SUPPLEMENTARY JOINT SUBMISSION TO
THE PRODUCTIVITY COMMISSION
ON
THE DISCUSSION DRAFT OF THE REVIEW OF
THE AUSTRALIAN CONSUMER PRODUCT SAFETY SYSTEM

2 December 2005

REFERENCE: DR48 Further Submission to the Productivity Commission's Review of the Australian Consumer Product Safety System – Comments on the Discussion Draft of 9 August 2005 by Dr Luke Richard Nottage.

Introduction

On 29 September AEEMA/CESA made a joint submission to the Commission in response to a request for comment on the Discussion Draft. Since then the Commission has posted 15 more submissions on its website, including the submission from Dr Nottage. In his submission Dr Nottage addresses some of the comments made by the Associations. This supplementary submission addresses some of the issues raised by Dr Nottage.

General Safety Provision

The Discussion Draft (page 150) states, "If the GSP obligations and standards are harmonised with those of Part5A, compliance costs for industry would be minimized since meeting their existing obligations under the product liability laws would at the same time ensure compliance with any GSP obligation."

In response the Associations commented, "The most effective pro-active element in safety regimes based upon a GSP is mandatory demonstration of compliance with GSP requirements. If mandatory demonstration of compliance were required, significant additional costs would be incurred by business, even if the GSP were based upon definitions that were harmonised with those in the TPA."

In paragraph 18 of his submission Dr Nottage referred to the Associations' submission and wrote, "There is no ground for concern that there would be 'mandatory demonstration of compliance with GSP requirements', 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."

The Associations' intentions would have been clearer if the term 'mandatory' had not been used. Besides mandatory demonstration, the statement should also have covered voluntary demonstration as outlined in the "Demonstrating Compliance" section of the Discussion Draft.

A GSP that is effective as a pro-active measure would create a legal environment in which well informed and prudent suppliers would seek to demonstrate compliance with GSP

requirements for their products notwithstanding the costs entailed. These costs would be substantial, even if definitions and standards of safety are closely aligned with existing provisions of Part VA.

Mandatory demonstration of compliance could be required for certain types of products where 'voluntary' measures alone are insufficient to assure compliance with safety standards. This would apply especially where there is evidence of non-compliant products of certain types entering the market.

The Associations note that, although the EU GSP Directive does not mandate demonstration of compliance, products within the scope of 21 other Directives are subject to CE marking to denote compliance with those Directives. CE marking greatly facilitates marketing of subject products within the EU. Hence marking is virtually universal on these products.

Some of these Directives relate to safety of consumer products (e.g. electrical equipment, machinery, gas appliances, personal protective equipment and toy Directives). For this reason, within the EU, demonstration of compliance with safety requirements is de facto required for many, if not most, relatively high risk consumer product types. (However, baby care products appear to be an unfortunate exception.) Therefore to members of AEEMA and CESA with their experience of business in the EU, it would be de facto mandatory for prudent companies in our specific product categories to be able to demonstrate compliance with GSP requirements.

Most electrical products sold in Australia are designed to comply with the EU GSP and other applicable EU Directives, or to meet USA UL requirements, or both. This applies whether a product is sourced from a local manufacturer who also exports the product to the US or Europe, or whether it is imported from Europe, the USA or Asia. This does not cover products that are designed exclusively for Australia or those designed for other markets excluding the USA and the EU. However, when assessing the benefits of a GSP for Australia, it should be noted that most of the safety characteristics of many products are already assured by compliance requirements of other markets for which these products are designed.

Reporting of unsafe goods

The Commission favored requiring suppliers to report products subject to a successful product liability claim resolved in court or to multiple out of court settlements. The Associations do not support this proposal. Reasons were presented in the submission. Paragraph 19 of Dr Nottage's submission indicates that he did not find these reasons convincing. His views do not address the core problem.

In the absence of effective monitoring and enforcement of reporting requirements, costs will be incurred and reports will only be obtained from well informed and responsible suppliers that are careful to comply with legal requirements. Uninformed and careless suppliers will not incur the costs and may rarely be subject to penalties.

The Associations have had considerable unhappy experience of mandatory requirements that are inadequately monitored and enforced. The Associations consider that monitoring of compliance with the proposed reporting requirements would be extremely difficult and unlikely to be given a high priority by regulators. It is probable that failure to report might

only become apparent in the course of investigating unsafe product which had already caused some harm. At that point, the regulator's prime concerns should be prevention of further harm and obtaining redress for those already harmed. Penalizing the supplier's failure to report prior claims or settlements related to the product may be the least of the regulator's concerns or the supplier's problems.

Not the least of the costs of reporting such matters to a regulator (and therefore to all nine regulators in the states and territories) is that sensitive and untested information may be leaked to competitors who could make mischievous use of it in the market place.

The other cost relates to the current practices of many firms of obtaining advice from both legal and insurance experts to settle claims, even though they do not believe the product to be faulty. This advice can be for many reasons, including the cost and time involved in long court cases. Mandatory reporting of out of court settlements would most likely lead to the current pragmatic situation changing to a more adversarial and costly scenario.

Rather than investing in collecting and analyzing reports of liability claims on suppliers and using scarce regulatory resources to monitor and enforce reporting requirements, the Associations consider that better outcomes could be obtained by utilizing those resources on early warning and information sharing as described in the Associations' comments on "Early Warning and Information Sharing".