



Australian Government

The Treasury

Consultation Regulation Impact Statement

**Improving the effectiveness of the
Consumer Product Safety System**

Consumer Affairs Australia and New Zealand

October 2019

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About this Regulation Impact Statement

In June 2015, the Australian Consumer Affairs Ministers, through the Legislative and Governance Forum on Consumer Affairs (CAF) requested Consumer Affairs Australia and New Zealand (CAANZ) to initiate a broad-reaching review of the Australian Consumer Law (ACL). In April 2017, CAANZ released the [Final Report](#) of the ACL Review (the Review).

The Review identified some deficiencies embedded in the current product safety system, and put forward three legislative proposals relating to product safety, including the introduction of a General Safety Provision (GSP) to improve the product safety framework.

In August 2017, CAF Ministers asked officials to undertake regulatory impact assessment of a GSP. Ministers noted that further consultation was needed on design and implementation issues.

The Commonwealth Treasury (Treasury) is undertaking this assessment and public consultation on behalf of the Commonwealth, states and territories. This Consultation Regulation Impact Statement (RIS) provides an overview of the current product safety system, explains identified problems and outlines some potential reform options for feedback, including options for a GSP.

Providing your feedback

This consultation process will consider how reform of the product safety legislative framework could improve safety outcomes for consumers, enhance clarity for businesses and improve government's ability to respond to unsafe products without imposing unnecessary costs.

Treasury, on behalf of CAANZ, is seeking feedback from stakeholders and interested parties on proposed policy options to strengthen the existing product safety framework. The consultation process will run for a period of eight weeks, with the objective of gathering additional evidence and data on the extent of the problem and to seek views on the benefits and costs of the proposed policy options.

Treasury intends to reach a broad cross-section of stakeholders. It will be important to assess the views of businesses, representative bodies, legal societies and consumers. Stakeholders can access details of the consultation process via the consultations page of the Treasury website www.treasury.gov.au/consultation.

Once the initial consultation process has concluded, a final or decision-making RIS will be produced to discuss the results of the consultation process, the evidence that has been gathered and the preferred policy option.

1.1 Submissions

CAANZ welcomes formal written submissions on the content of this Consultation RIS. Five questions have been included as a guide, however, there are a number of focus questions to consider when making a submission. There is no obligation to answer any or all of the questions, and there is no limit to the length of submissions. Submissions should be uploaded using the consultation page of the Treasury website. For accessibility reasons, please upload responses in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless it is indicated that you would like all, or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Anyone who would like part of their submission to remain confidential should provide this information marked as such in a separate document.

A request made under the *Freedom of Information Act 1982 (Commonwealth)* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Please upload Submissions via the Treasury Website

Website	www.treasury.gov.au/consultation
Mail	General Safety Provision Consumer and Corporations Policy Division The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Manager, Consumer Policy Unit on 02 6263 2111 or via productsafety@treasury.gov.au

The closing date for submissions is 30 November 2019.

1.2 Consumer and business survey

As part of the RIS process, individuals and businesses can complete an online product safety survey to help capture experiences with the current product safety system. The survey covers overall impressions and views on product safety, experiences with particular products and views on the current product safety system. There are also questions specifically for traders of consumer products.

The survey is available at www.treasury.gov.au/consultation.

The closing date for the survey will be 30 November 2019.

1.3 Brief Feedback and Informal Comments

Brief feedback can also be provided at www.treasury.gov.au/consultation.

1.4 Stakeholder Meetings

Treasury will conduct targeted meetings with stakeholders to discuss the matters outlined in this Consultation RIS. If you would like further information on stakeholder meetings or are interested in attending, please contact Treasury at productsafety@treasury.gov.au.

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Glossary of terms

ACCC Australian Competition and Consumer Commission

ACL Australian Consumer Law

ASIC Australian Securities and Investments Commission

CAANZ Consumer Affairs Australia and New Zealand

CAF Legislative and Governance Forum on Consumer Affairs

CCA *Competition and Consumer Act 2010 (Cth)*

EU European Union

GSP General Safety Provision

OECD Organisation for Economic Co-operation and Development

PC Productivity Commission

RIS Regulation Impact Statement

UK United Kingdom

Executive summary

The Australian Consumer Law Review final report recommended the introduction of a General Safety Provision (GSP) into the Australian Consumer Law (ACL) requiring traders to take reasonable steps to ensure the safety of a product before selling it onto the market. As further work was required on the design of a GSP, Consumer Affairs Ministers requested officials undertake a regulatory impact assessment of this proposal. This Regulation Impact Statement (RIS) is the first step in that process. The Treasury, on behalf of officials from all jurisdictions, has led the development of this RIS in accordance with best practice guidelines and advice from the Commonwealth Office of Best Practice Regulation. As a result, this RIS includes additional options to the GSP requested by Ministers.

This RIS outlines several key problems of the current product safety system. First, unsafe products are entering the market and causing harm to consumers, businesses and the economy. The Australian Competition and Consumer Commission (ACCC) estimates unsafe consumer products cause around 780 deaths and 52,000 injuries each year, which equates to around two deaths and 145 injuries each day. The ACCC also estimates the cost to the economy is at least \$5 billion per year; further discussion on these statistics can be found on page 18 of this Consultation Regulation Impact Statement (CRIS).

Secondly, the current product safety system is slow to respond to prevent unsafe products entering the market or to address unsafe products/instances of harm — leaving consumers at potential risk. It relies heavily on post-market tools that address safety issues only after products have been sold on the market. This approach provides relatively few incentives for traders to consider product safety before placing products on the market or to deter them from supplying unsafe products. Time-intensive requirements and provisions in the law may inhibit quick and effective responses to product safety risks once they are identified.

Thirdly, consumers and traders report confusion and a lack of knowledge about the level of safety that is reasonable and how traders should comply with their safety obligations.

In considering how best to address these issues, when the ACL was created in 2010 key objectives for governments taking action in relation to product safety included:

- the primary objective to promote consumer confidence in the market through eliminating risks that cannot be mitigated by market forces alone;
- not hinder the efficient operation of consumer markets by imposing unnecessary costs on businesses; and
- for consumers to be able to purchase goods and services that meet their safety expectations.¹

¹ Explanatory Memorandum for the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*, pp. 566-567.

Therefore the key objective of this RIS is to limit the harmful effects caused by unsafe consumer products by assessing a range of options to improve the effectiveness of the product safety framework, assessed according to their ability to:

- provide sufficient controls and incentives to prevent unsafe consumer products from entering or remaining on the Australian market whilst balancing consumer access and choice;
- be responsive and effective in dealing with potential or actual instances of harm and injury caused by unsafe consumer products;
- where appropriate, adapt to future changes in products and the market; and
- not hinder the efficient operation of consumer product markets by imposing unnecessary costs on business.

Options presented for consideration include:

- Option 1: No change to the system – maintains the status quo and provides a benchmark to compare the costs and benefits of other options.
- Option 2: More education and increased industry engagement – would target manufacturers, importers and traders in Australia to better ensure they are aware of their responsibilities, while also increasing consumer awareness of the product safety system and their rights under the ACL.
- Option 3: New enforcement instrument – would provide an additional post-market tool to allow regulators to take action in response to product safety incidents by introducing a prohibition on continuing to supply unsafe products accompanied with the power to issue a ‘Notice of Risk’.
- Option 4: A new protection power – would give regulators the power to make direct orders to address conduct that has caused, or is likely to cause significant detriment (similar to ASIC’s product intervention powers).
- Option 5: A new safety duty aligned with the existing ACL – would require traders to take reasonable steps to ensure products placed on the market are not unsafe (similar to requirements under work health and safety laws).
- Option 6: A new safety duty with a higher safety threshold – would require traders to ensure products placed on the market are safe by adhering to prescriptive requirements (modelled on the UK GSP).

The RIS does not present a preferred option as further consultation and evidence on the likely impact of all options is required to conduct an informed evaluation of each option. The views of stakeholders will inform a final Decision Regulation Impact Statement (DRIS).

Key focus questions

You are asked to respond to the following key focus questions when lodging submissions. Additional and more detailed questions are located throughout the RIS, however, there is no need to answer each question or repeat answers already made in the submission. Where possible, Treasury encourages the provision of data and evidence to support your views.

In responding to this RIS, you are asked to consider:

Focus questions:

1. Do you agree with the key problems identified in the existing product safety system? Please provide any examples or evidence to explain your views.
2. Do you agree with the policy objectives outlined in this RIS? What are your reasons?
3. What impact will the proposed options have on product safety, risks to consumers, access to products as well as business practices and costs? Please provide details.
4. What is your preferred reform option, or combination of options? What are your reasons?

5. Additional focus questions for traders:

- 5a. Please provide examples of your current product safety practices from design and manufacturing, right through to monitoring of the market. Please indicate the costs of these practices to your business.
- 5b. What changes would you expect to make to your business practices as a result of each of the options proposed? Please provide details and indicate what change in compliance costs you would expect.

To ensure that broad views are captured, consultation is also taking place through a consumer and business survey.

2 Background

2.1 Australia's product safety system

Australia's product safety framework is contained in the ACL — a uniform consumer protection and fair trading law that applies across Australia.² It is jointly administered and enforced by federal, state and territory consumer protection regulators (the regulators) at each level of government.

The intention of Australia's product safety framework is to:

- deliver appropriate levels of consumer safety;
- maximise benefits and choice for consumers;
- minimise regulatory burden for traders and provide certainty about their obligations;
- promote competition in the supply of consumer products; and
- ensure that regulation is efficient, appropriate and responsive.

The ACL sets out the product safety legislative framework in Australia which includes:

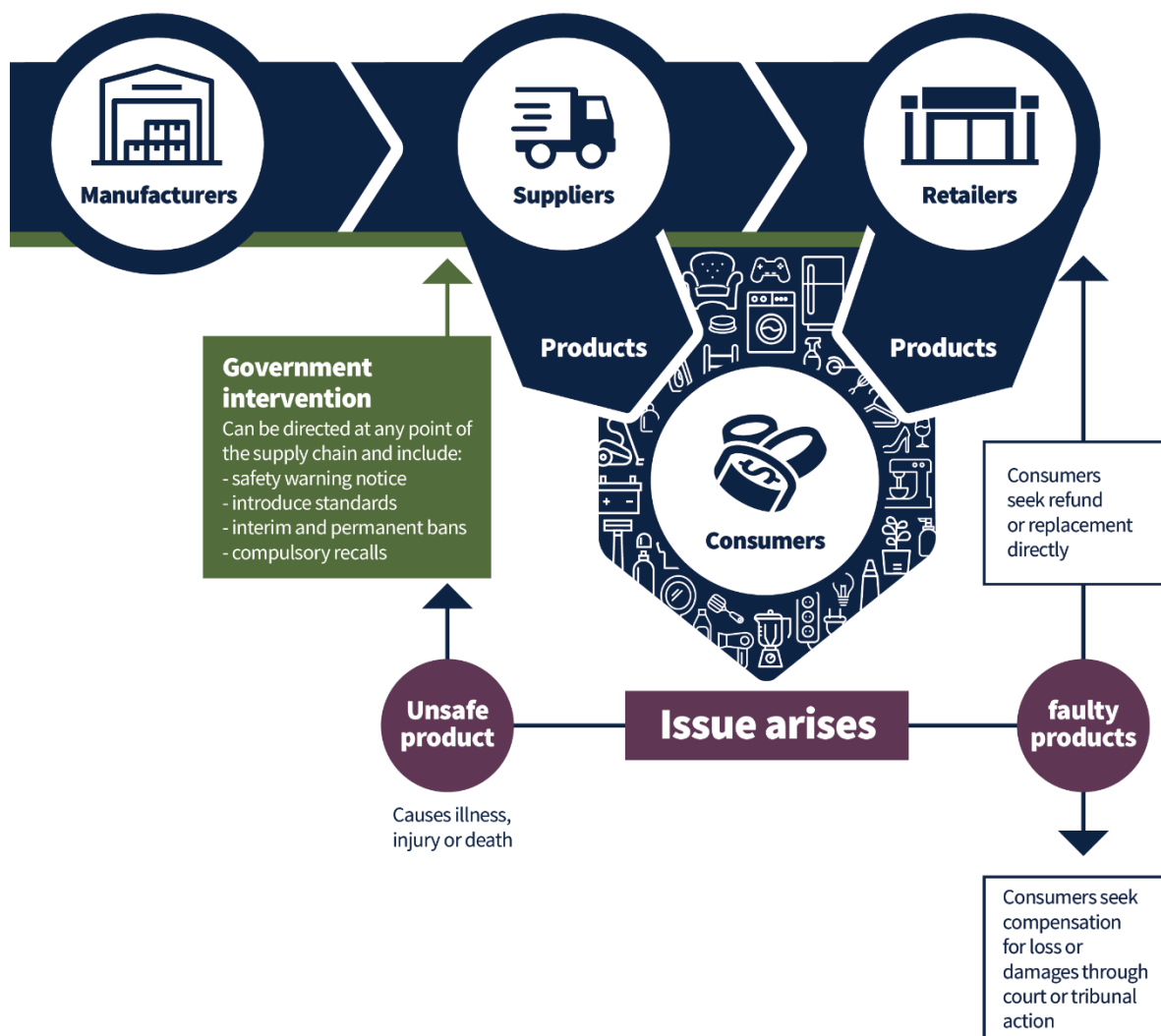
- **Product safety provisions (Parts 3-3 and 3-4 of the ACL)** – regulating consumer goods and product-related services (products) to address safety hazards including by:
 - Mandating supplier reporting such as:
 - : requiring traders³ to make a mandatory report to the Commonwealth Minister when a product they supply causes a death, serious injury or illness; and
 - : requiring traders to notify the Commonwealth Minister when they voluntarily take action to recall a product.
 - Providing regulatory and enforcement powers such as:
 - : issuing safety warning notices to advise of products under investigation and warn about possible risks;
 - : introducing safety or information requirements for consumer goods and product related services using mandatory safety and information standards;
 - : removing unsafe consumer goods and product related services from the market using interim and permanent bans and compulsory recalls;

² The ACL is set out in Schedule 2 of the *Competition and Consumer Act 2010*.

³ Traders include, but are not limited to, manufacturers, importers, suppliers and retailers.

- : requiring traders to take certain actions with respect to consumer goods such as disclosing information, repairing the goods, replacing the goods or refunding the price paid for the goods through a compulsory recall; and
 - : providing for penalties for breaches of certain ACL provisions, such as for a failure to comply with a mandatory safety or information standard, interim or permanent ban or compulsory recall.
- **Defective goods regime (Part 3-5 of the ACL)** – giving consumers an individual right of action to seek compensation in court for loss or damage caused by a product with a safety defect.
 - **Consumer guarantee of acceptable quality (Part 3-2 of the ACL)** – giving consumers an individual right of remedy (refund, repair or replacement and compensation in certain circumstances) where a product is not of acceptable quality, including because it is not safe.

Diagram 1: Product supply chain – ACL provisions in action



For further information on the ACL’s product safety framework see [Appendix A](#).

How are unsafe consumer goods defined in the ACL?

While an 'unsafe' good is not currently defined in the ACL, the ACL's defective goods regime does present a list of circumstances to consider if a good contains a 'safety defect'⁴. These are outlined in Box 1 below.

Box 1: Safety defect definition in section 9 of the ACL

Goods have a safety defect if their safety is not such as persons generally are entitled to expect.

In determining the extent of the safety of products, regard is to be given to all relevant circumstances, including:

- the manner in which, and the purposes for which, they have been marketed;
- their packaging;
- the use of any mark in relation to them;
- any instructions for, warnings with respect to, doing, or refraining from doing, anything with or in relation to them;
- what might reasonably be expected to be done with or in relation to them; and
- the time when they were supplied by their manufacturer

2.2 Product safety system reviews

Between 2006 and 2008 the Productivity Commission (PC) undertook two broad reviews of Australia's consumer product safety system and the consumer policy framework⁵. Although these reviews found the system was providing a level of product safety consistent with consumers' expectations, there was scope to make regulation more efficient, effective and responsive to consumers' needs. Recommended reforms included a national consumer law, the harmonisation of core legislative provisions and clearer definitions of legal terminology, combined with a number of administrative reforms. The 2006 PC review also considered the merits of introducing a GSP based on its use in the United Kingdom (UK) and Europe, however it was determined that the evidence presented was not sufficient to conclude that a GSP would deliver net benefits over and above what was being achieved at the time.

In June 2015, the Australian Government undertook a broad review of the ACL using information provided through public consultations, overseas developments and the Australian Consumer Survey of 2016, as well as related reforms that were ongoing at different levels of government.

While the Review found the ACL's introduction in 2011 had benefited consumers and traders and the law itself is 'fit for purpose', it also identified areas for improvement. In relation to product safety, the review noted that rather than using pre-market controls to encourage traders to take

⁴ The defective goods regime gives consumers a private right to seek compensation for harm caused by a product with a safety defect. See [Appendix A](#) for further information.

⁵ Productivity Commission (2006), *Review of the Australian Consumer Product Safety System*, 16 January 2006; Productivity Commission (2008) *Review of Australia's Consumer Policy Framework*, No 45, 20 April 2008.

pro-active steps to only introduce safe products on the Australian market, the current system relies on regulators and consumers taking action only after a safety problem has been identified.

The ACL Review noted the PC's 2006 conclusion that the overall benefits of a GSP were likely to be limited, but it also highlighted that significant market changes have occurred in the decade since the reviews were completed. These changes include globalisation, the emergence of online shopping and the increase in low-cost products manufactured overseas and sold in the Australian market. They present consumers, businesses and regulators with challenges in managing product safety in an increasingly complex and modern economy. For example, while all traders that sell into Australia must comply with the ACL, it can be more difficult for consumers to obtain a remedy and for regulators to enforce the ACL when the trader is not based in Australia.

In its Final Report the ACL Review recommended the introduction of a GSP requiring traders to take reasonable steps to ensure the safety of a product before selling it on the market, with two additional elements:

- a reasonableness test to enable flexibility for business to demonstrate compliance with the GSP (which acts as a 'safe harbour' defence); and
- the broader ACL penalties regime to apply for breaches of the GSP.

The Final Report noted that further work was required on the design of a GSP, including appropriate transitional arrangements, and that the overall benefits and costs will depend largely on how the obligation is implemented, administered and enforced. The Final Report also identified a range of GSP design issues for further consultation including: the scope of the provision, how to define 'safety', the incentives and consequences, how risks should be allocated along the supply chain, and how the provision could meet its objectives while minimising costs for traders.

In August 2017, Consumer Affairs Ministers asked officials to undertake a regulatory impact assessment on the proposal to introduce a GSP, noting that further consultation was needed on design and implementation.

Following the death of Isabella E Reeves after she ingested a button battery, a report from a Victorian coronial investigation into her death, released on 4 April 2019, also recommended the introduction of a GSP into the ACL.

2.3 The changing nature of consumer markets

The product safety system is under increasing pressure due to considerable change that has occurred in the consumer product market over the last two decades. As such, it is timely to examine options for policy reform to address the identified problems and strengthen the system.

Consumers now have access to a broader range of products designed to meet their needs at a variety of price points, given:

- the emergence of online shopping;
- the proliferation of low-cost products manufactured overseas; and

- increasing product complexity and diversity.

In a globalised marketplace, the widespread penetration of imports into the domestic market means any product safety risks emerging in other countries could also be present in Australia. While consumers can benefit from increased access, innovation and choice, there is also the risk of unsafe products being supplied to consumers, presenting a greater challenge for identifying and responding to such products under the current system.

The potential risk to consumers increases where these unsafe products are directly imported by consumers or by small traders with limited experience with the product, or where the product has not been subjected to adequate quality control and risk assessment processes in its originating country. A 2016 Organisation for Economic Co-ordination and Development (OECD) report found that with respect to products that do not meet voluntary or mandatory safety standards, the level of non-compliance was twice as high for goods sold online overseas (88 per cent of inspected products) compared to those sold online domestically (44 per cent of inspected of products).⁶

⁶ OECD Digital Economy Papers No. 261, "Online Product Safety" OECD (2016), "Online Product Safety: Trends and Challenges", OECD Digital Economy Papers, No. 261, OECD Publishing, Paris, <http://dx.doi.org/10.1787/5jlnb5q93jlt-en>.

3 The problem

There are three key problems identified within the current product safety framework:

- unsafe products enter the market and cause harm to consumers, businesses and the economy;
- the current product safety system is slow to respond when harm occurs; and
- there is confusion and misunderstanding in the market.

Each of these problems are examined further below with supporting evidence.

3.1 Unsafe products are entering the market and causing harm

Unsafe products continue to be supplied to consumers despite existing laws and considerable efforts by regulators to provide information to consumers and industry, and take regulatory action to address safety issues. As a result, major product safety incidents continue to occur in Australia (as illustrated in Diagram 2).

The supply of unsafe products can have wide reaching and devastating consequences and causes harm to consumers, businesses and the economy.

However, given the limited national product incident data available and the considerable volume of products on the market, there are challenges to identifying the main sources of problem consumer goods. While all regulators collect different types of data on product safety incidents as part of their monitoring function, overall the current product safety data system is fragmented, with no single data source to support the work of product safety regulators. The ACCC has commissioned a study to identify possible solutions for addressing the product safety information gap, including the merits of establishing a national product safety incident database system.

3.1.1 Harm to consumers

Unsafe products can cause serious harm and affect consumers and those close to them, with monetary and non-financial costs including but not limited to a loss of wellbeing through physical and emotional pain, medical expenses and reduced productivity.

The ACCC estimates unsafe consumer products cause around 780 deaths and 52,000 injuries each year, equating to around two deaths and 145 injuries each day.

These estimates include instances where there was:

- a product failure or malfunction, such as a tipping baby walker, electrical fault or a chair collapse; and/or
- an available design solution or safety equipment that could have prevented or reduced the severity of the incident but was not present in the product, such as a failed child-resistant cap or a pram tipping over due to non-compliance with stability standards.

The ACCC estimates do not include products involved in a safety incident where:

- the cause was unclear - such as persons falling from a ladder or being burnt by hot food or liquid; or
- the product was in proximity when the incident occurred (such as a toe being caught on furniture or a swallowed battery).

Consumer detriment is not limited to physical harm. Consumers can also experience loss from damage to property (such as house fires caused by faulty electrical components) and loss of utility from goods if the safety issue results in the good being disposed of. For example, since 2010, the total costs of injuries and house fires attributed to ethanol burners is between \$14.3 and \$27.2 million per year. See Diagram 4 for more information on regulatory actions concerning ethanol burners.

Diagram 2: Harm caused by unsafe products in the Australian market



Despite evidence of the harm caused by unsafe products in the Australian market, reducing the incidence of product safety incidents to zero would not be realistic. Such a system would likely require burdensome regulation which would come at a significant cost to the broader economy. A product safety system should appropriately balance the risk and costs of harm to consumers as a result of unsafe products, with the costs imposed by the regulatory system in place.

3.1.2 Harm to businesses

When product safety issues occur, they can have a significant additional financial and reputational impact on the manufacturer or supplier. Businesses can bear significant costs of remedying safety issues (e.g. recalls, remediation, compensation and reputational damage), as well as stock write-offs and disposal costs.

A European Commission review in relation to the European general safety requirement found that unsafe and non-compliant products pose problems for industry and identified unfair competition as a significant issue:

“operators not adhering to rules can make significant savings on compliance cost... [and] offer their products at lower prices. [T]he situation therefore “punishes” the law-abiding manufacturer, as compliance becomes a “competitive disadvantage”.⁷

This is particularly problematic if a supplier deliberately leaves the market before compensation can be sought and provided to affected consumers. In addition to consumers being prevented from seeking compensation for any loss or damage, other suppliers who have invested in safety may be competitively disadvantaged. However, there is no clear evidence to determine the extent to which non-compliant traders erode the competitive advantage of compliant traders.

It could be argued that the current framework disadvantages traders who invest time, effort and money into ensuring their products comply with existing safety requirements. In particular, the argument may have greater merit given the mistaken view of most consumers that the current product safety framework requires businesses to ensure the products they sell are safe prior to sale.⁸

Traders of safe products can also suffer detriment when they are caught up in regulatory interventions that address unsafe products in the same product class. For example, due to customer fear and confusion following the national interim ban on ethanol burners in 2017, other traders in the industry reported a drop in sales of their safe ethanol burners as well as their other safe products.⁹

⁷ European Commission (2013), ‘Commission Staff Working Document: Executive Summary of the Impact Assessment – Product Safety and Market Surveillance Package’, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2013:0033:FIN>

⁸ In January 2018, CHOICE’s Consumer Pulse survey of 1,029 households found that 79 per cent of Australians believe that businesses are currently required by law to ensure the products they sell are safe before releasing them for sale.

⁹ Australian Government (2017), Consumer Goods (Decorative Alcohol Fuelled Devices) Safety Standard 2017, <https://www.legislation.gov.au/Details/F2017L00909/Explanatory%20Statement/Text>

Unsafe products being sold in their respective industries may also mean businesses face increased insurance premiums, or find it difficult to obtain insurance.

3.1.3 Harm to the economy

Unsafe products affect the broader economy through lost productivity and costs of medical treatment and permanent disability, and lost efficiencies through anti-competitive behaviour. Lost productivity occurs due to time off from work following an injury, premature exit from the labour force in extreme circumstances of death or significant injuries, and the costs of others needing to provide care to an injured family member.

The ACCC has recently investigated and assessed the impact of unsafe products on the Australian economy. Despite the limited availability of national product incident data and the considerable volume of products on the market, the ACCC estimates the annual economic cost of injury and death caused by unsafe consumer products in Australia is at least \$5 billion and is likely to be much higher. There is also evidence to suggest that only a very small proportion of injuries resulting from hazardous consumer products are reported to the ACCC.¹⁰ In comparison the total revenue or value of consumer goods traded in the Australian market was estimated to be \$173 billion in 2018-19.¹¹

Box 2: Estimate of the total cost of unsafe products to the Australian economy

The ACCC's approach to estimating the \$5 billion cost of injury and death occurring in Australia each year from unsafe products builds on existing official statistics on the number of deaths and injuries occurring and methods used to determine the level of product involvement. The ACCC relied on three main inputs to determine the figure:

1. **Quantity** – the number of years of healthy life lost by the Australian population due to fatal and non-fatal injuries each year.
2. **Price** – the Value of a Statistical Life Year (VSLY) which represents the value that society is willing to pay for one year of healthy human life.
3. **Percentage of product involvement** – an estimate of the proportion of incidents that were caused by unsafe products.

The three inputs listed above, when multiplied together, provide an estimate of the annual economic cost of harm in Australia from unsafe products. The estimate measures both direct and indirect costs resulting from an injury or death. Further information on the data sources and methodology used to determine the figure are shown in [Appendix B](#).

¹⁰ Watson, W. L., & Ozanne-Smith, J. (2006) *Consumer Product-related Injury In Australia: Hospital & Medical Costs to Government*, Monash University

¹¹ IBISWorld (2019), *Consumer goods Retailing – Australia Market Research Report*, <https://www.ibisworld.com.au/industry-trends/market-research-reports/retail-trade/other-store-based-retailing/consumer-goods-retailing.html>

3.2 The current system is slow to respond

In the face of ever-changing consumer markets, it is important to assess if the existing framework is fit for purpose, and provides regulators with sufficient levers and tools to protect consumers from product safety issues. Key areas of regulatory pressure include, but are not limited to the:

- reliance on post-market controls; and
- responsiveness of regulatory and enforcement action.

3.2.1 Reliance on post-market controls

Australia's approach to product safety regulation is based on the principle of harm minimisation, where products are removed from the market once they are proven to pose a risk to safety. This has resulted in a suite of 'post-market controls,' including compulsory recalls and product bans, to stop the supply of unsafe products and rectify safety defects.

In practice, these controls are reactive as they are implemented after a product is supplied to the market and consumer harm is identified and legislative thresholds for intervention can be met. There are relatively few levers regulators can use to reduce or prevent unsafe products entering the market, unless there is a mandatory safety or information standard or a ban in place.

This approach may not provide sufficient incentives for traders to take steps to address product safety before placing products on the market such as by putting quality control or safe design measures in place. In addition, while consumers have rights under the consumer guarantee protections and the defective goods regime, they may face barriers in exercising their rights which may result in traders not bearing the full economic cost of any harm caused by their products. Combined, these issues may not be sufficient to deter traders from supplying unsafe products.

The following sub-sections examine the effectiveness of some of the post-market controls, including voluntary and compulsory recalls and safety warning notices.

3.2.1.1 Voluntary recalls

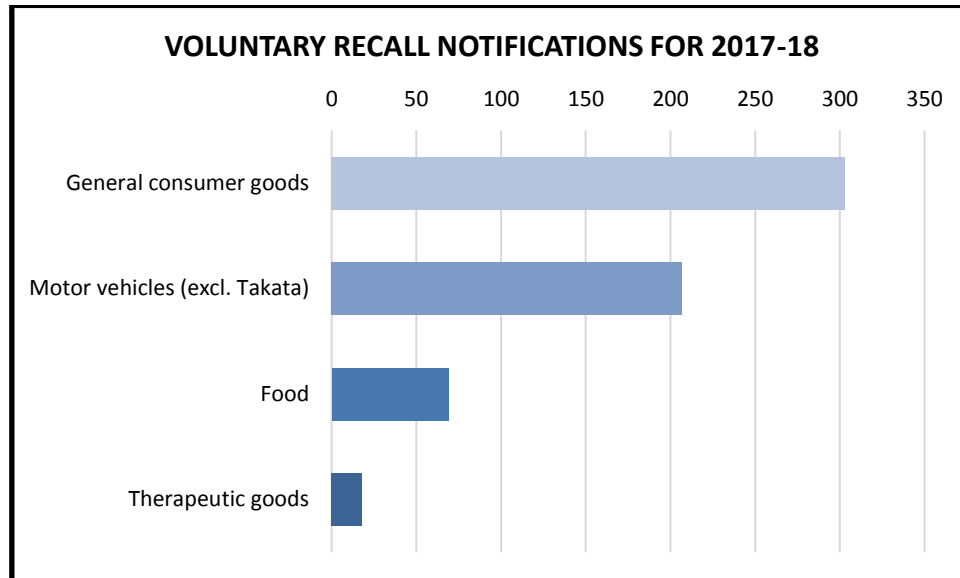
Traders can conduct a voluntary recall after becoming aware that one or more of their products presents a safety risk. They must then notify the Commonwealth Minister. The ACCC, on behalf of the Commonwealth Minister, received 597 voluntary recall notifications in 2017-18 (see Graph 1) and around 2,000 recall progress reports. This equates to more than 4.5 million product items being voluntarily recalled by traders (including motor vehicles).

All regulators review the effectiveness of recalls by assessing supplier reports, and contacting traders about possible improvements to increase recall rates. Recall success rates are important as they demonstrate how many unsafe products remain in the community after action is taken to remove them. Despite these efforts, overall voluntary recall success rates are low.

There is also anecdotal evidence from regulators to suggest traders sometimes downplay the risk in a recall notice to minimise damage to brand reputation or possible admission to liability, and the regulator has little leverage to require specific wording in the notification. Delays and deficiencies in voluntary recalls mean that consumers remain exposed to the risks of unsafe consumer products.

In December 2018 the OECD released the background report *Enhancing Product Recall Effectiveness Globally*.¹² It found that the average return rate in Australia for consumer products subject to a voluntary recall was 49 per cent (excluding motor vehicles). This means around 1.5 million individual product items remain on the market after a voluntary recall.

Graph 1: Voluntary recall notifications



An earlier ACCC report into product recalls in 2010 revealed the average return rate of recalled goods regulated by the ACCC was 39 per cent whereas the average recall rate of all products regulated across all Commonwealth safety regulators¹³ was 59 per cent.¹⁴

3.2.1.2 Compulsory recalls

Compulsory recalls are typically used to remove or remediate unsafe products from the market where traders have not taken satisfactory action to prevent injury and there is a risk of harm requiring regulatory intervention. They can be initiated by a Commonwealth, state or territory Minister. Compulsory recalls have been used infrequently, with only five initiated since 2012.

The largest compulsory recall in Australia’s history relates to Takata airbags. Globally, defective Takata airbags have been associated with 26 fatalities and over 300 injuries. The recall notice commenced on 1 March 2018, requiring traders of vehicles with defective Takata airbags to replace

¹² Organisation for Economic Co-Operation and Development (OECD) (2018), *Enhancing Product Recall Effectiveness Globally - OECD background report*, 17 December 2018.

¹³ Commonwealth product safety regulators include: the ACCC; the Therapeutic Goods Administration; the National Industrial Chemicals Notification and Assessment Scheme; Food Standards Australia and New Zealand; the Australian Pesticides and Veterinary Medicines Authority; and the Department of Infrastructure, Transport, Cities and Regional Development.

¹⁴ ACCC (2010), *Review of the Australian product safety recalls system*, <https://www.accc.gov.au/system/files/Review%20of%20the%20Australian%20product%20safety%20recalls%20system.pdf>.

them in Australian vehicles by 31 December 2020. The scope of the compulsory recall included an additional 1.3 million vehicles with defective Takata airbags on top of vehicles being remediated under previous voluntary recall actions.

As of 30 June 2019, over 3.21 million airbags have been recalled and replaced; a recall success rate of approximately 78.9 per cent, with around 604,000 still in circulation.¹⁵ Despite this mandatory recall being heavily monitored and subject to rigorous processes and timeframes, there continues to be an ongoing risk to the community until all recall items are recovered.

While the method of recall, consumer behaviour and many other factors help determine recall success rates, a key limitation of compulsory recalls is that they are post-market controls primarily focussed on removing products *after* they are identified as causing consumer harm or satisfactory action has not been taken by traders to prevent the risk.

Despite best efforts, there can be an ongoing risk to the community until a compulsory recall is fully implemented, and products that may have been widely distributed to consumers successfully recalled.

3.2.1.3 Safety Warning Notices

A Commonwealth, state or territory minister may publish safety warning notices to alert consumers of products that have been supplied to the market which may cause injury or are under investigation. Safety warning notices are intended to inform consumers about safety investigations or warn consumers of the potential dangers with using particular goods and services.¹⁶

Notices are communicated through regulator websites, social media and media statements. However, as they are intended to warn consumers about potentially unsafe products, they do not, in effect, give regulators power to undertake enforcement action. Instead they rely on traders and consumers being actively engaged and informed to become aware of the updates and act on them, and the media picking them up to inform the general community. As an example, the recent button battery safety warning notice received relatively little media attention, compared to the reports of high profile incidents or actual harm caused by the batteries.

However, this power is rarely used with ten safety warning notices issued in Australia since 2013 (although additional safety warning notices have been issued under state legislation). This may be because they are an information tool only, and not an enforcement tool, used to put industry on notice and alert consumers to the possible safety risk. A safety warning notice places no obligation on traders to stop supplying a consumer product that is subject to a warning notice. As there are no clear obligations on suppliers to only supply goods that are safe, regulators may be cautious about

¹⁵ <https://www.productsafety.gov.au/recalls/compulsory-takata-airbag-recall/takata-recalls-progress-data>

¹⁶ Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 Second reading speech, [https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4335%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards\);r ec=0](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4335%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards);r ec=0)

issuing more safety warning notices. As a result, the risks of consumer harm continue until a trader remediates the safety issue or there is further regulatory action.

Table 1: Safety Warning Notices issued since 2013

Year	Notice issued
2013	Saeko Dive Buoyancy Compensator Device (South Australia) – a risk that the plastic joining the inflator device dump valve breaks, detaching inflator device from the vest
2013	Fire wallets (South Australia) – possible asbestos content in wallets
2014	Ethanol fuelled fireplaces (Queensland) – a risk of combustible gas build up and foreseeable misuse when being refuelled can lead to fires and burns.
2014	Wooden baby sleigh cots (Commonwealth) – inappropriate sharp edges and movement of the drop side mechanism could result in bruising and laceration to infants.
2014	M Spa Inflatable spas with 240v control box (Commonwealth) – a failure of insulation between a live part of the heating element and its metallic enclosure may have resulted in electrocution.
2015	Eraser balls (Victoria and South Australia) – erasers contained in ‘gumball’ styled machines that are scented to smell like food and physically resemble food can attract children to ingest them and pose a choking and toxic hazard.
2015	Hoverboards (Commonwealth) – overheating of hoverboards and/or chargers could cause fires.
2017	Takata airbags (Commonwealth) – airbags could misdeploy in an accident resulting in metal fragments propelling from the airbags.
2017	Polaris youth quad bikes (Commonwealth) – a risk of injury to users and particularly repairers resulting from inhaling asbestos fibres.
2019	Button batteries (Commonwealth) – button batteries pose a serious hazard to children if swallowed; in addition to choking, a button battery get stuck in a child’s throat and cause a chemical reaction that burns through tissue causing catastrophic bleeding.

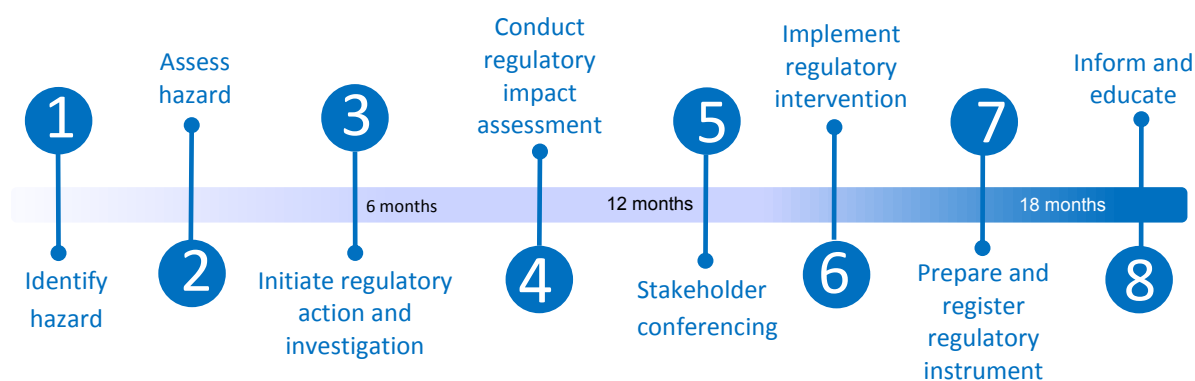
3.2.2 Responsiveness of regulatory and enforcement actions

3.2.2.1 Delayed regulatory interventions

All regulators collect, monitor and analyse available data on product safety incidents as part of monitoring the consumer product market. This includes using data from consumer complaints, mandatory reporting of incidents by traders, and information from health authorities, emergency services and media reports. However, the current product safety data system is fragmented, with no single data source to support the work of product safety regulators.

Once regulators become aware of a significant safety hazard, their limited powers to immediately ban or address dangerous products means they are unable to intervene immediately or in a targeted way. Instead regulators spend considerable time assessing the hazard and investigating the possibility of using limited product safety tools, such as bans and safety standards. In doing so, they must consider the impact on all traders, including those supplying safe products, and weigh up the most appropriate regulatory response. As a result, it usually takes 6-18 months to implement a product safety regulatory intervention from the time a safety hazard is identified and initially assessed. Diagram 3 outlines the steps typically involved in undertaking a product safety regulatory intervention, including a rough timeline.

Diagram 3. Regulatory intervention timeline



In order to implement an intervention, regulators are required to adhere to a number of complex and lengthy procedural and legislative requirements to:

- collect and analyse data on product safety incidents;
- investigate the hazard to ascertain the problem or cause of injury; and
- satisfy legislative thresholds for regulatory intervention.

Regulatory intervention can take much longer than 18 months. Unless traders undertake voluntary action to address the safety risk adequately, consumers remain exposed to risk and may have already suffered an injury or incident before regulatory interventions have occurred. This also means that some traders may, in the interim, continue to gain an unfair advantage over other traders by supplying unsafe products.

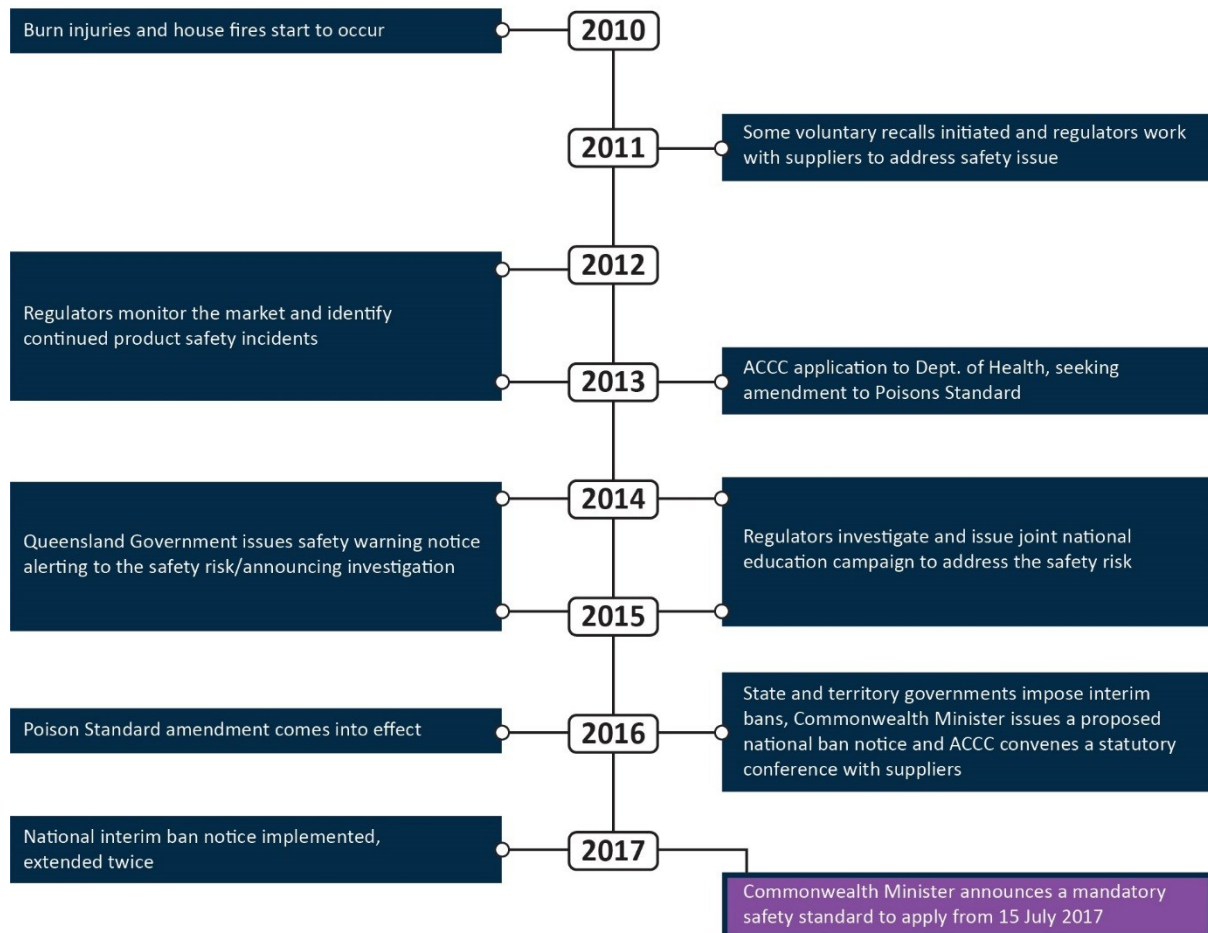
In some circumstances, the regulators do not have the required information to investigate and ascertain if a potential hazard poses a safety risk sufficient enough to meet legal thresholds for them to take action, leading to delays. For example, one regulator highlighted the challenges it faced investigating imported squishy toys where the regulator had reason to believe the toys posed a safety risk as they may have contained hazardous levels of unregulated chemicals. Given the evidence required, the regulator referred the product to an external laboratory for further testing, but the laboratory did not have access to the relevant standards to test the product against. This example further demonstrates the problems of the reliance on post-market controls, which could be avoided if product safety was considered earlier in the supply chain.

The recent experience with ethanol burners is a useful example of the time it can take for regulatory action and the harm these delays can cause. Burn injuries and house fires may have been caused by ethanol burners in 2010 or 2011. However, it took until December 2016 for an interim ban to be put in place. A national interim ban was implemented in 2017 and a mandatory safety standard followed in July 2017. Regulators undertook to address the hazard, including releasing education materials, submitting an application to amend the poison standards and issue a safety warning notice. During this time traders also initiated voluntary action and regulators monitored the effectiveness of the recalls and continued to investigate the hazard to ascertain the cause of the problem. The processes involved in satisfying legislative thresholds for regulatory interventions contributed significantly to delays. The efforts of regulators were also affected by a lack of available data to identify incidents

and determining a viable solution that protected the public while not unduly affecting businesses. Between 2010 and 2017, ethanol burners were responsible for 36 house fires across Australia, and 105 severe and life-threatening injuries to people, including infants and the elderly.

Diagram 4.

Ethanol Burners intervention



3.2.2.2 Direct enforcement action is restricted

In the absence of a direct ‘product safety’ enforcement mechanism in the ACL, regulators can also rely on alternative ACL provisions, including *false or misleading representations* and *misleading or deceptive conduct* laws, to take enforcement action and penalise traders’ wrong doing where the product may be unsafe. In these circumstances, regulators are required to gather evidence to substantiate a contravention of these provisions, rather than evidence of the supply of the unsafe product itself or an unreasonable disregard to safety.

Reliance on such provisions as a method of enforcement has limitations because:

- these provisions are not specifically designed to deal with unsafe products;
- they don’t establish the necessary incentives and culture within industry of appropriately prioritising safety in the manufacture and supply of consumer products;

- the sanctions available under the ACL (such as for conduct in misleading consumers) are not linked directly to the actions of the supplier which led to the unsafe product being on the market (and so any deterrent effects are not directly linked to product safety practices); and
- the success of these actions largely depends on establishing the supplier's knowledge of a safety issue with their product and establishing what relevant information the supplier did or did not disclose to consumers about the safety issue.

Reliance on general misconduct provisions as an enforcement mechanism potentially fails to establish clear incentives and might not adequately promote a culture within industry of appropriately prioritising safety in the manufacture, import and supply of products to consumers.

Box 3: Enforcement action against Thermomix for supplying unsafe products

In 2018 the ACCC brought legal action against Thermomix in Australia Pty Ltd (Thermomix) who promoted and supplied appliances 'to consumers which [Thermomix] knew may be affected by the safety issue without informing them of that fact and, thereby, exposing them to the potential risk of serious injury'.¹⁷ A number of consumers suffered serious burn injuries from the safety issue which was known to Thermomix but did not disclose this to consumers for a period of time while the products remained on the market. In this case Justice Murphy commented that Thermomix made a deliberate decision not to inform consumers of the safety issue.¹⁸

In legal proceedings brought by the ACCC, Thermomix admitted to contravening the false or misleading representation and misleading or deceptive conduct provisions in relation to their TM31 appliances in a number of respects. Specifically in relation to product safety, Thermomix continued to supply and promote the TM31 product after it had become aware of a safety issue with the lid that had the potential to cause, and had caused, injury, without disclosing the safety issue and consequent potential risk of injury. That Court held that this *amounted to a misrepresentation through silence* that the TM31 appliance was safe to use, was fit for purpose and was of a particular standard or quality. The court ordered Thermomix to pay \$4.6 million in penalties.

Under the current framework consumers are able to seek an individual right of remedy under the consumer guarantee protections (where a product is not of acceptable quality because it is not safe), or under the defective goods regime. However, consumers may face barriers in seeking remedies and enforcing their legal rights in court, which may result in traders not bearing the full economic cost of any harm caused by their products (e.g. compensation, fines or penalties). These barriers include significant legal costs, complex legal processes, imbalance in bargaining position and uncertainty of prospects. Because these regimes are intended to provide only affected individuals with remedies, they do not provide regulators with the ability to seek penalties or to influence market-wide outcomes relating to product safety. This limits the ability of those regimes to provide adequate incentives for traders to honour consumer claims and to address safety risks.

¹⁷ *Australian Competition and Consumer Commission v Thermomix in Australia Pty Limited* [2018] FCA 556 at [19]

¹⁸ *Ibid* at [17]

3.3 Expectations, uncertainty and lack of knowledge

Considerable information is already published by governments about product safety (including on the www.productsafety.gov.au website), and consumer advocacy groups also invest significant time and resources informing consumers about making safe product choices and using products safely.

Nevertheless, consumers and traders report confusion and a lack of knowledge about the level of safety that is reasonable and how traders should comply with their safety obligations. Additionally, consumers expect that products should be safe before they are released for sale, potentially causing them to be complacent when making purchasing decisions. For example, in January 2018, CHOICE's Consumer Pulse survey of 1,029 households found that 79 per cent of Australians believe that businesses are currently required by law to ensure the products they sell are safe before releasing them for sale.¹⁹ However this is not currently a requirement under the ACL.

Box 4: Button batteries case study

Button batteries are flat, round, single cell batteries used in a broad range of personal and household products such as children's toys, hearing aids, watches, remote controls, digital thermometers, calculators, torches and other items commonly found in households. If swallowed, button batteries can get stuck in a child's throat or intestinal system, triggering a chemical reaction that can burn through tissue and cause catastrophic internal bleeding.

To date, two children have died from swallowing a button battery in Australia, however it is also estimated that about 20 children visit an Australian emergency department each week due to suspected ingestion of a button battery.

The ACCC has engaged with Industry since 2014 to raise awareness of the issue, seeking voluntary actions to improve safety of supplied products. With ACCC support industry developed a voluntary *Industry Code for Consumer Goods that Contain Button Batteries*. The Code was launched in 2016 coinciding with the ACCC and ACL regulators announcing a 2-year National Button Battery Safety Strategy. The ACCC has recently evaluated effectiveness of the Strategy and assessing the uptake of the Code by Industry is a key consideration.

Preliminary findings indicate there has been limited progress made by suppliers in applying the principles of the Industry Code, and some unsafe products have been recalled. However, the number of safety incidents reported indicates button battery exposures continue to present a serious health issue for Australian children. As a result, a Safety Warning Notice was issued by the Commonwealth Minister on 30 March 2019.

Throughout the strategy the ACCC observed that many suppliers became confused about actions that they needed to take, given the voluntary nature of the code. Many suppliers also expressed concern about being asked to take any action to improve safety given the Code was voluntary. Suppliers' perceptions were also that the voluntary nature of the Code resulted in subscribers being unfairly penalised, whereas other retailers who did not adopt the Code suffered no consequences.

The ACCC has released an Issues paper²⁰ for broad consultation with a view to identifying areas for targeted regulatory intervention.

¹⁹ CHOICE, 2018, <https://www.choice.com.au/shopping/consumer-rights-and-advice/your-rights/articles/weak-product-safety-laws-in-australia>

²⁰ <https://consultation.accc.gov.au/product-safety/button-battery-safety-issues-paper/>

The 2006 PC Inquiry into Australia’s product safety framework noted that in general, consumers presume that governments are extensively involved in vetting the safety of most products on the market, especially particular categories of products, such as infant furniture and toys. For example, the Infant and Nursery Products Association of Australia commented to the 2016 PC’s Review that ‘[c]onsumers, particularly in relation to nursery products, incorrectly assume that there are regulations for all nursery products. The result is confusion and anxiety when they discover that this is not the case’.²¹

Businesses also face difficulties in understanding what actions they need to take to ensure product safety through due diligence and product stewardship. Product safety experts reveal that ‘even with the best intentions, the chance of confusion and mistakes is high’.²² Box 4 above highlights the recent confusion experienced by consumers and traders in relation to button batteries undermining the effectiveness of regulatory actions and exposing consumers to harm. In addition, there are sometimes multiple regulators and regulatory frameworks with which traders must comply for any given product. Even where there is one regulator and one mandatory safety standard for a product, traders may face confusion when an updated voluntary standard for that product is released.

Focus questions:

6. Do you agree or disagree with the identified problems? Please provide any evidence to support your position.
7. Do the existing ACL provisions provide effective deterrence against the supply of unsafe goods?
8. Do you consider that Australia’s product safety regulators have sufficient power to take adequate enforcement action in a timely manner?

Focus question for consumers:

9. As a consumer, have you suffered serious harm from an unsafe product? What were the events and their effect on you? Did you seek remedies or compensation from the supplier or manufacturer for the harm or injury you suffered? Please describe your experiences.

Focus questions for traders:

10. As a business, what quality assurance or safety measures have you implemented to ensure that your obligation complies with current safety requirements under the ACL? How much do you currently invest in product safety?
11. As a business, how much does product safety contribute to the cost of products your business produces and your operating costs?
12. Has your business suffered a competitive disadvantage from other businesses that do not comply with existing product safety rules?

²¹ PC 2006 Inquiry, page 19, <https://www.pc.gov.au/inquiries/completed/consumer-product-safety/report/productsafety.pdf>.

²² Gail Greatorex, 2018, Consumer product safety in Australia: Challenges for practitioners and business managers White Paper, page 11.

4 Policy objectives

When the ACL was created in 2010, key objectives for the Government taking action in relation to product safety included:

- promoting consumer confidence in the market through eliminating risks that cannot be mitigated by market forces alone;
- to not hinder the efficient operation of markets in safe consumer products by imposing unnecessary costs on businesses; and
- for consumers to be able to purchase goods and services that meet their safety expectations.²³

As the market for products continues to evolve at a rapid pace with technological developments and globalisation, it is timely to assess if the current product safety system provides the right levers and policy settings to prevent and respond to product safety risks. In this context, a range of policy options to improve the effectiveness of the product safety framework was assessed according to their ability to:

- reduce harm to consumers by providing sufficient controls and incentives to prevent unsafe consumer products from entering or remaining on the Australian market whilst balancing consumer access and choice of products;
- be responsive and effective in dealing with potential or actual instances of harm and injury caused by unsafe consumer products;
- where appropriate, adapt to future changes in products and the market; and
- not hinder the efficient operation of consumer product markets by imposing unnecessary costs on businesses.

An overarching product safety system should provide sufficient incentives (and deterrents) to ensure unsafe products are not available on the market. This should not restrict consumer access to, and choice of, products but ensure they meet the safety expectations of consumers and that the responsibilities for the safety of a product are commensurate with a market participant's ability to control such a risk. Where there are potential or actual instances of harm or injury caused by unsafe products, the system should allow regulatory efforts to be timely, targeted and proportionate to the level of risk to consumers and the broader economy. The system should also be enduring and able to adapt to future changes where appropriate, given the continuing evolution of the consumer product market. Businesses should also not be unnecessarily weighed down by the costs of adhering to safety requirements, in particular as any increased compliance costs are likely to flow onto consumers in the form of increased prices or restricted access to goods.

²³ Explanatory Memorandum for the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*, pp. 566-567.

5 Options analysis

Chapter 5 of this RIS identifies and considers options to achieve the specified policy objectives.

5.1 Option 1: No change to the product safety system

5.1.1 Description

This option would maintain the current product safety system with the existing legislative framework.

Under this option, regulators would continue to monitor the market and inform consumers about product safety. Regulators and responsible ministers would also continue to use existing tools to address instances of unsafe products, including the ability to ban products, issue compulsory recalls, work with traders to encourage voluntary recalls, and issue mandatory safety and information standards. Consumers would continue to have entitlements to seek redress where any products have a safety defect.

Market forces, media scrutiny and the work of organised consumer advocacy groups would continue to maintain the focus of traders on product safety. The 2006 PC review found that Australian businesses were generally taking a responsible attitude towards product safety, which is consistent with the experience of regulators.

There is also work in progress to better equip regulators to identify emerging risks. The ACCC has commissioned a study to identify possible solutions for addressing the product safety information gap, including the merits of establishing a national product safety incident database system. Work is also underway to clarify the definition of voluntary recalls, which may improve regulators' visibility of product safety risks by ensuring traders consistently report recalls to the ACCC.

5.1.2 Rationale

The Final Report of the ACL Review noted that the product safety and defective goods regime (detailed in [Appendix A](#)), are often seen as an implied duty on traders not to supply unsafe products. The product safety regime also includes legal consequences for those that supply unsafe products in Australia, such as penalties for non-compliance with an existing product ban or mandatory standards, and being held liable for loss or damage caused by a product through private action taken by consumers.

In addition, the ACL Review included a significant public consultation process, and although the Review recommended that Ministers consider the introduction of a GSP, it also noted more generally that:

“the introduction of a generic consumer law has benefited consumers and traders and that the law itself is generally ‘fit for purpose’. In particular, the introduction of the ACL has helped

empower consumers, lower the incidence of consumer problems and ease the regulatory burden on traders”.²⁴

5.2 Option 2: More education and increased industry engagement

5.2.1 Description

This option will maintain the current product safety system, alongside an education campaign targeted at manufacturers, importers and traders to ensure they are aware of their responsibilities under the ACL. A separate campaign would also aim to increase consumers’ awareness of the product safety system as well as their rights under the ACL. It could also create opportunities for industry product safety forums/voluntary initiatives to lift the overall level of product safety engagement and encourage best practice activities amongst traders.

An information and education campaign is important to raise awareness with consumers and industry of rights and obligations under the product safety system. It would target manufacturers, importers and traders in Australia to ensure they are aware of their responsibilities, and would also help ensure consumers are aware of their rights.

The campaign could include digital and out of home advertising and communications activities to inform Australian consumers and businesses of the product safety framework. The campaign could include tools such as:

- information sheets;
- frequently asked questions;
- an online tool to help business determine the appropriate action for a product; and
- industry forums to facilitate discussions around best practice.

5.2.2 Rationale

Consumer and supplier confusion about the level of safety expected under the system, and the lack of awareness about supplier responsibilities undermines the effectiveness of the product safety system. For example, when purchasing products directly from an overseas manufacturer, consumers may be unaware that products may not meet the same level of safety as a product supplied in Australia.

In implementing an education and awareness campaign, the state and territory regulators could reduce business and consumer confusion and increase awareness and knowledge of the system. Elements of the campaign would aim to address the confusion reported by traders about how they comply with their safety obligations and help to inform those that are unaware. The campaign would also deal with confusion raised by consumers about what level of safety is reasonable under the current framework.

²⁴ Consumer Affairs Australia and New Zealand, 2017, *Australian Consumer Law: Review Final Report*, https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf.

Providing clarification to businesses of their obligations is expected to improve compliance with the current product safety framework and may lead to more voluntary action (such as voluntary recalls) from traders in instances where products are, or are at risk of, causing harm. It could also help to facilitate industry engagement on best practices approaches to product safety to lift overall standards across key areas of the market. Minimising confusion experienced by consumers about the product safety framework could also improve their ability to make informed safe product choices, and thereby use products more safely.

The need for further information for consumers and business will be monitored by the regulators.

Focus questions:

13. Would additional guidance assist industry to better understand their obligations under the existing law to achieve better product safety outcomes? If so, please describe the type of guidance that would be beneficial for your industry.

Focus questions for traders:

14. As a business, would you sign up to an industry-led, voluntary code of conduct?

15. As a business, do you currently:

- a. consider that most businesses seek to comply with mandatory standards and product bans?
- b. remove products from sale once a ban is in place?
- c. take into account the risk of potential liability to pay compensation for product-related injuries and incidents?

Focus questions for consumers:

16. As a consumer, what product safety information sources are you currently aware of?

17. As a consumer, what types of information would assist you in making more informed decisions in regards to safety when purchasing products?

5.3 Option 3: New enforcement instrument

5.3.1 Description

This option would provide an additional post-market tool to regulators to take action in response to product safety incidents by introducing two new elements into the ACL:

- a prohibition on continuing to supply unsafe products; and
- a power to issue a “Notice of Risk”.

5.3.1.1 Introduce a prohibition on continuing to supply unsafe products

The current framework could be improved with a prohibition on the continued supply of unsafe products, applying to all traders, whether they are based domestically or overseas and regardless of role in the supply chain. Currently, regulator actions are limited to issuing safety warning notices,

working with traders to issue voluntary product recalls and providing recommendations to the Minister on compulsory recalls, mandatory standards and bans. Regulators may also issue warning letters to traders they consider to be in breach of the ACL to inform them of their responsibilities.

This option would provide an additional tool for regulators to pursue direct post-market enforcement action against non-compliant traders, including retailers and importers, who are reasonably aware that a product has a safety hazard and continue to supply it nonetheless. This would enable the regulator to use a 'product safety' specific provision in the framework rather than more indirect tools such as pursuing actions for misleading or deceptive conduct.

To demonstrate a contravention in court, it is anticipated regulators would be required to establish:

- the product was unsafe (which may require expert evidence);
- the trader was aware the product was unsafe (requiring evidence of corporate knowledge); and
- the trader continued to supply the product knowing it was unsafe.

5.3.1.2 Introduce the power to issue a Notice of Risk

To complement the above prohibition, regulators would be provided with the power to issue a Notice of Risk to a trader where the regulator has reasonable grounds to believe the trader is engaging in the continued supply of a product with a safety defect (that does not meet the standard of safety persons generally are entitled to expect).

Unlike some other actions by regulators such as initiating court proceedings, the Notice of Risk could be confidential to provide an incentive for traders to rectify the safety issue, for example by voluntarily recalling the product and potentially avoiding the public scrutiny a court judgment may attract.

The continued supply after issuance of a Notice of Risk would demonstrate traders were aware of the view of the relevant regulator in relation to potential safety defects in a product and could be submitted as evidence in court proceedings, particularly regarding the corporate knowledge identified above.

5.3.1.3 How would this be enforced?

Existing sanctions and penalties under the ACL and the *Competition and Consumer Act (CCA)* could be applied to traders for breaching this prohibition, and include infringement notices, court-based outcomes and enforceable undertakings. For more information on actions under the ACL and penalties see [Appendix A](#).

Specifically, regulators could pursue court-based enforcement outcomes, including seeking penalties. This would apply to traders in circumstances where they are informed by a regulator that, in their view, a product is unsafe and the trader continues to expose a consumer to the potential risk of injury or death by failing to remediate the safety issue or remove the product from the market. Given the potential to cause significant harm, it is proposed maximum civil penalties available under the ACL apply under this option. A Notice of Risk would not in itself be directly enforceable.

5.3.2 Rationale

The existing post-market regulatory tools require lengthy processes that often affect a regulator's ability to respond promptly to existing or emerging product safety risks and meet community expectations. For example, safety warning notices, bans and compulsory recalls are time-intensive and rely on investigation and analysis to inform ministerial decision-making — potentially exposing consumers to unnecessary risks.

The only other avenue for a regulator when it identifies a product safety hazard, is to negotiate with traders to initiate a voluntary recall. Before conducting a recall, traders are expected to develop an effective recall strategy based on a safety investigation and a risk analysis to determine the cause of the hazard and the potential risk of harm. However, traders might downplay the risk in the recall notice to minimise damage to brand reputation or possible admission to liability, and the regulator has little leverage to encourage appropriate wording in the notification. Delays and deficiencies in voluntary recalls mean that consumers remain exposed to the risks of unsafe consumer products — potentially causing unnecessary harm.

Providing regulators with an additional power to address product safety directly may increase their ability to intervene efficiently, reduce risks to consumers and prevent consumer harm. It would also allow regulators to take enforcement action against traders for supplying unsafe products, rather than relying on indirect provisions such as misleading or deceptive conduct, potentially increasing the deterrents for traders supplying unsafe products. However, as noted previously, regulators would still need to establish that a product was unsafe, which can take substantial time and resources.

The application of penalties under this option is likely to better ensure traders give more serious consideration to initiating voluntary recalls and to better ensure that recall strategies are effective as reasonably possible. The option would also provide regulators with the ability to take enforcement action if voluntary recall approaches are not effective — resolving issues faster to the benefit of consumers.

Focus questions:

18. Do you think providing regulators with an additional tool to intervene in the market when a product safety incident occurs will:

- a. result in a reduction in accidents or injuries to consumers?
- b. result in additional costs to businesses?
- c. result in reduced incidences of harm occurring?

19. For businesses, would you need to take any additional action above your existing product safety practices to comply with this option?

5.4 Option 4: A new protection power

5.4.1 Description

Under this option regulators would be given a new ‘safety intervention power’, empowering them to make direct orders to address conduct that has caused, or is likely to cause, ‘significant detriment’ to consumers, without having to obtain ministerial approval or establish a breach of the ACL in court. Direct orders issued under this option could be made to traders based domestically or overseas, if they are conducting business in Australia.

The ACL would be amended to enable the regulator to issue temporary orders (up to 18 or 24 months) to address the conduct of a specific trader and/or market-wide conduct. For example, this may include an order to:

- issue or modify product warnings, instructions or packaging information;
- comply with relevant testing requirements for a product;
- notify the public of an identified safety hazard;
- remediate a safety issue; and/or
- stop supplying a product.

It is proposed this power apply to conduct relating to the supply or intended supply of products likely to cause, or that have been identified as causing, a significant detriment to consumers. This would better ensure regulators can take action against real safety risks present in products already in circulation as well as those that have not yet been supplied to consumers (i.e. products in storage or in the process of manufacture). Unlike voluntary recalls, the failure of traders to comply with a regulator’s directive orders may constitute a breach with penalties applicable under the ACL.

5.4.1.1 What does ‘significant detriment’ mean?

It is important that this power is broad enough to enable regulators to take into account the specific circumstances of an individual consumer or class of consumers when determining whether detriment is significant. Considerations would include:

- the cumulative effect of a small amount of harm across a large number of consumers;
- the impact of a significant level of harm suffered by a small number of consumers; and
- the disproportionate impact that product safety issues can have on vulnerable and disadvantaged consumers (e.g. children and elderly consumers).

5.4.1.2 How would it work?

Safeguards would be put in place to provide an acceptable level of ministerial oversight and to better ensure regulators only exercise the new power when appropriate.

Central to the safeguards would be a requirement for regulators to consult with traders that are reasonably likely to be affected by an order, including through publishing the proposed order on the

regulator's website and inviting the public to comment. Regulators would also be required to consult with their Commonwealth, state and territory counterparts prior to taking any action. This would better ensure regulators have knowledge of each other's respective actions and that the Commonwealth is aware of actions taken by other jurisdictions.

Consideration would need to be given to what, if any, additional consultation requirements would be appropriate for interventions that are market-wide, as opposed to targeted to a particular trader. For example, the ACCC is currently required to undertake a RIS process for many market-wide product safety actions under the ACL. While these processes help ensure responsible decision making, consultation and oversight, if used to the same extent in the exercise of this new power it may reduce regulator responsiveness — adding months before action is taken.

It is proposed that regulators would also have the ability to impose a safety intervention order without engaging in consultation where the consumer product poses an imminent risk of death, serious injury or serious illness.

Actions taken under the new power would also be time-limited to help ensure there is ministerial oversight of any permanent actions. This would be consistent with existing mechanisms under the current ACL framework such as mandatory safety standards and product bans. As such regulators would be able to make an intervention order for a period of up to 18 or 24 months. During this time, relevant governments would have time to gather evidence, conduct further consultations and consider whether any permanent action under existing ACL provisions (such as compulsory recall, ban or mandatory standard) should be taken.

It is proposed two types of orders could be made under this new power:

1. an individual order, that a specified person must not engage in specified conduct in relation to a consumer product; or
2. a market-wide order, that traders must not engage in conduct in relation to a class of consumer product.

To provide guidance as to what is considered in determining whether conduct has resulted in or is likely to result in 'significant detriment', the law could include a range of legislative factors to be considered by the regulator, such as:

- the nature and extent of the detriment;
- the actual or potential risk of injury, illness or death;
- a product defect or dangerous characteristic; and/or
- the impact that the detriment has had or is likely to have.

If a trader does not comply with the regulator's orders, regulators could utilise existing investigative/enforcement powers already available in the ACL, the CCA or other relevant State or Territory law. This would include using infringement notices and undertakings and seeking civil pecuniary penalties. It is proposed the penalties for breaches be consistent with the maximum civil

penalties available under the ACL for similar infringements such as sections relating to failure to comply with a mandatory safety standard or ban.

5.4.2 Rationale

This power is modelled on the powers recently granted to the Australian Securities and Investments Commission (ASIC) to better protect consumers from harm.²⁵ From 6 April 2019, ASIC can take regulatory action to address significant consumer detriment caused by a financial product without a demonstrated or suspected breach of the law. Given the parallel role ASIC and the ACCC have in protecting consumers and the serious consequences that safety defects can cause including the potential for injury or death this option considers extending similar powers to the ACCC and other ACL regulators.

The additional protection powers would allow regulators to take action directly under a 'product safety' provision of the ACL and be responsive to existing and emerging safety issues. This would potentially reduce the time consumers are exposed to risk and as a result reduce harm caused by unsafe products.

The option would also provide regulators with the flexibility to issue a targeted order against a specified supplier whose activities have caused or are likely to cause significant detriment to consumers.

Extending this new intervention power to both the supply of new products, and those already in the market, would align with other product safety provisions in the ACL such as voluntary and compulsory recalls which are designed to reduce the potential for harm even after products have been supplied. While this is a departure from the powers provided to ASIC, (which only apply to new products) it is important for the safety of consumers for regulators to have the ability to prevent potential injuries or deaths in products already supplied.

Focus questions:

20. Do you have any feedback on how 'significant consumer detriment' is described?

21. Do you think providing regulators with a power to intervene in the market before and after a product safety incident occurs will:

- a. result in a reduction in accidents or injuries to consumers?
- b. result in additional costs to businesses?
- c. result in reduced incidences of harm occurring?

22. For businesses, would you need to take any additional action above your existing product safety practices to comply with this option?

²⁵ *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*

5.5 Option 5: A new safety duty - aligned with existing ACL

5.5.1 Description

This option would impose a new duty on traders to take reasonable steps to ensure products placed on the market are not 'unsafe', consistent with existing ACL principles. It would operate in a similar way to existing work health and safety laws that require businesses to do what is reasonably practical. Under this option, traders conducting business in Australia, whether they are based domestically or overseas would be required to comply with this new duty. This option is one of two akin to a GSP.

5.5.1.1 What do we mean by unsafe?

A product would be considered 'unsafe' if it contains a 'safety defect', which is already defined in the defective goods regime under section 9 of the ACL.²⁶ By aligning the definition of 'unsafe' with this existing standard for safety (i.e. the current definition), traders would not be required to comply with a new benchmark standard of safety, but would be obligated to consider upfront whether or not their products contain a 'safety defect'. See Box 1 (page 12) for information on what is a 'safety defect'.

5.5.1.2 Demonstrating compliance with the duty

Under this option, traders would be required to take 'reasonable steps' to ensure they do not supply unsafe products. While the current system relies on regulators demonstrating a product supplied on the market is causing consumer harm before being able to use a suite of post-market controls, this option shifts the obligation to traders to demonstrate they took reasonable steps to ensure they did not supply unsafe products.

The individual circumstances of the supplier would be considered when determining whether this obligation has been satisfied. For example, what is considered reasonable for a manufacturer may not be reasonable for a retailer, given that their level of knowledge and control is likely to vary substantially.

The definition of 'reasonable steps' would facilitate a flexible approach to compliance and align with similar legal concepts familiar to many businesses, such as the definition of 'reasonable practicability' in workplace health and safety laws.

Factors to be considered in determining whether or not reasonable steps were taken in a given case may include:

- the size of the business – the larger the business, the more reasonable it is to expect that they invest in extensive product safety practices;
- the role in the supply chain – for example, it may be reasonable for a retailer to apply different quality assurance processes to a manufacturer;

²⁶ The defective goods regime gives consumers a private right to seek compensation for harm caused by a product with a safety defect. See [Appendix A](#) for further information.

- knowledge and control – the extent to which a business has, or reasonably should have, knowledge of a safety defect and control over the product; and
- level of safety risk – it is reasonable to expect greater investment into quality assurance processes and product testing where the safety risk associated with a product is higher (including the type of consumers it would reasonably be accessible to).

The ACL would provide guidance to help traders of all types and sizes, including manufacturers, importers and retailers, understand their responsibilities and what is reasonable in their circumstances. An indicative outline of what those responsibilities could entail can be found in [Appendix C](#).

5.5.1.3 How would this be enforced?

The ACCC and state-based regulators would investigate possible contraventions of the safety duty using existing investigative/enforcement powers already available in the ACL and the CCA or other relevant State or Territory law. This includes:

- issuing an infringement notice: regulators may issue an infringement notice for contravening conduct that is minor, less serious or does not warrant litigation;
- accepting a court-enforceable undertaking from the trader, which may include provision for compliance programs, declarations and corrective action; and
- civil pecuniary penalties to penalise traders and deter contravening conduct.

Using existing enforcement tools, regulators would be able to take direct compliance or enforcement action against traders that have supplied an unsafe product or have an unreasonable disregard to the safety of their products. In proving a breach of the duty, regulators would need to establish that reasonable steps were not taken by the trader. To demonstrate a contravention in court, it is anticipated regulators would be required to establish the product was unsafe. Consideration should also be given to appeals processes for traders, to ensure the reasonableness tests for a new safety duty are applied appropriately.

It is proposed that penalties for breaching the new safety duty be consistent with the maximum civil penalties available under the ACL, as the placement of unsafe products on the market has the potential to cause significant harm to consumers and the broader community.

Compliance and enforcement with the new duty would not affect any existing sector specific safety regulation, such as for food, electrical and building products. Rather, the duty would act as a safety net where a safety hazard fell outside regulatory scope or where ACL remedies and tools are more appropriate to achieve an effective resolution.

Transitional arrangements would be in place to assist traders to update their practices, if needed, before the new duty came into effect.

5.5.2 Rationale

A new safety duty would require traders to incorporate product safety into their decision making, including design and manufacturing processes, if they have not already done so. It is expected that this would help reduce both the number of unsafe products entering the market and the potential for harm to consumers, businesses and the economy. It would also clarify for consumers the standard of safety they can expect.

It would also allow product safety issues experienced by consumers to be more effectively handled by regulators once they become apparent in the market. Regulators would be able to take direct enforcement action under a product safety provision with penalties designed to encourage manufacturers, traders and retailers to comply with their obligations. Depending on their proactive compliance activities, regulators could also act before harm occurs and arguably more quickly than when using other regulatory measures, such as mandatory safety standards or product bans. This would reduce the risk to consumers of unsafe products and associated harm caused by them. Where the new safety duty is not able to address a specific issue, a mandatory safety standard or product ban might still be required.

Requirements under the new duty would reflect the different role and level of control over product safety of each participant in the supply chain. While each participant is responsible for ensuring that unsafe products are not supplied to the market, they should only be required to do what is reasonable for them to ensure compliance. Tailoring compliance to a trader's size, role, knowledge and control and the inherent safety risk of the product would promote fairness while encouraging greater responsibility by all those in the supply chain. It would also encourage a more level playing field as it would help prevent some traders from gaining a financial advantage by selling cheaper unsafe products and the costs of unsafe products being borne by the community.

Introducing a new safety duty would also be consistent with international best practice. A 2016 report by the OECD on *International Consumer Product Safety Risk Assessment Practices* examined risk assessment practices across 21 member jurisdictions and noted that, in what appeared to be a trend towards best practice, all but three jurisdictions reported having a GSP (safety duty) in their legislation.²⁷ A new duty would therefore make Australia's safety framework more consistent with key economies and trading partners around the world, including the EU, UK, Singapore, Malaysia and Canada, noting that the actual duty imposed varies between jurisdictions.

It would also better align with the expectations of consumers. The 2018 CHOICE survey found almost all (97 per cent) Australians think it is important that businesses have a legal obligation to ensure the products they sell are safe before releasing them for sale (80 per cent indicated that this was 'very important').²⁸

Focus questions:

²⁷ OECD, 2016, *International Consumer Product Safety Risk Assessment Practices*, p.30, <https://www.oecd.org/sti/consumer/Report%20on%20International%20Consumer%20Product%20Safety%20Risk%20Assessment%20Practices.pdf>

²⁸ CHOICE, 2018, <https://www.choice.com.au/shopping/consumer-rights-and-advice/your-rights/articles/weak-product-safety-laws-in-australia>

23. Does the existing definition of 'safety defect' under the ACL set an appropriate level of safety for a new safety duty?

24. Is it sufficient to require traders to take 'reasonable steps' to not supply unsafe products, or do you think the duty should be more or less strict? Please provide reasons.

25. How much guidance is required for traders on what constitutes reasonable steps in meeting their obligation under the proposed new safety duty? What form would this guidance take?

26. Do you think this option would have a negative effect on consumers? For example, are you concerned about certain products becoming unavailable, an increase in price, a reduction in overall choice or some other concern?

Focus questions for traders:

27. As a business, in the event that this option for a new safety duty were introduced into law making it an offence to sell products with a safety defect, would you make any changes to the products you offer to the market or to your business processes? Specifically, would you:

- a. change the range of products offered to the market, or change the design, packaging or marketing of products you offer to the market?
- b. change your supply-chain management processes to re-design, change or modify the products that you use as inputs or components to the products you offer to the market?
- c. engage in additional testing or other forms of due diligence before offering a product for sale in Australia?
- d. hire or provide additional training for staff?

28. As a business, would the introduction of this form of safety duty have any benefits to your business?

5.6 Option 6: A new safety duty - higher safety standard

5.6.1 Description

This option would introduce a new safety duty on traders but in contrast to Option 5, it proposes adopting a higher safety threshold by placing a duty on traders to ensure products supplied are 'safe', with additional obligations along the supply chain. This is modelled on the more prescriptive GSP in the UK. Under this option, traders conducting business in Australia, whether they are based domestically or overseas would be required to comply with this new safety duty

5.6.1.1 What do we mean by 'safe'?

Applying a definition of 'safe' would increase the threshold from current requirements under the ACL's defective goods regime. In essence, a product would be safe if it does not present a risk (or only a minimal risk) to safety under normal conditions of use taking into account factors including: product characteristics, reasonably foreseeable misuse and product labelling. The definition of safe would be similar to the regulatory threshold outlined in the UK's General Product Safety Regulations 2005 outlined below.

Box 5: Safe product definition in section 2 of the UK Regulations

A 'safe product' means a product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons. In determining the foregoing, the following shall be taken into account in particular:

- the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, instructions for installation and maintenance;
- the effect of the product on other products, where it is reasonably foreseeable that it will be used with other products;
- the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product; and
- the categories of consumers at risk when using the product, in particular children and the elderly.

Under this option, it is proposed a stronger duty would apply to both manufacturers and importers to ensure products supplied are safe. Separately, where suppliers and retailers have knowledge or can presume a product is not safe, the duty would require the products not to be supplied. This is based on the general safety requirement in the UK regulations and could be framed as:

- A manufacturer or importer **must not supply** a product on the market unless the product is safe.²⁹

²⁹ The General Product Safety Regulations 2005 (UK), s 5(1)

- A supplier or retailer must **exercise due care** to not supply a product to any person which it knows or should have presumed, is not a safe product.³⁰

5.6.1.2 Demonstrating compliance with the duty

Under this option, traders would be required to comply with a list of prescriptive obligations to demonstrate the products they supply are safe depending on their role in the supply chain. While the current system relies on regulators demonstrating a product supplied on the market is causing consumer harm before being able to take action, this option shifts the obligation to traders to ensure the products they supply are safe. Based on the UK regulations, examples of the obligations could include:

Manufacturers and importers	Suppliers and retailers
<ul style="list-style-type: none"> • Minimising the risks associated with the product (which may include sample testing) • Generating and keeping records of associated technical documentation • Placing appropriate labelling on the product • Providing instructions on how to use the product safely 	<ul style="list-style-type: none"> • Passing on information about product risks • Maintaining documentation to identify and trace the origin or the product • Cooperating with enforcement agencies • Monitoring the market, including consumer report of safety issues

As with Option 5 these obligations would apply to all traders in the supply chain to a degree that is proportionate with their ability to affect the safety of products.

The use of agreed standards for design and manufacture of a product – where these exist – would be one way to demonstrate compliance. Where no standards exist, traders must use other ways to demonstrate compliance which could include considering codes of practice and relevant standards of technology. Regulators would also provide guidance, where appropriate.

5.6.1.3 How would this be enforced?

Using existing enforcement tools, regulators would be able to take direct compliance or enforcement action against traders that supply unsafe products or have an unreasonable disregard to the safety of their products.

As with Option 5, the ACCC and state-based regulators would investigate possible contraventions of the higher safety duty using existing investigative and enforcement powers already available in the ACL and the CCA. Under these powers, the regulators could compel traders to provide evidence of the steps they have taken for products they supply to ensure compliance with the higher safety standard. Evidence could include documentation that demonstrate the safety tests undertaken on products prior to supply or compliance with existing standards (domestic, international or voluntary) or industry best practice. Transitional arrangements would be in place to assist traders to update their practices, if needed, before the new duty came into effect.

³⁰ The General Product Safety Regulations 2005 (UK), s 8(1)(a)

5.6.2 Rationale

Similar to Option 5, a new duty with a higher prescriptive safety requirement would require manufacturers and importers to incorporate product safety into their decision making, including design and manufacturing processes. It would also provide strong incentives for traders to ensure they exercised due care when making decisions about which products to supply. These incentives would help reduce the number of unsafe products entering the market and the potential for harm to occur.

Having prescriptive obligations may potentially reduce confusion amongst traders about what level of safety is required and provide consumers more confidence about the safety of products they purchase.

As with Option 5, this option would also be consistent with international best practice of having a GSP (safety duty) as identified by the OECD's 2016 report *International Consumer Product Safety Risk Assessment Practices*. Modelled on the UK regulations, this option may also help reduce barriers for Australian businesses exporting to the UK and around the world as the safety standard required would be equal to or higher than what is required elsewhere. It would also better align with the expectations of consumers that products should be safe before they are released for sale.

The higher prescriptive threshold may also help place the onus of safety liability on manufacturers and importers, given their level of control over the safety features and properties of products before entry into the Australian market. It would still place some responsibility on suppliers selling products, but they would only be required to exercise due care, in recognition of their limited ability to influence product design and manufacture.

Focus questions:

29. Is there a need to increase the level of safety to which products currently comply?
30. Should detailed obligations apply across the supply chain? Are there particular disadvantages?

Focus question for traders:

31. Would your business incur any *additional* costs or benefits under this option, when compared to the previous option?

5.7 Possible combinations of options

The options presented in this RIS should not be considered mutually exclusive, given they target different aspects of the product safety system. In some cases, it will be possible to combine the different options, either in their entirety or with select elements. For example, it could be possible to combine the new enforcement tool (option 3) with a new safety duty (option 5), or that some form of education campaign (option 2) is likely to accompany any of the other options presented.

Given the number of possible permutations, this RIS only presents the five different options in addition to no changes to the system. However, we would be interested in receiving feedback during the consultation process on the merits of possible combinations. If after consultation, it becomes apparent an alternative combination of elements is warranted, these may be explored in advance of a Decision Regulation Impact Statement (DRIS).

Focus questions:

32. Are there any particular combinations of options that you would recommend to address the identified problems?

33. Are there any other options not presented in this RIS that would address the identified problems?

6 Preliminary impact analysis

6.1 Introduction

The purpose of this chapter is to evaluate the expected relative costs and benefits of the options, and how well they achieve the policy objectives identified in Chapter 3 of this RIS. Noting the challenges of drawing comparisons between the different options, the initial assessments outlined below are indicative only, and reflect the qualitative discussion of options in this chapter.

Table 2: Summary of an initial assessment of RIS options impact on the policy objectives

Options	Objective 1: Reduce harm to consumers through prevention of unsafe goods entering the market	Objective 2: Improve regulator responsiveness relating to actual or potential harm to consumers	Objective 3: Flexible to allow for future changes in the market	Objective 4: Minimise costs for traders
1: No change to the product safety system	No expected impact on policy objectives			
2: More education and increased industry engagement	Short term improvement	No expected impact	No expected impact	Varied depending on traders' current practices
3: New enforcement instrument Prohibit continued supply and issue Notice of Risk	Improvement [limited]	Improvement [limited]	No expected impact	No expected impact
4: A new protection power Increase regulator ability to make fast temporary safety orders	Improvement [limited]	Improvement	Improvement	Varied depending on traders' current practices
5: A new safety duty, - aligned with existing ACL Traders must take reasonable steps to ensure products are not unsafe	Improvement	Improvement	Improvement	Varied depending on traders' current practices
6: A new safety duty - higher safety standard Traders must comply with a prescriptive duty to supply safe products	Improvement	Improvement	Improvement	Varied depending on traders' current practices

An absence of data relating to the current product safety system makes it difficult to undertake a quantitative assessment of the costs and benefits of the proposed options. The PC's 2006 Review identified a number of problems with consumer product safety data in Australia and found that

available information on product-related injuries was piecemeal, uncoordinated and beset with methodological problems.

While an ACCC estimate of the economic cost of injury and death from unsafe products is available, there are no such estimates for other consumer and business costs or other impacts on the economy. These will vary by individual consumers, suppliers and products.

Chapter 3 identified three classes of harms associated with unsafe products: harm to consumers, harm to businesses, and harm to the economy, which have a number of costs associated with them:

- direct harm to consumers from unsafe products includes physical harm, financial and non-financial costs, damage to property and loss of confidence in the safety of products;
- harm to businesses from unsafe products includes financial costs and reputational damage, costs associated with recall, remediation and product disposal, costs of re-designing products, higher production costs associated with higher cost inputs, and costs of informing consumers of product risk, legal costs and compensation payouts, unfair competition and competitive disadvantage suffered when cheap, unsafe product enter the market, and costs of regulatory action taken against unsafe products in the same product class; and
- harm to the economy from unsafe products includes lost productivity, costs of medical and hospital care, costs of disability, and lost efficiencies from unfair competition.

Other impacts on consumers, businesses and the economy include barriers to trade and market entry, loss of clarity and certainty for traders, lost consumer utility if products are no longer supplied or if the range of products is reduced, or if re-designed products are not as valuable to consumers. Information collected through the consultation process will assist in understanding the impact in greater detail and, as a result, if any of the indicative ratings require fine-tuning.

6.2 Option 1: No change to the product safety system

Objective 1: Reduce harm to consumers through prevention of unsafe goods entering the market	Objective 2: Improve regulator responsiveness relating to actual or potential harm to consumers	Objective 3: Flexible to allow for future changes in the market	Objective 4: Minimise costs for traders
No expected impact on policy objectives			

6.2.1 Impact on consumers

This option would continue to provide consumers with access to the existing range of consumer products with no expected price effects. However as outlined in the Chapter 3, the current product safety system does not create an incentive to prevent unsafe goods from entering or remaining on the market. Therefore with no change, regulators would still pursue remedies under misleading and deceptive conduct provisions which are not designed to deal with product safety.

Traders would also still be exposed to liabilities for losses and damages for goods with a safety defect. However, the current framework may not provide incentives for all traders to ensure their

products do not pose harm to consumers, as the private liability laws are dependent on consumers being able to overcome any legal barriers to taking their own legal action.

Maintaining the status quo would also result in no change in the responsiveness of the product safety system to potential or actual instances of harm or injury to consumers. In practice, there are lengthy delays for regulators to take action using existing regulatory tools as they typically only become aware of a product safety issue once the implications are widespread, or after consumer harm has already occurred. Regulators then undertake significant work to investigate and collect sufficient evidence to satisfy legal requirements before an interim or permanent ban, mandatory safety standard or information standard can be introduced. This may not meet the expectations of consumers.

In the case of unsafe ethanol burners, it took seven years before a mandatory standard was imposed. Work is already underway to investigate a national product safety incident database system which could improve regulator responsiveness by allowing better access to information to identify risks and trends. In any case, a database by itself would not improve the ability of regulators to respond quickly once issues are identified.

There would also be no change in the ability of the system to adapt to changes in product or the market caused by factors such as technology and increased globalisation. This would potentially expose consumers to risk as regulators would need to continue to respond to new safety risks identified.

As a result, consumers would still be exposed to the same level of risk from unsafe products including physical harm (the ACCC estimates at least 780 deaths and 52,000 injuries per year) and other losses such as productivity and damages to property. Based on ACCC's estimations, the economic cost of unsafe consumer products would remain at least \$5 billion, and could grow if the consumer market continues to expand.

6.2.2 Impact on traders

There would be no change to costs for traders, as businesses would continue to rely on their existing practices in relation to product safety, including product design and manufacturing, compliance processes and voluntary recalls. As a result it is not expected to impact the operation of consumer product markets. Some businesses, particularly those without product safety expertise or compliance processes, may not be aware of their product safety might continue to disregard safety in favour of saving costs.

6.2.3 Other impacts

There would be no additional impacts or costs to the economy with option 1.

6.3 Option 2: More education and increased industry engagement

Objective 1: Reduce harm to consumers through prevention of unsafe goods entering the market	Objective 2: Improve regulator responsiveness relating to actual or potential harm to consumers	Objective 3: Flexible to allow for future changes in the market	Objective 4: Minimise costs for traders
Short term improvement	No expected impact	No expected impact	Varied depending on traders' current practices

6.3.1 Impact on consumers

An education campaign could help consumers make more informed decisions, particularly where consumers are considering online purchases from overseas businesses. Consumers will be able to access the existing range of consumer products with no expected price effects. The likely impact will depend on the length and structure of the campaign. However, it is expected only to have small, short term improvement on the number of unsafe products purchased by consumers.

Further, without explicit requirements in the law, regulators may not be able to provide much additional guidance compared to what is already available. The approach might be limited to increasing awareness of existing guidance and communicating it more effectively. However, there might be an opportunity for industry forums/voluntary initiatives to encourage best practice approaches to product safety – as these would be voluntary it is difficult to assess what impact this may have.

An education campaign and increased industry engagement would not change the response time of regulators. While reporting by traders or consumers to regulators of potential or actual instances of harm or injury might increase, it is not likely to be significant. Moreover, the ability of regulators to respond to information provided by traders or consumers would be limited given the lengthy processes that exist with taking regulatory action.

Similarly, an education campaign and increased industry engagement would result in no improvement to the product safety system's ability to deal with the risks associated with any new and emerging consumer goods. While consumers may be better informed about the need to consider safety in their purchasing decisions, particularly of new and innovative products, the system would still rely on standards and bans after goods are supplied to the market.

However, education supports the existing product safety framework. As such, an education campaign could enhance the ability of any other option to ensure it is implemented as effectively as possible.

6.3.2 Impact on traders

Under this option, traders would continue their existing practices in relation to design, manufacture and managing products. Many businesses would benefit from receiving more information about how to comply with existing obligations, for example, by outlining information on safety processes they could implement. This could potentially reduce their exposure to risks from regulatory and legal action. Previous information campaigns directed at traders have resulted in an increase to the

number of voluntary recalls undertaken in the following months, but the increases have tended to be time-limited with voluntary recalls ultimately returning to previous levels after some time.

There are no additional compliance costs for industry associated with an education campaign as it would be Government funded. However, there would be an increase in costs in the short-term if businesses choose to voluntarily adjust their product safety practices to comply with their existing obligations. That is, businesses may face additional costs in bringing up their practices to where they should have been.

6.3.3 Other impacts

An education campaign is unlikely to have any other effect on consumers, businesses or the economy.

Focus questions:

34. Do you agree with the impact analysis of this option? Are there other factors that should be taken into account when analysing the impact of this option?
35. Can you identify or provide any relevant data or evidence on the costs and benefits of education campaigns?
36. What type of education would be most valuable to consumers? Please provide evidence or data to support where possible.
37. For businesses, what type of education and engagement would be most beneficial to helping you understand your requirements under the ACL?
38. Is there data or evidence available on any other impacts on consumers, businesses or the economy?

6.4 Option 3: New enforcement instrument

Objective 1: Reduce harm to consumers through prevention of unsafe goods entering the market	Objective 2: Improve regulator responsiveness relating to actual or potential harm to consumers	Objective 3: Flexible to allow for future changes in the market	Objective 4: Minimise costs for traders
Improvement [limited]	Improvement [limited]	No expected impact	No expected impact

6.4.1 Impact on consumers

Providing a new enforcement instrument could reduce the time unsafe goods from remain on the market once supplied — reducing risk to consumers. For example, regulators could, in addition to negotiating with suppliers, issue a Notice of Risk to traders to ensure traders are aware of potential risks associated with the product. A Notice of Risk could facilitate direct enforcement action against traders, stop future supply by the trader and could deter other traders from supplying similar unsafe products in the first place. As a post-market tool it would be unlikely to impact on consumer’s access to the existing range of products, and have no expected price impacts. However, it would still rely on

regulators to identify and respond to safety issues — rather than putting the responsibility on traders who are best placed to identify and manage product safety before supply.

In practice, this new enforcement instrument would likely require one or a series of significant events (not necessarily serious injury or death) to occur for the issue to come to the attention of regulators — potentially exposing consumers to risk. This option is not likely to reduce the number of unsafe products entering the market as it does not directly regulate corporate behaviour in relation to pre-market design and manufacturing processes. Additionally, there is also the possibility this option signals to a small number of less responsible traders that no safety processes are needed until a regulator issues a Notice of Risk.

The new tool would likely improve the response time of regulators and increase their ability to deal with instances of harm or injury caused by consumer products. The Notice of Risk would allow regulators to put traders on notice if they have sufficient evidence to establish that a product is unsafe. They could do so without needing to prove it in court, or satisfy regulatory processes for actions such as standards, mandatory recalls or bans. As a result issuing a Notice of Risk would be expected to allow for faster initial action by regulators and quicker voluntary recall outcomes. It is unclear if this option would result in faster court proceedings as the evidentiary thresholds to establish the continued supply of an unsafe product could be difficult to establish. While overseas based retailers would also be required to respond to a new enforcement instrument if instructed, it is not clear how effective this would be.

As this option provides a post-market response, it does not impact on the system's ability to adapt to future changes in products and the market. Regulators would still need to identify and respond to any new and emerging risks.

6.4.2 Impact on traders

As with Options 1 and 2, traders would be able to continue their existing practices in relation to managing product safety as this option places no additional obligations on them. However, if traders receive a Notice of Risk, they would have an opportunity to voluntarily respond to the hazards identified and rectify the issue before harm is potentially caused to either consumers or their business. Some traders may also voluntarily improve their product safety practices as a result of the potential of direct product-safety enforcement by regulators. Conversely, some traders might ignore product safety concerns until they receive a Notice of Risk.

There would be no change to compliance costs associated with this new tool as enforcement costs would be borne by Government. However, if businesses chose to voluntarily improve their product safety practices they may face additional costs in bringing up their practices to where they should have been.

6.4.3 Other impacts

If this option increases the responsiveness of regulators, and it is observable by the public, there may be a minor improvement in consumer confidence in the safety of products on the market. There may also be additional costs associated with this option for governments and regulators to implement new legislation and for monitoring and enforcement activities.

Focus questions:

39. Do you agree with the impact analysis of this option? Are there other factors that should be taken into account when analysing the impact of this option?
40. Do you think regulators currently have enough tools for successful enforcement of the ACL?
41. Can you identify or provide any relevant data or evidence on the costs and benefits of a new enforcement instrument?
42. Is there data or evidence available of any other impacts to for consumers, businesses or the economy?

6.5 Option 4: A new protection power

Objective 1: Reduce harm to consumers through prevention of unsafe goods entering the market	Objective 2: Improve regulator responsiveness relating to actual or potential harm to consumers	Objective 3: Flexible to allow for future changes in the market	Objective 4: Minimise costs for traders
Improvement [limited]	Improvement	Improvement	Varied depending on traders' current practices

6.5.1 Impact on consumers

A new protection power would allow regulators to take swifter and more effective action where unsafe products are identified, after they have been supplied to the market, resulting in better protection of consumers from the risks of unsafe products. Regulators could potentially also take action before products enter the market, for example using intelligence from international markets about emerging safety issues to protect or inform Australian consumers. This could include actions such as requiring traders to include safety warnings or additional instructions with the product when it is sold.

This option is likely to result to reduce the number of unsafe products entering the market, however the onus would remain on the regulators to identify and take action to address product safety issues. Across the vast number of consumer products, this could be resource intensive. Accordingly, as a stand-alone option, its ability to provide sufficient market-wide incentives to encourage traders to ensure their supplied products do not have a safety defect would be limited. It would however not be expected to have any real impact on consumer's choice of, and access to, products that meet their needs.

By allowing actions to be taken directly by the regulator without ministerial approval or having to establish a contravention in court, the new power could facilitate faster responses by regulators to potential or actual instances of harm. While regulators would still need to become aware of a product safety issue before taking action, this option is expected to improve the effectiveness of regulatory and enforcement actions by allowing regulators to tailor directives to the particular circumstances and traders involved, better protecting consumers from the risk of harm. For example, it could allow a regulator to require an irresponsible trader to remediate a safety issue.

However, the effectiveness of these actions will be limited by the resource-intensive nature of the regulator actions under this option as mentioned above. It is also unclear how effective regulator actions against overseas based retailers would be under this option.

This option is expected to improve the responsiveness of the system to future changes in products or the market. The option may also reduce the need for industry-specific regulation by allowing regulators to make tailored orders to particular traders or products without imposing a market-wide mandatory standard or ban. While it may not provide strong incentives for traders to consider safety when supplying innovative new products, it would allow regulators to adapt their regulatory and enforcement activities to changing products and markets in a targeted way.

6.5.2 Impact on traders

For the majority of businesses who already have product safety processes in place, this new power is not likely to have a significant impact. If traders are supplying products that do not cause (or likely to cause) significant detriment, then they can continue their existing practices and would not be subject to any possible intervention. The new power could reduce the impact on businesses by allowing regulators to quickly make tailored directives targeted at specific traders with respect to product safety. The new power could reduce harm caused while allowing compliant traders to continue trading unaffected. Even for market-wide orders, the new power would allow regulators to ensure actions are proportionate to the potential or actual harm, for example, by requiring additional consumer instructions where this would be an appropriate response to the type and level of risk.

This option would not impose additional compliance costs on traders who do not supply unsafe products. However, for traders that receive an order from a regulator, the compliance costs would vary depending on the particular circumstances. For example, an order to include a warning on the packaging of products sold in the future may impose a moderate cost. However an order to rectify a safety issue in new products as well as those already sold could have a significant cost. Overall the expected additional costs will vary depending on traders' current practices.

6.5.3 Other impacts

An observable and swift response from regulators under this option might improve consumer confidence in the safety of products on the market. Additional costs associated with this option are likely to fall to regulators to implement the new legislation and for monitoring and enforcement activities.

Focus questions:

43. Do you agree with the impact analysis of this option? Are there other factors that should be taken into account when analysing the impact of this option?
44. Do you consider that this new power would allow regulators to quickly respond to product safety incidents?
45. Can you identify or provide any relevant data or evidence on the costs and benefits of a new protection power?
46. Is there data or evidence available of any other impacts to for consumers, businesses or the economy?

6.6 Option 5: A new safety duty - aligned with existing ACL

Objective 1: Reduce harm to consumers through prevention of unsafe goods entering the market	Objective 2: Improve regulator responsiveness relating to actual or potential harm to consumers	Objective 3: Flexible to allow for future changes in the market	Objective 4: Minimise costs for traders
Improvement	Improvement	Improvement	Varied depending on traders' current practices

6.6.1 Impact on consumers

Introducing a new safety duty is likely to result in an improvement to the product safety system's ability to prevent unsafe products from entering the market and to remove those already supplied. This is because it will specify the expected standards of safety for traders and consumers, noting they would require guidance to understand what steps regulators would consider to be reasonable for this new duty to have its intended effect.

Importantly, the duty would shift the responsibility for monitoring safety from consumers and regulators to traders. This better ensures responsibility for safety is with those that are best placed to manage product risks. It also would elevate the product safety culture in Australia and encourage traders to implement proper processes if they have not already done so.

The introduction of a new duty may not be sufficient, however, to deter poor practices from some traders. Although it is unclear to what extent these traders are the largest source of product safety problems. As the duty would impact on unsafe products entering the market and change trader behaviour, it may reduce to some extent consumer choice of, or access to, products to meet their needs.

Explicitly shifting the responsibility for product safety to traders is also expected to reduce the amount of time regulators would require to investigate and subsequently take action for product safety breaches. This could include formal actions, such as instigating court proceedings, but importantly more informal actions such as reminding traders of their responsibilities under the new duty and negotiating appropriate voluntary actions. While regulators would still need to become aware of a product safety issue before taking action, it is anticipated that enforcement action would be more direct and practical under a specific product safety provision in the ACL. In particular, it would provide a strong improvement on the status quo as regulators would no longer need to rely on indirect action, such as using misleading and deceptive conduct provisions. It would also be anticipated to be easier for regulators to take pre-emptive action before a product causes harm — particularly in instances where a trader has not taken any steps to address product safety. While for formal actions, such as court proceedings, regulators would need to prove the steps taken were not reasonable in the circumstances, which may be challenging, the ability for regulators to leverage the duty to achieve an outcome means the impact on responsiveness is still high. However, the effectiveness of regulator actions against overseas based retailers under a new duty remains unclear.

As a principle-based duty, this option would provide traders with flexibility in how to comply with safety obligations. This would allow traders' practices to innovate, respond to market changes and

potentially reduce the need for future prescriptive requirements, such as mandatory safety standards and/or product-specific regulatory regimes. It could also help to future-proof product safety requirements by allowing traders' practices to evolve with innovation. Accordingly, this option is expected to improve the system's ability to adapt to future changes in products or markets, noting that a more targeted regulatory approach may impose lower costs on traders.

6.6.2 Impact on traders

This option, like the existing ACL provisions, would impact on all traders supplying consumer products including manufacturers, importers and retailers of all sizes, whether they are based domestically or overseas. The impact on those that already have adequate product safety practices in place is expected to be minimal, as this option maintains a standard of safety that suppliers are already required to meet under the defective goods regime in order to avoid paying compensation for loss or damage. In fact, many traders already exceed the requirements under this option.

The impact on other traders would largely depend on the adequacy of their existing product safety practices taking into account their role in the supply chain, their size, their knowledge and control of safety features and how risky the products they supply are. Compliance costs for a small stationary retailer in doing what is reasonable could include asking traders for information on the safety of the product and their safety practices (including if it meets any applicable standards), paying attention to product quality and any observable hazards, and checking for compliance with mandatory standards and bans. The increased compliance costs may also raise barriers for new small traders to enter the market, although the magnitude of this effect is not clear.

In contrast compliance costs for a large manufacturer of furniture products could be higher if they do not already have adequate product safety practices in place. For example, reasonable steps for them could include the following at the design and manufacture stage:

- adjusting product designs;
- checking raw material safety;
- ensuring compliance with mandatory standards;
- following industry codes of practice;
- assessing safety risks and controls and implementing processes to address them;
- staff training; and
- continued product safety monitoring.

Additional steps might also be required to monitor products in the market and perform quality control and maintain records of the reasonable steps they took.

6.6.3 Other impacts

With the introduction of a safety duty, it is likely that there will be an improvement in consumer confidence of the products placed on the market. Impacts on overall consumer utility however are

expected to be minimal under this option because products already being offered will not need to change significantly in order to meet the existing safety standard.

As traders are already expected to meet the standard of safety under the defective goods regime, the prices of products are expected to only increase marginally reflecting the change in compliance costs (e.g. record keeping). It would also have the benefit of ‘levelling the playing field’ by reducing the number of unsafe products on the market that gain an unfair competitive advantage compared to other products that already comply with the implied safety standard set by the ACL. To the extent this results in higher prices or a reduced availability of desired products for consumers, particularly low-cost products, will lead to increased costs for consumers and disproportionately affect low income consumers.

Additional costs associated with this option are likely to fall to governments and regulators to implement the new legislation and cover monitoring and enforcement activities.

Focus questions:

47. Do you agree with the impact analysis of this option? Are there other factors that should be taken into account when analysing the impact of this option?

48. Can you identify or provide any relevant data or evidence on the costs and benefits of a new safety duty – aligned with existing ACL?

49. In your experience, how widespread are adequate safety practices in Australia? Are there particular industries who are more likely to have sub-standard safety practices?

50. Is there data or evidence available of any other impacts to consumers, businesses or the economy?

6.7 Option 6: A new safety duty - higher safety standard

Objective 1: Reduce harm to consumers through prevention of unsafe goods entering the market	Objective 2: Improve regulator responsiveness relating to actual or potential harm to consumers	Objective 3: Flexible to allow for future changes in the market	Objective 4: Minimise costs for traders
Improvement	Improvement	Improvement	Varied depending on traders' current practices

6.7.1 Impact on consumers

Introducing a new safety duty with a higher prescriptive safety standard is, like Option 5, likely to result in an improvement in terms of preventing unsafe products from entering the market (including from traders overseas) and removing those already supplied. This option is expected to have a similar ability to prevent unsafe products from entering the market. While it would explicitly identify what safety standards traders must comply with (increasing compliance) it may encourage suppliers to comply only with the minimum required standard (which may become outdated) rather than assess what is reasonably required in the circumstances. As with Option 5, this option would shift the responsibility for monitoring safety from consumers and regulators to traders, and

encourage traders to take responsibility for product safety. Potentially, this option may have a stronger preventive effect than Option 5 because it explicitly imposes higher obligations on manufacturers and importers, who are best placed to influence safety at the design and manufacture stage, or before products enter the country. The introduction of this new duty, as with Option 5, may not be sufficient to deter poor practices from irresponsible and fly-by-night traders. However, due to the more prescriptive approach of this option when compared to Option 5, regulators would be able to act quickly to remove products supplied by such traders.

There are also risks that a prescriptive standard may not suit all circumstances, resulting in costs to some consumers. The prescriptive nature of this option may have a material impact on consumer choice of, and access to a variety of products to meet their needs, particularly as traders may be discouraged from supplying products that do not have a relevant safety standard and that otherwise might be reasonably safe.

This option would also likely result in an improvement to the responsiveness of regulators, beyond that provided by Option 5, as traders would be required to comply with prescriptive obligations to ensure a product is safe rather than comply with a reasonableness test (as in Option 5). As a result, this option would significantly reduce the time needed by regulators to investigate and take both formal and informal enforcement action on potential breaches. Regulators would still need to become aware of the safety issue, assess compliance and prove a breach of the duty however having a specific duty in the law and a prescriptive standard of behaviour would make it easier to take enforcement action. The effectiveness of regulator actions against overseas based retailers under this option is unclear.

There is also a risk this option could result in regulatory resources and business effort shifting from compliance and enforcement activities (including monitoring the market), and towards the creation of standards and guides in product areas where they are yet to be created. Despite these factors, it is anticipated the prescriptive compliance obligations of this option will enable regulators to take significantly faster pre-emptive action.

This option is anticipated to result in an improvement on the ability of the system to respond to future changes in products and markets. A pre-market duty would have the ability to influence safety at the design and manufacture stage – which is particularly important for new and emerging products. However, its prescriptive obligations may increase the need for mandatory safety standards and/or product-specific regulatory regimes, as traders may need clearer benchmarks for their conduct. This could undermine the ability of the new duty to be responsive to product innovation and changes in the market as standards would always be playing catch up.

6.7.2 Impact on traders

As with Option 5, this option would impact on all traders supplying consumer products including manufacturers, importers and retailers of all sizes. The impact, however, is likely to be significantly higher for manufacturers and importers, including for those who have already implemented reasonable product safety practices (high compliance costs). Although many manufacturers operating internationally would be adhering to the higher safety standard or equivalent, it is unlikely any of them will already be in strict compliance with the new prescriptive duties required under this option.

The impact on other suppliers and retailers may be more comparable to Option 5 as they would only be required to exercise 'due care'. The impact on other suppliers would therefore depend largely on the adequacy of their existing product safety processes, such as whether they provide information to purchasers about safety and maintain traceability of the products they supply. The increased compliance costs associated with this option may raise the barrier of entry for new small traders, although the magnitude of this effect is not clear. Accordingly, the impact of this option varies depending on traders' current practices.

6.7.3 Other impacts

This option will likely increase losses to consumers if products previously available, but otherwise 'safe', are no longer supplied. Compliance with any new requirements under this option could result in, re-designed products that are no longer valued by consumers. When traders do not already have adequate product safety practices in place, it could also result in higher cost inputs for traders leading to higher prices for consumers due to the higher safety standards being imposed. Additional costs associated with this option are likely to fall to regulators to implement the new legislation and for monitoring and enforcement activities.

Focus questions:

51. Do you agree with the impact analysis of this option? Are there other factors that should be taken into account when analysing the impact of this option?
52. For importers/exporters, do you currently work with any overseas markets that have a general safety provision in legislation? Please provide details of how this affects your business decisions and product safety practices.
53. For businesses, do your current practices already adhere to a higher safety threshold than under the ACL?
54. Can you identify or provide any relevant data or evidence on the costs and benefits of a new safety duty – with a new definition of safety?
55. Is there data or evidence available of any other impacts to consumers, businesses or the economy?

7 Conclusion

This objective of this RIS is to improve the effectiveness of the product safety framework by limiting the harmful effects caused by unsafe consumer products in the Australian market. However, an absence of data relating to the current product safety system makes it difficult to undertake a quantitative assessment of the costs and benefits of the proposed options. Therefore the RIS does not present a preferred option.

The consultation process will enable further stakeholder input and evidence to be collected on the likely impact of all options, which will be required to conduct an informed evaluation of each option. The key focus questions in this RIS, along with other planned modes of consultation will help facilitate in the collection of this data during the consultation process, and inform the preparation of a final DRIS.

Appendix A – The current product safety system

The current product safety system is a combination of legislation and regulation, administered by Commonwealth and state-based regulators across Australia.

Product safety legislative framework

The Australian Consumer Law (ACL) commenced operation on 1 January 2011, creating a uniform consumer protection and fair trading law across Australia following the PC review. The ACL is jointly administered and enforced by federal, state and territory consumer protection regulators (the regulators) at each level of government. This is commonly referred to as the ‘one law multi-regulator’ model.

The ACL sets out the product safety legislative framework in Australia which includes:

- **Product safety provisions** (Part 3-3 and 3-4 of the ACL) – which set out how governments can regulate consumer goods and product-related services to address safety hazards including:
 - Regulating supplier responsibilities such as requiring traders to make a mandatory report when a product they supply causes a death, or serious injury or illness and requiring traders to notify when they voluntarily take action to recall a product.
 - Regulatory and enforcement powers (such as imposing mandatory safety and information standards and removing unsafe consumer goods and product related services from the market using interim and permanent bans and compulsory recalls and seeking penalties for breaches of the ACL).
- **Defective goods regime** (Part 3-5 of the ACL) – giving consumers the right to seek compensation in court for loss or damage caused by a product with a safety defect.
- **Consumer guarantee of acceptable quality** (Part 3-2 of the ACL) – giving consumers an individual right of remedy (refund, repair or replacement and compensation in certain circumstances) where a product is not of acceptable quality because it is not safe.

Product safety provisions

The product safety provisions set out how the Australian Government and the state and territory governments can regulate consumer goods and product-related services to address safety hazards.

When an unsafe product is identified traders are expected to take actions to address the safety risk. The key ACL provisions relating to supplier responsibilities are outlined in Table A.

Table A. Supplier responsibilities

Action	Description
Voluntary recalls	Traders can conduct a voluntarily recall after becoming aware that one or more of their products presents a safety risk. They are required to notify the Commonwealth Minister within two days of voluntarily taking action to recall a consumer good.
Mandatory reporting	<p>Traders are required to notify the Commonwealth Minister within two days of becoming aware that the use, or foreseeable misuse, of a consumer good or product related service, caused or may have caused, a death or serious injury or illness.</p> <p>They are also required to notify the Commonwealth Minister if another person (e.g. a customer) considers that the death or serious injury or illness was caused, or may have been caused, by the use or foreseeable misuse of consumer good or product related service.</p>

In addition to the supplier requirements, regulators continuously monitor the market and product safety issues and provide advice to their respective Ministers when regulatory interventions are required. Within the product safety provisions of the ACL regulators can take a range of regulatory, enforcement and monitoring activities. These are outlined in Table B.

Table B. Regulatory and enforcement powers

Action	Description
Mandatory safety standards	<p>The Commonwealth Minister may make a mandatory safety standard for a consumer goods or product related service containing any requirements reasonably necessary to prevent or reduce the risk of injury to any person.</p> <p>Mandatory standards can include requirements for design, method of manufacture or processing, construction, performance, composition, contents, finish, testing, packaging, warnings and instructions.</p> <p>There are currently 40 mandatory standards in place under the ACL.</p>
Information standards	<p>The Commonwealth Minister may make an information standard setting out when and how information about a good or service is disclosed to consumers.</p> <p>An information standard can specify the content, manner and form of information to be provided or not provided with a good or service.</p>

	<p>There are currently 3 product safety-related information standards under the ACL.</p>
<p>Compulsory recalls</p>	<p>The Commonwealth, state or territory Minister may issue a compulsory recall notice if:</p> <ul style="list-style-type: none"> - the use or reasonably foreseeable misuse of a consumer good will or may cause injury to any person; - a consumer good does not comply with a mandatory safety standard, or interim or permanent ban; or - one or more traders have not taken satisfactory action to prevent the goods causing injury to any person. <p>A compulsory recall notice may require a supplier to recall the goods, disclose to the public the nature of the risk or dangerous characteristic of the goods, specify procedures for disposing of the goods, and state that the supplier undertakes to repair the goods, replace the goods or refund the price paid for the goods.</p> <p>All responsible Ministers can issue a compulsory recall, however only the responsible Commonwealth Minister can issue a compulsory recall where it is likely that the recall would affect three or more States or Territories.</p>
<p>Interim and permanent bans</p>	<p>The Commonwealth, state or territory Minister may impose an interim or permanent ban where the use or reasonably foreseeable misuse of a consumer good or product related services will or may cause injury to any person.</p> <p>An interim ban prohibits the supply of consumer goods or product related services for up to 120 days, while a permanent ban prohibits supply indefinitely.</p> <p>All responsible Ministers can impose an interim ban. Only the Commonwealth Minister can impose a permanent ban.</p> <p>There are currently 20 permanent bans in place under the ACL.</p>
<p>Safety warning notices</p>	<p>The Commonwealth, state or territory Minister may publish on the internet a notice stating that:</p> <ul style="list-style-type: none"> - consumer goods or product related services are under investigation, and - warning of possible risks involved in the use or reasonably foreseeable misuse of the consumer goods or product related services.

	All responsible Ministers can issue a safety warning notice. Regulators can also issue public warning notices in some circumstances.
Investigative/enforcement powers	<p>The ACCC and state based regulators have a range of investigative/enforcement powers available in the ACL and the CCA. This includes:</p> <ul style="list-style-type: none"> - issuing an infringement notice: regulators may issue an infringement notice for contravening conduct that is minor, less serious or does not warrant litigation; - section 87B undertaking: an important compliance tool allowing for the trader to provide an enforceable undertaking, including compliance programs, declarations and corrective action; and - civil pecuniary penalties: seeking to penalise and outweigh any benefits obtained from contravening conduct.
Penalties	<p>Where there is a failure to comply with a mandatory safety standard, interim or permanent ban, or compulsory recall notice, penalties may apply.</p> <p>For companies, up to:</p> <ul style="list-style-type: none"> - \$10 million; - 3 time the benefit gained from the contravention; or - 10% of annual turnover in the preceding 12 months. <p>For individuals, up to:</p> <ul style="list-style-type: none"> - \$500,000

Defective goods regime

Part 3-5 of the ACL contains the defective goods regime which provides statutory liability for manufacturers of unsafe products, giving consumers and third parties harmed by unsafe products a right of action against the manufacturer for compensation for loss or damage, such as injuries or property damage. A supplier is taken to be the manufacturer of products for the purpose of a defective goods action where the manufacturer cannot be identified.³¹ The ACCC may also bring a representative action on behalf of harmed individuals where it is in the public interest to do so but it is not their role to seek compensation on behalf of harmed consumers. The need for a broader public interest is important as the ACCC is unable to seek penalties against non-compliant traders as a form of deterrence or punishment under this regime.

The basis of liability under this regime is that the products in question have a 'safety defect' which caused injury, loss or damage. A product has a 'safety defect' if the safety of the product is not such

³¹ ACL, s 147

as persons are generally entitled to expect, taking into account the manner in which they are marketed and the instructions or warnings provided with the products.

Consumer guarantee of acceptable quality

Under section 54 of the ACL, the statutory consumer guarantees include a requirement that products be of acceptable quality, meaning they are fit for purpose, free from defects, safe and durable and of acceptable appearance and finish such that a reasonable consumer fully acquainted with the product would regard as acceptable.

A consumer has the right of private action to seek a remedy, in the form of a repair, refund or replacement, directly from a supplier if the product they purchase does not meet the acceptable quality guarantee. A consumer may also commence legal action to seek damages from a manufacturer or supplier where they have not complied with the guarantee. The ACCC can take a representative action on behalf of affected consumers for a contravention of the guarantee of acceptable quality, but is unable to claim penalties in such proceedings.

Sector specific safety regulations

In addition to the consumer protection obligations under the ACL, Australian governments have also established specialist regulatory regimes for a range of products which are deemed either complex or have the potential to pose a higher safety risk.

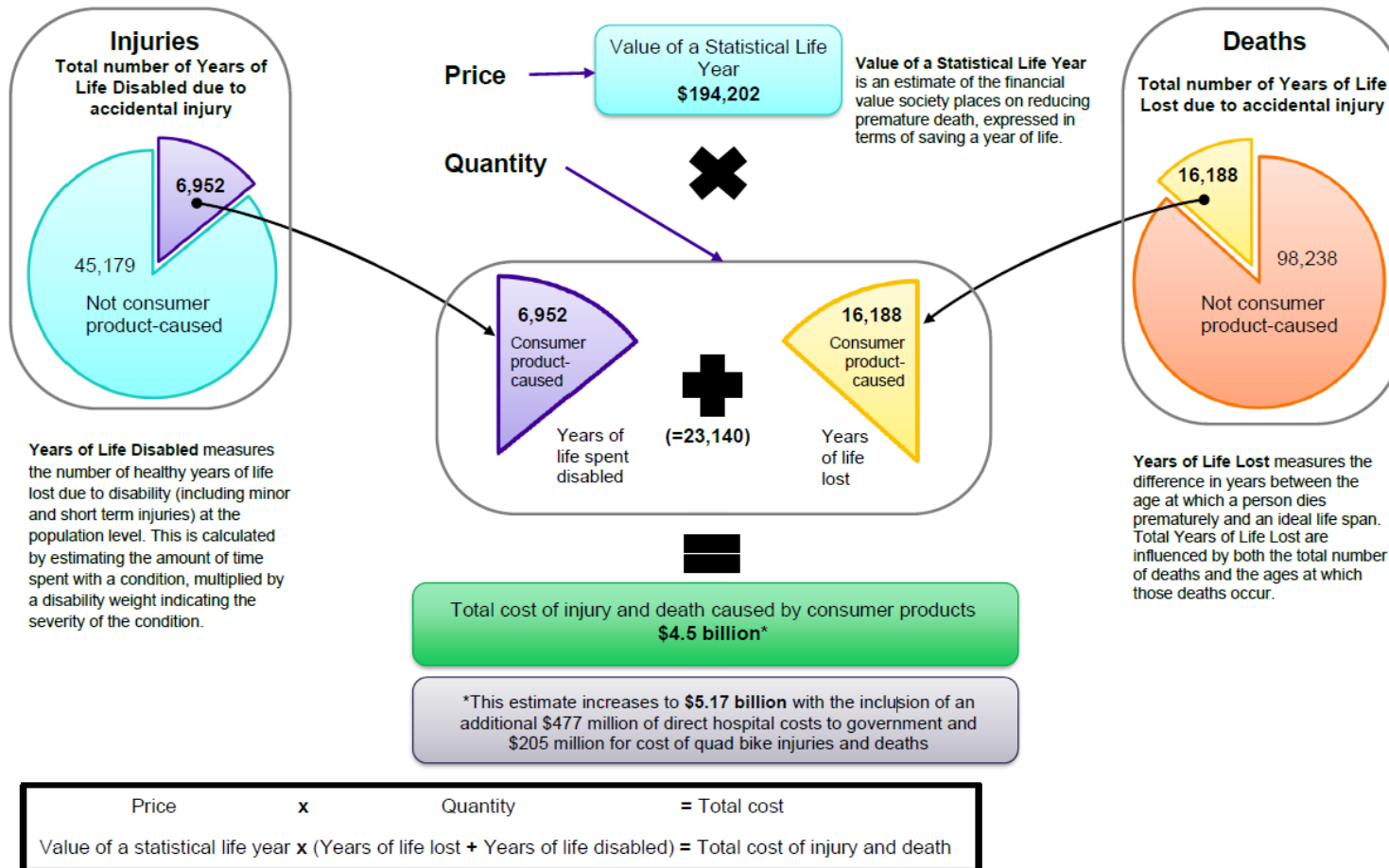
Safety issues arising in relation to these products are generally dealt with by specialist regulators, given their industry experience, expertise and technical skills in those fields. For example, specialist regulators at the Commonwealth level include the Therapeutic Goods Administration (medicines and medical devices) and Food Standards Australia New Zealand (food) and the Department of Infrastructure, Regional Development and Cities (motor vehicles). There are also numerous regulators at the state and territory level relating to a wide range of products including electrical goods and food. Examples are outlined in Table 2.3.

Despite these specialist regulatory arrangements there are circumstances where the regulatory responsibilities of specialist safety regulators and ACL regulators can overlap.

For example, Food Standards Australia and New Zealand is responsible for developing and administering the Food Standards Code. The Code sets out requirements for the safety, composition and labelling of food products and is enforced by state and territory food and health agencies. Where a food product presents a safety hazard not regulated by the Code, the regulation of the safety hazard would fall to ACL regulators as long as the food product is a consumer good.

To assist regulators to work together in areas of regulatory overlap, the Government usually outlines in its statement of expectations for particular regulators that they are to work with other agencies to ensure the proper functioning of Australia's regulatory framework, avoid duplication of supervisory activities and consider whether outcomes could be achieved by using regulation administered by another regulator, in order to ensure an integrated regulatory framework and minimise compliance costs.

Appendix B – ACCC Methodology - total cost of unsafe products to the Australian economy



Appendix C – Option 5 (A new safety duty – existing ACL) - indicative supply chain application

