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Consumer Product Safety  
Productivity Commission  
PO Box 80  
BELCONNEN ACT 2616

## **REVIEW OF THE AUSTRALIAN CONSUMER PRODUCT SAFETY SYSTEM DISCUSSION DRAFT**

Thank you for the opportunity to comment on the Discussion Draft released by the Productivity Commission on the Review of the Australian Consumer Product Safety System.

The Small Business Development Corporation (SBDC) is an independent statutory authority established to assist and promote the growth and viability of the small business sector in Western Australia. The issue of product safety has relevance to small businesses both as consumers of products purchased and as manufacturers, suppliers and retailers of products.

The SBDC appreciates that consumer product safety is a shared responsibility between business, consumers and governments. As such, the SBDC has reviewed the preliminary findings of the Commission with interest and offers the following comments from a small business perspective.

### **Overall position**

The SBDC is broadly supportive of initiatives to strengthen the consumer product safety system in Australia. However, any changes to the system should not place significant additional burdens on small business. That is, care should be taken to ensure that costs to business are minimised and that liability for consumer products and extra reporting requirements are not over burdensome for business, commensurate with the anticipated benefits of the new measures.

In relation to the likely impact on small business, the SBDC provides the following comments on specific options for reform assessed by the Commission.

### **General Safety Provision (GSP)**

In our submission to the Product Safety Review conducted by the Department of Treasury on behalf of the Ministerial Council on Consumer Affairs (MCCA), the SBDC expressed concerns about the overall gain to be achieved from the

introduction of a GSP and did not support such a measure as it would establish an onerous and unnecessary layer of regulation on business. Placing greater responsibility on businesses to ensure only safe products are placed on the market would also impact on both business operations and costs, and could unnecessarily interfere with trade in consumer products, restrict competition and disadvantage consumers through increased costs. Small businesses in particular would be detrimentally impacted by the burdens of additional compliance and administration costs involved in meeting their obligations under a GSP.

The preliminary finding of the Commission, therefore, to not endorse the introduction of a GSP is supported by the SBDC. The SBDC concurs with the Commission's contention that a number of the potential elements of a GSP could be better implemented, with less impact on business and ultimately the consumer, if they were introduced separately. These include extending the definition of "safe" products under consumer product safety legislation to include "reasonably foreseeable misuse", and mandatory reporting of voluntary recalls (discussed below).

### **Harmonise legislation, administration and enforcement**

Given that the introduction of a GSP has been found to be not warranted, the SBDC sees the advantages to small business of implementing measures to increase the consistency and transparency of product safety legislation, administration and enforcement activities of the Australian, State and Territory Governments. Improved harmonisation would provide greater certainty for business, particularly those that trade across borders, and allow regulatory authorities to respond more quickly and cooperatively at the national level to potentially hazardous consumer products.

#### *Legislation*

The SBDC endorses the intent of the Commission's preliminary recommendation to introduce uniform product safety legislation in all jurisdictions to deal with current issues relating to inconsistencies and fragmentation of regulations and administration. The SBDC agrees that, in many cases, businesses devote substantial resources to checking and monitoring the compliance of their product lines with the different legislative requirements that are imposed around Australia.

As such, greater harmonisation of product safety systems within the nine Australian jurisdictions has the potential to reduce compliance costs for business as well as duplication of government resources. The SBDC can see advantages in introducing template legislation that sets out nationally consistent administrative and enforcement guidelines. Such consistency would ensure that businesses were certain about their product safety obligations regardless of where they trade, now and into the future (as all jurisdictions must automatically adopt any future amendments made in a designated parliament).

However, the SBDC is also cognisant of the inherent difficulties and dilemmas associated with developing uniform legislation – including the challenge of reaching agreement from nine separate and often strongly independent jurisdictions and concerns about the promulgation of lowest common denominator legislation.

#### *Bans and standards*

The SBDC agrees with the Commission’s assessment that permanent bans and mandatory standards should be adopted on a national basis. Addressing the existing inconsistencies between bans and standards (such as differences in the scope of products subject to regulatory intervention and inconsistent assessment criteria for the introduction of bans or recalls) would provide substantial benefits to businesses, particularly those that operate in more than one jurisdiction, and would make it easier for governments to enforce them. As a result, consumers should also be better off due to reduced prices of products.

#### *Enforcement*

The SBDC also agrees with the finding of the Commission that benefits would be achieved by greater consultation about, and benchmarking of, enforcement practices between governments with a view to achieving greater consistency in enforcement methods across jurisdictions. The increased consultation between jurisdictions would lead to more effective and efficient enforcement of hazardous products. Once again, this would provide greater certainty for businesses involved in manufacturing, supplying or retailing consumer products.

#### **Foreseeable misuse**

The SBDC accepts the Commission’s assessment that there is a case for “foreseeable misuse” to be explicitly covered in the definition of “safe” under product safety legislation, providing the Minister’s powers to act are appropriately constrained, so as to limit action only to those cases where the behaviour resulting in the misuse of the product is not only reasonably foreseeable but also *not unreasonable*. It is imperative then that the definition of “reasonably foreseeable misuse” is specifically defined so as not to leave it too broad or open to interpretation at the expense of business.

The definition should also take into consideration the degree of control that a business has over the consumer product, that is, more legal onus to provide safe products should be on the manufacturer (or distributor if it is an imported good) than the supplier or retailer of the product.

Achieving greater regulatory harmonisation through template arrangements (as discussed above) would ensure the application of uniform definitions of “safe” and “unsafe” products across jurisdictions and would reduce jurisdictional inconsistencies in relation to taking action to address hazards associated with the use of goods. This would ensure that all Australian businesses have the

same responsibility to provide consumer products that are safe from foreseeable misuse.

### **Revision to coverage**

#### *Services*

The SBDC accepts the Commission's preliminary finding that an extension of the product safety provisions to cover *all* services is not justified. However, the SBDC would go further and not support any extension of coverage to include services specifically related to the supply or maintenance of consumer products on a case by case basis, as proposed by the Commission.

Current Western Australian product safety legislation does not cover services, and any extension of coverage to services would therefore impose compliance costs on those businesses providing such services within the State. The SBDC believes that the existing provisions in the Trade Practices Act and current common law remedies are sufficient and therefore further regulation of services is not supported.

#### *Second-hand goods*

The SBDC does not share the view of the Commission that definitions under the Trade Practices Act and State fair trading legislation should be clarified to explicitly include the treatment of second-hand goods and the responsibilities of sellers. There are practical difficulties associated with enforcing compliance by commercial second-hand dealers in meeting product safety standards, including the cost and efficacy of testing second-hand goods and the lack of detailed product knowledge by general resellers.

Given there is an inherent risk to consumers in buying second-hand goods, the burden of ensuring that the product is safe should not be placed entirely on the commercial seller. The business' ability to guarantee the safety of used goods needs to be balanced against reasonable consumer expectations. Additionally, requiring second-hand goods to be tested against product standards is likely to be impractical and cost prohibitive in many cases. Placing additional obligations on commercial dealers, who are already heavily regulated, may potentially curtail the second-hand goods market for some products (such as electrical items) and lead to the closure of businesses and loss of consumer choice.

A more practical and feasible method of promoting safe product standards for second-hand goods would be to encourage commercial second-hand dealers to provide point of sale information to buyers about what standard they can reasonably expect from the product. This material should also include information on what options are available to a consumer who finds that a second-hand good is unsafe.

## **Provision of information**

The SBDC understands the Commission's view that an across-the-board increase in funding of information or educational initiatives may not be justified on cost-benefit grounds. However, while the SBDC acknowledges there would be substantial costs involved in providing information to business and consumers via a high profile marketing program, there is still a need to promulgate product safety information to the business community and public. In particular, if there are any new changes adopted to the consumer product safety regulatory system, information must be made available to ensure businesses are aware of and fully understand their obligations.

Cost effective ways to achieve this may include using other associations and networks to promulgate targeted information and promote reform initiatives. In Western Australia for example, promotional material could be disseminated via the established small business networks of the SBDC and the State-wide network of Small Business Centres (formerly known as Business Enterprise Centres), as well as through other industry bodies such as local chambers of commerce and trade associations. There are also opportunities to promote the new consumer product safety system through the internet.

## **Requirements for businesses to monitor and report unsafe products**

The SBDC agrees with the Commission's assessment that the benefits that would flow from the introduction of additional reporting requirements on businesses to monitor the safety of their products (and to report any which are under investigation for possible safety risks, have been associated with injury or death, or have been subject to a successful liability claim) are unlikely to justify the costs of implementing and maintaining the system. Such a proposal would add significant administrative and compliance costs to law-abiding businesses and would do little to curb the activities of recalcitrant and fly-by-night suppliers.

As an alternative, the SBDC can see advantages in the Commission's proposal to make the reporting of all products subject to a recall, voluntary or otherwise, mandatory to the appropriate regulator. This approach would improve government information sharing about products that may pose safety risks and may lead to more efficient and effective measures being introduced by regulatory authorities across jurisdictions to respond to product hazards. Mandatory reporting of product recalls would be a low cost option for businesses compared to other alternatives.

## **Removing Unsafe Goods – Product Recalls**

### *A requirement for business to recall unsafe products*

The SBDC endorses the Commission's preliminary finding that providing a formal requirement for businesses to recall products that are found to be unsafe is not warranted at this time. The SBDC supports the argument that there are

already adequate incentives for businesses to voluntarily recall unsafe products, such as the threat of product liability claims or the potential damage to their reputation, and that any formal requirement is unlikely to result in a large number of additional recalls. There is also evidence that there could be significant costs to government in terms of implementing and enforcing the regulation, with little gain expected from introducing this requirement.

#### *Government to audit product recalls*

The SBDC agrees with the Commission's view that, on balance, the benefits accruing from granting government the ability to audit product recalls (in terms of assessing the effectiveness of recalls, whether they had been conducted properly, and whether they had removed dangerous products from the market) are unlikely to justify the costs of establishing an audit process.

The Commission presents a number of sound arguments on why governments should not have this authority (for example, the potential to be held accountable for failure to audit if accidents subsequently ensue), which are supported by the SBDC. It is noted that, as a last resort, enforcement agencies already have the power to order a compulsory recall and direct the nature of the recall if it is suspected that recalls are being undertaken inappropriately.

In addition, the SBDC sees benefits for small business in improving current recall guidelines, as proposed by the Commission. The review of recall guidelines should be conducted with a view to developing nationally consistent recall mechanisms which would provide business with clear and uniform measures. Standardised recall measures would help to cut business costs, particularly for unsafe products that need to be recalled from more than one jurisdiction, by streamlining the process and making product recalls more effective.

#### **Conclusion**

The SBDC recognises the importance of the Australian consumer product safety system to the activities and buying patterns of businesses, consumers and government. The SBDC supports policies that facilitate an effective consumer product safety system for Australia balanced with, as far as reasonably possible, minimal compliance and administration costs for small business.

The SBDC considers that non-regulatory options should be explored as a priority. If regulation is deemed necessary, in certain areas, it should be ensured that costs to business are minimised and therefore ultimately to consumers. Further to this, it should be ensured that any changes introduced are clear, certain and reasonable in all circumstances and that any obligations placed on business be commensurate with the degree of control they have in the process that brings the product to the consumer.

The SBDC appreciates the opportunity to comment on the Discussion Draft released by the Productivity Commission. If you would like further information on

any aspect of the SBDC's comments, please contact Mr Martin Hasselbacher, Policy and Business Liaison, on (08) 9220 0241 or email [hassem@sbdc.com.au](mailto:hassem@sbdc.com.au).

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George Etrelezis  
MANAGING DIRECTOR

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