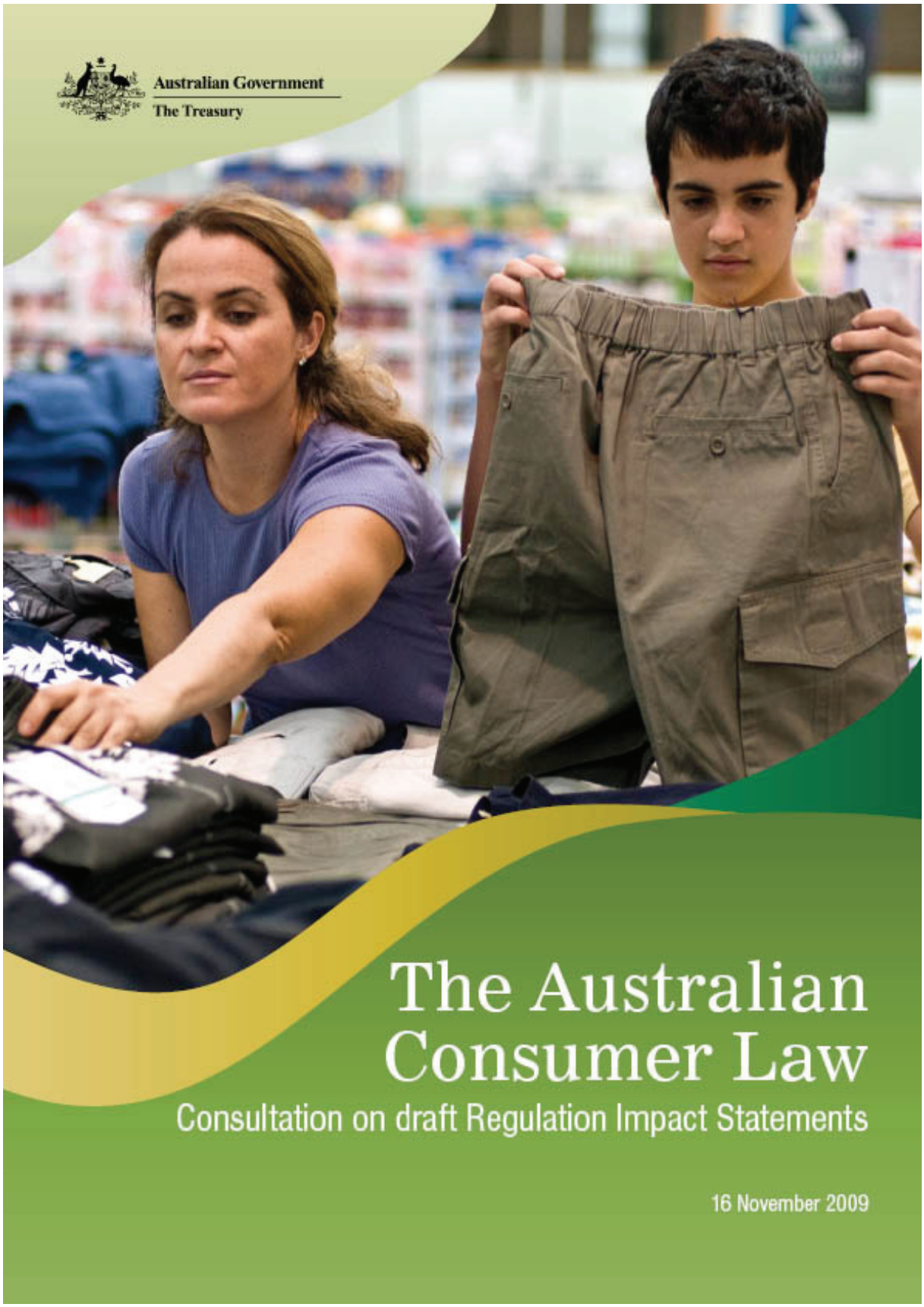

Australian Government
The Treasury

The Australian Consumer Law

Consultation on draft Regulation Impact Statements

16 November 2009

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CONTENTS

REQUEST FOR COMMENTS

The Standing Committee of Officials of Consumer Affairs requests the views of stakeholders on draft Regulation Impact Statements for best practice reform and product safety reform proposals, to be considered for inclusion in the Australian Consumer Law.

The proposals do not represent agreed policies of the Australian Government or of any State or Territory government.

Responses are requested by **Friday, 27 November 2009** and can be submitted to:

australianconsumerlaw@treasury.gov.au

or

SCOCA Australian Consumer Law Draft RIS Consultation
Competition and Consumer Policy Division
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PARKES ACT 2600

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Confidentiality

It will be assumed that submissions are not confidential and may be made publicly available on the Treasury website (www.treasury.gov.au) and the Ministerial Council on Consumer Affairs' website (www.consumer.gov.au). If you would like your submission, or any part of it, to be treated as 'confidential', please indicate this clearly. A request made under the *Freedom of Information Act 1982* (Cth) for a submission marked confidential to be made available will be determined in accordance with that Act.

GLOSSARY OF TERMS

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
BRCWG	Business Regulation and Competition Working Group of the Council of Australian Governments
COAG	Council of Australian Governments
FTA	A State or Territory Fair Trading Act or similar legislation, namely: *Fair Trading Act 1987* (NSW), *Fair Trading Act 1999* (VIC), *Fair Trading Act 1989* (QLD), *Fair Trading Act 1987* and *Consumer Transactions Act 1972* (SA), *Fair Trading Act 1987* and *Consumer Affairs Act 1971* (WA), *Fair Trading Act 1990* (TAS), *Fair Trading Act 1987* and *Fair Trading (Consumer Affairs) Act 1973* (ACT) and *Consumer Affairs and Fair Trading Act 1990* (NT).
IGA	*Intergovernmental Agreement for the Australian Consumer Law*, signed by COAG on 2 July 2009
IGA voting arrangements	Changes to the ACL, and any regulation made under it, require the agreement of the Commonwealth as well as four jurisdictions (three of which must be States).
MCCA	Ministerial Council on Consumer Affairs, made up of ministers responsible for consumer affairs from the Australian, New Zealand and State and Territory Governments.
PC	Productivity Commission
RIS	Regulation Impact Statement
SCOCA	Standing Committee of Officials of Consumer Affairs, composed of the senior officers of consumer policy and enforcement bodies in Australia and New Zealand.
TPA	*Trade Practices Act 1974* (Cth)

PURPOSE OF THIS CONSULTATION

The Standing Committee of Officials on Consumer Affairs (SCOCA) seeks the views of stakeholders on the further development of the Australian Consumer Law (ACL).

The draft Regulation Impact Statements (RIS) included in this paper set out options for:

- reform proposals in the ACL which amend the provisions of the *Trade Practices Act 1974* (TPA) based on best practice in existing state and territory consumer laws; and
- implementing the recommendations of the Productivity Commission's (PC) *Review of the Australian Consumer Product Safety System* as part of the ACL.

The proposals outlined in the draft RISs are options for reform proposals to be considered by Ministers at the 4 December 2009 meeting of the Ministerial Council on Consumer Affairs (MCCA).

The proposals do not represent agreed policies of the Australian Government or of any State or Territory Government.

In releasing these draft RISs, SCOCA is seeking views on:

- the content of the draft RISs, in particular the analysis of the potential costs and benefits for these reform proposals or options for the proposals;
- information about any additional costs or benefits to proposals or additional options for the proposals, so as to better inform the analysis contained in the decision-making RISs to be considered by Ministers on 4 December 2009; and
- any other issues relevant to these proposals.

Views received as a result of this consultation will be considered in the finalisation of the RISs that will be presented to Ministers for decision at their 4 December 2009 MCCA meeting.

SUMMARY

THE AUSTRALIAN CONSUMER LAW REFORM PROCESS

In 2007-2008 the PC reviewed Australia's consumer policy framework. The PC concluded that 'while Australia's consumer policy framework has considerable strengths, parts of it require an overhaul.'[1] On 2 October 2008, all Australian governments agreed to a new consumer policy framework, comprising a single national consumer law and streamlined enforcement arrangements.

The new national consumer policy framework will involve the following key elements:

- A new national consumer law, which will be called the ACL, and which is implemented as part of an application law scheme with the Australian Government as the lead legislator and other jurisdictions to apply the national consumer law as a law of their respective jurisdictions.
- The ACL will be based on the existing consumer protection provisions of the TPA.
- As recommended by the PC, the ACL will also include:
  - a provision which regulates unfair terms in consumer contracts;
  - new enforcement powers which will enable more proportionate responses to consumer law breaches and new redress options for consumers; and
  - a new national legislative and regulatory regime for product safety.
- Where it is generally agreed that the current provisions of the TPA are inadequate, the ACL should include provisions which modify and augment the existing generic consumer protection provisions of the TPA, which are based on best practice in state and territory consumer laws.
- On 2 July 2009, the Council of Australian Governments (COAG) signed the *Inter-Governmental Agreement for the Australian Consumer Law* (IGA), setting out the relationships between the Australian Government and the governments of the States and Territories concerning the process for amending the national consumer law and the administrative architecture underpinning it.
- Consumer agencies will develop improved enforcement cooperation and information sharing arrangements.

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1 Productivity Commission (2008) *Review of Australia's Consumer Policy Framework*, vol. 2, 2.

The first of two Bills, the Trade Practices Amendment (Australian Consumer Law) Bill 2009, to implement the ACL is currently before the Australian Parliament. This Bill covers the establishment of the ACL, the introduction of a national unfair contract terms law, new enforcement powers for the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) and remedies and sanctions for breaches of consumer laws, which will form the basis of the common powers to be included in the ACL.

A RIS for those reforms is included in the Explanatory Memorandum to the Bill. A second Bill to complete the ACL, including any agreed best practice and product safety reforms, will be introduced in early 2010.

REFORMS BASED ON BEST PRACTICE IN STATE AND TERRITORY LAWS

On 2 October 2008, COAG agreed that the ACL should include, where agreed, reforms based on best practice in state and territory consumer protection laws. The proposals have arisen through the work of SCOCA in developing the ACL, and are based on suggestions made in the PC Review and additional suggestions made by the States and Territories, based on their own laws. Many of these proposals were discussed and consulted on in the SCOCA information and consultation paper *An Australian Consumer Law: Fair markets – Confident consumers* released on 17 February 2009.

Since that time, informed by stakeholder views, SCOCA has developed a list of potential reforms based on best practice in state and territory consumer laws. As part of that exercise, a number of additional reforms, not previously consulted on, are now included, and some of those reforms which were previously consulted on have been further developed and are considered in more detail than previously.

The following reform proposals are considered in the consultation RIS in Part I of this paper:

Unsolicited selling

- Whether there is a need for a national regulatory scheme for all forms of unsolicited offers and sales that occur in a non-retail environment, in person or via telephone, to be included in the ACL**.**

- This proposal is covered at pages 17 to 26 of the draft RIS. The options identified in the draft RIS for this proposal are:

  – Option A: Prohibit direct and telephone sales.

  – Option B: Not include any specific provisions regulating direct and telephone sales and repeal the existing provisions of State and Territory legislation.

  – Option C: Create a harmonised framework for direct and telephone sales reflecting best practice in state and territory legislation.

Asserting a right to payment for unauthorised advertisements

- Whether there should be a prohibition on a person asserting a right to payment from another person for unauthorised advertisements.

- This proposal is covered at pages 27 to 30 of the draft RIS. The options identified in the draft RIS for this proposal are:
  - Option A: Retain the TPA provisions only, which prohibit a person asserting a right to payment for unsolicited goods or services, and unauthorised directory entries, but does not regulate unauthorised advertisements.
  - Option B: Retain the TPA provisions, and include a new provision that prohibits a person asserting a right to payment from another person for unauthorised advertisements.
  - Option C: Retain the TPA provisions, include a new provision that prohibits a person asserting a right to payment from another person for unauthorised advertisements, and regulations detailing requirements for the making of a warning statement.

Information standards

- Whether a specific regulation-making power relating to the provision of information in relation to both goods and services should form part of the ACL.
- This proposal is covered at pages 31 to 35 of the draft RIS. The options identified in the draft RIS for this proposal are:
  - Option A: Incorporate the TPA information standards power in the ACL, which applies to goods only.
  - Option B: Include a general power in the ACL to prescribe information standards in relation to both goods and services.

Liability for unsolicited services

- Whether a person receiving a supply of unsolicited services should be liable for such services.
- This proposal is covered at pages 37 to 39 of the draft RIS. The options identified in the draft RIS for this proposal are:
  - Option A: Retain the TPA provisions only, which makes a person not liable for a supply of unsolicited goods (other than in respect of wilful or unlawful acts).
  - Option B: Retain the TPA provisions, and include provisions dealing with liability for unsolicited services.

Standards of disclosure

- Whether there should be minimum standards for documents required under the ACL.
- This proposal is covered at pages 40 to 44 of the draft RIS. The options identified in the draft RIS for this proposal are:
  - Option A: Not adopt standard of disclosure requirements in the ACL.
  - Option B: Adopt, in principle, the Victorian requirements that documents specifically required under the ACL must be clear and legible.

  - Option C: Adopt, in principle, the Victorian requirements that all consumer documents must be clear and legible.

Bills and receipts

- Whether requirements should be placed on a business to provide receipts or itemised bills in certain circumstances, in addition to existing legal requirements to do so.

- This proposal is covered at pages 45 to 49 of the draft RIS. The options identified in the draft RIS for this proposal are:

  - Option A: Remove the Victorian bills and receipts requirements, and rely on the requirements for tax invoices in the GST law.

  - Option B: Adopt the Victorian requirements for bills and receipts in the ACL, and retain the requirements for tax invoices in the GST law.

  - Option C: Adopt the Victorian requirements for bills in the ACL to cover only those transactions for goods and services not already covered by the GST law.

Lay-by sales

- Whether there should be national regulation of the sale of goods where payment is made by instalments prior to the receipt of goods (lay-by sales).

- This proposal is covered at pages 50 to 57 of the draft RIS. The options identified in the draft RIS for this proposal are:

  - Option A: Not adopt specific lay-by sales regulation in the ACL.

  - Option B: Adopt a harmonised model for lay-by sales regulation, based on existing state and territory provisions.

Dual pricing

- Whether a prohibition on suppliers selling at more than the lowest appended price where multiple prices are indicated for a good is needed.

- This proposal is covered at pages 58 to 61 of the draft RIS. The options identified in the draft RIS for this proposal are:

  - Option A: No specific regulation of dual pricing.

  - Option B: Where more than one price is appended to goods, prohibit selling at higher than the lowest of the prices.

Offering gifts and prizes

- Whether the current prohibition on offering gifts and prizes without an intention to provide them, or to provide them as offered should be augmented to require that gifts and prizes offered are provided within a 'reasonable time' and as ordered.

- This proposal is covered at pages 62 to 67 of the draft RIS. The options identified in the draft RIS for this proposal are:

  - Option A: Retain the TPA provision only, which prohibits accepting payment without intending to provide the gifts or prizes as offered.

  - Option B: Replace the intent-based TPA provision with a requirement to provide gifts and prizes, as offered, within a reasonable time.

  - Option C: Add to the intent-based TPA provision to include a separate requirement to provide gifts and prizes, as offered, within a reasonable time.

Accepting payment without intent to supply

- Whether the current prohibition on accepting payment for goods or services without an intention to provide them, or to provide them as offered should be augmented to require that goods or services are provided within a 'reasonable time' after payment is accepted.

- This proposal is covered at pages 68 to 74 of the draft RIS. The options identified in the draft RIS for this proposal are:

  - Option A: Retain the TPA provision only, which prohibits accepting payment while: not intending or being able to supply goods or services as offered.

  - Option B: Replace the TPA provision with a requirement to supply within the specified time or, if no time is specified, within a reasonable time and a prohibition on supplying materially different goods or services.

  - Option C: Retain the existing intention-based elements of the TPA provision and add a requirement to supply within the specified time or, if no time is specified, within a reasonable time and a prohibition on supplying materially different goods or services.

False or misleading representations

- Whether the current prohibitions on false or misleading representations should be extended, including clarifying that the prohibition extends to all false *or* misleading representations of the types listed in section 53 of the TPA.

- This proposal is covered at pages 75 to 80 of the draft RIS. The options identified in the draft RIS for this proposal are:

  - Option A: Retain the TPA's existing types of prohibited false or misleading representations listed in section 53 of the TPA.

  - Option B: Add to the TPA provision to include a separate prohibition on representations that purport to be a testimonial or that are about a testimonial from being false or misleading (based on VIC FTA 14(1)).

  - Option C: Option B, but with an evidentiary burden on the respondent.

These proposals will be considered by MCCA at its 4 December 2009 meeting, assisted by a decision-making RIS.

The draft RIS in Part I of this paper sets out:

- options for each of these reform proposals;

- a preliminary analysis of the costs and benefits of these reform proposals; and
- questions highlighting potential additional information that may be provided to better inform this analysis.

PRODUCT SAFETY REFORMS

In its 2006 report, *Review of the Australian Consumer Product Safety System* (2006 Report), the PC made recommendations to reform the existing regulatory arrangements for product safety in Australia. This included a number of specific legislative amendments to enhance the effectiveness of the current product safety law in all jurisdictions (referred to in this document as non-framework recommendations).

In May 2008, MCCA agreed in principle to implement the majority of the PC's recommendations, including the non-framework recommendations, and presented its agreed model for product safety reform to COAG for consideration. On 3 July 2008, COAG endorsed MCCA's agreed model for product safety reform. On 2 October 2008, as part of its agreement to create a nationally consistent consumer law, COAG agreed that the national law should include the reforms to product safety to create a new national product safety regulatory framework.

The draft product safety RIS in Part II of this paper examines the case for implementing the PC's legislative non-framework recommendations which have been agreed to, in principle, by MCCA.

The PC's 2006 Report also included options for creating more clearly defined roles for the Australian Government and the States and Territories under a single national law with respect to product safety regulation (referred to in this document as framework recommendations). A RIS for the framework recommendations was prepared and considered by MCCA in May 2008.

The draft product safety RIS describes the nature of the problem giving rise to a number of the PC's legislative recommendations, the objectives of the recommendations, options for achieving these objectives, the costs and benefits of these options, the results of consultation undertaken on the options, and how the proposed reforms will be reviewed after implementation. The draft product safety RIS also draws on the findings of the PC's 2006 Report.

The specific non-framework recommendations contained in the PC's 2006 Report that are the subject of the draft product safety RIS, are:

- **Recommendation 7.1**: Governments should amend consumer product safety provisions in all jurisdictions to cover services related to the supply, installation and maintenance of consumer products. This proposal is covered at pages 85 to 88 of the draft RIS.
- **Recommendations 6.1 and 8.1**: The threshold test in all jurisdictions for bans and recalls should cover goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person. This proposal is covered at pages 88 to 91 of the draft RIS.

- **Recommendation 9.3**: Governments should require suppliers to report to the appropriate regulator, products which have been associated with serious injury or death. This proposal is covered at pages 91 to 94 of the draft RIS.

- **Recommendation 11.2**: Governments should have the power to undertake a recall directly where no supplier can be found to undertake such a recall. This proposal is covered at pages 94 to 96 of the draft RIS.

These recommendations relate to amending existing legislation on product safety which will form the basis of the national consumer law. Accordingly, the draft RIS considers two feasible options to these recommendations:

- implement the recommendations by amending or augmenting the current product safety provisions in the TPA; or

- not implement the recommendations and maintain the existing product safety provisions in the TPA.

If the non-framework recommendations contained in the draft product safety RIS are implemented, the proposed legislative amendments, together with the framework reforms, would form part of the broader national consumer law reforms agreed to by COAG in October 2008.

PART I
CONSULTATION REGULATION IMPACT STATEMENT — BEST PRACTICE REFORM PROPOSALS

PART A: BACKGROUND

Introduction

On 2 October 2008, COAG agreed to establish a single national consumer law as part of the *National Partnership Agreement to Deliver a Seamless National Economy*, which will include reforms based on best practice in existing state and territory consumer laws ('the best practice reforms'). This COAG agreement is based on detailed reform proposals developed by MCCA on 15 August 2008, and agreed to by the Business Regulation and Competition Working Group of COAG (BRCWG). These proposals are based on consumer policy objectives agreed by MCCA and set out in its communiqué of 15 August 2008.

This Part examines the case for implementing the best practice reforms.

The national consumer policy objective 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 is supported by six operational objectives:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
- to ensure that goods and services are safe and fit for the purposes for which they were sold;
- to prevent practices that are unfair;
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;
- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate, risk-based enforcement.

Background to the reform of Australia's consumer policy framework

The current legislative framework

Generic consumer protections for Australian consumers are currently found in 13 separate laws: the TPA and the *Australian Securities and Investment Act 2001* (Cth) (ASIC Act), which apply nationally, and 11 State and Territory laws dealing with fair trading and consumer

protection (FTAs). The PC found that in a number of respects, while state and territory laws are generally similar to the TPA, the provisions are not uniform.

While there is a high degree of commonality in Australia's various generic consumer protection laws at the national and state and territory levels, there still remains some variation in the legislative, policy and enforcement approaches adopted between all Australian jurisdictions. This shift away from largely consistent generic consumer laws has resulted in the current framework becoming more costly for consumers and businesses.

The PC recommended a national generic consumer law based on the TPA.

The most significant differences between existing jurisdictional consumer protection legislation, which are relevant in the context of the best practice reforms discussed in this RIS are set out below:

- **Objects of the TPA and FTAs**: There are significant differences between the objects provisions of the various Australian consumer laws. Objects provisions can be significant as an aid to judicial interpretation and therefore differences can influence judicial outcomes for consumers seeking to utilise a particular consumer provision. They can also reflect and inform very different approaches to issues of policy development and enforcement.[2]

- **Industry specific regulation**: The PC recognised significant differences in industry specific consumer regulation in the energy, food, credit, tobacco, electrical products and therapeutic goods industries. The PC also found some industry specific legislation is overly prescriptive and unnecessary given the existence of generic consumer protections. Furthermore, changes to industry specific regulation often occur, which creates ongoing complexity and cost of businesses as they attempt to maintain compliance across jurisdictions.[3]

- **Diversity of regulatory approaches:** The diversity of consumer agencies is also reflected in the wide range of regulatory approaches that they adopt. These reflect a range of practical considerations, including cost and the needs of the industry being regulated, but also the regulatory objectives of the organisation concerned, informed by the legislation it is responsible for enforcing.[4] Variable outcomes for consumers occur due to the divergent requirements for businesses, differences in enforcement intensity and jurisdictional priorities.[5]

Most consumer protection provisions in the TPA (and in the future, the ACL) are mirrored in the ASIC Act to provide the consumer protection regime in respect of financial products and services at the Commonwealth level.

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2 Corones and Christensen (2007) *Comparison of Generic Consumer Protection Regulation*, report prepared for the Productivity Commission, 25-6.
3 Productivity Commission (2008) *Review of Australia's Consumer Policy Framework*, vol. 2, 65, 81-7
4 ibid.., 227.
5 ibid.., 19.

The current enforcement framework

At the national level, the ACCC is responsible for enforcing the generic consumer protections of the TPA, while ASIC monitors and promotes market integrity and consumer protection in relation to the Australian financial system. The TPA excludes the provision of financial services from the scope of its provisions.

There are also eight lead consumer agencies that administer and enforce consumer protection policy in the States and Territories: NSW Fair Trading, Consumer Affairs Victoria (CAV), Queensland Office of Fair Trading (OFT), WA Department of Commerce, SA Office of Consumer and Business Affairs (OCBA), Tasmanian Office of Consumer Affairs and Fair Trading, ACT Consumer Affairs and Fair Trading and Northern Territory Consumer Affairs

The division, in terms of jurisdictional and functional responsibilities, between the different enforcement agencies is not always straightforward and has been a long term source of confusion for consumers and industry alike. In practice, it can result in a duplication of resources as enforcement agencies try to ascertain jurisdiction in overlapping cases.[6]

Background

In early 2006, the Banks Taskforce presented the report *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* to the Australian Government. The taskforce recommended that COAG should, through MCCA, initiate an independent public review into Australia's consumer protection policy framework and its administration.

On 11 December 2006, the PC commenced an inquiry into Australia's consumer policy framework. The PC was asked to report on ways to improve harmonisation and coordination of consumer policy, its development and administration across jurisdictions in Australia, avoiding regulatory duplication and inconsistency.

The PC presented its final report to the Government on 30 April 2008, and it was tabled in the Australian Parliament and published on 8 May 2008. The report included a recommendation that:

> 'the Government implement a new national generic consumer law to apply in all jurisdictions. This law should be based on the consumer protection provisions of the TPA…[and] incorporate additional provisions from State and Territory Fair Trading Acts in those cases where the TPA is generally agreed not to be adequate to deal with a particular generic issue'.[7]

On 26 March 2008, COAG agreed that the BRCWG, in consultation with MCCA, would develop an enhanced consumer policy framework, including legislative and regulatory structures, drawing on the final report of the PC.

On 15 August 2008, MCCA developed a series of reform proposals for enhancing Australia's consumer policy framework, based on the recommendations in the PC report. These proposals included the establishment of a single national consumer law which is based on

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6 Corones and Christensen (2007) *Comparison of Generic Consumer Protection Regulation*, report prepared for the Productivity Commission, 21, 22, 130-2.

7 Productivity Commission (2008) *Review of Australia's Consumer Policy Framework*, recommendation 4.1.

existing consumer protection provisions of the TPA and incorporates 'appropriate amendments reflecting best practice in state and territory legislation'.

MCCA's proposals were endorsed by the BRCWG and agreed by COAG on 2 October 2008.

Previous consultation

SCOCA released *An Australian Consumer Law: Fair markets – Confident consumers* on 17 February 2009. The paper provided a brief overview of the suggested best-practice reforms based on current state and territory laws and sought suggestions on areas where consumer protection laws could be enhanced by incorporating best practice regulations from the States and Territories.

SCOCA received 102 submissions from a wide variety of business and consumer stakeholders. While a majority of these focused on the proposed introduction of a national unfair contract terms law, some submissions commented on the best-practice reforms outlined in the paper.

On 24 June 2009, the Australian Government introduced the Trade Practices Amendment (Australian Consumer Law) Bill 2009 into the Australian Parliament. The Bill establishes the framework and the unfair contract terms provisions of the ACL and introduces new penalties, enforcement powers and consumer redress options into the TPA. That Bill is still before the Parliament.

The Australian Government intends to introduce a second Bill that will implement fully the ACL in early 2010. The second Bill will include those best-practice reforms that are agreed to by the Commonwealth, States and Territories following this RIS consultation and subsequent decision-making process. It will also include a new national product safety regulatory framework and the remaining ACL provisions drawn from the current consumer protection and enforcement provisions of the TPA.

The problem

The reforms described in this RIS are intended to modify or augment the existing consumer protection provisions of the TPA and the ASIC Act, based on existing best practices in state and territory consumer laws.

The proposals to be discussed below have been divided into two groups:

- reforms which promote national consistency (Part B); and
- reforms which promote the use of best practice in specific areas (Part C).

Reforms which promote national consistency

These reforms relate to those laws that apply in all – or nearly all – jurisdictions, and will:

- create national consistency, and
- enhance the current level of consumer protection.

In this regard, where there are differences among the TPA and state and territory legislation, national consistency would result in business compliance cost savings and reduced consumer confusion.

Reforms which promote the use of best practice in specific areas

These reforms relate to those laws that apply only in one or some jurisdictions and take account of market developments or new regulatory approaches. The application of these reforms as part of the ACL is necessary to:

- promote national consistency; and
- enhance protection for all Australian consumers where an existing protection for consumers should not be lost in moving to a national law.

How we assess the regulatory impact of reforms

The potential impacts from these reforms are considered in terms of three general groups: consumers, businesses and governments. Examples of impacts on consumers are changes in prices or availability of goods or services, access to legal rights of action, or access to redress. Examples of impacts on businesses are changes to compliance costs or changed opportunities to market products or otherwise interact with consumers. Examples of impacts on governments are changes to the costs of administering and enforcing regulation.

Reform options are assessed against the status quo. The status quo may involve no regulation, TPA provisions only, State or Territory regulations only, or a mixture of Commonwealth and State and Territory regulations, as the case may be.

The status quo does not contemplate the COAG agreement that the default position for consumer protection laws being considered for inclusion in the ACL is to uplift the TPA provisions into the ACL, and repeal any corresponding State and Territory laws unless a best practice reform proposal is agreed. Instead, where there are existing TPA provisions related to a proposal, the TPA provision being adopted wholly in the ACL would always be considered as an explicit option.

Benefits and costs under each option are assessed and assigned a score of:

- one, if the expected impact is minor;
- two, if the expected impact is moderate; or
- three, if the expected impact is significant.

These scores are indicative only, and are based on the quantitative and qualitative evidence available.

The scores for each option are then tallied to arrive at a total benefit or cost. The option with the highest positive score, indicating the highest net expected benefits compared to the status quo, is the preferred option.

It is also important to note that the rankings for options in each proposal are self-contained. There is no relative ranking across proposals — that is, a proposal where the preferred option has a score of +7 is not necessarily a 'better' proposal than a different best practice reform proposal where its preferred option has a score of +4.

PART B: NATIONAL CONSISTENCY REFORMS

Introduction

A number of best practice reform proposals relate to laws that already exist in most, if not all, States and Territories, or already apply to a majority of Australian consumers. For the purposes of this RIS, these will be called 'national consistency reforms'.

In recent years, Australia's consumer product and services markets have increasingly become national in character. For example, in 2007, around 48 per cent of goods and services (measured by turnover) were supplied by firms operating nationally.[8]

The trend towards national consumer markets and the existence of separate consumer protection laws at the national, state and territory levels can result in Australian consumers receiving different levels of protection depending on where they live or where they make their purchases.

National consistency in consumer regulation provides a strong argument for national regulation as consumers and businesses would only need to be familiar with a single, national law. It would empower Australian consumers and businesses to participate in national markets with greater confidence, and result in compliance cost savings for businesses as they would only be required to comply with a single national law, instead of multiple regulatory regimes. Consumers would also benefit from access to consistent remedies and legal certainty, regardless of where they reside in Australia.

All of the options considered in this RIS consist of nationally consistent regulation in all States and Territories through the applied ACL. The introduction of nationally consistent regulation would provide significant compliance cost savings for businesses, which would only have to comply with a single, uniform set of consumer protection provisions. This would result in cost savings which flow through to consumers. There would also be benefits for consumers through familiarity and consistency of legislation, particularly when purchasing from interstate. Benefits also flow to consumer agencies through easier cross-border enforcement and the ability to issue consistent, national guidance.

The case for and against national consistency in existing consumer laws generally is outlined in more detail below.

8 Productivity Commission (2008) *Review of Australia's Consumer Policy Framework*, vol. 2, 51.

Assessing the case for national consistency		
Impact group	Benefit	Cost
Consumers	National consistency in protections for consumers across product and service markets with greater confidence.	Potential for a reduction in targeted consumer protections applicable to the specific circumstances of an individual jurisdiction.
	Business savings due to decreased compliance costs can potentially be passed onto consumers, including in the form of lower prices.	
	Greater clarity due to certainty about which consumer law applies, and would allow for more efficiency in markets, as there is a greater common understanding of the 'ground rules' for activity in the market.	
	Improved access to redress where a breach of the law has occurred, particularly where the conduct occurred across jurisdictions.	
Business	Consistent national regulation for businesses, reducing complexity and compliance costs, by eliminating significant areas of jurisdictional variation. This would provide savings for businesses currently operating nationally, which can be applied to meet business objectives, such as expansion and innovation.	Potential for a reduction in targeted business regulation applicable to the specific circumstances of an individual jurisdiction.
	Provides greater incentives for new entrants due to a simpler regulatory framework.	Transitional costs for businesses in understanding and complying with the new national provisions.
	Greater clarity and certainty in the consumer law, allowing for more efficiency in markets, as there is a greater common understanding of the 'ground rules' for activity in the market.	
Governments	Simpler legislation and greater efficiency in policy development and innovation, reducing the need for duplicative legislative and policy consideration processes.	Less ability to engage in regulation that is targeted to the individual requirements of each jurisdiction.
	New regulation is considered by all jurisdictions, reducing the likelihood that the national law is overly reactive to a very localised problem or short-term circumstances where the costs might outweigh the benefits or the effects would not justify national regulation.	Transitional and coordination costs resulting from implementation and administration of the new, national law.
	Jurisdictions can potentially share and allocate more efficiently the cost of developing policy, and allocate administrative resources more efficiently, potentially providing greater resources to enforcement and conciliation functions.	

In the light of the benefits and costs listed above, there is a case for proceeding with national consistency reforms, as the benefits from the reforms would be likely to outweigh the costs, particularly where existing regulatory arrangements are inconsistent across state borders. However, the actual impacts of implementing national best practice reforms will depend on how those reforms are designed and implemented. Options for specific best practice proposals are discussed in the remainder of this RIS.

PROPOSAL 1: UNSOLICITED SELLING

Current regulation

Unsolicited direct selling (often referred to as door-to-door sales) and telephone sales occur when a trader approaches a consumer directly to offer for sale a product or service and where a consumer agrees to make a purchase and then enters into an agreement with the supplier either at the consumer's home or another place that is outside of a retail environment (or not the supplier's usual place of business), or over the phone.

All states and territories have specific laws regulating unsolicited, including door-to-door, sales. Victoria and NSW also have specific laws regulating telephone sales. These jurisdictional regimes diverge on various points, including in the details of the rights and responsibilities conferred, and have their own jurisdiction-specific features, including the extent of coverage of activities that are not undertaken in trade or commerce.

While there is national legislation regulating the unsolicited selling of certain financial services and products, there is no specific regulation of direct or telephone sales in the TPA. Under the TPA, unsolicited consumer transactions completed via telephone and face-to-face are treated in the same way as transactions entered into at 'bricks-and-mortar' locations or on the internet. Conduct related to unsolicited selling is subject to the prohibitions against unfair practices in the TPA, including misleading or deceptive conduct (section 52), false or misleading representations (section 53), harassment and coercion (section 60) and unsolicited goods or services (sections 64 and 65).

The *Do Not Call Register Act 2006* (Cth) regulates telemarketing, but not the formation of sales contracts by telephone. As at May 2009, 3.5 million numbers were listed on the Do Not Call Register. In the year to May 2009 12,057 complaints were made to the Australian Communications and Media Authority (ACMA) about breaches of the register or associated industry code.

While direct sales methods may often be convenient for consumers, they can cause inconvenience and can, in some cases, be perceived as threatening, particularly where the approach is unsolicited. Australian consumer agencies frequently receive complaints in respect of this form of selling, for example:

- over the last two financial years, CAV received 1,056 complaints and enquiries about unsolicited selling;
- over the last three financial years, NSW Fair Trading received 2,015 complaints and 3,229 enquiries about door-to-door selling and telephone sales;
- over the last two financial years, the South Australian OCBA received 872 complaints and enquiries annually about unsolicited selling generally; and
- the Queensland OFT receives over 125 enquiries per month, on average, about door-to-door sales.

Industry ombudsmen also receive complaints and enquiries about unsolicited selling:

- the Energy and Water Ombudsman of Victoria received 1,307 complaints about door to door and phone sales in the year to June 2007;[9] and

- the Energy and Water Ombudsman of NSW reported a significant increase in complaints about elderly customers concerning unsolicited selling since January 2006.[10]

The objective of regulation in this area is to promote the operation of fair and efficient markets by providing appropriate consumer protection. This is achieved by giving consumers additional rights and protections that are not available in other retail contexts. This may be warranted where aggressive selling techniques (such as high pressure sales) are employed in a non-retail environment, especially where consumers do not have the option of walking away from the situation, such as in their own home, and may feel threatened to agree to an offer simply to put the situation at an end. Existing State and Territory regulatory mechanisms are intended to reduce:

- the impact of **information asymmetry** between the supplier and consumer, so that consumers can make informed decisions;

- the **incentives for unfair conduct**, by minimising the potential gains to suppliers from engaging in unscrupulous practices, including high-pressure sales techniques; and

- the **impact of unfair conduct**, particularly with respect to vulnerable and disadvantaged consumers, by providing clear avenues for redress, other than recourse to the courts.

Information asymmetry

Consumer purchasing decisions occur with reference to information available to the consumer, much of which is provided by the trader. Provided that this information is truthful and provided that consumers are in a position to properly evaluate it, they can use this information to select products and services which meet their requirements.

In some situations, however, there is greater likelihood that the decision-making process will be constrained and that this will result in poor consumer choices. In the case of unsolicited sales, the consumer is unlikely to have engaged in a product comparison or sampled the product prior to the unsolicited approach of the trader and so the decision-making context available to the consumer is largely that which is represented to them by the trader. Information asymmetry compromises the ability of consumers to make the best consumption choices in view of their limited purchasing power.

Incentives for unfair conduct

High-pressure sales techniques, which are sometimes employed and which take advantage of the unequal market power of the participants in an unsolicited transaction, exacerbate the problem of information asymmetry. These sales techniques may involve:

- misleading representations or lack of disclosure of important information;
- inter-personal pressure exerted by sales people; and

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9 Consumer Action Law Centre and the Financial & Consumer Rights Council (2007) *Coercion and harassment at the door – Consumer experiences with energy direct marketers*, p 33, http://www.consumeraction.org.au/downloads/EnergyMarketinginVictoria-Finalv.3.pdf.

10 *Newsletter of the Energy and Water Ombudsman of NSW*, September 2006.

- targeting vulnerable consumer groups, including the elderly, consumers with poor understanding of English and the disadvantaged.

The potential for such conduct may increase where it occurs in a non-public environment, such as a private home, and where the consumer is at a disadvantage from the outset.

Impact of unfair conduct

An effective consumer regulatory regime requires that consumers have access to remedies should problems occur and that businesses' obligations are made clear, where the risk of not specifying these obligations are potentially significant.

Existing State and Territory unsolicited selling regimes allow for the provision of self-enforcing remedies, such as statutory cooling-off periods and the right to recined contracts where they have been mislead about the identity or their motives for making contact with the consumer. Such remedies gives consumers the opportunity to obtain adequate information about the goods or services being sold, to access information about the price and quality of similar products, or to understand the contract they have entered into before finalising an agreement with a supplier.

Previous reviews of unsolicited selling

A 2002 review of the NSW *Door-to-Door Sales Act 1967* found that some of the most vulnerable groups in society continue to encounter undesirable direct selling practices. These were noted to include the elderly (especially older women living alone), the unassertive, consumers with poor understanding of English and the disadvantaged. Many direct selling firms were also found to target particular suburbs or areas, including those with a high percentage of public housing.[11]

The NSW review also considered that modern telemarketing practices, given the very similar nature of inter-personal pressure exerted by sales people at a customer's front door and on the phone, led to a sufficiently significant and wide-spread incidence of marketplace detriment to warrant regulation.

A recent Victorian paper identified the risk of high pressure sales resulting in poor choices by consumers being greatest in situations characteristic of unsolicited selling, including when:

- consumers do not expect to be approached by the trader, or cannot walk away from the situation;
- traders use moral pressure or try to create an obligation for reciprocity by, for example, providing free gifts;
- the goods are unique so that exactly the same product cannot be purchased elsewhere;
- the goods are complex or unfamiliar so that the consumer has more difficulty relying on their own judgement;

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11 National Competition Policy Review: *Fair Trading Act 1987 and the NSW Door-to-Door Sales Act 1967*, p. 49. http://www.fairtrading.nsw.gov.au/pdfs/About_us/ftadtdreport.pdf

- the relationship between the trader and the consumer is not ongoing because the product is an infrequent purchase and/or the trader is not local; and
- the consumer is in a situation in which they are vulnerable or disadvantaged.[12]

Question 1.1

Is there further evidence about the impact of existing unsolicited selling regulation on consumers and on businesses?

Options for unsolicited sales

The status quo comprises retaining the existing direct/door-to-door and telephone sales regimes of the States and Territories, in addition to the national Do Not Call Register.

Three options are identified for this proposal, all of which include adopting a single national legislative approach. These options are to be compared with the status quo, which reflects the current regulatory arrangements and has no additional associated costs and benefits. The options are:

- Option A — Prohibit direct and telephone sales through the ACL.
- Option B — Not include any specific provisions regulating direct and telephone sales in the ACL and repeal the existing provisions of state and territory legislation.
- Option C — Create a harmonised framework for direct and telephone sales reflecting best practice in state and territory legislation, to be included in the ACL.

Each option would augment the existing provisions of the TPA and the ASIC Act.

Impact analysis

Option A — Prohibition of direct and telephone sales

Option A is a prohibition that would be imposed at a national level on all forms of unsolicited direct and telephone sales. It would not be lawful for a business to approach a consumer directly in any place outside of the business' usual place of business, including by telephone, unless the consumer has previously requested that they do so.

Option A would allow for the possibility of some organisations or types of activities to be explicitly exempt from the prohibition having met certain criteria. If such an exemption power was included in the ACL, exemptions would be subject to the IGA voting arrangements on a case by case basis.

Further consideration would need to be given on the nature of legislative guidance on the exercise of the power. Such guidance could restrict the granting of exemptions to businesses or activities that are subject to industry self-regulation or other factors that reduce the risk of behaviour that is contrary to the intent of the more general provisions of the ACL.

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12 Consumer Affairs Victoria (2009) *Cooling-off periods in Victoria: their use, nature, cost and implications*, Research Paper no. 12, 12.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	No availability of goods and services provided by unsolicited sales methods. (-2)
	Removal of information asymmetry and risk of exploitative conduct associated with unsolicited sales. (+3)	
	Consumer benefits: +4	Consumer costs: -2
Business	Less prescriptive regulatory regime for those businesses subject to exemption, if any (+1).	Ban on supplying goods and services by unsolicited sales methods. (-3)
		Previously compliant businesses would have to cease trading in whole or part. (-3)
		Changes likely to be required with shifting to alternative sources of supply. (-2)
	Business benefits: +1	Business costs: -8
Governments	Reduction in enforcement costs for consumer agencies. (+1)	
	Government benefits: +1	Government costs: 0
Total benefit/cost	**-4**	

Option A — Outcome

Option A would effectively prevent consumers from purchasing goods and services via unsolicited sales approaches. The costs to consumers resulting from a prohibition on purchasing goods and services via unsolicited sales would be offset to some extent by eliminating the detriment suffered by consumers as a result of the high pressure sales techniques.

Option A would impose very significant costs for businesses that employ direct selling marketing techniques, which are mostly small business entities,[13] and would affect particularly those businesses that are unable to offer their goods and/or services other than by way of unsolicited selling.

Under Option A, all businesses would be banned from selling goods and services through unsolicited sales. Furthermore, all legitimate businesses that currently rely partly or wholly on an unsolicited sales business model and that comply with the relevant state and territory regulatory requirements would have to cease or restrict their trading using unsolicited selling. Businesses that choose to adopt an alternative selling model would face associated establishment costs, which could potentially be passed on to consumers in the form of higher prices.

Option A may provide some administrative benefits for consumer agencies as a per se prohibition would be relatively simple to administer. Any benefit to government would be eroded to the extent that exemptions are given and any, further regulatory, requirements not adhered to by exempt businesses.

13 According to the Direct Selling Association of Australia, almost 67 per cent of its members are small business entities with annual retail sales of less than $5 million.

Option B — Not include any specific provisions regulating direct and telephone sales in the ACL and repeal the existing provisions of state and territory legislation

Under Option B, unsolicited direct selling practices would be regulated through the operation of the general consumer protection provisions of the ACL, including prohibitions on unconscionable or misleading or deceptive conduct.

Option B		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1) Less costly for consumers to enforce specific legislation than to rely on more general deceptive conduct and unconscionable conduct provisions.	Information asymmetry and risk of exploitative conduct associated with not directly regulating unsolicited sales, particularly where conduct contrary to the general consumer protection law that occurs in a home or other place is difficult to identify. (-3)
	Consumer benefits: +1	Consumer costs: -3
Business	Nationally consistent regulatory requirements would reduce compliance costs. (+3)	
	Business benefits: +3	Business costs: 0
Governments		Continuing complaints about high pressure sales methods associated with unsolicited sales. (-1)
		Need for consumer agencies to educate consumers and businesses on application of TPA to unsolicited sales. (-1)
	Government benefits: 0	Government costs: -2
Total benefit/cost	**-1**	

Option B — Outcome

Option B would give consumers the option to purchase goods and services sold through unsolicited sales, but would not be afforded specific protections in respect of this selling method. Removing current jurisdictional direct/door-to-door and telephone sales regulation would reduce the compliance costs incurred by businesses currently complying with those regimes and would impose no additional regulatory burden.

The impact of removing regulation on enforcement costs is difficult to estimate, as a reduction in enforcement or conciliation proceedings relating to specific unsolicited selling regulation may continue to be borne, at least in part, in respect of increased regulatory activity under the broader consumer protection provisions of the ACL.

Question 1.2

Would broad consumer protection provisions such as the prohibitions on misleading and deceptive conduct or unconscionable conduct, among others, provide sufficient consumer protection in the absence of specific unsolicited selling regulation?

Option C — Create a harmonised framework for direct and telephone sales reflecting best practice in state and territory legislation, to be included in the ACL

Option C would involve introducing a single national regulatory framework for all forms of unsolicited offers and sales that occur in a non-retail environment, either in person or by

telephone. This would be based on harmonisation of the current jurisdictional direct/door-to-door and telephone sales regimes.

One of the key differences between the current jurisdictional laws is the variation in the scope of what unsolicited selling practices are subject to regulation, including:

- what constitutes a sale or marketing approach outside of a retail environment;
- the extent to which the regimes place different obligations on different forms of unsolicited selling (for example, face-to-face versus telephone sales); and
- the scope and range of exemptions from the general requirements of the regime.

Option C could provide a scheme that does not discriminate between different forms of unsolicited selling unless the substance of the potential harm to consumers warrants a different approach. In doing this, it would be necessary to define unsolicited sales in a sufficiently broad way to cover all forms of unsolicited selling approaches, including face-to-face (in home and other non-retail environments) and telephone sales.

Option C would apply to all goods and services, with the exception of financial products and services to the extent that they are regulated by the *Corporations Act 2001* (Cth) and the ASIC Act.

Option C would allow for the possibility of some organisations or types of activities to be explicitly exempt from the prohibition having met certain criteria. If such an exemption power was included in the ACL, exemptions would be subject to the IGA voting arrangements on a case by case basis.

Further consideration would need to be given to the nature of legislative guidance on the exercise of the power. Such guidance could restrict the granting of exemptions to businesses or activities that are subject to industry self-regulation or other factors that reduce the risk of behaviour that is contrary to the intent of the ACL.

Option C could apply to solicited sales in circumstances where a consumer initially solicits a supplier for the purpose and expectation of providing, or quoting for, a particular product or service, and when the supplier consequently comes to the consumer's home or otherwise approaches the consumer, the supplier applies high pressure sales techniques to make an unsolicited offer of a related or unrelated product or service. It would also be possible to approach the issue in a similar way to section 40B of the NSW FTA. The NSW FTA applies if the consumer did not invite the dealer to call for the purpose of entering negotiations that would lead to a contract for the supply of goods or services

Drawing on current jurisdictional approaches, Option C would include the following key provisions:

- Express consumer rights, including:
  - a cooling-off right, exercisable by providing the supplier with a cancellation notice (containing prescribed information) via a wide range of delivery methods;
  - provisions specifying the effect of cancellation under the cooling-off right; and

  - provisions specifying that the consumer can rescind an unsolicited sales agreement after the cooling off period in various circumstances related to breaches by the supplier of certain supplier obligations specified in the regime.

- Express supplier obligations about the way in which consumers are approached, including:

  - permitted hours of visiting and calling consumers; and

  - duties to leave a consumer's premises or end a call when requested by the consumer.

- Express supplier disclosure obligations about the making of contracts, including:

  - formal requirements for valid agreements arising from suppliers approaching consumers by telephone based on subsections 67E(1)-(4) of the Victorian FTA (which include requirements to, among other things, provide the full written purchase agreement, which must include particular details of the transaction, within five days);

  - formal requirements for valid agreements arising from suppliers approaching consumers other than by telephone based on subsections 61(1)-(2) of the Victorian FTA. A valid agreement would be required to include, for instance, a cooling-off notice and a cancellation notice (containing prescribed information); and

  - at the outset of an approach or call, a requirement to clearly advise the consumer of their purpose and to display or produce identification containing certain prescribed information.

- Express supplier obligations about post-contractual behaviour, including:

  - prohibitions during the cooling-off period against a supplier supplying goods or services, or accepting trade-in goods; and requiring or accepting payment for goods or services to be supplied;

  - a requirement that a supplier immediately repay money received after the consumer has exercised their cooling off right; and

  - prohibitions against a supplier taking action against a consumer for the purpose of recovering amounts allegedly payable under a validly cancelled or terminated unsolicited sales agreement; and

  - prohibitions against a supplier from seeking to avoid provisions concerning the cooling off right or operation of the regime.

Option C would also provide that a contravention of any of the supplier obligations would impose civil and criminal liability under the ACL.

The harmonised framework would also be supported by the consumer protection provisions in the TPA, which are mirrored in almost all jurisdictions, that would be uplifted to form part of the ACL.

Option C		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	
	Savings due to decreased compliance costs can be passed onto consumers as lower prices. (+2)	
	Consumer benefits: +3	Consumer costs: 0
Business	Nationally consistent regulatory requirements would reduce compliance costs. (+3)	Cost of compliance/understanding new laws. (-1)
	Business benefits: +3	Business costs: -1
Governments	Uniform legislation would allow more efficient policy development. (+2)	Guidance would need to be issued for the new requirements to ensure that consumers are aware of their rights. (-2)
	Consistency in enforcement approach. (+1)	
	Government benefits: +3	Government costs: -2
Net benefit/cost	**+6**	

Option C — Outcome

Option C would benefit consumers by enhancing consumer protection over and above that available for sales undertaken in retail contexts and over the internet. This would be a positive benefit in situations where unsolicited selling approaches pose greater risks of information asymmetry between suppliers and consumers, or particularly high pressure sales techniques targeting a range of vulnerable consumers, which are unlikely to be captured adequately by the current unfair practices provisions of the TPA. This could occur where evidence of breaches of the broader consumer protection provisions are difficult to prove based on behaviour that occurs inside a private residence or other non-retail place. It could also provide clear avenues for consumer redress in instances where unfair conduct has taken place.

These additional consumer protections would be provided in a nationally consistent form with common provisions for all forms of unsolicited sales (including door-to-door and telephone sales). Nationally consistent consumer protection would encourage confidence in national consumer product and service markets.

Replacing inconsistent state and territory regimes with a single, national approach would also benefit businesses, particularly those operating nationally, by reducing compliance costs for businesses operating in multiple jurisdictions, which could benefit consumers if cost savings are passed on in the form of lower prices.

A nationally consistent framework would provide indirect benefits for consumers, businesses and consumer agencies by making the unsolicited selling regime easier to understand, comply with, provide guidance to consumers and businesses, and enforce.

This proposal would incur indirect costs associated with any change to regulation, such as loss of familiarity and the need for the government to educate businesses and consumers on the change. However, these costs would be offset by the benefits to government associated with a single national framework, including efficiencies in policy development and consistency in the enforcement approach of consumer agencies.

Question 1.3

In moving to a national regime, which aspect(s) of the harmonised framework would carry the greatest compliance costs for businesses beyond those currently in existence under state and territory laws?

Consultation

SCOCA received 25 public submissions which provided responses to the 'Door-to-door trading and telemarketing' section of *An Australian Consumer Law: Fair markets – Confident consumers*. The submissions reflected a number of key themes, including:

- the need to harmonise regulation across state and territory borders in order to reduce regulatory burden for operators;
- support for an approach based on models such as the Victorian or NSW FTAs;
- comments on the appropriate length of cooling-off periods and calling hours; and
- some support for industry specific regulation, while some stakeholders were cautious of the need for further regulation of door-to-door trading and telemarketing.

Harmonisation of the laws regulating door-to-door trading and telemarketing was widely supported by stakeholders, particularly as a way of reducing the regulatory burden for businesses. They identified costs of complying with separate jurisdictional regimes related to: audit requirements; the preparation of different versions of cooling-off notices; the training of sales representatives working in different jurisdictions; the administration of different systems and IT specifications; and the adoption of different internal policies and procedures. For door-to-door sales, one submission estimated that the costs of creating, formatting, reproducing and printing six different versions of a cooling-off notice are extremely high and that a uniform approach would reduce this cost by 70 per cent.

Conclusion

Option A, prohibiting nationally all forms of unsolicited sales, would clearly carry the greatest compliance burdens for businesses, and potentially create further complexity through an exemption regime. Offsetting this to some extent, it would also provide the clearest deterrent from engaging in unscrupulous selling practices, although it would also carry the greatest impacts for legitimate selling practices.

Under Option B, consumers would retain the choice of purchasing goods and services through direct and telephone sales, but would have a lower level of protection than that currently provided. The benefits accruing to businesses from a significantly lessened compliance burden would be unlikely to outweigh the potential costs of this option, particularly for vulnerable and disadvantaged consumers.

Under Option C, consumers would benefit from a higher level of protection. While businesses would have to comply with a new regulatory regime, these costs would be more than offset by the reduction of compliance costs associated with removing multiple state and territory laws. This option would also make it easier for consumers and businesses to understand the regulation.

PROPOSAL 2: ASSERTING A RIGHT TO PAYMENT FOR UNSOLICITED GOODS AND SERVICES, AND UNAUTHORISED DIRECTORY ENTRIES AND ADVERTISEMENTS

Current regulation

Generally, a transaction between a buyer and a seller occurs by agreement between the buyer and the seller. In some cases, a seller may approach a person or business directly stating a claim for payment for goods or services which have been provided but were not requested. For example, the author of a publication may seek payment for printing of a directory entry or advertisement that had not been requested.

Most jurisdictions have provisions mirroring section 64 of the TPA, which prohibits a person from asserting a right to payment for unsolicited goods or services, unless they have reasonable cause to believe they have a right to payment, or for making an entry in a directory without a person's consent.

In NSW, Queensland and Victoria, there are also specific additional provisions that prohibit a supplier from seeking payment for the making of unauthorised advertisements. These are contained, respectively, in section 58A of the NSW FTA, section 52 of the Queensland FTA, and section 27 of the Victorian FTA. There is no equivalent of these provisions in the TPA.

Section 64 of the TPA prohibits asserting a right to payment for making an entry in a 'directory'. While the definition of directory is broad enough to include some advertisements, the intention of the provision is not to provide protection in respect of certain types of publications: the provision aims to prohibit the unscrupulous practice of asserting a right to payment for something that a person has not asked for. As such, the extension found in this proposal to explicitly cover advertisements under the ACL (that is in the NSW, Victoria and, indirectly, in Queensland) is aimed at ensuring there is not a loophole for asserting a right to payment for an entry in a publication if it cannot, in fact, be defined as a 'directory'.

The NSW and Queensland provisions also specify that a warning statement must be included on documents that purport to be invoices for unsolicited goods or services, or unauthorised directory entries or advertisements. The requirements for the warning statement are specifically detailed in the provisions.

In NSW the following statement is required in at least 18 point font on the first page of the unsolicited document or invoice: 'THIS IS NOT A BILL. YOU ARE NOT REQUIRED TO PAY ANY MONEY.'

These provisions apply in addition to the general requirements relating to misleading and deceptive conduct and false or misleading representations in sections 52 and 53 of the TPA.

Evidence of consumer detriment

There is some evidence that assertions of right to payment, particularly directed at businesses, occur:

- In the last two financial years, CAV recorded 580 enquiries and 50 complaints in relation to unsolicited goods or services.

- In the past three financial years, NSW Fair Trading has received 1,023 enquiries and 369 complaints about unsolicited goods and services. In the same period, it received 318 enquiries and 69 complaints about false billing and reports a reduction in complaints since section 58A was incorporated into the NSW FTA.

- The Queensland OFT receives over 100 enquiries and 20 complaints a month regarding assertion of a right to payment through false billing. A majority of these complaints are from small businesses about requests for payment for listings in directories or advertising in publications such as magazines.

Options for Proposal 2

The status quo comprises a national provision in the TPA and three jurisdictions (NSW, QLD and Victoria) with both a provision mirroring the TPA provision and an additional prohibition on a supplier from seeking payment for the making of an unauthorised advertisement.

Two options will be considered for this proposal, and will be compared with the status quo:

- Option A: Incorporate the current section 64, without amendment, into the ACL.

- Option B: Extend the TPA provision to apply to unauthorised advertisements and to include a regulation-making power in respect of requirements for the provision of a statement that an unsolicited 'invoice' is not a demand for payment.

Impact analysis

Option A — TPA provision only

Option A would involve repealing the various state and territory provisions. Section 64 of the TPA would apply, without amendment, in each State and Territory as a provision of the ACL.

The proposed ACL provision would prohibit a person from seeking payment for unsolicited goods or services, or for the making of unauthorised directory entries.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	Consumers in NSW, QLD and VIC would no longer have specific provision relating to claims about unauthorised advertisements. (-2)
	Consumer benefits: +1	Consumer costs: -2
Business	Nationally consistent regulatory requirements. (+3)	
	Business benefits: +3	Business costs: 0
Governments	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Fair trading offices in NSW, QLD and VIC can no longer rely on their provisions to pursue suppliers that have charged consumers for unauthorised advertisements. (-1)
	Government benefits: +1	Government costs: -1
Total benefit/cost	**+2**	

Option A — Outcome

Option A provides a net benefit through nationally consistent regulation and the retention of existing Commonwealth legislation in the ACL, which ensures that businesses are familiar with their obligations under the new consumer protection laws. However, there is a potential loss of protection for consumers and small businesses in NSW, QLD and Victoria in relation to unauthorised advertisements, as the relevant provisions in those jurisdictions would be repealed.

Option B — Extend the TPA provision to apply to unauthorised advertisements and to include a regulation-making power in respect of requirements for the provision of a statement that an unsolicited 'invoice' is not a demand for payment

Option B involves including a section in the ACL based on an amended section 64 of the TPA to include a prohibition on traders seeking payment for unauthorised advertisements, along the lines of the prohibition currently present in NSW, QLD and Victoria. In addition, the ACL would include a regulation-making power in respect of requirements for the provision of a statement that an unsolicited 'invoice' is not a demand for payment, along the lines of that in section 58(A) of the NSW FTA. The relevant State and Territory laws would be repealed.

Advertisements include those placed in newspapers as well as magazines and other similar publications. Such publications are also the subject of complaints to consumer agencies, in addition to complaints relating to directory entries. Recent examples include complaints received by CAV in relation to companies which publish handbooks, magazines and online media.

Option B		
Impact group	Benefit	Cost
Consumers	Consumers across Australia would be receive protection in respect of suppliers seeking payment for unauthorised advertisements. (+2)	
	Nationally consistent consumer protection laws. (+1)	
	Consumer benefits: +3	Consumer costs: 0
Business	Nationally consistent regulatory requirements. (+3)	Some small additional compliance costs due to the more prescriptive nature of the proposed legislation. (-1)
		Minor costs to ensure compliance with the new parts of the legislation. (-1)
	Business benefits: +3	Business costs: -2
Governments	Consumer agencies across Australia would be able to act against suppliers seeking payment for unauthorised advertisements. (+1)	
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	
	Any necessary future changes to the requirements for the statement would be easier to implement as they are contained in regulations rather than the primary legislation. (+1)	
	Government benefits: +3	Government costs: 0
Total benefit/cost	**+7**	

Option B — Outcome

Option B provides additional protection to consumers across Australia from suppliers who seek payment for unsolicited goods or services, or unauthorised directory entries or advertisements, and there would only be one set of laws governing this area in Australia.

The warning statement for unauthorised advertisements would be prescribed in regulations under the ACL, which impose additional compliance costs on businesses outside of NSW. This could be offset to some extent by assisting consumers to distinguish between genuine bills and scams.

Consultation

An Australian Consumer Law: Fair markets – Confident consumers invited submissions on whether the operation of section 64 of the TPA could be improved from its current form. Out of 102 submissions received, there was one submission in favour of extending the operation of section 64 of the TPA to unauthorised advertisements, and none against.

Conclusion

Both options examined for this proposal provide a net benefit based on a preliminary qualitative assessment of costs and benefits. This reflects that each of these options would provide for continued regulation at in this area, although in a nationally consistent way.

Option A would draw upon existing legislation in the TPA, which consumers and businesses would be familiar with. Option B would add an explicit prohibition to assert a right to payment for unauthorised advertisements, and require a warning statement as an additional layer of protection for consumers.

Question 2.1

Should this proposal be mirrored in the ASIC Act in relation to financial products and services?

PROPOSAL 3: INFORMATION STANDARDS

Current regulation

The TPA currently includes a power for the Commonwealth Minister to declare, by regulation, a standard to be a consumer product information standard under sections 65D and 65E. Section 65D provides that a corporation must not supply goods that do not comply with a prescribed information standard.

Section 65D of the TPA allows such standards to be made in relation to:

- the disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods; and
- the form and manner in which that information is to be disclosed on or with the goods;

as are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods.

Section 65D of the TPA does not cover products that are for export only.

All jurisdictions, except Tasmania, have a general power to prescribe product information standards with respect to goods. Tasmania has a specific power under its *Flammable Clothing Act 1973* to prescribe how clothing is to be labelled.

Victoria, Queensland, SA and WA also have a general power to prescribe information standards for services. NSW does not have a general service information standard power but has industry specific powers to prescribe information standards for employment placement services and funeral goods or services.

The provision of information to consumers to enable them to make informed purchases enhances the functioning of markets. Information standards can be used where critical information about the quality of goods or services is not easily observable to consumers.

Currently there are 25 different information standards in Australia — 23 which relate to goods and two which relate to services. Below is a table identifying the information standards currently in place.

Categories	Jurisdiction
Fibre content labelling for textiles	NSW, Qld, SA, WA, Tas
Care labelling for textiles	Cth, NSW, WA, ACT
Cosmetics	Cth, Qld
Petrol price signs	NSW
Petrol composition	Vic
Leather goods	Qld
Footwear	Qld. SA, WA, Tas
Furniture	Qld, SA, WA
Opals	SA
Builders plates for vessels	WA
Employment placement services	NSW
Funeral goods/services	NSW
Total categories: 12	**Total information standards: 25**

Options for Proposal 3

The status quo comprises the mixture of TPA and state and territory provisions with differing standards relating to goods or, in some cases, goods and services.

Two options will be considered for this proposal, to be compared with the status quo:

- Option A: Incorporate the TPA information standards power, without amendment into the ACL, which applies to goods only.
- Option B: Include a general power in the ACL to prescribe information standards in relation to both goods and services.

Impact analysis

Option A — Incorporate the TPA information standards power in the ACL, which applies to goods only

Under Option A, the three current national information standards in the TPA would continue to apply, whilst existing State and Territory standards will be assessed to determine whether it is appropriate to grandfather them under the ACL. For a standard to be grandfathered in the ACL it would need to be agreed to by MCCA under the existing consensus voting arrangement. A standard would not be grandfathered unless it is considered appropriate following an assessment by MCCA.

Any new information standards (whether based on existing State or Territory standards or not) would be made by the Commonwealth Minister. However, each new proposal would be subject to the IGA voting requirements. Standards would only be made in respect to goods, and not to services.

Each proposal for a new information standard would be subject to a separate regulation impact assessment involving an analysis of its likely impacts.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	Consumers in a number of jurisdictions will not be able to benefit from information standards for services if they are warranted. (-1)
		Some state and territory information standards could be repealed in the interim prior to determining if they remain relevant and are needed under the national law. (-1)
	Consumer benefits: +1	Consumer costs: -2
Business	Nationally consistent regulatory requirements. (+3)	
	Any future standards would be nationally applied and subject to consistent voting processes and regulation impact assessments prior to introduction. (+1)	
	Business benefits: +4	Business costs: 0
Government	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	
	Government benefits: +1	Government costs: 0
Total benefit/cost	**+4**	

Option A — Outcome

Transfer of the TPA regulation making power to the ACL would have no direct impact on business compliance costs. Compliance costs under this option would be related to the extent to which existing state information standards are nationalised and in future, the creation of new standards. Any new standards would be subject to the regulatory impact analysis process. Having a single set of nationally consistent information standards would also reduce compliance costs for businesses.

Despite the potentially lower costs for business, consumers would not be afforded the protection of any repealed information standards nor information standards for services, should they be required.

Question 3.1

What impact has the existing information standards (under the TPA or State or Territory law) had on consumers and businesses?

Option B — Include a general power in the ACL to prescribe information standards in relation to both goods and services

Under Option B, the ACL would include a more general information standards making power than that currently in the TPA, along the lines of that in South Australia, which applies to both goods and services.

Markets for goods and services are inherently subject to asymmetric information; that is, suppliers almost invariably know more about the characteristics of the goods and service being offered for sale than consumers. The information standards power in the TPA helps to minimise the impact of asymmetric information by requiring information to be disclosed to consumers about the quality and nature of the goods. For example, the cosmetics information standard in the TPA contains ingredient labelling requirements to allow

consumers to identify ingredients which they may be allergic to or which may cause adverse reaction. It would be impossible for a consumer to observe these characteristics of a good independently of information provided by the supplier.

Including an additional power for the Minister to declare information standards for services would enable future action to be taken where it is considered appropriate. Informed choices through a ready access to clear and accurate information about goods as well as services can contribute to consumer confidence, which is vital for effective market operation. For instance, the funeral service standard in NSW ensures that funeral directors provide consumers (amongst other things) with information about the costs and coverage of their 'basic funeral' option (if any), while the employment placement services standard requires employment service providers in NSW to inform consumers (amongst other things) of the prohibition on misleading conduct and the ability to lodge a complaint with NSW Fair Trading.

The information standards making power in the South Australian *Trade Standards Act 1979* allows information standards to be made that:

- prescribe or regulate the content of information in respect of goods or services, or the manner or form in which information is to be provided in respect of goods or services;
- provide that information of a specified kind is not to be provided in respect of goods or services, or that information in respect of goods or services is not to be provided in a specified manner or form;
- require the provision of specified information in respect of goods or services and prescribe the manner and form in which it is to be provided;
- assign a meaning to information of a specified kind in respect of goods or services; and
- prohibit the alteration or variation of, or any interference with, any information provided in compliance with any regulation.

Under Option B, the three current information standards in the TPA will be included in the ACL and applied nationally, whilst existing state and territory standards will be assessed to determine whether it is appropriate to grandfather them under the ACL, in accordance with the process outlined above.

New information standards would be made by the Commonwealth Minister under the ACL, they could apply to goods (as in the current TPA) or to services (unlike the current TPA) and would apply nationally. Before a new standard can be made it would need to have a separate regulatory impact assessment and be subject to agreement in accordance with voting processes outlined above.

Option B		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	Some state and territory information standards could be repealed in the interim prior to determining if they remain relevant and are needed in the national law. (-1)
	Additional protection could be given to consumers if an information standard for services became necessary. (+2)	
	Consumer benefits: +3	Consumer costs: -1
Business	Nationally consistent regulatory requirements. (+3)	
	Any future standards would be nationally applied and subject to consistent voting processes and regulation impact assessments prior to introduction. (+1)	
	Business benefits: +4	Business costs: 0
Governments	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	
	Government benefits: +1	Government costs: 0
Total benefit/cost	**+7**	

Option B — Outcome

Including an information standards regulation making power, in itself, would have no direct impact on business compliance costs. Compliance costs of this option would be related to the actual standards prescribed under this power. Any new standard would not be introduced unless it has been approved under the IGA, and has been the subject of a separate regulatory impact analysis.

Option B would provide both the protection of the existing national product information standards, while broadening the scope of coverage to services that could be subject to a standard in the future. This expanded power would allow information standards to apply to goods or services supplied in Australia if agreed under the IGA. These likely benefits would exceed the potential cost to consumers of repealing any existing state or territory standards in the interim.

Conclusion

Option A could offer significant benefits for business through nationally consistent requirements, while Option B could offer those same benefits but with an expanded capacity to provide a more diverse range of information standards (particularly in respect of services) in the future, should they be required.

Question 3.2

What are the likely impacts on consumers and businesses with expanding national coverage of information standards to services?

PART C: REFORMS WHICH REFLECT BEST PRACTICE IN STATE AND TERRITORY LAWS

Introduction

A number of best practice reform proposals relate to laws that only exist in some jurisdictions. This situation is the result of legislative and policy developments by States and Territories to deal with specific issues that may have arisen in particular jurisdictions.

As with the national consistency reforms, the separate consumer protection laws at the national, state and territory levels can be harmonised to eliminate regulatory duplication and inconsistency. However, as only some jurisdictions have particular regulations, consideration of the factors for and against each proposal is required, including:

- the nature of the problem facing consumers;
- the appropriate policy response to address these consumer issues, including non-regulatory approaches;
- what benefits may result from the change and whether these can be quantified; and
- whether the proposed change is appropriate for inclusion in a law which applies generic consumer protections in all Australian jurisdictions.

All of the options considered consist of nationally consistent regulation in all States and Territories through the applied ACL. The introduction of nationally consistent regulation would provide significant compliance cost savings for businesses, which would only have to comply with a single, uniform set of consumer protection provisions. This would result in cost savings which should flow through to consumers. There would also be benefits for consumers through familiarity and consistency of legislation, particularly when purchasing from interstate. Benefits also flow to consumer agencies through easier cross-border enforcement and the ability to issue consistent, national guidance.

PROPOSAL 4: LIABILITY OF RECIPIENT OF UNSOLICITED SERVICES

Current regulation

Section 65 of the TPA provides that a person is not liable to make any payment for any unsolicited goods supplied to them, and is also not liable for loss or damage to the goods unless the loss or damage is a result of a wilful or unlawful act by the person. There is currently no equivalent section in the ASIC Act for unsolicited financial products or services.

Most States and Territories have a provision in their FTAs that mirrors section 65 of the TPA. In addition, Victoria also has section 26 of the Victorian FTA, which provides similar consumer protection in relation to unsolicited services. This protection against unsolicited services is not replicated in any other jurisdiction.

Consumers are particularly disadvantaged in their dealings with suppliers who present them with unsolicited goods or services, particularly where their rights and obligations are uncertain. This is particularly the case when a trader asserts a right to payment for unsolicited goods or services since this behaviour is already covered by section 64 of the TPA (and its equivalent in state and territory legislation). It is timely to consider whether it would be inconsistent for consumers not to receive protection from the liability for unsolicited services.

Evidence of consumer detriment

In the last two financial years, CAV recorded 849 enquiries and 135 complaints in relation to unsolicited goods and services across a wide range of industries.

Options for Proposal 4

The status quo comprises a national provision (section 65 of the TPA), with most state and territory jurisdictions mirroring it in their FTAs. Victoria also has an additional section that provides similar consumer protection in relation to unsolicited services.

Two options are considered for this proposal, and would be compared with the status quo:

- Option A: Include a provision in the ACL based on the existing TPA provisions only, without amendment.
- Option B: Include a provision in the ACL based on the existing TPA provisions, amended to cover unsolicited services and limitation of liability as a result of the supply of such services.

Impact analysis

Option A — TPA provisions only

Option A would involve retaining the existing TPA provision without significant change. The provision in the current section 65 of the TPA would be retained in the ACL. The various state and territory provisions would be repealed. The proposed ACL provision would ensure that a person is not liable to pay for unsolicited goods from a supplier, and is not liable for the loss or damage to those goods unless the loss or damage is caused by wilful or unlawful action by that person.

As Option A does not incorporate Victoria's provisions on unsolicited services, Victorian consumers would no longer receive specific protection from being liable for unsolicited services, even though the generic consumer protection laws under the ACL would apply to them. Similarly, fair trading officers in Victoria can no longer rely on the unsolicited services provisions to pursue suppliers that have charged consumers for unsolicited services, but would instead have to use the generic consumer protection laws under the ACL.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws in this area. (+1)	Consumers in Victoria would no longer have a specific provision protecting them from being liable for unsolicited services. (-1)
	Consumer benefits: +1	Consumer costs: -1
Business	Nationally consistent regulatory requirements. (+3)	
	Business benefits: +3	Business costs: 0
Governments	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Fair trading offices in Victoria can no longer rely on their provisions to pursue suppliers that have charged consumers for unsolicited services. (-1)
	Government benefits: +1	Government costs: -1
Total benefit/cost	**+3**	

Option A — Outcome

Option A provides a net benefit through nationally consistent regulation. However, the downside is a potential loss of protection for consumers in Victoria.

Option B — TPA provisions, provisions dealing with unsolicited services and limitation of liability as a result of the supply of such services

Under Option B, the existing section 65 of the TPA would be incorporated into the ACL. In addition, a provision similar to the Victorian provision, which excuses a person from liability to pay for unsolicited services, would also be incorporated into the ACL.

Section 64 of the TPA was introduced in 1975 to prevent a trader from asserting a right to payment for unsolicited goods, with the coverage for unsolicited services added in 1977. Section 65, to prevent a person from being liable for being supplied with unsolicited goods, was introduced in 1986 to supplement the effect of section 64. Australian markets have evolved in the intervening two decades to become more service-oriented, so it is timely to consider whether it is necessary to expand section 65 to cover unsolicited services also.

There would also be an extension that negates any liability arising for the recipient of unsolicited services as a result of the supply of such services, rather than just the services themselves. This ensures that consumers are not responsible for liabilities arising indirectly out of receiving unsolicited services. For example, loss or damage to a third party while the consumer was waiting for the supplier to restore something to its previous condition before the unsolicited services were performed, or where unsolicited services rendered caused other repairs to be necessary as a result of the services, are clearly liabilities which arose due to actions which were not authorised by the consumer, and thus the consumer should not be liable for them.

The relevant state and territory laws would be repealed. In addition, this proposal would include a new provision in the ASIC Act for unsolicited financial services.

Option B		
Impact group	Benefit	Cost
Consumers	Consumers across Australia would be additionally protected by not being liable to pay for unsolicited services. (+2)	
	Consumers across Australia would also be protected against liabilities arising indirectly from receiving unsolicited services. (+1)	
	Nationally consistent consumer protection laws. (+1)	
	Consumer benefits: +4	Consumer costs: 0
Business	Nationally consistent regulatory requirements. (+3)	Minor costs to ensure compliance with the new parts of the legislation. (-1)
	Business benefits: +3	Business costs: -1
Governments	Consumer agencies across Australia would be able to act to protect consumers who receive unsolicited services and are charged for those services. (+1)	
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	New enforcement and compliance responsibilities for consumer agencies. (-1)
	Government benefits: +2	Government costs: -1
Total benefit/cost	**+7**	

Option B — Outcome

Under Option B, consumers across Australia would not be liable to pay for unsolicited goods or services, and there would only be one set of laws governing this area in Australia. In addition, consumers would also be protected against a liability arising as a result of the supply of such services, rather than just the services themselves. This removes a discrepancy in the consumer protection laws, which currently protects consumers from liability for unsolicited goods, but not unsolicited services. The same benefit applies to consumer agencies, which would be able to act to protect consumers who receive unsolicited services and are charged for those services.

Consultation

An Australian Consumer Law: Fair markets – Confident consumers invited submissions on whether section 65 of the TPA should be extended to services. Out of 102 submissions received, there were seven submissions in favour of the proposal, and two against.

Conclusion

Both options would provide a net benefit compared to the status quo. Option A would maintain nationally consistent consumer protection laws, while providing protection against unsolicited services by generic laws. Option B provides a more explicit protection to consumers by specifying that they are not liable for unsolicited services.

Question 4.1

Are there any issues arising from extending this protection to consumer services?

PROPOSAL 5: STANDARDS OF DISCLOSURE FOR INFORMATION UNDER THE AUSTRALIAN CONSUMER LAW

Current regulation

The PC recommended that information disclosed to a consumer should be comprehensible, with a focus on content, clarity and form of disclosure, in order to facilitate good consumer decision-making.

Victoria is the only jurisdiction that has mandatory disclosure requirements for consumer documents. Section 163 of the Victorian FTA requires that a consumer document:

- must be easily legible;
- to the extent that it is printed or typed, must use a minimum 10 point font; and
- must be clearly expressed.

Subsection 163(1) of the Victorian FTA defines a 'consumer document' to mean a consumer contract, or a statement, notice or other document required by the Victorian FTA. A 'consumer contract' is defined in section 3 of the Victorian FTA as an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services. South Australia also has similar requirements in section 17 of the *Consumer Transactions Act 1972* (SA).

The Victorian provision does not apply to consumer contracts which are credit contracts. The new *National Credit Code* already stipulates disclosure requirements in relation to credit contracts, so this proposal should not apply to credit contracts.

In making consumption decisions, consumers are assisted by information in a clear and legible form. This reduces the potential for uncertainty, misunderstanding and poor consumption decisions.

At the Commonwealth level, certain documents already have disclosure standard requirements under the *Corporations Acts 2001*. For example, Financial Services Guides are required to comply with Part 7.7 of that Act, which specifies information that needs to be included, such as details of the entity providing the services, remuneration provided to the entity and related entities, and dispute resolution systems. However, most consumer documents do not have similar disclosure requirements at present.

The Victorian model imposes a basic, minimum standard, requiring material information about goods and services to be provided to consumers upon request. It sets a positive standard of conduct required from suppliers, rather than relying only on negative prohibitions in other provisions of the law. The positive requirement creates more clarity for traders, who may otherwise be unclear when a failure to disclose information would constitute a breach of the general prohibition against misleading and deceptive conduct.

Question 5.1

What criteria are required to ensure that a document is clear and legible?

Evidence of consumer detriment

CAV has advised that section 163 of the Victorian FTA is often used in conjunction with the Victorian unfair contracts terms provisions. In the last two financial years, CAV has received 153 enquiries and 11 written complaints that involve section 163 of the Victorian FTA.

Options for Proposal 5

The status quo comprises the standard of disclosure requirements in section 163 of the Victorian FTA, with no specific requirements in the TPA.

Three options are considered, and would be compared with the status quo:

- Option A: Not adopting standard of disclosure requirements in the ACL.
- Option B: Adopting, in principle, the Victorian requirements that documents specifically required to be provided under the ACL must be clear and legible.
- Option C: Adopting, in principle, the Victorian requirements that all consumer documents must be clear and legible.

Impact analysis

Option A — Not adopting standard of disclosure requirements in the ACL

Option A would involve the repeal of section 163 of the Victorian FTA, as part of Victoria's application of the ACL. To the extent that this removes the discrepancy between the consumer protection regime of Victoria and the rest of Australia, it provides a nationally consistent set of consumer protection laws that consumers and businesses can rely upon.

However, consumers in Victoria would lose their current protection and would have to rely on other, more generic consumer protection laws for redress should they encounter suppliers which attempt to use consumer documents which are not clear or are illegible.

Consumer agencies also face costs as they have to develop new guidance to explain how those provisions would apply.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	Consumers in Victoria would no longer have a specific provision requiring consumer documents to be clear and legible. (-1)
	Consumer benefits: +1	Consumer costs: -1
Business	Nationally consistent regulatory regime. (+3)	Uncertainty over how the TPA applies to content in consumer documents. (-1)
	Business benefits: +3	Business costs: -1
Governments	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Development of new guidance to explain how the TPA applies to the content in consumer documents may be necessary. (-1)
	Government benefits: +1	Government costs: -1
Total benefit/cost	**+2**	

Option A — Outcome

Option A provides a consistent set of national consumer protection laws in relation to the requirements for content in consumer documents.

This outcome, however, relies upon the use of more generic provisions, rather than specific regulations on that content, as is currently the case in Victoria. Businesses and consumer agencies would also face costs as to how those generic provisions would apply to the content in consumer documents.

Option B — Adopting, in principle, the Victorian requirements that documents specifically required to be provided under the ACL must be clear and legible

Under Option B, the provisions in section 163 of the Victorian FTA are to be incorporated, in principle, into the ACL, and is to apply to documents specifically required to be provided under the ACL only. Documents which would be required to be given under the ACL include a cancellation form under the proposed unsolicited selling regime, the new requirements for receipts and itemised bills, a lay-by sales agreement, and a cancellation form for lay-by sales.

Businesses that are not trading in Victoria may incur compliance costs to ensure that their consumer documents comply with the requirements under this option, to the extent that they do not already do so. However, this would be mitigated to some extent by less prescriptive requirements, as the font size requirement in section 163 of the Victorian FTA would not be adopted. It is expected that documents should be legible for consumers with normal eyesight, and a specific requirement on font might be unnecessarily restrictive, depending on the circumstances of the situation. Prescribing a specific font requirement, as in Victoria's case, may not be appropriate for every situation.

Consumer agencies would also need to produce new national guidance on what is considered 'clear and legible' in consumer documents required to be provided under the ACL.

Option B		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	
	Prescribed documents would be provided in a clear and legible manner. (+2)	
	Consumer benefits: +3	Consumer costs: 0
Business	Nationally consistent regulatory regime. (+3)	Costs to ensure compliance with the requirements. (-1)
	Business benefits: +3	Business costs: -1
Governments	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Development of new national guidance to explain how the proposed provisions apply to content in consumer documents. (-1)
		New enforcement and compliance responsibilities for consumer agencies. (-1)
	Government benefits: +1	Government costs: -2
Total benefit/cost	**+4**	

Option B — Outcome

Under Option B, prescribed documents required to be given under the ACL must be clear and legible, providing more certainty for consumers on their rights and businesses on their responsibilities, compared to the current situation which relies on generic protection in relation to, for example, false or misleading representations. The potential compliance burden for businesses is lowered by a less-prescriptive approach than mandating a particular font size for text in consumer documents, such as in the Victorian FTA currently.

Option C — Adopting, in principle, the Victorian requirements that all consumer documents must be clear and legible

Option C is similar to Option B, but extends the coverage of the proposed laws to all consumer documents, rather than just those required under the ACL. This would effectively replicate the current Victorian FTA provisions.

The number of documents covered by this option that a consumer is likely to encounter is greater compared to Option B. However, this will create regulatory duplication in relation to consumer standard form contracts, which is also covered by the proposed national unfair contract terms law currently before the Australian Parliament. The unfair contract terms law requires terms in relevant contracts to be 'transparent', which is a similar concept to 'clear and legible' which is proposed to be included in the ACL as part of this proposal.

Option C		
Impact group	Benefit	Cost
Consumers	As for Option B. (+3)	As for Option B. (0)
	Consumer benefits: +3	Consumer costs: 0
Business	As for Option B. (+3)	Regulatory duplication in relation to consumer standard form contracts. (-2)
		Otherwise, as for Option B. (-1)
	Business benefits: +3	Business costs: -3
Governments	As for Option B. (+1)	As for Option B. (-1)
	Government benefits: +1	Government costs: -2
Total benefit/cost	**+2**	

Option C — Outcome

Under Option C, all consumer documents provided in Australia must be clear and legible, providing more certainty for consumers on their rights and businesses on their responsibilities. The potential compliance burden for businesses is lowered by not mandating a particular font size for text in consumer documents, as the Victorian FTA currently does.

However, extra compliance costs would be imposed on businesses by the overlap between the unfair contract terms law's 'transparent' requirement and this proposal's 'clear and legible' obligations.

Consultation

An Australian Consumer Law: Fair markets – Confident consumers invited submissions on whether there should be a minimum standard for documents in the ACL. Out of 102 submissions, 11 were in favour of establishing some form of minimum standard for documents in the ACL, three were against, and four suggested having regard to existing laws and regulations on documents and disclosure before imposing any further requirements on businesses.

Conclusion

All three options examined for this proposal are likely to provide a net benefit for the economy compared to the status quo. All three options would provide a nationally consistent set of consumer protection laws in relation to the content in consumer documents. Option A does so by the existing generic provisions in the TPA, while Options B and C provide specific requirements for clarity and legibility. Option B limits the application of the proposal to documents required under the ACL only, while Option C covers a wider range of consumer documents.

Question 5.2

Should there be a separate provision which states that documents must be clear and legible, or should this requirement be stipulated for particular documents as appropriate?

Question 5.3

Should this proposal be mirrored in the ASIC Act, in relation to documents for financial products or services?

PROPOSAL 6: BILLS AND RECEIPTS

Current regulation

The provision of a bill or a receipt to a consumer is a way of ensuring they are informed about the goods and services they receive, and provide evidence of the terms of a transaction where a dispute occurs. Generally, a bill is a document which is provided to a consumer after goods or services have been supplied but have not been paid for, while a receipt is provided after goods or services have been paid for.

There are no specific requirements for bills and receipts in the TPA. However, the goods and services tax (GST) law requires tax invoices to be provided in relation to taxable supplies. Taxable supplies cover a large majority of the range of consumer goods and services.

Currently, the GST law requires that an invoice includes the Australian Business Number and name of the supplier, the words 'tax invoice' stated prominently, the date of issue of the tax invoice, and the price and description of the taxable supply being sold. If the total amount on the tax invoice is $1,000 or more, the invoice must also include the ABN and name of the recipient, and a brief description and quantity of the goods or services supplied.

Section 161A of the Victorian FTA contains the right for a consumer to request an itemised bill within 30 days of receiving a bill or account for services performed by a supplier. The same section also provides an obligation for businesses to provide a 'proof of transaction' for purchases of more than $50, and the right for a consumer to request this proof if the purchase is valued at $50 or less.

Both 'itemised bill' and 'proof of transaction' are terms which are defined in section 161A of the Victorian FTA, which describes what information each should contain.

- An 'itemised bill' specifies how costs to perform a particular service are calculated, including, where applicable, the hourly rate and number of hours comprising the labour component, a list of the various materials used, and the amount charged for each item.
- A 'proof of transaction' identifies the supplier, the date of the supply and the goods or services supplied to a consumer.

The Victorian provision also prohibits a person from charging for an itemised bill, to ensure that a person is not charged for providing something they are required to provide by law.

There is significant overlap between the receipts requirements under the Victorian FTA and the Commonwealth's tax invoice requirements under the GST law, with all of the Victorian FTA requirements duplicated in the GST law where the good or service is a taxable supply.

Question 6.1

What information should be included in a bill or receipt?

Enforcement

Bills and receipts may be useful as evidence in statutory warranty claims, disputes with tradespeople and other tribunal and lower court consumer cases.

In the last two financial years, CAV has received 5,411 enquiries and 1,102 written complaints relating to overcharging. The right to obtain bills, in particular, would assist consumers in determining whether they have been overcharged.

Options for Proposal 6

The status quo comprises the requirements for bills and receipts in the Victorian FTA, as well as the tax invoice requirements in the GST law.

Three options would be considered, and would be compared with the status quo:

- Option A: No requirement in the ACL, and retaining the requirements for tax invoices in the GST law.
- Option B: Adopt the Victorian requirements for bills and receipts in the ACL, in addition to the requirements for tax invoices in the GST law.
- Option C: Adopt the Victorian requirements for bills in the ACL to cover only those transactions for goods and services not already covered by the GST law.

Impact analysis

Option A — No requirement in the ACL, and retaining the requirements for tax invoices in the GST law

Option A would involve the repeal of section 161A of the Victorian FTA. This provides a nationally consistent regime (under the GST law) in relation to receipts, and also removes the regulatory duplication that currently exists for receipts, but there would be no specific regulation in relation to bills.

Victorian consumers would lose the protection of laws designed to ensure they receive a bill or receipt, but the tax invoice requirements under the GST law would continue to apply.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	Consumers in Victoria could lose the protection of laws designed to ensure suppliers would not take unfair advantage of consumers, particularly in relation to billing practices. (-1)
	Consumer benefits: +1	Consumer costs: -1
Business	Nationally consistent regulatory regime. (+3)	Uncertainty in Victoria over how, in the absence of the current Victorian FTA provisions, the TPA applies to billing practices. (-1)
	Reduced duplication in relation to requirements for receipts between the TPA and the GST law for businesses that operate in Victoria. (+1)	
	Business benefits: +4	Business costs: -1
Governments	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Development of new guidance to explain how the TPA applies to billing practices. (-1)
	Government benefits: +1	Government costs: -1
Total benefit/cost	**+3**	

Option A — Outcome

Option A provides a consistent set of national laws in relation to receipts in Australia, albeit in the GST law and not the ACL itself. This also removes the regulatory duplication between the Victorian FTA and the GST law that currently exists for receipts. There would be no specific regulatory requirements for bills under this option.

Option B — Adopt the Victorian requirements for bills and receipts in the ACL, in addition to the requirements for tax invoices in the GST law

Option B would incorporate the provisions in section 161A of the Victorian FTA into the ACL. This includes the definitions for 'itemised bill' and 'proof of transaction' that currently exist in that section.

This aspect of section 161A of the Victorian FTA aims to enhance the ability of consumers to enforce their rights if they have been incorrectly or excessively charged for services rendered. It is designed to encourage service providers to engage in honest and fair billing practices. It assists with the enforcement of other provisions of consumer law, by enabling consumers to obtain proof of a transaction if a dispute arises after purchase.

In relation to bills, this means that consumers have the right to request an itemised bill within 30 days of receiving a bill for services from a supplier. The supplier must provide the itemised bill upon such a request, and it must contain the details currently set out in the definition of 'itemised bill' in section 161A of the Victorian FTA.

In relation to receipts, a supplier would have to provide receipts to consumers where the price of a good or service is more than $50. A receipt must be provided to consumers upon request where the value of the good or service is $50 or less. The tax invoice requirements under the GST law would continue to apply to goods and services that are taxable supplies. The provision would also prohibit a person from charging for an itemised bill, to ensure that a person is not charged for providing something they are required to provide by law.

Consumers across Australia would, upon request, receive an itemised bill or receipt where appropriate, and this is an important part of informing consumers about what goods or services they are receiving from a supplier. This also allows evidence on transactions to be presented to tribunals and lower courts in a straightforward manner, as the relevant bill or receipt would contain sufficient information for use in those forums.

Option B would introduce a national overlap in requirements for receipts between the TPA and the GST law. This would impose significant compliance burdens on businesses, which would need to ensure that their receipts or invoices comply with both sets of regulations. Consumer agencies would also face the difficult task of developing national guidance on how the two sets of regulations interact.

Option B		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	
	Consumers across Australia would be assured of receiving an itemised bill (for services) or receipt (for goods or services) upon request. (+1)	
	Consumer benefits: +2	Consumer costs: 0
Business	Nationally consistent regulatory regime. (+3)	Costs to ensure compliance with the new parts of the legislation. (-1)
		Costs to comply with overlapping requirements of this option and the GST law. (-3)
	Business benefits: +3	Business costs: -4
Governments	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Development of new national guidance to explain how the proposed provisions would apply to bills and receipts, and how these would interact with the requirements under the GST law. (-1)
	Easier evidence gathering for tribunals and lower courts. (+1)	New enforcement and compliance responsibilities for consumer agencies. (-1)
	Government benefits: +2	Government costs: -2
Total benefit/cost	**+1**	

Option B — Outcome

Under Option B, consumers across Australia would have the right to receive a bill (for services) or receipt (for goods or services) upon request. This should assist consumers to prove that they have a right to, for example, access after-sales support or make warranty claims. However, the drawback to this option is that the proposed requirements in the ACL would overlap with existing requirements under the GST law, imposing significant compliance costs on businesses.

Option C — Adopt the Victorian requirements for bills in the ACL to cover only those transactions for goods and services not already covered by the GST law.

Under Option C, the requirement under section 161A of the Victorian FTA would be incorporated into the ACL, as it is for Option B, but only insofar as there are not already requirements under the GST laws.

For receipts, the requirements for tax invoices under the GST law would be extended under the ACL to all goods and services with a value of greater than $50 which are not already covered by the GST law. It is important to note that, in this case, the 'requirements' are the more detailed ones that apply to tax invoices valued at more than $1,000. This means that, for tax invoices valued between $50 and $1,000, the extra requirements currently imposed only on tax invoices valued at $1,000 or more would also apply under the ACL.

The provision would also prohibit a person from charging for an itemised bill, to ensure that a person is not charged for providing something they are required to provide by law.

Option C		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	
	Consumers across Australia would now be assured of receiving a bill or receipt for a transaction upon request. (+2)	
	Consumer benefits: +3	Consumer costs: 0
Business	Nationally consistent regulatory regime. (+3)	Costs to ensure compliance with the new parts of the legislation. (-1)
	Business benefits: +3	Business costs: -1
Governments	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Development of new national guidance to explain how the proposed provisions would apply to bills and receipts, and how these would interact with the requirements under the GST law. (-1)
	Easier evidence gathering for tribunals and lower courts. (+1)	New enforcement and compliance responsibilities for consumer agencies. (-1)
	Government benefits: +2	Government costs: -2
Total benefit/cost	**+5**	

Option C — Outcome

The benefits and costs under Option C are similar to those under Option B. The main difference is that the overlap between the Victorian FTA and the GST law that currently exists in relation to receipts has been eliminated, thus removing a significant compliance burden on businesses. The implementation cost of this option for businesses should be minimal, as requirements to issue receipts already exist under the GST law.

Consultation

An Australian Consumer Law: Fair markets – Confident consumers invited submissions on whether a consumer should have the right to request an itemised bill from a supplier of services. Of 102 submissions received, seven were in favour of requiring suppliers to provide an itemised bill to consumers on request, two were against, and three suggested having regard to existing laws and regulations on bills and receipts before imposing any further requirements on businesses.

Conclusion

The three could options provide a net benefit for the economy compared to the status quo. All three options would provide a nationally consistent set of consumer protection laws in relation to the content in consumer documents. Option A does so by repealing inconsistent legislation, while Options B and C provides specific regulation in relation to bills and receipts. Option B contains a degree of overlap with the GST law, while Option C does not.

PROPOSAL 7: LAY-BY SALES

Current regulation

A lay-by is a method of sale where a consumer purchases a good by paying amounts to the supplier over a period of time, the goods are held by the supplier for the consumer, and ownership of the good passes from supplier to consumer when it is fully paid for.

There is no specific regulation of lay-by sales in the TPA. However, conduct in respect of lay-by sales agreements are subject to the generic provisions of the TPA, such as those governing misleading or deceptive conduct (section 52), false or misleading representations (section 53), or harassment and coercion (section 60). Lay-by sales agreements would also become subject to the national unfair contract terms law, when it takes effect, to the extent they are consumer contracts in a standard form under those provisions.

The ACT, NSW and Victoria have specific provisions that regulate lay-by sales. These provisions specify:

- requirements for terms and conditions governing lay-by sale agreements;
- cancellation procedures by the consumer and supplier; and
- issues relating to cancellation charges.

Consumers face considerable risks by paying for goods well before actually gaining title or possession. In addition, lay-by sales agreements are typically standard form contracts, with little or no opportunity to negotiate the terms and conditions.

Before lay-by sales were regulated in Victoria, a report by the Consumer Advocacy and Financial Counselling Association of Victoria[14] identified the key issues associated with lay-by sales as:

- the denial of any refund if the purchaser sought to cancel because of changed circumstances;
- the supplier going into liquidation;
- the supplier cancelling a lay-by without informing the purchaser;
- goods being unavailable;
- general confusion about terms and conditions; and
- default by the purchaser.

Minimum legislative standards would give consumers protection from unfair terms and conditions, especially in relation to refunds on cancellation, while also protecting suppliers against unfair outcomes when consumers default on lay-by sales agreements.

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[14] The Consumer Advocacy and Financial Counselling Association of Victoria (1994) *Why Lay-by?*

The ACT, NSW and VIC legislative provisions

The lay-by sales agreement

Section 60E of the NSW FTA and section 83 (with definitions in section 3) of the Victorian FTA set out similar frameworks for a lay-by sales agreement. They specify that:

- a lay-by sales agreement would apply to goods only;
- it should involve at least three instalments to be paid (the NSW FTA allows less than three instalments upon agreement between the consumer and the supplier);
- ownership of the goods would pass to the consumer only when the full price has been paid; and
- there is no need for goods to be in existence or in the possession of the supplier when the agreement is entered into.

The ACT regulates lay-by sales under the *Lay-by Sales Agreement Act 1963* ('the ACT Act'). It operates slightly differently to the NSW and Victorian FTAs, in that a good purchased via a lay-by sales agreement:

- is to be paid for by a pre-determined (but unspecified in the law) number of instalments;
- is to be picked up by or delivered to the consumer when the whole amount or a specified part is paid for; and
- has its ownership pass from the supplier to the consumer at the time the agreement is made, unless the goods are not in the possession of the supplier at that time, in which case the ownership passes over when the consumer has inspected and approved the goods.

All three jurisdictions stipulate that a lay-by sales agreement must be in writing, and must be provided to the consumer at the time the agreement is entered into. NSW and Victoria further specify that the document must be clear and legible, and be in English or another language that the consumer understands. Victoria also has a requirement that the font be larger than 10 point size.

The details required on the lay-by sales agreement by the three jurisdictions are as follows:

	ACT	NSW	VIC
Description of goods	Yes, including if they are second-hand.	No.	Yes.
Price of goods	Yes.	Yes.	Yes.
Deposit paid and balance outstanding	No.	Yes.	Yes.
Dates when instalments due	No.	Yes.	Yes.
Cancellation charges	No.	Yes.	Yes, and how they are calculated (in bold).
Terms and conditions	Yes, in no less than 10 point size font.	No.	Yes.
Purchaser's rights	Yes, a copy of the Schedule to the ACT Act, containing a summary of the purchaser's rights under that Act, must be included with the lay-by agreement.	No.	Yes, the lay-by sales agreement must include a statement of the purchaser's rights and the procedures to be followed to cancel the lay-by.
Others	A recorded number of the lay-by sales agreement.	No.	The trader's details, including name and street address.

The ability to alter the terms in a lay-by sales agreement, once it has been agreed to by both parties, varies with each jurisdiction. The NSW FTA does not provide for the alteration of such agreements, while the Victorian FTA allows alterations if they have the purchaser's agreement in writing. The ACT Act allows alterations, but they are voidable by the purchaser.

Cancellation by purchaser

All three jurisdictions specifically provide that the purchaser has the right to cancel a lay-by:

- Section 60G of the NSW FTA provides that a purchaser may cancel a lay-by in writing (or orally if the supplier agrees) at any time before the goods are delivered.
- Section 85 of the Victorian FTA has the same effect as the NSW FTA provision, with the addition that the purchaser may cancel if the goods are damaged at the time of delivery.
- Section 16 of the ACT Act provides that a purchaser may cancel a lay-by at any time by serving a written notice at the supplier's place of business.

If a supplier would not accept an oral cancellation, NSW places the onus on the purchaser to cancel in writing. In contrast, Victoria requires the supplier to give the purchaser a prescribed cancellation form. There is no equivalent provision in the ACT Act as it does not provide for oral cancellations.

The ACT and Victoria also provide that the supplier must give the purchaser, on request, a statement that includes the following details:

	ACT	VIC
Purchase price of goods	Yes.	Yes.
Fees payable	Yes, storage charges.	Yes, cancellation fees.
Total amount paid on lay-by	Yes.	Yes.
Net amount owing to supplier or due back to purchaser	Yes.	Yes.
Other requirements	Amount owing to the supplier to recoup selling costs. Balance payable by the purchaser to complete the agreement. The statement costs the purchaser 20 cents.	Clear and legible handwriting or print of not less than 10 point font, in English or other language understood by the purchaser. Signed by the supplier.

Cancellation by supplier

All three jurisdictions allow cancellations of a lay-by sales agreement by the supplier in limited circumstances.

Section 60H of the NSW FTA allows cancellation by a supplier only where the purchaser has breached the terms of the agreement. The purchaser must be given written notice of the breach, and be allowed at least seven days to rectify the breach.

Section 15 of the ACT Act allows cancellation if they have given the purchaser at least 14 days' notice of their intention to cancel. The notice must contain the same information as the statement described above for cancellations by the purchaser. However, if the purchaser pays any charges outstanding before the cancellation date, the supplier must deliver the goods to the purchaser.

The Victorian FTA provides that a supplier may cancel a lay-by if:

- there has been a breach of the terms of the agreement by the purchaser;
- the supplier ceases to trade; or
- the goods are no longer available.

The supplier must notify the consumer in writing if the cause of cancellation is a breach by the purchaser or the supplier ceases trading. In the case of the former, the supplier must give the purchaser at least 14 days to rectify the breach before cancelling. For the latter, the supplier must allow the purchaser seven days to complete or cancel the lay-by.

Cancellation charge

A cancellation charge is an amount that a supplier can ask to be paid if the purchaser cancels the lay-by or the lay-by is cancelled due to a breach by the purchaser.

The ACT Act does not specifically provide for a cancellation charge. Instead, the supplier can charge a fee in lieu of storage costs, actual selling costs and any loss in value of the goods.

The NSW FTA provides that a cancellation charge cannot be more than reasonable costs incurred by the seller, including administrative and storage costs. It can also cover loss of

value of the goods from the time the lay-by was entered into until the lay-by is cancelled. However, the supplier is not entitled to the cancellation charge if the lay-by statement does not comply with the requirements.

The Victorian FTA provides that a cancellation charge cannot be more than reasonable costs incurred by the seller, including administrative and storage costs, and prohibits a lay-by agreement from being entered into if the agreement provides for a cancellation charge that is inconsistent with this requirement. As with the NSW FTA, the supplier is not entitled to the cancellation charge if the lay-by statement does not comply with the relevant requirements, but the supplier is also not entitled to that charge if they refuse to allow inspection of the goods, or their business is no longer operating from premises that are a reasonable distance from the purchaser's home or work.

Evidence of consumer detriment

In Victoria, there were approximately 1,000 enquiries from members of the public to Consumer Affairs Victoria on lay-by sales between 2007 and 2009, with around 30 of those enquiries needing dispute resolution action.

NSW fair trading received 368 complaints between 1 January 2004 and 31 May 2009 regarding lay-by sales.

Options for Proposal 7

The status quo comprises the ACT, NSW and Victorian provisions regulating lay-by sales in their respective jurisdictions. The generic consumer protection provisions of the TPA would apply in other jurisdictions in relation to lay-by sales.

Two options are considered, and would be compared with the status quo:

- Option A: No specific regulation of lay-by sales agreements.
- Option B: Adopting a harmonised model for lay-by sales regulation, based on existing state and territory provisions.

Impact analysis

Option A — No specific regulation of lay-by sales agreements

Option A would involve the repeal of the ACT, NSW and Victorian provisions specifically regulating lay-by sales. The current generic consumer protection provisions in the TPA would continue to provide protection to consumers in respect of lay-by sales. The national unfair contract terms law, which is currently before the Australian Parliament, would apply to terms in lay-by sales agreements if that law is passed.

The current laws prescribe how lay-by sales should operate in some detail, and provides redress options for consumers should suppliers fail to adhere to those express requirements. As a result, the loss of specific regulation on lay-by sales would reduce certainty for consumers when seeking redress in relation to lay-by sales agreements.

Businesses and consumer agencies would also face costs in adjusting to how lay-by sales would be treated under the general provisions of the ACL.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	Consumers in the ACT, NSW and Victoria could lose the protection of laws specifically regulating lay-by sales. (-2)
	Consumer benefits: +1	Consumer costs: -2
Business	Nationally consistent regulatory regime. (+3)	Businesses in the ACT, NSW and VIC have less certainty in relation to the regulation of lay-by sales. (-1)
	Business benefits: +3	Business costs: -1
Governments		Development of new guidance may be needed to explain how the general provisions of the ACL apply to lay-by sales. (-1)
		Potential test cases to establish how the courts would apply the general provisions of the ACL to lay-by sales. (-1)
	Government benefits: 0	Government costs: -2
Total benefit/cost	**-1**	

Option A — Outcome

Option A provides a consistent set of national consumer protection laws in relation to lay-by sales in Australia. This outcome, however, relies upon the use of general provisions in the ACL, rather than specific regulations on lay-by sales, as is currently the case in the ACT, NSW and Victoria.

Option B — Adopting a harmonised model for lay-by sales regulation, based on existing state and territory provisions

Under Option B, specific harmonised regulation of lay-by sales would be incorporated into the ACL, using elements from different state and territory provisions. The relevant provisions in ACT, NSW and Victoria would be repealed. As this proposal is only relevant to non-financial goods, it will not be mirrored in the ASIC Act.

A definition of what a lay-by sales agreement constitutes would be necessary, as the lay-by sales regulation is targeted at a specific form of agreement, rather than other forms of financing a purchase.

Drawing on current jurisdictional approaches, Option B would include the following provisions:

- **Defining a lay-by sales agreement**. Common to the definitions in the ACT, NSW and Victoria, a lay-by sales agreement must be in writing, and must be provided to the consumer at the time the agreement is entered into. However, there would be no specific language or font size requirements in the ACL. Certain information should be included in a lay-by sales agreement in order for such an agreement to be useful to a consumer, and such information should be mandated in the ACL. This could include:
  - a description of the good;
  - the total purchase price of the good;
  - the deposit paid and the balance outstanding;

  - the dates on which instalments are due;
  - any cancellation charge, or method of calculating such a charge;
  - rights to cancelling the agreement for the purchaser; and
  - the supplier's name and business address.

- **Cancellation by the purchaser**. The Victorian FTA provides that a purchaser can cancel a lay-by sales agreement at any time before the goods are delivered, without providing a reason, and subject to the payment of a reasonable cancellation charge. The cancellation should be in writing, or orally if both parties agree.
  - The Victorian FTA also has a provision that allows cancellation where goods are delivered in a damaged state. This second provision would not be adopted in the ACL, as it is clear that damaged goods would not satisfy the terms of a lay-by sales agreement, and there does not seem to be other obvious consumer benefits in having such a provision in the ACL.
  - If a supplier does not accept an oral cancellation, they must provide a cancellation form to the consumer.
  - The ACT and Victoria require that the supplier must give the purchaser, on request at the time of cancellation, a written statement which includes:
    - the purchase price of the goods;
    - any cancellation charge payable or the method of calculating such a charge;
    - the total amount paid on the lay-by; and
    - the amount owing to the supplier or the amount due back to the purchaser as a result of the cancellation.
- **Cancellation by supplier**. A supplier can only cancel a lay-by agreement where:
  - there has been a breach of the terms of the agreement by the purchaser;
  - the supplier ceases to trade; or
  - the goods are no longer available (but not because they have sold the goods to someone else).
    - The supplier must notify the consumer in writing if the cause of cancellation is a breach by the purchaser or the supplier ceases trading. The supplier must give the purchaser at least seven days to rectify a breach or, in the case of the supplier ceasing to trade, to cancel or complete the lay-by, before cancelling.
- **Cancellation charge**. The ACT, NSW and Victorian provisions limit the cancellation charge to the recovery of reasonable costs by the supplier.

Analysis

Businesses in jurisdictions other than the ACT, NSW and Victoria would face additional compliance burdens in adhering to a lay-by sales framework. Consumer agencies would also need to develop national guidance on how the proposed model would operate across Australia.

However, there are also significant benefits for consumers in having access to lay-by as an option for purchasing goods. It is a more flexible method of purchase, and is an alternative means to credit. While lay-by sales are still likely to be available to consumers in the absence of regulation, they may find it difficult to understand their rights and obligations in this area, as a combination of common law (property and contracts) and state and territory legislation relating to the sale of goods would apply. They would also be in a weak bargaining position in determining the details of a lay-by sales contract as the supplier would hold the bargaining power.

In allowing access to lay-by, the proposed model also provides strict conditions for suppliers to follow, in order to address the imbalance in bargaining power between them and consumers. Should consumers still feel they have been treated unfairly, the model also provides redress options for consumers.

Option B		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	
	Consumers across Australia would now be protected by specific legislation when they enter into lay-by sales agreements. (+3)	
	Consumer benefits: +4	Consumer costs: 0
Business	Nationally consistent regulatory regime. (+3)	Costs to ensure compliance with the new legislation. (-2)
	Business benefits: +3	Business costs: -2
Governments		Development of new national guidance to explain how lay-by sales would be covered under the ACL. (-1)
		New enforcement and compliance responsibilities for consumer agencies. (-1)
	Government benefits: 0	Government costs: -2
Total benefit/cost	**+3**	

Option B — Outcome

Under Option B, consumers across Australia would have a consistent set of laws specifically regulating lay-by sales. The proposed model for regulating lay-by sales is generally prescriptive in nature, which imposes a burden on businesses. However, this may be offset to some extent as businesses would also benefit through having to deal with only one, nationally consistent regulatory regime.

Consultation

An Australian Consumer Law: Fair markets – Confident consumers invited submissions on whether there should be a regime regulating lay-by sales in the ACL. Of 102 submissions received, eight were in favour of including a lay-by sales regime in the ACL and two were against.

Conclusion

Option A would continue to provide nationally consistent protections to consumers on lay-by sales, albeit through the use of generic laws only. Option B provides a more prescriptive approach, but would provide greater protection for consumers engaging in lay-by sales, and greater certainty for both consumers and businesses in their rights and obligations in this area.

PROPOSAL 8: DUAL PRICING

Current regulation

The TPA prohibits misleading and deceptive conduct (section 52) and false or misleading representations of price (section 53(e)). While both of these provisions apply to pricing, the alleged contraventions do not provide for any automatic redress mechanisms for consumers, where relatively minor contraventions (which may not warrant prosecution through a court process) have occurred.

NSW and the ACT have an additional provision that applies to pricing. These provisions (section 40 of the NSW FTA and section 22 of the ACT FTA) require that, if a person displays goods with more than one price appended, they must not sell the goods at the higher price. The NSW provision has been in force for around 30 years.

These provisions do not seek to address 'was/now' pricing that is alleged to be misleading, but simply provide that if a business displays more than one price to goods, including electronic scanning, those goods cannot be sold to the consumer at a higher price than the lowest of the displayed prices (however, businesses retain their right to withdraw the item from sale if they choose). The dual pricing provisions are, in some respects, self-enforcing, as they provide a clear rule if multiple prices are appended to goods.

Between 2005 and August 2009, NSW Fair Trading recorded 365 enquiries and 192 complaints about dual pricing. Since March 2006, CAV received 44 enquiries and 18 complaints between July 2007 and June 2009 related to dual pricing. For the financial year 2008-2009, the Queensland OFT received 84 complaints that have been identified as dual pricing or double ticketing. A number of state and territory fair trading offices also conduct price scanning audits annually which often reveal high levels of scanner error.

Question 8.1

Does the current regulation in NSW and the ACT provide a useful avenue for redress that is understood by consumers and traders?

Options for proposal 8

The status quo comprises no specific regulation of dual pricing at the national level, but with regulation in NSW and the ACT.

Two options will be considered for this proposal, to be compared with the status quo:

- Option A: No specific regulation of dual pricing.
- Option B: Where more than one price for goods is displayed, prohibit selling at higher than the lowest of the prices.

While the consumer protection provisions in the ASIC Act generally mirror the TPA consumer protection provisions, it is not proposed that this reform be included in the ASIC Act as it has little or no relevance to financial products and services.

Impact analysis

Option A — No specific regulation of dual pricing

Option A involves retaining the TPA provisions that apply to false or misleading pricing representations, but no specific regulation of dual pricing as in NSW and the ACT under the ACL. When their goods have multiple prices appended, businesses have the option to sell at whichever price they choose, if the consumer still wants to purchase it, or withdraw the item from sale.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	NSW and ACT consumers would no longer have a specific provision dealing with dual pricing. (-1)
	Consumer benefits: +1	Consumer costs: -1
Business	Nationally consistent regulatory requirements. (+3)	
	Business benefits: +3	Business costs: 0
Government	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	
	Government benefits: +1	Government costs: 0
Total benefit/cost	**+4**	

Option A — Outcome

Option A may reduce consumer empowerment in NSW and the ACT. Other prohibitions on misleading conduct and false or misleading representations would continue to protect consumers. Option A is likely to be beneficial overall, mainly due to a reduced regulatory burden on business through consistent national consumer protection regulation.

Option B — Where more than one price for goods is displayed, prohibit selling at higher than the lowest of the prices

Option B is to include in the ACL a specific prohibition on the sale of goods with multiple displayed prices at a price higher than the lowest of the prices.

The NSW FTA refers to 'appended' prices which includes a price that is, among other things, annexed, affixed, stamped on, used in connection with the goods on a display, encoded, published in a catalogue (while the catalogue is current) and in any other way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods.

The NSW FTA provision was reviewed when the *National Competition Policy Review of the Fair Trading Act 1987* was undertaken in 2000. The review report concluded that:

> 'The dual pricing provision does not appear to have any impact on competition, since it applies to all NSW retailers. The provision does not appear to impose any unwarranted costs on traders, given that it is a matter of good business practice to ensure that products and coding systems are accurate. Incorrect pricing would increase

the level of customer complaints a trader receives, thereby increasing complaint handling costs'.[15]

A dual pricing provision would only relate to selling prices, so as not to conflict with other requirements such as trade measurement regulation and the unit pricing requirements of the *Retail Grocery Industry (Unit Pricing) Code of Conduct*.

If a supplier does not wish to sell the product at the lowest appended price, they retain their right to withdraw the item from sale. This protects suppliers from loss due to error (where an incorrect price has inadvertently been displayed) or attempted fraud (where a price label from a cheaper product has been placed onto a higher value product).

Option B		
Impact group	Benefit	Cost
Consumers	Increased certainty for consumers where more than one price is appended to goods. (+1)	
	Nationally consistent consumer protection laws. (+1)	
	Consumer benefits: +2	Consumer costs: 0
Business	Nationally consistent regulatory requirements. (+3)	Businesses must familiarise themselves with the new pricing requirement if more than one price is appended to goods. (-1)
	Business benefits: +3	Business costs: -1
Governments	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Guidance would need to be issued for the new requirement. (-1)
	The dual pricing provision's requirement that items be sold at the lowest appended price (unless they are withdrawn from sale) would be an easier message to give to consumers. (+2)	New enforcement and compliance responsibilities for consumer agencies. (-1)
	Government benefits: +3	Government costs: -2
Total benefit/cost	**+5**	

Option B — Outcome

The inclusion of a 'dual pricing' provision does not appear to impose unwarranted costs on traders, given that it is a matter of good business practice to ensure that product labelling and coding systems are accurate.

The main benefit would be that consumer empowerment is enhanced, as it provides certainty for consumers and traders as to their rights and responsibilities in the marketplace. Dual pricing provisions might also benefit vulnerable consumers by creating an easy to remember rule that if the business wants to sell goods they must sell them at the lowest appended price, independent of any concerns about misleading conduct. This is likely to be easier for consumers to self-enforce than conceptually more complex breaches such as misleading and deceptive conduct.

15 NSW Office of Fair Trading (2002), *National Competition Policy Review: Fair Trading Act 1987 & Door to Door Sales Act 1967*, 38-9.

Consultation

An Australian Consumer Law: Fair markets – Confident consumers raised the question of whether the ACL should include a dual pricing provision such as that found in NSW. Submissions that commented on this issue were divided. Consumer groups and some retailers supported the proposal being in the ACL, citing that consumers should be availed of the lower price that is displayed. However, other submissions suggested that the existing prohibitions on misleading and deceptive conduct and false or misleading representations adequately protected consumers from misleading pricing.

Conclusion

Retaining the existing TPA provisions only as in Option A has merits, through national consistency and existing protections from misleading conduct. Option B provides an additional empowerment option for consumers, while appearing to have low compliance costs for business beyond simply understanding the law. This would allow the status quo, or similar, in NSW and the ACT to continue.

Question 8.2

Would there be any significant compliance costs for business that have not been identified?

PROPOSAL 9: OFFERING GIFTS AND PRIZES

Current regulation

Section 54 of the TPA currently prohibits a corporation from offering gifts, prizes or other free items, in connection with the supply or possible supply or promotion by any means of goods or services, with the intention of not providing them or not providing them as offered.

Section 16 of the Victorian FTA provides a similar prohibition based on the intention of the supplier, but also contains a second subsection which provides that the person is guilty of an offence if such an offer is made and the person 'does not within a reasonable time from the making of the offer provide a gift, prize or item which is in accordance with the offer'.

Regulation in this area seeks to deter traders from luring customers or clients with offers of gifts and prizes which they do not intend to honour and provides an incentive for traders to engage in fair conduct in relation to gifts and prizes that can help to contribute to consumer confidence in traders generally.

If a trader fails to provide gifts and prizes as offered it could have negative effects, including:

- giving the business an unfair competitive advantage over competitors that attract sales with genuine offers;
- reducing consumer confidence in future representations by all businesses; and
- causing the consumer significant costs in following-up to try and receive the offered gifts or prizes or make complaints to regulators.

Evidence of consumer detriment

The provision of gifts and prizes is an area of concern for consumers.

- In the last two financial years, CAV recorded 761 enquiries and 447 written complaints about the supply of gifts and prizes, including related misrepresentations.
- In the same period, the Queensland OFT has received 168 complaints about gifts and prizes.
- The South Australian OCBA received 161 complaints from 1 July 2007 to 30 June 2009, but also notes that this represents an increase in complaints relating to this issue. This is particularly the case in relation to cash-back offers, where such offers are increasingly handled by third parties which can create further delays and difficulties for consumers accessing their money.
- The WA Department of Commerce has also received 83 complaints concerning cash-back offers and incentive schemes over the past three years.

Question 9.1

What are the reasons gifts, prizes and other offers (including cash-back offers) are not be able to be provided promptly and in accordance with the offer?

Options for Proposal 9

The status quo comprises a national, intent-based provision (section 54 TPA) and one jurisdiction with both the intent-based provision and an additional requirement to provide the gifts or prizes within a reasonable time.

Three options are considered, to be compared with the status quo:

- Option A: Incorporate the current section 54, without amendment, into the ACL.
- Option B: Replace the intent-based TPA provision with a requirement to provide gifts and prizes, as offered, within a reasonable time; and
- Option C: Add to the intent-based TPA provision to include a separate requirement to provide gifts and prizes, as offered, within a reasonable time.

It is intended that if this proposal were to proceed in the ACL, that a mirror provision would be included in the ASIC Act, to apply to the offer of gifts and prizes in connection in relation to the supply of financial products and services.

Impact analysis

Option A — Incorporate the current section 54, without amendment, into the ACL

Option A would involve retaining the existing TPA provision without change. The intent-based provision in the current section 54 of the TPA, which allows consumer agencies to act as soon as it is apparent that the business does not intend to provide the gifts or prize, would be retained in the ACL. The Victorian FTA provision would be repealed as part of Victoria's adoption of the ACL.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	Victorian consumers would no longer have a specific provision allowing them to pursue a person who offered a prize but did not provide it within a reasonable time in accordance with the offer. (-1)
	Consumer benefits: +1	Consumer costs: -1
Business	Nationally consistent regulatory requirements. (+3)	
	Business benefits: +3	Business costs: 0
Government	National regulatory guidance would not need to be significantly amended. (+1)	
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	
	Government benefits: +2	Government costs: 0
Total benefit/cost	**+5**	

Option A — Outcome

Option A would preserve the prohibition on disingenuously offering gifts or prizes, where the business could gain the promotional benefits of the offer, but has no intention to provide them.

While all Australian consumers and businesses would benefit from consistent regulation, in Victoria, a business that genuinely intends to provide the prize but does not provide it, as offered, for a very long period would no longer be specifically required by the consumer law to provide it within a reasonable time.

Option B — Replace the intent-based TPA provision with a requirement to provide gifts and prizes, as offered, within a reasonable time

Option B would remove the prohibition of offering a gift or prize without intending to provide it, and create a prohibition on the supplier failing to provide gifts and prizes, as offered, within a reasonable time. These requirements are already present in the Victorian FTA and, as such, many businesses are already subject to these requirements if they trade in Victoria.

The provision would not apply to a situation where a person could not provide the gifts or prizes as offered or within a reasonable time based on a mistake of fact or the failure of a third party on which they reasonably relied upon.

The removal of the requirement that the person intend to provide the gifts or prizes would remove the ability to act quickly if an intention not to supply was apparent, potentially to the detriment of consumers. For example, in instances where a trader goes out of business or there is evidence that goods do not exist or the supply is impossible.

The fact that very long time has elapsed may be relevant in trying to establish that a person does not intend to provide gifts or prizes, however, delay in itself is unlikely to be sufficient to prove that a person intended not to provide the gift or prize at the time of the offer. The actual intention of the defendant has to be proved[16].

A trader who genuinely intends to provide a gift or prize at the time it is offered, but subsequently decides not to deliver the gift or prize to the consumer, does not contravene section 54 of the TPA. In the case of *TPC v Calderton Corp Pty Ltd*[17] a trader formed the intention not to provide gifts and prizes only after a competition had commenced (when it became apparent that the competition results would not be favourable to the trader). The trader breached section 54 in that case only because it continued to operate the competition (and continued to offer prizes) after the requisite intention had been formed. Had the trader ceased the competition based on the unfavourable results and refused to provide prizes to the original entrants, there would have been no breach of section 54. Under the Victorian model, prosecution would be possible for a failure to supply the gifts or prizes within a reasonable time.

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[16] Australian Competition and Consumer Commission v Nationwide News (1996) ATPR 41-519.
[17] (1994) ATPR 41-306.

Option B		
Impact group	Benefit	Cost
Consumers	Ability to challenge a person that has not provided gifts or prizes as offered or after a long delay. (+2)	Lack of a specific cause of action where it is apparent the person does not intend to provide the gift or prize, but where a reasonable time may not have elapsed. (-3)
	Greater certainty that gifts and prizes will be provided as offered and in a timely manner. (+1)	
	Nationally consistent consumer protection laws. (+1)	
	Consumer benefits: +4	Consumer costs: -3
Business	Nationally consistent regulatory requirements. (+3)	Businesses must ensure that gifts or prizes they offer are able to be supplied, as offered, within a reasonable time to avoid a contravention. (-1)
		Cost of compliance/understanding new requirement. (-1)
	Business benefits: +3	Business costs: -2
Governments	Ability to act where a person has not provided gifts or prizes as offered or after a long delay. (+2)	New enforcement and compliance responsibilities for consumer agencies. (-1)
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Guidance would need to be issued for the new requirement. (-1)
	Government benefits: +3	Government costs: -2
Total benefit/cost	**+3**	

Option B — Outcome

The proposal to add the requirement of supply within a reasonable time adds both potential benefits and costs for consumers. The fact that the test is one based on reasonableness will ensure that the provision does not become too onerous on business. Reasonableness will be based on the court's interpretation of what is reasonable in the circumstances, not necessarily what a consumer may contend is reasonable.

Some of the potential costs for suppliers are able to be offset through exclusions for certain situations where failure to supply as offered or within a reasonable time is beyond the control of the supplier.

While requirements for supply, as offered, within a reasonable time would have benefits and costs for consumers, much of the benefits would be negated through the loss of the intent-based cause of action which can be taken at any time following the offer. This proposal would also incur indirect costs associated with any change to regulation, such as loss of familiarity and the need for the government to educate businesses and consumers.

Option C — Add to the intent-based TPA provision to include a separate requirement to provide gifts and prizes, as offered, within a reasonable time.

Option C would add to the current section 54 of the TPA by including an additional prohibition based on the act of a supplier not providing gifts and prizes, as offered, within a reasonable time, which creates distinct ways of contravening the provision.

As discussed in Option B, this prohibition is already present in the Victorian FTA. It would not apply to a situation where a person could not provide the gifts or prizes as offered,

within a reasonable time based on a mistake of fact or the failure of a third party on which they reasonably relied upon.

Option C		
Impact group	Benefit	Cost
Consumers	The additional ability to challenge a person who has not provided gifts or prizes, as offered, after a long delay. (+2)	
	Greater certainty that gifts and prizes will be provided as offered and in a timely manner. (+1)	
	Nationally consistent consumer protection laws. (+1)	
	Consumer benefits: +4	Consumer costs: 0
Business	Nationally consistent regulatory requirements. (+3)	Cost of compliance/understanding new requirement. (-1)
		Businesses must ensure that gifts or prizes they offer are able to be supplied, as offered, within a reasonable time to avoid a contravention. (-1)
	Business benefits: +3	Business costs: -2
Governments	Ability to act where a person has not provided gifts or prizes as offered after a long delay. (+2)	Guidance would need to be issued for the new requirement. (-1)
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	New enforcement and compliance responsibilities for consumer agencies. (-1)
	Government benefits: +3	Government costs: -2
Net benefit/cost	**+6**	

Option C — Outcome

The retention of the existing provision provides the ability for a consumer to seek the assistance of the law where a person makes an offer they do not intend to fulfil. For a business that does not intend to mislead a consumer by offering but not providing the gifts or prizes, there is no cost of the continuing application of this contravention.

The addition of the requirement of supply, as offered, within a reasonable time, as discussed under Option B above, adds both potential benefits and costs. The majority of costs for businesses could be avoided by taking all reasonable steps to ensure that they provide the gifts and prizes offered within a reasonable time and certain defences would be available.

There would be benefits where the provision can help consumers receive the gift or prize in a timely manner, having regard to all the circumstances. While there are potential costs for businesses, those costs would only be borne by those that are at fault for an unreasonable delay in providing the gifts or prizes or for providing the gifts or prizes different to those promised.

Consultation

An Australian Consumer Law: Fair markets – Confident consumers raised the question of whether the ACL should include a further 'reasonable time' requirement for provision of gifts and prizes. Nearly all respondents that addressed the issue were in favour of an extension of the TPA provision along the lines of the Victorian FTA provision, as outlined in Option C.

Conclusion

There would be benefits from Option A, the retention in the existing TPA provision only, as businesses nationally would be familiar with that requirement. However, some Victorian consumers would no longer have access to the statutory entitlement to have their gift or prize provided, as offered, within a reasonable time.

Option B could create a reduction of consumer protection where a business offered a gift or prize with no intention to provide it, with an accompanying cost to business of complying with a new regulatory measure. While the requirements to provide gifts and prizes, as offered, within a reasonable time would add benefits for consumers, these would be unlikely to outweigh the potential costs of this option.

Option C would benefit consumers through the ability to be able to pursue a person that they believed had taken an unreasonably long time to provide the gifts or prizes they had offered, or where they are not provided as offered. This approach would also retain important existing protection for consumers if a person did not intend to supply the gifts or prizes they offer.

Question 9.2

Given that the provision will be based on reasonableness, and that it will contain certain defences, are there other impacts on business that have not been identified?

PROPOSAL 10: ACCEPTING PAYMENT WITHOUT INTENDING TO SUPPLY

Current regulation

Section 58 of the TPA prohibits a corporation from accepting payment or other consideration for goods or services where, at the time of the acceptance the corporation:

- intends not to supply the goods or services;
- intends to supply materially different goods or services; or
- there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing the corporation will not be able to supply the goods in the time specified or, if no time is specified, within a reasonable time.

The NSW FTA contains a section in substantially the same terms as section 58 of the TPA. Section 19 of the Victorian FTA prohibits a person who accepts payment or other consideration for the supply of goods or services from:

- failing to supply all the goods or services within the period specified by the person or, if no period is specified, within a reasonable time; or
- supplying goods or services that are materially different.

Consumers expect to receive goods and services that they pay for. Non-receipt of goods and services can be particularly distressing for consumers and cause them direct and indirect financial losses. It is particularly concerning where a trader accepts payment without ever intending to supply goods and services.

There is evidence that there is concern over the way in which goods and services are supplied, and whether they are in fact supplied:

- NSW Fair Trading has received on average over the last three years 734 enquiries and 504 complaints. Over that period 14 per cent of these matters were referred to the Consumer, Trader & Tenancy Tribunal.
- CAV received 4,140 enquiries and 1,744 written complaints in relation to non-supply, delays in supply and allegations of an intention to not supply in 2008-09. This represents a significant increase from the 3,159 enquiries and 1,424 written complaints in 2007-08. Complaints relating to non or late delivery of goods ranked in the top 10 complaints in the 2008 CAV research paper *Consumer confidence and market experience study*.
- The Queensland OFT receives on average 760 complaints a year relating to the supply of goods or services generally.
- The SA OCBA also received 516 complaints relating to the non-supply of goods and services from 1 July 2007 to 30 June 2009.

Options for Proposal 10

The status quo comprises a national provision (TPA) that is mirrored in all jurisdictions, except Victoria, which has a provision based on a requirement to supply within the specified time or, if no time is specified, within a reasonable time.

Three options will be considered for this proposal, to be compared with the status quo:

- Option A: Incorporate the current section 58, without amendment, into the ACL.
- Option B: Replace the TPA provision with: a requirement to supply within the specified time or, if no time is specified, within a reasonable time; and a prohibition on supplying materially different goods or services.
- Option C: Add to the TPA provision: a requirement to supply within the specified time or, if no time is specified, within a reasonable time; and a prohibition on supplying materially different goods or services.

It is intended that, if this proposal were to proceed in the ACL, a mirror provision would be included in the ASIC Act to apply in relation to the supply of financial products and services.

Question 10.1

Are there any issues particular to financial services and products that need to be considered in respect of this proposal if it is mirrored in the ASIC Act, such as with a conditional offers, such as a minimum subscription level issue of securities?

Impact analysis

Option A — Incorporate the current section 58, without amendment, into the ACL

Option A would involve retaining the existing TPA provision without significant change. The intent-based provision in the current section 58 of the TPA would be retained in the ACL. The Victorian provision would be repealed as part of Victoria's adoption of the ACL.

This prohibition allows the consumer agencies to act as soon as it may become apparent that the business did not intend to provide the goods or services.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	Victorian consumers would no longer have a specific provision allowing them to pursue a person who accepted payment but did not provide them within a 'reasonable time'. (-1)
	Consumer benefits: +1	Consumer costs: -1
Business	Nationally consistent regulatory requirements. (+3)	
	Business benefits: +3	Business costs: 0
Government	National regulatory guidance would not need to be significantly amended. (+1)	Victoria would no longer have a specific provision allowing consumer agencies to pursue a person who accepted payment but did not provide the goods or services within a 'reasonable time'. (-1)
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	
	Government benefits: +2	Government costs: -1
Total benefit/cost	**+3**	

Option A — Outcome

The retention of the existing requirement of section 58 of the TPA would preserve the prohibition on accepting payment where the business has no intention to provide them or intends to provide them in a materially different form to what was agreed.

This proposal would create benefits for consumers and business through nationally consistent regulation, but could also have potential costs for some Victorian consumers (as opposed to the status quo) in circumstances where goods or services are not provided within a reasonable time, or where different goods are provided.

Option B — Replace the TPA provision with: a requirement to supply within the specified time or, if no time is specified, within a reasonable time; and a prohibition on supplying materially different goods or services

Option B would replace the current section 58 of the TPA with requirements in the ACL to deliver within a reasonable time and not to supply materially different goods or services. These requirements are already present in the Victorian FTA and, as such, many businesses are already subject to this requirement if they trade in that jurisdiction and may, where they operate nationally, apply the same standard elsewhere.

The Victorian offence provision is subject to defences of reasonable mistake, the act or omission of another person where the defendant had taken reasonable precautions to avoid the contravention. This option would see these defences retained in the ACL provision.

Removal of the intent-based TPA requirement would mean that failure to supply can only be challenged after: a reasonable time has elapsed (even where it is apparent there is no intention to make the supply; or, where something other than what was offered is supplied). A 2002 National Competition Policy review of the NSW FTA found that taking action under the NSW equivalent of section 58 of the TPA has sometimes proved to be difficult in practice,

due to the problem of proving in retrospect that a trader was aware that goods or services would not be supplied.[18]

Option B		
Impact group	Benefit	Cost
Consumers	Ability to challenge a person that has not provided goods or services after a long delay, or are not supplied as ordered. (+2)	Lack of a specific cause of action where it is apparent the person does not intend to provide the goods or services, but where a reasonable time may not have elapsed or incorrect goods have not been supplied. (-3)
	Greater certainty that goods and services would be provided, as ordered, in a reasonably timely manner. (+1)	
	Nationally consistent consumer protection laws. (+1)	
	Consumer benefits: +4	Consumer costs: -3
Business	Nationally consistent regulatory requirements. (+3)	Businesses must ensure that goods or services for which they accept payment are able to be supplied, as ordered, within a reasonable time to avoid a contravention. (-1)
		Cost of compliance/understanding new requirement. (-1)
	Business benefits: +3	Business costs: -2
Governments	Ability to act where a person has not provided goods or services as ordered or after a long delay. (+2)	New enforcement and compliance responsibilities for consumer agencies. (-1)
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	Guidance would need to be issued for the new requirement. (-1)
	Government benefits: +3	Government costs: -2
Total benefit/cost	**+3**	

Option B — Outcome

The proposal to move exclusively to the requirement to supply, as ordered, and within a reasonable time adds both potential benefits and costs for consumers through providing a different type of protection. This option could provide greater certainty for consumers purchasing goods, knowing that they have a specific statutory right of challenge for unreasonable delay or where they did not receive what they ordered. Businesses may also need to be particularly careful ensure that their supplies are not subject to unreasonable delays and that they supply what is ordered.

The Victorian model was applied by the Victorian Supreme Court in the case of *Cousins v Merringtons*.[19] The Court found that the trader had accepted payment but failed to supply prescription spectacles and contact lenses within the time specified or within a reasonable time. The trader in that case had also breached section 19 by providing incorrect prescriptions to consumers after accepting payment, such services being materially different to those to which the agreement to supply related. Pursuing redress for the consumer under the TPA would have been more difficult as the intention to provide incorrect lenses at the time the payment was accepted would have needed to proven.

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[18] Department of Fair Trading, 2002, *National Competition Policy Review: Fair Trading Act 1987 & Door to Door Sales Act 1967*, Sydney, p.68. http://www.fairtrading.nsw.gov.au/pdfs/About_us/ftadtdreport.pdf.

[19] [2007] VSC 542.

The broader nature of section 19 has allowed CAV to provide more effective dispute resolution in a higher number of cases than would have been the case under a provision which requires the trader's intention to not supply to be proven. Prohibiting failure to supply, as ordered, within a reasonable time can be more effective in negotiating with a trader to resolve a dispute, because they would be unable to simply (honestly or otherwise) rely on an assertion that they intended to supply the goods or services as a justification to refuse to negotiate with the consumer or regulator.

Some of the potential costs for suppliers are able to be offset through exclusions for situations where failure to supply is beyond the control of the supplier. The fact that the reasonable time test is one based on reasonableness would ensure that the provision does not become too onerous on business. Reasonableness would be based on the court's interpretation of what is reasonable in the circumstances, not necessarily what a consumer may contend is reasonable. There would also be defences available for situations where the failure to provide the goods or services within a reasonable time or as offered is due to a mistake of fact or reasonable reliance on another person. The requirements to provide goods or services as offered would also not apply if a consumer agreed to accept replacement goods or services.

However, the removal of the requirement that the person intend to provide the goods or services would remove the ability to act quickly if an intention not to supply as ordered was apparent, potentially to the detriment of consumers.

Option C — Add to the TPA provision: a requirement to supply within the specified time or, if no time is specified, within a reasonable time; and a prohibition on supplying materially different goods or services

Option C would add to the current section 58 of the TPA by creating additional prohibitions based on the act of a supplier accepting payment but not supplying goods or services within a reasonable time, or supplying something materially different to what was agreed. This option would result in many of the benefits outlined in Option B, without the costs associated with the removal of the existing TPA requirements.

Option C		
Impact group	Benefit	Cost
Consumers	The additional ability to challenge a person who has not provided goods or services, as ordered, after a long delay. (+2)	
	Greater certainty that goods or services would be provided, as ordered, in a timely manner. (+1)	
	Nationally consistent consumer protection laws. (+1)	
	Consumer benefits: +4	Consumer costs: 0
Business	Nationally consistent regulatory requirements. (+3)	Cost of compliance/understanding new requirement. (-1)
		Businesses must ensure that goods or services they accept payment for are able to be supplied, as ordered, within a reasonable time to avoid a contravention. (-1)
	Business benefits: +3	Business costs: -2
Governments	Ability to act where a person has not provided goods or services either as agreed or after an unreasonably long delay. (+2)	Guidance would need to be issued for the new requirement. (-1)
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	New enforcement and compliance responsibilities for consumer agencies. (-1)
	Government benefits: +3	Government costs: -2
Net benefit/cost	**+6**	

Option C — Outcome

The retention of the existing provision provides the ability for a consumer to seek the assistance of the law where a person makes an offer they do not intend to fulfil. For a business that does not intend to mislead a consumer by failing to provide the goods or services, there is no cost associated with the continuing application of this contravention.

The addition of the requirements to supply as ordered and within a reasonable time, as discussed under Option B above, adds both potential benefits and costs. The majority of costs for businesses could be avoided by taking all reasonable steps to ensure that they provide, within a reasonable time, the goods or services for which they accept payment.

There would be benefits where the provision would help consumers receive their goods or services, as ordered, in a timely manner, having regard to all the circumstances. Unreasonable delays can cause detriment to consumers both directly and through loss of confidence in the market.

Consultation

An Australian Consumer Law: Fair markets – Confident consumers raised the question of whether the ACL should include a provision requiring supply within a 'reasonable time'. In the five submissions that addressed the issue, businesses generally did not favour the extension, preferring to leave delays or failure to supply as a matter of contract, whereas consumer groups and some smaller businesses generally suggested that specific statutory relief should be provided for unreasonable delay.

Conclusion

There would be benefits from Option A, the retention in the existing TPA provision only, as businesses nationally would be familiar with that requirement. However, some Victorian consumers would no longer have access to the statutory entitlement to have their goods or services provided within a reasonable time.

Option B would create a reduction of consumer protection where a business accepted payment for goods or services with no intention to provide it, with an accompanying cost to business of complying with a new regulatory measure. While the 'reasonable time' and 'not materially different' requirements would add benefits, these would be unlikely to outweigh the potential costs of this option.

Option C would retain the important consumer protections in Option A as well as the benefits which would flow from adding the requirements outlined in Option B. While there would be costs associated with the new elements of this proposal, they would not be particularly onerous on the vast majority of businesses that trade fairly and diligently.

Question 10.2

Given the reasonableness requirement and the defences that will be available, are there any likely scenarios where businesses should not be prohibited from failing to supply?

Question 10.3

Section 19 of the Victorian FTA currently prohibits a failure to supply as ordered within a reasonable time. Has this provision caused any unintended effects on the supply of goods and services?

PROPOSAL 11: FALSE OR MISLEADING REPRESENTATIONS

Current regulation

Section 52 of the TPA prohibits conduct, in trade or commerce, that is misleading or deceptive or that is likely to mislead or deceive. Section 52 is broadly framed and does not attract civil or criminal penalties. Section 53 of the TPA provides specific prohibitions on certain false and misleading representations in relation to the supply or possible supply of goods or services. Section 53 attracts criminal penalties.

Section 14 of the Victorian FTA provides an additional prohibition on representations that purport to be a testimonial or that are about a testimonial from being false or misleading in any material particular. The Victorian provision also puts a burden on the person accused of using a false or misleading testimonial to either adduce evidence to the contrary or, in relation to a body corporate, prove that the testimonial or statement is not false or misleading.

The US Federal Trade Commission has recently highlighted false testimonials as a problem in this context by issuing targeted guidance on this issue in October 2009.[20] In Australia, CAV has received 10 complaints about false or misleading testimonials since 2007.

Testimonials can provide consumers with confidence in a product on the basis that another person (particularly a celebrity or well-known person) is satisfied with the goods or services in question. Consequently, false or misleading representations that purport to be a testimonial or that are about a testimonial can have a detrimental impact on consumers as they may be induced into buying something based largely or wholly on the belief in the testimonial.

Options for Proposal 11

The status quo comprises a national provision (TPA) prohibiting certain misleading or false representations, the elements of which are mirrored in all jurisdictions, but with an extra provision in Victoria that relates to testimonials.

Three options will be considered for this proposal, to be compared with the status quo:

- Option A: Incorporate the current section 53, without amendment, into the ACL.
- Option B: Incorporate the current section 53 into the ACL, amended to include a separate prohibition on representations that purport to be a testimonial or that are about a testimonial from being false or misleading (based on VIC FTA 14(1)); and
- Option C: Option B, but with an evidentiary burden on a person alleged to have made a false or misleading testimonial or representation about a testimonial.

If this proposal were to proceed in the ACL, a mirror provision would be included in the ASIC Act to apply in relation to the supply of financial products and services.

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20 www.ftc.gov/opa/2009/10/endortest.shtm

Impact analysis

Option A — Incorporate the current section 53, without amendment, into the ACL

Option A would involve retaining the existing TPA section 53 in the ACL without significant change. The Victorian provision dealing specifically with testimonials would be repealed, as part of Victoria's adoption of the ACL.

Option A		
Impact group	Benefit	Cost
Consumers	Nationally consistent consumer protection laws. (+1)	Victorian consumers would no longer have a specific provision dealing with false or misleading use of testimonials. (-1)
	Consumer benefits: +1	Consumer costs: -1
Business	Nationally consistent regulatory requirements. (+3)	
	Business benefits: +3	Business costs: 0
Government	National regulatory guidance would not need to be significantly amended. (+1)	Victorian consumer agencies would no longer be able to refer to a specific section allowing them to pursue a matter relating to the use of false or misleading use of testimonials. (-1)
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	
	Government benefits: +2	Government costs: -1
Total benefit/cost	**+4**	

Option A — Outcome

This proposal would create benefits for consumers and business through nationally consistent regulation, but would also have potential costs for some Victorian consumers (as opposed to the status quo) if section 53 TPA does not cover false or misleading use of testimonials as broadly as section 14(1) of the Victorian FTA.

Option B — Add to the TPA provision a separate prohibition on representations that purport to be a testimonial, or that are about a testimonial, from being false or misleading

Option B would see the ACL contain both a provision based on section 53 TPA and on section 14(1) of the Victorian FTA. The provision would include a separate prohibition on representations that purport to be a testimonial, or that are about a testimonial, from being false or misleading.

The provision would not only prohibit fake testimonials, but also the misleading use of a testimonial; for instance, quoting a notable celebrity's genuine quote and then claiming that it was made about a product when it was, in fact, not made.

Option B		
Impact group	Benefit	Cost
Consumers	Specific prohibitions on false or misleading use of testimonials under which a consumer could take action. (+1)	
	Greater certainty that testimonials will be genuine representations of opinions by the attributed persons. (+2)	
	Nationally consistent consumer protection laws. (+1)	
	Consumer benefits: +4	Consumer costs: 0
Business	Nationally consistent regulatory requirements. (+3)	Businesses must familiarise themselves with the new prohibition relating specifically to testimonials. (-1)
	Business benefits: +3	Business costs: -1
Governments	Specific prohibitions on false or misleading use of testimonials under which consumer agencies could take action. (+1)	Guidance would need to be issued for the new requirement. (-1)
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	New enforcement and compliance responsibilities for consumer agencies. (-1)
	Government benefits: +2	Government costs: -2
Total benefit/cost	**+6**	

Option B — Outcome

The costs to businesses of a specific prohibition would be minimal. The vast majority of businesses would use genuine testimonials, and need only be sure that they are using them in a manner that is not misleading. Misleading representations about testimonials are already unlawful under section 52 of the TPA, but do not attract punitive penalties.

A specific prohibition on false or misleading representations in relation to testimonials would mean that consumers could be more confident that testimonials are more likely to be genuine, and in instances where they are not, action could be more easily taken.

Option C — Option B, but with an evidentiary burden on the respondent

As with Option B, Option C would place a specific prohibition on making false or misleading representations that purports to be a testimonial or that are about a testimonial, but would be augmented to require someone accused of breaching the provision to adduce evidence (in court) that the testimonial was not false (or misleading as the case may be), or else the representation would be deemed to be misleading.

As such, failure to adduce evidence that a claim was not false or misleading would result in the claim being deemed to be misleading. This burden would be evidentiary only (that is, require a person to put evidence before the court) and would not place a persuasive or legal burden on the respondent to *prove* they had reasonable grounds. Testimonials can be distinguished from other representations, as whether or not they are true, or being used in a genuine manner, they are only likely to be in the knowledge of the respondent and the person making the testimonial statement. As such, an evidentiary onus on the respondent would ensure that all relevant information is put before the court.

Option C		
Impact group	Benefit	Cost
Consumers	Specific prohibitions on false or misleading use of testimonials under which a consumer could take action. (+1)	
	Greater certainty that testimonials will be genuine representations of opinions by the attributed persons. (+2)	
	Nationally consistent consumer protection laws. (+1)	
	Reduced burden on consumers trying to prove false or misleading use of testimonials. (+1)	
	Consumer benefits: +5	Consumer costs: 0
Business	Nationally consistent regulatory requirements. (+3)	Businesses must familiarise themselves with the new prohibition relating specifically to testimonials. (-1)
		Requirement for businesses accused of using a false or misleading testimonial must be able to provide some evidence to the contrary or it would be deemed to be misleading. (-1)
	Business benefits: +3	Business costs: -2
Governments	Specific prohibitions on false or misleading use of testimonials under which consumer agencies could take action. (+1)	Guidance would need to be issued for the new requirement. (-1)
	Reduced burden on consumer agencies trying to prove false or misleading use of testimonials. (+1)	Cost of compliance/understanding new requirement. (-1)
	Nationally consistent laws provide easier cross-border enforcement and allow uniform national guidance. (+1)	
	Government benefits: +3	Government costs: -2
Total benefit/cost	**+7**	

Option C — Outcome

Option C would place an additional burden on a business accused of making a false or misleading representation that purported to be a testimonial or that was about a testimonial, but the burden would not be high. A business making a genuine representation should easily be able to adduce evidence that the testimonial is real or being used in an up-front manner.

The introduction of an evidentiary onus on the person making the representation would ensure that action taken by both consumers and consumer agencies in relation to testimonials is made easier. In the absence of a reverse onus, the regulator would have difficulty ascertaining whether a testimonial is accurate without the use of extensive information gathering powers.

Consultation

An Australian Consumer Law: Fair markets – Confident consumers raised the question of whether the ACL should include an expanded prohibition on false or misleading representations. Some types of representation listed there are not proposed to be included in the ACL. Of the eight submissions covering this issue, generally speaking, businesses considered that the existing section 53 was broad enough. Consumer groups generally argued that, in some cases, extensions are justified to ensure adequate protection for consumers.

Conclusion

Option A would ensure that consumers and businesses remain protected from misleading and deceptive conduct (including in relation to testimonials), as well as other specific types of false or misleading representations. While this option is likely to produce benefits overall through nationally consistent regulation, consumers could be better protected against testimonials.

The introduction of a specific new prohibition on making a false or misleading representation concerning a testimonial under Option B would ensure that consumers and consumer agencies are better equipped to take action in this area. There should not be a burden on businesses that make genuine representations in respect of testimonials.

Option C would have all the likely net benefits of Option B, but would provide for more effective and efficient court-based proceedings without significant costs to business. Consumers and consumer agencies would be able to more easily ensure that evidence is before a court to determine whether a representation that purports to be a testimonial or is about a testimonial is false or misleading.

Question 11.1

Is there any reason why false or misleading representations concerning testimonials should not be listed in this provision?

Question 11.2

Given that statements about testimonials are difficult to objectively prove as untrue, is there any reason why respondents should not bear an evidentiary burden?

Clarifying amendment to section 53

Section 53 of the TPA has been amended a number of times since 1974, including in 1977 and 1986. The framing of the specific prohibitions refer variously to representations that are false and misleading, only false, or only misleading. The explanatory memoranda also use 'false' and 'false or misleading' interchangeably, indicating that the differences in the legislation may not have been deliberate.

There appears no reason why, over time, the additional 'misleading' element has been introduced for later subsections of the provision, but some of the earlier subsections remain only as prohibiting 'false' representations. As an example, a business is prohibited from making false or misleading representations about whether goods have spare parts available, but is only prohibited from making false representations about whether those goods are new; there seems to be no policy reason for this distinction.

The section could be redrafted to ensure that both false and misleading representations of the types in the section are prohibited. While the scope of parts of section 53 would be widened, most misleading representations would already be covered by the section 52 prohibition on misleading and deceptive conduct, so additional prohibitions by extending some parts of the section to misleading representations as well as false should not provide significant compliance burdens for business, but the potential consequences of non-compliance would be greater.

Question 11.3

Is there any reason why the provision prohibiting false or misleading representations should not cover all false *or* misleading representations of the types currently found in section 53 of the TPA?

PART II
CONSULTATION REGULATION IMPACT STATEMENT — PRODUCT SAFETY REFORM PROPOSALS

PART A: INTRODUCTION AND BACKGROUND

Introduction

This RIS addresses the case for making a number of legislative amendments to the TPA to give effect to some of the recommendations of the PC Research Report, *Review of the Australian Consumer Product Safety System* (PC Report). The recommendations considered in this RIS, if implemented, would require legislative amendments to the product safety and information provisions and enforcement provisions of the TPA (Division 1A of Part V and Division 3 of Part VC of the TPA).

In May 2008, at the request of COAG, MCCA developed a model for reform of Australia's consumer product safety regulatory framework. This decision responded in part to the PC Report and involves: the Commonwealth assuming responsibility for making permanent product bans and safety standards; the States and Territories retaining their power to issue interim bans; and Commonwealth and State and Territory consumer agencies sharing responsibility for enforcing the national product safety law. MCCA agreed in principle to implement the majority of the PC's recommendations as part of this reform process. In July 2008, COAG endorsed MCCA's agreed model for product safety reform.[21]

This RIS describes the problem which has given rise to the need for a number of the PC's legislative recommendations, the objectives of these reforms, options for achieving these objectives, the costs and benefits of these options, the results of consultation undertaken on the options, and how the proposed reform will be reviewed after implementation. This RIS draws of the findings of the PC Report.

Background

In March 2005, the then Parliamentary Secretary to the Treasurer requested the PC to examine options for reforming Australia's general consumer product safety system. This system consists of the product safety provisions of the TPA and the equivalent provisions in the state and territory FTAs, along with the administration and enforcement of those provisions and other non-regulatory activities conducted by governments to achieve consumer product safety objectives. The terms of reference for the research study required the PC to assess the effectiveness of current regulatory arrangements in addressing product safety-related market failures. The PC was also asked to examine the direct and indirect

21 COAG Communiqué of 3 July 2008

economic and social costs and benefits of each of the reform options presented in the 2004 MCCA discussion paper titled *Review of the Australian Product Safety System*.[22]

The PC released its report in January 2006. Its findings and recommendations included options for creating more clearly defined roles for the Commonwealth and the States and Territories with respect to generic consumer product safety regulation (referred to in this RIS as framework reforms). The PC also recommended a number of specific legislative amendments to enhance the effectiveness of the TPA, which could be implemented independently of the national model for product safety regulation (referred to in this RIS as non-framework reforms). This RIS examines the case for implementing the non-framework reforms only.

If the non-framework recommendations of the PC are implemented, the proposed legislative amendments would form part of the broader national consumer law reforms agreed to by COAG in October 2008. The national consumer law reforms will cover consumer protection more generally, including unfair contracts, new enforcement powers and state and territory best practice provisions and will be implemented by the end of 2010 via application legislation in the Commonwealth and all States and Territories.

Problem

Responsibility for regulating consumer product safety in Australia is shared between the Commonwealth and the State and Territory Governments. Due to the limitations on the Commonwealth's powers under the *Australian Constitution*, the TPA only applies to corporations and to businesses engaged in interstate trade, operating in one of the Territories, or operating via post or telecommunications technology. This limitation does not extend to the States and Territories, but state and territory legislation only applies to situations within the legislative reach of the Commonwealth to the extent that it is not inconsistent with the TPA. While the objectives of all jurisdictions are very similar, the individual statutes vary on a number of significant ways between jurisdictions. This can result in variations in the interpretation and enforcement of similar legislation.

The TPA product safety provisions have not been updated comprehensively since they were introduced in 1986. The PC noted that there is considerable scope to improve the existing system of regulation to make it more efficient, effective and responsive. Given COAG's decision to create a new national system of product safety regulation, which is to be based on the TPA and is to be implemented by the end of 2010, it is timely to consider whether the scope and range of the product safety regulation under the TPA is appropriate.

Objectives of government action

Product safety regulation plays a necessary and important role in identifying and removing unsafe products from the market through recalls, bans, safety standards and public warnings. Consumers should be able to purchase goods and services that meet their expectations with respect to safety. Unsafe products should be readily detected, reported, and, if necessary, removed from the market and consumers should be able to obtain redress and compensation where appropriate.

22 Available at www.consumer.gov.au

Product safety regulation should not hinder the efficient operation of markets in safe consumer products, by imposing unnecessary costs on businesses or unduly limiting the ability of businesses to supply products with varying price/quality levels demanded by consumers. The primary objective of product safety regulation is to promote consumer confidence in the market through eliminating risks that cannot be mitigated by market forces and in doing so to enhance demand. There are also savings in health and welfare costs for individuals and the community with improved product safety regulation. Product safety regulation impacts broadly across the community since most citizens and businesses regularly engage in consumer transactions. Accordingly, product safety regulation can be most effective when consumer agencies are able to act proactively in a nationally consistent and clear manner.

Proposed amendments

The PC's specific non-framework recommendations, which are the subject of this RIS, are set out below.

- Recommendation 7.1: Governments should amend consumer product safety provisions in all jurisdictions to cover services related to the supply, installation and maintenance of consumer products.
- Recommendations 6.1 and 8.1: the threshold test for bans and recalls should cover all goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person.
- Recommendation 9.3: Governments should require suppliers to report to the appropriate regulator, products which have been associated with serious injury or death.
- Recommendation 11.2: Governments should have the power to undertake a recall directly where no supplier can be found to undertake such a recall.

The existing law

Currently, all nine Australian governments are responsible for regulating product safety. The relevant product safety provisions at the Commonwealth level are contained in Division 1A of Part V and Division 3 of Part VC of the TPA. The key regulatory provisions within the TPA include the power to issue warning notices on goods (section 65B), the power to ban the supply of goods (section 65C), the power to establish product safety standards (sections 65C and 65E), the power to establish product information standards (sections 65D and 65E) and the power to order product recalls (section 65F). All of the these powers are vested in the relevant Commonwealth Minister. In addition, suppliers must notify the Minister of all voluntary safety related product recalls (section 65R).

The States and Territories each have fair trading legislation containing product safety provisions that are similar, but not identical to, the provisions of the TPA. Policy making and enforcement under these Acts are undertaken by the relevant State or Territory fair trading agency or equivalent.

The TPA also establishes a statutory liability regime for manufactures and importers of defective goods. Part VA of the TPA provides a series of statutory rights of action against a manufacturer or importer who supplies defective goods and as a result of that defect a

consumer suffers injury, loss or damage. A good is considered to be defective for the purposes of Part VA if their safety is not such as persons are generally entitled to expect. Part VA serves a distinct, complementary purpose to Parts V and VC. It provides an avenue to recover damages after an incident has occurred, whereas the regulatory provisions in Parts V and VC are designed to reduce the risk of consumer product related injury from occurring in the first instance.

PART B: OPTIONS

This RIS deals only with the non-framework legislative amendments recommended by the PC. These recommendations relate to amendments to existing provisions of the TPA, which will form the basis of the national consumer law. Consequently, there are only two feasible options to respond to these recommendations. These are:

1. implement the recommendations by amending or augmenting the established product safety legislative provisions in the TPA; or

2. not implement the recommendations and maintain the existing product safety provisions in the TPA.

Alternative, non-regulatory or quasi-regulatory approaches would not be appropriate in the context of the existing legislative product safety regulatory system.

PART C: IMPACT ANALYSIS

In this Part, the respective costs and benefits of either implementing the PC's recommendations via legislative means or not implementing them at all are examined for each of the four recommendations. In its report, the PC recognised the difficulty of this task, citing the paucity of data and research available in Australia that could assist with assessing product related injury costs across the country and the size and nature of the problem posed by unsafe consumer products.[23]

The changes discussed in this RIS would apply to the legislative framework for product safety actions. The actual costs and benefits of these changes will depend on the number of regulatory actions actually taken (i.e. the number of individual bans, standards and recalls undertaken). Currently the Australian Government has 11 active product bans and approximately 35 mandatory product safety and information standards in place under the TPA. These numbers may grow slightly with the transfer of existing state and territory bans and standards to the Commonwealth under a national product safety regime, but it is unlikely that the changes discussed in this RIS would lead to a proportionately large increase in regulatory actions. In addition, the Australian Government's regulatory impact analysis requirements apply to the development of mandatory standards, including the preparation of individual RISs before any such standard can be made.

23 Other, non-regulatory recommendations of the Commission are being implemented to address this paucity of data in future.

Recommendation 7.1: Governments should amend consumer product safety provisions in all jurisdictions to cover services related to the supply, installation and maintenance of consumer products

Background

The product safety provisions in Division 1A, Part V of the TPA currently relate only to the safety of consumer 'goods'. Division 1A contains a comprehensive set of provisions dealing with the publication of warning notices in relation to goods, the establishment of mandatory safety and information standards for goods, the banning of unsafe goods, compulsory recalls of unsafe goods and the requirement to notify the Minister of voluntary safety related recalls. It is silent on the safety of services. Other consumer protection provisions of the TPA relate to services, including sections 52, 53 and 74, but none of these directly deal with the provision of unsafe services.

Services may be unsafe either because of the nature of the service itself or because of the relationship between the service and a particular good, such as the installation of looped blind cords within easy reach of small children and infants. The PC examined existing legislative approaches to safety of services in some Australian States as well as overseas approaches. Some jurisdictions, including Victoria, Queensland and South Australia, have consumer product safety laws that apply to services.

The PC concluded that there would be net benefits in extending the reach of product safety legislation to cover the safety of services, in some situations. This implies that governments would have the power to issue warning notices on services, to introduce safety standards for services, to introduce information standards for services and to ban certain services considered unsafe. The PC concluded that these powers should only apply to limited situations relating to the supply, installation and maintenance of consumer goods, as the provision of these services have the greatest potential to render an otherwise safe good unsafe.

Option 1: Amend the TPA to extend the consumer product safety provisions to services related to the supply, installation and maintenance of consumer goods

Implementation of this recommendation would be achieved via amendments to the existing product safety provisions of the TPA to allow the Minister to publish warning notices in relation to services, prescribe mandatory safety and information standards for services and to ban certain unsafe services where appropriate. The administrative provisions of the TPA which relate to the existing product safety provisions, such as information gathering, review and penalty provisions would also apply in respect of services.

This amendment would allow the national product safety law to be applied fully to situations where there is an underlying consumer product which, although in itself is not dangerous, may pose a danger to sections of the community as a result of how the product is supplied, installed or maintained.

Costs and benefits to suppliers

Suppliers may incur higher compliance costs in ensuring that their product related service meets any relevant safety or information standards introduced. Suppliers may also lose business where a service is banned. There would be initial transition costs associated with understanding new requirements and implementing new systems and processes, with

ongoing costs associated with meeting new standards, if any. The nature of these costs would be similar to those already imposed by the regulation of goods.

However, evidence from jurisdictions where product safety regulation already covers services indicates that the number of bans or mandatory standards for services would be low compared with bans and standards for goods. Further, standards introduced by the Commonwealth in respect of goods are supported by regulatory impact analysis, including consideration of the compliance costs, on a case by case basis and a similar process would apply before a new standard was to be introduced for services. In addition, the PC noted in its report that services which pose the greatest consumer hazards are already covered by sector-specific regulatory arrangements (i.e. electrical product and equipment safety) and would not be likely to be affected by this amendment.

The relatively narrow scope of the PC's recommended amendment (i.e. to services related to the supply, installation and maintenance of consumer products) would also contribute to minimising compliance costs for businesses. An alternative suggested by the PC is to extend the product safety provisions to cover all services (including those not related to a good). Currently, some State and Territory product safety laws extend to the safety of all services. However, evidence gathered by the PC indicated that in practice these provisions have not been applied to services unrelated to the supply of consumer goods.

Costs and benefits to consumers

Although impossible to quantify, consumers would benefit from the potential for government action in respect of unsafe services, when justifiable bans are introduced; and improved safety of services, when mandatory service standards are introduced. These measures have the potential to reduce consumers' exposure to unreasonable risks of injury from unsafe services relating to consumer products. Examples of potentially unsafe services include the unsafe installation of blind and curtain cords which create a strangulation hazard for young children, the installation of highly flammable material as insulation in roof cavities, and the incorrect installation of heat lamps in ceilings creating a fire hazard. There have been a number of avoidable deaths of young children in Australia from strangulation on incorrectly installed blind and curtain cords. The PC noted there was a paucity of data relating to injuries and property losses arising from unsafe services.

Benefits to consumers would potentially be offset by any corresponding increase in the prices of services or lack of availability of services or service providers. The prices of services may be pushed up where service providers are required by law to expend a greater deal of time or effort to ensure that a service is provided in a lawful way. However, these effects would be limited to only a few categories of services which are capable of posing risks to consumers. Experience with safety of services regulation in those jurisdictions where it currently exists indicates that this power would not be used often.

Costs and benefits to government

The PC noted that the number of instances of regulatory action in relation to services is likely to be relatively limited. Accordingly, costs to government associated with considering and implementing regulatory interventions in respect of safety of services would be small compared to the costs of regulating the safety of goods. Evidence of the infrequent use of safety of services powers in those jurisdictions that have them supports this view.

Selective and soundly based use of this power would meet the reasonable expectations of consumers that consumer agencies can act to help ensure the safety of services.

Option 2: No change to the TPA

Currently, Division 1A of Part V of the TPA relates only to product safety and product information in respect of goods. Not amending the product safety provisions in the TPA would mean that the safety of goods only would be regulated. In the absence of any amendments, consumer agencies would not be able to take action on behalf of consumers in relation to safety of services issues.

Costs and benefits to suppliers

To not introduce powers to issue warning notices, bans or mandatory standards for services related to the supply, installation and maintenance of consumer products (that is, to maintain the status quo) would essentially be cost neutral to suppliers. Suppliers of services would continue to make their own assessments and decisions about the safety of their services, and the current sanctions and remedies in place would continue to apply (sections 52, 53 and 74 of the TPA).

Suppliers may benefit from being able to provide and perform services to their own standards (provided they meet consumers' perceptions of an acceptable standard) without the risk of a ban on the service, even if unsafe. However, suppliers may be subject to potential legal actions if injuries or property losses do arise. The common law duty of care in tort and rising insurance premiums are also strong deterrents to potential providers of unsafe services.

Maintenance of the existing system, within a national product safety regime, would lead to a reduction in coverage in some jurisdictions across Australia. State and Territory product safety legislation that currently applies to services would need to be narrowed in order to apply the national law.

Costs and benefits to consumers

In the absence of a power to regulate the safety of services, consumers would have to continue to rely of section 74 of the TPA, which implies a warranty into contracts that services will be performed with due care and skill as well as actions under the common law. However, because section 74 is an implied term in consumer contracts, consumers can only rely on private court action to recover for any loss or injury caused as a result of a breach of this term, rather than an action under the TPA brought by the regulator. Some protection is also provided to consumer services under sections 52 and 53 of the TPA, which prohibit misleading and deceptive conduct and false or misleading representations respectively. However, these provisions do not directly address underlying safety concerns with services.

Costs and benefits to government

Not extending the product safety powers to cover services would be cost neutral to the government.

While governments would avoid the costs associated with investigations, policy development, compliance strategies and enforcement actions relating to unsafe services, without these amendments, consumer agencies would not be able to respond in an appropriately targeted way to instances of services related deaths and injuries. Consumer

criticism could also be expected if laws did not meet the reasonable expectation of consumers to be protected from unsafe service delivery. Although governments can still take action with regards to the underlying product, such action may be poorly targeted where the safety of the product is compromised by the performance of a related service.

Summary

While recognising that there were limited instances of safety problems related to services which were not already addressed by specific safety regimes, the PC concluded that there would be an overall benefit from extending the product safety provisions of the TPA to cover services related to the supply, installation and maintenance of consumer goods. Given the existing effective use of similar powers within some Australian jurisdictions it would be desirable to incorporate this amendment into the national product safety legislation.

Recommendations 6.1 and 8.1: The threshold test for bans and recalls should cover all goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person

Background

Currently, the product safety provisions of the TPA permit the Minister to ban or recall goods which are unsafe due to a defect in the product itself. It is unclear whether the Minister may ban or recall products that pose a significant threat to consumer safety as a result of their being misused. However, some products pose a significant hazard to consumers not because they are defective but because they have a high probability of causing injury through the behaviour of the user. For instance, where a person uses a product (i.e. a child playing with a toy) in a manner which, whilst not its normal or intended use, nevertheless should have been reasonably foreseen (i.e. the child placing the toy in their mouth), then the product should be supplied in a form that can remain safe in circumstances of their 'reasonably foreseeable use'.

The PC argued that the concept of 'reasonably foreseeable use' is already part of the regulatory environment in some Australian jurisdictions (Victoria, NSW and Western Australia) and is embedded in common law. The PC viewed such amendments as materially contributing to reducing injuries associated with the use of consumer products. The PC has estimated that the vast majority (generally greater than 90 per cent) of consumer product-related deaths and serious injuries are caused by the behaviour of the user of the product and not because the product is defective. Although to incorporate this concept into product safety regulation will not mean the number of bans and standards would increase by a similar proportion.

Implementation of this recommendation would expressly recognise product hazards arising in the course of a reasonably foreseeable use of a consumer product to be appropriate grounds for introducing a ban on the supply of a specific product or to order the recall of the product.

Option 1: Amend the TPA to apply the recommended threshold test to bans and recalls

The concept of 'reasonably foreseeable use' would be expressly included in the threshold test for the exercise of the power to ban goods (section 65C) or to order the recall of goods

(section 65F) or to issue a warning notice in respect of a good (section 65B). The Minister would have the power to ban or recall goods which are assessed as unsafe in the course of their intended use or 'reasonably foreseeable use'. Such circumstances may arise if a consumer uses a product in a manner which, while not the primary or normal use of the product, should nevertheless have been foreseen, and the product causes an injury as a result.

The amendment would ensure the ban and mandatory recall powers are consistent with the 'duty of care' principle in common law negligence and the safety standard embodied in the Part VA (Product Liability) of the TPA.[24]

Costs and benefits to suppliers

The PC noted in its report that 'the same preventative measures that [suppliers] would take to avoid potential [product] liability suits would also protect them from government action to withdraw their product from the market.' These measures include knowing any safety risks associated with their products, reducing such risks through product design, research and testing, and providing adequate instructions and warnings to address any residual risks. Few product bans have been made, and the test of 'reasonable foreseeable use' proposes a fairly limited expansion in the circumstances of when the government can conduct a ban or recall on unsafe goods.

However, suppliers may incur additional costs if uncertainty about the definition of 'reasonably foreseeable' misuse leads to overcautious approaches to product design and distribution. This could be mitigated to some extent through clear legislative drafting and timely guidance issued by consumer agencies to suppliers. The legal system is used to dealing with the concept of 'reasonably foreseeable' in relation to the requisite 'standard of care' in common law negligence actions.

Costs and benefits to consumers

Consumers would benefit from improved product design, product information and product warnings that would result from suppliers' knowledge that their product would be banned or recalled if it will or may cause injury under conditions of 'reasonably foreseeable use'.

Consumers may face some reduction in the availability of consumer products with increases in price where suppliers incur additional costs in design and manufacture of their products, or in educating consumers about appropriate uses of their products. This may be a particular disadvantage for consumers that use existing products strictly in accordance with their normal or intended use.

Costs and benefits to government

This recommendation would allow consumer agencies in all jurisdictions to be able to take appropriate action when a product poses an unacceptably high risk to consumer safety as a result of its 'reasonably foreseeable use'. Additional regulatory actions in respect of reasonably foreseeable use would be likely to be incremental to the total product safety actions (bans, recalls and mandatory standards) currently undertaken.

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24 Section 75AC(2)(e) provides that a factor in determining the safety of a defective good includes 'what might reasonably be expected to be done with or in relation to them'.

Consumer agencies may also face increased expectations from consumers to act where goods are associated with injuries or property damage. Such expectations would need to be managed through clear guidance to suppliers and consumers as to the interpretation of 'reasonably foreseeable'.

Option 2: No change to the TPA

Currently, Division 1A of Part V of the TPA empowers the Minister to declare specific goods to be unsafe, and hence ban their supply or order the supplier to recall the goods, if it appears to the Minister that the goods 'will or may cause injury to a person'. The 'will or may cause injury to a person' test allows some latitude in determining whether a product poses a danger. The phrase 'may cause injury' calls for a judgement to be made in respect of likelihood or probability that an injury event may occur with a causal link to a particular consumer product. In the absence of any amendments, such judgements will continue to be made, drawing on any available injury evidence and the experience and judgement of policy advisors and the Minister, however, it will not be clear that the reasonably foreseeable misuse of a product is grounds for a ban or recall.

Costs and benefits to suppliers

Suppliers would benefit from the status quo by continuing to make their own assessments of the safety of their products under normal or other foreseeable conditions of use, and also make their own judgments about the level of information and warnings to provide with their products. Further, maintaining the status quo would be cost neutral to suppliers. They would be exposed to the same product-related injury risks (and consequential product liability claims or other legal action), and the same regulatory intervention risks that currently exist.

Costs and benefits to consumers

In the absence of the concept of 'reasonably foreseeable use' in the threshold test for bans and mandatory recalls, consumer agencies may not be able to act when a product poses a danger when used in ways other than its primary purpose. This may lead to the exposure of consumers, particularly vulnerable or disadvantaged consumers, to unreasonable risk of injury. A related cost to consumers would be that suppliers may be less motivated to provide clear use instructions and warnings with their products, which again may result in a small increase in injuries.

Costs and benefits to government

Maintenance of the status quo would be cost neutral for the government.

Summary

The PC concluded that there were net benefits in revising the threshold test for bans and compulsory recalls under the TPA to explicitly allow for 'reasonably foreseeable use'. This amendment would contribute to reducing injuries associated with the use of consumer products.

Overseas experience where consumer agencies have the power to ban or recall products subject to 'reasonably foreseeable use' indicates only a small number of requests for consumer agencies to take action. Within Australia, some Victorian, NSW and

Western Australian consumer agencies already have the power to ban or recall products because of their foreseeable use.

Recommendation 9.3: Amend the TPA to require suppliers to report products which have been associated with serious injury or death

Background

Currently, the TPA requires that suppliers must report to the Minister, within two days, when they undertake a voluntary product recall on safety grounds. State and Territory legislation also contains reporting requirements to state consumer agencies. Before arriving at a decision to take action as significant as a voluntary recall, a supplier would usually undertake extensive internal investigations, which may take some time to complete. Currently, there are no other formal requirements for suppliers to report potential or actual issues with the safety of their products to consumer agencies. This lack of early reporting by businesses reduces the opportunity for consumer agencies to take timely actions to protect consumers from unsafe products, which may lead to an unsafe good remaining on the market for a longer time than would otherwise be the case.

The PC examined the case for requiring businesses, in certain circumstances, to provide information on the safety of products they supply, such as when a consumer makes a complaint directly to the supplier. This would give consumer agencies access to more timely information about potential safety hazards.

The PC recommended the creation of a new requirement for a supplier to report to the Minister if they become aware that a product they have supplied has been associated with a serious injury or death. The PC favoured a definition of serious injury as any injury requiring admission to a hospital as this would provide a clear, objective trigger for the reporting requirement. Consistent with the current reporting requirement for voluntary recalls, a time limit of two days would be appropriate for reporting such events to the Minister after the supplier becomes aware of the injury or death. There would be no requirement on the supplier to substantiate the report or to admit that their product was either at fault or even a contributing factor. The product need not be the direct cause of the serious injury or death or indeed the only cause; it is only necessary for the product to be 'associated' with the injury or death to trigger the reporting requirement. Consumer behaviour and/or environmental factors are often contributing elements to product related deaths or injuries.

An alternative suggested by the PC would be to require businesses to report any product associated with a successful product liability claim or multiple out-of-court settlements. This option has similar benefits and costs of the obligation to report products which have been associated with serious injury or death. However, while this option would provide governments with some useful information, it is unlikely to significantly improve the responsiveness of the current regime and thereby reduce the incidence of consumer injury. Often it will take some time after the consumer is injured before a product is the subject of a successful liability claim or out-of-court settlement. During this period it is likely that consumer agencies would have found out about the danger of the product from other sources.

Option 1: Introduce a new legislative requirement for suppliers to report products associated with serious injury or death

To implement this recommendation a new mandatory reporting requirement would be imposed on suppliers to report to the Minister in writing in a timely manner, when they become aware that a product they have supplied has been associated with the serious injury or death of a person.

Costs and benefits to suppliers

Introducing this additional reporting requirement will lead to suppliers incurring compliance costs associated with forming judgements about what information needs to be reported, including establishing internal reporting mechanisms to ensure that information subject to the reporting requirement is identified in a timely way. However, provided that the reporting requirement is framed with clearly designed triggers for reporting information the compliance costs of meeting this requirement will be low. A definition of 'serious injury' as those injuries requiring admission to a hospital would provide a relatively clear-cut threshold which should reduce the compliance burden for business. The cost of producing and providing each report to government would be straightforward and should be relatively inexpensive.

Resulting regulatory or other action taken by government in response to these notifications may generate costs for business (that is, a recall), but such action would only be taken after a thorough product risk assessment and when clearly necessary to protect consumers. All new product safety standards introduced by the Commonwealth in respect of goods must be supported by regulatory impact analysis on a case by case basis.

There would be no requirement on suppliers to either investigate or monitor the safety of products they supply. Rather, the requirement is to report to government once the supplier becomes aware that their product has been 'associated' with a death or serious injury. In addition, only being required to report to the one (Federal) Minister under the national consumer law arrangements (and not being required to also report to state or territory authorities where the product is sold in more than one jurisdiction) will help minimise compliance costs.

Suppliers may benefit from this reporting requirement where any necessary remedial action is negotiated with consumer agencies and such action reduces the future product liability exposure of the supplier.

Costs and benefits to consumers

There are no identifiable costs flowing to consumers from introducing this reporting requirement.

Consumers will benefit from the potential for improved responsiveness by consumer agencies to emerging product hazards. Unsafe products will be more readily identified and appropriate action taken to remove product hazards from the market or to warn consumers of the risks associated with the use, or misuse, of a product.

Costs and benefits to government

An additional reporting requirement may place significant enforcement obligations on consumer agencies and would be likely to require a substantial administrative infrastructure to process and assess the reports. Reports will need to be acknowledged, data captured and

analysed, appropriate product safety investigations and assessments conducted, negotiations with suppliers where necessary, exchanging information and liaising with other consumer agencies, and regulatory or non-regulatory interventions undertaken where justified. This may require additional resources for consumer agencies. Further, there could be duplication and multiple reports of the same information relating to one product by various sources throughout the supply chain (retailers, manufacturers and importers). It is difficult to ascertain the number of unique product related incidents that would be reported under this requirement.

Government would benefit from the improved quality and nature of product data received, which would allow consumer agencies to improve responses to product safety issues. Government would also benefit from meeting reasonable consumer expectations about the role of the state in product safety.

Option 2: No change to the TPA

Currently, the only statutory reporting requirement on suppliers in respect of product safety is with respect to voluntary recall actions initiated by the supplier under section 65R of the TPA. Section 65R provides that where a corporation voluntarily takes action to recall goods because the goods will or may cause injury to any person, the corporation must, within two days of taking that action, report this to the Minister. All notified recalls are posted on the Product Recalls Australia website, and hence recall information is available to all interested parties, including consumers, consumer agencies and suppliers.

Costs and benefits to suppliers

No change to the product safety legislative reporting requirements is expected to be cost neutral to suppliers. No required reporting of deaths and injuries associated with consumer products would subject suppliers to the same product liability risks as they are currently exposed to.

The benefits to suppliers of not having to report products that have been associated with serious injury of death would include avoidance of the minor information collection and reporting costs, and possible avoidance of the risk of regulatory action which may impact on the continued supply of a product.

Costs and benefits to consumers

Consumers would continue to rely on the ability of consumer agencies to gather intelligence on unsafe products though existing mechanisms which include consumer complaints direct to consumer agencies, media reports, injury data research, supplier liaison and general market surveillance. However, suppliers often hold better information about the safety of their products and market incidents relating to their own products than consumer agencies.

There are no identifiable benefits to consumers of maintaining the status quo. Maintaining the status quo may prevent any opportunity for potentially significant safety benefits to be derived from the introduction of a mandatory reporting obligation.

Costs and benefits to government

Consumer agencies would continue to rely on secondary sources for information about the incidence of consumer product related accidents.

Summary

Following an analysis of costs and benefits and having regard to possible disincentives if reporting requirements were too onerous, the PC concluded that there were benefits in requiring suppliers to report to the government products (supplied by them) which have been associated with serious personal injury or death, and that non-compliance with the requirement should carry appropriate financial penalties.

The Commission's view was that a tightly defined mandatory reporting requirement should limit compliance costs on business and was likely to be a cost effective way of enhancing the ability of consumer agencies to identify the most hazardous consumer products early. Nonetheless the PC noted the benefits and costs are uncertain and accordingly, the operation of this requirement would need to be reviewed within three years after implementation.

There is potential to improve consumer product safety by adding to the data sources available to a hazard identification system and providing governments with more timely and comprehensive information to improve the responsiveness of the regulatory regime for injury prevention. It also encourages businesses to be more mindful of safety in the design, production and marketing of their products.

Recommendation 11.2: Amend the TPA to give express power to the government to undertake a recall directly where no supplier can be found to undertake such a recall

Background

The PC considered the issue of 'orphan goods', that is, goods on the market for which a supplier (such as a manufacturer, importer or wholesaler) cannot be identified or no longer exists as a legal entity. Instances have arisen in the past where such goods are found to be unsafe and a recall would clearly be justified. However, there is no identifiable supplier responsible for the product that could undertake a recall. The PC has recommended that, in such circumstances, governments should have the express power to undertake appropriate recall action to remove the hazardous product from the market. Such recall action would be expected to be conducted by the ACCC, and could include appropriate notices to consumers about the defective goods, the hazards presented and procedures for the safe disposal of the goods.

Option 1: Amend the TPA to give the regulator power to undertake a recall where no supplier can be found

A new express power would be included in Division 1A of Part V of the TPA to allow the Minister (through the ACCC) to conduct a product recall in cases where a recall is considered necessary because of the potential or actual safety risk of a product, but a supplier for the product does not exist or cannot be identified to conduct the recall. The nature of the recall action that would be undertaken would be determined on a case-by-case basis.

Costs and benefits to suppliers

The express power for the government to conduct a recall would only be exercised where a supplier (that is, manufacturer, importer or wholesaler) cannot be found or no longer exists,

and therefore its introduction is expected to have no impact on upstream suppliers (manufacturers or importers).

Downstream suppliers, such as retailers would benefit by the government managing the recall process rather than leaving individual suppliers to deal with customers. Suppliers may also derive some benefit from the expected increase in consumer confidence in the safety of products in the market generated by the existence of the power.

Costs and benefits to consumers

There are no identifiable costs to consumers by providing the government with an express power to conduct a recall in circumstances where a supplier cannot be found.

Consumers would benefit from the existence of greater flexibility for consumer agencies to provide a place for consumers to return products that need to be recalled, particularly where disposal of those products may be hazardous.

Costs and benefits to government

The Government would bear the costs of conducting the product recall where a supplier cannot be identified or no longer exists as a legal entity. These costs could be managed on a case-by-case basis through the conditions and arrangements set by government for the conduct of the recall, commensurate with the effective removal of the defective product from the market. However, there may be mixed results when a large percentage of products remain in consumer hands after the recall process. In such circumstances significant government resources may have been expended to undertake the recall with the result of little apparent success. The decision to undertake a recall would consider the potential outcomes and the associated costs and benefits on a case by case basis.

Option 2: No change to the TPA

The absence of an express power to conduct a recall means the Australian Government would need to rely on existing tools such as a warning notice (under section 65B of the TPA) and/or media releases to alert consumers to the product hazard and provide advice on the appropriate action to avoid potential associated injuries.

Costs and benefits to suppliers

The absence of an express power for the government to conduct a recall would leave retailers and other downstream suppliers with the existing uncertainty as to how to deal with products they have supplied for which there is some consumer demand for a recall action, possibly in response to a warning notice issued by a regulator.

Costs and benefits to consumers

The costs to consumers of no express power for the government to conduct a recall are those associated with injuries which may arise due to a defective product remaining on the market because no supplier exists to recall it. There are no readily identifiable benefits to consumers of not including an express government recall power.

Costs and benefits to government

By not recalling defective goods in the absence of an identified supplier, government could be criticised for failing to meet the reasonable expectations of consumers to be protected from products which will or may cause injury.

Summary

The PC saw the lack of an express power of government to conduct a recall in circumstances where no supplier could be identified as a significant gap in the current range of available powers to effectively address hazardous products and protect consumers from continuing exposure to such hazards.

Although qualitative, there is a likely net benefit to both consumers and government of introducing this power since most of the costs of this measure will be borne by government and these costs can be managed on a case by case basis.

PART D: CONSULTATION

PC consultations

Consumer product safety regulation is of broad interest within the community, including suppliers, consumers and consumer agencies at all levels of government. The PC undertook extensive public consultation in developing the recommendations discussed in this RIS, including through the publication of a draft report. A brief summary of participants' views on the proposed areas for reform is provided below. Further information about the PC's study processes, including transcripts of hearings and copies of written submissions, is available at www.pc.gov.au.

Amend the threshold test for bans and recalls to cover goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person.

- There was considerable support from consumer groups and the ACCC for broadening the threshold test to explicitly cover foreseeable use and not just normal or intended uses for a product.

- Some participants, mainly industry and business groups, did not believe any change to the current wording was warranted and that the current system had been working well. There were also some concerns about the uncertainty in the definition of 'reasonably foreseeable misuse', and the potential that action could be taken too frequently or in an unnecessary manner to impose substantial costs on business.

Amend the consumer product safety provisions to cover services related to the supply, installation and maintenance of consumer products.

- There was some support from consumer groups and within government for a limited extension of the TPA to cover particular ancillary services that have a bearing on the safety performance of a product.

Amend the TPA to require suppliers to report products which have been associated with serious injury or death.

- Some participants considered the current reporting requirements (through voluntary recalls) were sufficient and working effectively to provide for appropriate reporting of proven identifiable and significant risks, and that any further requirement would be onerous on business.

- On the other hand, consumer groups were concerned that maintaining the status quo through voluntary reporting would continue to result in critical safety information not reaching the public.

Amend the TPA to give the government express power to undertake a recall directly where no supplier can be found.

- Consumer groups argued for the government to be more involved during the recall process. Some participants noted incidents where the hazard justified a recall but there was no supplier to be found to recall the defective good, a problem identified in the electrical products area.

MCCA consultations

Prior to the PC study process, during 2004, MCCA undertook its own public review of product safety regulation. A number of the recommendations of the Commission's report were also examined in the MCCA review. Further information about MCCA's study, including copies of written submissions, is available at www.consumer.gov.au.

PART E: IMPLEMENTATION AND REVIEW

In October 2008, COAG agreed to create a national consumer law, based on the TPA and enacted via application legislation in each of the States and Territories. The national consumer law is to be implemented by the end of 2010. The national consumer law will incorporate implementation of the product safety reforms agreed by COAG in July 2008.

Any amendments to the product safety provisions along the lines outlined in this RIS would form part of legislation to implement the national consumer law. The operation of these provisions would be reviewed within five years of their being made, in accordance with the Government's usual policy for reviewing all new regulations made within five years.

The PC recommended that a review of the mandatory reporting provisions (recommendation 9.3) should be conducted within three years of its introduction. This review would provide an opportunity to consider whether the reporting requirement should remain, and if so, whether to refine its scope, timing and form after some practical experience of its operation.