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Ministerial Council of Consumer Affairs

Discussion paper on the
Review of the Australian Consumer Product Safety
System, released August 2004

**Australian Competition and Consumer Commission
Submission
November 2004**

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The Australian Competition and Consumer Commission endorses the need for review of consumer safety in Australia with a view to *creating a more proactive system*. Australia must look to promoting the tripartite approach to consumer safety, with a *more active role for suppliers*. This must be done in the context of the *global economy*, with an eye to the *competitiveness of Australian business* and *greater protection for consumers*. This includes *reform of the government structure* to find greater efficiencies for government and business.

This submission:

- highlights the complex nature of the consumer safety system - it is critical that system reform is considered as a whole and not done in a piecemeal fashion
- discusses the elements of reform, including:
 - the widespread implications of a general safety provision and its potential to drive a shift in the business mind-set;
 - enforcement powers under a general safety provision, such as the value of civil penalties;
 - questions the need for mandatory reporting; and
 - a limited application of product safety regulation in the field of services.
- suggests some areas of opportunity additional to those in the discussion paper, including:
 - research in product design;
 - consumer education strategies;
 - the use of other sectors, such as insurance; and
 - testing and conformance assessment.

The ACCC strongly endorses the need for comprehensive cost/benefit analyses of policy options being considered in the review – analyses which take into account the full range of benefits and costs to the community and individuals (not simply the financial aspects of the options under review).

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A. *The ACCC's role in Australia's product safety system*

The role of the ACCC in product safety is to:

- Maximise compliance with product safety provisions in Part V Division 1A of the Trade Practices Act (TPA), expressly for standards mandated and bans declared by the federal minister
- Ensure unsafe goods subject to these provisions are removed from the marketplace and recalled where necessary
- Promote consumer safety through awareness of the product liability provisions under Part VA of the TPA, with the aim of:
 - providing redress for consumers and, perhaps more importantly,
 - providing incentives for suppliers to make and sell safe goods.

The ACCC's philosophy that "prevention is better than cure" is paramount in addressing consumer safety. The ACCC takes a proactive approach in achieving compliance with mandatory standards and bans and will take enforcement action where necessary. This is on the basis that in relation to more hazardous products where there is a higher risk of physical injury, more stringent action is required by regulators to protect consumers.

The ACCC conducts random surveys of retail outlets throughout Australia to detect non-complying or banned products, to assess the overall level of marketplace compliance and to liaise with suppliers. While the focus of the surveys is on retail outlets, suppliers up the supply chains are also targeted, plus internet sales and direct marketing. In addition, the ACCC also investigates allegations by consumers, suppliers and consumer representative organisations about non-complying goods.

The ACCC is very active in achieving enforcement outcomes and remedial action in the interests of consumers. These outcomes can range from administrative action, recalls, court enforceable undertakings, injunctions and other court orders.

In addition to providing guidance to suppliers, the ACCC is active in the development and revision of standards, as it is critical for effective enforcement and compliance that the standards remain current and meaningful to suppliers to ensure consumers are protected.

The ACCC liaises closely with all stakeholders, including industry, consumers, standards development bodies and testing agencies and other product safety regulators.

B. The ACCC's submission

Introductory comments

The MCCA discussion paper is a timely review of Australia's consumer safety system as there has been considerable change in the nature of the national and international marketplace since the last major review.

The ACCC's submission summarises the main points and attaches a series of annexures containing more detailed comments on specific topics.

This submission identifies issues and questions associated with the options presented in the discussion paper. Where information was readily available on an issue, the ACCC discusses that issue in some depth. In other/most cases however, this submission seeks mainly to raise points about which further research and analysis are required. This is consistent with the MCCA discussion paper, in that this submission is designed to provide a basis for public consultation and does not explore the reform options in detail.

Overall, the MCCA discussion paper contains a sound assessment of the principles and philosophies of a product safety framework. It examines the framework as a whole and analyses the elements that make up an effective and balanced system from the perspective of the various stakeholders, including taxpayers.

A strategic approach is necessary for governments to effectively manage consumer safety. While government alone is not responsible for achieving consumer safety, it does have a key role in addressing current and emerging issues by the various means available to it and by facilitating actions in other sectors such as consumers and the private sector.

One of the key principles in community safety is that prevention is better than cure. One tenet of government policy should be that its policies and actions should be proactive where possible. The ACCC supports moving from a reactive to a more proactive system. The current system places a great deal of emphasis on government intervention rather than the three-way partnership – with government, business and consumers – operating together.

The hierarchy of risk reduction indicates that the greatest influence in product safety is at the design stage, followed by applying protective devices and providing information¹. Actions by users of the product are the next level down. Therefore suppliers have potentially the greatest opportunity to improve the safety of products and a proactive strategy will be the most effective.

¹ ISO/IEC Guide 51 – Safety aspects – Guidelines for their inclusion in standards

The Productivity Commission's draft proposal² relating to a national review of consumer protection policy is noted in the context of this review of Australia's consumer safety system. Its draft proposal recommends a focus on competitive markets and co-ordination across jurisdictions to avoid duplication.

1. Economic considerations

Global marketplace

Australia is part of the global marketplace, but the current system of product safety takes only limited account of the global nature of trade in consumer goods. A proactive approach to consumer safety, as advocated in this review, must incorporate the realities of the global market and be forward-looking to the medium-to-longer term.

Australia must set its approach to product safety in terms of global competitiveness - creating opportunities and avoiding inhibiting factors. To do so it will be necessary for this review of the product safety system to remove inefficiencies and promote Australian competitiveness and good business practices.

The review process should also consider Australia's special economic relationship with New Zealand.

Cost/benefit analysis

Along with a range of benefits, a number of the policy options raised in the review paper involve significant financial costs to businesses supplying goods to the Australian market, particularly manufacturers and, to a lesser extent, importers. While there is some potential for some reduced costs within a reformed system, the overall cost to suppliers will need to be carefully assessed. Most of the reform proposals also involve significant costs to government.

Costs of course cannot be solely measured on a financial basis. Other costs can be associated with product regulation beyond the direct financial costs. For businesses, these might include costs associated with damage to brand image and restrictions on design and product range. For consumers, regulation may impact for example on the range and price of goods available but much more important are the costs of the emotional as well as individual financial burdens that can arise from injuries - which includes such things as time off work as well as time spent in medical facilities by the individual and their families, plus the pain and suffering associated with injury to the individual.

The ACCC recommends a comprehensive cost/benefit analysis be conducted as part of this review process.

² Review of National Competition Policy Reforms Discussion Draft, October 2004

Competition

Consumers help drive competition and safety is increasingly a key factor influencing consumer behaviour. With a better understanding of the factors that motivate (and demotivate) consumers, business and government can respond more effectively – whether it be in regulatory design, product design or provision of information.

Safety increasingly drives competition from a supplier perspective. A manufacturer that incorporates safety from the outset will gain an advantage not only in marketing, but in reducing the likelihood of sustaining costs associated with selling unsafe goods. In addition to the usual costs such as recalls, a flawed design may require a manufacturer to completely retool. There are economies for suppliers in giving priority to safety.

Opportunities for innovation in the consumer market can be a key factor in business competitiveness. A product safety system that facilitates innovation whilst maintaining effective product safety would enhance Australian business opportunities in the global marketplace.

In his landmark 1990 book, *The Competitive Advantage of Nations*, Harvard University professor Michael Porter wrote that:

It might seem that regulation of standards would be an intrusion of government into competition that undermines competitive advantage. Instead the reverse can be true....Stringent standards for product performance, product safety, and environmental impact contribute to creating and upgrading competitive advantage.

Firms, like governments, are often prone to see the short-term cost of dealing with tough standards and not their longer-term benefits ... Such thinking is based on an incomplete view of how competitive advantage is created and sustained. Selling poorly performing, unsafe, or environmentally damaging products is not a route to real competitive advantage ... especially in a world where environmental sensitivity and concern for social welfare are rising in all advanced nations.

In fact, as Porter points out, good regulation can be good for business and provide those who work with it, instead of against it, with a competitive advantage.

As markets become more competitive, it is necessary to monitor whether the existing regulatory framework facilitates consumer participation in these markets and take appropriate steps where necessary. This is important not just because it serves the purpose of protecting consumers from unscrupulous traders (who exist in both competitive and uncompetitive markets), but also because it enhances and strengthens the development of competitive markets and efficient outcomes. When consumers can make effective choices, markets will operate more competitively. Equally, it may also be necessary to consider whether certain aspects of regulation remain appropriate where a more competitive market environment exists.

However, not all consumer protection policy and regulation is about facilitating consumer choice. For example, rules regarding the safety of certain products such as electrical appliances or toys, laws about microbiological contamination in food or

safety requirements for prescription and other drugs. In assessing consumer protection policy and regulations, it is important to consider the public benefits that arise from them as well as competition issues.

Efficiencies

The ACCC agrees that achieving a more efficient government framework for the administration of consumer safety must be a primary objective of this review. The current system has two layers of government that leads to duplication in policy, legislation and administration. Any new product safety policies in addition to those currently in place would need to find greater efficiency, reducing the inconsistent obligations on suppliers.

A rationalisation of levels of government involved in consumer safety will act to lower compliance costs to business. Maintaining the existing state-federal system involves considerable duplication and is therefore also an imposition on the taxpayer.

Government structure

Australia needs a system that is supportive of efficient markets and makes it easier for industry (both domestic and international) to comply with a safety regime. The ACCC supports a single product safety regime to ensure businesses do not have to deal with multiple agencies. A single product safety regime would reduce duplication and therefore be a better use of government's limited resources. Options could include single entity or uniform legislation with joint jurisdiction (discussed further under Harmonisation of administration and enforcement).

National infrastructure

Australia also needs to ensure there is sufficient infrastructure to support and build the community's capacity for improving consumer safety. Such infrastructure includes technical expertise and facilities to support the needs of business. A subset of this is technical education and research facilities. While facilities may be available off-shore, particularly in Asia, there may also be value in promoting the development and maintenance of services in Australia that can cater to the local and international market.

Development of standards is another important aspect of infrastructure. As a developed country, Australia has often taken the lead in setting standards for product safety and must continue to participate effectively in this work on an international level.

Education of consumers so they may participate more effectively in consumer standards and policy would also be valuable.

2. General Safety Provision

It is time to consider the need for a general safety provision. While the Trade Practices Act provides a number of proactive and remedial measures to address unsafe goods, a new law prohibiting the sale of unsafe goods would provide greater protection.

The potential advantages of a GSP include:

- that it does not require an injury to occur before action can be taken (as does product liability).
- driving the supply sector's consciousness, awareness and mind-set of safety in all aspects of products' pre-, during and post- production. A GSP could be the most effective driver of a shift in mindset within the business community to:
 - a) become pro-active in the supply of safe products
 - b) better understand the potential influence suppliers can have over the safety of their products
 - c) better understand their obligation to supply safe goods.

If a GSP is to work effectively, then careful consideration needs to be given to the remedies that should apply to a breach of a GSP, and the administrative responsibility for enforcement.

In formulating an approach to identifying appropriate remedies and enforcement mechanisms for a GSP, it is necessary to have regard to (a) achieving a strong deterrence effect and (b) ensuring that the penalty scheme put in place is consistent with community notions of fairness and justice.

As a general duty not to supply unsafe products, a GSP would be inherently broader in scope than Part VA, which only provides that a manufacturer may be liable where loss or damage has been suffered in a particular case. However, without sufficient additional "teeth" to enforce a GSP, in practice the introduction of a general duty may have little or no impact on the current behaviour of businesses.

The availability of remedies other than (or in addition to) penalties would be an important driver of compliance with a GSP. Having a wide range of remedies would assist enforcement agencies achieve better compliance.

The widespread implications of introducing a GSP justify a full and thorough cost-benefit analysis to fully assess the impact of such a policy.

Refer to **Annex 1** for further comments on the framing of a GSP and its enforcement.

3. Reporting

The ACCC agrees with the points made on reporting requirements in the discussion paper. While some potential benefits may be available through this type of requirement, the costs, benefits and limitations need to be closely examined, quantified and analysed in determining the value of such a measure.

The paper also rightly points out other issues raised by this concept, including new obligations on government. There are many implications for government, all requiring careful and comprehensive assessment.

Many suppliers already act quickly to remove potentially unsafe goods from the marketplace and perhaps current incentives (combined with possible new policies) alleviate the need for a reporting requirement.

See **Annex 2** for further comment on this topic.

4. Supplier Education

A supply sector that knows and understands its role in producing safe products is critical to achieving improved consumer safety. An increased role and responsibility by suppliers will involve both a cultural shift and a need for guidance.

Supplier education should include:

- Why safety is important and their role in achieving it
- How to make safe products – general approach, risk assessment
- Specific technical advice, eg. standards
- Systems, eg. recalls, quality assurance, customer feedback
- Compliance obligations
- Where to get assistance

All material would need to be easy to access and comprehend.

Certainty is a key factor to enable suppliers to proceed confidently with their business. Suppliers, producers, distributors, manufacturers, traders and any operator involved in the supply chain before a consumer receives the good/service must not only beware but understand the product safety system in which they operate and know where to go for assistance. Guidance material can be produced not only to inform, but for reference when considering remedial actions.

While confidence is important, an example of business's ability to work without precise boundaries is the misleading and deceptive conduct provisions of the Trade Practices Act. These provisions are generally understood and met by companies.

The change in role for suppliers would place an essential role on representative organisations, such as industry associations. Such organisations understand the needs of their members and can help foster change.

A support system would also be needed within the private sector to provide consulting services to suppliers. Expertise in product safety – including risk assessment,

technical advice, quality management, production systems - would all be required to support businesses in their bid for compliance with new provisions.

5. Revised definition of unsafe goods

Relaxing the 'will or may cause injury' restriction on bans and compulsory recall orders makes sense as it simply removes the requirement for the actual product to *cause* the hazard. Several instances have occurred where the product itself is not the cause of the injury but more of a conduit to accessing the hazard.

Such a change is unlikely to give rise to calls for unnecessary intervention. Even if that were the case, the procedures that usually apply to regulatory intervention should provide effective balance.

6. Services

Amending the product safety provisions of the Trade Practices Act (the Act) to include 'services' and enabling States and Territories to draw down the provisions could increase protection of consumers.

The most appropriate option at this stage would be to limit any service safety provisions to apply to those services related to products, for example, the supply, installation and maintenance of certain products such as consumer household items. This threshold is more appropriate than to extend the provisions to a range of different consumer services.

Governments could then ban certain services considered unsafe and introduce safety and information standards designed to ameliorate the dangers inherent in the provision of other services. This would realise benefits for services relating to potentially dangerous products.

See **Annex 3** for further comment on this topic.

7. Second hand goods

The ACCC agrees with the need to address the coverage and handling of second-hand goods within the regulatory scheme for product safety. An agreed approach by all jurisdictions is necessary to enable a fair, considered and even-handed way of dealing with this important part of the Australian retail market. When setting standards, realistic consideration should be given to the ability of second-hand goods to fully comply.

Second-hand goods occupy a significant portion of the Australian market and are essential for many consumers, but there are many issues associated with maximising their safety. A number of strategies are possible to address these issues and a multi-faceted approach is needed, including guidance for suppliers and consumers and regulation that takes account of the practical issues.

See **Annex 4** for further comment on this topic.

8. Consumer education

Consumer education is a critical element of improving consumer safety. Education in assessing and managing risk is not specifically covered in the paper. The paper mentions creating an obligation on suppliers to better inform consumers on safe use. In the ACCC's view there are also benefits in providing consumers with a better understanding of risk management.

The paper notes there is a variety of ways to deliver product safety information to stakeholders, but the ACCC believes that consumer safety awareness needs to be developed as a long term strategy and that this is an important role of government.

Annex 5 discusses a number of approaches to consumer education.

9. Support systems and infrastructure

As part of a strategic approach to consumer safety, this review should look at broader issues that impact on policy and operations and at new measures to address problems. Such issues include:

- Early warning system
- Research
- Central database
- Testing facilities and technical expertise
- Standards development
- Insurance sector and occupational safety

Annex 6 provides details of these issues.

10. Recall audits

The power to audit recalls would potentially be a valuable tool for product safety regulators, although the need to employ such a provision may be infrequent. Regulators' discretion should be used to determine the need for an audit of any particular recall exercise, based of factors such as the nature of the hazard, nature of distribution and the supplier's level of co-operation. Use of such a provision on a risk management basis should minimise the costs to government. Consideration could also be given to the possibility of appointing independent third-party auditors at the cost of suppliers.

See **Annex 7** for further comment on this topic.

11. Harmonisation of legislation, administration and enforcement

As noted above, Australia needs a system that is both supportive of efficient markets and easier for industry (both domestic and international) to comply with a safety regime. The present system of legislation, enforcement and administration across many Australian jurisdictions is complex. This review presents a genuine opportunity to reform the present system to improve Australia's competitiveness in local and international trade as well as enhancing consumer protection.

Some consider that administrative inconsistencies between jurisdictions have a greater impact than the legislative differences.

The ACCC supports a single product safety regime to ensure businesses do not have to deal with multiple agencies, which would reduce duplication and better utilise government's very limited resources.

It is premature to nominate a model for the legislative approach at this stage of the review process. The model adopted will need to take account of any new policies that are developed as part of the review as they have the potential to impact upon the respective roles of the federal, state and territory agencies.

This is particularly the case with a general safety provision. The states have an existing role investigating one-off hazardous products; if GSP is brought in under the Trade Practices Act, respective roles between the Commonwealth and states and territories would need to be reviewed.

12. Decision making at the Commonwealth level

It is both appropriate and necessary to review the current administrative arrangements. However, the most suitable arrangements at Australian Government level will be best considered when this review has resolved which, if any, new policies will be introduced as part of a revised consumer safety system. In particular, a general safety provision would have considerable influence on the respective roles of federal (and state/territory) agencies.

13. Additional comment

There are some aspects of the product safety system that have not been canvassed in the discussion paper. These issues have the potential to improve the efficacy of consumer safety policy and enforcement. The ACCC has not formed any concluded view on these issues, but believe they should be considered as part of any review of the Trade Practices Act provisions.

Point of sale specifications

A number of current standards incorporate requirements for provision of information at point of sale, including children's nightwear flammability, cosmetics and care labelling. However the situation as it applies to these standards in the case of indirect marketing, such as mail order and internet sales, is less than clear and should be considered in the review to ensure consumer protection.

Utility of the recalls database

The Recalls Australia website is an initiative of Treasury's that has been very well received. It provides an excellent resource for products that have been 'recalled' as notified to Treasury under s. 65R. Section 65R applies only to 'voluntary' 'recalls'. This essentially excludes recalls that are ordered under s. 65F or by a court. It also leaves out any actions by companies to withdraw products if they challenge the term recall (which is not defined). It would be worth examining these issues as part of the review. In the present system, consumers cannot rely on the database as being comprehensive.

Preventing re-supply of unsafe goods

The Trade Practices Act currently provides that goods in breach of mandatory standards can not be supplied or exported. However, to limit the risk of future supply, it may be useful to consider including powers to order that goods be disabled or destroyed.

List of annexures

1. General Safety Provision
2. Reporting
3. Safety of services
4. Second hand goods
5. Consumer education
6. Support systems and infrastructure
7. Recall audits

General safety provision (GSP)

General comments

Benefits

While the Trade Practices Act provides a number of proactive and remedial measures to address unsafe goods, a new law prohibiting the sale of unsafe goods would provide greater protection.

Unlike product liability, a GSP does not require an injury to occur before action can be taken. This has obvious benefits in terms of consumer safety, but also increases the risk of costs for suppliers that sell unsafe goods.

A GSP also has the potential to drive the supply sector's safety consciousness, awareness and mind-set in all aspects of products' pre-, during and post- production. In that sense a GSP could be the most effective driver of a shift in mindset within the business community to:

- becoming more pro-active in the supply of safe products
- gaining a better understanding of the potential influence suppliers can have over the safety of their products
- understanding the obligation to supply goods that are safe.

The ACCC agrees that a further benefit is, compared to mandatory standards, a GSP can provide greater flexibility and opportunities for product innovation. However, suppliers would need to understand the nature of their obligations lest they feel more constrained to comply with standards and become risk averse.

Reliance on mandatory standards to regulate product safety has some limitations and constraints. Mandatory standards impose very specific obligations on suppliers and how they design and make their goods. Along with other stakeholders, the ACCC invests considerable time to ensure each mandatory standard provides as clear and effective a coverage as possible. A GSP has the potential of reducing reliance on mandatory standards, with the potential benefits of greater flexibility for suppliers and reduced need for government involvement in the design of standards but with the potential burdens of additional compliance costs for business, especially small business (in ensuring their products meet requirements while having less guidance from a detailed standard), and potentially greater difficulty in consumers knowing how to choose in the market (transactions costs increase with product diversity especially in the absence of labels, for example, indicating compliance with a mandatory standard).

There are many elements that make up an effective product safety management system. They apply to all stages of a product's life and demand the involvement of many normally separate segments of a company's operations. Effective product safety management should be viewed as an integrated system - many elements dependent on one another to work well. Design is the most important element, but this must be

considered in the context of marketing and must be monitored in light of feedback. A GSP should take account of the various elements involved in product supply if it is to provide the necessary incentives to suppliers.

Similarly, safe use can be influenced by the effective provision of information including warnings and instructions for use and maintenance. The ACCC considers that including such elements in assessing a product's safety is worth considering as it will help raise suppliers' awareness of the need for effective information and promotes consumer education.

Would a GSP change things much? It might be argued that the top proportion of the market already makes its goods to optimum safety; the bottom end tends to pay safety scant attention (even flouting bans and mandatory standards) and the middle segment has a fair go at doing the right thing. One theory is that while a GSP may not change much at the top and bottom ends, it is the majority of suppliers in the middle that would improve their attention to safety to a significant extent and therefore provide a substantial overall improvement in the market.

Costs

A GSP would of course involve significant costs to suppliers and government, associated mainly with promoting and achieving compliance. Implementation would need to be very carefully planned and executed. By applying an all-purpose requirement across virtually all consumer goods, companies would need to come to terms with the practical implications for their operations. The impact on government would also be substantial, especially in the introductory stages. This would all require adequate planning and resourcing. All businesses involved in the supply of consumer goods, across all levels of the supply chain, will need to be educated on their new role and responsibilities.

Whichever suppliers are affected, they would need a fair and adequate lead time. This is especially so for small businesses with limited resources to determine the nature of any new obligations. They would also need major assistance in the form of education to understand the nature of their new obligations and risks. Allowance would also need to be made for the surge in demand on test facilities and technical advisors. The implementation process is critical if a GSP is intended to create a new mind-set in suppliers in which the notion of their having primary responsibility for product safety is understood and adopted.

In principle, the ACCC supports the objective of reducing the need for mandatory standards. Our experience in implementation and enforcement of mandatory standards has shown they always contain some bureaucratic and interpretational elements that impose additional costs on suppliers and government. This is compounded where standards are not uniform across jurisdictions. However, we feel the extent to which a general product safety provision is likely to reduce the need for mandatory standards is limited. Mandatory standards would still be needed for high risk products as a complement to a GSP.

The paper notes the prospect of a GSP giving rise to pressures on government to act on alleged breaches. A 'level playing field' is important in government regulation and

suppliers are likely to complain to enforcement agencies if they consider their competitors are not taking adequate steps to fulfil any GSP obligations. Therefore a GSP would create a considerable amount of new, ongoing investigation work for the government additional to the necessary supplier education.

Cost/benefit analysis

A GSP on any scale would involve a major change for Australian business. The paper acknowledges the need for detailed assessment of the proposals in terms of the costs and scope. The actual benefits of the proposals have not been quantified in the paper and the costs to government/s will be a major determinant of their viability. A GSP would involve significant costs to government. Reform of this nature is only viable if adequate funding is established.

Application/scope

Products

The ACCC agrees that comprehensive cover would be important for a GSP, although as a number of other product categories are already covered by regulation, it may be inappropriate to impose *additional* requirements on them. Goods such as food, therapeutics and pharmaceuticals may be adequately covered through existing means and further regulation may potentially lead to bureaucratic duplication and therefore over-burden for suppliers and government.

It is notable though that in some cases, goods subject to partial regulation by specialist agencies tend to fall through the cracks of the current system when a safety problem emerges that is not properly covered by the regulation itself. This review may provide an opportunity to address this issue, whether through a GSP or by other means.

There is strong argument for keeping the regulation of certain goods as the responsibility of departments and agencies that specialise in each sector. If a GSP covered goods already regulated, could specialist agencies administer and enforce it within their jurisdiction? Clarity of coverage would be important if business is to properly understand its obligations.

A GSP may also introduce issues of demarcation of the coverage of goods between consumer goods used in normal household applications and those used in commercial and industrial applications, giving rise to demarcation with occupational health and safety authorities.

Supply chain

For a product to be safely used, consumers need to understand how it is intended to be used. Ambitious marketing that exceeds the original intention of the designers can give rise to unrealistic expectations of the product and hazards that the designer may not have anticipated. This is within the realm of responsibility of both the manufacturer and those further down the supply chain.

The product safety scheme currently under the Trade Practices Act particularly in relation to mandatory standards, applies to all levels in the supply chain. That is, all levels are required to ensure the goods they sell comply with the standards. Defences under the Act provide appropriate balances to take account of the different levels' capacity to influence safety and undertake assessments. This arrangement aids compliance considerably as conscientious companies down the supply chain can ensure compliance on a wide scale. The ACCC's enforcement policy takes account of the differing roles within the chain, but expects all companies to meet their obligations³.

The ACCC believes consideration should be given to applying a GSP across the whole supply chain, with balances such as defences incorporated to reflect the respective roles of different suppliers.

Definition of safety

The standard of safety for a GSP should be set in the context of the overall consumer safety system. All factors that contribute to safety need to be balanced to provide a practical level of safe use. Guides such as ISO Guide 51⁴ provide useful discussion of these factors, but it would also need to take account of local factors.

Setting the level of safety

To optimise the safety of goods sold in the Australian market, suppliers must seek to minimise hazards in all aspects of the manufacture and selling of their goods. While suppliers will need to weigh up any additional costs, a key purpose of a GSP is to provide suppliers with incentive to improve the level of safety of the goods they sell and this can only be achieved through an approach that includes all aspects of a product's safety.

Scope of the definition

Some general principles are available to suppliers and government to apply in the consideration of product safety. The safety of products involves a number of key elements. The ACCC believes it appropriate to consider not only the intended user (user fit) but also for a product to be safe within its intended environment (environment fit). These considerations incorporate the concept of intended use and foreseeable misuse.

One example is that of prams being used to hold sleeping children. While this may not be the primary intended use of a pram, consideration of this as a potential use/misuse by the designer can avoid the prospect of an incident that imperils the child.

Safe use can be influenced by provision of information including warnings and instructions. The ACCC considers that including such elements in assessing a product's safety is an important element in assessing product safety.

³ ACCC brochure – Consumer Product Standards and Bans – A Compliance Guide for Suppliers

⁴ ISO/IEC Guide 51 – Safety aspects – Guidelines for their inclusion in standards

Voluntary standards

The means of assessing the safety of a product would probably largely rely on voluntary standards if they are available. These could be Australian or overseas standards. If no product-specific standard is available, a standard for a comparable product could be used. In some cases no standards will be available. Whichever is the case, issues of interpretation would present issues for enforcement agencies, testers and suppliers.

Currently, prior to standards being mandated, they face close scrutiny and are often varied to maximise enforceability and protection to consumers. Such influence is limited for overseas and international standards, which may present some interpretation issues for suppliers and regulators.

Private interests involved in the development of standards can lead to standards that are anti-competitive. A greater reliance on published standards may create opportunities for anti-competitive behaviour. It may be necessary to develop strategies to address such possibilities.

If either Australian or overseas standards were used as benchmarks to assess the safety level of a product under a GSP, issues of availability, accessibility and appropriateness of some standards may arise for both suppliers and enforcement agencies. Should relevant standards be restricted to standards published by prescribed standards-making organisations such as Standards Australia, ASTM, National Standards of Canada, ISO or other European or British organisations or could any published standard apply?

On the other hand, the introduction of a GSP may encourage the harmonisation of standards worldwide. For example, there is an increasing trend for both voluntary and mandatory standards in Australia to be based on or take account of overseas standards for certain products.

Compliance with voluntary standards is only one factor to be considered in assessing the safety of a product and a GSP would need to take this into account.

The ANU *Centre for Competition & Consumer Policy Project, Competition and Consumer Laws in a Global Market*⁵ notes the EU example:

“... where much standard setting is common throughout the EU and is effectively private standard setting within a loose legislative framework. In other words, standardization can be industry driven, with appropriate consumer and government input and monitoring. The EU regime effectively creates a hierarchy of standards under which vertical legislative rules at EU or national level take precedence, followed by EU or national private standards and only in the absence of such specific standards do enforcement officers and the courts have the broader discretion to determine whether products comply

⁵ ANU Centre for Competition & Consumer Policy Project 2, *Competition and Consumer Laws in a Global Market*; <http://www.cccp.anu.edu.au/projects/project2.html>

with safety standards against the criteria of general safety requirements which balance risk and practicality in reducing risks.

The bias of the EU regime is towards harmonization through EU legislation and privately set standards and it would be instructive to compare this with the more diffuse pattern in APEC. Greater diversity in standards in a selection of the APEC standards could yield a variety of different results in theory. A race to the bottom might be observed as countries competed to attract mobile manufacturing firms with lower standards, or there might be evidence of international policy entrepreneurship through NGOs and international organisations creating a pattern of de facto harmonisation. A third possibility is that the capacity to operate diverse standards results in some policy innovation with higher standards than the norm across some product fields. Differing standards can act as form of trade protectionism and hence the matter is at the interface of trade/competition and consumer policy. The Hong Kong approach to toy safety standards, which recognises EU, US and ISO standards explicitly in its law may be an interesting model to examine in its practical operation.”

Evidence of safety

ACCC has not yet had an opportunity to properly study the various approaches to establishing the safety of goods. We would however seek a system that provides as much objectivity in the assessments as possible, for the benefit of both enforcement agencies and suppliers.

With regard to giving weight to different types of evidence, current Trade Practices Act defences for product safety offences strike a sensible balance in respect of suppliers' abilities to ascertain compliance. They refer to reasonable reliance on information provided by others. This prevents suppliers from attempting to absolve themselves of their responsibilities by relying fully on other parties such as test companies without some level of check into, say, the qualifications of the tester. The general approach gives some emphasis to due diligence on the part of all in the supply chain in taking responsibility for supplying safe goods.

Enforcement and penalties

If a GSP is to work effectively, then careful consideration needs to be given to the remedies that should apply to a breach of a GSP, and the administrative responsibility for enforcement.

In formulating an approach to identifying appropriate remedies and enforcement mechanisms for a GSP, it is necessary to have regard to (a) achieving a strong deterrence effect and (b) ensuring that the penalty scheme put in place is consistent with community notions of fairness and justice.

As a general duty not to supply unsafe products, a GSP would be inherently broader in scope than Part VA, which only provides that a manufacturer may be liable where loss or damage has been suffered in a particular case. However, without sufficient

additional “teeth” to enforce a GSP, in practice the introduction of a general duty may have little or no impact on the current behaviour of businesses.

The availability of remedies other than (or in addition to) penalties would be an important driver of compliance with a GSP. Having a wide range of remedies would assist enforcement agencies achieve better compliance.

One way to achieve a greater deterrence effect in practice is to make the GSP a contravention of the TPA itself. This would attract, at the very least, the range of remedies available in relation to similar contraventions of consumer protection provisions of the TPA, rather than rely solely on liability for an action in damages under the existing Part VA. This would provide a greater deterrence effect for potential offenders, and provide a range of remedies more appropriate to combating unsafe products.

If the breach of the GSP constituted a contravention of the TPA, it would have the following consequences:

- The ACCC may take action against a contravention of the provision. This may increase the deterrence effect of the provision, as potential offenders would perceive (correctly) a greater likelihood of detection and prosecution from the ACCC than it would from private litigants.
- The range of remedies available would be broader than compensatory loss or damage and may include injunctions, declarations, corrective advertising and other remedial orders. This would be more effective in stopping harmful conduct, rather than just compensating consumers for the damage after the event.
- The ACCC would be able to resolve matters by way of s 87B undertakings to facilitate speedy, strategic and flexible solutions to particular issues.
- Actions may be less complex, expensive and time consuming, as it would only be necessary to prove a breach of the GSP, rather than actual loss or damage in relation to particular persons.

This would effectively mean that any supply of unsafe products would be subject to scrutiny by the ACCC and subject to similar penalties to the breach of a mandatory standard or ban.

If GSP is a contravention of the TPA, what penalties should be available?

As outlined above, if a GSP is introduced under the TPA, a wider range of remedies than is currently available under Part VA would be available - notably, injunctive relief and other remedies available for breaches of other consumer protection offences under the Trade Practices Act.

Imposition of civil penalties

Currently, a contravention of the consumer protection provisions of the TPA, including breaches of Part V Div 1A (product safety standards and bans) do not attract civil pecuniary penalties.

The ACCC believes that it is important to retain the possibility of criminal penalties to deal with a small number of cases that may warrant criminal sanctions. However, because the number of criminal matters taken will (by necessity) be small and the processes of a criminal investigation are slow, this has obvious limitations and does not provide sufficient deterrence by itself.

This issue would be particularly relevant in relation to a GSP. Clearly, one of the most important factors in dealing with product safety issues is to get the contravening products off the market as soon as possible. Criminal investigations, while delivering a severe message to offenders and potential offenders, are by their nature long and complex. A long, complex criminal investigation is therefore not going to be an appropriate mechanism in many cases involving unsafe products. At the same time, injunctive relief and civil actions for damages may not provide sufficient incentive for traders to comply with product safety provisions.

Accordingly, for a GSP to have sufficient deterrence to be effective, civil pecuniary penalties should apply to breaches of the provision.

Consumer redress

Under the current provisions of the TPA, the ACCC does not have the ability to obtain compensation or other forms of redress for consumers unless those consumers are parties to the proceeding, or have provided written consent to be represented by the ACCC in a representative action pursuant to s 87 of the TPA. The clearest example of the limitations this places on the ACCC to obtain legal redress is demonstrated in the recent case of *Cassidy, CEO of ACCC v Medibank Private Ltd* (High Court: M176/2002 (20 June 2003)).

The ACCC doubts the adequacy of leaving issues of compensation or other remedial orders to private action in all circumstances. This issue may be of particular relevance to a GSP.

Other remedies

The role in relation to recall orders would need to be considered. It would probably make sense to locate this with the enforcement agency.

Administrative roles

The roles of the product safety agencies at the Commonwealth level would require consideration in terms of the speed and utility of actions available under the various remedial avenues. As speed is often important for unsafe goods, the respective roles under a GSP would need to take account of the practical opportunities and impediments in achieving remedies.

Reporting to Government

The ACCC agrees with the points made on reporting requirements in the discussion paper. While some potential benefits may be available through this type of requirement, the costs and limitations need to be closely examined. Both the benefits and costs must be quantified and analysed to determine the value of such a measure.

The paper also rightly points out other issues raised by this concept, including new obligations on government. There are many implications for government, all requiring careful and comprehensive assessment.

It should be noted that this appears to be a resource-intensive function for government and such a scheme would be quite costly to both government and business.

Many suppliers already act quickly to remove potentially unsafe goods from the marketplace and perhaps current incentives (combined with possible new policies) alleviate the need for a reporting requirement. Recall statistics in the period since 1992 (when the product liability provisions were inserted as Part VA of the Trade Practices Act) are indicative of this.

Compliance and enforcement of a reporting requirement may not be particularly efficacious. It is likely that companies that willingly comply with the requirement are those that would normally seek to ensure good product safety management. Those that fail to report are the companies that pose the greatest risk. Even if one recalcitrant is detected, it may not mean the next one would change their behaviour. Enforcement agencies could spend many resources monitoring good corporate citizens with little effect on the bad ones.

Guidelines for business would be essential in such a requirement and indeed may partially address some of the issues raised. ACCC believes a threshold for reporting would need to be established to mitigate against hazards being reported that may unnecessarily burden suppliers and government.

Government agencies would also need their own protocols to ensure appropriate and consistent actions.

Overseas requirements

Mandatory reporting requirements have been in force in the US for some time, have been introduced by the EU and are still under consideration in Canada and the UK.

US

The Consumer Product Safety Commission (CPSC) is the federal body in the US and has responsibility for the Consumer Product Safety Act 1972 and several other Acts relating to hazardous products. Section 15 requires firms to report violations of standards and bans issued under the Consumer Product Safety Act. CPSC also administers standards and bans under other laws but violations of those are only reportable if they present a risk of serious injury.

The CPSC employs approximately 480 people. Last advice from the Director of the Legal Division was that they have a staff of around 13 compliance officers and a number of attorneys who spend most of their time investigating problems that should have been reported or working with firms who have reported. They also have various technical experts to support this work.

Suppliers can be reluctant to report serious hazards for a number of reasons:

- product liability exposure
- don't wish to acknowledge a problem as it might weaken their side of a potential lawsuit
- recall costs
- an aversion to government intervention

Canada

Advice from a Senior Policy Analyst, Product Safety Programme, Health Canada is that Canada is still analysing and reviewing mandatory reporting and no decisions have been made at this point. Canada plans to develop various options by February 2005.

UK

The UK does not appear to have progressed very far in consideration of possible mandatory reporting requirements. Discussions continue between local authorities, central government and industry. Advice received from the Policy Officer – Product Safety, Local Authorities Co-ordinators of Regulatory Services (LACORS), states:

- mandatory reporting is still under consideration
- if introduced, there will be a threshold for reporting in relation to the seriousness of the hazard but this is still being discussed with industry
- it is not clear what action government would be required to take once notified, but any action by government would be by the local authorities.
- no decision has been made on who would run the investigation or how it would proceed

EU

- The requirements of Directive 2001/95/EC - General Product Safety Directive have been reviewed and included in the changes made is a requirement on suppliers to notify enforcement authorities when they become aware of dangerous products

Safety of Services

The ACCC agrees that amending the product safety provisions of the Trade Practices Act (the Act) to include 'services' and enabling States and Territories to draw down the provisions could increase protection of consumers. It would allow all governments to ban certain services considered unsafe and to introduce safety and information standards designed to ameliorate the dangers inherent in the provision of other services. The ACCC agrees that particular benefit would be realised in relation to services involved with potentially dangerous products.

Consumers do receive a measure of protection in relation to services under the common law (negligence) and provisions such as *section 74 - Warranties in relation to the supply of services* of the Act; although it is worth noting that the scope and coverage of such protections have been subject to a degree of scrutiny and amendment through the professional indemnity and public liability debate recently, particularly in relation to recreational services.

It is worth noting the EC Report [SEC (2003) 625] (the EC Report)⁶ notes there is a substantial lack of data and information on the risks and safety aspects of services in the European Union.

Obligations to provide 'safe services' would be more readily enforced if they are supported by clear Australian or international standards. That is, when the legislation clearly defines 'safe' and 'unsafe', including by reference to standards and/or which lists generic criteria by which the court will assess the safety or otherwise of a particular service. The EC Report notes that the actual safety level of a service is basically determined by the aggregate effects of a number of main components (p.7). The main components identified by the EC may provide a useful basis for further discussion.

A wide variety of sectors in Australia are subject to sector-specific service safety legislation, including the accommodation, building, installation of gas, electricity and particular products, fire protection, food, negligence, OH&S, rental services, repair services, sports and leisure and transport sectors. As with the EU, these sectors merit specific regulatory scrutiny due to the potentially high-risks involved in lapses in service safety. Careful consideration must be given to issues of regulatory overlap and appropriate demarcation of responsibility between this legislation and any proposed 'service safety' obligation under trade practices law.

There may be consumer benefits in developing safety information standards (for business to provide to consumers) to ameliorate dangers inherent in provision of services, especially services related to potentially dangerous products. The ACCC sees some merit in obliging business to fully inform consumers of the risks foreseeable relating to goods they supply when the supply involves a service element which may materially affect the safety of the goods. Business should generally be

⁶ Report from the Commission to the European Parliament and the Council: on the safety of services for consumers. Commission of the European Communities, Brussels, June 2003. EC Report [SEC (2003) 625]

obliged to inform consumers about serious risks connected with the service they provide.

Provisions could include obligations on service providers to implement safety management procedures in their business operations. Such obligations could include: to identify and assess risks, to take reasonable measures in order to prevent damages to health and safety, to establish internal control systems to ensure systematic and safe organisation of the activities and to establish emergency procedures. Internal control measures should be adapted to the nature, activities, risks and size of the enterprise to the extent required by the legislation – to avoid disproportionate obligations for SMEs.

The issue of whether these safety and information standards could best be developed by business or government, by Standards Australia, or by some other combination, merits further attention and is perhaps best decided according to the risks implicit in the design, characteristics of use and performance of the particular service. Discretionary issues involved in assessing these risks and determining the approach to take to ameliorate them also merit further attention.

The ACCC suggests the most appropriate option at this stage would be to limit any service safety provisions to apply to those services related to products, for example, the supply, installation and maintenance of certain products such as consumer household items. The ACCC believes this threshold is more appropriate than to extend the provisions to a range of different consumer services. *Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety* at Chapter I, Article 2 (a) includes such a threshold:

‘(a) “product” shall mean any product – including in the context of providing a service – which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned.’

The ACCC considers that relevant authorities (including other national and state/territory agencies besides the ACCC) should have appropriate compliance and enforcement powers under any service safety provisions. Information sharing between regulators, including sharing of information provided under compelling processes, in relation to service safety standards would also be of benefit to ensure consistency in regulation and to facilitate appropriate enforcement responses. The ACCC is also supportive of maintaining the private right to take action for service safety breaches as per the current product safety provisions.

While businesses (in particular SMEs) may face some burden implementing service safety proposals, it may be worth considering whether failing to implement a level of protection commensurate with the EU, US, Canada etc, may impact on Australian businesses’ international competitiveness.

Enforceability of any service safety provision requires supporting Standards related to service delivery. There are few International, or national standards regarding service delivery. The COPOLCO '*Framework of Consumer interests in the preparation of standards for services*'⁷ outlines, among other things, the elements of services from the standpoint of consumers and a raft of possible services standards topics and elements which will facilitate rapid development of standards. COPOLCO's working groups in the Tourism and Financial Services industries will also provide useful starting points. But COPOLCO notes that any individual international standard concerning consumer services will take approximately four years to develop.

⁷ International Organisation for Standardisation (ISO) Consumer Policy Committee (COPOLCO), March 2003. **A framework of consumer interests in the preparation of standards for services.** [Working Draft]. Annex to COPOLCO 20/2003, at ISO/COPOLCO Workshop, Bangkok, 9 September 2003, 'Consumer confidence and the role of standards – Principles and ethical practice'.

Second-hand goods

The ACCC agrees with the need to address the coverage and handling of second-hand goods within the regulatory scheme for product safety. The Commission believes that an agreed approach by all jurisdictions is necessary to enable a fair, considered and even-handed way of dealing with this important part of the Australian retail market.

Second-hand goods occupy a significant portion of the Australian market and are essential for many consumers, but there are many issues associated with maximising their safety. A number of strategies are possible to address these issues and a multi-faceted approach is needed, including guidance for suppliers and consumers and regulation that takes account of the practical issues.

While this sector of the market is entitled to consumer safety, a cost/benefit analysis must weigh up the availability of affordable goods against potentially unattainable safety standards.

One possibility that could be explored is the imposition of some additional obligations on dealers through a licensing scheme, or at least using that scheme to improve dealer self-regulation and education.

The ACCC also endorses the idea of actively discouraging the sale of those goods where compliance (and more particularly, safety) cannot be gauged with confidence. The ACCC supports the development of a strategy with this objective (see US CPSC proposal below).

Mandatory standards

Consideration must be given to the implications for second-hand goods when setting and revising standards. There is good argument for giving special consideration to the requirements for second-hand goods and varying a standard to allow for the practical difficulties associated with their sale, including labelling and packaging. This can also apply to some performance specifications in the standards, where assessment is simply not feasible for finished product.

Ideally, mandatory standards would be applicable to both new and second-hand goods, however this may in some cases lead to a compromise of safety specifications for new goods which, of course, would not be justifiable.

With all regulatory policy, the benefits must be weighed against the costs. The costs in safety regulation can sometimes mean denial of supply. The ACCC believes such assessment is best done on a product by product basis. Where second-hand goods are unable to comply, do consumers have a low-priced new product available? If cheap new products are not available, what degree of hazard is posed by the product if it is sold second-hand?

In mandating safety measures for consumer goods, the benefits of the safety measures are usually only achieved in the medium to longer term, particularly with products with a long lifespan. Existing products in consumers' homes are not made safe until replaced by goods that comply with the standard.

Guidance for retailers

Traders need to have confidence in the goods they sell. Guidance in assessing the safety of the goods they receive would be most valuable for traders' day to day business as well as to understanding compliance obligations. It may be necessary to provide guidance for traders on what to look for in those products that we know to be frequently traded second-hand.

Consumer education

Consumer education in purchase and use of second-hand goods is equally as important as trader education. It is noted that some jurisdictions already have available checklists for consumers. This education program could be extended further and the development of specific education material is worth consideration.

International

USA: In 1999 the US Consumer Product Safety Commission (CPSC)⁸ carried out a nationwide study of thrift stores, specifically targeting banned, recalled and other hazardous products. The product areas targeted were those that posed a danger of death or serious injury. The results of this study were then used as a basis for developing guidance and providing safety information for traders and consumers.

CPSC has published a checklist for consumers⁹ as well as a reference guide for retailers¹⁰. Of course these publications do not cover all products available from thrift stores, but certainly what they consider the most hazardous.

CPSC also drafted 'model legislation' for state governments to adopt to make it illegal for commercial entities who sell or provide children's products for public use, such as thrift stores, to sell or distribute certain hazardous products. This model legislation is currently under review.

International Standards Organisation - Consumer Policy Committee (COPOLCO): At the May 2002 COPOLCO meeting, Consumers International submitted a paper¹¹ for consideration by the meeting on the effects of the commercialisation of second-hand products. The document states:

International rules and standards have an important impact on the safe design, performance of products and services, and hence provide vital safeguards and protection for consumers. These rules and standards are made by a number of

⁸ CPSC Study of hazardous products in thrift stores 1999(available through CPSC Library)

⁹ CPSC Publication - Thrift Store Safety Checklist CPSC

¹⁰ Dangerous and Recalled Products Reference Guide for Resale Stores

¹¹ COPOLCO 26/2002 (Add.) May 2002 Report on Second hand, defective and recalled products

bodies. Standards must be developed taking into account actual use by consumers of new and second hand products ...

Standards appear to be written to facilitate the supply of new products; they take no obvious account of second hand products.

The report then goes on to advise of the situation in a number of countries and problems encountered, particularly in developing countries where the supply of previously used goods is commonplace. Consumers International then proposed a project team to review the requirements of an international standard in specific products of consumer concern.

At the 2003 COPOLCO meeting, the ad hoc group advised of the proposal developed for further work on second-hand goods¹². The intention is to establish a set of consensus-based international and measurable criteria against which second-hand goods can be evaluated to protect consumers against risk to health and safety.

In April this year Consumers International issued a press release¹³ advising that ISO would be developing international standards for used/second-hand goods. The term 'used goods' applies also to the export of defective and/or recalled products that do not meet the exporting country's standards.

The US Consumers Union recently issued a report¹⁴ on recalled and unsafe goods rejected by the US being dumped in developing countries. The press release quotes Consumers International as stating – 'The idea of the standard for second hand products is to put the burden on the country of export. You cannot export products that are classified unsafe in your country and just dump them somewhere else.'

¹² *Annex 1 to COPOLCO 22/2003*

¹³ *Consumers International press release: Second hand goods to get first class standards 4/5/2004*

¹⁴ *ConsumerReports.org – Dangerous products, unsafe goods go abroad 11/04*

Consumer education

Education for consumers in assessing and managing risk is not specifically covered in the paper. While it does mention creating an obligation on suppliers to better inform consumers on safe use, the benefits in providing consumers with a better understanding of risk management is also necessary. This complementary element (which fits in to the tripartite approach) is an essential part of improving consumer safety. .

The paper notes there is a variety of ways to deliver product safety information to stakeholders, but the ACCC believes that consumer safety awareness needs to be developed as a long term strategy.

Smartrisk

One particular program of which the ACCC is aware is a Canadian approach known as Smartrisk.

Ref: <http://www.smartrisk.ca/>

“Smartrisk is a national non-profit organisation dedicated to preventing injuries and saving lives it was founded in 1992. The founder, paediatric surgeon Dr. Robert Conn, realized that far more lives could be saved through prevention than through surgery and rehabilitation. Instead of repairing the excessive damage done to children through injuries Dr Conn chose instead to focus his career on prevention.

Smartrisk has become one of the leading injury prevention groups in Canada and enjoys international recognition and support. The Smartrisk philosophy approached product safety from a non-traditional angle. Conn examined traditional safety approaches to injury prevention and discovered that the messages were often negative. Consumers were fed messages in the form of rules. *Do not ride your bike without a helmet. Do not play with matches.*

Smartrisk recognises that people take risks every day it is just how well thought out their risk taking and actions are that makes the difference to the risk taking outcomes.

Conn recognised that people often do not understand that they have the power to take smart risks. And taking a smart risk is very different from taking a risk. To educate Canadians on his Smartrisk philosophy and decrease the number of injuries Conn has created a range of products that include Programs, Services, Tools, Campaigns and Resources that are interactive and as user friendly as possible.

Workable programs are in place to minimise risk and increase awareness of safety. There are four programs and three of these programs focus on educating children and teenagers with clear, simple, positive messages that not only acknowledge risk but also offer tools to navigate that risk.

'Smartrisk Heroes' is a program that educates youth via a touring road show. The website offers communities the opportunity to put on a show and guides them through each step of the event process.

'Smart Moves' is a program that identifies the needs of the adult population and in particular helps older adults learn to prevent falls. A book called the toolkit focuses on four critical areas: bone health, exercise, home modifications and medication management. An exercise video supplements the exercise part.

By using interactive tools such as touring road shows, real life heroes and survivors of bad risk situations Smartrisk creates a positive learning culture and at the same time instils an awareness in the next generation who will be more aware of taking sensible positive moves to eliminate high risks. Conn's incorporation of interaction in his programs assists consumers to have better memory retention of positive messages "practice makes perfect" placing people in scenarios helps them learn the better way rather than just reading about it.

Through their website Smartrisk offers 'Smartrisk Navigator' – it is an online broadcast and resource centre for injury prevention that targets the information needs of six distinct audience types.

Conn's Smartrisk philosophy offers a "Prevention is better than Cure" approach to Product Safety and highlights obvious precautions to minimise injury for a wide range of consumers. Presently Australia has an enforcement orientated approach to Product Safety and no such educative program in place. Agencies in Australia are focussed on compliance with standards and consumer safety laws. The introduction of a GSP would provide a vehicle by which a positive philosophy could be attached and this, in the long run, will benefit a wider cross section of the community rather than just suppliers who are mainly targeted for compliance issues.

Smartrisk is a good example of how targeted information assists in creating positive product safety awareness. This program also focuses on consumers' behavioural patterns and decision making processes and trains people how to take a smart risk rather than an uncalculated high risk.

"Working Together To Achieve Consumer Product Safety"
Ministerial Council On Consumer Affairs (MCCA), May 2001

MCCA acknowledges the importance of input from industry and consumers in formulating a uniform approach to achieving appropriate levels of safety with consumer products in Australia and New Zealand.

MCCA outlined the roles and responsibilities of Government, Consumers and Industry under their proposed framework in their May 2001 paper.

Consumers can contribute to safe outcomes by:

- Recognising that in any situation the person most at risk is the one using the product and is therefore the one most able to influence the safety of the situation
- Buying products that meet standards

- Reading instructions before use
- Following instructions
- Using product for intended purpose only
- Considering the environment in which the product is being used and possible effects on non-users
- Checking ongoing condition of product and performing maintenance
- Taking a safety problem back to the supplier
- Advising appropriate agencies about safety concerns.

In commenting on the topic of Risk Management by Commonwealth Consumer Product Safety Regulators in 1995, the Australian National Audit Office noted: “A successful product safety regime requires an integrated and informed network of manufacturers, retailers, consumers and regulators. All should work together to reduce the risk to consumers of injury, death or loss to a minimum.”

The framework acknowledges that the greater number of consumers who take a more informed approach to Product Safety will have an onflow affect to the overall levels of safety in Australia and New Zealand. Safety aware consumers will not only seek to use products safely, but safety will also be a priority in their purchasing.

In the same way of thinking as Conn of Smartrisk, the Working Together Framework supports a long term information strategy that will ensure that the most effective consumer safety outcomes are achieved over time.

New Zealand

Ref: International Approaches To Consumer Product Safety Regulation - Report For SCOCA - November 2003

The Ministry of Consumer Affairs publishes several information resources. These include separate guides for consumers and suppliers on the rights and responsibilities under the CGA, the “Thinksafe – Children’s Nursery Furniture” booklet and fact sheets on products where safety issues have arisen. There is also a fortnightly “Word of Advice” newsletter that is circulated to consumer stakeholders. These resources are also available on the Ministry’s website. “Train the trainer” programmes are conducted with regard to the CGA and FTA (clients are community based organisations) and a more detailed product safety component was included in the delivery of this programme to the Maori Women’s Welfare League in 2003. The Ministry also participates in training seminars for other government agencies (ACC and Commerce Commission) or community based organisations – but these are organised on an informal basis.

There are several education products used by The Ministry of Consumer Affairs in New Zealand, however a common theme is unknown. For example although the educations material and programs supplied are topic specific an overlying theme will help send one key important message with each delivery. Think before you act “Thinksafe – Children’s Nursery Furniture” booklet and fact sheets.

Other Australian initiatives

Informally – in Australia each jurisdiction has publications that incorporate their Product Safety work and are tailored to fit in with the resources and the work of their particular body. Perhaps these publications could be supplied on a central, national basis so that all reference documents relating to Product Safety are in the one area. This would keep with the GSP Discussion paper approach of a ‘one-stop shop’ advice service.

At present in Australia consumers may enquire about product safety issues via the website <http://www.consumersonline.gov.au/> or they may also go directly to The Australian Consumer Handbook 2004 which refers them to a comprehensive list of agencies and services to assist them with seventeen various product categories and their specific product safety enquiry. Consumersonline also offers a feedback email address for visitors questions.

Consumersonline and the Australian Consumer Handbook provides valuable information and an organised referral system for consumers although they are not interactive. Australia does not have a documented information strategy in place for Product Safety that indicates how the consumers find out about these two important products/education tools.

Support systems and infrastructure

As part of a strategic approach to consumer safety, this review should look at broader issues that impact on policy and operations and at new measures to address problems.

Early warning system

Data systems in Australia are currently limited in their ability to provide practical information for addressing product problems. In some cases, information about current coronial investigations are not available until coronial findings are made, often more than 12 months after an incident.

The ACCC agrees that an early warning system for product related injury would be advantageous to regulators in detecting emerging safety issues. Such a system would need to greatly improve on existing databases to provide adequate data for decision-making.

Improvements to injury data would also help suppliers identify problems and act more quickly.

Research

The ACCC agrees that more detailed epidemiological data would assist in several aspects of the product safety system. As discussed above, current injury databases provide only limited practical information.

However, it is not just research in the form of injury data that is needed to support government and industry actions. Organisations such as the Monash University Accident Research Centre have identified potential application of research in various aspects of the consumer product safety system that can be of direct benefit to government and suppliers. Such research includes:

- identifying the nature of injuries related to specific products and emerging or previously unrecognised product related injuries.
- developing and refining an injury prevention priority setting and cost-effectiveness model, including an exposure database.
- developing a hazard and energy exchange model for injury causation.
- refining a relevant human factors model for the product/human interface and integrate it with the hazard/energy model.
- development of mechanical, design and statistical computer modelling research tools, and simulation testing.
- applying industrial design research methods to translate safety principles from models to integrated product designs.

In ACCC's view, there is a good deal of scope to better utilise this form of research, which could form a key component in a proactive approach to consumer safety.

A recent situation with pop-top drink bottles provides a good example of product research. A problem with a choking hazard was researched in the UK and the resulting remedy was available for use in Australia. This research was commissioned and published by the UK Department of Trade and Industry Competition and Consumer Policy Directorate as one of many such research programs¹⁵. It has now been used by Australian soft drink suppliers as a basis for implementing a code of practice.

Funding such research could potentially be sourced from government and the supply sector as improved resources would be of benefit to both sectors.

Central database

The ACCC agrees with the points made in the paper in relation to linking product safety information systems. A system that facilitates co-ordination between agencies would be advantageous if, as the paper states, it is supported by effective operating processes and a central administrator.

Testing facilities and technical expertise

The availability and capacity of test facilities and technical experts is an important part of the product safety system and must be considered as part of this review. In general the facilities in Australia are minimal and suppliers may look to overseas testers. This raises issues of accreditation of test companies, plus quality assurance and consistency.

The ISO Committee on conformity assessment (CASCO)¹⁶ is undertaking a project that may assist in this area. It incorporates:

- studying means of assessing the conformity of products, processes, services and management systems to appropriate standards or other technical specifications.
- preparing international guides and international standards relating to the practice of testing, inspection and certification of products, processes and services, and to the assessment of management systems, testing laboratories, inspection bodies, certification bodies, accreditation bodies and their operation and acceptance.
- promoting mutual recognition and acceptance of national and regional conformity assessment systems, and the appropriate use of International Standards for testing, inspection, certification, assessment and related purposes.

Expertise would also be needed in Australia in the form of systems consultants – in areas such as compliance, quality assurance, risk assessment, etc.

¹⁵ <http://www.ecdti.co.uk/CGIBIN/priamlnk.cgi?MP=CATSER^GINT65&CNO=1&CAT='CO15'>

¹⁶ <http://www.iso.org/iso/en/comms-markets/conformity/iso+conformity.html>

While it is generally not government's role to establish such facilities, it is nonetheless a legitimate role of government to foster the availability of such services and utilities that are necessary to support the needs of Australian businesses and the protection of consumers.

Standards development

The review will need to consider the impact of policy reform on Standards Australia and its capacity to provide standards that are relevant to the consumer safety system in Australia.

One benefit of promoting compliance with voluntary standards may be to strengthen support for Standards Australia, however suppliers may look to other sources for standards. The production of consumer product standards is not very cost-effective for Standards Australia, so any diminished use of Australian standards may have negative implications.

This may also have implications for the level of local involvement in standards development overall. For example, any reduction in our already limited testing and technical expertise will impact directly on the development of Australian standards. Current development relies substantially on unpaid research conducted by test companies.

Insurance, environment and occupational safety practices

Other segments of the supply infrastructure support consumer product safety. The overall system of product safety should take account of all available resources and collaborate with systems already operating in this arena.

- Some checks on product safety are built into manufacturers' and other supplier's insurance assessments.
- Some workplace occupational safety programs incorporate home safety education and actions as a way of instilling a product safety culture within all members of an organisation.
- Some companies and overseas governments have extended the concept of product stewardship from environmental planning to consumer product safety.

Recall audits

The ACCC supports the contention that a recall audit power could improve the ability of government to assess the effectiveness of recalls undertaken by business. The ACCC considers that knowledge of the manner in which a recall is or will be conducted can assist regulators negotiate more effective recall measures and/or determine whether a compulsory recall is required.

The power to audit recalls would potentially be a valuable tool for product safety regulators, although the need to employ such a provision may be infrequent. Regulators' discretion should be used to determine the need for an audit of any particular recall exercise, based on factors such as the nature of the hazard, nature of distribution and the supplier's level of co-operation. The strategic use of such a provision should minimise the costs to government. Consideration could also be given to the possibility of appointing independent third-party auditors at the cost of suppliers.

The ACCC notes the concerns expressed with this proposal, being that such a power may:

1. inhibit the flexibility of business to conduct recalls in a cost-effective manner, depending on the way the audit power is exercised [which in turn may depend on the nature of the relationship between business and the regulator during the recall];
2. if applied to voluntary recalls, make recalls more complex or may discourage businesses from taking them depending on the administrative processes involved;
3. place significant resource burdens on government; and
4. raise legal issues for government.

The ACCC considers the issues raised could be managed and that the recall audit power could be an effective monitoring tool to protect and safeguard consumers' interests. Many of the concerns articulated above deserve further investigation, but could be ameliorated by, for example, guidelines for business on their reporting obligations and the administrative processes. This could be facilitated by clear demarcations of governments' role advising on audits and the circumstances in which compulsory recalls should be implemented.

The ACCC notes the reporting regime under section 15(b) of the *Consumer Product Safety Act* ('the CPS Act') in the United States of America, which provides for a comprehensive, tiered reporting regime for voluntary and compulsory product recalls. The regime is intended to provide timely and effective information about potential product safety problems to the regulator. The U.S. Consumer Product Safety Commission ('the CPSC') may determine whether the potential product hazard constitutes a substantial product hazard and whether corrective action is necessary. The CPSC also has an alternative procedure established to expedite recalls - the Fast Track Product Recall Procedure. This procedure allows CPSC staff and the company 'to work together on a corrective action plan almost immediately, rather than

spending the time and other resources necessary to investigate the reported defect further to determine whether it rises to the level of a substantial product hazard'.¹⁷

The ACCC also notes the recent Australian Review of the Uniform Recall Procedure for Therapeutic Goods¹⁸ which identified the following issues in relation to the TGA's auditing of recalls:

There is a lack of power to audit recalls. There is both a lack of power to audit statutory recalls and no arrangements under Uniform Recall Procedure for Therapeutic Goods (URPTG) for non-statutory recall audits. Ideally there would be a power to audit any recall, whether mandatory or undertaken voluntarily, if necessary. In the case of voluntary recalls the power could be linked to any recall notified to the TGA. Not notifying a recall should also be an offence.

Currently, breaches or alleged breaches of the Trade Practices Act, including the product safety provisions, may be settled by a variety of means, including by court judgement, settlement or agreed court orders or in the case of the ACCC, by accepting a court enforceable undertaking under s.87B. Common features of settlements involving alleged product safety breaches include remedies for affected consumers and placement of warning/recall notices and advertisements.

In many cases, the companies will be required to implement, update, and audit for a period of years a corporate trade practices compliance program that complies with Australian Standard 3806-1998. A compliance program will have particular regard to the provisions of the Act giving rise to the breach.

Should government consider implementing a discrete system to audit product safety recalls the ACCC recommends further analysis of, for example:

- the level of involvement of the regulator in the recall audit;
- the compelling powers needed by the regulator;
- the criteria to assess recall performance;
- whether that level of involvement would change depending on the nature of the risk identified e.g. if it would change if there was a determination to decide whether a recall will be compulsory or voluntary;
- the duty of the regulator to respond to companies concerning the matters contained in the audit reports; and
- the duty of the regulator to respond to identified deficiencies in an audit report, via the range of enforcement measures available to it.

¹⁷ *Recall Handbook, including CPSC Fast Track Product Recall Program*. US Consumer Product Safety Commission, May 1999, see <http://www.cpsc.gov.BUSINFO/8002.html>

¹⁸ *Review of the Uniform Recall Procedure for Therapeutic Goods*. Oceania Health Consulting, May 2004, see http://tga.gov.au/recalls/urptg_rev.htm

The ACCC also recommends further consideration of whether third party, rather than regulator only, audits may be warranted in certain circumstances. Such audits may reduce the burden on government, but it may be useful to establish certain criteria. Consideration could be given to the:

- skills and qualifications necessary to perform audits;
- 'independence' of the auditor;
- elements auditors would assess
- possible allocation of costs; and
- evidence auditors would need to provide to substantiate audit assessments.