

Australian Consumers' Association

Submission to the Ministerial Council of Consumer Affairs Review of the Australian Consumer Product Safety System

1. Introduction

The Australian Consumers' Association (ACA) is an independent, not for profit, consumer research and advocacy organisation. ACA has published CHOICE magazine since 1960 and currently also publishes Choice Money & Rights magazine, Computer Choice magazine, Choice Health Reader and the website Choice Online. We welcome the opportunity to comment on this MCCA review.

ACA has been consistently involved in product safety issues since it was founded in 1959. Past issues of Choice magazine as far back as 1960 demonstrate ACA's concerns with research and demonstrating risks with consumer product safety, combined with advocacy to bring about improved standards and regulations to overcome design and manufacturing deficiencies in consumer goods.

ACA regularly tests and reports on the safety performance of a range of children's products – portable cots, strollers, high chairs, safety gates, dummies, toys¹. It was largely through the work of ACA continually demonstrating via CHOICE magazine the safety problems with household cots² that led to the mandating of a product safety standard for that product category.

ACA's laboratories test many hundreds of toys every year for manufacturers and distributors largely in a public service endeavour to help achieve a high level of safety conformance for toys in Australia.

2. Problems with the current system

The MCCA review paper clearly sets out a comprehensive range of problems and limitations with current arrangements. The problems and weaknesses identified in the review paper are consistent with ACA's experience of product safety problems in the marketplace and the state of regulation in this area.

Several tests of consumer goods published in CHOICE this year have demonstrated inadequate safety standards. Examining just three tests from 2004 helps to illustrate a wide range of problems with the current system.

1. In November we reported in CHOICE Online on our most recent test of children's cots, where five out of ten cots failed the safety requirements set out in the mandatory Australian Standard.

2. In September CHOICE, we reported that fourteen out of sixteen flat top pool fences failed the Australian Standard covering fence strength, while four out of fifteen loop top fences failed this test³.
3. In a report published in January CHOICE, four out of eight jogger strollers that we assessed demonstrated serious failures against the Australian standard (a non-mandatory standard).

It's important to note that ACA approaches these tests with realistic criteria for risks as part of our assessment standards. If we strictly applied the relevant standards the failure rates would be even higher! For example, several of the strollers that we recommended to consumers had features that were potentially in breach of the Australian standard. However, we regarded these as sufficiently remote risks in real use situations, and hence we were satisfied about recommending these products to consumers (of course we point this out in our CHOICE article). In other words, ACA seeks to apply our tests in a fair manner, and we take into account the realistic conditions under which products will be used. Nonetheless we still find multiple failures when we test these products.

As well as the basic problem of multiple failures of safety standards, there are several other problems that these three CHOICE assessments raise:

- There are multiple instances of products that were advertised as meeting relevant standards (eg through a sticker or claim on product brochures) but that failed the standards on one or more criteria. In other words, these tests demonstrated that the market is characterised by misleading claims in the area of product safety as producers make safety claims for their products that aren't supported by independent testing. (The fact that some of these misleading claims may be inadvertent does not help the purchaser).
- For some of these products (pool fences being a clear example), it would be *impossible* for a consumer to determine whether the product met relevant standards, and for other products this could only be partially determined or assessed with some difficulty (eg cots). In other words there are consistent failures against safety standards where even well-informed consumers will find it impossible or difficult to make the right choice. This represents a basic breakdown in competition as a result of a poor regulatory regime, as consumers cannot easily choose better quality products. It's also important to note that disclosure will not be the answer to product safety in these circumstances.
- In our test results, more expensive products are not necessarily safer products (eg jogger strollers). Price is not an indication of safety. This is again a sign of market failure – consumers cannot readily assess safety elements, so lower quality products can survive in the market even at a higher price! The losers in this situation are also those manufacturers and suppliers who are seeking to meet higher standards.

- CHOICE has found it very difficult if not impossible to find up-to-date information on injuries that have arisen from these product lines (and this also holds for many other consumer products we test for safety). As a result, it is difficult to fully advise purchasers about all of the most significant risks. It is also more difficult to ensure manufacturers and distributors are informed of key risks in a timely manner. The information in this area is poor, despite the efforts of some departments, and would certainly be very difficult for a consumer to find.
- The regulatory regime is inconsistent and hard to understand, even if we only look at the three products mentioned above. Yet these are all products that are designed for use by children and babies or are designed to protect children and babies. Some of these products involve mandatory standards administered by the ACCC (cots), for others there is a standard but it is not mandatory (strollers and pool fences), and hence is regulated by state agencies (although enforcement is difficult to find). In the case of pool fences, local councils and state governments are involved in different ways around the country in relation to both the strength of the fences and their installation. The standards are of course established through the work of yet another organisation.
- The measures needed to make the products safer are in most cases relatively simple and should not be expensive. Similarly, the features that must be improved to meet safety standards are documented in Australian standards – they are not unknown or inaccessible to manufacturers or suppliers. The measures do not require fundamental redesign of products. This situation is the same for many products that regularly fail safety tests, and again demonstrates that the current regulatory structure is not making markets work for consumers.
- Cots and strollers are both products that are often sold on or passed on to other parents when the original purchasers' children have grown. The importance of safety is therefore higher when such consumer behaviour is common.

In summary it is ACA's view that the current product safety system is incoherent and reactive. Regulatory powers are inadequate and regulatory responsibilities are poorly defined. This makes the job of agencies in this area difficult, which is exacerbated by poor resourcing.

The direct costs of product safety are inappropriately burdensome on consumers and the health system. Consumers bear the costs of pain and suffering (including deaths in the worse cases), lost income, family disruptions, health expenditures, and potentially legal costs.

It is also important to note that there are a range of direct and indirect costs for industry under the current system that must be taken into account in looking at any possible costs under a reformed system. Direct costs arise through the additional expense incurred in dealing with multiple agencies, the uncertainty arising from multiple laws with overlaps and gaps, resource intensive and uneven development of standards, and the uncertainty in dealing with regulatory responses under a reactive system. Indirect costs arise in a variety of ways, including as a result of injuries to adults and children generating lost working days (both for those injured and those caring for injured children or other family members) and lost productivity. It is very difficult to put a total figure on any of these costs, which in itself points to the inadequacy of research in this area.

The case for reform is clear and improvements are long overdue. ACA is keen to see action with this process so that a repeat of the inaction with the 2000 review (and earlier efforts) is avoided.

3. Reforms

ACA supports a range of measures set out as options in the reform paper. We note that many of the options mentioned in the paper are already in place in Europe, the UK, the US and Canada. The core options for reform in other words would see Australia simply catch up to other major Western countries rather than moving ahead.

National approach

ACA believes that it is essential that the same laws and regulations protect all Australian consumers equally well regardless of where they live. We would prefer that the Commonwealth take on this responsibility. While some states have demonstrated a commitment to consumer product safety, this does vary over time and it will be difficult to continually monitor this and to try to improve jurisdictions' performances. Commonwealth responsibility would make performance uniform and manifestly clear to all. It would also improve enforcement of product safety requirements, and significantly reduce the information problems between agencies that currently exist.

It is vital that sufficient resources are provided for the administration, monitoring and enforcement of product safety regulations. At present consumer product safety is the "poor cousin" of other parts of the regulatory regime for competition and consumer protection – while the MCCA paper cannot make this point it is widely understood. This clearly is one of the reasons for inconsistency and inaction both on policy development and enforcement. It is unfortunate that an area where people's personal safety is at stake can be in this position. A well resourced national regulator would help address this problem.

ACA recognises that there may be a limited range of products/services that are not appropriately dealt with at a federal level for practical reasons (eg installation of pool fences). This limited set of products/services should be explicitly identified and responsibilities clearly spelt out for other levels of government, rather than continue with the current situation of ambiguous coverage with overlaps and gaps.

We agree with the discussion paper's proposal that the ACCC take over many of the administrative and enforcement powers currently residing with the Minister.

General Safety Provision

ACA strongly supports the inclusion of a General Safety Provision (GSP) into Australia's product safety regime – it is an essential element of the reform of Australia's product safety system. This is consistent with other submissions made by ACA on this matter over many years. On many occasions ACA has observed that despite specific laws or standards being in place for a limited range of particular products, cases of concern continue to reach the marketplace.

A GSP would help address several anomalies and weaknesses in current arrangements. As the MCCA paper notes, it would help ensure that the system was less reactive, especially if it was to include standards relating to "foreseeable misuse" rather than simply a defect in the product itself.

A GSP applied consistently across industry would also help address the current issue where those businesses that act responsibly to ensure their products meet safety standards (and take action if there are problems) incur more costs than businesses meeting lower standards and/or offering unsafe products. This situation arises because in most markets there are no mandatory standards (or indeed any standard), and where such standards are mandatory they are often not adequately enforced. And as noted earlier, for many products it is difficult for consumers to assess safety features in a clear manner. In other words a GSP applied across all businesses would help correct the current market failures that work against raising safety standards because higher quality producers are not rewarded.

A General Safety Provision would do much to ensure that there was both an increased awareness by manufacturers, distributors and retailers of their overall responsibilities for consumer safety, and by providing substantial penalties for failure by these providers to take due care to meet those obligations.

A General Safety Provision should apply to all parties in the supply chain for new products. While ACA recognises that some participants in that supply chain are in a stronger position than others to ensure appropriate outcomes and may have access to more and better information than others (e.g. manufacturers compared to retailers), we believe that those further along the chain will exert pressure on their suppliers in line with their own assessment of their obligations and risks to ensure higher quality outcomes. We would, however, support a tiered approach to responsibilities and liabilities depending on whether the business is the manufacturer/importer or not.

ACA believes that a General Safety Provision must be enforceable by governments and that government agencies have the primary responsibility for enforcement action. We also believe that it is sensible to allow citizens to use such a law. The General Safety Provision should also provide for criminal sanctions where it is shown beyond reasonable doubt that suppliers have wilfully or negligently provided unsafe products.

ACA would strongly support the provision of guidance on the operations of a GSP to industry sectors.

Second hand products and services

ACA sees a strong case for the inclusion of second hand goods provided by a person trading in the sale of goods – but for practical reasons not in regard to second hand sales by individual consumers disposing of unwanted goods.

While general coverage would be preferable, we would also see merit in a designated list of second hand products that would be covered by such a provision. Certain products that are sold second hand quite regularly such as children's products, power tools, lawn mowers, bicycles and motor vehicles could well provide much enhanced safety outcomes for consumers by such an inclusion.

ACA supports the coverage of services as well as products in an equivalent manner. The increasing importance of services in the economy suggests the potential for risks to come about. Again, while general coverage is preferable, we would support a further examination of particular services that could be included on a priority list for coverage because they involve higher risks and/or they are linked to key products. Examples could include the installation of children's furniture, pool fences or security equipment.

Recalls

ACA supports stronger responsibilities for safety notification and recalls being placed on businesses. Again, we make the point that responsible businesses are less likely to bear costs from this approach compared to those businesses that currently have poor compliance systems, poor information systems, and/or offer sub-standard goods.

With regard to recalls the General Safety Provision should also provide here penalties for knowingly or negligently failing to ensure consumers' safety by not recalling products promptly and effectively.

Appropriate guidelines would be necessary for businesses in this area, as outlined in the report.

Early Warning and “Accredited Complainants”

Short term warnings

Early warning on product safety problems could be facilitated by better and timely information systems about immediate complaints and risks. However, complex and complicated information systems are expensive to establish and maintain, and it is arguable that simply establishing such a system between regulators will not work while there are too many agencies with poorly defined responsibilities in this area. Therefore a necessary step to addressing information problems would be to simplify the number and variety of agencies involved and the levels of regulation. The provision of appropriate resources to a lead agency would also greatly assist in addressing information problems.

Accredited Complainants

A key problem with the current system is not so much the lack of information about immediate problems, but the lack of action to address problems by either businesses or regulatory agencies following receipt of significant information from independent or “third party” organisations with recognised expertise.

One option to improve information provision and responses to identified problems is to establish a limited range of third parties as “accredited complainants”. The UK has recently listed several organisations in legislation (including the UK Consumers’ Association) as “super-complainants”. Complaints from these organisations must be responded to within set parameters (eg timeframes) by regulatory agencies on key market issues. The organisations in question must ensure that the information they provide meets certain standards (eg it is properly researched and documented). ACA believes that this approach could work to improve product safety in Australia better than a complicated information system. It would help ensure that those organisations with appropriate expertise were able to present more significant systemic complaints to regulatory agencies for a more timely and detailed response. At present, the response to ACA’s detailed research work on product safety is inconsistent, often non-existent. For example, the response from state agencies to our research showing pool fence failures was very poor, with only Queensland formally responding.

A system whereby a limited range of well recognised third parties were able to lodge complaints that had to be dealt with through a more formal process by relevant agencies would do more to improve information provision than expenditure on an interdepartmental database. Agencies besides ACA could include relevant health bodies, hospitals and/or Universities with relevant expertise.

Information and Research

Research on the impact and costs of product safety

There is a very significant gap in information about medium-longer term impacts and costs of product safety in Australia.

ACA supports measures that would facilitate more complete information being available to regulatory agencies, businesses and consumers in this area. ACA strongly supports greater research in this area. The review paper refers to the unacceptable situation where there are no comprehensive figures currently produced on product related injuries and deaths in Australia. Regulation and regulators could operate in a more targeted and cost-effective manner if such research and information was more readily available. Businesses could also benefit from information about risk issues that may affect, for example, their import strategies or product design. Consumers could benefit through more intelligently targeted warnings and safety campaigns.

ACA Contact: Peter Kell, 02 9577 3225 or Norm Crothers,
normcrothers@choice.com.au, 02 9577 3218.

¹ CHOICE Magazine in the past 4 years only - Portable Cots, July 2000, May 2003; High Chairs, August 2001, October 2001, October 2003; Baby Carriers, March 2003; Strollers, August 2000, August 2002, August 2003, January/February 2004; Safety Gates, May 2004; Bunk Beds, September 2002; Car Restraints, September 2000.

² CHOICE Magazine, Household Cots, July 1989, March, June, July 1991, October 1996, January/February, August 1998, September 1999, January/February 2002.

³ CHOICE Online/Baby/Pool fences, August 2004; CHOICE magazine, September 2004.