Review of the Australian Consumer Product Safety System

Options paper

Ministerial Council on Consumer Affairs

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CONTENTS

EXECUTIVE SUMMARY

At the Ministerial Council on Consumer Affairs (MCCA) Meeting of 22 April 2005, ministers asked the Standing Committee of Officials of Consumer Affairs (SCOCA) to establish specific options for reform of Australia's consumer product safety system for consideration at their September meeting. This involved the development of three separate papers, providing options in regard to:

- ensuring product safety laws are consistent across Australia and are administered and enforced in a consistent manner (Chapter 1);
- making the product safety system more proactive so as to reduce the incidence of injury to consumers, without placing an undue burden on business (Chapter 2); and
- improving product safety research and information (Chapter 3).

The three papers have been developed by different teams of SCOCA officials and within them an attempt has been made to cover all major reform proposals raised in the MCCA product safety discussion paper *Review of the Australian Consumer Product Safety System*.

Possible broad conclusions that could be drawn from the papers are that:

- there is an opportunity for greater harmonisation of product safety laws and the administration of those laws between jurisdictions;
- a general safety provision (GSP) involves numerous complex policy choices and it remains unclear whether it would be an appropriate change to current arrangements; and
- it appears that product safety information and research could be improved in a cost-effective manner.

The papers make no recommendations for reform but put forward possible options for change. It is important to note that options discussed in the papers are not independent of each other nor do they represent the policy or position of any government.

Chapter 1: A More Harmonised Product Safety System

Currently all jurisdictions including the Australian, New Zealand, state and territory governments have their own product safety legislation and administrative resources.

'Harmonisation' involves a process to align these laws and their administration to promote consistency in their application and outcomes, and to remove inconsistent or contradictory requirements.

Product safety stakeholders, including key consumer, business and government representatives agree on the need for greater harmonisation of product safety legislation and enforcement. While it remains unclear whether harmonisation would lead to a safer marketplace, all agree it would reduce existing cost burdens on both businesses and regulators, reduce complexity in existing product safety arrangements and lead to a more efficient marketplace.

While greater harmonisation is supported it is noted that there are some potential benefits gained from the regulatory flexibility of the existing system. For example, state- and territory-based regulators may be able to respond more promptly to jurisdiction-specific product safety issues than would be possible under a national system.

The legislation of all jurisdictions aims to ensure reductions in consumer injury from unsafe products and unsafe product use. For this reason many similarities exist in state, territory and national laws. However, there are some significant exceptions. The most notable of these are in relation to definitions of safety, the coverage of services and review processes.

While legislative inconsistencies create some difficulties, another dimension to this problem is the inconsistencies created through the administration and enforcement of such legislation. An example is in relation to bans and mandatory standards. In this regard there are significant differences between jurisdictions. This results in very few products subject to a ban or standard receiving identical treatment across all jurisdictions. Businesses producing such goods often accept the highest safety standard as a means of complying with the rules of all jurisdictions. This can mean withdrawing their product from national markets to comply with the rules of one state or territory.

There have been attempts to achieve improved harmonisation. The MCCA Framework and Principles for seeking national outcomes and enhanced coordination of investigation, compliance and enforcement activities identify product safety as a 'specific area of concern'.

Mutual recognition legislation promotes the freedom of movement of goods in the national market but has not been invoked to override individual regulatory interventions. Clearly there is a need to examine new approaches to achieving harmonisation.

Option – Improve the existing mutual recognition system

Businesses could be encouraged to raise harmonisation concerns openly to MCCA through its Consumer Products Advisory Committee (CPAC). Where such concerns demonstrate that mutual recognition principles have not been appropriately observed it would then be incumbent on officials to act to ensure such principles are observed. Such an approach would continue to allow jurisdictions to act individually where they see a short-term need, but would ensure in the medium term any individual actions are merged into a uniform approach to ensure a consistent application of rules across all jurisdictions.

Option – Single law but numerous regulators

An alternative approach would be to establish identical legislation with all jurisdictions involved in administering such legislation. Various models could be used, for example, uniform legislation, template legislation or core-consistent provisions.

The problem with this approach is that it may be difficult to get all jurisdictions to develop and agree to such legislation. Also regulators would be faced with the problem of keeping legislation consistent over time while ensuring it can adapt to a changing product safety environment. Additionally, legislative consistency provides no guarantee that numerous regulators would administer and enforce such legislation on a consistent basis.

Option – Single law and regulator

The Australian Government with the agreement of the states and territories could enact a single product safety law and establish a single product safety regulator to enforce that law. To support an efficient transition, the Australian Competition and Consumer Commission (ACCC) could be the single regulator and continue to monitor existing Commonwealth law.

Advantages of this approach would be that businesses would be subject to identical domestic requirements, and interpretation and enforcement should be more consistent. Changes to product safety rules should be quicker and more efficient.

However, a national approach would require close consideration of the related infrastructure and resourcing issues. Boundaries may also need to be established between product safety and other areas of

consumer policy which would continue to be administered by state and territory governments. Finally, such a system may not take sufficient account of local and regional needs.

Option – High-level memorandum of understanding

A high-level Memorandum of Understanding (MOU) between governments could help support a framework that establishes roles and commitments by governments to assist harmonisation. This could be done through a variety of mechanisms including by pursuing an enhanced coordination of investigation and formalised exchange of expertise and experience for product safety officers.

Chapter 2: A More Proactive Product Safety System

It is generally considered that Australia's product safety system reacts to injury rather than anticipates it. For this reason various approaches to improving the 'proactive' nature of the system were examined.

Option – A General Safety Provision (GSP)

The most significant of these involves the possible introduction of a GSP which would place a legal obligation on businesses to ensure they market only safe products.

By its general nature, covering all or most products and suppliers, and by focusing on the safety outcome rather than prescribing the design of particular products, a GSP could lead to safer product markets in a way that does not unduly distort trade and competition. That is, a GSP allows businesses to choose how to meet the overall objective of supplying only safe products.

There are numerous questions to resolve in terms of how a GSP would operate. Design and implementation issues associated with a GSP include: the standard of safety established under a GSP; its coverage; and how it would be enforced and introduced.

Businesses are generally opposed to a GSP as they consider it may place a new, costly and unnecessary burden on them. A significant risk is that businesses may seek to 'over-comply' with a GSP, taking steps to prove they are compliant which are not really necessary and do not improve safety outcomes.

The success of a GSP may depend upon whether it can deliver new benefits that will exceed the inevitable new costs involved in its implementation and continuing operation. This remains unclear and may hinge on how a GSP changes business and regulatory approaches once introduced. Clearly, decisions about the design of a GSP could critically impact on behavioural change and for this reason the design of a GSP may ultimately determine whether it is worthwhile reform.

Option – Revising the definition of unsafe goods

One key area of business concern is uncertainty relating to the standard of safety established under a GSP. Such concerns appear to be overstated and may be removed if the standard of safety is set at a level equivalent to that under product liability law. An advantage of this approach is that the standard of safety under product liability law should be familiar to businesses and is one with which they should already comply.

Regardless of whether a GSP were introduced, definitions of 'unsafe' goods currently existing in product safety law could be similarly changed and set at a level equivalent to that under product liability law, as it makes sense that one standard of safety be established across the entire product safety system.

Options – Monitoring and reporting requirements on businesses and extension of the existing recall powers

Other key proactive measures considered include mandatory reporting of unsafe products by businesses and options associated with extending the existing recall obligations on businesses. Such measures could enable governments to access broader and timelier product safety information and may remove unsafe goods from the market more swiftly. However, offsetting this advantage, such measures may represent potentially onerous, time-consuming and costly processes for both businesses and regulators and it is uncertain how effective they would be in increasing product safety. For example, it appears likely that irresponsible businesses would not comply with any reporting obligations or extended recall obligations and it is such businesses that give rise to many product safety hazards.

Chapter 3: A More Informed Product Safety System

The existing product safety research and information system appears to have four key problems that result in stakeholders sometimes not receiving key information or receiving such information in an untimely and/or inefficient manner. These are that:

- existing systems do not identify product hazards as rapidly as they could;
- available data is not always of sufficient quality for use for product safety purposes;
- research into product safety is not well-coordinated or funded; and
- information allowing businesses to meet their regulatory and legal obligations is inadequate or poorly presented.

These problems result in consumers not having enough information to decide whether a product is safe, businesses not being sufficiently aware of their product safety obligations and governments often not having sufficient information to respond to product safety risks adequately.

Options

Options to overcome such problems include:

- improving existing information, for example by improved codification of hospital and coronial data;
- establishing suitable databases (consumer, business and/or government) to facilitate early warning information systems that could alert governments to potentially unsafe products;
  - this could include establishing programmes to capture lower grade injuries and/or 'near miss' hospital and medical data;
- establishing a central research facility as either
  - an information clearinghouse;
  - an information clearinghouse with some specialised research functions; or
  - a dedicated product safety research facility with significant resources and expertise;
- provision of a one-stop shop for business information;
- targeted advertising and education campaigns to develop a product safety culture; and

- development of a product safety research agenda.

All information and research options above would need to be subject to a detailed costing to ensure they provide net benefits. This signals the need for further investigatory work by MCCA in this area. However, it would appear certain changes could be undertaken to provide significant benefits without significant expense.

CHAPTER 1: A MORE HARMONISED PRODUCT SAFETY SYSTEM

INTRODUCTION

'Harmonisation' involves the alignment of laws, rules and processes to promote consistency in their application and outcomes, and to remove inconsistent or contradictory requirements.

In seeking to protect consumers from the harm caused by unsafe products, governments must consider the impact of their regulatory actions on the overall welfare of the Australian community. Governments should seek to ensure that their actions result in safer markets but also do not interfere unnecessarily with trade in consumer products or lead to an inefficient use of government regulatory resources.

The product safety review process has revealed that a significant problem in this regard may be the lack of consistency in product safety legislation, administration and enforcement between jurisdictions in Australia. This lack of 'harmonisation' may mean that businesses face additional compliance costs and barriers to supplying products throughout Australia, and the involvement of multiple jurisdictions in regulating product safety may lead to a duplication of effort and an inefficient use of regulatory resources. It is also considered that the lack of harmonisation could lead to a more complex system for all stakeholders.

Harmonisation – what is it?

This paper defines the need for harmonisation as being a need to ensure that any variance in product safety legislation, administration and enforcement throughout Australia does not unduly and unnecessarily interfere with key product safety objectives. Greater harmonisation could be supported if it were shown that inconsistencies in legislation and administration under the existing system, consisting of the regulatory involvement of multiple jurisdictions, compromised consumer safety, led to unwarranted significant disruptions to trade in consumer products or resulted in an inefficient use of government regulatory resources.

What factors may contribute to a lack of harmonisation?

Legislative factors

Product safety regulation in Australia is shared between the Australian and the state and territory governments, with the Australian Government's responsibilities and powers constrained by the Australian Constitution.[1]

At the Commonwealth level, the safety of consumer products throughout Australia is regulated under the *Trade Practices Act 1974* (TPA). State and territory governments have enacted their own fair trading legislation incorporating consumer product safety provisions that are similar, but not identical to, the provisions of the TPA.[2] There are some important legislative inconsistencies between jurisdictions. Such

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1 Effectively the coverage of Commonwealth product safety legislation is generally limited to corporations as well as non-corporations engaged in interstate trade or operating in one of the territories. State and territory legislation is not limited to corporations.

2 The focus of this paper is on improving harmonisation between the Australian and the state and territory governments. However, it should be noted that a number of specialised agencies administer product safety regulations associated with certain products including medicines, food, motor vehicles, electricity, buildings and agriculture. Also, other agencies can support product safety objectives through special powers. For example, the Australian Customs Service has the power to support the banning of products through import controls and local governments can act to ensure improved product safety. MCCA decided early in the review process to exclude

differences may reflect local and regional needs or interests, however, this can be difficult to identify and is not always a clear justification.

Administrative and enforcement factors

While jurisdictions have been increasingly committed to act in a coordinated and nationally consistent way, there are a range of factors which can inhibit a truly harmonised approach to producing nationally consistent outcomes. The need or perceived need to address a local issue immediately or urgently may lead to unilateral action by one jurisdiction which may or may not ultimately be supported for national action.

Differences in interpretation of product safety standards and legislative powers can also result in differences of approach in addressing a product safety problem. Availability of resources may vary between jurisdictions and differences in research and hazard identification methodologies can lead to differences in priority-setting.

What are the key inconsistencies?

Legislative inconsistencies

There are a number of 'core' product safety provisions in the legislation of all jurisdictions. These permit the making of product information and safety standards, the banning of unsafe goods, the power to order goods to be recalled and the power to issue warning notices.

These basic powers are accompanied by ancillary provisions or are subject to conditions designed to aid the administration and enforcement of the legislation. Such rules often describe who can exercise the powers and in what circumstances. A SCOCA review undertaken in 2001[3] revealed that there are a multitude of differences in these rules between the jurisdictions.

The most notable differences in the statutory provisions of the various jurisdictions are in relation to definitions of safety, the coverage of services and review processes.

These differences in the core product safety provisions are only of practical significance when they result in the prescription of product standards and banning orders in a manner causing variations in coverage based on location, entity affected (corporate vs non-corporate) etc. This highlights the need for harmonisation of bans and standards and exposes a weakness in the current system.

In relation to only a small minority of products, requirements have been enacted with national application. For example, there is a mandatory standard for children's cots for household use that applies in every state as well as under the TPA. However, for the vast majority of products harmonisation is not evident. A 'head count' of bans and standards applying in various Australian jurisdictions identified more than 380 product-based statutory instruments, but instances of comprehensive coverage in relation to any specific product were minimal.

The legislative provisions of any state will only be struck down in circumstances of direct inconsistency with Commonwealth law (by virtue of section 109 of the Constitution). However, in light of the application of the 'mutual recognition' principle[4] which applies in all Australian jurisdictions and with New Zealand, the value of any jurisdiction seeking to maintain statutory requirements which are not broadly applicable in other participating jurisdictions is questionable, in the absence of efforts to achieve long-term harmonisation of requirements.

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products covered by specialised legislation from any policy reform measures – see the MCCA discussion paper *Review of the Australian Consumer Product Safety System* p 4.

3 Report prepared for SCOCA by the Tasmanian Department of Justice and Industrial Relations, *Consumer Product Safety in Australia: A Comparative Analysis of the Statutory Regime, Part 1, March 2001.*

4 *Mutual Recognition Act 1992.*

Administration and enforcement inconsistencies

Differences between regulators in interpretation of legislation and prescribed standards/banning orders can exacerbate the problems created by legislative inconsistencies. Product standards often require a degree of subjective assessment of their application in a particular case. Inevitably differences can arise between regulators, to some extent compounded by a 'literal' versus 'purpose' approach to determining product coverage and specific product safety requirements. Recent examples of differences in interpretation have occurred in respect of baby bath supports, children's household cots and projectile toys.

Legislation can also be open to various interpretations. For example, product safety legislation does not distinguish between new and second-hand goods and consequently there are some differences between jurisdictions in the way in which second-hand goods are treated. Where a mandatory standard exists for a product, in some jurisdictions this is deemed only to apply when the item initially enters the market, that is, when it is new. The standard is not enforced when the product is subsequently sold as a second-hand or used item.

Another aspect of legislative interpretation which has been the basis of differences between jurisdictions in the past is whether the respective legislation restricts the mandate to act on product safety to circumstances where the product itself presents the danger, rather than its foreseeable use or misuse.

Agencies have different levels of resources, which results in different priorities for product safety issues. Resources include: budget allocation; numbers of staff; staff experience and level of expertise; training and access to training for front-line product safety officers; access to legal services and expertise for enforcement and prosecution of product safety breaches; in-house testing facilities and funding to access external testing facilities, especially National Australian Testing Authority (NATA) accredited facilities; and ability to respond to cross-jurisdictional matters. These can significantly affect an agency's capacity to respond to a product safety issue.

What is the result of such inconsistencies?

There is no empirical evidence indicating the extent to which a lack of harmonisation is detrimental to key product safety goals. However, anecdotal evidence and intuitive analysis support the view that a lack of harmonisation significantly interferes with trade in consumer products, leads to regulatory inefficiencies and may compromise consumer safety objectives. That said, it must be recognised that current product standards and bans under the TPA and fair trading legislation only impact a relatively small segment of the consumer products market.

Safety

At times the involvement of multiple jurisdictions in regulating product safety can make it difficult to know which jurisdiction has responsibility for taking action. Businesses have suggested this may lead to 'problems falling between the cracks'. Businesses are also concerned about situations where one jurisdiction lags behind the others in reacting to safety concerns, potentially exposing consumers in that jurisdiction to safety risks for longer than would have been the case had legislation been harmonised.

Differences in legislation can undermine the ability of regulators to act uniformly or in a coordinated way.

However, examples of where safety suffers from a lack of harmonisation can be countered by situations where safety benefits. For example, faced with different rules, it appears most businesses abide by the strictest rules or interpretation of those rules across all jurisdictions.

Additionally, it is argued that legislative flexibility promotes safety in different jurisdictions. For example, in the Northern Territory small fuel storage devices (jerry cans) are regulated because these are commonly used products by consumers. In other jurisdictions where their use is less frequent there is not a similar community demand for these items to be regulated or controlled.

Trade in consumer products

The Productivity Commission's *Australian and New Zealand Competition and Consumer Protection Regimes*[5] - *Research Report* found that there has already been significant convergence of Australia's and New Zealand's competition and consumer protection regimes, particularly by international standards. Consequently, it found that the regimes are not significantly impeding businesses operating in Australasian markets.

The report further found that full integration, requiring identical laws and procedures and a single institutional framework, would have high implementation and ongoing costs, change the operation of the existing national regimes and achieve only moderate benefits.

The general view, however, is that the lack of harmonisation between different jurisdictions with respect to product safety perceptions and obligations is causing problems for both business and consumers and needs to be rectified.[6] In stakeholder consultations in response to the product safety discussion paper both business and consumer groups strongly expressed the view that there was an urgent need to harmonise product safety law and its administration across Australia. This would reduce costs and complexities and produce benefits for both business and consumers.[7]

In addition, the report prepared for SCOCA by the Tasmanian Department of Justice and Industrial Relations indicated that business is subjected to various levels of intervention and the disparity of regulation makes it difficult for businesses to ascertain their obligations. Compliance costs are a substantial financial impost on business and have a direct impact on their competitiveness.[8]

Regulatory efficiency

Harmonisation of legislation, administration and enforcement could improve governments' collective ability to address problems in the marketplace, leading to a more efficient use of regulatory resources. Under the current system many of the actions taken by one jurisdiction are duplicated elsewhere. Development and implementation of mandatory standards and banning orders may require action in all jurisdictions to be nationally effective. This suggests some lost economies of scale in the development and administration of product safety which can only be minimised if there is very close cooperation between agencies and a pooling of resources.

The involvement of numerous regulators also requires agreement on enforcement responsibilities (including who has the appropriate authority to act) and the development of coordinating mechanisms to ensure against regulation that overlaps the responsibility of multiple jurisdictions. Significant time and resources need to be utilised to ensure such mechanisms operate effectively.

How does the existing system attempt to overcome such inconsistencies?

Ministerial Council on Consumer Affairs (MCCA)

MCCA, its executive and advisory bodies all play a leading role in facilitating coordination between the numerous jurisdictions and agencies in the area of product safety. MCCA focuses on strategic national consumer issues (including product safety issues) and is supported by the Standing Committee of Officials of Consumer Affairs (SCOCA). One of SCOCA's four advisory committees is known as the Consumer Products Advisory Committee (CPAC) whose aim is to promote a safe and well-informed marketplace

5 Productivity Commission: *Australian and New Zealand Competition and Consumer Protection Regimes - Research Report* released 13 January 2005

6 Review of Australian Consumer Product Safety System – Consultation workshop – 28 February 2005.

7 Review of Australia's Consumer Product Safety System – MCCA Paper, MCCA Meeting, 22 April 2005, Agenda Item 5.3.

8 Report prepared for SCOCA by Tasmanian Department of Justice and Industrial Relations, *Consumer Product Safety in Australia: A Comparative Analysis of the Statutory Regime*, Part 1, March 2001.

across Australia and New Zealand by promoting a consistent, strategic response to consumer product issues.

Mutual recognition

Mutual recognition legislation has been developed for the purpose of 'promoting the goal of freedom of movement of goods and service providers in a national market in Australia'.[9] An underlying principle of mutual recognition is to counter the imposition of 'local' rules and requirements when dealing with the supply of goods. Mutual recognition legislation states that:

> 'goods produced in or imported into the first State, that may lawfully be sold in that State either generally or in particular circumstances, may be sold in the second State either generally or in particular circumstances (as the case may be), without the necessity for compliance with further requirements'[10]

Mutual recognition aims to override regulatory intervention at the jurisdictional level which does not warrant adoption nationally. However, in the area of product safety, state agencies have continued to take action in response to issues that have arisen locally irrespective of whether national action is proposed. Mutual recognition principles have not been used by businesses to challenge product safety requirements. Furthermore, the process for an agency to obtain a temporary exemption under the *Mutual Recognition Act 1992* is not well-understood.

The necessity of being able to act quickly to meet community expectations in response to local events and issues, particularly where there has been a death or serious injury, remains a significant factor influencing the existing product safety system. For example following the deaths of two children there was strong community demand that action be taken by the NSW Office of Fair Trading in respect of portable soccer goal posts, which was taken independent of other jurisdictions. Similarly Victoria has recently acted unilaterally to control the use of motorised scooters and mini-bikes (monkey bikes).

Principles for seeking national enforcement and compliance outcomes

Under the auspices and direction of MCCA, SCOCA and its advisory committees including CPAC have been working to develop suitable mechanisms and processes to deliver greater consistency and cooperation nationally in relation to policy development, administration and law enforcement. Most notably in its 27 August 2004 communiqué MCCA endorsed the Framework and Principles for seeking national outcomes and enhanced coordination of investigation, compliance and enforcement activities.

Product safety is identified as a 'specific area of concern' under the Framework and Principles document. Accordingly this has reinforced the commitment of SCOCA and CPAC to ensure jurisdictions work together as closely as possible to address product safety issues on a national basis.

Options Leading to Improved Harmonisation

Proposals for addressing inconsistencies under the current product safety system in relation to second-hand goods and services are described at Appendix 1.

More broadly, the Working Party has identified a number of models (not necessarily mutually exclusive) that may be used to attain improvements in the harmonisation of legislation, administration and enforcement. These include:

- improving the existing mutual recognition system;

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9 *Mutual Recognition Act 1992* (Cwth) - Section 3
10 *Mutual Recognition Act 1992* (Cwth) - Section 9

- maintaining the existing regulatory agency functions but legislating to ensure such regulatory actions are based on (more) harmonised product safety legislation;
- introducing a single law and regulator; and
- developing a high-level memorandum of understanding to support harmonisation.

Option 1 – Improve the existing mutual recognition system

As discussed above, the mutual recognition principle has not fully achieved its objective in the field of product safety for two main reasons. First, because state agencies have continued to take action in response to local issues irrespective of whether national action is proposed or supported and secondly, because businesses have not used mutual recognition principles to challenge product safety requirements.

At times, regulatory flexibility may be necessary to support legitimate and important differences between jurisdictions. For this reason fair trading offices could argue that on occasions the community benefits if they do not follow the mutual recognition principle. However, such assertions are rarely tested.

The reason why businesses do not take action more frequently in support of mutual recognition may be because any appeal or challenge must be heard in the courts. Businesses appear to find the court system too expensive, slow, complex or uncertain. Therefore, businesses generally find it less costly to meet a second set of regulatory requirements in a second jurisdiction than to initiate court proceedings.

Mutual recognition is national legislation and resolving issues in relation to the application of mutual recognition to product safety legislation will require action by governments beyond the limits of the fair trading portfolio. Nevertheless there is a strong case to review the effectiveness and suitability of the principles and processes under the mutual recognition legislation, as it applies to product safety.

It is important to product safety objectives that the need for urgent local action can be accommodated under mutual recognition arrangements.

Likewise it is important that SCOCA and CPAC officials ensure that mutual recognition principles are properly applied to product safety regulatory action recognising the benefits to businesses and consumers of nationally consistent regulation of the marketplace.

CPAC (perhaps through a subcommittee or the chair) could provide a point of contact for businesses which are confronted by apparent inconsistent regulatory requirements in particular cases to consider and review their concerns about the application of mutual recognition principles. To promote such discussion CPAC could invite submissions from industry groups on particular issues for consideration. Where such concerns demonstrate that mutual recognition principles have not been appropriately observed it would then be incumbent on officials to act to ensure such principles are observed. Such an approach would continue to allow jurisdictions to act individually where they see a short-term need, but would ensure in the medium term any individual actions are merged into a uniform approach to ensure a consistent application of rules across all jurisdictions.

Option 2 – Single law but numerous regulators

National schemes of legislation

National schemes of legislation can be agreed between the Australian and the state and territory executive governments and then presented for passage to their respective parliaments. Each jurisdiction would then enact identical legislation.

Identical legislation would lead to product safety being governed by one set of rules, which would have considerable advantages in terms of consistency and simplicity. It would also facilitate the introduction of a

GSP which would apply at both Commonwealth and state level to corporations and non-corporations (see Chapter 2 for a detailed discussion on the GSP).

However, such legislation would need to be developed and agreed. This may be a complex, costly and time-consuming process. Also, while national legislation provides legislative consistency it does not ensure administrative consistency as there would be no guarantee that numerous regulators would administer and enforce such legislation on a consistent basis.

There are a number of models which can be used to attain commonality of legislation, both in terms of the powers held by Ministers and their agencies and the administrative processes governing how such powers might be exercised. These models are briefly discussed below.

Uniform legislation

Uniform legislation[11] would allow one set of rules for product safety throughout Australia. However, it could not be guaranteed that one set of rules would continue to exist through time. This is because uniform legislation continues to require the cooperation of jurisdictions to ensure any amendments to the legislation remain consistent, are adopted by all jurisdictions and are enacted without time lags.

Template legislation

Template legislation attempts to overcome problems with the uniform legislation model by designating one jurisdiction to enact the template legislation while the other jurisdictions enact legislation which applies the template as the law in each jurisdiction. Any amendments made to the legislation in the designated jurisdiction immediately apply elsewhere.

For example, in Australia the Uniform Consumer Credit Code has been adopted on the basis of 'template legislation' in accordance with the Uniform Credit Laws Agreement. The initial legislation was passed by the Queensland Parliament and amendments automatically apply in the other states and territories. Under the agreement, there had to be unanimous agreement to the initial legislation whereas amendments can be made by approval of a two-thirds majority of participating jurisdictions.

A problem with template legislation is that it raises possible concerns about compromising the autonomy of parliaments. Template legislation may also be difficult to change and therefore be somewhat inflexible in the face of changing circumstances.

Core consistent provisions

The core consistent provisions approach requires all jurisdictions to agree to enact consistent essential (core) legislative provisions but allow for the existence of various local or regional product safety rules.

Such an approach can be found in the informal agreement made by previous MCCA ministers that they would 'mirror' the provisions in Division 1 of Part V of the TPA. This approach provides maximum flexibility to jurisdictions (and to those responsible for the drafting of legislation) to make any changes which are considered appropriate to ensure that amending legislation meets a jurisdiction's particular needs. The problem with this approach is that agreeing to pursue the enactment of core consistent provisions has proven in the past to lead to sub-optimal outcomes in promoting harmonisation. Invariably, one or more jurisdictions have been out of step in progressing regulatory changes, with the result that comprehensive harmonisation has not been attained.

11 Uniform legislation has been used in Australia's Uniform Trade Measurement Legislation.

Option 3 – Single law and regulator

The Commonwealth, with the agreement of the states and territories, could enact a single product safety law and establish a single product safety regulator to enforce that law. A similar arrangement has been put in place in relation to the competition provisions of the TPA.

To ensure the most efficient transition from the existing system, the single regulator should be the Australian Competition and Consumer Commission (ACCC) and the single law could be existing Commonwealth laws which that agency already enforces. The states and territories using various possible mechanisms[12] could apply Commonwealth product safety laws in their own jurisdictions while also conferring existing powers and functions on the ACCC.

Advantages of this approach would be that businesses would be subject to identical domestic requirements regardless of where or to whom their goods were being supplied, and businesses and consumers would no longer be faced with the problems of dealing with a multiplicity of regulatory requirements. Interpretation and enforcement should be more consistent in all jurisdictions and the changes to product safety rules should be quicker and more efficient. It would facilitate the introduction of a GSP.

However, despite the relative ease of moving to this new system this approach would represent a significant change to the existing product safety system and incur some significant costs. Such a national approach would require close consideration of the related infrastructure and resourcing issues. Boundaries may also need to be established between product safety and other areas of consumer policy which would continue to be administered by state and territory governments.

Finally, such a system may not take sufficient account of local and regional needs and interests. Decisions made at the local level tend to be more customised and responsive to local requirements and conditions.

Option 4 – High-level memorandum of understanding

A high-level Memorandum of Understanding (MOU) for Australian governments could also enhance the implementation of the MCCA Framework and Principles for seeking national outcomes and enhanced coordination of investigation, compliance and enforcement activities in relation to product safety issues.

An MOU, establishing roles and commitments by governments, would assist in the implementation of the framework. Pursuing an enhanced coordination of investigation, compliance and enforcement activity under the Framework, particularly at the operational level, could significantly address differences between jurisdictions. If a GSP were introduced, guidelines on its implementation could be included in the MOU to emphasise the need for harmonised interpretation of the standard of safety requirements.

Possible future arrangements which could be developed under the framework include a formalised exchange of expertise and experience for product safety officers to improve consistency of interpretation of standards and legislation, adoption of a uniform hazard assessment system to help identify issues for uniform action and greater pooling of research and product-testing resources.

12 Under the Conduct Code agreement, which provides for uniformity of the competition provisions of the TPA, all jurisdictions have agreed that 'Competition Code text' should apply by way of application legislation to all persons within the legislative competence of each jurisdiction. Once changes to the Competition Code text are passed by the Commonwealth Parliament, they are applied automatically by the laws of all the other jurisdictions. The Conduct Code agreement provides for states to be consulted on, and to vote on, proposals for amendment by the Australian Government.

Comparison of the different options

In considering the application of the above options to Australia's consumer product safety system it is necessary to weigh the importance of achieving legislative and administrative consistency, both initially and over time, with the needs of individual jurisdictions for legislative flexibility.

Any proposals that MCCA consider one of the above options, in addition to the existing mutual recognition drivers for harmonisation, should be considered in the context of the costs associated with each option in light of the additional harmonised outcomes that they would deliver. The current cost/benefit analysis being performed by the Productivity Commission in relation to elements of the product safety policy framework may be of some assistance in this process.

CHAPTER 2: A MORE PROACTIVE PRODUCT SAFETY SYSTEM

INTRODUCTION

Product safety-related injury imposes significant costs on both individuals and the economy. The costs are experienced personally through personal medical costs and incapacitating injury and also through lost work hours, higher public medical expenses and diminished employment potential.

Such significant costs may signal a market failure. Arguably, the most significant cause of such failure is that when businesses make decisions about the appropriate investment in assuring the quality and safety of their products, they may not take into account the full costs to consumers from being harmed by unsafe products. This is because often injury is paid for by governments or the consumers themselves and not the business that placed the product on the market.

Consumer product safety regulation is designed to reduce injury costs and any market failure. The current Australian consumer product safety legislation largely relies on targeted action applied to a very small number of specified products to achieve this aim. Additionally, it is generally considered the system reacts to injury rather than anticipates it. Because of these characteristics many commentators have suggested the system needs to adopt a more broadly based 'proactive' policy approach.

A proactive system involves regulators being able to identify safety hazards before consumers suffer harm, responsible businesses thinking sufficiently about safety issues in product design and consumers better understanding the risks involved before using a product.

This chapter explores various policy options that could lead to a more proactive product safety system.

OPTION 1 – A GENERAL SAFETY PROVISION

What is it?

A GSP would place a legal obligation on businesses to ensure they market only safe products.

Why have it?

In its discussion paper, *Review of the Australian Consumer Product Safety System*, MCCA indicated that the most significant challenges facing a product safety regulatory framework were the needs to:

- deal more swiftly, and less reactively, with emerging product safety problems;
- ensure that government regulation does not interfere unnecessarily with trade in consumer products; and
- ensure that government regulatory resources are used as efficiently as possible.

Depending upon the manner of its implementation, a GSP could meet these challenges.

By its general nature, covering all or most products and suppliers, and by focusing on the safety outcome rather than prescribing the design of particular products, a GSP could lead to safer product markets in a way that does not unduly distort trade and competition. That is, a GSP would allow businesses to choose how to meet the overall objective of supplying only safe products. Through such a mechanism a GSP could allow for a reduced emphasis being placed on other product safety enforcement mechanisms.

By placing greater responsibility on businesses to ensure that only safe products are placed on the market, a GSP would seek to address the reactive nature of the current regulatory system under which governments generally deal with product safety hazards as they come to the attention of regulators. That is, a GSP should encourage businesses to market only safe products and may drive a shift in approach within the business community towards greater safety in design and labelling. In so doing it may help to address the cost disadvantage that responsible businesses suffer when competing against businesses which do not invest sufficiently in product safety.

Alternatively, businesses argue that a GSP may place a new, costly and unnecessary burden on them. A significant risk is that businesses may seek to 'over-comply' with a GSP, taking steps to prove they are compliant which are not really necessary and do not improve safety outcomes.

What are the key issues to consider?

A number of issues need to be addressed before a GSP could be introduced and the choices made would be fundamental to its effectiveness. Broadly these include deciding how to frame the standard of safety under a GSP, how to assess whether businesses are meeting this requirement, what businesses and products are to be subject to a GSP and how a GSP is to be enforced and administered.

What is the framework for designing a GSP?

A GSP could consist of three basic elements. These are: the nature of the basic obligation on businesses; the standard of safety applying under this obligation; and the means of assessing whether the standard of safety has been met.

How should the basic obligation be designed?

The European Commission General Product Safety Directive (EC GPSD) basic obligation is very broad. It simply states that: 'Producers should be obliged to place only safe products on the market'.

A broad obligation, with the additional flexibility it provides could be used provided businesses have sufficient certainty as to its application. Such clarity about the intent of the basic obligation could be developed in a second reading speech or through other means.

The basic obligation above raises various issues including how to define 'businesses', 'safe', 'product' and 'on the market'.

Which businesses should be subject to a GSP?

Under existing product safety laws it is an offence for any business to supply goods in breach of a mandatory standard or ban. This suggests a GSP could similarly be applied to all producers and suppliers within the supply chain commensurate with their ability to affect the safety of products. Indeed, if a GSP were applied only to manufacturers of products, other businesses may not have sufficient incentive to take responsibility to cooperate with the manufacturer in transmitting safety information to the consumer or may promote or market a product which they know does not comply with the GSP.

What products should be considered 'safe'?

Businesses have indicated[13] that a GSP could create much uncertainty and lead to costs in determining what products would be considered safe. They want product safety laws to provide a clear indication of the appropriate standard of safety required, including how safety would be tested.

However, being too prescriptive about how business would comply with a standard of safety may reduce the freedom of manufacturers to design products in the manner of their choosing, and possibly lead to businesses overspending on safety. It would also contrast with the nature of a GSP which is to allow businesses to choose how to meet the overall objective of producing and supplying only safe goods.[14] Also, concerns about business uncertainty may be addressed by other design features of a GSP.

While there is a need to keep the definition of 'standard of safety' flexible there is the need to provide businesses with clear guidance on key safety issues. These are briefly discussed below.

Reasonable expectations of consumers

The EC GPSD accepts that the level of risk of a product may vary depending upon the risks inherent in its use. Supporting this approach it is considered sensible to take account of the reasonable expectations of consumers. Otherwise new product safety rules could lead to products such as scissors being declared unsafe and removed from markets. This means a product does not require absolute safety, but the minimum compatible with the product's use as considered acceptable based on the reasonable expectations of consumers.

Foreseeable misuse

Currently, the provisions in the TPA appear to allow the Minister to act only where the product is defective[15] and not where a product's 'foreseeable misuse'[16] could endanger safety.

However, under the product liability provisions manufacturers are required to anticipate the real world uses of their products and have responsibility for taking account of a level of 'foreseeable misuse' in the design and information supplied with their products. A GSP could apply a similar standard of safety to that which applies under product liability law.

This would lead to a situation where a product must reach a level of safety that 'persons are generally entitled to expect taking account of all relevant circumstances'. An advantage of this approach is that it may reduce uncertainty as regulators could claim that the standard of safety established under a GSP was equivalent to the standard of safety established under the product liability regime, which should be familiar to businesses.

The type of user

When products are used by vulnerable consumers (for example, children) the standard of safety could be set at a higher level. There are numerous examples in case law where the 'nature of the user' is taken

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13 During the SCOCA stakeholder product safety roundtable held on 28 February 2005.

14 Of course, concerns about the safety of any particular product can be addressed individually under a GSP as it does not preclude regulators from adopting a specific standard for a particular product or class of products.

15 Currently the provisions in the TPA allow the Minister to compulsorily recall consumer goods where they: will or may cause injury; do not comply with a prescribed safety standard; are declared as unsafe goods; or are permanently banned. It is generally considered that the effect of these provisions is that the Australian Government can recall goods that are defective, but not those which are unsafe as a result of foreseeable misuse.

16 A situation where the consumer uses the product in a way which, while not intended by the manufacturer, could have been reasonably foreseen and in so doing the consumer risks being injured.

into account. For example, in the law of negligence, a disclaimer will not generally be effective in relation to children.

Which products should be exempted from the coverage of a GSP?

One of the chief advantages of a GSP is that it can provide uniform and comprehensive cover of a wide range of consumer products. However, a GSP could be developed to apply more detailed requirements for certain classes of goods, for example children's products.[17] This approach may lead to definitional, business and administrative costs that would need to be considered against any benefits to safety.

Conversely, there may be some product categories which could be excluded. These are discussed below.

Production equipment and capital goods

A GSP is intended to apply to consumer products only. This means products used exclusively in the context of trade or business, such as production equipment and capital goods, could be excluded. Some definitional problems may arise. Would a capital good used by consumers (for example, shopping trolleys) be subject to a GSP?

Services

To promote safety it can be argued that a GSP should incorporate services - for example, the installation of a product may have an important bearing on the safety of that product.

However, to do so would significantly extend the scope of government product safety regulatory activity and may risk the application of a GSP extending beyond product safety into areas covering accommodation, fire protection, and occupational health and safety.

Additionally, applying a GSP to services may do little to improve safety. It can be argued that consumers currently receive sufficient protection in respect of services under common law and other legislation. For example, section 74(i) of the TPA provides consumers with an implied warranty that services will be rendered with due care and skill.

However, it could remain possible to include specific types of services within a GSP and this could be made clear if and when a GSP is introduced. Such flexibility would allow scope for a GSP to cover services subject to a mandatory standard.

Second-hand goods

Second-hand goods are generally considered to be covered by Australia's existing product safety provisions on a similar basis to other products.[18] This would suggest a GSP should apply to second-hand goods in a similar fashion to new products.

Questions arise as to whether complete coverage of all second-hand goods is practicable under a GSP because of enforcement difficulties associated with the large number of unrecorded second-hand transactions made by individuals. Another problem is whether it is reasonable to expect individuals selling goods privately (perhaps through a fete or garage sale) to know whether the product they are selling is safe. Exempting such transactions from a GSP would remove such compliance difficulties and in turn significantly reduce the regulatory burden.

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17 A GSP can be established as overarching legislation which can be underpinned by second-tier legislation or secondary directives that set more detailed requirements for certain classes of goods. In some instances compliance with mandatory consumer product safety or information standards may still be required.

18 This assumption has yet to be tested by a court.

However, such an exemption should not apply to second-hand goods that are sold in the course of normal business. To do so may relieve businesses selling goods for profit of their duty of care under case law that their goods are of 'merchantable quality'. Additionally, it may afford the opportunity for unscrupulous traders to avoid their responsibility for the supply of safe products and thereby compromise desired safety outcomes.

At what point in a product's life cycle should it be subject to a GSP?

An issue is whether the standard of safety should apply throughout a product's life cycle, from its manufacture to disposal (as proposed by Canada) or alternatively only when placed 'on the market'.

A life cycle approach would place significant additional cost pressures on businesses, would greatly expand the regulatory task and may not improve safety commensurately with these costs. Also numerous complex issues may need to be decided, for example, what is the 'effective safe life' of a product beyond which it would be unreasonable to penalise its maker.

For these reasons it may be appropriate that a GSP apply only when a product is placed on the market. This could include situations where a product is being supplied down the supply chain (from manufacturer to distributor to retailer) as is the case currently. It would also include situations where a product is supplied to a consumer, and therefore capture the hiring and lending of products, and where a product is given as a prize or gift.

How should we assess whether the standard of safety has been met?

In establishing the standard to which regulators are able to hold businesses accountable it will be necessary to determine the evidence which businesses are able to offer in defence of a charge that they have breached the GSP.

Various types of evidence may suffice. Evidence that a business has given genuine consideration to safety issues, for example by supplying relevant safety information to consumers and/or by thinking about safety in designing a product, would go a long way to supporting the view that the business has complied with its GSP obligation.

Additionally, compliance with a voluntary standard could be presented as solid evidence that businesses have met the standard of safety under a GSP. However, such evidence would not automatically ensure that a product is considered to be safe. To do so may reduce innovation as businesses may have too much incentive to conform to the standard rather than focus on a specific safety outcome in the design and sale of their products.[19] That higher levels of safety have been obtained by comparable products should not, in isolation from other factors, cause a product to be considered unsafe. Otherwise a car without an airbag would always be unsafe.

Should enforcement of a GSP be done through a system of public rights and/or private rights?

Private rights could be established under a GSP and this could lead to an extension of the operation of the existing product liability system.[20] New provisions which encouraged consumers to take their own remedial action against unsafe goods would create new incentives for businesses to place only safe products on the market.

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19 Government(s) should make clear at an early time (perhaps in the Second Reading speech) that conformance with a voluntary standard is not necessary to comply with the GSP obligation.

20 Under both tort law and PartVA of the TPA.

However, private rights of action already exist in Australia. Establishing new rights for consumers would disturb established product liability balances and practices, possibly resulting in uncertainty, new costs and problems. Enforcement of a GSP solely by regulators has the advantages of maintaining the existing product liability system and not having to consider how individual rights under a GSP would interact with such a system.

Should enforcement of a GSP become a centralised responsibility for one agency?

Providing different agencies (jurisdictions) with the task of enforcing a GSP may encounter some problems. It would risk inconsistencies in the enforcement approach[21] and duplication of effort. The involvement of numerous regulators would also require agreement on enforcement responsibilities (including who has the appropriate authority to act) and the development of coordinating mechanisms for the exchange of information. Particular problems would be caused by the nature of a GSP. As discussed above, the standard of safety could be defined broadly in the legislation, however, this could lead to the enforcement of different standards of safety depending upon jurisdictional interpretation, leading to confusion and uncertainty for businesses.

Conversely, leaving the task to one agency would risk the loss of local knowledge and relationships and require agreement from jurisdictions on a possibly complex legal mechanism to allow it to occur.

What penalties or remedies should flow from breaches of a GSP?

Appropriate penalties for breaches of a GSP will encourage businesses to think more carefully about designing better products and improving consumer information.

SCOCA has established a working party to investigate and report on the desirability of adopting civil pecuniary penalties, or some other more flexible enforcement strategy, in substitution for, or as an alternative to, criminal fines for contraventions of the consumer protection provisions of the TPA and the equivalent state and territory fair trading legislation. It may be appropriate to allow this specialist working party to release its findings before deciding the nature of penalties to apply under a GSP.

What would be the process once a regulator considered a product to be unsafe?

Under a GSP, it would be expected that a regulator would act as soon as it had reasonable grounds to believe a product was unsafe. Some evidence would need to be collected to support that view. Depending upon the severity of the risk the regulator could either negotiate a voluntary corrective action with the business (for example, withdrawal from sale, modification of the product, provision of information, recall etc) or utilise enforcement powers available to it.

One enforcement action would involve the regulator taking the matter to court. If the court considered the product unsafe, the business would be subject to a penalty.

Existing product safety remedies, such as recalls, warning notices and mandatory standards, could be used in conjunction with a GSP. Thus a GSP could provide regulators with an additional option for combating unsafe products.

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21 This point has been made in various consultation processes and reports including the SCOCA report *Consumer Product Safety in Australia: Achieving Uniformity through Review/Reform of the Regulatory Regime* – Melanie Archer, February 2003.

How can any initial business uncertainty and confusion caused by a GSP be overcome?

A GSP may create uncertainty (at least in the short term) as to what is required by businesses to comply with the standard of safety.

Various approaches could be used to reduce uncertainty, including: development of clear guidelines for businesses; greater government resources channelled towards the development of standards or greater use of international standards; development of a specialised website for the GSP detailing results of court cases, tribunal decisions and administrative settlements and other information about the standard of safety etc; and implementation of a transition period for introduction of a GSP.

A transition period of three years, based on no penalties applying for a breach of the GSP, would continue to allow regulators to enforce pre-existing product safety rules but provide some experience with enforcement of a GSP as well. During the transitionary period the regulator would undertake surveillance and publish any findings so that businesses could be better aware of their obligations under a GSP.

What ancillary obligations should accompany the introduction of a GSP?

A GSP may be accompanied by other 'ancillary' obligations in addition to the basic (safety) obligation. Ancillary obligations may include requirements for suppliers to monitor the ongoing safety of products, take corrective action and notify regulators of problems. Such obligations could be placed on business regardless of whether a GSP was introduced.

OPTION 2 – REVISING THE DEFINITION OF UNSAFE GOODS

What is it?

Currently, the provisions in the TPA allow the Minister to ban or recall consumer products where the products 'will or may cause injury'. The effect of this restriction is that the Australian Government can ban or recall products that are defective, but may not be able to act against those which are unsafe as a result of foreseeable misuse. The definition could be changed so that the Minister may ban or recall products that do not reach a level of safety that 'persons are generally entitled to expect'. Such a change could allow a level of 'foreseeable misuse' to be included in the definition and lead to a new definition of safety equivalent to that established under the product liability regime.

Why have it?

The existing definition appears to require a direct causal link between the product and the injury before direct interventions can take place. This results in a regulatory system which is reactive to unsafe products that enter the market and that come to the attention of government. Changing the definition may lead to a more proactive system.

Is this change justified?

Consumer groups in Australia have advocated the introduction of foreseeable misuse in the definition of safety in relation to several products, particularly baby or infant products, where the product itself is not the cause of injury but more of a conduit to accessing the hazard. Alternatively, businesses claim such a change could lead to significant uncertainty regarding what is meant by foreseeable misuse and what products are to be considered safe.

To overcome business concerns the wording of the new definition could be made similar to definitions used under the product liability regime. This may counter business claims about uncertainty as

regulators could argue that the new definition was equivalent to the standard of safety established under the product liability regime and this should be familiar to business. Additionally, the product liability regime allows for only a component of foreseeable misuse, that is it limits action only to cases where the behaviour resulting in the misuse of a product is reasonably foreseeable.

Moreover, changing the standard of safety in the TPA is not likely to give rise to calls for a range of new products to be banned or recalled. Supporting this, some other jurisdictions, which are not subject to the current restriction faced by the Australian Government, have reported that the power to ban or recall products subject to misuse has not led to numerous unwarranted requests to do so.

OPTION 3 – MONITORING AND REPORTING REQUIREMENTS ON BUSINESS

What is it?

Mandatory monitoring and reporting requirements (mandatory reporting) involve placing a legal responsibility on businesses to continue to monitor the safety of their consumer products and notify a government regulator of any 'potentially' unsafe product that they have placed on the market.

Why have it?

Under the current system, the only reporting requirement on businesses is to notify the Minister within two days of commencing a voluntary recall action. Mandatory reporting could enable governments to access broader and timelier product safety information. It could enhance product safety investigations and allow governments to respond more promptly to product hazards. Additionally, a legal obligation to report unsafe goods could encourage suppliers to be more mindful of safety in the design, production and marketing of products.

Mandatory reporting may also better identify trends within product groups or manufacturing processes, supporting overall product safety information and research capabilities. Once identified, governments could develop strategies, including working with business groups, to address more systemic issues. For all of these reasons mandatory reporting could significantly enhance the proactive nature of the product safety system.

However, despite these possible advantages the issue of whether to introduce mandatory reporting is far from clear. Mandatory reporting is a potentially onerous, time-consuming and costly process for both businesses and regulators and it is uncertain how effective it would be in increasing product safety. One reason is that it is likely that irresponsible businesses would not comply with any reporting obligation and it is such businesses that give rise to many product safety hazards.

What are the key issues to consider?

A number of issues need to be determined before mandatory reporting could be introduced. Broadly these include what businesses should be covered, what should be the safety threshold for notification purposes, when should businesses report and whether the burden placed on businesses and regulators by mandatory reporting justifies its development.

Which businesses should be required to report?

Different levels in the supply chain could be included in the obligation to report, with varying degrees of responsibility either written into the provisions or applied. The United States (US), which has a comprehensive mandatory product safety reporting system, includes all levels of businesses in its provisions, but generally pursues cases against manufacturers or importers.

What should be the safety threshold established under mandatory reporting?

It would be necessary to set a safety threshold for reporting. A number of considerations would be relevant in determining just where to set the threshold. Setting a higher threshold would result in fewer reports by businesses and a lower cost for businesses and governments from such a system. However, it may result in fewer opportunities to investigate potentially unsafe products and remove them from the market. It would also reduce the amount and value of information gathered.

These factors suggest that as a starting point minor hazards should not be the subject of any requirement to report but that products associated with serious injury or subject to a successful liability claim should be reported.

When should businesses be required to report?

Mandatory reporting would fundamentally change the nature of the existing arrangements between businesses and government. At present, unless there is a breach of existing regulation or a report of an unsafe product, businesses are generally left to conduct their own investigation and make their own decisions on the need for remedial action. Often remedial action takes the form of a voluntary recall which is notified to ministers within two days of commencing the action.

Immediately the company is aware of an unsafe good

Australia could adopt an approach similar to that undertaken in the US.

In the US companies must notify the Consumer Product Safety Commission (CPSC) immediately where they obtain information which reasonably supports the conclusion that a product distributed in commerce (1) fails to meet a consumer product safety standard or banning regulation, (2) contains a defect which could create a substantial product hazard to consumers, (3) creates an unreasonable risk of serious injury or death, or (4) fails to comply with a voluntary standard upon which the CPSC has relied under the Consumer Product Safety Act 1972. In addition to the general triggers, hazards associated with some specific products are listed as triggers to reporting. These relate to choking incidents in children.

The CPSC encourages companies to report potential substantial product hazards even while their own investigations are continuing. However, if a company is uncertain whether information is reportable, it may spend a reasonable time investigating the matter. That investigation should not exceed ten working days unless the business can demonstrate that a longer time is reasonable in the circumstances.

Only after the matter is resolved by the company

There is some concern that imposing mandatory reporting requirements on businesses may potentially expose them to product liability claims. Additionally, businesses may be reluctant to comply with informing regulators on investigations for which they have concluded that remedial action, such as a recall, is unnecessary, as they may be concerned that the regulator will force their hand or take some action itself.

For these reasons, an alternative approach would be for businesses to be required to report only after the matter is resolved. This would reduce the regulatory burden by avoiding the need (and obligation) for regulators to investigate and possibly take action. It may also encourage businesses to think about safety as regulators could ask businesses to report on any remedial actions taken to prevent further problems.

However, such an approach relies on a business acting appropriately to ensure the ongoing safety of its products and if this is not the case it may not permit timely remedial action to be taken by regulators.

'Fast track' option

As a means of reducing the burden on businesses and regulatory resources the US mandatory reporting system contains an option that limits the need for government involvement in the decision-making process. If a business undertakes to conduct a recall as a priority, no further investigation is deemed necessary and no 'preliminary determination' is made. This assuages business concerns as to product liability implications. In Europe, businesses that take immediate, effective corrective action are exempt from reporting altogether.

What burden is placed on businesses and regulators by mandatory reporting?

Businesses

Business groups have raised several concerns about mandatory reporting. Such concerns focus on the potentially onerous, time-consuming and costly nature of the reporting obligation. It is suggested that the reporting obligation and safety threshold for reporting may be too broad and imprecisely defined to be adequately complied with by businesses or administered by regulators.

Additionally, as discussed above, some businesses may be discouraged from reporting safety problems by potential exposure to product liability claims, while others believe[22] mandatory reporting of product safety problems would make product liability insurance more expensive or difficult for businesses to obtain. Also it is considered that irresponsible businesses would not comply with these obligations and that such businesses give rise to most product safety hazards.

For all these reasons businesses are generally opposed to mandatory reporting or signal that reporting should only be mandatory after a significant safety issue has been properly established.

Regulators

Mandatory reporting may place significant obligations on regulators to investigate and act on business reports and this may impose substantial costs on governments. Indeed, an obligation to act on business reports, coupled with the potentially large number of reports (including multiple reports concerning the same product), could require a substantial administrative infrastructure to process and assess reports. Anecdotal evidence suggests that about one-third of all staff employed by the CPSC work on investigations associated with mandatory reporting. If true, this raises the issue as to whether Australia wishes to increase its existing regulatory resources significantly to investigate such business reports or instead maintain existing resources and shift them into processing such reports and away from existing product safety activities. It could be argued that while investigating business reports has benefits, any shift may actually reduce the overall safety of the existing system.

If governments decide to establish a system of mandatory reporting but generally not investigate business reports, a question arises as to why businesses should be forced to undertake such activities. Also not acting on such reports may open regulators to being sued for negligence if a product not subject to an investigation causes serious injury or death.

Ultimately a decision on whether to introduce mandatory reporting may be dependent on what other policy changes are to be made. The introduction of a GSP may substantially reduce the need for mandatory reporting. On the other hand the introduction of mandatory reporting could reduce the need for the development of a GSP or other options discussed below.

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22 This claim was made by the Australian Electrical and Electronic Manufacturers' Association in its submission to the MCCA discussion paper entitled *Review of the Australian Consumer Product Safety System* (August 2004).

OPTION 4 – EXTENSION OF THE EXISTING RECALL OBLIGATIONS

What is it?

An extension to the existing voluntary recall obligation could lead to the imposition of a legal requirement on businesses to recall products as soon as there is reasonable evidence available to support the view that a product is unsafe. Currently businesses decide when a voluntary recall should take place. Defining in the regulations when businesses should undertake a recall may lead to businesses recalling a product at an earlier time than otherwise and this may improve product safety.

A new recall obligation could be accompanied by a power for regulators to audit and assess all voluntary recalls. Alternatively such an audit power could be introduced separately. The new recall obligation and/or recall audit power could form part of the 'ancillary obligations' on businesses under a GSP.

Why have it?

A new recall obligation could provide more effective precautionary protection of consumers from unsafe goods as businesses could be required to act more quickly once they considered a product might be considered unsafe. This could be before consumers suffered injury and may reduce the period of time that an unsafe product remains on the market.

The audit power may provide regulators with additional details about voluntary recalls that could improve their ability to assess the effectiveness of such recalls and act more quickly where recall procedures were proving ineffective.

Can these changes be justified?

New recall obligation

The greatest challenge in introducing a new recall obligation on businesses would be in establishing the circumstances in which a business would be required to recall a product. As a product recall can be very costly to undertake, it would be important to define clearly the extent and nature of the risk to consumers that should prompt a recall. This may not be an easy task.

Additionally introducing a recall obligation could have some perverse effects on businesses. For example, the potentially high cost of undertaking a recall may reduce the incentive for businesses to respond swiftly to a perceived safety risk. Instead, businesses may prefer to conduct a full and comprehensive investigation before declaring a product to be unsafe. After the recall it may be difficult to determine whether the business acted responsibly because it may be hard to ascertain at what point the business had sufficient information available to it to action a recall.

Finally, the new recall obligation may give rise to potentially unnecessary and costly recall actions.

A recall audit power

A recall audit power could improve the ability of regulators to assess the effectiveness of recalls undertaken by businesses. However, such a power may also inhibit the flexibility of businesses to conduct recalls in the most cost-effective manner. Whether this occurs could depend on the way the audit power is exercised and on the nature of the relationship between businesses and regulators during the recall process. For example, if the audit power were to be applied to voluntary product recalls, the administrative processes involved could make such recalls more complex and difficult and this may act to discourage businesses from undertaking further recalls.

Also a recall audit power may place a significant burden on regulatory resources and raise legal issues for governments. For example, governments may face pressure in circumstances where a poorly conducted

recall failed to protect consumers and the recall had not been monitored, even though regulators had the power to do so.

Additionally, while it could be said that the TPA does not expressly provide regulators with a recall audit power, the (section 65F) power relating to compulsory product recalls can be seen to imply the possibility that such a recall audit could be requested. This is because one of the ways the Minister can be satisfied that a supplier has taken satisfactory action to prevent injury is by undertaking a recall audit.

Finally, experience has shown that supplier goodwill and cooperation with Government is almost always forthcoming when a recall audit by government officials has been suggested, even though an express legal power to conduct such an audit does not exist.

CHAPTER 3: A MORE INFORMED PRODUCT SAFETY SYSTEM

INTRODUCTION

Consumers, as well as businesses and governments, have a requirement for relevant product safety information. However, relevant product safety information may not be readily available. This could be because it is costly to obtain, difficult to charge for, or the self-interest of the seller may result in it being withheld. If product safety stakeholders cannot obtain such information they may make decisions that are not in their or the community's best interest.

This raises a number of issues. What information is important? Do product safety stakeholders currently receive this information? If not, why not? Finally, what efficient mechanisms can be introduced to overcome any problems?

What product safety information is important?

Product safety information is primarily about identifying the risks of unsafe products and unsafe product usage. Product safety information takes many forms, and consumers, business and governments have different requirements regarding the type of information they need to identify and assess risk.

Product safety information should allow consumers to understand product risk so they can make better decisions about how and understand whether to use a product. Businesses must understand their legal and regulatory obligations, how their customers will use the product and how to manufacture safe products. Finally, governments need to identify, analyse and respond to product safety risks to consumers. They also need information that will allow them to assess intervention options and whether policy achieves its objectives.

Do product safety stakeholders receive important information?

The existing system appears to have four key problems that result in stakeholders sometimes not receiving key information or receiving such information in an untimely and/or inefficient manner.

Detecting unsafe products

A key objective of Australia's consumer product safety system is that any unsafe products that reach the market be readily detected and reported.

The current system places a significant responsibility for detecting unsafe products on governments. However, government resources directed towards detecting unsafe products are limited, resulting in a system that perhaps does not identify product hazards as rapidly as it could.

Often detection depends on consumer complaints, information exchanged with other jurisdictions, and media reports. All safety-related recalls are posted by the ACCC on the Product Recalls Australia website, which is used by consumers, suppliers and regulators. Hospital-generated product-related death and injury data could be useful in detecting newly emerging unsafe products or trends in unsafe use of products; however, current data collation and analysis lead times (and other limitations, discussed below) make it more amenable to longer term analysis. A greater reliance on regulatory audits and more timely use of research data could result in a more proactive approach to detection rather than one that reacts to product-related death or injury.

Quality data to inform a proactive product safety strategy

Product safety regulation has often been reactive, responding to incidence of product-related death or injury. A more proactive product safety system requires consumer agencies to have access to good-quality data and research to identify emerging trends and longer term issues. A major challenge for consumer agencies in obtaining, analysing and using product-related death and injury data is a lack of clarity regarding the scope of data that falls within the 'personal, household or domestic' product jurisdictions of these agencies.

A programme driven by good-quality data has a number of benefits, including assisting consumer agencies to:

- create appropriately targeted programmes;
- monitor programmes and outcomes on an ongoing basis;
- evaluate and measure the success of programmes;
- ensure programmes meet the contemporary needs of consumers; and
- improve programme response to new or emerging product safety issues.

It is also important that businesses and consumers have access to accurate and timely information to allow them to take a greater level of responsibility in preventing product-related harm.

The need to improve research capabilities

Product safety research is currently not well-coordinated in Australia and funding appears to be lacking when compared to other developed countries. Additionally, research is often undertaken on an ad hoc basis as a response to short-term problems. Such factors lead to a situation where often important information is not available to stakeholders.

Supporting these views the National Heath and Medical Research Council (NHMRC)[23] states that 'consumer product-related injury is poorly identified and documented in routine health and mortality data; risk is poorly understood, especially in the interaction between product and human development; preventative interventions are not well-evaluated and while broad costs are known product-specific costs have not been determined and therefore cost-benefit analyses on the rare occasions they are undertaken are not reliable'.

Just as the potential for improved research capabilities in Australia could assist government agencies to address safety problems, it could also provide opportunities and incentives for Australian and regional business to address product risk and safety by making data and research facilities available for private research and development projects and partnerships.

Business information

Most businesses recognise that providing safe products, and information for safe use of products, contributes to their corporate objectives by maximising customer satisfaction and minimising costs and risks arising from customer complaint and litigation. In addition, most businesses seek to comply with relevant regulation and legislation. Businesses require information on their regulatory and legal obligations, as well as information on the implications of failing to meet such obligations.

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[23] National Health and Medical Research Council paper - *Paradigm shift. Injury: from problem to solution*. 1999. NHMRC: Canberra

Businesses impacted by regulatory standards claim[24] that they find complying with product safety rules difficult and costly. As there is no 'one-stop shop' to locate all product safety information, businesses that market products nationally may be forced to contact up to nine jurisdictions to obtain relevant information.

Why don't product safety stakeholders receive important information?

Existing data may not be in a readily usable form or timely

Current major data sources (see Appendix 2) are limited. They include:

- coroner's data - The National Coronial Information System (NCIS) overseen by the Monash University National Centre for Coronial Information (MUNCCI). This provides information from all state and territory coronial courts;

- hospital emergency department and admissions data. This data is produced from the various state and territory health systems and is collated by the Australian Institute of Health and Welfare, the National Injury Surveillance Unit and Monash University Accident Research Centre (MUARC); and

- the Australian Bureau of Statistics, which collates information from state and territory Offices of Births, Death and Marriages.

Such data from different systems is not always compatible and usually differs in the level of detail recorded. While NCIS records contain detailed information, they often lack sufficient detail on specific products and how the product contributed to the death under investigation.

Additionally, the current data collected mainly covers deaths and serious injuries which may be product-related. Data on low-grade injury or 'near misses' is not captured.

Existing data does not adequately define product safety information and consumer agency responsibilities

From a product safety perspective, a major problem with the data is that it often does not classify injuries as related to product safety or not. Hospital data collection is driven from a health and injury diagnostic perspective, not a product safety perspective, and in Victoria at least, capture of product information is not mandatory, and not codified.

Generally, only broad information about injuries is available. For example, Victorian hospital admissions show that 3 per cent of injuries were caused by a person being poisoned. However, such information does not show whether poisoning was related to a particular product and usually there are no details about how the injury occurred. This makes it difficult for regulators to judge whether to take action.

Building on this issue, a significant challenge for consumer agencies is the lack of clear guidelines about what constitutes a 'consumer' product-related injury, and what products, accidents, deaths and injuries fall within their jurisdiction.

Current hospital death and injury data collection clearly defines road accidents and workplace accidents. Categories such as homicides and suicides are defined and can be excluded from the set of preventable injury and death within the jurisdiction of consumer agencies, and other categories of death and injury fall within the jurisdiction of other agencies such as the Office of Gas Safety, the Office of Chief Electrical Inspector, the Therapeutic Goods Authority, etc. Essentially the scope of consumer agencies' jurisdiction for product-related death and injury is those categories and sub-categories which do not fall within these other areas.

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24 During SCOCA product safety stakeholder consultations held in Canberra on 28 February 2005.

To establish a clearly defined data set, a clear definition of what does and does not fall within consumer agencies' jurisdictions is required first.

Based on MUARC data there could be up to 500 deaths a year that are associated with the use of consumer products in Victoria.[25] This upper estimate exceeds the annual road toll. Even if the true measure was one-tenth of this upper estimate, this is significantly more deaths than occur at workplaces in Victoria per annum. However, the lack of information on the product connection in death and injury data, and the composite nature of the data comprising the subset of product-related death and injury relevant to consumer agencies' jurisdictions, make it difficult to present a strong message on product safety to the community or to other policy makers.

A comprehensive consistent data base does not exist

It is reasonable to assume that product safety issues are broadly similar across States and Territories, and available State-based data can be used to provide a useful indication of the extent of product safety issues nationally. However, Australia does not collect comprehensive national statistics on product-related injuries and deaths.

Without national data, it is difficult to establish the extent of the harm caused to consumers by unsafe products, including the cost of such injuries and the breakdown of injuries between those caused by defective products and those caused by product misuse. It is also difficult to determine which products pose the greatest risk to consumers, which consumer groups face the greatest risk of injury, and the factors that contribute most to significant harm.

Uncoordinated data and research

The structure of the current product safety system is such that state, territory and Commonwealth agencies may be investigating similar products concurrently, resulting in a duplication of research and inefficient use of product safety resources.

Lack of use of overseas information

In contrast to Australia, the US CPSC has detailed product safety information. For example:

> The Commission's data files contained 155 deaths (or an annual average of 52 deaths) associated with nursery products that occurred from 1998 through 2000. About 39 percent (60 total or 20 annually) of the deaths involved cribs. Playpens and play yards, and baby bath seats or rings had the second highest number of deaths reported each with 18 or 6 annually. Infant carriers and car seats had the third largest number of reported deaths or about 5 annually.[26]

Such detail can make overseas consumer agencies a valuable source for product safety information. While information about specific products is not always directly applicable to Australia, in many cases international information and discussion of issues will be relevant.

By using overseas data and information more effectively, Australian regulators could use their own resources better, by, for example, not duplicating relevant international research. International product safety information, including email product alert bulletins from the CPSC, also have the benefit of acting as a type of early warning system, allowing Australian consumer agencies to take proactive steps to address problems identified overseas that may not yet have impacted on Australian consumers.

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25 This figure is an upper estimate of the number of deaths which could be related to the use of consumer products in Victoria, based on 2001 MUARC death and injury data. The figure is derived from the total number of injury deaths in Victoria, less deaths coded as transport-related, suicides, homicides, and 'undetermined intent'. Of the 500, some 400 are coded as related to falls, or poisoning.

26 United States Consumer Product Safety Commission, 2003, *Nursery Product-Related Injuries and Deaths to Children under Age Five*, Memorandum, 24 July 2003.

PRODUCT SAFETY DATA AND RESEARCH IN AUSTRALIA

A range of information on product safety is used in Australia, including:

- complaint data. Product safety complaints are the main source of information for state and territory consumer agencies. The ACCC uses complaint data on an ad hoc basis to identify hazardous products. The media is also a key source of information to help identify issues for action and areas of priority;
- research produced by injury research and surveillance units such as the Queensland Injury Surveillance Unit (QISU), the MUARC and the Injury Prevention Unit – Otago University;
- National Coroners Information System. The NCIS is an electronic records system for coroners' reports and associated documents, and provides generally detailed information that enables accidental deaths to be linked to consumer products;
- international research and data.

Appendix 2 provides greater detail on these information sources.

IMPROVING PRODUCT SAFETY DATA AND RESEARCH

Issue 1: Poor quality data on outcomes

There are three key sources of data on consumer product-related injuries: hospital emergency room data; hospital admissions data; and coronial data.[27] Consumer agencies use this data to help assess product hazard risk and commission research on consumer product-related injuries. Organisations such as MUARC collect and analyse injury data from systems such as the Victorian Injury Surveillance System (VISS) and QISU.

The available data is subject to a number of limitations, as discussed above.

More detailed, codified product information relating to the cause of injury in hospital admissions or emergency department presentations could be captured. However, the optimum amount of detail to collect on each injury remains unclear[28], the cost associated with additional data collection would need to be analysed, and the accuracy of such data would need to be tested. Interpretation of the information is also vital, requiring some expertise and possible follow-up.

NCIS records contain generally detailed information, but often lack sufficient detail on specific consumer products and how the products contributed to the deaths being investigated. This issue has been raised in a letter to the Victorian Coroner, but it would appear that a discussion with the coroners is necessary to explain the value of detailed product information for consumer agencies to assess product safety hazards and determine appropriate solutions. Again, the structure, codification and costs associated with capturing and analysing additional data need investigation.

The current data collected focuses on deaths and serious injury. What remains to be captured effectively is data on low-grade injury or 'near misses'. This type of information is not generally available from hospitals. Consumers, business, and people who treat minor injuries, such as GPs, are the best source of this information.

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27 Hospital expenses account for the greatest proportion of costs associated with injury.

28 A questionnaire used to gather data in the UK under the Home Accident Surveillance System (HASS) had over 50 headings. It should be noted that the UK no longer collects statistics on the causes and nature of home and leisure accidents from hospitals.

An alert system for medical practitioners could provide a means for GPs to alert consumer agencies where they believe there is an unsafe product on the market. As medical practitioners may see lower grade injuries than hospitals, this system may allow product safety risk to be addressed before a more severe injury occurs. The CPSC runs a Medical Examiner and Coroner Alert Program (see Appendix 2). The CPSC commits part of its budget to obtaining a targeted number of reports from medical practitioners through this programme; therefore, some of the success of this programme would be associated with the funding that CPSC dedicates to it.

Possible options

- Improve the level and codification of detail collected in hospital data.
- Work with stakeholders including government health departments and injury surveillance organisations to develop a strategy to improve hospital data collection, possibly as part of a broader injury prevention strategy, incorporating product safety-related data.
- Increase and improve the level of detail in coronial data.
- Expand the collection of data to capture low-level and 'near miss' injury data

Issue 2 – Product safety research

There appears significant potential to develop Australia's product safety research programme to underpin effective programme design and implementation, and support product safety objectives. Any research effort requires the ongoing commitment of resources, yet the benefits of implementing and monitoring a well-researched product safety programme appear, at face value, significant.

In 2001, MUARC estimated the lifetime cost of death and hospital-treated injury in Victoria at $3.1 billion. [29]

Injury	Cost per injured person	Incidence	Total cost ($m)
Death	$590,716	1,638	$938
Hospitalisation	$24,389	75,934	$1,852
Emergency dept presentation	$1,221	254,245	$310

The figures demonstrate that there would be considerable cost benefits through expanding the research programme even if product-related death and injury were reduced only slightly. To get resources to expand the research programme, it may be useful to work with the stakeholders that would reap the benefits of a reduction in death and injury, including the health system, to consider a jointly managed and funded research programme.

MUARC has identified potential areas of research that can be of direct benefit to government and suppliers. This research includes:

29 Victorian Injury Surveillance & Applied Research System, *Hazard* Edition No. 54, Autumn 2003. www.general.monash.edu.au/muarc/visar. Note that the MUARC cost estimates are largely confined to direct medical/hospital costs and foregone earnings. Personal pain and suffering, other associated costs, and broader societal loss, are not factored into the costs. The CPSC uses an average US$2 million as the 'cost of a life' in its benefit cost analyses.

- identifying the nature of injuries related to specific products and emerging or previously unrecognised product-related injuries;
- developing an injury prevention priority-setting and cost effectiveness model;
- developing a hazard and energy exchange model for injury causation;
- refining a 'relevant human factors' model for the product/human interface;
- developing mechanical, design and statistical computer modelling research tools, and simulation testing; and
- applying industrial design research methods to translate safety principles from models to integrated product designs.

There is good opportunity to use this form of research to support the generation of proactive programmes and policy.

Expanding the research programme would support government in taking proactive steps to reduce the incidence of product-related death and injury, but requires the ongoing commitment of resources to develop an effective research programme. An important element of any research programme is to provide improved product-related death and injury information to enable programmes to be designed, performance targets to be set, and outcomes monitored.

A second key element of any research programme is that it is tightly connected to programme implementation and improvement, and not simply an 'academic exercise'. A research programme that achieves these objectives would support not only Government product safety activity, but also Australian businesses, which could use the research capabilities for private research and development programmes, or partnerships with government and other agencies.

There are a number of options regarding how such a research programme could be managed and undertaken.

Possible option: national research agenda

Coordinating national research could be achieved through establishing a national research agenda through CPAC. This would include agreeing on long-term research plans and results of research projects. Alternatively, an established research facility could be nominated to undertake the research programme, with coordination of the research programme managed by CPAC.

Possible option: centralised research facility

The establishment of some form of coordinated or centralised research facility could be used to integrate and analyse product safety information and research from all sources (both national and international). The functions of such a facility may range from:

- acting as a clearinghouse for the collection and dissemination of injury data and other product safety information; to
- maintaining the clearinghouse function but also performing some specialised and expert product safety tasks; to
- performing the full functions of a dedicated research facility staffed by people with significant research and technical expertise.

A centralised research facility could have benefits including improving harmonisation and efficiency.

Clearinghouse

For investigations and risk analysis by consumer agencies to be consistent, access to the same data and research is required. This could be facilitated through the establishment of a clearinghouse for domestic and international data and research. Both Europe and the United States have established large-scale research infrastructures to investigate consumer product safety. For example, in the United States the CPSC's National Injury Information Clearinghouse provides injury data from electronic data sources and distributes publications including hazard analyses, special studies, and data summaries. A similar model could be adopted in Australia to take advantage of the significant levels of product safety information available overseas. For example, the clearinghouse could be used to distribute important email product alert bulletins from the CPSC.

The clearinghouse approach is used in other policy areas, for example the National Child Protection Clearinghouse at the Institute of Family Studies, operated by the Australian Government. Consideration would need to be given to who will have responsibility for administering the clearinghouse.

Clearinghouse with specialised functions

Apart from acting as a clearinghouse of information, a central research facility could have other specialised product safety functions. These would include:

- establishing a national research agenda. This would include agreement with CPAC on long-term research plans and results of research projects; and

- coordinating and managing injury and product research that would be undertaken by external consultants and agreed with CPAC.

Dedicated research facility

Another approach would be to establish a centralised national research body to service the research needs of Australian consumer agencies. Such a facility would have the resources and expertise to undertake a national research programme, with the results being accessible to all agencies. For example, it would be expected the facility would have the skills to undertake specialised internal investigation and analysis of the causes and prevention of death, injury, and illness associated with consumer products. This could improve efficiency in product safety by eliminating duplication of effort, utilising specialist research analysts and providing national data coverage. The downside of such a facility would be its cost, which would be considerable.

Issue 3 – Timeliness of information (earlier warning)

Good-quality, timely information can assist consumer agencies prevent repeat occurrences of previously identified product-related harm, and take action to prevent deaths occurring where a serious injury has been identified. Timely data is most useful in addressing short-term issues by improving reaction time to identified and emerging product safety risks.

Developing ongoing product-related injury data on a timely, ongoing basis is an option to facilitate earlier warning of hazardous products.[30] Such a system would monitor the safety performance of existing products. It could also be used to ascertain the effectiveness of any government intervention. The emphasis on developing such a system would be on identifying unsafe products very quickly, so as to encourage timely investigation and action by regulators.

30 Consultations have revealed strong support for such a system.

Timely, relevant data from hospitals[31] or GPs would be extremely useful in this regard. Such data would need to include details about the injury, the product, the person and how the injury occurred.

To ensure appropriate timeliness such information could be collected from emergency rooms across a sample of hospitals on either a daily or weekly basis.

The NEISS early warning system collects information on product-related injuries each day from over 100 emergency rooms across the United States (see Appendix 2). In Victoria a similar system is operating providing state-wide coverage of 35 hospital emergency departments. The lead time in collating and analysing this data currently is not supportive of a 'true' early warning system, and could be better used in medium-term, proactive programme development.

An early warning system raises some key issues. The available data would need to be developed in a way that accurately captured the relationship between product safety risks and injuries, and the accuracy of such data would need to be tested. Interpretation of the information is also vital, requiring some expertise and possible follow-up. Poor interpretation of results could result in governments taking unwarranted regulatory action. How such information would be coordinated and made available to relevant parties in a timely fashion would also need to be decided. State, Territory and Commonwealth collaboration may be required.

The use of 'timely' data needs to be considered. Data to identify emerging unsafe product risks needs to be available quickly. Data used to design and improve proactive programmes does not need to be available on such short timeframes. As the provision of 'timely' data usually has a cost attached, determining which data needs to be provided rapidly should be carefully considered.

Interestingly, the United Kingdom no longer collects statistics on the causes and nature of home and leisure accidents from hospitals. The reasons given by the Government on 2 May 2003 were that 'increased pressure on resources and the need to focus on core priorities' meant that the Home Accident Surveillance System (HASS) and the Leisure Accidents Surveillance System (LASS) had to be stopped.

Possible options

- Early access to coronial information.
- Improved and more timely medical data, either through current data collections or through new data collections (eg via GPs).
- Better use of international data.

Issue 4 – An 'unsafe product' database

A national product safety database could alert regulators to unsafe products. Such a database could take many forms, which are explored below.

A regulatory database

Consumer agencies could establish a national database to upload complaint and investigation information, disseminate information, and post alerts. This would require that consumer agencies record complaint and investigation information in a standard format so it is compatible with the system, and comparable to other jurisdictions. This system would improve the comparability of information, and create a larger, national sample of data to identify trends and emerging issues.

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31 Hospital expenses account for the greatest proportion of costs associated with injury.

AUZSHARE is a secure web-based alert system currently operating for scams, which could be adapted for a national product safety database. AUZSHARE has a number of features that could improve information exchange between consumer agencies (see Appendix 3).

Even without a database such as AUZSHARE, product safety information that is gathered by consumer agencies is generally shared, albeit usually on an ad hoc, informal basis. However, the extent to which such information is utilised is an open question. For example, the Alleged Hazardous Products electronic register, designed for disseminating information to consumer agencies on identified or suspected hazardous products, has been in place for a number of years, but appears not to be widely used by state and territory agencies.

Regarding information-sharing between consumer agencies, at the MCCA meeting of 27 August 2004, ministers endorsed a framework for enhancing coordination of investigation, compliance and enforcement activities in a number of areas, including product safety. This included enhancing coordination through improved information-sharing in these areas.

A consumer database

Consumers are a valuable source of product safety information; however, there are challenges in how to collect, and get consumers to provide, good-quality product-related information. An internet-based 'consumer watch database', similar to the online reporting capabilities of the CPSC, could provide an avenue for consumers to report 'near misses' and unsafe products. Such a service could quickly alert regulators to potential product safety problems.

Interpreting the information provided by consumers would involve a degree of subjectivity and could result in governments not responding appropriately to consumer alerts, either under or overreacting. There is also a possibility that a web-based system could be abused, and it is unclear how it could be determined if notices about unsafe products were genuine, unless resources were committed to following up information provided by consumers. For a system such as this to be effective, resources would need to be committed to managing the volume of information and investigating consumer reports.

Capturing consumer concerns about product safety quickly appears to offer sufficient benefit to regulators to warrant some investment in data management and analysis. There are significant issues, however, if such a database were available for public viewing - predominantly related to the authenticity and accuracy of claims made. Such a database could be viewable only to regulators, providing consumers with a central repository to lodge concerns for investigation.

A business database

Businesses could provide information to regulators regarding products that they have identified as posing a risk to consumers. In the absence of mandatory reporting obligations on businesses, it is unclear whether such a system would achieve a useful take-up.

In the US, manufacturers, importers, distributors, and retailers are required to report to the CPSC under the Consumer Product Safety Act 1972 (CPSA) within 24 hours of obtaining information which reasonably supports the conclusion that a product may be unsafe (as defined in the CPSA). The issue of mandatory reporting requirements on business is explored more fully in Chapter 2.

Issue 5 – Developing a 'safety culture'

Effective advertising campaigns could be developed to encourage consumers and businesses to pursue product safety objectives. Specific high-risk consumer groups such as families with young children could be targeted. Australia has previously run successful advertising campaigns relating to road safety and skin cancer.

A problem with this approach is that the data required to support such advertising may not be readily available. Such data is required to define a problem, target a message and assess whether the provision of information has achieved its objectives. Until systems have been established to support the development of such data it may be unwise to fund a campaign emphasising product safety issues. Additionally the option could be costly.

Road safety campaigns are an illustration of successful, objective-based policy and programmes, focused on reducing the incidence of death and injury arising from certain products (cars), rather than focusing on unsafe products. It demonstrates how focusing on one performance measure (road deaths) leads to a variety of integrated programmes addressing a common objective and underlying causes.

The road toll campaigns also highlight the extensive use of local and overseas research to inform and improve programme design.

Issue 6 – Improving product safety information for business

Businesses claim[32] that they find complying with product safety rules difficult and costly. The overwhelming reason for this problem is the lack of harmonisation between different product safety jurisdictions. Businesses consider it unreasonable that they have to contact up to nine separate jurisdictions to have a good understanding of product safety laws.

Businesses have suggested a possible solution to the problem would be a 'one-stop shop' advice service or dedicated Internet site where they can find all regulatory information in one place. Such a service could provide businesses with a good understanding of the application of product safety laws across separate MCCA jurisdictions. Ways of providing such a service range from providing links from each jurisdiction's website to all other jurisdictions' sites, through to a centralised site providing all jurisdictions' information.

Before investigating such alternatives, possible changes leading to greater harmonisation of product safety laws and administration could first be given a chance to work as such changes may mean there is no longer a need for a one-stop shop for businesses (see Chapter 1).

Conclusion

Consumer agencies require good-quality research and data to detect, assess and address product safety hazards readily; however, consumers and business also require good-quality product safety information to assess and address product risks, comply with regulations and take responsibility for preventing product-related harm.

With improved quality of data and research, consumer agencies can help facilitate improved information flows between government, business and consumers. Good-quality data and research support this through helping identify the type of information that is required by the different stakeholders and who is the best party to collect and distribute that information. There are a wide range of information requirements and flows between consumers, government and business (see Appendix 4). This chapter sets out a range of approaches which would address the information gap and improve product safety in Australia.

32 During SCOCA product safety stakeholder consultations held in Canberra on 28 February 2005.

APPENDIX 1: SECOND-HAND GOODS AND SERVICES

PRODUCT SAFETY STANDARDS SPECIFICALLY TO ADDRESS REQUIREMENTS FOR SECOND-HAND GOODS

Second-hand goods should, to the fullest extent possible, be as safe as new goods of that kind and subject to the same types of controls. It is proposed that any distinction in standards or legislation be abandoned and that all safety-based requirements apply equally to new and used items unless a specific policy decision has been made to exclude second-hand products from these requirements. The Consumer Products Advisory Committee (CPAC) has discussed this proposal. In future, all standards should specifically address the issue of how and if they apply to second-hand items.

APPLICATION OF PRODUCT SAFETY LEGISLATION TO SERVICES

The service sector accounts for a significant share of economic activity in Australia, yet there is no uniform application of consumer safety provisions relating to services. Only in Victoria, Queensland and South Australia do consumer safety laws cover services as well as products. Consumer advocates argue that there are risks to consumers from unsafe delivery of services and that the regulatory framework should include services.

Where regulatory arrangements are in place, they focus on specific sectors such as health, recreation, tourism and transport and are generally administered outside consumer protection/fair trading portfolios.

In the absence of systematic data collection and accident-monitoring in relation to the safety of consumer services, it is not possible to quantify the level of risk in order to justify a need for coverage of services. The three jurisdictions with regulatory coverage of services have not introduced any mandatory standards or banned the delivery of any services.

The current consumer safety system identifies consumer goods that present specific unacceptably high risks to the health, safety or welfare of consumers and addresses these. However, in some instances there are definitional problems in distinguishing between the 'supply of a product' and 'the delivery of a service' when determining the appropriate course of action. For example, when developing a mandatory standard for blind cords to prevent strangulation, the installation of the cord (service) is as critical to the child's safety as the design of the blind (product). In the absence of a statutory power to regulate 'services', the standard can only deal with the 'product'.

A second example is the pool fence. According to the Australian Consumers' Association, many pool fences fail a strength test, although insufficiently strong fences are not the primary cause of children drowning in backyard swimming pools. Faulty installations (and gates being left open) are more common contributors. If consumer safety laws covered services, a mandatory standard for installation of pool fences could be introduced.

The manufacture, supply, installation, use, maintenance and disposal of products can all pose risks to consumers — covering services would allow standards to be developed in a 'whole-of-supply-chain' approach and address all the potential hazards posed.

It is proposed to apply consumer product safety legislation to consumer services in a targeted way so as to minimise the regulatory burden on business. This could be done by making provision for mandatory safety requirements in relation to services that are ancillary to or associated with the supply of goods to which a mandatory standard applies.

APPENDIX 2: WHAT PRODUCT SAFETY DATA AND INFORMATION DO CONSUMER AGENCIES CURRENTLY USE?

COMPLAINT DATA

Product safety complaints are the main source of information for state consumer agencies. Consumer Affairs Victoria (CAV) manages a database of complaints that holds detailed information about the complaint received, the product type, whether there was an injury involved and the alleged hazard. It also includes file notes on any action taken in regard to the complaint. The Ministry of Consumer Affairs in New Zealand (MCANZ) maintains a similar database to provide statistical information to ministers.

State and Commonwealth consumer affairs agencies share complaint data to identify hazardous products and issues for action. The ACCC operates the Register of Alleged Hazardous Products system for circulation of this information. State agencies use complaint data to identify issues for action. The ACCC uses complaint data on an ad hoc basis to identify hazardous products. The media is also a key source of information to help identify issues for action and areas of priority.

INJURY RESEARCH AND SURVEILLANCE UNITS

Queensland Injury Surveillance Unit

QISU provides bi-monthly reporting and data on product-related injuries. QISU takes a safety advocacy role, and is a member of the Queensland Consumer Safety Committee.

Monash University Accident Research Centre

MUARC undertakes applied research contracts for government agencies. The Victorian Injury Surveillance and Applied Research System (VISAR) is a major project of MUARC. VISAR stores, analyses, disseminates reports on and applies injury data to injury prevention. MUARC also implements prevention strategies, and monitors trends and outcomes of interventions. VISAR includes data from the Victorian Injury Surveillance System (VISS). VISS records details of injuries treated at the emergency departments of the six VISS hospitals. The data is based on information provided by the injured people and the attending doctor.

Injury Prevention Unit – Otago University

MCANZ undertakes research with the Injury Prevention Unit at Otago University, used mainly in specific product investigations and assessing product risk.

National Coroners Information System

The NCIS is an electronic records system for coroners' reports and associated documents, available to consumer agencies through access agreements. The records provide generally detailed information that enables accidental deaths to be linked to consumer products.

Consumer agencies use NCIS data to gain information on coronial investigations that have implicated consumer products as a causal factor in accidental deaths, and help determine appropriate action.

Other Safety Regulators

The Queensland Office of Fair Trading (QOFT) Product Safety Unit works closely with other safety regulators including road safety, electrical safety, food safety and public safety regulators to identify areas that would benefit from a whole-of-government approach to issues.

The ACCC liaises with other Commonwealth and State agencies on product safety matters relevant to their responsibilities, including the Department of Transport and Regional Services, Food Standards Australia and New Zealand, the Department of Health and Ageing, the Therapeutic Goods Administration, the National Industrial Chemicals Notification and Assessment Scheme, electricity authorities and gas authorities.

MCANZ uses Accident Compensation Corporation (ACC) injury data to assist consumer product investigations. The ACC administers the accident compensation scheme in NZ, which provides personal injury cover to citizens, residents and temporary visitors to NZ. In return, people do not have the right to sue for personal injury, other than for exemplary damages.

The ACC collects injury statistics to analyse claim trends, identify priority areas to target, and develop programmes to reduce the number and cost of injuries. Medical practitioners log all accidents with the ACC, including hospital admissions. The data collected on the injury is not always product- specific.

Queensland Government Statistical Householder Surveys

QOFT uses data from the Queensland Government Statistical Householder Surveys to measure consumer and business perceptions of the effectiveness of product safety activities.

International Research and Data

Consumer agencies use data from international consumer agencies in a variety of ways, from monitoring websites and receiving email alerts, to networking with staff from various international agencies. Research and data from the following agencies are used in product safety activity:

- Consumer Product Safety Commission, United States
- Consumer World, United States
- European Consumer Safety Association
- EU Health and Consumer Directorate-General
- Health Canada
- UK Trading Standards Authorities.

United States Consumer Product Safety Commission (CPSC)

The CPSC is an independent federal regulatory agency. The CPSC works to reduce the risk of injuries and deaths associated with consumer products. Use of data and research by the CPSC include:

- developing voluntary standards with industry;
- commissioning research on products to support recommendations to voluntary standards committees;

- using research and data to drive mandatory standards or banning consumer products if no feasible standard would adequately protect the public;

- conducting research on potential product hazards.

The Hazard Identification and Analysis (HIA) program

The HIA program provides the CPSC with the information needed to assess product hazards and develop injury reduction strategies - it is the agency's early warning system.

The CPSC collects data on consumer product-related injuries and deaths, as well as economic and hazard exposure information, for those products under its jurisdiction. CPSC also investigate specific injury cases to gain additional knowledge about injuries or hazards and how the reported product was involved. The HIA work provides underlying support to all the Commission's Results Act activities.

Medical Examiners and Coroners Alert Program

The MECAP Project is designed to collect timely information on deaths and injuries involving consumer products. The program relies on coroners or medical examiners contacting the CPSC whenever they encounter a death or situation that they believe should be considered during a safety evaluation of a product.

National Electronic Injury Surveillance System (NEISS)

NEISS is a national probability sample of hospitals in the US and its territories. Patient information is collected from each NEISS hospital for every emergency visit involving an injury associated with consumer products. From this sample, the total number of product-related injuries treated in hospital emergency rooms nationwide can be estimated.

Neighbourhood Safety Network

Organisations enter contact information into the NSN database. The CPSC uses the contact information to send out posters, publications and announcements that are specially tailored to meet the needs of specific groups — such as child safety tips for new parents and fire safety advice for older people living on their own.

Consumer Product Safety Review

This is a quarterly publication that offers an in-depth look at the latest hazards associated with home and recreational products, as well as significant current product recalls.

UK Department of Trade and Industry

Home Safety Network

The Home Safety Network is a research arm investigating home safety. DTI has produced research papers on practical ways to reduce accidents around the home, and patterns and trends of home accidents, including looking into factors of product fault or contributory behaviour. The research was driven by data including Home Accident Surveillance System (HASS) and Home Accident Death Database (HADD) and the Office of National Statistics (ONS) database of coroners' returns.

Royal Society of the Prevention of Accidents — RoSPA

RoSPA is a charitable organisation working toward the promotion of safety and accident prevention in all areas of life. RoSPA was contracted by DTI UK to provide an information service using the HASS and Leisure Accident Surveillance Systems (LASS). The HASS and LASS systems are no longer collecting data, but have product safety data from 1978 to 2002.

EUROPEAN UNION

PROSAFE

PROSAFE is an organisation established by enforcement officers throughout Europe who deal with the safety of consumer products, which promotes coordination of enforcement activities and exchange of information, expertise and best practices. PROSAFE online enables these officers to overcome some of the physical barriers that separate colleagues throughout the European economic area.

Scientific Committees

The Scientific Committees provide the European Commission with the scientific advice it needs when preparing policy and proposals relating to consumer safety, public health and the environment. The Committees also draw the Commission's attention to the new or emerging problems which may pose an actual or potential threat. In the interest of transparency, the opinions of the Committees are made available as quickly as possible following a request for advice from the Commission. In addition, the agendas, minutes of plenary meetings and lists of members are published.

APPENDIX 3: AUZSHARE

AUZSHARE is a secure web-based alert system currently operating for scams and a database on consumer complaints. The system was agreed at MCCA and went 'live' in April 2005. All jurisdictions, except South Australia, have contributed financially to the system.

Each agency is able to manage its users and their access, update its mailing lists, add and remove its own alerts and view the history and status of all uploaded complaint data. Output reports, including comprehensive search criteria, will be available for:

- alerts by origin of complaint (jurisdictions and totals);
- complaints by origin;
- alerts by conduct/practice;
- complaints by conduct/practice.

The features of AUZSHARE that could improve information exchange between consumer agencies are that:

- alerts can be sent via email, improving the timeliness of information on unsafe products, and could improve product safety regulators' response time;
- a historical and searchable database of alerts and complaints is readily available and sophisticated reports on historical information can be obtained;
- specific users groups can be established for specialised areas (eg product safety).

The alerts function allows authorised users to post alerts, notify specific user groups of an alert by email and search for an alert by type of complaint, business, date and keyword. Users can access information immediately after it has been posted. Protocols could be established regarding the types of issues to be placed on the AUZSHARE database, and how alerts are categorised, eg 'High Alert' could be used for an unsafe product where injury risk is high.

The complaints function allows access to a central database of complaints information downloaded from each jurisdiction. Users will be able to search for information by type of complaint, business and other details.

APPENDIX 4: INFORMATION

		INFORMATION TO		
		Government	**Business**	**Consumer**
INFORMATION FROM	**Government**	• Unsafe products • Current investigations • Alerts from consumers, business, or overseas agencies • Current research	• Regulatory requirements • Product safety laws • Banned products • Product safety and complaint data	• Targeted advertising and education campaigns • Product warnings
	Business	• Product safety risks or faulty products • Product recalls	• Industry groups sharing safety innovations • Development of safety standards	• Product information and safety instructions • Recall notices • Feedback and information services
	Consumer	• Unsafe/ faulty products	• Complaints regarding unsafe, unsuitable or faulty products • Consumer groups working with business to improve product safety information and labelling	• Unsafe/faulty products • Safety risks of using certain products • Product reviews