

6 February 2017

Our ref: Competition and Consumer Law Committee/KB

Consumer Law Enforcement and Administration Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Commissioner Abramson

Consumer Law Enforcement and Administration Draft Report

Thank you for the opportunity to provide a submission on the Consumer Law Enforcement and Administration Draft Report.

The Queensland Law Society (the Society), in carrying out its central ethos of advocating for good law and good lawyers, endeavours to be an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

Please find **enclosed** the Society's submission responding to the report. Our comments do not address all substantial aspects of the report and should not be considered to be either endorsement or rejection of its subject matter.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Kate Brodnik on k.brodnik@qls.com.au or 3842 5851.

Yours faithfully



Christine Smyth
President

QLS Submission - Productivity Commission's draft report on the Review of Consumer Law Enforcement and Administration

PC Draft Report Finding	QLS Submission
Assessments of the multiple-regulator model	
<p>DRAFT FINDING 3.1</p> <p>The multiple-regulator model appears to be operating reasonably effectively given the intrinsic difficulties of having 10 regulators administer and enforce one law. However, the limited evidence available on regulators' resources and performance makes definitive assessments difficult. Enhanced performance reporting requirements (Draft Recommendation 4.2) would help address this limitation.</p>	<p>The Society agrees that there are intrinsic difficulties in the multiple-regulator model.</p> <p>The Society believes that the existing State ACL regulators are functioning effectively and should be retained in their present form, but submits that there should be only one Federal ACL regulator. The Society believes that the ACCC (not ASIC) should become the sole Federal ACL regulator, and that this would provide benefits including the following for consumers:</p>
<p>DRAFT FINDING 3.2</p> <p>The Australian Consumer Law (ACL) regulators communicate, coordinate and collaborate with each other through well-developed governance arrangements, and have mechanisms in place to promote consistent approaches to the interpretation and application of the ACL. Nevertheless, the multiple-regulator model allows for differences among jurisdictions in approaches to aspects of their administration and enforcement of the ACL, which likely create inconsistent outcomes for consumers and for businesses.</p> <p><i>INFORMATION REQUEST</i></p> <p><i>The Commission invites further comment and detailed information on:</i></p> <ul style="list-style-type: none"> <i>the nature of inconsistencies, including specific examples, in the approaches of the ACL regulators to administration and enforcement</i> <i>the materiality of these inconsistencies for consumers and/or businesses</i> <i>options for addressing inconsistencies across ACL regulators.</i> 	<ul style="list-style-type: none"> overhead costs of coordination between regulators will be reduced or removed; no duplication of functions between regulators will occur; there will be a greater ability for that regulator to make decisions which are consistent with consumer priorities; enforcement of the ACL is likely to be simpler (from the regulator's perspective); the centralisation of Federal ACL enforcement is likely to enhance the development and retention of ACL regulatory skills and knowledge; and public awareness and understanding of the ACL is likely to be increased.
<p>DRAFT FINDING 3.3</p>	<p>The Society acknowledges some practical costs may arise in any change to a single Federal ACL regulator. In particular, the Society is conscious of the potential for a reduction in jobs and expertise due to having a single Federal ACL regulator, however the Society believes</p>

PC Draft Report Finding

QLS Submission

ACL regulators have developed policies and protocols to implement strategic and proportionate approaches to compliance and enforcement, including prioritising matters that represent higher levels of risk to consumers. The extent to which these are implemented in practice is likely to vary across regulators.

that the benefits from having a single Federal ACL regulator are likely to outweigh the costs.

The generic national product safety regime

DRAFT RECOMMENDATION 4.1

The State and ACT governments should relinquish their powers to impose compulsory recalls or interim bans. This would signal that it is the Commonwealth's responsibility to immediately respond to all product safety issues that warrant a compulsory recall or ban.

In parallel with any such change in responsibilities, there should be a mechanism for State and Territory governments to raise and provide input on product safety matters to the Australian Competition and Consumer Commission (ACCC) that they consider would warrant a compulsory recall or ban.

The Society submits that, due to the importance of product safety, it is preferable for the State and Territory ACL regulators to retain their existing powers to handle product safety issues.

Performance reporting

DRAFT RECOMMENDATION 4.2

ACL regulators should publish a comprehensive and comparable set of performance metrics and information to enhance their public accountability and enable improved regulator performance. Consumer Affairs Australia and New Zealand (CAANZ) could be charged to develop a reporting framework with a view to providing meaningful metrics and information on:

- resources expended on regulator activities
- the range and nature of regulator activities
- behavioural changes attributable to regulator activities

The Society supports this recommendation and submits that the ACL regulators should also publish their enforcement guidelines to provide greater transparency on how decisions to take (or not take) enforcement action are made. Publication of this information will also enable:

- enhanced scrutiny of the actions, priorities and budgets of regulators, and better-informed public debate regarding these matters; and

PC Draft Report Finding

QLS Submission

- outcomes attributable to regulator activities.

- more certainty for business and consumers regarding enforcement and the consequences of non-compliance with the ACL.

A national database

DRAFT FINDING 4.2

A national database of complaints and product safety incidents has merit. It would enable better identification and analysis of consumer hazards and risks, and help focus ACL regulators' compliance and enforcement activity. CAANZ should examine the impediments to establishing such a database, its likely benefits and costs, and, subject to the findings of that analysis, develop a plan to implement such a system. CAANZ should also consider what information from the database should be publicly available.

The Society supports this finding in principle, but is concerned about any potential unintended consequences of publishing complaints online, particularly if the published information contains material that could be perceived to be prejudicial or defamatory.

Further, the Society submits that any obligation to provide data to such a database should not constrain the actions of State ACL regulators in relation to complaints and/or product safety incidents.

Enforcement tools and penalties

DRAFT FINDING 4.3

There are some small differences in the enforcement powers of the ACL regulators across jurisdictions. There is scope to improve consistency in infringement notice powers and other additional remedies that the States and Territories have introduced to augment the ACL 'toolkit'.

The Society supports this finding.

DRAFT FINDING 4.4

Australian governments should increase maximum penalties for breaches of the ACL. They should consider the option, being examined by CAANZ, of aligning them with the penalties for breaches of competition provisions in the Competition and Consumer Act 2010.

The Society agrees that the maximum penalties for certain breaches of the ACL need to be increased to ensure they are effective in all circumstances to deter future breaches of the ACL, particularly in cases

PC Draft Report Finding

QLS Submission

of more serious misconduct by large corporations. For example, the size of some maximum penalties may, in circumstances involving serious or repeated breaches by large corporations, prevent a Court from imposing a penalty that is better aligned with the benefits the company may have received from its misconduct.

Consumer redress

INFORMATION REQUEST

Are there gaps or deficiencies in the current dispute resolution services provided by the ACL regulators that a retail ombudsman would fill? What incentives would attract retailers to sign up to such a scheme and observe its determinations? How could the scheme be funded?

The Commission seeks further detail on the extent to which the dispute resolution services offered by the State and Territory ACL regulators meet/fall short of the Commission's 2008 recommendation for effective, properly-resourced, government-funded alternative dispute resolution (ADR) mechanisms that deal consistently with all consumer complaints?

Does the case for the ADR review mechanism as outlined in 2008 remain? Are there impediments to its implementation and, if so, how could these be addressed?

The Society believes that it is the role of the ACL regulators to enforce the laws, and that it should not be the role of ACL regulators to provide 'dispute resolution services'. There are various other existing avenues currently providing dispute resolution services to consumers. For example, there are courts, tribunals and existing ombudsman services through which consumers can seek redress.

The Society submits that an additional retail ombudsman is unnecessary. In addition, the funds that would be spent on such an ombudsman could better be directed towards pursuing cases and bringing court proceedings to allow the ACL to be tested in court, and to produce precedent regarding its meaning and correct interpretation.