

The Chair
Review of the Australian Consumer Product Safety System – Impact of Reform
Options
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Sir/Madam

This submission is prepared in response to the Productivity Commission's (the Commission) draft 'Review of the Australian Consumer Product Safety System' report which was published in August 2005.

This submission discusses:

- The cost of product-related injury;
- The benefits of the introduction of a General Safety Provision;
- The need to develop product safety policy around the prevention principle because of the imprecise nature of current injury and death data;
- Reform areas that can be achieved relatively quickly;
- A preferred model for improved harmonisation of product safety laws; and
- The use of evidence-based risk assessment by product safety regulators.

These issues are consistent with those that the Commission is seeking further information on in the next stage of the study.

The Cost of Product-Related Injury

The Commission has sought further comment on the costs associated with product-related injury. The Commission has made some estimates concerning the number of deaths and injuries directly and indirectly attributed to general consumer products. While noting that the costs do not appear to be as great of those injuries that relate to the workplace or transport, the data does strongly suggest that these costs are not insignificant.

The Commission acknowledges that its estimates of the scope of the product safety problem are based on limited and incomplete data. This is because many product related injuries are considered minor and do not, thankfully, result in long term hospital stays. It does not mean that the costs are insignificant. It means that they are not as obvious and refined as costs associated with workplace or road-related injuries. As far back as 1996, the cost of government outlays on product-related injury was conservatively measured at somewhere between \$194 and \$238 million annually. These figures were quoted in the Commonwealth Government's National Audit Office report called 'Risk Management by the Commonwealth Consumer Product Safety Regulators'. Even allowing for the recognised drop in non-intentional injuries between 1996 and the present, the current cost would still be significant.

Furthermore, while the Productivity Commission appears to have clearly taken an economic view of the situation, this approach does not sufficiently take into account the value of safe products to our community. Product-related injury has a broader significance in the community than purely economic considerations.

There are major social issues around the safe supply of consumer products which cannot be quantified in strictly dollar terms such as pain, suffering and long-term lifestyle changes resulting from injuries.

Economic and emotional costs are not limited to the injured person as the consequences can flow to their friends, family and associates. For example, a person may sustain injuries which preclude his/her return to former employment; or the severity of his/her injuries may result in a temporary or sustained loss of independence and reliance on others to meet his/her basic needs, impacting negatively on the injured person's self esteem. The cumulative affect on the injured person then impacts on those around, including carers.

A full picture of costs is very difficult to estimate as many injuries may never be reported, for example, due to the injured person's particular circumstances (such as an injured person's concern about increasing their workplace insurance premiums) or failure to report the incident due to the minor nature of the injuries. Minor injuries affecting many people could be caused from a product that is widely distributed but the very minor nature of the injuries means that there is unlikely to be data captured on either the frequency or the product type.

One of the eight world consumer rights adopted by the United Nations (UN) is intended to protect consumers against products, production process and services that are hazardous to health or life. To ensure this is realised in the marketplace the onus needs to be on those who supply the product. Responsible traders take safety issues into consideration when selecting products and those who currently dismiss this critical consideration would, under a General Service Provision, be obliged to comply, thus contributing to a fairer and safer marketplace for all.

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Consumers expect that all products offered for sale are safe for their intended purpose. When an unsafe product is removed from the marketplace after injuries have already occurred, consumer confidence can be undermined with a consequent adverse effect on business.

A General Safety Provision (GSP)

The aim of a GSP is to place an onus upon product suppliers to make safe-design and risk assessment fundamental in the process of manufacturing and marketing consumer goods. Currently there is some belief that this onus rests with only government and consumers. The Ministerial Council on Consumer Affairs, in part, commenced the review of the Australian product safety system in 2003 because of its concerns over the lack of a systematic approach to the way in which Australia manages product safety. Part of this discussion highlighted the need for a tripartite sharing of the responsibility for the safety of consumer products between government, industry, and consumers.

The 'catch all' nature of a GSP would allow for product safety regulators to manage the safety of new and innovative products in a much more efficient manner than at present. Without a GSP, government will continue to be fighting rear guard actions whenever unsafe products are identified. The examples of this happening are numerous such as the delay involved in dealing with micro scooters and more recently mini motorbikes. The micro scooter quickly emerged as a worldwide issue following its speedy rise to popularity from around 2002.

These products were sold into European and United States markets at least 12 months before they arrived in Australia, and even though overseas injury data suggested there was a need for some form of intervention by government on the grounds of safety and a need for a more proactive stance by industry, little actually happened until some time later when the product emerged as a problem in terms of Australian injury data. The Australian standard setting process was unable to deal with the safety of these products until injury data, which identified specific hazards, was available.

A GSP in this situation would have caused industry to undertake a risk assessment of the product (as there were no standards to draw from) prior to its release for sale. This would in all likelihood have identified a number of inherent design problems with these products e.g., the risk of finger amputation due to a serious scissor type hazard when the scooter's steering stem is folded down for carrying and/or storage. Once industry was alerted to the problem then immediate action took place to shield the scissor action so that fingers could not enter the gap between the moving parts. However, this was a reactive response and many thousands of scooters are still being used with this potential finger amputation hazard. A more effective outcome would have been for suppliers to evaluate the risk prior to supply rather than to wait for government to inform them of injuries and recommend the necessary action. The existing standards were ineffective in this case as they did not apply to this new product which was somewhat innovative and extremely popular.

The Commission rightly points that the introduction of a GSP does not guarantee a reduction in the extent of mandatory safety standards. It would however, have the potential to reduce the technical nature of mandatory safety standards and allow for a more horizontal approach to standards generally where the focus is on hazard and injury reduction rather than on technical detail.

A GSP does not necessarily mean an overly onerous and complicated system. It would, for example, cause a cultural shift in that industry would be compelled to work closer with government in a practical sense at an earlier stage in the product supply cycle to agree on levels of safety for particular products. There may also be a de-facto flow on benefit in that regulators may be able to shift their focus towards the science of product design and risk management practices and away from post-supply activities like product bans, enforcement actions and warnings.

There is some argument that responsible industry already applies the proactive principles that underpin a GSP in which case costs for these suppliers would be minimal if a GSP were to be introduced. However, there would be costs for those suppliers that continue to seek a competitive advantage over more reputable traders by taking the risk in supplying products without considering the safety of the product in terms of design and use. Often the regulating authority finds out about these problem products only after injuries have occurred.

One means of mitigating costs and perceived negative impact associated with the introduction of a GSP would be to clearly define what constitutes an unsafe product e.g., by using existing definitions under the product liability provisions of the *Trade Practices Act 1974*. The Commission also highlights this. Under current laws there is a lack of clarity as to what constitutes an unsafe product. Technically, bans and recalls can be introduced only when there is a clear causal link between the product and injury i.e., the product design will cause an injury. In practice, this link has on occasions been tenuous and not based on solid evidence as frequently the risk arises because the way in which a product can be used renders it unsafe.

This could be addressed (as was highlighted by the Commission) by including foreseeable misuse within the broader context of an unsafe product.

Under the product liability provisions a product is defective if it does not provide the level of safety that the community generally is entitled to expect. This allows for each product to be taken on its merits and lends itself well to the concept of a general safety requirement. The issues that industry would need to consider (under the product liability guidelines) if they are to show a product meets a reasonable level of safety include, inter alia:

- How and why the product has been marketed;
- How it is packaged and advertised;
- The use of any mark in relation to it;
- Instructions for, or warnings about, doing or refraining from doing anything with or in relation to the product;
- What might reasonably be expected to be done with it; and
- The time when it was supplied.

Given that industry may have a degree of familiarity with these concepts it may be more a question of refining existing practices rather than initiating something completely new. How a business manages a GSP could be measured by their application of the following risk management practices:

- Providing clear and concise (non-jargonistic) information to consumers so that they can evaluate the risks associated with the product (e.g., warnings about using protective equipment with power tools, and age grading on toys);
- Regularly testing products to avoid over-reliance on dated test reports;
- Having in place a plan to remove and recall products that slip through the safety auditing process. The scope of this could be dictated by the risk attached to the product. This could also include a plan to inform the respective regulator of safety problems that warrant greater public awareness;
- Having in place a feedback loop to suppliers/manufacturers so they are informed of incidents and can take corrective action. All businesses involved in the supply chain should have a risk management plan to ensure that adverse product feedback is acted upon in a timely manner;
- Closely monitoring safety complaints so that issues can be addressed when they first come to light rather than after a serious event;
- Developing a standard set of risk assessment criteria based around the use and foreseeable misuse of the product; the seriousness of the consequences of a product failure (e.g., extent of injuries) and how likely the consequences are to occur for products that do not have recognised standards applicable to them;
- Building up a technical document database of information on the design, manufacture, construction and use of the products they supply; and
- Having an effective system of tracing products e.g., through use of individual or product codes that can be electronically read. This would, for example, enable a product that has been withdrawn from sale to have the barcode electronically blocked so that it cannot be scanned at the retail checkout.

The introduction of a GSP would take serious commitment by government at the State and Commonwealth level and necessitate the development of closer relationships with industry, consumer groups and testing authorities. The issue is also closely linked with the proposal to move towards a more harmonised product safety system and should not therefore be viewed as an isolated concept.

Lessons can be learnt from overseas experiences in that although there have been criticisms of the European model, it is recognised that it is a fundamentally sound concept and worthy of closer scrutiny in terms of its application in Australia.

The Prevention Principle

It must be remembered that as there is always a user/product interaction for a product related injury to occur then it follows that there may be an element of predicability of the type of injuries that may occur. If the injury is predictable it could then be considered manageable. This may not be the case with the wide-ranging factors involved in transport and workplace related injuries. Further, traditionally, considerably more resources have been allocated to the reduction of transport and workplace related injuries by government and industry than those that have been allocated to general product safety interventions. The argument often presented is that most injuries associated with consumer products are the result of consumer behaviour rather than a faulty product which, as a result, are difficult to prevent and predict. However, this argument also holds true for transport and workplace related injuries.

Another impact on general product related injury is that new consumer products are entering the marketplace on a regular basis with unquantifiable risk attached to them so that direct injury prevention strategies and associated costs are difficult to determine. It could be argued that this lack of an evidence base will not improve until a uniform and properly funded consumer product injury data collection system similar to that used by the Consumer Products Safety commission in the U.S. is developed.

The difficulty in developing an economic cost benefit model for product related injury prevention has also been recognised by the Canadian government and the European Union. However, rather than waiting for injuries and deaths to occur before they make a decision these governments have taken a risk management approach by examining the application of the 'precautionary principle'. What this means is that a lack of scientific data should not necessarily be a reason for a government not to act on issues of public safety and welfare especially when it is known that a problem exists or is emerging.

The precautionary principle, as it might be applied to product safety, recognises that the absence of full scientific certainty shall not be used as a reason to postpone decisions where there is a risk of serious or irreversible harm. Even though scientific information may be inconclusive, decisions have to be made to meet society's expectations that risks be addressed and injuries prevented. The precautionary principle primarily affects the development of regulatory options and is ultimately guided by judgement, based on available evidence, community values and government priorities.

It is recommended that the Commission consider this issue in the broader context of product related injury prevention. Further information on the precautionary principle can be obtained from the documents produced by Health Canada in 2003 when considering the regulatory options associated with babywalkers, and from the issues raised in the paper published in 2000 by the UK National Consumer Council and called 'Public Health and the Precautionary Principle'.

Reform areas that can and should be enacted quickly

The Commission has considered a raft of potential reforms. Some such as a GSP and legislative harmonisation are complex and may take considerable time to finalise. However, there are some areas where reform can be enacted relatively quickly and with a minimum of cost, including:

- Amending the *Trade Practices Act 1974* and the state fair trading acts to include 'foreseeable misuse' in the definition of 'unsafe' when considering action such as product bans and mandatory standards;
 - Ensuring consistent coverage of services relating to the installation and maintenance of consumer products;
 - Improving the information sharing capabilities of regulating authorities;
 - Providing more and better information to businesses on regulatory requirements and targeted information campaigns to consumers and especially those consumers most at risk of product related injury;
 - Make evidence-based hazard identification and risk management central to policy making, standard setting and enforcement; and
 - Mandatory standards and permanent bans should be introduced on a national basis only and follow the principles under the *Mutual Recognition Agreement*. It should be noted that does not reduce the power of the states to act on issues. However, it does mean that long term changes which impact significantly on industry will need to be better justified than at present. This is also recommended by the Commission.
- **A preferred model for the harmonisation of product safety laws**

As pointed out by the Commission there are many forms that a harmonised regulatory system can take. Whereas a single regulator is the most appealing to industry and consumer bodies it may not be the most effective in terms of innovation, ensuring compliance, and educating consumers and business.

Interestingly, the Commission have highlighted that even though legislative inconsistencies between states are not large these do add significantly to industry (and thus consumer) costs. The practicalities in adopting a single or template legislation are difficult but should be considered as the best long-term option. Alternately, the commission should explore further the concept and level of support for core consistent provisions. It is noted in the draft report that core uniform provisions are suggested for:

- The coverage of services;
- Pre-conditions for bans and mandatory standards (e.g., reliance on the principles of mutual recognition);
- Uniform recall powers;
- Notification of voluntary recalls by suppliers to the regulators;
- Uniform time limit on interim bans; and
- Uniform appeal processes.

These core provisions are supported and it is felt achievable in the medium to long term. Ideally these core provisions would also filter down to standardised education strategies directed towards consumers and industry as well as compelling the regulating bodies to work closer towards national outcomes.

The use of evidence-based risk assessment by product safety regulators

A major concern is the lack of consistency in terms of the level of evidence required before an intervention such as a ban or mandatory standard or a serious enforcement action takes place. In fact information suggests that this is the most confusing factor in the current system. It is therefore critical that the rules for product safety regulations and bans be consistent and based on sound risk management practices if reform progress is to be made.

As a minimum all mandatory standards and permanent bans should be subject a Regulatory Impact Statement (RIS). Consideration should also be given to principles established by National Competition Policy, public benefit tests and other risk, management tools such as the precautionary principle.

Further, the RIS's must be consistent across jurisdictions in terms of the rigour used in their development. The guidelines laid down and agreed to by COAG in relation to regulations and standards making should be followed closely. The advantage to this concept is that given the relative homogeneity of the Australian marketplace a RIS undertaken in one jurisdiction could then be used as a justification document throughout the country thus avoiding unnecessary duplication. It is highly likely that industry and consumers would support action based on a transparent risk assessment. It could also speed up the decision making process for when a safety intervention is required.

Thank you for the opportunity to have further input into this important debate. I trust these comments will be seen as constructive. Further information on any of the issues can be obtained by contacting Dave Strachan on 07 330 59610 (or email dave.strachan@dtftwid.qld.gov.au). Mr Strachan will be overseas until 21 November 2005, however he is contactable by email.

I look forward to the final report in due course.

Yours sincerely

Julie Kinross
Commissioner for Fair Trading

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