

**Response by the**  
**Australian Competition and Consumer Commission**  
**to Specific Requests for Comment**  
**in the Productivity Commission Discussion Draft**  
**on the Review of the Australian Consumer Product Safety System**

**Preamble**

The Australian Competition and Consumer Commission welcomes the Discussion Draft (DD) by the Productivity Commission (PC) on the review of the Australian Consumer Product Safety System. The report should prove extremely helpful in providing a better understanding of Australia's current product safety system and should generate healthy debate on initiatives which may enhance the current system. The ACCC is pleased to provide further comments on selected specific requests for additional input. The selected requests are reproduced below, followed by the ACCC response.

**Product liability**

*(p. 99) The Commission is seeking participants' views on the implications for Australia's consumer product safety system of the recent changes to the product liability system.*

The ACCC agrees with the PC that the incentives created by the product liability system are an important part of Australia's consumer product safety system. As noted in the draft, the threat of product liability along with market forces and media pressure are the key elements that motivate the supply of safe goods.

In risk management terms, the consequences for suppliers (of having to pay out for damages) have been reduced by the 2004 amendments because the amount of claim has been limited. More importantly however is that the likelihood of having to pay out at all is further diminished. The likelihood has always been affected by whether a defective good will lead to injury and whether the injured party will sue. Now further diminishing factors are whether the injury reaches the required threshold and whether the claim can be made within the shortened time limit.

While the PC found there is no evidence of a widespread problem of businesses intentionally releasing unsafe products (Preliminary finding 5.2), this does not account for the existing evidence of careless disregard on the part of some businesses. The product liability reforms indicate a potential for this to remain, if not increase.

The ACCC is concerned that the 2004 amendments may have diminished the incentives for suppliers to make safe goods and this needs to be taken into account in reviewing the consumer safety system as a whole.

In the opinion of the ACCC, the attainment of optimal safety outcomes requires an appropriate balance between reliance on market forces and the application of an appropriate regulatory environment. Improvements to community wellbeing are most likely to be enhanced by a more proactive regulatory environment in which a centralized governmental agency can actively respond to problems caused by unsafe products. Any dilution of Australia's product liability regime is unlikely to promote safe and efficient national markets.

**Only have necessary safety specifications in mandatory standards**

*(p. 111) The Commission is therefore seeking additional information on the extent to which regulators aim to sharpen the focus of mandatory standards on specific product-related hazards and use risk analysis to inform this process.*

In formulating its policy advice, the ACCC invariably uses risk analysis to focus resources on addressing key product related community hazards, particularly for vulnerable community groups. Hence the safety of children's products has been accorded priority. Mandatory standards for children's cots, toys, children's nightwear and bunk beds have all been aimed at avoiding deaths and serious injuries caused by design hazards eg. small parts choking hazards, hanging hazards in structural design, fire hazards caused by certain clothing design or fabrics.

A rigorous regulation impact statement and consultative process is required in respect of mandatory standards proposed under the Trade Practices Act. Costs and benefits are addressed in respect of options for addressing the identified hazard. A preliminary risk analysis is conducted prior to commencing a RIS process. Most mandatory standards are driven by the actual occurrence of avoidable deaths and/or serious injuries. There are always competing interests in developing standards as regulation and, as there is often an absence of useful data, some value judgements need to be made. It is often the case that information gained post-implementation allows a revaluation of the need for some aspects of the standards. When mature mandatory standards are reviewed, care is taken to ensure that mandatory obligations are addressing only essential safety issues.

It is understood that in Europe, the hazards must be identified and outlined at the outset and then standards are written to address only those hazards. This may be contrasted with the system in Australia where a product is put forward for developing an Australian Standard (usually after one or more hazards are identified) but the whole product is then up for consideration, so that even relatively minor hazards are included.

### **Distribution of responsibility**

*(p. 118) In its final report, the Commission intends to explore in more detail the distribution of responsibility for consumer product safety within the existing regulatory framework. It would therefore welcome participants comments on this issue.*

The attainment of consumer safety is presently achieved through a multi-faceted approach. Efficient markets can generally be relied upon to provide safe outcomes for the community, as consumers will not knowingly purchase unsafe goods. In some instances market failures can eventuate in consequence of consumers lacking the necessary information to make informed decisions about the products they are purchasing, and governments have intervened to address these asymmetry of information issues through consumer information programmes or other targeted mechanisms directed to ensuring consumer awareness. The achievement of safe market outcomes is also assisted by product liability laws which make the manufacturers and suppliers of unsafe goods liable to those suffering injury caused by those products, thereby serving to rectify market distortions which might occur if unsafe goods could be marketed at lower cost than those which were safe.

Governments also intervene in the market to ensure safe outcomes in a more direct fashion. At present, however, the powers exercised by government to ban the supply of unsafe goods or to require them to be recalled, together with the power to mandate minimum safety standards with which goods must comply, have been used sparingly. The issue, in determining an appropriate distribution of responsibility for product safety, is whether this level of government intervention is adequate to achieve optimal safety outcomes, or whether broader regulation of consumer goods would provide a better balanced approach to ensuring safe market outcomes.

The ACCC believes that the distribution of responsibility for safety, while residing with all three groups (suppliers, consumers and governments), must be focussed on the parties most able to influence change. The current system places a great deal of emphasis on government intervention rather than the three-way partnership – with government, business and consumers – operating together.

Consumer education is a critical element of improving consumer safety. In the ACCC's view there are also benefits in providing consumers with a better understanding of risk management. There is a variety of ways to deliver product safety information to stakeholders and the ACCC believes that an important role of government is to develop consumer safety awareness as a long term strategy.

The potential to modify consumer behaviour is however essentially limited, especially across such a wide range of product types. The PC notes that it is rarely possible for consumers to gain a thorough understanding of all the safety risks associated with a particular product or the extent to which safety features ameliorate those risks (DD p. 14). It further notes (DD pp. 21-22) that consumers' risk perceptions can be inaccurate and biased in relation to probability judgements. While some targeted education strategies can be helpful, reliance on this as a principal strategy is arguably not a sound basis for policy.

The PC also comments (DD p.113) that regulators face challenges in proactively identifying hazards that can not easily be addressed. However, it can be argued manufacturers and others involved in the supply and marketing of consumer goods have far greater opportunities to do so. While regulators and epidemiologists have all 15,000 products to worry about, individual suppliers are in a position to understand the uses and abuses of their own limited range of goods. Points on hazard considerations listed in the DD (p. 59) in relation to the need for government intervention could be equally applied to manufacturers and importers.

Further, business associations also have a detailed understanding of safety issues associated with their specialty product categories. They provide a collective means of improving safety in the interests of their members and the wider community.

Manufacturers can, often with limited effort or expense, predict and anticipate consumer behaviour, including likely uses and misuses. They can then use this information, in many cases, to design hazards out of a product. (Exercise bikes are one example: if manufacturers had turned their minds to the environment in which their product is used, they could have *identified* and *easily treated* the hazard before it caused the amputation of many toddlers' fingers. Injury data was also available prior to government intervention. Instead of just designing the product for the bike user, they could have considered that the product is used in the home environment where young children have access to the product.).

The comments by the various groups quoted on page 118 of the DD regarding supplier attitudes and actions are considered valid and reflective of the ACCC's experience in administering product safety provisions of the Trade Practices Act. Safety policy in Australia is predominantly reactive in nature and the legislative powers underpinning safety policy were intended to be of a reserve nature. The responsibility for ensuring consumer safety lies in consequence predominantly with manufacturers and importers of goods, and it is arguable that the present regulatory environment does little to ensure that manufacturers or importers put in place appropriate risk management strategies to achieve optimal safety outcomes for the community at large.

As noted in the ACCC's submission to MCCA (November 2004) the hierarchy of risk reduction indicates that the greatest influence in product safety is at the design stage, followed by applying protective devices and providing information<sup>1</sup>. Actions by users of the product are the next level down.

Manufacturers therefore have both the power and the opportunity to improve the safety of the goods they supply to the consumer. And while a large proportion of consumer goods sold in Australia are imported, the importers will often have control or influence over design and other aspects. The fact that these players have the most potential to influence product safety means that they should be the real target of government's strategy. The measures contained in the DD do not appear to reflect this.

In the opinion of the ACCC, a properly balanced regulatory environment needs to be proactive if it is to achieve optimal outcomes, as over-reliance on market mechanisms to

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<sup>1</sup> ISO/IEC Guide 51 – Safety aspects – Guidelines for their inclusion in standards

achieve appropriate safety outcomes results in unnecessary and inefficient delays between the identification of safety problems and their resolution.

### **Enforcement effectiveness**

***(p. 120) The Commission is seeking information from regulators on the extent to which they use risk analysis to focus their available resources on: product-related hazards that have the highest potential cost to the community in terms of injury and death; and those businesses that are likely to have low levels of compliance.***

The ACCC is very active in its compliance and enforcement role in product safety and can point to numerous actions that have provided successful outcomes for consumers. In response to the statements made in section 5.3 of the DD (pp 119-120), the ACCC would like to make the following points:

The ACCC has a well-established system of risk management in designing its work in product safety compliance strategies and targeted enforcement actions. The factors that apply in managing the risk are outlined in *Attachment 1*. The level of a product's hazard and the nature of its market are the two key factors.

Through this system, the products with the highest risk of *hazardous non-compliance* are targeted. Priority is given not only to non-compliant goods, but those that pose significant, *actual* hazards. Where available, injury and mortality data is used to help determine the extent of the hazard in real terms. All available information is fed into the overall ranking of products subject to standards, as well as taking account of any emerging issues.

The statement in the DD (p. 120) that 5 out of 10 cots failed the mandatory standard (as reported by Choice magazine) is evidence of enforcement problems is, in our view, not substantiated. The breaches found by ACA in its testing related to hazards that were minor in terms of both injury and likelihood of occurrence (as assessed through technical knowledge of the standard, supported by detailed injury data and absence of complaints). ACCC and its state counterparts have found compliance with the cot standard to be very high. Instead of these results being evidence of poor resource targeting, they should be seen as effective risk management.

The nature of the market is assessed and monitored through market intelligence and surveys. A key factor in this is the use of the provision in the Trade Practices Act that makes it an offence to *supply* non-compliant goods. Including all suppliers in the supply chain creates a potential compliance 'ripple effect'. In other words, traders down the line make their own suppliers accountable for their compliance. This can be more effective than enforcement agency staff undertaking random surveys, as it potentially covers a large percentage of the market through a kind of 'self-enforcement'. Larger companies that have more resources can and should promote compliance with the various SMEs that supply them. As such, targeting surveillance and enforcement activities at major retail companies is a legitimate and important strategy.

Approximately half of the ACCC's product safety investigations result from surveys while the rest emanate from complaints or reports. Surveys are designed using the risk assessments

done for each product. Complaints are assessed against those rankings before proceeding with an investigation. Suspected breaches are analysed in the context of the specific hazard created by the breach.

The ACCC does not encounter many breaches in product safety by what could be called ‘fly-by-night’ traders. This may be partly due to its focus on national and widespread consumer detriment, but more generally the ACCC does not find the ‘cheaper-end’ of the market (as noted on p. 113) to be disproportionately represented in the more significant product hazards. The ACCC is aware that the state agencies find high levels of non-compliance with some standards at discount variety stores, but the products concerned are not always those that pose the greatest risk.

\$2 shops are included in the ACCC’s monitoring program, often to target specific goods known to be stocked by those outlets.

The primary ‘enforcement’ problem faced by regulators, however, is that enforcement activities can only be directed to breaches of the law as it stands. Agencies have no fiat to take action in relation to unsafe goods *per se*, and in consequence the benefits that are capable of being achieved from a proactive approach to product safety are not being achieved to the extent possible. Mechanisms similar to, but arguably less intrusive than a General Safety Provision (discussed further in the following section) could operate to provide the basis for more proactive and better targeted enforcement activities by agencies. The ACCC considers that more attention could be given to other regulatory models which might be utilized to achieve better safety outcomes for the community.

### **General Safety Provision**

*(p. 172) Further comment is sought on the costs and benefits of a GSP, in particular views and information addressing any of the factors noted above. [reproduced below]*

The key to achieving better outcomes lies in governments enabling enforcement agencies to take action when product hazards are identified (ie a proactive rather than a reactive approach). While the introduction of a General Safety Provision may enable this, there are obvious problems and inefficiencies flowing from the uncertainty inherent in the concept. It is possible that the costs attaching to the introduction and implementation of a GSP could be reduced by the adoption of some other regulatory model which might share some of the benefits of a GSP without having some of the challenges noted in the Discussion Draft.

One of the obvious major contributors to the uncertainty attaching to the enforcement of a GSP lies in the need to develop a body of law to support the envisaged regulatory structure. If regulatory mechanisms can be developed that enable reliance to be placed on existing law, the costs flowing from the uncertainty in any re-balanced regulatory environment should be minimised.

An example of how this has been done in the past lies in s. 51AA of the Trade Practices Act, which adopts the meaning of ‘unconscionable’ within the meaning of the unwritten law of the States and Territories and gives the ACCC an enforcement role where none existed prior to the enactment of the provision. In the area of product safety, the ACCC could similarly be

provided with an enforcement role where goods were supplied which “will or may cause injury” (to adopt and rely on the present law surrounding the provisions in Div 1A of Part V of the Act).

A similar but differently focused option could be developed around conferring an enforcement role upon the ACCC in relation to the supply of goods which are ‘defective’, adopting the meaning already enacted in s. 75AC of the Act and interpreted by the Courts in relevant Australian cases and European decisions on the EC’s product liability directive. The Productivity Commission may wish to consider whether its Terms of Reference might enable it to consider whether a variant of the GSP could facilitate better product safety outcomes at a lower cost to the community.

Alternatively, the Commission could be given a specific role where a person suffered an injury as a result of a product related breach of duty of care. The legal concept of product related duty of care is well developed in the State and Territory courts. Enabling the Commission to seek an appropriate order from a Court, whether it be in the nature of a fine, pecuniary penalty or simply a remedial order to protect other consumers, could serve to rectify any unsatisfactory risk management strategies presently being adopted by manufacturers or importers of goods.

***The number of businesses that currently pay insufficient attention to the safety of their products.***

While most suppliers pay some attention to safety, there would be a significant number that fail to give safety sufficient consideration overall in terms of design that takes proper account of intended and unintended uses and the potential for injury to the user and others in the environment in which a product is used.

In some cases, the ACCC finds insufficient attention to safety even with suppliers of goods that are subject to mandatory standards, for example jacks for which compliance levels continue to be lower than acceptable. It appears that neither the declaration of a mandatory standard nor the threat of product liability provide sufficient incentives for these traders.

***Of those businesses not currently doing the right thing, what proportion are likely to alter their behaviour under a GSP — how big is the ‘fly-by-night’ or ‘recalcitrant trader’ element and will the GSP have any impact on this group?***

As noted above, the ACCC does not encounter many breaches in product safety by what could be called ‘fly-by-night’ traders with regard to products subject to mandatory standards and bans.

The ACCC encounters a fairly low level of recalcitrance in its product safety activities. One factor contributing to this may be the comprehensive nature of the ACCC’s remedial actions. These include measures to stop errant conduct, remedy the problems with the products supplied and address any systemic problems within the supplier’s purview, such as implementing compliance systems for the future supply. These measures impose costs on the suppliers and seem to have the effect in most cases of ensuring that compliance and perhaps

safety are given due attention in the future. Occasionally, monetary penalties are also sought through prosecutions.

At present, any non-regulated goods that are identified as hazardous are not subject to the same comprehensive treatment. If a GSP were in place, this would allow more effective remedies for the goods concerned. Recalcitrance could be addressed through substantial remedial action.

One key difference between a GSP and the existing product liability regime is that a GSP would provide a more proactive approach. With product liability, suppliers have the option of taking the risk that even if the product is defective, no-one will be harmed and also want to sue. A GSP may provide incentive for all suppliers to consider the safety of their products at their inception, including design, production and marketing. However, a supplier may also choose to 'risk manage' in relation to a GSP.



***Where unsafe products are placed on the market, how many accidents are likely to be avoided by regulators being able to more effectively take pre-emptive action? Without a significant increase in resources and/or better early warning systems, how much difference would the GSP make to early detection and removal?***

The number of accidents likely to be avoided is very difficult to quantify due to the paucity of available data. The large majority of suppliers are willing to conduct a voluntary recall as soon as a significant product hazard is identified. Very few suppliers would knowingly supply an unsafe product. If new mechanisms, including legislation, and resources were available which provided better and earlier hazard information to regulators, some product related injury events might be avoided. This improvement might result, for example, from being able to negotiate or direct a product recall earlier than might currently occur.

In our view, without improved resources and better warning systems, the GSP alone would make little or no difference to early detection and removal of hazards. The GSP may influence suppliers who currently don't pay enough regard to the safety of their products and also help raise the product safety profile. There then might be less unsafe products supplied to the market. However, once a product is on the market, improved resourcing and/or better early warning systems would be required to detect these hazards. Once detected, the presence of the GSP could be expected to facilitate removal of the hazardous product by providing a simpler reference point for establishing a breach.

***How important would transition costs be and how long would the adjustment period be (for example, before the legal interpretation of new concepts is settled; businesses understand their obligations; where necessary appropriate standards have been developed).***

Transition (implementation?) costs to government would be substantial with a great deal of resources required to ensure suppliers understood their new obligations. It would be necessary to strike the right balance between insufficient and too much attention to safety by suppliers as 'over-compliance' is acknowledged as a potential burden on business. A substantial lead period would be necessary to allow for development of guidance materials and for suppliers to make the necessary changes.

## **Services**

***(p.193) Further information is sought from participants on the nature and magnitude of any problem with unsafe services – in particular, data on injuries or deaths caused by ‘unsafe’ service provision or complaints about the safety of services, including the proportion relating to:***

- ***Services already covered by sector-specific regulation;***
- ***Other services, including those relating to the installation and maintenance of products.***

***How adequate is the protection provided by existing legislative coverage of services and the common law?***

Section 74 of the Trade Practices Act implies into consumer contracts a warranty that services will be rendered with "due care and skill" and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. This statutorily implied contractual requirement is similar in nature to the tortious 'duty of care' which underpins negligence actions and assists to ensure the availability of remedies for injury or damage caused by unsafe services. Prescriptive statutory provisions directed to regulating the manner in which services are to be provided, however, have proven to be only of limited value in improving the quality and safety of services, and are inherently difficult to enforce in consequence of the variable nature of the product being delivered and the difficulties involved in determining compliance with service delivery standards prior to the time of service delivery. Anecdotal evidence suggests that the behaviour of service providers is positively influenced by their knowledge that delivery of unsafe services which cause injury or damage will result in their being liable to pay compensation to affected parties.

## **Second-hand goods**

***(p. 201) The Commission requests further information from governments on their enforcement efforts in relation to second-hand goods, including:***

- ***What level of resources are applied?***
- ***Which strategies are employed and how successful have they been?***
- ***What products and suppliers are targeted and/or given priority?***

The ACCC devotes its product safety compliance and enforcement resources primarily to the market for new goods, in accordance with its stated priorities of targeting widespread consumer detriment.

Where appropriate, the educational material developed for suppliers and consumers addresses the need for vigilance in dealing with second hand goods and provides practical guidance on assessing and improving safety.

### **Recalls**

***(p. 279) The Commission seeks further information on the effectiveness of recalls in reducing the harm done by unsafe products and on mechanisms for improving the quality and success of recalls in addition to those proposed by MCCA (such as the inclusion of photographs in recall notices).***

Australia's (voluntary) product recall system is considered the main mechanism for removing unsafe goods from the market. The success rate of individual recalls can vary but recall efforts are generally commensurate with the assessed risk associated with the defective product. Under the Trade Practices Act, the relevant Minister has the power to order recalls or additional recall action if the supplier has not taken satisfactory action to prevent goods causing injury to any person. This power facilitates negotiations for additional recall efforts when necessary.

Mechanisms for improving the success of recalls include more effective advertisements (large advertisements, increased range of newspapers used), product photographs in recall ads, repeat rounds of advertising where appropriate, use of in-store notices, recall ads in speciality magazines, radio and television items when appropriate. As with other market interventions, the costs of recall actions should be commensurate with the benefits arising, and these costs should be kept (whenever possible) within the capacity of the supplier. Success rates of recalls might also be generally improved by targeted consumer awareness programs, as consumer apathy can adversely impact on recall outcomes.

### **Harmonisation**

***(p. 295) The Commission is seeking further comment on whether the above legislative differences [reproduced below] are the most significant and the ones that, if harmonised, will deliver the greatest net benefits.***

- *the scope of any coverage of services;*
- *pre-conditions for the imposition of bans and mandatory standards;*
- *mandatory recall powers;*
- *requirements to notify authorities of voluntary recalls;*
- *length of interim bans; and*
- *appeal processes.*

In respect of legislative differences, with the exception of services, the listed items appear to have the most potential benefit to reduce burden on business and deliver a more efficient system for all stakeholders. In those States which have included safety of services in their fair trading legislation, the ACCC is not aware of any use of relevant powers. Lack of harmonisation in relation to services does not appear to be an issue.

***(p.315) The Commission is seeking comment on the merits of greater industry and consumer representation on inter-jurisdictional bodies which decide on national standards and bans.***

The ACCC does not see any particular merit in this proposal. Industry and consumer bodies are widely consulted on any draft proposals for national standards and their views are respected and fairly assessed. Many national standards are based on published Australian Standards. Industry and consumers are generally well represented on the technical committees which write these standards.

National bans are relatively rare and are in response to strong evidence that a product on the market will or may cause injury or death. The TPA provides for conference procedures available to suppliers impacted by bans or proposed bans. Industry and consumer representatives are also invited to meet with inter-jurisdictional regulators on specific issues to provide valuable input, but final decisions on national standards and bans should be based on advice from regulators.

***(p. 316) The Commission is seeking information on the benefits and costs of the creation of a national, inter-jurisdictional product safety agency and the division of the roles and responsibilities between such a body and the jurisdictions.***

***(p. 317) The Commission is seeking further comment on the workability of a national regulator with the power to impose national standards and permanent bans and with responsibility for enforcement. If such a body is thought beneficial, it is also requesting advice on whether the ACCC or some other body should take on the role of the national regulator.***

Australia needs a system that is supportive of efficient markets and makes it easier for business (both domestic and international) to comply with a safety regime. The ACCC supports a single product safety regime to ensure businesses do not have to deal with multiple agencies.

A single regime would reduce duplication and therefore be a better use of government's limited resources. A further benefit of a single decision-making body would be to remove the need to co-ordinate actions and therefore improve response times on strategies to counter hazardous goods.

It has been observed that while only limited goods are subject to specific regulation, those businesses that are affected experience a considerable burden. This stems from their having to manage multiple interactions and the variant demands of the different agencies.

The PC notes in the DD (p. 289) that the various agencies sometimes run parallel investigations due to inadequate communications. However, the ACCC observes that they may have occurred due to an unwillingness to accept decisions or outcomes made by other jurisdictions' ministers or agencies and a perceived need to conduct the work themselves.

The subjectivity of product assessments and interpretations (as noted on p. 39) and the diverse enforcement approaches taken by the multiple agencies (p. 303) are noted as leading to complications for business. The ACCC agrees that these factors will always affect the consistency between jurisdictions. While efforts are to be made via the CPAC network, the ACCC questions the potential to achieve such enforcement consistency between jurisdictions in the current regime “at very little cost” (as suggested on page 304) in such a way that could significantly reduce the cost to taxpayers and to business.

As national regulator, the ACCC endeavours to undertake leadership and co-ordination of some regulatory, administrative and enforcement activities. However, as noted in the MCCA Options Paper of August 2005, significant time and resources are needed to ensure such mechanisms operate effectively. This statement accords with the ACCC’s experience. The PC notes that reaching inter-jurisdictional agreement can at times be a frustrating process (DD p. 302).

In the absence of structural change there will always be limitations on the effectiveness of harmonisation. The suggestion on DD page 318 that the high costs of duplication and inconsistency should encourage new efforts to achieve harmonisation is a fair observation, but not supported by the fact that these costs have not to date been sufficient incentive for change.

Based on its experiences with competition policy, the ACCC would be strongly supportive of a model that facilitated a harmonized approach based upon a national regulator. The ACCC recognises that there are significant sovereignty issues involved in any initiative directed to achieving harmonized outcomes, but is of the view that compromise solutions are both desirable and achievable, as already evidenced in the mutual recognition principles adopted by all MCCA jurisdictions. The ACCC believes that it would be possible to develop a system that would provide for substantially increased harmonization on the national scale without significantly derogating from the sovereignty of State/Territory jurisdictions. For example, jurisdictions could retain the right to temporarily ban the supply of unsafe goods or temporarily impose a labelling, design or performance standard (perhaps for a short period of 2-3 months), and then permit a national agency to examine that jurisdiction’s concerns with a view to making a recommendation to the Ministerial Council on whether or not a permanent ban or standard on a national basis might be warranted. An appropriate form of high level intergovernmental agreement could underpin such an arrangement. Some minor amendments to State / Territory legislation might also be required.

A national agency appears to be the most effective solution to address the harmonisation issues. The ACCC considers itself well placed to perform a wider role in product safety as an established national organisation. The ACCC has a very high profile which can assist in achieving the requisite publicity for the purposes of awareness, education and deterrence. It also has the expertise and reputation in enforcement to effectively influence and take action against suppliers. A separate agency established to administer product safety at the national level would be less effective in absence of these factors.

**Response by the**  
**Australian Competition and Consumer Commission**  
**to Other Elements of**  
**the Productivity Commission Discussion Draft**  
**on the Review of the Australian Consumer Product Safety System**

In addition to its response to specific requests for comment, the Australian Competition and Consumer Commission wishes to make comments on two further aspects of the Discussion Draft.

**The need for research**

The PC notes that research could deliver benefits to government in guiding regulatory activity, but places only limited store in the potential for research to provide business with information to identify and treat product hazards. It notes (DD p. 20) however that part of the underlying information problem is either the unavailability of data or that manufacturers have invested too little into research and development. It would be helpful if this issue could be further explored. Given the potential for manufacturers and importers to have the greatest influence on safety of the three sectors, the ACCC believes this aspect should be further explored.

There may be merit in governments funding research that both assists and encourages suppliers to incorporate safety into their business thinking.

**The insurance sector as a driver of supplier actions**

The DD notes (p. 27-30) that private insurance can have an impact on consumers' and suppliers' product safety incentives. The ACCC understands that some insurance cover for suppliers involves the conduct of risk assessments and requires manufacturers to address those risks before cover is provided. It would be very helpful if the PC could explore this aspect further and any potential to enhance its influence in its final report.

### **ACCC's risk management approach to compliance and enforcement**

The ACCC has a well established application of risk assessment and management in respect of its compliance activities.

To be effective, monitoring should be based on a risk assessment of the goods being surveyed. Targeted enforcement can maximise the use of monitoring and enforcement resources.

In the context of the product safety market surveillance, risk management applies to how *likely* a product will be sold that could cause *serious injury* to consumers.

In designing a survey program, the factors that can be taken into account include:

- The level of hazard - assessed with reference to maximum possible injury, hazard recognition and likelihood of occurrence. The greater the hazard, the more frequent and extensive should be the survey.
- Compliance record of the product - from past surveys and complaints we may know whether there is a good level of compliance with particular products. Products whose compliance levels are historically poor should be surveyed more often than those where compliance is high.
- Nature of the market - the size, breadth and turnover rate of suppliers, the range of outlets, level of product innovation, etc. are also taken into account in planning the surveys.
- Means of assessing compliance - many products need to be tested to ascertain compliance, so the practicalities and cost of testing need to be factored into the design of a survey.

Some products can be checked for compliance simply through visual assessment. For example, labelling or dimensional requirements. So, if a regulation sets a minimum dimension, such as the depth of a cot/crib, then doing this measurement will allow compliance with that aspect to be determined by quick inspection.

Other products of course must be tested in a laboratory to assess compliance. But with some, you may be able to use your knowledge to detect likely failures without having to test everything. For example, through expert advice and experience in testing, we know that the foam liner on a bicycle helmet needs to be at least 20 mm thick to pass the energy absorption part of the safety standard.

- Third-party certification - some suppliers obtain third-party certification for their products, which provides some assurance of compliance. Surveillance agencies can use this information to assist in determining the need to conduct further checks on these products.

- New developments - new standards and bans; or recent revisions to those provisions should be factored into the survey program.

Differentiating hazards within products - in addition to comparing whole products, not all aspects need to be treated the same within standards themselves. Surveys can be conducted focussing on selected elements that are more hazardous (also based on risk assessment).

For example, within the mandatory Australian standard for bicycles, there are specifications for effectiveness of brakes and requirements that there not be any sharp edges that could cause cuts. Staff are advised to focus their surveys on the serious hazards only. This is done via checklists that note 'Critical' items, such as brakes, and 'Non-critical' items, such as sharp edges. Only critical items are checked while doing a survey.

By checking only the critical aspects, more goods can be checked for serious hazards instead of spending time checking everything from major to minor hazards on only a few products.

If a significant breach is found while surveying, staff usually purchase samples and bring them back to the office. Once there, a full check against the non-critical aspects of the standard is conducted, to be reported back to the supplier and taken into account in determining remedy and enforcement action.

## **Enforcement**

When complaints received or marketplace monitoring leads to discoveries of non-compliance, the enforcement agency has two issues to consider:

- remedial action to remove the product from the market and from consumers; and
- enforcement action to address the non-compliance.

Remedial - Clearly, the level of hazard is the main determining factor in deciding the need for remedial action. With breaches of safety regulations, the product will usually need to be withdrawn from sale. If the product poses a serious hazard, the supplier may need to take action to recall the product from consumers.

Enforcement - Some of the same factors used in setting the survey program are used to help determine appropriate enforcement action, including the level of hazard, compliance history for the product and whether the standard is new.

Strong enforcement action may be taken on products whose compliance levels are historically poor and where an industry sector or individual company have poor compliance records.

In Australia, under the Trade Practices Act, it is a criminal offence to breach the product safety provisions. As with any enforcement agency, enforcement actions need to be tailored to the circumstances of any particular breach. The Trade Practices Act provides a range of actions for breaches - including prosecution, court-ordered injunctions, court-enforceable



undertakings and administrative actions. It is common to seek from a company that has breached the Act institution of a compliance program aimed at ensuring full compliance in the future. These are often done under the supervision of an independent auditor.

A couple of other factors are taken into account in determining enforcement action:

- Extent of the breach - was the breach technical in nature? is there real likelihood of serious injury or other consumer detriment? were test results borderline or inconclusive?
- The level of co-operation given by a supplier in response to the agency's actions.

Enforcement outcomes need to be accompanied by targeted publicity to maximise the deterrent effect.

### **Supply chain coverage**

Under the Australian Trade Practices Act all levels in the supply chain - manufacturers, importers, wholesalers, distributors, retailers and hirers - are covered by the obligation to comply with the product safety provisions.

The Act does, however, provide a number of defences including where a company's breach of the act was due to reasonable reliance on information supplied by another person.

Including all suppliers creates a potential compliance 'ripple effect'. In other words, suppliers down the line make their own suppliers accountable for their compliance. This can be more effective than enforcement agency staff undertaking random surveys, as it potentially covers the whole market through a kind of 'self-enforcement'.

In addition to action against manufacturers and importers, enforcement agencies must be prepared to take action against retailers and others down the line if this approach is to be effective. The ACCC's enforcement policy is to take action against retailers and distributors where they have not taken reasonable steps to ensure compliance.

This attachment is an extract from an ACCC presentation to an international consumer safety workshop:

**International Organisation for Standardisation, Consumer Policy Committee 2003 Workshop:  
Consumer confidence and the role of standards - Principles and ethical practice, Bangkok, 9 September 2003**