

# **Australian Consumers' Association**

## **2<sup>nd</sup> SUBMISSION TO THE PRODUCTIVITY COMMISSION**

### **REVIEW of the AUSTRALIAN CONSUMER PRODUCT SAFETY SYSTEM**

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 earlier submission to the Productivity Commission and ACA's submission to the MCCA review.

ACA appreciates the opportunity to submit comments in response to the Productivity Commission's Discussion Draft (hereinafter Commission Report or Report) and reflect on the ACA's expertise in testing products and helping to ensure only safe products reach the marketplace

The Productivity Commission must be commended for preparing an exhaustive review of the state of product safety law and regulation in Australia, and for its exploration of other systems in other countries and for preparing a lengthy set of recommendations for reform. Below are ACA's positions on a range of issues addressed in the Productivity Commission's Draft Report.

#### **Framework Issues: A General Safety Provision (Option 1)**

ACA continues to support the concept of a single, Commonwealth law governing product safety nationally. Although, as the Commission comments, it may be easier to determine costs rather than benefits from the European model, ACA agrees with the notion that a general safety duty imposed on all producers nationwide would help make safety a top priority and not an afterthought, and would underscore the Government's support for a safer marketplace.

ACA also supports the establishment of a new, national, product safety agency with independent power to enforce the product safety law, collect and analyse data, act as an early warning system for removing imminently hazardous products from the market, guide businesses in conducting recalls and inform the public of product hazards. Many of the submissions to the Commission highlight concerns over lack of coordination, fragmentary laws in different jurisdictions, mandatory and voluntary standards. This concern would be best addressed by the establishment of such a Commonwealth agency.

## **Comments on Specific Recommendations in the Discussion Draft**

### **System Design Features: Foreseeable Misuse, (Option 2)**

ACA strongly supports the Commission's conclusion that injuries that result from "foreseeable misuse," be covered under Australian law. However, ACA dislikes the term "foreseeable misuse" because in most cases it is really foreseeable use. It gives a producer the power to define what is "foreseeable use" and "foreseeable misuse", simply by labelling a product as appropriate for only specific uses, even when the producer has reason to know that what it terms "misuse" appears to be a pattern of usage.

Including within the law's reach what is termed "foreseeable misuse" is long overdue and if adopted into law, would bring Australian product safety law into line with common law tort principles of negligence and strict product liability law, as well as the product safety legal regimes in American and the European Union.

### **Information and Research Matters: Provision of Information, (Option 4)**

ACA supports the concept of a one-stop shop for information about all State, Territory and Australian government product safety law and regulation, including all bans and standards.

Recalls Australia works provides consumers with some useful information on product recalls. However, while the Recalls Australia website offers advice to suppliers, the latest version does not mention the requirement that companies inform the government when a voluntary recall is in progress and does not stipulate the criteria notices should meet. ACA recommends that businesses be instructed to work with the government in the event of a recall and government should develop a protocol for working with business in developing effective outreach to customers and the public to ensure adequate information gets disseminated about an unsafe product.

The Report recommends that business not be required to monitor and report about products under investigation for possible safety risks. That depends on the level of risk and the number of complaints. It may be that the risk is minor and there are only one or two complaints, in which case reporting may not be critical. On the other hand, the risk may be high, or even moderate, and the company may have received a few or perhaps many reports about hazards when using the product. The government entity overseeing product safety should set out criteria for when businesses must monitor and report.

That obligation has existed for a number of years in the US, and more recently under EU directives – to inform government even if a company is still investigating, because leaving it to the company alone to make the decision with no criteria on which to make the decision is inherently risky. Businesses are likely to err on the side of not reporting because of concerns of triggering government regulatory action. ACA recommends setting out clear criteria, i.e., if a company has reason to believe that one of its products "creates a substantial risk of injury to the public, fails to comply with a product

safety voluntary or mandatory standard, has a defect, creates an unreasonable risk of injury or death.”

While the Commission’s stated concern is that businesses would be discouraged from investigating if they were required to report, that has not been the practical result in other countries where these reporting obligations exist. Furthermore, businesses already investigate product safety reports out of concern that they might face a lawsuit if a product injures or kills a consumer. Most responsible businesses will have a mechanism set up to ensure that any such reports are investigated and receive a response. Thus the argument that requiring business to report will discourage investigation has little real world merit.

In addition, if regulatory action is required regulatory agencies could take into account prompt and co-operative action by suppliers as occurs in other fields. This could be incorporated into guidelines issued by regulators.

Moreover, very often the businesses are the only repository of information about hazardous products. Consumers often call the company that made the product before they call anyone else. Thus, not requiring businesses to report bypasses an important source for product safety hazard information. In addition, in the US, when a company reports a potential product safety hazard and contacts the US Consumer Product Safety Commission, only 50% of the time is regulatory action triggered. In this way reporting need not be tantamount to regulatory action.

ACA’s concern is that maintaining the status quo by making reporting voluntary for businesses will continue to result in critical safety information not getting out to the public.

On a related matter, ACA agrees that providing information to consumers about risk, through warning labels or “education and information” campaigns has limited effectiveness in changing consumer awareness and behaviour, particularly where the nature of the risk is too complex for consumers to readily comprehend. Such education campaigns can be important, but this is likely to be the case in a very limited set of circumstances, such as where there is a significant but relatively straightforward risk and where information is backed by penalties (eg seatbelt wearing).

ACA agrees with the Productivity Commission’s recommendations on the need for an Early Warning Information System (EWIS) to identify hazards quickly, alert governments and consumers of the risks, and withdraw the goods from the marketplace. ACA also supports the notion of linking that to an upgraded, far more detailed system of data collection, similar to, but improving upon, the NEISS (National Electronic Injury Surveillance System) that exists in the US. If this was combined with an early warning system (EWIS) this would be invaluable to officials. ACA also supports including within the database consumer complaints, all of which should be coordinated, analysed and addressed by a product safety agency, or ACCC if such a specialized agency is not established.

Data collection on injuries must be sufficiently detailed to tell officials how an event happened and develop a body of information to work from. Too often, for example, a

report might say only “child died while baby bath seat was in use.” That information must be upgraded, which will take some limited by specific training and education for coroners, hospital personnel and others involved in the data collection process. For example, product safety officials need to be able to review such reports for details about the make and model of the seat, the specifics about the baby’s death, i.e., submarining under the seat, tipping over, time baby was under water, circumstances of why the child was left alone, etc.

### **Product Safety Research, (Option 8)**

ACA supports the concept of the government undertaking a baseline study of consumer product related injuries and deaths. It was just such a study undertaken in the US in the late 1960s, which became the basis for the formation of the US Consumer Product Safety Commission. That study laid out an agenda for recalls, reporting of hazardous products, and recommendations for product redesign (foreseeable misuse was always covered in the CPSC’s mandate as long as the misuse was “reasonably foreseeable”).

### **Recalls: A requirement for business to recall unsafe products, (Option 9)**

ACA is disappointed by the Commission’s failure to recommend that businesses be required to recall products that are found to be “unsafe.” While later in the submission we have compared the American and EU recall systems and made recommendations to the Commission, below we discuss the ramifications of the Commission’s recommendations.

The Commission states that there are a relatively large number of recalls. It is hard to judge whether the Commission is correct in saying that 165 voluntary recalls of products means the system is working. Evidence from the product safety series in the Sydney Morning Herald last year, discussed in detail below, suggests that recalls are not willingly undertaken by businesses even when their products are found to be “unsafe.”

With an estimated 45 to 65 deaths per year and between 364 and 1027 serious injuries for foreseeable use resulting in hospital admission each year, 165 recalls might in fact be a low number. If foreseeable misuse incidents are included, where product redesign could reduce or eliminate the hazard, the Commission estimates those numbers to be much higher, in the range of 700 deaths and 30,000 to 90,000 serious injuries. Moreover, as the Commission has pointed out, “regardless of the incidence data, or methodology used, the total cost to the community of injuries and deaths caused by unsafe consumer products is likely to be in the order of hundreds of millions of dollars.”

If one believes, as ACA does, that with many products there is a pattern, and has been for years, of foreseeable misuse, for example baby bath seats and rings, and that this should be covered by product safety laws, the numbers of injured are very significant and requiring businesses to conduct effective recalls becomes more important than ever.

## Improving the Recall Process

The Commission has solicited further comments on making recalls more effective in reaching consumers with unsafe products and getting them out of their hands.

Recalls are, in a sense, a necessary evil. If a product needs to be recalled because it has proved hazardous to consumers, this means there has been a failure in the pre-market design and pre-market testing of the product and now consumers are being exposed to unexpected hazards. So an effective recall policy should include a means for analysing what went wrong in the process of getting the product to market, and how that problem can be avoided in the future. The responsible agency should review data to determine whether some industry sectors and/or companies have higher than average recalls of products. The government should also work with companies on better design and testing of higher risk products, as well as studying methods for making recalls more effective.

In this regard, ACA recommends that the Commission review reports prepared after a series of meetings – the first of which was held May 15, 2003 and was entitled, “Motivating Consumers to Respond to Recalls,” conducted by the US CPSC on the issue of improving recall effectiveness. These are available at the CPSC’s website [www.cpsc.gov](http://www.cpsc.gov). Many companies gathered in a series of three sessions to share their methods of reaching their customers in a recall situation. The suppliers proved to have a number of creative methods for getting products back from consumers.

ACA also recommends the Commission review the regulations imposed in the US on makers of child restraints by the National Highway Traffic Safety Administration, the regulator of auto safety in the US. [www.nhtsa.dot.gov](http://www.nhtsa.dot.gov). Child restraint makers are required to include a postage paid postcard that asks consumers to provide basic contact information –name address, phone number, etc. The card indicates this is requested in case of recalls and the consumer is asked to mail the postcard into the child restraint manufacturer. This hasn’t achieved universal compliance but the numbers are higher than the average recall achieves. The card attached to the child restraint also exhorts consumers to mail the card immediately and emphasizes its safety benefits.

Among the most interesting recalls, Consumer Reports, the CHOICE magazine counterpart in the US, had to recall a product offered in a promotion to sell magazine subscriptions. The torch included in the promotion was poorly designed and some of them melted with batteries inside!

Consumer Reports offered incentives to its affected subscribers to return the product – free subscriptions and books. Such incentives are commonplace among companies dedicated to getting their products back and out of consumers’ hands. It was also required by the CPSC to keep close track of consumer response to the recall and sent a picture of the product to newspapers and other news outlets. Consumer Reports received responses from 60% or more of its subscribers, a strong number in a situation where the risk was relatively low and consumers easily might throw the item away and not bother responding.

Other examples include Toys R Us, which sends notices "IMPORTANT UPDATED SAFETY INFO OPEN IMMEDIATELY" in the event of a recall. Bath and Body Works reaches customers with incentives, visual graphics, prepaid mail envelopes and interactive voice response 1-800 numbers. Radio Shack recalled antennas, and made sure when customers used its website and searched antennas, the recall notice was the first thing to appear on the screen. Sauder Corp. used customer contact information from a simple warranty registration cards, customer service database and consolidation of miscellaneous store customer lists. All told, this provided access to 60% of customers during a recall. There are many more examples from US and international companies available on the CPSC website on methods for improving recall response.

Consumer Reports, like CHOICE, also lists these recalls on a page in its magazine, available as free content online, and supported the government's launch of a webpage, referenced above, bringing together all of the government agencies into one main recall site for consumer convenience.

ACA disagrees with the Commission that "any formal requirement that business recall unsafe products would be unlikely to significantly change the behaviour of either responsive or unresponsive suppliers...". Instead, with guidance on creative approaches to recalls provided by the relevant agency (which would obviously develop considerable expertise in this area), requiring companies to recall unsafe products would prove to be quite effective.

### **Additional Conclusions ACA Does Not Support**

Unfortunately the Draft Report arrives at several additional conclusions which we believe are not justified based on evidence in Australia or overseas or on economic grounds.

"The current system seems to be generating reasonable safety outcomes" and "Where a safety issue is identified after a product has been released onto the market, there appears to be sufficient incentives for businesses voluntarily to recall the product." ACA has publicly noted that safety levels have improved in some areas over time (eg some key areas of car safety), but this does not support an assertion that the current system in Australia is working well and generating acceptable outcomes.

A series of articles that appeared in the Sydney Morning Herald titled "Babies In Peril: A Herald Investigation" in May 2004 uncovered the weak, lax, and dangerous product safety system in place and more than likely provided the impetus for this government enquiry.

Anyone who might believe the rosy conclusion in the Commission's report on the state of product safety need only ask the parents of three Australian children who died in 2002 using baby bath seats. 6-week-old Brandon Muddle died after slipping out of his baby bath seat, a product marketed to parents as a convenience device for bathing a child. A 9-month-old Ballarat girl also slipped out of her bath seat and died, as did Christopher Smith, a seven month old from Adelaide. The Herald documented these deaths plus total 9 additional deaths from bath seats, one each year from 1992 to 2000. Well over one hundred children have died in the United States using these devices. We

do not know how many children have died in other countries that do not track such data.

Despite solid evidence that producers of bath seats know they are dangerous, Australian authorities have taken no steps to ban the product or recall them. Fisher Price, maker of one model, stopped making the bath seats years ago, with one of its officials testifying in American court, "We elected to exit the business rather than work to ensure that the product could be manufactured in a way that could be safe. While this may be possible, Fisher-Price has elected not to pursue this. For example, it did not seem possible to properly warn consumers of the risks since the product itself, during normal use, seemed to imply that supervision was not necessary, despite any warnings to the contrary."

Though Fisher Price stopped selling its baby bath seat in Australia in 1997, the government has never required Fisher Price to recall the bath seats remaining in consumers' homes, and Fisher Price has not done so on its own. Instead, only NSW has acted on bath seats and only by requiring extended warnings on the product, a notoriously ineffective means of protecting the public from a hazardous product.

The Hon Reba Meagher, (the then) NSW Fair Trading Minister named the Paddleduck bath cradle as one of the implicated products, ordered it withdrawn from sale during an investigation, but the product was back on the market within a year with no design changes, and only a new warning label. A spokesman for Paddleduck had this alarming response to a question posed by the Herald:

"In answer to your question [as] to the laws that related to this sort of product, there are none. The only area we failed to comply with our product was that it was incorrectly labelled. No testing was required. There are no laws regarding the testing of the product."

NSW never prosecuted the company, despite its violations of the NSW labelling law.

In sum, at least 12 children are dead using baby bath seats in Australia, no government testing requirements are in place for these children's devices, implicated seats go back on the market with no design changes; no recall of unsafe seats was required, while a major distributor of the product admits they are inherently dangerous and can't be made safer.

Let us turn to prams. Ask the parents of Stephanie Swanson, age 7 months, who was smothered by bedclothes when her pram tipped over, if the current system is "generating reasonable safety outcomes." Or ask the parents of another baby, Joshua Taylor, who also died when his pram tipped over in 2002.

How did the product safety system in Australia react to the dangerous design flaw allowing the pram to tip over? The producer of Stephanie's pram, BabyCo, did not recall the old models, blaming the parents for "misuse", but redesigned the new models. No recall of the old prams was ordered, and without a recall, manufacturers do not have to alert consumers that a product may be unsafe or no longer meets the standard.

Standards Australia developed a *voluntary* standard for pram safety. A spokesman for the federal Treasury's Competition and Consumer Policy division said there was not enough evidence to justify a mandatory standard.

We turn lastly to baby walkers. CHOICE strongly discourages the sale and use of baby walkers, for reasons outlined below and point out to our readers that there is no evidence that they help children to start walking sooner; in fact, they may even delay a child's first steps. We tell our readers that if they must use one, look for a model that complies with the US safety standard F977-96.

8 month old Jamie Turnbull is one 420 children injured each year using baby walkers. He spent three weeks in hospital, undergoing a series of painful operations to have his burned skin grafted. Jamie pulled hot water down on himself after learning to dart around in his steel framed baby walker. Scalding is a common hazard for children using baby walkers, and though a baby walker standard from 2002 helps protect children from falling down stairs, it does not protect children from burns.

Moreover, when it set the standard, the federal government was aware of a study by Dr. Peter Thompson that predicted that half of the most serious injuries would not be prevented under the standard. Yet, the government failed to act because the product itself does not cause injuries. Blame, once again, is placed on parents for leaving children unsupervised. The stark reality is that under this scenario, children, the most innocent of consumers, pay the price of official inaction by continuing to be scalded or otherwise hurt using a product that may actually inhibit their growth and development.

The Herald estimated that 2580 infants are injured each year by just 7 items: baby walkers, prams, strollers, cots, high chairs, change tables and bouncers. Only cots and walkers have mandatory safety standards.

The ACA submits that the current product safety system is not "generating reasonable safety outcomes" in many areas and in particular is failing to adequately protect more vulnerable consumers, notably children. It is in need of a series of reforms.

### **ACA and CHOICE magazine test results**

ACA has published test results in CHOICE magazine repeatedly showing a lack of compliance with serious safety requirements in the standard. Five out of ten cots in our latest tests passed the mandatory safety requirements of the Australian standard. Half of the cots we tested failed parts of the standard.

Clearly, makers of cots have flouted mandatory safety standards when they manufacture and sell the product and have encountered little or no regulatory action in response. Often, the costs of redesign or employing a safer design are minimal and when spread over many thousands of products over a period of years, they are smaller still.

Further, as a demonstration of market failure and grossly ineffective regulatory response, year after year makers of cots sold even after CHOICE's revelations about the cots' failure to come into compliance with mandatory standards have failed to improve



the design. Poor quality products continued to be sold from a wide variety of manufacturers. The government may have a standard but if manufacturers insist on ignoring the standard and face little or no government sanction when they do, these hazards will persist. Clearly the system isn't working to protect consumers.

### **Harmonizing Standards between Australia and New Zealand**

ACA supports the use of international standards and particularly would like to urge the adoption of harmonized standards between New Zealand and Australia. Since Australia has 27 mandatory standards while New Zealand has only 7, without harmonization, Australian consumers may be exposed to products this government has deemed unsafe. However, harmonization must result in arriving at the safest and most protective standard, and not harmonizing down to a less protective regulation than what is in force in Australia currently. In certain cases, local standards are necessary because of local circumstances and these must be taken into account.

### **Adoption of an Australian General Product Safety Directive (GSP) modelled after the EU's General Product Safety Directive.**

ACA has stated previously its support for a General Product Safety Directive similar to the European Union's system. Legal scholars studying the most highly developed product safety regimes have made important observations about the strengths and weaknesses of systems. For example, UK Law Professor Geraint Howells has compared the American and European product safety and product liability systems and concludes that "the European Commission's (EC) General Product Safety Directive (GPSD) provides a far more complete system of protection than the US Consumer Product Safety Commission is able to offer. . ."

While Professor Howells has described the US regime as an 'information and litigation' approach and the EC approach as one of 'regulation and administration' with each having strengths and weaknesses, he argues persuasively that Europe has managed to integrate voluntary standards into its regulatory regime. The EC has also developed a general safety obligation, which ensures all consumer products are subject to some regulatory controls.

In this regard, the ACA believes that the Productivity Commission's work on reforming the Australian Consumer Product Safety system provides an ideal opportunity to adopt the best features of the leading product safety systems from other, appropriate countries.

### **European General Product Safety Directive**

While the Productivity Commission has done laudable research into the European system and written about that system in the Commission Draft, the ACA would like to add our own perspective.

In the 1980s, the European Commission adopted a comprehensive set of directives establishing harmonised technical standards for broad product sectors and those directives were supplemented by a Directive on General Product Safety (GPSD) in 1992. The GPSD places a general safety requirement on producers and distributors of all consumer products and requires all member states equip their authorities with powers to address consumer product safety concerns. Under the GPSD, member states are obligated to notify Brussels of safety problems to enable information to be exchanged and a co-ordinated within the EC. In 2001 the EC issued a revised directive. Under the new scheme, businesses have to inform regulators of problems and regulators can now require the recall of products that are in consumers' homes.

According to Professor Howell and his co-author, Duncan Fairgrieve, of the Lancaster Law School and the British Institute of International and Comparative Law respectively, as described in their forthcoming article, General Product Safety – a revolution through reform? the new reforms “bring Europe into line with the position in the US, which has long relied upon business notification and recalls as important regulatory tools exercised by the US Consumer Product Safety Commission.”

While the GPSD says that products should be safe, the standards tell us what safe actually means. For both consumers and manufacturers, the European model has advantages. Though the standards in Europe remain voluntary, in practice there are great incentives attached to complying with standards that helps to encourage business to adopt them.

European products carry a presumption of conformity and the CE marking gives them a passport to the European market. The advantage for business is that once it puts the article into the stream of commerce, there is no need for third party verification, though companies may choose to obtain such third party safety verification.

### **Development of Standards and Regulations under the EU system**

An important part of the process of getting companies to comply with standards is the standards setting process itself. Standards bodies in Europe work closely with Government and are required to have high levels of public participation. High level or framework directives are adopted through an appropriate political process, generally requiring a qualified majority approval of the relevant Council of Ministers. However, most of the critical detailed decisions are delegated to the standards bodies and it is their procedures are relevant to Australia's reform efforts.

There are three European standards organizations: CEN (European Committee for Standardisation), CENELEC (European Committee for Electrotechnical Standardisation) and ETSI (European Telecommunications Standards Institute). The EC has entered into an agreement with these bodies, making them responsible for the development of the European standards. CEN is the most relevant for this discussion as it is standard setting entity that deals with the majority of standards work for non-electrical consumer products. CEN is industry funded.

By 1995 1,700 European standards were in existence with a further 8,300 projected. As of 30 June 1996 the number of standards had risen to 2,700. In 1992 CEN produced 307 new standards; this had risen to 408 in 1993 and increased further to a 710 in 1995. Even with this increase in activity there is a large backlog of projected proposals.

Professor Howells observes that industry in Europe does not see why it should fund CEN if it cannot control the outcome. This should be a familiar concern to consumers in Australia. The Herald series highlighted similar problems with the process of setting standards in Australia. Industry interests tend to dominate the standards committees, as they do in the United States (See Consumers Union's comments below).

Dr. Peter Thompson, a member of the Australian committee writing standards for bunk beds, found that he had to use extreme measures to get his fellow committee members to understand the need for strong standards. "I used to front up to standards meetings with death photos. It was the only way I could get some of them to snap out of their apathy. It was only when they were confronted by someone's death that you could get anywhere."

Moreover, even when the standards committees develop a standard and it is in force, as with cots, government officials too often fail to enforce it. CHOICE testing, as described above, finds many companies in violation of the mandatory standard and the government doing next to nothing to pursue the violations.

To overcome the inherent conflict within standard setting organizations funded by industry, the ACA believes the standard setting process has to be either funded in part by a neutral body, government, or monitored closely by government to ensure that the consumer voice is not drowned out during the standards setting process. Industry and government must also ensure that consumer representation is fully funded.

In 1991 the EC provided CEN with 75% of its funds because of the demands of harmonization. That may be too much public funding, but reasonable level, say 25%, would help to alleviate the ongoing problem of conflict of interest among industry members who are setting standards for their own products.

Interestingly, Professor Howells takes a very different position to ours. He posits the hazards of too much public funding, "Nevertheless the European standardisation bodies were perhaps unhealthily dependent on EC funding. Whilst prepared to continue to commit public funds for the foreseeable future to standardisation, the EC was rightly alarmed at this imbalance between public and private funding."

There certainly appears scope to achieve a happy medium!

The EC uses the concept of 'open' mandates, which allow the standardisers, and hence the economic interests affected a broad degree of flexibility in structuring the standards programme. Such mandates tell the standards setting groups which general areas need standards, but leave the standardisers free to decide which standards are actually needed.

If the proposal is new, the proposed standard is sent to a technical committee, the matter is put out for comment from CEN members for 6 months. If the matter is not new, it goes through a shorter process of consideration. The procedure is largely the same for standards developed pursuant to a mandate from the EC.

CEN tries to ensure quality control by appointing consultants to ensure the members of the technical committees understand the Directive and that they stay within their mandate.

### **US System: the Consumer Product Safety Commission**

In contrast with the European system, the US Consumer Product Safety Commission, (CPSC) established in the mid-1970s after a US congressional report in 1970 cited this ongoing problem: "twenty million Americans are injured each year in the home as a result of incidents connected with consumer products. Of the total, 110,000 are permanently injured and 30,000 are killed . . . The exposure of consumers to unreasonable consumer product hazards is excessive by any standard of measurement."

Though CPSC's authority and mandate was watered down during an anti-regulatory period under President Ronald Reagan in the 1980s, as originally conceived and established, the CPSC had innovative and novel powers to develop mandatory standards for safer products. For example, consumer groups and others with expertise have developed safety standards, with financial compensation from the CPSC for their work. Consumers Union developed a lawn mower standard while the National Consumers League has developed a miniature Christmas tree light standard.

Professor Howells points out that this role for consumer groups has them playing more than a consultative role. The Productivity Commission might consider whether groups like the ACA, which has technical experts on staff and does its own testing on consumer products, might play a more direct role in the development of standards with the appropriate compensation provided for its work. This was a feature of ACA's original submission to the MCCA paper – the proposal that groups with particular expertise in product safety be given a formal role in identifying issues and assisting with standards.

Consumer involvement in standard setting procedures is critical for both the credibility of the process and the input from consumer representatives, whose paramount concern is the protection and safety of the end users of the product.

### **Voluntary vs. Mandatory Standards: Contrasting US and Europe**

The vast majority of standards under which products are introduced to consumers in America are voluntary. There are many standards setting organizations in the United States. Although the CPSC would monitor some standards to ensure that they adequately protected consumers, these standards remain truly voluntary in the sense that manufacturers are not required to use them. This contrasts with the position in Europe where manufacturers in areas covered by new approach directives must apply the standards or otherwise satisfy essential safety requirements.

## **EU emphasis on consumer involvement in standard setting**

There is general agreement in Europe that consumers should be involved in the standards-making process. This has been stated by the Commission on numerous occasions, and is also the position of the European standardisation bodies.

To be able to operate effectively consumers need to be represented by technical experts. This expertise is needed because these consumer representatives will be participating in working groups and technical committees the other members of which will be technical experts from industry. European consumer organizations have found a number of such consumer-oriented technical people in consumer organisations, research institutes and test houses. Australia should affirmatively endorse – as the EU has – consumer involvement in the standards setting process.

## **Commitment to Consumer Representation**

The European system for consumer representation in European standardisation, ANEC, was formed in 1995. Its General Assembly comprises one member of a national consumer organisation in each EU/EFTA member state and four nominees from the EU, and two from the EFTA, CCC. ANEC has six working groups – on child safety, electrical appliances, machinery, the environment, gas appliances and traffic safety. These bring together experts to consider particular projects.

In 1995 750,000 ECU was granted by the EU to support consumer representation in standardisation. This fund pays the expenses of consumer representatives attending CEN working groups. Roughly 50 European committees have an ANEC representative, with consumer representation being assured on another 150 or so committees through national delegations. ANEC is also trying to ensure greater influence can be exerted at the national level by circulating written comments on drafts to national representatives. The use of written comments has increased, with 63 of these written comments being made in 1995 compared to 15 in 1992.

The EU has also established a mechanism for consumer representatives to petition for their concerns to be addressed through standardisation. The EU product safety system, in word and in deed supports consumer involvement in standards setting.

ANSI has what is called a Consumer Interest Council (CIC). The head of that council has conceded that the 'consumer participation in US standards policies is minimal at best.' Professor Howells points out that "the notion of consumer representation – at least at this political level – appears to be different in nature from that espoused in Europe. For example, the chair of the CIC talks about the need for representation on CIC from not only all consumer organisations, but also all industry sectors and also aspires to high-level representation from each ANSI member company. Participation is sold to companies on the basis that they will be involved in decisions, which will affect their business."

Professor Howells observes that "In the US the emphasis seems to be far more on convincing industry that they have something to gain from listening to consumers rather than on the right of consumers to be involved in the process in order to protect their interest. This is underlined by a recent ANSI initiative to encourage industry to set up their own Consumer Advisory Boards, comprised of academics, government officials, consumers etc., to look at the needs of their own consumers. To European ears this model of consumer representation may appear more appropriate to the development of internal company policy than to the generation of legal or quasi-legal norms. In part this may be due to the more purely voluntary nature of standards in the United States, whereas in Europe standards increasingly fall within regulatory regimes based on new approach directives."

The US system provides too little support and incentive for consumer representation and too much power is placed in the hands of industry. Consumer input contributes to the development of standards that reflect real world uses and gives the entire process credibility. Industry, if left to act on its own in this process, or by majority rules, inevitably faces inherent conflicts of interest in setting standards governing its own products.

Australia should avoid the American model, which places too little emphasis on consumer input into standards setting process. Australia should seek to improve upon its own standards setting process, and avoid the situation described below by the Technical Director of the Consumers Union, who told the National Commission on Product Safety:

'The consensus principle means in practice that the industry people have veto power...Our proposals [as consumer representatives], our negative votes, are given "due deliberation" but are ultimately vetoed or overridden, as without merit. After a while it seems fruitless to spend time and money to go to such meetings ...Volunteerism and token consumer representation have been generally unsuccessful in protecting the consumer interest.'

**RECOMMENDATION: ACA recommends that the product safety standards setting process through Standards Australia increase resources for consumer involvement and recognize a formal right of consumers to be involved in matters of consumer concern, with government contributing to sufficient funding to Standards Australia to ensure consumer inputs are as effective as those of businesses.**

## **What is covered under the EU's General Product Safety Directive?**

The Directive includes important provisions relating to the exchange of information and novel provisions providing for a Community procedure in emergency situations.

The Directive's definition of 'product' makes it clear that it is only intended to apply to consumer products. To fall within the definition the product must be both:

- (a) intended for consumers or likely to be used by consumers; and
- (b) supplied, whether for consideration or not in the course of a commercial activity.

The definition makes it clear that the Directive covers new, used and reconditioned products. The only exceptions to this are for (i) second-hand goods supplied as antiques and (ii) products, which need to be repaired or reconditioned prior to use where the supplier clearly informs the buyer of that fact.

**RECOMMENDATION: new rules should apply not only to new products but used and reconditioned products, with the exceptions tracking the EU's.**

## **Operation of a GSP modelled after European GSP**

ACA addressed the value for Australia in adopting a GSP briefly in its previous comments. The Commission Draft also discusses the pros and cons of a GSP for Australia.

ACA would once again recommend the adoption of a GSP modelled on the European system. Unlike the American system, the EU's General Directive on Product Safety is, as the Commission points out, a "front end, proactive measure" rather than an "ex post measure." The American product safety regulatory scheme tends to operate reactively, leaving industry to report to regulator unless government learns of the problem first.

Under the regulations of the CPSC if a product appears to be 'substantial product hazard. "This triggers CPSC evaluation of the hazard and response, which could run the gamut from taking no regular action, to issuing a recall of the product, to imposing a mandatory standard or banning the product. But there is no affirmative obligation on the manufacturer to produce a safe product.

Contrast that scheme with the EU system, which defines a safe product below:

'safe product shall mean any product which, under normal or reasonably foreseeable conditions of use, including duration, does not present any risk or only the minimum risks compatible with the product's use, considered as acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular:

- the characteristics of the product, including its composition, packaging, instructions for assembly and maintenance,

- the effect on other products, where it is reasonably foreseeable that it will be used with other products,
- the presentation of the product, the labelling, any instructions for its use and disposal and any other indication or information provided by the producer,
- the categories of consumers at serious risk when using the product, in particular children.

The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be "unsafe" or "dangerous".'

The General Product Safety Directive only accepts as safe products which either (i) do not present any risk, or (ii) only the minimum risks compatible with the product's use. Even these minimum risks must be acceptable. The risks must be compatible with a high level of protection for the safety and health of persons.

In determining whether a product is safe, the Directive lists factors, which should be particularly taken into account. Some concern the nature of the product and relate to its durability, characteristics, presentation, labelling, instructions and the information, which is provided, as well as its effect on other products. In addition, the product must be judged according to its normal or reasonably foreseeable conditions of use.

The definition singles out children as consumers in need of special protection. Current Australia law does not underscore the importance of protecting children. US law does not do so either, though the CPSC has given special priority to children's hazards for many years. In FY 1990, for example, roughly 82% of all recalls addressed children's products.

The definition of "safe product" forms the foundation of the general safety requirement. This places on producers the obligation to place only safe products on the market and on distributors the duty to take due care to help ensure compliance with that requirement. However, for these purposes the definition of a safe product has to be read in the light of a subsequent provisions, which lays down a hierarchy of rules and standards against which a product should be judged to determine whether the general safety requirement is satisfied.

How is an article deemed to be safe? Conformity to the general safety requirement is assessed based on a review of compliance with the following criteria:

- (i) voluntary national standards giving effect to a European standard,
- (ii) Community technical specifications,
- (iii) standards drawn up in the member states in which the product is in circulation,
- (iv) codes of good practice in respect of health and safety in the sector concerned,
- (v) the state of the art,
- (vi) safety, which consumers may reasonably expect.

**RECOMMENDATION: Australian law should, under a GSP, place an affirmative obligation on industry to manufacture and sell products that don't present**



**risks under normal or reasonably foreseeable conditions of use, coupled with language that emphasises “a high level of protection for the safety and health of persons,” and singles out children for special consideration.**

The Commission itself listed many of the potential benefits of adopting a GSP, including creating a stronger incentive for suppliers not to put unsafe products on the market, giving businesses greater flexibility in how they meet their safety obligations, shifting the onus for managing product safety away from government and onto business, making government action less complicated by allowing pre-emptive action in the event of an unsafe product without the need for the product to have caused an injury, and creating a level playing field by imposing minimum safety obligations on all products. We agree.

**RECOMMENDATION: Producers should have an obligation to sell only safe products. They should also be required to inform consumers of product risks and to have in place systems to keep themselves (producers) informed of product risks and to react to them, take corrective action, and notify regulators of problems and actions taken to correct them, as they are required in the European GPSD and outlined by the Commission.**

**RECOMMENDATION: Distributors should have an obligation as well under the GSP, though not one of strict liability. Under the European GPSD they are required to act with due care to help ensure compliance with the general safety requirement, and their liability is premised on fault distributors' liability is premised on fault, a negligence standard. Distributors should not supply products, which they know, or should have assumed, do not comply with the general safety requirement**

**RECOMMENDATION: The state and local product safety rules can apply if they properly address a safety issue; otherwise an overall GSP would and would use that safety net function to insure all relevant hazards are covered. Under the new EU rules, which apply to all EU member states, the General Product Safety Directive will provide a safety-net function. If a member state properly addresses a hazard, then that specific rule takes priority. This is a good model for Australia's efforts to harmonize under a GSP.**

### **Enforcement of the GPSD**

While an affirmative obligation to place only safe goods on the market is an incentive to businesses to make safer products, inevitably there will be products that don't meet the safety standards. Enforcement authorities are prepared to monitor compliance and act when an unsafe product emerges and must have severe enough sanctions when a violation occurs in order to deter non-compliance.

The GPSD requires states to establish or nominate authorities to monitor compliance with the obligation to place only safe products on the market. Authorities have powers laid out in the Directive, the first three of which are intended to ensure that the authorities can undertake adequate surveillance of products. The other five relate to

controls on the marketing of products. Enforcement authorities must have the powers to:

- (a) Organise appropriate checks on the safety properties of products, on a “risk-based” approach to product safety. These must be on an adequate scale, involve checks up to the final stage of use or consumption and even involve checks of products after they have been placed on the market as safe.
- (b) Require all necessary information from the parties concerned.
- (c) Take samples of a product or product line and subject them to safety checks.
- (d) Subject product marketing to prior conditions designed to ensure product safety and require suitable warnings to be affixed regarding the risks, which the product may present.
- (e) Make arrangements to ensure that persons who might be exposed to a risk from a product are informed of it within good time and in a suitable manner. This is said to include the publication of special warnings.
- (f) Prohibit temporarily (while checks are being carried out) anyone from supplying, offering to supply or exhibiting a product or product batch, whenever there are precise and consistent indications that they are dangerous.
- (g) Prohibit the placing on the market of a product or product batch, which has proved to be dangerous. Accompanying measures to ensure the ban is complied with should also be available. This refers to the powers to seize and, if necessary, destroy dangerous products.
- (h) Organise the effective and immediate withdrawal of a product or product batch already on the market. If necessary this should involve destruction of products under appropriate conditions.

The GPSD also stipulates the parties against whom appropriate measures can be addressed, including both producers and distributors. Regarding distributors, measures should only occur within the limits of their activities. In addition measures can be addressed to any other person where this is necessary to avoid risks arising from a product.

The powers of the enforcement authorities under the GPSD include the possibility of imposing penalties, including criminal sanctions, administrative fines etc.

**RECOMMENDATION: Australia should adopt a GSP that includes civil and criminal sanctions for non-compliance with general safety requirements.**

### **Recalls: Comparing the EU, Australian and US systems**

The US system provides the regulator with important powers to order a product recall or as happens most often, to work with the company cooperatively to recall a product that has proved hazardous. If the CPSC determines that a product presents a substantial product hazard and that notification is required to adequately protect the public, it may order the manufacturer, distributor or retailer of the product to do one or more of the following; namely (i) to give public notice of the defect or failure to comply; (ii) to mail notice to each manufacturer, distributor or retailer of such product, or (iii) to mail notice

to every person he knows the product was sold or delivered to. The form and content of the required notice can be specified (15 U.S.C. 2064(c)).

In addition, if the CPSC considers it to be in the public interest it can order the manufacturer, distributor or retailer to choose which of the following actions it wishes to take:

- bring the product into conformity with the requirements of the applicable consumer product safety rule or repair the defect;
- replace the product with a like or equivalent product, which complies with the applicable consumer product safety rule or does not contain the defect;
- refund the purchase price. A reasonable allowance for use can be made if the product has been in the consumer's possession for more than one year from the earlier of the time public notice of the substantial product hazard was given or the consumer receives actual notice of the defect or non-compliance.

Interested persons, including consumers and consumer organisations, may also be afforded the opportunity for a hearing before these steps are taken.

The Commission divides products posing a substantial product hazard into three categories: categories A, B and C. Class A hazards exist when a risk of death or grievous injury or illness is likely or very likely, or serious injury or illness is very likely. Class B hazards exist when a risk of death or grievous injury or illness is not likely to occur, but is possible, or when serious injury or illness is likely, or moderate injury or illness is very likely. Class C hazards exist when a risk of serious injury or illness is not likely, but is possible, or when moderate injury or illness is likely, or possible. The response to substantial product hazards varies according to how the hazard is classified.

### **Australian Product Recalls**

Australia's guide for suppliers outlines the aims of a voluntary recalls, why a supplier might want to conduct a recall and requirements on companies to notify the Minister on the voluntary recall and what action consumers should take. But there appears to be no requirement that suppliers provide an indication of the level of risk posed by the recalled product and no requirement to note that the product may cause "serious injury or death" when that is the case. Nor, in the ACA's view, is government taking a strong enough role in guiding the supplier and monitoring supplier activities vis-à-vis a recall.

### **Recall Powers Enhanced Under New EU Directive**

Regulation 9 in the 2001 EU reforms requires producers and distributors to notify in writing enforcement authorities where their products pose risks to consumers because they are incompatible with the general safety requirement. They have to explain the steps taken to prevent risk to consumers and provide details to other Member States to which it has been supplied.

While the American model has been tried and tested for many years, especially in the case of serious hazards, it has serious weaknesses: often consumers who own recalled products have no idea the product has been recalled. Recalling a product under the CPSC likely means that only 10-30% of that product will be recalled, shorthand for repaired, replaced or recovered by the company. In the US, children have died using products that had been recalled because parents and carers never received the warning. This can be explained by too many baby products reaching the market without adequate safety testing and safety systems in place, a weak system of getting information on recalls to the consumer, with makers of the recalled product wielding too much power over how that message gets disseminated. Producers in the US have traditionally opposed even a simple system of encouraging consumers to register with producers when they buy the product with a no-frills registration card that gives basic contact information or online registration.

The EU regime is more focused on the immediacy of the hazard and the paramount importance of consumer safety than the American model and is worthy of using as a model.

The new EU Directive defines the recall obligations: "any measure aimed at achieving the return of a dangerous product that has already been supplied or made available to consumers by the producer or distributor". Producers must adopt measures enabling them to take appropriate action, including recalls, from consumers of unsafe products and destruction of such products where all other measures are insufficient, a new requirement under the Directive.

The previous requirement called for withdrawing products from the market. The new requirement increases the responsibilities of the producers and distributors to monitor their products, including those products already in use by consumers. National enforcement officials have the authority to "order or co-ordinate or, if appropriate, organise together with producers and distributors" recalls from consumers of any dangerous product and its destruction. The Directive states that recalls should be "a last resort" but give authorities the power to order recall and destruction "if the action of producers and distributors in fulfilment of their obligations is unsatisfactory or insufficient". And in a departure from the American system, once the national authority decides that the recall should be carried out, there is no requirement to consult producers or distributors.

According to Professors Howells and Fairgrieve, the effect on member states is significant. "The Directive introduces compulsory recalls for the first time into the United Kingdom. Previously, enforcement authorities were empowered to require producers to suspend or remove dangerous products from the distribution chain and prosecute for placing unsafe products on the market, but could not require producers to recall dangerous products that have already been supplied to consumers. Recalls had thus occurred in the past on a solely voluntary basis, without coercion by the relevant authorities. Figures show that between 1990 and 1996 there was an average of 42 consumer product recalls per annum in respect of unsafe products.

The new recall powers in the Directive apparently raised concerns in the UK among producers. Authorities there went out of their way to emphasize that, "where a producer

can show that it acted responsibly, to the extent that it is reasonable to expect of it and, in respect of a voluntary product recall, in accordance with industry practice, it is improbable that any enforcement authority could claim that the action has been insufficient or unsatisfactory." This should be the posture taken by Australian authorities. Further, UK officials compiled a brochure for industry to help companies who are facing a recall; the CPSC has developed similar guides for US companies concerned about recalls. ACA recommends that the MCCA develop a similar document.

**RECOMMENDATION: Australia should develop a recall system under a GSP, taking the best from the American and EU models.**

- **A description of the level of hazard should be made public in a recall notice.**
- **Australian government authorities should work more closely with companies that carry out recalls, including determining what failed design or information failures lead to the recall.**
- **Government agencies should require information on proposed design changes in the product that is subject to recall.**
- **There should be monitoring of the range of consumers reached.**

**ACA further believes that companies should be under an affirmative obligation to recall products found to be unsafe.**

#### **RECOMMENDATION**

**ACA recommends that consumer product registration cards should be required in the sale of durable children's products (cots, prams, bunk beds, walkers, bath seats, bouncers, and other products likely to be found in a nursery) so that families can be directly contacted in the event of a recall of these products and that incentives are provided for a no-frills simple registration system of these products.**

#### **Paying for safety?**

The Draft contains a curious statement. In the section entitled "Potential Costs associated with a GSP" a sentence on page 165 reads, "This uncertainty may result in some businesses investing too much in safety." ACA agrees that it is legitimate to ask, as the Draft does, whether consumers are willing to pay more for safety features. We cannot think of a situation, however, where a company has invested "too much in safety" and paid a price for doing so. In fact, when a company makes a safer product, overall customer satisfaction with the product seems to increase. In addition, the investment in safety is usually a fix that can be done without great cost to the company's bottom line – like redesigning a stroller to prevent it from tipping over or adding a 'child-proof' cap to medicine bottles.

The leading consumer survey firm in the US, J.D. Power, (J. D. Power also operates in Canada, Germany, the UK and India), has polled consumers extensively over the years on their beliefs about safety and J.D. Power's surveys show a steady increase the value consumers place on safety and give some indication about what consumers are willing to pay for it. Consumers show considerably more interest in new safety-related features

in cars than in entertainment, comfort or convenience features in those cars, for example, according to a 2002 study entitled "U.S. Automotive Emerging Technologies."

Among the 25 features measured in the 2002 study, nine of the top 10 most desired features are designed to enhance vehicle or occupant safety. The price has to be reasonable, however, and not unexpectedly, consumers' interest in safety features will wane when the price gets too high. For example, while night vision technology polled as one of the most desired features in the study mentioned here, it plummets to near the bottom of the list when consumers are shown the current market price of \$1,800.

In 2004, J.D. Powers' released similar survey results. Safety related technologies were still a top priority for consumers. With cars, a price tag of \$300 for anti-rollover technology, called electronic stability control, came first in the consumer interest in safety devices. Once again, when prices get into the thousands, too high for most consumers' wallets, for example, interest tapers off.

Consumers will also pay reasonable amounts for improved safety when it comes to the food they consume. A 2002 survey entitled, Country-of-Origin Labelling of Beef Products: U.S. Consumers' Perceptions found that in Chicago and Denver consumers will willing to pay more for country-of-origin labelling (COOL) of beef. Survey results indicate the majority of consumers (73%) were willing to pay an 11% and 24% premium for COOL of steak and hamburger, respectively. Food safety concerns were the primary reason cited: Americans trust the food inspection system to keep their food supply safe and, as with products, assume it to be safe. (This survey occurred before any cattle with mad cow disease were detected in the US) and therefore feel more secure with a label that tells them the food was produced in the US.

In conclusion, surveys indicate that consumers are willing to pay more for the promise of a safer product or a safer drug or a safer food. Obviously, if the price gets so expensive as to be prohibitive interest will decline commensurate with the higher costs, but we seem to be some considerable distance from this point with most products. Critically, consumers' willingness to pay for safety is also dependent on how much the consumer knows about the risks in using the product, the likely incidence of accidents or mis-use, and the overall cost of the product.

Consumers expect that products available to them in stores and in car showrooms have met a minimum level of safety or have been tested under a basic safety regime and they expect that the government ensures that these requirements have been met. Unfortunately, there is a lot less safety regulation than most consumers probably grasp.

Finally, ACA believes that safety should not be an option that is only accessible to the wealthy, as with advanced safety devices on luxury vehicles. Suppliers should strive to build any hazards out of the product, not expect consumer behaviour to change. If safety technologies are available for a reasonable cost, suppliers should incorporate them into product design and make them available to all.

## **A National Consumer Product Safety Agency**

The above discussion also lends weight to the concept of a national agency with responsibility for:

- product safety law, compliance and enforcement;
- product safety standards;
- consumer input and representation;
- recalls;
- education;
- data collection and analysis.

There is a great deal to be done and it needs to be done in a highly co-ordinated manner. As the Commission has pointed out one of the problems of our current regime is its lack of effective co-ordination and inconsistency in regard to standards, bans and field action.

Ideally, ACA would suggest a specialist agency be created for this function. However, this could be constructed within the ACCC. If that was the case it would need to have clear separation from general ACCC activities and an identifiable budget and staff of its own. Some of its functions could be carried out by appropriate parts of the ACCC currently in existence as there would be obvious practical, experiential and financial benefits in that.

It is vital that sufficient resources are provided. At present consumer product safety seems to play second fiddle to many other parts of our competition and consumer protection systems. Within state agencies the product safety area is often exceedingly small compared to other areas and this overall fragmentation will not change if we have to depend on the many jurisdictions and local budgets to change. Only a national agency can draw together the critical mass of resources that is required to be truly effective in this area.

## **Conclusion**

In conclusion, ACA finds much to support in the Commission's findings and a number of areas where ACA has a very different perspective. ACA believes strongly in the need for a national product safety regulator operating under uniform national laws, which include a General Safety Provision. We believe this case as we have demonstrated above is compelling.