

30 August 2016

Consumer Law Enforcement and Administration
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Via online lodgement: www.pc.gov.au/inquiries/current/consumer-law

Dear Productivity Commission Commissioners

Consumer Law Enforcement and Administration: Issues Paper

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, as well as in the not-for-profit (NFP) and public sectors. They frequently are those with the primary responsibility for dealing and communicating with regulators such as the Australian Securities and Investments Commission (ASIC) and consumer law agencies, including the Australian Competition and Consumer Commission (ACCC) and we have drawn on their expertise in this submission.

Governance Institute believes that good governance is a prerequisite to businesses becoming more accountable, transparent and ethical in their dealings with all stakeholders, including their customers. As such, the objectives of Governance Institute are aligned with the overarching objectives of the National Consumer Policy Framework that emphasises the prevention of unfair practices and promotes confidence in fair and efficient markets by enabling informed consumers.

Governance Institute made a written submission to the parallel Consumer Affairs Australia and New Zealand (CAANZ) review on behalf of its members in May 2016 and welcomes the opportunity to provide feedback on the Productivity Commission's issues paper on how the multiple regulator model for the Australian Consumer Law (ACL) is working and could be improved. Governance Institute has limited its comments to this issue and does not address the issues concerning the specialist safety regulatory regimes referred to in the issues paper. Our submission does not deal with each information request but provides our general comments.

Multiple regulator model

Governance Institute is of the view that the multiple regulator model does cause confusion, which in turn creates problems for consumers (and their advisers) in seeking redress, due to the divided responsibility between federal and state and territory governments.

We question how well consumers understand the various legal avenues of redress under the legislation and how this impacts on their ability to utilise the provisions. We note that, depending on their grievance, consumers can institute proceedings in the Federal Court of Australia or lodge a claim with various state tribunals or courts. A consumer requires a certain level of

sophistication in order to determine whether they may have a claim and through what court or tribunal they can pursue it.

We are of the view that consumers should not be required to have nuanced knowledge of the applicable legal and regulatory framework to know how they can seek redress. It is a strong disincentive to seeking redress if consumers feel that they require legal advice before acting on their rights.

Another source of confusion for consumers and their advisers is that states and territories still have sale of goods legislation which contain implied terms and warranty provisions that are similar but not identical to those available to consumers under the ACL. While Governance Institute acknowledges that this is outside the scope of the review, we consider that governments could consider harmonising consumer legislation to ensure consistency across the jurisdictions by referring all powers concerning consumer law to the Commonwealth. This would ensure that consumers need only access one piece of consumer protection legislation administered by one regulator in order to make a consumer complaint. This would address issues of inconsistency, gaps and overlaps in consumer law. Governance Institute, however, acknowledges that a referral of powers to enable a single consumer law regulator administering a single act covering all aspects of consumer protection is outside the scope of this review and would face constitutional and practical impediments.

In our submission to CAANZ, Governance Institute recommended that the relevant consumer bodies be charged with providing more guidance and information to consumers to better explain the ACL framework and to better inform consumers on how they can use the system to obtain a solution to their problem. Materials such as short guidance notes, educational videos and short, accessible 'How To' guides are useful information tools and are currently used by government agencies such as ASIC and the Australian Charities and Not-for-profits Commission to inform consumers and those engaging with charities of their rights. These materials could be adapted by consumer agencies to fill this knowledge gap. While we recognise that guidance is currently made available on the ACL website, we question whether it is 'consumer-friendly'. For example, we note that at present the fact sheets available on the ACL website can run to 42 pages in length — most consumers would not consider this to be accessible guidance or conducive to reading. Any guidance should be tested with consumers to make sure it enables understanding.

Governance Institute also recommends that the regulators improve the way in which they cooperate, coordinate and communicate to facilitate simplification and integration of the information given to consumers as well as the experience which consumers have when they access websites for information on a complaint. Governance Institute notes, by way of example, that the home page of the NSW Government's Department of Fair Trading, which is the ACL regulator for NSW, does not refer to the ACL. We suggest that ACL regulators develop a central consumer website to operate as a single 'one-stop shop' containing hyperlinks which lead consumers to the relevant site appropriate to their complaint, depending on their responses to some simple gateway questions. A consumer enquiry could therefore be funnelled to the website of the relevant regulator such as ASIC, ACCC or the consumer affairs websites of the states and territories, depending on the information provided in their responses. To that end, a 'take the quiz' field could be developed to ascertain consumer rights in a similar fashion to the Fair Work Commission website where, for example, an employee is able to determine if they are eligible to bring an unfair dismissal claim. Similarly, the ATO has recently introduced a short quiz to assist organisations determine the distinction between a contractor and an employee. ACL regulators could also cooperate to achieve greater standardisation of layout and language of their websites to ensure each one has a consistent look and feel in order to give consumers a more streamlined and user-friendly experience. This would require ACL regulators at the Commonwealth, state and territory levels to undertake greater cooperation and consultation than they currently do.

Governance Institute notes that one of the objectives of the ACL is to meet the needs of vulnerable and disadvantaged consumers. We consider that these consumers often fall within the category of those who find the ACL framework the most confusing and require more

assistance in order to avail themselves of any remedy. In order to redress this imbalance, the ACL must be presented and communicated in the simplest possible way. Governance Institute recommends that ACL regulators consider cooperating with organisations in the social justice sphere to present information on their websites concerning the ACL framework and consumer rights. These social justice websites could also contain hyperlinks to the relevant ACL regulator websites to enable consumers to access relevant information by way of a simple 'click through'.

Enforcement tools and approaches

Governance Institute supports greater consistency of the enforcement tools available to the regulators across jurisdictions. Currently the ACCC has broader enforcement powers than the states and territories, which leads to inconsistency in enforcement depending upon the jurisdiction in which the matter was commenced.

Governance Institute recommends that the ACCC's powers be introduced into the state and territory consumer laws to enable consumers to access the full range of remedies.

Application of the ACL to not-for-profit organisations

Governance Institute has also lodged a joint submission to the Productivity Commission with the Australian Institute of Company Directors (AICD) and JusticeConnect, with specific reference to the not-for-profit (NFP) sector. We do not repeat the points raised in our joint submission here, but simply note that a number of parties, including Governance Institute, AICD and JusticeConnect, recommended in our submissions to the review of the ACL conducted by CAANZ that amendments be made to the ACL to put its application to NFP organisations beyond doubt, including in relation to fundraising activities. The submissions made by a number of parties to that review made the point that the implementation of the ACL has not been sufficiently progressed in terms of its application to the activities of NFPs. In our joint submission to the Productivity Commission, we make the point that this has implications for the administration and enforcement of the ACL.

We look forward to seeing the results of the review.

Yours sincerely

Steven Burrell
Chief Executive