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## **Responsive Re-regulation of Consumer Product Safety: Hard and Soft Law in Australia and Japan**

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9/2006

# Responsive Re-regulation of Consumer Product Safety: Hard and Soft Law in Australia and Japan

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## 1. Re-regulation amidst De-regulation

For a year from mid-2005 in Japan, product safety problems once again became a widespread social problem (*shakai mondai*). This time, the problems were caused by asbestos, defectively designed buildings, second-hand electrical products (which also now require the PSE Mark), Schindler's elevators, and Paloma gas water heaters.<sup>1</sup> There was a strong sense of *déjà vu*. In 2000, another "year of living dangerously", an earlier wave of safety problems surfaced concerning foodstuffs, automobiles, and consumer electronics such as televisions, resulting in somewhat stricter

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<sup>1</sup> Particularly on the first four, see eg L Nottage 'The ABCs of Product Safety Re-regulation in Japan: Asbestos, Buildings, Consumer Electrical Goods, and Schindler's Lifts', *Sydney Law School Research Paper*06/13 via [www.ssrn.com](http://www.ssrn.com) (forthcoming in 15(2) *Griffith Law Review*). On Paloma gas heaters and subsequent problems with consumer goods, see L Nottage (2007) 'Product Safety Regulation Reform in Australia and Japan: Harmonising Towards European Models?' 2 *Yearbook of Consumer Law*, forthcoming.

regulatory enforcement.<sup>2</sup> Does this mean that Japan remains a paradise for producers, prepared to risk harm to consumers particularly given the country's prolonged economic recession? Instead, recent events should be appraised more positively in light of the broader socio-economic transformations in Japan since the late 1980s. Those also underpinned the enactment of Japan's strict-liability Product Liability Law of 1994 and largely pro-plaintiff judgments over the ensuing decade.<sup>3</sup> Safety issues, even complex ones such as asbestos, are now being more vigorously reported, debated and addressed.

However, recent problems are not readily covered by the PL Law. For example, they involve services (building design), or raise problems of causation and limitation periods (asbestos). They also raise broader concerns that even private law generally, including tort and contract law under the Civil Code, may not be a sufficient substitute for regulation by public authorities. This presents a major problem for policy-makers in Japan. Since 2001, the Koizumi government has pressed forward with reforms consistent with recommendations of the Judicial Reform Council. This has involved further moves away from direct ex ante regulation, and towards more indirect socio-economic ordering achieved primarily by private initiative – including lawsuits for compensation pursued by private parties through a more functional civil justice system. Although the Council's recommendations and subsequent reforms have mainly focused on procedural law,<sup>4</sup> they also involve or imply stronger private law rights, including in the area of consumer protection. However, improving such substantive rights has often been limited or delayed compared to some

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<sup>2</sup> L Nottage (2000) 'New Concerns and Challenges for Product Safety in Japan', 11 *Australian Product Liability Reporter* 100.

<sup>3</sup> L Nottage (2004) *Product Safety and Liability Law in Japan: From Minamata to Mad Cows*, London: RoutledgeCurzon, chapter 2; L Nottage (2005) 'Comparing Product Liability and Safety in Japan: From Minamata to Mad Cows - to Mitsubishi', in D Fairgrieve (ed.) *Product Liability in Comparative Perspective* Cambridge: Cambridge University Press; L Nottage (2005) 'A Decade of Strict-liability Litigation under Japan's Product Liability Law of 1994', 16 *Australian Product Liability Reporter* 65 . Broader changes are outlined in T J Pempel (1998) *Regime shift: comparative dynamics of the Japanese political economy*, Ithaca, NY: Cornell University Press; S K Vogel (2006) *Japan remodeled: how government and industry are reforming Japanese capitalism*, Ithaca, N.Y.: Cornell University Press,.

<sup>4</sup> Eg L Nottage (2005) 'Civil Procedure Reforms in Japan: The Latest Round', 22 *Ritsumeikan Law Review* 81.

other jurisdictions such as Australia.<sup>5</sup> Even more worrying is that problems such as asbestos reveal broader limits to addressing safety issues through private law and private suits anyway. In Japan, this has led to growing pressure to “re-regulate”: filling gaps in offences, strengthening enforcement, and raising penalties imposed or threatened. This occurs against a comparatively strong reliance still on both criminal prosecutions, particularly for “professional negligence causing death” (*gyomu-jo no kashitsu*), and state liability compensation claims (under the *Kokka baisho-ho*).<sup>6</sup>

The question in Japan is whether issues such as those highlighted in product safety are now being addressed through a combination of differing areas of law, interacting with broader market forces and communities or associations, which is both economically efficient and more generally accepted as “effective” and legitimate.<sup>7</sup> Yet very similar issues are being explored in other jurisdictions like Australia and the United Kingdom. They too have gone through a wave of deregulation and socio-economic transformation following poor economic performance, but have also witnessed significant re-regulation in various forms and areas. Globally, the pattern has involved considerable rolling back of regulations in areas such as financial markets, but significant ratcheting-up of regulations in areas such as the environment and safety.<sup>8</sup>

This experience has also generated many interesting experiments trying to develop hybrid forms of regulation, bringing together public authorities with private actors and other groups in novel ways. “Responsive regulation” is a very influential model that has sought both to explain this phenomenon from an economic (game-theory) perspective, and to justify it

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<sup>5</sup> See, eg, the Trade Practices Act 1974 (Cth) Parts IV, IVA, V Div 2 and 2A, and VA; and the Contracts Review Act 1980 (NSW). See also L Nottage (2000) 'Nihon-Nyujirando Shohishakeiyakuho [Consumer Contract Law in Japan and New Zealand]', 1620 *Toki no Horei* 4.

<sup>6</sup> See further R B Leflar and F Iwata (2006) 'Medical Error as Reportable Event, as Tort, as Crime: A Transpacific Comparison', 12 *Widener Law Review* 195 and L Nottage (2007) 'Product Liability and Safety Regulation', in G McAlinn (ed.) *Japanese Business Law* The Hague: Kluwer, forthcoming

<sup>7</sup> See Zandankai [Colloquium] (2003) 'Gendai ni okeru Anzen Mondai to Ho-shisutemu (Ge) [Contemporary Safety Issues and the Legal System (Part 2)]', 1248 *Jurisuto* 92; Zandankai [Colloquium] (2006) 'Jiko Chosa to Anzen Kakuho No Tame No Ho Shisutemu [Accident Investigations and a Legal System to Secure Safety (special issue)]', 1307 *Jurisuto* 8.

<sup>8</sup> J Braithwaite and P Drahos (2000) *Global business regulation*, Cambridge; Melbourne: Cambridge University Press.

normatively.<sup>9</sup> One element involves the idea of the “benign big gun”. Regulators need not exert their stronger powers further up the “enforcement pyramid”, and indeed usually should not, in order to obtain optimal collaboration from private firms and associations. The broader notion of “soft law” operating in the shadow of “hard law” resonates with the proposals to reform both formal court proceedings and Alternative Dispute Resolution in Japan.<sup>10</sup> However, Japanese regulators have tended to lack strong formal powers, hence having to rely on looser “administrative guidance” (*gyosei shido*).<sup>11</sup> The potential for the latter has been eaten away over the last 15 years, due to legal reforms, Japan’s weak economy and declining trust in the bureaucracy.<sup>12</sup> This generates the need to rebuild new patterns of collaborative relationships, involving heightened enforcement powers not only in areas such as competition law,<sup>13</sup> but also product safety regulation.

Thus, regulators need to be able to make more credible threats to ban or recall unsafe products, across a broad range of consumer goods, rather than relying overwhelmingly on voluntary recalls by suppliers and product-specific regulation. This demands more than broader scope of application, as well as more resources for enforcement and tougher penalties for non-compliance. A credible system also involves regulators being able to attract and analyse information regarding latent or actual safety risks. This can be achieved by shifting the primary burden onto suppliers to themselves develop and supply only safe products, and then imposing a (well-supervised) requirement to report serious incidents or complaints to regulators. Regulators also need to keep engaged in “voluntary” standard-setting associations that suppliers can and should use to help refine safety of goods. This can be achieved directly or by encouraging the involvement of other stakeholder groups, including not only consumer representatives, but also “competing” industry groups. This also parallels a second important idea in the model of responsive regulation, namely “trilateralism” (or perhaps “multilateralism”, given the increasing diffuseness of

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<sup>9</sup> I Ayres and J Braithwaite (1992) *Responsive regulation: transcending the deregulation debate*, New York: Oxford University Press.

<sup>10</sup> See also T Kojima (2004) *Civil procedure and ADR in Japan*, 65, Tokyo: Chuo University Press, using the metaphor instead of concentric circles, with “hard law” court proceedings in the middle.

<sup>11</sup> J O Haley (2001) *Antitrust in Germany and Japan: the first fifty years, 1947-1998*, Seattle: University of Washington Press.

<sup>12</sup> J Kingston (2004) *Japan's quiet transformation: social change and civil society in the twenty-first century*, London; New York: Routledge,.

<sup>13</sup> J O Haley (1991) *Authority without Power: Law and the Japanese Paradox*. New York: Oxford UP.

“regulatory space” and growing expectations about broad stakeholding).<sup>14</sup> In fact, these ideas fit very well with the relationships regulators in the European Union (EU) have developed with both industry and other groups, in connection with consumer product safety regulation first in specific product areas, and then (in 1992, and especially since 2001) for consumer goods generally.<sup>15</sup>

EU law continues to significantly influence Australian consumer law and policy. The “responsive regulation” model developed partly out of this field, and has then spread into many others in Australia.<sup>16</sup> Further, following public perceptions of an “insurance crisis” and escalating tort litigation generally, since 2002 the federal and state governments have legislated “tort reforms” restricting claims especially for personal injury against both private parties and public authorities.<sup>17</sup> Tort litigation dropped significantly, but this coincided with some large-scale recalls (notably of health supplements, and foodstuffs) and widespread concern about other products (such as asbestos and children’s goods). All this underpinned a Review announced by the Australian Ministerial Council on Consumer Affairs in mid-2004.

On 9 August 2005, the Government’s Productivity Commission (‘PC’) released its 434–page Discussion Draft (‘DD’) entitled *Review of the Australian Consumer Product Safety System*. This study by the Commission, founded in 1998 as the Government’s principal advisory body on microeconomic reform, was commissioned to inform the Review. The Council received 31 Submissions, and the PC received 12 more (including a first one by this author). The final Research Report (‘RR’) was made public on 7 February 2006, after another 20 Submissions

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<sup>14</sup> Compare Ayres and Braithwaite (supra) with C Scott (2001) ‘Analysing Regulatory Space: Fragmented Resources and Institutional Design’, 2001 *Public Law* 203; and “Principles for the Appointment of Consumer Representatives - Final Paper” (15 June 2005), <<http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=994>>.

<sup>15</sup> G Howells (2000) ‘The Relationship Between Product Liability and Product Safety: Understanding a Necessary Element in European Product Liability through a comparison with the U.S. Position’, 39 *Washburn Law Journal* 305; D Fairgrieve and G Howells (2006) ‘General Product Safety - A Revolution Through Reform?’ 69 *Modern Law Review* 59.

<sup>16</sup> See eg C Parker (2002) *The Open Corporation: Effective Self-Regulation and Democracy*. New York: Cambridge University Press.

<sup>17</sup> See the “Ipp Report” and aftermath via <<http://www.lawcouncil.asn.au/tortreform.html>>.

(including a second by this author).<sup>18</sup> Significant reforms now seem inevitable over the next few years. The real question is how far those reforms will go. In particular, it remains unclear whether Australia will follow sufficiently the lead of the revised EU regime for general consumer product safety,<sup>19</sup> also being considered for example in Canada. Even more so than in Japan, the Australian federal Government still emphasises deregulation and a declining role for the state. Even partial improvements in the existing regulatory scheme, however, should generate more “responsive regulation”. They may also encourage developments in closely-linked jurisdictions such as New Zealand, given both countries’ business law harmonisation agenda pursuant to their longstanding Free Trade Agreement (FTA).<sup>20</sup> As both Australia and Japan continue to accelerate the numbers and breadth of FTAs particularly in the Asia-Pacific region, and even finish off a Feasibility Study into concluding an FTA between the two countries,<sup>21</sup> harmonisation of areas such as consumer product safety regulation becomes increasingly desirable. Even without an FTA, moves in Australia towards a better balance between “hard” and “soft” law in this field may assist policy-makers and commentators in Japan in achieving their own better “re-regulatory mix” despite the pressures of deregulation.

Part 2 of this paper therefore outlines Australia’s main existing regulatory regime, the *Trade Practices Act 1974 (Cth)* (‘TPA’). It highlights its reactive nature (and effects) in putting the primary onus on the government to act only when a lack of safety becomes apparent, as well as some parallels with Japan’s Consumer Product Safety Law of 1973. Part 3 highlights some key points from the PC’s DD in 2005. The Draft was hesitant about shifting towards the EU model particularly through transferring the duty onto firms not to supply unsafe products in the first place, via a General Safety Provision (‘GSP’). Part 4 briefly summarises responses in the second round of 20 Submissions to this DD, and Part 5 analyses key recommendations of the RR. Part 6 looks at the aftermath, mentioning some highlights from the PC’s draft report in a follow-up

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<sup>18</sup> All the Submissions, Issues Papers, the DD and the RR are available via <http://www.pc.gov.au/study/productsafety/index.html>.

<sup>19</sup> Revised Directive for General Product Safety, 2001/95/EC.

<sup>20</sup> See generally the PC’s February 2005 report on ‘Australian and New Zealand Competition and Consumer Protection Regimes’, available via <http://www.pc.gov.au/study/transtasman/finalreport/index.html>.

<sup>21</sup> See < <http://www.dfat.gov.au/geo/japan/fta/index.html>>.

study into Standards Australia (SA). This is the peak non-governmental standard-setting body, mainly used by businesses but also still supported financially by the Government. It also involves other stakeholders, such as consumers; but their role is under growing threat, as the body becomes more market-driven.<sup>22</sup> Part 7 concludes by emphasising that the final outcomes of the PC's studies must feed back into the political process anyway. This ongoing reform process therefore should be widely monitored not only for its likely outcomes, but also for the lessons it may provide into how consumer law is made and remade nowadays in other jurisdictions. In particular, the paper highlights some of the challenges of developing sufficient "big guns" (or "hard law" potential) to renegotiate collaborative relations with the business sector (effective "soft law") in a world of persistent deregulation rhetoric. On the other hand, that rhetoric may be more muted in Japan, its tort law remains on an expansionary path, and other aspects of the Japanese legal system (such as state liability in tort) may promise better outcomes for consumer product safety there.

## **2. Australia's Current Consumer Product Safety Regime<sup>23</sup>**

Australia, with its federal system of government, has a dispersed regulatory regime in this field (DD Chapter 4). Increasingly, however, the central regime is federal legislation applicable to most corporations: the TPA, Part 5 (Consumer protection) Division 1A

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<sup>22</sup> For a snapshot of SA's governance changes, including incorporation as a company in 1999 and a public float of its publishing operations in 2003, see <<http://www.standards.org.au/cat.asp?catid=24>>. Parts 2-5 of this Paper, and some of Part 6, are largely taken from L Nottage (2006) 'Consumer Product Safety Regulation Reform in Australia: Ongoing Processes and Possible Outcomes', 1 *Yearbook of Consumer Law* forthcoming.

<sup>23</sup> The remarks in this Part and Part 3 are largely reproduced from L Nottage (2005) 'Reviewing Product Safety Regulation in Australia - and Japan?' 16 *Australian Product Liability Reporter* 100, which contains full references and is freely available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=795884](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=795884). For further overviews of the current regulatory regime, see especially D Harland (1990) 'Post Market Control of Technical Consumer Goods in Australia', in H-W Micklitz (ed.) *Post Market Control of Consumer Goods* Baden-Baden: Nomos; and J Kellam (2005) 'Post-Sale Duty to Warn and Product Recall in Australia', 16 *16(8) Australian Product Liability Reporter* (September 2005) 113 (including product-specific regimes, not covered here).



(Product safety and product information). First, under s. 65C(2), the responsible Minister (currently the Parliamentary Secretary to the Treasurer) may prescribe requirements under a consumer product safety standard ‘as are reasonably necessary to prevent or reduce risk of injury to any person’.<sup>24</sup> A corporation supplying in trade goods that do not comply with such a mandated standard is subject especially to criminal sanctions (s. 65C(1)). Australian courts have become increasingly strict in enforcing such sanctions. By contrast, the EU regime sets a GSP for manufacturers and distributors of consumer goods, without first requiring specific regulatory standard-setting. This should help address problems related to a paucity of strict standards prescribed under the TPA – currently, 27 – highlighted by several Submissions to the PC (cf. e.g. DD pp. 157–160).

Any requirements prescribed by s. 65C(2) may be set directly by regulation, or (s. 65E) by the Minister partly or completely adopting a voluntary standard elaborated by Standards Australia International Limited (which recently changed its name to Standards Australia Limited, ‘SA’), there still being no other ‘prescribed association or body’. Most prescribed standards are based on SA standards. The Full Court of the Federal Court of Australia has recently indicated that courts will be ‘very cautious in finding that a particular prescribed product safety standard has been prescribed invalidly, when the issue is whether the standard concerned really promotes safety’, especially where ‘the standard is produced by a body of experts’ such as a SA technical committee (as in that case).<sup>25</sup> Indeed, the Court held (at para 33) that any SA standard prescribed under s. 65E need not be shown to be ‘reasonably necessary to prevent or reduce risk of injury to any person’, which is the threshold if the Minister mandates a standard instead under s65C(2). This is problematic, given the criticisms now being directed at the governance and processes of SA, outlined in Part 6 below. However, the Court did mention several considerations that might limit such deference to the SA, or indeed other ‘expert’ standards, in different situations.

More generally, SA’s activities and governance are currently under review. This follows its transformation in 1999 from an association into a public company limited by guarantee; and the floating of commercial operations (e.g. publishing and sales of standards) as ‘SAI Global Limited’ in December 2003. In July 2005, a report by consultants Cameron Ralph was circulated to an array of stakeholders and concluded with 28

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<sup>24</sup> Cf also Japan’s Consumer Product Safety Law (No 31 of 1973) Art 3 (Minister may *directly* prescribe standards to avoid injury).

<sup>25</sup> *BMW Australia Ltd v ACCC* [2004] FCAFC 167 (28 June 2004) at para 30.

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recommendations. Key proposals address some perennial criticisms of SA and its standard-setting processes (see also DD pp. 110–3). These include problems with transparency; broader stakeholder participation (including interested individuals, consumer groups and the user community); and (perhaps especially) prompt and focused action.

Secondly, under s. 65C(5) of the TPA, the Minister may declare that consumer ‘goods of a particular kind *will or may cause injury* to any person’. Such a declaration establishes a temporary ban on the goods for up to 18 months (s. 65C(6)). Thereafter, and if no safety standard has been mandated under s. 65C(2), the Minister may declare a permanent ban pursuant to an amendment made in 1986 (s. 65C(7)). Once again, regulatory prohibition on supply of such unsafe goods only arises after the Minister has acted (s. 65C(1)(b) and (c), respectively). However, by contrast to s. 65C(2) standard-setting, the threshold for regulatory action does not require that it be ‘reasonably necessary’ to avoid injury – at least for temporary bans. There are currently 12 bans in force, almost all of which are permanent. This compares with three permanent bans ordered between 1986–1988. In addition, from when the power to make temporary bans was introduced in 1977 through to 1988, 30 were ordered but then expired. Some of these were replaced by mandatory standards, but most were not renewed, probably as they referred to discontinued brands. In the 15 years since 1989, many more temporary bans have followed similar patterns.

Thirdly, since TPA amendments in 1986, the Minister has been empowered to compel a recall of consumer products (s. 65F(1)(d)) if they: (i) are of a kind which *will or may cause injury*, (ii) do not comply with a mandatory product standard, or (iii) are subject to a temporary or permanent ban (s. 65F(1)(b)); *and* ‘it appears to the Minister that the supplier has not taken satisfactory action to prevent the goods causing injury to any person’ (s. 65F(1)(c)). The latter requirement indicates that the legislative intention was for suppliers still to take the first steps in conducting recalls. This approach is reinforced by a duty on suppliers to notify the authorities within two days of a voluntary recall of products subject to the TPA (s. 65R). Many recalls have been conducted and notified under this voluntary regime, but some products are not covered and there is anyway no definition of what constitutes a ‘recall’.<sup>26</sup> By contrast, the

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<sup>26</sup> Cf Japan’s Consumer Product Safety Law (No 31 of 1973) Art 82 (Minister may order *manufacturers to undertake* recalls or temporary measures *reasonably needed* to prevent escalation of *serious harm*, if such harm has occurred or there is an *imminent risk*). This power was first exercised in November 2005, regarding faulty kerosene fan heaters produced by Matsushita Electric, although this attracted little media attention. In mid-2006, METI mandated a recall also of Paloma gas water heaters, unsatisfied with the

revised EU regime introduces an explicit obligation on producers to monitor safety of their goods after supply and to recall them, if necessary, or become susceptible to enhanced powers for authorities to mandate or organise a recall. In Australia, on the other hand, there have been very few compulsory recalls. The first, for condoms that had failed to meet a SA standard on freedom from holes, was implemented only from late 1988.

Some reticence to act on the part of the Minister, even in issuing temporary bans, may be linked to the requirement that if he envisages a ban or recall, he must first allow any suppliers to call a conference with the Australian Competition and Consumer Commission (the ACCC, s. 65J), which then gives a non-binding recommendation (s. 65P). The exception is where the goods 'create an imminent risk of death, serious illness or serious injury' (ss. 65L and 65M). Conferences have frequently been requested, beginning with the condoms recall and the banning of smokeless tobacco products. In addition, the Minister regularly calls for requests for a conference especially before deciding whether or not to turn a temporary ban into a permanent one.

A fourth option expressly available to the Minister under the TPA (s. 65B(1)) is to publish in the Gazette (a) 'a statement' that specified goods 'are under investigation to determine whether the goods *will or may cause injury* to any person', or (b) 'a warning of *possible risks* involved in the use' of specified goods. Yet again, this legislation puts the onus on the Minister to act. By contrast, the EU regime not only imposes a general obligation to supply safe products, but also specific obligations to provide information for consumers to assess risks (if not immediately obvious) and instructions on safe use of the products. Producers and suppliers must also keep themselves informed about possible risks. If they discover that their products on the market are unsafe, they must notify the regulatory authorities of this fact and what action they have taken to remove the risk to consumers. Amendments to Australia's regime along these lines, casting the primary onus on suppliers to warn about possible risks, again would fill an important gap.

Even under the current s. 65B, the threshold for action by the Minister seems lower even than for temporary bans. For paragraph (a) 'statements', it is only an investigation into whether the goods will or may cause injury (the threshold for bans and also a key requirement for recalls). For paragraph (b) 'warnings', the threshold is clearly even looser, namely 'possible risks' (perhaps not even leading or likely to result in *injury*, but instead lacking safety features that might result say in *property* damage). However, the Minister seems quite loath to take advantage of this option.

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company's voluntary recalls: 'Govt may order Paloma to recall faulty water heaters', Mainichi Daily News, 26 August 2006, at <<http://mdn.mainichi-msn.co.jp/national/news/20060826p2a00m0na022000c.html>>.

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At present, there seems to be only one notification pending under s. 65B. Like temporary bans, however, notifications may lead eventually to a new voluntary or mandatory standard.

Overall, there remains remarkably little readily accessible guidance on key considerations for deciding whether the regulatory thresholds are met. The statutory wording itself is quite broad. For example, the ‘injury’ is not required to be ‘serious’, so a ban or recall might be triggered for example by a product causing or likely to cause quite minimal harm (e.g. a scratch), albeit to a significant number of individuals or vulnerable group such as children or the elderly. On the other hand, safety risks causing merely property damage could presumably only generate a s. 65B(1)(b) warning. In addition, there has been almost no case law on these regulatory thresholds, although the courts have indicated an expansive interpretation seemingly in viewing ‘injury’ as including disease.

We are left instead mainly with documents produced by a succession of regulatory authorities since the mid-1980s, especially directed at considerations in setting mandatory standards, but seemingly carried over to a considerable degree when considering bans or other action. From the outset, the recommended investigation procedure involved identifying the product, establishing its source, defining the hazard, and assessing it. In particular, Australia’s safety regulators focused on:

- Compliance costs for industry (including sufficiency of a voluntary approach, stocks of existing goods, phase-in times, effects on small business) versus consumer benefits (reduced risk and improved product awareness);
- Whether standards (or presumably other action) would inhibit fair competition (including, no doubt increasingly, from imports);
- Social utility of the product;
- Availability of substitute products; and
- Potential for other government agencies to intervene.

More recently, further – largely overlapping – guidance is provided by Regulation Impact Statement (‘RIS’, now required to be) published prior to possible regulatory action. The usual format is to identify the problem, define objectives for government action and whether some action is already in force, set out options (e.g. self-regulation or the status quo, consumer education, or the various forms of government regulation under the TPA), weigh the costs and benefits for each option (for groups such as consumers, industry and the government), and recommend one (in light of consultations). Overall, however, these and other RIS’s suggest that regulatory practice in Australia has become reactive and limited (cf. e.g. DD pp. 160–2). Intervention seems to have become justified almost only when it can be shown that *serious injury* has *actually* been caused due to a

clear product defect, even though the statutory threshold only requires that the product ‘will or *may* cause *injury*’ to justify a ban or a s. 65B investigation (or a standard, albeit additionally if ‘reasonably necessary’).

Yet the ‘likelihood of injury’ threshold is a broader one than ‘defect’, just as ‘unsafe’ is understood in the EU product safety regime to be broader than ‘defect’ under its Product Liability Directive regime — in turn transplanted in 1992 into Part VA of the TPA.<sup>27</sup> Such a broader concept and threshold triggering product safety regulation is deliberate, to allow intervention (to varying degrees, depending on the likely risks) even before a proven defect (triggering compensation claims) actually causes injury. In other words, a major reason for superimposing product safety regulations onto a product liability regime is to allow for proactive prevention of likely injury, rather than having to wait for those injuries to manifest themselves (cf. DD pp. 146–50). Australia’s current regulatory regime, and improvements towards a less reactive regime which may emerge from the current governmental review, are and should remain aligned with the EU regime rather than the US one.<sup>28</sup>

In addition, many submissions to the PC assumed that Australia’s system does not allow regulatory intervention where there is foreseeable misuse of products. This is controverted by even recent cases, as well as the wording of the statute. As one leading commentator explains, the EU regime more explicitly requires safety ‘judged according to its normal or reasonably foreseeable conditions of use’.<sup>29</sup> It should not matter that the misuse might be deliberate, or even by a third party, provided that is foreseeable – so common sense would view the product as a significant

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<sup>27</sup> Directive 85/374/EEC (revised by Directive 99/34/EC, extending strict liability to defective primary agricultural products). For a detailed comparison of all three product liability regimes (and the US regime), see Nottage (2004), ‘Product Safety and Liability Law in Japan’ (supra), especially Chapters 2 and 3.

<sup>28</sup> By contrast, s. 15 of the Consumer Product Safety Act (15 USC 2064) requires suppliers to report situations where the product ... (c) does contain ‘a defect which could create a substantial product hazard’, or (d) ‘creates an unreasonable risk of serious injury or death’. Reporting ground (d) was only added in 1990, and Australian practice or views taking an unduly restrictive interpretation of the TPA may have been overly influenced by the US trigger of ground (c). See also generally G G Howells (2000a) ‘The relationship between product liability and product safety: understanding a necessary element in European product liability through a comparison with the US position’, 39 *Washburn Law Journal* 305, and Submission DR51 by the Australian Consumers’ Association (ACA).

<sup>29</sup> G G Howells (1998) *Consumer product safety*, Aldershot: Ashgate, pp. 126–7.

cause of the injury – and it would be reasonable for suppliers to take counter-measures to minimise such risks. Including ‘foreseeable misuse’ within the scope of the safety regulation regime is all the more necessary, given its more expansive ambit, in light of its well-established inclusion already within the scope of ‘defectiveness’ triggering civil liability under the EC Product Liability Directive and its clones in Australia and Japan. Thus, the PC’s recommendation to clarify that Australia’s regulatory regime does (or should) encompass certain foreseeable misuse situations is generally to be welcomed. However, it is questionable if implying that such situations should never encompass the misuse which is *unreasonable solely from the perspective of the user* (DD Chapter 7, especially Table 7.1). It should always be asked whether the supply of the product in light of foreseeable misuse, for example without adding design or warning improvements to minimise potential for such misuse, is *reasonable from the perspective of the supplier*.

Overall, the main difficulties in prompting regulatory action in Australia in response to safety problems lie not so much in the wording of the current TPA, although the structure of that regime is still quite reactive (especially compared to the current EU regime) in placing the primary burden to assess and continuously monitor safety on the Minister rather than suppliers themselves. A major problem lies instead in the way the TPA has been interpreted, primarily by regulators themselves, and (perhaps for that reason) the way it has come to be perceived by others. In turn, this suggests another potential problem: that regulators in recent years have lacked the resources or political will to ‘take on’ certain entrenched and more conservative business interests, in order to take advantage even of current statutory powers. This may be particularly true at the federal level, reflecting the (Liberal) Howard Government’s long reign, since at least some (mostly Labour) state governments seem to have continued to intervene more actively to regulate product safety. Such problems of resources and disparity among regulations in different jurisdictions also emerge from Australia’s current review of its overall product safety regime, including many submissions so far and the PC’s Discussion Draft. To address these problems too, and to benefit from the concepts and additional features contained in its new regime, the EU model remains very attractive for Australia.

### **3. The PC’s Discussion Draft**

Nonetheless, the preliminary assessment by the PC did not propose such far-reaching changes, although it already favoured important improvements to Australia’s regulatory regime for the safety of general consumer goods. For example, the PC already strongly advocates harmonising legislation across the States and Territories in Australia –

*Todai COE Paper*

which would also impact on New Zealand, through the ANZCERTA Free Trade Agreement dating back to 1982 – as well as better mechanisms for early detection of unsafe products. The DD also saw merit already in the following reforms:<sup>30</sup>

- include ‘foreseeable misuse’ in the definition of ‘unsafe’, as long as it is limited to behaviour which is reasonably predictable and not unreasonable;
- ensure consistent coverage of services relating to the installation and maintenance of consumer products;
- provide better information to businesses on regulatory requirements and targeted information campaigns to consumers, where effective and efficient;
- provide better information to businesses on regulatory requirements and targeted information campaigns to consumers, where effective and efficient;
- make evidence-based hazard identification and risk management central to policy making, standard setting and enforcement; and
- make greater use of cost-benefit analysis, embodying risk assessment, in determining whether and how to intervene to address identified product hazards.

On the other hand, the PC remained hesitant in three major areas (DD Chapters 6, 10 and 13). First, it was not yet convinced that benefits would outweigh costs if a GSP were added to Australia’s existing regulatory regime, thus putting the onus on suppliers to market only safe products. Secondly, it remained unsure about introducing a requirement for suppliers to notify authorities if their goods may be unsafe, although the PC did already see more merit in requiring reporting of products subject to a successful (private law) liability claim or multiple out-of-court settlements, and in ‘guidance material encouraging businesses to clarify how consumers and retailers can notify them of unsafe or faulty products’. Thirdly, the PC did not (yet) propose a formal legislative requirement for suppliers to recall unsafe products, or even for the government to audit voluntary recalls – believing those are generally now sufficient.

However, these three (inter-related) features are central to the revised EU regime, and the PC did not adequately explain what is so distinctive about Australia’s socio-economic structure and growth trajectory that it should not follow this emerging global standard. If anything, Australia has even more exposure to a growing tide of potentially unsafe products imported from rapidly growing Asia-Pacific economies like China. Perhaps

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<sup>30</sup> ‘Key points’, at <http://www.pc.gov.au/study/productsafety/draftreport/keypoints.html>.

it is felt that Australia does not and need not share the EU's commitment to a 'high level of protection of safety and health of consumers'.<sup>31</sup> If so, however, then many in Australia would or should contest a lower standard being set in that country. The evidence presented in the DD (pp. 139–41) on 'Overseas Experience' with a GSP was particularly weak; it referred primarily to publications published *before* the strengthening of the EU regime in 2001, and to a subsequent survey by a law firm only of some *manufacturers* (predictably quite negative about the new regime).<sup>32</sup> It appears implausible that Australia can continue to make do with a regulatory regime similar to that prevailing in Europe even before 1992, when at least a GSP was introduced for suppliers. It also seems likely that Australia's trading partners, increasingly linked by existing Free Trade Agreements (like New Zealand) or potential ones (like Japan), will need to update as well. More generally, although any system will have some flaws, the revised EU regime arguably still offers the most appropriate division of responsibilities among firms, the government and consumers.

#### **4. Responses to the Discussion Draft**

Over September and October 2005, to get feedback on its DD, the PC initiated forums in major Australian cities, although not aimed at the general public. Further written Submissions were requested by 14 October. Only one had been added to the PC's website by that deadline, from the peak associations of electrical products suppliers (DR44), which supported the PC's preliminary views especially about key aspects of the EU regime such as a GSP. Attempting to rectify this imbalance, this author submitted a second Submission (DR48) touching upon Submission DR44 in making points about the DD along the lines set out above, and generally emphasising that the PC's preliminary views seemed quite Panglossian given the widely conceded (and unsurprising) lack of systematic data on product-related accidents in Australia.

Also around this time, however, quite negative Submissions were provided from a small businesses association (DR46), the Australian Toy Association (DR49: preferring the US approach), a consumer hygiene

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<sup>31</sup> As required by Article 95 of the Treaty establishing the European Community, and reiterated in the revised Directive's Preamble and Article 2(b)'s definition of 'safe product' for a GSP.

<sup>32</sup> Compare also the immediate criticism of the PC's preliminary view against a GSP, by the ACA: 'Consumer Product Safety: Productivity Commission Gets It Half Right', 9 August 2005 press release, at: <http://www.choice.com.au/viewPressRelease.aspx?id=104862&catId=100202&tid=100010&p=1>.



products association (DR52), the National Product Liability Association (which largely comprises defendants' lawyers: DR51), and the Australian Chamber of Commerce and Industry ('ACCI': DR54). Nonetheless, a brief but seemingly quite agnostic Submission was also provided by the Insurance Council (DR47), and both the Department of Immigration (DR45) and a Coroners Institute (DR50) came out encouraging at least better systems for generating or disseminating injury or risk related information.

From late October, moreover, almost all Submissions became more favourable to introducing a GSP or more far-reaching reforms. This included yet another Submission from the Australian Consumers Association (DR51), but also one from a baby products association (perhaps comprising the more reliable suppliers: DR55) reinforced by a non-profit foundation for children (DR57). A freelance journalist also related a distressing incident involving children's bicycle seats to support, in particular, the need to ensure that services are subjected to further safety obligations (DR58). Bringing the total to 18 Submissions on the DD, four were provided by government regulators: the ACCC again (DR56), and – rather belatedly – fair trading authorities in Queensland, Victoria and New South Wales (DR59–61). In December, Dr Ron Somers of South Australia's Department of Health added a rare but compelling argument from a public health perspective (DR63), emphasising the need for firms to notify authorities – quite inexpensively – of injury incidents, rather than relying on even improved hospital-based reporting systems. The electrical product suppliers also came back with a second Submission (DR68) partly responding to this author's (DR48), but only presenting brief and unpersuasive further arguments.<sup>33</sup> Hence it seemed that pressure was

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<sup>33</sup> A first argument reiterated, against any mandatory reporting requirements (even as mooted in the DD regarding products subjected to serious product liability claims), was that 'uninformed and careless suppliers will not incur the costs and may rarely be subject to penalties'. The simple answer, to prevent a disproportionate burden falling on more diligent suppliers, is proper enforcement. More generally, if Australia follows the EU in shifting the main burden from government onto suppliers to ensure goods are produced safely and monitor them for accidents, it is crucial for 'responsive regulators' to retain enhanced back-up powers to intervene if suppliers do not comply with the new regime. Secondly, while backtracking from any suggestion of 'mandatory demonstration of compliance' with a GSP, DR68 argued that their experience in the EU was that diligent suppliers 'would seek to demonstrate compliance with GSP requirements for their products notwithstanding the costs involved', and that the CE Mark system under 'vertical' Directives (e.g. only for electrical products) made it 'de facto mandatory' to demonstrate compliance with such requirements as well. The answer to the first point is

building again to push the PC towards more far-reaching changes, with a welcome but belated emergence of a broader array of interested persons and organisations.

However, the ACCI and other business interests had continued to stress the federal government's professed commitment to lighter regulation. Indeed, on 12 October, the Chairman of the PC (but not the Commissioner in charge of its Product Safety Review) was appointed to the federal government's *Taskforce on Reducing the Regulatory Burden on Business*.<sup>34</sup> On the other hand, at a minimum, the PC's Final Report seemed almost certain formally to recommend the major changes mooted in the DD and outlined above. Business interests were generally happy with, for example:

- better research and information systems (provided they themselves are not obliged to report safety risks and problems to regulators, as under the revised EU regime);
- clearly and consistently including foreseeable misuse and at least some services within Australia's existing regimes; and
- having a more harmonised regime generating standards or bans and enforcing them (albeit hoping that this will lead to fewer measures being taken, whereas consumer interests favouring harmonisation hope for more).

##### **5. The PC's Final Research Report<sup>35</sup>**

The 503-page RR was published on 16 January 2006, but only made public on 7 February 2006, after having been provided first to relevant Ministers

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that how an Australian supplier would decide to fulfil new obligations to produce only safe products remains an individual choice, to be made in light of likely risks of harm, the sector involved and so on. The answer to the second is that even within the CE system, European firms retain the freedom not to comply with the detailed requirements set provided they remain confident of meeting the general safety requirement set by the relevant vertical Directive (especially likely if they are only producing for a local market); and, anyway, that the current Review is not focusing on sector-specific regulation.

<sup>34</sup> The Taskforce reported in April 2006, and the Government responded in August 2006: see <<http://www.regulationtaskforce.gov.au/index.html>>.

<sup>35</sup> This Part is largely reproduced from L Nottage (2006) 'The Latest Round in Australia's Review of Consumer Product Safety Regulation: The Productivity Commission's Final Research Report' 17 *Australian Product Liability Reporter* 1 (including footnote references, and some updated material as of May 2006).

and officials. The PC summarised as follows its final Report, which contains few surprises in light of the preceding analysis:<sup>36</sup>

The current regulatory system plays a necessary and important role in identifying and removing unsafe products through recalls, bans and standards. Overall, the regulatory system in combination with other mechanisms — the market, the product liability regime, media scrutiny and consumer advocacy — deliver a reasonable level of product safety, as expected by Australian consumers.

Nevertheless there is considerable scope to make the regulation of consumer product safety more efficient, effective and responsive. A strong case exists for national uniformity in the regulation of consumer product safety. Current differences create inefficiencies in a resource-constrained environment, including duplication of effort and inconsistent approaches to similar risks and hazards. The preferred model is to have one national law, the Trade Practices Act, and a single regulator, the Australian Competition and Consumer Commission. If this is not achievable, jurisdictions should harmonise core legislative provisions, including a changed requirement that permanent bans and mandatory standards should only be adopted on a national basis.

There is also merit in the following legal reforms:

- including ‘reasonably foreseeable use’ in the definition of ‘unsafe’;
- ensuring that services related to the supply, installation and maintenance of consumer products are covered by all jurisdictions; and
- requiring suppliers to report products which are associated with serious injury or death.

The Commission also proposes a number of administrative reforms, including:

- consistently making hazard identification and risk management more central to policy making, standard setting and enforcement;
- improving the focus and timelines for the development of mandatory standards;
- providing better regulatory information to consumers and businesses through a ‘one-stop shop’ internet portal; and
- establishing a national clearinghouse for gathering information and analysis from existing sources to provide an improved hazard identification system.

Efforts to improve the safety of consumer products would also benefit from:

- conducting a comprehensive baseline study of consumer product-related

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<sup>36</sup> See <http://www.pc.gov.au/study/productsafety/finalreport/keypoints.html>, taken from RR (Preface) p. XX. Particularly on coverage of installation and maintenance services, relevant also for Japan’s problems with Schindler’s elevators and Paloma gas heaters, see pp. 153-63.

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- accidents; and
- reviewing product recall guidelines.

The starting point for these recommendations, that the system basically works quite well, still lacks robust empirical foundations. The RR (p. XXV) now applies, for example, the proportions of injuries from home accidents in the UK attributed to ‘product fault alone’ in a DTI study in 2002, to some reported injury data in Australia, to suggest that ‘up to 32 unintended deaths and between 182 and 513 serious injuries each year would be due to manufacturing fault in consumer products’. However, even in 2002, British suppliers were already subjected to a GSP (with the stricter 2001 Directive already due for implementation by 2004), so their manufacturing should have been safer. Anyway, the proportions of accidents attributed in the DTI study to ‘product safety and behaviour’ and even perhaps some attributed to ‘physical environment’ should be applied too, since those situations can often implicate (especially design or warning) defects causing the injuries. There are also grave difficulties in applying a monetary value to each (more broadly) product-related death or injury, let alone the non-monetary harms involved. Thus, the PC still seems to underestimate the magnitude of Australia’s predicament now and in the foreseeable future, colouring their assessment of the current regulatory regime and possible improvements.<sup>37</sup>

Thus, for example, the RR (p. 70) now acknowledges that product liability litigation may be becoming less of an incentive for firms to maintain product safety, in light of broader ‘tort reforms’ since 2002 in Australia (capping damages, etc); but concludes that ‘it is too early to tell what the impact of these changes may be on the effectiveness’ of the overall system. The RR (p. 72) also now concedes that it is not only relevant whether or not ‘there is a widespread problem of businesses intentionally releasing unsafe products’ (a point made in the DD), but also whether ‘all businesses have sufficient regard to their duty of care or the risks of being sued’. Yet, the PC asserts that there is only ‘likely to be a relatively small part of the market which may not act responsibly’ (p. 73). Further, the PC continues to underplay the benefits (economic – such as reduced transaction costs – and otherwise) of harmonising regulatory regimes not only with existing partners in Free Trade Agreements like New Zealand (cf. pp. 95–6); but also likely future partners like Japan,<sup>38</sup> or

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<sup>37</sup> See also S Greenberg (2006) ‘Australia’s Product Safety Regime: Overdue for Reform’ 17 *Australian Product Liability Reporter* 8.

<sup>38</sup> See Nottage ‘Reviewing Product Safety Regulation in Australia - and Japan?’ (supra) at p. 24; and further Y Shimano (2005) ‘*Kekkan-Kashi Seihin No Rikoru Ni Tsuite – Sogo Seihin Rikoruho no Seitei*’ [Recalls of Defective Products: Towards Enactment of Comprehensive Legislation on Product

Canada (already indirectly linked through the Australia–US FTA and NAFTA, and yet which gets little emphasis as a country seriously considering comprehensive adoption of the EU model).

The latter view also undermines the PC's rejection of the argument that Australian competitiveness may suffer because many 'developed country competitors have already adopted (or are considering implementing) a GSP and – at a time when consumers generally appear to be demanding higher levels of assurance about the safety of the products they use – Australia's products may be perceived as being of a lower standard', primarily on the basis that 'the vast majority of countries, including many of our largest trading partners, do not have a general safety obligation' (RR p. 113). Further, the empirical evidence presented, highlighting costs and other disadvantages of a GSP especially in the EU, remains weak. Yet the PC also now concedes (RR p. 107) that:

While the Commission did not uncover new formal assessments/evaluations indicating net benefits, there was also no clear evidence that the GPSD had failed to meet its objectives. Given the costs involved, the 'jury is still out' in terms of the net benefits associated with the basic general safety obligation.

It is therefore quite remarkable that the RR still remains so wary of switching the primary burden to ensure the supply of safe products from the government onto suppliers. This is particularly true given that the PC also concedes again that suppliers are often better placed to implement effective safety measures at early stages, thus generating the likelihood of 'some efficiency improvement overall'. It responds that this assumes 'enforcement efforts will need to be credible, such that businesses believe there is a reasonable likelihood that [nonetheless] unsafe products will be detected and action taken' (p. 121); but better backup enforcement is precisely what the EU has now implemented, and which Australian regulators like the ACCC have and use to good effect in other areas.<sup>39</sup> More generally, the PC has still not explained what is so fundamentally different about the Australian economy and its citizens' expectations about product safety that Australia should not enjoy the sort of regime developed in the rapidly expanding EU (and already attractive in other trading partners), a regime developed there in the context of both cost–benefit analyses and sophisticated political debate. The burden of proof really should be on those in Australia objecting to the introduction of a GSP.

Some vacillation prompted by such argument may help explain one very novel compromise now suggested in the RR. The PC now adds the

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Recalls]', 45 Kokumin Seikatsu Kenkyu 17.

<sup>39</sup> See also, R Freeman (2006) 'The new General Product Safety Directive in the EU – A Status Report' 17 *Australian Product Liability Reporter* 20.

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possibility of legislative amendment allowing the ACCC to impose financial penalties for supply of a product where a mandatory product ban is later imposed (under s. 65C, albeit so far rarely) and ‘the supplier knew or ought reasonably to have known that such goods were of a kind that had caused or was likely to cause injury’ (p. 132). As the PC concedes, this is ‘remotely similar in concept to a GSP (in that if an unsafe product is placed on the market the supplier can be penalised)’, but ‘it is substantially more limited in its scope and application’ and ‘would not impose any additional costs on the vast majority of “responsible” businesses’. However, ‘it may potentially increase the incentives for the very small proportion of businesses that might not be discouraged from marketing a dangerous product by the prospect of a ban’ (p. 133). If this logic is pursued, though, it is only a short step to concluding that a GSP is useful and necessary more generally.

The RR also contains many other interesting elements, especially from the viewpoint of consumer interests. First, still in the context of the GSP debate, it stresses that ‘under the existing system *action can be taken* to recall or ban unsafe products, irrespective of whether an injury has occurred’, giving some examples of a few recent ‘pre-emptive’ actions (p. 117, original emphasis). This is important, as practical experience shows that Australian regulators still tend to ask ‘where are the bodies?’ before taking seriously any claim that goods are unsafe and likely to cause future injury. Nonetheless, an even more pro-active mindset is necessary on the part of regulators, and is more likely to be achieved if businesses also are forced to adopt that approach by taking primary responsibility (via a GSP and ancillary obligations) to produce only safe products.

Secondly, the RR again notes Submissions – also contrary to the assumption by many regulators – arguing that the existing TPA regime allows intervention even if injury is likely to result from foreseeable misuse of a product, not only when it is defective in a narrower sense. ‘At a minimum, the Commission considers that there is a need for greater certainty as to the scope of the current TPA provisions covering bans and recalls’ (p. 138), and generally it agrees that scope should be clearly widened. Moreover, it accepts a point made in response to the DD that the focus ‘should not be exclusively on the appropriateness of the actions [or inactions] by the consumer’ using the product (p. 143), and so even foreseeable *deliberate* misuse might still mean that the product supplied may be unsafe.<sup>40</sup>

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<sup>40</sup> Specifically, this follows the objection made by Nottage ‘Reviewing Product Safety Regulation in Australia - and Japan?’ (supra), at p. 106. Accordingly, Table 6.1 of the RR (p. 146) provides an ‘indicative checklist’ for considering what is reasonably foreseeable use or misuse – rather than the stricter

Thirdly, the PC urges more guidance on current regulatory thresholds for intervention, noting the view that in the absence of case law and other readily available material the legislation has come to be interpreted quite narrowly and primarily by the regulators themselves (RR p. 184). On the other hand, it persists in recommending that if a GSP does happen to be introduced, its definitions of safety ‘should be closely aligned with existing provisions of Part VA of the TPA (excluding the precondition of actual injury or loss)’ (p. 196). Even with that exclusion, the risk remains that the threshold – of ‘defectiveness’ – will be set too high, as it was developed to be applied in the different context of harms having actually eventuated and resulted in civil claims for compensation. If a GSP is introduced, it should adopt instead the well-established definition and threshold in the EU regime, which may allow regulators (and responsible managers in firms, at first instance) more scope to intervene to secure the safety of goods supplied before any injury actually occurs.

Finally, the PC goes further in the RR, by recommending that suppliers should now be required to report to regulators products that have been associated with serious injury or death. Otherwise, as prefigured in the DD and despite opposition by many business interests even to this, the PC proposes reporting of products subject to a (hitherto rare) successful product liability claim, or multiple out-of-court settlements ‘where a verifiable initiating action to commence litigation has occurred, such as statement of claim’ (RR p. 227). Requiring firms to report products associated with serious injury goes considerably closer towards the current EU regime, as actually implemented (pp. 218–221).

By contrast, the PC suggests only that the government issue (non-binding) guidelines to ‘encourage all suppliers to explain to consumers and retailers how they can notify the supplier of unsafe or faulty products’, and it only favours requiring all voluntary recalls to be subject to mandatory reporting and listing on one national website (p. 227). It believes Australia’s voluntary recall system, and failing that the government’s (very rarely exercised) power to mandate a recall, is basically sufficient. The PC still does not see net benefits from adding a formal requirement for firms to themselves have to recall unsafe products, or even from giving regulators powers to audit or later review voluntary recalls (p. 261). This conclusion sits uneasily, however, with the possibility now mooted of allowing the ACCC to impose financial penalties for irresponsible pre-ban behaviour. At the least, for consistency, it should also be able to impose penalties on firms for irresponsibly not conducting a recall if the government is later forced to mandate one under TPA s. 65F. Both powers would go some way towards ensuring firms better monitor their products’ safety on an ongoing

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approach in the DD concluding that deliberate misuse could not mean that the product was unsafe or likely to cause injury.

and pro-active basis, although the better solution still would be to go the whole way of the EU.

## **6. The Aftermath: The PC's Review of Standards Australia**

The RR contained a wealth of other interesting observations, analysis and recommendations. It will be interesting to track the next round of responses from various interested parties, but there has been disappointingly little public debate or media follow-up. Predictably, business interests will mobilise even more than they did in reaction to the DD from mid-2005, to contest some moves now by the PC in the direction of the EU model. Consumer interests, easily afflicted by collective action impediments, may nonetheless instead take heart and push for even more moves that way.<sup>41</sup>

The ACCC should be pleased to have succeeded in obtaining the PC's blessing to become the national regulator for a harmonised regime across Australia, centred on the TPA. But that recommendation may now generate some tension with the ACCC's 'repositioning in consumer protection' announced by the Chairman Graeme Samuels in a recent speech, namely selective movement of local consumer affairs matters to the state consumer affairs bodies, enabling the ACCC 'to focus its resources on matters of national importance and of significant, widespread consumer detriment'. On the other hand, Samuels also had remarked that:

The ACCC has always placed a high priority on consumer product safety, and our role in this area has recently been greatly enhanced with the transfer from the Treasury to the ACCC late last year [2004] of direct responsibility for product safety. As a result, the ACCC is now responsible for not only enforcing product safety regulations, but in advising government about what regulations are needed and what form they should take.<sup>42</sup>

State fair trading authorities, who responded only belatedly to the DD, may raise more concerns about the centralisation proposed by the PC. Bureaucrats (amongst many others) tend not to like a reduction in their potential sphere of activity and hence influence. Less cynically, some may

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<sup>41</sup> Cf. e.g. Greenberg (supra), with S Dennis (2006) 'Australian Business – Somewhat Relieved but Still Concerned' 17 *Australian Product Liability Reporter* 17.

<sup>42</sup> See 'The New Enforcement Regime: Changing Priorities, Processes and Legislative Powers', 20 *ACCC E-Journal* (October 2005). On this little-known shift towards setting safety standards as well as enforcing them, see also the ACCC's Annual Report 2004–5, pp. 6 and 40. Both are available via <http://www.accc.gov.au>.



fear that their more active invocation of regulatory powers at present will be compromised, resulting in a ‘race to the bottom’ as safety measures are minimised during the harmonisation process.

That point becomes more important when we realise that Australian bureaucrats operate – seemingly increasingly – in the shadow of their political masters. The more active implementation of product safety measures in some states recently, such as Victoria, seems to be related to the strength and commitments of their Labour governments. They may be less happy about transferring their powers to a central agency within the (conservative) Liberal federal government, unless the new regime established has stronger commitments to consumer protection, as under a more thoroughgoing adoption of the new EU model.

This political context regains particular importance now, as the Review goes back to the Ministerial Council on Consumer Affairs. After all, that grouping of state and federal ministers responsible for consumer policy did initiate this Review with its Discussion Paper of August 2004. The Council also may have been trying (perhaps rather too late or too weakly) to signal to the PC its ongoing interest in more thoroughgoing reforms when it released its 46–page Options Paper in August 2005, and the PC may have seen this as it was finalising its DD. Understandably, the PC certainly paid more attention to that Paper in its final Report.

Meanwhile, the Australian Government at least has requested the PC to undertake a study into the government’s relationship with SA as well as the National Association of Testing Authorities (NATA). Both are private sector, not-for-profit organisations which receive funding from the Government to represent Australian interests in key international standards writing and conformity assessment forums. The review of SA followed on from the problems identified by the PC both in its Building Regulation Review (2004, ch 8) and its Product Safety Review (chs 4 and 12). These included delays, unpaid and narrow participation in Committees, inadequate expertise, voting on Committees, and transparency more generally.

Specifically, the Treasurer’s Terms of Reference announced on 2 February 2006 asked the PC to examine and make recommendations on:

- (a) “the efficiency and effectiveness of standards setting and laboratory accreditation services in Australia;
- (b) the appropriate role for the Australian Government in relation to standard setting and laboratory accreditation;
- (c) the appropriate means of funding activities of SA and NATA, which are deemed to be in the national interest.

- (d) the appropriate terms for Memoranda of Understanding (MoU) between the Australian Government and its agencies and SA and NATA.”

The PC was also required to have regard to “the history of the relationship between the Australian Government and bodies that prepare standards and accredit laboratories, the cost impact on and benefits to business and the wider community of standards, including in regulation; and models in operation overseas”.<sup>43</sup>

The PC is to present its final report by 2 November 2006. To this end, it released an Issues Paper in March, and called for a first round of Submissions by 21 April, with a view to releasing a draft report by end-June and holding roundtable forums on this report over August and September. By end-August, over 130 Submissions had been uploaded on the PC’s website, showing widespread interest particularly in SA.<sup>44</sup> Most came from business interests, but some were from individuals or other stakeholder groups. Indeed, some appeared to be worried that the Government was seeking justifications simply to reduce or even abandon its residual funding of SA, leaving the organisation even more open to “industry capture”.

My own Submission (No 52) argued that the standard-setting system operated by SA had become dysfunctional and needed substantial reform, because it represents a key site of governance in Australia’s deregulating polity. SA acts as a delegated legislator, in setting many standards that promptly or eventually become mandatory, and even in generating “soft law” through “voluntary” standards that de facto must be followed in a particular field, or which may prevent or minimise the superimposition of mandatory rules. SA can also act as a de facto regulatory enforcement agency, particularly when it provides services to certify that important standards are being met by firms and other organizations. Although less frequently and obviously, SA can even act like a court, for example when it reconvenes and directs Committees to redraft standards after a dispute over interpretation arises. Yet, compared to such governance bodies, SA operates largely free of important constraints, such as participation, transparency, and potential for “appeal” or challenge. This vacuum also contributes to the inefficiencies of its processes. In short, I contended, SA’s current system is unlikely to generate optimal (efficient) standard levels; is

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<sup>43</sup> <<http://www.pc.gov.au/study/standards/tor.html>>.

<sup>44</sup> The Issues Paper, Submissions and other resources are available via <<http://www.pc.gov.au/study/standards/>>.

ineffective in promoting other values (such as participation, transparency, accountability and good citizenship); and is cost-inefficient in both those respects. This situation calls for considerable rethinking of the government's role and relationship with SA, including its MoU with the Government and its funding of SA funding.<sup>45</sup>

Predictably, however, the PC's draft report released on 25 July 2006 was more muted and tactful. It argued that: "In general, Australia's standard setting and laboratory accreditation arrangements are working effectively, but there is scope for improvement". For SA, nonetheless, this meant:

"processes can be made more efficient and effective by ensuring:

- systematic consideration of the costs and benefits prior to any decision to develop or revise a standard, and publication of reasons for such decisions;
- balanced stakeholder representation;
- barriers to volunteer and public participation are addressed; and
- improved accessibility, transparency and timeliness, including an improved appeals and complaints mechanism.

There is also a case for increased accreditation of other standards development organisations and partnering arrangements between Standards Australia and others. *Most importantly, governments should undertake rigorous impact analysis before referencing a standard in regulation, to ensure it is the minimum necessary to achieve their objectives.* The Australian Government should continue to support, with some reallocation of funding and possibly at an increased level overall: Australia's participation in international standardisation activities; and the role of the Standards Accreditation Board. Funding should also be extended to cover the development of, and to enable lower cost access to, regulatory standards."<sup>46</sup>

As the Australian Consumers Association proclaimed after the PC's DD on product safety was released, once again the PC has got it "half right". Although Government funding to SA now seems unlikely to be cut altogether, in exchange for the organisation making more substantial improvements in transparency and efficiency, the deregulatory urge is

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<sup>45</sup> A revised version was published in L Nottage (2006) 'Reviewing Standardisation in Australia: Another Dimension to Product Safety Regulation' 17 *Australian PL Reporter* 65, including footnote references to some of the Submissions that had been uploaded by the PC as of 21 April 2006.

<sup>46</sup> < <http://www.pc.gov.au/study/standards/draftreport/keypoints.html>>.

evident in many parts of this Standard-Setting Report including the italicised “key point” above.

The PC’s policy penchant, presumably with a keen eye to federal politics despite its independent status, is also underpinned by a request on 11 August 2006 to “undertake a study on performance indicators and reporting frameworks across all levels of government to assist the Council of Australian Governments (COAG) to implement its in-principle decision to adopt a common framework for benchmarking, measuring and reporting on the regulatory burden on business”.<sup>47</sup> On 15 August, the Treasurer also announced that the PC’s (already powerful) Office of Regulation Review would take on additional roles and responsibilities as the “Office of Best Practice Regulation”, “facilitating the Government’s strengthened RIS processes which will include, where appropriate, a requirement for enhanced cost-benefit and risk analysis”.<sup>48</sup>

## **7. Conclusions**

The Australian experience illustrates a growing awareness of the need to realign areas of law impacting on consumer product safety, especially an appropriate balance of public regulation versus tort law.<sup>49</sup> Yet it is clearly difficult to persuade policy-makers to experiment with more “responsive re-regulation” involving better information flows and back-up enforcement potential by public authorities, or even closer oversight of peak (mainly industry) bodies like SA. This is consistent with a broader “meta-regulation” that has developed in Australia particularly since the 1995 “National Competition Policy”. That has required Government at all levels to systematically review hundreds of laws and regulations to assess not only their costs and benefits, but also whether they sufficiently promote competitive markets.<sup>50</sup>

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<sup>47</sup> <<http://www.pc.gov.au/study/regulationbenchmarking/index.html>>.

<sup>48</sup> <<http://www.pc.gov.au/orr/index.html>>. This was one Government response to the report of the “lighter regulation” Taskforce (supra) chaired by a PC Commissioner.

<sup>49</sup> See generally H Sarumida (1996) ‘Comparative institutional analysis of product safety systems in the United States and Japan: alternative approaches to create incentives for product safety’, 29 *Cornell International Law Journal* 79; P Cane (2002) ‘Tort Law as Regulation’, 31 *Common Law World Review* 305 .

<sup>50</sup> B Morgan (2003) *Social citizenship in the shadow of competition: the bureaucratic politics of regulatory justification*, Aldershot, Hants, England; Burlington, Vt.: Ashgate.

Thus, even if the possibility of some stricter rules impacting on product safety can still be put on the agenda, Submissions tend to be reframed to appeal to this paradigm of economic rationalism. An example is my own Submission (No 42) to the PC's Product Safety Review. While this may allow more stakeholders to participate in the reform process and even have more impact on policy outcomes in the short-run or in that particular sector, such strategies also make it difficult to go beyond this discourse of "technocratic citizenship" towards a more expansive one seeking to revitalise "social citizenship". Nonetheless, Submissions like mine (No 52) to the PC's Standard-setting Review can attempt to broaden the frame of reference by developing distinctions raised by the PC itself as to "efficiency" and "effectiveness".

Thus, some headway can and probably will be made towards re-regulating Australia's consumer product safety system, even if it does not end up going as far as the EU. This would be consistent with observations that "social regulation" has had more chance of surviving compared to regulation primarily of economic activity, even in Australia and also on a more global scale.<sup>51</sup> As Australia looks beyond multi-lateral institutions like the OECD and the WTO, and begins building up bilateral FTAs particularly with diverse Asia-Pacific nations which have now weathered the 1998 Asian financial crisis, the prevailing discourse may become even less monolithic despite "free trade". This seems particularly likely for product safety, where the principles set by the WTO and hence FTAs remain quite porous, and where diverse areas of law interact in different ways in different countries.

The possibility of a re-regulatory reaction in Japan may be even higher, since its deregulation rhetoric and practice has developed more recently and less extensively.<sup>52</sup> If Japan can take the lead in "remodelling" responsive regulation in consumer product safety, this may open up possibility for current and potential FTA partners like Australia. Indeed, following problems with Paloma gas water heaters and other products in mid-2006, Japan's Ministry of the Economy, Trade and Industry (METI) proposed amendments to the Consumer Product Safety Law to formally require all manufacturers of general consumer goods to

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<sup>51</sup> Ibid; and Braithwaite and Drahos (supra).

<sup>52</sup> Vogel (supra); P Maclachlan (2004) 'From Subjects to Citizens: Japan's Evolving Consumer Identity', 24 *Japanese Studies* 115.

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disclose accident data – a key feature of the revised EU Directive<sup>53</sup> Persistent safety problems in around the world, including Australia and Japan, do suggest that effective “soft law” still requires the potential to invoke “hard law”, and other innovative ways to link together both of them as well as elements within each.

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<sup>53</sup> ‘Ministry in Call to Home Appliance Makers to Report All Accidents’, *Herald-Asahi*, 26 August 2006. However, some commentators persuasively argue that METI’s poor performance in product safety, and its greater potential for conflict of interest given its ongoing mandate to promote business interests, make it more reasonable to have the National Consumer Affairs Centre (under the increasingly powerful Cabinet Office) take on the role of collecting and disseminating accident data. See Junichi Abe, ‘Product Safety Being Neglected’, *Yomiuri Shimbun*, 5 September 2006; and Nottage, ‘Product Safety Regulation Reform in Australia and Japan: Harmonising Towards European Models?’ (supra).