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SUBMISSION TO PRODUCTIVITY COMMISSION

COMMISSIONED STUDY: CONSUMER LAW ENFORCEMENT AND ADMINISTRATION

30 August 2016

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ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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CONTENTS

INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments to the Productivity Commission (PC) to assist with its study on consumer law enforcement and administration. CHOICE has previously made a submission to the Consumer Affairs Australia New Zealand (CAANZ) review of the Australian Consumer Law (ACL); some of the comments made in that submission are repeated here.

In evaluating the effectiveness of the multiple regulator model generally, and the performance of the individual regulators specifically, consideration also needs to be given to the laws that support and empower the regulators to do their jobs. This submission discusses both the performance of the regulators as CHOICE has experienced it, and the adequacy of the legal powers available to assist them in administering and enforcing the law.

By and large, CHOICE is of the view that the ACL is being enforced well. The bulk of changes that need to be made to create a better consumer experience in Australia are reforms to the law itself; these are discussed in detail in CHOICE's submission to the CAANZ Issues Paper. However, CHOICE believes that there are steps that could be taken to bolster the power of the regulators. Regulators need to have adequate, stable and non-conflicted funding to conduct their work effectively. For example, greater funding for the Australian Securities and Investments Commission (ASIC) and an increase in penalties available for breaches of the ACL would lead to better enforcement outcomes.

Regulators can also do more to improve markets by releasing information they already collect. The release of data currently held by ACL regulators, particularly complaints data and product safety incident reports, would help consumers navigate the market more effectively and make informed decisions about the businesses they choose to deal with.

Additionally, while overall enforcement of the law appears to be good, the actual experience of individual consumers across Australia can differ depending on the State or Territory that they live in. Consumers attempting to enforce the law themselves by taking disputes to Tribunals may pay higher fees if they live in one State or Territory instead of another. Two consumers residing in different States or Territories who approach their local ACL regulators with the same complaint may be given different and conflicting advice, or one may be redirected to another body while the other is assisted immediately. One of the great benefits of the ACL is that it is a nationally consistent law, but the experiences of consumers in seeking enforcement of that law are not consistent. We recommend that the Productivity Commission looks to changes that will

mean everyone can get an equal and fair hearing anywhere in Australia, for any consumer problem.

Summary of recommendations

Making the consumer law more effective

When considering the effectiveness of the ACL regulators, it is necessary to consider the powers that they are granted under the law. The current laws do not allow for penalties that will act as commercially significant deterrents for businesses. Strengthening the legal tools available to the regulators as well as ensuring they are adequately funded will improve the effectiveness of the consumer law.

- Existing $1.1 million penalties available for breaches of the specific protections in the ACL should be raised, to align with the penalties available for breaches of the cartel conduct provisions ($10 million).
- Penalties should be available for misleading and deceptive conduct and unfair contract terms.
- Funding for regulators must be adequate, secure and non-conflicted.
- Organisations that assist consumers in enforcing their rights – such as community legal centres, financial counselling programs and bodies like the Consumers' Federation of Australia – should receive adequate and sustainable funding from Federal, State and Territory governments.

Product recalls and the multi-regulator model

The product safety system is not as good as it should be. There is little-to-no publicly available information about product-related injuries, including the 'near misses' that don't end up in a hospital admission and do not have to be reported to regulators. The voluntary recall process relies heavily on the goodwill of businesses working to ensure that customers hear their messages. More often than not, the public is in the dark as to whether a recall has actually worked or not. The product safety system needs to be reformed to improve its transparency, accountability and agility.

- There should be a legislative obligation on businesses conducting voluntary recalls to use all reasonable means available to communicate to the affected consumer community about the product safety issue and remedies available.

- Where businesses are seeking to protect their brand during a recall ahead of advertising their unsafe products, mandatory recalls should be used to require the funding of independent, non-conflicted third parties to promote the recall.
- Businesses conducting voluntary recalls should be required to publish regular results about the outcomes of any active product recall.
- All voluntary and mandatory recalls should be required to state whether or not the safety failing constitutes a major failure.
    - The ACCC would need to issue guidance to assist manufacturers and retailers in making this judgment.
    - Legislation should empower responsible regulators to reject the safety notice where the major failure status is in dispute.
    - If an agreement cannot be reached, then the recall should revert to the mandatory recall process with the regulatory agency view taking precedence.
- The section 132A confidentiality provisions of mandatory reports should be revoked.
- A public portal and publicly accessible, searchable database of consumer product incident reports should be adopted in Australia, based on the US model www.SaferProducts.gov
- A single regulator, preferably the ACCC, should have ultimate responsibility for managing product safety recalls.
- A General Safety Provision should be introduced to the ACL.

Consumer experiences across states and territories

A nationally consistent law like the ACL should provide consumers across the country with access to the same level of protection, and enable them to be confident that they are receiving the same advice. However, CHOICE has reason to believe that consumers in different jurisdictions receive different advice from their respective State and Territory ACL regulators on problem resolution. In addition to this, consumers wanting to enforce their rights at a Tribunal level will face different fees depending on which jurisdiction they are in.

- Tribunal and Court fees across states and territories should be equal and as low as possible, to ensure that all Australians have the same ability to assert their rights to a remedy.
- Disadvantaged and vulnerable consumers should have the right to seek a waiver of Court and Tribunal fees when pursuing ACL actions.
- As part of the Productivity Commission study of consumer law enforcement and administration, a framework should be developed to consistently evaluate the work of specific regulators.

- Further research should be conducted to determine whether State and Territory ACL regulators are providing consistent, accurate advice to consumers.

Making regulators more effective

Regulators and other institutions and non-government organisations that assist consumers in using their rights need appropriate and secure funding to do their job. Funding cuts have had a direct impact on the quality of enforcement outcomes. Funding must be sufficient to allow regulators like ASIC to be proactive, independent, flexible and able to offer competitive salaries.

- The Australian Government Guide to Regulation should be amended so that new regulations no longer have to be fully offset by removing other regulations, giving the Federal Government greater flexibility to remove or add regulations as the community requires.
- Public service Deregulation Units should be restructured into Better Regulation Units that assess whether regulation can be made more effective, to recommend the removal of unnecessary or harmful regulation, and to assess new laws or regulations.
- Annual Federal Government Deregulation Reports should include an assessment of the benefits delivered by new and existing regulations.

Access to data held by ACL regulators

ACL regulators hold a wealth of complaints data, generated by consumers. Sharing this data empowers consumers to make informed decisions about where to buy goods and services, while simultaneously encouraging businesses to improve their complaints handling and other practices.

- Other Federal, State and Territory regulators should follow the lead of NSW Fair Trading and create consumer complaints registers that publish information about individual traders who are the subject of a high number of complaints. Where possible, this information should be published in a consistent format nationally to allow comparison and aggregation of data.

Super complaints

Consumer advocacy bodies in Australia conduct investigations and receive information directly from consumers about problematic behaviour by businesses. This can provide new insights into systemic problems facing consumers. Providing these organisations with the ability to make

super complaints, in similar fashion to the process available in the United Kingdom, will provide ACL regulators with better information.

- Specified consumer organisations should have a right under the Australian Consumer Law to make a 'super complaint' to the relevant regulator, with the regulator being obliged to respond to that complaint publicly within a specified period of time (e.g. 90 days), and the relevant government (i.e. Federal, State or Territory) required to then respond publicly after another specified period.

1. Making the consumer law more effective

When considering the effectiveness of the regulators, it is necessary to consider the powers that they are granted under the law. The current laws do not allow for penalties that will act as commercially significant deterrents for businesses.

Higher penalties for breaches of the Australian Consumer Law

The maximum penalties available for breaches of the specific prohibited practices under the ACL are too low. They can often be a fraction of modern marketing budgets for large institutions, and easily absorbed and ignored as little more than a cost of doing business. There are no pecuniary penalties at all for breach of the misleading or deceptive conduct or unfair contract terms provisions. It is also unclear why penalties for the consumer law provisions are lower than those for competition provisions under the *Competition and Consumer Act 2010* (the Act). A company that breaches any of the ACL's specific prohibited practices in the Act, for example false and misleading representations, faces a maximum penalty of $1.1 million per breach.[1] Conversely, penalties can be as high as $10 million per breach if a company breaches the cartel provisions contained in the same Act, even though the total consumer loss from each breach could be similar.

In April 2016, the Federal Court handed Reckitt Benckiser a penalty of $1.7 million for misleading consumers by advertising Nurofen targeted pain relief products that didn't target pain. While the company claimed that each product was formulated to treat a particular area of pain, they all contained the same active ingredient of ibuprofen lysine 342mg. The company engaged in this conduct for years, with CHOICE first raising concerns about this in 2010.[2]

CHOICE is of the view that the $1.7 million fine handed down in this case is not proportionate in comparison with the profits that Reckitt Benckiser made by tricking customers into paying a premium for products that were no more effective than cheaper generic pain relief pills. Even the highest available fine under the law would have only been $6 million, which is insufficient to deter highly profitable misconduct.

If the existing penalties available under the ACL were the same as those available for cartel conduct, Reckitt Benckiser would have faced a more appropriate maximum fine of $60 million

[1] *Competition and Consumer Act 2010* (Cth), Schedule 2 Australian Consumer Law, section 224.
[2] CHOICE (2010), Shonky Awards, available via http://classic.choice.com.au/shonkyaward/hall-of-shame/shonkys-2010/shonky-2010-nurofen.aspx

(i.e. six breaches at $10 million per breach). A fine at this level would be a more proportionate punishment and a far greater deterrent to other companies considering engaging in similar conduct. This level of available fine would have aided the Australian Competition and Consumer Commission (ACCC) in achieving a better outcome for consumers.

Cases brought by the ACCC against false 'free range' egg labelling also demonstrate that while the law operates to prohibit individual companies from making false and misleading representations, the penalties do not provide a sufficient deterrent to other players in the industry. Penalties that have awarded to date for false and misleading 'free range' egg claims are:

- C.I & Co (2011) - $50,000
- Rosie's Free-Range Eggs (2012) - $50,000
- Pirovic (2014) - $300,000
- Darling Downs (2015) - $250,000
- Egg Farms - Ecoeggs, Port Stephens, Field Fresh (2016) - $300,000

The total penalties for false and misleading free range egg representations have reached $950,000. CHOICE research demonstrates that consumers are willing to pay a premium for free range eggs, with 65% of Australians purchasing eggs labelled 'free range' in 2014.[3] This research also found that a minimum of 213 million eggs sold in Australia in 2014 did not meet consumers' expectations of 'free range', which include that hens actually go outside regularly and have sufficient room to move when they do so.[4] Consumers paid, on average, $0.99 per hundred grams for eggs labelled free range and $0.71 for barn laid eggs in 2014. Assuming an average egg weighs 50g, companies that fail to meet consumer expectations of 'free range' were able to earn additional revenue of $29.8 million in 2014, in comparison to what they would have made had the eggs been sold as barn laid. In this situation, it appears that overall the financial benefits associated with misrepresenting eggs as 'free range' continue to outweigh the risks of being taken to court and issued with a penalty.

Penalties or fines required for all sections of the law

Some sections of the ACL do not allow for penalties or fines. Injunctions, publication orders, damages and remedial orders are all available for a breach of the prohibition against misleading and deceptive conduct (section 18), but no fines are available for a breach of this section.

[3] CHOICE (2015), 'Free range eggs: making the claim meaningful'
[4] Based on the market share of producers with an outdoor stocking density of 10,000 birds per hectare, which only 2% of respondents to CHOICE's 2014 survey indicated met their expectations of 'free-range' condition

Breaches of section 18 and of the unfair contract terms provisions should result in fines, similar to breaches of the specific protections found in Part 3-1 of the ACL. Section 18, the prohibition against misleading and deceptive conduct, is a broad provision. It establishes a norm of conduct, rather than creating liability.[5] However, this does not provide sufficient justification for such conduct to be exempt from financial penalty. Misleading and deceptive conduct harms consumers and their confidence in the market in exactly the same way that false and misleading representations do. This conduct should be punishable by fines in the same way as a breach of the specific protections, or the prohibition against unconscionable conduct.

Consideration should also be given to attaching pecuniary penalties to the unfair contract terms provisions. Currently, in order to secure penalties for including unfair contract terms in standard form contracts, the regulator must argue that the unfair terms also constitute a breach of the specific protections.[6] If this conduct attracted fines outright, it would enable the regulator to send a stronger message regarding the necessity for fair markets.

Recommendations 1, 2, 3 and 4

- Existing $1.1 million penalties available for breaches of the specific protections in the ACL should be raised, to align with the penalties available for breach of the cartel conduct provisions ($10 million).
- Penalties should be available for misleading and deceptive conduct and unfair contract terms.
- Funding for regulators must be adequate, secure and non-conflicted.
- Organisations that assist consumers in enforcing their rights – such as community legal centres, financial counselling programs and bodies like the Consumers' Federation of Australia – should receive adequate and sustainable funding from Federal, State and Territory governments.

2. Product recalls and the multi-regulator model

Based on official recall statistics, Australian consumers have recently experienced a period of increased exposure to unsafe products. Unsafe products have meant that doing our laundry might lead to a major house fire, charging our mobile phones and other electronic devices could

[5] Miller R. (2013), 'Miller's Australian Competition and Consumer Law annotated', 25th edition, p1443.
[6] ACCC v Chrisco Hampers Australia Limited [2015] FCA 1204.

produce an electric shock (or worse) and cooking family meals using a high-end appliance may land us in hospital with devastating burns.

It's not just the ubiquity of the recalls, but also the scale that is new. The recall of one million vehicle airbags means that, perversely, the very safety features we rely on to protect us while driving our cars could actually cause serious injury or death. The recall of 4000km of Infinity cabling means the wiring inside our homes and businesses could be putting lives at risk.

Each year children and adults are injured and require medical treatment because of product failures but no public records produce a full picture of the extent of injuries. Economic costs are incurred through large-scale repair and replacement programs of sub-standard goods, as well as the environmental cost of destroying millions of products that can't be repaired.

The product safety system is not as good as it should be. There is little-to-no publicly available information about product-related injuries, including the 'near misses' that don't end up in a hospital admission and do not have to be reported to regulators. The voluntary recall process relies heavily on the goodwill of businesses working to ensure that customers hear their messages. More often than not, the public is in the dark as to whether a recall has actually worked or not.

The product safety system needs to be reformed to improve its transparency, accountability and agility. Alongside law reform, which may be out of scope for this Productivity Commission study, better use of consumer-friendly technology and more sustainable funding of product safety regulators is critical to the future of Australia's product safety enforcement system.

Improving the information available for consumers would be a step in the right direction. Currently, the national product safety website (https://www.productsafety.gov.au/recalls) has an exhaustive list of recalls that have been conducted in recent years. It is reasonable to ask which of these recalls have worked, including which recalls worked better than others and why. But there is not enough publicly available information to make these assessments and apply lessons to future recall processes.

CHOICE is calling for a new legislative obligation on the businesses conducting voluntary recalls to publish regular results about the outcome of any active product recall. Consumers should have a right to know whether suppliers' actions are working to effectively remove unsafe products from the marketplace. This additional information would facilitate a more meaningful debate about when regulators should trigger a mandatory recall. CHOICE's experience in the Samsung washing machine recall was that it can help to sustain public interest in a recall when

new and relevant information is released (for example, information on geographic differences in return rates, or total volume of goods returned, replaced or refunded).

In addition to improving the information provided by businesses, more information currently held by regulators needs to be released. CHOICE is calling for the s132A confidentiality provisions of mandatory reports to be revoked. Since the ACL came into force on 1 January 2011 there have been over 10,000 mandatory reports of actual injuries or deaths caused by the use, or foreseeable misuse, of products and services. We know the details of just eight of those 10,000 mandatory reports as a result of the legal action taken against Woolworths for failing to make the mandatory reports within the required two day period on eight occasions. On that occasion Woolworths was fined $57,000 for failing to comply with its obligations.

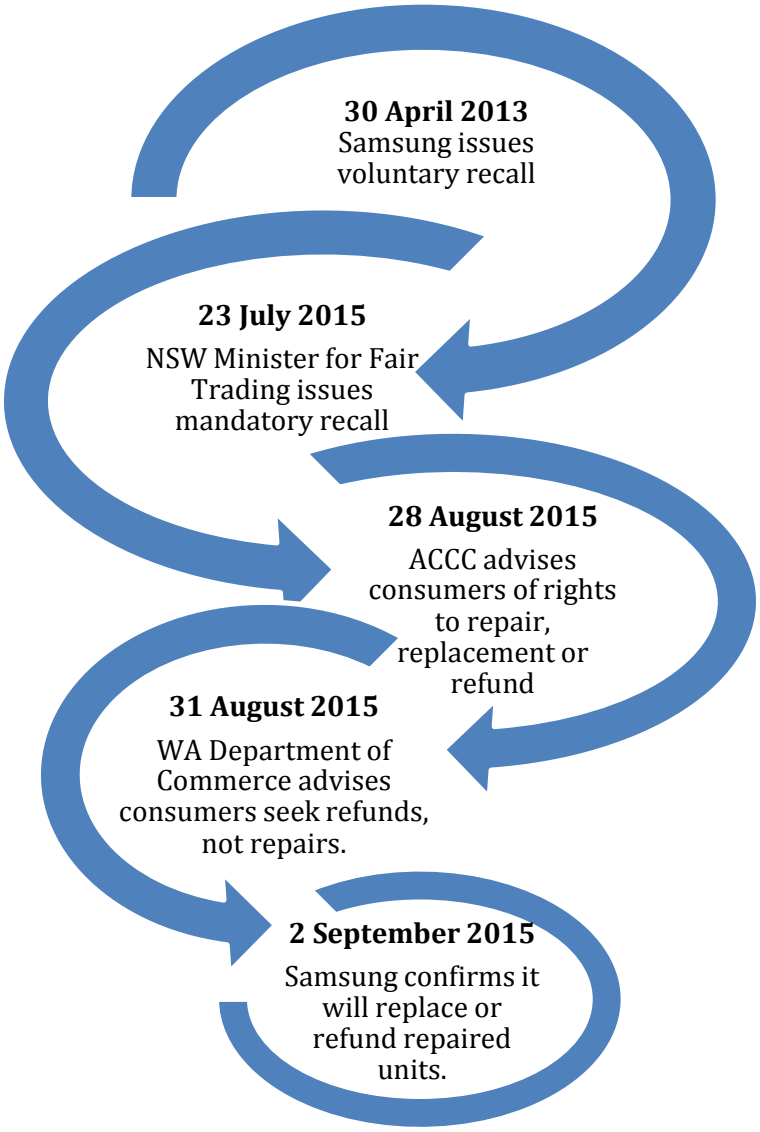
CHOICE believes that the Australian public has a fundamental right to know the nature of these injuries and/or deaths, including the steps taken by suppliers in response to the incidents. In other jurisdictions internationally this information is made available.

If this information was available to CHOICE, we would be in a position to adapt our testing of consumer products to take account of consumer experiences with goods. For example, in light of our Mass Incident Report on Thermomix TM31 injuries, we have changed the way we rate all-in-one kitchen appliances and no longer recommend products that don't have a cut out switch at high temperatures and speeds.

Case study: Samsung washing machine recall

The Samsung washing machine recall has been confusing for consumers, with the end result being that after several years there are still tens of thousands of potentially dangerous washing machines in Australian consumers' homes and fires are continuing to damage homes.

Graphic 1 – Timeline of Samsung recall



Consumers affected by the recall received contradictory advice at different points during the timeline depicted above. When the recall first became mandatory on 23 July 2015, consumers were advised that the available remedy was a repair. However, a safety defect is arguably a major failure of the consumer guarantees, meaning consumers should have the right to a remedy of their choice, including a replacement or refund.

Just over a month later, the ACCC advised consumers that they in fact had the right to choose a remedy, including a repair, replacement or refund. The rights of consumers who had already accepted a repair based on previous advice were unclear, although the ACCC advised CHOICE that this class of consumers were entitled to retrospectively reject the repair.

Days later, the WA regulator released advice recommending consumers do not seek a repair, but instead assert their rights to a refund and remove the machines from their houses as soon as possible. In early September 2015, Samsung clarified that it would replace or refund repaired units, while continuing to offer repairs, replacements or refunds for unrepaired machines.

In this example, significant consumer confusion was caused by the regulators' and the manufacturer's actions. With multiple regulators making public, sometimes conflicting statements on a recall, it was unclear for consumers which body is responsible for the recall, and which advice they should follow. The revamped product safety recall website assists in clarifying for consumers which body is ultimately responsible for a recall. However, more could be done to ensure businesses communicate to their customers about recalls more effectively, and to provide clarity around the remedies available to consumers in the event that a product has a safety problem.

The number of regulators involved in the Samsung recall heightened the risk of consumer confusion and consumer detriment. In the example above, multiple regulators were involved at different points during the recall, but not in a complementary way. Conflicting advice was given. Having a single regulator with ultimate responsibility for managing product safety recalls and communicating with the public about these would reduce the risk of conflicting advice being given to consumers. If the ACCC were responsible for this, it would also increase the likelihood that information about recalls will reach a wider audience.

Recommendations 5, 6, 7, 8, 9, 10 and 11

- There should be a legislative obligation on businesses conducting voluntary recalls to use all reasonable means available to communicate to the affected consumer community about the product safety issue and remedies available.

- Where businesses are seeking to protect their brand during a recall ahead of advertising their unsafe products, mandatory recalls should be used to require the funding of independent, non-conflicted third parties to promote the recall.
- Businesses conducting voluntary recalls should be required to publish regular results about the outcomes of any active product recall.
- All voluntary and mandatory recalls should be required to state whether or not the safety failing constitutes a major failure.
    - The ACCC would need to issue guidance to assist manufacturers and retailers in making this judgment.
    - Legislation should empower responsible regulators to reject the safety notice where the major failure status is in dispute.
    - If an agreement cannot be reached, then the recall should revert to the mandatory recall process with the regulatory agency view taking precedence.
- The section 132A confidentiality provisions of mandatory reports should be revoked.
- A public portal and publicly accessible, searchable database of consumer product incident reports should be adopted in Australia, based on the US model www.SaferProducts.gov
- A single regulator, preferably the ACCC, should have ultimate responsibility for managing product safety recalls.

Infinity cables: Federal regulator working with industry regulators

The Infinity Cable recall began in 2014, with retailers and wholesalers recalling Infinity and Olsent-branded electrical cables due to risk of fire or electrical shock. The cables were supplied in the majority of Australian States and Territories between 2010 and 2013.[7] The recall is being coordinated by a taskforce of consumer agencies, building regulators and electrical safety regulators.

Unfortunately, current recall progress reports indicate that up to 22,000 buildings, both commercial and residential, could still be affected by the potentially dangerous cables. This recall appears to be successful in terms of the coordinated approach from the regulators, but the outcome is unsatisfactory. This is not a slight on the regulators; it may be in this case that legal reform could have created conditions where the faulty cabling would have been less likely to have been sold in Australia.

[7] NSW (2010-2013), ACT (2011-2013), VIC, QLD, SA and WA (2012-13) and TAS (2013). See https://www.accc.gov.au/update/infinity-cable-recall-act-now-before-its-too-late#about-the-recall

While the PC is seeking information on the enforcement and administration of the law, rather than assessing the law itself, it can be difficult to separate the two in all instances. In this case, the introduction of a general safety provision into the ACL may have resulted in suppliers being more proactive in ensuring the safety of the cabling that they were bringing to the market.

Contrary to what the average consumer believes, there is currently no requirement under the ACL that products be safe in order to be sold in Australia. Our product safety regime is largely reactive; recalls are conducted and investigations initiated only after it becomes clear that a product poses a risk to consumers' safety. Re-imagining the law so that it places an onus on manufacturers and retailers to proactively ensure the safety of their products before they reach the market could lead to safer products and fewer recalls. This could be achieved through the introduction of a general safety provision in the law.

Recommendation 12

- A General Safety Provision should be introduced to the ACL.

3. Consumer experiences across states and territories

One of the benefits of the national law is that it should provide consumers across the country with access to the same level of protection, and enable them to be confident that they are receiving the same advice. But is this working in reality?

Consumer experiences gathered through our CHOICE Help dispute resolution and complaints handling service suggest that consumers in different jurisdictions may be receiving different advice from their respective State and Territory ACL regulators on problem resolution. For example, CHOICE members from several States (Tasmania, South Australia, Victoria and Western Australia) had issues with faulty products purchased from online store Android Enjoyed. While all members were able to eventually receive refunds, the advice and assistance they received from their local ACL regulator varied. For instance, a Tasmanian consumer that contacted CHOICE was advised by Consumer Affairs and Fair Trading Tasmania that they should instead contact NSW Fair Trading, given the trader was registered in NSW. NSW Fair Trading liaised with Android Enjoyed on their behalf, and assisted them in making a claim for a refund. In contrast, CHOICE heard from a consumer in Victoria who was assisted directly by

Consumer Affairs Victoria without their needing to contact another regulator in a different state. Both consumers ended up with a refund, but one consumer had additional barriers to overcome in order to have their problem resolved.

Access to justice: Tribunal fees across States and Territories

CHOICE receives hundreds of contacts from members seeking help enforcing their consumer guarantee rights. The majority of these members are able to resolve their own issues once provided with additional information about the application of the law; a small number require CHOICE to negotiate on their behalf. A smaller number still find themselves deciding whether they should abandon their claim, or pursue it in their local court or tribunal. While these consumers are in the minority, the existence of the courts and tribunals should be an avenue to justice, not a barrier. However, the costs associated with taking a matter to the court or tribunal can dissuade consumers from asserting their rights, particularly when the dispute is for a comparatively small amount.

State/Territory	Tribunal or Court	Filing Fee	Application Type
Australian Capital Territory	ACT Civil and Administrative Tribunal	$68	When the amount in dispute is $2000 or less.
New South Wales	NSW Civil and Administrative Tribunal	$47	If the amount claimed is $10,000 or less.
Northern Territory	NT Magistrates Court	$65	Small claims – statement of claim.
Queensland	QLD Civil and Administrative Tribunal	$23.80	Not more than $500 in dispute.
South Australia	SA Magistrates Court	$138	Minor civil action.
Tasmania	Magistrates Court of TAS	$111	Claim for

			$5000 or under.
Victoria	VIC Civil and Administrative Tribunal	$59.80	Claims for less than $500.
Western Australia	Magistrates Court of WA	$106	Filing fee for claim not exceeding $10,000.

Differences in fees across States and Territories

It is not fair that a consumer experiencing a problem with a business in South Australia will pay nearly six times more than a similar consumer in Queensland would in order to seek a remedy. The ACL is a nationally consistent law, and should apply equally across Australia – including in terms of enforcement and consumer access to remedies. In all States and Territories, where the amount in dispute is not substantially higher than the filing fee, businesses know that consumers are unlikely to pursue action. Fees should be consistent and as low as possible in order to facilitate access to justice. Vulnerable or disadvantaged consumers should also have access to a fee waiver scheme, in order to best facilitate access to justice.

Recommendations 13 and 14

- Tribunal and Court fees across States and Territories should be equal and as low as possible, to ensure that all Australians have the same ability to assert their rights to a remedy.
- Disadvantaged and vulnerable consumers should have the right to seek a waiver of Court and Tribunal fees when pursuing ACL actions.

Assessing the comparative effectiveness of the state and territory regulators

It is difficult to construct a methodology for accurately and comprehensively assessing the performance of the State and Territory ACL regulators with the information that is currently publicly available.

While each of the ACL regulators publishes its own Annual Report, or is included in the Annual Report of an overarching department, the information provided in these reports is not consistent

across States and Territories, making direct comparisons difficult. For example, a quick review of the available Annual Reports reveals that in 2014-15 Consumer Affairs Victoria provided information and advice over the phone, in person and via written correspondence on 481,669 occasions.[8] This number seems remarkable on the face of it, but none of the other regulators have provided a directly comparable statistic. Consequently, it is difficult to determine whether Consumer Affairs Victoria is performing exceptionally well, or simply in line with the other regulators. Equally, it is difficult to determine whether this statistic should be given more or less weight than, for instance, the 500,000 letters promoting known scams that were intercepted by the Western Australian Department of Commerce in the same year, or the $6.1 million in consumer redress raised by the Queensland Office of Fair Trading.[9] All of these statistics represent different, successful approaches to improving consumer welfare and increasing consumer awareness of their legal rights. This comparability issue could in part be addressed if the state and territory bodies were required to report consistently on certain core elements of their roles (e.g. number of inquiries received, number of disputes resolved, number of cases litigated, uses of statutory powers). There are variations in jurisdictions between the state and territory regulators that would make completely consistent reporting difficult, but there remains an opportunity for improving the information provided in annual reports. For instance, breaking down overall complaint numbers into type of complaint would assist in comparing regulators by making the non-consistent elements easy to identify.[10]

Beyond publically available reports, CHOICE has been able to form a view that the effectiveness of the different ACL regulators varies, based on complaints lodged through our dispute resolution service, CHOICE Help. The Android Enjoyed case discussed earlier in this submission is one example where we have seen consumers in different jurisdictions receive different levels of customer service. CHOICE has also received complaints that indicate that the level of training and expertise of some staff working for specific State and Territory regulators varies significantly, in a way that leaves consumers in some locations at a disadvantage.

One complainant advised CHOICE that they contacted NSW Fair Trading with a complaint about misrepresentations that had been made to them by a car dealer about a motor vehicle,

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[8] 2015 Consumer Affairs Victoria, 'Consumer Affairs Victoria: Year in Review 2014-15', available at https://www.consumer.vic.gov.au/annual-report/previous-annual-reports

[9] The State of Western Australia Department of Commerce annual report 2014 – 15, available at http://www.commerce.wa.gov.au/sites/default/files/atoms/files/ar2014-15_full.pdf and the State of Queensland Department of Justice and Attorney-General annual report 2014 – 15, available at https://publications.qld.gov.au/dataset/24d90be2-dc70-4e77-b31d-71d59a1737c1/resource/5073d703-a2fc-491a-b4f6-34e5a4ae2965/download/djagannualreport201415.pdf

[10] E.g., some regulators handle tenancy problems (Consumer Affairs Victoria, NSW Fair Trading) while others do not (Queensland tenancy problems handled by the Residential Tenancies Authority). Identifying volume of complaints received by complaint type would enable tenancy complaints to be removed when comparing the performance of one regulator against another.

only to be told that the ACL does not apply to cars. This is categorically incorrect. When this same complainant, following advice received from CHOICE, raised concerns with a different NSW Fair Trading staff member, they were told that the first staff member simply did not understand the way the ACL applies to cars, but that this had subsequently been clarified. Had the consumer not contacted CHOICE, they would have been left basing their decisions on incorrect advice. This is not an isolated incident; the CHOICE Help service has received other, similar complaints about advice received from state-based fair trading staff. Further research is needed to determine whether state and territory-based ACL regulators are providing consistent, accurate advice to consumers.

Consumers should have confidence in the advice that they are given by their local ACL regulator in relation to their rights and businesses' responsibilities. Complaints received by CHOICE indicate that this can be an issue. The conflicting public advice on remedies available to consumers provided by regulators involved in the Samsung washing machine recall adds to CHOICE's concerns.

Recommendations 15 and 16

- As part of the Productivity Commission study of consumer law enforcement and administration, develop a framework to consistently evaluate the work of specific regulators.
- Further research should be conducted to determine whether State and Territory ACL regulators are providing consistent, accurate advice to consumers.

4. Making regulators more effective

Funding for regulators and organisations that support consumers

Regulators and other institutions that assist consumers in using their rights need appropriate and secure funding to do their job. Recently, regulators across Federal and State jurisdictions have faced repeated funding cuts and have been asked to do more with less. This has a direct impact on the quality of enforcement outcomes. For example, cuts to ASIC's operating budget have resulted in a substantially reduced number of actions to protect consumers of financial

services, including a drop in the number of high-intensity surveillance activities and actions against potentially misleading or deceptive promotional material.[11]

Ultimately, funding must be sufficient to allow ASIC to be proactive (able to uncover and investigate suspected misconduct rather than waiting for a crisis), independent (accountable to the Federal Government and Parliament, but able to set its own agenda), flexible (able to keep up with rapid change in the industries it regulates) and able to offer salaries in line with the financial services industry.

In addition to the level and security of funding, regulators need funding systems that allow them to remain independent and trusted by the community. The Federal Government has committed to consider three-year funding arrangements and an industry-pays funding model for ASIC. Industry funding can support compliance outcomes, especially if a levy includes a mechanism that requires industry bodies with the greatest risk of non-compliance to bear the costs of regulation.

However, an industry funding model must preserve regulator independence. CHOICE and other consumer organisations have raised a number of concerns with the proposed industry-pays funding model.[12] Of greatest concern is that the initial government proposal would allow for 12-monthly consultations with industry bodies on regulatory priorities and funding. This would allow regulated bodies to inappropriately pressure the regulator on a regular basis. No industry should have a say over how a regulator directs its funds – it means that key consumer issues can be prevented from being addressed by the source of the problems.

Finally, secure funding is required for bodies that assist consumers, particularly vulnerable consumers, in enforcing their rights and navigating complex markets. Consumer organisations provide a valuable, complementary role to the ACL regulators. They conduct investigations, uncover systemic detrimental conduct through complaints received, provide advice and assistance, and engage in direct dispute resolution for consumers. Initial investigations conducted by consumer organisations and escalated to regulators save those agencies time and money, enabling them to direct resources to known problems causing demonstrable detriment to consumers.

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[11] ASIC, *Annual Report*, 2014-15. http://download.asic.gov.au/media/3437945/asic-annual-report-2014-15- full.pdf?_ga=1.238564288.1398207759.1454312612 p. 32.

[12] http://consumeraction.org.au/wp-content/uploads/2015/10/Joint-consumer-advocate-submission-ASIC-industry-funding-October-2015.pdf

In 2008, the Productivity Commission recommended that the Federal Government should provide public funding to help support the basic operating costs of a representative national consumer peak body; assist the networking and policy functions of general consumer groups; and enable an expansion in policy-related consumer research.[13] This recommendation has not been acted upon. In 2014, the Productivity Commission conducted an inquiry into the costs of accessing justice services.[14] This inquiry acknowledged the importance of organisations like community legal centres, stating that "disadvantaged Australians are more susceptible to, and less equipped to deal with, legal disputes" and that "efficient government funded legal assistance services generate net benefits to the community". Two years on, it remains true that more resources are needed to better meet the legal needs of disadvantaged Australians, including in relation to consumer protection legal disputes.

Community legal centres, financial counselling programs and peak bodies like the Consumers' Federation of Australia are all currently underfunded, or in some cases receive no government funding at all. Federal and State governments need to look at overall funding arrangements for these bodies and ensure adequate and sustainable funding is provided.

Ensuring regulatory assessment tools support quality consumer outcomes

Just as consumers are harmed by a lack of effective consumer protections, they also ultimately bear the cost of poorly designed and targeted regulations where these increase costs for business and stifle competition. All regulators should assess the quality and effectiveness of regulation but in a way that captures both the costs and benefits of regulation, particularly to consumers and the broader community.

Some aspects of the Regulatory Impact Statement (RIS) process and current Federal Government requirements for assessing regulation give too much emphasis to business costs while not always capturing the benefits of regulation to consumers, or the costs to consumers of failing to act. For example, the Australian Government Guide to Regulation currently requires that new regulations must be fully offset by removing other regulations. This can leave regulators unable to progress necessary reforms. It is slightly ridiculous to assess regulations from this entirely quantitative perspective, rather than based on the quality of outcomes, or

[13] 30 April 2008, Productivity Commission, 'Review of Australia's Consumer Policy Framework', available at http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer1.pdf

[14] 5 September 2014, Productivity Commission, 'Access to Justice Arrangements', available at http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf

consideration of the problem the regulation was initially intended to address. While it is highly likely that certain regulations are redundant, cause more harm than good, and/or that the same problem could be addressed far more effectively and efficiently, none of this is captured in a simplistic 'offsetting' requirement. The Productivity Commission should consider how frameworks for assessing the effectiveness of current regulations or the need for new regulations can better include measures that capture consumer outcomes.

Recommendations 17, 18, 19, 20 and 21

- Funding for regulators must be adequate, secure and non-conflicted.
- Organisations that assist consumers in enforcing their rights – such as community legal centres, financial counselling programs and bodies like the Consumers' Federation of Australia – should receive adequate and sustainable funding from Federal, State and Territory governments.
- The Australian Government Guide to Regulation should be amended so that new regulations no longer have to be fully offset by removing other regulations, giving the Federal Government greater flexibility to remove or add regulations as the community requires.
- Public service Deregulation Units should be restructured into Better Regulation Units that assess whether regulation can be made more effective, to recommend the removal of unnecessary or harmful regulation, and to assess new laws or regulations.
- Annual Federal Government Deregulation Reports should include an assessment of the benefits delivered by new and existing regulations.

5. Specific industry regulators

Complaints processes: the Australian Health Practitioner Regulation Agency and the ACCC

CHOICE is aware of instances where consumers are unsure of which body is responsible for dealing with complaints about a specific industry, or where there may be two separate regulators whose interests overlap, but that have different approaches to enforcement, enforcement powers or complaints resolution processes.

For example, if you have seen advertising that you believe is misleading from an alternative health practitioner, do you lodge a complaint with the federal regulator responsible for

administering the consumer law preventing false and misleading conduct, or do you complain to the industry body charged with regulating the specific industry? This is the question that advocates Dr Ken Harvey and Loretta Marron tried to answer as they went through a process in an attempt to stop misleading and dangerous conduct by certain chiropractic clinics in Australia. Ms Marron and Dr Harvey collected cases and complaints demonstrating misrepresentations being made in a number of chiropractic clinics' advertising materials and presented them to the ACCC. The ACCC contacted the Australian Health Practitioners Regulation Agency (AHPRA) on their behalf, and several months later suggested that the complainants deal with AHPRA and the associated Board, the Chiropractic Board of Australia, directly.

While AHPRA may have the experience of dealing with the industry, the body rarely progresses issues to litigation or fines businesses that are found to be doing the wrong thing. It has relied largely on education to address issues of misleading and deceptive advertising. However, the existence of the specific body appears to have influenced the ACCC's decision to not take up the case themselves.

CHOICE has raised concerns with AHPRA and Federal and State Ministers about complaints processes and ongoing instances of misleading or deceptive statements from some chiropractors. It is still absurdly easy to find instances of likely misleading and deceptive advertising from chiropractors online, indicating that greater industry-wide enforcement activity is needed.

The Chiropractic Board of Australia has taken extremely limited actions against chiropractors making false or misleading claims. To CHOICE's knowledge they have only just begun to use their powers to pursue fines in court for misleading or deceptive advertising, issuing a charge for false and misleading advertising on 1 August 2016.[15]

CHOICE is pleased to see that AHPRA and the Chiropractic Board of Australia has started to use approaches beyond education, but notes that this has taken some years. Other similar issues of misleading and deceptive advertising have been dealt with in a quicker and effective manner by other regulators, showing that there can be inconsistent consumer outcomes depending on the responsible regulator.

[15] http://www.ahpra.gov.au/News/2016-08-01-misleading-advertising.aspx

Preventing dangerous conduct: the Therapeutic Goods Administration and the ACCC

The Therapeutic Goods Administration's (TGA's) website states that it is "the primary government stakeholder and regulator within the co-regulatory system of advertising for therapeutic goods". The ACCC's website notes that one of its priority areas for enforcement in 2015/16 is "health claims" and "consumer issues in the health and medical area". Both of these regulators are claiming some responsibility for regulating therapeutic goods advertising, which could cause some confusion for consumers wanting to lodge complaints.

However, the powers of the two bodies in seeking to resolve issues are markedly different. If the TGA finds that an advertising claim is misleading, there is little impact on the offending trader - the company can immediately re-brand the same product and have it approved, and wait for another investigation and adverse finding, at which point the process can repeat.[16]

In contrast, the ACCC has the power to litigate and seek fines. The best approach may be a joint one, rather than one regulator or the other claiming sole responsibility. In 2011, the ACCC worked with the Cancer Council and the TGA to warn consumers about unproven commercial breast imaging services that claim to detect cancer. The TGA removed a number of these devices from the Australian Register of Therapeutic Goods because sponsors were unable to substantiate claims. The ACCC took action against Safe Breast Imaging, securing a $200,000 fine as well as a $50,000 fine against the company director. The company stopped providing services. Overall, this was a successful, multi-layered approach to address a dangerous emerging practice putting Australian consumers at risk. This example stands in contrast to the AHPRA example above, where AHPRA appear to have either claimed or been handed sole responsibility for the investigation and enforcement of the law. A joint approach from the ACCC and AHPRA in this case may have led to a better outcome for consumers.

6. Access to data held by ACL regulators

Providing consumers with access to relevant information currently held by businesses can be facilitated by governments; NSW Fair Trading's pilot complaints register is one example that could be adopted nationally. CHOICE strongly supports the decision to create a consumer complaints register that will publish information about individual traders or franchisors who are

[16] https://ama.com.au/ausmed/supplement-regulation-tga-completely-cactus - see Swisse 'Appetite Suppressant' being remarketed as "Hunger Control".

the subject of a high number of complaints and encourages other States and Territories, and the Federal regulators such as the ACCC and ASIC, to follow suit.

We agree with NSW Fair Trading's view that sharing this data will improve consumer welfare by empowering consumers to make informed decisions about where to buy goods and services. Providing consumers with information on the traders that have had high levels of complaints made against them will help address existing asymmetries of information, where businesses are aware of the volume of complaints made against them but consumers are not. Addressing this will empower consumers to make more informed purchasing decisions. Making this information public will incentivise businesses to improve their complaints handling and other practices. In fact, the publication of the NSW Fair Trading data has already led to positive change. Several businesses initially on the unpublished list engaged with NSW Fair Trading and changed their practices to reduce complaint numbers and avoid appearing on the register. For example, one large national business decided to employ new complaints handling staff and invest in additional resources to reduce complaints. These actions led to a decrease in complaints, and presumably increased consumer welfare.

In order to facilitate innovation by third parties and app developers, regulators should endeavour to release as much information as possible. At a minimum such complaints registers should include information about the trader, the product or service complained about, the problem or practice complained about and the purchase method used.

Recommendation 22

- Other Federal, State and Territory regulators should follow the lead of NSW Fair Trading and create consumer complaints registers that will publish information about individual traders who are the subject of a high number of complaints. Where possible, this information should be published in a consistent format nationally to allow comparison and aggregation of data.

7. Super complaints

Consumer advocacy groups play a crucial role bringing the concerns of Australians to the attention of regulators and helping shine a light on harmful products and practices. In a recent review of the ACCC, the Australian National Audit Office recommended that the Commission

improve its focus on trends and patterns in market intelligence, identifying high levels of widespread consumer detriment[17].

To improve the responsiveness of regulators to consumer concerns, CHOICE is calling for consumer advocacy organisations to be given the power to make 'super complaints' to the ACCC, ASIC and the Australian Communication and Media Authority.

A super complaints process in the United Kingdom has given consumer groups the ability to highlight issues of concern and provided regulators with valuable insights into emerging and systemic issues, with examples ranging from energy billing practices and credit card interest rate calculations to care homes and compensation for train delays. In the UK model, only consumer organisations designated by the Secretary of State can make a super complaint with regulators obliged to respond in writing within 90 days. Responses must note how regulators intend to deal with the issue which may include enforcement action; launching a market study; making a market investigation reference; referral to a relevant industry specific regulator; or making a finding (and providing reasons) that no further action is warranted.[18] After another 90 days, the government is then required to publicly respond to the regulator.

A new process should be established under the ACL to let specified consumer organisations make a 'super complaint' to the relevant regulator, with the regulator being obliged to respond to that complaint publicly within a specified period of time (e.g. 90 days), and the Federal Government required to then respond publicly after another specified period. In order to constitute a super complaint, a reference must relate to widespread concern or conduct in a market and must meet other significant thresholds in relation to information provision. This measure has no additional costs for government, regulators and businesses. It would lead to better information being provided to regulators.

Recommendation 23

- Specified consumer organisations should have a right under the Australian Consumer Law to make a 'super complaint' to the relevant regulator, with the regulator being obliged to respond to that complaint publicly within a specified period of time (e.g. 90

[17] Australian National Audit Office (2016), *Managing Compliance with Fair Trading Obligations*, http://www.anao.gov.au/Publications/Audit-Reports/2015-2016/Managing-Compliance-with-Fair-Trading-Obligations
[18] Office of Fair Trading, *Super-complaints: Guidance for* designated consumer bodies, July 2003 at 9.

days), and the relevant government (Federal, State or Territory) required to then respond publicly after another specified period.