

## AUSTRALIAN TOY ASSOCIATION

### Submission to Consumer Affairs Australia and New Zealand

#### Australian Consumer Law Review – Interim Report

## Introduction

The Australian Toy Association (ATA) is an industry association representing and servicing suppliers of products for children and family leisure, learning and entertainment. We have approximately 280 members that together represent 90% of the toy industry and \$2.4b in annual retail sales.

Product Safety and compliance is one of our core activities.

- We actively promote the development of standardised requirements for safe toys and the international alignment of those requirements.

To this end, we provide resources to support Australia's participation in the development of ISO Standards for the safety of toys and our subsequent adoption of those as National Standards.

We provide resources to chair the Australian Standards committees for safety of toys, trampolines and dummies. We also participate in several other Australian and International Standards committees.

- We commit our members to adhere to safety standards applicable to their product and provide them with training and support to achieve this.

## Responses to Interim Report Questions

### **General**

The responses below address only those questions of particular relevance to ATA members regarding product safety issues.

#### **2.1.2 'Acceptable quality' for goods**

10. Could the issues about the durability of goods be addressed through further guidance and information?

##### ATA Response

The ATA agrees that issues around the meaning of 'acceptable quality' and other related terms should be addressed by additional guidance. Current guidance could be enhanced through reference to actual decisions from the courts made since the introduction of the law. Guidance should be reviewed to ensure that language is clear and not 'overladen with qualifications and disclaimers' as noted by CAANZ in the Interim Report.

The objective of the ATA submission on this point is to have consumer and supplier expectations more closely aligned and so simplify the application of the guarantee in practice. In this regard, it is important that the guidance material be easily accessible by both suppliers and consumers. The

means of achieving this should be further discussed and the ATA would be happy to participate in a workshop on it.

11. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance? For example, the cost of returning rejected goods, including what may constitute 'significant' cost?

ATA Response

The ATA is not specifically aware of other clarifications required, but supports the concept of providing examples and clarity wherever there is uncertainty.

12. If they are not suited to this approach, why not? For example, do the issues (such as the costs of technicians or returning a good) require further legislative clarification, or should the status quo remain to ensure a high level of flexibility?

ATA Response

The ATA supports the provision of clarifying guidance rather than changing the legislation. We support the intent of the legislation as written and are concerned that attempts to cover every possible situation within the legislation could give more opportunities for confusion and unintended consequences.

13. What more, if anything, can be done to encourage businesses to provide more information about the durability of their products? What, if any, further guidance on durability is feasible while still allowing important differences between goods of a certain type to be recognised?

ATA Response

The ATA supports the need for the test for durability to be 'flexible, principles-based, and designed to account for the specific circumstances of each good' as mentioned in the report. Additional guidance could be given based on the principles and actual determinations made since the law has been in effect. However, it should also be recognised that the determinations are complex and many factors may be considered, including price, branding, nature of use, appearance, etc. We do not think that it would be possible to give the precise detail to the level that Choice seem to be requesting in their submission without compromising in other areas and potentially causing worse levels of confusion.

The ATA does not support a call for businesses to be required or encouraged to make claims about the durability of their products. We have nothing against suppliers making claims, but note that they need to be correct and verifiable and this validation adds considerably to the cost of compliance.

## **2.1.6 Disclosure of rights under the ACL**

19. Is there a need to amend current requirements for the mandatory notice for warranties against defects? If so:

- How should the text be revised to ensure that consumers are provided with a meaningful notice about the consumer guarantees?
- Would it, in practice, reduce ongoing costs for business or were they largely incurred when the requirement was introduced?

- Would it require any transitional arrangements and, if so, what are the preferred arrangements and why?

ATA Response

The ATA supports a revision to the requirement for the mandatory notice for warranties against defects.

The ATA preference is that the requirement for specific text in any warranty against defects be removed. While there may be no particular issue with including it for goods that are specifically made for Australia or those that have a high value, it acts as a barrier to global trade and is a significant cost impact to lower value goods such as toys. The response to the requirement by suppliers has been to reduce the number of specific warranties added.

There is constant change in versions of consumer goods and continual development of new features and products. The requirement for special text related to the Australian Consumer Law therefore has an ongoing cost and impact to goods. Every new version or new product introduced that has a specific warranty has to be reworked to remove it or add the specific text in order to be sold in Australia.

20. Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirement?

ATA Response

The ATA recommends that advice and guidance for consumers on their rights under the ACL and Consumer Guarantees Act be consolidated so that they can access it via a single web portal or booklet (in the case that they don't have access to the internet). The dispersion of information across different web sites, layers of government and government entities adds complexity and confusion to an already complex topic. If this particular issue is considered to require more attention, then there are more options that could be considered, e.g. notices at the point of sale (including online), leaflets to be provided at retail when an item with a warranty is sold, a notice when registering for the benefit of a warranty, etc.

The interim report suggested that one of the objectives of the text was to continually remind suppliers of their obligations under the law in regard to warranties against defects. We believe that this can be achieved in other ways, e.g. by ensuring, through guidance materials, that suppliers understand that it is misleading and against the law to imply, within a warranty statement, that a consumer's rights are in any way limited by the provision of the warranty.

In case it is felt necessary to keep some generic text, it should be possible to develop wording that refers to 'relevant consumer law' rather than to Australian Law specifically and thus allow text that is not specific to our market.

### **2.2.3 General safety provision**

25. What are the key principles for an effective product safety regime?

ATA Response

The ATA agrees with the broad principles laid out in the Interim Report.

There are however, two additional principles to add:

- a. The regime must give priority to issues of product safety.  
It should not get bogged down with interpretations of the 'letter of the law' or difficulties with updating or creating mandatory standards.  
While this might seem obvious, we do have examples today where;
  - There are product recalls despite there being no data to suggest that there is a hazard, e.g. soft toys where the fibre fill can be accessed, and
  - There are products on the market where a mandatory standard should have been made, but hasn't, e.g. those using coin batteries that are known to get stuck in the throats of children and cause serious injuries and death.
- b. The regime should operate efficiently  
This is in addition to having the benefit outweigh the costs and should aim to understand and minimise unnecessary and unproductive compliance costs. We have examples today of unproductive costs related to mandatory standards referencing outdated versions of voluntary Standards as well as the complexity of multiple regulators and regimes.

26. Would a general safety provision in the ACL better meet those principles? Why, or why not?

ATA Response

The ATA has made submissions on adjustments that it believes would improve and enhance the current product safety requirements under the Competition and Consumer Act and Australian Consumer Law. We believe that the introduction of a general product safety provision would be a large and unnecessary change that would create enormous uncertainty and costs for all parties.

We believe that the failures in the current regime and comparative benefits of a general product safety provision have been exaggerated in some submissions. Comparisons with Europe and the UK are particularly inaccurate:

- a. It is suggested that the European General Product Safety Directive has resulted in a low number of recalls in the UK.  
In fact, RAPEX, which provides information on non-food recalls in Europe, is running at a consistent rate of around 2500 recalls per year.  
We are unable to get good detail on the UK recalls specifically as there is no central collection point comparable to our Australian Product Safety website, but they are clearly impacted by more than the numbers identified by Choice.
- b. A discussion on a February 2016 review of the UK system finds a favourable quote, but neglects to mention the following finding:  
*On paper it looks like a good system – our robust laws in the UK and Europe are among the strongest in the world, potential penalties and fines have been increased, thousands of products are withdrawn from sale or recalled every year. But the system is out of date. It isn't working well enough to protect us. Trading Standards Officers have suffered severe cutbacks and find it difficult, if not impossible to catch businesses cutting corners and behaving badly. Only one company across Europe has been fined. Many unsafe goods come from outside the European Union through entities which are hard – if not impossible - to trace. Traceability is a major issue.*
- c. The incredible complexity of the European regime is overlooked.

In addition to the General Product Safety Directive, they have added several specific product safety directives, e.g. the Toy Safety Directive. For certainty, they go through a complex process of 'harmonising' certain Standards to these so called 'New Age Directives' and once harmonised, the Standards are recognised to give presumption of conformity to the Directive. Any aspects not covered by a harmonised standard must go for EC type approval by a 'Notified Body', which is an expensive process. The accreditation of 'Notified Bodies' is, of course, another complex administrative process.

The European Commission provides a constant stream of interpretations in an attempt to help suppliers deal with the complexity.

The regime is said to have the flexibility to harmonise ISO or other Standards, but that has not happened to date.

We are encouraged by the Singapore model which will recognise a product that is compliant with any International Standard as safe, e.g. for toys, they would recognise EN 71, ISO 8124 or ASTM F963, without concern about the year version or how much input they have had into the development of the Standard.

However, there seems to be other factors in Australia that would need to be addressed before such an approach could be implemented here.

27. Would a general safety provision provide an effective and proportionate response to concerns raised about the current regime?

- What costs would it impose on business, for example, what processes or practices would need to be changed?
- What impacts would it have on safety outcomes for consumers?
- What, if any, transitional arrangements would be required for businesses?
- Are there any unintended consequences of a general safety provision?

ATA Response

As stated in the response to 26 above, the ATA does not see a general safety provision as providing an effective and proportionate response to the concerns raised. We believe that all concerns can be effectively dealt with by adjustments to the current regime and additional guidance and publicity about the current provisions.

The interim report notes that the guarantee of acceptable quality already includes a requirement that products be safe and responsible suppliers take account of this by ensuring compliance with a relevant Standard, e.g. a relevant Australian, European, US, ISO, etc. Standard would generally be sufficient to know that a product is safe (with exceptions for different voltages, etc.). A reinforcing of this requirement and guidance on complying with it would provide all the benefits of a general product safety provision.

On the other hand, adding a new differently worded requirement has the potential to create very large additional costs due to the uncertainty created and subsequent actions that would be required to sort it out.

It is uncertain whether a general safety provision would give any positive outcomes for consumers. There will always be suppliers that ignore requirements and it seems to be just as easy for them to slip under the radar in Europe as it is in Australia. On the other hand, it will gain the attention of

some suppliers that want to act responsibly but are not aware of the current requirements. The ATA submits that there are more efficient and effective ways to get the attention of these suppliers and let them know of the existing obligations.

If the option to implement a general safety provision is to be pursued further, then there should be a lot more consultation on it as a separate topic so that the rationale for it can be more fully explored along with the costs and benefits.

We certainly expect unintended consequences and they will be difficult to anticipate due to the differences in the Australian regulatory environment compared to the international examples reviewed. Our colleagues in Europe do not recommend their system and we should be prepared to learn from their mistakes.

28. Are there any current overseas models, or features of models, that should be considered in any general safety provision? If so, why? Would adaptation be required for the Australian context?

ATA Response

All existing international models should be examined to understand if there are any perceived benefits that could not be more efficiently obtained by adjustments or clarifications to our existing requirements.

Any model reviewed would require adaption for Australia due to the different regulatory environment and the comparatively small size of the Australian market. The Singapore model would have advantages, but would require a lot of change to the regulatory structure. We would not have the infrastructure or market size to sustain the European model in Australia.

## **2.2.8 Performance-based approach to compliance with standards**

29. Should a 'performance-based' approach to product safety standards be introduced?

- What changes would businesses need to implement, and what are the associated costs? What impacts would a 'performance-based' approach have for consumers?
- Are there any unintended consequences, and how could these be addressed?

ATA Response

The existing regime already has a mix of performance and prescriptive based requirements that can be adjusted to suit various situations:

- The obligation to ensure that products are safe under the acceptable quality guarantee is a performance based requirement and suppliers already rely on compliance with Australian, International or other National Standards (where appropriate) to know that they have met that obligation. The requirement provides the flexibility to recognise any one of various possible Standards as providing satisfactory due diligence on the safety of the product without requiring that goods be retested to a prescriptive Australian requirement.
- At the same time, in situations where there is a particularly serious risk (e.g. small, high powered magnets) and/or the available Standards do not cover the risk (e.g. coin batteries) and/or suppliers have failed to ensure compliance with relevant Standards (e.g. hoverboards), then the government has the option to step in with prescriptive requirements in the form of mandatory standards.

We have made submissions on adjustments that are required to make the application of prescriptive requirements more efficient and so reduce the cost to the economy. We are also happy to support the removal of individual prescriptive requirements as they become no longer necessary, (many prescriptive requirements were removed at the time of the introduction of the ACL and this doesn't seem to have led to any re-emergence of the type of incidents that these were designed to prevent). The ACCC's approach in starting to reference trusted International Standards in addition to Australian Standards within prescriptive requirements will also help to reduce costs and increase economic efficiency.

We therefore believe that the existing system has the ability to meet policy objectives and can be described as generally performance based. We do not see that additional actions are actually needed to implement a performance based approach and are concerned that the addition of further criteria in this regard would lead to confusion and unintended consequences.

It would be beneficial to provide guidance on the existence of the acceptable quality guarantee and how suppliers can take reasonable steps to comply with it.

30. How could the approach be designed? For example:

- Are there any current domestic or overseas models, or features of models, that should be considered?
- How would it interact with other elements of the current regime, or with a general safety provision?
- What, if any, transitional arrangements would be required for businesses?

ATA Response

The existing Australian regime is the only one that we are aware of that has a performance based approach.

- The European model starts off with a General Product Safety Directive, but this has been developed and interpreted to the extent that suppliers must comply with a range of prescribed European Standards and Directives.
- The US model, at least for children's products, prescribes compliance with relevant US Standards.
- Even the Singaporean model mentioned in the Interim Report prescribes compliance with a Standard, although it has admirable flexibility in accepting Standards from other jurisdictions.

As mentioned above, the ATA supports the performance based approach along with the ability to make prescribed requirements where deemed necessary as set out in the current Australian Consumer Law. Adjustments are needed to provide for quick and easy updating of prescribed requirements to maintain alignment with referenced Voluntary Standards and to recognise the intent of a referenced Voluntary Standard when there is doubt as to the meaning of a prescribed requirement.

A major issue for Australia is that there are many laws other than the Competition and Consumer Act, operating at both the State and Commonwealth levels and managed by different regulators that impact the supply of consumer products and act in different ways. Some of these are related to safety and others relate to information or other requirements. It would be unrealistic to expect a new supplier to identify all the relevant regulators, let alone comply with all the requirements.

There is a general expectation by new entrants that either the ACCC or the State Fair Trading Offices would be able to advise them on all relevant obligations. This has been shown to be incorrect and we are aware of suppliers requesting information and being given misleading or inaccurate information, for example suppliers of hoverboards making enquiries in NSW were not advised of the performance based approach that would have led them to the applicable Standards for electrical products and were further not told about the different mandatory requirements in different States, e.g. in Victoria where requirements for extra low voltage electrical goods are included in their Electrical Safety Act and so mandatory. We believe that a more co-ordinated and aligned regulatory process would have greatly reduced the number of defective hoverboards imported into Australia.

### **2.2.10 Mandatory reporting requirements**

#### 31. Should the mandatory reporting triggered be clarified? If so:

- How should this be achieved?
- What changes would businesses need to implement to their current reporting processes, and what impact would this have on their compliance costs?
- How would this affect the information that is available to regulators, and product safety outcomes for consumers?

#### ATA Response

The ATA agrees with the submissions of some stakeholders that the current trigger for reporting of 'the incident requiring medical treatment', captures incidents that may be minor. However, it does have the benefit of being clear and allows suppliers to make the decision on whether or not to report quite easily. We have seen instances where the same injury has been variously described as a cut and a partial amputation by different parties and it is often not possible for the supplier to get more information from the medical practitioner or the injured party directly. Providing options around this trigger may have a negative impact of making the need to report less clear and having the business spend too much unproductive time deciding on whether to report or not.

The ATA does not support the suggestion for reports on near misses generally as the concept requires too much expert knowledge, e.g. a layperson may see something as a near miss that has been considered by the Standard and known to be completely safe. On the other hand, there may be a justification for reporting a near miss where a product would have failed a regulated requirement, but was determined by the supplier to have been an individual, one off manufacturing defect and so not require a recall, e.g. the supplier becomes aware that a small part was released by a toy intended for a child under 3 as a one-off incident.

#### 32. Should the current timeframe for making a mandatory report be extended? If so:

- What time period should apply?
- Should it be accompanied by other requirements, for example, immediate notification?
- What changes to businesses processes would be needed, and what would be the impact on compliance costs?
- What, if any, transitional arrangements would be needed?
- Are there any unintended consequences, and how could these be addressed?

#### ATA Response

The ATA supports the suggestion for an increased timeframe for mandatory reporting and has suggested doubling the current period to 4 days. The rationale for this extension and the period suggested is solely to provide adequate time to determine correctly whether the incident is reportable or not.

It would be counterproductive (and a misunderstanding of the need for the time) to accompany the increased period by a requirement for immediate reporting.

We are also not suggesting that this 4-day timeframe would be sufficient to 'undertake an adequate risk assessment and develop a risk management strategy'. These are things that would take more time and may be done in consultation with the regulator at a later stage, depending on the issue. We do not believe that it is necessary to have completed all steps in the investigation before reporting and do not want to make the actual reporting process more complex.

Although not a part of the question posed, the ATA feels that it is important that the data collected from mandatory reporting be available on a selective basis to experts involved in developing product safety requirements, e.g. relevant Standards Australia Committees.

### **2.2.12 Product bans and recalls**

33. Should a statutory definition of a voluntary recall be introduced? Would this address the concerns raised? If so:

- How should a voluntary recall be defined?
- What factors or criteria should be included?

#### ATA Response

The ATA is not aware of any confusion in the meaning of 'voluntary recall'. The ACCC provide good guidance and work with suppliers to ensure that actions taken in association with recalls are appropriate for the situation.

There may be a need for more clarity on the requirements in the ACL associated with recall notices issued voluntarily. The ACCC guidelines seem to be aligned with sections 123 through 128 of the ACL and so imply that the same requirements apply regardless of whether the notice is issued by order of the Minister or voluntarily by the business. If that is not what the Act intends, then this should be clarified, but we would not need a new definition to do that.

It should be noted also that ISO 10393 is intended as a guidance for good practise. We don't believe that it was drafted to support legislation and the definition of 'product recall' in the Standard is far too broad to be useful in this application.

34. Should the penalty for a failure to notify a recall be increased and, if so, to what amount?

#### ATA Response

The ATA does not agree that there is a need to increase the penalty for failing to notify a recall. In the event that a supplier conducts a recall, there is no disincentive to notify the minister of that

action. In the case that a supplier refuses to conduct a recall for an unsafe product, the regulator has other remedies, including implementing a compulsory recall, enforceable undertakings, etc.

The reported suggestion by Choice that brand owners don't publicise a recall in order to protect their brand does not stand up in reality as the brand is not helped by having defective products in the marketplace. Also, despite a few notable exceptions, most product safety issues are with lower value, unbranded goods.

The report does not mention any concern by the ACCC of widespread lack of co-operation by suppliers or the need for additional remedies in this regard and we would rather be guided by concerns raised by the bodies responsible for enforcing the rules in this situation.

35. Should current processes for implementing product bans and recalls be streamlined? If so:

- How should they be streamlined?
- What would be the associated benefits and costs?
- Are there any unintended consequences, risks or challenges that need to be considered?

ATA Response

The ATA believes that the principles behind the ACCC's process for implementing product bans, mandatory standards and recalls are sound. However, they are impacted by outside factors such as the responsibilities of specialty regulators and determinations of the Office of Best Practise in Regulation.

Rather than changing the principles, the solution to the issues identified should be to simplify the regulatory framework to make responsibilities clearer and have national consistency. At the same time, the focus of the OBPR should be broadened so that it can consider the total cost and efficiencies to the economy associated with regulatory action rather than the narrow focus of just reducing the amount of regulation that it seems to have at the moment.

The example given of the hoverboard response is a good one to review. The complexities of the system contributed to the issue in the first place by making it difficult for prospective suppliers to find out about the various requirements that actually already existed.

The case study points out that the ACCC was the first to identify the potential risk and publicise it. Once they had publicised the risk; knowing that the issues were electrical in nature and governed by specialty regulators; and additionally, that there were already mandatory requirements in certain States, (e.g. Victoria); it seems reasonable that the ACCC would take a back seat and allow the specialty regulators to act. We suppose that there must have been jurisdictional issues because the specialty regulators did not act and it, understandably, took time for the ACCC to realise that they would need to manage the issue.

We agree that the process to eventually apply mandatory conditions took far longer than it should have, but on the other hand, the specialty regulators could have been enforcing the mandatory requirements that were already in place and it is arguable whether further regulation to make the requirements more mandatory was actually needed. The issue was not with the process to implement bans and mandatory standards, but with jurisdictional overlap, confusion and failure to act.

The process seems to allow for interim bans when quick action is required and provides for a consultative approach to ensure that a well thought out final solution is implemented. We have seen many issues when regulators have acted without due process in the past.

### **2.2.13 Public information about unsafe products**

36. Is there scope to improve the quality of information available to consumers on safety risks? If so:

- What are the benefits of increased information, and what costs, risks or challenges need to be considered?
- What information is most helpful to consumers, and how should it be used? In a context of finite resources, what information should be prioritised?
- How could this be achieved? For example, in what format should information be provided?

#### ATA Response

The ATA agrees that there is scope to improve the quality of information available to consumers, but doesn't agree that they need more information. The data on safety issues and recalls on the Product Safety Australia website is excellent, but we are not convinced that it is recognised by consumers generally as a resource. There should be more effort made to direct consumers to the site, e.g. by search engine optimisation strategies, television advertising, links on other websites, leaflet drops etc.

We support the concept of optional customer registers for major purchases or warranty registrations, e.g. cars and white goods, but there are many recalls of lower value items where this is not a sensible option.

We want mandatory report data to be available to compliance professionals for specific purposes such as to support the development of requirements for Standards, but we do not support the provision of this data to consumers generally. Data of this type can be easily misunderstood and misrepresented so should continue to be protected.