



Law Council
OF AUSTRALIA

Business Law Section

Ms Julie Abramson
Commissioner
Consumer Law Enforcement and Administration
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

30 August 2016

Dear Ms Abramson

Consumer Law Enforcement and Administration Issues Paper dated July 2016

Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The SME Business Law Committee of the Business Law Section of the Law Council of Australia (***SME Committee***) makes this submission in response to Consumer Law Enforcement and Administration Issues Paper dated July 2016, released by the Productivity Commission.

The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (***SMEs***) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SME's.

Please note that the SME Committee's submission may differ from those made by other Committees of the Law Council because of our Committee members' perspectives and experiences as advisers to SMEs.

Submission

Thank you for the opportunity to comment on the Australian Consumer Law Issues Paper (***Issues Paper***). We have sought to respond to each of the questions listed in the Issues Paper.

Reported progress

1. The Commission is seeking participants' comments on the progress in implementing the ACL and the general success of the multiple regulator model.

The SME Committee believes it is somewhat difficult to assess the success of the multiple regulator model. The SME Committee notes that there appears to be a considerable difference between the way the various ACL Regulators operate in terms of identifying their priority areas, communicating these priorities to businesses and consumers and ultimately their respective enforcement strategies.

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The ACCC has by far the clearest process for identifying and then communicating its Enforcement and Compliance Policy. Each year the ACCC undertakes broad consultation with key stakeholders and then prepares a Compliance and Enforcement Policy which sets out its general approach to enforcing the ACL and the key priority areas for the coming year.

The SME Committee believes that the various State and Territory based ACL Regulators should adopt a similar approach to the ACCC in terms of identifying and communicating their enforcement and priority areas each year, based on consumer harm rather than the number of investigations that these ACL Regulators are proposing to conduct in a financial period.

It would also be helpful for the ACL Regulators to release a joint statement identifying the particular areas which each of the ACL Regulators will be focusing their attention on in the coming year. For example, it would be helpful if one the ACL Regulators indicated that it would be focusing its activities on a particular issue in the coming year, for example door to door sales, so that consumers and businesses would know to whom they should direct their complaint.

Currently, there is limited advice available to consumers, small businesses and legal practitioners of the areas of focus for the ACL Regulators. For example, the SME Committee are only aware of the following information site about the ACL which provides information about the ACL and the current activities of the ACL Regulators in enforcing the ACL - <https://consumerlaw.gov.au/the-australian-consumer-law>

- 2. *To what extent have issues noted in the Commission's 2008 report — such as inconsistency, gaps and overlaps in enforcement and unclear delineation of responsibilities among regulators — been addressed by the current arrangements? To what extent have the 'high level' reforms documented in the implementation progress reports been reflected in improvements in 'on the ground' administration, compliance and enforcement of the ACL?***

As stated above, it is difficult to discern how the ACL Regulators are working together to remove inconsistencies, gaps and overlaps in ACL enforcement. SME Committee members are aware of situations where different ACL Regulators have taken quite different approaches to the same issue, particularly in relation to electrical safety standards and product safety.

SME Committee members are also aware of some evidence of better coordination in relation to particular matters, for example the recent joint activities between the ACCC and the NSW Office of Fair Trading in relation to vocational training colleges and the ACCC and Department of Justice in relation to express warranties. However, such joint activity appears to be more the exception than the rule.

- 3. *What evidence or metrics are available that can be used to assess or substantiate these claims? What have been consumers' and businesses' experiences under the ACL regime? Does the multiple regulator model cause any confusion or other problems for consumers seeking redress or for business operations? How, in broad terms, could any such problems be addressed?***

Small businesses and consumers are generally aware of the role played by the State and Territory Regulators as complaints handling bodies. Many small businesses and consumers know that they can contact State and Territory Regulators to seek information and to lodge complaints about traders. Many small businesses and consumers are also aware of their legal right to take their complaint to a specialist consumer complaint tribunal within some jurisdictions. The SME Committee also notes that some States and Territories are yet to implement specialist consumer tribunals, such as South Australia, Tasmania, and the Northern Territory.

Medium and large businesses tend to be quite active in managing their interactions with the State and Territory regulators. For example, medium and large businesses often take steps to advise State and Territory regulators of a contact person within their organisation (usually a member of the business compliance team) who is to be the nominated contact person for all consumer complaints about their business.

On the other hand, larger businesses are often concerned that similar types of contact arrangements are more difficult to enter into with organisations such as the ACCC.

There is a generally held view amongst consumers and small businesses that the State and Territory Regulators are best placed to resolve individual complaints. State and Territory regulators are often willing to contact the trader in order to achieve a resolution of a consumer complaint. The ACCC is seen as not equipped to resolve individual complaints, rather it is perceived to be focused more on broader enforcement action to stop systemic conduct which is occurring on a national basis as a result of on-going consumer harm.

4. *What, if any, alternatives to the multiple regulator model should be considered? What benefits and costs would the alternatives have?*

One option would be for a single Federal regulatory body to be given sole responsibility for all aspects of ACL, as is the case for regulation of corporations and businesses. This is a logical next step following the inclusion of the ACL in Commonwealth legislation. Any State or Territory based additional consumer ‘leftover’ laws would need to be swept up into the Commonwealth legislation as well and the Federal regulatory body could take over from the States and Territories existing forums to engage with consumers and businesses locally.

Another option would be for the ACCC to be given sole responsibility for ACL enforcement (ie investigations and litigation) and for the State and Territory ACL Regulators to focus exclusively on complaints handling functions. Such a structural change would permit State and Territory Regulators to devote their scarce resources to improving their complaints handling function, which is one of their key strengths. The State and Territory Regulators would also be able to refer ACL matters to the ACCC for potential enforcement action.

Such a structural change would remove a significant amount of the confusion which currently exists about which regulator is likely to pursue enforcement action for breaches of the ACL. Another factor in favour of this change would be that the ACCC is generally seen as the more effective ACL Regulator given its greater level of expertise and resourcing, particularly in relation to larger corporations.

The SME Committee understands that the legal funding budget of the ACCC is significantly greater than the State and Territory ACL Regulators. Hence, there is a strong preference for the State and Territory ACL Regulators to resolve matters by way of mediation rather than litigation or court enforceable undertakings.

Some particular concerns and challenges

5. *Are the levels of resources for enforcing the ACL adequate? What are the effects of differences in resources available to state and territory ACL regulators? To what extent,*

if any, does the potential for the ACCC or ASIC to undertake enforcement actions affect the resources the states and territories devote to ACL enforcement?

The level of resourcing for State and Territory ACL Regulators appears to be inadequate. Significant extensions of jurisdiction under the ACL are often enacted without a concomitant increase in resources.

Often the ACCC receives additional responsibilities without being provided with additional or ongoing resources. For example, as far as the SME Committee is aware the introduction of unfair contract terms legislation was not accompanied by any additional funding for ACL Regulators. Furthermore, the ACCC is no longer proactively administering the unit pricing code due to funding reasons, despite the ACCC being the only regulator administering this code.

The SME Committee believes that since the multiple regulator model was introduced, both State and Territory Regulators have significantly reduced the number of consumer matters which they investigate and pursue to litigation. Even a cursory review of various State and Territory Regulator websites shows very few ACL cases being pursued over the last few years, with the exception of contraventions of product safety standards and ACL warnings. For example, the SME Committee has reviewed the media releases issues by a number of State and territory ACL regulators and identified the following levels of ACL enforcement:

- NSW Fair Trading - approximately 4 specific ACL enforcement actions over the last 2 years;
- Victorian Consumer Affairs – approximately 6 specific ACL enforcement actions over the last 12 months; and
- South Australia Office of Consumer and Business Services – approximately 2 specific ACL enforcement actions over the last 12 months.

While the above figures do not reflect the totality of ACL enforcement undertaken by these ACL Regulators, they do support the view that the level of ACL Enforcement undertaken by these Regulators is significantly less than the amount undertaken by the ACCC. There also appears to be a great focus amongst State and Territory ACL Regulators on criminal prosecutions of individual offenders rather than civil penalty proceedings against corporate respondents. Further, there seems to be a preference for litigation to be pursued under state based legislation administered by these Regulators, such as Funeral Acts, and Liquor and Gambling Acts, various Building legislation rather than the ACL.

Enforcement tools and approaches

6. To what extent do the ACL regulators achieve proportionate, risk-based enforcement in practice? Are changes to the current approaches of the ACL regulators warranted, and is there any evidence to show that such changes would lead to improved outcomes for consumers overall? Are the enforcement tools and remedies available to regulators sufficient to address risks to consumers?

The SME Committee believes that each of the ACL Regulators are seeking to achieve proportionate, risk-based enforcement of the ACL. The ACCC is clearly the most transparent in its approach, as demonstrated by the preparation and release of its annual Compliance and Enforcement Policy and annual reporting procedures.

SME Committee members are aware of the occasional investigation which appears to diverge from best practice. For example, a SME Committee member is aware of a particular investigation which

was commenced without notice by an ACL Regulator through the issuing of substantiation notices in relation to alleged snake repelling solar lights. In another case, the ACCC was investigating Made in Australia representations being made by an Australian trader in relation to products which were being exported to China.

As stated above, improvements could be made if each ACL State and Territory Regulator adopted a similar approach to the ACCC in terms of issuing an annual Compliance and Enforcement Policy which explained their approach to enforcement and the priority areas that they would be focusing their resources on in the coming year. Another option would be for all ACL Regulators to issue a joint statement of enforcement and compliance priorities each year.

SME Committee members have also sought the views of their clients on how they interact with various State and Territory ACL Regulators. These clients have described quite different experiences.

For example, one large computer manufacturer has explained that in NSW they will often receive letters from NSW Fair Trading raising potential ACL issues and requesting their response. In other states and territories, similar types of complaint are very rarely actioned by the local State or Territory ACL Regulator but rather are discussed via the telephone informally with the company in question and/or referred directly to the state or territory consumer claims tribunal.

Allocation of issues and responsibilities between regulators

7. *What mechanisms are used to coordinate the regulation and enforcement of consumer financial products (or the financial aspects of consumer products) between ASIC and the other ACL regulators, and how effective are they?*

The SME Committee is not aware of the mechanisms which are in place between ACL Regulators and ASIC to coordinate the regulation and enforcement of consumer financial products. We understand that in the past there have been liaison meetings between the ACCC and ASIC to discuss such issues. However, the SME Committee is unaware whether these liaison meetings have been continued or how regularly they are held.

A number of SME Committee members were previously employed at the ACCC in various senior roles. Drawing on that experience, the SME Committee is able to say that in the past the level of coordination between the ACCC and ASIC in relation to consumer financial products was very limited. Often interactions would be limited to a formal request from the ACCC to ASIC for delegated authority to include claims of contraventions of the ASIC Act in particular legal proceedings which the ACCC was intending to commence against a particular business - for example, *ACCC v Original Mama's Pizzeria & Ribs Pty Ltd* [2008] FCA 37.

8. *How adequate are current arrangements among ACL regulators (and specialist safety regulatory regimes) for identifying consumer concerns that are 'extra-jurisdictional' and for developing a consistent national regulator response? How might these arrangements be improved?*

The SME Committee is not aware of the arrangements between ACL regulators for identifying consumer concerns which are 'extra-jurisdictional'. We understand that there is a broad understanding that the ACCC will focus primarily on matters of national significance, whilst the State and Territory Regulators will focus on small state based issues. In recent times, there has been greater involvement by State and Territory Regulators in larger national issues – a number

of which are described at the following website - <https://consumerlaw.gov.au/the-australian-consumer-law/acl-national-projects>

As stated above, the arrangements could be improved if all ACL Regulators adopted a practice of developing and releasing an annual Compliance and Enforcement Policy setting out their respective approaches to enforcing the ACL and each agencies' specific priority areas.

Intelligence gathering and sharing

- 9. *What ongoing arrangements are there for ACL regulators and regulators of specialist safety regimes to share information on consumer protection problem areas on a national basis? Are such arrangements adequate, including for a future where markets are increasingly national in nature and new products and services are constantly entering those markets?***

The development of the ACCC Product Safety site is a very welcome development as it has become an excellent resource not only for consumers and business, but also for legal practitioners, who need current information about product safety issues, including all current product safety recalls - <http://www.productsafety.gov.au>. Having said this, the SME Committee notes that changes were recently made to this website (in early August 2016) in relation to reporting procedures, without public consultation.

The SME Committee believes that current arrangements in this area are adequate, although the introduction of a proposed national database will further improve access to relevant information for regulators, businesses, lawyers and consumers.

- 10. *If not, what arrangements might be cost-effective to institute that could provide such a national database? Are there approaches used by other countries that provide lessons for Australia on how it might improve the sharing of information among the different ACL regulators, or in other ways (for example, artificial intelligence or machine learning) identify emerging consumer harms or scams, or areas for priority enforcement?***

The SME Committee does not believe that any changes are required. Indeed, the SME Committee believes that the arrangements in place in Australia are likely to represent world's best practice.

Other issues

- 11. *What problems are there with the administration and enforcement of the ACL under the multiple regulator model and how could it be improved?***

One potential problem with the administration and enforcement of the ACL under the multiple regulator model is that different regulators may each decide to take different actions against a business for the same conduct. SME Committee members are aware of a situation where a business which has been taken to court by the ACCC, was subsequently approached by a State regulator who demanded additional remedies in relation to the same conduct that formed the basis of the ACCC action.

As stated above, the multiple regulator model would be improved with greater agency specialisation. Ideally, the demarcation would be between the ACCC which would have sole responsibility for ACL enforcement and litigation and the State and Territory regulators, which would focus their efforts on the ACL complaints handling.

Alternatively, the multiple regulator model could be made more efficient by each regulator identifying particular types of conduct on which they will be focusing their resources in the coming year, rather than retaining a broad discretion to pursue every type of ACL contravention.

- 12. *Where particular problems have arisen in the enforcement of the ACL, are these because of (a) weaknesses in the law (b) weaknesses in the way enforcement is undertaken (c) insufficient resources to enable sufficient enforcement action?***

The SME Committee does not believe there are any significant weaknesses in the law – ie in the provisions of ACL. As outlined in the SME Committee’s submission to the ACL Review, we believe that the ACL is working well and that only relatively small adjustments are needed to improve the effectiveness of particular provisions.

Most weaknesses arise from disparities in both the expertise of different ACL Regulators and the level of resources which each ACL Regulator has at their disposal to pursue investigations and litigation into potential contraventions of the ACL.

Specialist safety regulatory regimes and their interface with the ACL

- 13. *The Commission would welcome comprehensive information on the specialist consumer safety regulatory regimes that lie outside the ACL and the regulators responsible for administering those regimes in and across jurisdictions in Australia. What are the rationales for the delineation of enforcement responsibilities under the different regimes?***

The SME Committee understands that the rationale for the delineation of enforcement responsibilities is due to the need to ensure that each agency had sufficient technical expertise to undertake the testing and analysis of products. A further reason for the demarcation is because some agencies have additional but related responsibilities, such as licensing of electrical products.

The SME Committee believes that generally the specialist safety regulatory regimes are operating effectively. The only area where SME Committee members have identified a lack of cohesion has been in relation to specialist electrical regulatory regimes. There have been a number of cases where different State and Territory based regulators and the ACCC appear to have had different views about the remedial steps which a particular business should be implementing in order to address a potential safety issue.

One option may be to provide the ACCC with joint jurisdiction with the specialist regulators. Alternatively, there may be some advantages separating the standard setting and licensing functions, which would remain the responsibility of the specialist regulator, from the investigatory and enforcement functions, which would become the ACCC’s responsibility. This change would reflect the ACCC’s particular expertise in conducting investigations and litigation.

Some potential problems and issues

- 14. *What challenges do product complexity and bundling, and overlapping regulation, pose for ACL regulators, specialist safety regime regulators, businesses and consumers? What are some current examples of particular concern? How significant are these challenges?***

Does the availability of alternative avenues of regulating particular products assist ACL or specialist safety regulators in protecting consumers?

As stated above, the main concerns arise when different ACL Regulators and/or specialist safety regulators take different approaches to the same safety issue, particularly in relation to the steps which need to be taken to remedy a safety issue.

The SME Committee is also aware that different regulatory responses to particular safety matters can cause confusion in particular industries. Different responses to similar product safety issues is a serious risk in terms of undermining business and consumer confidence in the product safety regime.

15. Are current protocols for communication, cooperation and coordination between regulators of specialist safety regimes and ACL regulators effective in dealing with consumer concerns where regulators in both regimes have responsibility for consumer protection? In particular:

- ***Are those protocols effective in ensuring that consumer concerns about product safety received by one regulator are effectively directed to the most appropriate (ACL or specialist safety regime) regulator?***
- ***Are there examples of especially good or poor interaction between ACL and specialist regulators, and what lessons might these provide to improve interaction between ACL and specialist safety regime regulators?***

As stated in the SME Committee submission to the ACL Review, we believe that the product safety regime in Australia is operating effectively. As stated above, the SME Committee is aware of some examples of poor communication, particularly in relation to the steps which have to be undertaken to remedy a product safety concern, and updates to the website in relation to reporting procedures.

16. What changes to current arrangements are needed to achieve effective communication, cooperation and coordination of consumer protection regulation among regulators of ACL and specialist safety regulatory regimes?

The SME Committee believes that some thought could be given to encouraging specialist safety regulators to release joint guidance documents to explain how they will undertake their functions, particularly in relation to remedial measures. Furthermore, steps should be taken to update and harmonise the legislation of the State and Territory Regulators in relation to safety regulatory regimes. Businesses seek transparency and consistency in the approach to product safety so that they can plan their business activities with greater certainty.

17. Can formal protocols for communication and cooperation provide effective channels or are broader organisational changes (such as co-location or amalgamation of regulatory functions) needed?

Further thought should be given to whether the advantages of consolidating product safety regulation into one national body, such as the ACCC, would outweigh the disadvantages of bringing a range of disparate functions together into one organisation. Another option would be to create a separate national product safety regulator which encompassed all product safety regulation.

Regulatory variations at the state and territory level

18. *What progress has been made in removing unnecessary and costly divergences in regulatory requirements between industry-specific state and territory consumer protection regimes since 2008? Where progress has been limited, why? Is there a case for pursuing a 'one law' model for areas of consumer product safety regulation, or other means of reducing the costs of variations, where there are currently state variations? If so, what areas should be priorities for review?*

The SME Committee is aware of some limited institutional changes which have occurred since 2008, associated primarily with the transfer of many product safety functions from the State and Territory Regulators to the ACCC. We have also observed a scaling back by State and Territory regulators of their activities in terms of investigating and litigating ACL contraventions.

Other market developments

19. *What are the ramifications of changes in products and nature of sales (including the move to online sales) for the enforcement of consumer product regulation? Are there other models that could provide lessons for the approach adopted in Australia?*

The rise of online sales is making it more difficult for end consumers and businesses to enforce their rights against fly-by-night on-line traders. Many product websites do not contain any physical address or even a telephone number, but rather provide only an email address. Many fly-by-night on-line operators, when faced with large numbers of consumer complaints, simply close down websites and disable their email addresses in order to avoid having to respond to claims from consumers.

Perhaps Australian legislation could be framed to provide for overseas entities to become liable under Australian law for consumer issues with regard to products distributed/sold into Australia by whatever means, and also include confirmation of this position in Trade Agreements with other jurisdictions.

Further discussion

The SME Committee would be happy to discuss any aspect of this submission.

Please contact Coralie Kenny, the Chair of the SME Committee, on 0409 919 082 if you would like to do so.

Yours sincerely,



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