



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Australia
ABN 76 369 958 788

23 January 2017

Ms Julie Abramson, Commissioner
Productivity Commission
Email: consumer.law@pc.gov.au

Dear Commissioner

PRODUCTIVITY COMMISSION DRAFT REPORT ON CONSUMER LAW ENFORCEMENT & ADMINISTRATION

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission to the Productivity Commission's draft report on the effectiveness of the "single law, multiple regulator" model for the national consumer policy framework.

Further to our previous submission to the Productivity Commission on its issues paper for this review, we wish to add to our previous points in response to the Productivity Commission's draft findings and recommendations.

1. INFORMATION REQUEST – The Commission invites further comment and detailed information on: the nature of inconsistencies, including specific examples, in the approaches of the ACL regulators to administration and enforcement; the materiality of these inconsistencies for consumers and/or businesses; and options for addressing inconsistencies across ACL regulators.

We have previously used the Infinity Cables recall matter as an example of where there have been different interpretations between Australian Consumer Law (ACL) regulators of what constitutes a consumer product and a need for policy makers to provide regulators with consistent guidance to the regulation of consumer products.

Below are other examples in which our members have experienced inconsistencies in regulator approaches, specifically around non-conforming building products.¹

Example 1

The following example demonstrates differences in regulatory approaches between the national regulator (ACCC) and NSW regulator (NSW Office of Fair Trading) over a material issue. Here, an Ai Group member, HPM Legrand, detected counterfeit versions of their double power point (cat no XL777) being sold in 2006. They approached the ACCC who decided not to take enforcement action; instead the NSW Office of Fair Trading (OFT) took action.

HPM Legrand stated:

"We found out because we had a sudden spike in warrantee returns when normally we have very few. Investigation of the returns found that they were counterfeit. With the help of some concerned electrical contractors we found they were being sold from a lighting shop in Bexley. We approached the ACCC about the fact they had counterfeited our logo. They informed us they were not interested and that we could mount a civil case against the company.

We then approached the OFT and they agreed to prosecute the company on the basis that they had used the RCM without a licence. Using their powers of search and evidence gathering the OFT were able to get enough evidence to mount a successful prosecution. I was

¹ These examples were previously presented to the Senate Economics Committee into non-conforming building products in November 2015.

able to give evidence to prove that the products were counterfeit by identifying subtle deviations in the counterfeit tooling that wasn't in our tooling. Unfortunately although the person was successfully prosecuted the fine was only \$8000, although there was anecdotal evidence that he has sold \$400,000 of product, mainly to small multi-unit developers. We also had a similar case with some counterfeit MCBs. The only way we found out about that was when the partners importing the counterfeit breakers had a falling out and split up, with one getting all the stock. The loser dobbed his old partner into us. Again we used the OFT to prosecute them over unlicensed use of the RCM, but again they received a small fine and forfeiture of their stock. We have not detected any more counterfeit HPM Legrand product since but there may be more that we don't know about."

Example 2

Another example of regulatory inconsistency was between State jurisdictions in Queensland, and NSW and Victoria.

Ai Group member, Schneider Electric, manufactures a product called the Clipsal 413QC Quick Connect. This is a power socket that through innovative design can connect to a power cable without the requirement to remove the insulation from the conductors. The design was developed by an Australian company, Krone, under the supervision of Clipsal engineers. A copy of the product was identified in the Victorian market in June 2013 under the name of Zeger and then in December 2013 it was identified in the NSW market under the brand of NADWAY. This product was found in the Queensland market in 2015. State regulators have acted in the NSW and Victorian markets where the product was withdrawn. Advice is yet to be received from the Queensland regulator.

2. DRAFT RECOMMENDATION 4.1:

- ***The State and ACT governments should relinquish their powers to impose compulsory recalls or interim bans. This would signal that it is the Commonwealth's responsibility to immediately respond to all product safety issues that warrant a compulsory recall or ban.***
- ***In parallel with any such change in responsibilities, there should be a mechanism for State and Territory governments to raise and provide input on product safety matters to the Australian Competition and Consumer Commission (ACCC) that they consider would warrant a compulsory recall or ban.***

In principle, we can see the benefits for industry in having to engage with one regulatory body as opposed to multiple regulators. However, the effectiveness of a single regulatory body is only as strong as its ability to properly enforce and administer the ACL. Critical issues still remain with how the ACL is interpreted and applied by the regulator, as well as the regulator's ability and willingness to properly consult with relevant industry stakeholders. The response time of the regulator should also be given consideration particularly in light of additional consultation requirements.

We would like to also point out that this is a separate issue to Consumer Affairs Australia and New Zealand's (CAANZ) proposal in its interim report to introduce a general safety provision.

Currently, regulation requires that all products sold in Australia must be safe, and declared articles must also be certified by a relevant body or authorised external approval scheme. An underlying problem with the current arrangements is the challenge for regulators to engage with relevant suppliers of unsafe products, and having the capacity to properly administer and enforce safety regulations.

As we indicated in our submission to CAANZ, we consider that introducing a general safety provision will be unlikely to address current fundamental problems around the regulator's capacity to administer and enforce the ACL against non-complying suppliers. Instead, it will create an additional regulatory burden and red tape on suppliers who are complying with the existing arrangements. If CAANZ decides to recommend the introduction of a general safety provision, we would welcome the opportunity to

explore further the cost and benefits of how such a provision would operate and how allocation of product safety risk is dealt with.

We would also like to bring to the Productivity Commission's attention that Standards Australia has recently circulated a proposal to adopt two international standards which is being driven by the ACCC: ISO 10393:2013 Consumer product recall – Guidelines for suppliers; and ISO 10377:2013 Consumer product safety – Guidelines for suppliers. We have also brought this to the attention of CAANZ and suggest the Productivity Commission consider what impact these standards will have on its review.

3. DRAFT RECOMMENDATION 4.2 – ACL regulators should publish a comprehensive and comparable set of performance metrics and information to enhance their public accountability and enable improved regulator performance. Consumer Affairs Australia and New Zealand (CAANZ) could be charged to develop a reporting framework with a view to providing meaningful metrics and information on: resources expended on regulator activities; the range and nature of regulator activities; behavioural changes attributable to regulator activities; and outcomes attributable to regulator activities.

With respect to performance reporting of ACL regulators, we agree that this is important to ensure public accountability and improve regulator performance.

Ai Group's members consider that excessive or poorly implemented regulation is a serious problem. This assessment has been expressed repeatedly by respondents to Ai Group's own surveys and is corroborated by international comparisons. The 2016-17 World Economic Forum Global Competitiveness Report ranked Australia 80th (out of 140 countries) for the burden of government regulation, which suggests this area needs to be improved to reduce its impact on Australia's overall global competitiveness.²

For businesses, success in the form of government regulation will be critical in creating the circumstances conducive to shaping a more competitive nation and generating higher growth, stronger investment and increased employment opportunities. And it is the conduct of regulators which is as important to the effectiveness of regulation as is the design of the laws themselves.

Ai Group advocates a range of best practice regulatory principles to reduce the regulatory cost burden on business. As previously detailed in our submission to the Productivity Commission on its inquiry into regulator engagement with small business in 2013, we recommended all regulators should adopt our proposed list of best practice regulatory behaviours (an updated list is attached to this submission). We consider this list should be relevant to the development of any set of metrics used to improve regulator performance.

In consultation with stakeholders, the Australian Government has also developed the Regulator Performance Framework for Commonwealth regulators, which is intended to reduce the cost of unnecessary or inefficient regulation imposed on individuals, business and community organisations.³ This framework consists of six outcomes-based key performance indicators covering: reducing regulatory burden; communications; risk-based and proportionate approaches; efficient and coordinated monitoring; transparency; and continuous improvement. We recommend that all ACL regulators adopt a similar framework.

Performance reporting will only be effective if it is open to receiving and responding to feedback from industry. Development of performance metrics for ACL regulators should be done in consultation with industry and the community to ensure that regulators are appropriately made accountable for decisions

² <http://reports.weforum.org/global-competitiveness-report-2015-2016/competitiveness-rankings/>

³ <https://www.dpmc.gov.au/regulation/commonwealth-regulators/regulation-performance-framework>

that directly impact on industry and the community. To enable this, a mechanism should be put in place to allow feedback and ranking of performance by stakeholders.

4. DRAFT FINDING 4.2 – A national database of complaints and product safety incidents has merit. It would enable better identification and analysis of consumer hazards and risks, and help focus ACL regulators' compliance and enforcement activity. CAANZ should examine the impediments to establishing such a database, its likely benefits and costs, and, subject to the findings of that analysis, develop a plan to implement such a system. CAANZ should also consider what information from the database should be publicly available.

While the Productivity Commission acknowledges Ai Group's concerns with the operation of the NSW complaints register, Ai Group would like to highlight certain assumptions that have been used to support the current form of the register. While these assumptions may be well-intentioned, they are misplaced, resulting in a poorly designed register that neither benefits the general public nor industry in the long term. These mistakes should not be repeated in the design of any other proposed public complaints register or database, including the Productivity Commission's proposed national database.

These problems are set out below along with principles which we consider are essential in the design of any consumer complaints register.

Lack of information, and feedback and complaint resolution mechanism

The NSW register was designed with the objective to deliver better customer service and assist customers to make more informed decisions. This means that the public have a right to be presented with any information relevant to the complaint to allow them to make more informed decisions.

It is unclear how the register will help consumers make more informed decisions given the following features:

- a low threshold for reporting complaints of 10 complaints made against a brand, which does not distinguish legitimate and reasonable complaints;
- easily misunderstood and misrepresented information, such as provision of complaint numbers without relating these to trading volumes; and
- limited information about the complaint.

As a consequence, the public is denied relevant information and is more likely to make misinformed decisions. Businesses are also unable to improve their practices without sufficient information about the complaint. This neither helps the consumer who made the complaint in seeing legitimate and reasonable matters resolved, nor other consumers in the future.

Since the NSW register has only been established since July 2016, and there is no mechanism for complaint feedback to businesses, it is also unclear whether the register has contributed to a reduction in complaints. Current business consumer complaints procedures may already be operating effectively without any additional value provided by the register.

The Productivity Commission notes more comprehensive registers exist including the US financial complaint database and that of the Financial Ombudsman Service. While we are not across the design of these registers, it appears that on their face these other registers have the potential to address some of the concerns that we have raised with the NSW register.

Name and shaming mechanism without procedural fairness

Publicity around the NSW register has inadvertently turned it into a "naming and shaming" enforcement mechanism in the eyes of the public. This tool has the potential to be very damaging to businesses' reputations. Reputation is invaluable and difficult to repair if it is damaged – policy makers and regulators should not underestimate this.



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

It is therefore critical that the design and administration of the register adheres to the fundamental principles of procedural fairness. We have elaborated further on these below with respect to principles for an effective complaints register.

Brand names vs trading names

The increasing presence of online retailers gives consumers a range of choices including whether they purchase from local or overseas suppliers. Some consumers may choose to purchase a product from overseas because they consider there is a price saving. However, consumers need to be aware that the benefit of purchasing locally (whether online or in store) is that the local price covers the local supplier's costs for doing business in Australia, including meeting local compliance costs (e.g. Australian product safety standards), providing parts for local models (as opposed to overseas models), and maintaining local service and support to consumers.

This is an important reason a branded product sourced from overseas is priced differently to the same brand purchased locally. This is also why policy makers and regulators need to be conscious of the legitimate distinction between the trading name and the brand name.

Therefore, if the consumer chooses to purchase a product from an overseas source, local suppliers and distributors should not be held accountable for products purchased from an overseas supplier even if they share a brand. While the ACL should be clarified in this respect, it is also critical that the complaints register recognises this as well.

As we have previously stated to NSW Fair Trading, many companies may share a brand but have independent operations and supply/distribution chains in Australia (not to be confused with franchisees which is a different topic). While a consumer may only discern a single brand, there may be no ability for the organisations that operate under the brand umbrella to collectively control variables such as product quality that can result in complaints. There appears to be a lack of regulator understanding and appreciation of these commercial constraints.

Companies should be given the right to make a case to NSW Fair Trading on what "trading" or "brand" names should be used for complaint logging purposes on the basis of business structure and/or ownership.

Online product reviews

Consumers increasingly can share their experiences with products on online review websites. The Productivity Commission notes that these forums, as well as social media, should be taken into account in terms of the potential value (and harm) to consumers and the reputational effect on businesses.

At a time when the dissemination of fake information to the wider public via social media has gained prominence, caution is needed in assessing the value of online product reviews.

We note that the ACCC has specifically published guidelines about online reviews for business, reviews and consumers. The ACCC recognised that this publication was necessary as consumers consider these websites as a low cost aid to making more informed purchasing decisions. The ACCC also considered online reviews to be a positive development so long as the integrity of those reviews is assured.

This raises an interesting point, particularly in the context of the NSW register. While the Productivity Commission considers that a more comprehensive register could still risk adversely affecting businesses through the publication of baseless or vexatious complaints, it is important for the register to be based on integrity. This can only be delivered through an appropriately designed, implemented and administered register, based on the principles of procedural fairness.

Administrative resources

The Productivity Commission considers that the NSW complaints register is less resource intensive, which on its face appears to be a positive design aspect. However, this does not mean that the register is administratively efficient for both the regulator and businesses.

As stated before, the policy objective of the register is to provide better customer service and help consumers make more informed choices. However, the NSW register's design (including limited information and low complaints threshold) does not deliver this desired outcome, which may be primarily as a result of limited regulator resources.

The pressure on the regulator to provide consumers with timely information compounds the challenge of limited resources.

We understand from member feedback that businesses have also had to create new roles and responsibilities to specifically deal with the NSW register, in addition to their existing internal consumer complaints processes. This duplication of effort for businesses indicates unnecessary additional red tape and burden for doing business in Australia, which runs counter to the various government initiatives to reduce red tape.

For the register to be effective and efficient for the benefit of consumers and businesses, sufficient public resources need to be allocated to ensure that the register is properly administered with the provision of relevant information and adequate stakeholder consultation.

Principles for an effective complaints register

If any complaints register is contemplated in the future, the following principles should be adopted by all relevant regulators. These principles reflect the overarching principle of procedural fairness. We have developed these based on our experience with the NSW register, as well as interactions with other regulators.

1. Impartiality

- Regulators should treat businesses (and other stakeholders) without bias, without a presumption businesses are at fault until proven otherwise. Regulator communication about complaints in the register should not explicitly or implicitly assign or infer fault.
- Regulators should not prejudge the situation and act as if an alleged matter complained about has occurred, or the facts alleged are true, until they are shown to be true.
- Interactions with businesses should not be personalised or adversarial.
- Businesses should not be made to feel that they will be disadvantaged if they take responsibility for adverse incidents and seek ways to immediately learn from them and avoid them in the future. Taking responsibility should not be equated with accepting blame.
- Regulators should not assume that businesses are too unstructured or unsophisticated to understand compliance duties, or assume they will not or do not have systems in place to meet them, until proven otherwise.
- Regulators should develop relationships with industry to ensure they have a balanced view and empathy for issues.

2. Transparency

- Industry should be extensively consulted before establishing any complaints register.
- A register should present full complaint information including reasons for the complaints, without omitting relevant information other than for privacy reasons.
- If no proper assessment has yet been made to determine a fault has occurred, the register should clearly qualify that a breach or regulatory action has not been taken against the business.
- If a complaint is not yet known to have been resolved, the register should clearly note this.
- Regulators should properly investigate a complaint when it is received, including properly consulting with affected stakeholders. This should be included as part of the complaint information.

- Businesses should have a right and avenue to respond to complaints made and to only be required to resolve legitimate and reasonable complaints that have been made.
 - Internal review processes or appeal mechanisms should be openly and freely promoted, as part of a strategy to make enforcement be, and appear, as objective as possible. Regulatory staff should actively encourage businesses to use appeal or review mechanisms if the business does not understand or agree with the regulatory action taken or the reasons given for it.
 - Regulators should actively acknowledge positive efforts, improvements or voluntary over-compliance by duty holders.
 - Regulators should provide a clear narrative that explains their objective, including the compliance behaviour they are looking for, and shows the role of every interaction (visit, notice, prosecution) in the context of the overall task of influencing business behaviour.
3. Accountability
- Regulators should clearly demonstrate the steps that they took before reaching a decision to publish any complaints made by adhering to the principles of procedural fairness.
 - Regulators should encourage feedback from affected stakeholders about their performance and that of the register.
 - Regulators should demonstrate action in response to feedback to improve the register and their stakeholder engagement.
 - Businesses should not be held accountable for complaints made in relation to the actions of third parties which are outside of their control.
4. Integrity
- The threshold for registering consumer complaints should only capture legitimate and reasonable complaints.
 - The complainant should provide sufficient evidence to support the legitimacy of a complaint.
 - Businesses should have a right to provide data that provides a trading context e.g. sales volume and number of customer enquiries. Not all businesses may be comfortable to provide trading information, but those that are willing to should be given the right to do so.
 - Businesses should be given the right to make a case to the regulator on what "trading" or "brand" names should be used for complaint logging purposes on the basis of business structure and/or ownership.
 - If the regulator does not have full information on a complaint, it should not publish partial information on the register.
5. Consistency
- Regulators should acknowledge, respect and try to be consistent with rulings, notices or observations made to an affected business by other regulators dealing with the same issue in other Australian jurisdictions. Inconsistency undermines authority and duplicates work.
6. Proportionality
- Benefits for establishing a register should be clearly set out and outweigh the regulatory costs for administering and complying with the register. The establishment of the register should be considered as an option if there is no existing mechanism achieving the same objective as the register.
 - Determination of whether a register has net community benefits should include the costs of adequate administrative resources for regulators and business to support the register.
 - Regulators should understand the regulatory burden to businesses for any proposed change to the existing compliance framework.

5. DRAFT RECOMMENDATION 4.2 – While interaction between ACL and specialist safety regulators generally works well, some changes are warranted. Options to improve the response to product safety concerns currently dealt with by joint ACL and specialist regulators' actions include:

- **instituting formal arrangements to guide cooperation and coordination between building regulators and ACL regulators, and between the ACCC and some national specialist safety regulators**



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

- ***expanding the regulatory tools and remedies available to specialist safety regulators (or at least developing a process to allow them to better harness the national reach of regulatory powers under the ACL)***
- ***introducing greater consistency of legislation underpinning the specialist safety regime for electrical goods.***

ACL and specialist regulators should conduct a mapping exercise to better understand the nature and areas of overlapping responsibility. Memoranda of Understanding should be put in place to address regulatory gaps in surveillance and enforcement.

6. DRAFT FINDING 6.1 – Australian governments should review, and revitalise as necessary, progress in relation to Recommendation 5.1 from the Productivity Commission’s 2008 Review of Australia’s Consumer Policy Framework. That recommendation called for a process to review and reform industry specific consumer regulation that would, among other things, identify unnecessary divergences in state and territory regulation and consider the case for transferring policy and enforcement responsibilities to the Commonwealth Government.

Our submission to CAANZ’s Interim Report is relevant. We identified a number of specific examples of problems relating to consumer guarantees, which have been reported by our consumer electronic and home appliance manufacturer members. These issues may be unique to specific industries and even products; for example, the definition for durability of goods may vary by the type of product. Therefore, we recommended that industry-specific guidelines could be a solution. Development of such guidelines will need further consultation with industry.

However, clarifying definitions and processes through industry-specific guidelines will only partly solve the above issues. Education and awareness programs for consumers and retailers could also complement these guidelines.

Should the Productivity Commission be interested in discussing our submission further, please contact Charles Hoang

Yours sincerely,

Peter Burn
Head of Influence and Policy

Attachment A – Dimensions of Best Practice Regulatory Behaviour

- **The principles of best practice regulation must be adhered to in all dealings with business** including: transparency; accountability; consistency; and careful targeting.
- **All regulations should be simply written in plain English**, so they are easily understood, implemented and enforced.
- **No inspection should take place without a reason.**
- **Businesses should only have to supply information that is necessary and that is unavailable through other sources** (e.g. through other Government agencies).
- **Claims of reduction in regulatory burden should be externally validated** by a process that includes industry-based feedback and assessment.
- **Regulators should share a common objective of allowing and encouraging economic progress** and should carry out their protective role within that context.
- **Businesses should feel encouraged to invite a regulator into their premises.** Regulators should include this in their key Performance Indicators (KPI's) and measure it through regular stakeholder surveys.
- **Regulators should always explain why they are there and what they are looking for.**
- **Regulators should have a consistent narrative** that explains their objective, including the compliance behaviour they are looking for, and shows the role of every interaction (visit, notice, prosecution) in the context of the overall task of influencing business behaviour.
- **Interactions with business should not be personalised or adversarial.**
- **If an inspection is undertaken following a third party complaint (by an employee, union or member of the public etc.), the regulator should not prejudge the situation** and act as if the alleged breach has occurred, or the facts alleged are true, until they are shown to be true.
- **Inspectors should act respectfully towards SMEs and seek to understand the limitations of a small management team.** Conversely, regulators should not assume that small businesses are too unstructured or unsophisticated to understand compliance duties, or assume they will not have systems in place to meet them, until proven otherwise.
- **Businesses should not be made to feel that they will be disadvantaged if they take responsibility for adverse incidents and seek ways to immediately learn from them and avoid them in the future.** Taking responsibility should not be equated with accepting blame.
- **Inspectors should not be afraid to admit they don't have particular technical expertise, and should call for assistance, rather than bluff their way through.**
- **Inspectors should actively acknowledge positive efforts, improvements or voluntary over-compliance by duty holders.**
- **Inspectors should acknowledge, respect and try to be consistent with rulings, notices or observations made to that business by other inspectors from the same regulator by another regulator dealing with the same issue** (e.g. a similar regulator in another state). Inconsistency undermines authority.
- **Internal review processes or appeal mechanisms should be openly and freely promoted, as part of a strategy to make enforcement be, and appear, as objective as possible.** Regulatory staff should actively encourage businesses to use appeal or review mechanisms if the business does not understand or agree with the regulatory action taken or the reasons given for it.