

## Australian Consumers' Association Submission to the Productivity Commission regarding Product Safety in Australia

6 July 2005

1. The Australian Consumers' Association (ACA) is an independent, non-profit body established to research and advocate on behalf of consumers. ACA publishes CHOICE magazine, CHOICE Online, other journals and books, and operates a NATA accredited testing laboratory. This submission supplements ACA's submission to the MCCA review.
2. The following table of information about children's products is derived from test work carried out by ACA over the past 20 years. The overall pattern is quite disappointing considering especially that compliance with the Australian Standard for cots became mandatory during this period (1997) and the product liability provision of the TPA commenced during this time too (1992). While there is an overall improvement in the performance of the specifically regulated product, cots, it is still far from satisfactory.

### Product safety tests published in CHOICE Magazine 1985 - 2005

Product	When published in CHOICE	Total Number Tested	Number Failing	Number Passing Marginally	Number Passing Fully	Number of Australian Made Passing Fully	Number of Imported Passing Fully
<b>Household Cots</b>	Jan/Feb 2005	10	5	2	3	1	2
	Jan/Feb 2002	9	4	4	1	0	1
	September 1999	11	8	0	3	1	2
	October 1996	10	9	0	1	1	0
	March 1991	12	10	0	2	1	1
	July 1989	10	7	2	1	1	1
	July 1985	18	15	3	0	0	0
<b>Strollers</b>	June 2005	10	8	0	2	0	2
	February 2004	8	4	4	0	0	0
	August 2003	11	5	3	3	0	3
	August 2000	8	2	2	4	0	4
	September 1997	12	5	1	6	0	6
	January 1988	10	8	0	2	0	2
<b>High</b>	August 2003	11	1	6	4	0	4

<b>Chairs</b>	August 2001	12	7	5	0	0	0
<b>Portable Cots</b>	May 2003	10	0	6	4	0	4
	July 2000	9	6	3	0	0	0
	March 1991	4	2	1	1	0	1
	July 1989	6	3	2	1	0	1
	July 1985	6	1	5	0	0	0
<b>Child Gates</b>	May 2004	7	5	1	1	0	1
<b>Car restraints</b>	September 2000	21	0	19	2	n/s	n/s
<b>Baby Monitors</b>	August 2004	9	0	6	3	n/s	n/s
<b>Baby Carriers</b>	March 2003	10	0	5	5	1	4
	June 1998	9	0	5	5	1	4
	August 1989	18	2	14	2	1	1
<b>Change Tables</b>	September 1987	11	2	8	1	0	1

#### CONSUMERS, AWARENESS, EDUCATION

3. Consumers are not well placed to identify many of the risks associated with the safety of products. While it may be apparent to most consumers that a rotary lawnmower blade poses a high risk and should be treated with respect the potential for a child's stroller to collapse or for a child's cot to pose an entrapment hazard is not at all apparent, even to the well informed.
4. Anecdotally it is apparent that many consumers, especially parents or impending parents, undertake a substantial amount of research into the products they purchase, from a wide range of perspectives, including safety, especially for baby products. However, it is equally clear that most find it impossible to find sufficient and reliable information, especially in regard to safety.
5. ACA laboratory tests on many children's products has found that there is no reliable correlation between safety compliance and certification marks on products indicating that they comply with certain safety standards. These marks are fundamentally aimed at consumers to assist them in making informed choices. Their lack of reliability demonstrates an important market failure; where they

should help address consumers' information needs in making purchase decisions in regard to safety they are in fact as likely to be misleading as useful.

6. While consumers do usually have a wide choice of products to choose from which may differ in a number of qualities and characteristics, including safety performance, and they may seek to make choices based on safety and other criteria, this is often not possible without credible independent information. Most information is provided by the manufacturer or retailer; certification marks noted above are paid for by the manufacturer as a marketing aid, and their reliability varies in accordance with the relationship of the original test sample and ongoing production products as well as the interpretation placed up the safety standard by the testing authority as part of the certification process.
7. While some products demonstrate what most consumers would recognise as serious potential injury risks – for example, circular saws, chain saws and lawnmowers – a number of consumers are regularly injured by these products in what are termed avoidable accidents. However, the injury potential in many other products is not apparent to almost all consumers and no amount of information or education is likely to change this. Experienced and trained laboratory personnel using standard techniques and instruments can sometimes miss a hazard in a product.
8. ACA consulted Dr R David Pittle, one of the foundation Commissioners of the US Consumer Product Safety Commission in 1973. Dr Pittle continued as a CPSC commissioner through 1982 before moving to a position as Technical Director with the Consumers' Union of the US. Dr Pittle offers the following advice based on his and the CPSC's extensive experience:
  - It is far easier to change a product design or set a safety standard than it is to teach consumers to adapt their behaviour to use a dangerous design.
  - The public simply cannot protect itself against unreasonably dangerous products. Most hazards are hidden and do not manifest until it is too late. A regulatory agency with enough authority to set mandatory standards and order recalls is a must to balance this problem and risk.

- Adequate product safety is assumed by consumers. “It wouldn’t be on the shelf if it was dangerous”, say most consumers. They are too often wrong and are injured or even killed as a consequence.
- Standards have lasting impact. Information campaigns, on the other hand, are expensive, rarely change consumer behaviour, and must be continued as new consumers enter the market. Hence, standards work more efficiently than public education campaigns.
- Relying on the development of an adequate industry voluntary standard to solve a long-standing safety problem works far better when there is the real threat of mandatory government action to correct the problem. Without this ever present force looming clearly in the background, there is too little incentive for an industry to correct its problems quickly or adequately. There are too many economic and business elements at stake for them – and consumer safety isn’t high on their list.

#### ESTIMATES/MEASURES OF PRODUCT RELATIONS INJURIES AND LOSSES

9. Injury is unlike financial or many other losses arising from loss or damage to goods or the home. While consumers can and will seek compensation, it is generally difficult to put consumers back in the position they were prior to a significant injury, and obviously impossible to do this in the case of a death. Consequently, while the TPA’s product liability provisions are useful they are almost certainly greatly underused through consumer ignorance and fears of costs. ACA would prefer to see options considered for a fairer and more efficient mechanism for dealing with injury redress and compensation claims. Again this is another initiative that will by ensuring consumer access to this kind of justice also place pressure on industry to avoid injuries.
10. There is very little data available on the overall pain and suffering experienced by consumers. Many minor avoidable injuries caused by consumer products do not result in hospital presentations. Only a small proportion of hospital presentations across Australia resulting from consumer product injuries are reliably logged and used to provide statistics. It’s reasonable to assume most minor injuries that may be beyond home treatment end up in regular GP surgeries or ‘medical centres’

which generally provide faster attention than hospital emergency services these days and bulk bill.

11. Foreseeable misuse. ACA agrees that foreseeable misuse is an area that warrants coverage. Also in this category there is weakness in the banning and recall powers for the indirect effect of products. The best example is a product known as a baby walker. These products do not themselves cause injuries but they allow infants to get into situations where they are injured and would not otherwise do so if not for the baby walker's use. Many experts and organisations called for the banning of baby walkers and some officials were in fact comfortable with the notion of affecting such a ban; however the law does not permit the product to be banned because it does not cause injuries. Baby walkers and now baby bath seats simply have warning labels – the onus has been placed entirely upon parents and carers to be informed and to judge and manage risk.
12. Consumers, and particularly children, continue to be injured by products when a substantial majority of those injuries could have been avoided by better product design and manufacture. These are completely avoidable injuries which have nothing to do with consumer awareness, consumer education or managing risk. That the product safety system has not been able to respond adequately over many, many years is a clear indication that the system is not as effective as it should be.

## STANDARDS

13. ACA supports the use of international standards. It's acceptable under the WTO to use some regionally specific standards or such modifications to standards where needed because of local circumstances. As far as we are aware Standards Australia operates well in accordance with this regime and is active in international standards writing to seek to achieve good standards that Australia can use with no or minimal adaptation. ACA's own staff is actively involved in this work and attends international standards technical meetings. Problems arise however when there are no main international standards, where certification to standards is unreliable, where standards are not mandatory (either within Australia or in a trading partner).

14. This is particularly the case with the TTMRA where, while a number of standards are in fact nominally Australia and New Zealand Standards (A/NZS) in relation to consumer product safety, and some are mandatory in Australia (27), very few are in New Zealand (6), and not all of the New Zealand standards are a subset of the Australian standards, allowing market access to products Australia has determined may well be unsafe. ACA believes that it essential to establish a harmonised product safety arrangement between Australia and New Zealand. Such an arrangement does exist in regard to electrical goods. Even though New Zealand does not require the same range of pre-market certification for consumer electrical goods as does Australia all the standards are the same and all are mandatory in each country.

#### MARKETS:

15. While the market may discipline a provider of seriously defective goods the market remains quite ineffective with regard to diverse lesser injuries. The market can only be effective when good information is available and as noted above this does not occur for other than deaths, and even then for a short time.

16. Unfortunately as much as consumer organisations and the general media try to expose safety hazards and ensure consumers are informed this is not anywhere nearly as effective as is needed. Prior to the mandating of the Australian Standard for children's household cots the results of tests by ACA were published in CHOICE magazine repeatedly demonstrating a lack of compliance with quite serious safety requirements in that standard. Despite this information provision and supporting exposure by the general media the test results year on year did not significantly improve. That is, poor safety quality continued in the market from a wide variety of manufacturers. The series of CHOICE test reports did influence the Australian government to mandate the standard as clearly the market continued to fail to provide the discipline needed.

17. ACA continues to find similar safety problems with a variety of other children's products; the market continues to fail and government has not taken up the baton. While it is difficult, if not impossible, to determine a direct linkage between all of these failures and injuries in the marketplace, it also suggests that the product liability provisions of the TPA are not being an effective discipline either. Of

course for lower level injuries most consumers are likely to determine that the potential legal and other costs of taking such an action, if they are indeed aware that they could take such an action, would not be worthwhile.

#### COSTS, BENEFITS, RISKS

18. In many instances the costs involved in complying with safety requirements are nil, or minimal. Manufacturers design, develop and manufacture new products constantly and taking due care in each of those phases need not introduce significant, if any, costs. While the addition of automatic braking systems to cars has an obvious and direct cost, as do airbags, and many other similar add-on products or components, good design in a children's cot or high chair does not necessitate raising manufacturing costs. Modest extra amounts spent on good design amortised over many samples does not raise the unit costs to consumers very much, and most consumers knowing why they have to pay a little more would be happy to do so. We are unable to determine whether these costs are greater or lesser than avoided medical and loss of income costs, but think it highly likely that they will be less.
  
19. What is an acceptable level of product safety risk? Most consumers would think that for products where the risk is invisible (e.g. a television set) the risk should be exceedingly low indeed. As noted above consumers can and do accept higher risks for some other products (power tools). Sometimes a product can only perform its intended functions with some risk to the user. Driving a car is demonstrably a risky activity and there is substantial information provided to consumers about those risks (driver training, police/RTA/TAC advertising, accident reporting). Consumers are increasingly aware that certain cars may provide greater safety to them as drivers and passengers and usually they have to pay more to obtain those cars, and many choose to do that. Others choose less safe cars simply because they judge they cannot afford the costs associated with a safer choice. Overall, however, standards are imposed through a variety of mechanisms (eg headlights, mandatory seatbelts) that mean any choice about car safety made by a consumer in the market occurs within a regulatory framework that imposes minimum standards of construction (on the part of manufacturers) and behaviour (on the part of the consumer/driver). This combination of responsibilities that establishes a "base-line" for safety is accepted by the community as an appropriate approach in

many areas of the economy. Those who wish to invest more in safety above this baseline can then choose to do so. But this choice occurs above a basic limit, and is not open-ended.

20. Costs. Old figures from MCCA estimate government outlays on direct treatment of injuries caused by consumer products exceeded \$200,000,000 around ten years ago. Underneath this are Medicare costs for unidentified product related injuries and consumers' own costs.
21. The system is too reactive. Much of our system of product safety is fragmented (federal, state/territory, agencies), it is based on prescriptive standards that don't provide for unforeseen hazards in many instances, it is based on a range of post-injury responses (investigation, recalls and bans, product liability). There are also simply too many products and too many supply chains for any reasonable expectation for managing safety by observation, inspection, and intervention by officials.

#### LAWS & JURISDICTIONS

22. Inconsistencies in consumer product safety laws between jurisdictions. While for many major hazards (e.g. electrical goods) this is not a concern, and there has been ongoing effort at harmonisation in regard to general consumer products, there are also differences in resource allocations in different jurisdictions and there are products that "fall down the cracks" of jurisdictions or agencies. By studying the safety of swimming pool fences ACA found and demonstrated that their safety performance management was highly uncertain, with a cast of many potential agencies and jurisdictions involved. There may well be a great many other products in a similar situation that we are simply not aware of at this time.
23. ACA's view is that the optimal harmonisation method for Australia's diverse collection of laws and agencies operating in the product safety arena is to have a single national law and single national regulator. If this is not legally or administratively practicable ACA would opt for a lead national agency with highly co-ordinated state laws and agencies operating to support that national agency. Far too many times have we seen instances of problems falling between laws or agencies and clearly, in responding to the political realities of each jurisdiction, agencies find it hard to focus on the same priorities all the time.

While there will be regional needs to address due to climate and activity in specific regions, ACA believes that a national agency with appropriate regional structures can serve these needs.

24. ACA believes that some current ministerial powers can be successfully passed to a body such as the ACCC and assist in achieving prompter action in some cases and this will be valuable for consumer safety. The agency is more focussed on compliance and enforcement whereas the minister and their department have many other and often pressing issues to deal with. ACA is not suggesting that any minister has delayed or not responded to proposed banning of products for political reasons; there is always the possibility of this but more likely the perception that this happens. Passing these responsibilities to the ACCC we ensure that there is no concern that decisions are made other than on their merits. The minister and department should of course remain responsible for developing overall policy and legal frameworks. The example of the US Consumer Product Safety Commission is an example of how this sort of structure operates. The CPSC works in a highly transparent manner but quite independently of government and not only promulgates and enforces standards and bans and recalls but can institute administrative fines, of substantial size, for non-compliance with its orders.
25. Dr Pittle adds: There needs to be a strong, single, federal focus on product safety. Otherwise, too many hazards fall between the cracks, and the fragmented safety voices are weak and easy for industry to ignore.
26. An independent entity must keep extensive product-related injury and death records to determine where the safety problems are. The database need to be large enough to be credible and guide the safety agency in setting priorities.

GSP

27. General Safety Provision. ACA is fully supportive of this proposal. ACA believes that this would provide much clearer and immediate signals to product suppliers that they need to consider safety as a paramount concern in providing a product to consumers. On the other hand it also provides a higher degree of certainty and some flexibility to traders both of which should be better for their business. If such a law is framed similarly to that in the UK (giving effect to the EU

requirements) then traders are provided with a clear hierarchy of references to determine compliance. In the absence of a particular standard it is clear where a trader would look to for an alternative to test and demonstrate compliance. A manufacturer may, depending upon how the law is framed, for instance be able to demonstrate compliance with a European or American safety standard, in the absence of a specific Australian Standard, as a means to manage their risk in providing the goods to the market place and as a subsequent defence should an injury occur. For traders supplying goods that are also supplied into the European or North American markets this may well produce higher certainty and lower costs. The GSP would be an economically fairer way of allocating costs in injury control. Through manufacturers' responses to a GSP at least some costs would be allocated more efficiently to injury prevention by manufacturers rather than inefficiently post-injury by governments and consumers.

28. Some services, such as electrical installations and repairs, appliance repairs, car repairs are as inherently critical to consumer safety as were the original design and manufacture or installation. Regulatory control by other means has effectively been greatly reduced for some of these works or is non-existent. For instance, ACA has had instances reported to it of motor cars passing a NSW 'pink slip' safety test for re-registration and having a critical safety failure almost immediately afterwards.
29. Certain second hand goods, principally children's products such as cots, high chairs and strollers are traded both privately and through second hand goods dealers. Failure to remove old design, poor safety performance from this re-use loop may be resulting in continuing injuries and a risk of deaths in some cases. The costs of rectifying this situation are not high as these goods do not trade for substantial amounts of money. ACA is not proposing intervention in private sales by individual consumers, only action with regard to the modest number of licensed traders.
30. As part of a GSP it would be automatic that not only should businesses not supply unsafe goods they would be under an equal obligation to immediately recall goods which they become aware are unsafe.

31. A GSP would not be enforced in any way particularly different from our current regime, other than ensuring that business and consumers are well aware of it and its implications. The GSP would not entail government agencies undertaking more market place surveillance or enforcement that they do now. That is a major benefit of a GSP, it places a strong pre-market onus on business to get the safety aspects of a product 'right'. Some market surveillance is necessary to seek to detect some of the goods that may still enter the market without adequately safe design or manufacture. This enforcement practice will ensure that business is increasingly aware of the risks of failure to provide safe goods. Of course, also, any goods causing injuries will leave the supplier open to prosecution, whether a mandatory standard exists or not, as opposed to only civil action for damages in the case currently where no mandatory standard exists.
32. The UK DTI recently put out consultation papers on the implementation of the GSP in the UK. We should draw on the UK experience in framing their law and on their consultation and subsequent implementation in seeking to determine the best means of making this change in Australia. The consultation papers in the UK also canvas a range of options for their local trading standards agencies which has implications for the roles of state agencies in an Australian GSP operation. The consultation closed on 31 March 2005. ACA recommends that the PC consult directly with the UK DTI.
33. The UK regulations propose, for instance, that compliance with an appropriate standard is a demonstration of compliance with the requirements of the GSP. While largely ACA supports this approach we do have some concerns about foreseeable (for the manufacturer) faults in the design for factors not covered by the applicable standards. ACA feels that knowingly or negligently supply a product with a safety defect even when the product fully complied with the relevant standard still needs to be an offence. Obviously this situation would be more difficult to attempt to prosecute than a more straightforward failure to comply with the technical aspects of a standard. Nevertheless ACA feels quite strongly that we must send a signal to manufacturers and others that negligent design will not be accepted nor will highly innovative design, a desirable thing in itself, beyond the scope of standards exempt them from due care for safety.

34. One of the last factors in the UK draft regulations is for “reasonable consumer expectations regarding safety” to be considered in determining a businesses’ compliance with the GSP. This has an advantage along with another factor, “the state of art and technology”, in moving the standard of safety along with the times. For instance, a few years ago a reasonable consumer expectation in buying a new car would not have been that it necessarily have anti-lock brakes as standard fitment (ABS provides a substantially safer braking performance in most road conditions), but in another five years it may well be that this in fact a reasonable consumer expectation and that it will be rare to find new cars on sale without ABS. All reasonable consumers would expect an infant’s cot to provide absolutely zero risk of injury to the child when the cot is used as intended. On the other hand most consumers would realise that placing a child on the top level of a bunk bed is risky – they would expect, reasonably, that the design be the best it can be to minimise the risk, but not that it is risk free in the same was as a cot.
35. The number of mandatory standards would not necessarily increase or decrease under a GSP. ACA sees that it is still useful in critical areas, such as infant’s cots, to set out a very clear specification of what is safe. If there is a good international or voluntary national standard for an important safety requirement that can still serve the purpose without being made mandatory, if the GSP is framed along the lines of the UK version. Along with our concern expressed in 29 above ACA believes that good voluntary standards have an important role to play in this safety regime but they must be comprehensive and well developed. To achieve this standards writing must include adequate representation from consumers, regulators and independent experts as well as industry. Where this occurs with other standards – for example those for electrical safety and for energy efficiency – the participation of the regulators has proven to be a critical success factor. Therefore these agencies and experts and consumer representatives need to have adequate resourcing to ensure they participate effectively.
36. Dr Pittle adds from US CPSC experience: Most manufacturers are well-intentioned, but when mistakes happen – either in design or in manufacture – they generally become defensive and find ways to blame the victims. This is classic and predictable. You need a federal agency with the mandate to protect consumers and fix the problem – even while the consumers are being blamed by the industry.

37. And, the safety agency must be independent of political influence. Consumer safety is not a political issue, and you need to shield the agency from the contributors and political allies of industry.

#### SELF REGULATION

38. ACA has for long had concerns about the effectiveness of industry codes of practice to satisfy the needs of consumers. With regard to product safety ACA believes there is no role for self regulation. While we can observe what is technically a non-regulatory response to safety improvement in motor car crash safety, this is in large part driven by state governments with primary responsibility for road safety, after the Commonwealth ceased to continue upgrading motor car safety standards. An attempt by the infants' products industry association to improve product safety in their area has not borne any benefits as far as ACA's testing can reveal.

39. Dr Pittle again: Safety is an externality of the market system. We simply cannot depend on the marketplace to rid itself of dangerous products. It rarely, if ever, works that way.

---

ACA Reference: Norm Crothers  
Deputy CEO  
T: (02) 9577 3218  
F: (02) 9577 3390  
E: [nc218@choice.com.au](mailto:nc218@choice.com.au)  
W: [www.choice.com.au](http://www.choice.com.au)

57 Carrington Road  
Marrickville NSW 2204.