

**Submission to the Australian Government Productivity Commission's
Review of the Australian Consumer Product Safety System –
Impact of Reform Options**

by

Dr Luke Richard Nottage

Senior Lecturer, University of Sydney Faculty of Law

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I. Summary

1. This Submission is for the Productivity Commission's research Study into the impact of options for reforming Australia's general consumer product safety system, following the Discussion Paper ("DP") and Submissions last year pursuant to the Review of the system initiated by the Ministerial Council on Consumer Affairs ("MCCA"). Further background is set out below (Part II).
2. My key conclusions, tracking the main Terms of Reference for the Productivity Commission's Study, are that:
 - ① Regulatory intervention is justified in setting safety standards for supplying consumer products and in post-market controls, but Australia's present system is increasingly failing to meet its objectives (Part III);
 - ② The European model, recently revised and already gaining acceptance beyond the (soon 27) member states of the EU, is the most efficient and legitimate "transplant" for Australia (Part IV.A). It establishes a balanced and effective structure, as well as refined concepts that fill significant gaps in our system (Part IV.B). Net costs for businesses and government are unlikely to be significant, but net gains for consumers and other stakeholders will be considerable (Part IV.C).
 - ③ Although Submissions so far have generated many useful insights, including several elaborated below, the Australian Government must take care in assessing Submissions and in ongoing consultations, as collective action problems endemic to consumer policy-making extend to this Review process as well. In particular, the Government should encourage more advice from consumer safety experts with less direct interest in reforms for Australia, especially those familiar with the evolving European regime.

II. Background

3. I am a full-time Senior Lecturer at the University of Sydney Faculty of Law. I am also a Director of a legal consultancy firm, Japanese Law Links Pty Limited. I specialise in Australian and comparative commercial and consumer law, and have taught and published widely in the area of product liability and safety law. Specific qualifications and experience are set out in Appendix A to this Submission.
4. I was on research (sabbatical) leave last year, mostly in Germany, the United States and Japan, so I was unable to make a formal Submission to the MCCA's Review. Fortunately, the further comparative research conducted overseas since last August is highly relevant to the present Study.
5. I also believe it is important for Submissions to be presented from a more independent viewpoint on such an important issue for Australian citizens – and, indeed, Australia's trading partners. Australia's business sector, consumers, peak associations, and even government agencies each will tend naturally to have their own agendas in presenting Submissions.

III. Problems in Achieving Objectives of the Consumer Product Safety System

6. Australia's existing regulatory scheme rightly seeks to “minimise the physical and economic harm caused by unsafe consumer products”, and to “promote the confidence of local and international consumers in Australian consumer products” (Review DP p3).
7. Well-known “weaknesses in the supplier/consumer relationship provide rationales for State intervention” to supplement incentives provided by the market and by private law remedies to provide optimal levels of product safety.¹ Problems highlighted by contemporary “behavioural law and economics”, for example, also tend to justify regulations going beyond merely requiring more or better information for consumers to base their purchasing decisions on.² Regulatory controls on product safety must also apply not only to what can be initially marketed, and how; but also encompass “post-market” controls, such as recalls required if the products later prove to be unsafe.

¹ Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law* (2nd ed., Ashgate, Aldershot, 2005) ch 10.1.

² Cass R. Sunstein (ed.) *Behavioral law and economics* (Cambridge University Press, Cambridge, 2000); Cass R. Sunstein, *Risk and reason: safety, law, and the environment* (Cambridge University Press, Cambridge, 2002).

8. The Review (DP p3 n1-2) indicates significant economic costs arising from consumer product related injuries in Australia. (In addition, there are less readily measurable but equally real social costs to families, communities, the workplace, and so on.) The sources cited date back 5 or 10 years, so follow-up studies are vital; but one would expect rising costs since 2000. For example, imports from newly industrialising Asian countries like China have been accelerating, and similar trends have been identified by both European and US authorities to justify recent initiatives to strengthen their own regimes to control product safety.³ Even for goods produced domestically, some residual deterrent effect from Australia's civil liability regime will have been further reduced by "tort reform" legislated since 2002 first at State level and then at the federal level. Anyway, there has been little strict-liability product liability litigation under Part VA of the Trade Practices Act ("TPA") since that was added in 1992.⁴ Generally, *combining* significant levels of protection through civil liability regimes, market and media discipline, and regulatory action creates a sort of "multiplier effect" in encouraging the supply of safe products.⁵ Conversely, undermining the tort law system risks leading to considerable overall declines in incentives to supply safe products.
9. From this perspective, it is unsurprising to read the Submission to the MCCA by the Australian Consumers' Association ("ACA"), demonstrating several concrete instances recently in which half or more tested products failed mandatory or voluntary safety standards. That Submission also specifically illustrates market failures related to an inadequate regulatory regime. The regime also faces challenges from evolving community expectations especially regarding recalls, in the wake of very large-scale recalls in Australia such as the Pan Pharmaceuticals debacle in 2003.⁶
10. The ACA, as well as for example the Commonwealth Consumer Affairs Advisory Council and the Consumers' Federation of Australia in their Submissions to the

³ See eg, respectively, the UK DTI's Final Regulatory Impact Assessment, para 4.1 (via <http://www.dti.gov.uk/ccp/topics1/safety.htm>); and <http://www.cpsc.gov/CPSCPUB/PREREEL/prhtml04/04124mou.html> (elaborated at <http://www.cpsc.gov/BUSINFO/china.pdf>).

⁴ See S Stuart Clark and Christina Harris, 'Tort Law Refor in Japan: Fundamental and Potentially Far-reaching Change' (2005) 72 *Defense Counsel Journal Jan 2005* 16; Luke Nottage, 'A Decade of Strict-liability Litigation under Japan's Product Liability Law of 1994' (2005) 16 *Australian Product Liability Reporter* forthcoming.

⁵ Luke Nottage, *Product safety and liability law in Japan: from Minamata to mad cows* (Routledge, London, 2004) ch5.

⁶ Masterfoods' current recall of all Mars and Snickers chocolate bars in New South Wales is also keeping recalls very much in the public eye, although this has been triggered by an unusual case of adulteration aimed at extortion.

MCCA, also agree with the Review DP's assessment (p5) that Australia's current regime "needs to be able to deal with potential safety hazards more swiftly, with a greater emphasis on the prevention of problems". A shift from a reactive to a pro-active, preventative approach would fit with a similar broader trend in business and even public-sector management in Australia and world-wide, exemplified by the development of dispute management protocols like that revised last year by Standards Australia ("SA", voluntary standard AS 4608-2004).

11. The Review DP and almost all Submissions to the MCCA and so far to the Commission – even from business associations and the like – also highlight the problem of a lack of coordination amongst regulatory agencies. This impedes the development of effective and trust-based relationships with the business sector, no doubt contributing to the other problems mentioned above.
12. A related issue, not highlighted as much by Submissions so far (except for example in both those by SA, and that by the Australian Competition and Consumer Commission eg at pp19-20) or by the Review DP (although mentioned eg at p9 and p45), is coordination arising from "the wider international context". It is not just that the recent or planned updates to regulatory regimes by our main trading partners provide a checklist for areas in which Australia's now seems to fall short, and a template for specific reforms likely to be effective in filling those gaps. In addition, we should also be aware of potential to draw on the expertise already being developed by overseas regulatory agencies to improve regulatory responses in Australia. Longer-term, we should envisage being required to harmonise responses with them, as Australia continues to embark on a variety of bilateral free trade agreements and the like. Regulatory agencies in our main trading partners are already concluding Memoranda of Understanding with overseas counterparts to coordinate product safety initiatives.⁷ However, such measures to improve the situation in Australia are more difficult given its now outdated regime.

IV. Costs and Benefits of Reform Options

IV.A The European Model as the Efficient and Legitimate "Transplant" ⁸

13. Generally, maximum benefits and minimal costs from regulatory reform in Australia

⁷ One between Canada and the US, for example, was announced on 29 June 2005: <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml05/05212.html>.

⁸ On such rationales for law reforms borrowing from abroad, see eg Jonathan Miller, 'A typology of legal transplants' (2003) 51 *American Journal of Comparative Law* 839.

are likely to follow by adopting the emerging “global standard” in product safety law: the European Directive on General Product Safety (“GPSD”, introduced by the European Commission in 1992, and amended in 2001 for the then 15 member states of the European Union to implement from 14 January 2004).

14. The GPSD has emerged from comprehensive rounds of further consultation at the EU level, as well as by member states implementing the Directive into national law. Particularly instructive for Australia is the work by the Department of Trade and Industry (“DTI”) in the UK, given the impact British law had on the initial Directive of 1992 and which it generally still exerts on Australian law. Detailed implementing Regulations were laid before the British Parliament on 7 July 2005 and will come into force from 1 October 2005, with a Final Regulatory Impact Assessment as well as Guidance on the Regulations now available on the DTI website. In addition, the majority of the now 25 member states of the EU – bringing together 450 million people and a vast economic bloc – had implemented the GPSD by late 2004.⁹
15. Further, Canada has responded to weaknesses in its regulatory regime similar to those in Australia by proposing reforms modelled on the revised GPSD (Review DP, p27). In Japan, too, the government’s National Consumer Affairs Center looked closely at the new European regime in its comprehensive Report on recalls published in 2004, in the wake of an upsurge in product safety scares and recalls since Japan’s “summers of living dangerously” in 2000 and 2001.¹⁰ The (main opposition) Democratic Party of Japan is considering proposing a Bill on general product safety modelled closely on the GPSD. It also seems likely that the EU model will spread well beyond Europe, especially in the Asia-Pacific region where Australia’s interests increasingly lie, as occurred with the 1985 EC Directive on Product Liability (“PL Directive”) from the 1990s.¹¹
16. A particular advantage in Australia following the GPSD regime, as it did when

⁹ Rod Freeman, 'The State of the Revolution: An Update on the Status of the New General Product Liability Regime in the European Union' (2004) 16 *Lovells European Product Liability Review* 5. On the “State of the Union” one year after the addition of these 10 additional member states, see http://europa.eu.int/enlargement/memo_en.htm. Two more states (Bulgaria and Romania) will join the EU in 2007, and two more have been accepted as “candidate countries” (Turkey and Croatia: <http://europa.eu.int/comm/enlargement/candidate.htm#cc>).

¹⁰ See generally http://www.kokusen.go.jp/ncac_index_e.html (although the Report is only available in Japanese); and Luke Nottage, 'Comparing Product Liability and Safety in Japan: From Minamata to Mad Cows - to Mitsubishi' in Fairgrieve (ed.) *Product Liability in Comparative Perspective* (Cambridge University Press, Cambridge, 2005) forthcoming.

¹¹ On the latter phenomenon, see David Harland, 'Some Reflections on the Influence Outside Europe of the EC Directive on Product Liability - Liber Amicorum Nibert Reich' in Kraemer, Micklitz and Tonner (eds), *Law and Diffuse Interests in the European Legal Order* (Nomos, Baden-Baden, 1997) 681.

modelling Part VA to the TPA on the PL Directive regime, is that it will be able to keep referring to European (and other borrowing nations’) interpretations of key legal terms, as well as broader practical issues arising in both somewhat overlapping regimes.¹² More generally, Victoria has recently amended its Fair Trading legislation to regulate unfair contract terms based on a 1994 EC Directive in that area, and other Australian states are now considering this option as well. As the EU is already looking at ways of harmonising key concepts used in its Directives impacting on private law (beginning with contract law),¹³ Australia should benefit increasingly by modelling other parts of its consumer law on widely accepted European standards.

17. Reforming Australia’s general product safety regulations based on the GPSD is also preferable to following too closely the US regime, despite the Free Trade Agreement already between the two countries. Such regulatory reform also requires rethinking the ways in which safety standards are created and enforced in specific sectors.¹⁴ The US approach in the latter respect relies heavily on a diverse array of standard-setting bodies, heavily dominated by industry interests.¹⁵ The “new approach” since 1985 in Europe also relies on standardisation organisations (at member state level, but coordinated increasingly by the European Committee for Standardisation [“CEN”] in particular), to elaborate technical specifications that firms may (but need not¹⁶) follow in producing and marketing safe products in the relevant sector. However, these specifications are generated in response to “essential safety requirements” agreed at the political level, namely in harmonising legislation at the EU level; and the EU provides funding to improve consumer input into CEN and the standard-setting process.¹⁷ This regime is therefore more balanced, and more appropriate to the more centralised standard-setting scene in Australia, than the US system.¹⁸

¹² Related to the GPSD – although not always precisely (Rod Freeman, 'Dealing with Dangerous Products' (2004) 16 *Lovells European Product Liability Review* 9) – for example, the European Commission has funded “Product Safety in Europe: A Guide to Corrective Action Including Recalls” (http://www.europa.eu.int/comm/consumers/cons_safe/action_guide_en.pdf).

¹³ See generally Luke Nottage, 'Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law' (2004) 1 *Annual of German and European Law* 166.

¹⁴ This issue is raised in the DP and in several Submissions. In December 2003, the European Commission published helpful Guidance on the relationship between the GPSD and sector-specific Directives (http://europa.eu.int/comm/consumers/cons_safe/prod_safe/gpsd/guidance_gpsd_en.pdf).

¹⁵ Responding in part to concerns about this system, the US Consumer Product Safety Commission (“CPSC”) has recently initiated a pilot scheme to provide information on some CPSC staff participation in voluntary standards activities: ‘Transparency in Government’, 9(3) *Consumer Product Safety Review* (2005).

¹⁶ Generally, they are followed because this entitles affixing of the “CE” mark, which permits export of the certified products to other member states without otherwise having to prove they comply with the safety requirements set by the relevant directive.

¹⁷ See Geraint G. Howells, 'The relationship between product liability and product safety: understanding a necessary element in European product liability through a comparison with the US position' (2000a) 39 *Washburn Law Journal* 305; and Geraint G. Howells, *Consumer product safety* (Ashgate, Aldershot, 1998) chs 2 and 4.

¹⁸ More broadly, both the governance “style” affecting consumer policy and the way topical issues such as

18. The EU support for consumer input is also important under the revised GPSD. It now provides a (still rebuttable) presumption of conformity with the Directive's general safety requirement if a product conforms with a member state's transposition of a voluntary European standard accepted by the EU via the Official Journal.¹⁹ The many other voluntary European standards are also still given priority as a source for assessing whether or not products meet the GPSD's general safety requirement.²⁰
19. The "vertical" (sector-specific) safety standards under the European "new approach" therefore respect both some local variation, and business involvement in generating technical specifications; but encourage both adoption of European standards, and consumer input in standard-setting. Similar features are also found in the GPSD regime:
- ① First, in the absence of European voluntary standards (whether published and then transposed into national regulations or otherwise), safety of products can be assessed in light of national standards or even (potentially local) industry codes of good practice and "state of the art".²¹ Further, measures to restrict marketing or to require recalls of a product remain primarily the province of member states, although the revised Directive does expand the powers of the European Commission to act on its own initiative in emergencies.²²
 - ② Secondly, the DTI Guidance on the British Regulations implementing the GPSD mentions not only the above-mentioned potential for industry codes to influence assessment of compliance with safety requirements. It also emphasises that codes on recalls "may be valuable in determining the nature and scope of a recall action", and more generally that voluntary actions by firms are to be encouraged over enforcement measures by regulators. Uniquely, moreover, the DTI outlines a scheme it developed, but which is operated by the (private) Chartered Institute of Arbitrators: a

tobacco regulation have been "framed" in Australia tend still to track the experience and guiding principles in Europe rather than the US. Cf generally Christoph Strunck, 'Mix Up : Models of Governance and Framing in US and EU Consumer Policy' (2005) 28 *Journal of Consumer Policy* 203.

¹⁹ A listing of such accepted standards (eleven so far, mostly for child care products) can be found now at <http://www.europa.eu.int/comm/enterprise/newapproach/standardization/harmstds/reflist/gpsd.html> (the DTI Guidance URL at p9 n 4 no longer functions).

²⁰ Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law* (2nd ed., Ashgate, Aldershot, 2005) ch 10.5.3.

²¹ The DTI Guidance (p10 para 33) adds that broader international standards such as those published by the International Standards Organisation are given no special status under the UK Regulations implementing the GPSD, but may fall within these three sources of norms.

²² Such action by the Commission is expected to remain rare: Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law* (2nd ed., Ashgate, Aldershot, 2005) ch 10.6.

business (at its own expense) may require authorities to seek a reasoned fast-track (“Early Neutral Evaluation”) non-binding opinion on the need for a recall.²³

20. Both characteristics seem important in any product safety scheme; and especially for a country like Australia:

- ① Generally, as in other spheres of business and social activity where we increasingly devolve decision-making towards the grassroots, we would expect firms and their associations often to be in a better position to elaborate both highly technical aspects of safety standards and to implement rapid responses to breakdowns in the system. On the other hand, again as in other areas, we expect considerable benefits through some monitoring and contributions by independent parties – in this case notably consumer groups, to minimise rent-seeking activity amongst firms or their associations, as well as decisions adverse to other major stakeholders.
- ② Likewise, we would expect some variation in local circumstances allowing for differing assessments of optimal safety levels when marketing products or recalling them; but generally not too much, in regions exhibiting comparable economic development. Thus, the European model seems attractive not only in terms of basic design, but also for countries like Australia exhibiting significant differences among states under a federal system of government. Although arising from a peculiar “constitutional” history, specific aspects of the inter-relationships between EU member states and key institutions like the European Commission under the GSPD may prove very useful in thinking through Australia’s problem of coordination of regulatory action identified in this Review.

IV.B Specific Lessons from the European Model

21. The Review DP remarks (pp 35-6) that a key problem is that Australia’s current regime under the TPA (and Fair Trading legislation at state level) only permits the authorities to ban or recall consumer goods where they “will or may cause injury” – interpreted to mean those which are defective and not those unsafe as a result of foreseeable misuse. This interpretation is generally accepted by other Submissions to the MCCA, although an Australian Court nowadays might take a more expansive view and decide that something misused in a foreseeable manner might be one that “will or may cause injury”:

²³ DTI Guidance pp 18-19, paras 71 and 74.

- ① The Submission by the National Product Liability Association points in the latter direction by stating that some might regard Australian business as already subjected to “the equivalent of a general safety provision”, in that Part VA of the TPA imposes strict product liability on manufacturers and others for a product “defect ... defined very broadly to exist if the safety of the product is ‘not such as persons generally are entitled to expect’...” (para 3). This is partly true, as a matter of substantive law, in that assessment of defectiveness under Part VA (or the EC PL Directive) can consider foreseeable (mis)uses, just as assessing “safety” under s2(b) of the GPSD considers “normal or reasonably foreseeable conditions of use”.²⁴ However, as a practical matter, civil liability under Part VA is far from adequate in regulating product safety, especially given the further constraints on private litigation imposed by “tort reform” in Australia since 2002.
- ② In addition, although not elaborated in the Review DP (cf pp 25-6), US law allows the CPSC not only to take remedial action if a product contains a defect which could create a substantial product hazard, but also to apply for court orders regarding a product presenting an imminent and unreasonable risk of death, serious illness or severe personal injury. These provisions, not too dissimilar to those under the TPA, have effectively allowed the US authorities to intervene to control unsafe products.

Assuming the conventional interpretation of Australian regulations, however, the general safety requirement in GPSD art 2(b) provides a tried and tested way to extend application to the (not infrequent) situations of products being used in dangerous ways reasonably foreseeable to suppliers.²⁵

22. Likewise, art 2(b) of the revised Directive clearly extends safety assessment to the consideration of any “putting into service, installation and maintenance requirements”. Relatedly, art 2(b) extends its scope of application to products supplied in the course of providing a service (albeit not – yet – to the supply of services as such²⁶), thus minimising some of the (quite common) problems involved

²⁴ See eg C. J. Miller and Richard Goldberg, *Product liability* (2nd ed., Oxford University Press, Oxford, 2004) para 19.24; cf also {Howells 1993}, and Geraint G. Howells, *Consumer product safety* (Ashgate, Aldershot, 1998) pp 124-5.

²⁵ More controversial may be the requirement for enforcement authorities to be guided by the “Precautionary Principle” (DTI Guidance paras 76-9). The Principle demands erring on the side of caution where there threats of irreversible or serious harm but these are shrouded in scientific uncertainty. EU law continues to extend this Principle its original domain of environmental law. Cf generally Cass R. Sunstein, *Laws of fear: beyond the precautionary principle* (Cambridge University Press, Cambridge, UK ; New York, 2005).

²⁶ Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law* (2nd ed., Ashgate, Aldershot, 2005)

in deciding what constitutes an applicable “product”.²⁷

23. The GPSD not only requires producers to supply safe products, but also sensibly requires “distributors” (and professionals in the supply chain whose activities do not affect a product’s safety) to take due care to ensure that the products they supply are safe. Nowadays, through quality assurance programs and the like, such intermediaries often work closely with producers. It is appropriate to engage them to reinforce the importance of maintaining product safety, while imposing somewhat reduced standards of behaviour. However, a new obligation under revised Directive requires both producers and distributors who discover they have marketed an unsafe product to notify regulators and describe what action they have taken to remove risks to consumers.²⁸ This has been heralded as meaning the end of the “silent recall” in the EU, at least for consumer products. This problem has also surfaced in Japan, mostly noticeably with Mitsubishi Motors, generating momentum for a similar strengthening of that country’s product safety regime.²⁹ It should also be a concern in countries like Australia.
24. The European Commission’s rapid alert system for dangerous consumer products (RAPEX) has also been strengthened. Almost triple the notifications were made in 2004 compared to 2003.³⁰ However, there remains considerable variance in proportions of notifications by country and type of product, as evident from Appendix B to this Submission.³¹ Further improvements can be expected, and again this system provides a model for more effective information-sharing and dissemination within a federation like Australia.

ch 10.3.4.

²⁷ For similar problems under the PL Directive and other strict liability regimes, see Luke Nottage, *Product safety and liability law in Japan: from Minamata to mad cows* (Routledge, London ; New York, 2004) ch 3, and Luke Nottage and Yoshitaka Wada, 'Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?' (1998) 6 *Zeitschrift fuer Japansiches Recht* 40 (especially in disputes regarding installed gas appliances).

²⁸ Compare D’TI Guidance pp 12 with pp 14-16. In the US, the government brought its first case only in 2001 against a retailer (Wal-Mart) for failing to report defective products. The parties settled in 2003, including a \$750,000 payment by Wal-Mart (the “Stipulated Judgment and Order” is available via the CPSC website). Their ongoing collaboration has generated a new (but still optional) system for retailers to relay to CPSC complaints from consumers and other information about product hazards, flagging incidents triggering certain hazard or injury patters. See ‘Safety Reporting’, 10(1) *Consumer Product Safety Review* (2005).

²⁹ Rod Freeman, 'The State of the Revolution: An Update on the Status of the New General Product Liability Regime in the European Union' (2004) 16 *Lovells European Product Liability Review* 5 at p6; Luke Nottage, 'Comparing Product Liability and Safety in Japan: From Minamata to Mad Cows - to Mitsubishi' in Fairgrieve (ed.) *Product Liability in Comparative Perspective* (Cambridge University Press, Cambridge, 2005) forthcoming.

³⁰ See http://europa.eu.int/comm/dgs/health_consumer/dyna/rapex/rapex_en.cfm.

³¹ This reproduces recent statistics compiled by Lovells, a leading international law firm for product liability and safety law issues, kindly supplied by a partner originally from Australia, Rod Freeman.

25. Finally, the revised GSPD introduces an explicit obligation for producers to take measures 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. By contrast, Australia’s legislation restricts compulsory recalls to goods that “will or may cause injury”; and contains no requirement for producers to conduct their own recalls, instead only obliging them to inform with government within two days of any voluntary recall of products.

IV.C Costs and Benefits for Particular Groups in Australia

26. No doubt it will be difficult for the Productivity Commission to achieve a rigorous cost-benefit analysis of regulatory reforms based on the current European model, even on an aggregated basis. However, the Australian Government should take heart from the primary conclusion of the DTT’s Final Regulatory Impact Assessment (paras 1.6-7):

the Regulations for the UK based on the revised Directive “will place little additional burden on businesses” since products are already required to be safe, and such a burden is anyway “more than compensated for by increased benefits to the consumer in terms of product safety and transparency, greater clarity for producers, distributors and enforcement authorities, and fairer competition”.

Although Australia still lacks the more expansive safety requirement introduced for Europe originally in 1992, it does have some partial substitutes, and reforms along European lines should also generate similar benefits for consumers and others.

27. In considering more specifically the impact on the Australian business sector, it is also important to differentiate among different sub-sectors.

① For example, the theory mentioned in the ACCC Submission, that introducing a general safety provision “may not change much at the top and bottom ends”, but “the majority of suppliers in the middle ... would improve their attention to safety”, provides a plausible hypothesis perhaps amenable to some empirical research.

② Some Submissions also mention that standard-setting organisations in Australia may benefit under a stronger regime for product safety, especially if they can collaborate overseas (eg drawing more on European developments, and re-exporting these or indigenous Australian standards to Asian neighbours).

③ Likewise, a new regime aligned with the European model would provide new opportunities for Australian lawyers, active world-wide but especially in

Asia and London, as well as advice for domestic clients. Australian lawyers are increasingly involved in helping clients set up systems to prevent disputes, rather than to react to them after the event, which fits with the philosophy of reforms along European lines. In addition, both legal advisors and standard setting organisations may benefit from a more active system of product safety in Australia in that the CPSC already now expects US firms to monitor information concerning products manufactured or sold outside the US in deciding whether or not to act in relation to defects or hazards for those within the US.³²

- ④ Finally, the privately-supplied Early Neutral Evaluation scheme introduced by the DTI to advise in the event of different views on recalls seems a very worthwhile innovation also for Australia that would create further opportunities for professional advisors (lawyers, engineers and the like), as representatives, witnesses or the third party neutrals in such proceedings.

28. As in UK and the EU, however, consumers should be the primary net beneficiaries of reforms updating Australia's regulatory regime in line with the European model:

- ① They should benefit not just through stricter reporting and recall requirements, and enhanced back-up powers for regulatory authorities, but also if they can become more involved in initial standard-setting activities.
- ② A further opportunity would come from consumer interests being better integrated into processes for review of action (or indeed inaction) by the Minister and the ACCC or state regulator. As noted in the Review DP (pp 56-7), the TPA quite unusually allows suppliers generally to hold a conference with the ACCC (the regulator) to consider their concerns about a planned ban or recall by the Minister (the policy-setter), with the ACCC then making a non-binding recommendation to the Minister for the ban or recall is finalised. The Early Neutral Evaluation scheme established by the DTI for the UK is an attractive alternative; but there is scope also for consumer interests to provide non-binding recommendations to the Minister. More broadly, Australia should follow initiatives in the UK, again in the shadow of broader European developments in consumer law and policy, to allow accreditation of independent "super-complainants". Such organizations may petition regulators concerning market failures, and they must respond in accordance with legislated processes.³³ As noted in the

³² Peter Winik and Laura Neuwirth, 'Obligation to Report Product Hazards Grows' (2002) 167 *New Jersey Law Journal* 489

³³ See eg the outline of the system and the three "super complaints" brought by the UK Consumers Association since 2001, at <http://www.which.co.uk/campaigns/how/supercomplaints.html>.

ACA's Submission to the MCCA (p7), candidates for accreditation under any similar Australian scheme might include not only such consumer bodies, but also "health boards, hospitals, and/or Universities with relevant expertise".

29. The Government itself will face costs and benefits from reforms to Australia's regime for product safety regulation. One driver of the present Review, evident throughout the DP, is the potentially high fiscal cost of requiring the Minister (and the ACCC) to take primary responsibility for mandatory standards or recalls. The Government seems to hope that devolving more responsibility explicitly onto suppliers will reduce such costs.

- ① Although this might be seen simply to be shifting costs, probably there will be indeed some aggregate reduction in costs across both the Government and the business – for a given level of safety – in that suppliers will often be in a better position to implement effective safety measures, at early stages of product development and marketing. On the other hand, we should also expect higher levels of safety to emerge from a strengthened and more visible regulatory regime, as in Europe. Any concomitant incremental costs would need to be weighted against economic and social benefits for consumers and other stakeholders in product safety.
- ② In addition, despite the potential for the Government to regulate more indirectly by devolving more standard-setting and post-marketing product safety management to businesses, it should expect and plan to exercise occasionally its expanded back-up powers. Having such capacity not only under amended legislation, but also in budgetary terms, is essential for the sort of effective "responsive regulation" that regulators like the ACCC are already practicing in other spheres.³⁴
- ③ Further and relatedly, as explained in the DTI's Final Regulatory Impact Assessment, the Government should envisage higher costs in educating firms (and the broader public) about the new regime, at least in the short-term.

Overall, however, the Government can and should minimise costs by linking in to Europe's emerging global standard for product safety regulation. There is also a more unquantifiable benefit in doing so, namely increased transparency for the system and corresponding gains in legitimacy.

³⁴ See generally Ian Ayres and John Braithwaite, *Responsive regulation: transcending the deregulation debate* (Oxford University Press, New York, 1992).

V. Assessing Submissions to the MCCA, and Further Consultations

30. The Productivity Commission's Terms of Reference also asked the Study to consider Submissions to the MCCA last year. This Submission has already picked up and developed many insights from them. By way of conclusion, I end with some broader observations on those Submissions and the ongoing consultation process initiated by the Review.
31. Generally, consumer law reform highlights a pervasive problem especially in consumer policy generation (and enforcement): collective action.³⁵ Even today, the interests of consumers remain much more dispersed than those of firms. This explains why so many Submissions so far for this Review have come from business associations. In addition, they tend to follow a predictable line. The end result, of course, is that quantitatively more will be "opposed" to reforms along European lines proposed in this Submission; and the risk grows that reformers will be held not to have "discharged their burden of proving the case" for reform. It is important therefore for the Productivity Commission and the MCCA to bear in mind this tendency, and specifically that those opposed to broader reforms are predictably those aligned more with business interests, including for example the National Product Liability Association (including many defence lawyers). Further, the successful implementation of the revised GPSD in (soon) 27 member states of the EU should instead create a presumption that reform is seriously needed in Australia as well, casting the burden instead on those opposed to why this country should not follow such a trend.
32. The Commission and MCCA should also note that there has been little input even from New Zealand, linked by a longstanding Free Trade Agreement and broader agenda in legal harmonisation. Despite NZ's Consumer Affairs Minister Tizard providing some publicity for this Review, it does not feature prominently on her Ministry's website and in public debate, and only one Submission has come from across the Tasman. More should be encouraged, especially as that Submission by the NZ Retailers Association was surprisingly balanced compared to some Australian counterparts.³⁶
33. More broadly, the Australian Government should also seek further Submissions or

³⁵ See eg Patricia Maclachlan, *Consumer Politics in Postwar Japan* (Columbia University Press, New York, 2002).

³⁶ For example, the Submission sees some merit in introducing a broader general safety requirement and scope for recalls, and in extending application to services and second-hand goods (p4).

consult extensively with regulators and a range of stakeholders in consumer safety especially in Europe, as well as countries like Japan and Canada already interested in following the latter's revised regime. Our government also should do the same, and seek to publicise this important Study and Review among other independent entities, such as universities and Law Reform Commissions at state and federal levels. In particular, I would urge the Government to seek views from leading academic commentators on comparative product safety regimes, like Lancaster University Professor Geraint Howells; or a UK-based Australian lawyer like Rod Freeman, who recently helped coordinate an empirical study into possible further reform of the PL Directive for the European Commission.

34. In conclusion, the Government is to be commended for initiating this sustained Review process, after a more limited attempt five years ago.³⁷ Australia can no longer afford to procrastinate in implementing reforms to its general product safety system, especially now that Europe has developed an effective model destined for broader acceptance world-wide. It is no longer a question of *whether* to reform, but *how* precisely to adapt especially this EU model to Australia's circumstances. Ongoing consultation should be directed towards that goal.

³⁷http://www.consumersonline.gov.au/content/publications/Consumer/resources_product_safety_DP.asp.

Appendix A: Qualifications and experience of Luke Richard Nottage

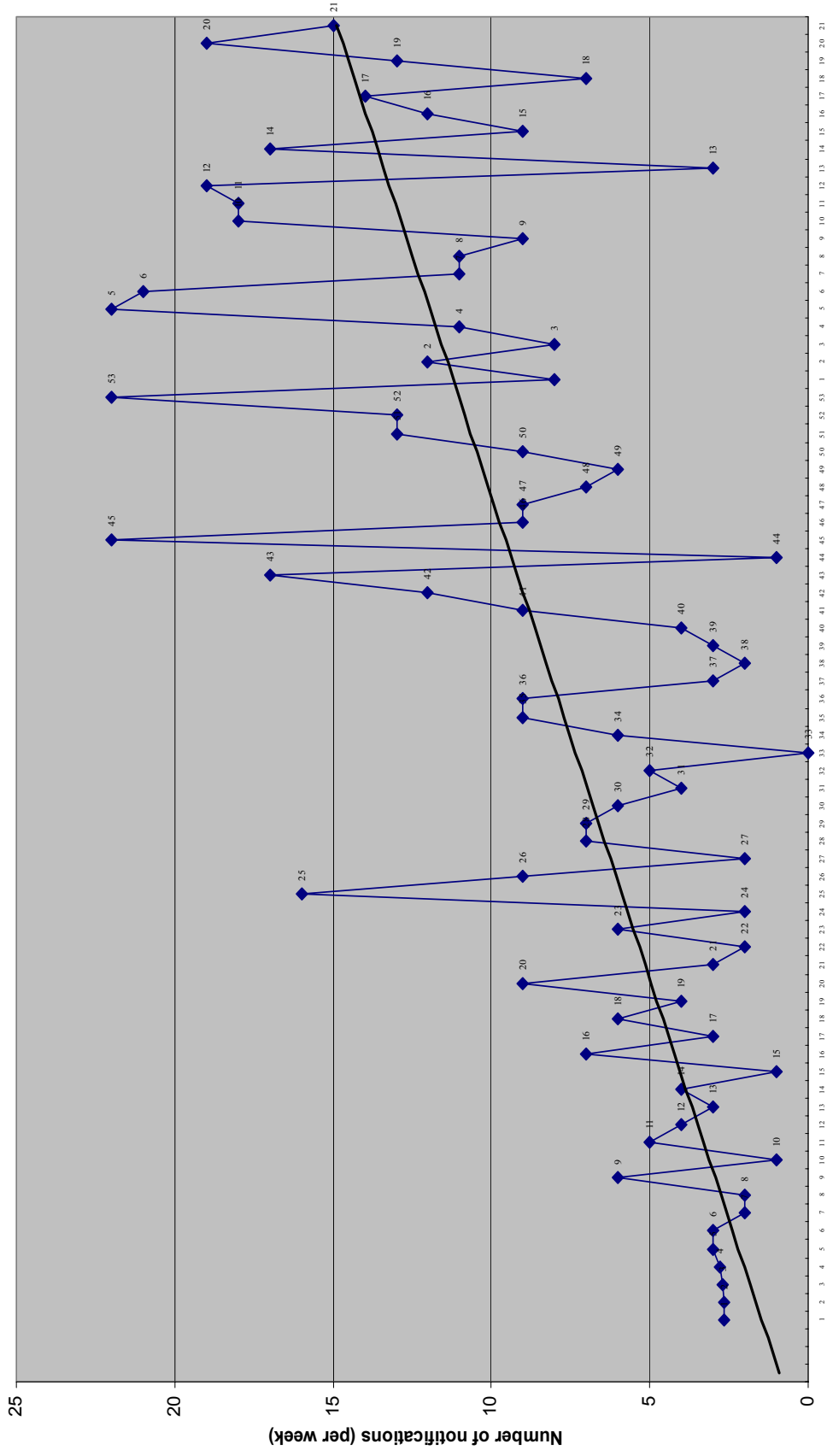
1. I hold the following degrees: Bachelor of Commerce and Administration (BCA), Bachelor of Laws (LL.B) and Doctor of Philosophy (Ph.D) in Law, Victoria University of Wellington (VUW); Master of Laws (LL.M), Kyoto University, Japan.
2. I qualified as a barrister and solicitor in New Zealand in 1994, practising there until 1997 in a firm specialising in cross-border (especially Japan-related) matters, while a fractional Lecturer in Law at Victoria University of Wellington. I continued some part-time legal consultancy while Associate Professor of Transnational Law at Kyushu University Law Faculty in Japan until 2000, when I also practised full-time as a barrister in New Zealand, until assuming research fellowships at the European University Institute (Italy) and the University of Victoria (Canada). Upon settling in Sydney in 2001, I qualified as a legal practitioner and held a part-time practising certificate as barrister until 2003. Since then I have continued legal consultancy work through Japanese Law Links Pty Limited, of which I am a Director.
3. Since 2001, I have also held a full-time senior lectureship at the University of Sydney Faculty of Law (USydney), where I am also founding Co-director of the Australian Network of Japanese Law. I research and teach mainly in the following areas:
 - (i) For the LL.M and other postgraduate law degrees: Consumer Protection – Supplier Liability (co-taught with Dr Jocelyn Kellam, a leading practitioner particularly for product safety issues); International Commercial Arbitration; and International Law – Practice and Procedure (co-taught with Professor Donald Rothwell and others);
 - (ii) for the LL.B degree: Contract Law, International Commercial Transactions (including product liability and safety, for the LL.B), and Japanese Law.
4. As a Visiting Professor or shorter-term visitor, I have also taught related courses at or for Auckland University, the University of Victoria, the University of North Carolina, the University of Illinois – Urbana Champaign, Chulalongkorn University, and several Japanese universities (most recently, Ritsumeikan University, Kyoto)
5. I have also organised and/or presented papers in these areas at numerous Continuing Legal Education seminars (at USydney, the NSW Bar Association, and privately for law firms in Australia and New Zealand), as well as national and international conferences. These are often based on, or result in, published works (such as those listed below).

6. I serve on the Editorial Board of the *Australian Product Liability Reporter* and the *Journal of Japanese Law*, on the Advisory Board of Osgoode Hall Law School's centre for Comparative Research in Law and Political Economy; and as National Rapporteur for Australia (with Dr Jocelyn Kellam) and Japan for the British Institute of International and Comparative Law's Product Liability Forum database project comparing product liability and safety regulation. Over 2003-4 I was a member of Standards Australia's Committee MB-003, which generated Standard AS 4608-2004 on Dispute Management Systems.
7. I have published one book, one co-authored book, one co-edited book, dozens of longer articles or book chapters, and dozens of shorter works, mostly in English or Japanese, since 1995, comparing Japanese and other foreign law in these areas. The following are my main publications comparing product safety issues, most relevant to this Opinion:
- “Comparing Product Liability and Safety in Japan: From Minamata to Mad Cows - to Mitsubishi” in Fairgrieve, D (ed.) *Product Liability in Comparative Perspective* (Cambridge: Cambridge University Press, 2005) forthcoming.
 - “Redirecting Japan's Multi-level Governance” in Baum, H and Hopt, K (eds), *Changes of Governance in Europe, Japan, and the US: Corporations, State, Markets, and Intermediaries* (Oxford: Oxford University Press, 2005) forthcoming.
 - “Comparing Product Liability and Safety in Japan” in Scheiber, H (ed.) *Emerging Concepts of Rights in Japanese Law* (Berkeley: UC Berkeley - Robbins Collection, 2005) forthcoming.
 - ‘A Decade of Strict-liability Litigation under Japan's Product Liability Law of 1994’ (2005) 16 *Australian Product Liability Reporter* forthcoming.
 - *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (London: Routledge Curzon, 2004), including updated and expanded versions of:
 - “The Still-birth and Re-birth of Product Liability in Japan” in Nelken, D and Feest, J (eds), *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001) 147-185
 - (with Kato, M) “Product Liability” in Taylor, V (ed.) *CCH Japan Business Law Guide* (North Ryde, NSW: CCH (looseleaf), 1999-2000).
 - (with Melanie Trezise) ‘Mad Cows and Japanese Consumers’ (2003) 14 *Australian Product Liability Reporter* 125-36.
 - (with Wolff, L) “Japan” in *Doing Business in Asia* (Singapore: CCH Pte Ltd (looseleaf), 2000-5)

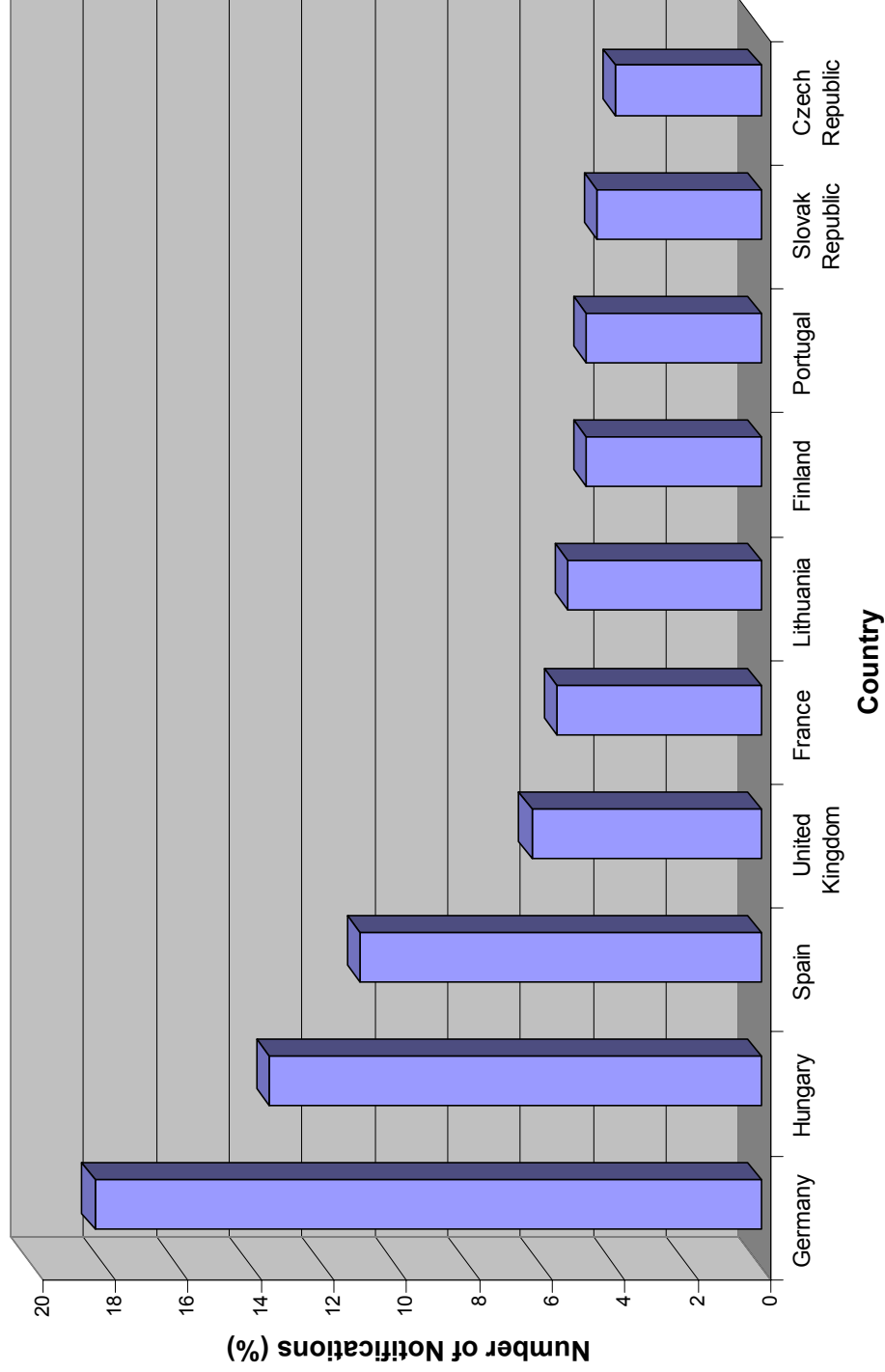
- ‘The present and future of product liability dispute resolution in Japan’ (2000) 27 William Mitchell Law Review 215-235.
- ‘New Concerns and Challenges for Product Safety in Japan’ (2000) 11 Australian Product Liability Reporter 100-110.
- (with Kitagawa, T) ‘Japan’s First Judgment under its PL Law of 1994: Echoes of Donaghue v Stevenson’ (1999) 10 Australian Product Liability Reporter 121-132.
- Nottage, L, ‘Global Harmony and Disharmony in Accident Compensation: Japan’s New Product Liability Legislation Compared to the EC Directive and Part IV.A of the Trade Practices Act’ (1999) 66 Hosei Kenkyu F1-40.
- (with Wada, Y) ‘Japan’s New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?’ (1998) 6 Zeitschrift fuer Japanisches Recht 40-81.

8. Further information is available at: www.japaneselawlinks.info and www.law.usyd.edu.au/staff/LukeNottage

RAPEX Notifications over 18-month period from 2004 to mid-2005



Top 10 countries by number of RAPEX Notifications over 18-month period from 2004 to mid-2005



Types of products subject to RAPEX Notifications over 18-month period from 2004 to mid 2005

