

Submission to the Productivity Commission Study of Consumer Law Enforcement and Administration by Dr. David Cousins AM 30 August 2016

This is a personal submission, and not connected with my current part-time role in consumer protection as Deputy Monitor Emergency Services Levy Insurance Monitor in NSW. I been involved in the administration and enforcement of consumer policy and regulation for many years in different roles, including as Chair, Prices Surveillance Authority (1992-1995), Commissioner, Australian Competition and Consumer Commission (1999-2002) and Director, Consumer Affairs Victoria (2002-2008). I teach in the area of consumer policy and regulation at Monash University where I hold an Adjunct Professor appointment.

Role of State/Territory regulators

The State/Territory regulators perform a valued service to their individual jurisdictions and beyond. Historically, assisting consumers to resolve complaints has been a major activity for these agencies and whilst some have reduced their activity in this area, it remains of vital importance to vulnerable and disadvantaged consumers in particular. However, all consumers ultimately also benefit from the policy responses that the analysis of complaints generates. Providing information and advice to consumers and traders also continues to be a major activity of these agencies.

The State/Territory regulators have an important role in administering consumer laws, both general laws such as the ACL, but also many industry-specific laws covering significant areas such as building, real estate and motor car traders. Unfortunately, it seems to have been too difficult to date to achieve national uniformity in these industry-specific laws.

The State/Territory roles extend widely into accommodation related areas such as landlord tenancies, retirement villages, owners corporations, and numerous other areas such as the registration of cooperatives and incorporated associations.

Changes since the Council of Australian Government Reforms

CoAG agreements following earlier Productivity Commission reviews have led to the removal of some functions from the State/Territory agencies, which has weakened their ability to provide a holistic service to consumers. These include the removal of business name registration, credit and trade measurement.

In relation to business name registration, a national approach was clearly desirable, but could have been achieved with continuing State/Territory administration. However, the function was fully transferred to the Australian Government, which has since been looking at privatisation of it. I doubt the States/Territories would have agreed to the transfer of this function if they had been fully aware of this likely outcome.

On credit, it was a bad mistake, in my view, to transfer all the administration and enforcement of this function to the Australian Securities and Investments Corporation. Many complaints to State/Territory agencies involve general goods and services as well as credit issues. These agencies previously handled many inquiries and complaints about credit. As well the local Tribunals dealt with many credit cases. The Ombudsman services have by no means filled the gaps created by removal of the States/Territories from the administration and enforcement of national credit laws.

As regards Trade Measurement, I am not fully aware of how effective administration and enforcement now is at the State/Territory level and suggest that this is a matter that the Productivity Commission could consider. There are several issues here including the importance of the National Measurement Institute maintaining close links with the State/Territory agencies and the desirability of having full transparency in relation to their compliance and enforcement activities, not just their policies.

Institutional structure of State/Territory agencies

The State/Territory agencies form parts of bigger departments. They are headed by Commissioners in some cases and Directors in others. They have restricted independence in resourcing and often in their operational decision making. Departmental heads have varying influence and ultimately the Minister can enforce control. This is not the best structure for undertaking enforcement work. It cannot be said that this work is free from political interference and the effectiveness of the work is frequently compromised by difficulties associated with dealing with the media. The impact of a good decision under the ACL can be lost if it is not given wide publicity.

In recent years State/Territory agencies have been greatly weakened by broader moves within their governments to change the approach to service delivery and the way departments and their agencies are organised. Functions previously undertaken by these agencies have been shifted into their respective departments and their resources have often been diminished.

It would be appropriate, in my view, for the Productivity Commission to consider these institutional issues in its Study. On the one hand, the continuing demise of the State/Territory agencies suggests that it may be better to further transfer functions to the ACCC. On the other hand, if the State/Territory bodies were given greater administrative autonomy they could be made more effective.

Coordination and cooperation between agencies

As an interested observer, it seems to me that considerable efforts have been made by the ACL regulators to coordinate their activities and cooperate where possible. This was to some extent a continuation of a previous trend, but there is no doubt the introduction of the ACL gave added impetus to it.

There seem to be a couple of gaps in achievement in this area. First, there is still the absence of an effective national consumer complaint statistical data base. This has been an on-going issue for over thirty years as progress is made and then changes occur so things move backwards.

Second, an effective means of reporting on the enforcement activities of all regulators does not exist. Whilst the ACCC reports publicly the details of all significant enforcement matters in a comprehensive way, this is not the case with all State/Territory agencies. In the past the agencies had annual reports which provided significant details of enforcement activities, but as these have been absorbed into broader departmental reports or reduced in scope, the level of detail on enforcement matters has been reduced. Matters reported on web sites frequently disappear over time leaving little on the public record. An important objective, it seems to me, would be to have a quarterly national enforcement report covering all the regulators.

Product safety issues

The multi-regulator approach to product safety appears to have worked quite well with the States/Territories generally continuing their on the ground enforcement activities and the ACCC giving a significant boost to enforcement at the strategic and operational levels. This is becoming an increasingly important area with the growth of on-line sales, new technology and imports as highlighted by recent serious cases over the past couple of years.

At a broader level, however, I consider there is scope to reduce the fragmentation of regulators involved with product safety in Australia. In some cases this might be achieved by combining regulators. For example, there is considerable overlap between general product safety administration and electricity product safety administration at present.

In my view there is much to commend the Consumer Product Safety Commission model in the USA whereby product safety regulation is separated from regulation affecting the economic interests of consumers.

Where there are separate industry product safety regulators difficulties can arise in the enforcement of the ACL's general prohibitions, for example in relation to misleading or deceptive conduct. Often the skills and capacities of the industry specific regulators do not match those of the ACCC and the approaches taken can be different. Greater consistency could be achieved by broadening the role of the ACCC in these particular areas.

Independent national secretariat for consumer regulators

At present the Australian Treasury provides the major secretariat function for the ACL and this seems to have worked reasonably well on policy matters. However, going forward, consideration could be given to establishing an independent body to act as a national co-ordinator for ACL enforcement matters. This would help to reduce the political influence which often seems to impinge on co-ordination between the agencies. It could work to overcome the difficulties the agencies themselves often experience in achieving real and effective coordination. And it could promote greater transparency through things like a national complaint data base and effective reporting of enforcement activities.