

EXECUTIVE OFFICE



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Competition &
Consumer
Commission**

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COAG Reform Agenda Study
Productivity Commission
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By email: coagreporting@pc.gov.au

Dear Sir / Madam

Impact of Council of Australian Government Reforms

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission to the Productivity Commission in relation to the impact of Council of Australian Government (COAG) deregulation reforms currently under consideration. This submission outlines the early observations of the ACCC on benefits and challenges that have arisen from two such reforms, the creation of the Australian Consumer Law (ACL) and the related national product safety regime.

Overview

The ACL came into effect on 1 January 2011 with the creation of a nationally consistent consumer law for fair trading, consumer protection and product safety. Consumer regulators, including the ACCC, were provided with new and effective tools to respond to breaches of fair trading, consumer protection and product safety laws.

To implement the single law, multiple regulator approach to consumer policy, the Commonwealth, States and Territories agreed to mechanisms to amend the law and have established a number of forums to facilitate consultation on further development of the regime and the consistent application and communication of the law.

In such an environment, the ability to detect emerging and pressing issues for consumers, to coordinate and respond appropriately, has risen. In part, this has been facilitated by a comprehensive MOU between the agencies and the creation of an information sharing platform, the Australian Consumer Law Intelligence Network Knowledge system (ACLINK) to which all ACL regulators have access.

The purpose of the reforms to Australian consumer law and product safety was to provide a nationally consistent regime and in doing so, reduce compliance costs. It may be too early to tell whether compliance costs have been reduced for business however steps taken by the ACCC and other ACL regulators may assist to achieve this end. For example the ACCC has engaged in extensive consultation with business and consumer stakeholders, drawing on information developed by ACL regulators, educating the community on the introduction of the new consumer and product safety regime.

One area in which the benefits of the COAG reforms are being realised and are likely to be realised into the foreseeable future, is in relation to the powers provided to the ACCC. In particular, the ability to require traders to substantiate their claims, to issue infringement notices and the ability to seek civil penalties before the Courts, in tandem with already existing tools, has assisted the ACCC to address matters in a proportionate manner and more quickly than before.

The Australian Consumer Law

New protections

In essence the ACL provides a greater degree of protection for consumers, by maintaining and transferring across the substance of the old fair trading and consumer protection regime from the *Trade Practices Act 1974* (Cth) into a national regime, while also extending and clarifying consumer rights in certain areas. For example, the new consumer law prohibits unfair contract terms in standard form consumer contracts and provides a new regime of statutory consumer guarantees.

Under the ACL businesses have the same obligations and responsibilities wherever they operate in Australia. Similarly, consumers will have the same protections and expectations about business conduct no matter where they are in Australia.

New powers

The ACL remedies and powers provide the ACCC with effective tools to respond to breaches of fair trading and consumer protection laws. Among those new remedies and powers are civil pecuniary penalties; infringement, public warning, and substantiation notices; disqualification orders and non-party redress.

The ability to require a business to substantiate their claims, together with an ability to resolve less serious breaches of the law by infringement notices, has given the ACCC greater capacity to respond swiftly and more efficiently to breaches of the law. Importantly for traders, businesses can elect to pay an infringement notice and move on without risk of the matter then proceeding to Court.

If Court action is required for more serious cases, there are now penalties that are commensurate. For such cases the Court can now order civil pecuniary penalties of up to \$1.1 million for corporations and \$220,000 for individuals. Criminal proceedings can also be taken where appropriate.

ACCC use of the new powers to September 2011 – consumer protection and fair trading

Civil pecuniary penalties

Civil pecuniary penalties have been ordered by the Federal Court in eleven proceedings.

Disqualification orders

Disqualification orders have been sought against six individuals in three separate proceedings.

Non-party redress

Non-party redress has been obtained in one matter and is currently being sought in two other matters.

Infringement notices

Fifty-seven infringement notices have been issued and paid. Four infringement notices that were not paid by the compliance date were the subject of subsequent legal proceedings.

Substantiation notices

The ACCC has issued substantiation notices to five companies.

The new product safety regime

The ACL brought about significant changes to administration of product safety laws, providing for a nationally consistent regime. The system allows for prompt action to be taken against hazardous products, with the Commonwealth Minister able to impose interim or permanent bans, or issue a compulsory recall notice that is effective throughout Australia.

The effectiveness of the new regime has been enhanced by a mixture of legislative changes, such as inspection powers, mandatory reporting¹, a shared ability for Ministers to issue public warnings² as well as practical changes brought about in preparation for the ACL, such as a 'one stop shop' national product safety website³, an emerging hazard clearinghouse, revision of recall guidelines and harmonisation of standards and bans.

Case study – harmonisation of standards and bans

An extensive harmonisation process was undertaken in the lead up to the new national product safety regime: 177 different standards and bans were harmonised into a single set of 20 bans, 37 mandatory product safety standards and three information standards.

¹ The mandatory reporting regime requires a supplier to notify the Commonwealth Minister within 2 days of becoming aware of serious injury, illness or death from use of a consumer good.

² A Commonwealth, State or Territory Minister may issue a safety warning which advises that certain goods or product related services are under investigation to determine whether the goods will or may cause injury to any person.

³ <http://www.productsafety.gov.au>

The ability to issue infringement notices, and to seek civil pecuniary penalties, also applies to matters involving the product safety provisions under the ACL.

ACCC use of the new powers to September 2011 – product safety

Civil pecuniary penalties

Civil pecuniary penalties have been ordered by the Federal Court for breach of the product safety provisions in two proceedings.

Infringement notices

One infringement notice has been issued and paid.

Mandatory reporting and recalls

The ACCC received 911 'mandatory reports' during the first six months of 2011. Intelligence provided by these reports and the ACCC product safety data clearinghouse were associated with 40 recalls of unsafe goods during this period.

Framework for cooperation between the Australian Consumer Law regulators

In the transition to the establishment of the Australian Consumer Law, consumer agencies entered into a comprehensive MOU⁴, which in practise has resulted in enhanced communication, cooperation and coordination.

Committees

The ACCC is actively engaged with ASIC and State and Territory ACL regulators in COAG Legislative and Governance Forum on Consumer Affairs (CAF) committees that have been established to facilitate a co-operative approach to the Australian Consumer Law. CAF is supported by Consumer Affairs Australia New Zealand, which in turn is supported by three advisory and consultative committees being:

- *Compliance and Dispute Resolution Advisory Committee*, which deals with compliance, dispute resolution and enforcement activities relating to the ACL
- *Education and Information Advisory Committee*, which deals with education and information activities relating to the ACL and consumer issues more generally
- *Policy and Research Advisory Committee*, which meets to consider and develop common policy on national consumer issues

The ACCC also operates and chairs the *Product Safety Consultative Committee*, which engages product safety officers from the ACCC, New Zealand and States and Territories on policy, enforcement and awareness issues.

Close collaboration of ACL regulators through these structures is essential to realise the benefits of the new regimes. The ACCC's experience is that, at this early stage, effective collaboration requires slightly increased commitment of regulatory resources.

⁴ http://www.consumerlaw.gov.au/content/the_acl/downloads/acl_mou.pdf

ACLINK

Cooperation and coordination between the various ACL regulators is facilitated by access to a common information sharing platform hosted on the Commonwealth's Govdex site, in the form of ACLINK. While each ACL regulator operates their own complaint and inquiry database, ACLINK provides a common platform for regulators to notify each other of key issues, such as by posting alerts to emerging conduct of concern and matters under investigation.

The ability to use ACLINK as a common platform has been of benefit to ACL regulators. However, the benefits of the ACL could be further realised by a single national contacts database. Broadly, a national database would give ACL regulators the capacity to see all complaints and inquiries received across the jurisdictions, allowing review and analysis of all data to better inform the allocation of enforcement resources, more rapid responses and inform the effectiveness of existing regulations and the need for future protections. It would also reduce the level of double handling of information and improve consistency of data.

Costs and compliance

The ACCC engaged in extensive consultation with stakeholders across Australia both in the build up to, and following implementation of, the ACL and new product safety regime. This engagement has been particularly intensive in relation to areas where legislative changes were more significant, such as unfair contract terms and consumer guarantees. Further, broad consultation significantly contributed to the success of new developments and processes such as the new national portal for product safety information, the Product Safety Australia website and the implementation of an improved recalls system.

More generally, members of the ACCC and its staff have participated in speaking engagements and events around the country. Information and awareness activities included delivering training sessions, presentations, meetings, and written communications. Industry associations, as well as the ACCC's Small Business Consultative Committee, Small Business Information Network, and Consumer Consultative Committee have assisted to disseminate information materials. It has been assisted in this process by being able to draw upon nationally consistent guidance material developed by the ACL regulators. Further, a wealth of information has been placed on the ACL website⁵ by ACL members and on the Product Safety Australia website.

While the ACCC has engaged in significant compliance activities, the ACCC has received representations from some industry participants regarding difficulty transitioning to the new regimes and increased costs of compliance in relation to some reforms where consumers have been afforded a higher level of protection. The ACCC considers it is too early to be definitive as to whether the anticipated reduction on the compliance burden arising from a single national law will be realised.

⁵ <http://www.consumerlaw.gov.au>

Yours sincerely

Brian Cassidy
Chief Executive Officer