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

Re: Study into *Consumer Law Enforcement and Administration*

The Retail Council welcomes the opportunity to provide feedback on the Productivity Commission's Draft Report for its study into *Consumer Law Enforcement and Administration*. The Retail Council has briefly summarised its responses in the attached table. Its more detail comments are as follows:

The key finding of the study is that:

> *The multiple-regulator model for the ACL (Australian Consumer Law) appears to be operating reasonably effectively given the intrinsic challenges in having 10 regulators administer and enforce one law.*

By its very nature, having a single national law that is enforced by 10 regulators is always going to be difficult. This is further complicated by the fact that the 10 regulators are also responsible for enforcing and administrating many other laws and regulations. All things considered, the Productivity Commission's characterisation of the system working *"reasonably effectively"* is one that the Retail Council would agree with.

But the system is not perfect and the operation of the ACL could be improved.

There are two key principals that feature strongly in the Draft Report, which the Retail Council agrees could, if acted upon, improve the operation of the ACL.

- The need for greater consistency between regulators.
- The need for more data collection and reporting mechanisms so that an evaluation of the system as a whole, and individual regulators, can be properly undertaken.

Improving consistency

The Retail Council welcomes the Productivity Commission's recognition that consistency between the regulators needs to improve. This theme is featured in Draft Findings 3.2, 3.3, 4.3, 5.1 and 6.1 and in Draft Recommendation 4.1.

The system of regulating the ACL would be enhanced with improved consistency in approaches, enforcement, administration, advice and remedies across the State and Territory regulators, ACCC and the specialist regulators.

The Retail Council recognises that regulators do have a level of communication and engagements between themselves and that they do attempt to deliver consistency. We also understand that the

model allows for differences in approaches by the regulators. But from a national retailer's perspective these different approaches are undesirable because they are delivering inconstant enforcement of the ACL and adding to consumer confusion.

The focus of all retailers when a customer raises an issue under the ACL is to resolve the matter as quickly as possible. In most cases this is done at the store-level. Large retailers have nation-wide internal processes and systems in place to deal with customer inquiries about ACL issues and matters are usually quickly resolved. In some cases, however, customers are unhappy with the retailer's response and go to the regulator.

Examples of instances where members have encountered consistency problems with regulators fall in to two broad areas:

- **Information collected from customers by regulators** – Some regulators collect comprehensive information from customers when they make contact, such as what was purchased, the date, what store, when the initial contact with retailer was made, what was the outcome. However, some members have received calls from regulators, following up consumer complaints, where they have little of the information needed. They do not know what store it happened in, which is an issue for a national retailer with multiple stores. They do not know when the initial retailer contact was made, which again makes it hard to verify the customer's complaint.
- **Differing advice from regulators** – The administrative approaches to enforcing the ACL can only differ if the main outcome – the advice on how to proceed – is consistent. Our members report that consumers can get different advice for the same failure or issue depending on the state-body they speak to. This means customer concerns take longer to resolve than is needed because the customer can start the process with unrealistic expectations about the remedy they will be offered. It also undermines the operation of the ACL itself which should treat all consumers and retailers the same no matter where they reside or operate.

Both problems could be resolved by developing more nationally consistent reporting frameworks. For example, the problem of incomplete information gathering could be resolved by having a national standard form used by each regulator to record the initial information from customers when they first contact regulators. Similarly, the development of nationally used decision trees could help regulators deliver more consistent advice.

The Draft Report discussed the formal mechanisms that regulators use to try to improve consistency. These formal arrangements could also be built on by encouraging secondments between regulators to give staff exposure to the way other regulators approach issues.

It is also important to recognise that informal mechanisms can be helpful to improve consistency, especially if these informal contacts flow through all levels of the organisations and are not just at the senior level.

This theme of the need for consistency is also the basis for the Retail Council supporting Recommendation 4.1 of the Draft Report.

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 implementation of this recommendation would provide greater certainty for retailers, especially those with national operations, around the important area of product safety. An additional suggestion

would be to also allow the specialist regulators the opportunity to provide input on a decision (where applicable).

Improving transparency and reporting

The other key theme of the Draft Report is the need for more data collection by agencies. This is a feature of Draft Findings 3.1, 4.2 and 6.2 as well as Draft Recommendation 4.2.

It is hard to definitively evaluate the system and compare the effectiveness of each regulator without reliable, universally collected data. As such, the Retail Council supports 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*
- *outcomes attributable to regulator activities.*

There will be two clear benefits from this process. Firstly, it will allow stakeholders to better evaluate how well the enforcement system as a whole is working, and which regulators are best-practice and which are lagging. Secondly, it will encourage all regulators to improve their performance and avoid being near the bottom of the table of these key indicators.

Along the same theme of improved information, the Retail Council also supports, in part, Draft Finding 4.2. The Retail Council supports the establishment of a national database for product safety incidents, in the interests of promoting public safety and co-operation and consistency between regulators. Sharing this information between regulators will be particularly useful.

However, we have reservations about what information should be made public, especially around the issue of a complaints register.

The experience in NSW with the Fair Trading Complaints Register highlights the problems with a poorly designed system. The NSW Fair Trading Complaints Register gives no recognition that larger businesses will automatically have more complaints than smaller businesses. All businesses are named on the register once they have 10 complaints lodged against them within a month, irrespective of how many transactions they have done in that month. Clearly, a large retailer with multiple stores and millions of transactions a month will automatically have more complaints against them than a single store retailer. However, this is not taken into account. Another fault with the system is that it just measures complaints, and makes no distinction between vexatious claims, claims that are yet to be investigated and genuine problems. That is, a business can find itself on the register even if it has not breached any laws. Finally, in the case of franchise businesses it names the franchisor rather than the specific store that the complaint was made against. This means all franchisees in that network are tarnished even if a branch has had no complaints against it. A national register of complaints would need to be better designed than the NSW model to gain the support of major retailers.

No need to lift penalties

The Retail Council disagrees with the Productivity Commission on 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 Retail Council does not support the increase in maximum penalties for breaches of the ACL and believes current penalties are appropriate.

Once again, the Retail Council thanks the Productivity Commission for its work in conducting this study and we hope our comments assist in your deliberations. Should you have further questions about the matters raised in this letter, please contact our Sydney office on (02) 8823 3515.

Kind Regards

Steve Wright
Acting Chief Executive Officer

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Table 1. Retail Council response to Draft Findings

Finding number	Finding	Retail Council position
3.1	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.	AGREE
3.2	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.	AGREE
3.3	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.	AGREE
4.1	The Commonwealth Government's regulation impact assessment requirements may impede the timely implementation of national interim product bans. There is a case to amend the requirements to exempt interim bans from such assessments. Permanent product bans should continue to be subject to the existing regulatory impact assessment requirements.	AGREE
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	PARTIALLY AGREE – see submission for concerns about NSW Fair Trading Complaints Register

	a plan to implement such a system. CAANZ should also consider what information from the database should be publicly available.	
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'.	PARTIALLY AGREE – consistency should be improved but that does not mean automatically adopting the strongest powers available to one regulator across all regulators – the focus should be best practice.
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.	DISAGREE
5.1	While interaction between ACL and specialist safety regulators generally works well, some changes are warranted. Options to improve the response to product safety concerns currently dealt with by joint ACL and specialist regulators' actions include: • instituting formal arrangements to guide cooperation and coordination between building regulators and ACL regulators, and between the ACCC and some national specialist safety regulators • expanding the regulatory tools and remedies available to specialist safety regulators (or at least developing a process to allow them to better harness the national reach of regulatory powers under the ACL) • introducing greater consistency of legislation underpinning the specialist safety regime for electrical goods.	AGREE
6.1	Australian governments should review, and revitalise as necessary, progress in relation to Recommendation 5.1 from the Productivity Commission's 2008 Review of Australia's Consumer Policy Framework. That recommendation called for a process to review and reform industry-specific consumer regulation that would, among other things, identify unnecessary divergences in state and territory regulation and consider the case for transferring policy and enforcement responsibilities to the Commonwealth Government.	AGREE
6.2	There is scope to improve the transparency and effectiveness of the dispute resolution services provided by the State and Territory ACL regulators through: • applying the Commonwealth Government's Benchmarks for Industry-Based Customer Dispute Resolution Schemes to the services provided by the ACL regulators • establishing a formal cooperative mechanism between the various regulators, alternative dispute resolution schemes and other stakeholders to reassess every five years the nature and structure of alternative dispute resolution arrangements to achieve best practice and address redundancies or new needs — as per recommendation 9.2 from the Commission's 2008 Review of Australia's Consumer Policy Framework.	AGREE
6.3	In its 2008 Review of Australia's Consumer Policy Framework, the Commission identified material gaps in consumer input in policy processes. The Commission considers that recommendation 11.3 from the 2008 report — which in part directs the Commonwealth Government to provide additional public funding to support consumer advocacy — should be revisited.	PARTIALLY AGREE – There is a role for consumer advocacy, however, the need for more public funding also needs to be balanced against other

		priorities. For example, expanded consumer education may deliver better results for more consumers than funding specific advocacy groups. There also needs to be recognition that technological change – such as online forums – has increased the voice of consumers since the 2008 report.

Table 2. Retail Council responses to Draft Recommendations

Rec. number	Recommendation	Retail Council position
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.	AGREE
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 • outcomes attributable to regulator activities.	AGREE