

My name is Terry Fogarty and I was involved in the gas and electrical appliance industry for over forty years in the regulatory and compliance area. I also managed a number of recall programs for various products in that time. I retired three years ago, however I believe most of my comments will still be relevant. Please note that my observations should not be construed as indicating the behavior or attitude of specific companies that I worked for before I retired.

When considering Consumer Law Enforcement and Administration, I think it is also helpful to consider how businesses approach the subject. Therefore I have submitted the following observations.

Many businesses are now part of a global network and the senior management may be from another country where the culture of consumer law is significantly different from Australia. It is difficult to explain Australian Consumer Law and product recall requirements to some senior Asian or European business managers when it is contrary to the business culture in their country. It is not unreasonable in their culture to just quietly circumvent the regulations. Circumvention of regulations was seen as good or smart business practice in their culture if you achieved a competitive advantage with little likelihood of being exposed. It was not seen as illegal or bad behaviour.

One business strategy was to set up an Australian entity, but with limited financial support. They did not provide adequate financial provision in case of a recall or numerous product failures. They also did not insure against such an eventuality. They would then liquidate the company with little financial loss if a problem occurred. While this may seem harsh and extreme, in some countries it would not be seen as anything but a prudent business strategy.

Most companies now run their own risk assessment modelling. Typically this modelling will ask the monetary cost versus the likelihood of it being imposed. So while the proposal 4.4 in the draft report to increase the fines for breaches of ACL has genuine merit, it will not achieve its aim unless enforcement also increases rather than diminishes. I believe that this will require a change in the culture of the regulators. All the best consumer education and trader engagement in the world will not achieve the desired outcome if there are no adverse consequences for non-compliant behaviour. Unfortunately when financial resource restraints are imposed on the regulators it would appear that enforcement is the first area to be cut back because it is seen as the most costly. You need enforcement to carry weight with your trader engagement, inspections, warnings and investigations. Business is well aware of the risk based compliance and enforcement policies of the regulators and is exploiting the reluctance to proceed to prosecution.

One state regulator was known to really only prosecute on labelling non-compliance because this was seen as an easy and cheap prosecution with a strong chance of success. Labelling has a significant role to play in consumer awareness and safety, but I do not believe it is the number one safety issue. However, a problem with a house fire was not likely to be fully investigated due to a lack of the specialist resources required.

Queensland electrical safety office had an excellent relationship with the fire department in that state and you knew that if one of your products was involved in a house fire in Queensland, then it would be thoroughly investigated.

Energy Safe Victoria had excellent expertise in understanding possible failures, but did not seem to have the same relationship with the fire authorities in Victoria.

The draft report mentions the lack of sufficient data on failures in the field. It always puzzled me that each hospital in each state of Australia seems to report injuries to consumers in a different and confusing way. This makes it extremely hard for regulators to perceive early on if a potential problem exists. Equally it puzzled me that all states did not have a good relationship with the fire departments and that there was not standardised reporting requirements. Just getting the correct name and model number of the product involved in the incident would be of great assistance.

The situation of financial penalties around product recalls needs to be examined. At present the system rewards the company that carries out the least effective recall program. There is no financial incentive for a company to carry out an excellent recall program. Just pretend that you are trying hard, make all the right noises and the problem will soon go away at minimum cost.

The draft report mentions the possibility of recalibrating the penalties for breaches of ACL to three times the financial benefit to the company. Perhaps penalties should be introduced for recalls that do not achieve a minimum performance requirement. If the recall only achieves rectification of half the products in a reasonable time, then a company would be automatically fined three times the cost of rectification for the half not achieved. This would then give a huge incentive for a company to carry out an effective and efficient recall program because, in this example, they would have ended up paying double what they would have if they had achieved a full complete recall. Yes I know you cannot always achieve complete success, particularly with older product when it is hard to determine how many are still in the field, however the regulator should have discretion in these particular cases to set a lower minimum performance requirement.

Unfortunately the success of recalls for electrical products is generally not high and this now seems to have become the accepted normal rather than the exception. However the down side to this proposal is that suppliers will most likely become more reluctant to issue a voluntary recall program because of the increased potential costs and obligations. Therefore the regulators need to be confident that they have the tools to ensure that product recalls will still be implemented when warranted.

In the draft report you ask for comments on the lead or home regulator model. My experience was that dealing with the home regulator was definitely the superior way to go. The only down side was that some regulators were tougher to deal with than others. Therefore every business was trying to ensure that their home regulator was not the toughest.

Equally on the regulator side there was a reluctance to take the lead on a project that was going to involve a lot of work. Better to let another state handle that problem. Yet if the project had possible good publicity for the politicians with little resource investment, then every regulator wanted to take the lead. So I believe that two things need to happen. Firstly, that the distribution of projects to the regulators needs to be equitable. Secondly, that the regulators are consistent with their decisions. Until the regulators sort out their differences, business will continue to actively exploit this lack of harmony.

The draft report asks for comment about the Commonwealth being the only regulator having the power to issue mandatory recalls and interim bans. I agree that you need to amend the need for a RIS on interim bans so that they can be achieved in a timely manner. My suggestion is that an RIS would not be required to introduce an interim ban if a Safety Warning Notice had already been issued.

My final comment is about the lack of consistency in the electrical safety regimes across Australia. In particular, New South Wales electrical safety regulators did not appear to show a willingness to commit to a consistent Australian electrical equipment safety scheme. The reasons appeared to be all about process and they showed no desire to address the issues over a number of years.

Unfortunately some suppliers privately encouraged NSW in their stand because they feared a consistent national scheme. Division and disharmony among the electrical safety regulators will continue to be exploited by some businesses to achieve a better outcome for their business. I believe that the only way to bring NSW to the table for meaningful discussions is to publicly explain the situation and expose the bureaucracy to public scrutiny. Possibly reduce future funding and support in the area of ACL, although you do not want consumers in NSW to be at a disadvantage.

I trust that my observations have been of assistance. Should you require further explanation or clarification on any of the points raised above, please do not hesitate to contact me and I would be happy to assist.