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Melbourne | Sydney

Product Safety Review
Competition & Consumer Policy Division
Department of the Treasury
Langton Crescent
Canberra ACT 2600

Our reference
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Review of the Australian Consumer Product Safety System

Middletons Lawyers is a progressive law firm representing a number of manufacturers in the Australian market. In responding to the above Discussion Paper we take the opportunity to comment on the effectiveness of the current system of product safety regulation and the impact the proposed options for reform will have on the ability of manufacturers and suppliers to conduct business efficiently.

Given the extent to which product safety is currently regulated in Australia, and the avenues of redress available to consumers through the Trade Practices Act 1974 (Cth) (the "TPA"), the law of negligence and breach of contract (including conditions and warranties implied by Sale of Goods legislation in each State and Territory), we are of the opinion that further regulation will only increase the burden on manufacturers and the ultimate cost of products to the community, while consuming scarce government resources without reducing the likelihood of unsafe products reaching the market.

We have provided comments on what we regard to be the most significant proposed options for reform canvassed in the Discussion Paper. Further, we consider these options in the context of the ultimate goals of a system of product safety regulation, these being to ensure that:

- products which reach the market are safe;
- consumers are able to obtain compensation for injuries sustained as a result of defective products;
- government resources are allocated efficiently; and
- businesses are able to operate efficiently.

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1. General Safety Provision

The Discussion Paper proposes the introduction of a General Safety Provision as a remedy for "the overly reactive" nature of the current system. It suggests that a General Safety Provision will "allow governments to take more effective precautionary action to protect consumers" as manufacturers will be under a legal obligation to only place safe consumer products on the market. This reasoning is flawed in two respects.

Firstly, the so called reactionary regulations currently in place, namely the provisions in Part VA of the TPA which render manufacturers liable for injuries suffered by consumers as a result of defective products, already achieve the result of regulating the standard of products which reach the market. While this is regulation at the "back end" of the system and therefore classified as reactionary, its existence still has the result of regulating product standards at the "front end.". The consequences faced by a manufacturer who releases a substandard product which subsequently causes injury to a consumer can be severe and already create an obligation to only place safe products on the market.

Part VA of the TPA contains a regime which provides consumers with a number of rights of action against a manufacturer or importer. It enables any person who suffers personal injury or property damage as a result of defective goods to recover compensation from the manufacturer without the need to prove negligence or breach of contract. Under the TPA goods are considered "defective" if their safety is not "such as persons generally expect". This is an objective test and does not depend on what is appropriate in an individual circumstance. The standard imposed on manufacturers by these provisions of the TPA is already high and higher than the standard imposed by common law negligence.

Manufacturers are generally aware of the existence of Part VA and the implications it has for them. The exposure to damages both under Part VA and at common law are significant and despite being "reactionary" serve the purpose of providing an incentive for manufacturers to comply with the appropriate safety standards. They serve the dual function of providing redress for consumers and providing incentives for suppliers to make and sell safe goods. Manufacturers are also commercially motivated not to be perceived as a provider of unsafe goods, as this would destroy or substantially impair their financial viability. Part VA of the TPA, along with the avenues of recourse available at common law and under State/Territory legislation indirectly impose the same legal obligation to only place safe consumer products on the market which a General Safety Provision would seek to achieve.

Secondly, the criticism that the current system of regulation is overly "reactionary" is in our opinion unjustified. The ACCC currently undertakes surveys on the market which have lead to the discovery of products which either do not meet mandatory standards, or are in fact banned. In addition to complaints being received from consumers in respect of unsafe goods, a company's competitors are a significant source of complaint. Mandatory standards are in force for a number of products and not complying with a standard is grounds for the minister to order a recall of the product in question. These measures would appear to be sufficiently proactive.

The implementation of a General Safety Provision will provide manufacturers with an unnecessarily onerous burden and ultimately the costs faced by manufacturers in ensuring they comply with all of the requirements will inevitably be passed on to the consumer. We submit that the introduction of

such a provision would only be of assistance where the current system was demonstrably deficient and there was no incentive for manufacturers to maintain the quality and safety of their products.

The introduction of a General Safety Provision is likely to defeat the MCCA's objective of creating a more efficient regulatory system. The costs of managing a system with such a high standard and high need for monitoring will be significant. Finally we submit that a General Safety Provision will not achieve the objective of reducing the risk of defective products reaching the consumer as it would not provide manufacturers with any additional incentives to maintain the safety of their products beyond those created by the ramifications of being found liable under Part VA, in negligence or for breach of contract.

2. Mandatory Product Recall Order

Under the TPA in its current form, the Minister may order that a product be recalled if the product "will or may cause injury to any person." The inclusion of the word "may" gives the Government a very broad power with respect to the products it could potentially recall. Contrary to the opinion given in the Discussion Paper that this wording is overly restrictive, there is a sound argument for this test to be narrowed. Assuming the test stays in its current form, we submit it is more than adequate.

The Discussion Paper contains the opinion that the wording of the TPA "will or may cause injury" does not give the government power to recall a product on the grounds that it is unsafe when being misused. We submit that this interpretation is erroneous, as the phrase "may cause injury" would in certain circumstances embrace a situation where the injury would arise if the product has been misused. The Discussion Paper contemplates more flexible wording being inserted into the TPA to allow the Australian Government to order the recall of a product which is unsafe as the result of foreseeable misuse. It is undoubtedly appropriate for the Government to be able to exercise its power to order the recall of a product where the product is unsafe but we submit that it is too onerous a burden on the manufacturer to be faced with the possibility that its product will be the subject of a mandatory product recall for the reason that when it is misused it may cause harm. We recognize that situations will arise where products will be misused and there is a risk that consumers may be injured. However this risk must be weighted against the prejudice that would be faced by manufacturers if they were required to assess product safety, not only in circumstances where the products are used for the purpose for which they are manufactured but also where they are used for their purposes, including quite unexpected purposes. We submit that to impose a product recall on a product which may be dangerous when misused leaves the manufacturer in an uncertain position.

As the Discussion Paper acknowledges, most product recalls are undertaken voluntarily by responsible businesses. We submit that expanding the situations in which a product can be recalled will not enhance the current system. The provisions of Part VA, as well as the law of negligence, are sufficient to motivate manufacturers to take remedial action upon establishing that a product in the market is unsafe. Ultimately manufacturers conduct their business in pursuit of profit, and the desire to remain profitable (and therefore avoid exposure to substantial claims for damages) is sufficient to induce them to conduct a voluntary product recall.

In response to the suggestion that governments be given a power to audit and assess voluntary recalls, we submit that the same incentive which has caused the business to conduct the recall in the first place is likely to result in the business conducting a complete and effective recall. The aim

is to minimize potential costs in liability by consumers using the product, as well as preventing damage to the manufacturers' reputation. There is a sufficient element of self interest to induce the manufacturer to conduct an adequate recall. Furthermore, the expense involved in monitoring a recall is likely to be beyond the resources available to the Australian Government.

3. Expanding product standards to include services

While the TPA product safety provisions do not cover the supply of services, section 74 provides an avenue for consumers to obtain compensation for the provision of substandard services. The section implies a warranty into every contract for the supply of services to a consumer, by a corporation, in the course of business, that the services will be rendered with "due care and skill" and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. The effect of this section is to import a condition into every contract for the supply of services to a consumer which cannot be excluded. Any clause contained in such a contract which purports to exclude the operation of section 74 is void. Consequently, if services are rendered without due care and skill a consumer will be able to sue for breach of contract. This enables a consumer to recover damages in the amount necessary to put him or her in the same position he would have been had the breach not occurred.

Examples of consumers obtaining compensation for inadequate provision of services include the supply of burglar alarms which were found to have breached the warranty implied by s74 when burglars bypassed the alarm.¹ Similarly a bank manager who did not advise a customer correctly in relation to the preconditions attaching to an insurance policy taken out by the customer through the bank in relation to a loan was found to have breached s74.²

In addition, recipients of services are still capable of obtaining recourse through common law negligence and the law of misrepresentation. We submit that due to the existence of s74 of the TPA and other common law remedies, there does not appear to be a major need for expanding the product standards provisions to include services. While the avenues of recourse are not as comprehensive as those for defective products, the ultimate compensation available to a consumer in regard to services rendered without due care and skill is arguably adequate. The ability to impose standards or ban particular services would only be warranted in the face of clear evidence of a real need to reduce the incidence of inadequate services being performed.

4. Expanding product standards to include second hand goods

The definitions of goods in Part VA of the TPA or the various State and Territory Sale of Goods Acts or the Fair Trading Acts do not restrict the application of the legislation to new products. Contrary to the opinion given in the Discussion Paper, there are currently a number of avenues through which a consumer may obtain compensation for injuries resulting from defective second hand goods.

¹ *Mayne Nickless Ltd v Crawford* (1992) 94 ALR 445

² *Warnock v ANZ Banking Group Ltd* (1989) ATPR 40-928

5. Monitoring and reporting

Again, due to the ramifications of being held liable under Part VA of the TPA or at common law, manufacturers already have an incentive to monitor and respond to complaints about their goods. Businesses are driven by profitability and will respond faster than any government agency will be capable of. The amount of resources which would be necessary to maintain a system of monitoring the ongoing safety of each product in the market would be very substantial and could be more efficiently used elsewhere. The resources necessary to establish and maintain a database of all customer complaints would be significant. Of all the options for reform suggested so far, monitoring and reporting is the most reliant on government resources and an examination must be conducted of the likely contribution increased monitoring and reporting will actually make as opposed to the additional resources it shall require.

6. Harmonisation of Product Safety Legislation

It is clear that the most significant step towards meeting the MCAA's objective of making efficient use of government resources would be the harmonization of product safety legislation. Duplication exists not only in legislation but in the various state agencies which administer the relevant legislation. In addition to abiding by the regulatory system of each State and Territory in which they supply products, manufacturers need to be aware of their obligations under international law, including the Sale of Goods (Vienna Convention) Acts.

The Discussion Paper raises the issue of weighing the importance of achieving legislative consistency with the needs of individual jurisdictions to maintain legislative flexibility. We submit that in the area of product safety, the different legislative needs of individual jurisdictions are minor, and the need for each State to maintain flexibility is outweighed by the enhanced efficiency which is to be gained by uniform legislation.

In order to achieve the aim of consistency and thereby reduced wastage of resources by manufacturers, harmonization of the bodies which administer legislation is equally if not more important than harmonization of legislation itself. The advantages of uniform legislation can be completely undermined if there is variance in their administration.

We submit that the harmonization of legislation is a viable option for reform which has the potential to simplify the task faced by manufacturers in ensuring they adhere to a single set of product safety standards. Previous attempts at achieving uniformity of laws throughout Australia have been successful, particularly in relation to the regulation of companies.


The issue of what standard ought to be required of manufacturers would necessarily arise in an attempt to create uniform legislation. We submit that even if the most stringent requirements currently existing were adopted nationwide the costs that would be saved by businesses in needing to establish the requirements of supplying products in each State would be enormous.

7. Conclusion

We submit that the current system of product safety regulation provides sufficient incentive to manufacturers to prevent unsafe products reaching the market. The occasions upon which consumers do suffer injury as a result of defective products rarely result from a manufacturer's wilful omission to ensure the product is safe. The ability of a consumer to obtain compensation

through either the TPA or an action in negligence or for breach of contract and the Australian Government's broad power to order the recall of an unsafe product are sufficient and, with the exception of harmonisation of the legislation, none of the proposed options for reform discussed above will provide any significant additional benefit to consumers.

Yours faithfully



Murray Deakin
Partner