29 September 2005

Consumer Product Safety
Productivity Commission
PO 80
BELCONNEN ACT 2616

Dear Sir/Madam,

REVIEW OF THE AUSTRALIAN CONSUMER PRODUCT SAFETY SYSTEM

PREAMBLE

The Terms of Reference (Page IV) specify that the Review is "*a research study to examine the impacts of options for reforming Australia's general consumer product safety system. This system consists of the product safety provisions contained in the Trade Practices Act (the TPA) and equivalent provisions in the state and territory Fair Trading Acts and other non-regulatory activities conducted by governments to achieve consumer product safety objectives*".

The Overview (Page XXI) states, "*As well as this general 'safety net', a number of specialised regulatory agencies and regimes manage those consumer products presenting the greatest risks posed by death and injury, including electrical goods [among others]. These regimes and their effectiveness are not directly part of this study*".

The Review will not provide any findings or recommendations on the effectiveness or otherwise of specialised electrical product safety provisions contained in the state and territory Acts or on the efficiency and effectiveness with which they are administered. The Discussion Draft contains no findings on the specialised electrical product safety system.

However, the Commission has requested AEEMA and CESA to comment on experience with the specialised electrical product safety regime that is relevant to the general safety system (for example, effects of inconsistent administration between states and territories). These comments take that request into account.

Most AEEMA/CESA concerns with the consumer product safety system relate to the specialised electrical product safety system embodied in electrical safety regulation rather than the general product safety system based upon provisions of the TPA.

None the less, outcomes of this Review of the general product safety system are important to the industry.

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1. Electrical products are subject to TPA provisions in addition to specialised electrical safety provisions. For example, any revised definition of unsafe goods in the TPA would apply to electrical goods in some contexts.

2. It is expected that principles accepted by government as a result of this Review are likely to be applied to the specialised safety system for electrical products eventually. It is noted that, on 19 July, Albert Koenig, Chairman of ERAC, advised AEEMA and CESA that ERAC will seek ministerial support for a review of electrical safety regulation. He said, "This will be a major review from the ground up. There are no preconceived ideas". The outcomes of this current Review could influence the outcomes of any future review of electrical regulation.

3. There are overlaps between the provisions of the general consumer product safety system and the specialised system for electrical products and some degree of integration is required for effective and efficient operation of the system as a whole. Two particular overlaps are:
   - Recalls where the TPA powers exercised by the ACCC overlap recall powers under electrical safety acts exercised by state and territory regulatory authorities.
   - Any injury databases used within the consumer product safety system would include data on electrical products and should be used for early warnings, risk analysis and surveillance in the specialised system for electrical products as well as the general consumer product system*.

* Note: The national and international injury data in the Discussion Draft includes injuries related to electrical products among those related to consumer products covered only by the general consumer product safety system. Review of the types of faults listed in UK DTI data in Table C9 indicates that deaths and injuries related to electrical products would constitute the majority of deaths and injuries in that data set and would be about three times as great as the number related to general consumer products.

COMMENT ON THE PRELIMINARY FINDINGS ON THE GENERAL CONSUMER PRODUCT SAFETY SYSTEM

PRELIMINARY FINDINGS 5.1 - 5.11

Evaluation of the current system

The preliminary finding, "Overall, Australia's consumer product safety system appears to ensure a reasonable level of product safety." is plausible and may be correct. However, the finding is speculative because insufficient Australian consumer product safety data is available to prove its validity.

Other findings indicate that the current system requires improvement in several respects, for example:

- Early detection of unsafe products needs to be improved,
- Fragmented policymaking, administration and enforcement potentially undermine the efficient operation of national consumer product markets.
- Inconsistencies and duplication of effort across jurisdictions suggest that there is a degree of inefficiency in the use of government resources.

- Using risk analysis could better target product related hazards that have the highest potential cost in terms of injury and death. (Besides, existing databases are inadequate for risk analysis at a national level or for inter jurisdictional comparisons.)

The Commission's research provides evidence that consumer behaviour contributes much more to the incidence of consumer product related fatalities and serious injury than might have been expected. For example, Table 5.1 contains an estimate that 'behaviour alone' contributed to 705 out of 785 consumer product related accidental injury deaths in Australia in 2002. This supports the Commission's statement on Page 105 that "if a significant reduction in product related accidents is to be achieved, key behavioural factors involved will need to be addressed".

The present system is almost wholly dedicated to reducing product safety defects rather than reducing the incidence of accidents. Therefore it largely disregards consumer behaviour that caused 90% of these deaths.

The preliminary finding that "it is not clear that the current system engenders an efficient allocation of responsibility for consumer product safety among consumers, business and Government" may not be sufficiently explicit. Consumers, business and government all need to do more to address behaviour as a factor in product related accidents.

PRELIMINARY FINDINGS 6.1 – 6.2

General Safety Provision

AEEMA/CESA recommend against introduction of a GSP by because, as the Commission found, "the GSP may fail to target the areas of biggest risk and may deliver little benefit beyond what might be achieved with appropriate modifications to the existing consumer product regime."

A Standard that specifies "Essential Safety Requirements" for low voltage electrical equipment (AS/NZS 3820) was published in 1998. Over the following 5 years, or thereabouts, states and territories progressively introduced legislation mandating compliance with AS/NZS 3820. In effect, the specialised electrical consumer product safety system has had a GSP supported by that standard for some years. However, mandating essential safety requirements has had no effect on the safety of electrical products, largely because most industry participants are unaware of the existence of the standard, and electrical safety regulators have yet to determine how this standard and associated powers will be used to improve the safety of electrical equipment.

Effective implementation of mandatory compliance with AS/NZS 3820 entails application of regulatory resources for surveillance and enforcement, particularly for pro-active measures such as universal type testing to demonstrate compliance with essential safety requirements.

In the absence of substantial and reliable data on deaths, injuries and fires caused by non-compliance with Essential Safety Requirements, it is difficult for regulators to justify allocation of the additional resources needed for effective pro-active use of powers to require compliance. This may explain why electrical regulators tend to focus on measures that might be implemented within existing resources rather than more effective measures that would entail application of additional resources.

Experience with mandatory Essential Safety Requirements for electrical products indicates that a GSR is unlikely to be effective as a pro-active measure for improving the safety of general consumer products unless it were introduced after the following prerequisites are met:

- A defined purpose based upon a data supported understanding of what the GSR can achieve by way of reducing hazards,
- A strategy for achieving that purpose and
- A commitment of government and community resources to implement that strategy.

AEEMA/CESA cautions against introducing a GSP as an outcome of the present review. However, if a GSP were to be implemented there would be benefits in adopting definitions and standards of safety that are closely aligned with existing provisions of Part VA.

The Preliminary Report (Page 150) states, "If the GSP obligations and standards are harmonised with those of Part VA, compliance costs for business would be minimised since meeting their existing obligations under the product liability laws would, at the same time, ensure compliance with any GSP obligation. Administration costs for governments would also be lower if the GSR reflected familiar definitions and legal principles."

Use of common definitions etc would minimise business costs for most GSP obligations. However, costs of obligations to demonstrate compliance (the largest cost element for manufacturers and importers) would still be incurred even if the definitions etc were harmonised. 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.

PRELIMINARY FINDING 7.1

Foreseeable misuse

The intent of preliminary finding 7.1 is not as explicit in the wording of the finding as in the final key point on page 173. This says:

> 'The Commission's preliminary assessment is that there is a case for foreseeable misuse to be explicitly covered in the definition of 'unsafe', providing the Minister's powers to act are appropriately constrained so as to limit action only to those cases where behaviour resulting in the misuse of the product is not only reasonably foreseeable but also not unreasonable."

AEEMA/CESA considers that, when foreseeable misuse is explicitly included in any definition of unsafe goods to clarify that the Minister may ban or recall goods that are unsafe because of misuse, the definition should include provisions that the misuse is both "reasonably foreseeable" and "not unreasonable". This is consistent with the qualifications applying to 'misuse' when determining whether goods are unsafe by provisions in Section 75AC (2) of Part VA of the TPA. (See boxes 6.4 and 7.2.)

PRELIMINARY FINDINGS 8.1 – 8.2

Revision to coverage

These findings relate to services and second hand goods. Services are not covered by Part VA of the TPA. Second hand goods are covered.

In the absence of any injury data that allows costs in either monetary or non-monetary senses to be estimated or that would allow the benefits of Government intervention in either of these areas to be identified, no action is recommended at present. However, if and when a national database and monitoring system is established, injuries that are related to defective services (particularly related to the installation and maintenance of consumer products as suggested in Preliminary Finding 8.1) or are related to second hand goods should be investigated and corrective measures considered.

PRELIMINARY FINDINGS 9.1 – 9.3

Product safety information

Provision of an Internet based one-stop shop that is a source of information about all safety laws and regulations (including associated matters such as standards and bans and both voluntary and compulsory recalls) would be of benefit to industry and other stakeholders.

To minimise promulgation of obsolete information, avoid redundancy and minimise cost, the site should provide links to those websites that are the most authoritative sources of information on each topic. It should not provide an alternative and, possibly, less authoritative source of information from that available on those sites.

Targeted advertising and information programs and, possibly, some targeted 'Smartrisk" measures could comprise part of the measures taken to reduce the incidence of injuries due to misuse of consumer products.

PRELIMINARY FINDINGS 10.1 – 10.2

Requirements to monitor and report

Preliminary finding 10.1 The Recall Website is not serving its purpose as effectively as it might.

A review of 226 currently listed 'consumer product' entries on the Recalls Australia website indicate a lack of quality control over the information provided. Much of the information does not comply with recall guidelines available from the same site. The most common problem is omission or understatement of hazards. Some recalls are bizarrely classified (64 out 226 'consumer product' recalls relate to heavy earth moving and related equipment, mostly from only 2 suppliers). Prudence would be required in tracking the incidence of consumer product recalls from information provided on this site. This places some doubts as to governments' general ability to use information provided by industry effectively and judiciously.

It appears desirable to coordinate recall reporting within the ACCC rather than the Treasury.

Preliminary finding 10.2 that recommends against requiring industry to report unsafe goods is supported. Reasons were set out in detail in the AEEMA/CESA submission of November 2004.

However, finding 10.2 proposes mandatory reporting of goods that have been the subject of a successful liability claim or multiple out of court settlements. AEEMA/CESA considers that compulsory reporting of this information is not needed and would impose costs on responsible suppliers. Unless there is a substantial allocation of enforcement resources, this requirement may be largely ignored by irresponsible suppliers with impunity. This measure

would also expose complying suppliers to grave risks if information supplied in confidence to government were to become known to competitors and used mischievously.

Liability claims through the courts are rare and may not be completed for years after the event. It would be highly unusual for a settlement to be made through the courts on a consumer product hazard that had not been dealt with by a product recall long before the case was settled.

US business is required to notify settled or adjudicated law suits (Page 413) subject to limitations that include:

- A particular model is subject to at least 3 civil actions,
- Each suit alleges involvement of the product in death or grievous bodily injury,
- During a 2year period each suit resulted in a final settlement by the manufacturer or a court judgement in favour of the plaintiff and
- The manufacturer is involved in the defence of or has notice of each action and is involved in discharging any obligation owed to the plaintiff.

If the model adopted in Australia were to include these limitations, particularly the threshold level (three grievous bodily injury claims for one model which limits reports to really serious cases) any responsible manufacturer or importer in Australia would have initiated a voluntary recall before the reporting threshold was reached. Probably, an irresponsible supplier that would not initiate a recall would either be unaware of the responsibility to report the claims or would not report them if he were.

The measure might engender a flow of reports where investigation would show that the claim was caused by misuse not an unsafe product. Where misuse contributes to claims, suppliers commonly settle claims for economic reasons rather than to discharge legally enforceable obligations. Provided a claimant does not have a history of prior suspect claims, mostly it is less costly to settle gracefully and retain the goodwill of the customer than to refuse the claim even if the product did not cause the injury. Mandatory reporting of claims is likely to be counterproductive for claimants if it inhibited use of this mutually acceptable process.

In the real world, more can be learned about hazards in products by reading suppliers' safety warnings on products and accompanying literature than would be obtained by monitoring notified settled claims (and at less cost).

PRELIMINARY FINDINGS 11.1 – 11.3

Early warning and information sharing

AEEMA and CESA consider that the a prudently designed extensive early warning and surveillance system based, among other things, upon hospital records in a nationally linked database is essential to "achieving a genuinely evidence-based approach to hazard identification and risk analysis and management"(Finding 13.1). At present there is insufficient data to test the Commission's preliminary finding that the costs would outweigh the benefits. However, it is likely that the costs of a prudently designed and reasonably extensive database would be justified by the resulting benefits.

A comprehensive linked database would entail by links between databases for:

- Hospital data, possibly compiled in the formats used in the VAED and VEMD or the QISU data bases but eventually expanded to a sufficient number of hospitals in each

state or territory to support dependable estimates of injury incidences for both metropolitan, rural and indigenous populations nationally and in each jurisdiction and, eventually, for each specialist safety system.
- Coronial information on deaths
- Product safety complaints and information supplied to or obtained by both general consumer product safety system regulators and specialist regulators.
- Fire investigation data, particularly for electrical and gas products

It would also be desirable if the linked databases could contain information obtainable through the insurance industry.

A desirable characteristic for each database would be to enable original records to be traced where this would enable causes of particular injuries to be identified more precisely than is possible from database fields.

The comprehensive linked database should be built up progressively starting with existing resources but, where necessary, adapting these to suit a strategic plan based upon sound database architecture and analysis methodology and with provision for growth into the desired comprehensive system.

The linked databases could be used to provide data for:
- Nationally coordinated but not necessarily centralised injury surveillance units
- National and state and territory based safety regulators where applicable.
- Those who determine the content of safety standards
- Manufacturers and importers of products
- Consumer representatives

Data may be provided:
- either by read only direct access to the linked database (provided certain fields barred to protect personal privacy of injured persons and commercially sensitive material)
- or, where needed for particular investigations, by reports from a surveillance unit with appropriate qualifications and experience.

Data will only yield information that would allow a genuinely evidence based approach to improving injury related to consumer products if data are:
- Compiled in an appropriately designed information system,
- Entered into the data base accurately and
- Analysed rigorously by persons with the necessary skills

Although improved data is needed now, time should be spent to ensure that
- Each of the linked databases has sound architecture that is appropriate to the needs of the safety system and that
- All who enter, audit or analyse data are adequately trained.

Collectively, the injury surveillance units would
- Provide annual benchmark injury incidence rates nationally and for each jurisdiction. These would be sub divided to each applicable specialist product group and to the general consumer product group.
- Identify and quantify current major sources of injury
- Give early warning of emerging or growing sources of injury

- Provide detailed analysis of significant sources of injury that are evident from the macro data.
- Provide training materials to enable regulators themselves and other pertinent people to analyse information directly from the linked databases.

PRELIMINARY FINDINGS 12.1 – 12.3

Consumer product safety research

Initially research should be focussed on research needs for the proposed early warning and surveillance system.

PRELIMINARY FINDINGS 13.1 – 13.3

Removing unsafe goods

Industry supports the Commission's findings on removing unsafe goods through recalls.

Unsafe goods should be removed even when the local manufacturer or the importer of the goods in question cannot be identified or is no longer in business. In the case of these 'orphan products' there is no identifiable supplier to publish warnings or to make a recall.

Electrical regulators identified two cases in the recent years (a shock hazard in double adaptors and an overheating and potential fire hazard in extension cord assemblies). These products were distributed nationally. Most, if not all, regulators determined that the hazard was sufficient to justify a recall but, because no supplier of the defective goods could be identified (There were multiple importers.), no recalls were undertaken. Some regulators publicised warnings in newspaper advertisements. Others published warnings only on their web sites. It is not known how many, if any, injuries have occurred or will occur because warnings were ineffectively publicised or because these products were not recalled. This may remain a latent problem until deaths or major fires are shown to have been caused by these products.

Recall of orphan products could at any time become a major issue for safety of general consumer products as well as electrical goods.

PRELIMINARY FINDINGS 14.1 – 14.4

Harmonisation

AEEMA/CESA advocates adoption of single Australian law and single regulator for the safety of general consumer products and, although this is not a subject of his review, for electrical consumer products as well. That single Australian law should be embodied in the TPA. If the Ministers were to decide that a single Australian law will not be applied, then state and territory legislation should accurately reflect powers in the TPA and be identical in all jurisdictions, preferably by template legislation.

Template legislation is favoured as the next best alternative to a single Australian law because, as outlined in the MCCA Product Safety Discussion Paper published in 2004, it offers the best chance of the laws being identical in all jurisdictions not only as first enacted but with subsequent amendments. Failure to synchronise amendments is a certain cause of differences in law occurring between jurisdictions.

Experience shows that harmonization by processes such as model legislation or a core set of uniform provisions is not effective. Where a uniform provision does not accord with the opinion of regulators or parliamentary draftsmen in individual jurisdictions, they may use wording that accord with their opinion of what is needed rather than the desired uniform requirement.

If states are committed to uniformity then they should study proposed template legislation very carefully and, when satisfied that it will work in their jurisdiction, commit to it. With model legislation or core sets of uniform provisions, they may sign on easily but in the final outcome temper the provisions they like least during their legislation drafting processes.

AEEMA/CESA support identical administration of common provisions in legislation. That is why a single regulator is recommended. If Ministers were to decide to retain separate regulators for each jurisdiction, then, for uniformity of administration, common regulations should apply in all jurisdictions and if necessary all jurisdictions should operate under a common set of Administrative Guidelines to achieve uniformity in interpretation of regulations. Administrative Guidelines are used with good effect by NAEEEC in administering Energy Efficiency laws and regulations.

Industry supports the Commissions finding that both permanent bans and mandatory standards should only be adopted on a national basis. We also support the Commission's findings on temporary bans to facilitate timely action on newly recognised hazards.

PRELIMINARY FINDINGS 15.1 – 15.4

Making further progress

AEEMA/CESA support finding 15.1 that "there needs to be a stronger focus on achieving a genuinely evidence-based approach to hazard identification and risk analysis and management". However, an evidence-based approach requires sound evidence. That is why development of linked databases and establishment of skilled surveillance units are essential

AEEMA/CESA also supports the finding 15.2 that regulators should be "strategic about how they allocate limited resources". The approaches of 15.1 and 15.2 should also be applied to preparation of both mandatory and voluntary safety standards because sound safety standards are essential for an effective safety system.

The electrical industry is used to working with international safety standards that are adopted as Australian Standards. There are some cases where international standards are used with national variations, as are allowed in the international system, but these are exceptions, not the general rule. This works well.

OTHER COMMENTS

Specialised systems and the general consumer product safety system

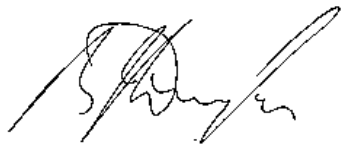
The requirements of the General Consumer Product Safety System and the complementary specialised systems should be consistent with consistent definitions of a key definitions such as the definition of a 'safe' product and common processes for recalls and bans, so far as is practicable.

All should be focussed on achieving a genuinely evidence-based approach to hazard identification, risk analysis and management with regulators being strategic about how they allocate limited resources.

The TPA should be the base upon which the specialised systems are built. There should not be any inconsistencies between the specialized systems and the general system based upon powers under the TPA.

AEEMA/CESA welcomes the review and is happy to provide further details on the above comments.

Yours sincerely



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