

ESV Ref: CM-5799

30 August 2016

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

By online submission: www.pc.gov.au/inquiries/current/consumer-law/

Dear Commissioners

INQUIRY INTO CONSUMER LAW ENFORCEMENT AND ADMINISTRATION

I refer to the Commission's Issues Paper dated July 2016.

I thank the Commissioners for the opportunity to provide input into the Commission's inquiry and enclose Energy Safe Victoria's submission.

Please contact me [redacted] should you have any queries. In the meantime, I look forward to reading the Commission's draft report.

Yours faithfully

**EXECUTIVE MANAGER
POLICY AND LEGAL**

Energy Safe Victoria—Submission to the Productivity Commission’s study into Consumer Law Enforcement and Administration

The Commission is seeking participants’ comments on the progress in implementing the ACL and the general success of the multiple regulator model. To what extent have issues... such as inconsistency, gaps and overlaps in enforcement and unclear delineation of responsibilities among regulators been addressed by the current arrangements? What evidence or metrics are available that can be used to assess or substantiate these claims? What have been consumers’ and businesses’ experiences under the ACL regime? Does the multiple regulator model cause any confusion or other problems for consumers seeking redress or for business operations? If so, how may these be addressed? What, if any, alternatives to the multiple regulator model should be considered?

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

Energy Safe Victoria (ESV) considers that the current multiple regulator model of response to consumer safety with a combination of Australian Consumer Law (ACL) and specialist safety technical regulators operates reasonably well, although there is some scope for improvement with respect to the coordination, application and enforcement of nationwide recalls and bans that are initiated or led by specialist regulators such as ESV.

Typically when addressing a safety issue related to electrical or gas appliances or equipment, there will be a lead specialist regulator or “home regulator” that will coordinate the response nationally. This works well for both suppliers and the specialist regulators in other jurisdictions. In particular, it provides the supplier with one regulator who is able assist the supplier in preparing a recall strategy and recall notice that will be acceptable to all regulators.

Specialist regulators are also best placed to appropriately manage the risks related to a product safety issue and act quickly. The safety regulators are technical specialists and actively participate in the development, maintenance and interpretation of Australian/New Zealand (AS/NZS) Standards and International Electrotechnical Commission (IEC) Standards.

Businesses that are proposing to conduct a voluntary recall either approach ESV directly or are referred to ESV by the ACCC for ESV approval of the recall notice before it is published on the ACCC website. This is further supported by the ACCC product safety recall guidelines and the Electrical Regulatory Authorities Council (ERAC) recall guidelines, which provide suppliers of electrical equipment with a clear understanding on how to conduct a recall successfully. The Gas Technical Regulators Committee (GTRC) is currently drafting similar recall guidelines in relation to gas products.

By dealing with a single specialist regulator, suppliers are able to act quickly, identify relevant issues, adopt flexible solutions and respond. The specialist regulator also has a technical understanding of issues, strong links with industry and connections with the trades. This can be invaluable with respect to some recalls which require the related industry and trades to participate and support the recall process.

While, these arrangements work very well in relation to voluntary recalls (the majority of recalls coordinated by ESV are voluntary), some difficulties can arise in relation to the enforcement of mandatory recalls.

Recalls coordinated by ESV 2014-2015		
	<i>Voluntary</i>	<i>Mandatory</i>
Electrical	34	2
Gas	15	0
<i>Total</i>	49	2
Recalls coordinated by ESV 2015-2016		
	<i>Voluntary</i>	<i>Mandatory</i>
Electrical	20	1
Gas	9	0
<i>Total</i>	29	1

The power for ESV to issue a recall of electrical equipment is set out in section 65 of the *Electricity Safety Act 1998* (Vic) (the ESA), and the power to issue a prohibition (ban) on the supply of electrical equipment is set out in section 63. Similar powers with respect to gas appliances and equipment is set out in sections 78 and 76 of the *Gas Safety Act 1997* (Vic).

Accordingly, the above powers are likely to be limited to prohibiting the supply of equipment into Victoria or requiring the recall of equipment supplied to consumers in Victoria. Given the nature of the national market in consumer goods, it is unlikely that ESV could enforce any mandatory recalls or bans with respect to other jurisdictions.

This is unfortunate as the efficiencies of dealing with the one lead regulator can begin to erode in these circumstances by requiring the duplication of regulatory effort as the specialist regulators in each jurisdiction will need to issue their own recalls and bans in order to give effect to the lead regulator's enforcement action in their home jurisdiction. In some cases, the ACCC may also issue its own recall or ban and in others some jurisdictions may lack the legislative power.

Perhaps the Commission could investigate whether there is a more efficient and effective way for a mandatory recall or ban issued or proposed by specialist state or territory regulator to have legal force nationally without losing the current ability that ESV and some other specialist regulators have to respond quickly in the interests of community safety. The Commission also could consider whether it is possible for the ACCC to streamline its ability to issue a national recall based on the work of a specialist regulator without having to duplicate the work already done by that regulator.

Notwithstanding the above issues, the various specialist regulators and the ACCC were able to coordinate their efforts and share the workload in relation to the infinity cable recall, which was a difficult recall due to the nature of the recalled product.

Infinity cable recall

In 2013 the Australian Cablemakers Association (ACA) made a complaint with ERAC about an Infinity TPS cable that did not comply with the requirements of AS/NZS 5000.2. The insulation of the cable was becoming brittle over time. As the investigations began into this defect the company that was importing this cable, Infinity Cables, went into liquidation.

The ACCC formed a taskforce of ACL and specialist regulators which included electrical and building regulators to handle the recall. This taskforce then made recommendations to the ACCC for the correct approach of the recall process and risks associated with deteriorating TPS cable. As Infinity Cables had gone into liquidation the burden then fell on the T2 suppliers who on-sold the cable to consumers.

As this became a complex task it was agreed that the ACCC would negotiate a voluntary recall with national T2 suppliers such as Masters, Danks, Mitre 10 and Go electrical and each state regulator would negotiate a recall with state-based suppliers. In Victoria there were 7 state-based suppliers and all of them agreed to implement a voluntary recall.

The majority of the other affected state-based regulators also negotiated a voluntary recall with their respective suppliers with the NSW regulator issuing a mandatory recall to their suppliers that was based on the same recall actions as the voluntary recalls.

Are the level of resources for enforcing ACL adequate? What are the effects of differences in resources available to state and territory ACL regulators? To what extent, if any, does the potential for the ACCC or ASIC to undertake enforcement actions affect the resources the states and territories devote to ACL enforcement?

ESV is well resourced to perform its regulatory functions in relation to electricity and gas appliances and equipment under its regulatory regime. ESV has 12 staff dedicated to appliance and equipment safety consisting of 2 managers, 7 compliance officers, 2 gas engineers and a technical writer.

ESV's staff carry out various functions and roles including: approval of electrical and gas equipment, carrying out investigations, responding to complaints, overseeing private certifiers, carrying out store audits (including some Australian-based online stores), coordinating check testing of equipment, taking appropriate compliance and enforcement action and coordinating recalls.

ESV's equipment safety staff also sit on Australian and international standards committees, are members of ERAC and the GTRC and provide advice and assistance to other

government agencies such as the Essential Services Commission, emergency services, the Coroner, WorkSafe and other State and Federal Departments.

ESV's dedicated resources and expertise allow for the Victorian ACL regulator and, to some extent, the ACCC, to focus its resources and expertise on other areas within their broad scope of responsibility. The fact that the ACCC and ACL regulators are able to take action in relation to unsafe gas and electrical products is not a significant factor with respect to ESV's resourcing decisions.

ESV's main consideration when making resourcing decisions is to determine what level of resources are required to carry out our statutory functions effectively and at an appropriate level. This is considered in the context of ESV's various other statutory functions and the need to act in accordance with our Corporate Plan and our responsible Minister's Statement of Expectations.

To what extent do the ACL regulators achieve proportionate, risk-based enforcement in practice? Are changes to the current approaches of the ACL regulators warranted, and is there any evidence to show that such changes would lead to improved outcomes for consumers overall? Are the enforcement tools and remedies available to regulators sufficient to address risks to consumers?

The technical and safety regulators are well placed to identify and assess the risks of different courses of actions in response to issues and achieve proportionate outcomes. ESV employs a risk-based approach to its regulation and enforcement. As such it gives consideration to consequences, safety and costs in relation to issues identified for consumer protection. It uses the forums ERAC and the GTRC to encourage a consistent approach across the states and territories, and also with industry.

The Ecables recall is an example of a safety issue where ESV was able to identify and assess the risks of different courses of action in response to a safety issue and employ a risk-based approach to achieve a proportionate outcome. The cables that were the subject of this recall were outside the scope of the ACL, however, the issue had an indirect impact on consumers as the cables were generally installed in large buildings including apartment buildings.

Ecables recall

In December 2014 ESV issued a recall notice to E Cables Pty Ltd requiring the recall of copper clad aluminium (CCA) power cable with RE110 insulation supplied by E Cables Pty Ltd since 2011.

Testing showed that the cable was non-compliant due to a manufacturing fault that identified the cable's insulation sheath had not been cross-linked. Due to the failure to cross-link the cable's insulation, the cable's mechanical properties were reduced with the increase of operating temperature. This meant that the cable's insulation was susceptible (at certain temperatures) to failure when external pressure from things such as cable ties, the weight of other cables or accidental penetration from foreign objects occurred. This could then allow access to live parts, which creates a risk of electrocution or shock should a person come into contact with the exposed live parts.

The cables were sold between January 2011 and June 2014 in Victoria, New South Wales and Queensland. Approximately 188km of the product was sold in Victoria with the cable (which is an industrial sized cable used in construction) installed at approximately 290 sites nationwide.

E Cables went into liquidation from January 2015.

Working with E Cables' former Directors, ESV was able to recommend a solution that would address the safety risks associated with the cables without requiring building owners to replace the cables at significant cost.

The actions to achieve this were to limit the temperature the affected cabled would operate at by modifying the circuit protection rating, identifying and labelling the affected circuit with warning labels and carrying out regular inspections of the insulation of the cable.

However, where the recalled equipment is covered by the ACL, ESV notes that such an approach may, in some cases, fail to fully appreciate consumer's rights under the ACL with respect to a major safety failure. The Samsung washing machine recall highlights the need for specialist regulators to take into account a consumer's choice of remedy in these cases and ensure that this is communicated to consumers in the context of a recall that offers a repair or modification to address a serious safety issue.

While ESV does aim to achieve positive consumer outcomes in relation to any recall it coordinates, ESV's mandate does not extend to enforcing and overseeing the ACL's consumer guarantees. The focus is primarily on safety and ensuring a safe outcome for consumers generally.

ESV would welcome any recommendations on how ESV could better incorporate recognition of the consumer guarantees in the safety related recalls it oversees without overstepping its

regulatory mandate. A revision of the ACCC recall guidelines could be considered to cover off on this issue by requiring suppliers to include information about a consumer's choice of remedy in any recall notice published.

What mechanisms are used to coordinate the regulation and enforcement of consumer financial products (or the financial aspects of consumer products) between ASIC and the other ACL regulators and how effective are they? How adequate are current arrangements among ACL regulators (and specialist safety regulatory regimes) for identifying consumer concerns that are extra-jurisdictional and for developing a consistent national regulator response? How might these arrangements be improved?

What ongoing arrangements are there for ACL regulators and regulators of specialist safety regimes to share information on consumer protection problem areas on a national basis? Are such arrangements adequate, including for a future where markets are increasingly national in nature and new products and services are constantly entering those markets?....

The GTRC and ERAC are effective forums for the sharing of technical information and responding to national safety issues. The ACCC is also a member of ERAC. ERAC has developed guidelines for electrical product recalls that are aligned with the ACCC guidelines. The GTRC will be reviewing the suitability of a similar model for use in relation to gas appliances.

ERAC membership consists of the ACCC and all of the State and Territory electrical safety regulators which are:

- Energy Safe Victoria (VIC);
- Electrical Safety Office (QLD);
- Office of Fair Trade (NSW);
- Office of the Technical Regulator (SA);
- Electrical Standards and Safety (TAS);
- Energy Safety Department of Commerce (WA);
- Department of Business (Electrical) (NT)
- Construction, Environment and Workplace Protection - Access Canberra (ACT); and
- Energy Safety (New Zealand).

ERAC has two work groups that look at specific issues. One of the work groups is for licensing of electrical workers and the other is for electrical equipment safety. The electrical equipment working group meets on a monthly basis to discuss technical issues with electrical equipment.

The ERAC's main committee meet face-to-face twice yearly and correspond as needed between meetings. Information and experiences are shared in the areas of licensing, electrical installation safety, electrical infrastructure safety and equipment safety. These discussions include product compliance, incidents and recalls.

The GTRC membership consists all of the State and Territory gas safety regulators which are:

- Energy Safe Victoria (VIC);
- Department of Natural Resources and Mines (QLD);
- Office of Fair Trade (NSW);
- Office of the Technical Regulator (SA);
- Workplace Standards Tasmania – Department of Justice (TAS);
- Energy Safety Department of Commerce (WA);
- NT Worksafe (NT);
- Construction, Environment and Workplace Protection - Access Canberra (ACT); and
- Worksafe New Zealand (New Zealand).

The ACCC is currently not a member of the GTRC.

The GTRC meets to discuss legislation changes and policy matters within each jurisdiction, incident data benchmarking, recalls, licensing, installation safety, infrastructure safety, equipment safety, practitioner training, recalls and reviews any recommendations from the GTRC Technical Sub-Committee. The GTRC and GTRC Technical Sub-Committee meet biannually.

The GTRC has a Technical Sub-Committee that includes members from the GTRC and representatives from the private certification bodies. The GTRC Technical Sub-Committee meets to discuss technical issues affecting the industry.

In addition, ESV is a member of the non-conforming non-compliant building products group that also includes WorkSafe Victoria, Consumer Affairs Victoria (CAV) and the Victorian Building Authority.

ESV and Consumer Affairs Victoria (CAV) cooperate well with an informally agreed division of responsibilities. CAV generally directs electrical and gas appliance safety issues to ESV as the specialist safety regulator and CAV also responds quickly to safety issues identified by ESV.

Recently ESV and CAV participated in a joint communication and enforcement strategy in relation to the safety issues surrounding self-balancing scooters (hoverboards). This involved a collaborative approach to identify suppliers that were offering hoverboards for sale and taking appropriate action including issuing show cause letters to suppliers and negotiating voluntary recalls and bans.

It was agreed that CAV field inspection officers would perform point-of-sale audits of targeted businesses and collect the technical information marked on the hoverboards found. Any identified hoverboard was then investigated by ESV to determine compliance to the relevant Australian Standard.

ESV and other specialist technical regulators have been proactively developing online databases to support industry and community, to supply and purchase, respectively, equipment that is certified and registered to specific safety and technical standards.

GTRC DATABASE

It is possible for consumers to confirm the certification status of Type A gas appliances and gas components directly. All Type A gas appliances sold in Victoria are required to be certified by an approval scheme recognised by ESV before they are able to be supplied, sold or installed in Victoria.

Gas components referenced in the gas installation standard AS/NZS 5601 as requiring certification cannot be installed by a licensed plumber unless they are certified. Certified appliances are required to be marked with the certification number and details of the certification body.

Using this information it is possible for industry and the public to verify the certification status of gas appliances and gas components by searching on the GTRC website.

ERAC DATABASE

Similarly, ERAC maintains a national database of certificates of approval for high risk electrical equipment. This is also available on the internet for the public, industry and regulators to search and verify the certification status of high risk electrical equipment and is accessible from the ERAC website.

It is proposed that this database be expanded to include a register of all Australian and New Zealand responsible suppliers with any medium or high risk electrical equipment supplied by a responsible supplier also registered on the database to that supplier. Responsible suppliers are any persons who import into Australia or New Zealand or manufacture in Australia or New Zealand, low voltage consumer electrical equipment.

This requirement is already in place in Queensland with most of the remaining jurisdictions currently developing an Intergovernmental Agreement and corresponding legislation to introduce the Queensland registration requirements in their own jurisdiction. The new requirements are referred to as the Electrical Equipment Safety System or EESS.

The database will provide specialist regulators with the ability to make notes and share information in relation to a supplier or product, which can be accessed by all other regulators. The Australian Communications and Media Authority also currently utilises the database for the administration of its Electromagnetic compatibility (EMC) requirements.

In addition to facilitating the sharing of information amongst regulators, suppliers will be able to use the database to effectively manage their compliance obligations and maintain their equipment certifications in one place. Retailers and the public will be able to check the register to ensure they are buying compliant equipment from a registered supplier.

This will offer consumers a choice when making purchasing decisions. Consumers will be able to choose whether to purchase equipment from registered responsible suppliers or risk purchasing products that may be unsafe or unsuitable for use in Australia from an overseas online supplier or at a market. The database will be complemented by the adoption of a uniform Regulatory Compliance Mark, which will indicate to consumers that the electrical equipment complies with Australian requirements.

The database will also provide an efficient and effective way to communicate with suppliers via email. Regulators will be able to provide education materials, information, alerts, recall information and updates to all registered responsible suppliers, which will assist them in supplying safe and compliant electrical equipment and maintaining the best quality control practices.

ESV also has an annual campaign warning consumers about the dangers of purchasing cheap electrical and gas products online directly from foreign suppliers and from local markets. ESV's current commercial is available to view on its YouTube channel and is promoted online at websites such as ebay and Yahoo7 and in advertisements aired in cinemas and on radio.

The Commission would welcome comprehensive information on the specialist consumer safety regulatory regimes that lie outside the ACL and the regulators responsible for administering those regimes in and across jurisdictions in Australia. What are the rationales for the delineation of enforcement responsibilities under the different regimes?

While there may be some slight differences at the margin, the specialist regimes for gas and electrical appliances and equipment are relatively uniform across the Australian jurisdictions. The current regimes for gas and electrical equipment have been in place for several decades and predate the current ACL regime.

These regimes were established individually at a State/Territory level and have developed to implement a pre-market approval and acceptance process for these types of products. This is not a feature of the ACL and it is considered to be an essential measure in preventing unsafe electrical and gas equipment from entering the Australian market.

Another reason for maintaining the specialist regime is the need to regulate gas and electrical products that are outside the scope of the ACL. In particular, commercial and industrial products and building materials.

In Victoria, ESV is responsible for gas and electrical safety. This includes oversight of the supply of gas and electrical products and monitoring and enforcing the Standards applicable to gasfitting and electrical installation work.

ESV also monitors and audits the activities of private Conformity Assessment Bodies to ensure that they are carrying out pre-market approvals/certifications of gas and electrical appliances and equipment to the standard required to ensure that the products comply with the mandatory standards and are safe to use.

What challenges to product complexity and bundling, and overlapping regulation, pose for ACL regulators, specialist safety regime regulators, businesses and consumers? What are some current examples of particular concern? How significant are these challenges? Does the availability of alternative avenues of regulating particular products assist ACL or specialist safety regulators in protecting consumers?

A key challenge for ESV is dealing with a product safety issue in cases where the importer has gone out of business. These businesses can choose to enter liquidation rather than respond to a safety issue related to a product they have supplied.

In some cases, the regulator can rely on large retailers who on-sold the product to conduct the recall but this is not always the case. These issues are made more difficult with respect to electrical and gas appliances and equipment that are installed in consumers' homes by tradespeople. In these circumstances, consumers are not in a position to remove or replace the products themselves as it is work that generally requires a licensed tradesperson to carry out.

This can significantly increase the costs of a recall with an equivalent increase in the temptation for suppliers to liquidate their business or take other measures to avoid responsibility and the costs of a recall for a safety issue they have caused. The businesses can continue trading in the same or similar products in a new or different corporate entity to the one responsible for the recalled product.

The Commission could consider whether there are any new measures to ensure that suppliers take responsibility for the safety issues their products create. This could include statutorily deeming that the officers of a liquidated corporate entity be personally liable for the costs of a recall action, introducing a recall fund or insurance scheme that all suppliers must contribute to, or requiring suppliers to hold recall insurance (assuming such a product is available).

With respect to requiring mandatory insurance or establishing a recall fund, the proposed EESS database of registered responsibly suppliers could form the mechanism for implementing any future reform with respect to suppliers of electrical equipment.

Are current protocols for communication, cooperation and coordination between regulators of specialist safety regimes and ACL regulators effective in dealing with consumer concerns where regulators in both regimes have responsibility for consumer protection?

The current arrangements have worked well but there could be improvements by establishing more formal arrangements between the different regulators, including development of MOUs or enforcement protocols.

What progress has been made in removing unnecessary and costly divergences in regulatory requirements between industry specific state and territory consumer protection regimes since 2008? Where has progress been limited, why? Is there a case for pursuing one law model for areas of product safety regulation, or other means of reducing the costs of variations, where there are currently state variations? If so, what areas should be priorities for review?

The requirements for certification of gas and electrical equipment are almost identical across all Australian jurisdictions so there are no additional fees or burdens on industry. One certificate of approval or acceptance for gas equipment or electrical equipment is recognised nationwide.

What are the ramifications of changes in products and nature of sales (including the move to online sales) for the enforcement of consumer product regulation? Are there other models that could provide lessons for the approach adopted in Australia?

In the past five years there has been increasing availability of electrical and gas appliances and products through online sales directly to industry participants and consumers. The other

major change is that most gas and electrical appliances and products are now being imported into Australia and are not manufactured locally.

ESV has worked with eBay and Gumtree and both businesses have been prepared to publish safety notices and remove certain sellers from activity. Separately, ESV has developed education campaigns targeted at consumers, electricians and gasfitters.

Perhaps consideration could be given to developing a formal relationship between the ACCC and major facilitators of online sales (e.g. eBay, Gumtree, Alibaba). Such a relationship could include the implementation of a mechanism by which the ACCC could notify these major facilitators of unsafe gas and electrical product so that any listings of these products can be removed from website sales promptly.

Energy Safe Victoria

30 August 2016

EM Policy and Legal