choice

Submission to Consumer Affairs Australia and New Zealand on the Australian Consumer Law Review: Issues Paper

26 MAY 2016

WWW.CHOICE.COM.AU **E** CAMPAIGNS@CHOICE.COM.AU
57 CARRINGTON ROAD MARRICKVILLE NSW 2204 **P** 02 9577 3333 **F** 02 9577 3377

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.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns and to support our campaigns, sign up at www.choice.com.au/campaignsupporter

choice

57 CARRINGTON ROAD MARRICKVILLE NSW 2204

P 02 9577 3333 **F** 02 9577 3377

CONTENTS

CONTENTS

CHOICE's key recommendations

Consumer guarantees: your rights to a refund, repair or replacement

- While the existing consumer law is powerful, consumers sometimes have trouble asserting their rights, especially when it comes to expensive household appliances that fail after several years. To help fix this, **consumers should be given clear guidance about how long products should be expected to last**.
- When it comes to new cars, the consumer law is not working as well as it should, with dealers sometimes failing to acknowledge or fix issues until after warranty periods expire, and consumers being pushed into non-disclosure agreements. **Consumer Affairs ministers should establish a taskforce to fix problems in the new car market, including by:**
    - **Making it clear when a series of minor problems becomes a major failure; and**
    - **Banning non-disclosure agreements where the consumer has existing rights to the same or greater remedies through consumer guarantees.**
- If the taskforce fails to resolve the problems in the industry within two years, **the Federal Government should introduce industry-specific lemon laws.**

Creating fair markets for consumers

- Consumers are increasingly being confronted with overly long and complex contracts, often during time-limited checkout processes, like online airline bookings or collecting a hire car. Businesses should take responsibility for communicating critical information to their customers quickly and clearly. **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.
- There is no justification for continuing to exempt insurance from unfair contract laws, and there are clear cases of consumers suffering harm as a result. The insurance industry has shown that it does not deserve a special exemption. **Unfair contract terms in insurance contracts should be banned.**
- 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**.

- There is abundant evidence that door-to-door sales result in the misselling of products, with aggressive and pressurised selling tactics particularly targeting vulnerable consumers. There is no justification for continuing this practice – no evidence of economic benefits that outweigh consumer harm; **door-to-door sales should be banned**.
- While comparison websites can help drive competition and better decision-making in complex markets, they can sometimes distort markets by failing to prominently disclose commissions, market coverage and the influence of commercial arrangements on results. **Comparison websites should be required to disclose to consumers whether they receive commissions for the sale of a product or service. Trail commissions should also be clearly disclosed**.
- Gift cards result far too often in consumers losing money when cards expire. Businesses pocket the cash regardless of whether the card is redeemed. To fix this, **gift card expiry cates should be abolished**.

Creating more transparent markets

- Consumer regulators collect vast amounts of information about consumer complaints, only a fraction of which can be backed by enforcement activity. Making this data publicly available will benefit consumers, drive competition and help regulators target their activities more efficiently. **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.
- Consumers are often up-sold into extended warranties without having clear information about what benefits they provide beyond the rights guaranteed under the Australian Consumer Law. 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**.

Making products safer for consumers

- We expect products to be safe but there is no general obligation for suppliers to make goods safe, and the number of product recalls in Australia has risen at an alarming rate.

To fix this, **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**.

- 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. 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 adopted in Australia, based on the US model www.SaferProducts.gov**

Access to justice: enforcing the law

- Penalties for some breaches of the Australian Consumer Law are insignificant, and fall well short of levels that would deter major businesses from ripping off their customers. To fix this, **the existing $1.1m penalties available for breaches of the specific protections in the ACL should be raised to up to $10 million per breach.**
- While the Australian Consumer Law is nationally consistent, consumers lack consistent access to courts and tribunals to assert their rights, and businesses can sometimes take advantage knowing consumers are unlikely to pursue them through expensive and time-consuming processes. **Tribunal and court fees across States and Territories should be aligned, to ensure that all Australians have the same ability to assert their rights to a remedy at as low a cost as possible.**
- In particular, **vulnerable and disadvantaged consumers should have the right to seek resolution of their consumer law disputes in Tribunals and Courts at no cost.**

INTRODUCTION

In 2009, CHOICE welcomed the Council of Australian Governments' (COAG) decision to introduce a nationally uniform consumer protection regime[1]. At the time, CHOICE acknowledged the intention of the law to enhance the quality of consumers' experiences in the marketplace and deliver financial benefits to the entire community. Seven years on, we are happy to see that the Australian Consumer Law (ACL) has delivered on this promise in many ways.

The general protections of the ACL provide both flexibility and certainty to consumers, and enable the Australian Competition and Consumer Commission (ACCC) to take action in many situations where business conduct is harming consumers and their confidence in the market. However, there are still opportunities to improve the current provisions. The guarantees regime, for instance, is a valuable part of the law and when working helps empower consumers. Despite this, in CHOICE's experience consumers often have difficulty enforcing their rights both when dealing with specific industries, particularly the automobile industry, and when experiencing specific problems with goods, particularly problems relating to the durability of goods. Steps must be taken to deal with problem industries, including the introduction of industry-specific lemon laws where problems remain endemic. Consumers should also be provided with some certainty around how long they can expect their purchases to last – the expected longevity of a product is an important factor that consumers weigh up when choosing to buy one product over another, and they should be able to rely on representations from the manufacturer or retailer when making this decision.

The prohibition on unfair contract terms was one that CHOICE welcomed when it was introduced, expressing the view that these would be at the heart of the new consumer protection regime. Representing the third tranche of consumer protection laws in Australia, CHOICE felt that the critical feature of the new national consumer law would be the legal expression of fairness in markets in the form of unfair contract terms provisions. While CHOICE retains the view that the unfair contract term provisions remain important at a conceptual level, in practice they often fail to deliver the fairness promised.

This is particularly evident in the insurance market, where insurers are exempt from unfair contract terms requirements. Allowing insurance contracts to include provisions that are unfair leaves consumers open to exploitation. For example, travel insurers should not be able to deny

[1] CHOICE (2009) 'An Australian Consumer Law: Fair Markets – Confident Consumers', submission to Treasury, available at http://archive.treasury.gov.au/documents/1501/PDF/CHOICE.pdf

claims based on undiagnosed pre-existing mental health conditions. Pet insurers should not be able to include terms in their contracts that require consumers to pay a full year's premium after their pets died. However, the current exemption allows clauses like these to persist, causing substantial harm to consumers.

The product safety regime is one that serves to protect consumers, but it could be improved to encourage a more proactive approach from manufacturers and retailers. As we stated in a submission to the Productivity Commission more than ten years ago, our product safety system is too reactive[2]. It is fragmented between Federal and State and Territory regulators and other agencies, fails to provide for unforeseen hazards in many instances, and is based on a range of post-injury responses including investigations, recalls and bans, and product liability. In 2005, we called for the introduction of a general safety provision (GSP). In 2016, it is a more urgently needed reform than ever.

The proliferation of unsafe products in the market is having a direct negative impact on consumer welfare and on consumer confidence in the market - doing our laundry might lead to a major house fire, charging our mobile phones and other electronic devices could produce an electric shock or worse, cooking family meals using a high-end appliance may land us in hospital with devastating burns, eating imported frozen berries in our breakfast porridge could see us stricken with Hepatitis A[3], and unsecured button batteries in innumerate household products can maim or kill our children.

Major reform of the product safety system is urgently needed to improve its transparency, accountability and agility. A GSP would provide much clearer and immediate signals to suppliers that safety must be a paramount concern, and would place a strong pre-market onus on business to get the safety aspects of a product right.

It is also time to consider whether the current penalties available are sufficient to deter businesses from bad behaviour. In CHOICE's view, they are not nearly high enough. In April 2016, the Federal Court handed Reckitt Benckiser a penalty of $1.7 million for misleading consumers by advertising Nurofen targeted pain relief products that didn't actually target pain.

---

[2] Australian Consumers' Association (now CHOICE) (2005), 'Second Submission to the Productivity Commission: Review of the Australian Consumer Product Safety System', available at http://www.pc.gov.au/inquiries/completed/product-safety/submissions/australian_consumers_association3/subdr051.pdf

[3] Multiple locally acquired cases of Hepatitis A virus infection have been identified in people who consumed the same brand of frozen mixed berries. The source of the Hepatitis A virus is still unconfirmed, however, the berries are the only common exposure for all cases. See Department of Health for details - http://www.health.gov.au/internet/main/publishing.nsf/Content/ohp-hep-A-frozen-berry.htm

The fine handed down in this case is not close to proportionate in comparison with the profits that Reckitt Benckiser made by tricking customers into paying the premium. The ACCC estimates that the company sold 5.9 million units containing the misleading representation. At $12.42 for Nurofen Period Pain Caplets in comparison with $1.65 for generic Ibuprofen, the company made an estimated $63 million more than a company selling correctly marketed generic pain relief.

The penalties available under the ACL should be raised to match those available for cartel conduct. Had this been the case, Reckitt Benckiser would have faced a more appropriate fine of $60 million (i.e. six breaches at $10 million per breach), subject to the Court's discretion. Fines need to be proportionate and effectively deter bad conduct, and $1.1m per breach is manifestly insufficient.

Finally, it is important that we recognise that the ACL in its current form can only go so far. Rather than amend or build on existing provisions in order to deal with specific behaviours, certain practices need to be dealt with directly. This is why CHOICE is calling for a ban on unsolicited door-to-door sales, and on unfair business practices. This review presents an opportunity to consider what value unsolicited door-to-door sales calls have to consumers. CHOICE research suggests the answer to this is clear - 'very little' - and it is time for an outright ban. It is also time to do away with predatory business models that only succeed when the consumer is led into harm. This type of behaviour benefits no one except the business, it is inherently harmful, and it must be stopped.

CHOICE appreciates the opportunity to provide the following comments in response to the Australian Consumer Law Review Issues Paper (the Issues Paper). CHOICE has provided comments on a broad range of issues highlighted in the Issues Paper. Our key recommendations are highlighted above; a comprehensive list of recommendations is included in Annexure A.

Consumer policy in Australia

Australia's consumer policy framework objectives

Recognising the inequality in bargaining power between consumers and businesses, CHOICE's purpose is to work for fair, just and safe markets that meet the needs of Australian consumers. For this purpose to be achieved, consumers must be able to understand and use their rights, engage actively in markets and make informed choices that reflect their best interests and values.

The overarching objective of Australia's national consumer policy framework is to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly. This objective, and the six operational objectives that sit under it, are aligned with CHOICE's own purpose as a consumer advocate. The overarching objective of the law remains as appropriate today as it was when the law was introduced; Australia's national consumer policy framework must have improving consumer wellbeing at its heart.

The legal framework

Structure and clarity of the Australian Consumer Law

The ACL is in part a principles-based law that, when working well, can be applied in a relatively simple way by individual consumers and businesses. Although broad, the law provides certainty for both consumers and businesses in their dealings with one another. Section 18, for example, provides "simply an obligation, in trade or commerce, to not engage in misleading or deceptive conduct". The provision is comprehensive, establishing a norm of conduct for businesses rather than creating a narrow liability.

The consumer guarantees contained within the ACL are also an example of law that empowers consumers, in part because they are relatively easy to understand and apply. The guarantees require that goods and services meet certain common-sense standards – goods must be safe, durable, and fit for purpose. Services need to be delivered with due care and skill and within a

reasonable period of time. These concepts of "fitness" and "reasonableness" are broad, applying to a wide range of situations to the benefit of consumers and the marketplace.

As far as legislation goes, it is comparatively clear for lawyers, consumer advocates and policy makers. However, consumers are still likely to have problems accessing and understanding the legislation itself. A popular annotated version of the law is hundreds of pages long, and it is unlikely that most ordinary consumers would slog their way through it in order to figure out their refund rights for a faulty fridge[4]. The law should lend itself to clear, plain English explanations. CHOICE articles, guidance issued by the regulators and segments on ABC's 'The Checkout' all serve to convey the spirit of the law, and demystify it so that consumers can use it. The 2016 Consumer Survey found that 71% of respondents believe they have at least a moderate understanding of their rights, and 82% of consumers who experienced a problem took action to resolve it[5]. It seems likely that these numbers are due largely to the communication efforts of advocates and regulators, rather than due to any inherent simplicity or clarity in the law.

While the broadness of the law helps ensure consumers can seek redress in a wide range of circumstances, in some cases this leads to a lack of clarity. In particular, the issue of durability is one that many CHOICE members raise. CHOICE runs a consumer dispute resolution service for members, and lack of certainty around how long products can be expected to be covered by the consumer guarantees is a frequent issue. Products that fail very shortly after purchase, or within the period covered by extended warranties, do not tend to pose substantial difficulties for consumers seeking remedies. However, when an expensive, significant household purchase fails after several years, application of the law appears to become much more difficult for both consumers and businesses. Consumers who have purchased expensive whitegoods that fail at the seven or eight year mark, for instance, are in our experience less able to confidently negotiate a remedy with the business. Some of these consumers have chosen to pursue their right to remedies in court or tribunals, but this can be an expensive and time-consuming option.

The confusion over durability should be addressed through the provision of clear guidance on how long a product can be expected to last. The ACCC should provide overarching guidance, including a series of examples in common product categories. Manufacturers and retailers should be encouraged to provide direct representations about individual products. This information is important for consumers making purchasing decisions. While we acknowledge that this might create scope for manufacturers or retailers to mislead consumers about their consumer guarantee rights (by understating the expected lifespan), we think that these risks are

[4] Miller (2013), 'Miller's Australian Competition and Consumer Law Annotated', 35th ed., ACL section from pp1395 to 1847.
[5] Treasury (2016), 'Australian Consumer Survey', available at http://consumerlaw.gov.au/files/2016/05/Consumer-Survey-2016.pdf

no greater than those that arise from current warranty and extended warranty practices. If anything, disclosure of the intended lifespan of a product would make it easier for consumers to understand whether an extended warranty offers any additional value. It would also create a new point of differentiation between products that could encourage competition for the benefit of consumers.

Protecting consumers from unfair contract terms

In 2009, when Treasury consulted with CHOICE on the development of a nationally consistent consumer protection law, we expressed the view that the unfair contract term prohibitions would be at the heart of the new regime. Representing the third tranche of consumer protection laws in Australia, CHOICE felt that the critical feature of the new national consumer law would be the legal expression of fairness in markets in the form of unfair contract terms provisions. While CHOICE retains the view that the unfair contract term provisions remain important at a conceptual level, in practice they often fail to deliver the fairness promised.

Consumers often do not have the power to protect themselves from unfair standard form contracts which continue to dominate everyday consumer interactions. 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. Overly lengthy and complex standard form contracts remain a problem that is not being dealt with adequately by the unfair contract terms law.

The unfair contract terms law asks whether a term is unfair, not whether the contract taken as a whole is so dense and complex as to be inaccessible to ordinary consumers. While the legal framework enables courts to consider the contract as a whole, this analysis is undertaken in order to determine whether a particular term is unfair and therefore void. Lengthy, complex contracts disempower consumers – they dissuade people from even attempting to understand the terms and conditions they are signing up to. CHOICE's UK-based sister organisation, Which?, found examples of standard form contracts that are longer than some of Shakespeare's works, and the situation is no better here in Australia[6]. Do any ordinary consumers actually read these hefty terms and conditions? It seems likely that individual unfair terms are able to persist in part because they are hidden in massive, impenetrable contracts.

[6] Read, S. (5 March 2016), 'Government to crack down on small print after Which? Report reveals some T&Cs are longer than Shakespeare play', The Independent, available at http://www.independent.co.uk/money/spend-save/government-to-crack-down-on-small-print-after-which-report-reveals-some-are-longer-than-a-a6913006.html

CHOICE is concerned that, despite the introduction of the prohibition on unfair contract terms, unfairness persists - particularly in the travel and insurance sectors. In 2014, following the deregulation of the travel agent industry, CHOICE commenced a project to establish a strong consumer voice in the travel market, in part by identifying emerging consumer issues and advocating for solutions. Through this work, CHOICE has collected case studies on standard form contracts from the travel sector that highlight consumer detriment, particularly in airline, car and campervan hire and travel agent contracts.

Car and campervan hire

In March 2013 the ACCC conducted an industry review into unfair contract terms, including evaluating problematic contract terms in the car hire industry. CHOICE is particularly concerned that representations made by car hire agents at the point of sale are incorrect and are likely to mislead consumers into purchasing products they do not need. This includes the sale of insurance products designed to give consumers "peace of mind". Products of this nature have been detailed on the CHOICE website[7] and in the ABC series *The Checkout*.

Car and campervan liability reduction

A CHOICE investigation found that consumers hiring campervans are charged the full excess upfront if the individual hiring the campervan chooses not to take out the campervan company's liability reduction product. CHOICE found that the major campervan hire companies (Britz, Apollo Campers, Maui and Jucy Rentals) only allowed consumers to pay by credit card, with consumers paying a credit card surcharge.

When the bond is debited a non-refundable credit card administration fee will apply of 4.5% for American Express and Diners Club and 2% for Visa, MasterCard, Visa Debit and MasterCard Debit. (Apollo Campers).

It has now been several years since the ACCC announced it was transitioning from a cooperative compliance approach to enforcement in the industries called out in the regulator's unfair contracts review. Action must be taken immediately to eliminate remaining unfair contract terms in the car hire and campervan hire industries.

[7] CHOICE (2016). *Reducing your car hire excess*. Accessed: https://www.choice.com.au/travel/on-holidays/car-hire/articles/car-hire-excess-and-hidden-fees

Airlines

CHOICE has received a number of complaints regarding problematic contracts with Australian and international airlines.

Case study: airline no show clauses

"My son and his friend booked return tickets with a major airline to London from Sydney plus return tickets from London to Rome. They then took a bus from London to Rome so didn't use the first section of their return ticket London-Rome.

When they turned up at Rome airport to fly back to London and connect with their flight home to Sydney they were told that the tickets had been cancelled as they hadn't used the London-Rome portion. It cost them $3000 each to get flights home plus a night in Rome and they were a day late for work. They were grudgingly told that they should have read the small print in the ticket.

It seems outrageous that the airline can charge people for a seat on a flight and then cancel their subsequent flights due to a no show. My guess is that the airline subsequently rebooked those seats so made two lots of fares from the one seat. Unbelievable!!"

CHOICE received the above complaint in our *Holiday Horrors* campaign. The complaint highlights problematic "no show" suspension and termination clauses where, in particular, the business does not consider the impact on the consumer (in this case, an economic loss of over $3000 and considerable inconvenience) and where the business did not seek to suspend or terminate the service without notice or any prior communication with the consumer.

CHOICE believes that "no show" terms are unfair and should be removed from passengers contracts with the airline with which they purchased their ticket. Several European Union member states (including Austria, Germany and Spain) have declared "no show" clauses unfair in cases against European based airlines including British airways, Lufthansa and Iberia.[8]

[8] BEUC, The European Consumer Organisation (2013). *Unfair terms in air transport contracts*. Accessed: http://www.beuc.eu/publications/2013-00073-01-e.pdf

In CHOICE's view, "no show" clauses are unfair, cause significant detriment to Australian consumers, and should be prohibited in Australian air contracts. We recommend the ACCC issue guidance to airlines explaining this, and follow this with enforcement action if necessary.

Travel agents

CHOICE is concerned that travel agents are imposing restrictive contract terms not disclosed in writing, to their customers' detriment. CHOICE was made aware of the following case study where both a restrictive contract term was imposed and that contract term was not represented clearly by the agent responsible for the sale.

Case study: flights and accommodation packages and travel agents

A group of 5 families booked airline tickets through a travel agent. After the bookings were made and paid for, they were told that a condition of the tickets was that they had to book accommodation through the same agent. The bundling of flights and accommodation was not disclosed at any point of the transaction and is not referred to in written terms in correspondence or on the website.

Unfair contracts as a whole

While protections currently only allow for a review of individual unfair provisions, CHOICE is increasingly concerned about contracts that may not contain an individual unfair clause but may, for various reasons, be unfair on the whole. There are still improvements to be made to ensure that standard form contracts are transparent and clear to consumers.
CHOICE believes that the following would inherently make a standard form contract unfair for a consumer:

- Extreme length of contract
- Lack of clarity, overuse of jargon or overly complex contracts
- Contracts that are hard to access or not publically available

Length of contract

In the case of products or services with lengthy contracts, summaries of the contract should be provided. Consumers should be given a reasonable cooling-off period to give them the

opportunity to review the full contract after purchase, specifically in the case of complex and

Bundled travel insurance and air ticket

A CHOICE investigation found that airline customers were only allotted 10 minutes to read up to 14,000 words in a Product Disclosure Statement when purchasing travel insurance bundled online with their air ticket (i.e. through QANTAS, Virgin, Tigerair or Jetstar).

A customer purchasing insurance bundled with their airline ticket would need to continue the booking in the time frame in order to stop a timeout of the online booking *system.* It is not made clear to consumers whether they will be able to obtain a refund if the product does not meet their needs.

Unclear or overly complex contracts

In addition to lengthy contracts, unclear and overly complex contracts present problems for consumers when purchasing products or services. This is particularly concerning for consumers that may face language barriers, such as Australian citizens or residents from culturally and linguistically diverse communities or travellers visiting Australia entering into contracts with Australian businesses.

Unclear contracts are confusing for consumers, particularly when being asked to make quick decisions on expensive purchases. This is particularly problematic to consumers being upsold insurance products at car hire pick-up points. CHOICE found in one case that a customer with Avis would pay a base rate of $34.40 per day, and if upsold insurance at the pick-up location, would be charged an additional $24 per day.[10]

[9] Case study - CHOICE (2014). *Flying blind with opt in insurance.* Accessed: https://www.choice.com.au/about-us/media-releases/2014/november/flying-blind-with-opt-in-insurance

[10] CHOICE (2016). *Reducing your car hire excess.* Accessed: https://www.choice.com.au/travel/on-holidays/car-hire/articles/car-hire-excess-and-hidden-fees

Access to contract

Contracts should always be available in public, easily accessible locations and should be offered to be sent to the customer in writing when purchasing products or services over the phone.

Case study: Virgin Travel Bank

CHOICE received a complaint from a CHOICE member regarding the terms and conditions of Virgin's Travel Bank. The member had booked and rebooked flights through the Travel Bank, valued at over $2500. All transactions occurred over the phone and the only representation of the contract's terms and conditions was made over the phone by a customer service representative.

The customer subsequently found that the funds stored in the travel bank expired 12 months from the original booking cancellation, not subsequent bookings as she was advised, and was unable to restore the funds.

The customer had no access to the contract at this time and when the customer contacted CHOICE Help, CHOICE was unable to locate a copy of the terms and conditions online without having access to a Travel Bank account. A customer not using the online function of the Travel Bank would have limited means to access their contract with Virgin Travel Bank.

Subsequently, through further contact with Virgin, the CHOICE member has had their funds reinstated and has been given specific details regarding how and when to spend these funds.

CHOICE believes stronger penalties (including pecuniary penalties) and clear guidance from the ACCC are necessary to protect consumers from unfair contract terms. It is vital that the regulators continue to take swift action against systematic unfair contract terms, especially where industry has ignored the advice following ACCC investigations. Some industry groups have shown a resistance to requests from the regulators.[11]

Summaries of long or complex contracts should be provided to consumers, cooling-off periods should be extended to other products and services with complex contracts, such as travel

[11] ACCC (2013). *Unfair contract terms: industry review outcomes.*

insurance, and contracts should be made available in public locations (and not only to account holders of specific services or products) and easily available for access.

Insurance and Unfair Contract Terms

Insurers have a duty to act in good faith but are exempt from unfair contract terms requirements. Allowing insurance contracts to include provisions that are unfair leaves consumers open to exploitation. Recent investigations into Comminsure highlight that consumers experience extreme detriment when insurers rely on unfair terms or interpret broad terms in an unfair manner.[12]

CHOICE has concerns about harmful terms and conditions in insurance contracts that would potentially be prohibited if the unfair contract terms laws applied to these contracts. For instance, in 2015 a CHOICE investigation found that a number of providers of pet insurance included terms in their contracts that required consumers to pay a full year's premium after their pets died, if they had already made a claim. Following a consumer-driven campaign, most insurers opted to remove or amend these clauses. However, one insurer refused to amend their terms[13]. If the unfair contract terms provisions applied to these types of contracts, this type of term would arguably be prohibited.

In 2015 we also saw damaging terms and conditions in travel insurance contracts. Victoria Legal Aid brought a significant case to the Victorian Civil and Administrative Tribunal on behalf of a consumer whose travel insurance claim was denied by her insurer after she was hospitalised with depression at age 17 and cancelled an overseas school trip on advice from her doctor[14]. The consumer had no pre-existing mental health conditions when she took out the insurance, but her $4292 claim for travel expenses was denied by the insurer on the grounds of its general exclusion for mental health-related claims. Victoria Legal Aid argues that blanket exclusions on mental illness claims are not justifiable – if the prohibition on unfair contract terms applied in this instance, the business may not have been able to include the exclusion in its contract.

Standard form contracts covered by the *Insurance Contracts Act 1984* should be subject to the same protections against unfair contract terms as apply under the ACL and the ASIC Act. This could be achieved by amending section 15 of the *Insurance Contracts Act 1984* so that the

[12] See http://www.smh.com.au/interactive/2016/comminsure-exposed/mental-health/
[13] CHOICE (18 April 2016), 'Beware: fishy claws", available at https://www.choice.com.au/about-us/media-releases/2016/april/pet-insurance
[14] CHOICE (26 October 2015), 'Are travel insurers discriminating illegally?', available at https://www.choice.com.au/travel/money/travel-insurance/articles/mental-health-and-travel-insurance#legal-challenge

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.[15] This change would address two problems: the quality of insurance products sold and the poor treatment of consumers after sale.

Insurance products are incredibly complex. It is extremely difficult for consumers to assess the quality of insurance products and fully understand at the point of sale exactly what is covered. Poor value products are common across multiple insurance categories, notably in consumer credit insurance (CCI) and life insurance.

After sale, consumers can face barriers in lodging a claim and receiving a fair response in a reasonable time. There is strong evidence to show that insurance providers are engaging in unethical practices to deny or delay paying reasonable claims.[16] Unfortunately, this behaviour does not necessarily breach the current law.

A ban on unfair contract terms would provide a relatively straightforward remedy for a consumer if a business relies on an unfair contract term. It would also prevent consumer harm by encouraging businesses to draft contracts with fairness in mind.

Extending unfair contract terms provisions to insurance contracts is not a new idea. A number of Australian inquiries and reviews have recommended extending unfair contract terms protections to insurance contracts.[17] In fact, the previous government announced in 2012 that the unfair contract terms regime be extended to insurance contracts however the Bill never entered into law. A ban on unfair contract terms in insurance contracts has also been in place in the United Kingdom for a number of years, demonstrating that this is a feasible reform.[18]

Unfair business practices

Whether it is funeral insurance, credit repair businesses or payday loans, some business models are structured to deliberately take advantage of consumers' lack of knowledge or limited

[15] S 15, Insurance Contracts Act 1984 https://www.legislation.gov.au/Details/C2016C00037/Html/Text#_Toc440549001
[16] For further detail see Financial Rights Legal Centre, CHOICE and Consumer Action (2016), Joint Consumer Submission to Scrutiny of Financial Advice Inquiry: http://consumeraction.org.au/wp-content/uploads/2016/04/160422_SOFA-joint-consumer-sub_FINAL.pdf
[17] See Senate Economics Legislation Committee (2009), Report into the Trade Practices Amendment (Australian Consumer Law) Bill 2009, para 10.12-10.14 and House of Representatives Committee on Social Policy and Legal Affairs (2012), Inquiry into the operation of the insurance industry during disaster events, Recommendation 4.
[18] Unfair terms were first being capable of being challenged by individuals in the United Kingdom under the Unfair Terms in Consumer Contracts Regulations (1999) and are now banned for insurance policies under the Consumer Rights Act (2015)

alternatives. There currently exist in the market predatory businesses that can only succeed where consumers fail – they systemically take advantage of consumers who are in dire straits financially, and make a profit by putting consumers into deeper trouble. These types of businesses and business practices are not adequately captured or prevented under the current law. The Consumer Action Law Centre offers a concise and accurate description of these practices:

> This is not about scams in which a fraudster tricks consumers, takes their money, and disappears. Nor is it about rogue traders, or 'bad apples' who apply over pressure to coerce consumers into unpalatable transactions. The focus is something more subtle, yet also more calculated. These are business models whose very operating premise relies upon taking advantage of the reduced ability of the consumers with whom it deals to protect their own interests in a transaction.[19]

Short-term payday loans target people in need of fast cash. CHOICE have seen examples of consumers being required to pay back the annual equivalent of up to a staggering 742% of what they borrowed in a combination of fees and interest. Repayments are generally directly debited from the borrower's bank account on the days that work or pension payments are deposited. Steps have been taken to deal with the problems that are rife within the payday loan industry, with regulations introduced in March 2013, banning payday loans of up to $2000 that have to be repaid in 15 days or less. Fees are also currently capped at 20% of the amount of the loan and interest at 4% per month. The new regulations have put the brakes on effective interest rates as high as the 742% we previously saw, but rates remain high - 240% is not uncommon[20]. The government's restrictions are a step in the right direction, but payday lenders are doing everything they can to keep the high fees and interest rolling in. Many payday loan businesses have simply moved to 16-day loans, only marginally less damaging than 15-day ones. A reform that deals with the underlying unfairness present in the industry is needed, rather than simply continuing to try to tackle specific instances of predatory behaviour as it arises.

Unfair business practices are not limited to the payday loan industry. The Consumer Action Law Centre notes a number of predatory business models and industries, including credit repair, for-profit debt negotiators, private car parks, car napping and in-home sales[21]. CHOICE supports

---

[19] Consumer Action Law Centre (2015), 'Discussion Paper: Unfair trading and Australia's consumer protection laws', available at http://consumeraction.org.au/unfair-trading-discussion-paper/

[20] CHOICE (1 July 2014), 'Payday lenders still cashing in with sky-high fees', available at https://www.choice.com.au/money/credit-cards-and-loans/personal-loans/articles/payday-lenders

[21] Consumer Action Law Centre (2015), 'Discussion Paper: Unfair trading and Australia's consumer protection laws', available at http://consumeraction.org.au/unfair-trading-discussion-paper/

the introduction of a general prohibition against unfair business practices. Expanding the ACL to prohibit unfair practices will bring Australian law in line with the European Union and the United States.[22]

A legislative provision that specifically deals with unfair practices will act as a safety net for consumers, preventing business models that take advantage of vulnerable consumers from thriving. Reforming the ACL to prohibit unfair conduct also brings the law closer to a common understanding of business practices. 'Unconscionable conduct' is a legal term that is difficult to explain to consumers who should have a good working knowledge of a law that covers everyday interactions with businesses. A ban on unfair commercial practices sends a clear signal to consumers and businesses about the purpose and intent of the law.

The consumer guarantees

Lemon laws

As the Issues Paper acknowledges, consumers have rights of redress under the consumer guarantees provisions when purchasing motor vehicles. Anecdotal stories and media reports suggest that enforcing these rights to remedies can be difficult for consumers, though. CHOICE conducted research into the prevalence of lemon cars and consumers' experiences in getting problems fixed, in order to gain an understanding of whether the existing consumer protection laws are working to help consumers or not[23]. CHOICE's research was limited to consumer experiences with new cars, and problems experienced in the first five years of ownership.

Our survey results found that two thirds of new car owners faced problems with their cars, with 21% of survey respondents experiencing a series of different problems. The majority of these consumers were able to resolve their problems. A large proportion of consumers who dealt with problems with their new cars experienced these issues in the first few years, and found that they were covered by the standard three-year/100,000km warranty. More than half of car owners with issues had their cars repaired, and one in five people were provided with a replacement.

However, getting a remedy was generally a long and difficult process for consumers, taking an average of 31 hours at a cost of $1295. Consumers said they found it difficult to convince

[22] Discussion paper, page 35.
[23] CHOICE (2016), 'Turning lemons into lemonade – consumer experiences in the new car market', available at https://www.choice.com.au/transport/cars/general/articles/lemon-cars-and-consumer-law

dealers to acknowledge that there is a problem with their new cars, with some reporting that dealers appeared to deliberately avoid acknowledging problems existed until after dealer warranty periods expired. Given this, it seems likely that the rate of problem resolution is high not because the car industry is proactively compliant with the ACL, but rather because consumers are resolute in seeking remedies – a new car is one of the most significant purchases a consumer will make.

While the majority of consumers were eventually able to access a remedy, 15% of people were not able to get their problem resolved. Given that the problems experienced should have been covered by the consumer guarantees, this is concerning. There is a range of potential options for improving compliance and consumer experiences in the car industry, some of which are discussed in the Issues Paper.

The Issues Paper notes that a 'lemon' law for motor vehicles could impose requirements for remedies above and beyond the general remedies for goods, and could also clarify the responsibilities of suppliers and manufacturers. CHOICE's research demonstrates that there is an issue in the industry – businesses do not provide prompt remedies to consumers experiencing problems with their cars, and the extent and frequency of problems is often hidden from the public. The consumer guarantees themselves are well-written laws that empower consumers seeking remedies in most industries, but as our research shows the motor vehicle industry is a special case.

We believe the problems in this sector are so prevalent, and the costs to consumers are so significant, as to require a strong and deliberate attempt by regulators to drive compliance with the law. CHOICE is therefore calling 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. We have reason to believe that the ACL as is should work effectively for consumers in this space, but a number of factors are hampering the effectiveness of the law. There is currently a lack of clarity regarding whether a series of minor failures constitutes a major failure, and this is coupled with a deliberate lack of transparency in dispute resolution bolstered by the use of confidentiality agreements. The taskforce, in order to alleviate these problems, should:

- Develop guidance confirming that a series of minor defects can constitute a major defect. This could be released by the ACL regulators, or incorporated into the legislation.
- 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.

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 approach suggested in the Issues Paper, of establishing an independent industry-based dispute resolution process could also be explored as part of this process. In CHOICE's experience, external dispute resolution schemes in other industries can be highly effective in achieving problem resolution, as long as they are established with adequate funding, strong powers and effective governance mechanisms that incorporate consumer representation. 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.

Confidentiality agreements

A particularly concerning finding from the survey discussed above is that 16% of new car owners who experienced problems were asked to sign confidentiality agreements in order to receive a repair or refund. These agreements prevent consumers from discussing the problem with the media, consumer regulators, advocates and other consumers.

The power imbalance between car dealers and manufacturers and consumers is already making the process of seeking a remedy more difficult than it should be for consumers. Denying them the right to talk about their problems and share knowledge with regulators, advocates and other consumers exacerbates this.

A transparent, online car dispute register like the one described above would help alleviate the negative impacts of non-disclosure agreements in the car industry, but CHOICE has found that the use of these agreements is more widespread than this industry alone. CHOICE's recent Thermomix safety investigation uncovered a number of instances where injured consumers were asked to sign confidentiality agreements in order to access remedies. These agreements sought to restrict consumers from speaking negatively about Thermomix, or discussing the details of their claims. Given some of these consumers have been left with lasting scarring from burns, it is an affront that the company is trying to prevent them from responding to questions about their injuries, particularly given their consumer guarantee rights should still apply. The ACL should prohibit the use of non-disclosure agreements in situations where the consumer had an existing right to the same or greater remedies under the consumer guarantees regime.

Business awareness of consumer guarantees

In late 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. Under the ACL, the answer would be yes. But 85% of the salespeople we talked to at that time got it wrong.

CHOICE repeated its shadow shop in August 2015 among 109 Harvey Norman, The Good Guys and JB Hi-Fi stores and the results were better. Some sales staff we talked to had a good understand of the ACL. In the scenario we presented to them some staff could explain the concept of a major failure, that ACL rights extended beyond the manufacturers warranty and that both the retailer and the manufacturer had an obligation to deal with the consumer guarantee failure.

But 48% of sales staff failed to give our shadow shopper accurate information about their warranty rights and many responses were just plain wrong. Perhaps most surprising is that the stores that had previously faced legal action from the ACCC and paid fines for misleading consumers about warranties actually performed much worse than the average, with a 67% failure rate.

CHOICE 2015 shadow shop: statements made by sales staff

“If the TV breaks outside of the manufacturer's warranty you're on your own unless you have an extended warranty.”

“Don’t bring it back to us. Contact the manufacturer.”

“Legally, after one year we can't do anything.”

“We have an understanding with the ACCC as to "reasonable" period of time.”

In our CHOICE Help casework we continue to find many major businesses, as well as large numbers of small businesses, who simply don’t understand their basic consumer guarantee obligations under the ACL. It’s extremely difficult for CHOICE members to advocate for their consumer rights when the businesses they trade with are wilfully ignorant of them.

Other consumer rights – gift cards

The ACL provides consumers with a range of rights when entering into a consumer transaction, including guidance around lay-by agreements, warranties, proof of transaction and itemised bills, but consumers are not adequately protected when buying gift cards.

CHOICE acknowledges that the growth of gift cards has given consumers greater choice. While a stigma was once attached to cash and cash-like gifts (e.g. gift cards)[24], gift cards now represent over $2.5 billion in the Australian economy each year.

'Closed loop' gift cards are available at almost all of Australia's major retailers. 'Open loop' gift cards (VISA and MasterCard branded pre-paid) have been growing in popularity and are available at supermarkets, online and at other major retailers.

Increasingly, we are seeing consumer detriment in the purchase, and use of, gift cards. Policies of gift cards vary card by card and can often be difficult for consumers to navigate. NSW Fair Trading conducted an audit of gift cards in the NSW economy in 2012 (Operation Gift Card[25]) and CHOICE conducted research into consumer uses and experiences of gift cards in 2014[26] where one in three survey respondents said they had a gift card expire before it was fully used. Investigations by both CHOICE and NSW Fair Trading identified the following problems with gift cards in the Australian market:

1. Expiry dates: expiry can range anywhere from 3 to 24 months. Sometimes expiry dates are not clearly detailed on the gift card.
2. Statement of value on card: value not written on card or not clearly stated.
3. Minimum spend: some cards impose a minimum spend or a "must be spent in one transaction" policy. This was not always clear to the customer.
4. Replacement of lost or stolen cards: differed from retailer to retailer, and was sometimes can be at the discretion of retail staff.
5. Redeeming unused funds: ability to withdraw unused funds is inconsistent across retailers.

---

[24] Waldfogel, J (1993). The Deadweight Loss of Christmas. *The American Economic Review* (85:5) pp. 1328-1336.
[25] NSW Fair Trading (2012), *Operation Gift Card Fact Sheet*. Accessed:: http://www.fairtrading.nsw.gov.au/pdfs/About_us/Operation_gift_card_results.pdf
[26] CHOICE (2014). *One in three gift cards expires before it's fully used*. Accessed: https://www.choice.com.au/shopping/shopping-for-special-occasions/christmas-birthdays-and-gifts/articles/best-and-worst-gift-cards

6. Gift cards issued as a replacement for cash in the return of products: some stores may issue gift cards when a consumer returns a product, even if that consumer paid with cash or card.

There is no real justification for including expiry dates on gift cards. Stores are paid up-front for the gift card – imposing an expiry date is unreasonable, and places consumers at significant disadvantage. Gift card sellers should be prohibited from setting expiry dates for cards. Consumers could also benefit from clear and simple instruction on both gift card packaging and in their interactions with retail staff when purchasing or using a card. Gift card instructions should be given in writing and should be transparent and clear to the consumer, similar to lay-by and warranty requirements. Such measures would ensure that consumers were aware of the specific conditions applied to the gift card upon purchase.

CHOICE also examined the rights of gift card holders in detail in a submission to the Senate's inquiry into the causes and consequences of the collapse of listed retailers[27], recommending that further protections be put in place for consumers using gift cards when a listed retailer collapses. Such rights are currently at the discretion of administrators.

[27] Australian Parliament House (2016). Causes and consequences of the collapse of listed retailers in Australia. Accessed: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Dick_Smith

Case study: Dick Smith

CHOICE member Peter returned a faulty item to a Dick Smith store in December 2015 and was issued a gift card in lieu of a refund, to the value of approximately $50:

"I returned a faulty computer mouse (still under warranty) to Dick Smith Electronics at approximately 5 December, 2015. They would not give me a refund, but instead issued a Dick Smith's gift card to the equivalent value.

Since 5 January 2016, as Dick Smith has gone into liquidation, they do not now honour their gift cards. Thus, I have no way to recoup the loss on the faulty item. Frustratingly, they now promote through their email promotions that any item bought from their stores post 5 January, 2016 and is found faulty, they will give a full refund.

I returned to Dick Smith store where item was bought. I explained the situation to the sales staff member. He would not give a refund. He took my telephone details. Never heard anything back."

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.

Protecting consumers from unsafe products

Australian consumers have recently experienced an intense period of exposure to unsafe products. Product recalls are likely to have impacted all of us, households and businesses alike, in the everyday activities that we typically assume will not harm us.

Unsafe products have meant that doing our laundry might lead to a major house fire, charging our mobile phones and other electronic devices could produce an electric shock (or worse), cooking family meals using a high-end appliance may land us in hospital with devastating burns and eating imported frozen berries in our breakfast porridge could see us stricken with Hepatitis A. It's not just the ubiquity of the recalls, but also the scale that is new. The recall of one million vehicle airbags means that, perversely, the very safety features we rely on to protect us while

driving our cars could actually cause serious injury or death. The recall of 4000km of Infinity cabling means the wiring inside our homes and businesses could be putting lives at risk.

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

The product safety system is not as good as it should be. There is little-to-no publicly available information about product-related injuries, including the "near misses" that don't end up in a hospital admission and don't have to be reported to regulators. The voluntary recall process relies heavily on the goodwill of businesses working to ensure that customers hear their messages. And more often than not, the public is in the dark as to whether or not a recall has actually worked. Longer-term systemic change in the form of implementing and updating mandatory safety standards can move at a glacial pace, leaving infants, in particular, at risk of unsafe products.

We expect products to be safe but there is no general obligation for suppliers to make goods safe.

CHOICE is calling for major reform of the product safety system to improve its transparency, accountability and agility. Alongside law reform, better use of consumer-friendly technology and more sustainable funding of product safety regulators must feature in the future product safety system.

Mandatory standards

CHOICE is uniquely positioned to provide advice on the efficiency and effectiveness of the system of mandatory standards. CHOICE experts have participated in the development of numerous Australian Standards (including cots for household use, portable cots, strollers, babies' dummies, swimming and flotation aids and toy standards), many of which form the basis of mandatory standards issued under the Australian Consumer Law. We also have a deep appreciation of the effectiveness of standards as a result of our product testing work, which regularly conducts commercial and consumer testing against mandatory and voluntary standards in our National Association of Testing Authorities (NATA) accredited laboratories.

CHOICE is strongly supportive of the need for mandatory safety standards. However we believe improvements could be made to the process by which existing mandatory standards are

reviewed, the way in which consideration of new mandatory standards takes place and the compliance and enforcement of mandatory standards.

Updating mandatory standards

The Issues Paper refers to the challenge of keeping the mandatory safety standards for toys up-to-date given the high rate of changes to the underlying voluntary standard. CHOICE points out that the mandatory standard for strollers (Consumer Protection Notice No 8 of 2007), cots for household use (Consumer Protection Notice No 6 of 2005) and folding cots (Consumer Protection Notice 4 of 2008) reference superseded Australian Standards.[28] This practice not only causes confusion for manufacturers, retailers and consumers, it also means that opportunities to provide better safety standards are being missed.

In 2016 CHOICE conducted consumer testing on a range of strollers. We test to the most current standard, which is a voluntary one. We found multiple instances of non-compliance with aspects of the harness configuration clauses that were developed to reduce risks of strangulation of infants.[29] These clauses have yet to be incorporated into the mandatory standard. The result was that strollers that met the mandatory standard nevertheless failed to meet the voluntary standard against which CHOICE assesses product safety, and therefore failed to meet CHOICE's definition of a safe product for infants. This confusing situation is unacceptable.

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

The Issues Paper suggests that it might be possible to automatically update mandatory standards. CHOICE is concerned that this may not be possible as mandatory standards for consumer goods usually refer to a very limited number of key clauses in an existing standard plus any additional requirements. Additional funding of regulatory agencies may be needed to ensure that mandatory standards are kept up to date.

Developing new mandatory standards

[28] In the case of strollers, the Consumer Protection Notice references the superseded AS/NZS 2088:2000 when the current standard is the 2013 version. In the case of cots for household use, the Consumer Protection Notice references AS/NZS 2172:2003, when again the updated standard is the 2013 version. The folding cot standard references AS/NZS2195:1999 and the latest is the 2010 version.
[29] Clauses contained in 8.8.1 of the *Australian/New Zealand Standard Prams and strollers – Safety requirements 2088:2013*)

There will be instances when the voluntary standard process fails to deliver timely, targeted standards. CHOICE has serious concerns about the absence of any mandatory or voluntary safety standards for bassinets, safety gates, change tables and bedside sleepers. While these were identified by Standards Australia as products of concern in 2014, it appears that there has not been sufficient interest in pursuing the resource-intensive standard development process for these products. We are aware of deaths related to these products overseas and other jurisdictions have already moved to implement standards for these products.[30]

When the Standards Australia process fails, the ACCC should be sufficiently motivated and resourced to proactively address known safety issues. CHOICE believes that the ACCC could adopt mandatory standards for these products using well-defined standards already in place for similar products in Australia, as well as drawing on standards developed for the same product categories overseas.

In the product categories identified above (bassinets, safety gates, change tables and bedside sleepers), we believe there is already a compelling case to demonstrate that a standard is "reasonably necessary to prevent or reduce risk of injury to any person". In addition, we are strongly of the view that the existing Australian Standard for cot mattress firmness (AS/NZS 8811.1) should be adopted as a mandatory standard. This Australian Standard was developed to address the risk of Sudden Infant Death Syndrome (SIDS) and CHOICE's most recent test found widespread non-compliance with the standard. It would be disturbing if Australians had to wait for an infant's death on our shores before these products could be made to be safe.

CHOICE is also working with The Parenthood to address the ongoing risks posed by button batteries contained in everyday household products. We believe it is necessary to introduce a mandatory standard for household goods containing button batteries (also known as disc or coin batteries). The standard should require these goods to have a secure battery compartment, to be sold in child-resistant packaging with button batteries secured within the packaging and to be accompanied by clear safety warnings.

Compliance and enforcement of mandatory standards

We are aware of a range of activities undertaken in the marketplace to monitor compliance with mandatory standards. However, we are concerned that compliance with mandatory standards remains a problem and that ACL regulators may not be sufficiently funded to undertake the necessary compliance work..

[30] See for example http://www.chicagotribune.com/news/nationworld/chi-bassinetaug28-story.html and http://www.dailymail.co.uk/news/article-3052438/Coroner-calls-urgent-action-newborn-baby-died-bed.html

For example, results from our NATA accredited testing facility have found that the compliance rate with the cot mandatory standard is in the range of just 50 – 70% of all cots tested. When we approach manufacturers with our test results, a common response is to produce a contradictory compliant test result from a different (usually internationally based) testing facility. CHOICE believes that testing is best carried out by facilities that have a close understanding of the standard maker's intentions and local conditions.

Another concern is that Australian businesses are struggling to understand their obligations under the mandatory standards system. There is currently no one-stop-shop for small businesses to get advice on how to comply with product safety requirements. Understanding the applicability of mandatory and voluntary standards can be extremely difficult. Each year CHOICE receives hundreds of requests from businesses to explain their product safety obligations, usually from small businesses looking to local small-scale manufacturing or importation of children's products. Businesses we speak to are often confused and unsure about which agency can give them the information they want and need, and why practical advice on compliance cannot be given by particular agencies.

CHOICE is supportive of additional support being available to responsible businesses looking to do the right thing for Australian consumers.

Lastly, the Issues Paper asks whether it may be appropriate to allow waivers to mandatory standards in certain (unspecified) circumstances. CHOICE would not support businesses being granted waivers from mandatory standards. Adopting such an approach risks undermining consumer trust in the product safety system and adds an unnecessary layer of regulatory cost, complexity and confusion.

Product Recalls

Since the Australian Consumer Law came into force on 1 January 2011 the number of product recalls has been steadily increasing from 420 recalls in 2011/12 to 596 recalls in 2014/15.

The overwhelming majority of product recalls during this time have been voluntary recalls, with just a handful of recalls conducted under the mandatory recall provisions of the ACL. Section 128 of the ACL deals with the notification requirements of a voluntary recall. It's slim. For businesses that choose to conduct a voluntary recall, there's not a lot that they are required to do. They have two days to notify the Commonwealth Minister that they are conducting a voluntary recall (and 10 days to notify the Minister if they supplied the goods overseas). The

notice that those businesses provide at that time has to outline facts including the goods subject to the recall and the nature of the safety defect.

If the responsible Minister forms the view that a business has not taken satisfactory action to prevent goods causing injury to any person, then the business may be subject to a mandatory recall, which carries a higher regulatory burden. However, given the nature of recalls that have been the subject of a mandatory recall, it would have to be a fairly spectacular, extraordinary or very public failure to attract Ministerial intervention.

CHOICE contends that Australians deserve a greater level of protection from recalled unsafe products.

Promotion of recalls

CHOICE is calling for a new legislative obligation on businesses conducting voluntary recalls to use all reasonable means available to communicate to the affected consumer community about the product safety issue and remedies available. A benefit of this approach is that it would incentivise businesses to build tailored communication channels with customers, including for example retaining contact details.

This approach should put an end to the practice of simply publishing a newspaper advertisement as a sufficient basis of communicating to consumers about product recalls. CHOICE research has found that people expect to find out about products in a far wider range of communications.

Where would you expect to see or hear about recall notifications or advertisements?

Newspaper/news website	61%
TV news	60%
In stores where the product was sold	52%
Email/letter from the manufacturer/ retailer	50%
Manufacturer website	47%
TV ads	47%
Retailer website	43%
Relevant government websites (e.g. Australian Competition and Consumer Commission, Food Standards Australia New Zealand)	43%

TV shows (e.g. current affairs)	42%
Radio news	42%
Radio ads	35%
Manufacturer social media (e.g. Facebook, Twitter)	34%
Retailer social media (e.g. Facebook, Twitter)	32%
Friends/family	20%
Don't know	7%
Other	1%

Source: CHOICE Consumer Pulse survey; nationally representative survey of 1087 people, conducted 15 – 21 September 2015

Our experience with the Samsung washing machine recall was that there were channels that were available to Samsung to tell a more compelling story of its recall but these avenues were not utilised. CHOICE's actions to promote the recall, including video footage of crushing faulty machines, generated huge public attention and a spike in people acting on the recall, as did the ACCC's public interventions. We also offered to work with Samsung to simulate a machine sparking and starting a house fire. These are the sorts of measures that are necessary to get public attention.

A fundamental conflict of interest can lie at the heart of a recall, whereby businesses are seeking to protect their brand reputation ahead of advertising their unsafe products. Where this behaviour is evident, mandatory recalls should be supported by a power for the ACCC to require the funding of independent, non-conflicted third parties to promote the recall.

Reporting recall outcomes

The national product safety website (www.recalls.gov.au) has an exhaustive list of recalls that have been conducted in recent years. It is reasonable to ask which of these recalls have worked, including which recalls worked better than others and why? But these are difficult questions to answer because there simply isn't sufficient publicly available information available about product recalls.

CHOICE is calling for a new legislative obligation on the businesses conducting voluntary recalls to publish regular results about the outcomes of any active product recall.

We believe consumers have a right to know whether what suppliers are doing is working well enough to remove unsafe products from the marketplace. This additional information would

facilitate a more meaningful public debate about when a mandatory recall should be triggered. CHOICE's experience in the Samsung washing machine recall was that it can help to sustain public interest in a recall with new and relevant information becoming available (for example geographic differences in return rates or total volume of goods returned, replaced or refunded).

Recall remedies

The Issues Paper refers to the specific challenge of how product recalls interact with consumer guarantee provisions of the Australian Consumer Law.

In the case of the Samsung washing machine recall, CHOICE welcomed the ACCC intervention to assure consumers that the failure amounted to a "major safety failure" and that consequently the right to choose between refund, repair or replacement sat with the owner of the goods.[31] But that advice was issued 2 years and 4 months after the original recall notice was published on 30 April 2013. During that time, Samsung routinely denied customers their right to a refund.

In our current dealings with the Thermomix sealing ring recall, we have struggled to ascertain whether the safety hazard constitutes a major safety failure. Our recently published Mass Incident Report identified 83 problems a TM31 Thermomix machine, of which 45 reported being injured, with 18 of the injured saying they received medical treatment. The manufacturer is not offering a refund as part of its recall advice, despite the pattern of product failure (even after using the sealing ring "fix") and the fact that the device cannot be used in ways represented at the point of sale, i.e. a device that can prepare food simultaneously at high speeds and at high temperatures. Due to the manufacturer's practice of settling disputes with non-disclosure clauses we do not believe that case law is likely to settle this matter.

It is difficult to determine how many other recalls may have misled consumers about their refund rights.

CHOICE supports a solution that would require all voluntary and mandatory recalls to state whether or not the safety failing constitutes a major safety failure. The ACCC would need to issue guidance to assist manufacturers and retailers to make this judgment. Legislation should empower responsible regulators to reject the safety notice where the major safety 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.

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

Specialist agencies and recalls

The Issues Paper discusses the interplay between the specialist safety regulators and the ACL regulators and outlines some of the recent steps that have been taken to improve cooperation and communication between these agencies. CHOICE is of the view that more work needs to be done align the consumer experience of product safety across specialist and generalist safety regimes.

Access to information

One glaring area where Australia's product safety scheme is well behind international developments is in the area of publicly available information about product safety injuries and incidents.

Confidentiality of mandatory reports

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

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

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

Reports from the public

In the United States, the Consumer Safety Protection Bureau publishes a public portal and a publicly accessible, searchable database of consumer product incident reports. CHOICE would like to see a similar model adopted in Australia.

Through the www.SaferProducts.gov website, consumers, child service providers, health care professionals, government officials and public safety entities can submit reports of harm (known as "Reports") involving consumer products. Manufacturers, importers and private labellers identified in Reports receive a copy of the Report, and have the opportunity to comment on them. Completed Reports and manufacturer comments are then published online at www.SaferProducts.gov for anyone to search. There are processes in place to deal with materially inaccurate information and confidentiality requests.

CHOICE receives regular reports from our members about product safety issues. Despite referring our members to the relevant regulatory agency, we know that our members are very unlikely to receive a comprehensive response to the issue they raise. These are examples of product safety incidents reported by CHOICE members:

> *I live in Victoria and would like to know who to report a problem with an electrical appliance. We have an Asko clothes washing machine, while in use my wife noticed a strange noise and smell, luckily she turned it off at the power point. Our son is an electrician and took the rear cover off and turned it back on at the power point, the electrical motor had burnt out and was arcing to the motor mount. Which could have potentially started a fire or become a quite serious shock hazard if the frame was to become live, luckily my wife turned it off. The circuit breaker did not trip. I have a video of the power arcing out (which shows how frightening it was) that I can send if you would like to see it.*
> **********
>
> *I am writing to inform you that I suffered a catastrophic failure of the Tagabike while riding it across the very busy intersection of Cleveland Street and Regent Street Redfern this morning around 9.15 am. The front and rear parts of the tricycle separated completely after the link hinge cracked apart causing me to sustain injuries as a result of falling onto the road between the collapsed parts. (Images and doctors notes available.) I had just dropped my daughter to preschool fortunately she was not on the tricycle at the time of the incident nor was her younger brother. Witnesses kindly offered assistance in the wake of the accident.*
> **********
>
> *The tips of my Bernafon hearing aid have come off in my ear a few times which can only be removed by a doctor. It is quite distressing. The company I bought them from has offered to make a mould to stop it from happening. But I'm not sure if it will work. I'm worried that it will happen to others.*

****

A public, searchable system like the www.SaferProducts.gov is a transparent way of seeing how businesses respond to legitimate concerns from members of the public, such as those raised above by CHOICE members.

General Safety Provision

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

A GSP would seek to address the largely reactive nature of the current regulatory system by placing greater responsibility on businesses to ensure that only safe products are available in the market.

A proactive requirement for products to be safe, accompanied by appropriate penalties, also aligns with consumer expectations of the marketplace. There is a persistent view in the community that products are required to be safe before they can be sold. Yet no such general obligation currently exists under the Australian Consumer Law.

We suggest the abnormally high rate of product recalls in Australia (see table below) may, in part, be driven by the absence of a GSP. One advantage of a GSP is that it can provide uniform and comprehensive cover of a wide range of consumer products, with associated penalties, and is therefore likely to reduce the incidence of unsafe products appearing on the marketplace. If a GSP is likely to drive down the incident of product recalls - and we believe it is likely to do that - then a GSP will deliver significant benefits for businesses, consumers and the community.

Consumer product recalls comparison

	Consumer goods	Motor vehicles	Food	Pharmaceuticals	**TOTAL**
Australia 2013/14	267	158	64	7	**496**
Australia 2014/15	306	230	54	6	**596**

UK 2013/14*	141	30	56	18	**245**
UK 2014/15*	179	39	84	8	**310**

Source: ACCC Annual Reports; "UK product recalls jump by 26% to a new high" available at www.rpc.co.uk accessed 11/5/16.

*Covers the year 1 November – 31 October based on information from the Trading Standards Institute, the Food Standards Agency, RAPEX ad the Medicines and Healthcare products regulatory agency.

If a GSP is framed similarly to European jurisdictions then businesses would be provided with a clear hierarchy of references to determine compliance. A manufacturer may, depending upon how the law is framed, be able to demonstrate compliance with a European or American safety standard, in the absence of a specific Australian Standard, as a means to manage their risk in providing the goods to the marketplace and as a subsequent defence should an injury occur. For businesses supplying goods that are also supplied into the European or North American markets this may well produce higher certainty and lower costs.

The GSP would not necessary entail government agencies undertaking more marketplace surveillance or enforcement than they do now. Enforcement practices should ensure that businesses are increasingly aware of the risks of failure to provide safe goods. Any goods causing injuries will leave the supplier open to prosecution (whether a mandatory standard exists or not) as opposed to only civil action for damages in the case currently where no mandatory standard exists.

Other issues

Unfair commercial practices

CHOICE believes that the existing unfair practices laws are adequate and should not be removed. Consideration should be given to expanding the list of unfair practices prohibited by law (see further comments on unsolicited sales). The Issues Paper suggests that the need for protections against unsolicited provision of credit and debit cards may no longer be required.[32] CHOICE strongly disagrees.

Currently section 12DL of the ASIC Act prevents a person from sending out a credit or debit card unless it has been requested by the consumer. The credit card market is still plagued by aggressive sales techniques with providers pushing features like rewards points that offer little actual value to consumers. If s12DL is removed, it is highly likely that one of the over 200 credit

[32] Issues Paper, page 20.

card providers in Australia will attempt this previously lucrative marketing technique. Given that the Federal Government is currently looking at interventions to improve credit card marketing practices, acknowledging the impact of poor practices on consumers, it is counterintuitive to consider removing a base-line protection for consumers against unfair credit card marketing.[33] Current protections against specific unfair practices should remain in the ACL and the ASIC Act.

Administration and enforcement

Penalties

CHOICE feels that the general protections against misleading and deceptive conduct and unconscionable conduct are operating effectively, working to address risks of harm to consumers without imposing disproportionate costs on business. CHOICE's annual Shonky Awards, which highlight unreliable or dishonest businesses and products, have in a number of instances led to successful legal actions against awardees[34]. These laws are operating well to protect consumers. The same can be said of the Part 3.1 Division 1 specific protections. However, the lack of penalties available for breach of misleading or deceptive conduct or unfair contract terms is an issue.

Penalties are capped at a maximum of $1.1 million per breach when a company breaches any of the ACL's specific prohibited practices, for example false and misleading representations[35]. Conversely, penalties can be as high as $10 million per breach if a company breaches the cartel provisions of the *Competition and Consumer Act 2010*. Injunctions, publication orders, damages and remedial orders are all available for a breach of the prohibition against misleading and deceptive conduct (section 18), but no fines are available for a breach of this section.

In April 2016, the Federal Court handed Reckitt Benckiser a penalty of $1.7 million for misleading consumers by advertising Nurofen targeted pain relief products that didn't actually target pain. While the company claimed that each product was formulated to treat a particular area of pain, in fact they all contained the same active ingredient of ibuprofen lysine 342mg.

---

[33] See http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2016/Credit%20card%20reforms/Key%20Documents/PDF/Credit_card_reforms_CP.ashx

[34] For example, LG fridges and Nurofen 2010 Shonkys, 'bling' dummies, Go4Green EnergySmart and Sensaslim 2011 Shonkys, EA Games, Eco Eggs and Energy Australia 2013 Shonkys.

[35] *Competition and Consumer Act 2010* (Cth), Schedule 2 Australian Consumer Law, section 224.

The company engaged in this conduct for years, with CHOICE first raising concerns about this in 2010.[36]

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

If the existing penalties available under the ACL were the same as those available for cartel conduct, Reckitt Benckiser would have faced a more appropriate fine of $60 million (i.e. six breaches at $10 million per breach). A fine at this level would be a more proportionate punishment and a far greater deterrent to other companies considering engaging in similar conduct.

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

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

The total penalties for false and misleading free range egg representations have reached $950,000. CHOICE research demonstrates that consumers are willing to pay a premium for free range eggs, with 65% of Australians purchasing eggs labelled 'free range' in 2014.[37] This research also found that a minimum of 213 million eggs sold in Australia in 2014 did not meet consumers' expectations of 'free range', which include that hens actually go outside regularly and have sufficient room to move when they do so.[38] Consumers paid, on average, $0.99 per hundred grams for eggs labelled free range and $0.71 for barn laid eggs in 2014. Assuming an

[36] CHOICE (2010), Shonky Awards, available via http://classic.choice.com.au/shonkyaward/hall-of-shame/shonkys-2010/shonky-2010-nurofen.aspx
[37] CHOICE (2015), 'Free range eggs: making the claim meaningful'
[38] Based on the market share of producers with an outdoor stocking density of 10,000 birds per hectare, which only 2% of respondents to CHOICE's 2014 survey indicated met their expectations of 'free-range' conditions.

average egg weighs 50g, companies that fail to meet consumer expectations of 'free range' were able to earn additional revenue of $29.8 million in 2014, in comparison to what they would have made had the eggs been sold as barn laid. In this situation, it appears that overall the financial benefits associated with misrepresenting eggs as 'free range' continue to outweigh the risks of being taken to court and issued with a penalty.

Finally, it is CHOICE's view that breaches of section 18 and of the unfair contract terms provisions should result in fines, similar to breaches of the specific protections found in Part 3-1 of the ACL. Section 18, the prohibition against misleading and deceptive conduct, is a broad provision. As commenters have noted, it establishes a norm of conduct, rather than creating liability[39]. However, this does not provide sufficient justification for such conduct to be exempt from financial penalty. Misleading and deceptive conduct harms consumers and their confidence in the market in exactly the same way that false and misleading representations do. This conduct should be punishable by fines in the same way that a breach of the specific protections, or the prohibition against unconscionable conduct, is. Consideration should also be given to attaching pecuniary penalties to the unfair contract terms provisions. Currently, in order to secure penalties for including unfair contract terms in standard form contracts, the regulator must argue that the unfair terms also constitute a breach of the specific protections[40]. It would be preferable, and send a stronger message regarding the necessity for fair markets, if this conduct attracted fines outright.

Super complaints

Consumer advocacy groups play a crucial role bringing the concerns of Australians to the attention of regulators and helping shine a light on harmful products and practices. In a recent review of the national consumer regulator, the ACCC, the Australian National Audit Office recommended that the Commission improve its focus on trends and patterns in market intelligence, identifying high levels of widespread consumer detriment[41].

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

---

[39] Miller R. (2013), 'Miller's Australian Competition and Consumer Law annotated', 25th edition, p1443.
[40] ACCC v Chrisco Hampers Australia Limited [2015] FCA 1204.
[41] Australian National Audit Office (2016), *Managing Compliance with Fair Trading Obligations*, http://www.anao.gov.au/Publications/Audit-Reports/2015-2016/Managing-Compliance-with-Fair-Trading-Obligations

A super complaints process in the United Kingdom has given consumer groups the ability to highlight issues of concern and provided regulators with valuable insights into emerging and systemic issues, with examples ranging from energy billing practices and credit card interest rate calculations to care homes and compensation for train delays. In the UK model, only consumer organisations designated by the Secretary of State can make a super complaint with regulators obliged to respond in writing within 90 days. Responses must note how regulators intend to deal with the issue which may include enforcement action; launching a market study; making a market investigation reference; referral to a relevant industry specific regulator; or making a finding (and providing reasons) that no further action is warranted[42]. After another 90 days, the government is then required to publicly respond to the regulator.

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

Access to remedies

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

[42] Office of Fair Trading, *Super-complaints: Guidance for* designated consumer bodies, July 2003 at 9.

Differences in fees across States and Territories

State/Territory	Tribunal or Court	Filing Fee	Application Type
Australian Capital Territory	ACT Civil and Administrative Tribunal	$68	When the amount in dispute is $2000 or less.
New South Wales	NSW Civil and Administrative Tribunal	$47	If the amount claimed is $10,000 or less.
Northern Territory	NT Magistrates Court	$65	Small claims – statement of claim.
Queensland	QLD Civil and Administrative Tribunal	$23.80	Not more than $500 in dispute.
South Australia	SA Magistrates Court	$138	Minor civil action.
Tasmania	Magistrates Court of TAS	$111	Claim for $5000 or under.
Victoria	VIC Civil and Administrative Tribunal	$59.80	Claims for less than $500.
Western Australia	Magistrates Court of WA	$106	Filing fee for claim not exceeding $10,000.

It is not fair that a consumer experiencing a problem with a business in South Australia will pay nearly six times more than a similar consumer in Queensland would in order to seek a remedy. The ACL is a nationally consistent law, and should apply equally across Australia – including in terms of enforcement and consumer access to remedies. In all States and Territories, where the amount in dispute is not substantially higher than the filing fee, businesses know that

consumers are unlikely to pursue action. Fees should be consistent and as low as possible in order to facilitate access to justice. Vulnerable or disadvantaged consumers should also have access to a fee waiver scheme, in order to best facilitate access to justice.

Emerging consumer policy issues

Selling away from business premises

The unsolicited consumer agreements give a baseline protection against unscrupulous selling practices. Whether goods or services are being sold by phone or door-to-door, businesses are required to make certain disclosures, provide a ten-day cooling-off period and face some penalties for breaching these requirements.

CHOICE thinks these protections are extremely important but not strong enough. Ultimately, consumers would benefit from a complete ban on unsolicited door-knocking. Unsolicited door-knocking is invasive and overwhelmingly unwanted, with no evidence of benefits to consumers. Further, this conduct places vulnerable consumers at risk. The recent Lux case provides an example of the types of damaging behaviour seen[43]. In this case, an elderly consumer was targeted by a door-to-door vacuum salesperson, and was subject to high-pressure sales tactics despite the fact that she:

- was substantially illiterate;
- was unable to understand commercial matters in any depth;
- was unlikely to be able to make a worthwhile judgement as to whether buying the vacuum cleaner would be in her best interest; and
- was clearly a vulnerable consumer.

The court found that the conduct in this instance was unconscionable. The regulator was able to use the existing provisions of the ACL to successfully take action in court against the company. However, a preferable outcome for the consumers involved in this case would have been if the business had been prevented from engaging in the conduct at all. CHOICE supports a total ban on unsolicited door-to-door sales.

Online shopping - price transparency

[43] ACCC (2004), 'Federal Court finds Lux acted unconscionably in door-to-door vacuum sale to vulnerable consumer', available at https://www.accc.gov.au/media-release/federal-court-finds-lux-acted-unconscionably-in-door-to-door-vacuum-sale-to-vulnerable

Price transparency is important for consumers as it allows them to identify the total cost of a good or service, enabling consumers to easily compare the price of a product. While it may be sufficient for some businesses to disclose a total minimum price before making a payment, some industries and/or businesses profit from such practices. Consumer detriment is particularly acute when booking processes are arduous or the product being purchased is complex and difficult to compare against other products in the market, such as booking airline tickets or in purchasing insurance policies.

CHOICE is concerned that some businesses, including airlines, are engaging in overly complex booking processes which make it difficult for consumers to compare the true price of a product. Consumers purchasing airline tickets are introduced to a low price through email, web or social media advertising, with additional charges being added on throughout the booking, sometimes pre-selected for the purchaser. Additional costs can add up to 40 per cent on to the cost of the advertised ticket price.

Pre-selected extras

CHOICE opposes the practice of pre-selected (or pre-ticked) extras on airline booking websites.[44] Pre-ticked extras can include checked luggage, travel insurance, standard seating and charity donations. Such pre-selected options are designed to trick the consumer into purchasing unnecessary components, or are used to disguise the true cost of the product.

CHOICE finds the practice of pre-selecting optional extras problematic for both 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 vision impaired consumers navigating websites with pre-selected extras, like airlines.

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

Table: The cost of pre-ticked boxes

The cost of pre-ticked boxes: Sydney to Gold Coast return flight over Australia Day long weekend with preselected optional extras*

	Jetstar	Qantas	Tiger	Virgin
Advertised price	$148	$221	$198	$244
Luggage	$34 for 20kg	23kg included	$39 for 20kg	23kg included
Seating (standard)	$10	-	-	-
Travel insurance	$12.95	-	$12.95	$13.95
Charity donation	$2	-	-	-
Final price (with preselected boxes left ticked)	$206.95	$221	$249.95	$257.95
Difference between advertised and final price	$58.95	$0	$51.95	$13.95
Percentage difference between advertised and final price	**40%**	**0%**	**26%**	**5%**
Booking fee	$17	$7	$17	$7.70

* Return trip from Sydney to Gold Coast, departing January 23 and returning January 26 2016. Lowest cost ticket for each airline selected. Reviewed on January 13 2016 between 9:30am and 10:30am. Preselected optional extras left ticked. If the option had no preselection provided, then none was selected. We've not included the booking fee in the final price as some consumers can avoid the cost and it's not an automatically added extra, although CHOICE recognises that the majority of travellers pay by credit card when booking flights.

CHOICE is also concerned that limited special deal tickets (such as Jetstar's "starter" fare) on particular flights would also pressure consumers into accepting a higher-than-advertised price, even as additional extras are added throughout the check-out process and the price is higher than the consumer expected.

Commerce Commission New Zealand: Opt-out pricing practices

The Commerce Commission New Zealand ruled against pre-selected optional extras on travel booking sites, with court enforceable undertakings handed to Jetstar in New Zealand to end the

practice on their website and mobile sites.[45] The Commerce Commission New Zealand found that pre-selected extras were likely to have breached sections 9, 11, 13(b) and 13(g) of the Fair Trading Act by:

- Misleading customers as to the nature of the services offered by Jetstar; and
- Misleading customers as to the price of its services.

The Commerce Commission found that pre-selected extras on its website, mobile website and mobile applications mislead the public about the true price of airfares or the nature of kind of services offered. They found the booking process was misleading in a number of ways:

> "13.1 Jetstar has mislead consumers about the price they will pay: Jetstar gives the impression that consumers are purchasing a specific product (particularly a "starter fare") at a specified price when in fact the customer will purchase a bundle encompassing the fare and pre-selected optional services at a higher price, unless they take the additional steps of deselecting the optional services.
>
> 13.2 Jetstar has mislead consumers about what they are buying: consumers think they have purchased a flight (or a flight and services they have selected) when they have purchased the flight plus one or more optional service that Jetstar has preselected."[46]

CHOICE recommends that airlines and other businesses be prohibited from pre-selecting optional extras in online booking and purchasing processes to improve price transparency

Online comparison shopping websites

CHOICE agrees that online comparator websites have great potential to assist consumers but that poor practices across the industry misrepresent the offerings and lead to consumer harm. Unbiased and independent comparison sites can deliver consumers with the information they need to navigate complex markets.

Commission arrangements that drive commercial comparison sites harm consumers. Health insurance comparison site iSelect, for example, collects upfront and trail commissions when it

[45] 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
[46] Ibid.

sells a health insurance policy. Recently, it has been revealed that it can collect up to $2,500 in upfront commissions for a family health policy worth approximately $5,000. iSelect then receives a trail commission of up to 6.5 per cent of the value of the premium when the customer renews its policy each year.[47]

These kinds of commissions have two major effects on comparison website offerings to consumers. First, it encourages comparison websites that receive commissions to present consumers with higher cost and/or higher commission products when they are searching. Second, the trail commission means that the comparison service has little motivation to recontact consumers.

Comparison sites must do better. At minimum, clearer disclosure is needed. CHOICE recommends that comparison websites are required to disclose to the fact that they receive commissions for the sale of a product or service, including trail commissions. Our preference is that this disclosure occurs at an early stage in any transaction, ideally at the product comparison stage.

Online reviews and testimonials

Online reviews and testimonials are increasingly important for consumers choosing to buy particular products or services. Consumers need to be sure that online reviews are genuinely independent and unbiased, and are not the result of a paid, fake review by a business looking to falsely promote its services.

Guidance provided to businesses by the ACCC on online reviews and testimonials[48] has provided adequate information for both businesses and comparator websites to improve the way reviews and testimonials are presented to consumers.

Businesses and consumers, however, would benefit from further advice on the use of social media and reviewing and moderating on these platforms. While significant investigations and guidelines are available for common review platforms (e.g. TripAdvisor or Zomato), further guidelines on reviewing on social media would be a useful tool for businesses and individuals. Platforms such as Instagram and Facebook have a large number of users reviewing for financial

[47] See http://thenewdaily.com.au/money/2016/03/15/private-health-costs-commissions/
[48] ACCC (2013). *What you need to know about: Online reviews – a guide for business and review platforms.*

incentive. The ACCC should investigate circumstances where reviewers may not be disclosing their incentives in full and provide guidelines for industry.

CHOICE supports continuing investigation of review platforms, such as NSW Fair Trading's 2013 national project to identify fake online reviews and testimonials. CHOICE acknowledges that the issuing of substantiation notices has been an effective compliance method for regulators and would encourage the continued investigation and monitoring of testimonials. In addition to continued investigations, the ACCC should provide updated guidelines for online reviews and testimonials with special references to social media.

Emerging business models and the sharing economy

As the Issues Paper notes, the sharing economy is generally subject to the ACL, provided the 'trade or commerce' threshold is met. The ACL is in many ways a flexible, adaptable law. Consumer protection issues arising due to new business models should still generally be captured by the law, as demonstrated in case study 18 in the Issues Paper.

In the recent review of Australia's competition laws and policies, CHOICE recommended removing restrictions to competition, including those that impact on the sharing economy. Our view remains that increasing competition in sectors that historically lacked competition will lead to improved consumer welfare. However, competition should not be improved for its own sake but in order to increase consumer welfare. Consequently, robust consumer protection frameworks must be in place – but this is already the case, and as noted the ACL is sufficiently flexible to deal with problems arising due to new services, or old services delivered in new ways.

Consumer access to data

The recent Competition Policy Review and Financial Systems Inquiry both made recommendations to increase consumers' access to, and improve the use of, their data. CHOICE strongly endorses these recommendations. Providing consumers with relevant, accessible information about the products they consume and the way in which they do so would improve both the individual consumer experience and the overall competitiveness of the marketplace. Coupling the release of this information with the development of user-friendly comparator tools would reduce consumer confusion and simplify the ways in which individuals engage with the market.

The Issues Paper highlights as an example the UK's Midata programme. The programme was launched in 2011, and focused on four key markets: energy, bank accounts, credit cards and mobile phone plans. The value of consumer data in these sectors is substantial, as consumers often enter into lengthy contracts for products that are complex and difficult to compare. An example of how a Midata-style scheme could work by encouraging the development of third party comparison tools for the credit card market is below.

While the four markets being addressed by the Midata programme provide a guideline for potential launch points in Australia, the automotive industry could be another sector to consider, given the increasing amount and depth of proprietary information held by consumers' cars, via on-board computers. Given the increasingly sophisticated operation of motor vehicle software, this issue will have significant impacts on consumers' rights and also the subsequent costs of vehicle repair and maintenance. Providing consumers, and independent repairers of their choice, with access to car service and repair data will empower consumers to engage more effectively with the market and will encourage a more competitive marketplace.

It is important to stress that simply making data available will not result in better-informed consumers – it is necessary that the data also be accessible and useable. The United States' "smart disclosure" policy memorandum provides some guidelines to ensure that data is not merely released, but is provided to consumers in a format that will aid their ability to make informed decisions[49]. CHOICE agrees that the characteristics of smart disclosure include accessibility, machine readability, standardisation, timeliness, interoperability and privacy protection.

[49] United States Government, Office of Management and Budget, Office of Information and Regulatory Affairs (2010) Memorandum for the Heads of Executive Departments and Agencies, 'Informing Consumers Through Smart Disclosure', available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf

Example: third party comparison tool for credit card accounts

Credit card search results

Provider	Card	Platform	Interest rate (p.a.)	Yearly fee ($AUD)	Linked to your rewards?	Better off by: (p.a.)	Apply
NSW BANK	Platinum Discovery Card	VISA	12.5%	$0	Yes	$227.00	Go to site / Compare
tasbank	Gold Premium Card	MasterCard	13.75%	$19	Yes	$168.00	Go to site / Compare
acu	ACU Essential Credit Card	VISA	14.99%	$15	No	$176.00	Go to site / Compare
this little piggy bank.	Platinum Rewards Card	MasterCard	19.99%	$49	Yes	$85.00	Go to site / Compare
Moneymiser	Moneymiser Maximiser Card	MasterCard	19.99%	$49	No	$85.00	Go to site / Compare
ebenezer	Ultimate Credit Card	VISA	22.99%	$49	No	$58.00	Go to site / Compare

Regulators providing access to data: NSW Fair Trading complaints register

Providing consumers with access to relevant information currently held by businesses can be facilitated by Government; NSW Fair Trading's pilot complaints register is one example that could be adopted nationally. CHOICE strongly supports the decision to create a consumer complaints register that will publish information about individual traders who are the subject of a high number of complaints and encourages other States and Territories, and the Federal regulators such as the ACCC and ASIC, to follow suit.

We agree with Fair Trading's view that sharing this data will improve consumer welfare by empowering consumers to make informed decisions about where to buy goods and services. Providing consumers with information on the traders that have had high levels of complaints made against them will help address existing asymmetries of information, where businesses are aware of the volume of complaints made against them but consumers are not. Addressing this will empower consumers to make more informed purchasing decisions. Making this information public will incentivise businesses to improve their complaints handling and other practices.

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

Mandatory reporting: ACL provisions that prevent consumers from accessing data

As discussed in the product safety section of this submission, the existing s132A confidentiality provisions regarding mandatory injury reports should be revoked. Australian consumers have a right to information about the nature of product-related injuries and/or deaths, including the steps taken by suppliers in response to the incidents. This section of the ACL actively constrains efforts to facilitate consumer access to important information generated by consumers reporting injuries.

Extended warranties

The ACL provides automatic guarantees that the products consumers buy will do what they reasonably expect them to do. When consumers ask CHOICE whether extended warranties provide added protection, our answer is – only sometimes. We advise consumers to find out what an extended warranty will provide, over and above their rights under the consumer laws. This may mean the consumer has to research the law and read through pages of terms and conditions, or directly ask the salesperson what extra benefits they will get.

New Zealand may have a more effective way of conveying this information and encouraging businesses to improve their extended warranty offerings. 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 have to be provided with a written copy of the extended warranty agreement. The agreement must be in plain language, and provide a comparison of the consumer guarantee rights and remedies and the additional protections provided under the extended warranty. The New Zealand Commerce Commission provides the following examples[50]:

> The Extended Warranty Agreement will apply for XYZ years. The Consumer Guarantees Act means people can expect goods to be durable for as long as most would expect that kind of good to last. We estimate this Extended Warranty

[50] Commerce Commission New Zealand, Extended Warranties Fact Sheet, available at http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/extended-warranties/

Agreement provides you with protection for XXX years longer than the protection you have under the Consumer Guarantees Act.

The Extended Warranty Agreement provides extra protection by:
[THE BUSINESS MUST EXPLAIN THE EXTRA PROTECTION CLEARLY HERE]
for example, for damage caused by the consumer's carelessness or coverage where the good/product was bought for use in a business.
This protection is not provided by the Consumer Guarantees Act.

In Australia, disclosure requirements coupled with cooling off rights for extended warranties would likely make it much more difficult for businesses to continue to sell low-value, unnecessary products to consumers. CHOICE shadow shops of electrical retailers in 2013 and 2015 found that nearly all salespeople offered consumers extended warranties without being prompted. With extended warranties a ubiquitous part of the retail landscape, laws that both empower consumers and encourage the development of beneficial extended warranties are worth investigating.

Annexure A: full list of recommendations

CHOICE recommendations

- The existing consumer policy framework objectives should be retained.
- 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.
- 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, cooling-off periods should be extended to other products and services with complex contracts and contracts should be made publicly available.
- Unfair contract terms in insurance contracts should be banned.
- A general prohibition against unfair business practices should be introduced.
- 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:
    - Develop guidance to confirm that a series of minor defects can constitute a major defect. This guidance could be provided by the ACL regulators, or incorporated into the legislation.
    - 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.
- 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.
- 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.
- 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 ACCC should adopt safety standards for bassinets, safety gates, change tables and bedside sleepers, using well-defined standards already in place for similar products in Australia, as well as drawing on standards developed for the same product categories overseas.
- The existing Australian Standard for cot mattress firmness (AS/NZS 8811.1) should be adopted as a mandatory standard.
- A mandatory standard should be introduced for household goods containing button batteries.
    - The standard should require these goods to have a secure battery compartment, to be sold in child-resistant packaging with button batteries secured within the packaging and to be accompanied by clear safety warnings.
- The Government should develop a one-stop-shop for small businesses to get advice on how to comply with product safety requirements.
- Businesses should not be granted waivers for mandatory standards in any circumstances.
- There should be a legislative obligation on businesses conducting voluntary recalls to use all reasonable means available to communicate to the affected consumer community about the product safety issue and remedies available.
- Where businesses are seeking to protect their brand during a recall ahead of advertising their unsafe products, mandatory recalls should be used to require the funding of independent, non-conflicted third parties to promote the recall.
- Businesses conducting voluntary recalls should be required to publish regular results about the outcomes of any active product recall.

- All voluntary and mandatory recalls should be required to state whether or not the safety failing constitutes a major failure.
    - The ACCC would need to issue guidance to assist manufacturers and retailers in making this judgment.
    - Legislation should empower responsible regulators to reject the safety notice where the major failure status is in dispute.
    - If an agreement cannot be reached, then the recall should revert to the mandatory recall process with the regulatory agency view taking precedence.
- The section 132A confidentiality provisions of mandatory reports should be revoked.
- A public portal and publicly accessible, searchable database of consumer product incident reports should be adopted in Australia, based on the US model www.SaferProducts.gov
- A General Safety Provision should be introduced.
- Current protections against specific unfair practices should remain in the ACL and the ASIC Act.
- Existing $1.1m penalties available for breach of the specific protections in the ACL should be raised, to align with the penalties available for breach of the cartel conduct provisions ($10m).
- Penalties should be available for misleading and deceptive conduct and unfair contract terms.
- 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.
- Tribunal and Court fees across States and Territories should be equal and as low as possible, to ensure that all Australians have the same ability to assert their rights to a remedy.
- Disadvantaged and vulnerable consumers should have the right to seek a waiver of Court and Tribunal fees when pursuing ACL actions.
- There should be a complete ban on unsolicited door-knocking sales.
- Airlines and other businesses should be prohibited from pre-selecting optional extras in online booking processes.
- Comparison websites should be required to disclose to consumers that they receive commissions for the sale of a product or service. Any trail commission arrangement should also be clearly disclosed.
- The ACCC should provide updated guidelines for online reviews and testimonials with special references to social media.

- The ACCC and regulators should continue the ongoing investigation into review platforms.
- 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.
- A cooling-off period for extended warranties should be introduced.
- 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.