

31 August 2016

By email: consumer.law@pc.gov.au

Consumer Law Enforcement and Administration
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Dear Commissioners,

Issues Paper for Study into enforcement and administration arrangements underpinning the Australian Consumer Law

Thank you for the opportunity to provide comments on the Productivity Commission's study on consumer law enforcement and administration. The Consumers' Federation of Australia (CFA) previously made a submission in response to the Consumer Affairs Australia New Zealand Issues Paper for the Australian Consumer Law. Some elements of that submission are relevant to the Productivity Commission's study. The full CFA submission is available on our website.¹

The introduction of the Australian Consumer Law (ACL) represented one of the most significant reforms to Australia's consumer protection framework since 1974. The ACL removed the need for multiple state and territory laws, creating a nationally uniform consumer protection regime. In addition to creating a national law, a national framework for consistent enforcement and administration was introduced, designed to ensure that all consumers across Australia not only have access to the same rights and remedies, but have consistent experiences in enforcing those rights.

In CFA's view, the ACL is largely being enforced well, but there remain things that could be done to improve this. In particular, changes could be made to bolster the power of the regulators, enhancing their ability to enforce the law. For instance, greater funding for ASIC and an increase in penalties available for breaches of the ACL would lead to better enforcement outcomes. The release of data currently held by ACL regulators, particularly complaints data and product safety incident reports, would help consumers navigate the market more effectively and make informed decisions about the businesses they choose to deal with. Requiring more consistency in reporting outcomes by the State and Territory ACL regulators would improve the ability of independent bodies to assess their relative effectiveness, and enable more support to be provided where needed. Extra funds to encourage

¹ <http://consumersfederation.org.au/publications/submissions/>

more test cases being brought to courts and tribunals would assist consumer organisations who provide consumers with advice and assistance, by enabling them to more confidently clarify the operation of the law. This last point is particularly important in relation to areas of the law that consumers rely on frequently but that are rarely tested in court, like the application of the consumer guarantees.

About the Consumers' Federation of Australia

The CFA is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations. Our organisational members and their members represent or provide services to millions of Australian consumers.

CFA's member organisations include membership based organisations, organisations that provide information, advice, counselling or assistance to consumers, and organisations that identify regulations or market features that harm consumer interests and propose solutions. A list of CFA's organisational members is available at <http://consumersfederation.org.au/members/cfa-organisational-members/>.

CFA advocates in the interests of Australian consumers. CFA promotes and supports members' campaigns and events, nominates and supports consumer representatives to industry and government processes, develops policy on important consumer issues and facilitates consumer participation in the development of Australian and international standards for goods and services. CFA is a full member of Consumers International, the international peak body for the world's consumer organisations. The objectives of the Consumers Federation of Australia are to promote the interests of consumers, in particular low income and disadvantaged consumers, through:

- Identifying areas in which the interests of consumers are being adversely affected;
- Advocating policy and law reform changes to benefit consumers;
- Conducting consumer awareness and information programs;
- Liaising with other consumer and community groups to advance the interest of consumers;
- Facilitating consumer responses to government, industry and regulators where specific funding or resources are available; and
- Doing other things to further the interests of consumers.

About this submission

A number of CFA's members have made individual submissions to assist in the Productivity Commission's study. This CFA submission does not seek to duplicate the individual submissions of members, but to highlight some high level themes that are relevant to all CFA members.

Improving and evaluating the performance of the regulators

Industry regulators have a very important job: to ensure consumers benefit in markets that they regulate.

Regulators include the Australian Competition and Consumer Commission, the Australian Securities and Investment Commission, the Australian Communications and Media Authority, the Australian

Energy Regulatory, the Australian Skills Quality Authority, the Therapeutic Goods Administration, Food Standards Australia New Zealand and state fair trading agencies.

Where regulators do not have the appropriate resources, power and culture, they can be limited in their effectiveness. Regulators need to be able to prevent consumer harm, not just deal with misconduct after it occurs. Scandals in the finance sector and in vocational education may have been prevented by better resourced and empowered regulators.

CFA members have undertaken some analysis about the appropriate powers and enforcement activity for consumer regulators.² This analysis provides a useful evaluation framework that could be adopted for further examination of the performance of the regulators. However the current regulator performance framework³ with its focus on cutting 'red tape' risks weakening the performance of our regulators. This framework needs to instead ensure that all regulators with a mandate to promote consumer outcomes have the resources, power and culture to effectively protect consumers, and that the regulators report publicly and consistently on their impact for consumers.

The regulators also need appropriate enforcement tools available to them, in order to punish individual traders who have breached the law, and deter others from engaging in the same conduct. The current penalties available are not nearly high enough to deter businesses from bad behaviour. The recent Reckitt Benckiser case provides an example. In April 2016, the Federal Court handed Reckitt Benckiser a penalty of \$1.7 million for misleading consumers by advertising Nurofen targeted pain relief products that were not able to 'target' pain any more effectively than general pain relief products.

This fine pales in comparison with the profits that Reckitt Benckiser made by tricking customers into paying the premium. The ACCC estimates that the company sold 5.9 million units containing the misleading representation. At \$12.42 for Nurofen Period Pain Caplets in comparison with \$1.65 for generic Ibuprofen, the company made an estimated \$63 million more than a company selling correctly marketed generic pain relief.

Fines need to be proportionate and effectively deter bad conduct, and \$1.1m per breach is manifestly insufficient. Fines of \$10m per breach would be more effective, and in line with penalty provisions in other sections of the *Competition and Consumer Act 2010*.

Increased funding is also needed to enable the regulators to take more test cases to clarify the operation of the law, so that individual consumers across the country can more confidently assert their rights, and receive clearer advice on those rights from consumer organisations.

Empowering consumers through access to data held by the regulators

Providing consumers with access to relevant information currently held by businesses can be facilitated by Government; NSW Fair Trading's recently launched complaints register is one example

² Consumer Action Law Centre, Regulator Watch: the enforcement performance of Australia's consumer protection regulators, 2013, <http://consumeraction.org.au/new-report-regulator-watch/>; CHOICE, Good Practice in Consumer Protection Enforcement: A Review of 12 Consumer Protection Regulators, 2008.

³ Australian Government, Regulator Performance Framework, available at: <https://www.cuttingredtape.gov.au/resources/rpf>.

that could be adopted nationally.⁴ CFA strongly supports the decision to create a consumer complaints register that will publish information about individual traders or franchisors who are the subject of a high number of complaints and encourages other States and Territories, and the Federal regulators such as the ACCC and ASIC, to follow suit.

Sharing this data will improve consumer welfare by empowering consumers to make informed decisions about where to buy goods and services. Providing consumers with information on the traders that have had high levels of complaints made against them will help address existing asymmetries of information, where businesses are aware of the volume of complaints made against them but consumers are not. Addressing this will empower consumers to make more informed purchasing decisions. Making this information public will incentivise businesses to improve their complaints handling and other practices.

The NSW Fair Trading Complaints Register was launched on 25 August 2016, and it has already impacted on the way businesses conduct themselves and respond to consumer concerns. Several businesses engaged with NSW Fair Trading in the months leading up to the launch of this project, and have taken steps to reduce the number of complaints and avoid appearing on the Register. These businesses reportedly made significant changes to their practices and dispute resolution processes, including by employing new staff to oversee complaints handling processes and providing additional resourcing to mitigate complaint levels. These new procedures resulted in a significant decrease in complaints lodged with NSW Fair Trading.

In order to facilitate innovation by third parties and app developers, regulators should endeavour to release as much information as possible. At a minimum such complaints registers should include information about the trader, the product or service complained about, the problem or practice complained about and the purchase method used.

Enforcing the law – the role of consumer organisations

Consumer organisations provide a valuable, complementary role to the ACL regulators. They conduct investigations, uncover systemic detrimental conduct through complaints received, provide advice and assistance, and engage in direct dispute resolution for consumers. Initial investigations conducted by consumer organisations and escalated to regulators save those agencies time and money, enabling them to direct resources to known problems causing demonstrable detriment to consumers.

In 2008, the Productivity Commission recommended that the Federal Government should provide public funding to help support the basic operating costs of a representative national consumer peak body; assist the networking and policy functions of general consumer groups; and enable an expansion in policy-related consumer research.⁵ Despite this recommendation being again made in subsequent inquiries, it has not been acted upon by successive Federal Governments.

⁴ http://www.fairtrading.nsw.gov.au/biz_res/ftweb/Public_Register/FT_Public_Register.htm

⁵ 30 April 2008, Productivity Commission, 'Review of Australia's Consumer Policy Framework', available at <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer1.pdf>

A funded peak body with capacity to both coordinate diverse consumer organisations as well as undertake or commission consumer research will facilitate better consumer policy outcomes, because the consumer interest will be strongly articulated in policy debates.

In addition, other consumer organisations should not be restricted from engaging in policy processes where they are funded by government.

CFA was founded in 1974, with funding from the Federal Government. This funding was maintained continuously for nearly 25 years, under governments of different persuasions. In 1996, however, funding was abolished completely. The Issues Paper for the Australian Consumer Law review emphasises the importance of engaging with stakeholders on ACL issues. CFA agrees that in developing and strengthening an effective consumer policy framework that bolsters consumer confidence in the market, key stakeholders must be involved. While CFA endeavours to take an active role in review processes relevant to the operation of consumer protection laws in Australia, a lack of adequate resourcing makes this more difficult than it should be.

In addition to funding the sector adequately, appropriate channels for elevating widespread consumer problems must be available for consumer groups. Consumer groups play a crucial role in bringing the concerns of Australians to the attention of regulators and helping shine a light on harmful products and practices. In a recent review of the Australian Competition and Consumer Commission (ACCC), the Australian National Audit Office recommended that the ACCC improve its focus on trends and patterns in market intelligence, identifying high levels of widespread consumer detriment.⁶

To improve the responsiveness of regulators to consumer concerns, CFA joins a number of its member organisations in calling for consumer organisations to be given the power to make ‘super complaints’ to the ACCC, ASIC and ACMA.

Such a power could be based on the process available in the United Kingdom, where consumer groups have been given the ability to highlight issues of concern, and receive responses within a specified period of time. This has provided UK regulators with valuable insights into emerging and systemic issues.

Cooperation between regulators and consumer organisations

Australian consumer organisations have enjoyed a high level of cooperation and good working relationships with ACL regulators, in particular ASIC and the ACCC. The existence of well-developed consultative forums have aided these relationships. CFA is represented on both ASIC’s Consumer Advisory Panel and ACCC’s Consumer Consultative Committee. The involvement of senior representatives of the regulators ensures consumer priorities are considered by decision-makers in the regulators.

There have been instances of innovation in consumer organisation-regulator relationships, and we would encourage further exploration of similar initiatives. For example, in 2013, CFA member the

⁶ Australian National Audit Office (2016), *Managing Compliance with Fair Trading Obligations*, <http://www.anao.gov.au/Publications/Audit-Reports/2015-2016/Managing-Compliance-with-Fair-Trading-Obligations>

Indigenous Consumer Assistance Network (ICAN) recognised the need for a coordinated approach between itself and consumer regulatory bodies to tackle Indigenous consumer disadvantage in North Queensland, due to the ongoing financial detriment caused by door-to-door traders, second-hand car dealers and telemarketers, who were specifically targeting remote Aboriginal and Torres Strait Islander communities. Remote Indigenous communities face a unique set of circumstances ranging from structural barriers (geographical distance, limited to no access to quality financial counselling and consumer advocacy services) to cultural factors which when combined, have historically impacted upon whether and how individual and systemic Indigenous consumer complaints make their way to appropriate regulatory bodies.⁷

ICAN has long held the belief that a collective impact approach can be an effective way to identify and address systemic issues being experienced by remote Indigenous communities. In response to the complex financial and consumer issues being experienced in North Queensland, ICAN, state and national consumer regulatory bodies: Australian Competition and Consumer Commission (ACCC), Australian Securities and Investments Commission (ASIC), the Queensland Office of Fair Trading (OFT) and ombudsman scheme: the Energy & Water Ombudsman Queensland (EWOQ) formed the North Queensland Indigenous Consumer Taskforce. The Taskforce utilises a collaborative framework, involving a range of agencies and services, to address systemic civil law issues at a regional level in innovative ways (see: the Wujal Wujal “Do Not Knock Town” initiative), with Indigenous input at grassroots and organisational levels.

The Taskforce allows ICAN and consumer regulators to review and respond to systemic consumer issues affecting Indigenous peoples, pool resources across agencies to achieve better outcomes for Indigenous consumers, and importantly, presents a unique opportunity for a multi-jurisdictional approach to resolving consumer matters (often unique to Indigenous communities).

It facilitates opportunities in the following areas:

- Knowledge exchange and transfer in two-way process, between communities and regulators, and equally between regulators and communities;
- Regulators meet and discuss how best to collaboratively tackle systemic consumer issues, and how each jurisdiction can/may best assist;
- Increases regulator presence in remote Aboriginal and Torres Strait Islander communities, where none may have previously existed;
- Provides alternate ‘access to justice’ pathways for Indigenous consumers to access appropriate and quality support;
- Consumer cases (systemic or individual) are handled by regulators in a timely manner, where case progress is regularly reported back to the Taskforce;
- Financial counsellors (ICAN and other participating community services organisations) are able to seek direct advice from decision-makers within consumer regulatory bodies on how best to handle cases, or where cases will then be managed by one or several regulators, with additional support by financial counsellors for ongoing client data collection/management;
- Direct partnerships between regulators and remote Aboriginal and Torres Strait Islander communities (See: Wujal Wujal Do Not Knock Town initiative).

⁷ Loban, H. (2010). *Unconscionable conduct and Aboriginal and Torres Strait Islander communities*. Retrieved from the Indigenous Consumer Assistance Network website: <http://ican.org.au/about-us/ican-publications/>

In 2014, frontline community services in the region, such as Shelter Housing Action Cairns (SHAC), the Cairns Community Legal Centre (CCLC) and Save the Children were invited to join the Taskforce. The building of relationships between ICAN, state & national consumer regulators, ombudsman schemes and frontline financial counsellors across the region has allowed the Taskforce to collectively uncover and address a wide range of systemic consumer issues in the region, resulting in enforcement action by the Queensland Office of Fair Trading, Australian Competition and Consumer Commission and the Australian Securities and Investments Commission, against the following traders⁸:

- John Hawash (Motor Dealer) (2015) – with assistance from Queensland Office of Fair Trading, motor dealer license revoked by Queensland Civil and Administrative Tribunal (QCAT) for failing to provide contracts and adhere to cooling off notices and statutory warranties;
- Channic Pty Ltd, Cash Brokers Pty Ltd (2013-present) – ASIC took legal action against Cairns-based lender and broker who offered high-interest credit contracts to Indigenous consumers;
- Chrisco Hampers Australia Limited (2014) – ACCC institutes proceedings against Chrisco for misleading representations to consumers, that they could not cancel their lay-by agreements after making their final payment, and continuing to take payments by direct debit after lay-by agreements were fully paid (See: “Chrisco practices hampered”⁹).
- Titan Marketing (2014) – Ordered to pay penalties of \$750,000 for engaging in unconscionable conduct, where misrepresentations were made to consumers about the value of first aid kits and water filters and intentionally not informing consumers about their cooling off rights.
- Rent the Roo (2013) – Entered into enforceable undertaking with ASIC due to deficiencies in its operating and compliance practices, where marketing of white goods was specifically targeting Indigenous consumers on government benefits.

Recently, the NQ Indigenous Consumer Taskforce partnered with the Wujal Wujal Aboriginal community to create Australia’s first “Do Not Knock Town” initiative to assist local community people to combat consumer exploitation occurring via Door-to-Door trading. Under the “Do Not Knock Town” initiative, signage was placed at both entrances into the Far North Queensland Indigenous community, reminds door-to-door traders they have legal obligations to consumers and can’t approach houses displaying do-not-knock notices. It is also hoped that the signage helps to empower Wujal Wujal residents to understand and assert their rights under the Australian Consumer Law (See ICAN¹⁰ & ABC News¹¹).

⁸ Indigenous Consumer Assistance Network. (2015). ICAN annual report 2014-2015. Retrieved from the Indigenous Consumer Assistance Network website: <http://ican.org.au/about-us/ican-publications/>

⁹ Indigenous Consumer Assistance Network. (2016). “Chrisco practices hampered.” Retrieved from the Indigenous Consumer Assistance Network website: <http://ican.org.au/chrisco-practices-hampered/>

¹⁰ Indigenous Consumer Assistance Network. (2016). “Wujal Wujal community puts door-to-door traders on notice.” Retrieved from the Indigenous Consumer Assistance Network website: <http://ican.org.au/wujal-wujal-community-puts-door-to-door-traders-on-notice/>

¹¹ Bainbridge, A. (2016). “Remote Indigenous community becomes first town to ban door-to-door salespeople.” Australian Broadcasting Corporation: April 22, 2016, <http://www.abc.net.au/news/2016-04-22/door-to-door-salespeople-warned-off-remote-indigenous-community/7347512>

CFA and ICAN encourage regulators to replicate this sort of initiative with other agencies, focusing on particular vulnerable communities. This could include indigenous consumers in other areas of Australia or, for example, newly arrived communities which can be affected by consumer problems. A key success factor in the NQ Indigenous Consumer Taskforce was that it was auspiced by a community organisation, which facilitated community trust and engagement in the initiative.

Another example of innovation in consumer organisation-regulator relationships is the Queensland Consumer Regulators Forum. Several years ago, CFA member the Queensland Consumers Association suggested that this be established to improve consultation and information sharing between consumer organisations and consumer regulators. The Forum has been meeting successfully twice a year for several years and deals with a range of consumer issues including credit, misleading and deceptive conduct, fraud, and scams. The Forum is convened by ASIC and attended by the ACCC, Queensland Office of Fair Trading, Queensland Police Department, Legal Aid Queensland, and representatives of a range of consumer and community organisations, including legal centres.

CFA encourages other consumer regulators to also consider taking a multi-agency approach to consultation and liaison on consumer issues with consumer and community organisations.

For further information, please contact CFA Chair, Gerard Brody,