



20 October 2005

Consumer Product Safety
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Attention: Sue Holmes

Also by email

Dear Ms Holmes

Review of the Australian Consumer Product Safety System

We refer to the discussion draft report issued by the Productivity Commission concerning the review of the Australian Consumer Product Safety System presently being undertaken by the Ministerial Council of Consumer Affairs.

This submission is made on behalf of the National Product Liability Association in response to the invitation by the Commission to comment upon the discussion draft. The comments that are made in this submission are supplemental to:

- (a) the submission NPLA made to the Ministerial Council of Consumer Affairs in November 2004, a copy of which has also been provided to the Productivity Commission; and
- (b) comments made during round table feedback and consultation meetings conducted by the Commission in February and October 2005.

We have sought to limit NPLA's comments in relation to the discussion draft to those matters that we consider most relevant to the aims and objectives of our organisation and its members.

At the outset, NPLA would like to congratulate the Commission on the very extensive discussion draft that has been published for public comment and response. NPLA considers that the Commission has achieved a commendable result in a limited timeframe and having had available to it only limited empirical data.

NPLA trusts that the contributions that it has made to the review being conducted by the Ministerial Council on Consumer Affairs and to the research being undertaken by the Commission have been and will be of some use in ensuring that the views and opinions of the NPLA membership are understood.

General Safety Provision

NPLA has already commented extensively upon the prospect of the introduction of a General Safety Provision. The comments previously made by NPLA are repeated. We note that the Commission has "so far" not been convinced that a GSP, as proposed in the MCCA options paper, would generate net benefits over and above those currently achieved.

This is certainly the view of NPLA.

Moreover, NPLA is concerned that the introduction of a General Safety Provision, expressed in the broad terms contemplated by the MCCA paper, would provide little meaningful guidance to participants in the market for general products in terms of achieving an outcome that is more safe to consumers than that which is presently achieved.

Foreseeable misuse

There is debate about whether the provisions of existing legislation, such as the Trade Practices Act, empower relevant authorities to act in relation to products that are considered to be unsafe when the concern about safety is motivated not so much by the product itself as by the way in which the product might be used by a consumer.

This debate is said to support express provision for the banning or recalling of products which it is perceived may result in injury to consumers if used in a manner which might have this result, being a manner which is "reasonably foreseeable" to the manufacturer or other supplier of the product.

NPLA has concerns about how such a provision would be expressed and regulated.

Inevitably, notions of what is or is not reasonably foreseeable will evoke debate. Equally inevitably, this debate will result in competing arguments being tested in the Courts, notwithstanding that notions of "reasonableness" are well known in the common law world. The scope for debate, and hence uncertainty, may be partly ameliorated if the empowering provisions are accompanied by appropriate definitions which give some guidance to industry participants.

Accordingly, if the concept of foreseeable misuse is to be embraced, NPLA would be concerned that there is some guidance given as to the circumstances in which a product might be regarded as unsafe because of "foreseeable misuse" and also that there be wide consultation concerning the way in which relevant definitions are to be framed.

Harmonisation of legislation, administration and enforcement

NPLA has previously expressed its strong support for whatever measures can be taken to ensure that there is harmonisation amongst the various jurisdictions concerning product safety laws and regulations. It seems that this sentiment is similarly expressed by many others.

It is noted that in an options paper published by the Ministerial Council on Consumer Affairs in August 2005, a number of "harmonisation" strategies were identified, including:

- (a) improving the existing mutual recognition system;
- (b) establishing identical legislation with all jurisdictions involved in administering that legislation;
- (c) introducing a single law and regulator, such that the Australian government, with the agreement of the States and Territories, could enact a single product safety law and establish a single product safety regulator to enforce the law, such as the ACCC; or
- (d) embracing a high level memorandum of understanding between governments.

NPLA does not have strong views in terms of which of these options might be preferred. NPLA has however expressed views about the desirability of there being separation between those aspects of government charged with the responsibility to set policy and introduce laws and regulations concerning consumer products as compared to investigation, enforcement and prosecution.

Provision of information

NPLA supports the suggestion for an internet-based "one-stop shop" to provide information about all State, Territory and Australian government product safety laws and regulations. NPLA considers that this resource should include all product bands and standards across Australia.

NPLA does not have a strong view as to whether this facility should be administered by the ACCC or some other organisation.

NPLA supports, in a general sense, the selective use of targeted information and education campaigns but agrees that this should only be done where an assessment is made that the campaigns will be effective and provide net benefits. There should be some discussion as to who is to bear the cost of these campaigns when they do occur.

Requirements for businesses to monitor and report unsafe products

NPLA notes that the view expressed in the discussion draft that the Commission considers that the benefits that would flow from the proposal to introduce additional reporting requirements on businesses to monitor the safety of their products and report any products which are:

- (a) under investigation by the business for possible safety risks;
- (b) have been associated with injury or death; or
- (c) have been subject to a successful liability claim,

are unlikely to justify the costs of implementation and maintenance of the system. NPLA endorses this approach.

NPLA also notes that there is an existing system that might be better utilised, namely the provision of information to the Health Insurance Commission at the time of settlement of personal injury actions and which is the basis upon which to achieve a reimbursement of Medicare payments made in support of medical treatment of the claimant. NPLA suggest that the data that is available to the HIC through these notifications might be adopted so as to provide better information concerning safety risks presented by products.

Recalls

Again, NPLA has previously commented upon the effectiveness of the system that exists in Australia for the recall of products due to a safety concern.

NPLA supports the view formed by the Commission that there is insufficient cause for the introduction of a general obligation to recall products that are found to be "unsafe".

We will be pleased to answer any questions that the Commission might have in relation to the contents of this submission.

Yours faithfully

Peter Holloway
Vice President
National Product Liability Association