

30 August 2016

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

Submission electronically uploaded: <http://www.pc.gov.au/inquiries/current/consumer-law/make-submission#lodge>

Dear Commissioner,

Consumer Law Enforcement and Administration Issues Paper – 15 July 2016

Thank you for the opportunity to provide comments on this Issues Paper. Queensland Law Society appreciates being consulted on this important review.

This response has been compiled with the assistance of the Competition and Consumer Law Committee who have substantial expertise and practice in this area.

We provide our feedback in the **attached** submission. The Society is happy for the submission to be published and would be pleased to be involved in any public forums, conferences and consultations with respect to the paper.

Thank you again for the opportunity to provide comments on the Issues Paper.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Government Relations Principal Advisor, Matt Dunn on ☎

Yours faithfully

Bill Potts
President

QLS Submission - Productivity Commission Review of Consumer Law Enforcement and Administration

PC Information Request	QLS Submission
Part A- How is the multiple regulator model for the ACL working and how could it be improved?	
Reported progress	
<p>1 The Commission is seeking participants' comments on the progress in implementing the ACL and the general success of the multiple regulator model.</p> <p>2 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? To what extent have the 'high level' reforms documented in the implementation progress reports been reflected in improvements in 'on the ground' administration, compliance and enforcement of the ACL?</p> <p>What evidence or metrics are available that can be used to assess or substantiate these claims?</p>	<p>The Queensland Law Society (the Society) is aware of the high level reforms documented in the ACL implementation progress reports. Anecdotally the Society is aware that these reforms have led to improvements in the on the ground administration, compliance and enforcement of the ACL by its multiple regulators.</p> <p>However, the Society recognises that there is still room to continue to improve the existing co-ordination between the multiple regulators of the ACL to ensure there is no duplication of roles between the regulators.</p> <p>The Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).</p>
<p>3 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? How, in broad terms, could any such problems be addressed?</p>	<p>The Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).</p>
<p>4 What, if any, alternatives to the multiple regulator model</p>	<p>Based on the information presently available to it, the Society believes that the most feasible</p>

PC Information Request

QLS Submission

should be considered? What benefits and costs would the alternatives have?

alternative to the multiple regulator model at a Federal level is a sole regulator model, in which one Federal regulator takes responsible for ACL enforcement. The Society's preliminary view is that it would be better if the sole Federal ACL regulator was the ACCC, rather than ASIC.

In comparison with the multiple regulator model, a single Federal ACL regulator model will be more efficient as:

- overhead costs of coordination between regulators will be removed;
- no duplication of functions between regulators will occur;
- there will be a greater ability for that regulator to make decisions which are consistent with consumer priorities;
- enforcement of the ACL is likely to be simpler (from the regulator's perspective);
- the centralisation of Federal ACL enforcement is likely to enhance the development and retention of ACL regulatory skills and knowledge;
- public awareness and understanding of the ACL is likely to be increased.

All of these efficiency benefits will be advantageous to consumers.

The Society acknowledges some practical costs may arise in any change to a single Federal ACL regulator. In particular, the Society is conscious of the potential for a reduction in jobs, and expertise, due to having a single Federal ACL regulator, however the Society believes that the benefits from having a single Federal ACL regulator are likely to outweigh the costs.

The Society believes that the existing State ACL regulators are functioning effectively, and are appropriately focussed on ACL issues within their respective States. The Society believes that the existing State ACL regulators should be retained in their present form.

Resourcing issues

5

Are the levels of resources for enforcing the ACL adequate? What are the effects of differences in resources available to state and territory ACL regulators? To what

In summary, based on the information presently available to it, the Society's view is that the resources available to regulators enforcing the ACL are not adequate.

Central to the aims and/or objectives of Australian regulatory bodies with consumer protection

PC Information Request

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?

QLS Submission

as part of their ambit, is to promote and ensure consumer confidence and participation in the Australian economy. The Society notes funding of regulators, at both a state and federal level, will likely always be an area of contention. There are those who will argue the regulators are financially frustrated from performing their role in a meaningful way, while others promote the view that regulators do not use the monies they are budgeted in an efficient or effective manner. The Society's view is that both state and federal regulators with responsibility for consumer protection, must be sufficiently funded in order to be capable of achieving their legislated aims and objectives.

ASIC and the ACCC's budgets have been reduced in recent years. ASIC lost 14% of its staff, the ACCC 10%. An interesting decision during a period of unprecedented corporate misfeasance and consumer dissatisfaction with the financial system and performance of certain regulatory bodies. It was announced in April this year that a user pays model for ASIC is to be commenced, resulting in a budgetary boost of between \$121 – 127m for ASIC, with a view to ASIC becoming entirely funded by the industry it regulates. The Society acknowledges community concerns that in adopting this strategy for regulatory funding, an inference could be drawn that ASIC is no longer as independent.

The above decision was made in a post GFC environment in which it is recognised that self-regulatory models, intended to result in reduced regulatory involvement through industry self-policing, have been found to be largely unsuccessful. Alan Greenspan noted on 23 October 2008, at a GFC congressional hearing, "I made a mistake in presuming that the self-interests of organisations, specifically banks and others, were such that they were best capable of protecting their own shareholders and their equity in the firms".

In making this statement. Mr Greenspan appears to be advocating that the funding of regulators should be increased, rather than be cut and supplemented with funding sourced from industry. This approach is commensurate with the resultant increase in responsibility arising from the perceived need for greater independent oversight.

In 2014, ACCC announced its concerns with respect to further budgetary cuts, claiming it was operating in a "constrained financial environment". However, ACCC chairman Rod Sims stated, "The ACCC will continue to take action where it believes there is significant consumer detriment or there is a risk to competition to ensure that businesses are compliant with the Australian Consumer Law".

When considering the question asked : "Are the levels of resources for enforcing the ACL adequate?", the Society believes it is also important to ask whether the sanctions available to

PC Information Request

QLS Submission

the regulators are capable of delivering a correction to both corporate attitudes and the market place, as opposed to present penalties which are often viewed more as a mere cost of doing business in Australia. (The Society is conscious this question is beyond the scope of the present review.)

The next question is whether the regulatory resources are being used effectively.

The Society is satisfied that the split of responsibility for matters as between the Commonwealth and State regulators is one in which there should be some overlap, which can be resolved as between them, where not already dealt with legislatively. An example of this is found at Part 1.1A of the Corporations Act 2001 (Cth). The result sought by the Society is one where the agencies collaborate in an efficient and effective manner by playing to their respective strengths.

Funding Special matters

History has demonstrated that where a party has the financial means to spend more than the regulators in a given piece of litigation, the Government will step in and create a special fund with the specific purpose to level the playing field (see ASIC v Rich). This is likely the best way to deal with such an issue. The alternative is to up regulatory budgets, which have a habit of being spent in order to indicate ingoing need.

Enforcement tools and approaches

6

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 Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).

As a preliminary view, the Society believes that consumer outcomes would be improved if greater transparency is applied to enforcement processes by regulators. Greater visibility of the regulators' decision making process is likely to positively affect consumer rights within the enforcement process, as well as encouraging public confidence in the regulators.

On way in which greater transparency could be achieved is for ACL regulators to publish their

PC Information Request

QLS Submission

enforcement guidelines, explaining how decisions to take (or not take) enforcement action are made within the organisation. Publication of this information will also enable:

- enhanced scrutiny of the actions, priorities and budgets of regulators, and better-informed public debate regarding these matters; and
- more certainty for business and consumers regarding enforcement and the consequences of non-compliance with the ACL.

Allocation of issues and responsibilities between regulators

7 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?

The Society is aware of Memoranda of Understanding which exist between regulators. The Society notes that the most recent ACL MOUs were entered into in mid-2010 by the following parties:

- ACCC
- ASIC
- Fair Trading NSW
- Consumer Affairs Victoria
- Office of Fair Trading Qld
- Department of Commerce WA
- Office of Consumer and Business Affairs SA
- Consumer Affairs and Fair Trading Tas
- Consumer Affairs NT
- NZ Commerce Commission
- NZ Ministry of Consumer Affairs,

However, the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper,

PC Information Request**QLS Submission**

and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).

- 8 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?

The Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).

Intelligence gathering and sharing

- 9 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 Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).

The Society notes a balance should be sought to be achieved that facilitates the sharing of information, in order to bring about greater efficiencies and more effective regulation, but which also ensures that the information entrusted to ACL regulators is treated in a manner which complies with the appropriate legislation dealing with its collection, retention, usage, amendment and storage.

- 10 If not, what arrangements might be cost-effective to institute that could provide such a national database? Are there approaches used by other countries that provide lessons for Australia on how it might improve the sharing of information among the different ACL regulators, or in other ways (for example, artificial intelligence or machine

The Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).

PC Information Request

QLS Submission

learning) identify emerging consumer harms or scams, or areas for priority enforcement?

Other issues

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

The Society considers that there are a number of problems with the administration and enforcement of the ACL under the multiple regulator model including:

- Consumer confusion as to which regulator can assist with consumer complaints
- Inability to readily spot emerging trends in the market, and take timely action where there are multiple regulators receiving information from consumers. Sharing of information between regulators, even if occurring regularly occurs after the fact.
- Duplication of resources and use of tax-payer funded departments in maintaining separate bodies administering the ACL.
- Limitations on resourcing mean that focus areas and enforcement are not be consistent across regulators.

Based on the information presently available to it, the Society believes that it a preferential alternative to the multiple regulator model at a Federal level is a sole regulator model, in which one Federal regulator takes responsibility for ACL administration and enforcement.

12 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?

The Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).

Part B- Specialist safety regulatory regimes and their interface with the ACL

PC Information Request	QLS Submission
The institutional 'architecture' for consumer safety regulation	
<p>13 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?</p>	<p>The Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).</p>
Complexities associated with multiple regulators	
<p>14 What challenges do 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?</p>	<p>The Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).</p>
<p>15 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? In particular:</p> <ul style="list-style-type: none"> • Are those protocols effective in ensuring that consumer concerns about product safety received by one regulator are effectively directed to the most appropriate 	<p>The Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).</p>

PC Information Request**QLS Submission**

(ACL or specialist safety regime) regulator?

- Are there examples of especially good or poor interaction between ACL and specialist regulators, and what lessons might these provide to improve interaction between ACL and specialist safety regime regulators?

16 What changes to current arrangements are needed to achieve effective communication, cooperation and coordination of consumer protection regulation among regulators of ACL and specialist safety regulatory regimes?

The Society is not aware of the informal processes that exist between the ACL and specialist safety regulators to achieve effective communication, co-ordination and co-operation between the ACL and specialist safety regulators.

As a preliminary view, Society submits that the existing co-ordination and co-operation between regulators would be improved through the formalisation of these existing arrangements in a similar way to that which has occurred between the multiple regulators of the ACL.

17 Can formal protocols for communication and cooperation provide effective channels or are broader organisational changes (such as co-location or amalgamation of regulatory functions) needed?

It is the Society's view that co-location of regulatory organisations at a Federal level would not be sufficient to provide effective channels of communication between regulators. In the absence of formal protocols allowing the sharing of relevant information, information would continue to be siloed in each organisation.

The Society considers that amalgamation of regulatory functions at a Federal level is necessary. Based on the information presently available to it, the Society believes that the most feasible alternative to the multiple regulator model is a sole regulator model, in which one Federal regulator takes responsibility for specialist safety regimes.

Regulatory variations at the State and Territory level

18 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 progress has been limited,

The Society believes this question merits careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the

PC Information Request

QLS Submission

why? Is there a case for pursuing a 'one law' model for areas of consumer 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?

Productivity Commission's Draft Report (presently scheduled for release in November 2016).

Other market developments

19

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?

The Society believes these questions merit careful consideration, however the Society needs more information in order to respond fully. The Society anticipates that further information will be provided in the ACL regulators' response to this Issues Paper, and accordingly the Society proposes to provide a more detailed submission in relation to these issues in response to the Productivity Commission's Draft Report (presently scheduled for release in November 2016).