

NSW OFFICE OF FAIR TRADING

SUBMISSION TO PRODUCTIVITY COMMISSION on the *Review of the Australian Consumer Product Safety System – Discussion Draft*

The Productivity Commission has been asked to assist the review by the Ministerial Council on Consumer Affairs into Australia's consumer product safety system, by examining the benefits and costs of the existing system as well as twelve options for reform as outlined in the Ministerial Council's August 2004 Discussion Paper. The Commission is to produce a report by 16 January 2006.

The Commission has invited comment on its discussion draft by 14 October 2005.

This submission addresses the Commission's preliminary findings in the context of the Ministerial Council's options for reform. Where relevant, further information is provided in response to the Commission's requests in the discussion draft.

Ministerial Council on Consumer Affairs Reform Options

Option 1: a general legal obligation for businesses to only market safe consumer products (termed a 'general safety provision')

The Commission remains to be convinced that the likely benefits of a GSP justify the costs involved. A particular concern is that 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 safety regime. (Preliminary finding 6.1)

NSW notes this finding and does not have any further information on the costs and benefits of a GSP to inform the Commission's final position.

Option 2: a revised definition of unsafe goods

On a preliminary analysis, the Commission is of the view that foreseeable misuse should be explicitly covered in the definition of 'unsafe', where the misuse of the product is not unreasonable. (Preliminary finding 7.1)

NSW notes that the definition of 'unsafe' is a threshold issue as far as harmonisation is concerned (see Option 11 below) and supports the need for a revised definition which will facilitate national action by jurisdictions.

The Commission's finding that misuse of products appears to be a more important causal factor in accidents than product defects reflects the experience of the Office of Fair Trading, particularly with respect to products for babies and children. Although 'foreseeable misuse' is not explicitly included in the relevant definitions in the *Fair Trading Act 1987*, bans or mandatory standards are imposed on products when the

product itself is the cause of injury (portable cots) or when inappropriate use of the product is the cause (baby walkers).

Option 3: revisions to the regulatory coverage of services and second-hand goods

An extension of the consumer product safety provisions to cover all services cannot be justified. There may be benefit, however, in consistent national coverage of services related to the installation and maintenance of consumer products. This would require an extension of the coverage of the consumer product safety provisions in some jurisdictions and in others a narrowing of the scope of their provisions. (Preliminary finding 8.1)

The current consumer safety system identifies consumer goods that present specific unacceptably high risks to the health, safety or welfare of consumers and addresses these. However, in some instances there are definitional problems in distinguishing between the 'supply of a product' and 'the delivery of a service' when determining the appropriate course of action. For example, when developing a mandatory standard for blind cords to prevent strangulation, the installation of the cord (service) is as critical to the child's safety as the design of the blind (product). In the absence of a statutory power to regulate 'services', the standard can only deal with the 'product'.

A second example is the pool fence. According to the Australian Consumers' Association, many pool fences fail a strength test, although insufficiently strong fences are not the primary cause of children drowning in backyard swimming pools. Faulty installation (and gates being left open) are a more common contributor. If consumer safety laws covered services, a mandatory standard for installation of pool fences could be introduced.

One option is the application of consumer product safety legislation to consumer services in a targeted way so as to minimise the regulatory burden on business. This could be done by making provision for mandatory safety requirements in relation to services that are ancillary to or associated with the supply of goods to which a mandatory standard applies.

In relation to second-hand goods, uncertainty for business and consumers should be reduced by clarifying that such goods (sold in trade or commerce) are covered by governments' existing powers to enforce product safety regulations. This could be achieved most cost-effectively through an agreed intergovernmental policy statement. There is a strong argument for a case-by-case approach to enforcement of product safety laws as they relate to second-hand goods. (Preliminary finding 8.2)

NSW makes no distinction between new and second-hand goods supplied in trade or commerce and regards both as subject to the product safety legislation. NSW suggests that safety-based requirements should apply equally to new and used items unless a specific policy decision has been made to exclude second-hand products from these requirements. For example, all mandatory standards should specifically address the issue of how and if they apply to second-hand items.

As far as enforcement is concerned, NSW does not specifically target second-hand suppliers. The product safety enforcement program handles them in the same way as suppliers of new products. NSW adopts a hierarchy of enforcement, beginning with a caution when non-compliance is detected the first time, followed by penalty notices and prosecution if further non-compliance is detected. In addition, NSW ensures that non-complying goods are withdrawn from sale and not returned at a later date. For example, during 2003 - 2004 Fair Trading removed from sale a second hand cot and several second hand pedal bicycle helmets.

Option 4: the provision of improved product safety information to businesses and consumers

A national internet-based one-stop shop focused on providing information about all product safety laws and regulations (including standards and bans) would provide net benefits. (Preliminary finding 9.1)

Targeted advertising and education campaigns can improve product safety outcomes but the costs and benefits of each campaign would need to be carefully evaluated. (Preliminary finding 9.2)

On balance, the Commission considers that the benefits of a broad 'Smartrisk' strategy involving substantial advertising and education activities is unlikely to exceed the costs. (Preliminary finding 9.3)

NSW notes the findings. The national website for the Uniform Consumer Credit Code, www.creditcode.gov.au, is an example of a one-stop shop that is maintained by the Secretariat for the Ministerial Council on Consumer Affairs.

Option 5: new requirements for businesses to monitor and report on the safety of their products

The requirement to report on voluntary recalls, where it is mandated, appears to work well. Governments should ensure that voluntary recalls in all jurisdictions are subject to mandatory reporting requirements, and all (voluntary and mandatory) recalls are posted on the Recalls Australia website. (Preliminary finding 10.1)

The Commission considers that the reporting of goods which have been the subject of a successful liability claim or multiple out-of-court settlements is justified. Further, encouraging businesses to clarify how consumers and businesses can notify them of unsafe or faulty products may improve the flow of information about potentially dangerous goods. (Preliminary finding 10.2)

NSW mandates reporting on voluntary recalls, but also provides that a supplier who has already given notice under the Trade Practices Act does not have to give notice in NSW. This should apply in all jurisdictions.

Option 6: the establishment of product hazard early warning information systems and

Option 7: the linking of product safety information systems

The Commission's preliminary assessment is that an extensive early warning system, based on a major upgrade of hospital-based data collection, would result in considerable costs, particularly for government. These costs are unlikely to outweigh the benefits that may be produced by such a system.

A stronger case exists for a more broadly-based and improved early warning system. Such a system could be based on limited data collection periods, improved categorisation and coordination of coronial and hospitals admission data, a slight expansion in the number of data reporting hospitals and improved use of consumer complaints information. It should also supplement Australian data with monitoring information from overseas where compatible and report via an established information portal. (Preliminary finding 11.1)

A linked system of complaints information that provides easy and timely access for regulators on emerging product hazards would provide net benefits when compared to the current system. (Preliminary finding 11.2)

Subject to a more detailed costing, the Commission considers that a combined national system, which incorporates linked complaints data and early warning information on injury, is warranted. (Preliminary finding 11.3)

NSW notes the findings. Product safety complaints are the main source of information for state consumer agencies. State and Commonwealth consumer affairs agencies share complaint data to identify hazardous products and issues for action, although the available mechanisms are not used by all jurisdictions.

Option 8: increased government and industry funding of product safety research

The provision of better quality data on the incidence and cost of product-related injuries would deliver benefits to government in guiding regulatory activity and to consumers in potentially reducing the number of deaths and injuries via improved hazard identification and risk analysis. (Preliminary finding 12.1)

The Commission remains to be convinced that a significantly expanded program of supporting research, in relation to consumer product safety, would be cost effective. The costs of such research may be considerable and would primarily be borne by government. Such a program is likely to result in limited net benefits. (Preliminary finding 12.2)

The Commission sees value in a limited increase in research in this area, initially focusing on a one-off baseline study of the current incidence and cost of product related accidents and the roles played in such accidents by product fault and consumer behaviour. (Preliminary finding 12.3)

NSW notes the Commission's findings. In this regard, it is relevant to note that the Ministerial Council on Consumer Affairs issued a Joint Communique at the conclusion of its meeting on 2 September 2005 which referred to the Council's agreement to develop and maintain a nationally significant consumer affairs research agenda. This agenda will be developed through consultation with the consumer

movement and others. NSW suggests that product safety research could be included for consideration.

Option 9: a requirement for businesses to recall unsafe products and

Option 10: a government power to audit product recalls

While the Commission has received limited evidence on the success of recalls, it appears that their ability to recover unsafe goods is questionable, especially for low value products. Consideration should be given to finding ways to improve the success of recalls, such as including photographs in recall notices. (Preliminary finding 13.1)

The Commission's preliminary assessment is that a general requirement for businesses to recall unsafe products is not warranted at this stage, as it appears that most businesses recall unsafe products on a voluntary basis and it is unlikely that a requirement to recall unsafe products would result in a significant number of additional recalls. (Preliminary finding 13.2)

The Commission considers that the benefits accruing from an ability to audit recalls is unlikely to justify the costs of establishing an audit process, particularly as firms already have incentives to ensure that recalls are undertaken in an appropriate manner and governments can, but rarely do, resort to mandatory recalls. (Preliminary finding 13.3)

NSW notes the Commission's preliminary findings. In Fair Trading's experience, there needs to be a system whereby recalls can be reviewed in order to gauge whether the current system actually works. In most consumer product recalls a return rate of less than 10% is viewed as very successful, which suggests there is a need for an improved method of assessing the effectiveness of recalls and determining whether the recall system needs to be changed.

Option 11: measures to harmonise product safety legislation, administration and enforcement

The establishment of identical product safety legislation (through arrangements where all changes to legislation in one jurisdiction would be adopted by all others) would deliver net benefits. However, if establishing these arrangements proves unattainable, jurisdictions should, at least, agree on a core set of uniform provisions to be incorporated in all product safety legislation. At a minimum, this core should include the harmonisation of:

- *The scope of any coverage of services*
- *Pre-conditions for the imposition of bans and mandatory standards*
- *Mandatory recall powers*
- *Requirements to notify authorities of voluntary recalls*
- *Length of interim bans*
- *Appeal processes.* (Preliminary finding 14.1)

NSW supports examination of existing product safety legislation with a view to promoting consistency in application and outcomes and to removing inconsistent or contradictory requirements.

In relation to the statement in table 14.1 that ‘In New South Wales only warning notices can apply to services’, it should be noted that this is a reference to section 86A of the Fair Trading Act, which enables the Minister or Commissioner to issue a public warning statement about unsatisfactory or dangerous goods, unsatisfactory services, unfair business practices or persons engaging in those practices. This provision is part of a wider public warning regime, not focused on safety issues alone.

With respect to the appeal process, NSW provides for a review of recall orders by the Products Safety Committee. Although this operates in the same way as a conference with the ACCC under the Trade Practices Act, the Products Safety Committee is an expert committee with independent members, not the regulator.

The Commission considers that permanent bans should only be adopted on a national basis. To achieve this, the process for banning goods should be more closely integrated with the temporary exemption process. This would see the following procedure apply:

- *When a jurisdiction introduces a ban it should automatically activate a temporary exemption under the Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Agreement*
- *The jurisdiction, or jurisdictions, introducing the ban should then report to the Ministerial Council on Consumer Affairs with a project plan for seeking consensus for a harmonised approach to the question of a national standard or ban*
- *A time limit of 120 days would apply to the temporary exemption*
- *If a permanent ban is agreed to (using the existing two-thirds voting rule) then all jurisdictions would implement the ban by the end of the 120 days*
- *If MCCA agrees to develop a national mandatory standard (using the same voting rule) then the temporary exemption could be extended while the standard is developed*
- *If no agreement is reached within 120 days the temporary ban would lapse or if some jurisdiction wished to continue the measure they would have to seek exemption from the Heads of Government. (Preliminary finding 14.2)*

The Commission considers that mandatory standards should only be adopted on a national basis. To achieve this, mandatory standards should only be implemented using the referral process under the Mutual Recognition Agreement or following a MCCA decision on an interim ban. The referral process should be modified so that an initial decision on whether a mandatory standard should be developed is made within 120 days of a matter being referred to MCCA.

The necessity of being able to act quickly to meet community expectations in response to local events and issues, particularly where there has been a death or serious injury, remains a significant factor influencing the existing product safety system. For example, following the deaths of two children there was strong community demand that action be taken by the NSW Office of Fair Trading in respect of portable soccer goal posts independently of other jurisdictions. Similarly Victoria has recently acted unilaterally to control the use of motorised scooters and mini-bikes (monkey bikes).

In this regard, NSW notes that the Commission has acknowledged there are some potential benefits in a multi-jurisdictional system and that State and Territory regulators will probably be more attuned to these issues and in a better position to more quickly coordinate any necessary responses. NSW agrees with the Commission's observation that seeking prompt agreement on the need for action among nine jurisdictions is probably unachievable.

Preliminary finding 14.2 aims to integrate the banning process with the temporary exemption process under mutual recognition. NSW considers that it is important to product safety objectives that the need for urgent local action can be accommodated under mutual recognition arrangements. It is also important to ensure that mutual recognition principles are properly applied to product safety regulatory action in recognition of the benefits to business and consumers of nationally consistent regulation of the marketplace.

Having said that, NSW has some concerns with the suggested process and timeframes, namely:

- Automatic activation of a temporary exemption under MRA and TTMRA.

In its 2003 Research Report, *Evaluation of the Mutual Recognition Schemes*, the Commission noted that the mechanism for invoking temporary exemptions has been used relatively infrequently and suggested that jurisdictions may not be comfortable with the process. NSW notes that this may stem from the fact that the Minister responsible for product safety is rarely also responsible for mutual recognition and consequently has no authority over making a temporary exemption regulation. For automatic activation to be effective, each jurisdiction would need to agree on a streamlined mechanism to facilitate the temporary exemption.

- A time limit of 120 days.

This time limit would apply to the Ministerial Council making a decision to either permanently ban a product or develop a mandatory standard. Both would have regulatory impact and be subject to the COAG Principles and Guidelines for National Standard Setting and Regulatory Action. In practice this means:

- The initiating jurisdiction would have to prepare a Regulatory Impact Statement for consultation
- In most jurisdictions a Products Safety Committee or its equivalent will have a role
- Consultation with stakeholders will be required
- The final decision-making RIS will be developed in consultation with the Office of Regulation Review.
- The final decision-making RIS will be submitted out-of-session to the Standing Committee of Officials of Consumer Affairs and then to the Ministerial Council on Consumer Affairs.
- Individual Ministers will have to seek Government approval to agree to a regulatory proposal.

The experience of NSW with this process, in relation to other national regulatory proposals, is that completion within 120 days is most unlikely. In the case of unsafe products, an interim ban will be imposed in the interests of public safety. The detailed analysis required by a Regulatory Impact Statement may only commence once the immediate danger is averted by imposing an interim ban.

From a NSW point of view the most timely recent action was related to projectile toys. Fair Trading was informed of a death in November 2003 and had an updated mandatory safety standard gazetted in late February 2004. However, it should be noted that this did not involve national action and there was an existing (NSW) mandatory standard for projectile toys and a reasonable voluntary Australian Standard that covered the issue. Being in a position to act so quickly is the exception, not the rule.

Option 12: measures to enhance the making of product safety regulation decisions by the Australian Government.

NSW notes that this option largely concerns making changes to the allocation of responsibilities between the Commonwealth Treasury and the Australian Competition and Consumer Commission. As some changes have now been implemented, the option has not been fully assessed in the discussion draft.

Other issues for comment

Role of Australian Competition and Consumer Commission

The Commission is seeking further information on whether the ACCC should take over the administrative functions of the Australian Government Minister and whether the ACCC could play an expanded role in developing national standards.

NSW has no objection to the ACCC playing an expanded role in developing national standards but would be concerned if that role subsumed those of State and Territory agencies who must take account of local and regional needs and interests.

Increasing stakeholder input

The Commission is seeking comment on the merits of greater industry and consumer representation on inter-jurisdictional bodies which decide on national standards and bans.

NSW notes that the COAG regulatory assessment process requires consultation with stakeholders before a decision is made. Industry and consumer representatives are also part of the Standards Australia standards-making process. With respect to bans, the NSW Products Safety Committee, which advises the Minister, has expert industry and consumer representation among its membership.

Creating a national, inter-jurisdictional product safety agency

The Commission is seeking information on the benefits and costs of the creation of a national, inter-jurisdictional product safety agency and the division of the roles and responsibilities between such a body and the jurisdictions.

NSW notes that the Consumer Products Advisory Committee is an inter-jurisdictional body that reports to the Ministerial Council. NSW suggests that it would be more cost-effective to enhance the role of the Committee than to create a new agency.

A national regulator

The Commission is seeking further comment on the workability of a national regulator with the power to impose national standards and permanent bans and with responsibility for enforcement. If such a body is thought beneficial, it is also requesting advice on whether the ACCC or some other body should take on the role of the national regulator.

NSW considers that regulatory efficiency may not necessarily result from a national regulator option. Dealing with issues in a federal system benefits from competition among jurisdictions to find solutions to problems, leading to better public policy and service delivery. Furthermore, a national system may not take sufficient account of local and regional needs and interests. Decisions made at the local level tend to be more customised and responsive to local requirements and conditions.

Commitment to harmonisation

The Commission is seeking further information of any other measures that could help to increase the level of political commitment in this area.

The Uniform Credit Laws Agreement, signed by members of the Ministerial Council on Consumer Affairs in 1993, continues to underpin the commitment to uniformity in consumer credit laws. A similar agreement could be developed with respect to product safety laws.

In this regard, NSW notes the submission by the Consumers' Federation of Australia quoted on page 294 of the discussion draft. The Uniform Consumer Credit Code is, in fact, template legislation. The initial legislation was passed by the Queensland Parliament and amendments automatically apply in the other states and territories. Under the agreement, there had to be unanimous agreement to the initial legislation whereas amendments can be made by approval of a two thirds majority of participating jurisdictions.

A problem with template legislation is that it raises possible concerns about compromising the autonomy of parliaments. The Uniform Credit Laws Agreement deals with this by permitting jurisdictions to adopt the initial legislation or enact and maintain legislation which is consistent with the initial legislation.

A high level Memorandum of Understanding (MOU) for Australian governments could also enhance the implementation of the MCCA Framework and Principles for seeking national outcomes and enhanced co-ordination of investigation, compliance and enforcement activities in relation to product safety issues.

An MOU, establishing roles and commitments by governments, would assist in the implementation of the Framework. Pursuing an enhanced co-ordination of investigation, compliance and enforcement activity under the Framework, particularly at the operational level, could significantly address enforcement and administrative differences between jurisdictions.

