

# Alex Cokic

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

## **Re: How is the multiple regulator model for the ACL working and how could it be improved?**

To whom it may concern,

Please see my short submission in relation to the Consumer Law Enforcement and Administration Productivity Commission Issues Paper July 2016.

### **To what extent have issues noted in the Commission's 2008 report — such as inconsistency, gaps and overlaps in enforcement and unclear delineation of responsibilities among regulators — been addressed by the current arrangements?**

Inconsistencies and gaps have occurred in enforcement and have not been addressed by the current arrangements and I refer to **A-1** Department of Commerce Complaint CC493763 Investigation Report dated 3 June 2016 involving a dispute against a Real Estate Agent for the management of a Property.

The Real Estate Agent in question is operating in the Rockingham locality as a franchisee of a Real Estate Brand that has a national presence and in addition is a member of REIWA.

Department of Commerce identified a breach of the Code of Conduct for Agents and Sales Representatives 2011, however determined that the Real Estate Agent would be issued education reminding them of their responsibilities under the code.

In this example there has been an unclear delineation of responsibilities among regulators, but also as referenced in the Commission's 2008 report, amongst the numerous bodies developing policy without adequate reference to, or knowledge of, initiatives or regulatory responses developed by other bodies or agencies.

As a consumer seeking the services of a Real Estate Agent for management of a property it is commonly advertised as a key point differentiator to the consumer that the Real Estate Agent holds a membership with REIWA or is part of a national brand as a franchisee.

REIWA (itself and its members a member of Real Estate Institute of Australia REIA) are to abide by the REIA National Principles of Conduct **A-2** attached which delineates a statement of ethics expected to be upheld by all REI Members.

With reference to the matters in Department of Commerce Complaint CC493763 that were notified in writing to the attention of the President of REIWA, the response **A-3** dated 25 July 2016 advised in summary REIWA does not have a regulatory function but does insist its members act in accordance with the Real Estate & Business Agents Act's Code of Conduct (the "Code") and encourages ongoing professional development and training.

With reference to the matters in Department of Commerce Complaint CC493763 that were notified in writing to the attention of the Agent's Head Office, the response **A-4** dated 3 August 2016 advised in summary that the matters were between the Agent and myself as the Landlord.

Significant gaps and inconsistencies are prevalent with Department of Commerce Complaint CC493763 where the Department of Commerce, REIWA and the Real Estate Agent's head office have each developed policy surrounding the behaviour of the Real Estate Agent or the expectations of service that a consumer can receive, yet none have sufficiently enforced such policy to reach those objectives and neither compliment ACL.

- ensuring that goods and services are safe and fit for the purposes for which they were sold
- preventing practices that are unfair or contrary to good faith

### **What have been consumers' and businesses' experiences under the ACL regime?**

Department of Commerce Complaint CC493763

I refer to **A-1** Department of Commerce Complaint CC493763, in this complaint, the Investigation Report details part of the matter as follows

- The Complainant has alleged that the Respondent failed to act in their best interests, failed to act under the instructions and failed to collect the correct amount of bond.
- The Respondent advised they have implemented procedures to ensure that all Property Managers collect the correct amount of bond moving forward, but failed to advise the Department of Commerce what those procedures were.
- Department of Commerce identified a breach of the Code of Conduct for Agents and Sales Representatives 2011, however determined that the Real Estate Agent would be issued education reminding them of their responsibilities under the code.
  - Legislation: Code of Conduct for Agents and Sales Representatives 2011
    - Sections 4,6(2) and 7(1)
- Recommendation Action Code:
  - A15 Advise Corrective Action
  - Result Code CEA – Education / Advice

The Agent in question is operating in the Rockingham locality as a franchisee of a Real Estate Brand that has a national presence and in addition is a member of REIWA.

### **Summary of Allegations against the Real Estate Agent to be proven in the Magistrates Court claim later this year.**

- Agent processed a Tenant Application **A-5** which contained Tenant identification as an expired Driver's License for the Applicant and a Birth Certificate which was not of the Applicant but for the Tenant's 6 year old Daughter at the time.
- Agent did not provide a copy of the Tenant Application to the landlord but provided a summary email of the Tenant **A-6** which failed to articulate the Tenant had a private rental history.
- Agent failed to collect the correct bond amount of 4 weeks rent, but advised that they had collected 4 weeks deposit in email dated 19 August 2014 **A-7**.

- Agent had rental arrears of up to 4 weeks and without notifying the Landlord until the Landlord asked where his money was
- Agent cited a pet Cat at the premises on a number of routine inspections, noting the same, but failed to collect a Pet bond from the Tenant
- Agent refused to increase the rent per week and was not familiar with the provision in the contract to support the same
- Agent identified damages in the Final Bond Inspection Report, but failed to prepare and request recovery of all damage noted.
- Agent by their own admission confirmed they acknowledged termination of the management authority **A-8**, but then refused to sign a bond variation form **A-9** to transfer the interested party of the bond from the Agent to the Landlord so that I could retrieve the bond as per the court order I was awarded. As the consumer I maintain that there was incorrect termination of the management authority **A-18**.

### **Summary of consequences suffered by the Landlord**

- Rockingham Magistrates Court awarded loss and damage to the Landlord of approximately \$7000 and issued a court order **A-10**. The bond portion of this money has been recovered, but no other money has been recovered as the tenant has no assets to seize, despite several attempts.
- Landlords insurance paid some \$8600 in loss and damage but refused to pay approximately \$2700, citing a requirement that the Agent collect a maximum 4 weeks bond (to minimise the loss from the insurer) as a reason for rejecting a portion of the claim.
- There was approximately \$850 in insurance excesses payable.
- There is currently pending legal action against the Agent for approximately \$6000 **A-11**

As a consumer after going through this experience, I certainly had the expectation that bringing it to the attention of the Department of Commerce would serve to investigate the matter, but where the Department had found a breach of the code of conduct, that they would take action on my behalf and seek redress.

### **Does the multiple regulator model cause any confusion or other problems for consumers seeking redress or for business operations?**

The current multiple regulator model causes significant problems for consumers seeking redress.

I refer to Department of Commerce Complaint CC493763 which resulted in a finding that the Real Estate Agent breached the Code of Conduct, yet the consumer has not gained advantage from the set objectives of the ACL multiple regulator model and unable to seek any redress.

In this example, the followed objectives have failed to be met

1. ensuring that goods and services are safe and fit for the purposes for which they were sold, encompasses all of the issues surrounding the creation of an effective set of implied terms and conditions and product safety. It involves preventing detriment arising from 'hidden risks' or unknown product characteristics;
  - As a consumer, by the very nature of a Real Estate Agent being licensed it is implied that the Real Estate Agent is qualified and competent to perform the services, the allowance for leniency with the Real Estate Agent by providing Education and Warnings with regards to their breach of ACL is simply inadequate and a miscarriage of justice.

2. preventing practices that are unfair or contrary to good faith addresses behaviour by suppliers that fails to meet generally accepted standards and which leads to consumer detriment or otherwise reduces consumer confidence;
  - I refer to the particulars surrounding the management of a tenancy which demonstrates that the ACL in its current form does not achieve the objective of preventing practises that are unfair. All documents referred to herein have been provided as an attachment in confidence for this submission.

#### **Material Particulars surrounding the Bond**

- **A-16 Tenancy Details Form for Application** signed by the Agent date unable to be determined, stamped Department of Housing and Works 10/08/2014
  - Bond \$1720 and Weekly Rent \$430
- **A-5 – Residential Tenancy Application** signed and dated 13 August 2014
  - Security Bond \$1720 and Weekly Rent \$430
- **A-6 Agent advised Landlord of Prospective Tenant** in email dated 15 August 2014
- **A-12 Landlord Advised Agent of Acceptance of Tenant** in email dated 15 August 2014
- **A-13 Tenant Lease Agreement** signed and dated 21 August 2014
  - Security Bond \$1720 and Weekly Rent \$430
- **A-14 Lodgement of Security Bond Money form** Dated and Signed by the Agent 25/08/2014, stamped by Department of Commerce 27/08/2014
  - Bond and Weekly Rent unable to be confirmed
- **A-15 Record of Payment of Security Bond** dated 5 September 2014
- **Emails between Landlord and Agent** on three occasions 19 August 2014, 20 August 2014 and 27 August 2014

#### **Summary of allegations against the Real Estate Agent to be determined by the Magistrates Court claim later this year – Bond Interpretation**

- It appears the Agent had signed and submitted a Department of Housing and Works Application for the proposed Tenant on behalf of the Landlord which was stamped by the Department of Housing 10 August 2014.
  - The Agent failed to disclose the Department of Housing and Works Application to the Landlord at all
  - The Agent submitted this paperwork on behalf of the Landlord and without authorisation from the Landlord.
  - The Agent submitted this paperwork 5 days prior to receiving authorisation of the Acceptance of the Tenant to rent the property from the Landlord in writing.
- It appears the Agent had signed a Tenant Lease Agreement
  - The Agent stated a bond of \$1720 was collected
  - The Agent failed to disclose to the Landlord that the material particulars of the Bond differed
- It appears the Agent had signed and submitted a Lodgement of Security Bond Money stamped by the Department of Commerce 27 August 2014
  - The Agent failed to disclose the Bond lodged was for the amount of \$1280 and not the \$1720
- It appears the Agent had received the Record of Payment of Security Bond dated 5 September 2014
  - The Agent failed to disclose the Bond lodged was for the amount of \$1280 and not the \$1720
    - It appears the Agent had communication to or from the Owner via email on two occasions regarding acceptance of the Tenant on 15 August 2014
      - The Agent failed to disclose the material particulars of the Bond to the Landlord

- It appears the Agent had communication to or from the Owner via email on three occasions 19 August 2014, 20 August 2014 and 27 August 2014
    - The Agent failed to disclose the material particulars of the Bond to the Landlord
- 3. providing accessible and timely redress where consumer detriment has occurred ensures that, where consumers' reasonable expectations are not met, effective remedies are available; and
  - Department of Commerce Complaint CC493763 took 6 months to investigate and has failed to provide any redress where consumer detriment has occurred costs have been incurred by the consumer allegedly as a result of the Real Estate Agent with a confirmation from the Department of Commerce that the Real Estate Agent has breached the code of conduct, however no redress has been made available by the Department of Commerce.

**How, in broad terms, could any such problems be addressed?**

- Sufficient incentive needs to be imposed on Real Estate Agents for any breach to the Code of Conduct and this would most commonly take form of a financial penalty on each occasion.
- Mandatory Public warning notices (or name and shame) where a Real Estate Agent has been found guilty of breaching the ACL.
- Where a complaint to the authority has resulted in a breach to the code of conduct and it can be readily established that such breach has resulted in costs incurred by the complainant, that the authority provides its departmental leverage to seek redress on behalf of the consumer.
- Removal of the leniency to Real Estate Agents where the Department of Commerce has identified a breach to the Code of Conduct.
  - Department of Commerce Complaint CC493763 leniency was provided to the Real Estate Agent where "education reminding them of their responsibilities" was the Department of Commerce method of choice.
  - Real Estate Agents are required to be licensed to provide professional services, the ability for the Department of Commerce to provide education to the Real Estate Agent in absence of direct penalties at a minimum for minor offenses followed by suspension or cancellation of a license and triennial certificate for significant breaches provides little to no incentive for Real Estate Agents strictly abide by the Code of Conduct.

**Are the levels of resources for enforcing the ACL adequate?**

As recently reported by news.com.au, the consumer watchdog allegedly escalates around 60 consumer and fair trading cases per quarter from approximately 10,000 complaints.

<http://www.news.com.au/finance/economy/australian-economy/labor-reveals-plan-for-tougher-consumer-cop-to-stop-the-shonks-and-sharks/news-story/64653445322168da5a4d9f95ecec8e8>

In conjunction with the Department of Commerce Complaint resulting in a confirmed breach of the code of conduct but a failure to proceed forward with action to seek consumer redress and meet the objectives of the Australian Consumer Law, It would strongly suggest that the levels of resources for enforcing the ACL are not adequate.

Further, in relation to Complaint CC493763 it was lodged on 10 December 2015 through the Department of Commerce Website and final date on the Investigation Report was 3 June 2016, taking almost 6 months to have investigated which would strongly suggest that the levels of resourcing to enforce the ACL are inadequate.

### **To what extent do the ACL regulators achieve proportionate, risk-based enforcement in practice?**

Department of Commerce Complaint CC493763 identifies there has been no proportionate, risk-based enforcement as they have explicitly advised the Real Estate Agent that they breached the code of conduct, yet the Real Estate Agent failed to advise the Department of Commerce what procedures it had implemented to ensure that Property Managers collect the correct amount of bond.

It is clear that the current legislation and its current enforcement is not effective and efficient to encourage appropriate supplier behaviour to begin with noting that the Real Estate Agent effectively demonstrated in CC493763 that it did not have suitable procedures to ensure Property Managers collected the correct amount of bond or to encourage appropriate supplier behaviour where the Real Estate Agent in CC493763 failed to provide indication as to what procedures were implemented to ensure the correct amount of bond was collected by Property Managers even as a result of a Department of Commerce Investigation, as evidenced in this instance **A1**.

### **Are the enforcement tools and remedies available to regulators sufficient to address risks to consumers?**

The regulators, in regulating the ACL should be granted further powers to compel parties to comply with investigations and further powers to enforce the ACL and act on behalf of the Complainant on all occasions where there is a direct breach of the ACL.

### **What problems are there with the administration and enforcement of the ACL under the multiple regulator model and how could it be improved?**

The Consumers are the vulnerable and disadvantaged, when a business decides to act in a particular way or take a particular action that is contrary to Australian Consumer Law, the consumer, as an individual, stands minimal chance of seeking the business to comply with the ACL and must then rely on the leverage of the multiple regulator model to actually administer and seek enforcement on the consumers behalf.

Enforcement of the ACL by its very definition is to compel observance or obedience to; this notion of enforcement is not met if the arsenal of methods available and used by the multiple regulator model consist of education and warnings to the party breaching ACL.

In relation to Complaint CC493763, The Department of Commerce have further commented to seek an understanding as to the progress and outcome of the legal action that is pending against the Real Estate Agent, but have failed to advise whether the Department of Commerce would take further action against the Real Estate Agent should the Magistrates Court determine an outcome against the Real Estate Agent.

**Where particular problems have arisen in the enforcement of the ACL, are these because of (a) weaknesses in the law (b) weaknesses in the way enforcement is undertaken (c) insufficient resources to enable sufficient enforcement action?**

To the extent that there are particular problems arisen in the enforcement of the ACL, these are because of all of the above.

- a) **A Weakness in the Law** – The Code of Conduct for Agents and Sales Representatives is very broad, fails to sufficiently contemplate Property Management Services at all or in any reasonable detail and the expectations of the licensed Real Estate Agents for the same service.
- b) **Weakness in the way enforcement is undertaken** – If the penalty provided by the Department of Commerce for an Agent's breach of the Code of Conduct for Real Estate Agents & Sales Representatives is too weak by way of issuing Educational/Corrective Advice or Administrative Warnings it will not sufficiently deter inappropriate supplier behaviour or sufficiently promote the appropriate supplier behaviour.
- c) **Insufficient resources to enable sufficient enforcement action** – With the reported approximate 60 cases escalated per quarter out of 10,000, it is reasonable to say that the investigations that are not indeed providing a significant breach to a code of conduct, that those investigations would not reach the attention of the Department of Commerce for enforcement, further to the fact that complaint CC493763 took approximately 6 months to investigate.