retail Ombudsman. An ombudsman would be required to provide granular reporting of ACL related matters, thus overcoming the difficulties that state based regulators currently have in that respect. This would also assist in freeing up the state based regulators to undertake more enforcement action (a key recommendation of Regulator Watch), by not binding their resources to complaints handling and conciliation services.

In short, Consumer Action concurs with Draft Finding 3.1, and does not believe that the difficulties identified by the CDRAC are fatal to the development of enhanced reporting requirements—which are outlined by Draft Recommendation 4.2.

The importance of developing enhanced, consistent and transparent reporting requirements cannot be overstated. In order to adequately assess the effectiveness of the ACL (and make administrative improvements if required), it is essential that the activities and resourcing levels of the various regulators be accessible and open to public comment, particularly by those organisations working in the field of consumer advocacy. Without such data, it is difficult to make meaningful assessments, or provide meaningful input and policy recommendations. Further, the lack of such data erodes trust and accountability. Currently, the poor and inconsistent availability of enforcement data across the various regulators represents a significant flaw in the multi-regulator model. While regulators may assert that collaboration between agencies is effective, it is impossible for any third party to objectively assess this—and this undermines efforts to ensure that the ACL is being adequately enforced and administered.

Draft Finding 3.2

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

Consumer Action notes that identifying inconsistencies in enforcement approaches between different regulators is extremely difficult owing to a lack of easily comparable data, and as a result the Commission has not been able to meaningfully assess the extent of inconsistencies in approaches of the ACL regulators.[4] We do however note the Commission's view that the information provided by CDRAC, on face value, seems to show a difference in the volume of complaints and enquiries handled by the state-based regulators which cannot be explained purely in terms of relative population size between jurisdictions.[5]

Consumer Action is unfortunately constrained in making our own thorough assessment, as we operate exclusively in Victoria. While we can make limited comparisons between Consumer Affairs Victoria (**CAV**), the ACCC and ASIC, we are not well placed to provide a genuine assessment of other state or territory based regulators, and how they may differ in approach from CAV or the national regulators. Accordingly, we are unable to advance on our views expressed in Regulator Watch—noting that the research we have undertaken since, although limited, does suggest that little has altered in the period since Regulator Watch was written in 2013.

Based on our assessment in Regulator Watch, Consumer Action would agree with the Commission's tentative view that inconsistencies between jurisdictions are likely (indeed, it would seem unlikely for there *not* to be inconsistencies), and that richer and more comparable data and information on resources, activities and outcomes would make it easier to clearly identify—and address—inconsistencies in approach.[6]

Information Request

The Commission invites further comment and detailed information on:

- the nature of inconsistencies, including specific examples, in the approaches of the ACL regulators to administration and enforcement
- the materiality of these inconsistencies for consumers and/or businesses
- the options for addressing inconsistencies across ACL regulators.

[4] Productivity Commission, *Consumer Law Enforcement and Administration -Draft Report*, December 2016, p 80.
[5] Productivity Commission, *Consumer Law Enforcement and Administration -Draft Report*, December 2016, p 77.
[6] Productivity Commission, *Consumer Law Enforcement and Administration -Draft Report*, December 2016, p 81.

As noted above, Consumer Action is unable to provide the requested data and specific examples as we operate exclusively in Victoria. While we are able to repeat the information set out in Regulator Watch and subsequent research, this has already been provided to the Commission and therefore does not advance on the currently available data.

That being said, we are strongly supportive of the Commission's view that richer, more accurate and easily comparable reporting of data is required and would assist greatly in identifying any problematic inconsistencies—providing greater transparency in the ways the different regulators administer and enforce the ACL.

We also note that beyond fuller and more consistent reporting of easily comparable data, there is a need for effective data sharing between regulators. Consumer Action raised this in our submission to the Issues paper, and we take the opportunity here to reiterate that consistent interpretation and enforcement of the ACL through the multi-regulator model depends upon effective knowledge sharing. While the Australian Consumer Law Intelligence Network Knowledge (**ACLINK**) has been established to serve that purpose, there does not appear to be a positive requirement for regulators to share information via ACLINK[7]—and without some form of automated positive sharing requirement the system is unlikely to deliver optimum results. Further, a standardised reporting framework would enable useful information to be more easily disseminated amongst regulators, through ACLINK.

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

Draft Finding 3.3

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

Consumer Action holds the view, as expressed in the Draft Report, that it is difficult to assess the appropriateness of priority setting by the ACL regulators for the simple fact that those processes are generally undertaken internally and are opaque to outsiders.[9] We do note that the ACCC is an exception to this rule, with an annual and highly consultative – and publicly stated – policy priority setting process. This assists greatly in understanding and engaging with work that the ACCC then undertakes. We are aware that CAV is also moving towards a more consultative process, and will

[7] Renouf, Gordon and Teena Balgi, *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, Consumer Action Law Centre, March 2013, p 40.
[8] See: https://www.anao.gov.au/sites/g/files/net1661/f/ANAO_Report_2015-2016_23.pdf
[9] Productivity Commission, *Consumer Law Enforcement and Administration -Draft Report*, December 2016, p 82.

be establishing an annual strategic plan including the use of an annual consumer forum. We welcome this, and look forward to participating. That being said, and as the Draft Report identifies, the public material provided to explain priority setting currently varies considerably between regulators, from reasonably substantial to practically non-existent—and there is often no real way for an external organisation to assess if the publicly expressed strategy (if indeed it is publicly expressed), is adhered to in practice. Again, the lack of consistently reported and easily comparable data is central to this difficulty. Well-developed and maintained reporting practices would do much to aid effective assessment, and would improve third party understanding of the practical implications of the risk-based approach to enforcement required of regulators by the Intergovernmental Agreement for the ACL.

As a final note, Consumer Action notes that there is a risk in implementing 'proportionate risk-based' enforcement as regulators may become too tentative, and overly cautious in their approach. The first recommendation that Consumer Action arrived at when compiling Regulator Watch was that regulators should increase the quantity of their enforcement work—particularly in QLD, the NT, the ACT and NSW, and potentially in VIC and WA. While under-resourcing may be a legitimate reason for a relative paucity of enforcement actions, it is also possible that the requirement for risk-based enforcement has inhibited action at times when it should have been taken. For the ACL to operate effectively, regulators should be seen to be pro-active, have a highly visible role in promoting the intent of the legislation and consciously seek to generate a positive culture of compliance.

2. The generic national product safety regime

Draft Recommendation 4.1

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

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

Consumer Action agrees with this recommendation, as a sensible approach to standardising the national approach to product recalls and bans.

As raised in our submission to the Issues Paper, the recent hover board safety issue highlighted the inconsistencies that exist in the management of product safety—and the lags that can occur when different jurisdictions respond with differing degrees of urgency. In that matter, the then Victorian Consumer Affairs Minister, Jane Garrett, called for an interim national ban on sales of the product on 5 January 2016[10]—yet a national ban was not applied by the Federal Assistant

[10] See: http://www.abc.net.au/news/2016-01-06/hoverboard-safety-blitz-as-victoria-floats-possible-ban/7069944

Treasurer until 18 March 2016[11], despite the destruction of two homes through fires caused by the devices.

This situation could have been avoided if responsibility for compulsory recalls and product bans (both interim and permanent) sat solely with the Commonwealth, in which case the response could have been uniform across all jurisdictions. As the Draft Report highlights, the state and territory based regulators rarely exercise their powers under the ACL to order compulsory recalls or impose bans, and clarifying that those powers reside solely with the Commonwealth would reduce regulatory uncertainties for both consumers and business.[12] As the Draft Report also notes, the existing systems for coordination, cooperation and communication between Ministers (through the Ministerial Forum on Consumer Affairs and senior officials – i.e. CAANZ) are sufficiently well developed to ensure that necessary information regarding emerging product safety issues can be shared to ensure appropriate action is taken swiftly by the ACCC.

Draft Finding 4.1

The Commonwealth Government's regulation impact assessment requirements may impede the timely implementation of national interim product bans. There is a case to amend the requirements to exempt interim bans from such assessments. Permanent product bans should continue to be subject to the existing regulator impact assessment requirements.

Consumer Action strongly agrees with the view that interim product bans should not only be the sole responsibility of the Commonwealth, but that they should also be exempt from regulation impact assessments. Interim product bans are implemented when the product in question poses a risk of serious injury or death—the need to protect consumers from serious physical harm clearly outweighs any need to assess the economic impact of imposing a ban. Needless to say, speed of response is also critical when implementing interim product bans.

Permanent product bans have a more lasting impact, and on that basis it is reasonable that they should remain subject to regulator impact assessment requirements. These can be undertaken while the product in question is subject to an interim ban.

3. Performance reporting

Draft Recommendation 4.2

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

- resources expended on regulator activities

[11] See: http://kmo.ministers.treasury.gov.au/media-release/027-2016/
[12] Productivity Commission, *Consumer Law Enforcement and Administration -Draft Report*, December 2016, p 101.

- the range and nature of regulator activities
- behavioural changes attributable to regulator activities
- outcomes attributable to regulator activities

Consumer Action agrees strongly with this recommendation, and note that it aligns strongly with a key recommendation of Regulator Watch which found that regulators should:

2- Report better on enforcement work

With the exception of ASIC and the ACCC, who should seek to maintain current high standards, all consumer protection regulators should significantly improve the way they report on their enforcement work to the community, so that consumers and businesses can be sure that they are performing a good job. This is particularly critical for ACT, NT, QLD, SA and TAS. In particular:

- *comprehensive;*
- *frequent and timely;*
- *consistent; and*
- *accessible.*

Regulators should use a consistent and as far as possible standard set of reporting indicators to enhance the ability of the community to compare regulatory performance across jurisdictions.

All regulators should report on litigation commended. Litigation commenced rather than litigation resolved is a more useful and up-to-date indicator of how proactive a regulator has been in any given year.

Regulators should clearly separate reporting on their consumer protection enforcement from any other jurisdictions that they are also responsible for. Regulators should report the number of each of the main types of enforcement action per agreed amount of population (for example per 100,000 adults).

Regulators should quantify and report on their budget allocation and the staffing resources allocated to enforcement.

Regulators should report in a timely fashion. Ideally regulators would provide period and year to date reports on their web site or at least report each 6 months as ASIC has now started to do. In any event regulators should report within 3-4 months of the end of the relevant period.

In our submission to the Issues Paper, Consumer Action recommended that CAANZ should develop a standard reporting template that could be used by all ACL regulators, which would enable easy and effective comparisons to be made. While CAANZ has issued annual progress reports of the implementation of the ACL,[13] (including highlights of enforcement and other regulator

[13] See: http://consumerlaw.gov.au/the-australian-consumer-law/implementation-2/

activities), this is not sufficiently comprehensive. More comprehensive and standard reporting would have value both in identifying where enforcement activity needs to be bolstered (potentially through the provision of additional resourcing), in identifying geographical trends in business misconduct, and also in facilitating knowledge sharing between ACL regulators.

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

> *"…designed to deliver an operational analytics platform which transforms and integrate multiple sources of data into a single user friendly environment and provide a range of analytic tools to develop understanding and meaning from the data. Project Sentinel seeks to deliver an analytics platform that would greatly improve regulators' ability to share information and identify consumer issues in the marketplace at a national level. ACL Regulators have agreed to a proof-of-concept trial of the operational analytics platform developed by the NSW Project – this trial, known as the National Sentinel Pilot Program, seeks to assess non-compliance in the automotive industry at the national level. If successful, the ACL Regulators have agreed to consider developing a shared operational analytics capability.*[14]

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

We also note the Commission's comments regarding the ASIC Capability Review, and concur that four tiered framework utilised by ASIC should also strongly inform CAANZ's thinking in developing a consistent reporting framework for all ACL regulators.

While we note the difficulties raised by the CDRAC, for the reasons stated above in our response to Draft Finding 3.1, we do not believe these difficulties are insurmountable—and simply need to be taken into consideration when devising a reporting framework to ensure they are overcome.

Consumer Action regards the development of a thorough, consistent, and accessible reporting framework for regulators as the key recommendation of the Draft Report. As stated earlier in this submission, the effective development of such a framework by CAANZ will do much to assist the meaningful assessment of regulators, including their priority setting and levels of collaboration, in addition to identifying areas of inconsistency and potential regulatory failure—so that they may be addressed. Without this data, it is very difficult to see how the multi-regulator model can work to ensure that the ACL fulfils its legislative purpose, at least to its optimum level. The human cost of this is that consumers, particularly vulnerable and low-income consumers, do not receive the level of consumer protection which the ACL was designed to deliver. Consumer Action notes that the primary objectives of the ACL are outlined in the Intergovernmental Agreement for the Australian Consumer Law—and include the objective to:

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

"…meet the needs of those consumers who are most vulnerable, or at greatest disadvantage."[15]

Without the development of an effective reporting framework it is difficult to assess and/or improve upon the extent to which this or any other primary objective of the ACL is being met, and on that basis we strongly agree with Draft Recommendation 4.2 and recommend that CAANZ undertake the required work as a matter of urgency.

4. A national database

Draft Finding 4.2

A national database of complaints and product safety incidents has merit. It would enable better identification and analysis of consumer hazards and risks, and help focus ACL regulators' compliance and enforcement activity. CAANZ should examine the impediments to establishing such a database, its likely benefits and costs, and subject to the findings of that analysis, develop a plan to implement such a system. CAANZ should also consider what information from the database should be publicly available.

Consumer Action strongly supports this finding, as we believe it has the potential to have a significant cultural impact for both businesses and consumers. A well maintained, well publicised national complaints and product safety register would contribute to generating a culture of compliance and raising the profile of the protections afforded to consumers by the ACL. We believe this is particularly necessary in light of the recent ACL Survey, which found that only 51% of consumers believe that businesses which treat consumers unfairly will be detected, only 45% believe that the government is proactive in preventing breaches and only 54% felt that the law adequately protects them. In addition, only 42% felt that businesses which treat consumers unfairly will be adequately penalised.[16] Taken together, these figures indicate that consumers do not feel empowered, and lack faith in the consumer protection regime. This in turn is likely to lead to a degree of cynicism and passivity, allowing businesses to operate in breach of the ACL with relative impunity.

A prominent complaints and product safety register could help to remedy this situation by creating reputational risk for non-compliant businesses, and improving consumer perceptions of and confidence in the consumer protection regime. In broad terms, such a register would serve to redress the perceived power imbalance between traders and consumers—whether that imbalance is wrongly perceived or otherwise. Simply put - transparency about complaint data is a relatively efficient, non-regulatory measure to promote effective functioning of consumer markets.

As a specialist consumer law legal service providing advice to low-income and otherwise disadvantaged consumers, Consumer Action is particularly concerned with the needs of those consumers. Disadvantaged consumers are likely to feel more disempowered than the norm, in part

[15] Intergovernmental Agreement for the Australian Consumer Law (2 July), paragraph C, www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf.
[16] ACL Survey infographic summary available at: http://consumerlaw.gov.au/files/2016/05/Infographic.pdf

owing to the cognitive pressure arising from poverty. Significant research in behavioural economics around the impact of poverty has shown that:

> "*The poor must manage sporadic income, juggle expenses, and make difficult trade-offs. Even when not actually making a financial decision, these preoccupations can be present and distracting. The human cognitive system has limited capacity. Preoccupations with pressing budgetary concerns leave fewer cognitive resources available to guide choice and action.*" [17]

Through their laboratory studies, the researchers determined that:

> *"Being poor means coping not just with a shortfall of money, but also with a concurrent shortfall of cognitive resources. The poor, in this view, are less capable not because of inherent traits, but because the very context of poverty imposes load and impedes cognitive capacity. The findings, in other words, are not about poor people, but people who find themselves poor.*
>
> *How large are these effects? Sleep researchers have examined the cognitive impact (on Raven's) of losing a full night of sleep through experimental manipulations. In standard deviation terms, the laboratory study findings are of the same size, and the field findings are three quarters that size. Put simply, evoking financial concerns has a cognitive impact comparable with losing a full night of sleep. In addition, similar effect sizes have been observed in the performance on Raven's matrices of chronic alcoholics versus normal adults and of 60-versus 45-year-olds. By way of calibration, according to a common approximation used by intelligence researchers, with a mean of 100 and a standard deviation of 15 the effects we observed correspond to ~13 IQ points. These sizable magnitudes suggest the cognitive impact of poverty could have large real consequences.*
>
> *This perspective has important policy implications.*"[18]

Consumer Action raises this as a relevant consideration when weighing the potential benefit of a national complaints register. It is important to recognise that rational choice theory, upon which much consumer protection policy has historically been based, is increasingly being shown to be inadequate to describe real world consumer behaviour—and that behavioural economics is generating a more complete understanding of how regulation works in practice. It is also important to understand the degree of powerlessness felt by the most disadvantaged members of our community, and the extent to which this may prevent those consumers from acting to enforce their own rights. In our view, a prominent and widely publicised national complaints register would have an empowering effect for consumers—and this would be most important for those who currently feel disempowered and lack confidence in the consumer protection regime. A well-functioning market depends upon well-informed consumers who feel empowered, and regard the consumer protection regime as effective in protecting their interests. A national complaints register, well publicised, could assist in achieving that outcome

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[17] Mani, Anandi; Mullainathan, Sendhil; Shafir, Eldar; and Zhao, Jiyaing, *Poverty Impedes Cognitive Function*, Science, Vol 341, 30 August 2013, p. 976.

[18] Mani, Anandi; Mullainathan, Sendhil; Shafir, Eldar; and Zhao, Jiyaing, *Poverty Impedes Cognitive Function*, Science, Vol 341, 30 August 2013, p. 980.

Finally, as raised in our submission to the Issues paper, we also note the recent publication of the New South Wales Office of Fair Trading (**NSW OFT**) complaints register.[19] Early indications suggest that the register has had a significant impact on some businesses, with some reportedly making wholesale changes to their business practices and dispute resolution protocols to avoid the possibility of appearing on the register.[20] In our view, these early signs demonstrate that 'naming and shaming' problematic traders can encourage a culture of compliance, and the concept should be adopted by all ACL regulators—for compilation in a national register. This also has cost and efficiency benefits - if businesses respond proactively to a complaints register, then there is less reliance on consumers making complaints to ensure just outcomes.

The NSW OFT complaints register[21] describes itself in the following terms:

> *The NSW Fair Trading Complaints Register provides information about businesses that are the subject of 10 or more complaints received by Fair Trading in a calendar month. The Register is updated monthly and only includes complaints considered by Fair Trading to have been made by a real person, relating to a real interaction with a business.*
>
> *As you browse through the Complaints Register, you'll find the following information about the businesses listed:*
>
> - *the name of the business*
> - *the number of complaints NSW Fair Trading has received about the business in the last month*
> - *the product groups complained about – click on the business name to display the types of products Fair Trading has received complaints about for that business.*
>
> *For privacy reasons, the Register does not disclose any detailed information on a specific complaint, nor name any person who has made a complaint. Detailed information on how the Complaints Register works can be found in the Guidelines (PDF size: 240kb).*[22]

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

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

> *NSW Fair Trading currently receives over 45,000 complaints each year and holds a wealth of information about businesses (also known as traders) operating in the marketplace. Section 9 of the Fair Trading Act 1987 gives the Commissioner for Fair Trading power to provide information and advice to consumers, enforce fair trading laws, and receive and deal with complaints relating to the supply of goods or services.*
>
> *Making some complaints information publicly available is likely to provide an incentive for businesses to deliver better customer service, and help consumers make informed decisions about where to shop.*

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[19] See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/Public_Register/FT_Public_Register.htm

[20] Cormack, Lucy. *NSW Fair Trading reveals the most complained about businesses in NSW for July*, Sydney Morning Herald, August 25 2016, available at: http://www.smh.com.au/business/consumer-affairs/the-most-complained-about-businesses-in-nsw-for-july-nsw-fair-trading-20160824-gqzub2.html

[21] See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/Public_Register/FT_Public_Register.htm

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

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

Data in the Complaints Register can be used to:

- *improve services*
- *inform the community about trends in the market*
- *create new business models; and*
- *devise innovative ways to help consumers gain better value in the marketplace.*[23]

Consumer Action submits that the NSW OFT register provides a useful model for a national register, and that CAANZ should undertake the work described by the Commission with urgency.

5. Enforcement tools and penalties

Draft Finding 4.3

There are some small differences in the enforcement powers of the ACL regulators across jurisdictions. There is scope to improve consistency in infringement notice powers and other additional remedies that the States and Territories have introduced to augment the ACL 'toolkit'.

Consumer Action agrees with this funding, and hold the view that enforcement powers should be consistent across all jurisdictions. This gives certainty to both consumers and business, and is true to the underlying principle of the multi-regulator model, i.e. "one law, multiple regulators".[24] We referred to one example of inconsistency in our initial submission to the CAANZ review, that is, jail time for breaches of the ACL. The NSW ACL application legislation is the only jurisdiction that allows for jail time (the court may decide to imprison an individual for a second or subsequent conviction of certain provisions, for up to three years).[25] That submission also referred to matters where repeated breaches or phoenixing occurs—contraventions that we think justify jail time. The ability for a court to award jail time should be consistent across jurisdictions.

Draft Finding 4.4

Australian governments should increase maximum penalties for breaches of the ACL. They should consider the option, being examined by CAANZ, of aligning them with the penalties for breaches of competition provisions in the Competition and Consumer Act 2010.

[23] See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Complaints_Register_Guidelines.pdf
[24] Commonwealth of Australia, *Australian Consumer Law – Compliance and enforcement: How regulators enforce the Australian Consumer Law*, 2010, p. 6. Available at: http://www.cbs.sa.gov.au/assets/files/compliance_enforcement_guide.pdf
[25] s64 *Fair Trading Act 1987* (NSW)

Consumer Action strongly agrees with this finding. We advocated strongly for this position in our submission to the ACL Review Issues Paper released by CAANZ in March 2016. In that submission we wrote:

> "It is clear that the current maximum financial penalties under the ACL are inadequate, particularly in respect of breaches by very large corporations. Recent cases against Coles and Reckitt-Benckiser demonstrate this.
>
> In *ACCC v Coles*,[26] the ACCC alleged that Coles had demanded payments from suppliers that it was not entitled to; threatened harm to the suppliers that did not comply with the demand; and withheld money from suppliers it had no right to withhold. In December 2014, the Federal Court by consent made declarations that Coles had engaged in unconscionable conduct in breach of the ACL and ordered Coles to pay $10 million in financial penalties. Coles also entered Court enforceable undertakings to provide redress to over 200 affected suppliers. In her judgment, Justice Gordon stated that:
>
>> "*while it is a matter for the Parliament to review whether the maximum available penalty of $1.1 million for each contravention by a body corporate is sufficient when a corporation with annual revenue in excess of $22 billion acts unconscionably... the current maximums are arguably inadequate for a corporation the size of Coles.*"
>
> In Reckitt-Benckiser, the Federal Court found misleading representations in relation to Nurofen Specific Pain products. The representations were that each product was formulated to specifically treat a particular type of pain when, in fact, each product contained the same active ingredient.[27] The court ordered a penalty of $1.7 million, which appeared to be out of proportion to the financial loss suffered by consumers due to the price premium attached to the products. Reckitt-Benckiser is also a multi-national corporation, with annual revenue of over $AUD15 billion. The penalty provided is manifestly inadequate given these circumstances, and that the ACL should be amended to increase the maximum penalties. We note that the ACCC has recently appealed this penalty decision to the Full Federal Court.[28]
>
> We note that the maximum penalty for breach of the competition provisions of the *Competition and Consumer Act 2010* (Cth) are much higher than the equivalent maximum penalties of the ACL. For these provisions, the maximum penalty is $10 million, three times the gain obtained from the conduct, or 10 per cent of the annual turnover of the business. Consumer Action sees no policy basis for different penalties for breaches of the competition law provisions, and submits that these should be applied for breaches of the ACL."

6. <u>Interaction between ACL and specialist regulators</u>

[26] *Australian Competition and Consumer Commission v Coles* [2014] FCA 1405,
[27] *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424
[28] Australian Competition & Consumer Commission, *Media release—ACCC appeals $1.7m penalty against Reckitt Benckiser for misleading Nurofen representations,* 23 May 2016, available at <http://www.accc.gov.au/media-release/accc-appeals-17m-penalty-against-reckitt-benckiser-for-misleading-nurofen-representations>.

Draft Finding 5.1

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

- instituting formal arrangements to guide cooperation and coordination between building regulators and ACL regulators, and between the ACCC and some national specialist safety regulators
- expanding the regulatory tools and remedies available to specialist safety regulators (or at least developing a process to allow them to better harness the national reach of regulatory powers under the ACL)
- introducing greater consistency of legislation underpinning the specialist safety regime for electrical goods

Consumer Action agrees with Draft Finding 5.1. We have previously expressed our concern that Australia's product safety regimes are generally too reactive and often require serious harm—a fatality, serious injury or significant property damage—before regulators intervene. Major reform is required in this area of Australia's consumer protection framework and although much of that comes down to substantive legislative reform (such as introducing a general safety provision into the ACL), there are improvements that can be made to administrative and enforcement to improve the current situation.

Formalised protocols to guide cooperation and collaboration between building regulators and ACL regulators and between the ACCC and some national specialist safety regulators would be a sensible initiative that, while not revolutionary, should help to improve consistency of regulation across jurisdictions and aid knowledge sharing. The lack of a genuinely cohesive approach to product safety between the various ACL regulators results in slow moving and anomalous responses—such as that in relation to hover-boards in early 2016, as identified earlier in this submission.

Consumer Action also agrees that expanding the regulatory tools and remedies available to specialist safety regulators, and introducing greater consistency of legislation underpinning the specialist safety regime for electrical goods would be positive developments. As we noted in our submission to the Issues Paper, where there are gaps or overlaps between regulators there can be a tendency for an organisation to focus on its core work rather than address the risk caused by the gap or overlap. One way to address this would to be ensure that all regulators have the same level of compliance and enforcement powers and authority to deal with likely consumer detriment. Another way to address this is to put greater expectation on regulators to enhance consumer outcomes. The Federal Government's existing regulator performance framework, a 'cutting red tape' initiative, has its focus on reducing regulatory burden on industry participants—it has no focus on consumer outcomes.[29] We submit that governments should reform regulatory performance frameworks to promote consumer outcomes—regulators should have the resources, power and culture to effectively protect consumers, and they should report publicly on their impact for consumer.

[29] Australian Government, '*Regulator Performance Framework*', available at: https://cuttingredtape.gov.au/resources/rpf/kpis.

In our view these are sensible “low hanging fruit” reforms, and it is difficult to conceive of arguments not to implement them. They represent administrative efficiencies and enhancements to enforcement that should be undertaken to improve the operation of the ACL.

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

Information Request

Is introducing or expanding data sharing among specialist regulators themselves, and between specialist regulators and ACL regulators, feasible? Where might it occur (and how might it be introduced?). What might be the benefits of introducing or expanding data sharing arrangements in terms of improving the interaction between ACL and specialist regulators?

Consumer Action believes that the dispersal of regulatory responsibilities between state and Commonwealth agencies and specialist regulators creates inconsistency and weakens the enforcement of product safety laws. More must be done to ensure regulators communicate better and have the capacity to enforce the same law, and expanding data sharing is essential to that process. To the question of whether or not this is feasible, we simply respond that yes—of course it is. The issue is not one of capacity or capability, but more of organisational culture and will. In terms of the benefits of improving data sharing, it would seem apparent that cross-jurisdictional collaboration is difficult to achieve without an evidentiary base from which to identify emerging issues, and then form joint strategies to optimise enforcement and minimise potential waste.

Consumer Action notes that one of the challenges with industry-specific regulators compared to the general consumer law regulators is that they can become too easily focused on industry assistance, rather than consumer outcomes. An example of this is the former Building Commission in Victoria, which was responsible for Victoria’s building consumer protection framework. The Building Commission was subject to a number of critical assessments by the Victorian Auditor-General and other oversight bodies over a long period of time. Media and other reports also aired allegations of serious failures of corporate governance, corruption[30] and also that Commission funds have been spent on corporate entertainment for major building firms, suggesting the Commission has been captured by the businesses it should be regulating.[31] Following this, the Commission was abolished and replaced with the Victorian Building Authority.

[30] ‘*Building watchdog shambles’*, The Age, 4 April 2012; ‘*Fees queried in new claims’*, The Age, 19 May 2012.
[31] ‘*Builders wined, dined by regulator’*, The Age, 5 April 2012.

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

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

It appears also that ASQA focused its regulatory effort on registration and auditing providers. We understood that, at the height of the VET scandal, ASQA was auditing agencies once every five years, allowing unscrupulous operators to fly under ASQA's radar.[32] Moreover, there was (and remains) a division in the regulation of vocational training from the regulation of VET-FEE HELP providers. Rather than ASQA, the Commonwealth Department of Education was responsible for the latter. This appeared to add unnecessary complexity to the regulatory framework, and dilute regulatory effort.

It is instructive that 'cleaning up' of the sector required enforcement action to be undertaken by the ACCC. During late 2015 and early 2016, the ACCC took four actions against private colleges.[33] Unlike industry-specific regulators, the ACCC had the necessary enforcement culture to take action. It would appear that consumer protection and the efficiency of regulators could be enhanced if industry-specific regulators similarly adopted a culture of 'action' in the face of substantial consumer detriment.

Consumer Action makes this point in the current context, a reiteration from our submission to the Issues Paper, to emphasise the point that while enhanced data sharing is necessary condition for improved regulatory collaboration, it is not a sufficient condition. It is probable that organisational issues would need to be addressed within some specialist regulators in order to facilitate effective collaboration, and generate a genuine enforcement culture.

Information Request

Where are there 'gaps' in the regulatory powers of specialist safety regulators that require them to have recourse to ACL regulators' powers to address product safety issues within the specialist regulators remit? What changes might be made to 'fill the gaps' in the specialist safety regulators' toolkit of remedies and what might be the implementation pathway to provide those additional powers?

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

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

Consumer Action does not conduct enough case-work in the area of product safety to respond meaningfully to this information request.

Information Request

What is needed to progress the move to national consistency among all State and Territory electrical safety regimes?

Consumer Action does not conduct enough case-work in the area of electrical safety to respond meaningfully to this information request. Further, we do not operate nationally but are funded to represent Victorian consumers.

7. Industry-specific consumer regulation

Draft Finding 6.1

Australian governments should review, and revitalise as necessary, progress in relation to Recommendation 5.1 from the productivity Commission's 2008 Review of Australia's Consumer Policy Framework. That recommendation called for a process to review and reform industry-specific consumer regulation that would, among other things, identify unnecessary divergences in state and territory regulation and consider the case for transferring policy and enforcement responsibilities to the Commonwealth Government.

Consumer Action agrees with this finding. Again, national consistency in consumer protection is necessary to meet the "one law, multiple regulators" conception of the ACL.

8. Consumer redress

Information Request

Are there gaps or deficiencies in the current dispute resolution service provided by the ACL regulators that a retail ombudsman would fill? What incentives would attract retailers to sign up to such a scheme and observe its determinations? How could the scheme be funded?

The Commission seeks further detail on the extent to which the dispute resolution services offered by the State and Territory ACL regulators meet/fall short of the Commission's 2008 recommendation for effective, properly-resourced, government-funded alternative dispute resolution (ADR) mechanisms that deal consistently with all consumer complaints?

Does the case for the ADR review mechanism as outlined in 2008 remain? Are there impediments to its implementation and, if so, how could these be addressed?

Consumer Action is strongly of the view that the positive economic and social impact of the ACL could be significantly enhanced by creating a national Retail Ombudsman to hear individual ACL related consumer disputes, and relieve regulators of the responsibility to deal with such matters thorough their own conciliation services. We note that the state-based regulators currently conduct individual level dispute resolution, in addition to general compliance and enforcement activities. By contrast, ASIC and the ACCC do not undertake this function. Not only would an ombudsman scheme improve outcomes for consumers, but it would free up state-based regulator resources to focus on enforcement actions and otherwise deal with systemic issues. The Retail Ombudsman would be free for consumers, accessible, well-publicised and would play an important role in empowering consumers and improving consumer awareness of, (and confidence in), the ACL. The service would also provide binding determinations—a significant improvement upon the conciliation services currently offered by regulators.

Throughout 2016, Consumer Action was heavily involved in campaign and policy work related to retirement housing in Victoria. This work culminated with a Victorian parliamentary inquiry into retirement housing, conducted by the parliamentary Legal and Social Issues Committee and held over the period September to November 2016. A key complaint of consumers in the Victorian retirement housing sector is that effective and affordable dispute resolution is not available. VCAT is too expensive, lengthy and overly formal, and the conciliation service offered by Consumer Affairs Victoria (CAV) is cumbersome, narrow in what it is prepared to deal with—and only able to provide non-binding conciliated outcomes. Despite sufficient consumer discord to justify a parliamentary inquiry which held seven days of hearings over three months and received over eight hundred written submissions, (the vast majority from individual consumers), CAV has only conciliated an average of twenty retirement housing disputes a year, for the past three years.[34]

In our submission to the parliamentary inquiry into retirement housing, Consumer Action presented the following case study to demonstrate the access to justice difficulties that consumers in that market face, and the impact this can have on them:

<u>Alleged interference in sale of property</u>

Marie* lives alone in a retirement village, and the relationship between her and management has long since broken down. Marie feels bullied and powerless in her village, and feels that she has 'no rights'.

Marie had previously been involved in a VCAT action by residents against management of the village, contesting fee increases. The residents were unsuccessful in that action. Marie described the VCAT experience as stressful and intimidating, and felt that because they did not have lawyers the residents' concerns had not been taken seriously. As a result, Marie was reluctant to repeat the experience and did not want to lodge a new complaint with VCAT.

Marie's current complaint concerned her attempts to sell her property to leave the village, and her belief that village management had interfered in those attempts.

In early November 2015 a potential buyer made enquiries about purchasing property at the village as a result of seeing Marie's property advertised on a sign outside the village.

[34] Standing Committee on Legal and Social Issues, *Hearing Transcript – Retirement Housing Inquiry*, 28 September 2016, p. 3.

The potential buyer's inquiry was fielded by the manager of the village. The manager took the buyer took through to the village community room, and when he asked to view Marie's unit, the manager replied that the unit was very run down and over-priced. The potential buyer did not view the unit at that time.

A week or so later, the potential buyer was again inspecting the advertising boards out the front of the village when he was approached by one of the owners of the village.

The potential buyer was accompanied by his daughter on this second occasion. The village owner opted to show the potential buyer and his daughter through another unit at the rear the village. The owner explained that the rear unit was in the final stages of renovation, and was to be sold leasehold.

When the potential buyer again requested to see Marie's unit (the advertised property), the village owner discouraged him from doing so, explaining that Marie's unit was run down and over-priced.

The potential buyer's daughter later found Marie's unit advertised on realestate.com.au and the potential buyer arranged for an inspection through a real estate agent.

On inspection of the property, the potential buyer found that in his view the property was well maintained, modern and appeared to be very good value for money.

Based on the potential buyer's version of events, (which the potential buyer had related to both Marie and the real estate agent), the village owner and manager may have breached section 32C of the Retirement Villages Act.

Clause 32C of the Retirement Villages Act (VIC) 1986 ("Act") states:

32C Manager not to interfere in sale

(1) A manager of a retirement village who is not appointed as an agent for the sale of the premises of an owner resident in the village must not interfere with the sale of the premises.

Penalty: 60 penalty units

The Act defines a manager as:

(a) A person who manages a retirement village; and
(b) if there is no such person, the owner of retirement village land;

Marie wrote to both the village manager and the village owner requesting that they desist from any further interference in the sale of her property, and advising that the matter has been reported to the relevant authorities. She was suffering from stress and anxiety as a result of the events around the sale of her property, and did not wish to have any further involvement with VCAT.

In January 2016 Consumer Action lodged a complaint with CAV on Marie's behalf.

CAV investigated the matter and spoke with Marie, the real estate agent, and the village manager.

CAV subsequently wrote to the village owner to the village owner, notifying them of section 32C of the Act and advising that if further non-compliance was identified then enforcement action would be considered.

Marie was disappointed with this outcome, and felt that enforcement action should have been taken in this instance. Her collective experiences with VCAT and CAV have left her feeling powerless and without recourse to justice.

Marie has expressed a view that the ongoing difficulties with village management have affected her physically and emotionally.

*—Name changed for privacy purposes.

Consumer Action submits that this is not an unusual dynamic and that the dispute resolution services offered by ACL regulators are generally under-utilised by consumers who are either not aware that they exist, or know that they do exist yet have little faith in achieving an acceptable outcome via the service – a sentiment which is sometimes justified. Again, the low figures recorded by the ACL survey strongly indicate that current dispute resolution arrangements are not working, and that the effectiveness of the ACL is compromised as a result. In particular, only 58% of consumers felt that the government provides adequate access to dispute resolution services—and a mere 42% believe that businesses which treat consumers unfairly will be adequately penalised. These figures broadly concur with our own observation that dispute resolution activities can be highly variable between regulators, and change in importance for particular agencies over time. For example, CAV finalised over 12,500 disputes in 2009-10,[35] and this has come down to 9,395 in 2013-14.[36] It does not appear that CAV reported the number of finalised resolutions in its 2014-15 annual report (it did note 1,318 building disputes were finalised), but the annual report did note that the Victorian Auditor-General recommended a review of dispute resolution services.[37] We understand that this has resulted in a change of model to 'frontline resolution'.

A recent media release from the ACCC also indicates that the ACL is being routinely flouted by businesses, and that lack of consumer (and trader) awareness of the ACL plays a significant role in enabling that to happen. The 3 January 2017 media release titled *20,000 complaints by shoppers about consumer guarantees*, stated that the agency had received more than 20,000 complaints about consumer guarantees during 2016, and more than 5000 of those were from consumers experiencing difficulties returning electronics and whitegoods to retailers.[38]

The ACCC were very clear in expressing their view that the ACL's consumer guarantee regime does not seem to be well understood by the general public (and potentially not even well understood by some retailers, or at least, some retail staff), and that this results in poor outcomes for consumers.

[35] Victorian Auditor General's Report, Consumer Protection, April 2013, p 22 available at: http://www.audit.vic.gov.au/publications/2012-13/20130417-Consumer-Protection/20130417-Consumer-Protection.pdf
[36] Consumer Affairs Victoria Annual Report 2013-14 available: https://www.consumer.vic.gov.au/annual-report/previous-annual-reports
[37] Consumer Affairs Victoria Annual Report 2014-15 available: https://www.consumer.vic.gov.au/annual-report/previous-annual-reports
[38] Available at: http://www.accc.gov.au/media-release/20000-complaints-by-shoppers-about-consumer-guarantees

"We are concerned that business continue to misrepresent the rights of consumers when they try to return a faulty product," ACCC Acting Chair Dr Michael Shaper said.

"We want more people to know about the Australian Consumer Law, and use it as the three 'magic words' to let retailers know you know your rights."

While the central thrust of the ACCC release is that consumer education and awareness must be improved, Consumer Action is of the view that consumer education alone would not be sufficient to improve the operation of the ACL.

Consumer Action has significant experience in supporting and acting on behalf of consumers with disputes considered by industry ombudsman schemes (such as the Financial Ombudsman Service (**FOS**), the Credit and Investments Ombudsman (**CIO**) service, the Energy and Water Ombudsman Victoria (**EWOV**) and the Telecommunications Industry Ombudsman (**TIO**)). We believe that, in providing access to justice, the establishment of these schemes has been one of the most significant advances in consumer protection of the past 30 years. Without industry ombudsman schemes, hundreds of thousands of people would have been left with no avenue for redress other than courts, or more likely, because of cost and other access barriers, would have been left with nowhere to turn. There is a clear need for a free, accessible and efficient means for consumers to have their matters heard and resolved.

On that basis we believe a Retail Ombudsman, based on the model already operating in the United Kingdom (UK), would assist Australians with disputes relating to the purchase of goods and services—and would effectively enforce the existing consumer guarantee regime, along with other elements of the consumer law. In doing so, a Retail Ombudsman would provide an important figure-head and bring focus to consumer rights, by serving a large and currently unmet need for effective dispute resolution in consumer law. We are conscious that, (given the findings of the ACL Survey), the number of complaints made to the ACCC is likely only a small measure of the level of disputation in the market (noting the figure represents consumer guarantee disputes alone). It is very difficult to definitively quantify how many consumer complaints are unresolved, or how many Australian consumers are deliberately or inadvertently misled by retailers every year, because comparatively few are likely to take the step to complain to the ACCC or other agencies. Indeed, in a 2006 study *Consumer Detriment in Victoria: A survey of its nature, costs and implications*, CAV found that consumer detriment is reported to them only 4% of the time.[39] We believe this is a significant access to justice issue. Not only are consumers unlikely to take their complaints to existing agencies, but the time and costs involved mean that very few are likely to pursue an action through small claims forums such as VCAT—even when the trader is clearly in the wrong. Very often the sums involved are simply not significant enough to justify that course of action, even if the consumer is aware of their legal rights. On that basis, we can only infer that a very high volume of complaints are not being resolved by the existing dispute resolution framework, and as a result, the ACL is operating far from its full potential.

The UK Retail Ombudsman (**UKRO**) began hearing complaints between consumers and retailers on 2 January 2015. The UKRO covers disputes relating to goods and/or services purchased

[39] Consumer Affairs Victoria, *Consumer detriment in Victoria: A survey of its nature, costs and implications*, October 2006, p. 9. Available at: www.consumer.vic.gov.au/...consumer-detriment-in-victoria-a-survey-of-its-nature-costs-and-implications-2006.pdf

either in stores or online.[40] Interestingly, the UKRO is a response to two 2013 EU directives—one regarding alternative dispute resolution (ADR Directive 2013/11/EU) and other regarding online dispute resolution (ODR Regulation 524/2013).

EU member states were required to incorporate the requirements of the ADR Directive into national law by 9 July 2015, with the ODR Regulation automatically taking effect six months later on 9 January 2016. Under the ADR Directive, member states were required to ensure that properly certified ADR services would be available for all disputes involving consumer complaints by EU consumers. It is worth noting that the Directive did not apply to business-against-business complaints or to trader-against-consumer complaints, such as debt recovery actions.

Unlike most industry ombudsman schemes in Australia, retail members of the UKRO are not required to join by law or as a requirement of their license.[41] Broadly, the UKRO is funded by retailers who 'opt-in' and pay for membership according to the size of their business. Single shop 'bricks and mortar' retailers are able to join for free, but any retailer beyond that size (including single shop plus online) must pay an annual fee according to a sliding scale. As at January 2015, '3,000 retailers were signed up, paying between £100 and £2,600 per year to subscribe'.[42]

Since September 2015, the UKRO has introduced a "gold tick" scheme whereby members who undergo extra vetting by the Ombudsman and pay it an additional £100 annually,[43] can display their enhanced accreditation status and be recognised as a 'trustworthy trader'. According to the ombudsman's website, the gold tick means that the trader:

> "...*has terms and conditions of business that are legally compliant, fair and easy to understand, has a fair returns policy, has a fair complaints policy, their VAT status (if applicable) has been verified, as have their contact details, and a unique check of the trader's website has been carried out.*[44]

As with industry EDR schemes in Australia, the service is free to consumers and the ombudsman's decisions only bind member retailers, who are contractually obligated to comply.

To be eligible for assistance from the UKRO, the consumer must first have complained directly to the trader and given the trader eight weeks to reply, and, that complaint must have occurred in the preceding six months. If after eight weeks the dispute remains unresolved, the consumer can then seek assistance from the ombudsman. The ombudsman's office will first attempt to settle the dispute through negotiation, and then by making a recommendation (if negotiation fails). If the recommendation is rejected, the ombudsman may then make a decision which is binding on the trader. If the consumer disagrees with the determination, they may take the matter to court.[45]

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[40] See: http://www.theretailombudsman.org.uk/

[41] See, for example, *Part 6 Telecommunications (Consumer Protection and Service Standards) Act 1999* which requires carriers and eligible carriage service providers to enter the TIO scheme to provide a dispute resolution service for complaints about telecommunications services.

[42] See: http://www.telegraph.co.uk/finance/personalfinance/11333939/New-Retail-Ombudsman-can-investigate-your-shopping-complaint-but-it-comes-with-a-catch.html .

[43] See: http://www.pcr-online.biz/news/read/policing-pc-retail-is-the-retail-ombudsman-s-new-gold-tick-just-what-tech-shops-need/036902

[44] See: https://www.theretailombudsman.org.uk/what-does-it-mean-to-be-retail-ombudsman-compliant/

[45] See: http://www.telegraph.co.uk/finance/personalfinance/11333939/New-Retail-Ombudsman-can-investigate-your-shopping-complaint-but-it-comes-with-a-catch.html

Remedies offered by the UKRO include directing the trader to take, or stop taking, certain steps (such as providing a refund or exchange or issuing a formal apology), and directing the trader to pay the consumer a financial award by way of compensation (up to £25,000) for proven financial loss.[46]

Australia is well-suited to establish a similar ombudsman scheme to the UKRO, in part because our retail sector is highly concentrated and dominated by large national chain-stores and franchises. Between them, Coles-Myer and Woolworths have a dominant role in Australia's retail sector—receiving approximately 40% of all retail spending.[47] An industry funded retail ombudsman scheme could quickly gain significant national coverage by having a relatively small number of very large retailers join the scheme. While this speaks more to the practical implementation of the scheme than the underlying purpose, it does mean that an Australian Retail Ombudsman could quickly be seen to be representative of the retail sector and therefore gain the credibility necessary to have a material impact on consumer confidence.

Further, an Australian Retail Ombudsman which commenced operation with a group of large national retail members could arguably establish a cultural norm which would encourage smaller retailers to join, in order to be seen as a 'trustworthy trader'. A retail sector where it was considered normal to belong to the Australian Retail Ombudsman scheme (and where the scheme was well known and understood by consumers), would be a major advance for consumer protection in Australia—and would align us with the standard already being set by the EU.

An Australian Retail Ombudsman would be more accessible and cost effective for consumers than small claims tribunals such as VCAT, and would be better placed to identify systemic issues. Over time, an Australian Retail Ombudsman could play a significant role in improving market operation and reducing complaints. Moreover, the establishment of such a service could provide invaluable (and centralised) data around consumer disputes, and would free up regulator resources to focus on enforcement and other measures to address systemic issues.

To recap, ombudsman schemes contain a number of useful features which contribute to strong justice outcomes, including:

- industry ombudsman schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes;

- industry ombudsman schemes typically have independent boards with 50 per cent representation from consumers so the dispute resolutions processes are fair and balanced;

- the ombudsman scheme process provides flexible solutions to disputes but also has 'teeth' because the ombudsmen can make findings binding upon the trader;

[46] See: https://www.theretailombudsman.org.uk/our-powers/

[47] News.com.au, *Coles and Woolworths receive almost 40 percent of Australian retail spending*, April 24 2011, available at: http://www.news.com.au/finance/money/coles-and-woolworths-receive-almost-40-per-cent-of-australian-retail-spending/news-story/3a9d8640b3c295b841a60c70d65b5529

- ombudsmen are typically required to investigate and report on systemic problems, meaning that they not only provide solutions for individual disputes but also help bigger problems be solved at their source; and

- ombudsmen keep detailed records and make detailed reports that assists the advancement of consumers' interests.

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

In our view, complaint or dispute resolution (such as through an ombudsman scheme) and compliance, monitoring and enforcement of laws (by a regulator) are related but separate functions. The Commission should consider the potential benefit of de-coupling state-based regulators from the responsibility of providing complaint or dispute resolution services, and instead assigning that task to a newly created Retail Ombudsman. Regulators with responsibility for compliance monitoring and enforcement do need to be aware of areas of consumer complaint in order to prioritise activities and deal with industry problems. However, effective dispute resolution (such as through ombudsman schemes) has a primary objective of resolving individual complaints efficiently and effectively for both parties—this may not be the primary objective of regulators. Finally, the potential cultural benefit of such a scheme (in terms of raising public awareness of consumer rights and positively impacting the business practice), is significant and warrants serious consideration.

Draft Finding 6.2

There is scope to improve the transparency and effectiveness of the dispute resolution services provided by the State and Territory ACL regulators through:

- applying the Commonwealth Government's Benchmarks for Industry-Based Consumer Dispute Resolution Schemes to the services provided by the ACL regulators
- establishing a formal cooperative mechanism between the various regulators, alternative dispute resolution schemes and other stakeholders to reassess every five years the nature and structure of alternative dispute resolution arrangements to achieve best practice and address redundancies or new needs – as per recommendation 9.2 from the Commission's 2008 Review of *Australia's Consumer Policy Framework.*

Consumer Action sees some merit in this, but holds the view that establishing a national Retail Ombudsman to fulfil external dispute resolution functions would be far preferable to attempting to improve the existing dispute resolution services provided by the State and Territory ACL regulators.

In addition to consistency and simplicity of function, a national Retail Ombudsman scheme would have a number of significant benefits which we describe in our response to the information request above (under the heading 8. - Consumer redress).

Draft Finding 6.3

In its 2008 Review of Australia's Consumer Policy Framework, the Commission identified material gaps in consumer input in policy processes. The Commission considers that recommendation 11.3 from the 2008 report – which in part directs the Commonwealth Government to provide additional public funding to support consumer advocacy – should be revisited.

Consumer Action strongly agrees with this finding, and notes that the call for additional funding to support consumer advocacy has been consistently maintained by us and others for many years.

Consumer advocacy in Australia is seriously hampered by a lack of sufficient resources, which results in a lack of consumer representation in significant policy debates. Consumer Action has had the benefit of reviewing the Consumer Federation of Australia's (**CFA**) submission to the Draft Report, and we note from that submission that in 2016 the CFA—the peak consumer advocacy body in Australia—was forced to decline to respond to at least fifteen requests for input and comment on various policy and regulatory reforms and processes due to insufficient resources.

Consumer Action supports the CFA's recommendation that the Productivity Commission consider mechanisms by which additional consumer advocacy may be funded, including through amendments to the remedy framework of the ACL. In our view, the Victorian Consumer Law Fund[48](whereby pecuniary penalties and various other amounts are paid into the fund, which can then be distributed in the form of grants to promote improved consumer wellbeing, consumer protection or fair trading), has been extremely beneficial, and serves as a useful model on which to base additional—and national—consumer advocacy funding. For example, we understand that the Victorian Consumer Law Fund will partially support the new Consumer Policy Research Centre established by the Victorian Government.

We also note the CFA's alternative suggestion of establishing an independent Consumer Advocacy Trust along the lines of that recently created by the Financial Rights Legal Centre. The Consumer Advocacy Trust is able to accept charitable donations as well as accept money paid pursuant to enforceable undertakings obtained by consumer protection regulators such as ASIC and other undistributed or surplus funds arising out of ACL breaches. The Trust can then fund applications from not-for-profit organisations '*seeking to undertake independent consumer research, policy analysis, casework and/or systemic advocacy (and related consumer education, where appropriate)*', among other things consistent with the objectives of the Trust.[49]

Consumer Action is attracted to the model of the Trust because, in addition to the urgent and pressing need to adequately fund consumer advocacy through organisations such as the CFA, we believe there is also significant scope to undertake additional research to provide evidentiary support for consumer policy proposals from the consumer advocacy sector. In particular, researching consumer behaviour with a particular view to behavioural economics is highly valuable and still in the relatively early stages of its development, or at least, of acceptance as a genuine

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[48] *Australian Consumer Law and Fair Trading Act 2012* (Vic), sections 134-137.
[49] Financial Rights Legal Centre, Submission to Review of the Australian Consumer Law, see: https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Financial_Rights_Legal_Centre.pdf

basis for the formulation of consumer protection policy. While the field is gaining acceptance, much of our current policy debate is still informed by the entrenched concepts of rational choice theory—and this can result in regulatory outcomes that have limited real world impact. Consumer Action does occasionally commission research in this field, (most recently through Dr Paul Harrison, co-director of the Deakin Centre for Consumer and Employee Wellbeing, who examined the behavioural impact of cooling off periods versus an opt-in model), but there is far more that could be done if the resources were made available to do it.

Consumer Action submits that in a consumer economy it is essential that both the supply and demand sides of the market be adequately represented in the policy debate around market regulation. While representation of both sides does currently exist, it is grossly imbalanced in favour of the supply side—and this imbalance sometimes generates very poor policy outcomes. The Commission's Draft Finding 6.3 is important for redressing this imbalance and ought to be seriously considered, not just in terms of principle, but also in terms of the practical mechanisms that may be implemented to ensure that it is achieved. Adequately funding consumer advocacy and research both now and into the future is essential for protecting consumer interests and ensuring that the ACL is operating as intended—in turn improving the efficient operation of the consumer economy.

Finally, Consumer Action notes that while the Draft Report expresses a relatively tentative view on super-complaints,[50] we remain of the view that such a power would be extremely useful. Super-complaint powers for appropriate consumer advocacy organisations would enhance the operation of the ACL by ensuring that systemic issues affecting consumers are brought to the attention of regulators, and are required to be dealt with as a matter of urgency. While regulators obviously have their own mechanisms for identifying issues and priority setting, consumer advocacy organisations can on occasion have a stronger 'direct line' to what consumers experiencing and if a super complaints power were available, these could be elevated to be dealt with as a priority. This power would require great discrimination, and there are well-established consumer advocacy organisations in Australia who would use the power appropriately and not derail pre-established regulator priorities with unnecessary complaints. Instead, the super-complaints power should be seen as a 'checking' or safety mechanism to ensure that important issues which may have slipped regulators attention, or not been adequately recognised for their impact on consumers, can be picked up and given priority.

In Consumer Action's view the recent Victorian parliamentary inquiry into retirement housing is a good example of where the regulator was out of step with what consumers were experiencing, and an alternative mechanism was needed to ensure that consumers' needs were addressed. A super-complaints power could serve a very similar function. Consumer Action advocated strongly for a super complaints power in our submission to the Issues Paper and reiterate our support for the concept here.

In the Draft Report, the Commission raises three significant questions that would need to be addressed in order to justify implementing a newly designed super-complaints power, or expanding on the one previously tested by CHOICE in New South Wales.

The Commission asks:

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[50] Productivity Commission, *Consumer Law Enforcement and Administration -Draft Report*, December 2016, pp 179-180.

- *To what extent would the obligation to investigate and respond to a super complaint divert regulators' resources from alternative activities? While CHOICE mentions in its submission that a super complaint process has no additional costs for 'government, regulators and businesses', a super complaint could draw upon resources being used for other activities deemed as important by the regulator. In preparing its response, the regulator would also need to consult with the concerned businesses, which could result in some cost for them.*

In Consumer Action's view responding to super complaints should not seen as an additional cost for regulators. Instead, super-complaints have the potential to add value to the regulatory framework by effectively spreading the task the of issue identification and market monitoring beyond the regulators, to include interested consumer advocacy bodies. There is an inherent benefit in this, in that consumer advocacy organisations are often closer to the 'coal-face' and have a fuller understanding of the consumer experience that regulators, simply by virtue of the nature of their work. For example, at Consumer Action we have the benefit of providing direct legal advice and representation to thousands of consumers every year, and are therefore able to identify emerging issues and patterns that may not be being raised through consumer complaints to CAV. It also gives us insight into the challenges facing consumers on a level that is difficult for regulators to achieve.

The super-complaints system does rely on designated organisations using the super-complaints power with discretion, but provided discretion is exercised, then complaints raised will be worthy of the allocation of resources highlighted by the Commission above. At its core the issue comes down to a matter of perspective. In Consumer Action's view, super-complaints should not be seen as an 'interruption' of a regulators work, but instead, form part of the core work that regulators should be doing. Indeed, unless regulators have an infallible capacity to identify and prioritise all issues affecting consumers, then there can only be benefit in requiring them to respond to consumer needs as identified by organisations whose function it is to represent those needs - and who may be in a stronger position to identify them than regulators are themselves.

- *Would the issues that arise through the super complaint process not be adequately identified by the regulators through other mechanisms? For example, the ACCC and ASIC already conduct investigations into systemic issues. They have a range of mechanisms in place to enable this, including through monitoring complaints data. Additionally, all the ACL regulators have powers that allow them to bring action on behalf of one or more persons for a contravention of the ACL.*

While the regulators do of course have their own mechanisms for identifying key issues, consumer advocacy organisations are often "closer to the ground" and in more direct contact with consumers, often gaining a fuller understanding of consumers' experience (particularly if acting for them on a matter over an extended period of time, for example). This is a valuable distinction, and has the potential to bring issues to a regulator's attention that they may otherwise miss, or fail to give adequate consideration. A super-complaints power effectively spreads the capacity for issue spotting beyond the organisational and resource limitations of regulators themselves, to other actors in the sector with a developed understanding of and interest in consumer issues. As stated above, unless regulators have an infallible capacity to "cover the field" (which seems unlikely) then

there can only be value in extending super-complaints powers to appropriate and responsible organisations.

- *To what extent would consumer advocacy groups have the capacity to actively assemble the data and evidence required to make the case for a super complaint, and how would this impact their other activities?*

Consumer advocacy organisations do have the capacity to gather sufficient data to make the case for super complaints, and was demonstrated by CHOICE in 2012 when they entered into an 18-month super-complaints trial with NSW Fair Trading via a memorandum of understanding. CHOICE lodged two super complaints under the trial—the first in March 2012 into commercial electricity switching sites in NSW[51] and the second in August 2013 into free-range egg claims in NSW.[52] The trial was effective at driving policy debate around some intractable or difficult consumer issues, and was not limited by any incapacity of CHOICE to provide the necessary evidence. Further, Consumer Action notes our earlier support for Draft Finding 6.3. Additional funding that may be provided for consumer advocacy and research can assist in funding research or other activity to generate the required data and evidence to substantiate a super-complaint, should it be needed and beyond the current capacity of the organisation in question.

Finally, Consumer Action notes that super-complaints are well-established in the UK, which not only demonstrates that they can be very effective but also provides a useful model on which to base a super-complaints power in Australia. Super complaints are defined in section 11(1) of the UK's *Enterprise Act 2002*, as complaints submitted by a designated consumer body alleging that "*any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers*".

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

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

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

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[51] See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Problems_with_electricity_switching_sites.pdf
[52] See: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Choice_super_complaint_on_free-range_egg_claims.pdf

Since it was first introduced, the super complaint concept has been extended in the UK to apply to the finance sector through the *Financial Services and Markets Act 2000* (UK) (**FSMA**). The FSMA stipulates that designated consumer bodies may complain to the UK Financial Conduct Authority (**FCA**) about features of the UK financial services market which may significantly damage the interests of consumers. In March 2013 HM Treasury issued a thirteen page document titled *Guidance for bodies seeking designation as super-complainants to the Financial Conduct Authority*[53], and received and approved applications from the Consumer Council Northern Ireland, Citizens Advice, The Federation of Small Businesses and Which?.

Consumer Action submits that the success of the super-complaints concept in the UK does, in itself, provide a strong response to the questions raised by the Commission. The potential efficacy or limitations of a super-complaints power in Australia is answered by the fact that in a similar culture and economy (at least, structurally speaking), the concept has worked very well for a sustained period—and in fact has been extended, into the field of financial services. Consumer Action submits that if a super-complaints power can operate with success in the UK it is not unreasonable to suggest that it could also work here and is therefore worthy of serious consideration.

Please contact Zac Gillam, Senior Policy Officer on 03 9670 5088 or at zac@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
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[53] See: https://www.gov.uk/government/publications/guidance-for-bodies-seeking-designation-as-super-complainants-to-the-financial-conduct-authority