

Australian Consumer Law Review

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Advertising of Therapeutic Goods and Services

Overview of this presentation

1. Outline of the Australian Consumer Law
2. Summary of the Productivity Commission Review
3. Summary of the Final Report of the Australian Consumer Law Review (ACL Review)
4. Relevance to consumer protection in relation to therapeutic goods
5. A proposed way forward

Outline

Outline of the Australian Consumer Law

- Where did it come from?
 - From 1974 to 2010 the principle consumer protection law in Australia was provided in The Trade Practices Act
 - On 1 January 2011, the Australian Consumer Law (ACL) commenced operation as Australia's first nation-wide consumer protection law
 - The ACL is Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and is applied in each state or territory via each jurisdiction's application laws.

Key elements in consumer law

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

ACL Enforcement Agencies

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

Specialist Consumer Protection Regimes

The generic ACL is complemented by a multitude of consumer regulations and regulators specific to particular products, markets or industries.

- Food Standards Code
- Therapeutic Goods Act.
- Electrical product safety,
- Motor vehicle dealers
- Licensing of tradespeople.

Concurrent reviews of consumer protection

Productivity Commission

Consumer Law Enforcement and Administration

- How well does the multi regulator model work?

Australian Consumer Law Review Team

- Is the ACL fit for purpose and is it fit for the future?

Multi Regulator Model for Consumer Law



Australian Government
Productivity Commission

Consumer Law Enforcement
and Administration

Productivity Commission
Research Report

Multi Regulator Model for Consumer Law

Key points

- Despite the adoption of a single Australian Consumer Law (ACL) in 2011, Australia's consumer protection framework remains complex.
 - Two commonwealth and eight state and territory regulators administer and enforce the ACL.
 - Numerous specialist safety regulatory regimes complement the ACL.
 - Redress is provided via tribunals, courts and ombudsmen, and most ACL regulators.

Multi Regulator Model for Consumer Law

There is scope to strengthen the ACL's administration and enforcement, including through:

- developing a national database of consumer intelligence
- ensuring that data on consumer complaints published by ACL regulators are meaningful
- providing all state and territory ACL regulators with the full suite of enforcement tools
- increasing maximum financial penalties for breaches of the ACL
- exempting interim product bans from commonwealth regulatory impact assessments
- centralising powers for interim product bans and compulsory recalls in the ACCC
- improving the transparency of the resourcing and performance of the ACL regulators.

NSW Fair Trading

NSW Fair Trading
Supporting local communities

Home Consumers Tenants & Home Owners Businesses Property Agents & Managers Tradespeople

Our Minister
Our services
Online services
Complaints Register
Frequently asked questions - Complaints Register
NSW Fair Trading public register data
Conveyancers licence check

Home > About Us > Online services > Complaints Register

Listen

Complaints Register

[Go to the Complaints Register](#)

The NSW Fair Trading Complaints Register lists businesses that are the subject of 10 or more complaints to NSW Fair Trading in a calendar month. Businesses are listed according to their public and recognisable 'trading' or 'brand' name.

NSW Fair Trading Complaints Register

Productivity Commission recommendation

- Recognises the power and responsibility of consumers
- In line with contemporary social media expectations
- Provides a forum for accumulation of relevant data
- NSW Fair Trading Complaints Register
 - PC noted the positive dimensions of the scheme
 - NSW Government open data policy
 - Well executed and a model for others to follow

Multi Regulator Model for Consumer Law

Previous Commission proposals to address gaps in consumer policy research and advocacy should be revisited. There are also grounds for enabling designated advocacy groups to make 'super complaints' to ACL regulators, subject to appropriate guidelines.

Super Complaint Facility

- Originated in the UK Enterprise Act 2002
- Enabling designated consumer groups to make a 'super complaint' on behalf of classes of consumers
- Complaint to be fast-tracked by the relevant ACL regulator.
- Goal to ensure that areas of consumer detriment are brought to the attention of, and addressed by, regulators.
- Criteria for designating consumer bodies
- Process by which a regulator should respond

Multi Regulator Model for Consumer Law

Different results for different jurisdictions

The multiple-regulator model allows for differences among jurisdictions in approaches to aspects of their administration and enforcement of the ACL, which likely create some inconsistent outcomes for consumers and for businesses.

Multi Regulator Model for Consumer Law

Knowledgebase and transparency

- Currently no quality data on nature or incidence of problems
- A national database of consumer complaints and product safety incidents for use by consumer regulators should be developed
- Would enable better identification and analysis of consumer hazards and risks, and help focus ACL regulators' compliance and enforcement activity.

Complaints database

- Data on consumer complaints should be public.

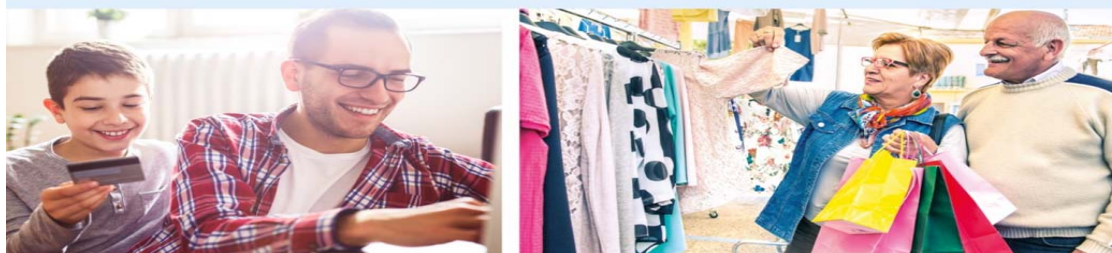
Public register should incorporate:

- appropriate vetting of complaints before publication
- detailed information about the complaint or incident
- information on the resolution or outcome of the complaint
- should involve consultation with consumers and business, and there should be subsequent reviews of its effects and effectiveness.

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Final Report



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

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2.1 Consumer guarantees

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

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2.1 Consumer guarantees (continued)

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

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2.2 Product safety

<p>Proposal 6: General safety provision</p>	<p>Introduce a general safety provision that would require traders to ensure the safety of a product before it enters the market including:</p> <ul style="list-style-type: none"> • a flexible and less prescriptive approach to compliance by reference to product safety standards (for example, a 'safe harbour' defence to a breach of the general safety provision) • a penalty regime for breaches of the general safety provision, consistent with the ACL penalties regime.
<p>Proposal 7: Voluntary recalls</p>	<p>Clarify and strengthen voluntary recall requirements by:</p> <ul style="list-style-type: none"> • introducing a statutory definition of 'voluntary recall' • increasing penalties for failure or refusal to notify a voluntary recall, proportionate to other ACL penalties.
<p>Proposal 8: Powers to obtain information</p>	<p>Strengthen ACCC powers to obtain information about product safety, by broadening the power to apply to any person (including a consumer) likely to have relevant information, rather than only the supplier.</p>
<p>Action Mandatory reporting</p>	<p>Make clearer traders' mandatory reporting obligations by clarifying through regulator guidance:</p> <ul style="list-style-type: none"> • existing reporting requirements (including timeframes) • reporting triggers on the meaning of 'serious injury or illness' and 'use or foreseeable misuse'.

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Action

Product bans and recalls

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

Looking to the future

Product safety data

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

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2.6 Purchasing online

Proposal 13:

Pre-selected options

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

Proposal 14:

Online auctions

Modernise the 'sale by auction' exemption from the consumer guarantees by ensuring the consumer guarantees apply to all online auctions.

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3.1 The ACL in practice

Proposal 17:

Private action

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

3.2 Penalties and remedies

Proposal 18:

Maximum financial penalties

Increase maximum financial penalties available under the ACL by aligning them with the penalty regime under the competition provisions of the *Competition and Consumer Act 2010*:

- for companies, the greater of:
 - the maximum penalty (of \$10 million), or
 - three times the value of the benefit the company received from the act or omission, or
 - if the benefit cannot be determined, 10 per cent of annual turnover in the preceding 12 months.
- for individuals, \$500,000.

Proposal 19:

Community service orders

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

What about therapeutic goods?

ACL covers therapeutic goods but...

- ACL regulators are mildly allergic to complaints about therapeutics
- Hundreds of complaints are lodged but a miniscule number acted on
- ACL Regulators wrongly assume that the TGA can or will act
- ACL Regulators reasonably point to their own heavy work loads

Conclusion:

The interests of consumers of therapeutic goods and services are not adequately protected under either the ACL or TGA regimes

Therapeutic Goods Act 1989

Does the Act empower consumer protection measures?

4 Objects of Act

(1) The objects of this Act are to do the following, so far as the Constitution permits:

(a) provide for the establishment and maintenance of a national system of controls relating to the quality, safety, efficacy and timely availability of therapeutic goods

Therapeutic Goods Act 1989

6 Operation of Act

(1) This Act applies to:

- (a) things done by corporations; and
- (b) things done by natural persons or corporations in so far as those things are done:
 - (i) in the course of, or in preparation for, trade or commerce between Australia and a place outside Australia, among the States, between a State and a Territory or between 2 Territories; or
 - (ii) under a law of the Commonwealth relating to the provision of pharmaceutical or repatriation benefits; or
 - (iii) in relation to the Commonwealth or in relation to an authority of the Commonwealth.

Therapeutic Goods Amendment Bill (2017)

Explanatory Memorandum

The Australian National Medicines Policy recognises the primary position of the consumer in the Quality Use of Medicines framework. This means that the consumer can select management options wisely; choose suitable medicines (if a medicine is considered necessary); and using medicines safely and effectively. Similar considerations apply to other therapeutic goods (such as certain medical devices) that may be appropriate for self-selection by consumers for use in the care of them or their family.

Therapeutic Goods Amendment Bill (2017)

Explanatory Memorandum

Appropriate controls on advertising are required to adequately protect the public from false or misleading advertising of therapeutic goods and the consequent risks to public health. Schedule 6 amends the advertising related provisions throughout the Act to modernise the advertising framework for therapeutic goods while taking account evolving advertising practices.

Therapeutic Goods Amendment Bill (2017)

42DL Advertising offences—general

(1) A person commits an offence if:

(a) the person:

(i) advertises, by any means, therapeutic goods; or

(ii) causes the advertising, by any means, of therapeutic goods; and

(b) subsection (5), (6), (7), (8), (9), (10), (11) or (12) applies to the advertisement; and

Therapeutic Goods Amendment Bill (2017)

(c) either:

(i) the use of the goods in reliance on the advertisement has resulted in, will result in, or is likely to result in, harm or injury to any person; or

(ii) the use of the goods in reliance on the advertisement, if the goods were so used, would result in, or would be likely to result in, harm or injury to any person.

Penalty: Imprisonment for 5 years or 4,000 penalty units, or both.

A Way Forward

1. The Therapeutic Goods Bill (2017) should be amended to incorporate an objective to protect the interests of consumers
2. Measures proposed to be added to the ACL regime should, where relevant, be added to the Therapeutic Goods Bill (2017)
3. Enforcement of the consumer protection elements of the Therapeutic Goods Bill (2017) (when enacted) should be regarded as a specialised element of the ACL regime
4. For the avoidance of doubt, the Therapeutic Goods Bill (2017) should be amended to provide that:
 - Wherever the term “harm or injury” appears in this Act, it shall be understood to include economic harm or injury