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SUBMISSION TO CONSUMER AFFAIRS AUSTRALIA AND NEW ZEALAND IN RESPONSE TO THE INTERIM REPORT FOR THE REVIEW OF THE AUSTRALIAN CONSUMER LAW

9 DECEMBER 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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INTRODUCTION

The Australian Consumer Law (ACL) is legislation that impacts all of us in our day-to-day lives; we assume that the products we buy are safe, that we have rights to remedies when we are unfairly sold a product, and that businesses who do the wrong thing will be punished. When the ACL is working well, these assumptions are correct. But we sometimes see examples of the law failing consumers, due to gaps, inadequate penalties and an increasingly outdated approach to product safety.

When you buy a phone, it shouldn't catch fire. Your elderly relatives should not have to deal with aggressive salespeople coming into their homes and harassing them to buy products they don't need. When you buy an insurance product that is advertised as providing cover in case of critical illness, it should do exactly that, without hidden terms removing the value from the product.

This review represents an opportunity to fix the gaps in the law, and adopt the best of international approaches to consumer protection. A final report that is ambitious and fearless could lead to the creation of a more robust and useful consumer protection framework that will remain relevant for years to come, create positive market change and represent a benchmark for international best-practice. A final report that chooses to simply stick with the status quo will be a wasted opportunity that harms consumers in the long-term.

Product safety reform should be a key priority for the review, and CHOICE is glad to see the focus given to this area in the Interim Report. Now is the time to encourage a more proactive approach from manufacturers and retailers, and sow the seeds for a change in corporate attitudes towards product safety. CHOICE has been calling for the introduction of a General Safety Provision (GSP) for more than ten years; with product recall rates skyrocketing in recent years, now is the time to reform our product safety system with the introduction of a GSP.

In addition to introducing a GSP there is another reform that needs to be made to our product safety system; abolishing the confidentiality requirement for mandatory safety reports made to the ACCC. Since 2011, there have been more than 10,000 mandatory reports of actual injuries or deaths caused by the use, or foreseeable misuse, of products and services, yet these have been kept hidden by confidentiality requirements built into the ACL. To help protect consumers from dangerous products, the confidentiality of mandatory reports should be abolished, and a public portal and publicly accessible, searchable database of consumer product incident reports should be created in Australia.

As well as putting forward a positive reform agenda, this review presents an opportunity to mend the current gaps in the law, none of which is more outrageous than the unfair contract terms exemption for insurance contracts. Insurance is the ideal case study for why a prohibition on unfair contract terms should exist. Contracts extend over pages of information, containing complex terms and medical definitions that most people will not understand. The detriment caused by the mismatch between what consumers believe a policy to cover and what is actually covered can be disastrous when claims are denied. Unfair contract terms should be banned in insurance contracts; it is that simple.

Unfairness in markets should be removed. We continue to see predatory business models based on the exploitation of vulnerable consumers, where the very business model is dependent on taking advantage of their vulnerability. Funeral insurance and payday lending are clear examples. Current laws are not broad or strong enough to deal with these businesses; instead consumers need a general prohibition against unfair commercial practices.

Finally, there are some business practices that cause harm, but are governed by legislation other than the ACL or ASIC Act. Fundraising activity, especially when conducted using aggressive sales tactics, can cause consumer harm. There are major regulatory gaps that leave people with no protections from constant calls for money. However, amendments to the ACL alone are unlikely to address this issue. As charities increasingly adopt commercial practices, consumers are receiving fundraising requests that more closely mirror harmful high-pressure sales tactics. Approaches can be constant, aggressive and deliberately exploit emotions. Unsolicited calls cause clear consumer harm. The same reason to restrict aggressive unsolicited sales extends to unsolicited fundraising requests: it puts vulnerable people at risk of exploitation. As part of the review of the ACL, consideration should be given to broader consumer problems; to minimise consumer harm, the Do Not Call Register Act should be amended to allow consumers to opt out of all unsolicited fundraising calls.

CHOICE'S KEY RECOMMENDATIONS

Making products safer for consumers

- A General Safety Provision should be introduced, putting a clear obligation on suppliers to ensure that all goods that are sold to Australian consumers are safe, leaving irresponsible suppliers open to prosecution.
- The confidentiality of mandatory reports should be abolished, and a public portal and publicly accessible, searchable database of consumer product incident reports should be created in Australia, based on the US model www.SaferProducts.gov
- To promote better recalls, a statutory definition of a voluntary recall should be introduced, all recalls should state whether or not the safety failure constitutes a major failure, and businesses should publish regular information about the progress of recalls.

Making markets fairer and more transparent

- The ACCC should release guidance on the application of the ACL to fundraising activities and this guidance should include recommendations that will enable consumers to determine if fundraising is being conducted by a volunteer, charity employee or third-party.
- The Do Not Call Register Act 2006 should be amended so that consumers can opt-out of any call where they are being asked for money (including fundraising).
- There is no evidence that consumers benefit from door-to-door sales practices yet abundant evidence that this type of high-pressure, unsolicited selling causes harm. For this reason, door to door sales should be banned.
- Despite the prohibition against unconscionable conduct, predatory business practices that harm vulnerable consumers persist. Due to this, there should be a general prohibition against unfair commercial practices.
- 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. This should take a consistent approach nationally so that data can be combined.
- To make it easier for consumers to understand whether an extended warranty is worth anything, new requirements should be introduced at the point of sale, providing consumers with a clear written comparison of the consumer guarantee rights and the additional protections provided under the extended warranty.

Strengthening enforcement of the law

- The existing $1.1m penalties available for breaches of the specific protections in the ACL are not substantial enough to act as an effective deterrent against unlawful conduct. These should be amended to match those under the competition provisions of the *Competition and Consumer Act.*
- The penalties available for breaches of the specific protections in the ACL should also apply to misleading and deceptive conduct and unfair contract terms.
- Despite awareness of the consumer guarantee rights increasing, salespeople continue to mislead consumers about their rights to remedies. To better educate both consumers and sellers, notices should be displayed at the point of sale to inform consumers of their rights.

1. Scope and coverage of the ACL

Fundraising activities and the ACL

Fundraising activity, especially when conducted using aggressive sales tactics, can cause consumer harm. There are major regulatory gaps that leave people with no protections from constant calls for money. However, amendments to the ACL regime alone are unlikely to address this issue.

As charities increasingly adopt commercial practices, consumers are receiving fundraising requests that more closely mirror harmful high-pressure sales tactics. Approaches can be constant, aggressive and deliberately exploit emotions.

CHOICE has released research about the rate, nature and impact of unsolicited calls in Australia.[1] This focuses on fundraising through one of the three major channels used to solicit donations from people who have no established relationship with a charity (door-to-door, calling and on-street fundraising). Headline findings relevant to this inquiry are that:

- Older Australians are most affected by unsolicited calls. 89% of people have received an unsolicited call in the last six months, and this rises to 92% for 65-89 year olds.
- Fundraising calls are by far the most common kind of unsolicited call. Over 60% of people have received an unsolicited call from a charity, and this rises to over 70% for 65-89 year olds.
- 25% of people receive an unwanted call on their landline from a charity each week. 5% receive unwanted calls on their landline from charities at least once a day.
- 55% of people agree that “The callers use guilt to emotionally manipulate me into giving into their requests”.
- There is a possibility that third-party marketing organisations acting on behalf of multiple charities share information to target people most likely to donate, raising major privacy concerns. 67% of people who donated because of an unsolicited call noticed that they received more calls from others asking for donations.

Unsolicited fundraising requests should be restricted for the same reason as aggressive unsolicited sales; these practices put vulnerable people at risk of exploitation. Consumers are

[1] CHOICE (2016), *Who’s on the line? Unsolicited phone calls and the consumer experience.*

also unable to use telecommunications services as they wish due to constant calls. We have received reports of people not answering their phone, considering disconnecting services and even moving in with older relatives who need a phone but are unable to deal with constant calls asking for money.

Four case studies: consumers speak out about aggressive fundraising practices

1. After answering a telephone survey regarding works done by various organisations, I obviously got put on a "sucker" list. I now get between 10 and 30 phone calls a week plus half a dozen mail requests. I am a pensioner and while I give what I can to the charities I support, the harassment from other charities is unending. They refuse to take no for an answer, pleading and begging for just a small donation which I "surely can afford".

2. I regularly get requests for donations in the mail and if I don't respond it is followed up with a phone call they bombard me with information and do not even listen to what I have to say…I have got to the stage where I do not answer my phone any more. My friends and family know to leave a message and I get back to them. I should not have to do this!!

3. I have being [sic] getting calls for months now on my landline. They are have become so annoying that I just refuse to answer the phone at all and only keep the landline so I continue to have internet available. So much for the Do Not Call Register it simply does not work and never has for me.

4. I am constantly bothered by nuisance calls from charities, generally every 2 days or so. If I do get caught when answering the phone, the pressure on me to donate or buy raffle tickets is enormous. Asking to be taken off the call list doesn't always work either. Oftentimes, I don't hear from them for a few weeks then sure enough, the calls start again. To stop these constant calls, I now let my phone go to voicemail which sometimes annoys friends but at least I'm not being caught out so often.

Source: CHOICE.community – an online community of CHOICE supporters and members. All comments dated from August 2016 or later.

CHOICE supports calls for clarity about the application of the ACL to the activities of charities, not-for-profits and fundraisers. Further regulatory guidance is needed, especially for fundraising activities where a for-profit third-party is involved.

The guidance needs to consider how to signal to consumers who is collecting funds. As noted in the Interim Report, it is likely that a transaction between a third-party fundraiser fulfilling contractual obligations and a consumer could be captured by the ACL. However, fundraising carried out by volunteers is unlikely to be regarded as in "trade or commerce". Currently, it is extremely difficult for consumers to determine if they are being approached by a volunteer for a charity, a charity employee or, by a paid representative collecting funds for a third-party. Third-party for-profit fundraisers go to great lengths to appear like an employee or volunteer for a charity – they wear uniforms that signal their affiliation with the charity and fundraising scripts won't let the consumer know that the fundraiser works for another party. Consumers deserve to be given information about who is collecting funds and how their money will be used, including how much of their donation will be directed to the charity through various donation channels.

We also see benefit in a single, clear national law for fundraising activities. This would reduce costs for charities and make it easier for consumers to understand their rights and act if something goes wrong.

Most importantly, consumers need a way to control who can contact them and have the option to stop unsolicited approaches for money, especially in their own home. Currently, charities have an exemption in the *Do Not Call Register Act 2006* that allows them to call any number in Australia.

An opt-in system for sales would provide consumers with the greatest level of protection, but given the existing Do Not Call Register system is available for use, a simple solution is to remove the exception for charities and allow consumers to opt-out of receiving these calls. Alternatively, the Do Not Call Register could be amended to allow consumers to opt-out of the type of request being made, rather than opt out of receiving calls from types of organisations. For example, consumers should be able to opt-out of all requests for money including fundraising and telemarketing. This would allow charities to continue to contact people to discuss matters of public importance or to request non-financial assistance.

Amending the Do Not Call Register Act would be the simplest way to address consumer harm caused by unsolicited fundraising calls. However, we would welcome an inquiry examining alternative approaches. Another option for addressing problems in the sector may be to amend

existing codes of conduct that apply to charities. However, as there are many codes, and all are voluntary, this will not fully address the problem.

Charities perform a valuable function in society, providing advocacy, support and research services that otherwise may not be provided. Charities hold a special status in Australian society. They should be held to, at minimum, the same standards we expect of other companies when it comes to treatment of consumers.

Recommendations:

- The ACCC should issue regulatory guidance about the application of the ACL to fundraising activities.
    - The guidance should include recommendations that will enable consumers to determine if fundraising is being conducted by a volunteer, charity employee or third-party.
- The Do Not Call Register Act 2006 should be amended so that consumers can opt-out of any call where they are being asked for money (including fundraising).
    - If the Do Not Call Register Act 2006 is not amended, an inquiry into fundraising practices and the impact on consumers should be launched to examine all options for reform.

The $40,000 threshold

Section 3 of the ACL defines the meaning of "consumer", as it applies to the consumer guarantees and unsolicited consumer agreements. Part of the definition states that a person will be a consumer if they purchased goods for $40,000 or less. As noted in the Interim Report, the $40,000 threshold has not changed since 1986. Option 2 on page 13 suggests increasing the threshold to, for example, $100,000, and to link it to the Consumer Price Index.

At an average annual inflation rate of 3.2%, since 1986 the change in value of goods is a very substantial 154.2%.[2] A consumer who purchased a product for $39,000 in 1986 would have been protected by the law at the time; in 2016 the same product would cost roughly $99,000, leaving them without the benefit of the protections in the ACL (unless the goods were of a kind ordinarily acquired for personal, domestic or household use).

[2] See the Reserve Bank of Australia's Inflation Calculator, accessed on 30 November 2016, available at http://www.rba.gov.au/calculator/annualDecimal.html

Changing the threshold will primarily benefit small businesses, with some benefits for individual consumers. It is fair to note that small businesses are consumers, and generally do not have access to the same resources as big businesses. It is reasonable for small businesses to be treated differently to big business, allowing them to rely on the consumer guarantee rights included in the ACL. As the Interim Report discusses, many small businesses make purchases costing more than $40,000 that could not be considered of a kind ordinarily acquired for personal, domestic or household use or consumption.

The Interim Report also acknowledges that there are situations in which an individual consumer might purchase an item for more than $40,000 that also does not fall under that definition. It notes the example provided by the Law Council of Australia's Competition and Consumer Committee of an injured consumer purchasing a $50,000 elevator for use in their home. CHOICE expects that examples like this will increase in frequency as markets evolve, for example the likely impact of the National Disability Insurance Scheme.

There is no reason to abolish the threshold, and to do so would unnecessarily restrict the operation of the consumer guarantees. Taking into account changes in inflation and the cost of goods since 1986, it is entirely reasonable to increase the threshold and also link it to the Consumer Price Index. As a starting point, increasing the threshold to $100,000 would adequately bridge the inflation gap from 1986, and bring the law up to date.

Recommendation:

- Increase the $40,000 threshold for the definition of "consumer" to $100,000 and link it to the Consumer Price Index.

Protections for financial products

CHOICE believes there would be benefit in clarifying the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) to explicitly apply its consumer protections to financial products. Based on evidence presented by Consumer Action Law Centre (CALC), it is clear that the construction of the ASIC Act and the ACL make it difficult to assess which legislation a product or service may be covered by.[3] Currently the definition of a financial product or service must be determined by referring to both the ASIC Act and its regulations. As a general principle clear legislation is desirable as it cuts down on the expense involved in interpretation,

[3] Submission from Consumer Action Law Centre, page 41.

particularly through the courts. This clarification is likely to decrease compliance costs for business and make it easier for consumers to understand their rights under the Act.

Recommendation:

- Clarify the ASIC Act to explicitly apply its consumer protections to financial products.

2. The legal framework

Consumer guarantees

In our submission to the Issues Paper, CHOICE raised concerns about the effectiveness of the consumer guarantees regime with particular reference to consumers' experiences in resolving problems with their new cars. Shortly after submissions to the Issues Paper were made, the ACCC announced it will conduct a thorough market study into new cars. CHOICE is an active participant in the ACCC's ongoing consultations, and we await publication of the final study with interest.

As stated in our earlier submission, CHOICE research demonstrates that the problems in the sector are so prevalent, and costs to consumers so high, as to require a strong and deliberate attempt by regulators to drive compliance with the law. The ACCC's market study is a welcome first step, but CHOICE reiterates our call for the ACL regulators to set up a taskforce to investigate and report on compliance with the consumer guarantees regime across the motor vehicle industry. The taskforce should:

- Fast track complaints received about motor vehicle consumer guarantee issues, and prioritise these cases for resolution and investigation; and
- Publish complaints received about motor vehicles on a central database, and report annually on the industry's progress towards compliance, including the number of complaints received and resolutions reached.

If this fails to resolve the problems in the industry within two years, governments should introduce industry-specific lemon laws. Consumers are losing confidence in the market, and action is needed to fix this. Consumers have rights to remedies under the law, but at the moment it is incredibly difficult for them to enforce these rights.

The establishment of an independent industry-based dispute resolution process could also be explored. As we outlined in our submission to the Issues Paper, establishing an accessible, fair

and transparent dispute resolution body could help consumers get remedies for failures of the consumer guarantees in relation to cars, and assist them to do this with greater ease and speed than is currently the case.

The issue of what constitutes a "major failure" is particularly relevant to the new car sector, but has wider application as well - and it continues to confound consumers, suppliers and experts alike. We note that submissions from respected academics acknowledged the difficulty in applying aspects of the law, particularly given tribunals have differed in their view as to whether a series of minor failures can be taken collectively to constitute a major failure.[4]

CHOICE supports the Interim Report's option presented on page 62, to clarify the law on what can trigger a "major failure". It would provide much-needed clarity if the law specified that a safety issue will trigger a major failure. This would also improve the efficiency and effectiveness of voluntary recalls, discussed below. Specifying within the ACL that multiple minor failures can trigger a major failure would also serve to reduce the time taken and costs incurred to resolve consumer disputes, particularly in relation to new cars. We agree with the assessment presented in the Interim Report that this would encourage traders to implement better quality control procedures, and would provide consumers with the confidence to raise problems sooner rather than later, reducing the risk of exacerbating the original problem with continued use of the faulty product.

Recommendations:

- The ACL regulators should set up a taskforce to investigate and report on compliance with the consumer guarantees in the motor vehicle industry. The taskforce should:
    - Fast track complaints received about motor vehicle consumer guarantee issues, and prioritise these cases for resolution and investigation.
    - Publish complaints received about motor vehicles on a central database, and report annually on the industry's progress towards compliance, including number of complaints received and resolutions reached.
- An accessible, fair and transparent dispute resolution body should also be established to help consumers get remedies for failures of the consumer guarantees in relation to cars.
- If the above fails to resolve the problems in the motor vehicle industry within two years, the Federal Government should introduce industry-specific lemon laws.

[4] See submissions to the Issues Paper from Professor Stephen Corones of QUT and Associate Professor Paterson and Professor Bant.

- Clarify the law on what can trigger a major failure, including explicitly amending the law to state that:
    - A safety issue will trigger a major failure; and
    - Multiple minor failures can trigger a major failure.

Non-disclosure agreements

CHOICE is pleased to see that the issue of non-disclosure agreements was canvassed in the Interim Report, but disappointed that CAANZ is not seeking further information or presenting any options for dealing with the problem. While the Interim Report is strictly correct to note that suppliers cannot contract out of the consumer guarantees, the very nature of non-disclosure agreements means that most consumers subject to them will remain unaware of their rights. Additionally, individual contractual terms in these agreements may not represent a "contracting out" taken singly, and therefore may not actually be void. Rather, our concern is that when the non-disclosure agreement is taken as a whole and requires a consumer to agree to onerous terms in order to receive a remedy that they had a right to under the ACL, then there may be an implied misrepresentation of their consumer guarantee rights.

Consumers are typically in a less powerful position than the suppliers they are seeking remedies from. This already makes accessing remedies more difficult than it should be; seeking to deny consumers the right to talk about their problems and share knowledge with regulators, advocates and other consumers exacerbates this. CHOICE maintains that the ACL should explicitly prohibit the use of non-disclosure agreements in situations where the consumer has an existing right to the same or greater remedies under the consumer guarantees regime.

Recommendation:

- The use of non-disclosure agreements should be banned where the consumer had an existing right to the same or greater remedies under the consumer guarantees provisions.

Durability

The consumer guarantees require that goods be safe, durable and fit for purpose. In some respects, these are fairly common-sense requirements. While the flexibility of these terms theoretically helps consumers seek redress in a wide range of circumstances, in practical terms the lack of clarity often discourages consumers. Consumers contacting CHOICE seeking help are most frequently having issues related to the application of the consumer guarantees – and one of the most common problems that they have is determining whether or not the product they purchased failed the guarantee for durability.

In CHOICE's experience both ordinary consumers and experts struggle with precise interpretations of the requirement for "durability". This confusion could be addressed through clear provision of guidance on how long a product can be expected to last. The ACCC could provide overarching guidance, including a series of examples in common product categories. Given the practical difficulties raised by some stakeholders with "developing a definitive list of what constitutes a reasonable time period that a product failure is covered by the ACL"[5], CHOICE supports a simpler solution. Manufacturers and retailers should be encouraged to provide direct representations of the durability of individual products. These businesses are best placed with the knowledge of how long their products should last, and should be able to make claims with more confidence than any other body. As acknowledged in CHOICE's earlier submission, this could create scope for manufacturers or retailers to mislead consumers by understating the expected lifespan, but this risk is no greater here than in relation to current warranty and extended warranty practices. If anything, disclosure of the intended lifespan of a product would make it easier for a consumer to assess whether an extended warranty offers additional value, and may encourage more robust competition.

Recommendation:

- Clear guidance should be provided to consumers on how long a product can be expected to last.
    - Preferably, this guidance would be provided through direct representations from the manufacturer or retailer of a product at the point of sale.
    - Alternatively, the ACCC could issue guidance on reasonable durability.

Extended warranties

The Australian Retailers Association urged the review panel to "also consider the benefits these [extended] warranties provide both the retailer and the consumer in efficiently resolving product issues". CHOICE considers the benefits to consumers are frequently non-existent.

We receive many complaints through our CHOICE Help consumer advice service from consumers who have purchased an extended warranty and experienced a product failure that is likely to be covered by the consumer guarantees. Subsequently, they have approached the retailer to request a remedy only to be told that the extended warranty does not apply in this particular case due to exclusions in the terms and conditions.

[5] Submission from Retail Council, p8.

Case study: exclusions in extended warranties

William bought a washing machine from . He also bought a 60 month extended warranty, called a Product Care Replacement. When the machine was a little over 18 months old, and still covered by the extended warranty, the hot water hose at the back of the machine burst and caused several thousand dollars' worth of damage to William's house.

When William tried to make a claim under his extended warranty, he was told the warranty only covered the machine, and not the hoses attached to it.

The extended warranty was useless to William; in the end, he relied on his home and contents insurance to cover the damage.

We are aware of some cases where a consumer has attempted to rely on an extended warranty but has been turned back by the retailer. When they have complained about the inadequacy of the warranty, they have been offered a refund for the price of the extended warranty itself, rather than the faulty product.

These and other cases have led CHOICE to the conclusion that the quality of extended warranties offered in Australia is often very low. In many instances, consumers would be better off not buying extended warranties but instead relying solely on their consumer guarantee rights. As things stand, CHOICE advises consumers to find out what an extended warranty will provide, over and above their rights under the ACL. This may require legal research and a close reading of lengthy terms and conditions.

CHOICE believes New Zealand has a more effective solution to this problem. In addition to providing cooling-off rights for consumers purchasing extended warranties, the New Zealand law includes some useful disclosure rules. At the point of purchase, consumers must be provided with a written copy of the extended warranty agreement. The agreement must be in plain language, and importantly, provide a comparison between the consumer guarantee rights and remedies and any additional protections provided under the extended warranty.

We note that the ACCC has already begun experimenting with requiring businesses to include this kind of information through its compliance activities. Recently, the ACCC accepted a court enforceable undertaking from Virginia Surety Company, Inc (VSC), which dealt with extended

warranties directly. VSC undertook to "engage with retailers to revise extended warranty brochures to include additional information to assist consumers in comparing the features of the extended warranty being sold with the existing remedies available under the ACL".[6] CHOICE welcomes this strategic approach to encouraging compliance and market change, but we feel it would be more beneficial if it applied across the entire marketplace, rather than being applied on a case-by-case basis.

Extended warranties are a ubiquitous part of the retail landscape in Australia; CHOICE shadow shops have found nearly all salespeople offer extended warranties to consumers, unprompted. This is likely due to sales incentives or key performance indicators being linked to sales quotas, suggesting just how high-margin extended warranties must be. Adopting the New Zealand model will make it much more difficult for businesses to sell low-value, potentially harmful, products to consumers.

CHOICE also notes that the Interim Report raises manufacturers' warranties (or warranties against defects) as an issue to address. A warranty against defects must include mandatory text that explains to consumers that the warranty operates in addition to their rights under the ACL. The mandatory text is as follows:

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

CHOICE is concerned at the suggestion that the mandatory text should be removed, and strongly opposes this. As Associate Professor Paterson and Professor Bant described in their submission, manufacturers often already include confusing, contradictory terms in their warranty documents that serve to "muddy the reality" and leave consumers unsure of whether or not the ACL prevails. Removing the mandatory text is not the answer to this problem; the focus should instead be on ensuring that consumers' rights are clearly conveyed to them, and that manufacturers' warranties do not undermine this. CHOICE would support applying the New Zealand model of disclosure not just to extended warranties, but also to manufacturers' warranties, to better convey to consumers exactly what their statutory rights and remedies are.

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[6] 8 November 2016, *VSC undertakes to help improve extended warranty selling practices*, available at https://www.accc.gov.au/media-release/vsc-undertakes-to-help-improve-extended-warranty-selling-practices

CHOICE supports Option 3 in the Interim Report, to enhance transparency of extended warranties.[7] As outlined in the following section of this submission, we support requiring retailers to display a standard notice about the ACL at the point of sale. CHOICE also supports increasing the transparency of warranty documents through plain language requirements, including a plain language summary of key terms and conditions.[8]

Recommendations:

- Disclosure requirements for extended warranties should be introduced based on the New Zealand model.
    - These should require that at the point of purchase, consumers are provided with a plain language written copy of the extended warranty agreement that includes a comparison between the consumer guarantee rights and remedies and any additional protections provided under the extended warranty.
    - A plain language summary of key terms and conditions should also be provided to consumers at the point of purchase.
- The mandatory text for warranties against defects should not be removed.
    - Warranties against defects should also include a comparison of the consumer guarantee rights and remedies and the additional protections provided under the warranty against defects.

Misrepresentations

One ongoing issue with the consumer guarantees is that they are consistently misrepresented. In 2013 CHOICE shadow shopped 80 Harvey Norman, The Good Guys and JB Hi-Fi stores across every state and territory about warranty rights. We asked sales staff if the store had any responsibility in the event that the expensive TV we wanted to purchase broke down after the manufacturer's one-year warranty period had expired. Under the ACL, the answer would be yes, but 85% of the salespeople we talked to at that time got it wrong. In our repeat shadow shop of 109 stores in 2015, the results were better but still not as good as we would expect: 48% of the sales staff failed to provide accurate information about the consumer guarantee rights.

[7] Interim Report, p69.
[8] 29 November 2016, Consumer Action Law Centre, *Cooling-off periods for consumers don't work*, headline results available at http://consumeraction.org.au/cooling-off-periods-consumers-dont-work-study/

Consumers also contact CHOICE through various communication channels, including our CHOICE Help service, to report misrepresentations of consumer guarantee rights. These consumers are generally very aware of their consumer rights, but they still become confused or unsure when faced with salespeople who make firm misrepresentations about their rights to a remedy in the event of a product failure.

Case study: MSY Technology

In 2011, the Federal Court in Sydney imposed a $203,500 penalty against MSY Technology companies for making false and misleading consumer warranty representations.[9]

MSY Technology was found to have misrepresented consumer rights, including by stating that its companies:

- do not provide any statutory warranties to consumers in relation to their products;
- will only provide statutory warranties to consumers in a restricted range of circumstances; and
- require consumers to pay a fee to obtain a warranty beyond that provided by the manufacturer.

MSY Technology were also prevented for a period of five years from making false or misleading representations about a consumer's statutory warranty rights, including in relation to the then-new consumer guarantees.

Fast-forward five years, and MSY Technology has allegedly leapt straight back into the game of misrepresenting consumer guarantee rights.[10] On 1 December 2016, the ACCC instituted proceedings against the company, alleging that it made a number of misrepresentations to consumers about their consumer guarantee rights.

Consumers contacting CHOICE Help report a variety of misrepresentations; blanket "no refund" claims, references to set timeframes in which a consumer is allowed to make a request for a remedy (e.g. within one day of delivery), and "administration" fees for repairs or replacements.

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[9] 19 April 2011, *MSY Technology penalised $203,500 for false and misleading consumer warranty representations*, available at http://www.accc.gov.au/media-release/msy-technology-penalised-203500-for-false-and-misleading-consumer-warranty

[10] 1 December 2016, *ACCC takes action against MSY alleging misrepresentation of consumer guarantees*, available at https://www.accc.gov.au/media-release/accc-takes-action-against-msy-alleging-misrepresentation-of-consumer-guarantees

The ACCC takes action in relation to cases of consumer guarantee misrepresentations, but still the conduct persists.[11]

Retailers have now had nearly seven years to educate themselves about the application of the consumer guarantees, and the ACCC has taken legal action repeatedly, but bad conduct persists. It is time to try a different approach. As Dr Nick Seddon's submission to the Issues Paper discusses, it is possible under section 66 of the ACL to mandate the display of notices informing consumers of their rights at the point of sale.[12] CHOICE supports the suggestion that retailers should be required to display notices outlining the rights under the consumer guarantees in their stores. For online stores, this obligation could be fulfilled through notification in the online checkout process. It is worth noting that the value to be gained in doing so would likely primarily be found in educating salespeople and consumers about the ACL rights. They will provide a visual reminder to sales staff who might otherwise have an unclear understanding of how the consumer guarantees work. This may result in less compliance costs for businesses as well – if frontline staff can handle requests for remedies under the ACL appropriately in the first instance, there will be less need for escalation to senior staff or dispute resolution facilitated by state and territory regulators.

Recommendation:

- The display of notices informing consumers of their rights at the point of sale should be mandated.

Product safety

The product safety system in Australia could be improved to encourage a more proactive approach from manufacturers and retailers. Unsafe products in the marketplace have a direct negative impact on consumer welfare and confidence. Major reform is needed to improve the transparency, accountability and agility of the product safety system, and to update it so that we are no longer lagging behind comparable jurisdictions.

General Safety Provision

A robust, proactive and modern product safety system is vital to promoting consumer welfare and preventing consumer harm. As acknowledged in the Interim Report, most consumers

[11] For example, see 28 July 2016, *Ozsale pays $10,800 penalty for alleged consumer guarantee misrepresentation*, available at https://www.accc.gov.au/media-release/ozsale-pays-10800-penalty-for-alleged-consumer-guarantee-misrepresentation

[12] See Dr Nick Seddon's submission to the Issues Paper, p1.

assume that our product liability legal framework imposes a clear obligation on suppliers not to supply unsafe products. This is not the case, and it is time that the law was updated to match consumer expectations.

A modern product safety system is one that is proactive and encourages a culture of compliance at every stage of the supply chain. Our current system is out-dated and reactive; recalls are conducted and investigations initiated only after it becomes apparent that a product poses a risk to consumer safety. A modern, effective law would place an onus on manufacturers and retailers to ensure the safety of their products before they reach the market. Retailers should treat the safety of their products as a priority, rather than an element of financial risk to be weighed up against the chances of an individual consumer taking legal action for compensation following an injury. This kind of cultural change requires law reform, and the introduction of a General Safety Provision (GSP) is the best option for achieving this.

A proactive requirement for products to be safe, when coupled with appropriate penalties for breaches, better aligns with consumer expectations of the marketplace and international best practice. There remains a persistent view among the community that products must be safe in order to be sold; this view is entirely reasonable and the law should reflect it.

A GSP is likely to lead to fewer product recalls, and potentially fewer specific safety standards, reducing costs currently borne by governments. A GSP should not impose further costs on businesses that already treat product safety as a priority; if businesses are taking care to only introduce safe products to the marketplace, they will not need to change their practices to comply with a GSP. Manufacturers and retailers are best placed to observe and act on safety risks, and the introduction of a GSP would ensure that responsibility for the safety of products is placed with the parties best positioned to act on this. A GSP should also reduce costs for regulators, as the process to get a dangerous product off the shelf is radically simpler.

As CHOICE outlined in our submission to the Issues Paper, a GSP framed similarly to that available in European jurisdictions would provide businesses with a clear hierarchy of references to determine compliance. A manufacturer may, depending on how the law is framed, be able to demonstrate compliance with a trusted international safety standard, in the absence of a specific Australian Standard, as a means to manage their risk. This could also provide them with a legal defence should an injury occur. For businesses that are supplying goods that are also supplied into other markets, this could promote higher certainty and lower costs.

Recommendation:

- A General Safety Provision should be introduced.

- Breach of the General Safety Provision should carry hefty penalties capable of acting as a strong deterrent.

Making and updating mandatory safety standards

The Interim Report seeks views on options for reviewing mandatory standards. CHOICE is a body uniquely positioned to provide advice on this topic, given that CHOICE experts have participated in the development and review of numerous Australian Standards. We also have a deep appreciation of the effectiveness of standards as a result of our product testing work, where we regularly conduct commercial and consumer testing against mandatory and voluntary standards in our National Association of Testing Authorities (NATA) accredited laboratories.

Mandatory safety standards are valuable, but improvements could be made to the process for updating these. Publication of an updated Australian Standard referenced in any mandatory standards should prompt an immediate review of those standards. This would limit the confusion that occurs when a mandatory standard references a superseded standard, which the Interim Report canvasses in some detail. While a better system is needed for updating mandatory safety standards, it is important to be cautious in relation to automatic update processes. It may not be possible to automatically update standards because mandatory standards for consumer goods usually refer to a very limited number of key clauses in an existing standard plus any additional requirements. For example, the mandatory standard for prams and strollers is Consumer Protection Notice No. 8 of 2007, which refers to clauses of the voluntary standard AS/NZS 2088:2000. That voluntary standard has since been revised; the current version is AS/NZS 2088:2013, in which the clauses, both in numbering and content, are different to those specified in the mandatory standard. In order to support more responsive reviews of mandatory standards, additional funding for regulators may be necessary.

The Interim Paper also seeks views on the value of introducing a "performance-based" approach to compliance with product safety standards. Provided this is achieved through the introduction of a GSP, it could encourage a more proactive, holistic approach to product safety from manufacturers and retailers. Our product safety framework has the potential to shape the behaviour of market participants in at least two ways: it can "prescribe exactly what actions [they] must take to improve their performance" or it can "incorporate the regulation's goal into the language of the rule, specifying the desired language of performance and allowing the targets of regulation to decide how to achieve that level".[13] In practical terms, if we want safe

[13] Coglianese, Cary, Jennifer Nash and Todd Olmstead, 'Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection', Regulatory Policy Program Report No. RPP-03 (2002), Harvard, available at http://www.ksg.harvard.edu/m-rcbg/Events/Papers/RPPREPORT3.pdf

products we can either introduce prescriptive standards that manufacturers and retailers must meet, which when taken as a whole, address known safety risks, or we can place a general obligation on these market participants to only sell safe products and let them figure out what the best method for achieving that is. Of course, we can also use both of these tools, and allow businesses to rely on their compliance with standards as a defence against a breach of the GSP.

CHOICE is broadly supportive of this approach, but offers a note of caution: a performance-based approach should not be used if the main motivation for doing so is to cut costs. Additionally, breach of the GSP must carry a severe enough penalty to ensure that our product safety system becomes more robust, rather than less. Product safety is vital, and with certain categories of high-risk products, such as electrical equipment, it is sensible to maintain mandatory standards. We do anticipate that one benefit of a GSP may be that some mandatory standards will no longer be needed, as compliance with the GSP will achieve the same outcome. However, existing standards may offer guidance to manufacturers as to likely hazards that must be dealt with in design and production.

Recommendation:

- Mandatory standards should not reference superseded standards.
    - The publication of an updated Australian Standard referenced in any mandatory standards should prompt its immediate review. The review should be conducted in a transparent manner and provide for stakeholder participation.

Mandatory safety reports

The confidentiality provisions for mandatory reports, found in section 132A of the ACL, should be revoked. Since the ACL came into force on 1 January 2011 there have been over 10,000 mandatory reports made 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, due to legal action taken against Woolworths for failing to make mandatory reports within the required timeframe.

These reports represent vital safety information. If they could be shared with other Australian and international regulators, this information could be used to better coordinate regulator responses to safety hazards. If they could be shared with consumer advocates, they could better warn consumers of risks. If testing bodies like CHOICE could access them, we could adapt our testing to take account of consumer experiences with goods. And if these reports were publically available, Australian consumers could make more informed decisions about which businesses to deal with. The Australian public has a right to know the nature of these injuries or deaths, including the steps taken by suppliers in response to the incidents.

In other jurisdictions, similar information is made available. In the United States, the Consumer Safety Protection Bureau publishes a publicly accessible, searchable database of consumer product incident reports at www.SaferProducts.gov. CHOICE would like to see a similar model adopted in Australia.

In addition to increasing transparency, there is a strong argument for broadening the triggers for mandatory reports. It is important to gather information on "near misses" - product failures that do not cause injury or death but could foreseeably do so. For example, CHOICE asked the public to contact us if they had been injured using a . We received dozens of contacts from consumers, many of whom had observed their explode while blending hot liquids at a high speed, but who had luckily not been injured. This information is important, and provides a fuller picture of the likely hazard posed by a product, but is not currently captured in mandatory reporting requirements. Suppliers should have an obligation to make a mandatory report if they become aware of a near miss that foreseeably could have caused serious injury or death. A near miss could be defined in the legislation as an incident where a product malfunctions and no one is injured, but if it were to occur again it would be reasonably likely to injure or kill someone.

Arguments put forward by some industry groups to reduce the current timeframe to make a mandatory report should be treated with caution. The comment made by the Retail Council that the "current time period does not sufficiently balance the need to quickly address safety concerns against the need for retailers to have sufficient time to conduct internal reports and investigations" misses the point. Mandatory reports are meant to alert the regulator, and ideally the public, of risks as soon as possible. Remedy is not relevant. It also highlights a cultural problem within the retail industry.[14] That is, a deeply held view that "quickly addressing safety concerns" is not an overarching priority, but merely a factor to be balanced against a retailer's ability to cover its back and avoid adverse publicity or unwanted regulatory attention. Industry-wide cultural change is a difficult thing to achieve; as discussed above, the introduction of a GSP may be the best way of getting there. In addition to this, it is important not to take any steps that would signal to retailers that their assumptions are correct: that rapid responses to safety issues are less important than giving the retailer an opportunity to avoid making a mandatory report. For this reason, there should be no changes made to the current timeframe for making a mandatory safety report.

[14] Interim Report, quoted on p94.

Recommendations:

- The section 132A confidentiality provisions of mandatory reports should be revoked.
- A publicly accessible, searchable database of consumer product incident reports should be created in Australia, based on the US model www.SaferProducts.gov
- Suppliers should also be required to report any "near misses" that they become aware of, being product failures that do not cause injury or death but could foreseeably do so.
- The current timeframe for making mandatory reports should not be changed.

Recalls

The overwhelming majority of product recalls conducted since the ACL came into force on 1 January 2011 have been voluntary recalls, with only a handful conducted under the mandatory recall provisions of the ACL. As CHOICE detailed in our submission to the Issues Paper, the notification requirements for voluntary recalls are slim and the consequences of non-compliance are insignificant. CHOICE supports the Interim Report's proposal to introduce a statutory definition of a voluntary recall, and increase the penalties available for failure to notify a recall. This would go some way towards resolving problems with the voluntary recall system, but further reforms are needed.

Consumers often have difficulty understanding how their consumer guarantee rights apply in relation to voluntary recalls; in particular, do they have the right to choose a remedy, or do they need to accept what is offered by the business? In the case of the Samsung washing machine recall, the ACCC intervened to assure consumers that the failure was in fact a major safety failure, providing them with the right to choose between a repair, replacement or refund.[15] This provided much-needed clarity in a recall process that had been running for more than two years. CHOICE supports a solution that would require all recalls to state whether or not the safety failing constitutes a major safety failure. The ACCC would need to issue guidance to assist manufacturers to make this judgment. Legislation should empower regulators to reject the recall notification 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.

Improvements also need to be made to the ways that businesses conducting recalls publicise these to consumers. CHOICE is calling for a new legislative obligation on businesses conducting voluntary recalls to use the most effective means available to communicate to the

[15] http://www.accc.gov.au/media-release/consumer-guarantee-rights-following-samsung-washing-machine-recall, dated August 2015, accessed 18 May 2016.

affected consumer community. This approach would encourage businesses to communicate more strategically with their consumers, rather than rely on the standard practice of publishing a newspaper advertisement. In addition to this, conflicts of interest need to be addressed. There is a fundamental conflict of interest at the heart of recalls; the responsibility for advertising the recall lies primarily with the business, but the business will protect its brand reputation first and foremost.

CHOICE is calling for manufacturers and retailers subject to a recall to have an obligation to contribute to a Recall Promotion Fund. These funds should be used in the event of a recall to engage an independent third-party to promote the recall effectively. The fund should not be used to replace recall promotions currently funded by manufacturers and retailers, but should be used to launch coordinated and where necessary national promotions of recalls. The fund would be particularly useful in cases where a recalled product was distributed by dozens of suppliers and/or when suppliers no longer exist to promote the recall, as in the case of the infinity cables recall. The fund could be structured to offer financial incentives to businesses to promote recalls effectively and early. Ideally, retailers and manufacturers would pay an initial amount to the recall fund based on the scale of the recall. A second or third payment could be due if the recall doesn't meet key milestones as set by a regulator, for example, that a percentage of products have been repaired, returned or replaced by a certain date.

Consumers have a right to know whether suppliers are conducting their recalls well, and that they are efficiently removing unsafe products from the marketplace. Again, this measure could act as an incentive for a business to promote a recall in the most effective manner. CHOICE is calling for a new legislative obligation on businesses conducting voluntary recalls to publish regular results about the outcomes of any active product recall. This information should be provided on the product safety website. This additional information would facilitate a more meaningful public debate about when a mandatory recall should be triggered.

Current product safety measures	**Future product safety measures based on CHOICE recommendations**
A business only acts after a product is found to be unsafe.	A business has an obligation to make sure that the products they manufacture or sell are safe before they're available to the public
A business must report any instance where someone is harmed or killed to the ACCC within two days.	A business must report any instance where someone is harmed, killed or has a near miss to the ACCC within two days.
Reports about product safety incidents are not made public.	Reports about product safety incidents are released on productsafety.gov.au. Consumers

	can check the details of incidents before shopping and consumer groups can use the information to better test products.
It's unclear when a business will initiate a voluntary recall.	The law clearly defines a voluntary recall and businesses will face appropriate penalties for failure to notify a recall.
Consumers aren't given clear information about whether a voluntary recall results from a "major failure".	Consumers have clear information letting them know when they have a right to their choice of a repair, replacement or refund.
Businesses conduct the recall and are responsible for messaging and distribution of the recall message.	Businesses conduct the recall and are responsible for messaging and distribution of the recall message. Alongside of this, businesses will contribute to the Recall Promotion Fund and will be required to contribute further if key recall milestones are not met.
There is no public information about the status of most recalls.	Businesses must report on the status of voluntary and mandatory recalls, this information will be available on the product safety website.

Recommendations:

- A statutory definition of a voluntary recall should be introduced.
- Penalties for failure to notify a recall should be increased.
- 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.
- There should be a legislative obligation on businesses conducting voluntary recalls to use the most effective 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.

    - Alternatively, manufacturers and retailers subject to a recall should have an obligation to contribute to a Recall Promotion Fund, where the funds contributed can be used in the event of a recall to engage an independent third party to promote the recall.
- Businesses conducting voluntary recalls should be required to publish regular results about the outcomes of any active product recall.

Unfair contract terms in insurance

All businesses selling to consumers are prohibited from including unfair contract terms (UCT) in a standard form contract, except insurance.[16] There are sound policy grounds for the prohibition on UCT and these grounds apply equally to insurance. The UCT provisions were established to overcome consumer confusion in understanding complex contract terms in standard form contracts, where there was no possibility for a consumer to negotiate terms as part of the transaction.[17]

Australia has considered expanding UCT provisions to insurance as recently as 2013; however, the Bill lapsed at the change of government. In light of recent evidence of practice in the insurance sector it is time to introduce a prohibition on UTC.

In many respects insurance is the ideal case study for why a prohibition on UTC should exist. For example, life insurance contracts are so complex that consumers need an additional layer of protection against harmful terms. Contracts extend over pages of information and they contain complex terms and medical definitions which most consumers are unlikely to understand. Research into superannuation products, which often bundle life insurance, found 70% of consumers did not read Product Disclosure Statements (PDSs).[18] As a consequence, consumers suffer detriment by having claims denied due to the mismatch between what they thought the policy covered and what was actually covered.

Allowing insurance contracts to include provisions that are unfair leaves consumers open to exploitation. For example, life insurers should not be able to deny claims based on unfair or out dated medical definitions.

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[16] *Insurance Contracts Act 1984* section 15
[17] *Trade Practices Amendment (Australian Consumer law) Bill 2009* second reading
[18] ASFA, 2016, 'Keynote address delivered by Dr Martin Fahy CEO ASFA National Conference', available at: http://www.superannuation.asn.au/media/speeches

Case study: critical illness claim

As reported on ABC's 7.30, Steve Dixon was denied a critical illness claim under a life insurance policy after a near death experience in which he had to spend a week in intensive care.[19] Under the policy a claim is only paid out if the claimant is intubated for 10 consecutive days (24 hours per day).[20] During Mr Dixon's recovery he was intubated for 7 days, so his claim was denied.

Evidence from the Australian Institute of Health and Welfare indicates the average length of intubation for an intensive care event is just over 4 days. Patients intubated for at least 10 days have over a 20% chance of dying. Despite Mr. Dixon spending almost twice the average time intubated in intensive care and medical evidence which suggested his case was serious the insurance policy did not deem this a critical illness.

Mr Dixon's case is illustrative of the detriment consumers suffer due to the lack of UCT protections in insurance. The headline offer for his policy clearly states that "Critical Illness insurance pays a lump sum that lightens the financial load of a serious illness, so you can concentrate on getting better" with "cover for the most common critical conditions".[21] Mr Dixon even had the Critical Illness Plus policy which went further to provide "cover for an extensive range of critical conditions". Researching beyond the sales pitch to read the PDS he would have discovered on page 19 that his policy did in fact cover intensive care as one of its critical conditions.[22] It is not until he reached page 111 of the PDS that he would have discovered the term which eventually denied his claim. The policy defines intensive care as "mechanical ventilation by means of tracheal intubation for 10 consecutive days (24 hours per day) in an intensive care unit of an acute care hospital." The legislative intent of the UTC prohibition exists to stop exactly this type of practice. Hiding a term over 100 pages in to a contract and expecting a consumer to not only read but understand the implications of intubation times on a claim is unrealistic and ultimately unfair.

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[19] ABC, 2016, 'Man fights for insurance payout', 7.30, available at: http://www.abc.net.au/7.30/content/2016/s4548281.htm

[20] , 2016, ' Insurance – Product Disclosure Statement', available at: https://www .com.au/content/dam/ /fb/common/application-forms/84052 _insurance_pds_brochure_combined.pdf p.111

[21] , 2016, 'Critical Illness', available at: https://www .com.au/personal/insurance/products/critical-illness/at-a-glance

[22] , 2016, ' Insurance – Product Disclosure Statement', available at: https://www .com.au/content/dam/ /fb/common/application-forms/84052 _insurance_pds_brochure_combined.pdf p.19

Mr Dixon purchased a life insurance policy because he knew the serious financial impact a critical illness would have on his ability to support his family. To have a claim denied based on a fine print technicality highlights the real world impact of the exemption insurance contract enjoy.

MLC defended its policy by stating that it was unaware of any policy available in Australia which offered critical illness cover for less than 10 days of intubation.[23] This points to a systemic problem with critical illness life insurance policies, which make it so difficult to claim under the intensive care provisions that someone may have to die in order to claim, in which case they may also be ineligible.

Similar unfair terms exist in superannuation life insurance contracts.

Case study: life insurance in superannuation

An illustrative example is that of the family of Garrath Donaldson and their battle to gain a life insurance payout after he took his own life at age 22.[24] Garrath had a life insurance policy through his superannuation fund, REST. The $92,000 claim was rejected by REST and the insurer AIA on the basis that Garrath's account had fallen below $1,200 and no contributions had been received for at least 62 days. This was despite REST continuing to take premiums from his account up until his death.[25]

In situations when premiums are paid up, there is no legitimate reason why an insurer should be able to deny a claim based on the balance of the consumer's superannuation account. The current UCT exemption allows clauses like these to persist, causing substantial harm to consumers.

The Interim Report asks whether the ASIC Act's unfair contract terms provisions should be applied to contracts regulated under the *Insurance Contracts Act*. The principles underpinning the unfair contract terms provisions are sound and should apply equally to products regulated under the ASIC Act, including insurance. The argument from the insurance industry that it is exceptional is one frequently used to avoid appropriate regulation.

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[23] ABC, 2016, 'Man fights for insurance payout', 7.30, available at: http://www.abc.net.au/7.30/content/2016/s4548281.htm
[24] SMH, 2016, 'Devils are in the detail in super life insurance', Adele Ferguson, available at: http://www.smh.com.au/business/consumer-affairs/devils-are-in-the-detail-in-super-life-insurance-20160805-gqlnlk.html
[25] SMH, 2016, 'Devils are in the detail in super life insurance', Adele Ferguson, available at: http://www.smh.com.au/business/consumer-affairs/devils-are-in-the-detail-in-super-life-insurance-20160805-gqlnlk.html

How should this be approached? In CHOICE's view, the existing laws are sufficient to apply to insurance contracts. The previous attempt to introduce an UCT prohibition in relation to insurance was poorly designed as it confined the law to a very limited set of circumstances. It did this by defining "what is reasonably necessary to protect the legitimate interests of an insurer".[26] A term was not considered unfair so long as it reasonably reflected the underwriting risk accepted by the insurer in relation to the contract. It is unlikely this law would have prevented the problematic terms identified in this submission and runs contrary to the original legislative intent of the UCT provisions.

According to the second reading speech:

> *"Th[e] UCT reform is about making contracts clear in business-to-consumer transactions so that consumers can make an accurate assessment of the risks of signing a contract. And it is about ensuring that a business assesses its risk properly and does not use its stronger bargaining position to simply push all risk away from itself."*[27]

Implicit in this statement is a recognition that consumers are subject to behavioural limitations in their assessment of risk and terms which exploit this limitation should be prohibited. Designing UCT provisions in relation to insurance which allowed this practice to continue, so long as the insurer had undertaken underwriting of the risk, does not solve this problem. The internal underwriting practices of an insurer are not transparent to a consumer. This law would have in effect legitimised systemically unfair practices in the design of insurance products.

The previous attempt to regulate in this area also exempted life insurance on the grounds that these products are usually not renewed annually (and therefore would not fall under the new law for some time) and most were offered through superannuation. This reasoning is perverse; the fact that it would take time for the law to apply to contracts is a reason to introduce the law earlier rather than later. As for superannuation consumers, life insurance is generally offered on a default basis and without choice. Markets with a lack of competition and real consumer choice are usually in need of higher levels of protection rather than lower.

CHOICE maintains that the current UCT prohibition should apply equally to all insurance products. This would result in a significant positive changes in insurance contracts offered to consumers.

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[26] *Insurance Contracts Amendment (Unfair Terms) Bill 2013* Explanatory Memorandum, p.6
[27] Second reading speech Trade Practices Amendment (Australian Consumer Law) Bill 2009

The Interim Report cites a government source which puts the number of consumers likely to be impacted by unfair contract terms in insurance at 75-150. This figure is likely to be a gross underestimate as the source report noted there is a paucity of data.[28] Also, it does not capture persons who have decided not to challenge terms that may be unfair because UCT laws do not apply to insurance contracts. These numbers are based on complaints to the Financial Ombudsman Service (FOS), which by their nature they are escalated complaints and would have originated with a complaint to a customer's service provider. Consumer complaint fatigue, whereby a consumer simply "gives up" on a complaint due to the time and effort it takes to escalate it to a level where it will receive adequate consideration, has a significant impact on the number of complaints which end up in external dispute resolution. Research from the telecommunications sector found only 9% of consumers who were dissatisfied with an internal complaint process escalated to EDR.[29] Therefore the level of detriment suffered by consumers due to unfair contract terms in insurance is likely to be significantly higher than reported.

Any consideration of compliance costs should factor in the significant savings consumers are likely to achieve from the changes. Consumers face significant transaction costs when reviewing insurance policies for purchase. With many disclosure statements running over 100 pages and some policies (e.g. car insurance) taken out on a yearly basis, there is a regular and large investment of time required to adequately assess terms. A prohibition on unfair contract terms will help to reassure consumers that the terms of an offer will reflect the product they have been sold and they will not have to spend as much time assessing the fairness of fine print exclusions. Any short-term increase in premiums is more than likely to be offset by reduced transaction costs and easier to navigate claims processes.

The duty to act in utmost good faith is an inadequate consumer protection

The insurance industry has claimed that the duty to act in the utmost good faith under the *Insurance Contracts Act 1984* is sufficient protection for consumers and that an UCT prohibition is not required.[30] When compared to the UCT provisions the utmost good faith clause in the Insurance Contracts Act is unclear and jurisprudence is imprecise. This makes application of the law particularly difficult. Tellingly the leading High Court case on utmost good faith was a

[28] Australian Government, Regulation Impact Statement: Unfair terms in insurance contracts, November 2012, page 17
[29] Galaxy Research, Telco and ISP complaints: prepared for the Australian Communications Consumer Action Network (May 2015), available at: https://accan.org.au/files/Media%20Releases/ACCAN%20Galaxy%20Survey%20May%202015.pdf
[30] Insurance Council of Australia, 2016, 'Submission to the Australian consumer law review', available at: https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Insurance_Council_of_Australia.pdf

dispute between two large financial institutions, not an individual consumer attempting to enforce his/her rights.[31] This may be at least in part due to the lack of clarity around how the law should be applied and how far principles of fairness should be interpreted in contracts. To date, the utmost duty of good faith has not put an end to the types of clauses outlined above.

By contrast, one of the benefits of clear legislation, such as that contained in the UCT provisions, is that it can drive change without the need for costly litigation. The UCT obligations are very clear; the legislation even provides an extensive list of the types of terms which would be considered unfair. This is a far cry from the amorphous "utmost good faith" requirements. The UCT obligations are so clear that the Australian Competition and Consumer Commission and consumer organisations have used the laws to engage directly with businesses around removing unfair terms.[32] This has seen many businesses voluntarily improve their terms. With limitations on regulator budgets and the cost of litigation for business compliance, the UCT provisions should be viewed as balanced best practice regulation.

Recommendation:

- Remove the exemption insurance has from the prohibition on unfair contract terms. This could be achieved by amending section 15 of the Insurance Contracts Act (1984) so that the provision which currently excludes insurance contracts from the operation of any other Commonwealth, State or Territory Act allows the unfair contract terms provisions in the Australian Securities and Investments Commission Act (2001) to apply.

Unfair contract terms as they currently apply

Consumers often do not have the power to protect themselves from unfair standard form contracts which continue to dominate everyday transactions. Standard form contracts can be convenient for consumers, but must be clear and easy to read, represented correctly by the retailer and not contain unfair terms that will negatively impact a consumer entering into that contract. This is particularly pertinent to consumers engaging in transactions with time limits (such as airline or ticket booking websites) or on smart phones, where it may be difficult for the consumer to read a full contract. Overly lengthy and complex standard form contracts remain a problem that is not being dealt with adequately under the current law.

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[31] *CGU Insurance Limited v AMP Financial Planning Pty Ltd* [2007] HCA 36

[32] For example, see ACCAN, 2016, 'Unfair and misleading fine print could be costing you' available at: http://accan.org.au/hot-issues/726-unfair-and-misleading-fine-print-could-be-costing-you ; ACCC, 2016, 'ACCC warns businesses time is running out to review their standard form contracts for unfair contract terms', available at: https://www.accc.gov.au/media-release/accc-warns-businesses-time-is-running-out-to-review-their-standard-form-contracts-for-unfair-contract-terms

A recent CHOICE investigation uncovered a number of problematic terms in airline contracts. CHOICE has received and continues to receive a large number of complaints regarding problematic contracts with Australian and international airlines through the *Complane*[33] campaign and CHOICE Help service.

In the report *Fare Play? Terms and Conditions in Australia's Airline Industry* CHOICE identified potential unfair terms in each airline's standard form contract, the "Conditions of Carriage".

- Length of whole contract and booking timeouts
- No-show clauses
- Excessive cancellation fees and change fees
- Terms that exclude flight schedules from the Conditions of Carriage, yet prohibit the consumer making a change to their booking after purchase

CHOICE's investigation found that all four major domestic airlines in Australia (Qantas, Virgin, Tigerair and Jetstar) were engaging in selling activities ranging from possible breach to likely breach of the ACL. CHOICE also found that there is strong evidence that consumers are experiencing significant detriment due to these selling activities.

While a number of the identified unfair terms should be captured by the current scope of section 25 of the ACL, excessive length of contract may not. While no single term may be deemed unfair, airline contracts are prohibitively long and inaccessible to consumers. As the ACCC's travel & accommodation industry guide states, contracts should be easily available and easily to read:

> *"For online bookings, you should make terms and conditions easily available and identifiable on your website to avoid possible disputes. Failure to disclose these conditions could be considered unfair, due to a lack of transparency."*[34]

Consumers need to complete their ticket booking within the website's booking time limit. It would be impossible to read the Conditions of Carriage in full and purchase their ticket within the time allotted. For example, QANTAS' booking page times-out after 10 minutes of inactivity.

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[33] Complane was launched in July 2016 and assists consumers in making a complaint directly to their airline when
[34] https://www.accc.gov.au/publications/travel-accommodation-an-industry-guide-to-the-australian-consumer-law

The length of standard form contracts range from more than 6,000 to 13,000 words would be unreadable in the short booking timeframe.

Table: Conditions of Carriage length of contract in words

Airline	Conditions of Carriage by no. of words	Average reading time needed[35]	Online booking timeout
Qantas	13,025	52 minutes	10 minutes
Virgin	10,861	43 minutes	20 minutes
Jetstar	9602	38 minutes	10 minutes
Tigerair	6682	27 minutes	20 minutes

The length of these contracts and the short time frame required to make a purchasing decision in the online gateway should qualify these contracts as unfair as a whole. Lengthy and overly complex contracts should be considered unfair.

Access to contract

Contracts may not always be easily accessible to the consumer. This can cause consumers to experience financial loss, such as when cases involve expensive international travel. Several consumers have approached CHOICE Help, CHOICE's consumer advice service, when they experienced problems retrieving funds from Virgin's Travel Bank. Consumers had not been given adequate online access and therefore did not have satisfactory access to the terms and conditions.

Case study: Virgin Travel Bank and a cancelled flight

> "A few years ago my wife and I flew with Virgin from Rockhampton, Qld to Hobart, Tas. for holidays. While there the Rockhampton Airport went under water in floods, I rang Virgin to check this and was told airport was closed, next day we turned up at Hobart Airport to be told all of our connecting flights home had been cancelled by the call centre the previous day, I said we still need to get home, the Hobart Virgin staff was very good and rebooked us as far as Brisbane where we then flew Qantas to Gladstone and went by boat home to Yeppoon. Virgin didn't fly to Gladstone then. Anyway the flight we lost from Brisbane to Rockhampton wasn't refunded but put as credit to my name, next time we flew to Hobart, I could not find any record or way of

[35] Based on an average reading time of 250 words per minute; academic research suggests this as an assumed reading time: http://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf CHOICE considers this to be a generous estimate of reading time needed given the complex, legal language used in Conditions of Carriage.

> claiming this credit so ended up losing that money. I still don't know how I was supposed to use that credit."[36] CHOICE Community member, October 7, 2016

Contracts should always be available in prominent, easily accessible locations and customers should be proactively offered the option of receiving them in writing before purchasing products or services over the phone. This is even more important when the product or service purchased is relatively expensive, like many airline tickets.

No-show clauses

No-show clauses are contract terms that allow the airline to void sectors of a passenger's ticket when they do not show up for a sector of a booked journey. They are enacted when:

- A passenger misses the first or subsequent leg of a multi-leg itinerary; or
- A passenger misses the outbound flight of a return journey

The airline cancels subsequent trips and does not refund the passenger for sectors after the missed sector. Each Australian domestic airline has this clause. For example, Virgin describes this no-show clause as "tickets used in coupon sequence":

> **"*Tickets used in coupon sequence*.** *You must use the Flight Coupons or Electronic Coupons in your Ticket in the sequence they appear on your Ticket, and you must commence your journey with the first coupon. If you do not, your Ticket may be invalid, and we reserve the right to refuse to carry you, and to cancel the Ticket*."[37]

While the passenger is unable to travel for some, or all, of their journey the airline still retains revenue for all flights sold. This is without delivering the service on some (or all) sectors of travel. Airlines may also earn additional revenue if the seats are resold, without providing any refund to the original passenger. Tickets with flights spaced well apart - for example, on a "round the world" ticket[38] - could result in several months between the "no-show" segment and the consumer attempting to check-in to the next flight. This leaves ample time for the airline to enact the clause and then resell the seat.

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[36] CHOICE Community post: https://choice.community/t/ever-had-problems-with-cancelled-or-rescheduled-flights-we-would-like-to-hear-your-stories/11871/4
[37] Virgin Conhttps://www.virginaustralia.com/eu/en/about-us/legal-policies/conditions-of-carriage/
[38] Round the world tickets consist of up to 15 flight segments across a minimum of four continents. They are usually used by travellers on extended trips, such as gap year students or backpackers.

The European Commission introduced a proposal to partially ban no-show clauses, which was supported by the European Parliament. EU interest in airline no-show clauses is reinforced by states within its jurisdiction that have banned no-show clauses: Germany and Spain.[39] BEUC, the European Consumer Organisation, has argued that there is a significant imbalance to the detriment of the consumer, and that the airline should be obligated to deliver the service the consumer has paid for:

> *"A simple contractual analysis would suggest that the consumer's obligation is to pay the price of the air ticket which the airline is obliged to provide the air transport. However, the airline (through the no-show clause) reserves a right to breach the contract (by refusing boarding to no-show passengers on their return leg)…*
>
> *The airlines would of course argue that the consumer's obligation is not merely to pay the price, but also to use the tickets fully and sequentially. This however seems contrived, as the airline incurs no extra cost when the passenger fails to use one leg of a round-trip flight for example. The flight has already been paid for in full."*[40]

No-show clauses are not widely understood among consumers and when enacted can cause significant financial detriment. The ticket holders were not aware of this obscure clause and only became aware that their ticket was no longer valid when they arrived at the airport, by which point they had to accept the penalty of purchasing a new ticket.

CHOICE maintains that no-show clauses are unfair contract terms and should be eliminated from airline contracts. More broadly, this example illustrates the importance of drawing on international decisions to enhance consumer protections in Australia. Australian regulators should work with international regulators to make sure that terms found to be unfair in a jurisdiction with comparable UCT requirements are also prohibited in Australia.

Recommendations:

- Standard form contracts as a whole should be able to be deemed unfair, and consumers should be able to seek redress for any harm suffered as a consequence of being bound by an unfair contract. The following factors should be taken into account when determining whether a contract is unfair:

[39] A [Spanish language] decision on no-show clauses is available at http://notin.es/wp-content/uploads/2012/10/Sent-Juzg-Mercantil-12-Madrid-11-sept-2012-NULA-CLAUSULA-NO-SHOW.pdf
[40] Boulet et al, 'Eliminating airline "no-show clauses" in the EU", 2015

    - Extreme length;
    - Lack of clarity, use of jargon or unnecessary complexity; and
    - Accessibility and availability of the text of the contract.
- Stronger penalties, including pecuniary penalties, should be available for breach of the unfair contract term provisions.
- Summaries of long or complex contracts should be provided to consumers and contracts should be made publicly available.
- No-show clauses in airline standard form contracts should be deemed unfair and banned.

Unsolicited consumer agreements

Unsolicited sales are invasive and overwhelmingly unwanted. The unsolicited consumer agreements provisions in the ACL give a baseline protection against unscrupulous selling practices. Businesses are required to make certain disclosures, provide a ten-day cooling-off period and face some penalties for breaching these requirements. These protections are not strong enough.

The Interim Report states there is a lack of evidence to justify a change to these provisions. It is unclear what further evidence is required. As covered in the Interim Report, there is strong evidence demonstrating the harm of unsolicited sales, particularly for elderly, newly arrived, low income, unemployed, young and Indigenous consumers. What is missing is robust evidence from industry demonstrating consumer benefit of continuing door-to-door sales (as opposed to benefits to business). We note CAANZ's concern about a lack of data about the incidence of consumer problems. We would appreciate much greater clarity about the evidence CAANZ considers is lacking, on top of the 2012 ACCC research and multiple reports from consumer representatives, to make the case for change. Specifically, we would appreciate advice from CAANZ on exactly what data may be missing, how CAANZ would provide resources to collect the data required, a timeframe to complete this work.

CHOICE believes it would be extremely risky to pursue option one (maintain the current balance and breadth of the provisions - the status quo) as it would maintain inadequate consumer protections. Option one would continue to rely on cooling-off periods and disclosure as the primary means to protect consumers. There is now wide recognition that disclosure alone

cannot protect consumers[41] and a growing body of evidence showing that cooling-off periods offer greater advantages to businesses instead of consumers as they increase trust in the sales process while taking advantage of consumer behavioural biases.[42] Cooling off periods place the responsibility on the consumer to chase down the seller. In many cases a person who has been sold a product or service through an unsolicited sale is vulnerable, unlikely to complain and has signed on to receive something that wasn't fully explained or that they cannot completely understand (see case study below).

Finally, the current provisions mean that unsolicited consumer agreement protections only apply when the price is more than $100. $100 is a significant amount for people who are targeted by door-to-door salespeople. Currently the amount someone with no dependents on a Newstart payment receives each fortnight is $528.70.[43] An unsolicited sale of $99 is 37% of what someone receiving Newstart receives for a week. Given this, consideration must be given to lowering the $100 limit before protections apply. Similarly, the provisions that allow supply of goods and payments for amounts under $500 places low income consumers at high risk and should be reconsidered.

Cooling-off doesn't work: timeshare case study

CHOICE has recently made a complaint to ASIC about aggressive sales practices for holiday timeshare products. These products are sold away from business premises. Consumers report being given a scratch card by a promoter they encounter on the street or at a major tourist attraction. The scratch card almost always reveals that the consumer has won a "free holiday". At this point, it is revealed that the consumer will need to sit through a sales presentation to receive this holiday.

Consumers report that salespeople provide children with scratch cards to target parents, and that if they attend the sales pitch, are told that timeshare deals must be signed on the day. The claims of a free holiday are clearly a lure to get people to attend a long, high-pressure sales pitch for a timeshare scheme.

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[41] For example, the Financial System Inquiry *Final Report* found that "Product disclosure plays an important part in establishing the contract between issuers and consumers. However, in itself, mandated disclosure is not sufficient to allow consumers to make informed financial decisions." http://fsi.gov.au/publications/final-report/chapter-4/

[42] See Harrison, Paul (2016), Headline findings, opt-in research http://consumeraction.org.au/wp-content/uploads/2016/11/Consumer-Action-Opt-Out-Research-Briefing-Nov-2016-1.pdf and http://consumeraction.org.au/wp-content/uploads/2016/11/161104-Headline-findings.pdf

[43] https://www.humanservices.gov.au/customer/services/centrelink/newstart-allowance

Although not provided through the unsolicited sales provisions of the ACL, consumers who purchase a timeshare have a seven to ten day cooling off period. However, they are very unlikely to have fully engaged with the product in this period. Many Australian timeshare services operate on a points-based system – it is extremely difficult for people to understand the value of points until they book a holiday. As many people are targeted for timeshare schemes while already on holiday, it is unlikely that they would book another vacation so soon. In addition, it's unlikely that timeshare owners take a holiday in the first seven to ten days of signing up to the service, making it difficult to assess the quality of accommodation on offer.

This case also demonstrates the risk of limiting the unsolicited sales provisions to the home, workplace or over the phone. Businesses that use sales practices to lure consumers into high pressure sales environments create a high risk of consumer harm. This risk can be exacerbated in certain locations, including outside of jobseeker service provider offices, outside of Centrelink offices or simply in a location where the consumer has not invited a sales approach.

CHOICE maintains that a complete ban on unsolicited door-to-door sales is the best way to protect consumers. If this reform is not pursued, CAANZ should instead consider an opt-in arrangement to let consumers choose if they want the service or good pushed on them through an uninvited sales approach. For an opt-in arrangement to work, a minimum of two days should be given to allow consumers to compare other options and consider the detail of what's on offer. CHOICE expects that the opt-in model will reduce the number of sales made by traders. This would be a positive outcome and likely apply most to traders selling products consumers do not need or want.

CHOICE cautions against only applying these protections to "high-risk" sales. Risk means different things to different consumers. For a vulnerable consumer, a one-off purchase of a $99 good could be high-risk if it impacts a tight budget. Instead, we expect that a general opt-in protection would give the greatest protection to vulnerable consumers while confident consumers who genuinely want the service or good will follow up to arrange payment.

Recommendation:

- Unsolicited door-to-door sales should be banned.
    - If this is not pursed, then the cooling-off period should be replaced with an opt-in mechanism. This mechanism should require that there are two full days between the sales approach and finalising any contract.

3. Enforcement and administration

ACL accessibility

Knowledge of rights is the obvious first step to being able to exercise them. Further measures can be taken to improve accessibility and usability of information for consumers with special needs, for example disability, low-literacy and English as a second language consumers. We recommend using multiple formats, catering to different consumer needs, available both online and in hard copy on request.

CHOICE is pleased to see efforts made by the ACCC to provide consumer rights guidance to consumers with a disability. We note the production of easy English and video content explaining consumer rights.[44] These materials are particularly important in light of increased consumer choice for people with a disability under the National Disability Insurance Scheme (NDIS).

However we believe further effort could be placed in interpreting these resources for people who use sign language. The Web Content Accessibility Guide (WCAG) notes, "For those who communicate primarily in sign language it is sometimes less preferable and sometimes not possible for them to read and understand text at the rate it is presented in captions. For these latter individuals it is important to provide sign language presentation of the audio information. One universally compatible way of doing this is to simply embed a video of the sign language interpreter in the video stream".[45] Hence, there is a need for an alternative website information format to accommodate viewers who are deaf rely on a signed language as their first and sometimes only language.

Recommendation:

- ACL guidance materials produced and published by the regulators need to be accessible to all consumers.
    - Website information should be provided in an alternative format to accommodate viewers who are deaf and rely on a signed language.

[44] ACCC, 2016, 'ACCC releases guidance to consumers and businesses in the disability sector', http://www.accc.gov.au/media-release/accc-releases-guidance-to-consumers-and-businesses-in-the-disability-sector

[45] W3C, 2016, 'Web Content Accessibility Guidelines (WCAG) 2.0 - G54: Including a sign language interpreter in the video stream', Available at: https://www.w3.org/TR/2008/WD-WCAG20-TECHS-20081103/G54

Access to data

The Interim Report notes that the Productivity Commission is best placed to consider the issues around access to consumers' transaction data. However, there are other issues around access to data that are directly relevant to this review of the ACL. For instance, there are certain datasets currently held by regulators that would provide substantial benefit to the public if released. The first of these, data on mandatory safety reports, cannot be released unless the ACL is amended to remove confidentiality requirements. This is an issue that should be dealt with by the ACL review; there is no other review body better placed to address this. CHOICE deals with this in detail in the section of this submission titled "Mandatory safety reports".

The second valuable type of data held by regulators is complaints data. CHOICE strongly supports the approach taken by NSW Fair Trading, to create a consumer complaints register that publishes information about traders who are the subject of a high number of complaints. We encourage other states and territories, and the Federal regulators such as the ACCC and ASIC, to follow suit.

Sharing this data will improve consumer welfare by empowering consumers to make more informed decisions about where to buy goods and services, and incentivise businesses to improve their complaints handling processes and their business practices more generally.

Recommendation:

- 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.

Penalties

Penalties for breaches of the Australian Consumer Law are either set at a level that is inadequate to deter bad conduct and effect positive market change, or are entirely absent. It is vital that penalties are high enough to have a significant impact on business. Penalties that are too low risk becoming part of the cost of doing business where the benefits gained through unlawful conduct are substantial. As discussed in CHOICE's submission to the Issues Paper, an

example of such an imbalance can be seen in the multiple ACCC "free range egg" cases, where total penalties awarded to date are dwarfed by profits gained through misrepresentations.[46]

The Interim Report suggests one option for dealing with the current inadequate level of penalties available for breaches of the ACL, by increasing available penalties to match those under the competition provisions of the Competition and Consumer Law. That is, for companies, the greater of:

- $10 million;
- Three times the value of the benefit the company received from the breach; or
- If the benefit cannot be determined, 10 percent of annual turnover in the preceding 12 months.

There is no policy basis for distinguishing between the ACL and the competition law provisions when setting maximum penalties. The option suggested in the Interim Report is a sensible one, and would lift penalties to a more appropriate level, likely to create a stronger deterrent effect. However, CHOICE also supports the suggestion to index the maximum penalty rather than apply a flat cap; this would help future-proof the maximum penalties.

Recommendation:

- Existing $1.1m penalties available for breach of the specific protections in the ACL should be amended to match the penalties available for breach of the cartel conduct provisions.
    - The maximum penalty should be indexed rather than static.

Penalties for misleading and deceptive conduct and unfair contract terms

The lack of penalties available for misleading and deceptive conduct, and unfair contract terms, remains a concern. Breaches of these provisions should result in fines, similarly to breaches of the Part 3-1 specific protections. Penalties are an important tool for the regulators, and, when set at an adequate level, send a strong message to businesses about the importance of fair markets and legal compliance. In addition to increasing the penalties available for breaches of the ACL, the scope of conduct that can attract penalties should also be broadened to include misleading and deceptive conduct and unfair contract terms.

[46] See CHOICE, 26 May 2016, 'Submission to the Review of the Australian Consumer Law', p41. Total penalties handed down have reached $950,000; additional profits from selling fake 'free range' eggs in 2014 are estimated to be $29.8 million.

Recommendation:

- Penalties should be available for misleading and deceptive conduct and unfair contract terms.

Access to remedies – "follow on" provisions

CHOICE supported the recommendation made in the Competition Policy Review to amend section 83 of the *Competition and Consumer Act 2010* to include admissions of fact made by the person against whom the proceedings are brought, in addition to findings of fact made by the court. This lowers the costs of litigation for private litigants by simplifying the issues to be determined at trial, and adds value to regulator-initiated proceedings. As the Competition Policy Review noted, many ACCC actions are resolved when a corporation makes admissions of facts that establish the contravention. This is as true for actions taken under the ACL provisions as it is for actions taken under the competition provisions.

Measures that facilitate private action should be encouraged; private parties may be well placed to anticipate long-term harm to a market, they tend to have in-depth first-hand knowledge of the ways other market participants are behaving, and they may have suffered adversely due to another company's breach of the ACL. The arguments made in favour of extending "follow on" provisions during the Competition Policy Review apply equally in relation to the ACL. CHOICE recommends that the provisions currently available in section 137H of the CCA (and other state and territory ACL application laws) be expanded to allow private parties to rely on admissions of fact made in another proceeding, as well as court findings of fact.

Recommendation:

- The provisions currently available in section 137H of the CCA (and other state and territory ACL application laws) should be expanded to allow private parties to rely on admissions of fact made in another proceeding, as well as court findings of fact.

4. Other consumer issues

Auction exemption to consumer guarantees

The consumer guarantee rights are a powerful tool for consumers, but there are some limitations to the guarantees, and this review is a timely opportunity to consider whether these limitations remain appropriate or necessary. Where a consumer purchases goods via "auction",

for example, they will not be able to rely on some of the consumer guarantees. However, as the Interim Report notes, "auction" is defined as "a sale by auction that is conducted by an agent of the person (whether the agent acts in person or by electronic means)". This means that many online "auctions" may not fall under this definition, and will in fact be covered by the guarantees.

However, this is not clear to many consumers, who are likely to perceive sales made through bidding processes on websites such as eBay as an auction. Even experts find the application of the "auction" exemption to online sales unclear, noting that "whether an online auction, such as those that occur through eBay is actually an auction in accordance with the definition is also unclear".[47]

The Interim Report presents an option for dealing with this confusion; remove the "sale by auction" exemption for consumer guarantees in the online environment. Removing the exemption in relation to the online environment would provide clarity to both business and consumers. The rationale for originally including the exemption is that auctions occurred in circumstances where consumers were able to inspect the goods in person before purchasing them. For online sales, this rationale does not apply. More broadly, CHOICE is not convinced that this exemption is necessary even in the context of traditional, in-person auctions. In a situation where a seller stands to profit from selling goods, there should be an obligation on that seller to ensure the goods they are selling are of acceptable quality regardless of whether the goods are sold by auction, online, or in a bricks-and-mortar retail store.

Recommendation:

- The "sale by auction" exemption to the consumer guarantees should be removed.
    - At a minimum, the exemption should not apply in relation to online sales.

Goods damaged in transit

The Interim Report highlights a number of quirks of the law that lead it to be interpreted in a way that goes against common sense. One such quirk is section 63, which has been interpreted to mean that consumers ordering goods from a business are not protected by the ordinary consumer guarantees in relation to the shipping or transportation of the goods. That is, consumers cannot rely on the guarantees that the delivery services will be carried out with due care and skill, and be fit for purpose. The Interim Report references a High Court interpretation

[47] Submission from QUT Commercial and Property Law Research Centre, page 21.

in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* [1994] HCA 17. One judgement in this case interprets section 63 to apply not only where the buyer is carrying on a business, but also where the seller of the goods (consignor) is carrying on a business.[48] Given this interpretation comes from the judgement of one of the five judges we are sceptical of its value in setting strong precedent. However, we believe there is still a need to clarify the consumer guarantees in relation to goods lost or damaged in transit.

As pointed out in the Interim Report, consumers have no control over the transportation process. They do not have the opportunity to choose the transporter that they want to deal with. Due to the interpretation of section 63, businesses have all the control over the transportation of the goods purchased, but consumers bear the full burden of risk if those services are sub-par. This is unreasonable on the face of it.

CHOICE receives many complaints from consumers who have purchased items that have not been delivered, or have been delivered with damage, and the current operation of the law leaves consumers unsure of how to seek redress in these instances. We asked a nationally representative group of 1025 Australians in July this year about their experiences with parcel delivery. Of the 643 people who'd had parcels delivered in the previous 12 months (through any parcel service), we found that more than 50% had experienced a problem.[49] 23% of these people had experienced an unreasonable delay and 14% had a situation where a parcel went missing or was never delivered. With online shopping growing in popularity, this gap in the law needs to be fixed. The exemption should be removed, or at the very least, clarified so that it only applies where the buyer (rather than the seller) is acting for a business purpose.

Where consumers are uncertain about their rights to consumer guarantees they may be more willing to pay for duplicate protection. In many cases this protection may not offer anything above rights under a consumer guarantee. Online retailer Kogan sells “Freight Guarantee/Freight Protection” on the delivery of anything purchased through its store.[50] For an additional 1% on the purchase price of a good, Kogan offers cover for “loss or damage to your order that occurs during delivery”. However, it is not clear how this cover differs from what a consumer would be entitled to under the ACL.

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[48] *Wallis v Downard-Pickford (North Queensland) Pty Ltd* [1994] HCA 17

[49] https://www.choice.com.au/shopping/shopping-for-services/services/articles/parcel-delivery-and-postal-issues

[50] Kogan, 2016, available at: https://www.kogan.com/au/help/what-is-the-freight-guaranteefreight-protection-option-at-checkout/

In the Kogan example and in many online purchases there is no choice in delivery service provider. It is inappropriate to transfer risk on to a consumer in a situation where they have no control over the transportation process or choice of transporter. This example also provides further evidence of the need for retailers to inform consumers about how a warranty differs from a statutory guarantee. This would allow a consumer to adequately assess the value of the additional warranty, if any.

Recommendation:

- The ACL should be amended to make it clear that the consumer guarantee rights apply equally to goods damaged in transit.

ASIC investigative powers for unfair contract terms

Section 13(1) of the ASIC Act should be amended to allow potential unfair contract terms to trigger ASIC's investigative powers. One of the benefits of clear legislation, such as that contained in the UCT provisions, is that it can drive change without the need for costly litigation. The UCT obligations are very clear; the legislation even provides an extensive list of the types of terms which would be considered unfair. This is a far cry from the amorphous "utmost good faith" requirements. The UCT obligations are so clear that ACCC and consumer organisations have used the laws to engage directly with businesses around removing unfair terms.[51] This has seen many businesses voluntarily improve their terms. With limitations on regulatory budgets and the cost of litigation to business compliance, the UCT provisions should be viewed as balanced best practice regulation.

Recommendation:

- Section 13(1) of the ASIC Act should be amended to allow potential unfair contract terms to trigger ASIC's investigative powers.

Super complaints

Putting in place a framework that will enable consumer organisations to systematically provide the regulators with information on harmful products and practices will help the regulators to be more responsive. A "super complaints" power, modelled on the UK's system, would achieve

[51] For example, see ACCAN, 2016, 'Unfair and misleading fine print could be costing you' available at: http://accan.org.au/hot-issues/726-unfair-and-misleading-fine-print-could-be-costing-you ; ACCC, 2016, 'ACCC warns businesses time is running out to review their standard form contracts for unfair contract terms', available at: https://www.accc.gov.au/media-release/accc-warns-businesses-time-is-running-out-to-review-their-standard-form-contracts-for-unfair-contract-terms

this. CHOICE recommends that consumer organisations be given the power to make "super complaints" to the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission.

The UK process has given consumer groups in that jurisdiction the ability to highlight issues of concern and provide regulators with valuable insights into emerging and systemic issues. Energy billing practices, credit card interest rate calculations, care homes and compensation for train delays are some of the important issues contributing to significant consumer detriment that were brought to the regulators' attention through the super complaints process.

The ACL should be amended to introduce a super complaints process. Specified consumer organisations should be empowered to make a super complaint to the relevant regulator, with the regulator obliged to respond publicly within a specified time period (e.g. 90 days, as in the UK), and the Federal Government required to then respond publicly after another specified period. For a super complaint to be made, it should relate to widespread concern or conduct in a market, or significant consumer detriment, and must meet other thresholds in relation to information provision. This measure could reduce costs for regulators as initial investigative work is conducted by consumer organisations. It would lead to better information being provided to the regulator, in a structured format that best meets its needs.

Recommendation:

- 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 Federal Government required to then respond publicly after another specified period.

Gift cards

Currently, businesses in receivership are able to vary the terms of a gift card at will. This can include mandating spending minimums, dollar-for-dollar spend requirements or mandating type of purchase made. A consumer is unable to obtain a refund if the gift cards terms are varied from the time of purchase.

Additionally, a number of other problems have been highlighted through investigations by NSW Fair Trading, CHOICE and Consumer NZ, notably short expiry, transparency of available value, minimum spend, card replacement and being unable to extract remaining small value.

Case study: Pumpkin Patch

Children's clothing store Pumpkin Patch is currently in receivership. The administrators have placed restrictions on customers' ability to spend pre-purchased gift cards.

"Due to the receivership, gift cards will be honoured on a 'dollar-for-dollar' basis. For example, a $40 purchase can be paid for with a $20 gift voucher and $20 cash; a $100 purchase with a $50 gift voucher and $50 cash etc."[52]
Gift cards at Pumpkin Patch have no expiry, remaining balances will remain on the card (i.e. no change given) and cannot be replaced if lost or stolen.

Restricting gift card rights such as in the case above creates a significant imbalance between the consumer and business. While the business is able to alter the terms and conditions of the gift card product, the consumer is not able to redeem their value in cash if the product is not offered as originally purchased.

CHOICE recommends that the ACCC develop guidelines for retailers entering into transactions where consumers purchase gift cards, that expiry dates not be allowed, and that gift cards include clear and transparent information on the card, including clearly stating the card's terms of use, such as minimum spend.

Retailers should also be prohibited from changing terms that create a significant imbalance between the consumer and retailer, or significantly alter the product post-purchase.

Recommendations:

- Expiry dates on gift cards should be banned.
- The ACCC should develop guidelines for retailers entering into transactions where consumers purchase gift cards.
- Gift cards should include clear and transparent information on the card, including clearly stating the card's terms of use, such as minimum spend.
- Retailers should be prohibited from changing terms relating to gift card offerings that create a significant imbalance between the consumer and retailer, or significantly alter the product post-purchase.

[52] See Pumpkin Patch 'Gift Card Frequently Asked Questions' at http://www.pumpkinpatch.com.au/banner/generic/gift-card-faq_au

Purchasing online: pre-selected extras

The Interim Report has suggested the prohibition of preselected extras as one measure to enhance transparency in online shopping. CHOICE strongly supports this option and opposes the practice of pre-selected extras in online booking processes.

CHOICE sees particularly egregious examples of pre-selected extras (also known as pre-ticked extras) on airline booking websites. Such pre-selected options are designed to trick consumers into purchasing unnecessary components, or are used to disguise the true cost of the product. Consumers are initially attracted to the low cost of these products, including through "starter" or "sale" prices, only to find that subsequent inclusions increase the price significantly. In an investigation of the pre-ticked extras of the major Australian domestic airlines, CHOICE found that additional costs pre-selected in the booking process can add up to 40% to the advertised price.[53]

The practice of pre-selecting optional extras is problematic both for consumers who have limited time to make a purchase as well as consumers from culturally and linguistically diverse communities who may have difficultly navigating complex bookings. CHOICE is also aware of issues for consumers with vision impairment navigating websites with pre-selected extras, like airlines. Abolishing pre-selected extras would increase transparency as well as making online shopping simpler and clearer for consumers, including those from CALD and disability communities.

Recently, the four major Australian airlines voluntarily committed to stop pre-ticking optional extras. However, the airline with the worst practices, Jetstar, will not stop pre-ticking extras until July 2017.[54] Further action is needed to stop other powerful industries from adopting this practice and to make it clear to consumers that the practice is not allowed. There should be a ban on pre-selected optional extras, similar to the ban on pre-selected extras imposed by the NZ Commerce Commission[55] and the European Union.[56] The Interim Report's Option 1 would resolve consumer issues and reduce consumer detriment.[57]

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[53] CHOICE (2016). *Ticked off with sneaky costs*. Accessed: https://www.choice.com.au/travel/on-holidays/airlines/articles/preselected-extras-increase-airfare-costs

[54] https://www.accc.gov.au/media-release/accc-welcomes-jetstar%E2%80%99s-plan-to-stop-pre-selecting-extras

[55] Commerce Commission New Zealand (2016). *Enforcement Response Register: Jetstar Airways Pty Limited*. Accessed: http://www.comcom.govt.nz/fair-trading/enforcement-response-register/detail/928

[56] EU Directive on Consumer Rights (2011/83/EC), adopted 13 June 2014, Article 22, at: www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1.

[57] Option 1: introduce measures to enhance transparency in online shopping, for example, to prohibit the practice of pre-selected options.

Recommendation:

- Preselected extras should be prohibited in online shopping.

Supermarket pricing

Consumers face confusing pricing practices every day, most noticeably in the supermarket where they have to navigate not-so-special specials promotions, confusing multi-buy offers and poor information about how much goods cost per unit. There are clear steps that could be taken to address these issues by strengthening and better enforcing the Unit Pricing Code.

Australia implemented a compulsory unit pricing scheme in 2009 that lets shoppers compare product prices based on weight or unit of measurement. Unit pricing helps people save money each week. A study by Queensland University of Technology found that families can save $1,000 to $1,700 on groceries each year by using unit pricing. However, the Code is not working as well as it could. There is little monitoring and enforcement and supermarkets appear to be routinely failing to present accurate unit pricing.

The Code also needs to apply to more situations where consumers face confusing pricing. Supermarkets and grocery stores below a certain size are not subject to the Unit Pricing Code, on the basis that the costs of complying for these small businesses would be too significant. We are not convinced that this is always the case – a proper review into the Unit Pricing Code is needed to assess this claim and to consider rolling out the scheme to other retail spaces like hardware stores and large discount pharmacies.

Australia's unit pricing system was supposed to be reviewed five years after introduction. The review is now more than two years overdue and should commence as soon as possible.

We would also like to bring CAANZ's attention to a different, specific problem relating to pricing transparency in many smaller convenience stores – that is, there often is no pricing at all. This is unjustified and causes consumer detriment. Even the smallest of convenience stores need to price their products to sell them; putting labels on shelves should not constitute an unreasonable additional burden but a basic requirement of doing business. Theoretically, consumers can choose to reject prices once they see them during the check-out process. Realistically, this is no option at all. A consumer who has already invested the time to gather the goods they want is unlikely to be deterred by a slightly higher-than-expected price. Slight price gouging of many consumers leads to overall substantial consumer detriment. There should be a

positive obligation on all sellers to disclose prices in writing, on the shelves – this is a very low bar that too many sellers are failing to meet.

Recommendation:

- All sellers should be required to clearly display the prices of their products, adjacent to the product on offer.
- The Federal Government should initiate a review of the *Trade Practices (Industry Codes – Unit Pricing) Regulations 2009*. The review should be conducted by an independent body or eminent persons, with at least one having recognised expertise or experience in consumer affairs. It should have broad terms of reference that allow consideration of compliance, monitoring, enforcement and improvements to requirements and scope.

Annexure A: full list of recommendations

CHOICE recommendations

- The ACCC should issue regulatory guidance about the application of the ACL to fundraising activities.
    - The guidance should include recommendations that will enable consumers to determine if fundraising is being conducted by a volunteer, charity employee or third-party.
- The Do Not Call Register Act 2006 should be amended so that consumers can opt-out of any call where they are being asked for money (including fundraising).
    - If the Do Not Call Register Act 2006 is not amended, an inquiry into fundraising practices and the impact on consumers should be launched to examine all options for reform.
- Increase the $40,000 threshold for the definition of “consumer” to $100,000 and link it to the Consumer Price Index.
- Clarify the ASIC Act to explicitly apply its consumer protections to financial products.
- The ACL regulators should set up a taskforce to investigate and report on compliance with the consumer guarantees in the motor vehicle industry. The taskforce should:
    - Fast track complaints received about motor vehicle consumer guarantee issues, and prioritise these cases for resolution and investigation.
    - Publish complaints received about motor vehicles on a central database, and report annually on the industry’s progress towards compliance, including number of complaints received and resolutions reached.
- An accessible, fair and transparent dispute resolution body should also be established to help consumers get remedies for failures of the consumer guarantees in relation to cars.
- If the above fails to resolve the problems in the motor vehicle industry within two years, the Federal Government should introduce industry-specific lemon laws.
- Clarify the law on what can trigger a major failure, including explicitly amending the law to state that:
    - A safety issue will trigger a major failure; and
    - Multiple minor failures can trigger a major failure.
- The use of non-disclosure agreements should be banned where the consumer had an existing right to the same or greater remedies under the consumer guarantees provisions.
- Clear guidance should be provided to consumers on how long a product can be expected to last.

    - Preferably, this guidance would be provided through direct representations from the manufacturer or retailer of a product at the point of sale.
    - Alternatively, the ACCC could issue guidance on reasonable durability.
- Disclosure requirements for extended warranties should be introduced based on the New Zealand model.
    - These should particularly require that at the point of purchase, consumers must be provided with a plain language written copy of the extended warranty agreement that includes a comparison of the consumer guarantee rights and remedies and the additional protections provided under the extended warranty.
    - A plain language summary of key terms and conditions should also be provided to consumers at the point of purchase.
- The mandatory text for warranties against defects should not be removed.
    - Warranties against defects should also include a comparison of the consumer guarantee rights and remedies and the additional protections provided under the warranty against defects.
- The display of notices informing consumers of their rights at the point of sale should be mandated.
- A General Safety Provision should be introduced.
    - Breach of the General Safety Provision should carry hefty penalties capable of acting as a strong deterrent.
- Mandatory standards should not reference superseded standards.
    - The publication of an updated Australian Standard referenced in any mandatory standards should prompt its immediate review. The review should be conducted in a transparent manner and provide for stakeholder participation.
- The section 132A confidentiality provisions of mandatory reports should be revoked.
- A publicly accessible, searchable database of consumer product incident reports should be adopted in Australia, based on the US model www.SaferProducts.gov
- Suppliers should also be required to report any “near misses” that they become aware of, being product failures that do not cause injury or death but could foreseeably do so.
- The current timeframe for making mandatory reports should not be changed.
- A statutory definition of a voluntary recall should be introduced.
- Penalties for failure to notify a recall should be increased.
- 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.
- There should be a legislative obligation on businesses conducting voluntary recalls to use the most effective 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.
    - Alternatively, manufacturers and retailers subject to a recall should have an obligation to contribute to a Recall Promotion Fund, where the funds contributed can be used in the event of a recall to engage an independent third party to promote the recall.
- Businesses conducting voluntary recalls should be required to publish regular results about the outcomes of any active product recall.
- A general prohibition against unfair business practices should be introduced.
- Remove the exemption insurance has from the prohibition on unfair contract terms. This could be achieved by amending section 15 of the Insurance Contracts Act (1984) so that the provision which currently excludes insurance contracts from the operation of any other Commonwealth, State or Territory Act allows the unfair contract terms provisions in the Australian Securities and Investments Commission Act (2001) to apply.
- Standard form contracts as a whole should be able to be deemed unfair, and consumers should be able to seek redress for any harm suffered as a consequence of being bound by an unfair contract. The following factors should be taken into account when determining whether a contract is unfair:
    - Extreme length;
    - Lack of clarity, use of jargon or unnecessary complexity; and
    - Accessibility and availability of the text of the contract.
- Stronger penalties, including pecuniary penalties, should be available for breach of the unfair contract term provisions.
- Summaries of long or complex contracts should be provided to consumers \ and contracts should be made publicly available.
- No-show clauses in airline standard form contracts should be deemed unfair and banned.
- Unsolicited door-to-door sales should be banned.
    - If this isn't pursed, then the cooling-off period should be replaced with an opt-in mechanism. This mechanism should require that there are two full days between the sales approach and finalising any contract.

- ACL guidance materials produced and published by the regulators need to be accessible for all consumers.
    - Website information should be provided in an alternative format to accommodate deaf viewers who rely on a signed language.
- 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.
- Existing $1.1m penalties available for breach of the specific protections in the ACL should be amended to match the penalties available for breach of the cartel conduct provisions.
    - The maximum penalty should be indexed rather than static.
- Penalties should be available for misleading and deceptive conduct and unfair contract terms.
- The provisions currently available in section 137H of the CCA (and other state and territory ACL application laws) should be expanded to allow private parties to rely on admissions of fact made in another proceeding, as well as court findings of fact.
- The "sale by auction" exemption to the consumer guarantees should be removed.
    - At a minimum, the exemption should not apply in relation to online sales.
- The ACL should be amended to make it clear that the consumer guarantee rights apply equally to goods damaged in transit.
- Section 13(1) of the ASIC Act should be amended to allow potential unfair contract terms to trigger ASIC's investigative powers.
- 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 Federal Government required to then respond publicly after another specified period.
- Expiry dates on gift cards should be banned.
- The ACCC should develop guidelines for retailers entering into transactions where consumers purchase gift cards.
- Gift cards should include clear and transparent information on the card, including clearly stating the card's terms of use, such as minimum spend.
- Retailers should be prohibited from changing terms relating to gift card offerings that create a significant imbalance between the consumer and retailer, or significantly alter the product post-purchase.
- Preselected extras should be prohibited in online shopping.
- All sellers should be required to clearly display the prices of their products, adjacent to the product on offer.

- The Federal Government should initiate a review of the *Trade Practices (Industry Codes – Unit Pricing) Regulations 2009*. The review should be conducted by an independent body or eminent persons, with at least one having recognised expertise or experience in consumer affairs. It should have broad terms of reference that allow consideration of compliance, monitoring, enforcement and improvements to requirements and scope.