Further Submission to the Productivity Commission's Review of the Australian Consumer Product Safety System – Comments on its Discussion Draft of 9 August 2005

by

Dr Luke Richard Nottage

Senior Lecturer, University of Sydney Faculty of Law

14 October 2005

I. Summary

1. This Submission responds to the call by the Australian Government's Productivity Commission ("PC") for public comment on its Discussion Draft ("DD") released on 9 August 2005 as part of its research Study into the impact of options for reforming Australia's general consumer product safety system, requested by the Ministerial Council on Consumer Affairs ("MCCA").

2. Overall, the DD is a very welcome and impressive preliminary study, analysing many important issues and beginning to assemble relevant information. I agree with many of the preliminary views expressed (as noted below, and also eg improving research and extending scope of regulation clearly to certain services). I am agnostic about others (eg strong harmonisation within Australia. This Submission instead focuses on key Preliminary Findings ("PF") that seem to require significant reassessment, before the PC completes a final Report.

II. Background

3. My initial Submission to the PC, of 11 July 2005, agreed with several others and a set of options put forward by the MCCA in its initial Discussion Paper of 2004 (and reiterated in its Options Paper of August 2005), in proposing the introduction of key features particularly of the European Union's regime (initiated in 1992 and revised with effect from 2004) for regulating the safety of general consumer goods.

4. The PC's DD, however, remained to be convinced about the need for those key features, particularly a General Safety Provision ("GSP") putting the onus on firms not to supply unsafe goods, requiring them to report to regulators if their goods may

be unsafe, and requiring them to recall them if they decide they are unsafe.[1]

5. In late August and September 2005, my two-Part article ("Article") was published in the *Australian Product Liability Reporter*, examining more closely the framework and flaws of Australia's current main regulatory regime (the Trade Practices Act, "TPA", dating back to 1974) and similar problems with the regime of Australia's major trading partner in Japan (the Consumer Product Safety Law of 1973), in light of several points made in the DD. The article is therefore appended to this Submission.

6. Only one other formal Submission ("S1") has been made to the PC, by the peak business associations of the electrical products industry.

7. Although the PC has held forums in Canberra, Melbourne and Sydney inviting other feedback particularly from those who made submissions in its initial consultations for the DD, I was unable to attend these and several others who initially made Submissions may not have been able to participate either. Given also the PC's tight deadline for submitting a final Report to the MCCA, probably requiring drafting by Christmas, my present Submission attempts to rectify the balance somewhat by briefly addressing some key issues raised in the DD, highlighting some of the points raised in the other formal Submission so far and in my appended Article.

III. Evaluation of the Current System (DD Preliminary Findings ["PF"] 5.1-11)

8. As pointed out even by the electrical suppliers' Submission (S1 p2), the PC's Preliminary Finding (PF 5.1) that "overall Australia's consumer product safety system appears to ensure a reasonable level of product safety" is "speculative because insufficient Australian consumer product safety data is available". Taking this point a step further, note that it is widely agreed that the lack of safety data collected and disseminated by government agencies – and/or provided by firms – is insufficient (acknowledged in PF 5.5, 9.1-3, 11.1-3 and 12.1-3; by S1; and Article Part 1 at fn 30). Then it seems plausible that at least some firms are taking advantage of this shortage of information by supplying less safe products than they otherwise would – and might be more inclined to in countries where more and better-quality information is collected and disclosed, as under the present EU regime.

9. Such action need not involve "businesses *intentionally* releasing unsafe products onto

[1] All these documents are available via http://www.pc.gov.au/study/productsafety/index.html.

the market" (PF 5.2, emphasis added). Instead, they may be acting *negligently*, not giving proper weight to the likelihood and extent of harm likely to occur to consumers – and to be claimed against them by consumers, given the difficulties of (credible threats to) access the civil justice system through (recently reformed, ie restricted) tort law, and/or sanctioned or regulated by authorities also operating in an informational vacuum. These potential problems are related to widely-noted poor enforcement (PF 5.8; also S1 p3).

10. This perspective helps explain the pattern well-documented by the Submissions to the MCCA and the by the Australian Consumers' Association ("ACA"), demonstrating several concrete instances recently in which half or more tested products failed voluntary or even mandatory safety standards. In its initial public response to the DD (cited in Article Part 1 fn 9), the ACA further emphasises that "behavioural factors that contribute to product misuse and poor product maintenance and safety" (cf PF 5.3, and 5.2) are often irrelevant to these situations, eg involving child-care products. This indicates a serious regulatory system design problem (cf also S1 p3). Further, if product misuse is foreseeable and yet there is a way for suppliers reasonably to prevent it (eg by installing anti-tampering devices), then that should be another area in which firms should be forced to improve existing products rather than attempting to modify (eg tampering propensity) behaviours.

11. The lack of product-safety related information (and indeed legal standards under the existing law[2]) available to both firms and businesses also undercuts the DD's rosy view that there are "sufficient incentives for businesses to voluntarily recall" unsafe products and otherwise for regulators to effectively to "negotiate a voluntary recall in the first instance … in most cases" (PF 5.7). Similar problems have recently been highlighted by large-scale recalls in sectors subjected to specific safety regulations, notably in therapeutical goods. Australia's legislation on recalls and other important safety activities has had to be considerably strengthened in that sector (Article, Part 2 fn 2). Although the likely risk and extent of harm may be less for some types of consumer goods, there will be other more similar categories. Accordingly, the Government should be more consistent in (at least giving serious consideration to) extending stricter recall and other powers across the board, rather than responding only in specific areas like therapeutical goods after a huge problem arises such as the Pan Pharmaceuticals debacle in 2003.

---

[2] See Jocelyn Kellam, 'Post-Sale Duty to Warn and Product Recall in Australia' (2005) 16(8) *Australian Product Liability Reporter* (September 2005).

12. The DD also seems overly optimistic about the importance of other "incentives created by the product liability arrangements", particularly the strict product liability (PL) regime added in 1992 as Part VA of the TPA (PF 5.7). There has been very little case law, even unreported judgments, under this legislation. Perhaps products have suddenly become so safe that consumers don't need to sue under these provisions, and/or the law is so clear that they settle favourably in its shadow. But that seems unlikely given the lack of clear guidance from higher courts on some vague concepts in Part VA, and structural barriers to accessing the courts which have increased since Australia's "tort reforms" since 2002.

13. The DD is more convincing in conceding that "it is not clear that the current system engenders an efficient allocation of responsibility for consumer product safety among consumers, business and government". Shifting the primary onus onto firms not to supply unsafe products, since they tend to have better information on which to make such judgments, but with enhanced back-up powers and information provided to government, seems a more *efficient* regime particularly in today's deregulatory environment when direct government intervention and standard-setting is becoming increasingly impractical. Greater transparency of this system also has important *legitimacy*-promoting advantages, for a democratic society. Both grounds underpin the move towards such a system in the EU. If anything, the nature of Australia's economy and democratic institutions suggest that following revised EU regime is all the more desirable in this country (Article Part 1).

14. Likewise, although the DD may be correct in that differences between the current regulatory regimes in Australia and New Zealand, its long-standing trade partner, are sufficiently few "to have a significant distortionary impact on Australasian economic activity" (PF 5.11), both corporate and individual citizens can question the legitimacy of regimes that generate such clear variance in outcomes (eg four times the numbers of mandatory safety standards in Australia compared to NZ). Both efficiency and legitimacy issues can only grow as Australia continues to develop other bilateral and potentially regional FTAs, especially in the Asia-Pacific region (Article, Part 1). One important partner is Japan, which also has far fewer mandatory standards than Australia, but partially offsetting institutions and a growing interest in updating its regime – probably on EU lines (Article, Part 2).

IV. GSP (PF 6.1-2)

15. Even on a narrow economic analysis, the PC's scepticism about whether "the likely

benefits of a GSP justify the costs involved" seems excessive. Again, the Australian economy is even more open to more proportionately unsafe products eg from the PRC, a key contemporary concern in the EU (and the US). It is hard to believe that all their economists have got it wrong (especially in the US, with its tradition since the 1980s of increasingly light-handed consumer protection). Specifically, the data cited by the PC regarding the EU regime is weak (Article, Part 1).

16. The DD suggests that if the MCCA does favour adopting a GSP, that should define "safety" etc consistently with Part VA of the TPA (PF 6.2). That is a good starting point, but it should be remembered that product safety regulation generally (eg in both the EU and, since 1990, the US) has a broader scope than strict PL definitions of "defect", because it needs to allow preventive action rather than ex post responses triggered after injury or death giving rise to private compensation claims (Article Part 1 at fn 38).

17. On the other hand, a reformed regulatory regime in Australia should at least go as far as the TPA. Thus, it should clearly include foreseeable misuse within its scope, as recommended already by the PC (PF 7.1). However, care needs to be taken in then excluding situations where such foreseeable misuses involves unreasonable behaviour on the part of the user. The focus should remain on what a reasonable supplier would do. In some situations, for example, it may be reasonable to build in design features that prevent such unreasonable or even intentional misuse (Article Part 1 at fn 44). To draw an analogy, PL law might view a lack of design improvements (but resulting in an injury) having been broadly "caused" by the supplier of a product containing a "defect", but reduce damages awarded for the user's comparative negligence. Similar considerations should extend to product regulation reform.

18. There is no ground for concern that there would be "mandatory demonstration of compliance with GSP requirements" (S1 p4), if that implies that firms would need to provide documentation showing how each product meets detailed safety standards. Not even the revised EU regime goes that far.

V. Monitoring and Reporting for Unsafe Goods (PF 10.1-2)

19. Instead, the amendments in force since 2004 in the EU now add more general monitoring and reporting requirements. It was found that a GSP in itself, initiated in 1992, provided insufficient incentives. Combined with the point made above (para 8), this suggests that the PC needs to reconsider its view that adding such requirements

in Australia "would not justify the associated costs" (PF 10.1).

20. The PC does, however, approve of requiring firms to report goods subject to a successful PL claim or multiple out-of-court settlements (PF 10.1 para 2). The electrical suppliers' associations object even to this, yet they concede that "liability claims through the courts are rare and may not be completed for years" (S1, p 6). The implication that the tougher thresholds under US law for reporting in the event of PL suits or settlements should be transplanted to a reformed Australian regime, at least, is unconvincing given the huge volume of PL activity in the US. The further assertion that "mandatory reporting of claims" would be counter-productive to claimants negotiating settlement is also unpersuasive: even such settlements are comparatively rare in Australia, so reporting will simply shift the negotiating parameters somewhat more in favour of consumers. The extent of the shift will depend on the nature and extent of the reporting requirements added, and there is no evidence that the revised EU regime has an explosion of claims and/or settlement negotiation breakdowns.

VI. Recalls (PF 13.1-3)

21. The electrical suppliers associations also support the PC's preliminary assessment that "a general requirement for businesses to recall unsafe products is not warranted" (PF 13.2), due to incentives generating voluntary recalls and the threat (albeit rarely enforced) of mandatory government recalls. Again, the lack of information on when and how to make recalls and unclear enforcement powers (above para 8), along with the more robust systems in force in the EU and the US (and likely in other trading partners like Japan), call for a reassessment of such views.

22. The problem of "ophan products" (S1 p 8) is a serious one, but which could be addressed by deeming certain suppliers to be the suppliers subject to new recall obligations, along EU lines.

VII. Making further progress (PF 15.1-4)

23. Overall, as more narrowly acknowledged by the PC, we should already add "a stronger focus on reducing inconsistencies between Australian and international standards" in the field of consumer product safety regulation.

AUSTRALIAN
Product Liability
reporter

Reviewing product safety regulation in Australia — and Japan?

Part 1

Dr Luke Nottage UNIVERSITY OF SYDNEY FACULTY OF LAW

On 9 August 2005, the Australian Government's Productivity Commission (the Commission) released its 434 page Discussion Draft report, *Review of the Australian Consumer Product Safety System* (the Discussion Draft). This study by the Commission, which was founded in 1998 as the Government's principal advisory body on micro-economic reform, was commissioned to inform the review initiated in mid-2004 by the Ministerial Council on Consumer Affairs (MCCA). The MCCA received 31 submissions, and the Commission received 12 more (including one by this author), showing that Australians share considerable interest in this topic.[1] The Commission's final report is expected in January 2006, and legislative reform may begin already that year — the Australia-Japan Year of Exchange, commemorating the 30th anniversary of the Basic Treaty of Friendship and Cooperation between Australia and Japan. Both countries, moreover, have witnessed an upsurge of interest in product safety issues in recent years, exemplified by massive recalls of consumer goods.[2]

The preliminary assessment by the Commission does not propose fundamental reform, but already favours important improvements to Australia's regulatory regime for the safety of general consumer goods. The ongoing consultation process may also lead to a reassessment, and more thorough reforms. For example, the Commission already strongly advocates harmonising legislation across the States and Territories in Australia, which would also impact on New Zealand through the ANZCERTA Free Trade Agreement dating back to 1982,[3] as well as better mechanisms for early detection of unsafe products. The Commission also sees merit already in the following reforms:[4]

- 'include "foreseeable misuse" in the definition of "unsafe", as long as it is limited to behaviour which is reasonably predictable and not unreasonable;
- ensure consistent coverage of services relating to the installation and maintenance of consumer products;
- provide better information to businesses on regulatory requirements and targeted information campaigns to consumers, where effective and efficient;
- provide better information to businesses on regulatory requirements and targeted information campaigns to consumers, where effective and efficient;
- make evidence-based hazard identification and risk management central to policy making, standard setting and enforcement; and
- make greater use of cost-benefit analysis, embodying risk assessment, in determining whether and how to intervene to address identified product hazards.'

On the other hand, the Commission 'first' is not yet convinced that costs would outweigh benefits if a general safety provision (GSP) were added to Australia's existing regulatory regime, putting the onus on suppliers to market only safe products. Second, it remains unsure about introducing a requirement for suppliers to notify authorities if their goods may be unsafe, although the Commission already sees more merit in requiring reporting of products subject to a successful (private law) liability claim or multiple out-of-court

settlements, and in 'guidance material encouraging businesses to clarify how consumers and retailers can notify them of unsafe or faulty products'. Third, the Commission does not (yet) propose a formal legislative requirement for suppliers to recall unsafe products, or even for the government to audit voluntary recalls, believing the current recall requirements are generally now sufficient.[5]

However, these three (inter-related) features are central to the regulatory regime introduced in 1992 and revised in 2001 in the European Union (EU), applicable since 2004 in the (soon to be 27) EU member states.[6] The Commission does not adequately explain what is so distinctive about Australia's socio economic structure and growth trajectory that it should not follow this emerging global standard. If anything, Australia has even more exposure to a rising tide of potentially unsafe products imported from rapidly growing Asia-Pacific economies like China's.[7] Perhaps it is felt that Australia does not and need not share the EU's commitment to a 'high level of protection of safety and health of consumers'.[8] If so, however, then many in Australia would and should contest a lower standard being set in this country. The evidence presented by the Commission on 'overseas experience' with a GSP is particularly weak: it refers primarily to publications published before the strengthening of the EU regime in 2001, and to a subsequent survey by a law firm of only some manufacturers (predictably quite negative about the new regime).[9] It is implausible that Australia can continue to make do with a regulatory regime similar to that prevailing in Europe even before 1992, when at least a GSP was introduced for suppliers. More generally, the revised EU regime offers an appropriate division of responsibilities among firms, the government and consumers; and the PC or the MCCA may still come around to more far-reaching reforms along the lines of the EU model.

Reforms along such lines are also suggestive for other countries in the Asia-Pacific. Already, the revised EU regulatory regime is being closely investigated, for example, in Canada (publically) and Japan (albeit less visibly). Japan also shares a strict liability product liability regime with Australia, introduced in the early 1990s and modeled on a 1985 EC Directive.[10] Accordingly, adding more of a lawyer's perspective to that of the economists predominant in the Commission, this article outlines the nature and provisions of Australia's current regulatory regime aimed at securing the safety of general consumer goods, further elaborating on some of the issues and views presented in the Commission's Discussion Draft.[11] It highlights several problems broadly similar to those found in Japan; Japan may therefore be tempted to implement EU-like reforms as well. That would be desirable given the Trade and Economic Framework relationship already established between Australia and Japan in July 2003, and a full scale bilateral Free Trade Agreement currently under investigation.[12]

Australia has even more exposure to a rising tide of potentially unsafe products imported from rapidly growing Asia-Pacific economies like China's.

Consumer product safety regulation in Australia

Australia, with its federal system of government, has a dispersed regulatory regime in this field.[13] Increasingly, however, the central regime is federal legislation applicable to most corporations: the *Trade Practices Act 1974* (Cth) (TPA), Pt V (Consumer protection) Div 1A (Product safety and product information). First, under s 65C(2), the responsible Minister (currently the Parliamentary Secretary to the Treasurer[14]) may prescribe requirements under a consumer product safety standard 'as are reasonably necessary to prevent or reduce risk of injury to any person'. A corporation supplying in trade goods that do not comply with such a mandated standard is subject especially to criminal sanctions (s 65C(1)). Australian courts have become increasingly strict in enforcing such sanctions.[15] By contrast, as mentioned above, the EU regime imposes a GSP on manufacturers and distributors of consumer goods — instead of putting the burden on regulators to prescribe safety standards.[16] This should help address problems related to a paucity of strict standards prescribed under the TPA, currently 27, highlighted by several submissions to the Commission.[17]

Any requirements prescribed by s 65C(2) may be set directly by regulation, or by the Minister partly or completely adopting a voluntary standard elaborated by Standards Australia International Ltd (which recently changed its name to Standards Australia Ltd (SA)) (s 65E), there still being no other 'prescribed association or body'. Most prescribed standards are based on SA standards. The Full Court of the Federal Court of Australia has recently indicated that courts will be 'very cautious in finding that a particular prescribed product safety standard has been prescribed invalidly, when the issue is whether the standard concerned really promotes safety', especially where 'the standard is produced by a body of experts' such as a SA technical committee (as in that case).[18] However, the Court went on to mention several considerations that might limit such deference to the SA or indeed other 'expert' standards in different situations.[19]

More generally, SA's activities and governance are currently under review. This follows its transformation in 1999 from an association into a public company limited by guarantee; and the floating of commercial operations (for example, publishing and sales of standards) as 'SAI Global Ltd' in December 2003.[20] In July 2005, a report by consultants Cameron Ralph was circulated to an array of stakeholders and concluded with 28 recommendations. Key proposals address some perennial criticisms of SA and its standard-setting processes: transparency; broader stakeholder participation (including interested individuals, consumer groups and the user community); and (perhaps especially) prompt and focused action.[21]

Second, under s 65C(5) of the TPA, the Minister may declare that consumer 'goods of a particular kind will or may cause injury to any person'. Such a declaration establishes a temporary ban on the goods for up to 18 months (s 65C(6)). Thereafter, and if no safety standard has been mandated under s 65C(2), the Minister may declare a permanent ban pursuant to an amendment made in 1986 (s 65C(7)). Once again, regulatory prohibition on supply of such unsafe goods only arises after the Minister has acted (s 65C(1)(b) and (c), respectively). However, by contrast to s 65C(2) standard-setting, the threshold for regulatory action does not require that it be 'reasonably necessary' to avoid injury — at least for temporary bans.[22] There are currently 12 bans in force, almost all of which are permanent.[23] This compares with three permanent bans ordered between 1986 and 1988. In addition, from when the power to make temporary bans was introduced in 1977 through to 1988, 30 were ordered but then expired. Some of these were replaced by mandatory standards, but most were not renewed 'presumably because many referred to particular brands … which had by then been removed from the market'.[24] In the fifteen years since 1989, many more temporary bans have followed similar patterns.

Third, since TPA amendments in 1986, the Minister has been empowered to compel a recall of consumer products (s 65F(1)(d)) if they are:

(i) of a kind which will or may cause injury;
(ii) do not comply with a mandatory product standard; or
(iii) are subject to a temporary or permanent ban (s 65F(1)(b)); and
(iv) 'it appears to the Minister that the supplier has not taken satisfactory action to prevent the goods causing injury to any person' (s 65F(1)(c)).

Requirement (iv) indicates that the legislative intention was for suppliers still to take first steps in conducting recalls. This approach is reinforced by a duty on suppliers to notify the authorities within two days of a voluntary recall of products subject to the TPA (s 65R). Many recalls have been conducted and notified under this voluntary regime,[25] but some products are not covered and there is no definition of what constitutes a 'recall'. By contrast, the revised EU regime introduces an explicit obligation on producers to monitor safety of their goods after supply and to recall them, if necessary, or become susceptible to enhanced powers for authorities to mandate or organise a recall. In Australia, on the other hand, there have been few compulsory recalls. The first, for condoms that had failed to meet an SA standard on freedom from holes, was implemented only from late 1988.[26]

Some reticence to act on the part of the Minister, even in issuing temporary bans, may be linked to the requirement that if he envisages a ban or recall, he must first allow any suppliers to call a conference with the ACCC (s 65J), which then gives a non-binding recommendation (s 65P). The exception is where the goods 'create an imminent risk of death, serious illness or serious injury' (ss 65L and 65M). Conferences have frequently been requested, beginning with the condoms recall and the banning of smokeless tobacco products.[27] In addition, the Minister regularly calls for requests for a conference especially before deciding whether or not to turn a temporary ban into a permanent one.[28]

A fourth option expressly available to the Minister under the TPA (s 65B(1)) is to publish in the Gazette: (a) 'a statement' that specified goods 'are under investigation to determine whether the goods will or may cause injury to any person', or (b) 'a warning of possible risks involved in the use' of specified goods. Yet again, this legislation puts the onus on the Minister to act. By contrast, the EU regime not only imposes a general obligation to supply safe products, but also specific obligations to provide information for consumers to assess risks (if not immediately obvious), and instructions on safe use of the products. Producers and consumers must also keep themselves informed about possible risks. If producers discover that their products on the market are unsafe, they must notify the regulatory authorities of this fact and what action they have taken to remove the risk to consumers.[29] Amendments to Australia's regime along these lines, casting the primary onus on suppliers to warn about possible risks, would again fill an important gap.

Even under the current s 65B, the threshold for action by the Minister seems lower even than for temporary bans. For para (a) 'statements', it is only an investigation into whether the goods will or may cause injury (the threshold for bans and also a key requirement for recalls). For para (b) 'warnings', the threshold is clearly even looser, requiring only 'possible risks' (perhaps not even leading or likely to result in injury, but instead lacking safety features that might result say in property damage). However, the Minister seems quite loath to take advantage of this option. At present, there seems to be only two notifications pending under s 65B, although the governments' websites are confusing.[30] Like temporary bans, however, notifications may lead eventually to a new voluntary or mandatory standard, or to a ban.[31]

Overall, there remains remarkably little readily accessible guidance on key considerations for deciding whether the regulatory thresholds are met. The statutory wording itself is quite broad. For example, the 'injury' is not required to be 'serious', so a ban or recall might be triggered for example

by a product causing or likely to cause quite minimal harm (for example, a scratch), albeit to a significant number of individuals or vulnerable group such as children or the elderly. On the other hand, safety risks merely causing property damage could presumably only generate a s 65B(1)(b) warning. In addition, there has been almost no case law on these regulatory thresholds, although the courts have seemingly indicated an expansive interpretation in viewing 'injury' as including disease.[32]

We are left instead mainly with documents produced by a succession of regulatory authorities since the mid-1980s, especially directed at considerations in setting mandatory standards, but seemingly carried over to a considerable degree when considering bans or other action. From the outset, the recommended investigation procedure involved identifying the product, establishing its source, defining the hazard, and assessing it. In particular, Australia's safety regulators focused on:[33]

- compliance costs for industry (including sufficiency of a voluntary approach, stocks of existing goods, phase-in times and effects on small business) versus consumer benefits (reduced risk and improved product awareness);
- whether standards (or presumably other action) would inhibit fair competition (including, no doubt increasingly, from imports);
- social utility of the product;
- availability of substitute products; and
- potential for other government agencies to intervene.

More recently, further largely overlapping guidance is provided by a Regulation Impact Statement (RIS), now required to be published prior to possible regulatory action. The usual format is to identify the problem, define objectives for government action and find out whether some action is already in force, set out options (for example self-regulation or the status quo, consumer education or the various forms of government regulation under the TPA), weigh the costs and benefits for each option (for groups such as consumers, industry and the government) and recommend one (in light of consultations).[34] Overall, however, these and other RISs suggest that regulatory practice in Australia has become reactive and limited. Intervention seems to have become justified almost only when it can be shown that serious injury has actually been caused due to a clear product defect, even though the statutory threshold only requires that the product 'will or may cause injury' to justify a ban or a s 65B investigation (or a standard, albeit additionally if 'reasonably necessary').[35]

Yet the 'likelihood of injury' threshold is a broader one than 'defect', just as 'unsafe' is understood in the EU product safety regime to be broader than 'defect' under its Product Liability Directive regime,[36] in turn transplanted in 1992 into Pt VA of the TPA.[37] Such a broader concept and threshold triggering product safety regulation is deliberate, to allow intervention (to varying degrees, depending on the likely risks) even before a proven defect (triggering compensation claims) actually causes injury. In other words, a major reason for superimposing product safety regulations onto a product liability regime is to allow for pro-active prevention of likely injury, rather than having to wait for those injuries to manifest themselves.[38] Australia's current regulatory regime, and improvements towards a less reactive regime which may emerge from the current governmental review, are and should remain aligned with the EU regime rather than the US one.[39]

In addition, many submissions to the Commission assumed that Australia's system does not allow regulatory intervention where there is foreseeable misuse of products.[40] This view is controverted by recent cases[41] and the wording of the statute. As one leading commentator explains, the EU regime more explicitly requires safety:

> … judged according to its normal or reasonably foreseeable conditions of use. This is a compromise standard. It does not let the manufacturer arbitrarily restrict the uses to which the product can be put. Equally, the consumer is not protected against all misuses. He must, however, be protected against those which are reasonably foreseeable. This would seem to go further than simply preventing the manufacturer from claiming that some typical uses should not be treated as normal uses because they have been stated to be inappropriate uses in the instructions. Conceivably it could require manufacturers to guard against illegitimate uses to which they can reasonably foresee the product might be put. Thus, one might require toys which imitate adult equipment to make it clear that they cannot be used for that purpose. One can even imagine the need for solvent manufacturers to warn of the dangers of solvent abuse. There must, however, be limits to what is reasonably foreseeable. Thus, whilst one suspects that some ladies' tights have been used as an emergency fan belt to repair a broken down car, hosiery manufacturers would not be under an obligation to warn of the dangers of such ad hoc improvisation! It would, however, seem to require that businesses monitor the post-marketing history of their products to determine what uses the product is in fact put to.[42]

It should not matter that the misuse might be deliberate, or even be by a third party, provided that it is foreseeable — so common sense would view the product as a significant cause of the injury — and it would be reasonable for suppliers to take counter-measures to minimise such risks. Including 'foreseeable misuse' within the scope of the safety regulation regime is all the more necessary given its more expansive ambit, in light of its already well established inclusion within the scope of 'defectiveness' triggering civil liability under the EC Product Liability Directive and its clones in Australia and Japan.[43] Thus, the Commission Discussion Draft's recommendation to clarify that Australia's regulatory regime does (or should) encompass certain foreseeable misuse situations is generally to be welcomed. However, the Commission's view is questionable if it implies that such situations should never encompass misuse which is unreasonable judged solely from the perspective of the user. It should always be asked whether the supply of the product in light of foreseeable misuse, for example without adding design or warning improvements to minimise potential for

such misuse, is reasonable from the perspective of the supplier.[44]

Overall, an increasingly apparent flaw in Australia's regime regulating the safety of consumer products, especially compared to the current EU regime, is its reactive nature — placing the primary burden to assess and continuously monitor safety on the Minister rather than suppliers themselves. However, another problem is that even quite expansive wording in the existing TPA has come to be quite narrowly interpreted, primarily by regulators themselves, in the absence of guidance from the courts, and (perhaps for that reason) by some others. In turn, this suggests another potential problem: that regulators in recent years have lacked the resources or political will to 'take on' certain entrenched and more conservative business interests, in order to take advantage of current statutory powers. This may be particularly true at the federal level, reflecting the (Liberal) Howard Government's long reign, since at least some (often Labour) State Governments seem to have continued to intervene more actively to regulate product safety.[45] Such problems of resources and disparity among regulations in different jurisdictions also emerge from Australia's current review of its overall product safety regime, including many submissions so far and the Commission's Discussion Draft. To address these problems too, and to benefit from the concepts and additional features contained in its new regime, the EU model remains very attractive for Australia. ●

Dr Luke Nottage, Senior Lecturer & Co-Director, Australian Network for Japanese Law, University of Sydney Faculty of Law.

Endnotes

1. The Submissions, Issues Papers, and the Discussion Draft are available at <www.pc.gov.au/study/productsafety/index.html>. (All website references in this article are correct as of 20 August 2005.) See also Dennis S 'Productivity Commission's draft report on Australian consumer product safety: fundamental reform not required but important improvements warranted' in this issue at p 97.

2. In Australia, see for example Kellam J and Newman C 'Panic and pandemonium and the largest recall in the world: the Australian Pan Pharmaceuticals crisis' (2004) 15(1) *Australian Product Liability Reporter* 1. MasterFoods' recent recall of all Mars and Snickers chocolate bars in NSW is also keeping recalls very much in the public eye, although this has been triggered by an unusual case of adulteration aimed at extortion. In Japan, safety problems emerged during 'the summers of living dangerously' in 2000–2001, with recalls or restrictions affecting foodstuffs (including beef products following the outbreak of 'Mad Cow Disease'), automobiles and consumer electronics. See Nottage L 'New concerns and challenges for product safety in Japan' (2000) 11(8) *Australian Product Liability Reporter* 101; Nottage L and Trezise M 'Mad cows and Japanese consumers' (2003) 14(9) *Australian Product Liability Reporter* 125; and Nottage L 'A decade of strict liability litigation under Japan's Product Liability Law of 1994' (2005) 16(5) *Australian Product Liability Reporter* 65. The latest controversy, generating intense public debate, concerns products containing asbestos. See for example the collection of newspaper articles over July 2005 listed in ANJeL's *Japanese Law Monthly Bulletin 2005*, at <www.law.usyd.edu.au/anjel/content/anjel_research_guide.htm>.

3. The latest Memorandum of Understanding on Coordination of Business Law, concluded between Australia and New Zealand in 2000 (replacing a 1988 agreement) pursuant to ANZCERTA, will also be reviewed by October 2005: <http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2005/024.asp>. A key presumption in harmonising business law has been that coordination should take place unless there is a good reason for the law to be different between the two countries — a starting point that should also extend to other bilateral Free Trade Agreements concluded or being negotiated between Australia and other countries.

4. 'Key points', at <www.pc.gov.au/study/productsafety/draftreport/keypoints.html>; and see for further, Dennis S 'Productivity Commission's draft report on Australian consumer product safety: fundamental reform not required but important improvements w**arranted'** in this issue at p 97.

5. See, respectively, Discussion Draft chs 6, 10 (p 227) and 13.

6. Revised Directive for General Product Safety, 2001/95/EC, available at <http://europa.eu.int/comm/consumers/cons_safe/prod_safe/gpsd/index_en.htm>.

7. See this author's submission, available from <www.pc.gov.au/study/productsafety/subs/sublist.html>, Pt I; and above note 3.

8. As required by art 95 of the Treaty establishing the European Community, and reiterated in the revised Directive's Preamble and art 2(b)'s definition of 'safe product' for a GSP. More generally, see also <http://europa.eu.int/comm/consumers/cons_safe/prod_safe/index_en.htm>.

9. Discussion Draft, pp 139–41. Compare also the immediate criticism of the Commission's preliminary view against a GSP, by the Australian Consumers' Association: 'Consumer Product Safety: Productivity Commission Gets It Half Right', 9 August 2005 press release, at <www.choice.com.au/viewPressRelease.aspx?id=104862&catId=100202&tid=100010&p=1>.

10. Directive 85/374/EEC (revised by Directive 99/34/EC, extending strict liability to defective primary agricultural products), available at <http://europa.eu.int/comm/consumers/cons_safe/prod_safe/defect_prod/index_en.htm>. For a detailed comparison of all three product liability regimes (and the US regime), see Nottage L *Product safety and liability law in Japan: from Minamata to mad cows* Routledge London; New York 2004, especially chs 2 and 3.

11. It does not directly cover specific products such as foods, drugs, automobiles and electrical goods, which have their own (typically tougher) regulatory requirements (Discussion Draft pp 91–2; and Kellam J 'Post-sale duty to warn and product recall in Australia' (2005) 16 *Australian Product Liability Reporter* forthcoming). However, the broader problems of regulatory design identified here may also be relevant in reassessing those sector-specific regimes.

12. See <www.dfat.gov.au/geo/japan/fta/>.

13. Discussion Draft Ch 4 (for example Table 4.1, comparing numbers of mandatory standards and bans under federal versus State legislation). For a rare published account of a State regime (in NSW), see Laughton R 'Fair trading and the safety of consumer products' (1996) 7(6) *Australian Product Liability Reporter* 71.

14. See <http://parlsec.treasurer.gov.au/cjp/default.asp>. Similarly, Japan lacks a dedicated 'Consumer Affairs Minister', with responsibility for general consumer policy dispersed primarily among the Cabinet Office (which has subsumed the Economic Planning Agency), the Ministry of Economy Trade and Industry and the Ministry of Health Labor and Welfare (websites available at <www.jlawonline.info/content/6_Government.htm>. By contrast, New Zealand does now have such a Minister. Ironically, however, it has been even less active than Australia in taking consumer product safety regulatory measures (for example, only six mandatory standards: <www.consumeraffairs.govt.nz/productsafety/standards/index.html>).

15. Taylor L 'Product safety standards under the *Trade Practices Act*' (2000) 14 *Commercial Law Quarterly* 12; and see for example *ACCC v Dimmey Stores Pty Ltd* (2001) ATPR 41–811.

16. See this author's submission to the Productivity Commission, at <www.pc.gov.au/study/productsafety/subs/sublist.html>, especially Pt II.

17. These 27 standards include several 'information standards' (requiring specific warnings or instructions rather than design improvements) pursuant to s 65D: <www.accc.gov.au/content/index.phtml/itemId/268595/fromItemId/6191>. (But compare with <www.consumersonline.gov.au/content/ProductSafety/product_safety.asp>, contemporaneously listing only 23 — not including: baby bath aids, care labelling, cosmetics ingredient labelling and tobacco products labelling). As the Discussion Draft points out (pp 157–60), it is unclear whether introducing a GSP would actually reduce the numbers of mandatory standards, but (acknowledging a point made in this author's submission) the system in principle should put less onus on regulators to manage product safety.

18. *BMW Australia Ltd v ACCC* (2004) 207 ALR 452.

19. It mentioned this particular committee's make-up (including several members broadly representing consumer interests); that the standard adopted by the Minister had been kept under regular review; that the complainant supplier had raised a similar issue to that resulting in this litigation at an SA meeting, but the committee had rejected its proposal; and that the complainant's objection to the standard's required wording for warnings had some force for some models of motor vehicle but not necessarily all. More generally, on the challenges posed to contemporary legal systems by (quasi-) private 'experts', see Kennedy D 'Challenging expert rule: the politics of global governance' (2005) 27 *Sydney Law Review* 5; and Schepel H *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* Hart Oxford 2005.

20. Federal and State Governments are still among SA's members, and 13 per cent of its income still comes from the Federal Government as fees for services in the national interest, especially international standardising activities. Almost all the rest, however, comes from its 10 per cent shareholding in SAI Global (66 per cent of income) and from royalties paid by SAI Global for publication and sales of SA's standards pursuant to a 15 year contract (16 per cent of income). See, respectively, <www.standards.org.au> and <www.sai-global.com>.

21. Harland D 'Post market control of technical consumer goods in Australia' in Micklitz (ed) *Post Market Control of Consumer Goods* Nomos, Baden-Baden 1990 1, pp 38–40. See also the criticisms of standard-setting processes in Australia reported in the Discussion Draft pp 110–13.

22. As noted by the late Professor David Harland, s 65C(5) 'was intended to enable immediate action to be taken in cases of urgency, so that during the currency of a declaration further steps could be taken to enable any necessary standard to be prescribed' (above note 21, p 33). The statute does not explicitly state that a permanent ban can be extended merely if the goods 'will or may cause injury', but that seems a reasonable interpretation of s 65C, even if the Minister may be entitled to be somewhat more cautious than when imposing the initial temporary ban.

23. <www.accc.gov.au/content/index.phtml/itemId/268701/fromItemId/6191>. The temporary ban on dart gun sets since March 2003 may soon become permanent too. (But compare with <www.consumersonline.gov.au/content/ProductSafety/product_safety.asp>, contemporaneously listing a 13th product: 'Yo-yo water balls'.)

24. Harland, above note 21, para 9.2.

25. Up to around a dozen per month are currently notified under s 65R: <www.recalls.gov.au/view_recall_by_cat.php?recall_type=2>. See also Discussion Draft Fig 4.2 (p 80), depicting the increase in voluntary recalls especially since 2001.

26. Harland, above note 21, postscript. Compulsory recalls subsequently have included herbal teas, injections and fire doors.

27. Above note 26, and para 8.22 (*US Tobacco Co v Minister for Consumer Affairs* (1988) 79 ALR 430).

28. A recent example is konjac jelly products, a choking hazard subjected last year to a permanent ban: <www.accc.gov.au/content/index.phtml/itemId/555614>. (Compare also the response in Japan in the late 1990s, outlined in Nottage L 'The present and future of product liability dispute resolution in Japan' (2000) 27 *William Mitchell Law Review* 215.)

29. DTI Guidance on the new UK Regulations (2005), implementing the revised EU regime, available at <www.dti.gov.uk/ccp/topics1/safety.htm>, paras 44–61.

30. Blind and curtain cords (warning of possible risk of strangulation of children: Consumer Protection Notice 12 of 2003). A warning issued about Yo Yo Water balls (also risking strangulation of children: Notice 8 of 2003) was replaced six weeks later by a temporary ban (Notice 11 of 2003). See <www.consumersonline.gov.au/content/ProductSafety/ProtectionNotices/>. In addition, the Minister's own website

contains a press release (dated 28 June 2005) mentioning a further s 65B warning notice about 'pocket' or 'monkey' motorbikes: <http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2005/022.asp>. This warning is not listed on the ACCC website at <www.accc.gov.au/content/index.phtml/itemId/6191>, which moreover does not provide any explanation about this category of ministerial action (only explaining about mandatory standards, bans and recalls). The Discussion Draft (p 75) therefore seems only partly correct in stating that 'Warning notices are rarely used: the Australian Government has only issued two since 2000'. They are certainly rare, but there appear to have been three issued under the TPA. The multiple government websites are confusing even to the experts in this field and should be rationalised, reinforcing the Discussion Draft's broader points about the lack of coordinated information for product safety in Australia.

31. In December 1986, for example, the Minister published a notice advising that some oven mitts might be unsuitable for hot surfaces. In a report in October 1987, the investigation confirmed some risk, but also many types of fibres and blends precluding a comprehensive list (presumably facilitating a ban or recall), resulting in work towards a new performance standard for such products (Harland, above note 21, para 6.11). More recently, as mentioned above (note 30), the warning notice about Yo Yo Water Balls was soon replaced by a temporary ban.

32. Above note 27 (*US Tobacco*). In the shadow of that judgment, it seems, there was no challenge on that point in the condoms mandatory recall (above note 26). However, the recent full Federal Court judgment (*BMW*, above note 18) also suggests considerable deference to appropriately governed expert consultation processes.

33. Harland, above note 21, especially paras 6.1–7, 7.1–5, and 8.1–3.

34. For example, the first readily accessible RIS published in February 1997 for disposable cigarette lighters stated that requiring warnings to be affixed would be inadequate given that children at risk would still not (be able to) read them. Publishing a warning notice under s 65B would similarly only influence factors like parental supervision, although 'it would provide an early alert to the public about the danger' of children misusing the lighters. Accordingly, the regulators recommended development of a mandatory standard, which was eventually introduced. See, with 15 other RISs, <www.consumersonline.gov.au/content/ProductSafety/RIS/default.asp>. The most recent example is a draft RIS recommending safety warnings and instructions to be issued with basketball hoops, alerting (mis-) users to the possibility of collapse or injury from 'slam dunks'. A s 65B warning is not even mooted, probably because there have been five serious deaths or injuries clearly caused by collapses since 1996, and perhaps because it will be quite straightforward to extend nationwide a 2002 Victorian regulation. See <www.accc.gov.au/content/index.phtml/itemId/611376/fromItemId/6191>.

35. The Commission's Discussion Draft (pp 160–62) provides only limited examples of 'pre-emptive action' being taken.

36. See generally Howells G 'Consumer safety in Europe: in search of the proper standard' in Jackson and McGoldrick (eds) *Legal Visions of the New Europe* Graham & Trotman London 1993.

37. See for example Miller C J and Goldberg R *Product Liability* (2nd ed Oxford University Press Oxford 2004 para 19.24 and paras 10.60–61.

38. This fundamental distinction also goes against the Commission's proposal, in the Discussion Draft (pp 146–50), to closely align the definition of safety in any GSP with the definition of 'defect', triggering civil liability under Pt VA of the TPA.

39. By contrast, s 15 of the *Consumer Product Safety Act* (15 USC 2064) requires suppliers to report situations where the product … (c) does contain 'a defect which could create a substantial product hazard', or (d) creates an unreasonable risk of serious injury or death. Reporting ground (d) was only added in 1990, and Australian practice or views taking an unduly restrictive interpretation of the TPA may have been overly influenced by the US trigger of ground (c).

40. Compare with this author's submission to the Commission, para 21 (acknowledged at p 176 of the Discussion Draft, along with a similar view in the submission by Middletons lawyers). Some business interests would probably like this assumption to be true. Consumer interests making submissions probably go along with it because it strengthens their case for legislative reform.

41. For example, the proposed standard for basketball hoops, above note 34.

42. Howells G *Consumer Product Safety* Ashgate Aldershot 1998 pp 126–7. Professor Howells notes that s 2(b) of the EU Directive also states that a product should not be considered unsafe *merely* due to the feasibility of obtaining higher levels of safety or the availability of less risky products, but that such matters remain relevant to the assessment.

43. See for example Kellam J *A Practical Guide to Australian Product Liability* CCH Australia North Ryde NSW 1992 para 407; Miller C J and Goldberg R *Product Liability* (2nd ed) Oxford University Press Oxford 2004 for example paras 10.60–1 (design defects) and 12.78–80 (warning defects); Nottage, above note 10, at p 95 (for example 'car mask hooks', PL Law Case No 20).

44. Compare with Discussion Draft Ch 7, especially for example Table 7.1. The latter implies that a user deliberately misusing a product to harm another would be 'unreasonable' and so the product cannot be 'unsafe'. However, what if such misuse is foreseeable, and it would be 'reasonable' for the supplier to take 'cost-effective remedial action … (for example product alteration …)'? Then not taking such action may mean, in light of other considerations going to the reasonableness of the suppliers' actions, that it has nonetheless supplied an unsafe product, breaching regulatory requirements.

45. For example in Victoria, already in 2002, regarding basketball hoops (now under investigation at the federal level: above note 34).

AUSTRALIAN
Product Liability
reporter

Reviewing product safety regulation in Australia — and Japan? Part 2

Dr Luke Nottage
UNIVERSITY OF SYDNEY

Part 1 of this article, mainly outlining Australia's regulatory regime under the Trade Practices Act 1974 (Cth)*, was published in the August issue of this publication (2005) 16(7)* Australian Product Liability Reporter *100-106.*

Comparing Japan's regulatory regime

Despite perceptions, at least, that Japan and 'the West' share very different traditions of law and government–business relations,[1] Japan's current regime for regulating the safety of general consumer goods shows some remarkable parallels with Australia's main regime outlined in Pt 1 of this article. The Japanese system is similarly reactive, placing primary onus on the government to take action when an unsafe product is shown to have been placed on the market, rather than imposing a general obligation to maintain safety (or general safety provision (GSP)) directly on firms. Because legislation is also broadly worded, this has meant relying on the regulators' own interpretations and common practices. Yet from an early stage (and increasingly during the 1990s) the Japanese Government has delegated responsibility to various business associations to develop their own 'voluntary' safety standards, as it has been forced to rationalise and deregulate over the country's 'lost decade' of economic stagnation. This approach is coming under increasing strain, however, as Japan also faces a rising tide of imported products (especially from the Asia-Pacific region) and some massive recalls in recent years, albeit primarily under sector specific regimes (foodstuffs, automobiles, and consumer electronics).[2]

Specifically, Japan's Consumer Product Safety Law (No 31 of 1973) (the Law) was enacted as part of a multi-level response to large scale product safety failures particularly over the late 1960s and early 1970s, which provoked mass torts litigation (the 'birth of product liability') and nation-wide controversy.[3] Article 1 states that the Law aims to avoid general consumer products causing injury to consumers, both through regulating the manufacture and supply of 'specified products (*tokutei seihin*)' and 'through promoting private firms' autonomous activities to secure the safety of general consumer products, thus aiming at the protection of consumers in general'.[4] Article 2(2) defines 'specified products' as meaning those 'found to involve, in particular, a high risk of injury being caused to the life or limb of consumers in general, and then prescribed by ordinance (*seirei*)'. For such products, the responsible Minister (namely of the Ministry of Economy, Trade and Industry (METI)) must prescribe technical standards sufficient to avoid injury arising (Art 3). Manufacturers, importers and suppliers of such products may not supply them without affixing a prescribed safety mark (Art 13: currently, the letters 'PSC' contained within a circle). Manufacturers and importers may register with the Minister (Art 6), and then affix the necessary mark to the 'specified products' (Art 13), provided they believe they meet the prescribed technical standards (Art 11). However, if the goods are a 'special category of special products (*tokubetsu tokutei seihin*)' defined in Art 2(3) as those deemed inappropriate for self-assessment by manufacturers or

importers in order to avoid risk of injury, they must be subjected instead to assessment by a third party registered with the Minister (Art 12). Records must be kept. The Minister can order remedial measures (presumably including a recall) if a specified product is found to have been manufactured, imported or assessed in breach of Art 11 (Art 14); and prohibit labelling with the safety mark for up to one year if a specified product of the manufacturer or importer is found to be non-conforming (Art 15). In addition, the Minister may order them 'to attempt a recall or take other temporary measures to prevent the escalation of serious harm, within necessary limits and if deemed particularly necessary to avoid such harm, if serious harm to life or limb has eventuated or there is an imminent risk thereof due to a defect in [any] general consumer goods' (Art 82).

Compared to Australia's *Trade Practices Act 1974* (Cth) (TPA), the threshold to the Minister mandating a standard may seem even higher (compared with s 65C(2)), and there is no formal means to adopt a standard developed by a (semi-) private organisation like Standards Australia (SA). This partly explains why there are only now six 'specified products' under Japan's Law.[5] Another reason is that Japan has only recently moved towards a system of performance based standards, like the 'new approach' adopted in the EU in the 1980s.[6] Conversely, there have been many examples of the Ministry, often pushed along by other government agencies and sometimes broader stakeholders, encouraging a major associated business association (the Consumer Product Safety Association, established by the 1973 Law) to develop voluntary standards for its members.[7] This Association further operates the 'SG mark' system, whereby manufacturers can have their products certified through the Association as meeting its own safety standards. If they are certified but are later proven by consumers to have a defect causing harm, consumers can apply for limited insurance through the Association, funded by fees paid by the individual manufacturer but potentially passed on to consumers in the form of higher prices per unit.[8] By supporting this voluntary certification and insurance scheme, firms not only obtain a form of product liability insurance for their defective products; they also minimise the chance of the Minister setting (potentially higher) mandatory standards under the Law. The problem is that this entire system is even more opaque than standard setting by organisations like SA, and there is even less publicly available information as to what considerations do, or should, guide the Minister when issuing the rare prescribed standards.[9] However, Japan's system is similar to Australia's in requiring the government to take most of the initiative in generating standards, typically only after a serious risk can be shown to have materialised.

Likewise, the threshold for action under Art 82 of the Law seems somewhat higher than those for bans and recalls under ss 65C and 65F of the TPA. More importantly, Art 82 seems to envisage orders forcing manufacturers to take action; they do not expressly provide for the Minister to intervene directly. However, the Ministry does seem to have acted behind the scenes to prevent supply of (even non-specified) products having caused, or even perhaps highly likely to cause, serious harm, relying on broader 'administrative guidance (*gyosei shido*)' in the shadow of the Law. This practice now comes up against the *Administrative Procedures Law (No 88 of 1993*), setting various procedural requirements for administrative guidance (for example, that it is given in writing, upon request), and consolidating case law establishing that compliance with such guidance is voluntary.[10] A partial substitute is public pressure, since large scale recalls in 2000, which have encouraged firms to take more care in supplying potentially unsafe products and to undertake and disclose recalls. Thus, for example, in October 2003 the Association began to publicise on its website recalls of goods covered by the voluntary SG mark system on its website.[11] However, the Law does not even contain an express obligation on firms to notify the Minister after undertaking a voluntary recall, as required under s 65R of the TPA — let alone the requirement under the new EU regime to provide regulators with information that their products may contain a safety problem. Nor does the Law formally provide for the Minister to issue warning notices, as under s 65B of the Act. Instead, consumers and others must rely on potential hazards discovered or investigated, and disclosed, by other bodies. One major source of information is the central government's National Consumer Affairs Centre of Japan (NCAC). It provides alerts about potential hazards uncovered by its PIONET database of accidents and consultations brought as well to local government Consumer Lifestyle Centres, conducts its own tests or draws on those conducted by some of those other Centres (especially the larger ones, for example in Tokyo), and publishes a list of recalls it has got wind of.[12] The National Institute of Technology and Evaluation (NITE) has also improved its system of collecting and publicising information on accidents.[13] Collectively, the quantity and quality of product safety related injury data is probably now better than in Australia, but it still relies on quite informal and complicated mechanisms.[14]

Reform initiatives

So far, the formal legislative framework in Japan has seen little overt signs of change. In 1999, the Law was amended through the *Law on Adjustment and Streamlining of Systems for Certification and Standards related to the Ministry of the Economy, Trade and Industry (No 121 of 1999)*, which came into effect the following April as Japan's central government itself underwent a broader reorganisation. Third party assessment for 'special category specified products' was outsourced to (domestic, *nintei kensa kikan*) 'authorised' conformity assessment bodies and (overseas, *shonin kensa kikan*) 'approved' bodies, although as of late 2002 there were still only three authorised ones and no approved ones. A move from a pre-approval system to a simple registration system for such bodies was also proposed.[15] Otherwise, the main changes have come through

'jawboning' by government agencies, such as efforts to attract and organise more accident related information, and generate manuals especially for business people in the new environment — framed more by media scrutiny and public debate than by legislative reform.[16] Only a few preliminary reports have been issued comparing Japan's now quite antiquated system, with the notable exception of a detailed study by the NCAC comparing practice and rules on recalls in the EU and the US.[17] Some lateral pressure is also building slowly via the Cabinet Office, whose Quality of Life Bureau issued on 17 December 2004 a comprehensive report on the use of voluntary private sector standards of conduct.[18]

One interpretation might be that METI has emerged stronger than most major ministries in Japan from the economic meltdown and scandals since the late 1990s, and is using its muscle to prevent reform of the Law being placed on the legislative agenda. A related problem is the contradictory position of its Minister, even more obviously than the Parliamentary Secretary to the Treasurer in Australia, in serving both business and consumer interests. However, the history of Japan's Product Liability Law during the early 1990s shows how other stakeholders (even within government, let alone further afield) can succeed in bringing about change.[19] In 2004 there was anecdotal evidence of politicians within the main opposition party proposing reforms along the lines of the revised EU regime.

Conclusions

As with the Product Liability Law, the trigger for legislative reform will probably come from the next major political realignment — even within the more conservative ruling Liberal Democratic Party, which strongly consolidated its position following a snap general election on 11 September 2005. Alternatively or in addition, reform may come quickly in the wake of the next major product safety scandals to grab public attention, beginning perhaps with the explosion of concern about asbestos from July 2005. When new legislation comes, it will probably follow most closely the EU model instead of the more *laissez faire* US approach, heavily reliant on quite opaque private standard setting bodies.[20] That is the very problem now facing the Japanese system and, perhaps to a lesser extent, the Australian system for regulating the safety of general consumer products. The revised EU model provides the best available compromise among the interests of consumers, business and assorted government agencies. It shifts the main onus for product safety activities onto manufacturers and suppliers, who are often more able to develop and implement better solutions, but this shift is conditional upon more transparent information flows and hence greater opportunity for involvement by a range of other stakeholders.[21] More generally, the model fits nicely with the EC Product Liability Directive, which has formed the template for legislative reform in that area in Japan, Australia and many other countries in the Asia-Pacific.[22] That too provided a model that had been subjected to extensive debate and review, generating an acceptable political compromise as well as a set of useable legal concepts. The European experience is therefore instructive for the lessons it provides on how to develop a harmonised process for generating law reform, as well as particular outcomes.

As Australia and Japan now consider the feasibility of a full scale Free Trade Agreement (FTA), they should consider the advantages of adding a business law harmonisation agenda, like Australia and New Zealand have developed pursuant to their bilateral FTA of 1983.[23] Even without a formal agreement and new treaty, pursuant to their existing partnership,[24] Japan and Australia have a wonderful opportunity to work together to improve on similar problems in their general consumer product safety regimes — problems highlighted by the new EU regulatory framework as the emerging global standard. This would do more than just generate a similar product with enhanced efficiency and legitimacy, and a shared regulatory reform process exhibiting similar advantages. Such an initiative would also help in collaborating with — or providing leadership to — other countries in the

region. New Zealand seems happy to follow Australia's lead in the product safety arena, for example. But developments would also be welcome in Canada (already well advanced in considering law reform along EU lines) and countries like Singapore, already linked by bilateral FTAs with Australia and Japan respectively. In turn, outward looking 'regionalisation' of regulatory reform initiatives should also feed back constructively into the ongoing elaboration of broader global standards, within the EU itself but also at the level of the World Trade Organisation and other transnational institutions.[25] ●

Dr Luke Nottage,
Senior Lecturer & Co-Director,
Australian Network for Japanese Law,
University of Sydney Faculty of Law.

Endnotes

1. See generally Cohen D and Martin K 'Western ideology, Japanese product safety regulation and international trade' (1985) 19 *University of British Columbia Law Review* 315-74.

2. As in Pt 1, these sector specific regimes are beyond the scope of this article, although rather similar lessons may be drawn. However, those regimes seem to have been easier to reform or implement more strictly in the wake of product safety problems within their scope of application, as in Australia. See generally Kinkibenren (ed) and Rengokai K B 'Seihin no anzensei o kakuho suru shakai shisutemu o kangaeru [Considering a social system to ensure product safety]' Kinki Bar Association Conference Proceedings, Second Section 2001; and the latest round of reforms proposed to Australia's pharmaceuticals regime, 'TGA gets set to get tough' 24 August 2005, at <www.claytonutz.com/news/controller.asp?nid=766>.

3. Nottage L *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* Routledge London; New York 2004 Ch 2.

4. The Act is available in full text at <http://law.e-gov.go.jp/htmldata/S48/S48HO031.html>, hyperlinked (together with other applicable secondary legislation and some summary material) at <www.meti.go.jp/policy/consumer/seian/shouan/index.htm>. All websites cited from Japan, however, are in Japanese unless otherwise noted. All translations are the author's.

5. They are: (1) mountaineering ropes, (2) pressure cookers, (3) bike helmets; and ('special category special products') (4) cots, (5) laser pointers, and (6) bath whirlpool units. See <www.meti.go.jp/policy/consumer/seian/shouan/contents/shouan_gaiyo.htm> (METI); and <www.sg-mark.org/HOU/hou_index.htm>. But compare with the summary at the older website of the Office of the Trade and Investment Ombudsman, at <www5.cao.go.jp/otodb/english/houseido/hou/lh_03040.html>, mentioning only (1)–(5).

6. See '*Seihin anzen 4-ho no gijutsu kijun no seikoukiteika no Suishin ni tsuite* [Promoting performance based technical standards under the four product safety laws]', May 2003 report (Appendix 2-5), available at <www.meti.go.jp/policy/consumer/sankoshin/sk_bukai/ss_shoi/030528/2.pdf>.

7. See <www.sg-mark.org>.

8. As of December 2004, there were 129 such products, including various 'specified products': see above (English page). Another problem with this system has been its 'slow speed in expanding the range of covered products' (Sarumida H 'Comparative institutional analysis of product safety systems in the United States and Japan: alternative approaches to create incentives for product safety' (1996) 29 *Cornell International Law Journal* 79-160, at p 128). This is also linked to the relative paucity of performance based standards.

9. For a rare glimpse into considerations behind recent mandatory standards, see <www.meti.go.jp/report/data/g91201aj.html>. Because the Association is a non-profit association, it is not subject to the *Official Information Disclosure Law (No 42 of 1999*, applicable to central government since 2001). Anecdotal evidence suggests that the standards it sets involve even less input by consumers and a range of governmental agencies than SA's usual processes. The criteria established to pay out on insurance claims by consumers, and other relevant information, are also not readily available. The Association also runs a product liability alternative dispute resolution centre, which provides some useful information to consumers and others, but does not formally resolve many disputes or publically disclose much information compared to other such centres set up in the wake of the *Product Liability Law (No 85 of 1994).* Compare Ramseyer J M 'Products liability through private ordering: notes on a Japanese experiment' (1996) 144 *University of Pennsylvania Law Review* 1823-40 with Nottage L above note 3, at 174-76, and Nottage L and Wada Y 'Japan's new product liability ADR centers: bureaucratic, industry, or consumer informalism?' (1998) 6 *Zeitschrift fuer Japansiches Recht* 40.

10. See generally Nakagawa T 'Administrative informality in Japan: governmental activities outside statutory authorisation' (2000) 52 *Administrative Law Review* 175-211.

11. See <www.sg-mark.org/RECALL/recall-index.htm>.

12. See, respectively, <www.kokusen.go.jp/kiken/>, <www.kokusen.go.jp/kujo/>, and <www.kokusen.go.jp/recall/>.

13. See <www.jiko.nite.go.jp/>.

14. For summaries of growing numbers of accident reports received by NITE particularly since 2000, and somewhat more site inspections (as provided by the Law) as well as tests, see '*Jiko joho no haaku to seihin anzen 4-ho no shiko jokyo ni tsuite*' [Ascertaining accident information and the situation since implementing the four product safety laws], May 2003 report (Appendix 2–1), available at <www.meti.go.jp/policy/consumer/sankoshin/sk_bukai/ss_shoi/030528/2.pdf>.

15. Pursuant to a Cabinet Resolution of 29 March 2003, 'Plan to implement reform in the ways the administration gets involved with public-interest juridical persons': see '*Seihin anzen 4-ho no kaisei ni tsuite* [On the reform of the four product safety laws]', 22 October 2002 report, available via the *Shohisha keizai bukai* records at <www.meti.go.jp/committee/index.html>.

16. '*Seihin anzen 4-ho shiko manuaru to no seibi ni tsuite* [On organising manuals for implementing the four product safety laws]', May 2003 report (Appendix 2–2), available at <www.meti.go.jp/policy/consumer/sankoshin/sk_bukai/ss_shoi/030528/2.

pdf>; NITE, '*Seihin seikatsuyo seihin no soshiyo jiko boshi handobukku* [Handbook to prevent accidents from misuse of general consumer products], published 30 May 2005, available via <www.meti.go.jp/press/20050530002/20050530002.html>.

17. See NCAC, '*Tokubetsu hokoku: seihin kaishu o meguru genjo to mondai (gaiyo)* [Special report: present situation and problems regarding recalls (summary)]', 6 August 2003, available at <www.kokusen.go.jp/pdf/n-20030806_1.pdf>. However, this online version contains much less detail on the regulatory framework in Japan and other jurisdictions, compared to the published version.

18. See <www.consumer.go.jp/info/shingikai/report/finalgaiyo.pdf>. The Committee included an Australian consumer law expert, Tezukayama University Professor Michelle Tan.

19. Nottage L above note 3.

20. Howells G G 'The relationship between product liability and product safety: understanding a necessary element in European product liability through a comparison with the US position' (2000) 39 *Washburn Law Journal* 305-46.

21. The model is also suggestive in terms of the best balance between a centralised and a decentralised regime, particularly in (quasi-) federal systems. See generally the author's 'Submission to the Australian Government Productivity Commission's current review of Australia's regulatory regime', available at <www.pc.gov.au/study/productsafety/index.html>.

22. Harland D 'Conclusion' in Kellam J (ed) *Product Liability in the Asia-Pacific* (2nd ed) Prospect Media Sydney 1999.

23. See the current review of this arrangement, via <http://parlsec.treasurer.gov.au/cjp/default.asp>.

24. See <www.dfat.gov.au/geo/japan/fta/>.

25. Compare generally for example Dawar K *Decision Making in the Global Market: Trade, Standards and the Consumer* Consumers International London 2005, available at <www.consumersinternational.org>. For an even more promising avenue for regional solutions in product safety regulation, see Nottage L and Trezise M 'Mad cows and Japanese consumers' (2003) 14 *Australian Product Liability Reporter* 125-36; and latest developments via the new Food Safety Commission's website at <www.fsc.go.jp/english/index.html>.

PUBLISHING EDITOR: Rob Macredie BA/LLB MANAGING EDITOR: Helen McKenzie MA PRODUCTION: Alex Mullan
SUBSCRIPTION INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia
TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au rob.macredie@lexisnexis.com.au

ISSN 1034-4608 Print Post Approved PP 255003/00768 This newsletter may be cited as (2005) 16(8) APLR