Australian Chamber of Commerce and Industry

Consumer Law Enforcement and Administration

Submission to the Productivity Commission
March 2017

Introduction

The Australian Chamber welcomes the opportunity to provide a submission to the Productivity Commission's (PC) inquiry into Consumer Law Enforcement and Administration.

The Australian Chamber reiterates its view — as expressed in its June 2016 submission to the Consumer Affairs Australia and New Zealand review of the Australian Consumer Law (ACL) — that the ACL is working well and provides an appropriate balance between the needs of consumers and business.

While the current multi-regulator model is a departure from the principle of harmonisation, the Australian Chamber acknowledges that consistency (or lack thereof) does not appear to represent a major challenge for the business community right now. Despite this, the business community perceives that a national regulator is a sensible step to oversee the ACL for consistency reasons. The Australian Chamber has previously indicated its support for more streamlined administration of the ACL and in-principle support for a carefully managed transition to a single regulator model.

The Australian Chamber welcomes and supports the PC's recommendations that certain elements of the multi-regulator model be streamlined and improved, including with regards to product safety and reporting. Given appetite for more ambitious reform does not appear to be high, the Australian Chamber welcomes steps that could be taken to improve outcomes within the boundaries of the multi-regulator model.

A list of recommendations that we explore in detail in the remainder of this submission can be found on the next page.

The Australian Chamber recommends:

• ACL regulators should be proactive in identifying ways to better streamline and coordinate their activities. A unified "front end" for ACL regulators should be implemented to minimise ambiguities and inefficiencies generated by ten different contact points.

• The State and ACT governments should relinquish their powers to impose compulsory recalls or interim bans to ensure that our product safety laws provide consistent protections for all Australians.

• The principles underpinning existing Regulation Impact Statement (RIS) requirements should not be lost in decision making if short form RIS processes are adopted, including with regards to industry consultation.

• ACL regulators should consider whether they provide consistent and appropriate support to small business consumers. The Australian Chamber supports further consideration of the PC's earlier recommendations relating to small business access to justice.

• Consumer complaints should not be published unless they can be put within the proper context including (but not limited to) the rate of complaints, egregiousness of the alleged conduct and facts surrounding the complaint.

• Delegate more decision-making power on ACL policy to relevant officials or sub-committees that can meet more frequently than the ministerial council.

Multi-regulator model imperfect, but can be navigated

The multi-regulator model has not given rise to significant issues upon which the Australian Chamber has visibility. Feedback from business members has not suggested that having multiple regulators to oversee one national consumer law is a major challenge for the business community. This could be taken to suggest the multi-regulator model is working effectively, but it could also be because:

- small businesses mostly deal with a single regulator within the main jurisdiction in which they operate;
- larger, national businesses have established a capacity to deal with the idiosyncrasies of ACL regulators across jurisdictions; and/or
- most businesses (among our membership) do not regularly engage with ACL regulators.

With Australian businesses operating in a national economy (and indeed a global economy), it is a peculiarity that Australian businesses are subject to different laws and different regulators based on where they operate. Businesses supplying in a national market benefit greatly where national approaches are taken to address policy objectives. While the ACL was a key reform under the *National Partnership Agreement to Deliver a Seamless National Economy*, it stopped short at integrating the administration and enforcement of the law via a single national regulator.

Having multiple regulators puts at risk the consistency of administering the ACL which could cause confusion, ambiguity and geographic disparity for both consumers and the business community for a range of reasons including because:

- different regulators present guidance and advice in varying ways (though they may be derived from commonly developed materials they are not always presented in the same way);

- compliance and enforcement policies (and priorities) are not identical across jurisdictions meaning that some products, industries or sales methods are targeted differently depending on location; and

- businesses (when considered a consumer by the ACL) receive different levels of support in dealing with problems depending on where they operate.

So while the Australian Chamber is not aware of any particular recent circumstances which suggest the model is failing, any conclusion that the model is working well for business must be treated with equal caution.

Even if ACL regulators are generally working well together, an obvious indicator of the different jurisdictional approaches is an examination of the consumer law websites offered by the 10 ACL regulators as well as the overarching consumerlaw.gov.au website. There is no consistent structure across the websites and guidance is presented in varying ways. Further, each regulator has to manage both their ACL responsibilities (which ideally should be administered in a nationally-consistent manner) plus their specific jurisdiction-based regulatory priorities which can cause confusion and complexity.

Some of the challenges presented by the multi-regulator model, including those noted above, could be addressed by moving towards a more integrated "front end". This would involve business and consumer interactions with ACL regulators being managed via a single portal with "back end" services delivered separately.

Increasing user friendliness and efficiencies in the 'back end'

The Service NSW initiative provides a model through which multiple agencies manage their interactions with the community via a single online presence. This would provide a starting point for deeper integration, including opportunities for individual regulators to adopt a shared services model or to develop specialist expertise to better deal with different types of regulatory interactions.

More generally it is questionable whether the multi-regulator model delivers value for money for both taxpayers and consumers alike. There appears to be significant duplication of effort, management structures, capability and time taken to coordinate activities among ACL regulators. In a fiscally-constrained environment it is prudent to ask whether current levels of consumer support could be delivered more efficiently by eliminating this duplication. Analogous to this is to suggest that significant improvements to consumer support could be provided by reallocating resources to improve consumer outcomes.

Product safety

The Australian Chamber welcomes and supports the recommendation that the State and ACT governments should relinquish their powers to impose compulsory recalls or interim bans to ensure that our product safety laws provide consistent protections for all Australians.

Product safety is a challenging area of policy that must carefully balance the costs of an overly cautious approach with the potentially tragic consequences that could result from unsafe products. For this reason it is important that product safety regulators have the capability to engage in complex decisions about risk.

It is preferable for product safety decisions to be made by a single national regulator with experienced professionals (that are able to make risk-based decisions informed by the known circumstances) than for up to eight different Ministers to make varying decisions based on different advice and their own risk preferences.

The Australian Chamber supports this recommendation as it is consistent with the logistical imperatives of national product markets as well as the reasonable suggestion that, if a product poses potential safety risks, all consumers should be protected. Equally, if an informed judgement warrants that a product does not represent sufficient risks to justify an interim ban or compulsory recall, then it is sensible for that assessment to apply nationally so as not to disrupt national supply chains and distribution.

Use of short form impact assessments

The Australian Chamber acknowledges that agility is required when making product safety decisions in the interests of consumers.

While there are very clear benefits in having robust and comprehensive Regulation Impact Statement (RIS) requirements, their value is more profound for regulatory decisions where the costs and benefits are likely to be accrued gradually over time. In the case of interim bans and compulsory recalls, the costs and benefits of regulatory intervention are upfront and likely to be urgent. The Australian Chamber accepts that in these circumstances the costs of failing to act in a timely manner may exceed the benefits of standardising regulatory impact analysis through use of a prescribed format.

Despite this, it is the Australian Chamber's view that decisions about compulsory recalls and interim bans must be grounded by an appropriate assessment of the likely costs and benefits. Decisions should not, for example, be made without a conscious judgement that the costs of inaction are likely to be higher than if regulatory intervention were pursued. While the RIS process may not be complementary to the pursuit of quick and responsive decision-making, it nonetheless embeds important principles which policymakers should follow, including when considering bans or recalls.

One of these important principles is the need for consultation. The Australian Chamber considers that industry consultation (though not necessarily in the form prescribed by the RIS process) is essential to inform product safety decisions.

The Australian Chamber is open to the use of short form impact assessments provided the following principles are observed as part of the assessment:

- the key features of the RIS (including assessment of costs and benefits) are broadly retained, though depth of analysis and options considered could be adjusted to allow more timely advice;
- the problem and known incidences of consumer harm (or potential for harm) are clearly articulated;
- regulatory interventions are made with a conscious judgement that the likely costs of inaction more than justify any negative impacts;
- other evidence bases upon which the decision is made are clearly indicated and outlined; and
- transparency is maintained such that the assessment is made publicly available.

Access to justice: Small business issues

The Australian Chamber welcomes efforts that could be taken to improve small businesses' access to justice, though these need to be considered in the context of the potential for vexatious litigation against businesses that have acted according to their obligations.

While access to justice represents a much broader challenge than what can be resolved within the context of this current inquiry, the Australian Chamber considers that there is scope for ACL regulators to consider whether they provide consistent and appropriate support to small business consumers. Of course, ACL regulators can only work to constructively resolve issues with the parties involved and cannot act as a final arbiter in a given matter (with that responsibility left to the tribunals or higher courts).

However, with many small business owners exhibiting the same characteristics as individual consumers, it is against the spirit of the ACL (which does not make a distinction) to treat these groups inconsistently.

The Australian Chamber also supports the PC's suggestion that governments should revisit previous recommendations relating to small business access to justice.

Publishing consumer complaints

The Draft Report raises the prospect that information contained within a national database of consumer complaints could be made publicly available.

The Australian Chamber is strongly opposed to such initiatives unless the significant implementation challenges could be overcome. In particular, for publicly listed complaints to be useful to consumers (and a fair representation of the conduct of the businesses to which the complaint relates), such a register would need to also collect information relating to the:

- volume of transactions so that a rate of complaints can be identified for a given business;
- egregiousness of alleged conduct to differentiate between relatively minor complaints and complaints relating to infractions that cause significant consumer detriment; and
- facts surrounding the complaint, including whether they are disputed by the business.

It is apparent that obtaining this information is impractical and inconsistent with current databases compiled by ACL regulators. Therefore the Australian Chamber has significant concerns with any suggestion that data contained in a national database be made publicly available.

A preferable approach would be for ACL regulators to continue to use their existing powers (including public warning notices) to alert the public to particular traders that exhibit a pattern of egregious behaviour. ACL regulators should also continue to raise public awareness in circumstances where there are systemic issues or pitfalls associated with particular industries, product types or sales methods.

The Australian Chamber is supportive of private sector initiatives that provide consumers with information about the credibility, quality, value and reputation of suppliers offering goods and services in a given market (such as comparator tools and online review websites). It is consistent with an efficient and competitive market for consumers to be empowered through such initiatives, though datasets which may provide a distortionary picture (such as unfettered complaints data) may be given undue credibility by virtue of them being issued by government.

The Australian Chamber notes that the NSW Business Chamber has provided a submission which considers the NSW experience in more detail.

Amending the ACL

While this submission focuses mainly on the administration of the national consumer law, it is important that timely policy decisions can be made on the ACL.

The Legislative and Governance Forum on Consumer Affairs (CAF) (formerly known as the Ministerial Council on Consumer Affairs) is responsible for policy changes to the ACL. While ministerial oversight via a federated model ensures consumer issues have high profile and captures jurisdiction-based concerns, the downside is it takes too long to effect necessary change to the ACL through the current process. Currently, there are only bi-annual CAF meetings which could negatively impact changes that are time-sensitive. Businesses and consumers will suffer if consumer law cannot keep pace with the constantly evolving economy.

For example, it took a couple of years for the Restaurant and Catering Association to see consumer law reform which exempted restaurants from the inefficient and costly impact of single-component pricing. Prior to this exemption, changes to single-component pricing in 2009 resulted in restaurant operators being required to print separate menus for days where surcharges applied to restaurant meals. The requirements resulted in inefficiencies and additional costs as businesses had to constantly print and change menus. Minimal education was provided to operators on the implementation of the changes, resulting in significant fines and confusion in the sector.

The Australian Chamber recommends that the decision-making process be improved to allow for more timely changes to the ACL. This could be done by delegating more decision-making power to relevant officials or sub-committees that can meet more frequently than the ministerial council.

Summary

Improvements can be made to the multiple administration of the ACL which should be implemented over a reasonable time horizon according to their scale of impact. Recommendations are:

- ACL regulators should be proactive in identifying ways to better streamline and coordinate their activities. A unified “front end” for ACL regulators should be implemented to minimise ambiguities and inefficiencies generated by ten different contact points.

- The State and ACT governments should relinquish their powers to impose compulsory recalls or interim bans to ensure that our product safety laws provide consistent protections for all Australians.

- The principles underpinning existing Regulation Impact Statement (RIS) requirements should not be lost in decision making if short form RIS processes are adopted, including with regards to industry consultation.

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- Delegate more decision-making power on ACL policy to relevant officials or sub-committees that can meet more frequently than the ministerial council.

Working for business.
Working for Australia

About the Australian Chamber

The Australian Chamber of Commerce and Industry speaks on behalf of Australian Businesses at home and abroad. We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

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