



CONSUMER AFFAIRS AUSTRALIA & NEW ZEALAND

Mr Tom Nankivell
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Productivity Commission
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Dear Mr Nankivell

CAANZ RESPONSE TO THE FIRST DRAFT OF THE PRODUCTIVITY COMMISSION REPORT ON CONSUMER LAW ENFORCEMENT AND ADMINISTRATION

Thank you for providing Consumer Affairs Australia and New Zealand (CAANZ) with the opportunity to comment on the first draft of the Productivity Commission's (the Commission) Report on Consumer Law Enforcement and Administration (the Report).

This letter is the collective response of CAANZ officials. It does not, though, represent the views of Commonwealth Treasury. The Australian Securities and Investments Commission (ASIC) has been involved in the preparation of this response, although the comments below do not primarily relate to ASIC or its jurisdiction.

General comments relating to the Report

CAANZ acknowledges the primary findings of the Report and, in particular, the findings that the multi-regulator model under the Australian Consumer Law (ACL) is operating effectively, and the ACL regulators work well together through well-developed governance arrangements.

CAANZ considers it would generally not be appropriate at this time to make specific comment on draft recommendations of the Report, given the Legislative and Governance Forum on Consumer Affairs (CAF) will make the final decisions relating to any recommendations of the Commission.

However, CAANZ is able to offer some limited comments for the consideration of the Commission:

- (a) As regards draft recommendation 4.1 concerning the National product safety regime, the utility of individual states being empowered to make interim bans was recently demonstrated in respect of decorative ethanol burners. The collaborative processes established by CAANZ enabled a timely response to a product safety issue, the exchange of information and evidence, the consideration of trader education material previously issued by CAANZ members, the discussion of product safety concerns, and the development of a coordinated national response, with strong place-based information and inspection processes to ensure the speedy removal of products from sale. The response had strong buy-in from each jurisdiction, and used communication and other channels that leveraged off state and local presences. The multiple regulator approach therefore operates efficiently and, as demonstrated with the ethanol burner issue, can respond quickly to urgent consumer safety concerns.
- (b) As regards draft recommendation 4.2 concerning ACL regulators publishing a comprehensive and comparable set of performance metrics and information, CAANZ acknowledges the importance of having in place appropriate performance metrics.



The Report to some extent reflects that the ACL operates as one of a number of complementary consumer protection laws. However, the draft recommendation, as currently framed, may not have sufficient regard to the different nature of each jurisdiction's approach to acquit a range of responsibilities with accountability to their Parliaments and community. Matters including the following will be relevant in assessing the cost and benefit of any proposed framework:

- i. some jurisdictions integrate consumer protection functions with other regulatory functions in consolidated business units, while others provide stand-alone consumer protection services
- ii. ACL regulators administer multiple legislation, and use ACL and other (generally more specific) legislative tools to regulate businesses and protect consumers in an integrated manner
- iii. ACL regulators may also be specialist regulators in some jurisdictions, while in others ACL regulators may provide authorisation to specialist regulators to seek ACL remedies in addition to remedies under legislation these regulators administer
- iv. ACL remedies exist in the broader legal frameworks of each jurisdiction, such that there are different avenues to seek remedies dependent upon the jurisdiction, and
- v. ACL regulators operate in distinctive governmental environments, each with their own specific reporting and accountability requirements acquitted through budget, Parliament committee, annual reporting and other processes.

These matters are relevant when considering the most appropriate manner for an ACL regulator to report on its performance, and the cost and benefit of any recommendation to develop a new reporting framework that focuses on only one specific law, and only as it is administered by generalist ACL regulators.

CAANZ notes that ACL regulators currently produce a detailed annual report on the implementation of the ACL including compliance, education and policy initiatives. As the Commission has suggested in the Report, one approach that might be appropriate, therefore, is to build on this existing framework, to provide for jurisdictions to report in a consistent manner on their contributions in administering the ACL.

Interim bans

In the context of interim bans, CAANZ notes ACCC concerns that the requirement for a regulatory impact assessment before the ACCC can recommend an interim ban on unsafe products, risks impeding the Commonwealth from taking swift action to remove unsafe products from the market while it undertakes that impact assessment process. The ACCC finds this to be of particular concern in matters involving multiple decision points supported by a corresponding number of regulatory impact assessments.

The *Australian Consumer Law Interim Report* (the ACL Interim Report), published by CAANZ in October 2016, also reflects on the complex processes for implementing interim bans. The ACL Interim Report provides further support for the Commission's draft finding 4.1 as this is one measure that could be taken to streamline the processes for the Commonwealth Government to implement timely interim bans.

General comments relating to performance benchmarking, dispute resolution and cooperation

While the Report includes substantial information about cooperation between ACL Regulators in compliance activities, it could be improved through including detail about the substantial cooperation between ACL regulators in developing and implementing education and information campaigns (details of which were submitted by the Commonwealth Treasury to the Commission on 16 November 2016). This information demonstrates the development over the past 5 years of a coordinated and collaborative approach by ACL regulators, led by the Education and Information Advisory Committee. It also demonstrates how ACL Regulators leverage off resources and expertise across jurisdictions, to deliver consistent consumer protection messages tailored to industry and consumer audiences and to specific demographic groups (including location demographics).

Further to the above, the report might also discuss the cooperation achieved through CAANZ's Policy and Regulation Advisory Committee, which has provided a forum for the ongoing development of national consumer protection approaches in areas such as the current review of the ACL, free range egg labelling and country-of-origin labelling. This arrangement further evidences the value and impact of the multi-regulator model.

In addition, the cooperative way of working is embedded through all jurisdictions (including small jurisdictions) participating in the various working groups and governance forums, including as lead jurisdictions and as chairs of working and operational groups; this is perhaps a matter that should also be reflected in the Report.

The Report, in examining the interaction between ACL and specialist regulators, explores the gaps in the regulatory tool kits of some specialist regulators (at pages 157-159). Without commenting on the specific matters here, CAANZ endorses the principle that consistent powers and authorities are provided to specialist regulators, such that they are able to effectively regulate specialist sectors without the need to rely, in addition, on ACL regulators and their powers.

The Report canvasses (at pages 175-177) whether the dispute resolution services of ACL regulators be subject to a set of benchmarking principles similar to those used for industry-based customer dispute resolution services (i.e., industry ombudsmen). The Report suggests that ACL regulators offer services akin to these ombudsmen, and that a regular review process based on these benchmarks be instituted for ACL regulator services.

CAANZ acknowledges the value of regular reviews of the provision of government services, including dispute resolution services. There are a range of matters, however, relevant to the Commission's observations which may suggest the approach proposed at draft finding 6.2 may not be appropriate. These include:

- (a) Industry ombudsmen are by-and-large not-for-profit private companies operating outside government. They are not subject to the same accountability and transparency provisions that government agencies operate under, and therefore it is appropriate that regular benchmarking reviews are conducted to assess their dispute resolution practices. ACL regulators are government agencies and are subject to the additional accountabilities which result.
- (b) In industry-based customer dispute resolution schemes, participating service providers are required to participate in resolving disputes lodged by customers with the ombudsman, and the ombudsman may determine disputes where they are not resolved by agreement. In contrast, and with the exception of South Australia's compulsory conciliation conferences, ACL regulators generally only offer a voluntary conciliation service without any decision making power.



- (c) Different ACL regulators provide dispute resolution services that co-exist within the broader dispute resolution framework of jurisdictions, including arrangements such as stand-alone generalist dispute resolution services, small business commissioners and civil tribunals. As the Commission noted in its 2014 report Access to Justice Arrangements, these services contribute to a 'complex system' which 'resists both a single diagnosis and remedy'. A narrow focus on one element will unlikely provide a holistic assessment of the operation of these complementary mechanisms, unlike broader reviews (such as the 2016 Victorian Government Access to Justice Review) which provide a more complete assessment.
- (d) Unlike industry ombudsman, each of which offers a similar type of service, the dispute resolution services of ACL regulators are not homogenous, and hence any benchmarking exercise may not be of significant utility.

I hope that these comments assist the Commission in preparing the final Report on Consumer Law Enforcement and Administration.

Please contact me at if you have any questions or comments relating to this letter, or require any further information. I once again thank you for the opportunity to provide comments on the Report.

Yours sincerely

Simon Cohen
Chair
Consumer Affairs Australia and New Zealand