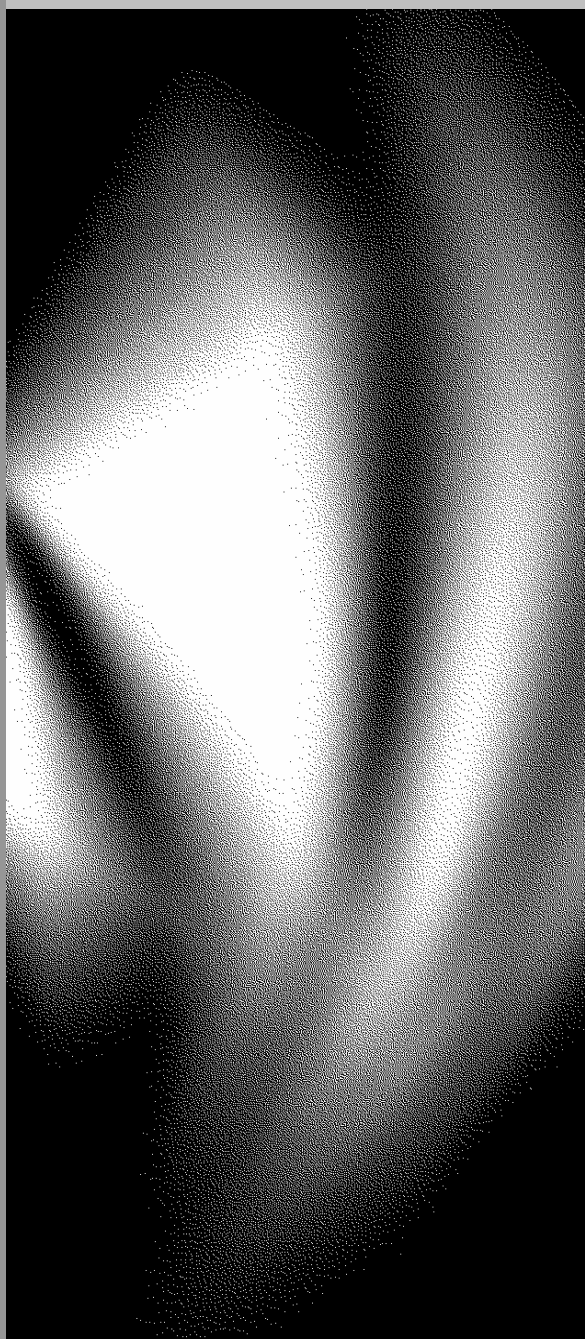
Australian Government
Productivity Commission

Review of the Australia Consumer Product Safety System

Productivity Commission Research Report

16 January 2006



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The Productivity Commission

The Productivity Commission, an independent agency, is the Australian Government's principal review and advisory body on microeconomic policy and regulation. It conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Information on the Productivity Commission, its publications and its current work program can be found on the World Wide Web at www.pc.gov.au or by contacting Media and Publications on (03) 9653 2244.

Foreword

This research report has been prepared by the Commission in response to a request by the Parliamentary Secretary to the Treasurer, on behalf of the Australian Government.

The primary purpose of this study is to inform the review of the Australian consumer product safety system currently being undertaken by the Ministerial Council on Consumer Affairs.

In undertaking this task, the Commission has been specifically asked to assess the extent to which Australia's consumer product safety system meets its objectives and examine the costs and benefits of a number of reform options outlined by the Ministerial Council. The study has been limited to consumer products, that are not covered by specific product safety regimes, and has not examined in detail other aspects of the product safety system, such as product liability laws.

The study was overseen by Commissioner Robert Fitzgerald, with a staff research team led by Sue Holmes.

The Commission's report has drawn on information and views from a wide range of sources, including industry associations, consumer groups, standard-making bodies and government agencies in all States and Territories. The study has benefited from roundtable discussions held to consider the findings of a Discussion Draft, as well as submissions from interested parties. The Commission wishes to thank the many people who have contributed to the study.

Gary Banks
Chairman
January 2006

Terms of reference

Review of the Australian Consumer Product Safety System — Impact of Reform Options

PRODUCTIVITY COMMISSION ACT 1998

The Productivity Commission is requested to undertake a research study to examine the impacts of options for reforming Australia's general consumer product safety system. The system consists of the product safety provisions contained in the *Trade Practices Act 1974* (the TPA) and equivalent provisions in state and territory Fair Trading Acts, along with the administration and enforcement of these provisions and other non-regulatory activities conducted by governments to achieve consumer product safety objectives.

The primary purpose of the study is to inform the Review of the Australian Consumer Product Safety System currently being undertaken by the Ministerial Council on Consumer Affairs (MCCA). The reform options to be examined in the study include those set out in the public discussion paper for the review, released by MCCA on 27 August 2004. The MCCA options include:

- a general legal obligation for businesses to market only safe consumer products;
- a revised definition of unsafe goods;
- revisions to the regulatory coverage of services and second-hand goods;
- the provision of improved product safety information to businesses and consumers;
- new requirements for businesses to monitor and report on the safety of their products;
- the establishment of product hazard early warning information systems;
- the linking of product safety information systems;
- increased government and industry funding of product safety research;
- a requirement for businesses to recall unsafe products;
- a government power to audit product recalls;
- measures to harmonise product safety legislation, administration and enforcement; and
- measures to enhance the making of product safety regulation decisions by the Australian Government.

In undertaking the study the Commission is to:

- assess the extent to which Australia's consumer product safety system is able to achieve its objectives, as outlined in the public discussion paper. This includes assessing the system's ability to address market failures which affect the safety of consumer products in Australia

- examine the direct and indirect economic and social costs and benefits of each reform option, in addition to the costs and benefits of retaining the current consumer product safety system. This work is to include: examining the distribution of costs and benefits amongst businesses, consumers and governments; assessing the impacts on small businesses and families; and evaluating the net community impact of each option. The examination of costs and benefits is to include the impact on competition and international trade of each option, as well as their impact on economic integration between Australia and New Zealand

- have regard to the submissions made in response to the MCCA discussion paper and consult as necessary with those who made submissions and other interested parties, including state and territory product safety administrators.

The Commission is requested to produce a report within 10 months of commencing the study and to provide a draft report by July 2005.

CHRIS PEARCE

16 March 2005

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Abbreviations and explanations

ABCB	Australian Building Codes Board
ABS	Australian Bureau of Statistics
ACA	Australian Consumers' Association
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ADR	Australian Design Rule
AEEMA	Australian Electrical and Electronic Manufacturers' Association
AIHW	Australian Institute of Health and Welfare
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement
ANZFSC	Australian and New Zealand Food Standards Code
APVMA	Australian Pesticides and Veterinary Medicines Authority
ASCC	Australian Safety and Compensation Council
ATA	Australian Toy Association
BCA	Building Code of Australia
CBA	Cost-Benefit Analysis
CCAAC	Commonwealth Consumer Affairs Advisory Council
CESA	Consumer Electronics Suppliers Association
CDC	Centre de Droit de la Consommation
CGA	*Consumer Guarantees Act 1993* (NZ)
CML	Coles Myer Limited
COAG	Council of Australian Governments
COPOLCO	ISO Consumer Policy Committee
CPAC	Consumer Products Advisory Committee
CPSA	*Consumer Product Safety Act 1972* (US)
CPA	*Consumer Protection Act 1987* (UK)

CPSC	Consumer Product Safety Commission (US)
CPSS	Consumer Product Safety System
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DoTARS	Department of Transport and Regional Services
DJIR	Department of Justice and Industrial Relations (Tasmania)
DTI	Department of Trade and Industry (UK)
EC	European Commission
ECOSA	European Consumer Safety Association
ED	Emergency Department
EFTPOS	Electronic Funds Transfer Point of Sale
EHLASS	European Home and Leisure Accident Surveillance System
ERAC	Electrical Regulatory Authorities Council
EWIS	Early Warning Information System
EU	European Union
FCAI	Federal Chamber of Automotive Industries
FTA	*Fair Trading Act 1986* (NZ)
FTE	Full Time Equivalent
FSANZ	Food Standards Australia New Zealand
GP	General Practitioner
GPSD	General Product Safety Directive (EU)
GSP	General Safety Provision
GSR	General Safety Requirement (Canada)
HASS	Home Accident Surveillance System
HPA	*Hazardous Products Act 1969* (Canada)
HRQoL	Health Related Quality of Life
IAC	Industries Assistance Commission
IC	Industry Commission
ICD-9-CM	International Classification of Diseases (Ninth Revision), Clinical Modification
ICD-10	International Classification of Diseases (Tenth Revision)
ICD-10-AM	International Classification of Diseases (Tenth Revision), Australian Clinical Modification
ICECI	International Classification of External Causes of Injury

INPAA	Infant and Nursery Products Association of Australia
IRMRC	Injury Risk Management Research Centre
ISO	International Standards Organization
ISS	Injury Surveillance System
LASS	Leisure Accident Surveillance System
MCCA	Ministerial Council on Consumer Affairs
MRA	Mutual Recognition Agreement
MUARC	Monash University Accident Research Centre
NCIS	National Coroners Information System
NEISS	National Electronic Injury Surveillance System (USA)
NHMD	National Hospital Morbidity Dataset
NHMRC	National Health and Medical Research Council
NIPAC	National Injury Prevention Advisory Council
NISPP	National Injury Surveillance and Prevention Project
NISU	National Injury Surveillance Unit
NOHSC	National Occupational Health and Safety Commission
NPLA	National Product Liability Association
NTC	National Transport Commission
OECD	Organisation for Economic Co-operation and Development
OHS	Occupational Health and Safety
ORR	Office of Regulation Review
PC	Productivity Commission
PIF	Product Involvement Factor
QISU	Queensland Injury Surveillance Unit
RIA	Regulation Impact Analysis
RIS	Regulation Impact Statement
SAI	Standards Australia International
SBDC	Small Business Development Corporation (WA)
SCOCA	Standing Committee of Officials of Consumer Affairs
TBTA	Technical Barriers to Trade Agreement
TCCI	Tasmanian Chamber of Commerce and Industry
TGA	Therapeutic Goods Administration
TPA	*Trade Practices Act 1974* (Cwth)

TTMRA	Trans-Tasman Mutual Recognition Arrangement
VAED	Victorian Admitted Episodes Dataset
VEMD	Victorian Emergency Minimum Dataset
VISAR	Victorian Injury Surveillance and Applied Research System
VOSL	Value of a Statistical Life
WTO	World Trade Organization

Explanations

Submission numbering	The Commission has considered submissions that were made to MCCA responding to its Discussion Paper. These submissions have been numbered with the prefix MCCA. Submissions made to the Commission after the release of its Discussion Draft are numbered with the prefix DR.
Page reference numbers	Because many submissions were originally received electronically, cited page numbers in this report may differ from page numbers in copies held by others.

OVERVIEW

Key points

- 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 accidents; and
  - reviewing product recall guidelines.

Overview

The Productivity Commission has been asked to assist the review by the Ministerial Council on Consumer Affairs (MCCA) into Australia's consumer product safety system, by assessing the existing system and a number of options for reforming it as set out in the terms of reference.

Legislation under reference

The system being assessed is underpinned by the provisions of Part V, Div 1A of the *Trade Practices Act 1974* (TPA) and the various fair trading acts of the States and Territories. While in law the general regime applies to all consumer products, in effect this system provides the general legal safety net for goods not otherwise protected by specific legislation, which addresses more hazardous goods, such as therapeutic goods, food, motor vehicles, electrical goods, and veterinary and agricultural chemicals. This latter group of laws is not directly under reference.

The general category of consumer products is regulated selectively, using warning notices, bans, compulsory recalls and mandatory safety and information standards. Of the thousands of consumer products, only 28 are subject to national mandatory standards, while some others are subject to State or Territory standards only, and a total of 111 are banned by one or more jurisdictions. This constitutes very light-handed regulation.

The TPA applies to all corporations and interstate traders and is enforced by the Australian Competition and Consumer Commission (ACCC). Fair trading acts are generally administered by fair trading offices in each jurisdiction and can apply to all suppliers of goods in the relevant jurisdictions. Where there is an inconsistency, the TPA takes precedence (for corporations, interstate traders and traders that sell goods through the post or electronic means, including e-commerce). The total combined resources allocated by the Australian and State and Territory Governments to enforcement in this area of consumer product safety is estimated to be about $5 million annually.

Goods under reference

Some estimates suggest there are around 15 000 types of consumer goods sold in the market place. Australian consumers spend about $50 billion (approximately 15 per cent of total expenditure) each year on those consumer products under reference.

Along with the wide diversity in function and characteristics of these products, they pose a diversity of hazards and risks. While most are relatively safe some are inherently quite dangerous, such as chain saws, knives, car jacks, or can become dangerous when used by vulnerable groups such as children and the aged and frail.

The community's expectations about an acceptable level of product safety

Generally, consumers want access to a wide range of consumer products, including some which are inherently hazardous and cannot be made 'accident proof' without imposing prohibitive costs. As consumers, we accept some level of risk but expect that products available in the market at least satisfy some minimum level of safety.

In determining what constitutes an 'acceptable' or reasonable level of product safety, policy makers need to be cognisant of the community's expectations in relation to product safety, the value of the product to consumers and the level of product safety they are ultimately prepared to pay for.

Incentives for supplying safe products

The regulatory system aimed at making products safe does not operate in isolation. Other mechanisms also create incentives for suppliers to provide safe goods and for consumers to exercise care. These include:

- the market place, where consumers seek out safe products and suppliers respond in order to gain their custom;
- media reporting on product hazards and injuries;
- non-government advocacy organisations pursuing consumer interests;
- strict product liability rules and provisions relating to the sale of goods; and
- general legal remedies, such as negligence.

The fact that most consumer products meet a reasonable level of safety, demonstrates that, in general, these mechanisms encourage the manufacture and supply of safe products. However, some situations are not addressed well by these mechanisms, including:

- where the suppliers know more than consumers about the hazards of a product and find it in their interest to withhold the information for commercial advantage;
- where the users are particularly vulnerable either because of physical frailties or limited cognitive capacities; and
- where suppliers do not have a strong or long-term commitment to particular product types and markets so that damage to reputation would have less impact (such as 'job lotters', some discounters and market traders).

What role for government intervention?

Government intervention should be guided by a risk management framework which involves:

- identifying hazards;
- forming judgements about their size, causation, likelihood of occurrence and impacts; and
- choosing options which can be reasonably justified on cost-benefit grounds.

The decision to intervene should also take into account whether any regulatory instruments can cost-effectively reduce these risks as sometimes no public instruments may be effective.

Challenges to regulating safe products

It is fortunate that the non-regulatory mechanisms outlined above generally work well because there are a number of challenges to regulating the general category of consumer products:

- It is neither practicable nor desirable to directly regulate activities in the home. Strategies to make the home safer must rely on indirect intervention, regulating products before they enter the home, and using information and persuasion to change awareness and behaviour. These indirect instruments can have frustratingly limited impact but few alternatives are available.
- Unsafe products, however defined, are only one of a number of causes of accidents. Hence, regulatory systems focused on making products safer, rather than more broadly addressing all causes of unintentional death and injury, will necessarily miss some important factors.

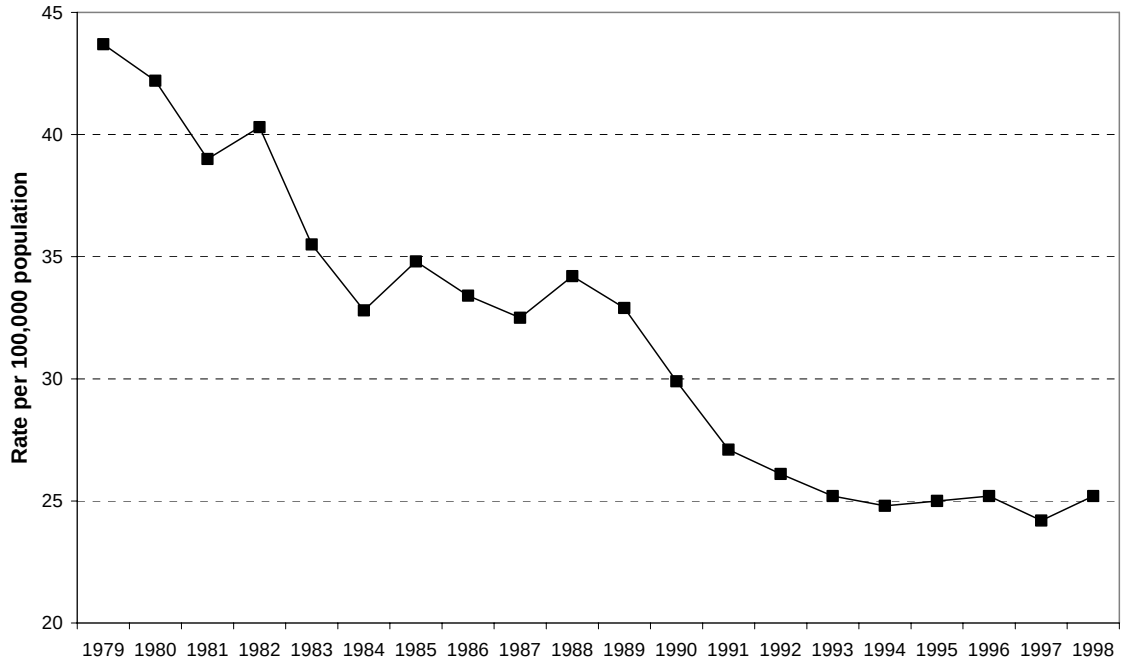
- Data and research into product injury are very limited, making it difficult to establish with confidence the numbers injured or killed by consumer products, the nature of the causes of injury and the costs imposed on the community.
- The growth in e-commerce is steadily eroding capacities for jurisdictions to apply differentiated standards, bans and recalls within their borders.
- Because the general consumer product safety system provides the safety net for products not covered in other regimes, the nature of the hazards are diverse and not always easily anticipated, and jurisdiction can be unclear.

A long-term trend towards safer consumer products in the aggregate

The death rate for all accidental injury has been steadily declining for at least the last 25 years. Not all of this reduction is associated with products and the most significant reduction is due to the halving of motor vehicle accidents (which are not under reference). Nevertheless, there are indications, from overseas data, that the goods under reference in this study are also getting safer:

- in the United Kingdom the contribution of product faults to home fatalities fell from 2.0 per cent in 1990 to 0.9 per cent in 1999; and
- in the United States, over the last 30 years, there has been nearly a 30 per cent decline in the rate of deaths and injuries associated with consumer products.

Accidental injury deaths,[a] Australia 1979-1998



a Includes all accidental injury deaths, not just those associated with products under reference.

Data source: NISU (1998).

While equivalent data are not available for Australia, this overseas evidence appears consistent with the comment made by the Australian Consumers' Association that:

> During the last few decades there have been significant improvements in product safety as a result of consumer pressure. (Kell 2005, p. 6)

This is not to suggest that consumer product safety is no longer an important issue, as some consumer products continue to pose significant safety risks for consumers.

The size of the problem and its causes

In order to target regulatory resources to reduce injury, it is important to know the size and nature of the problem posed by unsafe consumer products. In Australia, due to the paucity of data and research this is extremely difficult to assess. Nevertheless, the Commission tenders some indicative estimates. Research (in the UK) found that products are a relatively minor cause of accidents in the home. For almost 75 per cent of accidental deaths in the home, the environment in which the accident occurred (such as slippery surfaces and protruding paving stones) was judged by experts to be the main cause. Almost all the rest were primarily caused by the behaviour of the user (such as using a product while under the influence of alcohol or leaving a product in reach of children). In only 1.6 per cent of cases was product fault considered to be the sole cause of death and most of these were 'due to the article not having been serviced or maintained correctly rather than to a fault in manufacture' (DTI 2002). A further 1.2 per cent of deaths was attributed to a combination of product fault and behaviour.

Key findings of the DTI (UK) study into home accidents (weighted proportions by outcome)

Per cent

Cause	*Fatality*	*Serious Injury*	*Minor Injury*
Product fault alone	1.6	0.4	0.6
Product fault and behaviour	1.2	1.0	0.7
Behaviour alone	23.5	34.1	44.1
Physical environment	73.7	64.5	54.6
Total	100	100	100

Source: DTI (2002).

If these ratios applied in Australia, then up to 32 unintended deaths and between 182 and 513 serious injuries each year would be due to manufacturing fault in consumer products. On the UK evidence, a similar or greater number of deaths and injury each year would be caused by faults in consumer products due to the failure

of users to maintain and service products. Up to a further 50 deaths and between 900 and 2500 serious injuries would result from a mixture of fault and behaviour. However, this is somewhat speculative and in any case some products included in the UK estimates may not be directly under reference.

In comparison, tentative estimates indicate that over 700 deaths and somewhere between 30 000 and 90 000 serious injuries each year could result from the behaviour of the user, while about three times this level of accidents are primarily caused by the environment in which they occur, such as slippery floors.

However, caution should be exercised in relation to these figures because:

- ratios from UK home-based accidents have been applied to all unintended accidents (net of those unlikely to involve products under reference);
- accident causation is difficult to assign as many are caused by a combination of factors; and
- some accidents classified as caused by user behaviour potentially could be reduced by design changes to the products involved.

Notwithstanding that manufacturing fault in products plays a smaller role, we should not under estimate its impact. For affected consumers and their loved ones, physical and/or emotional pain will often be the predominant cost. In extreme cases, individual incidents can have devastating consequences, especially the deaths of children, young people and parents of children. People affected may also incur monetary costs, for example, for medical treatment and to replace unsafe items. Other costs can include reduced productivity, if consumers are injured and unable to work, and costs to the public health system.

Scope for improvement

The Commission has identified a number of important improvements that are needed to address current weaknesses in the consumer product safety regime, and which would enhance the responsiveness and overall effectiveness of the system. These include measures to:

- address regulatory inconsistencies and inefficiencies;
- streamline and improve currently fragmented policy making, administration and enforcement;
- address significant data and information gaps;
- ensure the consistent application of a risk management framework;
- improve the standards-making process; and

- strengthen incentives for business to supply safe products.

The consumer product safety system would be more effective if hazard identification, risk assessment and risk management were made consistently central to the approach taken to reduce deaths and injuries, wherever the gains outweigh the costs. This could provide the basis for a rationalisation of, and improvement to, the current system aimed at maximizing both the effectiveness and efficiency of the system and is reflected in the Commission's considerations.

Assessing the reform options

Reflecting data constraints and methodological issues, much of the analysis has used economic and institutional principles, overseas research and feedback from Australian stakeholders. The options, canvassed in the MCCA Discussion Paper, that are under reference have been grouped into four areas: framework issues, system design features, information and research, and recalls. The Commission has also examined some additional or alternative proposals.

Framework issues

General Safety Provision (GSP) — MCCA Option 1

A GSP would create an explicit legal obligation on businesses to supply only safe consumer products throughout Australia. Such a provision has existed in the UK and Europe for some time and the concept applies in a number of Australian product-specific regimes, including food and electrical goods.

Benefits and costs of a GSP

Some arguments favouring a GSP include:

- it makes clear the objective of supplying only safe products;
- as it already operates in a number of the specialised regulatory areas, it should be transferable to the general product safety system;
- it may facilitate a 'cultural change' by creating stronger incentives for businesses to consider safety;
- it could make it easier for regulatory authorities to take pre-emptive action before a product causes injury;

- it might give greater flexibility to businesses in meeting safety obligations and reduce the need for mandatory standards; and
- it might forestall the creation of more product-specific regulatory regimes, such as for toys or nursery furniture.

There are many different ways that a GSP could operate and the nature and magnitude of possible impacts would depend critically on its particular characteristics and the way it was implemented.

While a GSP could deliver some benefits, these are likely to be limited:

- the current system, as a whole, seems to be generating reasonable safety outcomes and it is not clear that a major shift in 'culture' is required;
- action can already be taken to recall or ban unsafe products irrespective of whether an injury has occurred;
- based on experience in other sectors and countries, most if not all of the existing regulatory framework would remain under a GSP;
- mandatory standards would still be required for higher risk products;
- while the GSP is intended to make producers more proactive, strict product liability rules should already have this effect; and
- it is likely to have little impact on the behaviour of recalcitrant and fly-by-night suppliers.

At the same time, the implementation of a GSP would be accompanied by additional costs:

- uncertainty about how to define and measure the benchmark level of safety required to demonstrate compliance with the GSP;
- considerable increases in the adoption of voluntary standards; and
- any costs in complying with a GSP, would largely be passed on to consumers as higher prices and withdrawal of some products.

On balance, the Commission has not been convinced that a GSP, as proposed in the options paper, would generate net benefits over and above those currently achieved. The case for a GSP may be stronger in the context of examining the overall consumer protection regulatory framework rather than the more limited area under reference.

Alternatives to a GSP

There is a greater potential for improved outcomes with the selective adoption of some of the elements of a GSP rather than its wholesale adoption. Some, which address specifically identified weaknesses in the system, were contained as separate options in the MCCA Discussion Paper and are discussed below: foreseeable use; extension of coverage; and supplier monitoring and reporting of safety problems.

Two other measures that target specific problems identified with the current system, may merit further consideration:

- providing regulators with the power to impose financial penalties, once a product ban has been implemented; and
- certification by importers that consumer products imported for resale meet mandatory Australian standards where applicable.

Harmonising legislation, administration and enforcement – MCCA Option 11

The MCCA Discussion Paper outlined a number of options to achieve greater legal harmonisation, including: single national law and regulator; template legislation; uniform legislation; and the harmonisation of administration and enforcement.

Why greater national consistency?

Greater harmonisation of product safety regulation is warranted due to the costs that inconsistencies impose on businesses, governments and consumers. Such inconsistencies make it difficult or more expensive for businesses to supply goods across State and Territory borders. Further, it reduces competition and opportunities to exploit economies of scale to some extent.

Moreover, the duplication and fragmentation inherent in parallel government regulations can be a costly drain on government resources and create unnecessary inefficiencies.

The Commission is of the view there is little justification for separate regulatory responses given that for the most part there is a national market for products, the risks and hazards are generally the same across the country and public resources are scarce. In addition, the growth in e-commerce will continue to erode the capacity of jurisdictions to enforce differences in standards and bans.

How to create greater national consistency

There are two broad models for achieving greater national consistency canvassed by the Commission: a 'one-law, one-regulator' model which would see the States refer powers to the Australian Government; or legislative uniformity, via adopting template legislation or, at a minimum, by adopting the same core legislative provisions and improved enforcement approaches.

'One law, one regulator' model

Many of the MCCA options supported by the Commission require a more national approach than currently exists, including those relating to information gathering and dissemination, bans, standards and general enforcement.

In the Commission's view the most appropriate way to achieve uniformity would be to centralise decision making with one regulator administering a single law. In short, the ACCC should be the national regulator and the TPA, as amended by recommendations in this report, should be the single law. Given the Australian Government's already significant role in this area, with the ACCC regulating a dominant proportion of the consumer product market, the transition costs are unlikely to be substantial.

However, the ability to act quickly and locally to deal with an unsafe product, appears to be the major concern of most States and Territories who may be reluctant to refer such powers. A modified alternative may be for the States and Territories to retain the ability to temporarily ban a suspected unsafe product, say for up to 120 days, while referring the powers to determine whether a national permanent ban or standard should be implemented and all other regulatory action to the Australian Government, with enforcement through the ACCC.

Increased legislative consistency

If the above model is not adopted, consumer product safety legislation should be made uniform, through the establishment of arrangements where legislation passed in one nominated jurisdiction would be adopted by all others, along with all subsequent changes — template legislation. If such template legislation cannot be achieved, governments should at least agree on a core set of uniform provisions.

At a minimum, the core set of legislative provisions that should be made uniform are set out below, and reflect recommendations proposed in this report. Appeal processes should not be included in the core provisions, due to the inherent structural differences in the judicial and appeal systems of the States and Territories.

Permanent bans and mandatory standards should be national

Currently bans and standards can be imposed by any or all of the nine jurisdictions with many only applying in one State or Territory. The Commission is strongly of the view that permanent bans and mandatory standards should only be imposed on a national basis. Under a 'one law, one regulator' model, this would be automatic. Alternatively, if an inter-jurisdictional regime remains, a proposed new mechanism would facilitate this outcome by allowing jurisdictions only to be able to impose interim bans, with a decision on whether they should be imposed nationally or lapse being referred to MCCA. Mandatory standards would only be initiated through MCCA and would have national coverage. The ACCC should provide formal advice to MCCA on national bans and be responsible for the development of mandatory standards for MCCA's approval.

Proposed uniform core provisions

Provision	*Recommendation*
Services	All product safety Acts should cover services related to the supply, installation and maintenance of consumer products.
Pre-conditions for bans and mandatory recalls	Products should only be banned if 'the goods are goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person.'
Pre-conditions for mandatory safety standards	The pre-condition of 'as are reasonably necessary to prevent or reduce the risk of injury' should be adopted.
Mandatory recall powers	All jurisdictions should have the power to order mandatory recalls when satisfactory action has not been taken by the supplier.
Notification of voluntary recalls	All voluntary recalls should be notified to regulators. If notification is given to the ACCC under the TPA this should be sufficient to satisfy all other notification requirements.
Length of interim bans	Interim bans should be 120 days in length (and only extended or made permanent through the MCCA process proposed).

Enhanced cooperative decision making

Unless a 'one law, one regulator' regime is adopted, there will be a need to better coordinate regulation making. Inter-jurisdictional decision making generally involves a Ministerial Council approving national regulations and standards. Based on an analysis of the strengths and weaknesses of other inter-jurisdictional bodies, any future consumer product safety cooperative arrangements should address the following principles:

- establish a strong commitment to uniformity;
- have independent experts develop standards;
- wherever possible, Ministers should be the final decision makers;
- establish clear decision rules; and
- integrate widely-based consultation in the development of proposals.

If the ACCC were to provide advice on regulatory decisions to MCCA, as proposed by the Commission, then criteria for independence and expertise would both be satisfied. ACCC is a statutory agency which has recently acquired the responsibility to develop regulations and standards for consumer products and has the relevant skills and capacities.

In making decisions, MCCA should be bound by clear rules. Experience indicates that an 'accept or reject' rule, without MCCA being able to propose amendments, would assist decision making. On rejecting a particular regulation, there could be provision for the ACCC to review, revise and resubmit the regulation. Majority voting rules would also help in reaching agreement. The Commission proposes a two-thirds majority for the introduction of new regulatory measures.

Proposed mechanisms to decide on permanent national bans and mandatory national standards would fit neatly into existing mechanisms to resolve temporary differences in standards and bans under the Mutual Recognition Agreement. Even though the temporary exemption process is largely unused, it provides a sound basis for achieving national agreement. All such arrangements should be built into an intergovernmental agreement.

Enforcement

Under cooperative multi-jurisdictional arrangements, inconsistencies in enforcement will remain. For example, to reduce these differences, regulators could:

- identify key inconsistencies and issues for businesses;
- benchmark enforcement decisions across jurisdictions; and
- institute joint information and education programs relating to unsafe products.

ACCC and appeal processes — part of MCCA Option 12

In all the approaches to harmonisation presented above, the Commission has recommended an expanded role for the ACCC. However, currently as well as being responsible for the development of Australian Government bans and recalls, the

ACCC is also responsible for the review of the adoption of these instruments through conferences. This dual role may make it difficult for the ACCC to be seen as an impartial umpire. Accordingly, there may be merit in establishing a new appeal process, at the Australian Government level, in respect of bans and recalls, in order to remove the ACCC from the formal appeal process.

System Design features

Consumer behaviour and foreseeable use — MCCA Option 2

MCCA has canvassed the proposal that the definition of 'unsafe' be extended to explicitly cover 'reasonably foreseeable misuse': goods that can potentially result in harm because of the way they are used, even when such usage was not intended by the producer, could be recalled or banned. Given the significant role that consumer behaviour plays in injuries related to products this is an important consideration.

The notion of reasonably foreseeable conduct is already embedded in the common law tort of negligence and in strict product liability laws. In designing a product, producers should take into account how it is likely to be used, including reasonably predictable misuse, especially where a pattern of use is recurring of which the producer is or should be reasonably aware.

Various interpretations exist across the jurisdictions as to whether foreseeable use can be taken into account under existing legislative provisions and should be clarified.

While there may be some costs to producers, largely associated with the uncertainties inherent with this concept, where consumer behaviour is likely to cause injury and can be reasonably anticipated, there can be even greater costs of not addressing these risks. Hence, reasonably foreseeable use should be explicitly covered in the definition of 'unsafe'.

Revision to coverage — MCCA Option 3

The MCCA Discussion Paper suggests that there is lack of clarity surrounding the legislative coverage of services and second-hand goods.

Consumer product safety and services

Some jurisdictions include services in their consumer safety provisions and others do not. Those that do, rarely if ever use these powers.

Were *all* services covered, costs are likely to outweigh the benefits. However, faulty installation or maintenance of a consumer product, such as blinds or pool fences, can render a product unsafe. There is likely to be a net benefit in a consistent approach across all jurisdictions to cover services related to the supply, installation and maintenance of consumer products.

Clarifying coverage of second-hand goods

There is confusion among business and consumer groups as to whether second-hand goods are currently covered by consumer product safety regimes. Yet, all governments do have the power to enforce product safety regulations in relation to second-hand goods *that are supplied in trade or commerce*. There would be some advantage in clarifying this to reduce uncertainty, either through legislative amendments or preferably an agreed intergovernmental policy statement.

Any increased enforcement of this power should be targeted on the higher risk consumer goods, such as infant furniture. As well as safety, regulators should take into account equity issues for low income householders (who may not easily be able to afford new goods) and an implicit obligation on consumers to be more aware of the risk of purchasing second-hand products.

A range of complementary strategies should be considered, including monitoring and surveillance, standards specifically dealing with or exempting second-hand goods, supplier education and consumer awareness campaigns. General awareness campaigns may be the only way to target non-commercial sales and hand-me-downs, although their effectiveness would need to be assessed.

Information and research

Better information and research would help governments to improve outcomes concerning consumer product safety. There are a number of aspects to this, consistent with a risk analysis strategy:

- gathering data and evidence to aid hazard identification;
- identifying significant emerging trends to aid risk assessment: the size, causes and probability of adverse events occurring; and
- disseminating observations about risks to relevant parties: researchers, regulators, business and consumers, as appropriate to aid risk management.

The contributions of the information and research options put forward by MCCA can be placed within this framework.

Early warning and consumer complaints information — MCCA Options 6 and 7

A national fully integrated early warning information system with centralised data collection, processing and assessment of new data could be very costly with significant uncertainty that the additional advance warnings would be justified against this cost. However, a centralised hazard identification system based on a clearinghouse model is likely to generate net benefits. The system would receive and disseminate information on incidents from existing or slightly improved data sources and expert groups. Sources would include hospital emergency departments and admissions, business notifications (including recalls), international product warnings, mortality data and consumer complaints.

Further, a national electronic system for registering consumer complaints (similar to that in operation in New Zealand) and for collecting and distributing consumer complaints information should be considered. This and the hazard identification system could be administered by the ACCC.

Reporting unsafe products by business — MCCA Option 5

MCCA has canvassed the introduction of additional requirements on businesses to monitor the safety of their products and report any which: are under investigation by the business for possible safety risks; have been associated with serious injury or death; or have been subject to a successful product liability claim.

It may be difficult for governments to enforce a requirement to report goods that are 'under investigation'; it may create confusion for businesses in determining what constitutes 'under investigation'; and may have the perverse effect of discouraging businesses from investigating potentially dangerous products because of the consequences that may follow.

However, a requirement for suppliers to report products associated with *serious* injury and death is more likely to provide net benefits to the community. Although their magnitude is difficult to estimate, the benefits would include:

- providing more timely information to regulators; and
- allowing the pooling of information to enable regulators to make better judgements about serious product-related injury.

While the costs to businesses of reporting is likely to be relatively low, higher investigative costs will be borne by regulators.

Should this proposal not be adopted, a modification worth pursuing would be to require suppliers to report certain products to the appropriate regulator:

- those which have been the subject of successful product liability claims; or
- those which have been the subject of multiple out-of-court settlements, where a verifiable initiating action to commence litigation has occurred, eg a statement of claim.

As the net benefits of these proposals are uncertain, the effectiveness and efficiency of whichever is implemented should be reviewed within three years from their implementation.

In any event, businesses should be encouraged to explain clearly to consumers and retailers how they can notify the supplier of unsafe or faulty products, in order to improve information concerning product safety to suppliers.

Currently, the Australian Government and most jurisdictions require suppliers to report voluntary recalls. It should be mandatory to report voluntary recalls in all jurisdictions and all should be listed on the Recalls Australia website.

The need for improved product safety research — MCCA Option 8

Currently, the dearth of consumer product safety data and analysis, limits the scope for informed public debate and policy design. Better collection of incidence and cost data on product-related injuries, would improve hazard identification, regulatory activity and provide information to consumers which may help reduce the number of deaths and injuries.

The Commission sees value in a baseline study of consumer product-related injuries and deaths, to establish the number of adverse product-related events and their costs, including the possible roles played by product fault, consumer behaviour and the physical context. Enhanced knowledge about the size and nature of the problem will better inform:

- choice of cost-effective instruments to improve outcomes; and
- where further research should be targeted in order to provide useful insights for further improving public policy in this area.

However, beyond the survey and the recently announced MCCA research strategy, any further research into consumer product safety should continue to be assessed on a case-by-case basis through the competitive processes already in place.

Improving the provision of information — MCCA Option 4

MCCA proposed: a one-stop shop for providing information to businesses on the requirements for designing or importing safe products; and targeted advertising campaigns to encourage consumers and businesses to pursue safety more actively.

Providing information to consumers and businesses can efficiently address product safety because it imparts knowledge while giving flexibility to consumers and businesses in how they respond. It may also be the only way to try to influence consumer behaviour and increase awareness about safe environments. However, there are doubts about how effective information is in changing consumer awareness and behaviour. It is unlikely to be effective, where the risk is very complex or the information is too remote from the consumer's purchasing decision.

Instead of the types of information proposed by MCCA, the following approaches may provide greater net benefits:

- an internet-based 'one-stop shop', administered by the ACCC, to provide information about all State, Territory and Australian Government product safety laws and regulations, including a link to the Recalls Australia website; and
- selective use of information measures, based on a case-by-case assessment of what will be cost-effective.

Recalls

Require businesses to recall unsafe products — MCCA Option 9

MCCA has identified a requirement that businesses recall products that are found to be 'unsafe' as a possible option. Product recalls provide a way to reduce the risk posed by faulty or unsafe products after they have already been sold.

Businesses have incentives to initiate recalls on a voluntary basis, to reduce their liability for potential damages and any adverse impact on reputation. About 160 voluntary recalls of general consumer products are conducted per year. However, their success is variable, seeming to be related to the value of the product and whether records of purchase can be used to track down the product without breaking privacy rules. Often a fairly small proportion of the total amount sold is returned.

Currently, very few mandatory recalls take place, partly because businesses undertake voluntary recalls to pre-empt having government mandate them.

Given that any formal requirement that businesses recall unsafe products would be unlikely to significantly change the behaviour of either responsive or non-responsive suppliers, and that recalls have a mixed success rate, the Commission does not believe that such a proposal would yield a net benefit.

Should government audit product recalls? — MCCA Option 10

In order to ensure that recalls are conducted well, MCCA also raised the idea that governments be given the power to audit voluntary recalls.

This might improve the thoroughness with which businesses conduct recalls and provide greater confidence in the recall system. However:

- the incentives which drive business to undertake recalls generally should also drive them to ensure that they are carried out in an appropriate manner;
- much of the success of recalls depends on consumer responses;
- it would impose additional costs on governments and potentially increase their accountability for unsuccessful recalls; and
- it may perversely provide a disincentive for business to undertake voluntary recalls.

Regulators already have, or should be given, the power to order a mandatory recall of a product (and direct the nature of that recall) if they assess the risk is sufficiently high. This provides a considerable enforcement stick with which to encourage suppliers to reveal details about a recall. On balance, the benefits accruing from an ability to audit recalls are likely to be limited and would not justify the costs.

Improving Recalls

However, the Commission believes that current recall guidelines could be improved. MCCA should initiate a review of current recall guidelines with a view to improving the effectiveness of recalls. Strategies to consider, include the inclusion of photographs in recall notices, more consumer friendly description of products and better methods of tracking recalled consumer products.

Making further progress

While a number of the MCCA reform options, as modified, would be likely to generate net benefits, they do not exhaust the potential to enhance the performance of the current system. Some other changes could further improve Australia's consumer product safety system.

Making risk management central to the regulation of consumer product safety — There needs to be a more consistent application by regulators of hazard identification, risk analysis and management. This would enable them to better target those product-related hazards that have the largest potential cost to the community in terms of injury and death. A particularly important aspect of this would involve the States and Territories consistently applying Regulation Impact Analysis, including risk analysis, to the assessment of the case for bans, recalls and standards. This would apply automatically, via COAG's *Principles and Guidelines*, if jurisdictions agree to reach national agreement on all standards and permanent bans. The ACCC also should consistently prepare Regulation Impact Statements before implementing permanent bans.

Achieving more strategic, responsive and transparent enforcement — Irrespective of the level of resources, there may be scope for some regulators to be more strategic in using these enforcement resources consistent with a greater emphasis on evidence-based risk management.

Standards — A stronger emphasis on risk management should underpin the development of mandatory product standards. It is important that the standards development process for consumer products is 'hazard' focused, so that they only address essential safety issues and leave other design features to be covered by voluntary standards. Mandatory standards should only be used to address hazards where risk and cost-benefit analysis indicate this will improve community wellbeing.

Importantly, the timelines for developing mandatory standards should be improved. It should be possible to develop mandatory standards within a twelve month period. A tighter focus on hazards could facilitate this.

Taking more account of the global nature of consumer product markets — While there is a general policy of adopting international standards where possible, there needs to be a stronger focus on systematically reducing inconsistencies between Australian and international standards. Domestic regulations should be consistent with international standards unless it can be demonstrated that adopting a different approach provides a net benefit to the community. The scope for recognising more bodies (including international standard-making bodies) under the TPA as standard makers should be explored.

Dealing more effectively with the challenge of e-commerce — New technologies are increasingly opening up opportunities for consumers to acquire products in ways that by-pass traditional retail outlets. This includes the sale of second-hand goods on the internet. The system may need to more fully address trading over the internet and its legal and practical implications for enforcing national and local regulations.

Concluding comment

The reform options, that the Commission has endorsed, would add greater consistency and clarity to the regulatory environment, provide better information to regulators, would improve hazard identification and risk management in the development of standards and other interventions, provide regulators with extended powers to address reasonably foreseeable use, and improve consumer and business information. Overall, the efficiency and effectiveness of the consumer product safety regime would be enhanced.

Findings and recommendations

Evaluation of the current system

FINDING 4.1

Overall, Australia's consumer product safety system appears to provide reasonable incentives and constraints to encourage most businesses to supply safe products. The main mechanisms through which these incentives and constraints operate are market forces, the product liability arrangements, media scrutiny of unsafe products and organised consumer advocacy. The regulatory system plays an important complementary role in seeking to protect consumers in the event unsafe products reach the market.

FINDING 4.2

It is too early to tell what the impact of recent changes to the product liability arrangements may be in terms of consumers' access to redress and compensation. However, on balance, these changes are likely to have weakened the incentives for businesses to supply safe products.

FINDING 4.3

The Commission's exploratory estimates of the incidence of product-related injury and death suggest that the number of injuries and deaths directly caused by product fault is small relative to other causes of mortality and morbidity, though not insignificant. Consumer behaviour and poor product maintenance and servicing are likely to be more significant causes of product-related injury and death. And the most dominant cause of injury appears to be the physical context in which product-related accidents occur.

FINDING 4.4

The total cost to the community of consumer product-related injury and death is likely to be in the order of hundreds of millions of dollars annually.

FINDING 4.5

Irrespective of whether a general safety provision is introduced, there are a number of ways governments could make the regulation of consumer product safety more efficient, effective and responsive. In this regard, the priorities are:

- *addressing fragmented policy making, administration and enforcement through a much stronger national approach;*
- *addressing significant data and information gaps;*
- *improving the responsiveness of government regulation to existing and emerging product-related hazards;*
- *focusing more strongly on hazard identification, risk assessment and risk management;*
- *improving the standards-making process;*
- *ensuring the regulation of consumer product safety is adequately resourced; and*
- *clarifying boundaries and areas of responsibility between the general consumer product safety system and the specific safety regimes.*

FINDING 4.6

Differences between the Australian and New Zealand consumer product safety regimes are unlikely to have a significant distortionary impact on Australasian economic activity. In practice the operation of these regimes is sufficiently similar and the significance of any differences should be mitigated by the Trans-Tasman Mutual Recognition Arrangement.

General Safety Provision

FINDING 5.1

The benefits of a General Safety Provision (GSP) applied to consumer products under reference are unlikely to justify the costs involved. A particular concern is that the GSP may fail to target the areas of biggest risk and may deliver little benefit beyond what might be achieved with appropriate modifications to the existing consumer product safety regime (as discussed in this report).

FINDING 5.2

Further consideration should be given by the Ministerial Council on Consumer Affairs to the following measures targeted at specific weaknesses identified in the current system:

- *imposition of financial penalties once a product ban has been implemented; and*
- *certification by importers that consumer products imported for resale meet mandatory Australian standards where applicable.*

Foreseeable use

RECOMMENDATION 6.1

Governments should amend consumer product safety provisions to explicitly cover 'reasonably foreseeable use' in the threshold tests for bans and compulsory recall orders under the Trade Practices Act and legislation in all jurisdictions.

Revision to coverage

RECOMMENDATION 7.1

Governments should amend consumer product safety provisions in all jurisdictions to cover services related to the supply, installation and maintenance of consumer products.

RECOMMENDATION 7.2

The Ministerial Council on Consumer Affairs should agree on an intergovernmental policy to clarify that second-hand goods (sold in trade or commerce) are covered by existing consumer product provisions. Further, all mandatory standards should explicitly state whether they apply to second-hand goods. A case-by-case approach to enforcement of product safety laws as they relate to second-hand goods should be adopted by all jurisdictions.

Safety criteria and thresholds

RECOMMENDATION 8.1

Subject to legal refinement:

- ***the following threshold test for bans and mandatory recall orders should be adopted by all jurisdictions:***

  'the goods are goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person'; and
- ***the following precondition for mandatory safety standards, currently in the Trade Practices Act, should be adopted by all jurisdictions:***

'as are reasonably necessary to prevent or reduce risk of injury to any person'.

These provisions should be supported by supplementary guidance material, which clarifies how the provisions should be interpreted and the factors that regulators should take into account in determining appropriate action.

FINDING 8.1

If a General Safety Provision were to be introduced, the obligation should be stated broadly and the definitions and standards of safety should be closely aligned with existing provisions of Part VA of the Trade Practices Act (excluding the precondition of actual injury or loss).

Better hazard identification and risk assessment

FINDING 9.1

A national fully integrated early warning system involving the centralised collection, processing and assessment of raw data on product-related injury and death could be very costly. The increase in timeliness and number of advance warnings provided by this system are unlikely to be justified against this cost.

RECOMMENDATION 9.1

The Ministerial Council on Consumer Affairs should initiate the development of a broadly-based hazard identification system, based on a clearinghouse approach, to gather a range of information and analysis on consumer product incidents (largely from existing sources) and disseminate it to all jurisdictions. Sources should include information from hospital emergency departments and admissions, business notifications (including recalls), international product warnings, mortality data and linked consumer complaints information. This system should be coordinated by the Australian Competition and Consumer Commission.

RECOMMENDATION 9.2

The Ministerial Council on Consumer Affairs should establish a national system for the exchange of complaints information across jurisdictions and give consideration to the establishment of a national electronic portal for registering consumer complaints.

RECOMMENDATION 9.3

Governments should require suppliers to report to the appropriate regulator products which have been associated with serious injury or death. Should this not

be adopted, suppliers should be required to report products which have been the subject of a successful product liability claim or multiple out-of-court settlements, in the latter case where a verifiable initiating action to commence litigation has occurred, such as a statement of claim. Such measures should be reviewed within three years of their commencement to determine their efficiency and effectiveness.

RECOMMENDATION 9.4

Governments should ensure that voluntary recalls in all jurisdictions are subject to mandatory reporting requirements, and all (voluntary and mandatory) recalls are posted on a national website, such as the Australian Competition and Consumer Commission's Recall Australia.

RECOMMENDATION 9.5

Governments should, through appropriate guidelines, encourage all suppliers to explain to consumers and retailers how they can notify the supplier of unsafe or faulty products, in order to improve the flow of product safety information to suppliers.

RECOMMENDATION 9.6

A one-off baseline study should be commissioned by the Ministerial Council on Consumer Affairs (MCCA) to identify the current incidence and costs of product-related accidents and provide a thorough analysis of the significance of different causes of accidents. This would improve hazard identification and help guide government interventions to address consumer product injury and death. The recent establishment of a dedicated research strategy by MCCA and the commitment by jurisdictions to fund further research through the Council, may provide the means by which to guide and fund this study.

FINDING 9.2

Beyond the research strategy recently introduced by the Ministerial Council on Consumer Affairs and the base-line study proposed in Recommendation 9.6, any further research into consumer product safety should continue to be assessed on a case-by-case basis through competitive funding processes already in place.

Better informed consumers and businesses

FINDING 10.1

The additional benefits associated with establishing a dedicated organisation tasked with providing information to consumers would not justify the associated costs.

Well-designed and cost-effective information provision can improve product safety outcomes and should be used in conjunction with regulators' overall strategies for addressing product safety risks.

RECOMMENDATION 10.1

The Ministerial Council on Consumer Affairs should establish a national internet-based one-stop shop providing information about product safety regulations for all jurisdictions, administered by the Australian Competition and Consumer Commission. The one-stop shop should include:

- ***relevant trade practices and fair trading provisions;***
- ***information about product bans and standards;***
- ***information about administration and enforcement practices;***
- ***information about product recalls generally and a link to Recalls Australia;***
- ***relevant product safety information targeted at consumers;***
- ***links to product specific regulators; and***
- ***potentially a consumer complaints registration portal.***

Removing unsafe goods

RECOMMENDATION 11.1

As the success of recalls in recovering unsafe products is variable (and especially poor for low value products) the Ministerial Council on Consumer Affairs should undertake a review of existing recall guidelines to ensure that recalls are undertaken in the most effective manner. Considerations for improving recalls could include:

- ***improved advertising efforts (including photographs in advertisements and other targeted material);***
- ***buyer registration cards for high risk products; and***
- ***identification and highlighting of particularly high risk products which have been recalled.***

RECOMMENDATION 11.2

Governments should have the power to undertake a recall directly where no supplier can be found to undertake such a recall.

FINDING 11.1

There do not appear to be net benefits in imposing a general requirement for businesses to recall unsafe products. Current incentives appear sufficient to motivate most businesses to recall unsafe products on a voluntary basis. It is unlikely that a legal requirement for suppliers to recall unsafe products would result in a significant number of additional recalls, while potentially adding to uncertainty and costs.

FINDING 11.2

The benefits accruing from governments being given additional powers to conduct audits of recalls are unlikely to justify the costs of an audit process, particularly as most governments can instigate mandatory recalls if they consider suppliers' actions to be inadequate. Such powers to instigate mandatory recalls should be available in all jurisdictions.

Design and standards

FINDING 12.1

It is at the design stage that manufacturers have the greatest opportunity to prevent injury caused by consumer products. In this regard, it is essential that product safety is carefully considered at each stage of the design process and re-evaluated in light of consumer feedback once the product is available on the market.

RECOMMENDATION 12.1

All mandatory safety standards for consumer products should be developed on a 'hazard' focused basis. Regulators should ensure such standards only address essential safety issues and leave other design issues for voluntary standards. Further, wherever appropriate regulators should adopt international standards.

RECOMMENDATION 12.2

The Ministerial Council on Consumer Affairs, through the Australian Competition and Consumer Commission, should work with Standards Australia with a view to significantly streamlining the standards-making process to improve timeliness, given the potential impacts of standards in a rapidly changing marketplace. The aim should be for mandatory safety standards to be developed and implemented within 12 months.

National Approaches

FINDING 13.1

There is little justification for different consumer product legislation and enforcement responses across Australia. Such differences create inefficiencies in a resource constrained environment including unnecessary duplication of effort and inconsistent approaches to similar risks and hazards.

RECOMMENDATION 13.1

Given the national nature of most product markets and the need to adopt the most efficient means of achieving an effective consumer product regime, a national regime with a single law and single regulator should be established; with the States and Territories referring their existing authority to the Australian Government.

RECOMMENDATION 13.2

Given its well established nature and broad application, the Trade Practices Act, as amended by the proposals recommended in this report, should be the single law for consumer product safety. Given its current role and breadth of coverage, the Australian Competition and Consumer Commission should be the single regulator. This would involve lower transition costs than establishing a new body.

RECOMMENDATION 13.3

Failing the establishment of a single law and regulator as proposed, there would be merit in a modified approach with the States and Territories retaining the power to impose interim bans only. The authority to impose all other consumer product safety regulation (such as permanent bans, mandatory standards and recalls) would be referred to the Australian Government, and enforcement would occur through the Australian Competition and Consumer Commission.

RECOMMENDATION 13.4

Should the 'one law, one regulator' regime as recommended not be adopted, then a number of reforms should be made to the existing cooperative arrangements, to be contained within an intergovernmental agreement by all nine jurisdictions, including:

- ***Permanent bans and mandatory standards should only be implemented on a national basis, by:***

- *automatically initiating the temporary exemption process, under the Mutual Recognition Agreement, when a jurisdiction imposes a temporary ban;*
- *requiring the Australian Competition and Consumer Commission (ACCC) to recommend to the Ministerial Council on Consumer Affairs (MCCA) on whether a permanent ban or mandatory standard should be imposed after the conclusion of the temporary exemption;*
- *a response to the ACCC's recommendation being made by MCCA using a two-thirds voting rule and on an 'accept or reject' basis; and*
- *imposing a time limit of 120 days on the temporary exemption, unless an extension is agreed to by MCCA.*

- *Consumer product safety legislation should be made uniform, through the establishment of arrangements where legislation passed in one nominated jurisdiction would be adopted by all others, along with all subsequent changes. However, if this cannot be achieved, governments should agree on a core set of uniform provisions. At a minimum, this core set of provisions should include:*
  - *the scope of any coverage of services*
  - *pre-conditions for the imposition of bans and mandatory standards*
  - *mandatory recall powers*
  - *requirements to notify authorities of voluntary recalls*
  - *length of interim bans.*

RECOMMENDATION 13.5

If an inter-jurisdictional approach remains, the Ministerial Council on Consumer Affairs should establish processes for the benchmarking of enforcement practices across jurisdictions as a way to lead to greater consistency in enforcement methods.

RECOMMENDATION 13.6

Alternative appeal arrangements should be established, such that the Australian Competition and Consumer Commission is no longer responsible for the review of its own decisions.

1 Introduction

1.1 Background to the study

From CDs to clothing, cereals to cosmetics, cups to combs and cots to cars, consumer products generate an array of benefits and play an obvious and central role in everyday life. Sometimes though, consumer products, through their malfunction and/or their use can cause property damage, personal injury or even death.

Product-related accidents can impose an array of costs on the individual and the broader community. For affected consumers and their loved ones, physical and/or emotional pain will often be the predominant 'cost'. Other costs can include monetary costs (for medical and other expenses), reduced productivity (if consumers are injured and unable to work), and costs to the public health system. While some product-related incidents result in serious injury or death, and entail substantial costs, others may result in more minor injury and lesser individual costs. However, the combined costs of these lower level incidents may still be significant.

While commercial incentives place limits on the extent to which unsafe products can reach or survive in the marketplace, and while consumers have a natural incentive to exercise care when using products, governments and the courts also play a role in promoting consumer product safety. This study is reviewing a range of 'general' product safety laws which cover the banning and recalling of goods, the mandating of product standards and the issuing of product warnings. In general these laws are applied to those (usually less hazardous) products that are not covered by product or sector specific regulatory regimes.

Over the last 15 years, there has been a series of government reviews into aspects of general consumer product safety in Australia. For the most part, these reviews have not found major deficiencies in the existing general safety regime but have identified ways it could be improved (see box 1.1).[1]

[1] In addition to these government reviews, in 1989, the Australian Consumers' Association (ACA) released a report into the cost of consumer product related injury: *An Arm and a Leg: the Human and Economic Cost of Unsafe Products* (ACA 1989).

Box 1.1 **Some recent reviews into aspects of consumer product safety**

In 1989, the Australian Law Reform Commission (ALRC) recommended radical changes to product liability laws to place more responsibility on producers for loss caused by goods. A follow-up report by the Industry Commission (IC) (1990) considered that the likely benefits of the ALRC proposal did not justify its likely costs (particularly the transitional costs). The IC considered that an outcome superior to the ALRC's proposals, and the laws in place at the time, could be achieved by relatively minor amendments to the existing laws. (Amendments to the *Trade Practices Act 1974* (TPA) similar to those recommended by the Commission were implemented in 1992.)

In 1993, the Australian Consumers' Council (a predecessor to the Commonwealth Consumer Affairs Advisory Council) commissioned a report on the state of product safety regulations. The Council considered that, while the current regulations had established a firm basis for product safety, further reforms would be needed to ensure that Australia met the Council's vision of world leading product safety outcomes by the year 2020.

In 1995, the Australian National Audit Office (ANAO) tabled a performance audit of risk management procedures used by Commonwealth consumer product safety regulators. The ANAO found that regulators had adopted a risk management approach towards some, but not the full range, of their activities.

Following a policy review, in 2000, the Australian Treasury released a discussion paper which examined product safety regulation in Australia and other countries. The discussion paper considered that Australia's product safety system was working efficiently, but also considered that a number of features from other countries could be introduced (such as a general safety provision, a requirement to report unsafe products and amendments to the definition of unsafe goods).

In 2001, the Tasmanian Department of Justice and Industrial Relations issued a report that looked in detail at the consumer product safety legislation in each jurisdiction (ie Australia and the eight States and Territories). It found that the legislation was broadly similar in terms of aims and objectives, but that there were significant differences in the scope and detail of the legislation. The report commented that:

> … the current fragmented regulatory and administrative arrangements contain a number of deficiencies and their implications for government, business, industry and consumers are a regime that is less than efficient, imposes high compliance costs and has a lack of certainty, consistency and uniformity. (DJIR 2001, p.3)

The report went on to recommend that:

- further work be undertaken to look at the administrative and operational aspects of the product safety system;
- an extensive and comprehensive process of consultation with all stakeholders be undertaken; and
- the Standing Committee of Officials of Consumer Affairs (SCOCA) and Ministerial Council on Consumer Affairs (MCCA) consider processes and mechanisms for achieving change to the legislation.

The Ministerial Council of Consumers Affairs (MCCA) began a further government review into the consumer product safety system in 2004. It released a Discussion Paper (MCCA 2004, prepared on its behalf by the Australian Government Treasury) containing 12 suggested reform options (see box 1.2). Key options included:

- a 'general safety provision' (which would impose a new requirement on businesses to supply only safe goods);
- options for the harmonisation of consumer product safety regulation and its enforcement; and
- mechanisms to deliver more timely safety information and more funding for consumer product safety research.

In August 2005, MCCA (2005c) released an additional Options Paper focusing particularly on these key options.

To help inform MCCA's review, the Productivity Commission was asked to undertake this research study evaluating both the Australian consumer product safety system and the benefits and costs of reform options.

1.2 Scope of the study

Terms of reference

Broadly, the terms of reference (reproduced at the front of this report) require the Commission to examine the current consumer product safety system, assess its effectiveness in meeting objectives and addressing market failures (with particular emphasis on the options for reform put forward in the MCCA Discussion Paper). In doing so, the Commission has been asked to examine the direct and indirect economic and social costs and benefits of each option, and to identify their impacts upon a number of groups including: businesses (including small businesses), consumers (including families) and governments. In addition, the Commission has been asked to examine the impact on competition and international trade as well as economic integration between Australia and New Zealand.

Importantly, the Commission has been asked only to examine the general consumer product safety system, and not the overall consumer protection regime. It is therefore required to assume that the current specific product regulatory arrangements, product liability rules and other consumer legislation remain unchanged.

Box 1.2 **MCCA reform options**

- The introduction of a general legal obligation for businesses to only market 'safe' consumer products (termed a 'general safety provision') — see chapter 5
- Revising the definition of unsafe goods to include 'foreseeable misuse' — chapter 6
- Revising the coverage of product safety legislation to include services and second-hand goods — chapter 7
- Improving and expanding the provision of product safety information to businesses and consumers — chapter 10
- A requirement that businesses monitor and report on the safety of their products — chapter 9
- Establishing product hazard early warning information systems to more promptly identify unsafe products — chapter 9
- Linking various state based product safety information systems — chapter 9
- Increasing government and industry funding of product safety research — chapter 9
- A requirement for businesses to recall unsafe products — chapter 11
- A government power to audit voluntary product recalls — chapter 11
- Measures to harmonise product safety legislation, administration and enforcement across jurisdictions — chapter 13
- Measures to enhance the making of product safety regulation decisions by the Australian Government — chapter 13

Source: MCCA (2004).

Products covered

In principle, the general consumer product safety provisions contained in the TPA apply to all consumer products. In general, a consumer product is any that is intended to be used or likely to be used by consumers (such as motor cars, kitchen equipment, garden tools, toys, food etc).[2] A consumer is considered to be anyone who purchases goods without the intention of either reselling them or using them in the course of the production, manufacture, repair or treatment of other goods.[3]

[2] While 'fixtures' are not generally considered a consumer product, they are explicitly covered by Part V, Div 1A of the TPA.

[3] Another caveat requires that the price of the good does not exceed a prescribed amount of $40 000.

While in theory the general regime applies to all consumer products, in practice a number of consumer products are not largely affected by the general regime as they have their own, more stringent, safety regimes. These products include:

- medicines and other therapeutic devices (which are regulated by the Therapeutic Goods Administration)
- food products and alcohol (Food Standards Australia New Zealand)
- road transport vehicles (Department of Transport and Regional Services, Vehicle Safety Standards)
- buildings (Australian Building Codes Board)
- pesticides and veterinary medicines (The Australian Pesticides and Veterinary Medicines Authority)
- electrical consumer products (which are regulated by a variety of State and Territory organisations and co-ordinated by the Electrical Regulatory Authorities Council)
- tobacco (which is subject to a range of regulations co-ordinated by the Ministerial Council on Drugs and the Department of Health).

In general, these are the products that pose the greatest safety risks to the public.

Thus, the general consumer product safety system under reference is left to deal with the majority of products that, with some exceptions (see below), do not individually pose particularly large or specific risks to the community (see box 1.3).

The Commission estimates that Australian consumers spend about $50 billion (approximately 15 per cent of total expenditure) each year on general consumer products (that is after removing most products in the categories listed above) (ABS 2005a and PC estimates). While it is difficult to estimate the total proportion of these goods which are imported, the Commission has estimated that for one important sub-group, children's toys, around 97 per cent are imported (ABS 2005b). The majority of these imports are sourced from China (almost 80 per cent), with the next largest sources Hong Kong and the United States accounting for only 3 per cent each (ABS 2005c).

Of the large number of goods under reference, only a very small number have become subject to mandatory standards or bans under the general consumer product safety provisions. Over half of these apply to products which may pose a danger to children. These include nursery products (such as cots, bunk beds), toys (such as bikes and 'victim toys') and other products that may harm children (such as bean bags and cigarette lighters). Other products subject to standards include vehicle jacks and ramps, sunglasses, elastic straps and cosmetics. A full listing of banned goods and goods subject to standards is included in appendix B.

Box 1.3 **Some goods covered by general product safety provisions**

- BBQs
- Bed sheets
- Bicycles
- Books
- Brooms
- Calendars
- Chairs
- Coffee plungers
- Cots
- Crockery
- Dummies
- Furniture
- Headphones
- Lighters
- Paperweights
- Pillows
- Pipe wrenches
- Screwdrivers
- Socks
- Sporting goods
- Stationery
- Tea cosies
- Tools
- Toys

Regulations covered

Legislation underpinning the consumer product safety system is contained in the *Trade Practices Act 1974* (TPA) and equivalent sections of State and Territory fair trading acts. This legislation allows governments to issue product warning notices, impose product bans, mandate safety and information standards and order compulsory product recalls. Other laws that protect consumers from unsafe products (but that are not directly under examination in this study) include product liability provisions and the common law of negligence (see chapter 3).

1.3 The Commission's assessment framework

The terms of reference require the Commission to assess the extent to which the consumer product safety system is meeting its objectives (set out below) and the costs and benefits of both the existing system and options for its reform. In doing so, the Commission takes a broad economy-wide perspective which is reflected in the concepts of 'effectiveness', 'efficiency' and 'equity'. These concepts provide the framework underlying the analysis of policy principles contained in chapter 2.

Effectiveness

Effectiveness concerns whether set objectives have been met. As set out by MCCA, the primary goal of the consumer product safety system is to minimise 'the physical and financial costs of unsafe products in a way that best serves the welfare of Australians' (MCCA 2004, p. 4). Specific objectives identified in the paper relate to:

- safe products and informed consumers
- detecting and reporting of unsafe products
- removing unsafe products from the market
- consumer redress and compensation
- efficient markets and the efficient use of government resources.

To judge effectiveness, it is important to assess the contribution that the consumer product safety system makes to each of its objectives — beyond what would have occurred without it. This is the 'additionality' criterion. What is important for assessing the success of the consumer protection provisions of the TPA and the fair trading acts of the jurisdictions and their administration is the impact that they have on making products safe or removing unsafe products from the market over and above that which is already delivered by other factors which also influence consumer product safety. These include: market-based competition and consumer preferences; the strict product liability regime; media scrutiny and consumer advocacy.

Another aspect of effectiveness concerns whether the costs of delivery and compliance can be reduced, while still addressing identified market imperfections and achieving given objectives. The calls for national consistency can be seen as an attempt to lower compliance costs to achieve better outcomes without incurring higher costs.

Effectiveness will also depend on having sufficient resources and applying them well to ensure compliance with the regulations.

Efficiency

Economic efficiency is a broader concept than effectiveness. A regime may be effective at meeting its objectives but might not be efficient if, for example, it achieves its objectives in an unduly costly way or pursues the wrong objectives.

There are two broad ways of assessing the economic efficiency of different policy options. One involves identifying and measuring, in cost and benefit terms, the various effects of the options on different groups, and then calculating a net benefit estimate for each.[4] The second approach involves the identification of principles that an economically efficient regulatory regime should exhibit, and then comparing different options against those principles. Options that accord more closely with the principles are likely to generate higher net benefits than those that do not readily align with them. Most policy analyses use a combination of these two approaches.

Both approaches have also been used in this review, although the nature of the main reform options lends themselves particularly to the use of a 'principles'-based approach for assessment. Indeed, while it is possible to identify the types of costs and benefits to different groups that flow from the current safety regime, and that would flow from the different reform options, often information is not available that would allow them to be quantified with great precision.

Accordingly, chapter 2 draws on the economic and regulatory literature to identify principles for good regulatory regimes in the product safety area.

These concepts are drawn on in the subsequent assessments of the current regime and the reform options (chapters 5 to 13).

Equity

Equity (related to justice) refers to fairness in the distribution of society's resources and wellbeing among its people. A common equity principle is that people in similar circumstances should be treated equally ('horizontal' equity). Equity can also require redistribution of resources from the well-off to the poorly-off in society ('vertical' equity), although various criteria (for example, people's need, merit) may underpin judgments about the appropriate basis for government intervention on equity grounds.

[4] Costs and benefits, in an economic sense, refer to much more than just money or financial costs and benefits. 'Costs' can include physical pain and suffering, psychological trauma or unease, or other forms of 'disutility'; while benefits can include pleasure and satisfaction, feelings of good health, and other forms of happiness.

Product liability laws are a particularly direct means of pursuing certain equity objectives, as they deal directly with the compensation of consumers who suffer product-related loss and impose penalties on producers whose products cause such loss. Indeed, in its 1990 inquiry into product liability, the Industry Commission (IC 1990) gave equity equal status to economic efficiency in its assessment of different product liability reform options.

Depending on their design, product standards, bans, recalls and information strategies can have some distributional impacts — for example, where product safety standards are framed to provide special protections to vulnerable groups (such as children, the elderly, people with disabilities and those for whom English is a second language). Consumer product safety laws can also affect the safety and affordability of products. In particular, they may increase the price of some products and this may reduce the capacity of people on low incomes to buy some products. Further, compliance costs imposed on business to meet product standards tend to have a (proportionally) larger impact on small and medium firms. And equity issues may also arise in relation to the penalties levied for non-compliance.

1.4 Conduct of the study

The terms of reference for this study were received on 16 March 2005. The Commission advertised the start of the study in major newspapers. In early April, a first circular and issues paper were forwarded to interested parties. Early in August, the Commission released a Discussion Draft outlining its initial views on the system and the options for reform.

The Commission has met with a wide range of organisations with an interest in product safety, including consumer groups, industry organisations, professional groups and representatives of the Australian, State and Territory Governments. The Commission received 12 submissions prior to the release of the Discussion Draft and a further 20 submissions following the draft. The Commission has also considered 31 submissions responding to MCCA's Discussion Paper.

Following the Discussion Draft the Commission has held round-table discussions in Sydney, Canberra and Melbourne and a round-table meeting with injury experts (dealing with the appropriate measurement of injury incidence and cost).

The Commission thanks interested parties for their participation in meetings and roundtables and for their submissions in response to the issues paper and Discussion Draft.

2 Policy principles

Key points

- Any reforms to the consumer product safety system should satisfy well-established principles of good policy making in order to ensure they bring about net improvements without undue adverse side-effects, supplanting private initiatives or unnecessary cost imposts. Broadly, this involves having regard for:
  - the role played by the market and the potential for market imperfections (such as information asymmetry); and
  - the existing institutional and legal framework.
- The strongest *a priori* case for intervention occurs when product-related hazards are not obvious or easily perceived; where it is difficult to establish the link between use of a product and damage it later causes; and where those exposed to hazards are particularly vulnerable.
- Reform to frameworks and institutions should be guided by the following principles:
  - allocate resources to maximise the net benefit to the community from reducing the incidence of product-related injury and death;
  - allow for the likelihood that efforts to reduce any particular risk suffer from diminishing marginal returns or effectiveness;
  - allocate accountability to those who can achieve desired outcomes at lowest cost;
  - allocate sovereignty to the optimal decision-making jurisdiction;
  - where sovereignty is shared between jurisdictions, coordinate policy making to achieve greater consistency in regulation and its administration and enforcement;
  - risks should be assessed and managed rationally; and
  - establish appropriate processes and institutions for assessing regulatory instruments before they are adopted, and for monitoring and reviewing their performance over time.
- Within the regulatory framework, the case for government intervention is best assessed on a case-by-case basis, taking into account the nature and size of the particular hazard and the scope for government action to cost-effectively reduce the incidence of product-related injury and death.
- Achieving an acceptable level of compliance is essential if regulations are to meet their objectives. Key aspects of 'smart' enforcement include maximising the potential for voluntary compliance; using risk analysis to target enforcement efforts on the most significant product-related hazards and businesses that are likely to have low levels of compliance; and developing a range of enforcement instruments so regulators can respond to different types of non-compliance.

When governments pursue social objectives, of which product safety is one, it is important to ensure this improves the wellbeing of the community as a whole. In particular, such policies should not unnecessarily supplant private initiatives, inadvertently exacerbate or create new problems, or impose unnecessary costs.

With respect to consumer product safety, government measures do not operate in isolation but supplement other forces also directed at minimising the incidence of product-related injury and death. It is important to establish the extent to which markets and other institutions already cater for consumer demand for safe products, in order to determine the nature and extent of government intervention needed in addition to these other mechanisms.

For reform proposals to deliver net improvements, they should be formulated using well-established economic and regulatory principles. In this chapter, policy guidance for consumer product safety is explored by examining:

- the trade-offs people make between greater product safety and other things they value (section 2.1);
- how markets address concerns with consumer product safety (section 2.2);
- reasons why markets may not deliver an optimal level of safety (section 2.3);
- private responses to these market imperfections (section 2.4);
- the reasons why these private responses might still fall short of an optimal level of safety and justify a role for government (section 2.5);
- existing government mechanisms aimed at addressing problems with consumer product-related safety (section 2.6);
- criteria to guide reform to the institutions and frameworks of the consumer product safety system in order to improve government intervention (section 2.7);
- criteria and processes to guide good regulation making (section 2.8); and
- the role played by enforcement in ensuring better outcomes (section 2.9).

2.1 Safety and its trade-offs

The nature of consumer product risk

The nature of the hazards and their associated risks varies considerably across the diverse range of consumer products. Many products clearly are not intrinsically hazardous, such as books and socks. Other products present greater risks to users, such as knives and power tools. Some products may appear deceptively harmless

but their use can expose consumers to risks, ranging from those that can lull consumers into underestimating the risk of leaving children alone (such as children's toys and baby bath seats) to products which embody latent hazards (such as tobacco, radiation or asbestos).

How much safety?

Sometimes, the risks posed by hazardous consumer products can be reduced by making changes to the design or use of the products. For example, fridges are now designed so that children cannot get trapped and suffocate inside them; safety matches can only be struck against the side of match boxes; and it is now against the law to drive cars under the influence of too much alcohol.

Counter-intuitively, even though injury imposes high costs, zero risk is unlikely to be optimal. This is because, beyond a certain point, the costs associated with reducing injury can begin to exceed the benefits of providing a safe product. For example, it is generally contended that there is a trade-off between the speed of cars and the number of car accidents: while proponents for increased safety will argue for reducing speed from 60 to either 50 or 40 kilometres per hour in built-up areas, almost no-one contends that risk should be made zero by limiting the speed to 0 kph (that is no cars). This is because there is a social consensus that the benefits provided by cars justify some of the costs they impose. Instead, the debate is about what the optimal trade-off should be.

Similar considerations apply to household consumer goods, for example, almost no-one would want to eliminate all electrical goods in order to ensure no-one ever gets electrocuted nor to remove all knives to ensure no-one ever gets cut. While the examples may seem trite or obvious, the points they illustrate are fundamental to policy analysis in this area. This is because risk is intrinsic to the function and utility provided by many of these products.

Sometimes the costs involved in reducing risk are political, social or cultural. For example, consumption of alcohol appears to be a significant contributor to accidents in the home. While society tolerates the limitations on our freedom due to the imposition of breath testing of drivers by the side of the road, it would not accept breath testing of consumers in their homes and preventing them from using hazardous consumer products if found to be over the limit. This would contravene some fundamental values our society holds about privacy and freedom.

An additional complication in setting policy derives from consumers differing in their attitudes to risks and their capacities to assess them. Hence, some consumers willingly embrace taking on risks, such as sky-diving, while others strenuously

avoid them. In addition, limited capacities to assess risks means that some consumers are unwittingly exposed to risks they would otherwise not be prepared to take. It is a challenge to protect this group versus maintaining the freedom to choose for those who make riskier choices while fully aware of the implications.

Limited private and public budgets mean sometimes difficult choices must be made between alternatives. Governments must decide between devoting resources to reducing the hazards posed by consumer products or those posed by other risks (or indeed other spending priorities). Choices should also be influenced by cost-effectiveness: once relatively easy improvements have already been made, further improvements may be both smaller and more costly.

In summary, there are costs as well as benefits from reducing consumer product-related risks. Hence, it makes sense to trade-off costs and benefits up to the point where the benefits of any further improvements in safety would be outweighed by the additional costs.

2.2 Markets and consumer product safety

Markets generally do a good job in helping people to satisfy their desires for goods and services, with the particular characteristics that they are prepared to pay for, including safety.

Household responses

When consumers buy a product, safety is only one of the qualities they consider. However, other characteristics being equal, they will generally be willing to pay more for products they perceive to be safer. For example, many consumers are willing to pay a higher price for a car with anti-lock brakes and airbags.

The emphasis given to safety when making purchasing decisions will vary from product to product and between individual consumers, being more prominent in the purchase of products which more obviously present hazards, such as heaters, power tools and cars.

Where consumers cannot assess all the safety risks associated with a particular product, they may rely on indirect ‘indicators’ of safety, such as the perceived quality of the product and the reputation of its maker, advertising on the safety attributes of the product, and/or information provided in independent product tests (such as those in *Choice* and *Wheels*).

While most consumers will not buy goods that they do not perceive to have a basic level of safety, beyond that level the extra money spent buying safer products leaves them with less money for other things they value. As North and Miller (1980, pp. 37–8) observe, there will be a limit to how much they are willing to pay for extra safety:

> At some price we can make every car a tank and completely safe for its occupants. … but it is doubtful that the idea would meet with overwhelming enthusiasm from consumers. In fact, if they were offered a trade off of various increasing degrees of safety in their cars but at successively higher prices, we would probably find that a great many would not opt for higher levels of safety. Most would be willing to accept additional risk in trade for a lower-priced automobile.

The amounts that people are willing to pay for enhanced safety will vary, depending on factors such as their age, gender, marital status, income, and personal attitudes towards risk. Some consumers will demand very high levels of safety, while others will choose to buy goods that the former consider excessively risky. Oi (1973, p. 27, (footnote 48)) notes:

> What appears to be an unreasonably dangerous product to a middle-aged cautious risk averse person may be a wholly acceptable risk to a young, risk-preferring man.

Likewise, consumers on lower incomes are generally likely to be willing to spend less on additional safety, needing and/or preferring to use more of their budget for accommodation, food, entertainment, education expenses and so on.

That said, consumers do expect that products they purchase, meet a minimum level of safety, even though it is difficult to determine what that level may be.

As well as addressing safety in purchasing decisions to differing degrees, consumers exercise care when using goods to varying degrees. While consumers have a strong natural incentive to avoid injury while using products, the care taken will depend on:

- risk preferences;
- awareness of the potential for injury;
- other factors impacting on behaviour, such as whether under the influence of alcohol or distracted by other matters, such as the demands of children; and
- capacities to use the product.

In summary, most consumer products pose relatively low levels of risk. Where consumers put a high value on safety, the market has generally responded by supplying safer products for those willing to pay for the added safety and non-government organisations provide information and advocacy to improve outcomes. Consumers can either assess the safety of a product before buying or can attribute

blame if accidents occur afterwards. Even for those goods which are inherently hazardous, most consumers are aware of the risks and value the benefits of the product sufficiently to manage risks rather than to do without the product.

Business incentives to supply safe products

Whether businesses survive and/or profit in the marketplace depends largely on whether they are able to supply products that meet consumer preferences, including desired levels of safety. Producers become aware of such preferences through market research, complaints received and, most importantly, through consumers buying or not buying their products. A firm's need to protect its reputation from adverse publicity, reinforces its incentive to provide safe products. These incentives will be more effective:

- where a death or injury associated with an individual item can adversely affect the reputation and sales of the entire business; and
- the more easily the safety of a product can be discerned: particularly where the connection is clear prior to purchase (such incentives are less effective the greater the delay in the onset of any injury until the connection between the product and the injury is generally established and well known).

In addition, producers may also focus on product safety for ethical reasons: 'It could also be for the simple fact that the manufacturer wants to do the right thing.' (Australian Consumers' Association (ACA) 1998, p. 15)

However, safe products can be more expensive to produce than their less safe equivalents, due to more thorough design procedures, the use of more expensive materials, the inclusion of additional safety items, and the adoption of more rigorous testing processes and post-sale services. Sometimes, though, simple modifications at the design stage can significantly improve the safety of some products at no or little cost:

> While the addition of automatic braking systems to cars has an obvious and direct cost, as do airbags, and many other similar add-on products or components, good design in a children's cot or high chair does not necessitate raising manufacturing costs. Modest extra amounts spent on good design amortised over many samples does not raise the unit costs to consumers very much … (ACA, sub. 41, p. 7)

Producers need to weigh up potential benefits and costs of investing additional resources in designing a product. Just as supplying products that insufficiently meet consumers' preferences for safety adversely affect sales, so too would supplying products that cater for safety in excess of the value consumers place on it.

2.3 Market imperfections

Even though markets cater to some extent for people's preferences for safety, the level may sometimes be less than people are prepared to pay for because of:

- information failures
  - general lack of knowledge about all of the risks posed by consumer products
  - gaps in knowledge between the producer and the consumer
  - limitations in some groups (such as children) being able to assess and respond to risks realistically;
- negative spillover effects
  - impacts on third parties such as injury incurred by bystanders
  - costs to taxpayers due to subsidised health care.

These 'market failures' are each discussed in turn.

The underlying information problem

The level of information

Sometimes neither consumers nor suppliers have a thorough understanding of all the safety risks associated with a particular product. The cases where neither the producer nor supplier knows about the hazards are where the connection with injury is not obvious, for example where the hazards of a product do not emerge until a significant time after the product has been used. In these cases, a number of years can pass before the connection between a product and its delayed-onset injury is made. In the interim, considerable costs can be imposed on consumers.

Information imbalance

In addition to a general lack of information, an imbalance in information between parties to a transaction, can impose costs which might be avoided if those with the information were prepared to share it. There are two types of information imbalance:

- where the supplier knows more about the hazards of a product than the consumer; and
- where the consumer has more knowledge than the supplier about how and in what context the product will be used.

Suppliers will typically have greater access to information about the characteristics of their goods and the inherent safety risk, through product testing and market intelligence. Especially for products which are more technically complex, inherently risky and difficult to evaluate, in the absence of information or advice from suppliers or others, consumers may effectively be 'in the dark' about the safety characteristics of products and be exposed to risks they would otherwise not be prepared to take. Indeed, as Geistfield points out:

> … many safety characteristics are not observable during normal product use (such as whether a motor vehicle is optimally designed to minimize the risk of injury for different types of accidents). Given the very low probabilities of most product-caused injuries and the fact that optimally safe products typically pose some risk of injury, very little information will be conveyed by a consumer's experience of 'no accident' or 'accident'. For example, suppose an unsafe product doubles the risk of injury from 1 in 10,000 to 2 in 10,000. Based upon their experience, it could take consumers a long time … to discover the increased risk. (2000, p. 352)

Even less complex products can incorporate hidden hazards that are difficult for the consumer to identify and evaluate. For example, hazards associated with the flammability of children's nightwear or internal components in toys. In this regard the ACA submitted:

> While it may be apparent to most consumers that a rotary lawnmower blade poses a high risk and should be treated with respect the potential for a child's stroller to collapse or for a child's cot to pose an entrapment hazard is not at all apparent, even to the well informed. (sub. 41, p. 2)

There may not be sufficient incentives to encourage suppliers to voluntarily reveal the information to consumers: producers may not be fully recompensed for the effort they put into increasing safety nor fully disadvantaged when they ignore safety considerations. For example, the reputation of a seller may remain intact, despite the supply of an unsafe product, in cases where consumers have little or no ability to learn about a safety hazard or to link it to the product, or to a particular supplier. This is likely to be the case for some 'delayed-onset' hazards.

Also, the desire to protect a brand name or reputation will not be an effective discipline on the conduct of so called 'fly-by-night' or recalcitrant traders. Further, some elements of the market — such as discount stores — engage in little brand differentiation at the store level and/or tend to stock cheaper products that are either unbranded or have low-recognition branding. Of course, this in itself may send a signal to consumers about the likely reliability, and the efforts taken to ensure the safety of products sold in such stores, and consumers who put a high premium on safety may tend to avoid such outlets or be more careful in their product purchases.

Due to the imbalances in information between consumers and producers associated with consumer product safety, the market cannot always be relied upon to supply the level of product safety that aligns with consumer preferences.

In other cases, the supplier may have *less* information than the consumer. For example, a consumer is better placed than a supplier to know precisely how, and in what conditions, he or she is going to use a particular item. Even so, manufacturers may be more likely to have knowledge of patterns of inappropriate use than individual consumers.

Risk misperceptions and cognitive limitations

The literature suggests that, in general, consumers will often underestimate product risks, which in turn can result in an under-demand for product safety:

> … consumers' expected damage costs will generally be observed to be less than the average actual costs which can be calculated from empirical evidence … Consequently, because they underestimate risk, they will buy more of the risky product than they would if they could have perceived and evaluated the risk. Additionally, firms will produce too many (a more than optimal number of) risky products and there will be a higher level of injuries. (Braddock 1989, p. 29)[1]

Even where consumers have access to sufficient information about product risks, they may not be able to competently interpret and apply the information. Children are a group who have very limited capacities to make realistic risk assessments. A wide range of studies show that people, when faced with risky decisions, make inconsistent and seemingly irrational choices (see box 2.1). Hence, the level of product safety demanded in the marketplace may to some extent diverge from consumers' true preferences for safety.

False assumptions about government involvement

In general, consumers presume that governments are extensively involved in vetting the safety of most products on the market, especially particular categories of products, such as infant furniture and toys. For example, the Infant & Nursery Products Association of Australia (INPAA) commented that:

> Consumers, particularly in relation to nursery products, incorrectly assume that there are regulations for all nursery products. The result is often confusion and anxiety when they discover that this is not the case. (sub. MCCA14, p. 1)

[1] Imperfect information need not result in overly unsafe products. If consumers overestimate the way in which increased safety investments reduce risk, they will attribute too great a value to safety investments and demand more than the optimal amount of safety (see Geistfield 2000, p. 351).

Box 2.1 **Risk perceptions: some observations**

Differences between perceived and actual risk levels can be a significant problem when determining appropriate safety policy. Inaccurate perceptions partly reflect a lack of information about risks, but also 'cognitive limitations' — an inability to process information about risk in an accurate and objective manner. Evidence on decision making in the presence of risk reveals some systematic biases in probability judgements. Observations from survey evidence in the safety literature, include:

- People frequently underestimate personal risks (the 'it'll never happen to me' belief), partly because they believe they have control over the events in question.
- People overestimate small *identified* risks, but often ignore small *unidentified* risks.
- Natural or old hazards seem to arouse less concern than 'artificial' or new ones. Perceived risks for new products or technologies are often far greater than actual risks.
- Risks which are hidden/unseen appear to be far less acceptable than risks that are more readily identifiable by non-technical means. For example, with a chainsaw or lawnmower, individuals may feel some ability to influence their exposure to the risk.
- Highly publicised risks and risks with which a person has had recent experience tend to be overestimated.
- Individuals are more willing to pay for risk reduction that leads to complete elimination of a hazard, than for risk changes of equivalent magnitude that do not completely eliminate the risk.[2]
- Prior probabilities are ignored when new information becomes available, even if the new information is irrelevant.
- Emphasis on 'causation' results in the underweighting of evidence that is relevant to probability, but is not perceived as causal.
- People believe that they exert control over purely chance events.
- Generalisations are made on the basis of small sample findings.
- Belief is placed in a self-correcting, but nonexistent, 'law of averages'.

Source: Asch (1988) and Viscusi (1996).

In fact, most consumer products are not subject to any specific regulatory requirements or inspection regime to identify risky products. False assumptions may lead consumers to underestimate the risk attached to potentially hazardous products.

[2] While this appears inconsistent with the concept of diminishing willingness to pay for successive risk reductions, Viscusi (1996) suggests that the observed result: '… stems both from the overestimation of small probabilities and consequently the excessive valuation placed on the certainty of no risk as well as the potential influence of being able to eliminate anxiety once the zero-risk level has been reached'.

Spillover costs

In addition to information problems, the market may fail to deliver appropriate levels of product safety due to spillover costs on third parties: that is, injury or loss can be imposed on people who did not purchase the product or cause the injury. For example, a pedestrian may be hit by a motor vehicle, a lawn mower can throw up a stone and injure a bystander, and a fire caused by a faulty product may cause substantial collateral loss.

Further, the costs of product injuries and death, whether to third parties or the consumer who purchased the product, usually impose costs on emergency services and the publicly funded health system. This then imposes spillover costs on taxpayers.

In both these cases, the owner does not bear the full costs of the injury and thus may not take them fully into account when deciding to buy and how to use a product, resulting in more accidents than would occur if the owner had to carry all the costs.

2.4 Living with risk: private responses to unsafe products

Most individuals are aware that products can be unsafe and that sometimes inadequacies in information can mean they do not know the full extent of the hazard posed by every product. There are a range of private responses to address these problems, including:

- households taking care when purchasing and using products;
- suppliers trying to meet consumer preferences by supplying safe products as long as consumers are willing to pay for the additional safety;
- some businesses supplying additional information on product safety;
- insurance companies offering cover for accidents to suppliers and consumers, although there is very limited insurance available for consumers for specific products;
- the media covering some of the more dramatic accidents associated with consumer products; and
- consumer advocacy groups supplying information on product safety and campaigning for government intervention to improve outcomes.

While consumer product markets may not work perfectly, private responses have evolved over time to mitigate some of the effects of market failure.

For example, some businesses may find it profitable to supply more information about the safety of their own products than the market norm. Advertising can highlight warranty offers, compliance with safety standards and accreditation to organisations which certify compliance with high safety standards.

Further, even when businesses do not openly differentiate themselves on their safety records, *some* consumers will actively seek out additional information. Importantly, the actions of such well-informed consumers may be sufficient to deliver good outcomes for most consumers. From this perspective, what matters most is the information available to the 'marginal consumer' (or the consumer businesses are competing for), rather than the average level of knowledge across all consumers.

In addition, the demand for more information from these consumers will encourage others, to fill 'gaps' in product safety information. Indeed, the emergence of consumer advocacy groups over the last 40 years is a partial response to the growing interest in product safety issues. Groups such as the ACA supply information on safety issues to consumers and actively lobby governments to address the most serious product-related hazards.

The same incentives will also drive the media to report on significant safety incidents. Adverse media attention can have a devastating impact on a business' reputation. Indeed, Viscusi and Hersch (1990) (cited in Geistfield 2000, p. 362), found media reports on product liability suits in the United States significantly decrease a firm's share price, costing the firm more than compensation payments. Of course, media coverage is not always balanced and may distort consumers' perceptions of which products pose the most significant safety risks.

Insurance premiums can impose an additional discipline on producer and consumer behaviour. Insurers will seek to ensure that premiums reflect the risk associated with the insured activity and this will provide an additional signal to producers and consumers on the costs of risky behaviour. However, insurance markets tend not to provide consumers with protection for specific consumer products (apart for motor vehicles) because of information problems (see box 2.2). Thus, in practice, the ability of insurance markets to provide signals to consumers is limited.

Nevertheless, as important as these responses are, they lessen but do not eliminate the need for government intervention. In particular, these private responses are not always sufficient to ensure the safety of consumer products accords with what consumers would be prepared to pay for if there were no market failure and some form of government intervention may still be justified on cost-benefit grounds.

Box 2.2 **Insurance and safety incentives**

There are several reasons why the market does not provide individuals with insurance protection against safety risks at what would seem to be reasonable prices:

- *poorly informed consumers* — consumers who are poorly informed or misperceive product risks, will not demand appropriate insurance;
- *adverse selection* — where individuals know more about how they intend to use a product than insurers, the insurers cannot set differential premiums to reflect differences in risky behaviour, hence, accident insurance may attract people who are more prone to accidents than average, further driving up premiums;
- *moral hazard* — as insurance reduces the cost of an accident, the insurance cover can have at least a subtle impact on the incentive to take care, thus raising the probability that the event will occur and this may lead to less insurance being on offer at a given premium;
- *partial insurance* — when the probability of loss depends on the action of the insured party, insurers often offer only partial insurance, in order to increase the incentive for the insured party to take care but it also reduces the amount of cover consumers can buy.

Source: Oi (1973), PC (2004b), Asch (1988) and IC (1990).

2.5 The role of government

Even though most people are aware that products can be unsafe and this leads private parties to make significant contributions towards the supply of safe products and their safe use, government regulation can play an important role where there is significant market failure. This is likely to occur where:

- hazards are not obvious or not widely or accurately perceived;
- people do not realize they are uninformed;
- a product's safety performance is hard to monitor by users;
- it is difficult to establish the link between use of a product and the damage it later causes;
- there is a longer time between the use of a product and the damage it later causes; or
- hazards have spillover effects on third parties.

In the first instance, an objective of intervention should be to move the market towards providing the levels of safety that informed consumers would be prepared

to pay for. Government interventions designed with economic efficiency in mind should generally have the effect of increasing safety and/or *reducing* risk.

Where the government intervenes with regulation, or information and education campaigns, it is essential that this is done efficiently. Some principles of institutional reform and good regulatory design are discussed in sections 2.7 and 2.8. But a first step is to take stock of existing interventions.

2.6 Existing government responses

In addition to private responses, there are a range of public responses already in place:

- the law: common law, liability and others;
- consumer protection law enforced by the offices of fair trading and the Australian Competition and Consumer Commission;
- specialised regimes to address the most risky products;
- health care;
- public provision of information in a range of forms;
- public education campaigns; and
- publicly-funded research.

Some of these supplement existing private responses and some rely on private actions to be effective; for example, the common law and liability rules. And similar to the role played by insurance, publicly funded health care rather than providing incentives to reduce accidents, instead mitigate their impacts and can reduce incentives to take care.

Market-augmenting legal incentives: the contribution of product liability law

Product liability law plays a particularly important role in providing incentives for businesses to supply safe products. The system of product liability law is a publicly supported means for people to seek redress over the supply of unsafe/risky products. Consumers who suffer loss or damage caused by goods (including parties who did not purchase the goods) can sue producers in certain circumstances. While this is an *ex post* measure that operates in the event of an accident/injury, it also creates incentives for manufacturers to not supply unsafe goods. The strength of this incentive effect will depend on producers' perceptions about the likelihood that

successful claims will be made and about the amount of compensation that would be payable in such an event.

In theory, product liability laws offer a means of sheeting home to producers many of the costs of accidents that result from the production and reasonably foreseeable use of their products. Shavell (1987) notes that a particular advantage of product liability and other *ex post* approaches to controlling product risks is that administrative costs are borne only if harm is done:

> Where an activity will not cause harm in the great majority of instances …, the savings that can be achieved by limiting the bearing of administrative costs to those occasions when harm does occur may be substantial. (p. 282)

In practice, however, the detailed design of product liability laws will affect the strength of the impact they have on safety. There are several options with respect to the degree of responsibility that has to be proven before a manufacturer is liable to pay compensation (and, in turn, the degree of responsibility that must be borne by the consumer). In principle, the options range from a 'no liability' rule (purely 'buyer beware') at one extreme through to 'strict liability' at the other. Some guiding principles for assignment of liability, from an economic efficiency perspective, are presented in box 2.3.

If a high degree of responsibility has to be proven before a producer is liable to pay compensation, the law will provide only limited incentives for producers to have regard to the risk of their goods causing loss but will provide strong incentives for consumers to take care in using goods. Conversely, if only a low degree of responsibility has to be proven before the producer is liable to pay compensation, the law will provide only limited additional incentives for consumers to take care when using goods but will provide strong incentives for producers to have regard to the risk of their goods causing loss. (IC 1990, p. 10)

If compensation/damages payments are too high (injured parties are compensated too generously for their losses), producers are forced to over-invest in avoiding risk and future legal action. This can result in beneficial (but risky) products being withdrawn from the market (sometimes with perverse safety outcomes).

On the other hand, if compensation payments are too low — or indeed subject to a legislative cap on amounts or severity of injury (which might preclude or discourage consumers from taking action) — there may be an insufficient deterrent for manufacturers to supply unsafe products. Asch (1988, p. 11) notes the possibility that a callous producer:

> … might find that the cost saving on [a dangerous product] outweighs consumer antipathy and legal damages combined, and therefore continue to make and sell it. … [concluding] … that severing a few customers' hands is 'cost effective'…

Box 2.3 **Guiding principles for efficient assignment of product liability**

The Industry Commission's 1990 *Product Liability* report identified the following principles as being relevant to achieving an optimal level of loss prevention:

- Liability should be assigned to the party who can provide the least cost way of avoiding accidents and often this will be the party with the best/cheapest access to information about the risk of loss.
- Where producers can more cheaply assemble information about the characteristics of their products that may cause loss (for example, product design and construction), they should be made liable for losses caused by the characteristics of goods. If consumers have better/cheaper access to information about the risks of accidents and loss arising from the improper use of products, consumers (or persons advising consumers) should be liable for losses caused by misuse.
- The extent to which efficiency is enhanced by assigning liability will depend, in part, on the difference between the knowledge of the particular parties. For example, the efficiency gains from assigning liability to producers when they have superior access to information would be greater the more imperfect is consumer knowledge.
- It is sometimes less costly for a consumer to bear the risk associated with the characteristics of a product even though the producer can more cheaply assemble information about that risk. In these circumstances, it will be efficient for the producer to make the information about the product available to the consumer — such that they then have equal information about the risk — and for consumers choosing to use the product to bear the risk involved. A case where this would be particularly relevant is where a drug causes an allergic reaction in people with a particular medical condition: it would be efficient for the producer to forewarn consumers of the risk and for consumers to be made responsible for avoiding the product if they have the particular condition, rather than requiring the producer to compensate any injured consumers after the event.
- To the extent that assigning more liability to producers requires them to build safer goods or to take out additional insurance, some consumers may be forced to buy goods of a higher price and quality than they would prefer. Any efficiency gains from assigning liability to producers therefore need to be balanced against the associated efficiency losses from over-riding consumers' risk preferences.
- In general, producers and consumers should not be liable for losses caused by third parties. Other firms in the supply chain that contribute to the loss or injury should in theory be liable commensurate with their contribution/impact, unless it can be shown that alternative allocations produce more efficient outcomes. (See Calabresi and Bass 1970.)

Source: IC (1990).

Apart from the sheer uncertainty of seeking legal redress, certain aspects of the legal system can also reduce its effectiveness in disciplining producers. Legal action can be costly relative to the losses associated with product failure. In particular, the threat of product liability actions is likely to have less influence on producer behaviour, where product safety deficiencies result in minor injuries experienced by many people, since often the victims cannot afford to individually seek compensation.

The scope for class actions, and the increasing prevalence of 'no win, no fee' legal representation, may partly address these deficiencies. However, to the extent that justified legal action is discouraged, the discipline that the law exerts to overcome the effects of product-related loss is reduced.

Further, for some types of injuries (for example, delayed-onset illness), it can be difficult to establish the causal link with the product or a court may have difficulty ascertaining whether a product was deficient or whether the consumer was negligent in using the product. The resulting uncertainty about the outcome of court action and long court delays may blunt the incentive effects of product liability by reducing the willingness of injured parties to litigate or encouraging suppliers to believe that the likelihood of successful action against them is remote.

Limited liability of some companies is another aspect of the law which can reduce the incentive for firms to produce safe products. This is because firms using this structure may bear only part of the cost of damages associated with their product. More generally, as identified by Shavell (1987):

> … the prospect of liability may not generate adequate incentives to reduce risk if injurers' assets are less than the losses they might cause because losses exceeding their assets will impose on them liabilities only equal to their assets. (p. 279)

Thus, while product liability laws and other legal avenues offer potential means for sheeting home to producers the costs of accidents that result from the production and (appropriate) use of their products, the strength of the incentives created by these legal avenues can be diluted to some extent by aspects of the legal system, as well as by the design of product liability laws themselves.

2.7 Improving government intervention

While private initiatives go a long way towards delivering safe products, there are times when government intervention is needed in order to improve outcomes, from a community-wide perspective.

In order to ensure governments do not unnecessarily supplant private initiatives nor impose adverse side-effects, and that policies are effective, efficient and consistent with society's equity goals, this section and the next canvass some general principles of good regulation that are used later in this report to help assess the current consumer product safety system (chapter 4) and options for reform (chapters 5 to 13).

Changes in the ways governments intervene can be contemplated at two levels: one is structural and involves changing the institutions and rules of the consumer product system (discussed in this section); and the second concerns how decisions are made within the system, such as decisions to implement bans or standards using criteria established by the rules of the system (section 2.8).

Based on the OECD's *Guidelines for Improving Regulatory Quality*, box 2.4 identifies elements of the processes and institutions that are key to achieving good regulatory outcomes. This forms the backdrop for the discussion in this section.

The focus is on how the regulatory system works in terms of the part it plays in the whole structure impacting on consumer product safety — the laws, institutions, processes and criteria applied in this area. Its main role is that of a safety net: identifying significant hazards and responding appropriately with a range of possibilities from no action to advice to bans and mandatory standards.

Issues to consider

Good policy making requires careful consideration of all organisations, groups, existing laws and rules and community norms and preferences. A number of relevant issues have already been discussed above. Other challenges when designing, implementing and enforcing government policy to improve consumer product safety, include:

- consumer product safety is a highly emotive area and the system can come under considerable pressure from politicians, the media and elements of the community more generally — it is important that the system be configured so that it can absorb this pressure while still ensuring that a rigorous and 'evidence-based' approach is taken to identifying potential hazards and managing the associated risks;
- ensuring the consumer product safety system is able to identify potential hazards early and respond quickly to manage the associated risks to the extent it is cost-effective to do so;
- maximising the potential for non-government organisations — consumer advocacy groups, research bodies and industry associations — to contribute to improved consumer product safety outcomes, in order to reduce costs to government and empower local groups;

- responsibility for Australia's consumer product safety system is shared between the Australian and State and Territory Governments so that the quality of the institutional arrangements for coordinating policy making and reform efforts across jurisdictions is central to achieving an efficient and effective consumer product safety system; and
- there are clear links between consumer product safety and other policy areas such as health, international trade and innovation, and each impacts on the other.

Box 2.4 **Aspects of good regulatory governance**

- Adopt an explicit regulatory reform policy at the highest political levels.
- Devise explicit standards for regulatory quality (as outlined in box 2.8) and principles of regulatory decision making and fully integrate into policy-development processes.
- Systematically consider regulatory and non-regulatory alternatives.
- Implement administrative simplification and reduce compliance costs.
- Create effective mechanisms for managing and coordinating regulation and its reform (including across jurisdictions).
- Direct regulatory resources so as to achieve the greatest net-benefit from government intervention, such as incorporating risk management to determine this.
- Make impacts transparent when devising regulation — use regulatory impact analysis.
- Avoid capture by specific interest groups.
- Ensure regulations are adopted and enforced to the optimum degree, with sufficient resources to achieve optimum compliance.
- Ensure regulations and regulatory processes are transparent, non-discriminatory and efficiently applied:
  - clearly articulate reform goals and strategies to the public;
  - institute systematic public consultation procedures;
  - ensure domestic and foreign businesses can easily identify all regulatory requirements applicable to them; and
  - ensure that procedures for applying regulations are transparent, non-discriminatory, contain an appeals process and do not unduly delay business decisions.
- Review and update existing regulations systematically:
  - to ensure that they continue to meet their intended objectives efficiently and effectively and that these objectives are still relevant;
  - integrate regulation impact analysis into the review;
  - target regulations where change is likely to yield the highest net benefits, particularly regulations restricting competition and trade; and
  - use automatic review methods, such as sun-setting.
- Evaluate results of regulatory programs.

Sources: OECD (1997a,b and 2002).

While these challenges are significant they are not insurmountable. The remainder of this chapter outlines some general principles of 'smart' policy making and enforcement, which could ensure that the community receives the greatest net benefit from any measures governments may take to improve consumer product safety.

Any decision to change the level of funding and regulatory effort directed towards consumer product safety should be guided by how well the existing system addresses market imperfections; existing private and public responses to these; and the costs, effectiveness and efficiency of possible reforms.

Some policy guidelines

The following policy guidelines, if adopted, are likely to maximise returns from government efforts and improve the quality of government intervention in consumer product safety:

- allocate resources (between programs) where the most lives can be saved or injuries reduced for a given cost;
- allow for the likelihood that efforts to reduce any particular risk will suffer from diminishing marginal returns;
- allocate accountability to those who can have the greatest impact on outcomes at the lowest cost;
- assess hazards and manage risks rationally;
- institute processes that ensure costs and benefits are assessed before solutions are adopted and implemented; and
- allocate jurisdictional sovereignty to the optimal decision-making unit.

Each of these guidelines is discussed in turn.

Opportunity cost

The presence of health and safety risks is ubiquitous. It is simply not feasible to eliminate all risks that we face and to ensure zero risk outcomes.[3]

[3] As Viscusi (1998) points out: "Consider, for example, the following risks that increase the annual risk of death by 1/1,000,000. Among the risk exposures that pose a 1/1,000,000 fatality risk are living two days in New York or Boston (air pollution), travelling ten miles by bicycle (accident), eating 40 tablespoons of peanut butter (liver cancer caused by aflatoxin B), living for 150 years within 20 miles of a nuclear power plant (cancer caused by radiation), and one chest X-ray taken in a good hospital (cancer caused by radiation)."

Government budgetary and regulatory resources are limited, so when assessing the case for intervening it is particularly important to be aware of what else could be done with these resources. Clearly, some distinctions are needed in order to identify which risks are significant and which are not and to rank the costs of risk reduction so that efforts can be focused where the greatest improvements can be made.

If government resources are devoted *inefficiently* to consumer product safety, the government's ability to pursue safety in other areas would be diminished, potentially resulting overall in more injuries, deaths and suffering.

Declining marginal effectiveness of regulatory efforts

Viscusi notes that the effectiveness of regulatory efforts progressively declines:

> There has been much discussion in the risk analysis literature of the 90–10 principle. Government agencies may incur 90 percent of the costs to address the last 10 percent of the risk. The initial regulatory expenditures are very effective, but their efficacy drops off very quickly. This hypothesized principle is intended to be not a precise rule of thumb but rather an indication that we can probably achieve most of the risk benefits through fairly modest initial expenditures and avoid the relatively unproductive expenditures while sacrificing little in terms of risk benefits. (1998, p. 99)

So, not only should risk-reduction efforts choose among those hazards likely to deliver the greatest reductions in harm but they should also be cognisant that it will rarely be possible to completely eliminate risks. Most of the gains in reducing a particular risk will be achieved with the initial expenditure and efforts with further gains being bought at increasingly higher costs. This and other 'lessons' for regulating risk as identified by Viscusi are contained in box 2.5.

Allocate responsibility to those with the lowest cost of influencing outcomes

Some people argue that it is possible to view all inadequacies in private solutions to problems as being due to 'transaction costs' or 'barriers' which prevent interested parties from bargaining to reach a mutually agreed position. Calabresi makes the point:

> The resource allocation aim is to approximate, both closely and cheaply, the result the market would bring about if bargaining actually were costless. The question then becomes: Is this accomplished most accurately and most cheaply by structural rules (like anti-trust laws), by liability rules, by taxation and governmental spending, by letting the market have free play or by some combination of these? This question depends in large part on the relative *cost* of reaching the correct result by each of these means … . (1968, p. 69)

This can involve subtle and strategic use of instrument mixes: 'different devices for accomplishing seemingly 'optimal' resource allocation vary in desirability depending on their relative costs and on the relative likelihood of error in our guess work.' (Calabresi 1968, p. 72) Hence:

> … there is no one simple rule that we can apply to find the cheapest cost avoider for all types of accidents in all types of product situations. How far one should in practice distinguish different product situations will depend on how expensive such analysis is and how likely it is to lead to significantly cheaper cost avoidance. (Calabresi and Bass 1970, p. 89)

So for example, at a minimum, consumer product safety policy makers should take account of the two sorts of information gaps which dominate product safety issues: producers will generally find it less costly to know about manufactured and design faults in products, while the consumers will generally find it less costly than producers to know how they will use products, the physical environment in which they will be used, and the attention they will give to maintaining and servicing a product. A priori reasoning would generally allocate responsibility for these problems to those with the least cost of dealing with them.

Box 2.5 **Risk analysis and regulatory policy**

It is possible to draw some lessons for government policy from the work by Viscusi which are relevant to this review:

- estimate risks accurately;
- assess the risk of the substitute response that a regulation may induce;
- avoid blurring risk assessment and risk management;
- balance risk and cost to focus on achieving the greatest risk reduction benefits for the effort and resources expended;
- allocate efforts to those areas where the costs of saving lives are lower so that more lives in total can be saved;
- especially where improvements have already been achieved, focus on whether the costs of any marginal improvements are justified;
- the focal point for policy design should be to structure policies to overcome the irrationalities and failures of the market and other private responses, such as the media, rather than to reinforce and institutionalize them; and
- avoid pre-empting individual choice by opting for limiting technological solutions, although in some cases this will be the best option.

Source: Viscusi (1998).

Assess hazards and manage risks rationally

Viscusi observed that often highly publicised risks do not pose substantial risks to health but instead reflect excessive reactions to minor hazards. As a result, 'the political pressures for government action are often the greatest when the need for government policies is least. The focus of risk policies should be on those risks that are not handled adequately by the market, not on risks that are so salient that individual decisions will be sound.' (1998, p. 127)

Actions to reduce product hazards should be guided by the true costs and benefits of government safety policy interventions. The benefits (or at least expected benefits) of safety policy interventions are easily identified, while the costs tend to be less visible and may not be considered or even recognised by many.

The concept of 'risk' involves a combination of the probability (or frequency or likelihood) that an adverse event (or hazard) will occur and the magnitude of the consequences of the adverse event. Thus, serious consideration might be given to averting a very unlikely event, if the potential harmful consequences are great, or alternatively where individual risk is low, but a very large number of people are potentially exposed.

The call to apply evidence-based risk and cost-benefit analysis to consumer product safety, is relevant at two broad levels: one at the structural or systemic and the other in determining whether to implement consumer product safety instruments in reaction to the hazards posed by particular products.

Typically, rational risk management involves clearly separating three stages of policy making: hazard identification; risk analysis; and risk management. (See Standards Australia and Standards New Zealand 2004.)

Hazard identification

Risk-management systems rely on even-handed identification of hazards. This will depend on the information gathering systems in place. As noted by the ACA:

> … product-related injury data is perhaps the most valuable asset in risk identification — it can be used as evidence to confirm the existence of a threat to public safety, thus allowing the government to target its resources on priority problems. This information is also vital in justifying safety regulations and standards. (1998, p. 11)

Risk assessment

The next stage is to assess the size of the risk. Ideally quantitative, scientifically-based risk estimates should be used. However, the feasibility of this will depend on the availability of adequate data and the cost effectiveness of compiling it. Qualitative information can also be helpful and may often be sufficient. The case for more rigorous and quantitative analysis will be stronger where a qualitative assessment suggests the risks are high or perhaps more uncertain.

Of course there can be major difficulties associated with identifying and measuring product-related risks. When faced with uncertainty about the estimated risk, governments will often choose to err on the side of caution — putting arguably excessive weight on worst case scenarios in order to 'play it safe'. However, excessive caution can prove costly for the community. Better estimation of risk can improve decision making and ensure regulatory resources are allocated to the highest priority areas. Where there is uncertainty that cannot be resolved, there may be value in making public a range of estimates.

Risk management

Once the size of the risk is established, governments must decide how to manage it. There are many considerations that might be taken into account in determining whether a product risk warrants some government action (see box 2.6). Ultimately, however, any risk assessment will involve an element of subjective judgement, in terms of determining the degree of risk aversion in response to uncertainty, how evidence is interpreted and the relative weights given to different factors.

People's tolerance for risk varies according to the type of risk and the manner in which it is assumed. For example, the risks associated with motor vehicle use are clearly high, even with current road safety measures, but the community continues to tolerate the activity on the basis of the economic and social benefits generated. Differences in apparent risk tolerance levels suggest the adoption of an inflexible benchmark standard for acceptable risk will not be appropriate.

As well as deciding whether to intervene government must decide on the form of the intervention and this decision is most usefully made within the context of preparing a Regulation Impact Statement, as discussed in section 2.8.

Allocate sovereignty to the optimal decision-making jurisdiction

An underlying consideration, and one which explains many regulatory differences, is the exercise of jurisdictional sovereignty. Sovereignty concerns the power to

make decisions and take actions. Sovereignty can apply to different sized communities. According to the principle of subsidiarity, promoted by the European Union, the central policy question is identifying the optimal decision-making unit.

Box 2.6 **Considerations in determining 'unreasonable' product safety risk**

Some issues that policy makers might consider when determining whether a risk is acceptable or unreasonable are set out below.

- The nature and severity of the injury or damage that the product might cause.
- The probability of the adverse outcome (and where there is significant uncertainty need to take into account the range of possible positive and negative outcomes).
- The size of the population potentially exposed to the product, including the extent to which third parties/bystanders may be at risk.
- How does the risk compare with risks historically judged to be acceptable?
- The time period over which the damage associated with exposure becomes evident.
  - Risks with longer latency periods may provide a stronger case for intervention.
  - Society is less tolerant of concentrated events (catastrophes) which involve a high number of fatalities or injuries.
- The type and vulnerability of the likely user and their previous experience with similar products.
  - If the product is likely to be used by children (particularly infants), those with mental disabilities or the elderly, the acceptable level of risk may be lower.
- The extent to which the product incorporates safeguards against the hazard.
- Consumers' knowledge of, or control over, the risk — how obvious is the hazard and is it possible to take precautions against it? For a non-obvious hazard has the manufacturer provided adequate warnings?
- Has the risk been accepted voluntarily rather than involuntarily?
  - The freedom of those at risk to avoid the risk may be used as an argument against the need for regulation.
  - Are there market or other mechanisms which compensate those who bear risks?
- Does the hazard exist when the product is used as the manufacturer intended and consistent with instructions/precautions (or as reasonably could be expected) or only when used in a careless or inappropriate manner?
- The utility of the product and the extent to which the hazard is necessary for the function of the product. Would cost-effective changes in product design or construction reduce injuries?
  - People accept higher risks in some circumstances — for example where the benefits of a technology are perceived as substantial (eg motor vehicles).

Source: Based loosely on COAG (2004), EU (2005a) and CPSC (1999a).

This evaluation is particularly concerned with the sovereignty exercised by the States and Territories and by the Australian Government. There is concern that jurisdictional and national sovereignty are diminished in an increasingly integrated world. There is, however, a trade-off between regulations or policies carefully tailored to specific jurisdictions (state, territories, nations), and the advantages of freer movement of goods across jurisdictional boundaries.

Some are concerned that acceptance of products from interstate will result in the lowest standard becoming the norm, as suppliers choose the least costly method of compliance. This leads to fears about a 'race to the bottom', with standards spiralling downwards as jurisdictions compete to attract businesses. However, when jurisdictions have similar cultures, values and standards of living, their regulations will address many of the same objectives and their optimal sets of regulation, chosen independently, may be very similar. While there are differences among Australian jurisdictions, the variation is contained within a much narrower band than applies throughout the world.

When different regulations or standards are used in different jurisdictions to achieve the same objective, the question arises as to whether the greater costs of compliance and decreased competition (see below) are justified. Sometimes, differences are intrinsic to a locality and require tailor-made regulations, such as protecting unique flora and fauna, or which deal with region-specific environmental problems, such as temperature inversion in Canberra. In contrast, human beings largely require the same sorts of basic interventions to preserve their health and safety, though preferences for higher standards usually correlate with higher levels of income. Other issues are based on differences in history, values or opportunities, and these explain differences in regulations. Some criteria for deciding the case for national as against State and Territory regulation are contained in table 2.1.

Jurisdictions assert that they value highly the right to act quickly against a dangerous product or maintain differences in standards. Sometimes this right is important in order to adapt to local preferences and conditions, as noted above. Other times, it reflects underlying differences in legal frameworks and regulatory philosophies, such as those focused on outcomes versus those focused on specifying inputs. In these circumstances, it can be difficult to transplant identical standards into the regulatory machinery of different jurisdictions. However, there are cases where it is difficult to understand why regulatory differences prevail. Sometimes, it can only be concluded that the pursuit of difference reflects either a desire to protect local industry, using standards to act as non-tariff barriers to trade; or a desire to justify the existence of state-level bureaucracy.

Issues of sovereignty also arise in relation to the requirement to be consistent with Australia's international obligations. In particular, under the World Trade

Organisation's (WTO's) Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT), Australia is obliged to regulate in ways that are least disruptive to trade and to adopt international standards where possible.

Assess the costs and benefits of greater jurisdictional consistency

Where a number of jurisdictions have sovereignty within the one nation, it is important to consider greater consistency in standards. Possible gains from greater consistency include:

- economies of scale from industry supplying to a national market;
- increased competitiveness;
- lower prices to consumers through greater competition and increased productivity; and
- decreased costs to industry.

Table 2.1 **Possible criteria for deciding the case for national as against State and Territory regulation**

Criteria	*Application to consumer products*
• whether the nature of the risk varies across jurisdictions	Generally, with respect to consumer products, the risk does not vary across jurisdictions and the same basic interventions are required. There is much more variation within populations of jurisdictions than across populations in Australia.
• the scope of the negative spillovers being regulated (whether some apply within a particular jurisdiction and not outside it) influences the optimal decision-making unit	The negative spillovers associated with consumer products are generally not limited to particular jurisdictions because the goods are traded and the externality travels with them, across all jurisdictions.
• scope for production economies	There are economies of scale from being able to manufacture a product to the one uniform standard across jurisdictions. This lowers the costs of producers and, in a competitive market, prices for consumers.
• where income levels and risk preferences differ significantly between jurisdictions	Compared to the rest of the world, Australia has reasonably similar income levels and preferences for risk.
• where there are differences in legal frameworks	There are some differences, but they are not insurmountable.
• where goods are traded across borders both within and outside a country	Consumer products are traded across borders so the costs of inconsistencies in standards are higher than for production that can only be produced and consumed locally.

Given the benefits of national consistency, any variations to a national standard should be put under scrutiny. To this end, COAG's *Principles and Guidelines for Standard Setting and Regulatory Action by Ministerial Councils and National Standard-Setting Bodies* seeks nationally *compatible* regulations and standards. Important questions to ask include: what is the difference worth and how much would it cost to maintain it (for example, in terms of greater costs of compliance and decreased competition)?

Coordination of policy making and reform efforts across jurisdictions

In areas such as consumer product safety, where responsibility is shared between the Australian and State and Territory Governments, the coordination of policy making and reform efforts across jurisdictions is often very important to achieving good regulatory outcomes.

Despite individual jurisdictions having largely the same policy objectives in relation to a particular problem, each may have different regulatory regimes in place to achieve those objectives. This can provide scope for a degree of policy experimentation and diversity which may be useful in testing different approaches and determining what works best. It also ensures that jurisdictions have the flexibility to respond to genuinely local issues.

However, a lack of consistency in regulatory regimes across jurisdictions can also impose costs on the community. For business, a lack of consistency can increase the complexity and cost of complying with regulation. This additional compliance burden on business may flow through to higher prices. Consumers may face higher prices or more restricted choice if a lack of consistency in regulatory regimes becomes a significant barrier to competition. For taxpayers, there is the cost of maintaining multiple regulatory systems when a single national system may have been able to achieve the same objectives at a lower overall cost.

For these reasons, the arguments in favour of achieving better coordination of policy making and reform efforts are often compelling. The issue of regulatory harmonisation is considered in detail in chapter 13. It is worth noting here, however, that effective coordination of policy making and reform efforts is likely to require:

- commitment at the highest political levels;
- institutions and processes that provide opportunities for networking, cooperation, collaboration and the development of partnerships;
- a commitment within the policy-making and regulatory agencies of individual jurisdictions to building the collaborative capability of their organisations; and
- institutions and processes which ensure delivery of policy commitments.

2.8 Good regulation

Also of critical importance to this review is the assessment of the *ways* by which standards and other requirements are developed and delivered.

There is broad agreement on the characteristics of the regulatory processes which are likely to engender good regulation with efficient and effective outcomes. Most OECD countries have adopted explicit regulatory review and reform programs, encompassing a range of mutually supportive tools and institutions and member countries agree on a number of broad best practice strategies for achieving better quality regulations.

Regulation has both costs and benefits. The nature of the problem — information deficiencies, spillovers and people's willingness to accept risk — varies across different products and in different circumstances, and the costs and effectiveness of government interventions themselves vary. (Some of the possible costs and benefits are outlined in box 2.7.) Hence, the merits of interventions to address product safety need to be assessed on a case-by-case basis. Regulatory design, implementation, monitoring and enforcement should aim to maximise the potential net benefit to the community from government intervention.

The costs of regulation include regulatory expenditures by government, compliance costs to business and any costs to the broader community (such as restricting consumer choice and higher prices). From the community's perspective, the resource cost associated with regulation can have substantial opportunity costs — in terms of alternative uses.

It is therefore crucial that policy makers recognise the possibility of poor regulation imposing significant costs on the community, for example, through:

- unnecessary duplication of effort (eg reflecting poor communication and coordination among government agencies and across jurisdictions);
- high compliance costs to business (eg because regulations are excessively complex or poorly communicated);
- the creation of distortions and disincentives in the economy (eg regulations that inhibit competition, investment and innovation);
- unnecessary confrontation and disputation (eg reflecting poor consultation with affected parties); and
- constraining users' flexibility (eg unnecessary reliance on overly prescriptive heavy-handed regulations).

Box 2.7 **Some costs and benefits of government interventions**

Benefits:

- encouraging producers to supply a level of safety which more closely aligns with consumer preferences;
- reduced hazard exposure for consumers (particularly the poorly informed) and lower transaction costs if the minimum safety performance of products is more certain;
- improvement in the market's general perception of the quality/safety of consumer products, possibly resulting in enhanced business competitiveness; and
- 'spillover' benefits to the community, eg reduced third party product-related losses and call on public health facilities (and therefore a reduced burden on taxpayers).

Costs:

- business compliance costs (eg costs of modifying output to conform with regulations, additional paperwork) — impacts will vary, depending for example, on size of business or where they are in the supply chain;
- consumers may pay higher prices resulting from increased production costs and also from any reduction in competition caused by 'regulatory capture' (whereby interventions are developed, implemented, or changed to suit the interests of existing suppliers, to the detriment of consumers);
- a reduction in variety as lower safety products (that would otherwise benefit better informed consumers) are no longer supplied to the market — this can include innovative (but riskier) new products;
- risk of unforeseen behavioural effects (for example, some consumers may be lulled into a false sense of security and take less care than they otherwise would,[4] or substitute to less safe unregulated alternatives, including second-hand goods);
- costs to government associated with the development, administration and enforcement of regulations;
- broader economic costs, for example the 'opportunity cost' associated with the alternative public uses of funds and costs associated with raising revenue by taxation; and
- risk of government failure — because governments do not have access to perfect information they may not always make safety policy decisions that improve on market outcomes. In particular, there can often be an incentive to err on the side of excessive caution (since the costs associated with wrongly acting on a 'safe' product may be less visible than a failure to act in relation to an 'unsafe' one).

[4] It is possible in the extreme for the net effect of the regulation (after allowing for behaviour modification) to result in an overall reduction in the level of safety (see, for example, Peltzman (1975) on automobile safety regulation and Viscusi (1985) on regulations requiring protective ('child-proof') bottle caps for pharmaceuticals).

In this sense, there is a risk that inappropriate or poorly implemented regulation can give rise to 'government failure' and result in the community being worse off than in the absence of regulation.

With this risk in mind, the Australian Office of Regulation Review (ORR) has developed a checklist which consolidates the best practice regulatory design standards and guiding principles that have been identified by various Australian and international bodies involved in regulatory management and reform. This checklist (see box 2.8) provides criteria by which to assess the quality of regulation. Regulation which satisfies these criteria will also generally target significant problems, usually market failure, while minimising the scope for 'government failure'.

The appropriate form of intervention will depend on the nature and magnitude of the safety problem, the underlying demand and supply characteristics of the product and the extent to which market and legal mechanisms are cost-effective in dealing with the risks. Some risks may not be amenable to any intervention. An understanding of the causal factors contributing to product-related accidents is essential in determining the most cost-effective solution. Important considerations include:

- To what extent are the hazards intrinsic to the utility provided by the products?
- To what extent are product-related losses the result of producers supplying unsafe products to the market? If unsafe products are being supplied, is this due to:
  - wilful disregard (or no concern) for the safety of consumers;
  - careless neglect;
  - lack of information or understanding by a producer motivated to 'do the right thing'; or
  - a failure by businesses to properly inform (warn) consumers about the safe usage of their product.
- To what extent are product-related losses the result of misuse, or insufficient care, by consumers? Where consumers use products in a manner contrary to that intended by the manufacturer, is this due to:
  - a lack of information (including inadequate warnings) about the risks associated with using the product;
  - an inability to understand or interpret available information;
  - careless negligence (eg didn't bother to read the warning label); or
  - reckless disregard for safety (intentional misuse).

In identifying the options, the most effective and efficient way of dealing with the problem may involve a mix of complementary policy instruments rather than relying on a single instrument. For example, regulatory approaches may be used in conjunction with information strategies, where the potential hazards are severe and a high degree of certainty of outcome is required.

Box 2.8 **Checklist for assessing regulatory quality**

Regulations that conform to best practice design standards are characterised by the following seven principles and features:

- Minimum necessary to achieve objectives
  - overall benefits to the community justify costs;
  - kept simple to avoid unnecessary restrictions;
  - targeted at the problem to achieve the objectives;
  - not imposing an unnecessary burden on those affected; and
  - does not restrict competition, unless demonstrated net benefit.
- Not unduly prescriptive
  - performance and outcomes focused; and
  - general rather than overly specific.
- Accessible, transparent and accountable
  - readily available to the public;
  - easy to understand;
  - fairly and consistently enforced;
  - flexible enough to deal with special circumstances; and
  - open to appeal and review.
- Integrated and consistent with other laws
  - addresses a problem not addressed by other regulations; and
  - recognises existing regulations and international obligations.
- Communicated effectively
  - written in 'plain language'; and
  - clear and concise.
- Mindful of the compliance burden imposed
  - proportionate to the problem; and
  - set at a level that avoids unnecessary costs.
- Enforceable
  - provides the minimum incentives needed for reasonable compliance; and
  - able to be monitored and policed effectively.

Sources: Argy and Johnson (2003) derived from: OECD (1995); Office of Regulation Reform (Vic) (1996); COAG (2004) — as amended; ORR (1998); and Cabinet Office (UK) (2000).

Consideration should also be given to the full range of government and non-government organisations that may be relevant to dealing with the problem. There may be scope to work with organisations, such as industry associations, consumer advocacy groups and research bodies, with a view to identifying a less costly way of dealing with the problem.

Policy makers can intervene at a number of different points along the supply chain and draw on a range of policy instruments.

The design, manufacture or importation of a product

There are a number of potential policy instruments that could be considered, including:

- Process regulation — requires businesses to take a systematic approach to identifying, controlling and minimising risk. The focus is on the development of a *process* rather than the specification of a performance *outcome*.
- Voluntary performance standards — this would involve encouraging an industry to develop and enforce its own appropriate performance standards. By focusing on results rather than on the means of achieving them, performance standards permit firms greater freedom of action to find the lowest cost or best means of complying for itself.
- Mandatory performance standards — requiring firms to achieve a specified performance outcome.
- Mandatory design standards — specifying how a product must be manufactured. There is a risk they can become de facto bans if they are so stringent they render a product unprofitable.
- Product ban (either temporary or permanent) — this is clearly the most restrictive instrument.

Once products are available on the market

There is also a range of instruments available to governments to influence consumer product safety once products have reached the market:

- Information strategies that aim to give consumers better information with which to make their own decisions about the products they wish to purchase. Such strategies generally fall into three broad categories:
  - manufacturer supplied information;
  - government supplied information;

– independently supplied information, for example by promoting the use of third-party certification of product safety (Pappalardo 1997).

- Consumer 'education' (or 'persuasion') campaigns that aim to more directly shape consumer behaviour by interpreting the information that is available.
- Negotiated voluntary recalls — this involves encouraging businesses to voluntarily withdraw a product from the market.
- Mandatory recalls — where businesses are required to withdraw a product from the market.
- Product bans (either temporary or permanent).

The re-sale of products on the second-hand market

At this point in the supply chain, there is the potential to use information strategies and education campaigns along the lines outlined above. Other options include:

- Voluntary re-testing of product safety — this would involve encouraging second-hand businesses to re-test the safety of a product before it is re-sold.
- Mandatory re-testing of product safety — requiring second-hand businesses to re-test the safety of a product before it is re-sold.

Good processes

An element particularly worth elaborating on in the context of consumer product safety is the role of regulatory impact analysis (RIA).

A cost-benefit approach to managing risk — using regulatory impact analysis (RIA)

A cost-benefit approach embodying risk analysis is required in order to determine appropriate regulatory action to deal with product safety risks. It should involve a systematic, analytical process to evaluate risks and assess whether proposed measures can generate more benefits to the community (in terms of reduced accidents and injuries) than the costs that are incurred.

RIA is an analytical tool that aims to optimise policy outcomes by maximising the net benefit of regulation. In Australia and some other OECD countries, RIA has been integrated into the policy-making process through the use of Regulation Impact Statements (RISs). A RIS is prepared by the government department, agency, statutory authority or board responsible for a regulatory proposal. A RIS should be available for consideration by decision makers prior to decisions being taken about regulatory issues.

As an analytical tool, RIA involves systematically and rigorously working through a series of key questions:

- Is there a demonstrated need for government intervention?
- What are the objectives of intervention?
- What are the options for dealing with the problem? As well as regulation, are there other alternatives?
- What are the impacts on different groups?
- What is the preferred policy solution?
- Is the proposed policy solution consistent with relevant international standards?
- How will the policy be implemented and reviewed at a later date to ensure the objectives have been achieved?

A full explanation of these elements is contained in *A Guide to Regulation*, (ORR 1998).

2.9 Compliance and enforcement

The success of any program for change will ultimately depend on the difference it makes to outcomes. An acceptable level of compliance is essential if regulations are to meet their objectives. In this regard, the design and implementation of effective enforcement strategies are central to reducing the risk of government failure. Based on work by the OECD, box 2.9 identifies some key aspects of good enforcement.

An important threshold issue for regulators is to determine what an acceptable or reasonable level of compliance is in relation to the regulation of consumer product safety. This recognises that achieving full compliance is not always possible, at least at reasonable cost, and governments will almost always have to be satisfied with a degree of non-compliance. As the OECD notes:

> There is no general answer to the question of what is a "reasonable extent" of non-compliance because each policy field has its own specifications, differences, and sensitivities. To define an acceptable level of non-compliance is context–dependent, and depends in part on the nature of the risks arising from non-compliance. (2000, p. 11)

In determining what constitutes an acceptable level of compliance in relation to consumer product safety, regulators would need to have regard for the risks associated with non-compliance in terms of injury and death, and community expectations.

It is also important to recognise that work to support good compliance really begins at the regulatory design stage. In this regard, adherence to preparing a rigorous RIS provides a solid foundation for achieving an acceptable level of compliance.

In terms of enforcement, the literature generally emphasises the desirability of regulators adopting:

- a responsive and flexible approach to regulatory enforcement that strikes an appropriate balance between persuasion and deterrence; and
- a strategic approach to how they use the resources available to them for enforcement activities.

Box 2.9 **Aspects of 'smart' enforcement**

- Maximise the potential for voluntary compliance.
  - Avoid unnecessarily complex regulation.
  - Ensure regulation is effectively communicated.
  - Minimise the costs of compliance (in terms of time, money and effort).
  - Ensure regulation fits well with existing market incentives and is supported by cultural norms and civic institutions.
  - Consider providing rewards and incentives for high/voluntary compliance. For example, by reducing the burden of routine inspections and granting penalty discounts when minor lapses occur.
  - Nurture compliance capacity in business. For example, by providing technical advice to help businesses, especially small and medium-sized enterprises, to comply with regulation.
- Maintain an ongoing dialogue between government and the business community, to ensure that regulators have a good understanding of the types of businesses they are targeting.
- Adequately resource regulatory agencies.
- Use risk analysis to identify targets of possible low compliance.
- Develop a range of enforcement instruments so regulators can respond to different types of non-compliance.
- Monitor compliance trends in order to gauge the effectiveness and efficiency of enforcement activities.

Source: Based on OECD (2000).

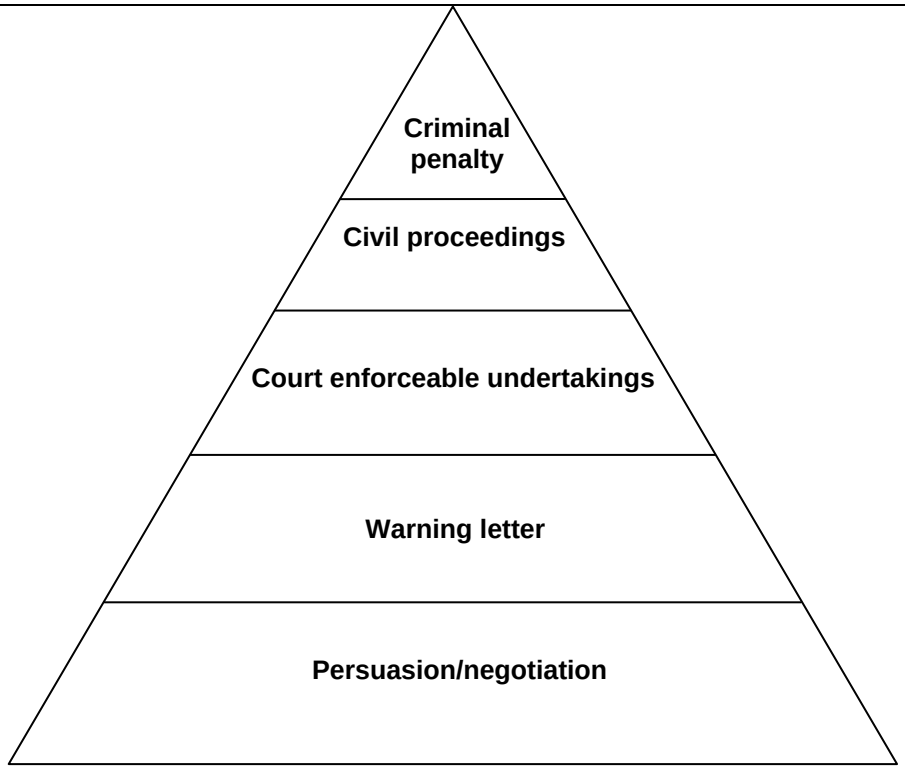
The desirability of a flexible approach

Of particular relevance, to assessing the consumer product safety system, is the desirability of regulators being able to draw on a range of enforcement instruments

in order to be able to respond to different types of non-compliance. This notion is encapsulated in the Braithwaite enforcement pyramid (see figure 2.1).

The central notion of the Braithwaite enforcement pyramid is that regulators signal to industry their commitment to escalate their enforcement response whenever lower levels of intervention fail. Moving up the face of the pyramid involves progressively enforcing harsher penalties until a peak is reached which, if activated would deter even the worst offender (in this case imposing criminal penalties).

Figure 2.1 **An enforcement pyramid for business regulation in relation to consumer product safety**



Source: Based on Ayres and Braithwaite (1992).

Of course, in areas such as consumer product safety, a gradually escalating response to non-compliance may not always be appropriate. If the risk of injury or death posed by non-compliance is sufficiently large, it would be appropriate for regulators to immediately invoke harsher penalties (for example, imposing civil or criminal penalties).

Later refinement of this concept has recognised that, in addition to the regulatory instruments governments can bring to bear on enforcement, other complementary forces are also likely to be at work (see Gunningham and Grabosky 1998). For

example, pressure on business to deal with a consumer product safety issue can come from three sources:

- progressively more stringent regulatory enforcement instruments;
- increasing pressure from competitive product markets encouraging self-regulation (for example, through temporary loss of market share, permanent loss of market share or even bankruptcy); and
- increasing risk of consumers seeking redress and compensation through the product liability system — again, creating incentives for business to self-regulate.

In designing enforcement strategies, policy makers should consider the potential to harness the incentives created by competitive product markets and the product liability system with a view to improving overall compliance.

Targeting resources to maximise the net benefit of enforcement activities

In order to maximise the net benefit to the community from enforcement activities, regulators need to use their limited resources in a way that will have the greatest effect on improving outcomes. Guided by evidence-based hazard identification and risk analysis, regulators need to target enforcement resources on those:

- product-related hazards that have the highest potential cost to the community in terms of injury and death; and
- businesses that are likely to have low levels of compliance.

Ongoing monitoring of the effectiveness of enforcement activities helps to determine which hazards and businesses should be targeted.

2.10 Summing up

By their nature, consumer products involve some level of risk for the health and safety of consumers. Indeed, most people would accept that risk is intrinsic to the functionality and utility of many of these products. That said, the community reasonably expects that consumer products will at least satisfy some minimum level of safety. Generally, market forces go a long way to ensuring suppliers satisfy this expectation. However, markets do not always work perfectly and, under some circumstances, government intervention may be needed to reduce the likelihood of consumers being exposed to unacceptable safety risks. The challenge for policy makers is to ensure that any measures governments take with respect to consumer product safety improve community wellbeing. In practice, this requires an objective evaluation of the costs and benefits of policy proposals on a case-by-case basis to ensure they are welfare enhancing.

3 Legal framework

Key points

- The Australian Government, through the *Trade Practices Act 1974 (TPA),* has the power to issue warning notices, mandate safety and information standards and ban or recall unsafe products. This power covers all corporations and other entities that conduct trade interstate or within a territory or that sell goods through the post or by electronic means.
- State and Territory legislation generally extends these powers to cover all other entities, and providing they are not inconsistent with the TPA, they also cover those entities otherwise covered by the TPA.
- The ACCC and State and Territory fair trading offices are responsible for the enforcement of these provisions.
- The product liability regime (contained in the TPA), along with other legal avenues for consumer redress (some of which are governed by State and Territory legislation), individually encourages businesses to supply safe products. Recently, damage caps and thresholds (which determine whether litigation can proceed) have been introduced.

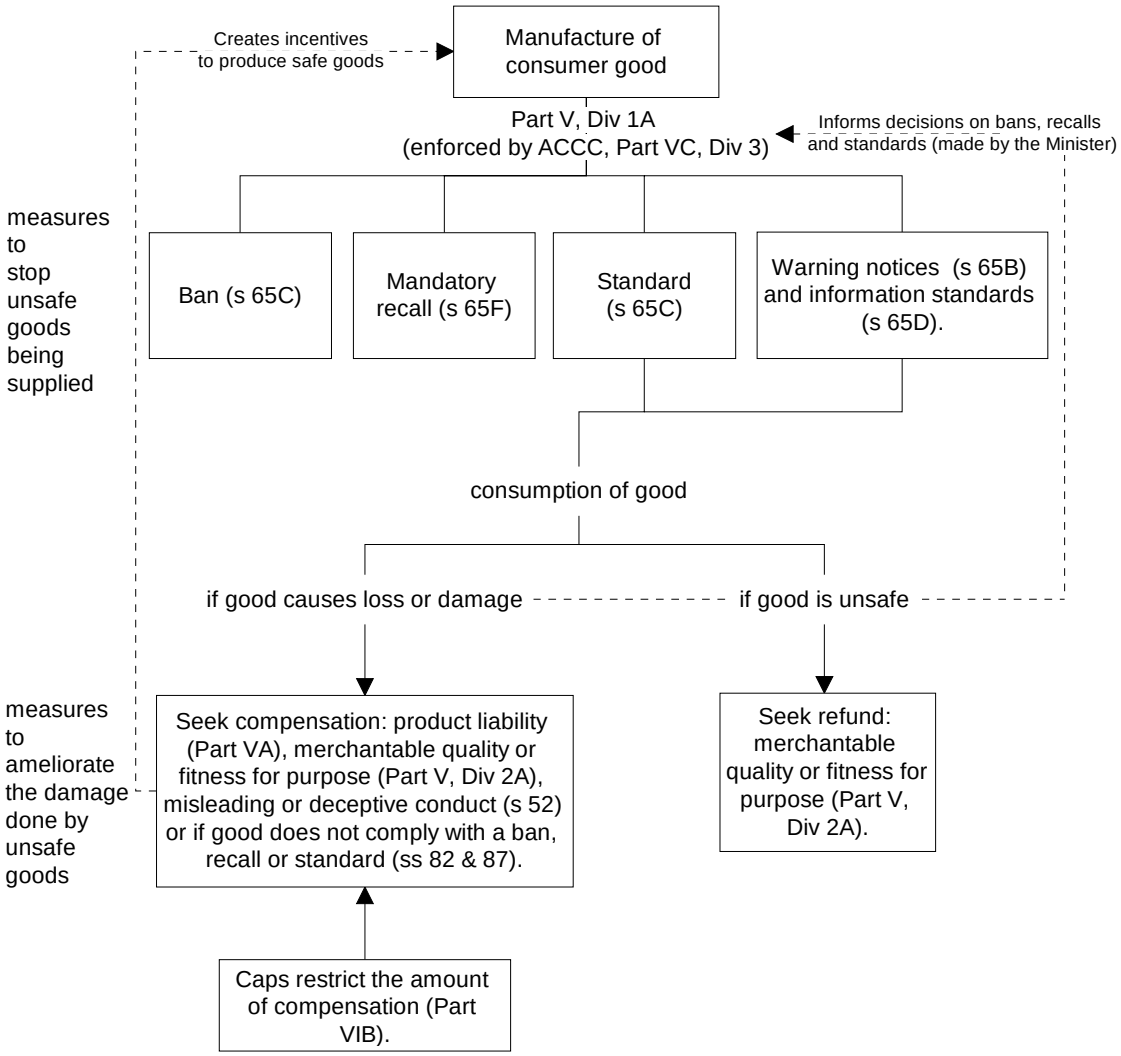
The previous chapter established that, despite the discipline of the market, in some cases governments may need to intervene to protect consumers from unsafe products. To this end, governments currently:

- ban, recall or mandate a standard for particular consumer products;
- provide information to consumers about certain risks; and
- establish statutory rights for consumers who are injured or suffer loss caused by unsafe products.

Figure 3.1 maps the interaction between these mechanisms under the TPA.

This chapter describes the above mechanisms as well as the manner in which they are applied and enforced. It concentrates on the regulations at the Australian Government level but highlights areas where State and Territory measures differ. Appendix B catalogues in more detail the specific differences between the State and Territory regulations and those of the Australian Government.

Figure 3.1 **How current regulations address unsafe goods under the TPA**



3.1 The product safety provisions

The product safety provisions allow governments to:

- ban or recall unsafe goods;
- require goods to be produced in a certain way or have information marked on or included with goods (standards); or
- issue notices about potentially unsafe goods (warning notices).

Part V, Division 1A of the TPA gives the Australian Government Minister responsible for consumer affairs these powers. This Act covers all corporations as well as other entities engaged in trade or commerce whose activities:

- cross state boundaries;
- take place within a territory; or
- are conducted through the post or electronic means, including e-commerce.

The TPA also covers the commercial activities of the Australian Government.

Parts of State and Territory fair trading acts generally replicate these provisions (although there are some differences), extending them to individuals and unincorporated businesses. State and Territory regulations also apply to all entities (including corporations) where they do not relate to products also regulated under the TPA. For example, if a good is banned in one State, all manufacturers located in that State are prohibited from supplying it, even if it is not banned under the TPA. (The operation of mutual recognition, however, does allow producers or importers in other jurisdictions to continue to sell the prohibited good, providing that it is not prohibited in their 'home' jurisdiction nor subject to a temporary exemption, see chapter 4.)

Table 3.1 lists the relevant product safety acts as well as the number of bans and standards enforced by Australian and State and Territory Governments. Currently, 57 products are subject to safety or information standards and 111 products are subject to bans. Appendix B contains more information on the different bans and standards in each jurisdiction.

The product safety provisions can generally only be used in relation to goods but in New South Wales, Victoria, Queensland and South Australia some of the provisions can also be applied to consumer services. To date, however, the provisions do not appear to have been used to this end: no standards or bans currently apply to services.

The provisions also apply to second-hand goods supplied in trade or commerce — since none of the relevant legislation excludes their application. For example, some State and Territory Governments enforce standards for cots and car seats against second-hand dealers.

Warning notices

Warning notices can outline the possible risks of using specific goods or inform consumers that a good is under investigation to determine whether it may cause injury. Warning notices can be issued by the Australian Government Minister and in New South Wales, Victoria, Western Australia and South Australia. In New South Wales, Victoria and South Australia a warning notice can relate to services as well as goods.

Warning notices are rarely used: the Australian Government has only issued three since 2000.

Table 3.1 **The use of product safety provisions**[a]

Jurisdiction	*Act*	*Mandatory standards*	*Bans*
Australian Government	*Trade Practices Act 1974*	28	12
New South Wales	*Fair Trading Act 1984*	23	31
Victoria	*Fair Trading Act 1999*	5	51
Queensland	*Fair Trading Act 1989*	29	3
Western Australia	*Consumer Affairs Act 1971* *Fair Trading Act 1987*	38	23
South Australia	*Trade Standards Act 1979*	23	14
Tasmania	*Sale of Hazardous Goods Act 1977* *Goods (Trade Descriptions) Act 1971* *Flammable Clothing Act 1973*	19	28
Northern Territory	*Consumer Affairs and Fair Trading Act 1990*	3	19
ACT	*Fair Trading (Consumer Affairs) Act 1973*	19	19
Total (net of duplication)[b]		**57**	**111**

a As at 5 January 2006. **b** Standards and bans relating to the same product that apply in more than one jurisdiction are only counted once in this total, although the requirements of particular standards may vary for the same product.

Source: ACCC (2005a,b), Office of Fair Trading (NSW) (2005), Consumer Affairs Victoria (2005), Office of Fair Trading (Qld) (2005), Department of Consumer and Employment Protection (WA) (2005), Office of Consumer and Business Affairs (SA) (2005), Consumer Affairs and Fair Trading (Tas) (2005a,b), Office of Consumer and Business Affairs (NT) (2005), *Consumer Affairs (Product Safety Standards) Regulations* (NT), *Consumer Affairs (Product Information Standards) Regulations* (NT) and *Fair Trading (Consumer Product Standards) Regulation 2002* (ACT).

Bans

All Australian jurisdictions can ban unsafe consumer goods. Bans can either be temporary or permanent. Depending on the jurisdiction, a temporary banning order remains in place for between 28 days and 18 months (although in Tasmania there is no specified period). The Australian Government Minister can permanently ban a good if a standard has not been agreed upon after 18 months.

To ban a good regulators must generally be convinced that the good 'will or may cause injury'. Although the particular wording varies between jurisdictions, the scope to impose bans appears similar across jurisdictions (see chapter 8).

Despite the similarities in the preconditions, the actual bans that exist vary greatly. Only 12 of the 111 bans currently in force apply Australia-wide (and then only for entities covered by the TPA).

Standards

All jurisdictions can mandate standards for consumer products.[1] There are two main types of standards:

- *Safety standards*, which generally relate to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods; as well as the form and content of markings, warnings or instructions to accompany the goods.
- *Information standards*, which mandate disclosure of information about the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging. In some jurisdictions there is scope for additional requirements for information relating to the price, identity of manufacturer, producer or supplier of the goods and the care, storage and use of goods.[2]

To be mandated, a safety standard must be reasonably necessary to prevent or reduce the risk of injury to any person. That said, under s. 65E of the TPA, the Australian Government Minister can declare a standard (produced by Standards Australia International) without concluding that it is reasonably necessary to prevent or reduce the risk of injury — even though this is the requirement for mandating a standard under s. 65C (see *BMW Australia Ltd v ACCC* (2004) 207 ALR 452). Yet, in practice, safety standards have so far only been mandated in response to safety concerns.

Information standards, however, have a broader application. They can be mandated if they are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods. Given this broader scope, some information standards have no clear safety rationale: for example, information standards currently mandate care labelling for clothes (by the Australian

[1] Instead of standards, Tasmanian authorities impose Sale of Hazardous Goods Orders. These orders effectively mandate a standard.

[2] Tasmanian legislation has no provision for the prescribing of information standards.

Government, New South Wales, Western Australia, South Australia and the ACT) and the marking of the place of manufacture on furniture (Queensland, Western Australia and South Australia).

Generally, mandatory standards take some time to implement. If a voluntary standard does not already exist, regulators need to draft their own standard as well as consult on the appropriateness of its requirements. And, even where an existing voluntary standard has been produced, some parts of it may need to be altered if they are not aimed at preventing or reducing injury. (Regulators are not obliged to adopt all elements of a voluntary standard.)

In South Australia and Western Australia standards can also relate to the quality or packaging of goods, however, these separate provisions do not appear to give additional scope to respond to safety concerns. All other jurisdictions can mandate safety standards relating to the packaging of goods (providing that they prevent or reduce the risk of injury) and also mandate information standards relating to the quality of goods (see above). The South Australian and Western Australian provisions, however, give these jurisdictions more scope to ensure that that the packaging of goods is not deceptive or does not unreasonably inconvenience consumers.

Recalls

Recalls are intended to remove unsafe goods that have already been sold or are currently on the market. All jurisdictions other than Queensland and Tasmania have mandatory recall powers.

A mandatory recall can be ordered if a supplier has not taken satisfactory action to prevent a good from causing injury and if the good:

- is subject to a ban;
- does not comply with a mandatory standard; or
- 'will or may cause injury'.

Recall notices can also require suppliers to repair, refund or replace the recalled goods. In Victoria, and at the Australian Government level, recall notices can only apply to goods that are intended to be used, or are of a kind likely to be used, by a consumer.

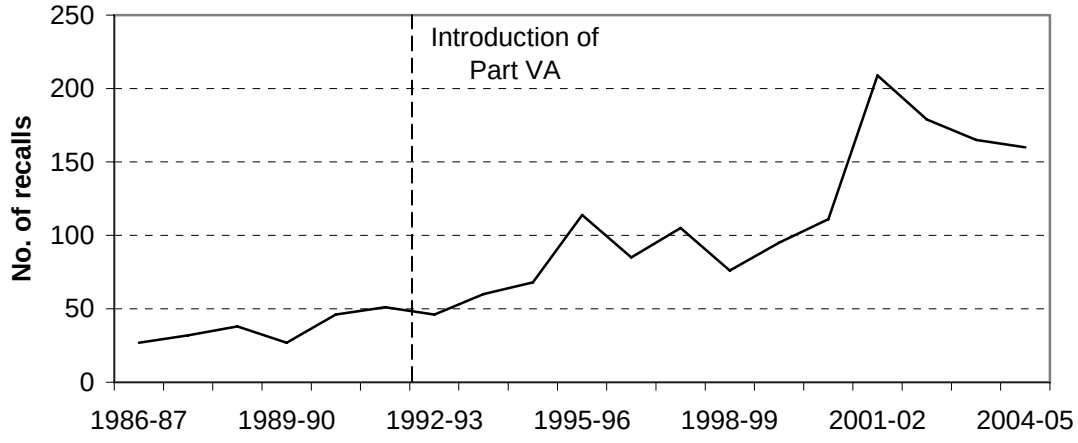
Mandatory recall powers are an option of last resort. Indeed, in introducing the mandatory recall powers to the TPA, Senator Gareth Evans (1986) commented that:

> I stress that the provisions for mandatory recall are designed to provide reserve powers which will be available for use where the safety of the public is threatened and the situation cannot be handled adequately by voluntary recall schemes or other means. In all cases, primary responsibility for ensuring the safety of consumer goods remains with manufacturers and importers.

Reflecting this policy, most recalls are voluntary (there have been about 1800 voluntary recalls since 1986 compared to only six mandatory). Figure 3.2 shows that there has also been a steady increase in voluntary recalls notified under the TPA since 1986.

In all jurisdictions, except Queensland and Tasmania, suppliers that undertake voluntary recalls must inform the relevant Government and must also take reasonable steps to inform consumers of the recall. In most States and Territories, except South Australia and the Northern Territory, a business will fully comply with this requirement, if they notify the ACCC under the TPA.

Figure 3.2 **Voluntary recalls notified under the TPA**
consumer products



Data source: ACCC (2005c).

Who makes the decisions?

Generally, decisions to issue warning notices, standards, bans or recalls are made by the Minister responsible for consumer affairs in each jurisdiction. The exception is Western Australia where the Commissioner (of the Product Safety Committee) is responsible for these decisions. (The Minister in Western Australia, however, can overrule the imposition of a permanent ban.)

Product Safety Committees or Councils also exist in all States and Territories except Victoria. These committees generally advise the Minister on product safety issues and often recommend the implementation of a ban, recall or standard. The members of these Committees or Councils are appointed by the Minister and (except in Western Australia) the Minister is not required to follow their recommendations. At the Australian Government level, the Minister is advised by the ACCC, while Consumer Affairs Victoria advises the Victorian Minister.

How are the decisions enforced?

It is an offence to supply a good that does not comply with a mandatory standard, a compulsory ban or a mandatory recall, if the good is intended to be used, or of a kind likely to be used, by a consumer. The maximum penalties for an offence vary between $5000 and $1.1 million (see table B.6). Box 3.1 outlines some instances where suppliers have been prosecuted for non-compliance.

The enforcement of these penalties falls to the fair trading offices in each of the States and Territories and, under Part VC, Div 3 of the TPA, to the ACCC for breaches of Australian Government regulations. There are time limits from the date of the alleged offence (varying from three to five years) on when prosecutions must begin. Currently, it would appear that around $5 million annually (and approximately 55 fulltime equivalent employees) are allocated to the administration and enforcement of product safety provisions (see table 3.2).

The ACCC, and the fair trading offices, have a similar range of powers available for enforcement. For example, all jurisdictions allow these agencies to variously search premises, seize goods and obtain information, documents and evidence. Some agencies also have the power to seek an injunction (on suppliers that are suspected of breaching product safety orders) or to agree to undertakings with suppliers on the rectification of an alleged breach.

Appeal provisions

In some jurisdictions, interested parties can apply for a conference to review the decision to impose a ban or recall, but not for the review of a standard or a warning notice. These conferences are organised by the ACCC (in the case of the Australian Government) or the relevant Product Safety Committee in New South Wales, South Australia and the Australian Capital Territory.[3] In urgent situations, where it appears to the Australian Government Minister that the goods create an imminent

[3] In these States and Territories conferences are only organised to review mandatory recall orders.

risk of death, serious illness or serious injury, these conferences can be delayed and the goods banned or recalled immediately. At the conclusion of a conference a recommendation on the validity of the ban or recall must be made, however, the Minister is not bound by this recommendation. Although other jurisdictions do not make express provision for conferences, if needed conference proceedings can be exercised administratively.

Table 3.2 **Product safety resources**

Agency	*Funding*	*Staff*[a]
	$'000	no.
Australian Competition and Consumer Commission	1665	14
NSW Office of Fair Trading[b]	1880	20
Consumer Affairs Victoria	440	4.4
Qld Office of Fair Trading	356	5
WA Department of Consumer and Employment Protection	500	4.25
SA Office of Consumer and Business Affairs	196	3
Tasmanian Office of Consumer Affairs and Fair Trading[c]	150	2
NT Office of Consumer and Business Affairs	100	1
ACT Office of Fair Trading	33	0.5
Total	**5170**	**54.15**

[a] Full-time equivalent [b] Includes resources that are applied to the gas and electrical appliance certification schemes. [c] In Tasmania product safety issues are considered within the Measurement and Standards Branch. These figures are an approximate estimate of the proportion of its budget spent on consumer product safety issues.

Further, in Victoria, interested parties have a right of appeal to the Victorian Civil and Administrative Tribunal, if they disagree with a ban or recall order. An appeal of a ban can also be taken to the Minister in Western Australia, to a Magistrate in Tasmania and to the Administrative Appeals Tribunal in the Australian Capital Territory. Objections to Australian Government decisions on all safety issues can be reviewed by the Federal Court or Federal Magistrates Court, however, the review is of the process of a decision rather than its merits. There is no express right of appeal in the Northern Territory.

Box 3.1 Non-compliance with product safety orders

Relying on advice from suppliers

Retailers of consumer products cannot simply rely on the assurances of suppliers (be they domestic or foreign) to defend themselves against a charge of non-compliance. For example, in 1998 Dimmeys (a retailer of apparel, homeware and variety goods) for the first time sold children's BMX-style bicycles. An ACCC officer noticed that these relatively cheap bicycles failed to comply with the existing bicycle standard. Dimmeys were notified and it immediately withdraw them from sale; spending $25 000 attempting to recall the 242 bicycles already sold. In deciding on a penalty for the contravention of the bicycle standard, Justice Weinberg stated that Starite (the initial importers of the bicycles) could not assume that the bicycles would comply with standards merely because they were told that they had been made for the Australian market. The Judge went on to state that Dimmeys were grossly irresponsible for failing to ensure the bicycles complied with standards, fining Dimmeys $60 000.

Repeat offenders

Businesses that repeatedly contravene safety standards will generally face escalating fines. Around two years after supplying the defective bicycles, ACCC officers in Townsville discovered that some children's clothing in a Dimmeys store failed to comply with mandatory standards. Again Dimmeys cooperated with the ACCC and promised to withdraw the items from sale and initiate a recall. However, four months later the same line of children's clothing, still without the correct warning labels, were discovered in a Victorian Dimmeys store.

As part of their defence in the earlier bicycle contravention, Dimmeys had submitted that they were aware of mandatory standards for other products (including clothing) that they regularly sold. The court took into account these earlier statements, as well as Dimmeys repeated offences, in levelling a large fine of $160 000 and an injunction requiring Dimmeys to institute a Trade Practices compliance program.

Goods sold for promotional purposes

Businesses that sell or give away goods for promotional purposes can still be prosecuted for breaches of the TPA. Following the ban of certain novelty balloons in 1980, a wholesaler sold the balloons to a sideshow operator who gave them away as prizes. Despite not actually selling the balloons, the operator was still found to be operating in trade or commerce and found to be in breach of the TPA. In a similar situation, Hungry Jack's was prosecuted for breaching a mandatory standard for sunglasses, which they sold for promotional purposes. Hungry Jack's submitted that the fact that the sunglasses were sold for $2, by a supplier of hamburgers, was "a very important contextual circumstance." Justice Carr rejected this plea and ordered Hungry Jack's to undertake corrective advertising of approximately $100 000.

Source: *ACCC v Dimmeys Stores Pty Ltd* [1999] FCA 1175, *ACCC v Dimmeys Pty Ltd* [2001] FCA 299, *Clarke v New Concept Import Services Pty Ltd* (1982) ATPR 40-284, *ACCC v Hungry Jack's Pty Ltd* [1996] 955 FCA..

3.2 Product liability arrangements

In cases where products do cause injuries, individuals can seek compensation through a range of avenues. The most direct of these, is the product liability arrangements of Part VA of the TPA (other avenues are discussed in box 3.2).

Part VA places strict liability (meaning that a plaintiff need not prove fault on the defendant's part) on manufacturers to provide compensation for injury, loss or damage caused by defective goods. A successful action under Part VA must prove three things:

- that the corporation, in trade or commerce, manufactured the goods;
- the goods had a defect; and
- because of this defect, the individual suffered injury.

The first condition is not as constraining as the ordinary definition of manufacture might imply, since a corporation will be held to be the manufacturer if it:

- grew, extracted, produced, processed or assembled the goods;
- promoted itself as the manufacturer or used its own brand name in relation to the goods; or
- imported goods into Australia, the manufacturer of which was not located in Australia.

Under Part VA, a good is deemed defective if its safety is not as 'persons are generally entitled to expect'. In determining the level of this community expectation, the courts are to have regard to:

- The manner and purposes for which a good has been marketed — products that are marketed to professions and trades would be expected to include less detailed instructions and warnings.
- The packaging, marking, instructions and warnings included with the good. So that a properly worded label on a good, that would otherwise be unsafe, may be sufficient to ensure that the good is not defective. Yet, the warning must be clear and comprehensive. For example, in *ACCC v Glendale Products Pty Ltd* [1998] FCA 180, the supplier was held liable because, despite the presence of a warning label, it did not specifically warn about the dangers of mixing caustic soda with hot water in a confined space.
- What might reasonably be expected to be done with the good — a manufacturer who does not warn of the consequences of reasonably foreseeable use could be found to have produced a defective product.

Box 3.2 **Other legal avenues**

The introduction of the product liability regime in 1992 did not prevent individuals from taking action under other parts of the TPA or under common law. These other avenues include claims made under:

- negligence law;
- contract law;
- the implied contract provisions of Part V, Div 2A of the TPA;
- the enforcement and remedies provisions of Part VI of the TPA; and
- the misleading and deceptive conduct provisions of s. 52 of the TPA.

Claims brought under the common law tort of negligence must prove that the breaching of a duty of care (owed by the supplier) caused loss or damage. A duty of care will exist if a reasonable person (in the manufacturer's position) would have foreseen that the conduct involved risk to the customer. In determining whether a manufacturer has breached this duty, courts will have regard to the magnitude of the risk of injury; the probability of its occurrence; the difficulty of alternative action; and any conflicting responsibilities. The elements of negligence (as it applies to product liability claims) are now largely captured by Part VA (Corones and Clarke 2002, p. v).

The specific clauses of a contract can also provide an avenue to claim compensation for the loss caused by an unsafe good. However, for most consumer transactions specific clauses are not written: hence, proving the breach of an express clause will not be possible.

Claims can more commonly be brought for a breach of the *implied* contract provisions that are codified in Part V, Div 2A of the TPA. These conditions place liability on manufacturers for the loss or damage caused by consumer goods that are not of merchantable quality or are not fit for specific purposes. Provisions in the State and Territory sale of goods acts apply these conditions to entities not covered by the TPA. These provisions cannot be used by bystanders or be applied to services.

If a good or service does not meet the requirements of a ban, standard or recall a consumer can also seek compensation for loss or damage, that would not have occurred without the contravention.

Finally, the misleading and deceptive conduct provisions of s. 52 of the TPA provide a further avenue for product liability claims. Often the marketing of products that turn out to be unsafe may involve a degree of misleading or deceptive conduct and hence product liability actions under this section may also be successful in obtaining compensation. For example, in *Hampic Pty Ltd v Adams* (2000) ATPR 41-737 the Court used the test applied in a previous Part VA case to justify finding in favour of the plaintiff. (Action was not taken under Part VA in this case because it was a workers' compensation claim.) Action against unsafe services can be brought under this section.

Source: Corones and Clark (2002).

- The time when the goods were supplied — goods that were not defective at the time of supply do not become defective if community expectations subsequently change.

The above list is not exhaustive: courts must take into account all relevant circumstances that affect the safety of a good. Such further considerations could include the nature of a product (there is a generally acknowledged risk of malfunction with certain medical products, see *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2004) FCA 853), the price of a good and the role played by intermediaries (such as pharmacists).

Compensation can be sought for injury, loss or damage to individuals, goods or buildings. Even if an individual is not the actual consumer of a defective product he/she can still claim compensation providing the injury was not suffered in the course of a business or professional relationship (such as an employee and an employer). Injuries that are covered by workers' compensation are also specifically excluded. If a defective product causes damage to other goods or buildings, claims can only relate to goods that are ordinarily used for personal, household or domestic use or to buildings that are acquired for private use.

Manufacturers who have been found to have supplied a defective product can only defend themselves by proving that the defect:

- did not exist when the goods were supplied;
- could not have been discovered given the state of scientific or technical knowledge when the manufacturer supplied the goods (the so called 'state-of-the-art' defence); or
- is attributable to the design, markings or instructions of a finished good, of which the defendant manufactured a component.

In addition, if the manufacturer can prove that compliance with an Australian Government mandatory standard is the *sole* cause of the defect, the Australian Government will assume liability. This defence is only available if a mandatory standard requires products to be produced in a strict manner and compliance with these particular provisions caused the defect. Usually this will be an unlikely situation (Corones and Clark 2002, p. 705).

Specific limitation periods apply under Part VA. There is a general limit of ten years from the date of supply and a limit of three years from when a person became aware, or ought to have become aware, of the defect and the identity of the manufacturer. In addition, if the manufacturer of the good is unknown, a notice can be served to every supplier of the good and if they cannot identify the manufacturer then they will be held jointly and severally liable.

When Part VA was introduced, there were concerns that it would lead to a flood of product liability litigation. However, not many Part VA claims have proceeded to court since 1992 (the Commission is aware of only 22 cases and some of these were subsequently settled out of court, see box 3.3). In addition, in only four of these identified cases has the court imposed liability under Part VA.

It is not clear why the predicted flood has failed to materialise. Some have conjectured that the introduction of Part VA did not add significantly to the avenues through which product liability claims can be brought and hence that its introduction did not change the frequency of claims (Stapleton 2000). Another possibility is that many product liability claims are settled out of court. Unfortunately, there is no reliable data on the incidence of out of court settlements.

Nonetheless, there is some evidence that the number of product liability claims is increasing and anecdotal evidence that many product liability claims are settled before proceeding to trial. For example, about 60 per cent of the product liability cases mentioned above were brought after 2000. Further, McGarvie (2001 and 2005) catalogues over 40 cases that have been settled out of court, including claims against suppliers of ladders, hair dyes and exploding lemonade bottles. Many of these claims are for relatively small amounts (the majority settling for between $2000 and $30 000). In this regard, McGarvie warns that in the future many of these small claims would be unlikely to meet the new threshold requirements for claiming damages for non-economic loss (see below).

The introduction of caps and thresholds to damages

At the May 2002 Ministerial meeting on Public Liability Insurance, Commonwealth, State and Territory Ministers agreed that personal injuries damages had become unaffordable and unsustainable (Ipp et al. 2002). Consequently, they tasked a panel of experts to review the law of negligence with the intention to propose measures to address the cost and availability of public liability insurance. The subsequent report, the *Review of the Law of Negligence* (or the Ipp Report), recommended that caps be introduced to the compensation awarded in negligence claims and that equivalent caps be introduced to the relevant parts of the TPA, so as to prevent claims under the TPA circumventing the proposed changes to negligence law.

All jurisdictions have now introduced changes to negligence law in response to the recommendations of the Ipp Report, although not all have introduced caps on damages for non-economic loss. Non-economic loss is defined to include pain or suffering, loss of amenities of life or expectation of life and disfigurement. The TPA

Box 3.3 **Action under Part VA of the Trade Practices Act**

Only a few product liability cases brought under Part VA have been fully considered by the courts. However, there have been some important legal questions considered in these cases.

- In *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853 Justice Kiefel ruled that a heart valve was not defective just because it caused side-effects in a small number of cases. This ruling referred to the Explanatory Memorandum for Part VA which stated that:

  > Such products [certain pharmaceuticals and vaccines] are known to confer substantial benefits which flow to the wider community at large. The small statistical chance of injury associated with them does not of itself mean that they are "defective".

  A chip subsequently found on the heart valve was ruled to be a defect but the manufacturers successfully relied on the defence that the chip did not exist when the valve was supplied. In a separate case, involving a safety pin in a chocolate bar which had caused injury, this defence was rejected because the defendant did not prove, on the balance of probabilities, that the bar was tampered with after it left the factory (see *Effem Foods Ltd v Nicholls* [2004] NSWCA 332).
- In *Graham Barclay Oysters v Ryan* [2000] FCA 1099 the court ruled that an oyster supplier could rely on the 'state-of-the-art' defence because the only test available resulted in the destruction of the oyster. In other words, it was not possible to extrapolate from a test sample of oysters to a general population.
- In *Cheong bht The Protective Commissioner of NSW v Wong & Ors* [2001] NSWSC 881, the court ruled that a retreaded tyre was defective because it failed after 19 000 km of driving and was hence not at a level of safety that persons were generally entitled to expect.

Other cases where product liability actions have been considered include: *Tristram v Hyundai Automotive Distributors Australia Pty Ltd & Anor* [2005] WASCA 168 (car accident), *Transfield v Rawson* [2005] WASCA 78 (construction site accident), *Thomas v Southcorp Australia Pty Ltd & Anor* [2004] VSC 34 (heater), *Tyzack v Chequered Flag Motors and Premier Automotive* (2004) County Court of Victoria no. 2002/6243 (4WD handbrake), *Morris v Alcon Laboratories (Australia) Pty Ltd* [2003] FCA 151 (surgical lens), *Roots v Trussmaster Pty Ltd* [2003] QSC 348 (timber frames), *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 851 (fruit juice), *Leeks v FXC Corporation* [2002] FCA 72 (parachute), *Forbes v Selleys Pty Ltd* [2002] NSWSC 547 ("Selleys Space Invader"), *Courtney v Medtel Pty Ltd* [2001] FCA 949 (shoes), *Lanza v Codemo Management Pty Ltd* [2001] NSWSC 72 (cherry picker), *Bright v Femcare Ltd* [2000] FCA 742 (female sterilisation applicators and clips), *Cook v Pasminco Ltd* [2000] FCA 677 (factory emissions), *Borch & Ors v Answer Products Inc & Ors* [2000] QSC 379 (mountain bike), *Stegenga v J Corp Pty Ltd* (1999) ATPR 41-95 (wooden joist), *Lopez v Star World Enterprises Pty* [1999] FCA 104 (bakery products), *Ian John White v Canberra Furniture Manufacturing Pty Ltd and others* [1999] ACTSC 53 (scaffolding), *ACCC v Glendale Chemical Products Pty Ltd* [1998] FCA 180 (caustic soda).

caps these damages at $250 000, while caps in the States and Territories range from $241 500 (in South Australia) to $400 000 (in New South Wales). In addition, to receive damages for non-economic loss, most jurisdictions require the losses to be above a set threshold (generally 15 per cent of the most extreme case). There are currently no caps on damages for non-economic loss in Western Australia, Tasmania and the ACT.

Caps on damages for economic loss (such as loss of income) are more standardised and apply across all jurisdictions. Most States and Territories cap these damages at three times average weekly earnings, over the duration of the economic loss. In contrast, under the TPA, damages for economic loss are capped at twice average weekly earnings and damages for future economic loss must also be discounted at the rate of 5 per cent. There are no thresholds on when compensation for economic loss can be claimed.

In addition, time limits on when action can be brought have been introduced in all jurisdictions. Generally, negligence claims must now be started within three years of when the plaintiff became aware of the loss (although this time is longer in some States). Although these time limits are no more restrictive than those that already existed under Part VA, they do foreclose other avenues to individuals that have been injured by products, yet are outside the Part VA time limits. For example, in *Thomas v. Southcorp Australia Pty Ltd* [2004] VSC 34, a successful personal injury claim relating to a fire caused by a defective heater, was made under negligence rather than Part VA because it was brought outside the three year time limit.

The Australian Government, however, has yet to introduce the Ipp Report recommendation that claims for personal injuries or death be prevented from being taken under the misleading and deceptive conduct provisions of Part V, Div 1 of the TPA. These additional changes are currently before the Senate. They attempt to prevent the newly introduced restrictions being circumvented through actions taken under this part. As the Explanatory Memorandum for the Trade Practices Amendment (Personal Injuries and Death) Bill 2004 explained:

> The [Ipp] Review noted that, to date, plaintiffs have rarely relied on the unfair practices in trade and commerce provisions of the TPA to form the basis of a claim for damages for personal injuries or death. This, to a significant extent, is the result of the prevailing legal culture. There has been no need to rely on Division 1 of Part V because the common law has been seen as an adequate source of compensation. The Review considered that once avenues for plaintiffs under the law of negligence are blocked or made less attractive by state and territory reforms … this situation is likely to change.

The limiting of damages in product liability cases, and the increased threshold for litigation, may have the potential to reduce, to some degree, incentives which encourage the supply of safe products. The extent to which this may occur is discussed in chapter 4.

4 Evaluation of the current system

Key points

- Looking at Australia's consumer product safety system as a whole, there appears to be reasonable incentives and constraints to encourage businesses to supply safe products.
- Over the longer-term the direction of change has been towards safer consumer products in the aggregate. Moreover, the Commission's exploratory estimates of the incidence of product-related injury and death in Australia suggest that:
  - the number of injuries and deaths directly caused by consumer products is small relative to other causes of mortality and morbidity although not insignificant; and
  - even where consumer products are in some way involved in accidents, genuine product fault is likely to be a far less significant cause of mortality and morbidity than consumer behaviour and the environment in which consumer products are used.
- The Commission has developed some *partial* estimates of the direct and indirect costs associated with consumer product-related accidents. These exploratory cost estimates suggest that the likely order of magnitude of the total cost to the community of consumer product-related accidents is in the order of hundreds of millions of dollars.
- Irrespective of whether a General Safety Provision (GSP) is introduced, there is considerable scope to make the regulation of consumer product safety more efficient, effective and responsive. For example, by addressing significant data and information gaps; focusing more strongly on hazard identification, risk assessment and risk management; improving the standards-making process; and addressing fragmented policy making, administration and enforcement.
- A priority going forward is to achieve greater national consistency in the regulation of consumer product safety.

Determining how well the current consumer product safety system is working is crucial to establishing whether, and to what extent, reform is needed in this area. Particularly when major reforms are being advocated, it is important to establish the nature and magnitude of any problems with the existing system. This chapter begins by assessing: whether the incentives and constraints embodied in the current consumer product safety system are likely to be sufficient to encourage businesses to supply safe products; and the incidence and cost of product-related injury and

death in Australia. It then focuses more narrowly on the potential to improve the regulation of consumer product safety. It concludes by considering how the consumer product safety system impacts on competition, international trade and economic integration with New Zealand.

4.1 Are there sufficient incentives and constraints to encourage the supply of safe consumer products?

Few would dispute that an overarching objective of Australia's consumer product safety system is to ensure that consumer products at least satisfy some minimum level of safety that is commensurate with consumer expectations. A key issue is whether there are sufficient incentives and constraints operating through the current system to achieve this outcome. As earlier chapters have shown, within the consumer product safety system, pressure to design, manufacture and supply safe products essentially comes from three main sources:

- consumer preferences expressed through the operation of competitive product markets;
- the ability of consumers to seek redress and compensation for the physical or economic harm caused to them by unsafe products (including under Part VA of the *Trade Practices Act 1974* (TPA)); and
- government regulation and information provision.

The incentives and constraints working through each of these mechanisms are considered in more detail below.

In addition, it is important to recognise there are other mechanisms supporting better product-safety outcomes. For example, the incentives and constraints operating through media reporting of accidents, the work of non-government organisations (such as consumer advocacy groups), the insurance market, the health system and research into the health and safety of consumer products.

Market forces

The markets for the consumer products under reference are generally competitive and consumer preferences are an important driver of the range of products available on the market (including in relation to safety). Moreover, as the Australian Competition & Consumer Commission (ACCC) noted, safety is increasingly a key factor influencing consumer behaviour (sub. MCCA4, p. 6). This view is consistent with surveys in the United States that show a steady increase over time in the value

consumers place on safety (see Australian Consumers' Association (ACA), sub. DR51, p. 21). To the extent that consumers value safety and can reflect that value in their purchasing behaviour, market forces reward businesses supplying safe products and penalise those that do not (for example, through loss of market share and lower profits).

While recognising the potential for market failure in relation to consumer product safety, the Commission considers that market forces generally provide reasonably strong incentives for businesses to supply safe products. Of the thousands of consumer products available on the Australian market, only a relatively small number are subject to some form of direct regulatory intervention with regards to their safety (see chapter 3). For most of the products under reference, and notwithstanding the incentives and constraints operating through the product liability arrangements, consumer preferences appear to be the most important driver of product-safety. Thus, while consumer product markets may not work perfectly, in most cases market forces appear to go a long way towards ensuring businesses supply the level of safety that consumers are ultimately prepared to pay for.

Clearly, however, this is not true in all cases, especially in relation to: safety hazards that are complex or not immediately obvious; and those cases where any adverse health effects only become apparent long after the product has been used (see chapter 2).

The importance of market forces in encouraging businesses to supply safe products was emphasised by a number of participants, including the Australian Chamber of Commerce and Industry:

> Government regulatory bodies should also recognise that industry places the highest priority itself on product safety matters, as any adverse consumer impact only harms business itself. The majority of businesses constantly work to ensure that products do not harm consumers. It is in their interest to do so. (sub. MCCA3, p. 2)

Similarly, the ACCC commented that:

> Safety increasingly drives competition from a supplier perspective. A manufacturer that incorporates safety from the outset will gain an advantage not only in marketing, but in reducing the likelihood of sustaining costs associated with selling unsafe goods. In addition to the usual costs such as recalls, a flawed design may require a manufacturer to completely retool. There are economies for suppliers in giving priority to safety. (sub. MCCA4, p. 6)

Further, other participants emphasised that, in practice, market incentives are strengthened by the media attention consumer product safety issues typically receive. As the National Product Liability Association observed:

> … perhaps one of the most significant incentives of all is the desire of businesses to avoid adverse media scrutiny. Australia has a lively and vigorous media. Products that are regarded as being unsafe will attract media attention. This media attention can have a devastating impact upon the marketability of products and, more widely, upon the reputation of a business or corporation. There have been many recent examples of this. (sub. MCCA19, p. 7)

In the Commission's view, organised consumer advocacy also plays an important role in strengthening market forces by drawing to consumers' attention products which may pose unacceptable safety risks and by providing information which assists consumers in comparing the safety features of different products.

However, there are some important qualifications. While there are reasonably strong market incentives for businesses to address product-safety problems which result in serious injuries and deaths, these incentives may not operate as effectively in relation to less serious safety problems which result in lower-level injuries. For example, the ACA argued that:

> While the market may discipline a provider of seriously defective goods the market remains quite ineffective with regard to diverse lesser injuries. The market can only be effective when good information is available and … this does not occur for other than deaths, and even then for a short time. (sub. 41, p. 6)

While businesses are likely to be informed if their products have caused serious injuries or deaths, this may not always be the case with regards less serious injuries. In the latter case, consumers may consider their injury is not serious enough to be worth reporting. In other cases, consumers may not report less serious injuries where there is some doubt about the extent to which their own behaviour or environmental factors contributed to the accident.

As a result, there is a risk some product-related hazards that result in lower-level injuries may not be adequately addressed and new products may be developed that repeat existing design problems.

A further qualification is that the strength of incentives to supply safe products is likely to vary depending on how committed businesses are to particular product-types and markets. For example, the incentives facing a business looking to exploit a short-term market opportunity, by selling a one-off product consignment, are likely to be weaker than a business with a long-term commitment to the same product and market.

The product liability system

Australia's product liability system also creates incentives for business to have regard for consumer product safety. While the product liability system is activated only after a product-related injury or loss has occurred, the potential for consumers to seek redress and compensation creates *ex ante* incentives for businesses to supply safe products. In this regard, Middletons Lawyers argued that:

> While this is regulation at the "back end" of the system and therefore classified as reactionary, its existence still has the result of regulating product standards at the "front end". The consequences faced by a manufacturer who releases a substandard product which subsequently causes injury to a consumer can be severe and already create an obligation to only place safe products on the market. (sub. MCCA18, p. 2)

When Part VA was inserted into the TPA in 1992, Australia moved to a strict product liability regime that removed the onus on consumers to prove negligence or intent on the part of producers. Discussions with interested parties suggest that many businesses are very conscious of the threat of being sued and take steps to establish good safety records and practices as an 'insurance' policy against this. However, some participants were concerned that consumers may not be making sufficient use of the opportunity to seek redress and compensation, with the ACA observing that:

> … while the TPA's product liability provisions are useful they are almost certainly greatly underused through consumer ignorance and fears of costs. (sub. 41, p. 4)

Similarly, the Commonwealth Consumer Affairs Advisory Council (CCAAC) noted in relation to Australia's product liability regime that:

> Product liability laws by themselves, provide some incentives — most companies operating in Australia would be aware that they could be sued. However, whilst companies may take steps to minimise the risk of such an event, there may be rational trade-offs for many between making a profit and lower safety levels. Access to the justice system is expensive and takes time — the chances of a consumer having enough money and enough energy to pursue their legal rights may only be practical in the most egregious of cases. Similarly regulators have extremely limited resources and may decide not to prosecute. (sub. 43, p. 7)

Moreover, in response to the Discussion Draft, Dr Luke Nottage (Senior Lecturer, University of Sydney Faculty of Law) argued that the Commission had been too optimistic in its assessment of the incentives operating through the product liability arrangements, particularly in relation to the strict product liability regime:

> There has been very little case law, even unreported judgements, under this legislation. Perhaps products have suddenly become so safe that consumers don't need to sue under these provisions, and/or the law is so clear that they settle favourably in its shadow. But that seems unlikely given the lack of clear guidance from higher courts on some vague

> concepts in Part VA, and structural barriers to accessing the courts which have increased since Australia's "tort reforms" since 2002. (sub. DR48, p. 4)

The Commission acknowledges that not many product liability cases, brought under Part VA, have been considered by the courts (see chapter 3).[1] Indeed, the available evidence suggests that Australian consumers have not been overly litigious. Nevertheless, many participants emphasised that the *possibility* of being sued, and the associated risks for the reputation and financial viability of a business, creates incentives to supply safe products.

While recognising there are limits to the incentives operating through the product liability arrangements, the Commission remains of the view that these arrangements are an important part of Australia's overall consumer product safety system. However, as outlined in chapter 3, the Australian Government has recently introduced a number of changes to the product liability arrangements including the introduction of an indexed cap on the amount of damages payable for non-economic loss and a threshold medical test before a person qualifies to receive damages for non-economic loss (the entry point is 15 per cent of the most extreme case). Further, time limits on when action can be brought have also been introduced. These changes are intended to ease pressure on insurance premiums.

It is too early to tell what the impact of these changes may be on the effectiveness of Australia's consumer product safety system. Nevertheless, in the Discussion Draft, the Commission observed that these changes may have a significant effect on the overall mix of incentives embodied in the current system. Indeed, it noted that some in the legal profession argue, as a result of the introduction of the threshold medical test, many consumers with moderate injuries will not take legal action. For example, Michael McGarvie, a partner at Holding Redlich, recently observed:

> This means that one very important level of pressure on suppliers, importers and manufacturers to ensure their products do not carry harmful defects has been lost. It will be interesting to see whether the volume of defective products remaining in the marketplace increases because of the absence of an opportunity for injured consumers to seek appropriate compensation under the present laws. (McGarvie 2005, p. 147)

In response to the Discussion Draft, the ACCC indicated that it shares the Commission's concerns about the effect of the recent changes:

> In risk management terms, the consequences for suppliers (of having to pay out for damages) have been reduced by the 2004 amendments because the amount of claim has been limited. More importantly however is that the likelihood of having to pay out at

[1] In addition to the strict product liability regime there are other legal avenues available to consumers. These include: negligence law, contract law and the misleading and deceptive conduct provisions of s. 52 of the TPA (see chapter 3).

all is further diminished. The likelihood has always been affected by whether a defective good will lead to injury and whether the injured party will sue. Now further diminishing factors are whether the injury reaches the required threshold and whether the claim can be made within the shortened time limit. …

The ACCC is concerned that the 2004 amendments may have diminished the incentives for suppliers to make safe goods and this needs to be taken into account in reviewing the consumer safety system as a whole. (sub. DR56, pp. 1-2)

Although it is too early to be certain what the impact of the recent amendments to Australia's product liability arrangements has been, the Commission considers that these changes are likely to have weakened the incentives for businesses to supply safe products.

Regulation

Governments also intervene to reduce product-related injury and death through other forms of regulation (for example, banning unsafe products, requiring unsafe products to be recalled and mandating minimum safety standards) and information provision. The legislative powers underpinning regulation in this area are largely of a reserve nature – ensuring that action can be taken to protect consumers in the event unsafe products reach the market. A detailed description of the legal framework underpinning Australia's consumer product safety system is provided in chapter 3.

The current regulatory system is configured primarily towards restricting the ability of businesses to supply products that have been found to be unsafe rather than providing incentives for businesses to design and manufacture safe products in the first instance. Although the current regulatory regime may create some *ex ante* incentives for businesses to supply safe products, these are unlikely to be as strong as the incentives operating through the product liability arrangements:

- Under the current regulatory regime businesses can only be prosecuted for not complying with mandatory product recalls, bans or mandatory safety requirements. A business cannot be prosecuted for supplying an unsafe product.
- Government regulatory powers have tended to be used sparingly.
- The regulation of consumer product safety is relatively narrowly focused and modestly resourced. As such, it is doubtful whether the current regulatory regime has as strong a deterrence effect on most businesses as the possibility of being sued.

In commenting on the largely reactive nature of the current regulatory regime, the ACCC observed that:

> The responsibility for ensuring consumer safety lies … predominantly with manufacturers and importers of goods, and it is arguable that the present regulatory environment does little to ensure that manufacturers or importers put in place appropriate risk management strategies to achieve optimal safety outcomes for the community at large. (sub. DR56, p. 4)

It is also likely that the current regulatory regime does not have a large impact on product-related hazards that result in lower-level injuries. This simply reflects that in most cases regulators are likely to be working with very limited information and data and this can make it difficult to identify these types of problems. Moreover, generally regulators try to focus their available resources on those product-related hazards that cause serious injuries and deaths.

That said, the regulatory regime plays an important role within the overall consumer product safety system by providing a general 'safety net' in the event unsafe products reach the market.

Participants focused mainly on the need to improve the effectiveness, efficiency and responsiveness of government regulation and information provision and these issues are taken up in more detail in section 4.3.

The system as a whole

Overall, Australia's consumer product safety system appears to provide reasonable incentives and constraints to encourage most businesses to supply safe products. The main mechanisms through which these incentives and constraints operate are market forces, the product liability arrangements, media scrutiny of unsafe products and organised consumer advocacy. There is no doubt, however, that these mechanisms are not always sufficient to stop unsafe products reaching or remaining available on the market. In this context, regulators play an important ancillary role by detecting unsafe products and seeking to remove them from the market (through product bans, recalls and mandating minimum safety requirements).

This is consistent with the view of many participants that Australian businesses generally take a responsible attitude towards product safety. There is no evidence of a widespread problem of businesses intentionally releasing unsafe products onto the market. However, it is equally true that not all businesses have sufficient regard for their duty of care or the risks of being sued. Dr Luke Nottage argued that such firms may be acting negligently by:

> … not giving proper weight to the likelihood and extent of harm likely to occur to consumers — and to be claimed against them by consumers, given the difficulties of (credible threats to) access the civil justice system through (recently reformed, ie

> restricted) tort law, and/or sanctioned or regulated by authorities also operating in an informational vacuum. (sub. DR48, p. 3)

The Commission acknowledges there is likely to be a relatively small part of the market which may not act responsibly with regards to consumer product safety. These are likely to be suppliers who do not have a strong or long-term commitment to particular product types and markets and, consequently, are less concerned about damage to their reputation (such as, 'job lotters', some discounters and market traders). In commenting on the enforcement of consumer product safety regulation, the ACCC noted that it:

> … does not encounter many breaches in product safety by what could be called 'fly-by-night' traders. This may be partly due to its focus on national and widespread consumer detriment, but more generally the ACCC does not find the 'cheaper-end' of the market … to be disproportionately represented in the more significant product hazards. The ACCC is aware that the state agencies find high levels of non-compliance with some standards at discount variety stores, but the products concerned are not always those that pose the greatest risk. (sub. DR56, p.6)

Of course, from the community's perspective, a key concern is how effective the incentives and constraints operating through Australia's consumer product system are in reducing the incidence and cost of product-related injury and death.

FINDING 4.1

Overall, Australia's consumer product safety system appears to provide reasonable incentives and constraints to encourage most businesses to supply safe products. The main mechanisms through which these incentives and constraints operate are market forces, the product liability arrangements, media scrutiny of unsafe products and organised consumer advocacy. The regulatory system plays an important complementary role in seeking to protect consumers in the event unsafe products reach the market.

FINDING 4.2

It is too early to tell what the impact of recent changes to the product liability arrangements may be in terms of consumers' access to redress and compensation. However, on balance, these changes are likely to have weakened the incentives for businesses to supply safe products.

4.2 What is the incidence and cost of consumer product-related injury?

Central to evaluating Australia's consumer product safety system is determining the extent to which unsafe products are responsible for causing injury and death and the magnitude of the associated costs for the community as a whole. Unfortunately, a paucity of data in this area makes it difficult to determine the share of injuries and deaths caused directly by unsafe consumer products or how these shares may have changed over time. However, as part of this study, the Commission has examined a range of data sources and studies; and has used this information to develop some exploratory estimates of the possible incidence of injury and death in Australia attributable to unsafe products (see appendix C).

The Commission has used these exploratory incidence estimates as the basis for calculating some of the costs associated with consumer product-related accidents. While the Commission has not been able to estimate the total cost to the community of consumer product-related injury, it's exploratory cost estimates are indicative of the likely order of magnitude (see appendix C).

A long-term trend towards improved safety

The available evidence suggests that, over the course of the last century there has been a long-term trend towards improved safety in many areas of everyday life. For example, Viscusi and Gayer (2002) report that in the United States accident rates have been declining throughout the last 100 years. These accident rates are based on data measuring unintentional injury deaths — including motor vehicles, in the work-place, in the home and in public spaces (non-motor vehicles). Viscusi & Gayer's general conclusion is that safety has been improving over a long period.

Similarly, in Australia, the rate of accidental injury-related deaths has been declining over a number of years (see figure 4.1). In 2002, the latest year for which figures are available, the rate of injury mortality in Australia was the lowest on record (Kreisfeld, Newson and Harrison 2004, p. 6). A significant contributor to this trend has been a decrease in transport-related deaths.

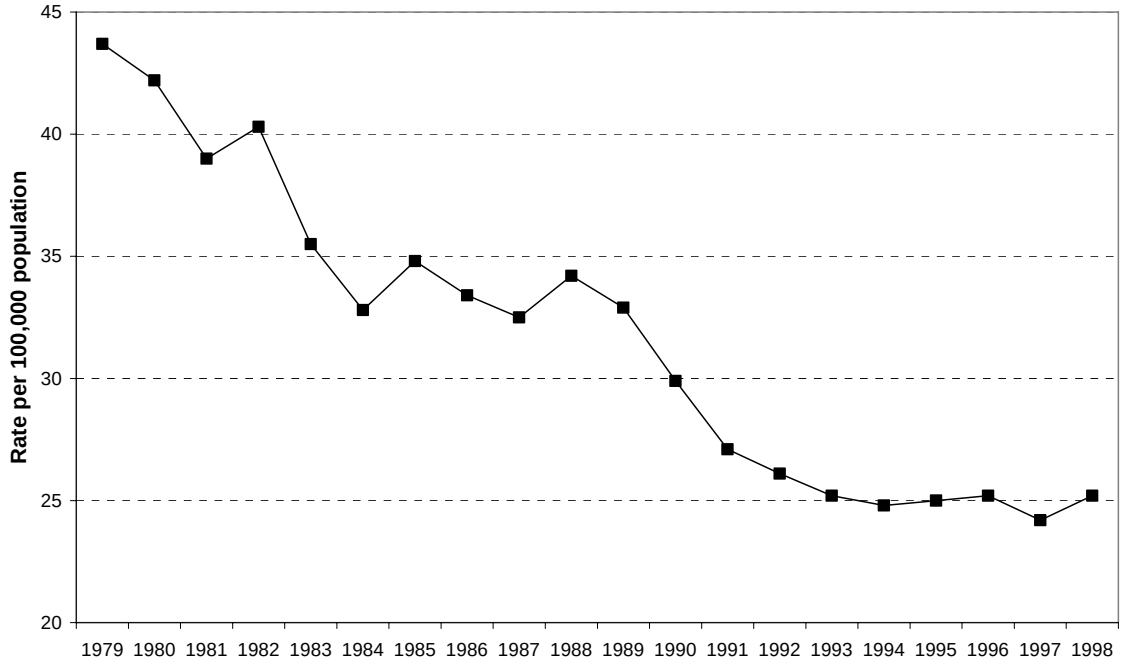
While both these data sets are broader in scope than the range of products covered by this study, there is also some evidence of a long-term trend towards safer consumer products in the aggregate. For example, in the United States, the Consumer Product Safety Commission (CPSC) reports that over the last 30 years there has been an almost 30 per cent decline in the rate of deaths and injuries associated with consumer products (2005a). This would appear consistent with a recent observation made by the Chief Executive Officer of the ACA that:

> During the last few decades there have been significant improvements in product safety as a result of consumer pressure. (Kell 2005, p. 6)

In making these observations, the Commission is not claiming that the longer-term trend towards safer consumer products in the aggregate is evidence that Australia's consumer product safety system is working well across the board or that there is no further room for improvement. Clearly, to the extent there has been a general trend towards improved product safety, there is no reason to suppose that this has occurred uniformly across all product types. And, as the work of consumer advocate groups highlights, some products continue to pose significant safety risks for consumers.

That said, the available evidence indicates that over the longer term the direction of change has been towards safer consumer products in the aggregate. And, in the Commission's view, this is important contextual information when considering the likely incidence and cost of product-related injury and how these may have changed over time.

Figure 4.1 **Accidental injury deaths[a], Australia 1979-1998**



a Includes all accidental injury deaths, not just those associated with products under reference.

Data source: NISU (1998).

The incidence of injury and death attributable to unsafe products

In practice, it is often very difficult to establish the precise cause of accidents involving consumer products. The factors potentially contributing to a product-related accident include: the design, construction, age and condition of the product; the behaviour of the person using the product or those nearby; the task the product is being used for; and the environment in which the product is being used.

Ideally, for the purposes of evaluating Australia's consumer product safety system, it would be desirable to be able to determine the incidence of injury and death directly attributable to unsafe consumer products. However, at present in Australia, death (mortality) and injury (morbidity) data are not collected in such a way that makes it easy to isolate product fault as a cause of injury and death from other contributing factors such as consumer behaviour and environmental influences.

As outlined in detail in appendix C, the Commission has calculated some exploratory estimates of the incidence of injury and death attributable to product fault. In preparing these estimates, the Commission looked at available international evidence and past Australian studies to try and determine the likely proportion of consumer product-related injuries directly attributable to product fault. In the Commission's view, a recent study undertaken by the Department of Trade and Industry (DTI) in the United Kingdom provides the most credible basis for these estimates (see box 4.1).

Importantly, the DTI study found that for almost 75 per cent of accidental deaths in the home, the environment in which the accident occurred (such as slippery surfaces and protruding paving stones) was judged to be the main cause. Almost all the rest were primarily caused by the behaviour of the user (such as using a product while under the influence of alcohol or leaving a product in reach of children). In only 1.6 per cent of cases was product fault considered to be the sole cause of death and most of these were due to the article not having been serviced or maintained correctly rather than a manufacturing fault. A further 1.2 per cent of deaths was attributed to a combination of product fault and behaviour.

In deciding to use the proportions from the DTI study to develop Australian incidence estimates, the Commission took into account that:

- the DTI study had tried to determine the relative contribution of product fault and consumer behaviour as underlying causes of accidents in the home;
- the study was underpinned by a large sample size (collected across a number of years); and
- the findings from the DTI study were consistent with earlier research the DTI had commissioned on the pattern and trends in home accidents (see box 4.2).

Box 4.1 **The UK Department of Trade & Industry study on the causes of accidents in the home**

Work commissioned by the DTI in the United Kingdom used extensive data collected within two data sets (the Home Accident Surveillance System and Home Accident Death Database) to estimate the proportion of home accidents caused by human behaviour, product fault, or a combination of the two.

The study drew on large sample sizes across four years (1990, 1993, 1996 and 1999). In general, the samples were based on all home-based death and injury, not just those associated in some way with a product, although the samples taken from the Office of National Statistics database of consumer's returns were selected on the basis of those codes more likely to include consumer products.

The definition of product fault and behaviour used for the analysis were:

- 'Product fault' — something wrong with the article that may have been involved in the cause of the incident.
- 'Behaviour' — some action by one of the people involved in the incident has, or might have, caused, or contributed to the cause of, the incident.

The key findings of the study were:

- Product fault alone was involved in 1.6 per cent of fatalities, 0.4 per cent of serious injuries and 0.6 per cent of non-serious injuries.
  - In most cases, the product fault was due to the article not having been serviced or maintained correctly rather than to a fault in manufacture.
- A combination of product fault and behaviour was involved in 1.2 per cent of fatalities, 1 per cent of serious injuries and 0.7 per cent of non-serious injuries.
- Behaviour alone was involved in 23.5 per cent of fatalities, 34.1 per cent of serious injuries and 44.1 per cent of non-serious injuries.
  - The main behavioural factors involved in the cause of home accidents are: alcohol; undertaking a hazardous action (eg climbing trees, walls, fences, roofs etc); leaving unsuitable items (eg medicine) in reach of children; smoking-related incidents; working-up ladder/step ladder; and careless action by another person.

Source: DTI (2002).

There are of course limitations inherent in applying the DTI estimates of accident proportions to Australian mortality and morbidity data. There are differences, for example, between the UK and Australia in terms of regulatory regimes. However, there are similarities in income and education levels and in the range of products likely to be consumed in both countries.

Box 4.2 **Some general conclusions from the UK Department of Trade & Industry's research on home accidents**

In 1999, the DTI published a report outlining research it had commissioned on the pattern and trends in home accidents. The purpose of this research was to provide an overview of the incidence of home accidents and to identify the areas where there is the greatest scope for reducing them.

This research reached the following conclusions.

- Most home accidents happen when people are doing ordinary, everyday things such as going up or down stairs, cooking, gardening or when children are playing.
- Accidents usually happen as a result of complex interaction between many factors: social and economic circumstances; immediate personal circumstances (eg alcohol consumption, tiredness), safety awareness and knowledge, as well as the mechanisms of the accident itself. The underlying causes are often difficult to determine. However, human behaviour seems to be the most common immediate cause of home accidents, with faulty products and poor design having an ever decreasing influence. Addressing behavioural factors directly through safety awareness efforts should therefore have a measurable effect on reducing accident rates. Reductions could also be made by addressing the more underlying factors which increase the chance of accidents.
- The study looked at the broad trends in the numbers of home accidents in the UK and estimated the likely number in 2010. It concluded that if present trends continue, home accident deaths would decline, but non-fatal injuries would rise.

Source: DTI (1999).

Notwithstanding the limitations, the Commission considers that applying the DTI accident proportions to recent Australian mortality and morbidity data provides a reasonable way of determining the rough order of magnitude of the problem — in the absence of any better available information.

The Commission's exploratory estimates of the likely magnitude of product-related injury and death in Australia are summarised in table 4.1.

These estimates suggest that between 45 to 65 deaths and 364 to 1027 serious injuries occur each year as a result of product fault alone. However, it is important to remember the DTI study suggests that most of these deaths and serious injuries are likely to be due to products not having been serviced or maintained correctly rather than a manufacturing fault.

Table 4.1 **Exploratory estimates of accidental injury deaths and hospitalisations, based on recent Australian data and DTI (UK) study**

Cause	*Fatalities ABS Deaths Data 2002*	*Serious Injury AIHW Hospital separations due to injury 1999-00 Lower (home only) upper (all places[c]) estimates*
Product clearly involved in the incident		
Product fault alone[a]	45 - 65	364 - 1027
Product fault and behaviour	35 - 50	910 - 2567
Product possibly present but not causally linked to the incident		
Behaviour alone[b]	705 - 775	31 049 - 87 555
Physical environment	2215 - 2410	58 730 - 165 610
Total	3000 - 3300[d]	91 053 (home only) to 256 759 (all places)

[a] The DTI study suggests that most of the fatalities and injuries due to 'product fault alone' were attributable to poor servicing and maintenance rather than a manufacturing fault (2002, p. 4). So, for example, this would suggest an upper bound estimate in 2002 of 32 fatalities directly caused by a manufacturing fault with the remaining fatalities caused by a failure to adequately service or maintain consumer products. [b] Includes incidents involving an interaction with a product but also incorporates accidents in which no product is present. Detailed lists of 'behaviour' and 'neither product fault nor behaviour' cases observed by the DTI (UK) study are shown in appendix C, tables C.8 and C.9. [c] The upper estimates for serious injury presented involve the application of home-based proportions to a broader data set (including many injury events occurring outside the home) and so may be significantly overstated. [d] These fatality totals have been obtained by netting out of the Australian Bureau of Statistics unintentional injury death data a number of mechanism/cause categories which in the Commission's view either do not contain consumer products within them, or are likely to contain products (such as therapeutic goods) or other objects (such as motor vehicles and firearms) that are outside the terms of reference of this study. The process used to estimate these fatality totals is outlined in detail in appendix C.

Source: Productivity Commission estimates.

It is important to note that no exploratory estimates are provided for injury categories other than injuries resulting in admission to a hospital. However, recent estimates (Harrison and Steenkamp 2002) suggest that, for each injury resulting in hospitalised admission, there are likely to be 7 to 10 injuries presenting at an emergency department and a further 18 to 27 attendances at a GP surgery. These totals do not capture injuries treated at home. The total number of lower level injuries is therefore likely to be much larger. In this regard, the Commission notes the ACA's observation that:

> Many minor avoidable injuries caused by consumer products do not result in hospital presentations. Only a small proportion of hospital presentations across Australia resulting from consumer product injuries are reliably logged and used to provide statistics. It's reasonable to assume most minor injuries that may be beyond home

> treatment end up in regular GP surgeries or 'medical centres' which generally provide faster attention than hospital emergency services these days and bulk bill. (sub. 41, pp. 4-5)

Appendix C provides a detailed discussion of the robustness of the Commission's exploratory incidence estimates, including ways in which these figures may both overstate and understate the extent of the problem. On balance, the Commission considers it is likely these figures overstate the incidence of consumer product-related injuries and deaths in Australia, particularly as they apply proportions derived from settings where product-related injury is more prevalent (the home) to some settings where such injuries are likely to be far less prevalent (for example, sports and athletics areas and schools).

However, even ignoring the possibility of some degree of overestimation, the Commission's exploratory estimates suggest that the number of injuries and deaths caused directly by consumer products is small relative to other causes of mortality and morbidity although not insignificant. Further, even where consumer products are in some way involved in accidents, genuine product fault is likely to be a far less significant cause of injury and death than the behaviour of those using the product and the physical context in which the accident occurs.

These results potentially have important implications for public policy making because they imply that, if a reduction in current levels of product-related accidents is to be achieved, key behavioural factors involved will need to be addressed. An important issue for policy-makers is how effective regulatory and other interventions are likely to be in influencing these behavioural factors.

FINDING 4.3

The Commission's exploratory estimates of the incidence of product-related injury and death suggest that the number of injuries and deaths directly caused by product fault is small relative to other causes of mortality and morbidity, though not insignificant. Consumer behaviour and poor product maintenance and servicing are likely to be more significant causes of product-related injury and death. And the most dominant cause of injury appears to be the physical context in which product-related accidents occur.

Are these incidence estimates consistent with Australia's consumer product safety system delivering a 'reasonable' level of safety?

The Commission acknowledges that, given the limited data available in this area, its exploratory incidence estimates are at best indicative of the likely order of magnitude of the problem. In a joint submission, the Australian Electrical and

Electronic Manufacturers' Association (AEEMA) and the Consumer Electronics Suppliers Association (CESA) observed that:

> The preliminary finding, "Overall, Australia's consumer product safety system appears to ensure a reasonable level of product safety" is plausible and may be correct. However, the finding is speculative because insufficient Australian consumer product safety data is available to prove its validity. (sub. DR 44, p. 2)

However, even if better incidence data were available in relation to consumer product-related injury and death, it is unlikely there would be a consensus on how well Australia's consumer product safety system is working. This simply reflects that there is a wide range of views in the community about what constitutes a 'reasonable' outcome in this area. For example, in response to the Discussion Draft, some participants questioned the Commission's findings:

> … the current product safety system is not "generating reasonable safety outcomes" in many areas and in particular is failing to adequately protect more vulnerable consumers, notably children. It is in need of a series of reforms. (ACA, sub. DR 51, p. 8)

> Kidsafe NSW also disputes the Commission's assertion that Australia does have a "… reasonable level of product safety", especially in relation to products for use with young children. We believe that improvements to the system need to be made especially in the areas of product testing, research and injury monitoring and that a more rigorous and consistent application of Standards be applied nationally. (Kidsafe NSW, sub. DR 57, p. 4)

The Commission remains of the view that Australia's consumer product safety system is delivering a reasonable level of product safety. The Commission received no feedback from participants indicating that it's exploratory incidence estimates were significantly understating the magnitude of the problem. Those participants who disputed the Commission's assessment of this issue focused largely on particular examples of problem products (such as baby bath seats and baby walkers). The Commission would not dispute that there are examples of consumers being injured as a result of their interaction with particular consumer products and that these accidents have serious and even tragic consequences for those involved and their families. However, the key issue is whether *overall*, the incidence of consumer product-related injury and death constitutes a reasonable outcome, recognising the impossibility of completely eliminating product-related injury.

Estimating cost

Ideally, the Commission would also have liked to be able to estimate the *total* cost to the community of injuries and deaths caused by unsafe consumer products (including both direct and indirect costs). However, data limitations and

methodological problems mean that it is only possible to provide partial cost estimates, which do not purport to fully capture the total economic and social cost of product-related mortality and morbidity.

In appendix C, the Commission has outlined the key methodological and data issues researchers are likely to face when attempting to estimate the cost of product-related injury; and has provided an overview of relevant overseas and Australian studies in this area.

Further, the Commission used its exploratory incidence estimates as a basis for calculating:

- Some of the major categories of direct costs associated with product-related deaths and serious injury (including emergency department and hospital inpatient costs; GP and specialist costs; ambulance costs; and coronial costs).
  - As a rough order of magnitude past studies suggest that the cost categories the Commission has been able to estimate are likely to account for around 80 per cent of total direct costs.
- The indirect costs of mortality include the value of lost output and the personal costs involved (such as pain and suffering).
- Due to the limited data available and methodological problems inherent in estimating indirect costs of this nature, the Commission did not attempt to estimate the indirect costs of morbidity.

The Commission's exploratory cost estimates suggest direct costs associated with product-related deaths and serious (hospital admitted) injuries of between $6-19 million annually; and indirect mortality costs of between $120–290 million annually. The Commission was unable to estimate the indirect costs of all product-related injury. Further, given the nature and extent of the problems of estimating the costs associated with product-related injury and death the Commission cautions readers against putting too much weight on these figures.

That said, these estimates suggest the likely magnitude of the cost to the community of product-related deaths and injuries is in the order of hundreds of millions of dollars annually. Of course, this says very little about the *net* benefits to the community which may accrue from proposals which aim to reduce the incidence of product-related injury and death.

FINDING 4.4

The total cost to the community of consumer product-related injury and death is likely to be in the order of hundreds of millions of dollars annually.

4.3 There is significant scope to improve the regulation of consumer product safety

The primary focus of this study is considering ways in which the regulation of consumer product safety in Australia could be improved. Arguably, the most fundamental change MCCA asked the Commission to consider was the introduction of a General Safety Provision (GSP) (see chapter 5). However, irrespective of whether a GSP is introduced, the Commission considers that there are a number of ways governments could make the regulation of consumer product safety more efficient, effective and responsive.

Addressing some significant information gaps

One of the most striking features of this area of public policy is the paucity of good quality data and analysis to inform policy-making and regulatory efforts. This makes it difficult to determine how well the current consumer product safety system is working; evaluate the effectiveness of policy interventions; and develop and assess options for reform.

In responding to the MCCA Discussion Paper, the Monash University Accident Research Centre (MUARC) noted that the National Injury Prevention Advisory Council (NIPAC) has identified several areas of significant research need in relation to consumer product safety:

> The greatest research gap, identified by NIPAC, is the absence of suitable national population-based data to identify emerging trends, assess how effective interventions have been and thus determine cost-effective intervention strategies.
>
> Other gaps identified include:
>
> - the absence of exposure studies, to determine appropriate relative risks, benefit/cost analyses and targeting of interventions, has hampered decisions on actions to take with many products of concern;
> - poor resourcing of biomechanical research which investigates the circumstances leading to injuries in relation to the forces involved and possible design faults; and
> - the lack of an Australian cost model for product-related injury to facilitate the estimation of the burden of product-related injury and credible modelling of the costs/benefits associated with particular interventions. (sub. MCCA16, pp. 2-3)

More generally, many participants considered that addressing the problem of poor quality data is crucial to improving the quality and effectiveness of government regulation and information provision. For example, the CCAAC commented that:

> CCAAC strongly supports more research in this area, so that governments, businesses and consumers have a much clearer picture of the impacts and costs of product safety.

> This would assist regulation to be more cost-effective, and would allow warnings and regulatory efforts to be directed towards areas of highest risk. (sub. MCCA10, pp. 2-3)

Similarly, in response to the Discussion Draft, the Victorian Government observed that:

> The need for better quality data on the incidence and cost of product related injuries is recognised and supported by the Victorian Government. It is understood that improvements in data will support evidence based policy and program development in the area of product safety and assist in developing better estimates of the costs and incidence of product related injury. This will support a more efficient allocation of resources to product safety activity. (sub. DR60, p. 22)

The Commission concurs that better quality data and analysis in this area would support a stronger evidence-based approach to policy development and regulation. In this regard, the immediate priorities appear to be:

- Determining with more precision the incidence and cost of product-related injury and death in Australia in order to provide a common understanding of the nature and magnitude of the problem.
- Examining more closely the incidence of product-related injuries that are not due to faulty products but rather to the interaction between consumers, consumer products and the environment in which these products are used. The objective would be to get a better understanding of the relative contribution of product design, consumer behaviour and environmental factors. The analysis should include consideration of the influence of broader issues (such as alcohol consumption and income distribution) on behaviour and product-safety outcomes.

Such information would assist policy-makers and regulators allocate their resources more efficiently, with a view to maximising the net benefit to the community from government intervention in this area.

These issues are discussed in more detail in chapter 9.

Improving the responsiveness of government regulation

A common criticism of the current regulatory regime is that regulators are usually one or more steps behind the latest developments in consumer product markets. To a large extent, the system relies on regulators being able to identify, assess and respond to unsafe products. Although there are some mechanisms in place to detect unsafe products before an accident occurs, many participants argued that in practice the regulatory system is not as proactive as it should be in preventing injury and death. In that regard, the MUARC argued there is a need for:

> … a proactive system, with a greater emphasis on prevention, to deal more swiftly with emerging product safety problems. Though, it should be noted that the bulk of the current product safety problem lies with existing products. (sub. MCCA16, p. 1)

Similarly, the ACA has observed that:

> Dangerous trends go un-noticed until an undeniable amount of evidence has accumulated — enough evidence to precipitate some sort of action. Sometimes it takes a death. Sometimes several deaths. But that's not preventive, its reactive. The trick is detecting that trend as early as possible. (1998, p. 15)

Other participants were concerned that even once an unsafe product has been identified, regulators are slow to respond. For example, the Australian Capital Territory Office of Fair Trading argued that:

> A major problem with the current system is that it is too slow to react to potential problems when dangerous products are found in the marketplace. This is because the current system relies on Government regulatory bodies to take action when a dangerous product is found or identified by consumers and brought to the attention of the regulators. The efficiency of this system is faltered by several problems including; the varying legislation responsibilities of each jurisdiction, the lack of resources dedicated to product safety compliance and political differences that dictate budgets, priorities and resource allocation within the jurisdictions. (sub. MCCA31, p. 1)

However, regulators face some significant challenges in trying to proactively identify and respond to product-related hazards. The most obvious challenges are the sheer volume of consumer products available on the market and the speed with which new products can enter the market.

Further, problems with unsafe products in Australia sometimes involve firms operating at the cheaper end of the consumer product market. Such firms may seek to exploit a short-term market opportunity by importing a cheaper version of a product that has been available on the Australian market for a number of years. Until the cheaper and unsafe version of the product has caused injury or death there may be no information indicating there is a problem with this particular type of product. For example, the Infant & Nursery Products Association of Australia (INPAA) noted that:

> … increasingly we are moving towards a borderless marketplace with greater market complexity. This problem is particularly prevalent in the nursery products industry as most products are imported. Any person with the resources is able to import product and the products are well and truly in the marketplace or in consumers hands before any effective regulatory action is possible to prevent unsafe product. Although "fly by night" operators are becoming less frequent, these recalcitrant suppliers can come and go quickly. Existing regulatory framework has a limited ability to address this fundamental change. (sub. MCCA14, pp. 2-3)

Notwithstanding these challenges, for the current regulatory regime to be effective in protecting consumers from serious product-related hazards, it is essential that regulators are able identify and respond to such hazards in a timely manner. There is scope to improve the responsiveness of the current regulatory regime by:

- Making better use of existing information and data sources (see chapter 9).
- Focusing available resources more strongly on identifying the most serious product-related hazards, and assessing and managing the associated risks (see the discussion below).
- Addressing fragmented policy making, administration and enforcement (see the discussion below).
- Ensuring that regulators are adequately resourced (see the discussion below).

A stronger focus on hazard identification, risk assessment and risk management

Ultimately, the community is best served by regulators adopting a rigorous and 'evidence-based' approach to identifying consumer product-related hazards and managing the associated risks. Such an approach ensures that in terms of setting priorities and allocating resources, the focus of government intervention is on those product-related hazards that have the highest potential cost to the community in terms of injury and death. While this already occurs to some extent, the Commission was told there is still a tendency for regulators to focus their efforts on dealing with the latest 'problem product' as reported in the media. To the extent this occurs, there is a risk regulators may not be making the best use of their available resources.

As outlined in chapter 2, the preparation of Regulation Impact Statements (RISs) for new regulatory proposals (such as mandating minimum safety requirements through standards) can provide a useful discipline on regulators to adopt an evidence-based approach to hazard identification, risk assessment and risk management. In particular, a good quality RIS requires regulators to have: clearly demonstrated the need for government intervention; identified a range of feasible options for dealing with the problem (including non-regulatory options); analysed how these options are likely to impact on different groups in the community; and carefully weighed up the costs and benefits of each option in arriving at a preferred approach.

In responding to the Discussion Draft, both the Victorian and Queensland Governments supported the need for a stronger focus on achieving a genuinely evidence-based approach to hazard identification, and risk analysis and

management. For example, the Queensland Government considered that consumer product safety regulations should be based on sound risk management practices:

> As a minimum all mandatory standards and permanent bans should be subject to a Regulatory Impact Statement (RIS). Consideration should also be given to principles established by National Competition Policy, public benefit tests and other risk, management tools such as the precautionary principle.
>
> Further, the RIS's must be consistent across jurisdictions in terms of the rigour used in their development. The guidelines laid down and agreed to by COAG in relation to regulations and standards making should be followed closely. The advantage to this concept is that given the relative homogeneity of the Australian marketplace a RIS undertaken in one jurisdiction could then be used as a justification document throughout the country thus avoiding unnecessary duplication. It is highly likely that industry and consumers would support action based on a transparent risk assessment. It could also speed up the decision making process for when a safety intervention is required. (sub. DR59, p. 7)

At the national level, the ACCC emphasised that it does use risk analysis to help focus resources on key product-related hazards. Further, in relation to the preparation of RISs, the ACCC observed that:

> A rigorous regulation impact statement and consultative process is required in respect of mandatory standards proposed under the Trade Practices Act. Costs and benefits are addressed in respect of options for addressing the identified hazard. A preliminary risk analysis is conducted prior to commencing a RIS process. Most mandatory standards are driven by the actual occurrence of avoidable deaths and/or serious injuries. (sub. DR56, p. 2)

While regulators generally do attempt to focus their efforts on those product-related hazards that pose the most significant risks to consumers, there is room for improvement. For example, although RISs are prepared by the ACCC for all mandatory standards, it appears that not all the States and Territories prepare RISs as part of their standards-making process. The Commission also understands that the ACCC and jurisdictions generally do not prepare RISs when deciding to implement product bans. Moreover, the Commission was told that the quality of the analysis underpinning RISs in the area of consumer product safety remains variable.

Improving the standards-making process

Standards are a published document which sets out specifications and procedures designed to ensure that a material, product, method or service is fit for its purpose and consistently performs the way it was intended. As such, compliance with standards provides an important way of reassuring consumers that the products they purchase are safe and reliable.

In Australia, standards are usually developed with the assistance of Standards Australia which is recognised by the Australian Government as the peak non-government standards organisation. A wide range of participants to this study raised concerns about how well the standards-making process is working and considered that this is an area where there is the potential for worthwhile reform. Many of these concerns are of a long-standing nature and have come to the Commission's attention in other contexts — most recently in relation to the reform of building regulation (see PC 2004b).

The process Standards Australia follows in developing new product standards has a number of important features, including that: standards are developed by technical committees which seek to bring together a wide range of interests (including, designers, manufacturers, safety regulators, testers, technical experts and consumers); participation on these committees is voluntary and unpaid; and a consensus voting model means standards are likely to reflect a compromise between the different interests represented on the committees.

The key issues participants raised in relation to the standards-making process were:

- standards take too long to develop;
- stakeholder participation (particularly by technical experts) is in decline;
- standards are not always being reviewed in a timely manner and consequently fall behind the latest developments in consumer product markets;
- the standards-making process is not adequately resourced; and
- standards are not always consistent with relevant international standards.

However, it is important to note that the Commission received no feedback from participants to indicate that standards produced in Australia are not of good quality in terms of their technical content.

The Commission considers that improving the standards-making process in the area of consumer product safety should be a priority going forward and this is discussed in more detail in chapter 12.

Addressing fragmented policy-making, administration and enforcement

As outlined in chapter 3, responsibility for Australia's consumer product safety system is shared between the Australian and State and Territory Governments. Although individual jurisdictions have largely the same policy objectives in relation to consumer product safety, each administers and enforces its own regulatory

regime. Many participants argued that regulatory fragmentation and unnecessary duplication of effort, imposes a significant compliance burden on business and is inefficient in terms of making the best use of government resources in this area.

A detailed analysis of the key differences between the regulatory regimes of the individual jurisdictions is provided in appendix B. This analysis suggests that there are inconsistencies in the:

- coverage and scope of the regulatory regimes (eg on whether or not services are covered);
- administration and application of the rules (eg some jurisdictions ban goods that others do not); and
- enforcement of the rules (eg some jurisdictions offer more avenues for appeal then others).

Differences between jurisdictions in the coverage and scope of their regulatory regimes appear to be relatively minor. However, for businesses operating in more than one jurisdiction even relatively small differences can impose a compliance burden. This is because businesses must still incur the cost of working out the extent of any differences and putting in place the systems needed to deal with multiple regulators.

The Commission's analysis suggests that the more significant differences relate to the administration, application and enforcement of the rules. For example, although jurisdictions have similar criteria for the imposition of bans, mandatory product standards and recalls, there are marked variations in the application of these measures.

- Of the 111 bans currently in place across Australia, over 80 per cent apply in only two jurisdictions; and only ten per cent apply in four or more jurisdictions.
- 35 per cent of mandatory standards apply in only one jurisdiction, while nearly 50 per cent apply in four or more jurisdictions.
- There are differences between jurisdictions in the mandatory standards applied to the *same* product.

There was strong agreement across a wide range of participants that the degree of regulatory fragmentation in relation to consumer product safety is inefficient and costly (see box 4.3).

Some participants were also concerned that current institutional arrangements do not appear adequate to achieve greater uniformity in this area. For example, INPAA commented that:

> Attempts to bring regulators together through the Consumer Products Advisory Committee (CPAC), produce few outcomes for industry and consumers. As stated in the [Discussion] paper, the main role of this group is to promote "a more consistent, strategic response to consumer product issues". From the nursery industry perspective this objective is not being achieved. A priority for a revised product safety system should be to make this structure more effective. (sub. MCCA14, p. 2)

In the Commission's view the degree of regulatory fragmentation and duplication of effort in relation to consumer product safety imposes an unnecessary compliance burden on business, delivers little benefit to the community in terms of improved product safety and potentially undermines the efficient operation of competitive national product markets.

The Commission notes that these problems should, in principle, have been mitigated to a large extent by the mutual recognition arrangements. Mutual recognition is one of a number of mechanisms governments use to reduce regulatory impediments to the mobility of goods and services across jurisdictions. The mutual recognition arrangements allow for goods that can be supplied in their home jurisdiction to be supplied in all the other jurisdictions, whether or not they are banned or subject to a product safety standard in another jurisdiction (except for up to 12 to 24 months if a temporary exemption applies). However, in practice businesses have not used mutual recognition to circumvent inconsistent bans and standards, consequently placing little pressure on governments to harmonise these inconsistencies.

The need for a much stronger national approach and greater regulatory harmonisation in the area of consumer product safety and possible models for achieving this objective are discussed in chapter 13.

Ensuring the regulation of consumer product safety is adequately resourced

In Australia the regulation of consumer product safety is relatively modestly resourced. As part of this study, the Commission asked each jurisdiction to provide an estimate of how much it is currently spending in this area. Based on this information, the Commission estimates around $5 million is spent annually on directly regulating the safety of the consumer products under reference.

Box 4.3 **A selection of participants' views on regulatory fragmentation**

Australian Chamber of Commerce & Industry (ACCI):

> ACCI supports, in principle, the minimisation of overlaps, duplication and conflicts between legislation and regulations in differing jurisdictions that govern product safety and enforcement. Harmonisation of legislation and regulations presents an opportunity for a more cost efficient system for government and business. (sub. MCCA3, p. 7)

The Australian Retailers Association considered a major problem confronting Australia's consumer product safety system was:

> The fragmented regulatory environment with jurisdictions that act independently and often inconsistently. (sub. MCCA7, p. 2)

Coles Myer Ltd:

> As a business that operates across all State & Territory jurisdictions, Coles Myer Ltd is frustrated and concerned about the inconsistencies in product safety standards, administration and enforcement of regulations, that currently occurs. A safety framework that eliminates the inefficiencies associated with having to cater for the jurisdictional differences would be welcomed. (sub. MCCA9, p. 5)

Consumers' Federation of Australia:

> The current safety regime is a mixture of mandatory and voluntary standards and different laws, administered by a range of regulators. There is universal agreement that this approach is not working. (sub. MCCA11, p. 1)

Infant & Nursery Products Association of Australia:

> The current product safety framework is not efficient. It is a fragmented mess of federal, state and local regulations. Little incentive exists for collaborative decision making which results in unnecessary confusion for suppliers of products and services. (sub. MCCA14, p. 1)

National Product Liability Association:

> With powers vesting in the Commonwealth, State and Territories, product safety requirements (whether information or design based) can differ from jurisdiction to jurisdiction. Identifying and understanding the differing requirements imposes an additional and unnecessary compliance burden on businesses and does not ensure greater product safety for consumers — to the contrary, it creates a tendency for confusion and seeking out the "lowest common denominator." (sub. MCCA19, p. 11)

Queensland Health:

> Queensland Health considers that the fragmentation of product safety regulation amongst the different jurisdictions, accompanied by a lack of uniformity in product safety legislation and its administration are major issues impacting on the Australian consumer product safety system. (sub. MCCA30, p. 2)

Australian Competition & Consumer Commission (ACCC):

> The ACCC agrees that achieving a more efficient government framework for the administration of consumer safety must be a primary objective of this review. The current system has two layers of government that leads to duplication in policy, legislation and administration. Any new product safety policies in addition to those currently in place would need to find greater efficiency, reducing the inconsistent obligations on suppliers. (sub. MCCA4, p. 7)

The Commission notes that some participants were concerned regulators are not adequately resourced to effectively administer, enforce and monitor existing regulations. For example, the ACA argued that:

> It is vital that sufficient resources are provided for the administration, monitoring and enforcement of product safety regulations. At present consumer product safety is the "poor cousin" of other parts of the regulatory regime for competition and consumer protection – while the MCCA paper cannot make this point it is widely understood. (sub. MCCA5, p. 4)

However, it is beyond the scope of this study to determine whether governments should be spending more on consumer product safety. That said, the Commission notes that:

- Governments are clearly spending far less than the likely cost to the community associated with consumer product-related accidents.
- However, current spending in this area is not necessarily inconsistent with the intended role of the regulatory regime, which is primarily configured to provide a general 'safety net' in the event unsafe products reach the market. In this regard, there is only a relatively small number of consumer products that regulators have determined require some form of direct regulatory intervention (in the form of recalls, bans and mandatory safety requirements).
- While it is true that product-related injury and death imposes a significant cost on the community this does not necessarily justify more being spent in this area. In determining whether more resources are needed in a particular area, the key issues are whether additional resources would result in a net benefit to the community and how this compares with other possible uses of those resources. As Currie et al. (2000, p. 176) state, a consideration of net benefits:

  > … requires marginal analysis, that is, comparing the expected changes in benefits and resource use for a given intervention, compared with other interventions … Again, in this context, the total cost of injury does not matter, it is the costs and benefits 'at the margin' that is the key issue in determining the efficient use of available resources.

- There does not appear to be any evidence that there is a significant problem of non-compliance with government regulation in this area as a result of regulators being inadequately resourced. In the Discussion Draft, the Commission noted that recent product safety test results published by *Choice* magazine found that five out of ten household cots failed the safety test, with a further two cots receiving only a marginal pass (ACA, sub. 41 p. 6). However, in response, the ACCC argued that:

  > The statement … that 5 out of 10 cots failed the mandatory standard (as reported by *Choice* magazine) is evidence of enforcement problems is, in our view, not substantiated. The breaches found by ACA in its testing related to hazards that were minor in terms of both injury and likelihood of occurrence (as assessed through

> technical knowledge of the standard, supported by detailed injury data and absence of complaints). ACCC and its state counterparts have found compliance with the cot standard to be very high. Instead of these results being evidence of poor resource targeting, they should be seen as effective risk management. (sub. DR56, p. 5)

If governments accept the recommendations the Commission has made in this report to improve the regulation of consumer product safety, it is likely that some additional resources would be required.

Clarifying boundaries and areas of responsibility

As outlined in chapter 1, the general consumer product safety system under reference is but one part of consumer protection policy and administration in Australia. In addition to the general consumer product safety system there are specific safety regimes covering products such as medicines and other therapeutic devices; food products and alcohol; road transport vehicles; buildings; pesticides and veterinary medicines; electrical consumer products and tobacco. For the overall consumer protection system to work well it is important that the boundaries between the specific safety regimes and the general consumer product safety system are as clear as possible and responsibility for monitoring the safety of consumer products is unambiguous.

In a joint submission, AEEMA and CESA raised concerns about overlaps between the general consumer product safety system and the specific safety regime covering electrical consumer products.

> There are overlaps between the provisions of the general consumer product safety system and the specialised system for electrical products and some degree of integration is required for effective and efficient operation of the system as a whole. Two particular overlaps are:
>
> - Recalls where the TPA powers exercised by the ACCC overlap recall powers under electrical safety acts exercised by State and Territory regulatory authorities.
> - Any injury databases used within the consumer product safety system would include data on electrical products and should be used for early warning, risk analysis and surveillance in the specialised system for electrical products as well as the general consumer product system. (sub. DR44, p. 2)

The Commission considers that MCCA could usefully examine the delineation between the general consumer product safety system and the specific safety regimes with a view to identifying whether, in practice, there are any areas of overlap which need to be addressed. It is also important that there are mechanisms in place to share relevant information across the various consumer product safety regimes.

FINDING 4.5

Irrespective of whether a general safety provision is introduced, there are a number of ways governments could make the regulation of consumer product safety more efficient, effective and responsive. In this regard, the priorities are:

- *addressing fragmented policy making, administration and enforcement through a much stronger national approach;*
- *addressing significant data and information gaps;*
- *improving the responsiveness of government regulation to existing and emerging product-related hazards;*
- *focusing more strongly on hazard identification, risk assessment and risk management;*
- *improving the standards-making process;*
- *ensuring the regulation of consumer product safety is adequately resourced; and*
- *clarifying boundaries and areas of responsibility between the general consumer product safety system and the specific safety regimes.*

4.4 The broader impacts of the consumer product safety system

The terms of reference for this study ask the Commission to consider the broader impacts of the consumer product safety system on competition, international trade and economic integration between Australia and New Zealand.

Competition

In its recent report on National Competition Policy reforms, the Commission noted there has been increasing recognition that competitive markets will generally serve the interests of consumers and the wider community, by providing strong incentives for suppliers to operate efficiently and be price competitive and innovative (PC 2005, p. xiv).

The consumer product safety system provides a framework that seeks to ensure businesses compete on the basis of supplying consumer products which at least satisfy some minimum level of safety. Of course, there is always a risk that some unscrupulous businesses will seek to obtain a short-term competitive advantage by supplying a cheaper but unsafe version of a product. Though seeking to eliminate

this risk would not be realistic or cost-effective, in the Commission's view, the current regulatory and legal framework substantially reduces it.

However, concerns raised by participants suggest that some aspects of the current consumer product safety system may weaken competition. For example, as noted earlier, the extent of inconsistencies between jurisdictions in the administration, application and enforcement of the current rules is likely to inhibit the efficient operation of competitive national consumer product markets. In addition, some participants felt that the rules are not being adequately enforced and that therefore the system is failing to deliver a level playing field.

International trade

Mandatory product safety standards can vary from country to country and in that way become barriers to trade. The Technical Barriers to Trade Agreement (TBTA) negotiated by the World Trade Organization (WTO) tries to ensure that regulations, standards, testing and certification procedures do not create unnecessary barriers to trade.

Under the terms of the TBTA, countries are able to adopt the standards they consider appropriate — for example, for human, animal or plant life or health, for the protection of the environment or to meet other consumer interests. Moreover, members are not prevented from taking measures necessary to ensure their standards are met. However, in order to prevent too much diversity, the agreement encourages countries to use international standards where these are appropriate, but it does not require them to change their levels of protection.

The TBTA sets out a code of good practice for the preparation, adoption and application of standards by central government bodies. In line with Australia's obligations under the code of practice, the memorandum of understanding between the Australian Government and Standards Australia requires that: no Australian standard will contravene the WTO's requirements that national standards should not be used as non-tariff barriers to free trade; and no new Australian standard will be developed where an acceptable international standard already exists.

Economic integration between Australia and New Zealand

Since the early 1980s, the Australian and New Zealand Governments have been pursuing closer economic integration. More recently, the two governments have articulated a long-term goal of achieving a single economic market and they regard deeper coordination of the regulatory environments for business as an essential element in achieving this goal. Measures such as the Australia New Zealand Closer

Economic Relations Trade Agreement (ANZCERTA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) are two important elements of the framework for removing obstacles to trade in goods.

Differences between the consumer product safety regulatory regimes of Australia and New Zealand could potentially have a distortionary impact on Australasian economy activity. A description of the New Zealand consumer product safety system is provided in box 4.4. The major differences between the Australian and New Zealand regimes are:

- In Australia there are 28 mandatory product safety and information standards under the TPA (and a further 29 products are subject to a mandatory standard in some States and Territories) compared with only six in New Zealand. There are equivalent Australian standards under the TPA regulations for each of the New Zealand product standards.
- Rather than a product liability system, New Zealand has a comprehensive accident compensation scheme that compensates consumers for loss caused by unsafe products. As a consequence, consumers in New Zealand do not have the right to sue, other than for exemplary damages.
- In New Zealand, the product safety provisions of the *Fair Trading Act 1986* are supplemented by the *Consumer Guarantee Act 1993* which, under the requirements that goods be of 'acceptable quality', requires that the goods must be safe. In Australia, the TPA does not contain a similar provision although there are provisions dealing with merchantable quality (see chapter 3).

However, in a recent assessment of the Australian and New Zealand competition and consumer protection regimes, the Commission found that generally the differences between the regimes of the two countries were unlikely to have a significant distortionary impact on Australasian economic activity. This is because in practice, the operation of these regimes are sufficiently similar (PC 2004c).

Moreover, the significance of any differences should be mitigated by the TTMRA. The essence of the TTMRA is that goods produced in or imported into a participating jurisdiction that may be lawfully sold in that jurisdiction may also be lawfully sold in the other participating jurisdictions. In respect of the sale of goods, the TTMRA relates to both standards covering characteristics (such as quality, size, strength, composition and technical performance) and conformance assessment (ie testing to ensure that products conform or comply with standards).

Box 4.4 **New Zealand's consumer product safety system**

Consumer product safety is regulated in New Zealand under the provisions of two main pieces of legislation: the *Fair Trading Act (FTA) 1986*; and the *Consumer Guarantees Act (CGA) 1993*. This legislation is administered by the Ministry of Consumer Affairs and the FTA is enforced by the Commerce Commission.

The FTA gives the government the power to: make consumer information and product safety standards; prohibit the supply of unsafe goods; and require that a supplier recall a product.

Consumer information standards can be made by the Governor General (on the recommendation of the Minister of Consumer Affairs) and may require the supplier to disclose certain information about goods placed on the market. The standard may also set out the form or manner in which information is to be disclosed to consumers. In making an information standard the Minister must consult with, and consider comments from, all parties that will be substantially affected by the standard. Currently four consumer information standards exist covering: care labelling of clothes; country of origin labelling of clothing and footwear; fibre content labelling; and the provision of a Supplier Information Notice in regard to used motor vehicles sold in trade.

Product safety standards can be made by the Governor General (on the recommendation of the Minister of Consumer Affairs) and can require: a product to meet certain performance requirements; the testing of a product during or after manufacture; and/or the product to be marked with, or accompanied by, certain warnings or instructions. The Minister can recommend mandating a pre-existing national standard or certain parts of a pre-existing standard can vary or amend the standard as is necessary, or devise a new standard. Again the Minister must consult affected parties before recommending a standard. There are currently six product safety standards covering: baby walkers; children's nightwear; children's toys; cigarette lighters; household cots; and pedal bicycles.

The Minister for Consumer Affairs may temporarily or permanently **prohibit the supply of 'unsafe goods'**. The minister can deem a good to be unsafe when it 'may or will cause injury to any person'. Initially goods can be banned for a period of 18 months after which, if a safety standard has not been prescribed, the Notice can be extended to a permanent ban.

The Minister may also require the supplier to **recall** a product that: has been banned; does not comply with a product safety standard; or 'will or may cause injury to any person'. The Minister can dictate the form of the recall — they may require the good to be refunded, replaced or repaired or require that information about the good be disclosed to the public.

The Commerce Commission is the key agency responsible for enforcing the FTA and ensuring the safety of consumer products that are specified in FTA regulations, bans or recalls. As such the Commerce Commission carries out market monitoring activities and receives and investigates complaints about products that appear to breach the

(Continued next page)

Box 4.4 **(continued)**

FTA (i.e. do not meet mandatory standards or are banned). The Commission is also responsible for prosecuting suppliers who breach the FTA. The maximum penalties for breaching the FTA are fines of up to $60 000 per offence for an individual and $200 000 per offence for a company.

The Ministry of Consumer Affairs also plays an active role in the New Zealand consumer product safety system. It advises the Minister about the use of the product safety provisions of the FTA and provides information to consumers and business about the laws and regulations (including standards and bans) that govern product safety as well as information leaflets about several dangerous products such as baby walkers, cots, pedal bicycles and wheat bags. In addition, the Ministry advises business about product recalls, provides a guide to recalling unsafe products, and requests that suppliers report voluntary recalls to the Ministry. The Ministry also collects and investigates consumer complaints about potentially dangerous products through an online incident reporting form (see chapter 9).

In addition to the FTA, the New Zealand CGA gives a number of rights to consumers expressed as guarantees that a supplier automatically makes to consumers. Such guarantees include that the good will be of 'acceptable quality' and that it will be fit for purpose. One aspect of 'acceptable quality' requires the good to be 'safe'. The CGA is enforced by private right of action against the supplier, that is consumers (not the government) can seek redress from a supplier when they sell a product that fails to meet the CGA. Such redress can include compensation for consequential loss. As such, manufacturers may have to recompense the consumer for any (property) damage caused by an 'unsafe' product. Nevertheless, this requirement does not extend to personal damage (ie injury).

Unlike Australia, New Zealand does not have specific product liability laws. In fact, consumers do not have the right to sue (other than for exemplary damages) for personal injury caused by faulty or unsafe products. Rather, New Zealand has a no fault accident compensation scheme that pays direct medical costs resulting from an injury as well as compensating for loss of income. The accident compensation scheme is administered by an Accident Compensation Corporation (ACC) which receives appropriations from government and collects levies from employers, 'earners' and motorists to fund accident compensation claims. In addition to processing claims and compensating victims, the ACC undertakes activities aimed at reducing the number of injuries, including consumer awareness and education campaigns and employer education activities.

The TTMRA provides for a temporary exemption mechanism giving participating jurisdictions the right to unilaterally stop the sale of goods in their jurisdiction for health, safety or environmental reasons for a period of up to 12 months. In addition, the TTMRA provides for Special Exemptions from the scheme where regulatory differences could not be addressed prior to the Arrangement coming into force. Co-operation Programmes have been established in these sectors with regulatory

authorities from both sides of the Tasman considering how best to overcome existing regulatory differences.[2]

The Commission notes the concern of some participants that possible changes to the Australian consumer product safety system may impact upon the obligations, risk or liability of New Zealand suppliers. More generally, these participants considered that any changes to Australia's consumer product safety system need to be consistent with Australia's obligations under ANZCERTA and the TTMRA (see for example, Employers and Manufacturers' Association Northern Inc, sub. 40).

Further, in response to the Discussion Draft, the ACA signalled its support for increased harmonisation between Australia and New Zealand in the area of consumer product safety but was concerned this could result in less protection for Australian consumers:

> ACA supports the use of international standards and particularly would like to urge the adoption of harmonised standards between New Zealand and Australia. Since Australia has 28 mandatory standards while New Zealand has only 6, without harmonisation, Australian consumers may be exposed to products this government has deemed unsafe. However, harmonisation must result in arriving at the safest and most protective standard, and not harmonising down to a less protective regulation than what is in force in Australia currently. In certain cases, local standards are necessary because of local circumstances and these must be taken into account. (sub. DR51, p. 9)

However, the temporary exemption mechanism under the TTMRA should ensure that Australia can take action to resolve any differences where there are safety concerns about New Zealand consumer products. Moreover, the Commission was told that in practice, Australian retailers often insist upon New Zealand suppliers complying with Australian standards.

FINDING 4.6

Differences between the Australian and New Zealand consumer product safety regimes are unlikely to have a significant distortionary impact on Australasian economic activity. In practice the operation of these regimes is sufficiently similar and the significance of any differences should be mitigated by the Trans-Tasman Mutual Recognition Arrangement.

[2] In its recent report to COAG and the New Zealand Government evaluating the Productivity Commission's review of mutual recognition schemes (2003b), the Cross-Jurisdictional Review Forum recommended that the single remaining special exemption under the consumer products safety standards cooperation program be transferred to the road vehicles cooperation program (Cross-Jurisdictional Review Forum 2004, p. 11).

4.5 Summing up

In the Commission's view, the incentives and constraints operating through competitive consumer product markets, the product liability arrangements, media scrutiny of unsafe products and organised consumer advocacy appear sufficient in most cases to encourage businesses to supply a reasonable level of product safety.

This is not to deny that some consumers continue to be injured as a result of their interaction with consumer products and that sometimes these accidents have serious and even tragic consequences for the individuals concerned and their families. However, the Commission's exploratory estimates of the incidence of product-related injury suggest that the number of injuries and deaths directly caused by consumer products is small relative to other causes of mortality and morbidity although not insignificant. Further, it is not clear to the Commission that the regulation of consumer product safety is necessarily the best way of reaching the underlying causes of many product-related accidents (particularly those linked to consumer behaviour).

The current regulatory regime plays a necessary and important role in providing a general 'safety net' in the event that unsafe products reach the market. Nevertheless there are weaknesses and inefficiencies that should be addressed.

5 General safety provision

Key points

- The nature and magnitude of possible impacts of a GSP would depend critically on how it is designed and implemented.
- While a GSP would deliver some benefits, these are not likely to be substantial, given that: in the main the current system seems to be generating reasonable safety outcomes; and much of the current system would remain. Moreover, the GSP may fail to address the areas of biggest risk, namely the manner and physical context in which products are used by consumers; and recalcitrant traders.
- At the same time, there will be transition and ongoing costs. On balance, the Commission considers that the benefits would be unlikely to justify these costs.
- Future consideration of a GSP would be best undertaken in the context of a broader examination of the overall product safety regulatory framework, rather than just one aspect under reference.
- Two alternative measures that target specific problems identified with the current system, merit further consideration:
  - providing regulators with the power to impose financial penalties, *once the threshold trigger for a mandatory product ban has been satisfied* and the ban implemented; and
  - a requirement that importers of consumer goods (commercial imports for resale) certify that their goods meet any applicable Australian mandatory safety standards.

5.1 Introduction

Option 1 in the terms of reference is the introduction of a General Safety Provision (GSP). As outlined in the MCCA Discussion Paper, this would involve the creation of an explicit legal obligation for businesses to market only 'safe' (or not 'unsafe') products. Under a GSP, action could be taken against a producer/supplier if it was determined that a product was unsafe, irrespective of any accident, injury or loss having been caused by the product.

The Commission has not received detailed evidence on the likely costs and benefits of adopting a GSP. This is partly because the proposal is very general and not yet well defined. The actual impacts would vary substantially depending on exactly how such a provision was implemented.

Our consideration of a GSP is restricted to how it would apply in respect of consumer products under reference and not more broadly. Further, the chapter considers the costs and benefits of implementing the *core* GSP requirement only. The GSP could include 'ancillary' obligations on business and these are discussed separately since they can be adopted independently of a GSP (and in some cases have been identified by MCCA as possible reform options in their own right). If modelled on the European General Product Safety Directive, the GSP could also require businesses to:

- provide consumers with information on product risks (MCCA option 5);
- monitor the ongoing safety of products (MCCA option 5);
- take corrective action in the event that a product proves unsafe (MCCA option 9); and
- notify regulators of product safety problems and the action the business has taken to correct them (MCCA option 5).

Further, to an extent, some of these requirements already exist in the current system and would continue in one form or another, irrespective of a GSP.

Nevertheless, even in relation to the core general obligation, there are a number of choices with respect to how it could be introduced. Perhaps the most critical questions to address are how the benchmark level of safety is defined and how businesses would demonstrate compliance with the GSP obligation — these issues are considered in section 5.3. Some of the other considerations include:

- What products (and possibly services) should be covered by a GSP? (MCCA option 3)
- Which businesses in the supply chain should be subject to the GSP?
- How the GSP should be enforced, including who would have a right of action (government and/or private parties) and what penalties/remedies should apply?

Many of the questions that would need to be addressed in the context of considering these issues are also of more general relevance and are discussed separately in other parts of the report.

Opinion is divided among the various interest groups regarding the merits (or otherwise) of introducing a GSP (see box 5.1).

Box 5.1 **Some views on a GSP**

Supportive:

The 'catch all' nature of a GSP would allow … regulators to manage the safety of new and innovative products in a much more efficient manner … (QLD Government, sub. DR59, p. 2)

ACA strongly supports the inclusion of a General Safety Provision (GSP) into Australia's product safety regime — it is an essential element of the reform of Australia's product safety system. (Australian Consumers' Association, sub. MCCA5, p. 5)

The benefits … of a GSP would outweigh its costs … for industry, consumers and regulators. (Commonwealth Consumer Affairs Advisory Council (CCAAC), sub. 43, p. 12)

… we can see some merit in the introduction of a general safety provision … (New Zealand Retailers Association, sub. MCCA20, p. 4)

[a GSP] would be of benefit to Australia's consumer product safety system and therefore, due to ANZCERTA, to New Zealand's consumer product safety system. (Royal New Zealand Plunket Society, sub. MCCA22, p. 1)

Unsupportive:

… the SBDC does not consider that, from a consumer or business perspective, change in the product safety regulatory system structure is warranted, or that if it is, a GSP … is the best solution. [A GSP] would … impact on both business operations and costs, and could unnecessarily interfere with trade in consumer products, restrict competition and disadvantage consumers through increased costs. Small businesses in particular would be detrimentally impacted by the burdens of additional compliance and administration costs involved in meeting their obligations …. (Small Business Development Corporation (SBDC) of WA, sub. MCCA24, p. 3 and sub. DR46, p. 2)

In reality Australia already has a GSP under the Trade Practices Act through the product liability provisions. In our opinion it would be better to 'clean up' the TPA rather than introduce a new GSP. (Australian Toy Association, sub. MCCA2, p. 4)

… experience … in other countries indicates that it should not be implemented under any circumstances in Australia. … [It] would not create a system that is better equipped to prevent injuries or remove products before injuries occur. … a GSP would lead to substantial costs for government and business, as well as consumers. (Australian Chamber of Commerce and Industry, sub. DR54, p. 4)

Rather than introducing a … GSP … with broad application, consideration should be given to addressing the particular problems that have been identified … such as the perceived limitations on the powers of authorities to move quickly to remove products that have been identified as unsafe. … reform, … should be considered with care and from the starting point that the present system is not in need of wide-scale reform. (National Product Liability Association, sub. MCCA19, pp. 2, 5)

… further regulation will only increase the burden on manufacturers and the ultimate cost of products …, while consuming scarce government resources without reducing the likelihood of unsafe products reaching the market. (Middletons Lawyers, sub. MCCA18, p. 1)

… we don't see how … a GSP would address the reactive nature of the current system. … A better approach may be to identify those sectors … that currently do not traditionally respond to their obligations and at least initially, tailor some … reforms and/or direct the bulk of the resources, to the needs of those sectors. (Coles Myer Limited, sub. MCCA9, p. 2)

The rest of this chapter is organised as follows:

- experience with general safety requirements (including overseas experience) (section 5.2);
- some issues in defining safety and demonstrating compliance (section 5.3);
- potential benefits of a GSP (section 5.4);
- potential costs (section 5.5);
- would a GSP deliver net benefits? (section 5.6).

5.2 Experience with general safety requirements

A general safety requirement was first introduced in the United Kingdom in 1987 and in the European Union in 1992. The current European General Product Safety Directive (GPSD), is based on revisions which became effective in 2004, however the Directive has not yet been transposed into national laws in all Member States.[1] Canada has been considering the introduction of an EU-style general safety requirement.

New Zealand has a statutory guarantee that goods will be 'safe', which some say imposes obligations on business similar to those under a GSP. However, importantly the guarantee can only be enforced through private action and it is not an offence for a product to be held to be 'unsafe'. Further information on overseas approaches to the regulation of consumer product safety is provided in appendix D.

Although Australia does not have the strict equivalent of New Zealand's statutory safety guarantee, in practice the implied warranty provisions (goods must be of 'merchantable quality') of Part V, Div 2A of the TPA essentially provide consumers with equivalent protection. More importantly, consumers can also take action against suppliers under the Part VA (product liability) provisions of the TPA, where 'defective' (ie unsafe) goods have caused injury, loss or damage (see chapter 8 for a discussion of the meaning of 'merchantable quality' and 'defective').

In addition, a number of the sector-specific safety regimes in Australia embody overarching general safety obligations. Some examples are outlined below and covered in more detail in appendix E.

[1] The United Kingdom was one of the last member states to implement the Directive, in October 2005.

Overseas experience

There is, surprisingly, limited evidence regarding the actual impacts (costs and benefits) of a general safety provision in Europe. Experience with the GPSD, however, does not suggest it has resulted in a clear improvement in safety outcomes and there is some evidence of increased costs (although, as noted above, the GPSD includes ancillary obligations which would create additional costs for business and governments).

An external study (CDC 2000) on the practical application of the European GPS Directive, commissioned by the European Commission, (see box 5.2), found *inter alia* that:

- the level of awareness of the requirements was somewhat disappointing;
- there were complaints about the vague nature of the general safety requirement;
- product liability laws impose a greater discipline on businesses than that created by obligations imposed by the Directive; and
- there remains (in several countries) a problem controlling unsafe cheap imports and 'fly-by-night' sales.

A law firm in the United Kingdom recently conducted a survey of manufacturers on the implications of the new European GPSD. The results, summarised in box 5.3, suggest mixed views on the likely benefits for consumers; concerns about costs; and questions about the ability to change the behaviour of the 'cowboys'. While these findings are interesting, they do reflect the views of a particular interest group.

There was very little discussion in submissions of the effectiveness, in practice, of the European GPS Directive. The detailed observations made by the Australian Toy Association were an exception:

> If the European experience with their Directive is studied it will be apparent that there has been considerable increase in costs without any offsetting advantage relating to the safety of goods. …
>
> The requirements of the European Directive have been a bonanza for the legal fraternity and trade consultants due to the fact that it is widely open to interpretation and there is a distinct great lack of guidelines. (ATA, sub. MCCA2, pp. 4-5)
>
> The European experience demonstrates how an apparently simple Safety Directive becomes almost unworkable in practice:
>
> - Due to difficulties in interpretation, the simple horizontal safety directive has had to be supplemented by a number of industry or product specific vertical directives. …
> - The lack of certainty creates the opportunity and environment for mischievous, frivolous and / or ill informed actions.

- Because suppliers can never be absolutely certain, they attempt to push all responsibility back to the regulating authority, the Commission. The Commission is continually being asked for interpretations and direction including what category products fall into and their age grade suitability.
- An incredibly complex and costly bureaucracy of documentation, process and "so called" experts has developed in order to give some comfort to all sides.
- While these costs are initially incurred by business and government, the final cost is borne by the consumer in more expensive product and higher taxes.

There is no evidence that this system provides any better protection to consumers than other simpler systems used in other markets … (ATA, sub. DR49, pp. 4-5)

Box 5.2 Experience with the European Directive

A report in 2000 on the practical application of the European GPS Directive, commissioned by the European Commission, suggests that the GSP experience in Europe has not been a clear success. The following are some extracts from the report:

> The sad fact is that the Directive has had very limited impact in practice. (p. 2)
>
> As regards the practical application of the transposition laws, the study shows that professionals know very little about their existence. (p. 2)
>
> It appears that professionals are far more worried about being held answerable on the basis of the product liability act. (p. 3)
>
> Professionals unanimously agree that the preventive effect of the product liability acts … is far greater …The fear of tarnishing their brand image or being sued for damages seems to constitute a far greater incentive than penalties which might be imposed in the case of failure to comply with the obligations imposed by the GPS Act. (p. 6)
>
> … professionals generally complain about the vague nature of the general safety requirement in the absence of binding standards. For professionals the best way of ensuring that their product complies with this requirement is to check compliance with existing standards. For sectors not yet covered they are keen to have such benchmarks developed rapidly. Beyond compliance with the standards, professionals are unsure of their ground and await advice from their administrations. (p. 5)
>
> … distributors too are unaware of their obligations. It seems that compliance differs depending on the sectors and the size of the firm. Major distributors have the resources to develop systems for evaluating consumer complaints, to perform sample checks before and after orders are placed and to foster close links with producers, but small distributors and retailers do not. (p. 7)
>
> … several countries … report the problem of controlling cheap products in the context of 'fly-by-night' sales, where products are sold over a very short period at a low price and whose importers swiftly disappear. (p. 9)
>
> … in most Member States, the penalties provided for in the transposition acts have never or virtually never been enforced. (p. 2)

Source: CDC (2000).

Box 5.3 **Survey on the implications of the new European GPSD**

In the United Kingdom, law firm CMS Cameron McKenna, recently conducted a survey of manufacturing industry on the implications of the new European GPSD.

While most manufacturers think the GPSD stands to benefit consumers, they view it as unnecessary additional regulation based on little evidence of a lack of safety of European products. Few respondents (19 per cent) … felt it would benefit the manufacturers 'a lot'. In contrast, 42 per cent felt that it would benefit consumers 'a lot'. Enforcement statistics show that consumer products in Europe are safe, the only small problem being some third world electrical imports.

Some quotes from respondents to the survey included:

> 'The perceived benefit that the GPSD helps to protect consumers from businesses that have inadequate controls or processes in place is questionable'.
>
> 'The main benefit is that it will heighten awareness amongst management of the importance of risk assessment and regular review of processes.' [According to the Survey, one-third of respondents currently have no risk assessment system in place for their products, or have an incomplete set of assessments].
>
> 'More bureaucracy for little or no benefit to anyone. The cowboys will still be cowboys, and compliance will be, as always, voluntary.'
>
> 'I have no real concerns with the product safety directive if it improves the safety of all products. My real concern is in the UK there will be hundreds of companies who will do nothing and therefore have a better cost advantage over the more diligent companies'.

Source: Hodges and Tyler (2005, p. 152).

Howells considers that the most likely benefit of the introduction of the general safety obligation in Europe is allowing 'enforcement authorities to take swift remedial action in the face of newly identified dangerous products' but questions its likely effectiveness in encouraging 'a greater sense of responsibility on the part of suppliers' (Howells 1998, p. 260):

> … for one suspects that businesses respond better to precise rules rather than general exhortations to produce safe products, which they would argue is their natural objective. A general safety duty may have a symbolic value and help to push safety up the policy agenda and to underline the Government's commitment to a safe consumer marketplace. (p. 260)

Further consultation since the release of the Discussion Draft, including with the Department of Trade and Industry in the United Kingdom, did not generate any additional 'hard evidence' of the impacts of the GPSD. 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 imposed, the 'jury is still out' in terms of the net benefits associated with the basic general safety obligation.

Sector-specific safety requirements in Australia

Broad overarching general safety obligations are a feature of several sector-specific safety regimes in Australia. Some examples include food, building, electrical products and Occupational Health and Safety (OHS). These are discussed in appendix E.

These regulatory regimes typically involve a tiered structure with health and safety requirements outlined in the broadest terms at the top level, with the specifications for meeting these general requirements (involving increasing degrees of guidance and/or prescription) at lower levels. The key to the effectiveness of such arrangements would appear to rest as much on the structure and design of these lower level specifications or guidance, as to the wording of the overarching safety obligation.

The sectoral regimes that have incorporated general safety requirements can all be categorised as typically involving potentially more significant safety hazards than the general range of products not covered by specific schemes. This had a critical bearing on the cost-benefit calculus for the implementation of general safety requirements in these areas. Nevertheless, evaluating the effectiveness of these GSP-type obligations in achieving improved safety outcomes is a difficult task for several reasons, including:

- the introduction of the general safety requirements occurred as part of a package of reforms and/or codified existing common law obligations;
- any measurable change in safety outcomes or other indicators of effectiveness or cost is difficult to attribute, even to the reform packages as a whole (the counter-factual problem); and
- identifying the particular impact of the general safety obligation is therefore even more problematic.

While there was some comment, following the Discussion Draft, regarding the success (or otherwise) of sector specific regulatory arrangements *overall* (see for example comments by ACCI, sub. DR54 on the Food and OHS models), there was very little *specific* comment in submissions on the actual impacts of GSP-type obligations in sector-specific regimes. The Australian Electrical and Electronic Manufacturers' Association (AEEMA) and Consumer Electronics Suppliers' Association (CESA) did, however make the following observations regarding electrical product safety regulation:

> In effect, the specialised electrical consumer product safety system has had a GSP supported by … the standard [that specifies "Essential Safety Requirements" for low voltage electrical equipment] for some years. However, mandating essential safety

> requirements has had no effect on the safety of electrical products, largely because most industry participants are unaware of the existence of the standard, and electrical safety regulators have yet to determine how this standard and associated powers will be used to improve the safety of electrical equipment. (AEEMA&CESA, sub. DR44, p. 3)

5.3 Defining safety and demonstrating compliance

The GSP obligation could be defined in the broadest terms, such as 'to ensure only safe products are placed on the market'. Alternatively, in theory at least, prescriptive rules could be developed (still within the context of the general obligation) about the level of safety and/or the processes that must be followed. In between these two extremes there would be a range of options that provide varying degrees of guidance on what constitutes 'safe'. In principle, a key advantage of a general safety requirement, stated in broad terms, is the flexibility it provides to industry in terms of how they meet their obligations (see section 5.5).

Safety definitions are discussed more fully in chapter 8, where the Commission suggests that, if a GSP were to be implemented, definitions and standards of safety should be closely aligned with existing provisions of Part VA.

Demonstrating compliance

Once an appropriate specification for the safety obligation (and definitions of 'safe' or 'unsafe') are determined, consideration must be given to what evidence will be accepted as demonstrating that businesses have met the required standard of safety (or as a defence against any claim that the GSP requirement has not been met). It is clear that standards would play an essential role. The Commonwealth Consumer Affairs Advisory Council (CCAAC), for example, considers that:

> As a starting point, a GSP would be based on existing standards as published by Standards Australia or those from international standard bodies. (sub. 43, p. 12)

However, it would be necessary to ensure that compliance with voluntary standards was not the only type of evidence that could be used to demonstrate compliance:

> Compliance with voluntary standards is only one factor to be considered in assessing the safety of a product and a GSP would need to take this into account. (ACCC, sub. MCCA4, p. 19)

> Government(s) should make clear at an early time (perhaps in the Second Reading speech) that conformance with a voluntary standard is not necessary to comply with the GSP obligation. (MCCA Options Paper 2005c, p. 21)

Some of the types of evidence that might be considered could include:

- compliance with international standards or an official standard of another country that appropriately addresses the risks in the product;
- compliance with the standard for another product that presents risks that are analogous to those in the product;
- compliance with an industry (safety) code of practice;
- the manner and purposes for which a good has been marketed and whether risks are within the reasonable expectations of the user and other affected persons;
- evidence that a business acted with due diligence and gave careful consideration to safety issues in the design and manufacture of a product, including for instance:
  - appropriate research and testing being carried out;
  - appropriate safeguards were incorporated into the design of the product;
  - appropriate quality control and risk management processes were employed;
  - appropriate warnings and other information were provided to the consumer;
- how reasonable it would be to expect the supplier to have anticipated that a product would prove defective in the way it did (because, for example, the risks might be so remote that, despite careful investigation, discovery would be unlikely before their realisation).

These are in fact the sorts of defences that a court might currently take into account when considering the merits of a common law negligence action against a supplier. Many are also broadly consistent with the principles applied in Part VA of the TPA.

The ACCC considers that the current TPA defences for product safety offences may provide some useful guidance:

> With regard to giving weight to different types of evidence, current Trade Practices Act defences for product safety offences strike a sensible balance in respect of suppliers' abilities to ascertain compliance. They refer to reasonable reliance on information provided by others. This prevents suppliers from attempting to absolve themselves of their responsibilities by relying fully on other parties such as test companies without some level of check into, say, the qualifications of the tester. The general approach gives some emphasis to due diligence on the part of all in the supply chain in taking responsibility for supplying safe goods. (sub. MCCA4, p. 20)

Not all types of evidence should be given the same weight in establishing compliance. This point was made in the MCCA Discussion Paper:

> While some could represent an absolute defence against a breach of the GSP, others could give rise to a rebuttable presumption of compliance or simply be factors taken into consideration in determining compliance. (2004, p. 33)

In this regard, the EU GSP regime effectively creates a hierarchy of standards and other evidence for establishing compliance with general safety requirements. Specific national or EU rules take precedence — products are deemed safe if they comply with Member States' product safety laws. Only in the absence of such rules, the safety of a product is assessed by taking into account:

> … in particular national standards transposing any other relevant European or international standards, Commission recommendations or national standards, international standards, codes of good practice, the state of the art and the safety which consumers may reasonably expect. (Directive 2001/95/EC, (EU 2002, p. 2))

While generally less specificity (in terms of how the safety benchmark is defined and what must be done to comply) can have benefits, this may result in greater uncertainty for suppliers. It is likely that once a more explicit legal obligation is imposed on suppliers not to place unsafe products on the market (even if stated in the broadest of terms), responsible suppliers will be looking for a high degree of certainty that their products meet the minimum required standard so as to minimise any likelihood that a successful action will be taken against them.

For this reason, producers may seek to have their products certified as compliant with voluntary standards — there is evidence that this has been the experience with the European GPSD. This raises two further issues. Firstly, for many consumer products, voluntary Australian standards do not exist and may take some considerable time to develop (although to the extent that existing relevant overseas standards exist this may be less problematic).[2] Secondly, voluntary standards are often not written with *minimum* safety objectives in mind. Because they are intended for voluntary adoption only and typically address general design characteristics as well as safety hazards, they are often aimed at 'better' or 'best' practice.[3] In addition, there is potential for the standards development process to be overly influenced by vested interests, resulting in inappropriate and sometimes anti-competitive standards.

Compliance with voluntary standards could therefore potentially result in suppliers building excessive safety into their products with the consequences that consumers may pay too much for access to those products. Certain products may even be withdrawn from the market because they are deemed 'too risky' and/or they are no longer profitable. (As explained in chapter 2, increasing safety has costs as well as benefits, so more will not always deliver a net benefit to the community).

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[2] Standards Australia is currently the sole recognised 'prescribed body' for making standards under the TPA.

[3] Voluntary standards can also on occasion set an inappropriately *low* standard and in extreme cases provide no more than 'window-dressing'.

If voluntary standards are to be used as a benchmark for determining GSP compliance, those standards should ideally focus on the most serious product-related hazards, rather than non-safety related design elements.

In designing standards, it may be that the best balance between, on the one hand allowing flexibility, and on the other hand, meeting the demands of some suppliers for greater certainty, will be achieved by incorporating both performance/outcome requirements (with a broad hazard focus) and optional detailed deemed-to-satisfy solutions. This is the approach that has been used successfully in a number of areas of regulation, for example in the Building Code of Australia (see appendix E).

5.4 Potential benefits of a GSP

Proponents of a GSP suggest that it would lead to better product safety outcomes and it would also, in some respects, be more equitable/fairer. More specifically, the main arguments put forward in favour of a GSP are:

- it may facilitate a 'cultural change' by creating stronger incentives for manufacturers/suppliers to not place unsafe (only place safe) products on the market;
- should an unsafe product find its way on to the market, regulatory authorities would be able to more effectively take pre-emptive action without a need for the product to have caused an injury;
- it could result in fewer mandatory standards, giving businesses greater flexibility in terms of how they meet their safety obligations;
- it would shift more of the onus for managing product safety away from government and onto business and thereby reduce government administration costs; and
- it creates a more 'level playing field' by imposing a minimum safety obligation on all products.

These arguments are assessed in the following sections, but first a few general observations are made.

If successful, a GSP may result in some products more regularly matching the safety expectations of consumers and a reduction in spillover effects on third parties and the general community, resulting from product-related accidents.

Producers may gain from a general improvement in consumers' perceptions and confidence in the quality and safety of their products. This may result in increased

product sales, including export sales if Australia's reputation and image is enhanced in overseas markets.

Whether this results in a net benefit for producers, will of course depend on any additional costs that they incur in complying with the GSP obligation (or reductions in costs associated with the current regime) and how much more consumers are willing to pay for the extra safety.

Some argue that if Australia does not adopt a GSP our competitiveness will suffer. This is based on the observation that many of our 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. The Commission does not find this argument convincing, particularly given that the vast majority of countries, including many of our largest trading partners, do not have a general safety obligation.

Further, while additional safety requirements can potentially reduce the incentive to innovate — particularly if they are prescriptive, but also if they create uncertain obligations — higher safety benchmarks can in some circumstances lead to innovative solutions, for example the incorporation into a design of a novel safety device or safeguard. The ACCC (sub. MCCA4, p. 6) submitted that this could 'enhance Australian business opportunities in the global marketplace'.

However, to the extent that such innovation comes in response to inefficient or unnecessary safety requirements it may generally be unlikely to result in a net welfare improvement.

Incentive effects/cultural change

Under a GSP, regulators would be able to impose penalties and/or ensure the removal of any product deemed to be unsafe. The type of penalties and remedies that would apply would need to be considered along with other design and implementation issues. If, for example, a breach of the GSP obligations was to constitute a contravention of the TPA, then any supply of unsafe products could be subject to similar penalties to those applying currently in the case of the breach of a mandatory standard, ban or compulsory recall order. A range of other remedies would also potentially be available, including injunctions, declarations, corrective advertising and other remedial orders. In addition, the ACCC would:

> be able to resolve matters by way of s. 87B undertakings to facilitate speedy, strategic and flexible solutions to particular issues. (ACCC, sub. MCCA4, p. 21)

The threat of such actions may provide a stronger incentive for businesses to consider safety in the design and manufacture of their products and the information and warnings that they provide to consumers. Some suggest that the GSP could create a fundamental 'cultural change' with respect to attitudes to safety:

> A General Safety Provision would do much to ensure that there was … an increased awareness by manufacturers, distributors and retailers of their overall responsibilities for consumer safety… (Australian Consumers' Association (ACA), sub. MCCA5, p. 5)
>
> … [it] would help make safety a top priority and not an afterthought, and would underscore the Government's support for a safer marketplace. (ACA, sub. DR51, p. 1)
>
> A GSP could be the most effective driver of a shift in mindset within the business community to:
>
> a) become pro-active in the supply of safe products
>
> b) better understand the potential influence suppliers can have over the safety of their products
>
> c) better understand their obligation to supply safe goods. (ACCC, sub. MCCA4, p. 8)

It is also possible that a GSP would make it easier for retailers to 'demand' from their suppliers appropriate consideration of safety and evidence of compliance with their safety obligation.

However, the scope for improvements in the incentives for the supply of safe products will ultimately depend on the extent to which such incentives are lacking under the current consumer product safety regime. That is, to what extent is there an actual problem that needs addressing. A further separate question then is what are the most cost-effective options to address any identified weaknesses.

Some submissions to MCCA on the Discussion Paper expressed the view that the discipline provided by the market (including insurance), media scrutiny, product liability laws, common law negligence and the existing regulatory regime ensure adequate incentives under the current system:

> [a GSP] … will not achieve the objective of reducing the risk of defective products reaching the consumer as it would not provide manufacturers with any additional incentives to maintain the safety of their products beyond those created by the ramifications of being found liable under Part VA, in negligence or for breach of contract. …
>
> such a provision would only be of assistance where the current system was demonstrably deficient and there was no incentive for manufacturers to maintain the quality and safety of their products (Middletons Lawyers, sub. MCCA18, p. 3)
>
> The current system has a structure to address product safety issues and provides incentives for businesses to take their responsibilities seriously and to ensure as far as possible that only safe products are released to the market … one of the most significant incentives of all is the desire of businesses to avoid adverse media scrutiny.

> … businesses … are already subject to an obligation to only manufacture or distribute safe products …. the prospect of suit by consumers … currently provides a strong financial incentive for businesses to ensure their consumer products are safe. (National Product Liability Association, sub. MCCA19, pp. 6, 7, 8, 15)

The limited evidence available on product-related accidents would appear, generally, to provide support for these views. The evaluation of the current system in chapter 4 suggests that:

- overall, the level of harm directly caused by consumer products is small, relative to other causes of injuries and deaths;
- even where consumer products are in some way involved in accidents, genuine product fault is a far less significant causal factor than the interaction between consumer behaviour, the environment in which products are used and product design;
- there is no evidence of a widespread problem of businesses intentionally releasing unsafe products onto the market and when defects occur most producers voluntarily act to remove the product from the market (see chapter 11); and
- for a small proportion of businesses, or particular types of products, the discipline imposed by the market, the product liability arrangements, media scrutiny and organised consumer advocacy, may not be sufficient to stop unsafe products reaching or remaining accessible to the market.

Further, the core GSP provisions (that is without the ancillary provisions) will not directly address problems associated with the *use* of products (except to the extent that suppliers may be encouraged to provide better information to consumers).

In relation to the supply of unsafe products, a GSP may, by making suppliers more conscious of their safety obligations, reduce the number of defective products *inadvertently* placed on the market by businesses concerned to do the right thing, and also lead to the quicker withdrawal from the market of products suspected of being unsafe. However, most reputable and long-term suppliers are already aware of their obligations and have a strong incentive to be pro-active. Nevertheless, there is no doubt that some businesses might try to get away with insufficient consideration of safety:

> With product liability, suppliers have the option of taking the risk that even if the product is defective, no-one will be harmed and also want to sue. A GSP may provide incentive for all suppliers to consider the safety of their products at their inception, including design, production and marketing. (ACCC, sub. DR56, p. 8)

Unfortunately, even under a GSP, it is likely that a proportion of businesses will continue to ignore the safety of consumers or 'risk manage'. The difficult empirical questions are how big this group is, what proportion of the product safety problem it accounts for and whether a GSP would affect its size. A number of submissions addressed this issue:

> The small number of businesses that currently cause problems or harm would still do so regardless of a GSP. (ACCI, sub. MCCA3, pp. 3-4)

> It might be argued that the top proportion of the market already makes its goods to optimum safety; the bottom end tends to pay safety scant attention (even flouting bans and mandatory standards) and the middle segment has a fair go at doing the right thing. One theory is that while a GSP may not change much at the top and bottom ends, it is the majority of suppliers in the middle that would improve their attention to safety to a significant extent and therefore provide a substantial overall improvement in the market. (ACCC, sub. MCCA4, p. 16)

> … no basis exists to suggest a better outcome might be achieved [under a GSP] in terms of improving the conduct of irresponsible and unscrupulous businesses. (Small Business Development Corporation of WA, sub. MCCA24, p. 2)

The Commission acknowledges, throughout the report, that there are weaknesses in the current consumer product safety regime. For instance, recent changes to liability rules, which have introduced thresholds and time limits for action and caps on damages (see chapters 3 and 4), are likely to have weakened the discipline on suppliers afforded by product liability law, and create a stronger case for significant reform. Nevertheless, a GSP would not necessarily be the first best approach to addressing this issue.

Overall, the discussion in this section indicates that the additional potential benefits from moving to a GSP at this time, while uncertain, are unlikely to be large.

Scope to act before injury occurs

Even if it is accepted that the number of unsafe products supplied to the market is relatively small, it is suggested that the current system reacts too slowly when problems do arise. Specifically, it is argued that authorities are constrained in their ability to remove hazardous products *before* injuries occur. The MCCA Discussion Paper makes the following observation about a GSP:

> … when potential problems are identified, a GSP could allow governments to take more effective precautionary action to protect consumers than is now the case. Governments could act once a product is determined to be unsafe, regardless of whether the product had yet caused injury. (2004, p. 32)

In fact, under the existing system *action can be taken* to recall or ban unsafe products, irrespective of whether an injury has occurred. Currently, at the Australian Government level, the Minister may ban or order the compulsory recall of goods where the Minister is of the view that the goods 'will or may cause injury'. Some examples of recent 'pre-emptive' actions, in response to product hazards, are provided in box 5.4.

The State and Territory Governments have similar powers, and in certain jurisdictions also the discretion to impose a ban in the case of reasonably foreseeable use (see chapter 6).

Not inappropriately, there are certain procedural requirements and notifications that must be made before such actions can be implemented and this does slow response times. However, in an emergency, a banning order can be implemented very quickly — for example, under the TPA, where the Minister is satisfied that certain goods create an 'imminent risk of death, serious illness or serious injury'.

A major constraint on the practical implementation of these powers, however, is the enforcement agencies' limited resources available to monitor product safety and therefore, as a consequence, their capacity to detect problems. The ACCC has prioritised its efforts on ensuring compliance with existing mandatory standards and bans, covering products previously identified as high-risk.

> The ACCC takes a proactive approach in achieving compliance with mandatory standards and bans and will take enforcement action where necessary. This is on the basis that in relation to more hazardous products where there is a higher risk of physical injury, more stringent action is required by regulators to protect consumers. (ACCC, sub. MCCA4, p. 3)

It is certainly the case, though, that the ACCC and the relevant State and Territory authorities will act to remove any product from the market, if satisfied that the product is unsafe. Consumer and competitor complaints can draw such hazards to the attention of the regulator if they are not detected in the course of the agency's monitoring and surveillance activities. The capacity of the current system to detect unsafe products at an early stage would be enhanced with better coordinated information systems that could provide timely data on complaints and other information on possible product safety problems (see chapter 9).

In the absence of a substantial boost to enforcement resources, even under a GSP, regulators would still be seriously constrained in their ability to act on unsafe products. They would no doubt continue to prioritise according to their perception of the severity of the risks and give greater emphasis to investigating the safety of products that have already caused injuries.

Box 5.4 Examples of pre-emptive action

Product safety provisions currently permit authorities to take pre-emptive action *before* a product causes serious injury. The following are some recent examples of such action.

Yo-yo water balls

Yo-yo Water Balls comprise a squeezable, soft plastic, liquid-filled ball attached to a stretchable synthetic cord that is capable of extending to many times its normal length. At the end of the cord is a plastic stretchable ring that is placed on the finger. The product can be used like a conventional yo-yo or swung around the head like a lasso.

Not long after their introduction, reports emerged of cords being wrapped around children's necks (although no injuries in Australia were reported). In addition, some children had experienced an adverse reaction following indigestion of the liquid inside the ball. Testing revealed that the forces of the cord were 'frightening and hazardous' and the product posed a strangulation hazard. Significant (though not hazardous) amounts of petroleum were also found within the liquid. In July 2003, yo-yo water balls were banned under the TPA for a period of 18 months. While this ban has expired, all jurisdictions (except the ACT and the NT) have now banned these products.

Candles with lead core wicks

A study by Lead Sense (a testing/consultancy firm) revealed that the burning of lead wicks could pose a risk of elevated lead levels in the blood and severe lead poisoning in children and pregnant women. Even minute amounts of lead can potentially result in IQ loss and learning and behavioural problems. In a follow up study, Western Australian Health, South Australian Health and the CSIRO backed these findings. As a result, candles with lead core wicks were permanently banned under the TPA in October 2002.

Portable fire extinguishers

In the late 1990s the ACCC received complaints about faulty portable (non-rechargeable) fire extinguishers. In two of these complaints premises were burnt down following the failure of an extinguisher. These fires did not result in injuries.

Although an existing standard was in place, it did not cover non-rechargeable fire extinguishers and its labelling requirements were thought too prescriptive. A new mandatory standard under the TPA dealing with these concerns was introduced in July 1998. In the Regulatory Impact Statement for the proposed new standard, it was argued that 'these incidents point to a continuing need for controls on fire extinguishers' (Australian Treasury 1998).

Source: Campbell (2003), Australian Treasury (1998 and 2002).

The Commission endorses the view of the ACCC that a GSP, of itself, would not significantly enhance the ability of regulators to detect unsafe products.

> … without improved resources and better warning systems, the GSP alone would make little or no difference to early detection and removal of hazards. (ACCC, sub. DR56, p. 9)

Other system refinements, discussed in later chapters, would be more effective in meeting the objective of *identifying* hazards before injuries occur. However, once a hazard has been identified, the GSP may make regulatory action, to remove it from the marketplace, somewhat easier:

> Once detected, the presence of the GSP could be expected to facilitate removal of the hazardous product by providing a simpler reference point for establishing a breach. (ACCC, sub. DR56, p. 9)

Need for fewer mandatory standards?

The introduction of an overarching general safety obligation could, it is argued, reduce the need for some existing mandatory standards and/or the need for new mandatory standards to be introduced in the future.

Some proponents of a GSP go further, suggesting that in the absence of such a reform there may not only be increasing resort to mandatory standards, but also a proliferation of sector-specific safety regimes — to deal with 'problem areas', such as toys or nursery furniture.

In principle, less resort to mandatory standards or sector-specific regimes may provide scope for savings in business compliance costs and government administration costs. Potentially a key benefit of a general safety requirement, stated in broad terms, is the flexibility it provides to industry in terms of how they meet their obligations. Administration costs might also be lower, but less specificity has both advantages and disadvantages (for example, vague requirements can be harder to enforce). These impacts are discussed further in section 5.5.

The benefit of increased flexibility for businesses, was noted at the time general safety requirements were being considered for adoption in the United Kingdom:

> The creation of a general rule of this type also conforms to the present deregulatory policies of the UK government. There is no longer a need to introduce a series of detailed rules, which inhibit enterprise and stifle innovation. Business can choose for itself how to meet the overall objective of producing and supplying only safe products … The flexible provisions of the 1987 [Consumer Protection] Act allow the manufacturer to adjust his techniques in order to produce goods which are suitable for the … market. (Weatherill, St. 1990, quoted in Howells 2000, p. 1)

However, in practice there has been a strong demand in Europe for the certainty provided by standards. The 2000 review of the European experience with the general product safety directive found:

> Often manufacturers of certain categories of products have requested the adoption of specific Directives for their products, in spite of the fact that the products considered were covered by [the] Directive … and specific European standards.
>
> On the side of both industry and consumers, the need for additional sectoral legislation is often felt as the Directive is not always considered sufficient for the objectives of consumer protection and the internal market. (EC 2000, p. 10)

In an Issues Paper dealing with Canada's proposed GSR, Health Canada stated:

> It is important to understand that the presence of a General Safety Requirement in the proposed Act would not, in any way, preclude setting regulatory standards. Health Canada would continue to establish standards by way of regulations. The General Safety Requirement operates as a safety net where there are no applicable regulatory standards. (Health Canada 2003, p. 10)

This appears to be consistent with the UK experience with a GSP, where, although there has been some shift from mandatory to voluntary standards, around 40 product specific regulations were retained.

Also, as noted above, where GSP-type obligations are a feature of sector-specific safety regimes in Australia, they are supported by essential underlying specifications and guidance. Where businesses have the choice, many prefer the certainty provided by standards.

It is not at all clear that the introduction of a GSP would significantly reduce the need for existing or new mandatory standards. There would certainly seem to be agreement that a GSP would not *eliminate* the need for mandatory standards. Whether the number would be reduced to any significant degree is difficult to predict:

> The number of mandatory standards would not necessarily increase or decrease under a GSP. ACA sees that it is still useful in critical areas, such as infant's cots, to set out a very clear specification of what is safe. (ACA, sub. 41, p. 12)
>
> … the extent to which a general product safety provision is likely to reduce the need for mandatory standards is limited. Mandatory standards would still be needed for high risk products as a complement to a GSP. (ACCC, sub. MCCA4, p. 16)

This also raises the question of how effective a GSP is likely to be if experts consider that such a requirement would be insufficient to deal with certain 'high-risk' products — the very products that the market and general legal mechanisms might have most difficulty dealing with.

Less onus on regulators to manage product safety

The MCCA Discussion Paper suggests that the current system places the principal responsibility for detecting unsafe products on governments:

> The current system places the onus on governments to identify, assess and regulate each product hazard amongst the large and ever increasing number of products which consumers can purchase. …
>
> The ability of governments to address potential safety hazards across this great range of products is affected by limitations on their resources and the substantial time and effort required to implement, enforce and review product-specific regulations. (MCCA 2004, p. 5)

It is claimed that a key advantage of a GSP would be that by making the responsibility of businesses to ensure safe products clearer, some of the onus (and costs) would shift away from governments. Further, the GSP could be implemented in such a way as to clearly shift the burden of proof, in any prosecution, to suppliers.

The Commission questions the view that the onus of identifying unsafe products falls principally on governments. There is ample evidence of businesses generally taking responsibility for ensuring the safety of products they supply to the market and then when problems arise, taking appropriate remedial action. The relatively good safety outcomes that are observed, have been achieved notwithstanding the current relatively modest monitoring and enforcement efforts of governments.

Nevertheless, to the extent that a GSP was successful in raising the safety consciousness and performance of businesses, there might, in principle, be scope for governments to reduce monitoring and enforcement efforts. Although this would essentially be a transfer of costs from governments to business, it could result in some efficiency improvement overall, since suppliers have better information about the characteristics of their products and are better placed to influence their safety:

> … probably there will be indeed some aggregate reduction in costs across both the Government and the business — for a given level of safety — in that suppliers will often be in a better position to implement effective safety measures, at early stages of product development and marketing. (Dr. Nottage, sub. 42, p. 13)
>
> Through manufacturers' responses to a GSP at least some costs would be allocated more efficiently to injury prevention by manufacturers rather than inefficiently post-injury by governments and consumers. (ACA, sub. 41, p. 10)

However, for a GSP to be effective in significantly *improving* outcomes, enforcement efforts will need to be credible, such that businesses believe there is a reasonable likelihood that unsafe products will be detected and action taken. Whether the resources required for monitoring and enforcement are more or less

than under the current system is difficult to judge, but the Commission's view (see discussion of administration costs below) is that any reductions in regulatory costs are likely to be small at best.

Level playing field

Another potential advantage of a GSP would be that it could, in principle, provide a consistent 'minimum' level of safety across a comprehensive range of consumer products.

Rather than having to identify all products that require some form of regulatory intervention (for example, by way of a mandatory standard), in theory a general safety obligation can act as a 'safety-net', mopping-up any product hazards that might otherwise not be dealt with appropriately or in a timely manner. However, possibly most of the products that are caught in the net pose no safety problems for consumers — the market and general legal mechanisms are working well to provide reasonably good outcomes and so a GSP may be redundant for these products.

The Australian Toy Association has argued for a simpler, more targeted system, like the US Model (and indeed the current Australian system), with interventions on a case-by-case basis as necessary:

> … the [US] Consumer Product Safety Commission … [makes] … specific regulation where required to supplement the application of voluntary standards. The requirement for regulation is driven by injury data collected by the CPSC which in turn assists in the development of standards referred to by the regulation. … The ATA believes that better outcomes will be achieved for Australia by more closely following the US model than the European one … (ATA, sub. DR49, p. 5)

Excluding a significant number of products from the GSP would undermine the fundamental 'catch-all' nature of the provision and the advantage of consistency. For this reason there would need to be a strong case made in order for any exemptions to be justified. In principle, even inherently dangerous products such as power tools, lawnmowers or trampolines could be covered by a GSP, providing the benchmark standard took into account the fundamental use and characteristics of the product. The obligation imposed on suppliers in the case of such products would be to make sure reasonable safeguards were incorporated and appropriate warnings and instructions for use were provided.[4]

[4] The European GPSD accepts that the level of risk of a product may vary depending on the risks inherent in its use — the definition of a safe product does not require absolute safety, but only the minimum compatible with the product's use which is considered acceptable.

It is argued that under the current system some businesses can get away with paying inadequate attention to the safety of their products. This may put responsible businesses that invest in product safety at a competitive disadvantage. The ACA stated:

> [currently] … those businesses that act responsibly to ensure their products meet safety standards (and take action if there are problems) incur more costs than businesses meeting lower standards and/or offering unsafe products. This situation arises because in most markets there are no mandatory standards (or indeed any standard), and where such standards are mandatory they are often not adequately enforced. And … for many products it is difficult for consumers to assess safety features in a clear manner. [as a consequence] higher quality producers are not rewarded. (sub. MCCA5, p. 5)

It is not clear, however, that a GSP would be successful in ensuring all businesses comply with minimum standards. As noted above, it seems that a significant proportion of those businesses that currently pay insufficient attention to the safety of their products may not modify their conduct under a GSP. Hence, the GSP might, in fact, further increase the disadvantage between businesses that took extra steps to comply and those that continued to ignore the law.

An issue that needs to be addressed is whether products covered by product or sector-specific arrangements should be covered by any GSP. There would appear to be general agreement that such products should either be exempted or alternatively, as long as they comply with the relevant specific regime, they should be deemed to have complied with the GSP:

> … products or services that are already subject to stringent regulation should be exempt. … An alternative approach might be that the level of "safety" for these products should be judged according to the requirements of those more prescriptive regimes. … This is similar to what is already in place with Part VA of the TPA. (NPLA, sub. MCCA19, p. 17)

> … should government proceed with a GSP then FCAI would suggest that compliance with the ADRs [Australian Design Rules] and the systems that underpin them would, like the UK/European model, be sufficient to demonstrate compliance with the GSP. (FCAI, sub. MCCA13, p. 3)

> Goods such as food, therapeutics and pharmaceuticals may be adequately covered through existing means and further regulation may potentially lead to bureaucratic duplication and therefore over-burden for suppliers and government. (ACCC, sub. MCCA4, p. 17)

The standard of safety required by these product-specific arrangements is at least at or above the level that might be more generally expected under a GSP. There are strong arguments for not causing unnecessary disruption or uncertainty by imposing additional obligations via a GSP.

5.5 Potential costs associated with a GSP

The costs associated with a GSP would also depend on the nature of the obligation and the way it was implemented, administered and enforced. The impacts are likely to be uneven among consumers and producers.

Business costs

If a GSP was effective in creating stronger incentives for businesses to consider the safety of their products, then some businesses would increase their investment in design, manufacturing processes, packaging and labelling, with the objective of making their products safer. There may be significant additional costs associated with having products tested and certified as compliant with standards.

Other businesses may not incur any significant compliance costs because they are confident that their product already meets the standard of safety required. The Infant & Nursery Products Association of Australia (INPAA), for instance, submitted:

> INPAA is willing to embrace a GSP because in reality responsible suppliers of nursery products are already working within this paradigm. It is nearly impossible to supply products with appropriate insurance cover without being able to demonstrate compliance to world's best practice in relation to safety. (sub. MCCA14, pp. 4-5)

Of course, reforms that impose costs on manufacturers may afford benefits to other businesses in the supply chain. For example, retailers might benefit to the extent that a GSP lowered their costs of verifying the safety of the goods they purchase (on the other hand if their suppliers are incurring higher costs these are likely to be passed on).

Another group may not incur costs (so long as they were able to avoid prosecution) simply because they would choose not to respond to the new requirements and continue to supply unsafe goods.

Given the evidence regarding product safety outcomes and the views of some participants about the adequacy of existing incentives, one might reasonably assume that aggregate compliance costs under a GSP will not be high. However, a number of submissions on the MCCA Discussion Paper argue that the introduction of a GSP would lead to substantial uncertainty surrounding what is safe or unsafe.

This uncertainty may result in some businesses investing too much in safety (although this possibility is questioned by some participants, see ACA, sub. DR51, p. 21). If a GSP was to rely too heavily on reference to voluntary standards (elevating them to quasi-mandatory status) then compliance costs for business could

be higher. Small businesses may also be disadvantaged relative to larger businesses (that typically have the internal systems and resources to more easily adapt to a new regime). Coles Myer Limited submitted:

> CML already has various Quality Assurance Teams that conduct ongoing assessment of products from a safety and compliance perspective. Introduction of a GSP could however, increase costs for smaller businesses, and those businesses that may not be currently complying, (sub. MCCA9, p. 2)

If a range of other types of evidence could be used to demonstrate compliance, the costs may, in principle, be lower. It may be the case, however, that even if the wording of the GSP, or associated policy guidelines, made it clear that such alternatives may be sufficient, businesses may feel compelled, in the interests of certainty, to ensure their products comply with standards, whether they are voluntary or mandatory.

The additional costs associated with compliance with voluntary standards under a GSP regime, would depend on the extent to which businesses are already complying with voluntary standards. While the Commission did not receive any evidence regarding compliance with such standards, the low number of standards, would suggest that most businesses do not currently have their products certified to voluntary Australian standards.[5]

Some argue that to the extent that a GSP would result in less resort to mandatory standards, some businesses will gain from increased flexibility. While a broad GSP obligation focuses only on the safety outcome, rather than on the specific means of achieving a safe product, and therefore, in principle would result in reduced compliance costs, as discussed above, voluntary standards may become *de facto* mandatory standards. Therefore the net result on compliance costs will depend on the prescriptiveness (and the level or stringency) of the voluntary standard compared with any mandatory standard that is removed. The ACCC made the following comment on this issue:

> A GSP has the potential of reducing reliance on mandatory standards, with the potential benefits of greater flexibility for suppliers and reduced need for government involvement in the design of standards but with the potential burdens of additional compliance costs for business, especially small business (in ensuring their products meet requirements while having less guidance from a detailed standard). (sub. MCCA4, p. 15)

[5] Based on information from Standards Australia (pers. comm., 9 December 2005), the Commission estimates that currently there are less than 200 voluntary *safety* standards for consumer products. Because there are multiple standards covering certain products, there are far fewer than 200 unique product categories covered by the standards.

Moreover, since currently mandatory standards apply to very few products, the aggregate number of standards (voluntary and mandatory) is likely to increase substantially. Most businesses would move from no standard to compliance with a voluntary standard.

In the discussion of benefits above, it was noted that a GSP could potentially improve the reputation and image of Australia's consumer products overseas. However, if compliance costs are too high, the flow on price effects may outweigh any perceived increase in value to the consumer and Australia's exporters may become less competitive.

Costs to consumers

While consumers may benefit from increased product safety under a GSP, for some the costs of this increased safety may exceed the benefits they derive.

To the extent that suppliers incur costs associated with complying with the GSP, these will in most cases be passed on to consumers in the form of higher prices. In addition, if uncertainty results in manufacturers withdrawing products (or less innovative new products are marketed), certain consumers (who would have preferred to purchase the product in the knowledge of the risks involved) will be disadvantaged. ACCI consider that:

> It is clear that a GSP would impose substantial compliance costs on all business and particularly on small business. This in turn would reduce the development and introduction of new products, reducing choice and increasing costs for consumers. (sub. MCCA3, p. 4)

Nevertheless, where such products pose 'unreasonable' hazards, or where there is the potential for substantial spillover costs, the community is likely to be better off if the product is not available.

Some consumers may, however, substitute into less safe products (for example second-hand goods), possibly leading to perverse safety outcomes. There is also the possibility that the introduction of a GSP may result in consumers taking less care:

> The GSP may provide greater protection for consumers from unsafe products, but as a result, there may be less incentive for consumers to exert caution in choosing and using products. (Victorian Government, sub. DR60, pp. 8-9)

Some argue that even under the current system, consumers tend to assume that all products are 'safe' (at least to a certain minimum level). The introduction of a GSP (and any associated promotion and awareness campaign) might create unrealistic consumer perceptions about the likely impact of the reform, possibly having the

consequence of consumers taking less than the optimal responsibility and care in the use of products.

Government administration costs

It is difficult to assess what the net impact of a GSP would be on government administration costs. Again costs will depend crucially on how any provision is implemented and effectiveness will depend on the level of resources devoted to enforcement.

If, under a GSP, regulators are to actively use their power to take pre-emptive action against unsafe products, resources will be needed for data gathering, investigation and assessment. The ACA submitted:

> Some market surveillance is necessary to seek to detect some of the goods that may still enter the market without adequately safe design or manufacture. This enforcement practice will ensure that business is increasingly aware of the risks of failure to provide safe goods. (sub. 41, p. 11)

There may also be a need for government involvement in relation to the development of new, and ongoing review, of voluntary standards. Based on the European experience, governments are also likely to have to deal with requests for advice on what constitutes a safe product and for guidance on how to comply with the requirements:

> A GSP … would, for example, cause a cultural shift in that industry would be compelled to work closer with government in a practical sense at an earlier stage in the product supply cycle to agree on levels of safety for particular products. (Queensland Government, sub. DR59, p. 3)

Regulators may also find it beneficial to produce and disseminate written guidance material. As outlined earlier, mandatory standards are still likely to be necessary (although there could be less) so there will continue to be costs associated with their maintenance and enforcement.

Participants generally seem to be of the view that there is only limited scope for reductions in administration costs and perhaps the possibility that they will be higher under a GSP:

> … it is unlikely a GSP that shifts responsibility onto business would reduce pressures on regulatory resources and facilitate rapid action by Government. Problems are likely to be compounded, for example, by the increase in Government resources needed to process, audit and assess GSP requirements. (Small Business Development Corporation of Western Australia, sub. MCCA24, p. 3)

> The introduction of a [GSP] is likely to defeat the MCCA's objective of creating a more efficient regulatory system. The costs of managing a system with such a high standard and high need for monitoring will be significant. (Middletons Lawyers, sub. MCCA18, p. 3)
>
> The GSP would not entail government agencies undertaking more market place surveillance or enforcement than they do now. (ACA, sub. 41, p. 11)
>
> Inevitably, the definition of a "safe" product would create ongoing legal arguments. Such arguments and related action would occur at a not insignificant cost to government and business. (ACCI, sub. MCCA3, p. 4)
>
> A 'level playing field' is important in government regulation and suppliers are likely to complain to enforcement agencies if they consider their competitors are not taking adequate steps to fulfil any GSP obligations. Therefore a GSP would create a considerable amount of new, ongoing investigation work for the government … (ACCC, sub. MCCA4, pp. 16-17)
>
> Reform of this nature is only viable if adequate funding is established. (ACCC, sub. MCCA4, p. 17)

The Commission's view is that any possible reduction in ongoing administration costs is, at best, likely to be small. Indeed, the European experience suggests that ongoing administration costs could well be higher than under the current regime. In addition, there is likely to be substantial transition costs for governments during the development and implementation (and possible phasing in period) of a GSP. These transition costs are discussed separately below.

As noted in chapter 2, one advantage of *ex post* approaches to controlling product risks (such as product liability and penalties where harm is done) is that they can increase suppliers' safety consciousness and lead them to proactively improve safety, while requiring relatively limited public resources.

Transition costs

In addition to the ongoing costs associated with a GSP, there would be transition costs in the early implementation phase. Some argue that the transition period for a major reform such as the GSP could be several years. However, these transition costs could be greatly reduced if a GSP adopted definitions and standards of safety that are consistent with existing provisions of Part VA (see chapter 8).

Some of the transition costs will be 'one-offs'. The costs and delays associated with creation of new legislation, amendment of regulations and passage through Parliament fall into this category. ACCI submitted:

> The introduction and implementation of a GSP would require the creation of new legislation, regulations and practices at a not insignificant cost to government.

> Simultaneously, existing legislation, regulations and practices would have to be amended, also at a not insignificant cost to government. (sub. MCCA3, p. 4)

Suppliers will need time to properly understand the implications for their business and where necessary make appropriate changes to their products and processes. The ACCC stated:

> A GSP would of course involve significant costs to suppliers … companies would need to come to terms with the practical implications for their operations. (sub. MCCA4, p. 16)

At least in the early period after the introduction of a GSP there may be increased pressure on the legal system as businesses and consumers seek to have the interpretation of GSP obligations and the definition of a 'safe' product tested through the courts. Some also argue there may be an increase in frivolous and/or vexatious litigation. INPAA, for example, expressed the concern that:

> The consequences of a move to a GSP and a transfer of proof to suppliers may result in a rush of vexatious litigation creating claims for compensation and a burden on the Australian legal system. A revised system must be cognisant of this likelihood and develop strategies to address compensation and liability. Without such a safety valve, the majority of businesses will not support a transition to a GSP. (sub. MCCA14, p. 6)

Greater uncertainty in the short term about what is 'safe' may mean that businesses adopt a very cautious approach, perhaps unnecessarily withdrawing products or building in arguably excessive (and costly) safeguards. Consumers could lose out from the higher prices and reduced choice that could be expected to result.

There will be a need for education and awareness programs for business. Industry bodies may be able to most efficiently deliver some aspects of these programs, but governments would be expected to have primary responsibility for their oversight. More generally, there is likely to be a need for significant demands on government for advice and to ensure a smooth transition. This was recognised by the ACCC:

> The impact on government would … be substantial, especially in the introductory stages. This would … require adequate planning and resourcing. All businesses involved in the supply of consumer goods, across all levels of the supply chain, will need to be educated on their new role and responsibilities. (sub. MCCA4, p. 16)

Governments would need to give serious consideration to a phase-in (or transition) period during which the emphasis would be on promoting awareness, rather than penalising breaches.

In Europe, substantial advance notice was given of the intended introduction of the 1992 GPS Directive. With respect to the current Directive, which nominally became

law in December 2001, Member States had until January 2004 to implement its terms, from which time the old 1992 GPS Directive was repealed.[6]

Overall, while transition costs could be substantial, the implementation of any GSP could be managed in such a way as to minimise these costs (see chapter 8).

5.6 Would a GSP deliver net benefits?

It is apparent from the above discussion that there are many different ways that a GSP could operate and the nature and magnitude of possible impacts would depend critically on its particular characteristics and the way it was implemented.

A GSP would deliver some benefits. It is likely that it would change the behaviour of *some* businesses, encouraging them to think more carefully about the safety performance of their products. A GSP may also, arguably, facilitate the quicker removal from the market of hazardous products once detected. However, several considerations suggest that the overall benefits of such a reform are likely to be limited:

- the current system, as a whole, seems to be generating reasonable safety outcomes;
- action can already be taken to recall or ban unsafe products irrespective of whether an injury has occurred;
- without better enforcement and warning systems, the GSP alone would make little or no difference to early detection of hazards.
- based on experience in other sectors and countries, most if not all of the existing regulatory framework would remain;
- mandatory standards would still be required for higher risk products;
- while the GSP is intended to make producers more proactive, strict product liability rules should already have this effect; and
- it is likely to have little impact on the behaviour of recalcitrant and fly-by-night suppliers.

At the same time, the implementation of a GSP would be accompanied by additional costs:

[6] Although as noted above, there have been some delays in achieving full implementation.

- a GSP would be likely to involve transition costs, with some ongoing uncertainty about how to define and measure the benchmark level of safety required to demonstrate compliance with the GSP obligation;
- overseas experience indicates considerable increases in the adoption of voluntary standards with consequent flow on costs; and
- to the extent that suppliers incur costs in complying with a GSP, these will largely be passed on to consumers as higher prices and withdrawal of some products.

On balance, the Commission has not been convinced that a GSP, as proposed in the options paper, would generate net benefits over and above those currently achieved. While the Commission acknowledges in the Report that improvements to the current system may be warranted to enhance its effectiveness and efficiency, a range of alternative measures may be more appropriate than the introduction of a GSP. The case for a GSP might be stronger if starting from a 'clean slate'. Moreover, any future consideration of a GSP would be best undertaken in the context of an examination of the overall product safety regulatory framework rather than one aspect of it under reference.

FINDING 5.1

The benefits of a General Safety Provision (GSP) applied to consumer products under reference are unlikely to justify the costs involved. A particular concern is that the GSP may fail to target the areas of biggest risk and may deliver little benefit beyond what might be achieved with appropriate modifications to the existing consumer product safety regime (as discussed in this report).

Alternatives to a GSP

As indicated above, a number of potential elements of a GSP could be implemented separately to address specifically identified weaknesses. While the Victorian Government's view that a GSP could help facilitate some other reforms (such as harmonisation) is acknowledged, the Commission sees a greater potential for improved outcomes with the selective adoption of some of these elements rather than a wholesale adoption of a GSP.

Some of the reforms that could be adopted independently of a GSP were contained as separate options in the MCCA Discussion Paper and are discussed in the following chapters, including foreseeable use (option 2 — chapter 6); extension of coverage (option 3 — chapter 7); and supplier monitoring and reporting of safety problems (option 5 — chapter 9).

In addition, two other measures that target specific problems identified with the current system, merit further consideration:

1) providing regulators with the power to impose financial penalties, *once the threshold trigger for a mandatory product ban has been satisfied* and the ban implemented; and
2) a requirement that importers of consumer goods (commercial imports for resale) certify that their goods meet any applicable Australian mandatory safety standards.

The Commission has not been able to fully assess these two options in the context of this study and is therefore not in a position to recommend either at this stage. Nevertheless, a brief discussion of each option is provided here.

Impose financial penalties in conjunction with a ban

With respect to the first of these, introducing such a measure would provide an added disincentive for those businesses for which the potential costs associated with a ban or mandatory recall order are not sufficient to deter them from supplying unsafe products. Such businesses may, for example, not have a long-term commitment to the market and therefore are not as concerned about effects on reputation or may know of the unsafe nature of the goods, but have failed to act in a appropriate manner, prior to the imposition of the ban.

Currently financial penalties are amongst a range of penalties and sanctions available to the ACCC where a safety order has been breached, for example where a supplier has defied a ban order. However, currently no statutory financial penalties apply in respect of the sale of unsafe consumer products, if no safety order has been breached.

Were this reform adopted, penalties are likely to be applied rarely. Bans are applied very infrequently — currently, for example, only 12 products are banned under the TPA. Moreover, if given the discretion to seek additional monetary penalties, the regulator might only do so if it considered that the supplier had placed the product on the market with the knowledge that it posed a hazard *and* the direct financial costs and indirect reputation effects for the supplier associated with the ban order, were not considered a substantial enough penalty.

The legislation could state that the penalty only applies if:

- a mandatory product ban is imposed;
- the supplier knew or ought to have reasonably known that such goods were of a kind that had caused or was likely to cause injury; and

- the supplier failed to take action to stop the supply of such goods prior to the imposition of the mandatory ban.

Naturally this proposal would require further consideration by MCCA and be subject to further legal advice.

While such a measure is remotely similar in concept to a GSP (in that if an unsafe product is placed on the market the supplier can be penalised) it is clearly substantially more limited in its scope and application. Such a measure 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.

Importer certification for goods subject to standards

Where an Australian mandatory standard exists, it is not lawful to sell products that fail to meet those standards. It is logical that importers should make themselves aware of whether the products to be imported are subject to such standards. The proposal, by requiring importers to make a declaration, would provide an added level of assurance that businesses have undertaken such checks as necessary to satisfy themselves as to whether there is a mandatory standard and that the goods meet those standards. This makes inadvertent non-compliance less likely, but also by requiring an official declaration with legal consequences for a false statement, could reduce instances of deliberate non-compliance.

Currently importers are required to declare certain information relating to the origin, valuation, nature, description and ownership details of the goods being imported. For most commercial importers these declarations will be made electronically (directly or through a Customs Broker).

The requirement to provide a description of the goods and the relevant tariff classification, enables Customs to clearly identify the goods and flag any that may be subject to special requirements. For such goods importers may be asked to make further declarations in the form of answers to lodgement questions, regarding community protection, prohibitions, restrictions, permits or other relevant information. An example of a specific lodgement question is:

> 'Do these goods contain knives that are daggers or goods incorporating a concealed blade or flick knives and the like' (ACS 2005, p. 23)

It may be appropriate that all imported goods with a description or tariff classification that suggests they could be subject to mandatory product safety standards *automatically* trigger a follow up lodgement question that in effect

requires the importer to certify, where applicable, compliance with such standards, (or indeed any other product safety order), before the goods can be cleared.

Such a requirement could be quite targeted and not impose any extra burden on importers of goods that are not classified to the categories of goods subject to product safety orders. For importers of higher-risk products that do fall within such categories, compliance costs should be negligible where they are acting with due diligence and aware of any legal obligations relating to their goods.

FINDING 5.2

Further consideration should be given by the Ministerial Council on Consumer Affairs to the following measures targeted at specific weaknesses identified in the current system:

- *imposition of financial penalties once a product ban has been implemented; and*
- *certification by importers that consumer products imported for resale meet mandatory Australian standards where applicable.*

6 Foreseeable use

Key points

- The manner in which products are used appears to be a more substantial causal factor in accidents than product defects.
- Currently under the Trade Practices Act, the relevant Australian Government Minister can act to compulsorily recall or ban goods which 'will or may cause injury'. A widely held view is that these words do not permit the Minister to act in cases where goods are unsafe as a result of foreseeable use, including misuse of a product (although some consider that they may in certain circumstances).
- In some Australian jurisdictions and in many other countries, the relevant definitions of 'safe' or 'unsafe' provide authorities with the ability to determine safety having regard to reasonably foreseeable use.
- There is a case for 'reasonably foreseeable use' to be explicitly covered in the threshold tests for bans and mandatory recalls under the Trade Practices Act, and in all fair trading acts.

6.1 Introduction

This reform option (option 2 in the terms of reference), essentially relates to giving the Australian Government Minister a wider power under the Trade Practices Act (TPA) to recall or ban goods that can potentially result in harm because of the way they are used.

Currently, the provisions in the TPA allow the Minister to ban or compulsorily recall consumer goods, in cases where the goods 'will or may cause injury'. This permits action to be taken when goods are defective, but arguably not in cases where goods are unsafe as a result of foreseeable use, including the misuse of that product. Most States and Territories have a clearer discretion to act in the case of foreseeable use.

The discussion in this chapter is confined to the issue of whether foreseeable use should be a part of any threshold test for regulatory action or the definition of a safety obligation imposed on business. More generally, the many considerations

relevant to determining appropriate safety criteria and thresholds are discussed in chapter 8.

The evidence on product-related accidents in chapter 4 and appendix C, indicates that the behaviour of users of products may be a much more substantial causal factor than product defects. There are a number of different types or categories of user behaviour that potentially can contribute to accidents. These include:

- careless use
  - warnings/instructions not followed
  - safety device/safeguards not used
  - environmental (eg inadequate lighting)
  - use of product while under the influence of alcohol/drugs
- used for a purpose not intended by the manufacturer
- inadequate skill
- perceptual and cognitive factors (failure to understand the risk)
- product not serviced/maintained
- intentional/self harm.

Clearly there is scope for more than one of these factors to contribute to a specific accident. It is also likely that many accidents are the result of a combination of behavioural and non-behavioural factors. An understanding of the relative importance of different causal factors can be important in determining whether there is a case for government intervention and in designing efficient policy responses.

As noted in chapter 2, as a general principle, responsibility for addressing product-related risks should be assigned to the party with greatest capacity to influence them (or the ability to control them at least cost). Risks relating to product design and construction are generally addressed most cost effectively by suppliers, while risks associated with improper use are usually best addressed by consumers (by taking greater care, acquiring the required skill, etc).

It would be unreasonable (and prohibitively costly) to expect a supplier to have to design and manufacture a product in such a way that all risk of misuse is eliminated. Many products from which consumers derive substantial utility pose significant hazards when used in a careless manner (for example, motor vehicles, power tools, scissors, knives, lawn mowers, ladders). Ultimately, consumers must take some responsibility for their own safety and make reasonable efforts to inform themselves about the risks associated with a product and its safe use.

Nevertheless, suppliers may often be able to make cost-effective adjustments to their products that reduce the scope for the product to be misused (for example incorporation of a safeguard, improved warnings and instructions for use).

6.2 Current approach — TPA

The pre-condition for an order to ban or compulsorily recall a product is that it 'will or may cause injury to any person'. A widely held view is that the inclusion of the word 'cause' in the phrase, permits action only when the product is defective and not when the injury is likely to result from its foreseeable misuse.

While the interpretation of these words does not appear to have been tested in the courts, legal advice provided to the Australian Government supports this more restrictive interpretation. A draft regulation impact statement prepared in 2001 for a proposal to introduce a safety standard for baby walkers, referred to such legal advice:

> The feasibility of establishing a Trade Practices Act consumer product ban for baby walkers has been considered as a means of eliminating the product from the market, but legal advice was that this would not be possible. Analysis determined that baby walkers are not necessarily unsafe when used in a suitable environment with appropriate supervision. Accordingly, baby walkers could not be described as a product that will or may cause injury in terms of the Act, and therefore they fail to meet the key criteria for a Trade Practices Act product ban. (Australian Treasury 2001, p. 5)

The Pharmaceutical Society of Australia outlined the problem in relation to medicines (although these are covered by the specific regime covering therapeutic goods, the general product safety provisions in the TPA also have application to these products — see chapter 3):

> Some legitimate and licit medicines are subject to or have a high potential for deliberate misuse, either by ingestion of a higher (than standard) dose or through use/administration by an unintended and/or unsafe route. In the absence of any intervention, continued misuse of a particular product is foreseeable based on observation of local trends of misuse, overseas experience and data, and knowledge of the physiological consequences being sought by misusers. … Unfortunately, at present such medicines cannot be recalled or removed from the market since they are not defective based on their inherent safety profile although we would certainly consider them to be 'unsafe as a result of foreseeable misuse'. (sub. MCCA23, p. 3)

However, two submissions expressed the view that the current 'will or may cause injury' test could be interpreted sufficiently broadly so as to encompass foreseeable misuse:

> … the phrase "may cause injury" would in certain circumstances embrace a situation where the injury would arise if the product has been misused. (Middletons Lawyers, sub. MCCA18, p. 3)
>
> … an Australian Court nowadays might take a more expansive view and decide that something misused in a foreseeable manner might be one that 'will or may cause injury'. (Dr. Nottage, sub. 42, p. 8)

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.

The pre-conditions for making mandatory information or product standards do not limit the Minister's power to act in the case of foreseeable use. However, such actions take time to implement and would be a less effective tool for dealing with *urgent* product safety issues. Although, once a mandatory standard is issued, the Minister can order a recall of products that do not comply with the standard.

6.3 Alternative approaches

In most cases, State and Territory Government Ministers appear to have a clearer discretion to impose a ban in the case of foreseeable use. In particular:

- South Australia 'may be dangerous'
- Tasmania 'substantial risk of injury'
- Northern Territory 'are dangerous to health or a possible source of danger to health'
- ACT 'to prevent or reduce the risk of injury'
- NSW 'so dangerous that their supply should, in the interests of public safety, be prohibited or restricted immediately'
- Victoria 'are dangerous'
- Western Australia 'so dangerous that their supply ought in the interests of the public, to be prohibited immediately'

In both NSW and Western Australia, the definition of 'dangerous' is: 'likely to cause death or to cause injury to the body or health of a person, whether the death or injury is likely to be caused directly or indirectly and whether or not because of …

the necessity for, or possibility of, the use of the goods with other goods'.[1] In Victoria the definition of 'dangerous' is very similar, also stating that the death or injury can be caused indirectly, but not making specific reference to the interaction with other goods.

The NSW Office of Fair Trading indicated that the words in that State's Fair Trading Act have provided scope for action in relation to misuse:

> Although 'foreseeable misuse' is not explicitly included in the relevant definitions in the *Fair Trading Act 1987*, bans or mandatory standards are imposed on products when the product itself is the cause of injury (portable cots) or when inappropriate use of the product is the cause (baby walkers). (sub. DR61, pp. 1-2)

The Victorian Government also indicated that their definition allows action to be taken against products that:

> may be safe for their intended purpose, but may be harmful when used in a way that is unintended by the producer but is reasonably foreseeable. (sub. DR60, p. 14)

Definitions of 'unsafe' or 'dangerous' used in the European General Product Safety Directive and in the proposed Canadian general safety requirement include 'foreseeable use' (see chapter 8). In the United States, when considering whether a product is 'defective' (and therefore subject to mandatory reporting and recall procedures), the reasonably foreseeable use or misuse of the product, and the population group (such as children, the elderly, or the disabled) exposed to the product, must be taken into account (CPSC 1999a, pp 10-11).

The inclusion of reasonably foreseeable use is consistent with the approach adopted by the courts in determining the required 'standard of care' in common law negligence actions (see box 6.1).

The product liability provisions in Part VA of the TPA, adopt some of the same common law principles. Goods are 'defective' (unsafe) 'if their safety is not such as persons generally are entitled to expect'. In determining the extent of the safety of the goods, regard is to be given to all relevant circumstances, including: 'what might reasonably be expected to be done with or in relation to them' (s. 75AC (2)(e)).

[1] Further information on the pre-conditions for product safety orders and other aspects of the product safety regimes in the States and Territories is provided in chapter 8 and appendix B.

Box 6.1 **Foreseeable risks in negligence cases**

To be successful in a negligence action under common law, a person has to prove that a duty of care was owed by the supplier[2]; that the acts or omissions of the supplier breached the standard of care required to discharge the duty of care; the breach caused injury, disease or other damage; and that the injury or damage was not too remote in that **it was a reasonably foreseeable consequence** of the negligent acts or omissions. The Ipp report on the future of negligence actions in Australia explained the role of 'foreseeability of risk of harm' in determining a breach of the duty of care:

> Foreseeability of the risk of harm is relevant to answering the question of whether the reasonable person would have taken any precautions at all against the risk and, hence, whether the defendant can reasonably be expected to have taken any precautions. It would not be fair to impose liability on a person for failure to take precautions against a risk of which they had neither knowledge nor means of knowledge. Foreseeability is a precondition of a finding of negligence: a person cannot be liable for failing to take precautions against an unforeseeable risk. But the fact that a person ought to have foreseen a risk does not, by itself, justify a conclusion that the person was negligent in failing to take precautions against it.
>
> Once it has been determined that the risk in question was foreseeable, the negligence calculus provides a framework for deciding what precautions the reasonable person would have taken to avoid the harm that has occurred and, hence, what precautions the defendant can reasonably be expected to have taken. The calculus has four components: (a) the probability that the harm would occur if care was not taken; (b) the likely seriousness of that harm; (c) the burden of taking precautions to avoid the harm; and (d) the social utility of the risk-creating activity. (2002, pp. 102-103)

Foreseeability is not a matter of what a person knows but what a 'reasonable person' in their position would have known. Hence the expression '*reasonable* foreseeability'. Whether it is reasonable to take precautions to avoid harm, and if so, what precautions, is resolved by asking what precautions the reasonable person would have taken. Case law suggests that once a danger or defect is foreseeable, a supplier should take all practicable precautions to eliminate the danger or defect by alteration of the product, so far as reasonable. This requires research and testing to determine if such alteration of the product is practicable. If alteration is not practicable, and the danger is sufficient, recall from the market is required. If alteration is not practicable and either the danger is sufficient to warrant withdrawal, or the danger is great but the product cannot be withdrawn, then the product must be accompanied by adequate and comprehensive warnings. Importantly, 'insufficient warnings will result in liability just as will a complete absence of warnings' (Brooks, 1993, p. 240).

Source: Ipp, Cane, Sheldon and MacIntosh (2002) and Brooks (1993).

[2] A duty of care may also be owed to a consumer by an upstream or downstream party, for example component supplier, designer, wholesaler, distributor, retailer, wholesaler, hirer, repairer or second-hand dealer.

Goods will not necessarily be safe even if they operate as intended. In *ACCC v Glendale Chemical Products Pty Ltd*[3], a corporation which packaged and sold caustic soda through supermarkets was found to have supplied defective goods when a consumer purchased the product and used it in an unsafe manner, suffering injury. The court found that the label did not contain sufficient warnings against the methods of using the product (see Miller 2005, p. 705). The judgement of Justice Emmett in the Glendale case makes a number of observations relevant to the interpretation of reasonably foreseeable, including:

> The question is whether it could reasonably be expected that a substance marketed for the purposes of cleaning drains could possibly have been used in a way in which it was used … In other words, **would it be reasonable to expect** [emphasis added] that a consumer, despite the directions on the label, albeit not in the form of a warning, would use the substance in a different way for much the same purpose.

6.4 Participants' views

There is considerable support for broadening the threshold test to *explicitly* cover foreseeable use (that is, not only normal or intended uses, but also foreseeable misuse). The Australian Competition and Consumer Commission (ACCC) and the Australian Consumers' Association (ACA) were among those advocating such a change:[4]

> Relaxing the 'will or may cause injury' restriction on bans and compulsory recall orders makes sense as it simply removes the requirement for the actual product to *"cause"* the hazard. Several instances have occurred where the product itself is not the cause of the injury but more of a conduit to accessing the hazard. (ACCC, sub. MCCA4, p. 10)

> The ACCC believes it appropriate to consider not only the intended user (user fit) but also for a product to be safe within its intended environment (environment fit). These considerations incorporate the concept of intended use and foreseeable misuse. (ACCC, sub. MCCA4, p. 18)

> Including within the law's reach what is termed "foreseeable misuse" is long overdue and if adopted into law, would bring Australian product safety law into line with common law tort principles of negligence and strict product liability law, as well as the product safety legal regimes in America and the European Union. (ACA, sub. DR51, p. 2)

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[3] (1998) 40 IPR 619.

[4] See also, for example, Victorian Government, sub. DR60, Kidsafe NSW, sub. DR57, Infant and Nursery Products Association, sub. DR55, Australian Toy Association, sub. DR49, and Small Business Development Corporation of WA, sub. DR46.

However, some participants, in commenting on the Commission's Discussion Draft, argued against changes to the current wording:

> As highlighted by the Commission, the current system is working well. Whilst a 'widely held view' exists that the Minister is not able to act in cases where goods are unsafe as a result of foreseeable misuse, the Commission acknowledges that "… the interpretation of these words does not appear to have been tested in court." ACCI therefore considers it is reasonable to conclude that it is unnecessary to change the current provision. (ACCI, sub. DR54, pp. 4-5)

> ACCORD … is yet to be convinced that any additional requirements such as the introduction of 'foreseeable misuse' in the definition of 'unsafe' are warranted. (Accord Australasia, sub. DR52, p. 2)

6.5 How should reasonably foreseeable use be defined?

The Commission considers that any foreseeable use concept that is to be the basis for government action must reflect two elements:

1. the foreseeability of the use — that is, the use must be reasonably predictable; and
2. the reasonableness of the use — some uses might be predictable, but nevertheless are clearly 'unreasonable'.

Appropriately defining and interpreting the second of these elements poses the greater challenge.

It clearly would be unreasonable for a lawnmower to be withdrawn from the market because some users have injured themselves trying to use the mower to trim a hedge. On the other hand, if it were likely that, given the design of a product (and accompanying packaging, labelling and instructions for use), a *reasonable person* was likely to use a product in a manner that could cause injury, then the community might have reason to expect that such a product should be withdrawn (and, if practicable, altered and reintroduced to the market).

In the United Kingdom, the Department of Trade and Industry provides the following guidance on how 'normal or reasonably foreseeable conditions of use' (the relevant words in the European General Product Safety Directive definition of a 'safe product' — see chapter 8) are to be interpreted:

> *Normal conditions of use* can be taken to be the general usage intended by the producer without him placing unreasonable restrictions on such use by consumers.

> *Reasonable foreseeable use* should, it is considered, where appropriate, take account of intended and potential types of user (ie the elderly, the unpredictable behaviour of

> children) and how a reasonable person might use a product in the absence of any indications to the contrary. (DTI 2005a, pp. 14-15)

It can often be very difficult determining whether an accident involving a product is due to bad product design and/or inadequate warnings or alternatively misuse by the consumer. Often a product will be utilised in a manner which the user considers reasonable, but the manufacturer considers abuse. However, merely warning users against unsafe uses of a product will not necessarily be sufficient to make a product 'safe':

> Most stepladders bear considerable amounts of user advice, which often seems to contradict the very purpose for which stepladders are intended. Messages such as 'Do not use a stepladder to access high places' or 'Do not stand on the top platform of the stepladder' may have little impact on users who believe that such actions are clearly within the normal functions of stepladders. (Clift, Navarro and Thomas 2002, p. 176)

The ACA expressed concern at the possibility that producers might have the power to define what is 'foreseeable use' and 'foreseeable misuse':

> … simply by labelling a product as appropriate for only specific uses, even when the producer has reason to know that what it terms "misuse" appears to be a pattern of usage. (ACA, sub. DR51, p. 2)

Howells (1998) makes the following observations about the approach taken in the European GPSD:

> … judged according to its normal or reasonably foreseeable conditions of use … is a compromise standard. It does not let the manufacturer arbitrarily restrict the uses to which the product can be put. Equally, the consumer is not protected against all misuses. He must, however, be protected against those which are reasonably foreseeable. This would seem to go further than simply preventing the manufacturer from claiming that some typical uses should not be treated as normal uses because they have been stated to be inappropriate uses in the instructions. Conceivably it could require manufacturers to guard against illegitimate uses to which they can reasonably foresee the product might be put. Thus, one might require toys which imitate adult equipment to make it clear that they cannot be used for that purpose. One can even imagine the need for solvent manufacturers to warn of the dangers of solvent abuse. There must, however, be limits to what is reasonably foreseeable. Thus, whilst one suspects that some ladies' tights have been used as an emergency fan belt to repair a broken down car, hosiery manufacturers would not be under an obligation to warn of the dangers of such ad hoc improvisation! It would, however, seem to require that businesses monitor the post-marketing history of their products to determine what uses the product is in fact put to.

In assessing what might constitute 'reasonable' or 'unreasonable' use the focus should not be exclusively on the appropriateness of the actions by the consumer. There must be some consideration of how reasonable it would be for the supplier to take action to minimise any scope for misuse. Thus, for example, while generally

the deliberate misuse of a product to harm another would be 'unreasonable' and therefore it would not render the product 'unsafe', there may be scope for regulatory action in some such circumstances:

> … what if such misuse is foreseeable, and it would be 'reasonable' for the supplier to take 'cost-effective remedial action … (for example product alteration …)'? Then not taking such action may mean, in light of other considerations going to the reasonableness of the suppliers' actions, that it has nonetheless supplied an unsafe product, breaching regulatory requirements. (Nottage 2005, p. 106)

Of course in other cases the abuse of the product can either not be addressed (because it is intrinsic to the functionality of the product) or it would be prohibitively expensive to do so. It would be more difficult for governments to justify withdrawing such a product from the market, particularly when it is providing substantial utility to those consumers using the product in a safe manner, nevertheless there may be particular limited instances when the benefit in terms of mitigating the potential harm outweighs the costs associated with denying consumers access to the product. There are not always easy answers and such questions need to be addressed on a case-by-case basis. Some examples of products where consumer behaviour and/or the environment in which the product is used has created a safety hazard are discussed in box 6.2.

In light of the above discussion, the Commission has identified a number of factors that might be taken into account in considering 'reasonably foreseeable use'. These factors, which could assist in establishing the reasonableness of the use by the consumer and also the actions of the supplier, are reflected in the indicative checklist in table 6.1.

6.6 Costs and benefits of including foreseeable use

The costs and benefits of broadening the definition used in the TPA of 'unsafe' would depend on the scope of the revised definition and its interpretation and implementation. If the scope was interpreted too broadly, costs for business and consumers could be very high. Products presenting known and acceptable risks could be withdrawn from the market. Considerable uncertainty could be created as suppliers try to 'second-guess' all the inappropriate (unsafe) ways in which their products might be used. In many cases the costs associated with trying to eliminate risk would be prohibitive.

Box 6.2 Consumer behaviour and product hazards — some contemporary examples

Baby walkers

Baby walkers comprise a frame mounted on wheels or castors which supports an infant in a standing position, assisting mobility at an early age. Infants enjoy using a walker and it keeps them entertained. Some parents also believe that a walker will assist their child's development, a view that is opposed by child health and development specialists. Baby walkers have been sold in Australia for over 30 years and in that time there have been a significant number of injuries (around 850 emergency department presentations annually (Australian Treasury 2001)), around two thirds occurring as a result of a fall. The injuries do not usually result from defects in the product; but from the mobility that the product gives the infant, providing access to hazardous areas around the home, for example stairs. Baby walkers are not necessarily unsafe when used in a suitable environment with supervision. Mandatory standards apply to these products.

Baby bath cradles and seats

Baby bath cradles are designed to support babies in a lying position, allowing the adult to use both hands for bathing the baby. Bath seats are for babies six months or older and enable the child to be seated. Although these products are promoted as bathing aids and not safety devices, they may provide carers with a false sense of security. As a result babies may be left unattended, for example, while the carer answers the phone, uses the toilet or collects a forgotten bath item. Six babies drowned in a bath aid in Australia over a 10 year period (many more have come close to drowning). A recent Victorian study of deaths of children in bathtubs (Bugeja 2004) found that in every case inadequate carer supervision was the most significant contributory factor. Mandatory standards apply to these products.

All terrain vehicles (Quad bikes)

All-terrain vehicles (ATV or Quad bikes) are used extensively in Australia on farms for activities such as mustering, spraying and transporting loads. They are also often used as a recreational vehicle. There is a propensity for ATVs to rollover and cause serious injury to riders and passengers (although they are not designed to carry passengers). There are around 10 deaths associated with ATVs each year in Australia (Fragar and Pollock 2005, p. 2). Terrain, slope and surface play a key role in ATV-related deaths. Despite being marketed as suitable for 'all-terrains' the vehicles are unstable on undulating or steep surfaces. Some argue this makes the product unsafe even under existing definitions (ie 'will or may cause injury'). However, the behaviour of users (misuse) has also contributed to a number of accidents. This includes the carrying of children as passengers, the unsupervised use of the product by children, use of the product whilst under the influence of alcohol or drugs, and reckless or careless use (including excessive speed or carrying inappropriate loads).

Source: Australian Treasury (2001), Bugeja (2004), Kids Health (2005), and Fragar and Pollock (2005).

Table 6.1 **Indicative checklist for considering action in relation to 'reasonably foreseeable use'**

Consumer behaviour/environment	*Actions by suppliers*	*Nature of the hazard/risk*
• Deliberate self-harm or harm to another? • Reckless disregard for own safety? • Were manufacturer's warnings heeded? • Were safeguards not used or removed? • Was the product used while under the influence of drugs/alcohol? • Was the product serviced/maintained as required? • Was the product used by an incompetent person (eg child unsupervised)? • Does safe use of the product require a level of care or supervision that is unlikely or unreasonable? • Could the 'average' or 'reasonable' consumer be expected to use the product in a way that is dangerous? • Has the particular environment in which the product is used, or its interaction with other products, contributed to the hazard?	• Were adequate warnings and clear instructions for use provided? • Has the product been promoted in such a way that encourages or facilitates an unsafe use? • How feasible would it be for the supplier to have taken cost-effective remedial action (eg product alteration, better information, etc). • Are the costs of preventing misuse prohibitive or not feasible without seriously compromising the functionality, performance, or utility of the product?	• What is the probability that harm will occur if care is not taken? • How serious is the potential harm? • How well known is the hazard? • Does the utility associated with safe use of the product outweigh the risk/hazard?

As always, any government intervention should be the minimum necessary. Governments would only need to act in circumstances where the suppliers fail to act responsibly. Generally, suppliers are likely to act quickly where their product is likely to cause injury — if only because of the risk of bad publicity and damage to their reputation or the threat of legal action if injury does occur. In some cases, if information about potential hazards has been brought to the attention of regulators before the manufacturer/supplier, the government could forward such information and encourage appropriate action by the businesses concerned.

Moreover, in many cases where a good is only unsafe because of the inappropriate manner in which it is used, the most cost-effective government response might be to

encourage (or require by way of a standard) producers to supply better or additional information about the potential hazard. In a limited number of instances it may be more efficient for the government to produce and disseminate information directly (for example through a general awareness campaign).

There may be other options for addressing particular hazards that would need to be considered before a ban or recall is considered — for instance in the case of all-terrain vehicles (see box 6.2 above) mandating the wearing of helmets might be a more appropriate government response.

Benefits

The main potential benefit from revising the definition of 'unsafe' is that it would allow regulators to ban or compulsorily recall a product in a greater range of safety situations. To the extent that accidents are avoided by implementing this reform, there will be benefits to consumers and spillover benefits to the community (through reduced third-party effects and public health costs).

It is not possible to say, even broadly, what the likely magnitude of the reduction in accidents might be. This would depend on a large number of factors, including:

- how many of the accidents involving products, that are caused by the behaviour of users, could be classified as reasonably foreseeable — that is the way that the product was used was not unreasonable and the supplier should have been able to foresee that their product could be used in that way; and
- where such foreseeable use is not already being effectively addressed by suppliers, how likely is it that regulators will get early warning of the potential hazards and act to have products withdrawn from the market (this depends critically on the quality of information systems and monitoring and enforcement resources).

Such a reform would also encourage businesses to think more carefully about designing safe products. The extent of such incentive effects would depend on the strength of existing incentives provided by, among other things, product liability laws and the desire to preserve reputations. As discussed in chapter 4, a number of submissions on the MCCA Discussion Paper suggest that the appropriate incentives exist already and suppliers do voluntarily act to withdraw products if they discover a significant hazard (either relating to a product defect or the way it is being used).

Costs

The main potential costs would result from the uncertainty that could be created as to what additional obligations such a revised standard of safety would place on businesses. As noted above, there could also be challenges for regulators in determining what is a reasonable or an unreasonable use of a product or when an unreasonable use warrants action by the Government. Nevertheless, as discussed, the notion of reasonably foreseeable use is already imbedded in much of the legal regulatory framework.

Some argue that the 'grey areas' and consequent uncertainty should be addressed by the use of more specific wording in the legislation that would seek to clarify and narrow the range of uses that might be deemed to justify Government action:

> It is imperative then that the definition of "reasonably foreseeable misuse" is specifically defined so as not to leave it too broad or open to interpretation at the expense of business. (Small Business Development Corporation of WA (SBDC), sub. DR46, p. 3)

The Commission favours the use of broader wording that provides regulators with appropriate discretion as to when to act. The legal system is used to dealing with such broad concepts, indeed 'reasonably foreseeable' is a familiar term that has been well tested in the court system. The examples provided in box 6.2 and the factors suggested in table 6.1 that might be taken into account in considering 'reasonably foreseeable use' serve to illustrate the difficulty that would be associated with precisely defining how different circumstances should be treated. A case-by-case assessment is required. Nevertheless, the Commission acknowledges the scope for uncertainty and the need for some guidance for business. In chapter 8, the Commission recommends the development of supporting guidelines which will provide clarification as to the sorts of factors that regulators will take into account in determining whether safety thresholds, more generally, have been met.

Costs on business

There would be a risk that action could be taken too frequently, or in a subjective, unnecessary or unpredictable manner. If this were the case there would be scope for substantial costs to be imposed on business. Middletons Lawyers submitted:

> It is undoubtedly appropriate for the Government to be able to exercise its power to order the recall of a product where the product is unsafe but we submit that it is too onerous a burden on the manufacturer to be faced with the possibility that its product will be the subject of a mandatory product recall for the reason that when it is misused it may cause harm. We recognise that situations will arise where products will be misused and there is a risk that consumers may be injured. However this risk must be weighted against the prejudice that would be faced by manufacturers if they were

> required to assess product safety, not only in circumstances where the products are used for the purpose for which they are manufactured but also where they are used for their purposes, including quite unexpected purposes. We submit that to impose a product recall on a product which may be dangerous when misused leaves the manufacturer in an uncertain position. (sub. MCCA18, p. 3)

Coles Myer Limited's submission addressed the need for limits on the extent of producer liability for how goods might be used:

> … we do not believe the manufacturer, importer and/or retailer should have to take responsibility for the outcome if all reasonable safety precautions have been taken (i.e. consumer should not be able to seek redress or compensation if the product was rendered unsafe as the result of misuse or abuse). (sub. MCCA9, pp. 2-3)

However, the Commission understands that other jurisdictions, which are not subject to the restriction faced by the Australian Government, have reported that the power to ban or recall products subject to misuse has not led to numerous unwarranted requests for them to do so. The ACCC considers that:

> Such a change is unlikely to give rise to calls for unnecessary intervention. Even if that were the case, the procedures that usually apply to regulatory intervention should provide effective balance. (sub. MCCA4, p. 10)

Similarly, the general experience overseas seems to be that the power to ban or recall products subject to reasonably foreseeable use tests has not led to a large number of inappropriate requests for regulators to take action.

Providing government action is restricted to those cases where the foreseeable misuse is not unreasonable then, in principle, revising the definition of unsafe in this way should not result in a significant increase in compliance costs for business. The same preventative measures that producers would take to avoid potential liability suits would also protect them from government action to withdraw their product from the market. Such measures include: informing themselves about the risks of harm associated with their products; determining and taking precautions that are reasonable and practicable; undertaking research and testing of the product; adequately warning consumers of any residual risks; and, if warranted, recalling unsafe products from the market. As noted above, these are the sorts of considerations that courts would take into account in considering a negligence action against a supplier or an action for breach of the liability provisions in Part VA.

Any scope for uncertainty will be greatest in the transition period after the introduction of the revised definition. As businesses become familiar with the particular (and limited) circumstances when the Ministerial power is exercised, they would have greater confidence about the implications (if any) for their business.

In addition, as discussed above, the Commission favours the development of guidelines to provide some clarification for business (and administrators) as to the sorts of circumstances when regulators may deem a product 'unsafe' due to reasonably foreseeable use.

Costs to government

There may be some additional costs to government in investigating reports about hazards associated with the use of goods. As noted above, there could be challenges associated with deciding when intervention is appropriate. Ensuring the development of clear guidelines and reference to established legal principles should help reduce uncertainty for government.

Costs to consumers

While 'at risk' consumers potentially benefit from the removal of certain hazards associated with the unsafe use of a product, other consumers of the product that are deriving utility from using it safely will lose out from the product's withdrawal from the market (or perhaps from its redesign in a way that reduces its functionality or performance). As noted in the context of the General Safety Provision discussion (chapter 5), there is also a possibility that when products are withdrawn, consumers may substitute into other products (for example second-hand goods) that actually pose greater hazards.

Even if the Minister was only to take action in rare circumstances, businesses might act in anticipation of such action (or on threats of such action) because they want to avoid the bad publicity associated with a compulsory recall or banning notice. In reality, the Minister would be likely to use the banning or compulsory recall power as a last resort. As is the case now, it would be expected that every attempt would be made to first negotiate a voluntary withdrawal (or provision of additional information to consumers).

6.7 Conclusion

The Commission considers that there is merit in revising the threshold test for bans and compulsory recall orders under the TPA and, where necessary, in State and Territory legislation, so as to explicitly allow for reasonably foreseeable use. Such a concept is already part of the regulatory environment in some jurisdictions and is embedded in product liability law. Reducing injuries associated with the use of

products is an important issue that needs to be addressed through a variety of strategies of which this proposal could be one element.

The Commission's suggested wording for harmonised national threshold tests for product safety orders are set out in chapter 8.

RECOMMENDATION 6.1

Governments should amend consumer product safety provisions to explicitly cover 'reasonably foreseeable use' in the threshold tests for bans and compulsory recall orders under the Trade Practices Act and legislation in all jurisdictions.

7 Services and second-hand goods

Key points

- There is currently some lack of clarity with regard to the coverage of services and second-hand goods in product safety provisions.
- While some jurisdictions include consumer safety provisions relating to *services*, the powers to mandate a standard for (or ban) a service have not been used.
- The Commission has not identified evidence of a substantial problem in relation to the provision of unsafe services (outside those services that pose the most serious hazards, that are already covered by sector specific regulatory arrangements).
- While coverage of *all* services, within the product safety provisions, may not be justified, there would be benefits in coverage of services related to the supply, installation and maintenance of consumer products. The provision of such services can potentially render a safe product unsafe. Coverage should be consistent across all jurisdictions, which would involve an extension in some jurisdictions and a narrowing of coverage in others.
- Given that governments have the power to enforce product safety regulations in relation to *second-hand goods*, there would be some advantage in making this more transparent, thereby reducing any uncertainty for business and consumers. This could be achieved through legislative amendments or, preferably, by an agreed intergovernmental policy statement.
- Specific standards and bans should make clear whether second-hand goods are covered or exempt. When developing or revising standards, special consideration should be given, where relevant, to the implications for second-hand goods.
- There is a strong argument for a case-by-case approach to enforcement of product safety laws as they relate to second-hand goods. Targeting of supply by commercial dealers offers the best prospects for cost-effective action. Resources should be devoted to addressing the most serious potential hazards; for example, ensuring compliance with mandatory standards applying to cots.
- A range of complementary strategies should be considered, including monitoring and surveillance, supplier education and consumer awareness campaigns. Awareness campaigns may be the only sensible approach to targeting non-commercial sales and hand-me-downs.

7.1 Services

The MCCA Discussion Paper (2004, p. 17) states that there is a lack of clarity surrounding the current consumer product safety regulatory system's coverage of services. It notes that while some State laws do include consumer safety provisions relating to services, this is not the case for all jurisdictions.

This section considers the case for amending the product safety provisions of the TPA (and where relevant State and Territory laws) to cover services (option 3 in the terms of reference).

Current treatment

Consumers receive some protection in relation to services under the common law (negligence), and statutory provisions under the TPA and State and Territory fair trading acts. In addition, various services identified as 'higher risk' are covered by specific safety arrangements.

Trade Practices Act

Section 74 of the TPA implies into contracts a warranty that services will be performed with 'due care and skill'.[1] Further, any materials supplied in connection with those services 'will be reasonably fit for the purpose for which they are supplied'. Thus, if services are not rendered with due care and skill a consumer can sue for breach of contract and recover damages. Middletons Lawyers noted:

> This enables a consumer to recover damages in the amount necessary to put him or her in the same position he would have been had the breach not occurred. (sub. MCCA18, p. 4)

Middletons also provided some examples of consumers obtaining compensation for inadequate provision of services. One which could be considered safety related, involved:

> … the supply of burglar alarms which were found to have breached the warranty implied by s74 when burglars bypassed the alarm. [*Mayne Nickless Ltd v Crawford* (1992) 94 ALR 445] (sub. MCCA18, p. 4)

[1] Applies to supply by a corporation in the course of business. Section 74 contains some exclusions, namely contracts for the transportation or storage of goods (s 74 (3)(a)) and insurance contracts (s 74 (3)(b)). In addition, contracts are to be read subject to any applicable State law which may place a limitation on, or exclude the consumers rights under section 74 (s 74(2A)).

In addition, some protection is afforded consumers of services by other sections within Part V of the TPA (and equivalent provisions in State/Territory legislation), in particular:

- Section 52 — prohibition on misleading and deceptive conduct.
- Section 53 — prohibition on certain false or misleading representations (including: 'A corporation shall not … falsely represent that services are of a particular standard, quality, value or grade; …' (s. 53(aa)).

State and Territory fair trading acts

The coverage of services varies between the States and Territories. In some jurisdictions certain product safety provisions relate to services as well as goods. Bans or mandatory standards can be applied to a service in Victoria, Queensland, and South Australia. A warning notice can relate to services in New South Wales, Victoria and South Australia. There is no express coverage of services in the equivalent legislation in Western Australia, Tasmania, the Northern Territory and the ACT.

Specific legislation covering higher-risk services

A wide variety of sectors in Australia are subject to specific service safety legislation, including:

- Installation of gas and electricity
- Fire safety
- Transport (including aviation)
- Motor vehicle repair services
- Food services
- Building
- Health
- Certain leisure/recreational services

Occupational Health and Safety (OHS) laws (see appendix E) also impact on the safety of services provided by businesses.

As noted by the Australian Competition and Consumer Commission, 'these sectors merit specific regulatory scrutiny due to the potentially high-risks involved in lapses in service safety'. (ACCC, sub. MCCA4, p. 25)

In addition, some other occupational registration and licensing requirements, covering professions outside these sectors, also contribute to the safety of certain services. Further, in some service sectors (particularly sporting and recreational activities and the motor vehicle repairs sector), voluntary safety codes give guidance to providers and/or information to users of these services.

Overseas approaches

Many developed countries have adopted a similar approach to the Australian Government with regard to regulating the safety of services — with an emphasis on sector-specific legislation, rather than more generic legislation. The United States and Canada, for example, do not have *general* service safety regimes.

Under the New Zealand Fair Trading Act, the Minister of Consumer Affairs can make *service safety standards* 'to prevent or reduce the risk of injury to any person'. However, such standards may cover only a specific range of services, namely:

- the maintenance, repair, treatment, processing, installation, assembly, cleaning, or alteration of goods
- the construction, maintenance, repair, cleaning, or alteration of any building, or other fixture on land
- the development of land, and
- the transportation of goods. (Ministry of Consumer Affairs NZ 2005a)

In Europe, the General Product Safety Directive (see chapter 5) imposes an obligation on producers 'to place only safe products on the market'. A safe product is defined to include:

> Any product … including … **where applicable, putting into service, installation and maintenance requirements** [emphasis added], does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account … (Article 2(b), of Directive 2001/95/EC (EU 2002))
>
> "product" shall mean any product – **including in the context of providing a service** [emphasis added] – which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, … .' (Article 2(a), of Directive 2001/95/EC (EU 2002))

Thus, the Directive covers the safety of those services related to the supply of products, for example installation and maintenance, and also products supplied for the use of consumers in the course of providing a service (eg a hotel hair dryer).

With respect to services more generally, there is currently no EU-wide legislation on service safety. The approach adopted varies between member states. All have adopted sectoral legislation, but some have also adopted general legislation. Several countries have chosen to include provisions regarding services in their consumer or product safety legislation (see appendix D).

Is there a problem with unsafe consumer services?

The Commission has not been able to identify data sources that would enable the systematic and consistent estimation of complaints, accidents, injuries or deaths relating to consumer services. Not surprisingly, the best data relates to those sectors that are already covered by specific legislation, for example OHS, health services and transport, where regulators collect some information to monitor the performance of these regulatory regimes. More general accident information systems do not identify accidents caused by consumer services as a separate category, nor do they typically present data for particular services. For services not covered by sectoral regimes, data collection appears to be somewhat *ad hoc*, often in response to particular problems or events.

Participants' views

Submissions did not provide evidence of a substantial problem with respect to the safety of consumer services. Moreover, a number of submissions suggested that the discipline provided by the market (including insurance), common law and current provisions in the TPA are adequate:

> Anecdotal evidence suggests that the behaviour of service providers is positively influenced by their knowledge that delivery of unsafe services which cause injury or damage will result in their being liable to pay compensation to affected parties. (ACCC, sub. DR56, p. 10)

> While the avenues of recourse are not as comprehensive as those for defective products, the ultimate compensation available to a consumer in regard to services rendered without due care and skill is arguably adequate. The ability to impose standards or ban particular services would only be warranted in the face of clear evidence of a real need to reduce the incidence of inadequate services being performed. (Middletons Lawyers, sub. MCCA18, p. 4)

> The introduction of new legislation or regulations is unnecessary. It would only serve to increase compliance costs of service providers. (Australian Chamber of Commerce and Industry (ACCI), sub. MCCA3, p. 5)

> … the case for extending the CPSS [Consumer Product Safety System] to cover 'services' is not convincing. The common law doctrine of duty of care in tort and rising insurance premiums are both strong deterrents to potential providers of unsafe 'services'. (NSW Minister for Primary Industries, sub. 39, p. 1)

> Current Western Australian product safety legislation does not cover services, and any extension of coverage to services would therefore impose compliance costs on those businesses providing such services within the State. The SBDC believes that the existing provisions in the Trade Practices Act and current common law remedies are sufficient and therefore further regulation of services is not supported. (Small Business Development Corporation of Western Australia, sub. DR46, p. 4)

In the Commission's consultations, businesses generally considered that further regulation of services was not warranted. However, there was some support within government for a limited extension of the TPA to cover particular services rendered in conjunction with products. For certain products, such 'ancillary' services have a critical bearing on the safety performance of the product:

> … in some instances there are definitional problems in distinguishing between the 'supply of a product' and 'the delivery of a service' when determining the appropriate course of action. For example, when developing a mandatory standard for blind cords to prevent strangulation, the installation of the cord (service) is as critical to the child's safety as the design of the blind (product). In the absence of a statutory power to regulate 'services', the standard can only deal with the 'product'.
>
> A second example is the pool fence. According to the Australian Consumers' Association, many pool fences fail a strength test, although insufficiently strong fences are not the primary cause of children drowning in backyard swimming pools. … If consumer safety laws covered services, a mandatory standard for installation of pool fences could be introduced. (MCCA 2005c, p. 40)

The Commission was also told about some problems with the assembly by retailers of certain products, such as bicycles, prior to sale.[2] Ms Mandy Bryan, for example, experienced a problem with the 'unsafe' installation of a child bike seat prior to taking delivery of a new bicycle:

> My problem is that the NSW Office of Fair Trading has told me it won't investigate the bike shop on safety grounds as it has no power to impose a penalty when the problem is with a service. (sub. DR58, p. 2)

The Victorian Government supported broader coverage, arguing for the maintenance of their existing coverage of all services:

> … consumers have the right to a basic level of safety in regard to the services they receive, and the legislation should provide protection for consumers in all trade or commerce, including services. (sub. DR60, p. 3)
>
> The Victorian Government considers that there is insufficient evidence to support limiting the coverage of the legislation for services and would not support a narrowing of the definition at this stage. (sub. DR60, p. 15)

Consumer groups also generally supported a wider coverage of services, but, in the case of the Australian Consumers' Association (ACA), recognised the need for some prioritisation (see below).

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[2] A possibly more significant safety problem relates to assembly or installation services performed by consumers with inadequate skill or without suitable equipment. This is an increasing concern because of the growing trend towards the sale of self-assembly furniture or other large items (including inherently dangerous products used by children, such as trampolines and bicycles) in a knocked-down or partially assembled state.

Regulators rarely act in relation to services

As noted above, some Australian jurisdictions and some other countries do explicitly cover services in *general* safety regimes. However, where authorities have the power to act on unsafe services, these powers are rarely used, perhaps indicating the absence of any major safety problems.[3]

In Australia, none of the jurisdictions whose consumer product safety legislation covers services have yet introduced safety or information standards for any services or banned the delivery of any services. Similarly, in New Zealand, there are no service safety standards under the Fair Trading Act (Ministry of Consumer Affairs NZ 2005a). In Europe, those countries that have included services intended for consumers within the scope of their legislation transposing the General Product Safety Directive rarely if ever enforce their powers in respect of services — France and Belgium being the exceptions (CDC 2000).

Reform options

As suggested in the MCCA Discussion Paper, the provisions of the TPA and, where relevant State and Territory laws, could be amended so as to explicitly cover services. This could include giving governments power to:

- issue warning notices
- introduce safety standards
- introduce information standards
- ban certain services considered unsafe.

As well as considering the scope of Ministers' powers (the types of actions that can be taken) in relation to services, a key issue relates to which services should be covered — all services, or only particular services. There was little support for broad coverage of services, although as noted above the Victorian Government does not support a narrowing of their existing coverage of services. There was greater support for a *limited* extension of the product safety provisions to cover services that are related to the supply, installation or maintenance of consumer products. For example the ACCC stated:

> The most appropriate option at this stage would be to limit any service safety provisions to apply to those services related to products, for example, the supply, installation and maintenance of certain products such as consumer household items.

[3] However, inadequate enforcement could also contribute to such an outcome.

> This threshold is more appropriate than to extend the provisions to a range of different consumer services. (sub. MCCA4, p. 10)

This approach would be consistent with the current European General Product Safety Directive's coverage of services.

Notwithstanding their support for general coverage of all services, the ACA acknowledge the case for some prioritisation:

> … we would support a further examination of particular services that could be included on a priority list for coverage because they involve higher risks and/or they are linked to key products. Examples could include the installation of children's furniture, pool fences or security equipment. (sub. MCCA5, p. 6)

A particular option suggested by the NSW Office of Fair Trading (sub. DR61) was to limit the application of consumer product safety legislation to only those services that relate to the supply of goods to which a mandatory standard applies. This is a position that appears to have broader support within MCCA:

> It is proposed to apply consumer product safety legislation to consumer services in a targeted way so as to minimise the regulatory burden on business. This could be done by making provision for mandatory safety requirements in relation to services that are ancillary to or associated with the supply of goods to which a mandatory standard applies. (MCCA 2005c, p. 40)

In considering the appropriate coverage of services, it must be remembered that the issues relevant to services safety and the most effective and efficient responses can be quite different to those relating to product safety. For example, input or process standards (covering, for instance, competency or qualification requirements) are likely to be important options in the context of regulating service provision. Howells (2000) made the following comment in relation to considering the issue of coverage of services under the European GPSD:

> In the goods sector it is appropriate to focus on the condition of the final product; in the service sector the inputs are more important. For instance, are personnel properly qualified and trained, are the premises and equipment suitable, are appropriate processes used? Also the sanctions need to be geared to these issues. Thus one might wish to ban a director/manager/worker from being involved in a service sector; or one might wish to close down premises or ban a certain piece of equipment or the use of a particular process. (Howells 2000, p. 36)

Benefits and costs

While consumers receive a measure of protection in relation to services under common law (negligence) and certain TPA provisions, this relies on them taking action against service providers through the court system. Any such actions are

subject to the constraints of the legal system in terms of cost, access, delays and uncertainty. Further, the ACCC submitted:

> … it is worth noting that the scope and coverage of such protections have been subject to a degree of scrutiny and amendment through the professional indemnity and public liability debate recently, particularly in relation to recreational services. (sub. MCCA4, p. 25)

Amending the product safety provisions of the TPA and relevant State and Territory laws to cover services could afford consumers greater protection by allowing all governments to take actions designed to ameliorate the dangers inherent in the provision of the services covered. Other benefits might be:

- clarification of the treatment of services and consistency between jurisdictions;
- greater consistency with the treatment of unsafe products; and
- improved consumer confidence/competitive advantages.

The magnitude of such benefits depends, firstly on the level and nature of the hazards that exist currently (the size of any problem), and secondly the effectiveness of consumer services safety measures in addressing the problem.

Given the paucity of data, the Commission is not in a position to quantify the likely reduction in accidents and associated injuries and deaths. However, given that the services generally accepted as posing the greatest hazards are well covered by existing safety regulatory regimes (or self-regulatory arrangements) and the fact that in jurisdictions (in Australia and overseas) that already have the power to act on unsafe services, such actions are rarely taken, the Commission's judgement is that the benefits from including most services are unlikely to be large.

Some doubts have also been raised about the effectiveness of, and difficulty of enforcing, service safety provisions:

> Prescriptive statutory provisions directed to regulating the manner in which services are to be provided, … have proven to be only of limited value in improving the quality and safety of services, and are inherently difficult to enforce in consequence of the variable nature of the product being delivered and the difficulties involved in determining compliance with service delivery standards prior to the time of service delivery. (ACCC, sub. DR56, p. 10)

Moreover, it is not clear that provisions dealing with the safety of consumer services *generally* should be linked to the product safety regime. Separate approaches may be more appropriate.

Nevertheless, the Commission considers that there is a special case for treating services that relate to the *supply, installation and maintenance of consumer*

products differently. A number of participants highlighted the critical relationship between the provision of such services and the safety performance of certain products, such as pool fences, children's playground equipment and furniture; security systems; and blind cords.

Notwithstanding the likelihood that the specific nature of any government action in relation to such services would need to be different to actions targeted at products (eg the design of any standards) and the challenges this might present for enforcement bodies, the Commission considers that the benefits of including those services that relate to the supply, installation or maintenance of *consumer products*, within the scope of the product safety provisions, are likely to outweigh the costs.

Some other services where the hazards may be relatively significant (for example, certain leisure and sporting activities) might also warrant priority attention but, in the absence of any robust data, the benefits are very uncertain and, moreover, these issues are best dealt with independent of questions about the scope of consumer product safety provisions.

Any extension of the product safety provisions to cover services would involve:

- Administration costs for governments — transition costs associated with legislative reforms and implementation of new requirements; education and training etc. If the additional powers are to be used effectively, resources will be required for ongoing monitoring, investigation and enforcement activity.
- Compliance costs for businesses — initial transition costs associated with understanding new requirements and implementing new systems and processes. Ongoing costs associated with meeting standards, if any.
- Consumers — depending on the level of compliance costs, consumers may face higher prices and reduced choice of services.

As in relation to many of the other reform options discussed in this report, the actual costs and benefits depend critically on how proposals would be implemented and enforced. For example, compliance costs will depend on what safety benchmarks are used. In this regard, it is worth noting that service standards can be difficult and time consuming to develop. The ACCC stated that:

> There are few International, or national standards regarding service delivery. … [and] COPOLCO [International Organisation for Standardisation Consumer Policy Committee] notes that any individual international standard concerning consumer services will take approximately four years to develop. (sub. MCCA4, p. 27)

As is the case for products, the question of whether government enforcement action in relation to supply, installation and maintenance services is warranted would need to be considered on a case-by-case basis. Considerations would include:

- the nature and magnitude of the hazards — while enforcement action may be appropriate for services rendered in relation to a limited number of 'high risk' products (perhaps, for example, those currently subject to mandatory standards) it is unlikely to be appropriate for services relating to the installation and maintenance of *all* types of products;
- the costs and benefits of alternative options for addressing particular hazards, for example:
  - could voluntary approaches, such as industry codes, more cost-effectively target the problem?
  - what role is there for information and education strategies, both for business and consumers?

Conclusion

The Commission has not been able to identify evidence of a substantial problem in relation to provision of unsafe services (outside those services that pose the greatest hazards, that are already covered by sector-specific regulatory arrangements).

An extension of the product safety provisions to cover *all* services is not justified. However, the Commission considers that there could be benefit in a limited coverage of services related to the supply, installation or maintenance of consumer products. If governments agree to greater consistency in product safety provisions between jurisdictions then it may be appropriate for those States and Territories that currently cover services in their product safety regimes to consider amending the scope of their provisions to cover a narrower range of services related only to the supply, installation or maintenance of products.

RECOMMENDATION 7.1

Governments should amend consumer product safety provisions in all jurisdictions to cover services related to the supply, installation and maintenance of consumer products.

7.2 Second-hand goods

The MCCA Discussion Paper (2004, p. 6) identified a lack of clarity surrounding current legislative coverage of second-hand goods as a problem and suggested two broad options for reform:

- all jurisdictions agree on a general policy statement which clarifies the treatment of second-hand goods and the responsibilities of sellers, while allowing regulators to continue to deal with such goods on a case-by-case basis; or
- amend the product safety legislation to specifically provide for second-hand goods.

When considering the safety of second-hand goods and the appropriate role for governments, a number of factors relating to the characteristics of such products, the manner in which they are supplied, and the expectations and motivations of consumers who purchase these products, must be taken into account. Some of the relevant considerations are outlined in box 7.1

Current treatment

In all Australian jurisdictions, *general* consumer product safety legislation is silent on whether second-hand goods are covered by the legislation. However, in the absence of any exclusion clauses, the provisions are considered to apply to second-hand goods.[4] The application of the relevant legislation is essentially restricted to activities engaged in trade or commerce.

As noted in chapter 3, the TPA provisions apply to all corporations as well as to non-incorporated entities in the Australian territories and to those engaged in interstate trade.[5] Many sellers of second-hand goods are individuals or unincorporated entities not trading across borders and are therefore not subject to the TPA. State and Territory fair trading acts extend coverage to individuals and non-incorporated entities.

[4] In addition, users of second-hand goods may, in certain circumstances, be protected by Part VA of the TPA and be able to take action against the original manufacturer or supplier where a product 'defect' causes injury, loss or damage. There are, however, time limits, and importantly one defence against a claim is that the defect did not exist when the goods were originally supplied.

[5] TPA provisions also apply to those engaged in activities that are conducted by telephone or post, or that use radio or television.

Box 7.1 Second-hand goods — some considerations

Characteristics of second-hand goods

- some products deteriorate with use or the passage of time (for example, due to wear and tear or environmental exposure) so that the safety performance of the used good may be less than when new;
- goods may have complied with applicable standards at time of manufacture, but not the standards of today;
- second-hand goods are often sold without the manufacturers' instructions and warning labels (or safeguard devices) may no longer be affixed;
- servicing and maintenance (essential for ensuring continuing safe performance) may not have been carried out;
- products may have been modified/altered or repaired in such a way as to render them unsafe.

Supply of second-hand goods

- there is a wide range of suppliers, including professional dealers, charities, fetes, private sellers (garage sales etc), on-line sellers, as well as gifts/hand-me-downs etc;
- dealers may specialise in particular categories of second-hand goods (eg nursery furniture) but more typically sell a variety of products and lack specialised knowledge with respect to any particular type of product.

Consumer expectations/motivation

- because the goods are not new, consumers would generally have lower expectations about the performance of the goods;
  - they may accept that the product is less safe than a new equivalent, but would expect some 'minimum' level of safety (which is likely to vary between consumers);
- consumers might be expected to take greater care because they are dealing with a used product;
- for some second-hand products, the fact that they are older may mean that consumers are more familiar with the inherent risks and requirements for safe use (ie familiar technology);
- value for money is often a key motivation for choosing second-hand goods and for some consumers these goods are the only ones that they can afford;
- for some second-hand goods there is no new equivalent (eg antiques/collectables);
- consumers may be motivated to 're-use' goods because of concerns about the environment.

A review of information available from the ACCC and State and Territory Fair Trading Agencies on current *specific* product standards and bans reveals that:

- in most cases the relevant measure is silent as to whether second-hand goods are covered (and therefore it is generally accepted that they are included);
- in some cases the relevant restriction specifically excludes second-hand goods (for example the mandatory standard for pedal bicycles and care labelling requirements for clothing and textile products); and
- in a limited number of cases second-hand goods are specifically noted as being covered (for example cots).

While jurisdictions are taking action on occasions in relation to 'unsafe' second-hand goods, often with a focus on making suppliers aware of their obligations and informing consumers about hazards, enforcement activity is generally fairly limited and rather *ad hoc*, resulting in inconsistencies between jurisdictions. Enforcement efforts have focused mainly on products for which mandatory standards apply, especially products bought for young children, such as cots, child restraints and certain dangerous toys. The ACCC and the NSW Office of Fair Trading made the following comments in relation to their enforcement efforts:

> The ACCC devotes its product safety compliance and enforcement resources primarily to the market for new goods, in accordance with its stated priorities of targeting widespread consumer detriment.
>
> Where appropriate, the educational material developed for suppliers and consumers addresses the need for vigilance in dealing with second hand goods and provides practical guidance on assessing and improving safety. (ACCC, sub. DR56, pp. 10-11)
>
> … NSW does not specifically target second-hand suppliers. The product safety enforcement program handles them in the same way as suppliers of new products. NSW adopts a hierarchy of enforcement, beginning with a caution when non-compliance is detected the first time, followed by penalty notices and prosecution if further non-compliance is detected. In addition, NSW ensures that non-complying goods are withdrawn from sale and not returned at a later date. For example, during 2003-2004 Fair Trading removed from sale a second-hand cot and several second-hand pedal bicycle helmets. (NSW Office of Fair Trading, sub. DR61, p. 3)

Some argue that the discretionary application of product safety legislation, creates uncertainty for sellers of second-hand goods about their responsibilities under the law. Some have also observed that the current treatment makes enforcement difficult. The Infant and Nursery Products Association of Australia (INPAA), for example, considers that:

> … safe supply of nursery products in the secondhand market is … a nightmare from a regulatory basis. The vagueness of the framework often leads to the inability to prosecute vendors of unsafe product and an apparent unwillingness of regulators to tackle this market. (sub. MCCA14, p. 1)

Overseas approaches

As in Australia, general product safety laws in many other countries (for example the United States) are silent as to whether second-hand goods are covered (and as a consequence it is generally accepted that they are not excluded). However, some other countries/communities are explicit, to varying degrees, with respect to coverage of second-hand goods:

- the Canadian Hazardous Products Act states that the products covered cannot be sold *or even given away* if they do not meet the relevant safety requirements and Health Canada guidance makes it clear that the Act applies to second-hand products.
- the European GPSD does explicitly cover second-hand goods[6]:

  "product" shall mean any product … which is intended for consumers … whether new, used or reconditioned. (Directive 2001/95/EC Article 2 (a) (EU 2002)
- In New Zealand, the Consumer Guarantees Act, (which requires that goods must be of an 'acceptable quality', including safe) covers second-hand goods sold by someone in trade, normally acquired for personal, household or domestic use. While the Act does not explicitly mention second-hand goods, guidance material on the Ministry of Consumer Affairs website makes the coverage of second-hand goods clear.

More broadly, a survey of 31 countries conducted in 2003 by Consumers International (reported in Williams and Homer 2004, p. 29) found that more than 50 per cent of the countries surveyed had, or were in the process of developing, national standards and/or laws, which stipulated requirements for second-hand goods.

In addition, in February 2004, the International Standards Organization (ISO) announced that it would begin the process of developing international standards for used goods, giving priority to standards for used tyres, vehicles, clothing, electrical and electronic items.

What is the evidence on unsafe second-hand goods?

The Commission has not been able to ascertain, from the evidence available, the exact nature and magnitude of any problem in Australia with the safety of second-hand goods. There does not appear to be any systematic collection of data on complaints, accidents, injuries or deaths relating to products that have been sold

6 Private sales are outside the scope of the Directive, and antiques and products sold with a view to them being reconditioned are also excluded.

second hand. Once purchased the goods would not normally be identified as 'second-hand', so for instance in injury surveillance data collection, the type of product that has contributed to an accident may be noted, but it is very unlikely that its 'used' character would be recorded.[7] In principle, at least, any evidence about unsafe second-hand products is more likely to be gathered from monitoring and investigations centering around the point of sale and/or complaints about second-hand dealers.

Notwithstanding the lack of data, it is clear that:

- certain products are being sold second hand that do not comply with current standards; and
- some products are being sold that, for various reasons (such as wear and tear and poor maintenance), present greater safety risks than when new.

The Commission is not in a position to assess the seriousness of the hazards that are implied by these observations, although in some cases they could be significant. For example, second-hand cots, particularly older ones that do not even comply with earlier versions of the relevant standards, may pose a serious risk of death or severe injury. The INPAA submitted:

> … in relation to nursery safety the second hand market is still the source of a majority of unsafe product. (sub. MCCA14, p. 2)

The Commerce Commission in New Zealand, which enforces standards made *mandatory* under the *Fair Trading Act 1986*, told the Commission 'that second-hand goods such as baby walkers and cots pose significant enforcement concerns because it is second-hand baby walkers and cots that most often fail to comply with the standards applicable to those goods'. (pers. comm. 14 June 2005).

In the United States, the Consumer Product Safety Commission (CPSC) has run various campaigns to alert the public and educate suppliers about the sale of potentially hazardous products by second-hand dealers (often called 'thrift stores'), and also by private sellers. In 2004, for example, the CPSC joined with private child safety organisations and the National Association of Resale and Thrift Shops to conduct a 'massive Resale Round-Up'. A study by CPSC in 1999, based on visits to randomly selected thrift stores around the country, found that nearly 70 per cent were selling at least one hazardous product (see box 7.2).

[7] Perhaps with the exception of cases where an accident occurs soon after the product is bought, since in such instances the injured party may be more likely to recall/note the fact that the product was bought second hand.

Box 7.2 **US CPSC study on hazardous products in 'thrift stores'**

In 1999, the United States Consumer Product Safety Commission (CPSC) visited 301 randomly selected thrift stores nationwide, including those run by national organisations and local and independent stores. CPSC found that overall nearly 70 per cent were selling at least one hazardous product. More detailed findings were:

- 51 percent sell children's jackets and sweatshirts with drawstrings, presenting a strangulation hazard.
- 20 percent sell hair dryers without protection against electrocution.
- 12 percent sell cribs that do not meet current federal and voluntary safety standards, presenting risks including entrapment and strangulation.
- 10 percent sell recalled halogen torchiere floor lamps without wire or glass guards, presenting a fire hazard.
- 7 percent sell recalled play yards and playpens with protruding hardware or collapsible top rails, presenting a strangulation hazard.
- 4 percent sell recalled car seat carriers with handles that can unexpectedly disengage, causing the seat to flip forward and injure infants.
- 3 percent sell recalled toy basketball sets with nets that present a strangulation hazard to children.
- About 1 percent sell other hazardous products including banned lawn darts, recalled cedar chests and recalled bean bag chairs, all of which present injury and death hazards to children.

Source: CPSC (1999b).

The results of the 2003 Consumers International survey (referred to above) identified some of the main problem areas with respect to the safety of second-hand goods as:

> … household electrical appliances, electric tools, baby cribs, vehicles and pneumatic tyres, all of which may pose risk to health, safety and/or the environment. (Williams and Homer 2004, pp. 28-29)

The findings of the survey in relation to electrical goods is consistent with concerns raised by the Australian Electrical and Electronic Manufacturers' Association (AEEMA) and Consumer Electronics Suppliers' Association (CESA):

> An issue of concern is the importation of second hand electrical goods. While they may once have complied with requirements in another country, there is no requirement to test them against local requirements. There is a real possibility that this regulatory gap could result in the importation of product that does not comply with the relevant Australian or New Zealand safety standard. (sub. MCCA6, p. 6)

Overall, the Commission has not received evidence of a substantial problem with the safety of second-hand consumer products generally. Nevertheless, there would

appear to be some particular areas of concern, such as nursery furniture and certain electrical goods.

Reform options

The broad reform options, as identified by the MCCA Discussion Paper, of either a general policy statement or amendments to the product safety legislation were outlined above.

The MCCA Discussion Paper suggests that the main advantages of the general policy statement approach are that it would clarify the responsibilities of sellers, while allowing regulators substantial flexibility to deal with second-hand goods on a case-by-case basis (MCCA, 2004, p. 37). This approach may also be able to be implemented more quickly and at lower cost than legislative amendments.

The main advantage of making the coverage of second-hand goods explicit through amendment to the legislation is that this potentially provides the highest level of certainty for suppliers and is likely to lead to a greater commitment to enforcement by regulatory authorities. The MCCA Discussion Paper notes that:

> This approach would allow the application of product safety regulation, such as mandatory standards or (potentially) a GSP, to be expressed in relation to second-hand goods with greater precision. However, such amendments may prove to be excessively rigid or too complex to apply, and second-hand goods may be more appropriately dealt with on a case-by-case basis. (2004, p. 37)

In principle, however, any legislative amendments (and if necessary supporting regulations and/or administrative guidelines) could be drafted in such a way as to preserve an appropriate level of discretion and flexibility for regulators to take into account the particular characteristics of second-hand goods and the practical difficulties associated with enforcing compliance.

Other options that might be considered include:

- specific requirements for designated 'higher-risk' products — similar regulations to those that apply to second-hand electrical products (it is an offence to sell these products unless they have been tested and certified/tagged as OK) could be applied to certain other consumer products that may become dangerous over time with use.
- a licensing or registration scheme for dealers. The ACCC submitted:

  > One possibility that could be explored is the imposition of some additional obligations on dealers through a licensing scheme, or at least using that scheme to improve dealer self-regulation and education. (sub. MCCA4, p. 28)

Education and awareness strategies must also continue to be a major part of any overall strategy to address unsafe second-hand products, both within the commercial dealer market and in relation to sale or gifting of such products by individuals. The Royal New Zealand Plunket Society submitted:

> There is an issue of communicating this information to the general public as those who must be reached are the current product owners and/or those individuals to whom they may sell the product. One suggestion may be to post information about second hand purchases — near displays of new items in retail outlets. Or if owner databases exist (eg through sending in warranty cards at original purchase) then a direct mail campaign would be possible. (sub. MCCA22, p. 3)

More generally, in considering reform options, there are a number of issues to consider and choices to make, including:

- should product safety legislation apply to individuals who sell second-hand goods through garage sales, weekend markets, fetes and the like?
- how should charitable organisations be treated?
- should all second-hand goods be covered or only particular high-risk products (for example, only those for which mandatory standards apply and/or those with inherent risks such as power tools and lawnmowers)?
- should second-hand goods be required to comply with today's standards or those applicable at the time of manufacture/original supply?

There was only limited comment on such issues in submissions.

In relation to the types of suppliers/sales that should be covered, the general consensus seems to be that provisions should apply to commercial traders, but private (non-commercial) sales should be exempt:

> … it is unlikely that any law could be enforceable to goods traded in such places as swap meets, boot sales or charity fairs. We recommend that this be left out of any legislation for the present time as this would also be consistent with New Zealand law. (Employers and Manufacturers' Association Northern Inc. (NZ), sub. 40, p. 7)
>
> ACA is not proposing intervention in private sales by individual consumers, only action with regard to the modest number of licensed traders. (ACA, sub. 41, p. 10)
>
> Private sales … should be exempt however, traders at weekend markets, fairs, cash converters and the like (which are a growing industry in the ACT) should be included. (ACT Office of Fair Trading, sub. MCCA31, p. 2)
>
> There appears to be little support, probably because of difficulties in regulation, for extension of CPSS [Consumer Product Safety System] liability to individuals selling second hand goods at garage sales or school fetes. Any exemption in this regard should also extend to farm 'clearing sales', which are similar in principle to garage sales. (NSW Minister for Primary Industries, sub. 39, p. 2)

With respect to the types of products, the ACA, while expressing the view that general coverage would be preferable, also sees merit in identifying a designated list of second-hand products to be covered by any provisions:

> Certain products that are sold second hand quite regularly such as children's products, power tools, lawn mowers, bicycles and motor vehicles could well provide much enhanced safety outcomes for consumers by such an inclusion. (sub. MCCA5, p. 6)

In relation to the question of which standards should apply, Coles Myer Limited stated:

> … second hand traders [commercial for profit] should be obligated to only on-sell goods that are safe according to the 'standards of the day' (sub. MCCA9, p. 3)

When and how should governments take action?

In designing regulatory and non-regulatory interventions to deal with safety issues presented by second-hand goods, governments must balance, on the one hand, the need to appropriately deal with products that present a hazard and, on the other hand, the costs for suppliers, consumers, governments and the general community associated with any action they take. The ACCC commented:

> While this sector of the market is entitled to consumer safety, a cost/benefit analysis must weigh up the availability of affordable goods against potentially unattainable safety standards. (sub. MCCA4, p. 28)

Enforcing product safety laws too strictly is likely to result in government administration costs and business compliance costs that outweigh any safety benefit. Government resources devoted to monitoring and enforcing the safety of second-hand products could have a significant opportunity cost in terms of the system's capacity to address other safety risks. Businesses could be required to incur large costs in understanding product safety requirements across the range of products they sell and from stock losses, where they cannot be confident that products satisfy the relevant requirements.

Moreover, while consumers may benefit from greater assurance with regards to the safety of second-hand products, some, particularly those on lower incomes, would be disadvantaged if products with known and/or reasonable risks are unnecessarily withdrawn from the market. If consumers are unable to afford equivalent new goods, denying them access to low cost used goods may result in them substituting to even less safe alternatives.

As discussed in chapter 2, in determining when action is appropriate and the best form of intervention, governments need to consider, on a case-by-case basis, whether the risks are 'unreasonable'. A number of issues were identified that policy

makers, or those enforcing laws, might consider when determining whether a risk is unreasonable and warrants some form of government action. Some of particular relevance to second-hand goods, include:

- the type and vulnerability of the user and their previous experience with similar products (for example will the product be used by children?);
- has the risk been accepted voluntarily rather than involuntarily (has the consumer knowingly accepted a greater risk as a trade-off for a lower price)?; and
- consumers' knowledge of, or control over, the risk (certain consumers may be very experienced in the use of the product and familiar with the inherent hazards, but on the other hand missing instructions/warnings etc may greatly increase the risks for other users).

Given that there will often be an inherently greater risk in buying second-hand goods, the burden of ensuring that the product is safe should not be placed entirely on the commercial seller. A relevant question may be 'is the product more dangerous than the user would normally expect'? The National Product Liability Association (NPLA) and the Small Business Development Corporation (SBDC) of Western Australia made some relevant observations:

> The business' ability to guarantee the safety of used goods needs to be balanced against reasonable consumer expectations. (SBDC, sub. DR46, p. 4)

> The acquirer of a second-hand good will generally be aware that the product in question is not new and therefore should be taken to know that the product will not be in the same pristine condition as a new item. Furthermore, instructions and warnings may have been removed and thus important consumer information could have been lost. There should be some obligation on the acquirer to inspect the goods and make inquiries about their provenance and any safety issues. Equally, there should be some obligation imposed on the supplier, although the standard required might be less than that of a supplier of a new product. Much will depend on the circumstances. (NPLA, sub. MCCA19, p. 19)

A 'consumer expectations test' is used by courts in product liability cases and is also found in some overseas product safety regimes. In considering whether second-hand goods are of an acceptable quality, the New Zealand Consumer Guarantees Act looks at what a 'reasonable consumer' would think was acceptable taking into account everything surrounding the sale — price, information about the goods, wear and tear (Ministry of Consumer Affairs NZ 2005b). Goods will usually meet the guarantee of acceptable quality if most consumers would be happy with them. Under the GPSD, in the absence of specific rules, or standards, the conformity of a product (including a second-hand product) to the general safety requirement is assessed having regard to *inter alia*, 'the safety which consumers may reasonably expect'.

However, the actions of individuals, in particular riskier behaviours, will often have spillover effects on third parties (for example, bystanders can be injured) or the community more generally (through public health costs). Efficiency and equity considerations will therefore justify government actions to control certain risks that particular individuals might be willing to voluntarily accept.

On the other hand, any reforms that constrain the sale and reuse of consumer products will also have implications for resource use and the achievement of environmental objectives.

Difficulties of enforcing product safety laws for second-hand goods

It is clearly not feasible for regulators to actively enforce product safety provisions in relation to sales of second-hand goods by individuals. The enforcement resources required would be enormous and, to be effective, such actions would need to be quite intrusive and would be unlikely to be well received.

General information and awareness campaigns would appear to be the best way to address hazards associated with products handed down to family members or friends or sold privately. Agencies have used such strategies in targeted campaigns, for example in relation to second-hand cots.

However, even in relation to commercial second-hand dealers, enforcement is likely to be problematic and resource intensive, for a number of reasons:

- there are many dealers, selling a very wide range of products, making coverage and detection more costly;
- dealers are typically smaller businesses that may find it very difficult to keep abreast of product safety issues, and in particular any standards applying to the products they sell,
  - a second-hand dealer who sells a variety of products cannot be expected to have the same level of product knowledge as a more specialised retailer selling new products;
- for many products, safety is difficult to assess by visual inspection and for certain products (for example bicycle safety helmets) it is not possible to test the second-hand item, because the required test (which for new goods would be conducted on samples of a production batch) involves destruction of the product being tested;
- normal wear and tear may make it impossible for a second-hand product to meet the standards applicable at the time of manufacture, and certainly not contemporary standards; and

- instructions for use (and sometimes warning labels or safeguards) will very often not be available with a second-hand item.

Some of the challenges associated with enforcing compliance with safety standards for commercially sold second-hand goods were outlined by interested parties:

> There are practical difficulties … including the cost and efficacy of testing second-hand goods and the lack of detailed product knowledge by general resellers. …
>
> Additionally, requiring second-hand goods to be tested against product standards is likely to be impractical and cost prohibitive in many cases. Placing additional obligations on commercial dealers, who are already heavily regulated, may potentially curtail the second-hand goods market for some products (such as electrical items) and lead to the closure of businesses and loss of consumer choice. (SBDC, sub. DR46, p. 4)
>
> Surveillance and enforcement of regulations for second-hand electrical goods would be formidable tasks and, where surveillance and enforcement resources are limited, the benefits of regulation may be insufficient to justify allocation of the resources required. (sub. AEEMA & CESA, MCCA6, p. 6)

If standards are to be enforced in relation to second-hand goods, it is important to ensure that the elements and criteria of these standards are practical, reasonable and measurable. Where possible, special consideration could be given to the implications for second-hand goods when developing or revising product standards:

> There is good argument for giving special consideration to the requirements for second-hand goods and varying a standard to allow for the practical difficulties associated with their sale, including labelling and packaging. (ACCC, sub. MCCA4, p. 28)

Information strategies (both general media and point of sale) may, in many cases, also be the most appropriate means of addressing safety issues for second-hand products sold by commercial dealers:

> A more practical and feasible method of promoting safe product standards for second-hand goods would be to encourage commercial second-hand dealers to provide point of sale information to buyers about what standard they can reasonably expect from the product. This material should also include information on what options are available to a consumer who finds that a second-hand good is unsafe. (SBDC, sub. DR46, p. 4)
>
> The benefits of an information campaign aimed at consumers regarding the purchase and use of second-hand goods should be considered as part of a broader strategy aimed at addressing the risks in this market. (Victorian Government, sub. DR60, p. 16)

Particular concerns were raised in relation to sales of second-hand goods over the internet. The Victorian Government submitted:

> The growing online trade in second-hand goods, through, for example, online auctions such as E-bay, is an issue that would benefit from further consideration and research to determine the effectiveness of existing protections for consumers. In particular, services such as E-bay blur the line between on-off sales and ongoing businesses

> captured by the 'in trade or commerce' clause which bring transactions within the scope of the Victorian *Fair Trading Act*. (Victorian Government, sub. DR60, p. 16)

In light of such concerns, the Commission considers that a further examination of the particular implications for consumer safety of internet sales of products (both new and used) may be warranted.

Conclusion

Given that governments have the power to enforce product safety regulations in relation to second-hand goods sold in trade or commerce, there would be some advantage in making this more transparent, thereby reducing any uncertainty for business. This could be achieved by implementing either of the MCCA reform options, or indeed a combination of the two approaches (legislative reform with appropriate agreed policy guidelines). However, the policy statement would appear to be adequate and this approach may be able to be implemented more quickly and at lower cost than the legislative reform option.

With respect to standards for specific products, there would also be benefits in explicitly stating that second-hand goods are either covered or not covered.

Since the Commission's Discussion Draft was released MCCA appears to have agreed on certain broad policy positions in relation to the treatment of second-hand goods:

> It is proposed that any distinction in standards or legislation be abandoned and that all safety-based requirements apply equally to new and used items unless a specific policy decision has been made to exclude second-hand products from these requirements. The Consumer Products Advisory Committee (CPAC) has discussed this proposal. In future, all standards should specifically address the issue of how and if they apply to second-hand items. (MCCA 2005c, p. 40)

Consistency of administration and enforcement (across jurisdictions) may be less of an issue than for new goods, because the majority of traders operate in only one jurisdiction. Nevertheless, agreement on some principles of administration and enforcement (including priorities) would be desirable.

There is a strong argument for a case-by-case approach to enforcement of product safety laws as they relate to second-hand goods. Resources should be devoted to addressing the most serious potential hazards, for example ensuring compliance with mandatory standards applying to cots. For products such as these there would appear to be a stronger case for actively enforcing *current* standards. This should be achieved through a range of complementary strategies, including monitoring and

surveillance, supplier education and consumer awareness campaigns, including approaches that target private sales and hand-me-downs.

For a range of other products it will either not be feasible or cost effective to enforce contemporary standards. It is appropriate that regulators are given the necessary discretion to make allowance for the various characteristics of second-hand products, the manner in which they are supplied and the reasonable expectations of consumers.

RECOMMENDATION 7.2

The Ministerial Council on Consumer Affairs should agree on an intergovernmental policy to clarify that second-hand goods (sold in trade or commerce) are covered by existing consumer product provisions. Further, all mandatory standards should explicitly state whether they apply to second-hand goods. A case-by-case approach to enforcement of product safety laws as they relate to second-hand goods should be adopted by all jurisdictions.

8 Safety criteria and thresholds

Key points

- With reference to a number of guiding principles, this chapter considers how the various threshold tests for consumer product safety orders should be harmonised.
- While the precise wording would need to be determined based on legal advice, the Commission recommends that all jurisdictions adopt the following threshold tests:
  - For bans and recalls — the existing Trade Practices Act (TPA) 'will or may cause injury' test modified to permit action to be taken in relation to reasonably foreseeable use;
  - For safety standards — the current TPA wording, that is, 'as are reasonably necessary to prevent or reduce risk of injury to any person' (which is already closely aligned with provisions in most of the State and Territory fair trading acts).
- In assessing the most appropriate wording, the Commission has placed considerable weight on the need to minimise transition costs and allow appropriate discretion for regulators and flexibility for business.
- Any definitions and thresholds should be supported by supplementary guidance material, which clarifies how the provisions should be interpreted and the factors that regulators would take into account in determining appropriate action.
- The Commission has not recommended the adoption of a GSP, however, were one to be introduced, the obligation should be stated broadly and definitions and standards of safety should be closely aligned with existing provisions of Part VA of the TPA (excluding the precondition of actual injury or loss).

This chapter explores some of the key features of the various safety criteria and thresholds used in Australia and overseas. It suggests some broad principles that could be applied in determining what any harmonised national thresholds for product safety orders should be, or safety benchmarks under a general safety provision (GSP), if one were introduced.

Under current Australian consumer product safety laws certain threshold tests or pre-conditions determine the scope and basis for action by regulators to deal with 'unsafe' products. While the relevant thresholds in the TPA and in the State and Territory fair trading acts are the same or similar in many respects, there are also significant differences (see table 8.1). Chapter 13 explains why harmonisation of Australian safety laws is desirable.

Table 8.1 **Comparison of pre-conditions for safety orders[a]**

	TPA	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Pre-conditions for interim bans	will or may cause injury to any person (s. 65C(5))	so dangerous that their supply should, in the interests of public safety, be prohibited or restricted immediately (s. 30(1))	are dangerous (s. 35(2))	likely to cause the death of any person or to injure or adversely affect the health or well-being of any person whether physical, mental or psychological (s. 85(1))	so dangerous that their supply ought, in the interests of the safety of the public, to be prohibited immediately (CA s. 23Q)	may be dangerous (s. 26A(1))	may be a source of danger and the risk of that danger is so substantial that the product should not be sold until an investigation is carried out (s. 7(1))	the Commissioner has undertaken an investigation (s. 30(1))	prevent or reduce the risk of injury to, or impairment of health of, any person arising out of the possession, handling or use of those goods by that person or any other person (s. 26(1))
Definition of dangerous	not applicable	likely to cause death or to cause injury to the body or health of a person whether … directly or indirectly (s. 4)[b]	likely to cause death or serious injury to the body or health of any person, whether directly or indirectly (s. 3)	not applicable	as per NSW (FT s. 5)[b]	no definition	possession, use, or handling gives rise to substantial risk of injury to, or danger to the health of, any person, whether directly or indirectly (s. 2)	no definition	not applicable
Pre-conditions for permanent bans	where an interim order has expired and no safety standard has been prescribed (s. 65C(7))	after consideration of report or any recommendation (s. 31(1))	goods or services of that kind are dangerous (s. 40(3))	as per interim ban (s. 85(1))	by reason of the goods being dangerous, or by reason of the supply of the goods being dangerous (CA s. 23L(1))	to avert risk of injury or impairment of health and not appropriate to deal with through use of safety standards (s. 25(2))	where satisfied that the product is a source of danger (s. 8(1))	are dangerous to health or a possible source of danger to health (s. 30(3))	as per interim ban (s. 27(1))

Table 8.1 **(continued)**

	TPA	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Pre-conditions for safety standards	as are reasonably necessary to prevent or reduce risk of injury to any person (s. 65C(2))	as per TPA (s. 26(2))	as per TPA (s. 34(1))	as are reasonably necessary to prevent or reduce risk of injury, including physical, mental or psychological injury, to any person (s. 83(2))	preventing or reducing risk of death, personal injury or disease (CA s. 23U(1)) or as are reasonably necessary to prevent or reduce risk of injury to a person (FT s. 50(2))	preventing or minimising risk of injury or impairment of health (s. 23(1))	where satisfied that the product is a source of danger (s. 8(1))	as per TPA (s. 25(2))	as are reasonable and necessary to prevent or reduce risk of injury to a person (s. 25(2))
Pre-conditions for information standards	as are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods (s. 65D(2))	as is reasonably necessary to give persons using the goods information as to their origin, quantity, quality, nature, durability or value (s. 38(2))	are reasonably necessary to inform persons to whom the goods are to be supplied about the quantity, quality, nature or value of the goods and about the care, storage, use and origin of those goods (s. 47(1))	as is reasonably necessary to give a person acquiring or using the goods information as to their origin, quantity, quality, nature, durability, value, or use (s. 81(2))	as is reasonably necessary to give persons using the goods information as to their origin, quantity, quality, nature, durability, value or safety (FT s. 59(2))	designed to ensure that misleading information is not provided and that adequate information is provided in respect of goods and services (s. 33(1))	no provision	as per NSW (s. 38)	as per NSW (s. 28)

(Continued next page)

Table 8.1 **(continued)**

	TPA	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Mandatory recall powers	will or may cause injury to any person and the supplier has not taken satisfactory action (s. 65F(1))	defective goods (s. 35(1))	will or may cause death or injury to any person and the supplier has not taken satisfactory action (s. 50(1))	no provision	defective goods (FT s. 54)	are dangerous or may cause injury and insufficient action has been taken to avert danger (s. 27A(1))	no provision	as per WA (s. 33)	will or may cause injury to someone and the supplier has not taken satisfactory action (s. 37)
Definition of defective goods	not applicable	goods of a kind that may cause death or injury to any person (s. 34)	not applicable	not applicable	goods subject to an investigation (FT s. 54)	not applicable	not applicable	as per WA (s. 33)	not applicable

a Some of the provisions have been abbreviated for the purposes of this table. See relevant sections for exact wording. **b** In NSW and WA there are additional conditions on the definition of dangerous including 'and whether or not because of: (a) a failure to include with or on the goods any instructions for their use, (b) the inclusion with or on the goods of instructions for the use of the goods that are inaccurate or inadequate, (c) a failure of the goods to function in the manner represented by the manufacturer or supplier, (d) the goods not being of the quality represented by the manufacturer or supplier, or (e) the necessity for, or possibility of, the use of the goods with other goods'.

Source: Legislative references are to the relevant fair trading acts. See table B.1 (of appendix B) for a list.

Many of the issues considered in this chapter are also relevant to the design of a General Safety Provision (GSP). Specific implications for any GSP are drawn out throughout the chapter.

8.1 Factors to consider in determining safety thresholds

The key factors to consider in establishing threshold tests or benchmark standards of safety are discussed in this section under the following headings:

- broad versus specific definitions;
- levels of safety and types of hazards; and
- scope/coverage of products and businesses.

The relevant considerations will often be the same whether the safety thresholds are the basis for regulatory action or principally as a statement of the requirements imposed on business. Nevertheless, the different objectives of any thresholds or criteria may alter the relative merits of different approaches. This might be the case, for instance, in relation to determining the degree of specificity or guidance that is provided. The case for additional guidance is likely to be stronger where the thresholds are the basis of an *obligation* imposed on business, such as a GSP or a mandatory reporting/notification requirement, rather than a trigger for a *discretionary* action by a regulator.

Broad versus specific definitions

Safety thresholds or obligations can be defined in the broadest terms. For example, as a pre-condition for action by regulators in relation to a consumer product, the test could be as simple as 'necessary to prevent or reduce the risk of injury' — which is the current precondition in the TPA and in NSW, Victoria, the Northern Territory and the ACT for the making of a standard (see table 8.1). The current 'will or may cause injury' test in the TPA for a ban or mandatory recall order is also broad, although, as discussed in chapter 6 the inclusion of the word 'cause', may limit the scope for action where it is the way the product is used or the environment in which it is used that creates the risk of injury.

Similarly, a general safety obligation can be defined broadly, for instance 'to ensure only safe products are placed on the market'. This is purely 'outcome' oriented, without providing a definition of safety or guidance as to how it is to be achieved. Alternatively, prescriptive rules could be developed (still within the context of the

general obligation) about the level of safety and/or the processes that must be followed. In between these two extremes there would be a range of options that provide varying degrees of guidance on what constitutes 'safe'. Too much prescription can stifle innovation and increase compliance costs but, on the other hand, a lack of guidance can create uncertainty for businesses and make enforcement more difficult. In general, however, a key advantage of a general safety requirement, stated in broad terms, is the flexibility it provides to industry in terms of how they meet their obligations.

Less prescription or specificity can also be an advantage for regulators giving them greater administrative discretion in the enforcement of laws. Again, however, there is a need to strike a balance between flexibility on the one hand and clarity and consistency of interpretation on the other. Given the concerns of stakeholders about the current lack of consistency between jurisdictions in the interpretation and enforcement of similar legal requirements and the concomitant costs this imposes on business (see chapter 4), consideration must be given to this issue when deciding upon the appropriate wording of any harmonised safety benchmarks.

Dr Nottage notes that, the current wording of the preconditions for safety orders under the TPA are quite broad, but little guidance is available on their interpretation:

> Overall, there remains remarkably little readily accessible guidance on key considerations for deciding whether the regulatory thresholds are met. …
>
> In addition, there has been almost no case law on these regulatory thresholds … (2005, pp. 102, 103)

Dr Nottage (2005, p. 104) considers that this lack of guidance has meant that, notwithstanding the quite expansive wording, the TPA product safety provisions have been quite narrowly interpreted, 'primarily by regulators themselves'.

One approach that seeks to address the competing needs for flexibility and also certainty/clarity, involves the specification of the safety threshold or requirement in very broad terms together with guidance as to the sorts of matters that are considered relevant. This is, for example the approach taken, to varying degrees, in the European GPSD (see box 8.1); the Part VA provisions of the TPA (box 8.2); and the proposed Canadian GSR (box 8.3).

Such matters can be specified in the legislation itself, or alternatively can form part of guidelines prepared for the benefit of regulators and business, which elaborate on the legislative requirements. As noted in the MCCA (2005c, p. 18) Options Paper, the second reading speech for any legislative amendments could also be used to provide additional 'clarity about the intent of the basic obligation'.

Levels of safety/types of hazards

There are a number of considerations relevant to determining benchmark standards of safety, including:

- the reasonable expectations of consumers, and whether particular types of consumers, such as children and the elderly, are referred to;
- the level of safety;
- the type of risk or hazard covered;
- whether the standard refers only to defects in the product itself or if foreseeable use is taken into account.

Reasonable expectations of consumers

As outlined in chapter 2, the case for government intervention varies from product to product and, generally a case-by-case assessment, based on risk analysis, should be used as the basis for determining cost-effective policy intervention. Governments should intervene where there is an 'unreasonable' risk that is not being addressed by the market and general legal mechanisms. Where market and general legal mechanisms work well to provide the appropriate incentives for producers to supply safe products and there is little evidence of unsatisfactory outcomes, the market should be given the maximum degree of flexibility to determine how the objective of safe consumer products can best be achieved.

A number of considerations relevant to determining whether a risk is 'unreasonable', and perhaps warranting a specific policy response, were outlined in chapter 2. These include, for example, the extent to which the identified risk is essential to the utility of a product; whether consumers are aware of the hazard and willing to voluntarily accept the risk; and the type of consumer (eg less risk may be tolerated when products are used by infants). Such notions of what constitutes an unreasonable or acceptable risk underpin some existing definitions of safety — most explicitly in the EU GPSD (see box 8.1).

While most consumers will expect a minimum or basic level of safety in the goods they buy, this level will vary from product to product. Consumers accept that there is a level of risk inherent in the use of many consumer products, for example knives, scissors and food processors. Any safety thresholds for regulatory action or safety obligations imposed on business must sensibly take account of the reasonable expectations consumers have in relation to such products. The European GPSD, explicitly acknowledges that the acceptable level of risk may vary between products

and therefore does not impose an absolute level of safety, rather 'the minimum risks compatible with the product's use, considered to be acceptable …'.

Box 8.1 **Definitions of 'safe' in EU General Product Safety Directive**

Producers are obliged 'to place only safe products on the market'. A 'safe product' means:

> Any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular:
>
> (i) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
>
> (ii) the effect on other products, where it is reasonably foreseeable that it will be used with other products;
>
> (iii) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;
>
> (iv) the categories of consumers at risk when using the product, in particular children and the elderly. (Article 2(b), of Directive 2001/95/EC)

Source: EU (2002).

When products are used by vulnerable consumers (for example, children) the acceptable standard of safety may be higher. The European GPSD explicitly states that the safety of products should be assessed taking into account, in particular:

> the categories of consumers at risk when using the product, in particular children and the elderly. (Article 2(b), of Directive 2001/95/EC)

The reasonable expectations of consumers is also the basis for the threshold test in the product liability provisions of Part VA of the TPA (see box 8.2). Goods have a defect 'if their safety is not such as persons generally are entitled to expect'. When considering this test it is necessary to take into account the class of persons to whom the product is directed or marketed, including 'the astute and the gullible, the intelligent and the not so intelligent, the well educated and the poorly educated' and determine what members of that class would be entitled to accept (Miller 2005, pp. 701-702). A manufacturer therefore must, for instance, make allowance for the cognitive limitations of children if their product is directed at that group and/or they are likely to use the product.

The MCCA Options Paper points out that 'there are numerous examples in case law where the "nature of the user" is taken into account. For example, in the law of negligence, a disclaimer will not generally be effective in relation to children.' (2005c, pp. 19-20).

Box 8.2 **Part VA — determining whether goods are safe**

For the purposes of the Part VA provisions of the TPA, defective (or unsafe) goods has a wide meaning (consistent with similar laws in the European Community). Goods have a defect 'if their safety is not such as persons generally are entitled to expect' (s. 75AC). In determining whether goods are safe, regard is to be had to all relevant circumstances, including a number of matters mentioned specifically in section 75AC(2):

- the manner in which they are marketed;
- the purpose for which they are marketed;
- their packaging;
- the use of any mark in relation to the goods;
- the instructions or warnings provided with the goods;
- what might reasonably be expected to be done with in or in relation to the goods; and
- the time when they were supplied by the manufacturer.

Source: Miller (2005, pp. 701-702).

With respect to Part V Division 2A, goods are of 'merchantable quality' if:

> … they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. (s. 66(2))

The New Zealand *Consumer Guarantees Act 1993*, uses a similar 'reasonable consumer' concept. Goods are of acceptable quality if they *inter alia* are as safe as:

> a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to ---
>
> f) the nature of the goods;
>
> g) the price (where relevant);
>
> h) any statements made about the goods on any packaging or label on the goods;
>
> i) any representation made about the goods by the supplier or the manufacturer;
>
> j) all other relevant circumstances of the supply of the goods. (s.7(1))

Appropriately, many of these definitions provide broad guidance to suppliers on the sorts of factors that need to be considered without being prescriptive. Nevertheless, some of the terms used in the definitions lack clarity and businesses would benefit from further guidance on how they are to be interpreted.

Level of safety

Safety definitions and criteria can specify levels of safety, at least in broad terms. This can be either in relation to significance of risk or in terms of severity of injury.

Some provisions have the effect of imposing *risk* thresholds, for example:

> 'substantial risk of injury to, or danger to the health of, any person (*Sale of Hazardous Goods Act 1977 (Tasmania),* s. 2); and
>
> 'a product defect which … creates a substantial risk of injury … or creates an unreasonable risk of serious injury or death' (*Consumer Product Safety Act 1972 (United States)*, s. 15).

The use of terms such as 'minimum risks' and 'high level of protection' in the EU GPSD seems to place on suppliers a significantly higher requirement of safety than that of the level of safety which 'persons are generally entitled to expect', which is the standard required under the TPA Part VA (see box 8.2).

The threshold pre-condition for product safety orders under the TPA — 'will or may cause injury' — does not require a minimum level or severity of injury. Dr Luke Nottage stated:

> … 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 (for example, a scratch), albeit to a significant number of individuals or vulnerable group such as children or the elderly. (Nottage 2005, pp. 102-103)

Similarly, with the exception of Victoria, the State and Territory requirements do not have threshold minimum levels of safety, in terms of severity of consequences. In Victoria the pre-condition for bans (like several other jurisdictions) requires that goods are dangerous. However, unlike the other States and Territories, the Victorian definition of dangerous imposes a severity of injury threshold, ie 'likely to cause death or serious injury' (see table 8.1).

Types of risk or hazards covered

While the TPA safety thresholds refer to 'injury', the preconditions for certain safety orders in all the States and Territories (see table 8.1) and some overseas safety definitions make explicit mention of other physical, or non-physical detriment. Some examples include:

> '… protection for the safety and health of persons' (European GPSD, Article 2(b));
>
> '…risk of death, serious illness, or severe personal injury' (*Consumer Product Safety Act 1972 (United States)*, s. 12);

'injure or adversely affect the health or well-being of any person' … 'including physical, mental or psychological injury' (*Fair Trading Act 1989 (Queensland)* s. 85(1));

'injury to the body or health of [NSW 'any', WA 'a'] person' (*Fair Trading Act 1987 (New South Wales)* s. 4(1) and *Consumer Affairs Act 1971 (Western Australia)* s. 23B)

In practice, however, the difference between the TPA and State and Territory preconditions is likely to be of little consequence, given the expansive interpretation by the courts of the term 'injury'. A challenge on the Australian Government's ban of smokeless tobacco, failed because the court interpreted the requirement of 'will or may cause injury' to include disease (see *United States Tobacco Co* v *Minister for Consumer Affairs & Ors* (1988) ATPR 40−870).

A feature of the proposed specification of the Canadian GSR is the detail it includes in terms of the types of hazards or adverse health effects that might be caused by an unsafe product (see box 8.3).

Foreseeable use

The specific question as to whether any definition of 'safe' or 'unsafe' should take into account reasonably *foreseeable use* was addressed in chapter 6. The Commission argues in that chapter that there is a case for introducing more flexible wording in the TPA and State and Territory legislation, where necessary, so as to ensure that the Ministers have power to ban or recall goods which are deemed unsafe as a result of 'reasonably foreseeable use'. This would be consistent with the approach in the European GPS Directive (see box 8.1) and the proposed Canadian General Safety Requirement (box 8.3), as well as the expected 'duty of care' applying to common law negligence actions and the safety standard embodied in Part VA (Product Liability) of the TPA.

Scope/coverage of products and businesses

Which products/services?

In principle, the general consumer product safety provisions contained in the TPA apply to all consumer products. In general, a consumer product is any that is intended to be used or likely to be used by consumers. A consumer is considered to be anyone who purchases goods without the intention of reselling them or using them in the course of production or manufacture or repairing or treating other goods

or fixtures.[1] Similar definitions of 'consumer' are used in most State and Territory fair trading acts.[2] Thus, products used exclusively in the context of trade or business such as production equipment, certain tools and capital goods would not fall within the scope of these provisions, but similar products intended for professional use, but which are also likely to be used by consumers, would be covered.

Box 8.3 Canada's proposed General Safety Requirement

Under Canada's proposed General Safety Requirement (GSR) it would be an offence to manufacture, promote or market any product that:

when manufactured, marketed, promoted, used or disposed of under reasonably foreseeable conditions, could cause adverse effects to the health of a person because:

- the product could be defective or could become so prematurely in comparison with similar products;
- the product could fail to accomplish what it can reasonably be expected to do;
- the product could be more dangerous than the user would normally expect;
- adequate information is not provided to the user to ensure the safe use and disposal of the product;
- the product could be adulterated;
- the product is fabricated, packaged, preserved, transported or stored in conditions that could cause the product to become unsafe;
- the product could contain or emit potentially harmful substances or radiation, and there are not adequate safeguards to address the risk;
- the product could emit potentially harmful substances or radiation in excess of what is necessary to achieve its purpose;
- the product could be poisonous, corrosive, flammable, explosive, toxic, infectious or dangerously reactive, and there are not adequate safeguards to address the risk;
- the product could be expected to come into contact with other products thus creating a hazard, and there are not adequate safeguards to address the risk;
- the design, structure or characteristics of the product could create a hazard, and there are not adequate safeguards to address the risk;
- prior to being promoted or marketed the product was not evaluated objectively to assess and address potential negative health effects;
- human or animal cells, tissues or organs are being collected, and there are not adequate safeguards to address the risk; or
- such other cause as specified in the regulations.

Source: Health Canada (2005).

[1] Another caveat requires that the price of the good does not exceed a prescribed amount of $40 000.

[2] Consumer is not defined in the South Australian and Tasmanian legislation.

Similar concepts are also the basis for definitions used overseas, for example, in the European GPSD:

> "product" shall mean any product … which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers … (Article 2(a))

The appropriate coverage of services and second hand goods were discussed in some detail in chapter 7. The Commission recommends:

- consistent national coverage of *services* related to the supply, installation and maintenance of consumer products. Harmonised provisions would be wider in scope than the current TPA provisions and the provisions in New South Wales[3], Western Australia, Tasmania, the Northern Territory and the ACT, none of which cover services, but narrower in scope than certain product safety laws in Victoria, South Australia and Queensland, which nominally cover all services; and
- clarification that *second-hand goods* (sold in trade or commerce) are covered by governments' existing powers to enforce product safety regulations. This does not require any legislative amendment and could be achieved through an agreed intergovernmental policy statement. Were harmonised product safety provisions to be agreed, it may be appropriate to make explicit the coverage of second-hand goods at the same time that other legislative amendments are being made.

Which businesses?

As is currently the case in both the TPA and the State and Territory fair trading acts, consumer product safety provisions should have application as appropriate to manufacturers, importers, retailers or indeed any business in the supply chain. This ensures that all suppliers have appropriate incentives to cooperate with manufacturers in the supply of safe products. Indeed, the threat of being held (at least partly) accountable for injuries caused by product defects creates strong incentives for businesses further down the supply chain to influence the safety of the products they purchase. In this regard, the ACCC submitted:

> Including all suppliers in the supply chain creates a potential compliance 'ripple effect'. In other words, traders down the line make their own suppliers accountable for their compliance. This can be more effective than enforcement staff undertaking random surveys, as it potentially covers a large percentage of the market through a kind of 'self-enforcement'. (sub. DR56, p. 5)

[3] A warning notice can relate to services in New South Wales, but the Minister does not have the power to ban services or introduce safety standards for services.

Some safety definitions make this explicit. This is the case, for example, with the European GPSD and, in the United States, the notification requirements in the *Consumer Product Safety Act 1972* relate to 'every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product'.

Should Australia adopt a GSP, it should apply to all suppliers (including producers) within the supply chain, commensurate with their ability to affect the safety of products.

Should the same safety standard apply throughout the product's life?

A consumer product can be safe at the time of manufacture, but deteriorate with age in such a way that it presents a safety hazard either associated with its use or disposal. An issue to consider in determining appropriate safety thresholds or requirements is whether the same benchmark standard of safety should apply throughout a product's life cycle or only for some lesser 'reasonable' period. Is it reasonable for consumers to expect that a product will remain safe (assuming normal use), regardless of age? Is there a point beyond which manufacturers or suppliers of a product should not be held responsible for safety-related defects?

The threshold pre-conditions for safety orders in the TPA and State and Territory fair trading acts do not make explicit reference to life cycle, except indirectly in so far as the pre-conditions for information standards in three of the States and both Territories (see table 8.1) include 'as is reasonably necessary to give persons using the goods information as to their … durability …'.

The European GPSD definition of a 'safe product' (box 8.1) includes the words:

> any product which, under normal or reasonably foreseeable conditions of use including duration … does not present any risk … Article 2(b)

Canada's proposed general safety requirement would apply throughout a product's life cycle, from its manufacture through to disposal (box 8.3). Suppliers would be responsible for ensuring that products were safe and did not cause adverse health effects, including when 'disposed of under reasonably foreseeable conditions'.

The Commission has concerns about such a lifecycle approach, for the sorts of reasons articulated in the MCCA 2005 Options Paper:

> [it] would place significant additional cost pressures on businesses, would greatly expand the regulatory task and may not improve safety commensurately with these costs. Also numerous complex issues may need to be decided, for example, what is the 'effective safe life' of a product beyond which it would be unreasonable to penalise its maker. (2005c, p. 21)

A common feature of product liability laws is that they impose a time limit for actions for compensation. Under section 75AO(2) of Part VA of the TPA, a liability action must be commenced within ten years of the supply by the manufacturer.

While under a GSP or product liability laws, some reasonable time limits will be appropriate, regulators must, in principle, have the power to take action in relation to products whenever there is a significant risk to the public, irrespective of the age of the goods. As noted in the discussion of second-hand goods in chapter 7, however, there are a number of practical difficulties in enforcing product safety laws in relation to used goods. In most cases, for older goods, particularly those that are no longer marketed, the only feasible strategies would involve public warnings or information campaigns.

8.2 How should safety thresholds be harmonised?

The Commission favours harmonised national safety thresholds for consumer product safety orders, that are consistent with the following general principles:

1. based as far as possible on existing definitions and concepts so as to minimise transition costs;
2. broadly stated to allow appropriate discretion for regulators to take 'all relevant factors into account' and flexibility for business;
3. provide scope for an order to be made without the need to establish that an injury has occurred;
4. provide scope for an order to be made without the need to establish that a product is faulty (that is, action can be taken where goods are deemed unsafe as a result of 'reasonably foreseeable use');
5. the same threshold tests should be used for different safety orders except where there is an explicit requirement for a different benchmark standard of safety; and
6. supported by guidance material that provides clarification as to the sorts of factors that regulators will take into account in determining whether safety thresholds have been met.

Various alternative formulations have been considered with these principles in mind. The Commission's preferred option for bans and mandatory recall orders would be to use the existing TPA 'will or may cause injury' test with appropriate modification to make it clear that regulators can take action without the need to demonstrate that a defect in the product gives rise to the likelihood of an injury (ie action can be taken in relation to reasonably foreseeable use). Harmonising around the 'will or may cause injury' test has the advantages of using the existing familiar

wording of the TPA that already has wide application, covering most businesses in Australia. This would be expected to lower transition costs.

While the precise wording would need to be determined based on legal advice, the Commission recommends that the following threshold test for bans and mandatory recall orders be adopted across all jurisdictions:

> … the goods are goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person.

The above form of words could, in principle, be used also for safety standards. However, currently, in most jurisdictions, the threshold test for safety standards is different to those applying to bans and recall orders — with the test for standards, generally being less restrictive (ie providing greater scope for regulatory intervention). Moreover, there is substantial commonality between the jurisdictions in the threshold tests for safety standards. Therefore, there may be merit in adopting, across all jurisdictions, the existing TPA wording for safety standards — that is:

> 'as are reasonably necessary to prevent or reduce risk of injury to any person'.

The same words are already used in four jurisdictions and form part of the threshold test in two others. These words would require no additional modification in order to cover injury risks associated with foreseeable use.

With respect to the threshold pre-conditions for bans and mandatory recalls and standards, the Commission's suggested wording is broad and does not make specific reference to particular factors that would be considered in determining if these thresholds have been met. For example, the recommended words do not expressly require that the 'reasonable expectations of consumers' or the particular needs of vulnerable groups such as children be taken into account. The words do, however, give regulators very broad discretion to take all relevant factors into account.

Notwithstanding the benefits for regulators of such broadly stated thresholds, they do not provide much guidance to businesses (or indeed administrators) as to when actions are likely to be taken. Consistent with principle number six, above, the Commission considers that there would be benefits in providing supplementary guidance material. This could take the form of very high level guidance set out in the legislation itself, perhaps modelled closely on the approach taken in Part VA (see the specific matters listed in box 8.2). This could then be further supplemented by more detailed administrative guidance material. Alternatively, intergovernmental guidelines could be developed and published.

The appropriate wording for *information* standards is complicated by the fact that these standards can be introduced for reasons other than safety. Most of the threshold tests identify the sorts of information such standards can cover (eg quality, nature, value durability, care, storage, use). While there is substantial commonality, some jurisdictions can introduce information standards to deal with a wider range of matters than others.

In addition to these choices regarding safety thresholds, the wording of any harmonised safety provisions would need to reflect the agreed coverage of services, as discussed above. This could be achieved by including an appropriate definition of 'goods' in the legislation that makes it clear that services related to the supply, installation and maintenance of consumer products are also subject to the provisions.

RECOMMENDATION 8.1

Subject to legal refinement:

- ***the following threshold test for bans and mandatory recall orders should be adopted by all jurisdictions:***

  'the goods are goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person'; and
- ***the following precondition for mandatory safety standards, currently in the Trade Practices Act, should be adopted by all jurisdictions:***

  'as are reasonably necessary to prevent or reduce risk of injury to any person'.

These provisions should be supported by supplementary guidance material, which clarifies how the provisions should be interpreted and the factors that regulators should take into account in determining appropriate action.

Defining safety under a GSP

The Commission has not recommended the adoption of a GSP. As discussed in chapter 5, the likely benefits do not appear to justify the costs. Nevertheless, this section provides some guidance on how any safety obligation should be defined under a GSP, were one to be introduced.

The principles for safety thresholds discussed above are also generally applicable when considering a GSP. A broadly stated obligation will maximise flexibility for business. However, if the compliance costs and uncertainty associated with a GSP are to be managed, it will be particularly important that clear guidance be provided to business on the factors that will be considered in assessing compliance (see chapter 5).

If a GSP were to be implemented, there could be benefits in adopting definitions and standards of safety that are closely aligned with existing provisions of Part VA. If the GSP obligations and standards are harmonised with those of Part VA, compliance costs for business would be minimised since meeting their existing obligations under the product liability laws would at the same time ensure compliance with any GSP obligation. Administration costs for governments would also be lower if the GSP reflected familiar definitions, standards and legal principles.

There was some support for such an approach, as proposed by the Commission in the Discussion Draft, (for example Queensland Government, sub. DR59; ACCC, sub. DR56; and AEEMA and CESA, sub. DR44). The ACCC submitted that:

> If regulatory mechanisms can be developed that enable reliance to be placed on existing law, the costs flowing from the uncertainty in any re-balanced regulatory environment should be minimised. (sub. DR56, p. 6)

Dr Nottage did not support the use of the Part VA definition of 'defective goods' as the basis for the GSP obligation, arguing that it would be too restrictive. He points out that the threshold 'will or may cause injury' test is a broader one than 'defect' under Part VA of the TPA:

> 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. (Nottage 2005, p. 103)

However, the basic Part VA test could be adopted without transposing the requirement for the product to have actually resulted in injury or loss.

Finally, if a GSP were to be introduced there could be advantages in adopting definitions of safety that are consistent with those used for product safety orders. This point was made in the MCCA Options Paper:

> … it makes sense that one standard of safety be established across the entire product safety system. (2005c, p. 5).

Thus, consideration would need to be given to also adopting the definitions used in Part VA as the threshold test for safety orders.

FINDING 8.1

If a General Safety Provision were to be introduced, the obligation should be stated broadly and the definitions and standards of safety should be closely aligned with existing provisions of Part VA of the Trade Practices Act (excluding the precondition of actual injury or loss).

9 Improved information for hazard identification and risk assessment

Key points

- A fully integrated national early warning system involving the centralised collection, processing and assessment of extensive new data on product-related death and injury could be very costly. The increase in timeliness and number of advance warnings provided by this system are unlikely to justify these costs.
- In comparison, the establishment of a broadly-based hazard identification system, based on a clearinghouse approach would provide net benefits. This would draw on a range of information sources and analysis on consumer product incidents (largely from existing sources) and disseminate it to all jurisdictions. Sources should include information from hospital emergency departments and admissions, business notifications (including recalls), international product warnings, mortality data and linked consumer complaints information. This system could be coordinated by the Australian Competition and Consumer Commission.
- A national electronic system for collecting and distributing consumer complaints information would also provide net benefits when compared to the current system.
- The Commission sees value in suppliers being required to notify government of products which have been associated with serious injury or death.
  - In the event MCCA does not introduce such a reporting requirement, there would be value in suppliers notifying government of products which have been the subject of a successful product liability claim or multiple out of court settlements.
- The benefits of requiring suppliers to notify government of products which are 'under investigation' for possible safety risks or formally requiring suppliers to monitor the safety of their products are unlikely to justify the associated costs.
- There is the potential to improve the operation of the existing requirement for suppliers to notify government of their decision to recall a product.
- A baseline study of consumer product-related injuries and deaths is justified in order to better inform policy judgements and identify areas of further research if necessary.

An effective product safety system should identify, in a timely fashion, significant hazards posed by consumer products. It should also assess and manage the risks

associated with these hazards. (The broad policy principles for government intervention of this type were outlined in chapter 2.)

Information on the existence and nature of hazards, and the level of associated risk, plays a pivotal role in this process. As MCCA (2005c, p. 29) states, governments need good quality information:

> … to identify, analyse and respond to product safety risks to consumers. They also need information that will allow them to assess intervention options and whether policy achieves its objectives.

The present chapter assesses several specific reform options proposed by MCCA for improving the quality of information used in hazard identification and risk assessments, including:

- the establishment of product hazard early warning information systems (section 9.2);
- the linking of consumer complaints information (section 9.3);
- new requirements for businesses to monitor and report on the safety of their products (section 9.4); and
- increased funding by government *and* industry of research in the area of consumer products (section 9.5).

9.1 Current information sources and problems

Main sources

Government regulators currently use a variety of information, and a range of formal and informal processes, when identifying hazards and assessing the risks that they pose to consumers.[1]

Important sources of information include: complaints from consumers, consumer groups and competitors; information provided from other jurisdictions; and media reports on unsafe products (MCCA 2004, p. 39). Information is also provided by business on product hazards through the requirement to report voluntary recalls in most jurisdictions. Finally, as discussed in Appendix C, input is also possible from

[1] As O'Bryen states (2002, p. 157): 'Most regulators practise some type of risk assessment either formally or informally. In consumer product safety in Australia and New Zealand, the New Zealand Ministry of Consumer Affairs nomograph is used, which measures consequence and likelihood to indicate the overall level of hazard of a product.'

product injury surveillance and research groups; coroners' reports; and overseas agencies.

A national Consumer Products Advisory Committee (CPAC), made up of representatives from each State and Territory, also meets twice yearly on a formal basis, and monthly via teleconference, to address issues of concern and form a national approach to addressing emerging problems. On a day-to-day basis, information exchange on product safety problems also occurs informally among regulators.

The Auzshare system, through which information on consumer scams and serious consumer complaints can be accessed by regulators (see box 9.1), was also recently established. This system currently involves the Australian Competition and Consumer Commission (ACCC) and relevant agencies in most States and Territories (ACCC 2005f).

Box 9.1 **The Auzshare system**

The launch in April 2005 of the Auzshare system could provide a significant platform for information exchange among regulators. This system is a web-based network through which Australian Government, State and Territory agencies can gain secure access to information on scams and consumer complaints.

At present, the focus of the system appears to be mostly on unlawful activities by fraudulent traders and scammers. The Queensland Fair Trading Minister describes the key features and potential benefits of the system as follows:

> [Auzshare] will… directly benefit consumers and businesses by facilitating early warnings of emerging scams and easier, quicker identification and coordinated responses to unlawful activities by traders and scam-artists … For example, agencies will more easily be able to identify an influx of complaints about a particular trader or new type of scam and respond appropriately, as they will have immediate access to current key data from multiple fair trading agencies and the ACCC instead of just their own.
>
> Previously agencies had to contact each other individually to get the required complaint information – now it is available through a few quick keystrokes … Participating agencies will post alerts on emerging scams and selected consumer complaints of a more serious nature and of national interest, information vital to reducing consumer detriment as well as being able to access national complaint trend data particularly useful for identifying borderless, new and emerging issues. (Queensland Office of Fair Trading 2005, p. 1)

The data base is accessible by all offices of fair trading across Australia and New Zealand consumer protection agencies can also post information. (MCCA 2005b, p. 5)

Source: ACCC (2005f).

Problems

Proponents of reform argue that the current system could be improved in terms of the speed with which it identifies significant hazards and removes them from the market; and the processes followed. In particular, it is argued that:

- there is little *direct* integration of injury data and regulatory action, rather, emerging problems with products tend to be identified informally by an interaction between State, Territory and Australian Government regulators, sometimes including informal input from coroners and injury surveillance units;
- the system often appears to be driven excessively by pressure from the media, politicians and the community to deal with the latest 'problem product'[2], rather than by an objective and even-handed assessment of all the hazards associated with a generic product and the costs and benefits of government intervention; and
- duplication of hazard evaluation occurs as jurisdictions may undertake separate assessments of the risks attached to a product and, in some cases, may not share the results with other jurisdictions, or the general public, for considerable periods of time.

MCCA (2004, 2005c) has also identified a number of specific problems with death and injury data, including:

- difficulties in using existing data to identify specific products or categories of products involved in injuries and deaths, due to lack of an agreed definition of consumer products;
- difficulties in using current data to identify in a consistent, cost-effective and timely manner, the relative importance of consumer behaviour in product-related injuries and deaths;
- limits on the extent to which data from different administrations can be cross-referenced or combined, due to varying methods for collecting and coding information; and
- lengthy lags in data collection and analysis.

[2] For example, the Monash University Accident Research Centre expressed a concern that: 'The focus has been on dealing with 'problem products', or even more narrowly, on a single specific problem associated with a product. A single complaint about the safety of a product, in the current system, can divert attention from the bigger picture.' (sub. MCCA16, p. 1)

9.2 Early warning information

One reform option (number 6 in the terms of reference) proposed by MCCA involves establishing an early warning information system (EWIS), *possibly* based on hospitals admissions data. The main objective would be to use information (such as injury data) to identify significant hazards as quickly as possible, to alert governments, consumers and business of the risks, and to facilitate action by regulators and business.

Several participants supported an early warning system. For example, the ACCC stated:

> … an early warning system for product related injury would be advantageous to regulators in detecting emerging safety issues. (sub. MCCA4, p. 35)

The Australian Consumers' Association (ACA) also pointed to:

> … the need for an Early Warning Information System (EWIS) to identify hazards quickly, alert governments and consumers of the risks, and withdraw the goods from the marketplace. (sub. DR51, p. 3)

What would an early warning system look like?

An effective early warning system would need to have in place mechanisms to gather and process data, establish (as far as is possible) the nature of causation in relation to potential hazards, remove identified hazards from the market temporarily or permanently, and provide for subsequent review in cases where business may appeal the declaration of a good as a hazard.

A key design consideration, with important implications for the likely costs and benefits of an EWIS, is the level and types of data and associated analysis that would be used to generate warnings. Data sources may vary in terms of the severity of injury they cover, the speed at which data is collected and the degree of analysis required to interpret the data. Importantly, for each potential data source there is a trade-off between the degree of analysis required and the timeliness in providing information on emerging hazards.

Possible data inputs could include:

- morbidity data from emergency department presentations and hospital admissions;
- mortality data from the National Coroners Information System;
- consumer complaints information (as discussed later in this chapter);

- monitoring of international information, for example information produced on product hazards by the Consumer Product Safety Commission in the US, the Department of Trade and Industry (DTI) in the UK and the RAPEX system in the EU;
- information provided by businesses should they be required to report unsafe products, including the existing requirement to report voluntary recalls (also discussed below);
- systematically monitored media reports;
- data gathered from ambulance personnel on product-related accidents; and
- information gained directly from triage nurses or emergency department doctors via an informal email network.

A system using some combination of the above sources could either rely on raw data collected predominantly via a newly-established infrastructure or, alternatively, rely mainly on existing sources of data collection and interpretation where they exist.

Another approach would be to have the system focus heavily on collection of a single data source, such as hospital-based injury data. This could involve either the linking of current hospital collections, together with an expansion of collection at new locations, or could involve the introduction of an entirely new hospitals-based administrative set, possibly running in parallel with existing collections. The latter approach would be similar in many respects to the National Electronic Injury Surveillance System (NEISS) that is currently used by the CPSC in the US (see box 9.2).

How the system is administered would also have important implications for its effectiveness. Several participants, including the ACA (sub. MCCA5, p. 4) and the Australian Toy Association (ATA) (sub. MCCA2, p. 4), supported the need for a centralised approach to administration within an early warning system to guarantee enforcement. The ACA stated:

> Early warning on product safety problems could be facilitated by better and timely information systems about immediate complaints and risks. However, complex and complicated information systems are expensive to establish and maintain, and it is arguable that simply establishing such a system between regulators will not work while there are too many agencies with poorly defined responsibilities in this area. Therefore a necessary step to addressing information problems would be to simplify the number and variety of agencies involved and the levels of regulation. The provision of appropriate resources to a lead agency would also greatly assist in addressing information problems. (sub. MCCA5, p. 7)

Box 9.2 **The US CPSC model of hospital data collection**

One example of an extensive data collection framework is the system used by the CPSC - known as the National Electronic Injury Surveillance System (NEISS). This serves the regulator as a primary source of injury statistics and is a major input into early warnings of product hazards within the US.

In the NEISS, daily reports of product-related injuries are gathered from 100 hospital emergency rooms. These are transmitted to CPSC via teletype terminals. The initial data collection is undertaken via emergency department staff, with collected information then assessed by a NEISS coordinator, based in each hospital, for possible inclusion within the NEISS.

The participating hospitals within the system were selected statistically to yield injury data upon which national estimates can be projected. Over 400,000 injuries involving consumer products under CPSC jurisdiction are reported each year.

Even within an extensive system such as the NEISS there is a need for follow-up assessments of initially identified hazards. The CPSC states (2005c, p. 1):

> Surveillance data enable CPSC analysts to make timely national estimates of the number of injuries associated with (not necessarily caused by) specific consumer products. These data also provide evidence of the need for further study of particular products. Subsequent follow-back studies yield important clues to the cause and likely prevention of injuries.

Such 'follow-back' assessments are usually conducted through telephone and on-site interviews with the patient or patient's relative. Investigation reports are then produced that consider in greater detail the likely causes of an event, including the nature of interactions between person, product and environment.

Information collected from the NEISS, together with other data collected by the CPSC, such as information from businesses on unsafe products (see box 9.4), is used to inform decisions on the need for product recalls, product standards and public awareness campaigns.

In 2005, the NEISS system employed 85 full-time equivalent staff at a cost of approximately US$12.6 million.

Source: CPSC (2005c).

The Infant and Nursery Products Association of Australia also suggested that achieving better data collection systems:

> … is a national responsibility and would in part contribute to a de facto harmonisation due to the availability of accurate data upon which decisions could then be formulated. The ACCC is probably well placed to have a coordinating role in this activity. (sub. DR55, p. 1)

The appointment of a single regulatory agency charged with such responsibilities is discussed further within chapter 13.

Creating a more responsive system - benefits

An early warning system may provide some benefits to government and business, however the primary beneficiaries from such a system are likely to be consumers.

For *government*, the effective operation of an early warning framework may allow the prioritisation of regulatory action and facilitate the targeting of regulation and enforcement towards demonstrated product risks. Some resources would be saved by avoiding unjustified intervention. Such a system could also provide the basis for a uniform regulatory response across all jurisdictions.

Business may derive some benefits if an EWIS resulted in swifter identification of product hazards, thus reducing the legal and reputational costs incurred from the continued sale of hazardous products. Businesses could also benefit from increased information about product risks. The ACA (sub. MCCA5, p. 8) suggests this may allow businesses to improve their design processes and import strategies.

The benefits for *consumers* would lie mainly in a reduction in the number of deaths and injuries caused by unsafe products through the more timely identification of product hazards. The size of this benefit is likely to be determined by a range of factors, including the extent to which the new system produces a swifter and more accurate identification of product hazards and a more timely notification of relevant parties. In this context, the quality of data used by the system and the speed at which it can identify and evaluate potential hazards are key considerations.

Data quality

One main threshold issue in assessing benefits concerns overall data quality. Clearly, the ability to identify whether a consumer product was involved in an injury, what type of product it was, and the nature of the involvement are crucial considerations.

As discussed in appendix C, the present use of ICD-10 and ICD-10-AM coding frameworks in collecting morbidity and mortality data, limits the ability of such information to identify the extent and nature of product involvement. Further improvements in data collection, involving the greater use of supplementary coding systems such as the International Classification of External Causes of Injury (ICECI), and the inclusion of routine narrative analysis as a screening tool, may enhance the ability of a data-based early warning system to identify emerging hazards in a timely and accurate way.[3]

[3] The uses of narrative analysis as a screening tool within hospital injury surveillance systems are discussed in detail by Jones and Lyons (2003).

Several participants called for the introduction of substantial modifications to current data collection practices to accompany the introduction of an EWIS:

> The ATA is concerned that quality data collection relies on consistency in collection methodology and that this needs to be addressed in any data system. Guidance should be sought from the CPSC for this. (Australian Toy Association, sub. DR49, p. 7)

> Such a system would need to greatly improve on existing databases to provide adequate data for decision-making. (ACCC, sub. MCCA4, p. 35)

> To strengthen the early warning systems in Australia, there needs to be a more sophisticated data collection system in hospitals and emergency rooms … General practitioners should also be allowed to access an electronic database to provide injury and product statistics to assist regulators to act more quickly. (ACT Office of Fair Trading, sub. MCCA31, p. 2)

> Data collection on injuries must be sufficiently detailed to tell officials how an event happened and develop a body of information to work from. Too often, for example, a report might say only "child died while baby bath seat was in use." That information must be upgraded, which will take training and education for coroners, hospital personnel and others involved in the data collection process. (ACA, sub. DR51, pp. 3-4)

Particular issues with hospital-based systems

Threshold issues also apply in particular to hospital-based systems in the area of accuracy. An EWIS based entirely on hospital-based injury data is likely to provide a selective and possibly limited picture of relative risks across product types, given that only a subset of injuries are reported at this point. As Stone, Morrison and Smith (1999, p. 167) state in relation to emergency department data:

> Whatever surveillance system is used, data derived from emergency departments are inherently flawed. They are seldom population based and may be biased by a number of factors including age, sex, ethnic origin, socioeconomic position, health insurance status, time and geographic location. Thus, the extent to which people utilise emergency departments after sustaining an injury varies widely between communities depending upon the other services available … The injuries captured by surveillance may not be at all representative of injuries seen over a wider area.[4]

Hospitals admission data is also problematic as a source of representative injury data. As Harrison and Steenkamp state:

> The several hundred thousand injury cases admitted to hospital in Australia each year are much more numerous than injury deaths, but they comprise only a small proportion

[4] This point is also acknowledged by MCCA: 'In addition, the data from the system may be incomplete, reflecting its source. For example, a system that is based on emergency room admissions would focus on severe injuries but would not represent all product related injuries. Such data would also not cover all deaths, since when a person is killed at the scene of an accident they are usually not taken to a hospital emergency room.'(2004, p. 39)

> of all incident injury cases. Limited available data suggest that something like ten times as many injury cases attend an emergency department as are admitted, and two or three cases attend a general practitioner for each one that is seen at an emergency department. Beyond this there are still numerous injuries that do not result in medical consultation. (2002, p. 56)

The ability of hospitals-based data collection to provide specific details about the injury incident and the nature of the product involved was also questioned by some participants. For example, Dr Ron Somers stated:

> Speculation about beefing up hospital-based data collection is poorly informed. The acute phase of medical treatment is not a good time to ask people to recall the exact make and model of the product involved in their injury. In South Australia, with the nation's longest standing hospital-based injury surveillance system, only about one per cent of parties injured by a product can successfully identify the product at the time of medical treatment. (sub. DR63, p. 2)

Lags

Unavoidable *collection* and *identification* lags mean that it could also be difficult to achieve significant benefits from improvements in the *speed* of hazard identification and notification, when compared to the current system. This may particularly be the case for a system based on an expanded use of currently collected administrative hospitals data. For example, in its later paper, MCCA appears to suggest that such lags may fundamentally limit the ability of an EWIS using hospital data to actually provide very early warnings of adverse events:

> The lead time in collating and analysing this data currently is not supportive of a 'true' early warning system, and could be better used in medium-term, proactive programme development. (MCCA 2005, p. 37)

Some identification lags would be inevitable in any system in the early stages before injuries related to a specific product reached a threshold level deemed significant enough to warrant further investigation.

The existence of *evaluation lags* is a further issue that any EWIS would need to overcome. Apart from adequate time, thorough evaluation also requires a critical mass of expertise amongst regulatory bodies, and a potentially significant commitment of new resources to this task.

Assessing the costs

The costs of this reform are likely to vary considerably depending on the design of the system.

An upgraded EWIS focused heavily on a major upgrade of hospital data collection and analysis, for example, is likely to result in considerable costs, in particular for government.

It is likely that, given the absence currently of an integrated national system of hospital-based injury surveillance, a nation-wide upgrade of hospital data collection would entail considerable set up costs and ongoing administration costs. These costs may be large given such a system is likely to be based on national data collection and reporting.

The main bearer of these costs is likely to be government. Front-end costs would be incurred in implementing uniform methodologies across collection locations and establishing structures for assessing risks and reporting warnings (although some reporting structures already exist).

As discussed above, an early warning system would also require evaluation of collected data in order to assess the relative size of risks and the need for intervention. Such analysis may be time-consuming and also require a critical mass of expertise, and a potentially significant commitment of new resources to this task. For example, the possibility that it would require a dedicated unit to perform this task, was suggested by the Australian Electrical and Electronic Manufacturers' Association and Consumer Electronics Suppliers' Association (sub. MCCA6, p. 7).

A further cost would derive from implementing education and training to gain uniformity in the data reporting process. Within the health system, and using the US example as a guide (box 9.2), this could entail the appointment and education of nominated data coordinators, possibly on a full-time basis, and may also involve training of other health professionals (doctors, nurses etc.) who play an ancillary role in the data collection process. The opportunity costs for the health system from such measures would be significant.

Ongoing costs to government from an expanded EWIS would also derive from the continued employment of data collectors and collators and through the upkeep of warning infrastructures. The example of the NEISS within the US also suggests that considerable follow-up work is required within early warning systems in evaluating the information collected on possible product hazards.

Lower cost alternatives?

The above analysis suggests that large costs may result in an extensive EWIS that involves the collection and analysis of raw data from newly established sources.

One alternative that could avoid such problems is a combined system for information exchange that draws largely on data and research information from a number of existing sources and locations (the health and coronial systems, media agencies, international consumer agencies etc.) and a range of market participants (consumers, business and government). Such a system was supported by MCCA:

> For investigations and risk analysis by consumer agencies to be consistent, access to the same data and research is required. This could be facilitated through the establishment of a clearinghouse for domestic and international data and research. (MCCA 2005c, p. 36)

A system based on a clearinghouse approach

Rather than relying on a newly established system of data collection, processing and assessment, an information exchange system that used a clearinghouse approach would focus on making better use of existing or slightly increased sources of product safety information and, most importantly, rely on existing expertise. Such a system would focus on identifying emerging product hazards and safety trends.

This system could receive information on incidents from sources and expert groups including:

- hospital emergency and admissions data;
- linked consumer complaints information (discussed in section 9.3);
- recalls and other information provided by business (discussed in section 9.4);
- international product warnings and research; and
- mortality and epidemiological research.

Initial inputs of data *and* analysis would be provided by participating organisations, with coordination and dissemination of the resulting information set being performed by the ACCC. The Auzshare system (box 9.1) could provide the platform for such a system.

This system may provide the breadth of coverage required for more effective risk analysis and, if properly implemented and administered, may also come at a relatively low cost.

The use of international research and data

The Commission was presented with some anecdotal evidence concerning the uses already made of international research in identifying possible hazards within the Australian market, in particular in relation to specific, high risk products such as all-terrain vehicles (ATVs or quad bikes) and blind cords. The possibility that results

from such research can be applied to the Australian market was also made clear within a number of submissions. For example, the ACCC stated:

> A recent situation with pop-top drink bottles provides a good example of product research. A problem with a choking hazard was researched in the UK and the resulting remedy was available for use in Australia. This research was commissioned and published by the UK Department of Trade and Industry Competition and Consumer Policy Directorate as one of many such research programs. It has now been used by Australian soft drink suppliers as a basis for implementing a code of practice. (sub. MCCA4, p. 36)

The Australian Toy Association also stated:

> In our opinion there is no need for research in Australia as this is very costly and duplicates efforts overseas. It is important however to access international research through formal links with international groups and research facilities. (sub. MCCA2, p. 7)

Some limits may exist on the application of international research to the Australian context. The NHMRC commented in this regard that:

> … Australian lifestyles and environments lead to hazard patterns and treatment circumstances that differ from those in other countries and create the need for unique research and implementation strategies. (NHMRC 1999, p. 34)

However, the growing commonality in consumer product design and manufacture internationally, partly the result of a globalised economy, and the small market share accounted for by Australian-produced output in most consumer product categories, also suggests that the results of international research may become increasingly applicable in Australia with the passage of time. Use of such information within an information exchange system is therefore worthy of further consideration, and may result in swifter identification of potential product hazards.

Summing up

The introduction of a national EWIS for product hazards based on the centralised collection, processing and assessment of raw data has initial appeal. However, several main weaknesses are likely to limit the effectiveness of this system in providing rapid and accurate warnings of product hazards. For example, in relation to a hospitals-based system these include:

- the lack of detail concerning injury causation within currently collected hospital data;
- the selective and possibly limited picture of relative risks provided by this data, given that only a subset of injuries are reported at this point; and
- unavoidable lags in information collection and evaluation.

The actual improvements that this system might make to response speed may be smaller than is commonly supposed, and the considerable upgrade in data reporting and assessment frameworks required to obtain information quickly is likely to result in substantial costs.

Future developments in injury surveillance, in particular hospitals-based systems using ED data, may ensure that, over time, an early warning framework of this type, which includes consumer products within its monitoring remit, may be feasible and able to be implemented at low cost.

However, the Commission is of the view that, given existing structures for data collection and evaluation, and given the inevitable lags in data collection and evaluation that any such system must overcome, the benefits delivered by a greatly enhanced national EWIS based on the collection and evaluation of raw data would be outweighed by the costs of implementation at the present time.

This is not to suggest that improvements in the use of data and research, and more effective hazard identification and risk analysis, could not be attained in a cost effective fashion within the current system. In this context, an information exchange system using a clearinghouse approach, whereby initial input of information and analysis is performed by established participants, may deliver net benefits. This system could provide regulators with useful and broadly-based information on emerging or existing hazards while avoiding the large costs associated with establishing, from the ground up, a self-contained system of data collection and analysis. The Commission therefore considers that the establishment of such a system merits further consideration by the Ministerial Council of Consumer Affairs.

FINDING 9.1

A national fully integrated early warning system involving the centralised collection, processing and assessment of raw data on product-related injury and death could be very costly. The increase in timeliness and number of advance warnings provided by this system are unlikely to be justified against this cost.

RECOMMENDATION 9.1

The Ministerial Council on Consumer Affairs should initiate the development of a broadly-based hazard identification system, based on a clearinghouse approach, to gather a range of information and analysis on consumer product incidents (largely from existing sources) and disseminate it to all jurisdictions. Sources should include information from hospital emergency departments and admissions, business notifications (including recalls), international product warnings, mortality data and linked consumer complaints information. This system should be coordinated by the Australian Competition and Consumer Commission.

9.3 Better use of complaints data

Linked consumer complaints

Consumer complaints (either alone, or in combination with a range of other information sources) are an important source of information on product hazards.

The MCCA Discussion Paper puts forward several options for linking complaints information (option 7 in the terms of reference) across regulators. Suggested options include:

- a centralised electronic database established to ensure that complaints data and other product safety information is available to relevant parties; and
- the appointment of a central coordinating body, possibly as an alternative to an electronic database, to distribute such information.

Support was apparent from several participants for some form of linked complaints and action data base. For example, the Royal New Zealand Plunket Society stated:

> Another information strategy which could provide a strong incentive for manufacturer's to self-police their safety standards may be that of a consumer watch database whereby notices of unsafe product/service experiences are posted electronically for other consumers to read. (sub. MCCA22, p. 3)

The Victorian Government also supported a national approach, stating:

> A national database could improve the information sharing between the jurisdictions, and make the data that is held by each jurisdiction more valuable by collating it into a national dataset.
>
> Clear guidelines defining the type, amount and format of information required for the national database are essential to ensure a smooth transition to better aligned data collection and reporting. Central administration of the database is considered important to ensure the website is functional and easy for jurisdictions to access and update. For the database to be useful, it is important that information is available quickly, to support product safety investigations, and that information is current. (sub. DR60, p. 20)

Possible variations to the option

Considerable variation in the design of a linked complaints distribution system is possible, in particular, in relation to:

- how such a system is administered; and
- who has access to the information contained on the system.

Administrative models

One option would involve the use of a centralised electronic data base, such as Auzshare (see box 9.1), upon which complaints information is posted by jurisdictions. This would entail an intranet-type system whereby jurisdictions all place information on complaints received into a central system that might be co-administered. Such a model would retain considerable independence for individual jurisdictions, and is likely to involve greater use of two-way information flows, whereby the primary responsibility for the form of complaints information remains with the States and Territories.

A second possibility would involve a more centralised system administered by a single jurisdiction or by a single regulatory agency such as the ACCC. The administrator would be charged with the primary responsibility for the collection of information from States and Territories on complaints received and with distributing this information to all governments. Importantly, in this model, the central administrator may play a greater role in ensuring that complaints information is collected in a consistent form, and in monitoring responses to such information by the various jurisdictions.

Distribution of information

With regard to whom information is distributed to within a linked system, MCCA (2004) emphasises the distribution of complaints information across regulators, but says little in relation to distribution directly to consumers or businesses. Options for expanded systems of information dissemination to these groups are considered in further detail within chapter 10.

Assessing the benefits

For *consumers*, the major benefit likely to result from a linked system is from a swifter identification of product problems across jurisdictions and a reduction in resulting deaths and injuries. A key question in assessing these benefits is the extent to which a linked system would permit a speedier and more accurate identification of hazards across jurisdictions.

The use of complaints information provided by consumers could deliver considerable benefits in this regard given the fact that it may broaden the base of available information on faulty products. Complaints-based information systems may have a greater ability to capture events that would be otherwise overlooked, such as near misses, low level injuries not presenting at a hospital, and faulty products that did not result in any loss.

For government, benefits may flow from a more efficient use of resources, as a linked system would provide a more comprehensive information base of consumer complaints from all jurisdictions and thus provide greater confidence in drawing conclusions about emerging trends. A recent review of the RAPEX system in Europe (see Appendix D), for example, suggests that such systems are capable of providing considerable informational benefits:

> Most countries are happy with the system and consider it to be effective. Indeed, several countries use the RAPEX system as their sole source of information for triggering surveillance mechanisms. (CDC 2000, p. 12)

Finally, for *business*, benefits may be produced by this system in providing a system of oversight in relation to the industry-wide safety of products and underpinning product hazard identification with a broad evidence base. Acceptance of complaints by businesses concerning problems with the safety of products within their industry, where subject to initial processes to ensure such complaints were not trivial or vexatious, may provide a useful additional source of information on hazards. This process would also ensure that business concerns about industry practices in regard to product safety were raised swiftly with regulators.

Assessing the costs

A linked system of product complaints data may involve costs during the initial establishment period and some ongoing administration costs. Costs will be involved in collecting, collating, assessing and distributing and updating the complaints information stored on the system. These costs are likely to be borne by *government*, and thus ultimately by taxpayers.

Several participants, and MCCA, emphasised the potentially significant nature of such costs. The MCCA Discussion Paper states:

> Such a system would require significant resources to be spent on staff training and continued surveillance to ensure the information in the system remains current and relevant. (2004, p. 40)

Middletons Lawyers also argued that:

> The resources necessary to establish and maintain a database of all customer complaints would be significant. (sub. MCCA18, p. 5)

A further perspective on costs was also provided by the Therapeutic Goods Administration. It stated:

> Although the TGA has a database of all approved [therapeutic] products, it does not support the development and maintenance of a centralised database covering every type

> of consumer product as any benefits would be likely to be outweighed by the costs involved. (sub. MCCA29, p. 4)

The total costs of such a system would, over time, be highly dependent on the form which the system takes. In the longer run, some reduction in costs could be achieved when compared to the current system, were the system to have a single body charged with administration and were it to employ established information systems. In this context, the following estimates for the establishment and running costs associated with the new Auzshare system are noteworthy:

> MCCA agencies shared the cost of Auzshare's development and set up costs ($180 000) … Ongoing annual hosting and maintenance costs, estimated at around $50 000, will be managed by the MCCA. (Queensland Office of Fair Trading 2005, p. 2)

A portal-based system for complaints gathering

In relation to how complaints are gathered initially, while current facilities for gathering consumer complaints via telephone, in writing or through the Internet exist in most jurisdictions, the introduction of a national electronic portal for the registration of complaints may be worthy of consideration. In many respects such a system could be similar to the complaints reporting system in New Zealand (see box 9.3).

Were a single national body, such as the ACCC, to oversee the administration of the site, and the initial collection and distribution of such complaints, this information could be effectively and swiftly distributed to jurisdictions for follow-up investigation and report. The introduction of such a portal, as part of the one-stop shop described in further detail in chapter 10, would also ensure ease of access for complainants and could be actively promoted across the nation.

Summing up

In the Commission's view, a linked system of complaints information that provided easier access for regulators to more timely information on emerging product hazards has merit. However, substantial benefits are only likely to be realised were such information to be provided in a comprehensive and consistent form, and were adequate safeguards put in place in relation to trivial and vexatious complaints.

Some costs would be incurred in setting up and administering such a system, in particular if a new intranet-type platform was chosen. However, in the final

analysis, these may be less than is commonly supposed were an existing communications platform (such as Auzshare) to be utilised.

The Commission also believes that consideration should be given to the establishment of a national electronic portal for complaints gathering.

RECOMMENDATION 9.2

The Ministerial Council on Consumer Affairs should establish a national system for the exchange of complaints information across jurisdictions and give consideration to the establishment of a national electronic portal for registering consumer complaints.

Box 9.3 **The NZ complaints system**

The New Zealand Ministry of Consumer Affairs has a complaints system that provides direct access for consumers to lodge complaints about specific products. Complaints are accepted in any form and through a variety of mediums, including hard copy, electronically, by telephone or via voice-mail message.

A web-based product safety incident form can also be accessed, and allows consumers to provide extensive details including:

- product brand name and model number;
- bar code (if shown);
- date and location of purchase;
- manufacturer or importer;
- country of manufacture;
- what standard number or certification marks are shown; and
- injury details (including information on doctor's visits and hospital admissions).

Consumers are also provided with the opportunity to provide a sample of the product to Ministry officials.

All complaints received, including those that do not proceed to an investigation, are stored on a database. The Ministry uses this information as a basis for follow-up investigations where required.

Source: Ministry of Consumer Affairs (NZ) (2004).

9.4 Business monitoring and reporting

Under the current regulatory system, businesses are required to report voluntary recalls to the Australian Government Minister responsible for consumer affairs and to the office of fair trading in some other jurisdictions. MCCA has proposed that suppliers could be required to monitor the ongoing safety of the products they sell and report to government any products which: are under investigation for possible safety risks; have been associated with serious injury and death; or have been the subject of a successful product liability claim (MCCA 2004, p. 38). The motivation for these proposed changes is to give governments access to broader and more timely sources of information, with a view to improving the responsiveness of the regulatory regime to existing and emerging product-related hazards.

This section looks first at the issue of formally requiring businesses to monitor the safety of the products they sell and then goes on to consider the issue of reporting requirements.

Mandatory monitoring of consumer product safety

Mandatory monitoring of consumer product safety involves placing a legal responsibility on suppliers to continue to monitor the safety of consumer products after they have been released onto the market. However, the MCCA Discussion Paper does not elaborate on what such a requirement would entail. Potentially, it could involve suppliers being required to put in place formal mechanisms to investigate any safety-related complaints they receive or it could go further and require suppliers to actively seek out information about the safety of the products they sell (for example, by requiring suppliers to develop and implement post-marketing safety monitoring programs). Further, it is not clear how long after the sale of a consumer product MCCA envisages suppliers would be required to monitor product safety (for example, for only a limited time or over the life of the product).

In the Commission's view, there are already reasonable incentives and constraints to encourage responsible suppliers to monitor the safety of the products they sell as part of good business practice. However, while these incentives are likely to be sufficient in the case of suppliers with an ongoing commitment to particular product types and markets, they are likely to be less effective in influencing the behaviour of 'fly-by-night' operators. At the margin, a formal requirement for suppliers to monitor the safety of the products they sell may have the benefit of raising the awareness of some suppliers of the need to have more regard for consumer product safety, but it is unlikely to significantly change the behaviour of genuinely recalcitrant operators.

The costs associated with this proposal could be substantial depending on the nature of the obligation. For suppliers there would be the cost of complying with the monitoring requirement. In this context it is important to recognise that such a blanket requirement would potentially impose an additional regulatory obligation on a large number of businesses. Obviously, the more onerous and prescriptive the requirement in terms of the actions suppliers are required to take, the greater will be the compliance cost to business. Further, an overly prescriptive approach may limit the ability of suppliers to put in place the most cost-effective monitoring arrangements given the actual risks associated with their particular product.

For government there would be the ongoing cost of administering and enforcing the new requirement. Again, the extent of these costs would depend on the nature of the regulation and how regulators decide to administer and enforce it.

In the Commission's view, it would be preferable if the limited government resources available in the area of consumer product safety (or any additional resources which may be made available) remain focused on identifying, assessing and responding to the most hazardous consumer products, rather than trying to administer and enforce a blanket requirement for suppliers to monitor the safety of the products they sell.

In summary, the benefits that would flow from a formal requirement for suppliers to monitor the safety of the products they sell are unlikely to justify the associated costs.

Reporting requirements

Through formal safety monitoring arrangements or informal feedback, suppliers will often have more information concerning the safety of their products than government. Where this information gap is significant it may result in governments being denied the opportunity to take timely action to protect consumers from unsafe products. Under some circumstances, the most efficient and cost-effective way of addressing this information asymmetry may be to require business to provide government with information, rather than the government trying to obtain this information through other sources.

There is a risk some businesses who identify, or are otherwise alerted to the fact a product is dangerous, may not act or may not take action that is proportionate to the risk if they consider they can get away with doing so. Unless or until regulators have sufficient information to identify, assess and respond to unsafe products in a timely manner the regulatory regime cannot protect consumers by removing unsafe products from the market.

A key policy question is determining under what circumstances it may be appropriate to require businesses to notify government of safety concerns about their products. To help analyse this issue, it is useful to identify the decision/action points which could potentially trigger a requirement for suppliers to report to government products which may pose serious safety risks. These points would include, when suppliers have:

- received complaints from consumers suggesting a product may pose an unacceptable safety risk;
- been notified that consumers have sustained lower-level injuries while using a product;
- identified an emerging pattern of lower-level injuries linked to the use of a product;
- been notified that a consumer has been seriously injured or killed while using a product;
- decided to investigate the safety of a product;
- determined a product is unsafe;
- decided to cease manufacture or importation of a product because of safety concerns;
- decided to recall a product;
- been notified that a consumer has initiated legal action for the physical or economic harm caused by a product; or
- been successfully sued by a consumer for the physical or economic harm caused by a product.

Of course, in practice the sequence of these key decisions and actions will vary from case to case. Similarly, the time between these points is also likely to vary. For example, the amount of time between when a supplier has determined a product is unsafe and the decision is taken to recall may be quite brief. In contrast, there may be several years between when a supplier first learns that a product has been linked to consumers being injured and identifying a recurring pattern of injuries which warrants investigation. Sometimes not all these points occur, for example, some intrinsically hazardous products may contribute to serious injury or death and never be recalled because the utility these products offer is highly valued by consumers.

It is also important to recognise there are trade-offs involved in choosing between different trigger points. As you move down the list, the stronger is the likelihood there is a causal link between a product and consumers being injured. In this sense, the significance of any information gap between business and government generally

increases. At the same time, however, the potential to improve the timeliness of government action to remove unsafe products from the market decreases and the likelihood of suppliers voluntarily taking action to remove unsafe products from the market increases.

Costs and benefits

In assessing the costs and benefits of different trigger points (or combination of trigger points), policy makers would need to take into account the following issues:

- The cost to business of having to notify government of concerns about the safety of their products. In this regard, it is generally desirable to try and minimise the number of decision/action points which trigger a reporting requirement. It is also generally desirable to choose trigger points that minimise the uncertainty for business about when they are required to report. For example, there is likely to be more uncertainty associated with a requirement to notify government of products which have been found to be 'unsafe' than a requirement to notify government when a product has been associated with consumers being seriously injured or killed.
- The creation of possible disincentive effects for businesses to investigate the safety of their products. For example, requiring business to notify government when they first initiate an investigation of the safety of a product may deter or delay some businesses from taking this step.
- The cost to government of administering and enforcing a reporting requirement. Generally, the earlier businesses are required to report the greater: the number of notifications regulators are likely to receive; the cost of administering and enforcing the reporting requirement; and the cost of investigating the significance of the information for consumer health and safety. To help minimise the cost of administering and enforcing a reporting requirement, it would be desirable to choose trigger points which provide the greatest certainty about when businesses are required to report; maximise the potential for voluntary compliance; and, to the greatest extent possible, filter out information which is not relevant to identifying serious product-related hazards and managing the associated risks.
- The benefits of requiring businesses to report safety concerns about their products include improving the ability of regulators to identify and respond to unsafe products in a timely manner. Improving the responsiveness of the regulatory regime may result in some unsafe products being withdrawn from the market earlier than they otherwise would, thereby reducing the risk of consumers being injured. In this regard, the benefits include reduced pain and suffering for

those consumers who would otherwise have been injured and reducing the cost of product-related injuries to the Australian health system.

In assessing MCCA's proposal in relation to business reporting, it is appropriate to focus on the *marginal* costs and benefits of imposing additional reporting requirements.

In relation to the current arrangements, the key requirement at a national level is for suppliers to notify the Australian Government Minister within two days of taking action to voluntarily recall a good because it 'will or may cause injury'. Within each notification, the TPA requires suppliers to inform the government of the goods subject to recall and the nature of the defect, or dangerous characteristic, of the goods. Since 1986, over 7000 recalls have been reported to the Australian Government (ACCC 2005c). Goods notified to the Minister are placed on the Recalls Australia website (www.recalls.gov.au) where the public can find information on product recalls. At the State and Territory level, all jurisdictions, with the exception of Queensland and Tasmania, require businesses to report voluntary recalls.

There are similar reporting requirements operating in the European Union and the United States (see box 9.4).

The Commission's assessment

In the Discussion Draft, the Commission was not convinced that there was a strong case for significantly extending the existing reporting requirements as proposed by MCCA. In part, this reflected an initial judgement that extending the reporting requirements would not substantially enhance the responsiveness of the regulatory system or have much of an effect on the actions of recalcitrant or fly-by-night businesses. Further, the Commission was concerned that extending the current reporting requirements could impose significant costs on business and government.

That said, the Commission saw value in requiring businesses to report products which have been the subject of a successful liability claim or multiple out-of-court settlements. Further, the Commission proposed that businesses should be encouraged to clearly explain to consumers and retailers how they can notify the relevant supplier of unsafe or faulty products with a view to improving the flow of product safety information to suppliers.

Box 9.4 **Mandatory reporting in the United States and the European Union**

In efforts to collect information about potential product safety risks, the EU and the US require businesses to report products which are found to be unsafe.

The new EU General Product Safety Directive (GPSD) requires that producers or distributors notify competent authorities (ie the government) when a product available on the market is revealed to be dangerous. That is, the product under normal or reasonably foreseeable conditions of use presents a level of risk that is considered unacceptably high.

European firms are not required to notify the government of unsafe products if the problems are of a one-off or isolated nature or if problems relate to the functional quality of the product and not to its safety. Under the GPSD the obligation to notify applies to producers, distributors and retailers.

In addition to reporting, European firms are expected to undertake a risk assessment of their products prior to placing them on the market. This risk assessment is intended to form the basis for concluding that the good is 'safe', thus meeting the requirements of the general safety provision.

The objective of the EU regulations is to allow governments to take more timely action to address product safety risks.

The Unites States CPSC requires businesses to report immediately (within 24 hours) of finding that a product may be unsafe. Section 15(b) of the Consumer Product Safety Act requires manufacturers, distributors and retailers to notify when they obtain:

> Information which reasonably supports the conclusion that a product … (1) fails to meet a consumer product safety standard or banning regulation, (2) contains a defect which could create a substantial product hazard to consumers, (3) creates an unreasonable risk of serious injury or death … (CPSC 1999)

Further, businesses are required to report within 30 days of any product subject to three successful civil law suits.

It is worth noting that the CPSC recently fined four companies amounts ranging from US$100 000 to US$1.4 million for allegedly failing to make timely reports after learning about defective products (Masuda, Funai, Eifert & Mitchell Ltd, Legal Updates, February 2005).

See appendix D for more information.

Source: CPSC (1999a) and EU (2005a).

The key issue remains whether there would be a net benefit to the community from requiring suppliers to notify government of safety concerns earlier than is currently the case in most jurisdictions (i.e. when suppliers have decided to voluntarily recall a product). In this regard, some participants considered that current reporting requirements are sufficient. For example, the Australian Toy Association argued:

> Clearly businesses should be required to report products that are proven to present an identifiable risk to a consumer safety central authority. For significant risk the current recall system provides for appropriate reporting. (sub MCCA3, p. 6)

Similarly, the Australian Chamber of Commerce and Industry (ACCI) contended:

> The requirement to report voluntary recalls to government is sufficient. The statistics provided … indicate that the system is working effectively. Any further requirements for reporting would be onerous and impose substantial compliance costs on businesses. (sub. MCCA3, p. 6)

In contrast, the ACA considered that:

> … very often the businesses are the only repository of information about hazardous products. Consumers often call the company that made the product before they call anyone else. Thus, not requiring businesses to report bypasses an important source of product safety hazard information. In addition, in the US, when a company reports a potential product safety hazard and contacts the US Consumer Product Safety Commission, only 50% of the time is regulatory action triggered. In this way reporting need not be tantamount to regulatory action.
>
> The ACA's concern is that maintaining the status quo by making reporting voluntary for businesses will continue to result in critical safety information not getting out to the public. (sub. DR51, p. 3)

Reporting products associated with serious injury and death

Following further analysis the Commission considers that there are likely to be benefits to the community in requiring suppliers to report to government products which have been associated with serious injury or death. In reaching this view, the Commission has given more weight in its final assessment of this proposal to the need to improve the responsiveness of the current regulatory regime. While the initiatives outlined earlier in this chapter would go some way to making the current regulatory regime more responsive to existing and emerging product-related hazards, it is important to recognise that businesses are often privy to valuable and more timely information about the safety of their products and this information is not always readily available to government through other sources at reasonable cost.

Clearly, only requiring businesses to report to government safety concerns at the time they decide to voluntarily recall a product does not leave very much scope for regulators to have responded more quickly to protect consumers from unacceptable safety risks. This is especially so where a supplier unduly delays initiating a voluntary recall. Indeed, under the current regulatory regime any scope for regulators to act more quickly is dependent on them learning about possible product-related hazards through other means (such as media reports, consumers contacting regulatory agencies or the Minister, and the work of consumer advocacy organisations).

Providing regulators with more timely information about potentially unsafe products enhances their ability to assess the situation on a case-by-case basis and where necessary work with business to ensure unsafe products are removed from the market as quickly as possible. Of course, this benefit should not be overstated, since in some cases businesses are likely to have taken action to address the problem of their own accord. However, the *marginal* benefit of being able to remove some unsafe products from the market sooner than would otherwise be the case could be significant (in terms of reducing the incidence of serious product-related injury and death).

Introducing a requirement for suppliers to report products that have been associated with serious injury or death would also enhance the pooling of available information, enabling regulators to make better judgements about the need to respond to serious product-related hazards. In particular, it could give regulators access to information which may assist them identify trends across product types and manufacturing processes. As Dr Somers of the South Australian Department of Health noted:

> … centralised reporting makes possible aggregation of information, speeding the time it takes for a given product hazard to be appropriately noted. The exact same product may be sold by many firms, each of which can only be aware of a small number of the injury incidents that occur. In addition, when case data are aggregated they may be more efficiently shared between agencies, presenting the opportunity for a greater practical contribution by sectors like health, justice (think coroners) and education (think universities) that are at present only peripherally involved in product-hazard assessment. Importantly, sharing of aggregated data has the potential to spread the cost of investigation, which is by far the largest cost in product regulation. (sub. DR63, p. 1)

The Commission also sees some value in this requirement, in terms of giving regulators more negotiating leverage with recalcitrant businesses at the time unsafe products need to be recalled. In this regard, Dr Somers contended that:

> … requiring businesses to notify injury incidents helps facilitate voluntary recalls when such action is required. It is apparent from US regulatory experience that businesses not complying with notification requirements tend to be those that are also most uncooperative in organising voluntary recalls. If failure to notify were an offence in Australia, as it is in the US, non-compliance could be used as a lever by enforcement agencies in negotiations with reluctant businesses. (sub. DR63, pp. 1-2)

Nevertheless, there are also costs associated with requiring business to report to government products which have been associated with serious injury or death. For business, there is the cost of notifying the government of potentially unsafe products. In this regard, it is important to note that some businesses may be required to report products which upon further investigation are found not to pose an unacceptable safety risk and therefore would not have needed to be notified under

current arrangements. Indeed, this may be a significant proportion of the products which end up being reported to government because in many cases consumer behaviour and the physical environment in which a product is being used are likely to be more significant causes of serious injury and death (see appendix C).

However, it is important that the cost to business is not overstated. Indeed, there is likely to be very little additional cost to most businesses as a result of this reporting requirement. The proposed threshold ensures that businesses would not be required to report minor safety incidents, nor be mandated to investigate the safety of their products. Any additional cost to business is likely to be borne by those businesses who are currently unlikely to notify government of problems with the safety of their products or deliberately delay action to minimise the costs of a recall.

Of course, some argue that this reporting requirement is unlikely to change the behaviour of genuinely recalcitrant suppliers. For example, the ACCC noted in its original submission to MCCA that:

> Compliance and enforcement of a reporting requirement may not be particularly efficacious. It is likely that companies that willingly comply with the requirement are those that would normally seek to ensure good product safety management. Those that fail to report are the companies that pose the greatest risk. Even if one recalcitrant is detected, it may not mean the next one would change their behaviour. Enforcement agencies could spend many resources monitoring good corporate citizens with little effect on the bad ones. (sub. MCCA 4, p. 23)

In the Commission's view, the introduction of a reporting requirement for business to notify government of products which have been associated with serious injury or death would need to carry appropriate financial penalties for any breach. Nevertheless, even with these penalties in place, it is likely some suppliers will continue to disregard their legal obligations. However, at the *margin* this reporting requirement may raise the awareness of some businesses of the need to have more regard for consumer product safety.

A further way this reporting requirement may impose a cost on business is through the uncertainty associated with determining what constitutes a 'serious injury'. While there are several possible definitions of serious injury available (for example, those used in Europe and the United States), the Commission favours defining serious injury as those injuries requiring admission to a hospital. This would provide a relatively clear-cut threshold which should reduce the compliance burden for business. A focus on hospital admissions also addresses a gap in the information currently available to government (see the discussion in section 9.2). In any event, guidelines would be needed to assist business interpret what is meant by serious injury and their obligations to report products to government.

It is important to recognise, however, that potentially the most significant cost to business is likely to be where reporting a product to government precipitates action which is not proportionate to the safety risk the product actually poses. For example, if regulators initiate an unnecessary product ban or recall. While there is always this possibility, the Commission would emphasise that regulators should use the information to inform an objective hazard identification, risk assessment and risk management process. In this regard, regulators would need to guarantee the confidentiality of the information provided by business until such time further investigation has revealed the product poses an unacceptable safety risk. The Commission also notes there is no evidence to suggest regulators have been overly 'trigger happy' in the area of consumer product safety.

The Commission considers it is more likely that government rather than business will bear most of the cost associated with this reporting requirement. The reporting requirement could lead to a significant number of additional notifications. To derive any value from this information, regulators would need to have the capacity to filter and analyse the information; and where appropriate make connections with other relevant sources of information.

Anecdotal evidence suggests that in the United States about one-third of all staff employed by the CPSC work on investigations associated with mandatory reporting (MCCA 2005, p. 26). While the mandatory reporting requirements in the United States are arguably more onerous and cast a wider net than what is being proposed here, there is no doubt that the issue of resourcing is important. If MCCA adopts this proposal, it is essential regulators are adequately resourced to ensure that the overall effectiveness of the regulatory regime is not inadvertently reduced through the inappropriate re-allocation of existing resources.

In the event MCCA decides not to adopt this proposal, there would be value in requiring businesses to report products which have been subject of a successful product liability claim or multiple out-of-court settlements, in the latter case where a verifiable initiating action to commence litigation has occurred (eg a statement of claim). While this reporting requirement would provide government with some useful additional information, it is unlikely to significantly improve the responsiveness of the current regulatory regime. By the time a product has been the subject of a successful product liability claim or out of court settlement, it is likely regulators will have found out about the product through other sources. That said, the Commission considers there would still be a small net benefit from introducing this reporting requirement since the costs to business and government associated with this measure are unlikely to be large.

As the net benefits of these proposed reporting requirements are uncertain, the Commission considers that if either (or both) are adopted, they should be reviewed

three years after their commencement to determine their effectiveness and efficiency.

Consumer products 'under investigation'

The Commission does not support requiring suppliers to report products which are 'under investigation' for possible safety risks. Such a reporting requirement would cast a wider net then a requirement to report products associated with serious injury or death. While this would provide governments with additional information, the value of regulators having access to this information is unlikely to justify the associated costs. This is because some of the additional information is likely to concern relatively minor product safety issues which do not require regulators to take any action.

Further, the Commission remains concerned that at the margin 'under investigation' may have the perverse effect of deterring or delaying some suppliers from investigating potentially dangerous products.

The Commission also notes that participants expressed a range of concerns about this proposed reporting requirement.

> … reporting should only be mandatory after it has been properly established that there is a problem (i.e. the recall or ban has occurred). …
>
> Businesses must be afforded the opportunity to investigate product safety issues and initiate action in due course. If businesses are not able to conduct a comprehensive investigation prior to making a decision on whether a product is safe or unsafe then they may be forced into an unnecessary product recall situation. (Coles Myer, sub. MCCA9, pp. 3-4)
>
> If products are still under investigation … Businesses MUST be offered the opportunity to investigate reports/incidents and to draw a preliminary conclusion as to cause & effect, without the possibility (& likelihood!) of having to unnecessarily withdraw goods from sale. (Australian Retailers Association, sub. MCCA7, p. 3)
>
> Initial reports of potential safety problems are usually imprecise. The causes, degree of hazard and the numbers and models of products are unknown. By the time these matters have been investigated and resolved, the supplier concerned is most of the way towards deciding whether a voluntary recall is necessary. (AEEMA & CESA sub. MCCA6, p. 7)

In the Commission's view, requiring suppliers to notify government of products associated with serious injury or death is likely to be a more cost effective way of enhancing the ability of regulators to identify the most hazardous consumer products.

There is the potential for other refinements

Regardless of whether MCCA decides to implement a new reporting requirement, there is the potential to improve the operation of the existing requirement for businesses to notify government of their decision to recall a product.

There is a compelling case for the harmonisation of reporting requirements for product recalls across jurisdictions. Governments should ensure that voluntary recalls in all jurisdictions are subject to mandatory reporting requirements. This will require Queensland and Tasmania to introduce a requirement for businesses to report voluntary recalls. Authorities from each jurisdiction should also ensure that notifications of recalls are posted on a national website, such as the ACCC's Recalls Australia website.

The Commission also considers there would be merit in all governments encouraging businesses to clarify how consumers and retailers can notify them of unsafe or faulty products. This may promote the flow of information to businesses, who can then assess and address potential product-related hazards. This could be achieved by the issuing of uniform guidelines.

RECOMMENDATION 9.3

Governments should require suppliers to report to the appropriate regulator products which have been associated with serious injury or death. Should this not be adopted, suppliers should be required to report products which have been the subject of a successful product liability claim or multiple out-of–court settlements, in the latter case where a verifiable initiating action to commence litigation has occurred, such as a statement of claim. Such measures should be reviewed within three years of their commencement to determine their efficiency and effectiveness.

RECOMMENDATION 9.4

Governments should ensure that voluntary recalls in all jurisdictions are subject to mandatory reporting requirements, and all (voluntary and mandatory) recalls are posted on a national website, such as the Australian Competition and Consumer Commission's Recall Australia.

RECOMMENDATION 9.5

Governments should, through appropriate guidelines, encourage all suppliers to explain to consumers and retailers how they can notify the supplier of unsafe or faulty products, in order to improve the flow of product safety information to suppliers.

9.5 The role of research

Problems and objectives

Limited nature of current research

The limited nature of current research on product-related injury in Australia has been discussed elsewhere in this report.

In the area of data collection, extensive information is collected in relation to deaths (mortality). To a lesser extent, data on injuries (morbidity) is also collected within several States. However this data is not currently collected in a way that allows the identification, in a consistent, cost-effective and timely manner, of the role of specific products or categories of products in the injury process or the relative contributions of consumer product use or misuse in the aggregate.

Varying methods for collecting data, and in particular different coding frameworks, used with or without the inclusion of incidence narratives, limit the ability of current data to isolate consistent patterns in loss statistics. Some notable recent improvements in data collection have occurred. For example, some consumer product-specific codes have been incorporated within the latest edition of ICD-10-AM. Yet despite such improvements, the available information on product-related injuries and deaths in Australia remains piecemeal, uncoordinated and fraught with methodological problems. Considerable uncertainty therefore exists about the current level of injuries and deaths, in the aggregate, caused directly by unsafe consumer products. Such problems also ensure that monitoring trends in adverse product-related events across time is not presently possible.

Some limited supporting research also currently occurs across several areas of prospective risk identification. Work by the Monash University Accident Research Centre (MUARC), for example, provides detailed information about the nature and extent of risks associated with particular products, product categories and recreational activities (see, for example, MUARC 1999, 2000 and 2004).

The limited nature of current research on injury generally, and consumer product-related injury in particular, has been emphasised by several sources. In considering research gaps within Australia, for example, the National Injury Prevention Advisory Council placed particular emphasis on gaps within current data collection as a matter requiring urgent attention. The Council stated:

> The greatest research gap in this area is the absence of suitable data to identify emerging trends, assess how effective various interventions have been, and thus determine cost-effective intervention strategies. (NIPAC 1999, p. 20)

The Council also identified several other areas of prospective research as particularly lacking, including:

- biomechanical research, investigating the conditions leading to the injuries, associated with forces and design faults;
- exposure studies to determine appropriate relative risks, benefit/cost analyses and targeting interventions; and
- an Australian cost model for product-related injury. (NIPAC 1999, p. 20)

A separate report by the NHMRC observed that funding for injury research generally was very poor in Australia when compared to the costs incurred within the health system (table 9.1). Research into injury prevention was also seen to be particularly under resourced (table 9.2).

Table 9.1 **NHMRC funding for research in National Health Priority Areas 1997 and direct health costs 1995-96**

NHPA	*NHMRC research funding ($m)*	*Health costs ($m)*	*Research funding (as a per cent of health costs)*
Injury	2.35	2,607.0	0.1
Mental Health	22.95	405.8	5.7
Cardiovascular disease	29.70	3,465.0	0.9
Cancer	17.57	1,311.0	1.3
Diabetes	3.61	311.0	1.2

Source: NHMRC (1999), p. 29.

Table 9.2 **Percentage of NHMRC injury funding by major type**

Type of injury research	*Per cent*
Funding to injury prevention research and training, road traffic related injuries	31
Funding to injury prevention research and training, all other injuries	18
Funding to clinical and treatment oriented research	51

Source: NHMRC (1999), p. 29.

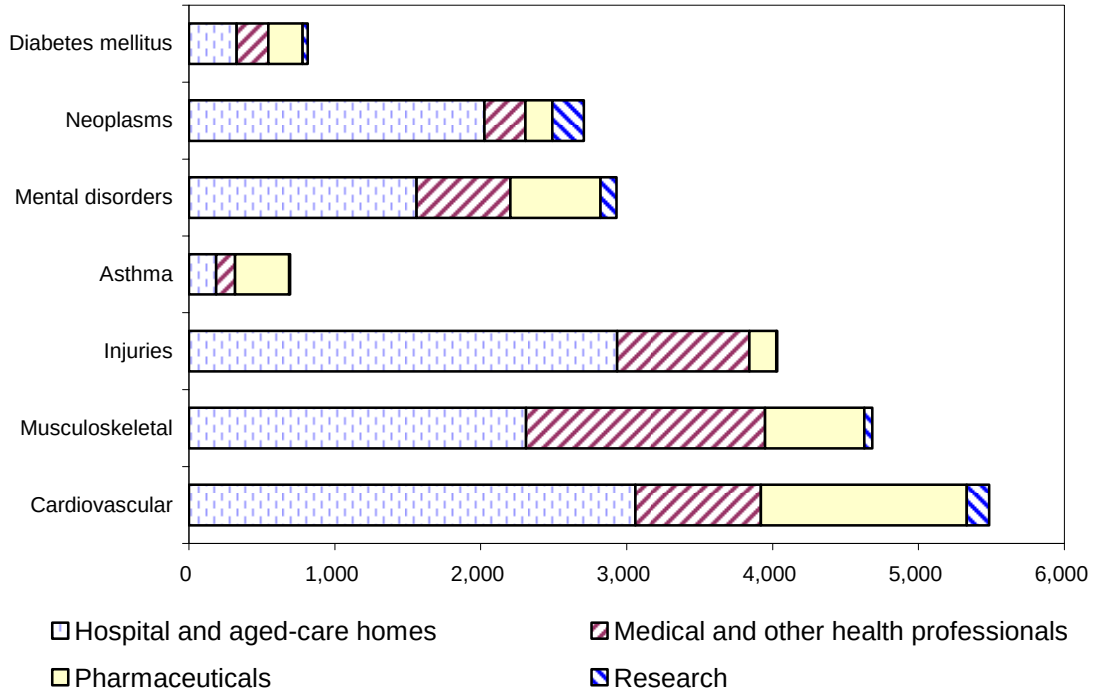
These observations are supported by later evidence presented within Australian Institute of Health and Welfare (AIHW 2004). While injury as a whole accounted for 8.3 per cent of health system costs (or $4061 million) in 2000-01, it received only $6 million in total research funding for this period. (see figure 9.1).

In the specific area of consumer products, the NHMRC provided the following assessment of research:

> [The] problem is poorly identified and documented with unsatisfactory documentation in routine health and mortality data. Risk is poorly understood, especially the interaction between product and human development and capacities. Preventive interventions are mostly poorly evaluated. Broad costs are known but product specific costs have not been determined. Cost benefit analyses are not reliable. (NHMRC 1999, p. 19)

The Council therefore recommended that the development of a broad-based research program occur, combining improved data collection with research on design and systematic risk assessment.

Figure 9.1 **Total health costs and research funding levels for National Health Priority Areas, Australia, 2000-01 ($m)**



Source: AIHW (2004).

MCCA options and objectives

MCCA has also suggested (option 8 in the terms of reference) that the current consumer product safety system lacks a comprehensive national evidence base that

would allow regulators to monitor the incidence and cost of product-related injuries, in a systematic fashion, across Australia:

> Currently, comprehensive national statistics on product-related injuries and deaths are not collected in Australia. This makes it difficult to establish the extent of the harm caused to consumers by unsafe products, the cost of such injuries and the breakdown of injuries between those caused by defective products and those caused by product misuse. It is also difficult to determine which products pose the greatest risk to consumers, which consumer groups face the greatest risk of injury, and the factors that contribute most to significant harm. (MCCA 2004, p. 40)

The potential for data and related research to inform the regulatory process in the area of consumer product safety is further emphasised by MCCA:

> Data of this type is required by governments in deciding on the level of resources to devote to consumer product safety regulation and in determining which product safety problems should be targeted by regulation. (2004, p. 40)

By implication, a lack of data and supporting research may act to prevent adequate assessment of the risks to consumers posed by existing products, and may also hamper the prospective identification of risk in new products.

One suggested option put forward by MCCA, designed to improve the evidence base upon which regulation might proceed, involves increased funding by government *and* industry of research in the area of consumer products. According to the MCCA Discussion Paper, such research would have a particular focus on the collection of data on the cost of product safety injuries and their causes. MCCA describes this option as follows:

> If this data were maintained over time, governments may be better able to assess the success of product safety regulations and be able to target their regulatory efforts more effectively. Such data could also be used to support information and advertising campaigns … (2004, p. 40)

Among the key objectives of such research would be to identify significant product hazards, via the use of adequate risk analysis, and to devise cost-effective means to reduce the harm done by such products where the benefits of doing so exceed the costs.

In connection to this option, the Commission notes with interest the recent commitment by MCCA (2005d) to:

> … develop and maintain a nationally significant consumer affairs research agenda. A key aim is to assist the Council to identify priority emerging issues that are of critical importance to consumers.
>
> A working party will be established to develop an initial consumer policy research agenda through consultation with the consumer movement and others for consideration

by MCCA Ministers by the end of 2005. It is anticipated that particular research projects will be tendered on a competitive basis.

Analysis of the option

Types of data collection and research included in this option

While the focus of the option put forward by MCCA is on data concerning injury incidence and cost (MCCA 2004, p. 40), a very broad range of research activities could potentially be undertaken in this area. Both costs and benefits are likely to vary considerably depending on the scope of research activities included as part of this option.

Several submissions, including MUARC (sub. MCCA16, p. 5) and ACCC (sub. MCCA4, p. 35), supported an expanded research agenda, in which the more detailed collection of epidemiological data forms one part of a broader, integrated research effort. For example, the ACCC stated that it:

> … agrees that more detailed epidemiological data would assist in several aspects of the product safety system … However, it is not just research in the form of injury data that is needed to support government and industry actions … there is a good deal of scope to better utilise … [an expanded] … form of research, which could form a key component in a proactive approach to consumer safety. (sub. MCCA4, p. 35)

Research activities put forward as possible elements within an expanded program include (subs. MCCA4 and MCCA16):

- specific, in-depth, product-related injury studies similar to those conducted by the CPSC in the United States and MUARC in Australia, where representative injury surveillance data are utilised as the basis of research planning;
- in-depth studies (case series and case control) to investigate the circumstances of injuries to assist the development of standards and other preventative measures;
- biomechanic studies, where appropriate, to determine the forces involved in injury events to improve design of products and protective equipment;
- in-depth case investigations to determine specific design faults, for example, coronial investigations on prams;
- exposure studies to assist with determining appropriate interventions, relative risks, benefits-cost analyses, and targeting interventions; and
- surveys to determine barriers to the adoption of injury countermeasures and consumer access to safe products and safety products.

Several of these activities already occur in Australia and others are conducted on a more regular basis internationally (see box 9.5).

Box 9.5 **The US CPSC integrated research program**

The CPSC in the US currently employs around 480 staff and monitors the safety of over 15 000 types of consumer products, with a total budget in 2004 of US$59.6 million.

A key function performed by the CPSC is research on potential product hazards. In 2004, for example, the Commission employed 67 full-time equivalent (FTE) staff (or around 15 per cent of its total workforce) in data collection at a cost of US$9.3 million (approximately 16 per cent of total budget). A further 18 FTE staff (at an annual cost of US$1.8 million) were devoted to researching emerging product hazards and assessing the ongoing utility of data collected by the Commission's NEISS database (described in further detail in box 9.2).

The CPSC's research program in this area is overseen by an Office of Hazard Identification and Reduction. This Office consists of a number of Directorates, including those dealing with epidemiology, economics, engineering sciences, health sciences and laboratory sciences.

Considerable resources are also devoted within the Commission to reducing previously identified hazards over a number of product categories. Major programs include:

- reducing fire and electrocution hazards — 174 FTE staff in 2004 at a cost of US$22.1 million;
- reducing children's hazards (including drowning) — 88 FTE staff at a cost of US$11.5 million;
- reducing poisonings and other chemical hazards (including carbon monoxide poisoning) — 61 FTE staff at a cost of US$8.2 million; and
- reducing household and recreational hazards — 53 FTE staff at a cost of US$6.7 million.

Each of these programs also contains a significant research component. For example, the program dealing with fire-related deaths had 14 planned review activities over 2005, involving data collection, hazard analysis and technical reviews. These were in product-specific areas such as: arc-fault circuit interrupters; duplex electrical receptacles; electric blankets; electrical lighting products; emergency escape masks; fire indicators; fuel fired heating/venting products; mobile homes; and smoke alarms.

Source: CPSC (2005a).

International experience suggests that an extended research program, such as described above, could be organised in several ways. One model would involve the individual elements of an expanded program being performed across a range of institutions (including regulatory agencies, university departments, injury research and surveillance units, consumer organisations and State Health departments).

Current research in Australia occurs in this way. A less diffuse model, involving the organisation and performance of significant research activity by a single centralised agency, occurs under the auspices of the CPSC in the US and to a lesser extent the Department of Trade and Industry in the UK.

Assessing the benefits

Benefits from increased product safety research may accrue to government, consumers and, to a lesser extent, to business.

The improved provision of incidence and cost data on product-related injuries, in particular, could deliver benefits to *government* in guiding regulatory activity. A more accurate identification of costs associated with consumer product-related injury, in particular those associated with faulty consumer products as opposed to product misuse, and a better appreciation of the relative size of such costs compared to other sources of loss, may allow government to better allocate resources to reporting and prevention across a range of loss areas.

In absolute terms, a better appreciation of the likely extent of losses related to consumer products may provide greater certainty about whether a problem actually exists that requires large-scale reform of the consumer product safety system. In this context, Australian Business Limited, for example, stated that:

> … access to cross-jurisdictional data on incidence and trends of product-related injuries and deaths is necessary to identify the extent to which a 'problem' exists and to inform policy development. (sub. MCCA1, p. 1)

Improved knowledge of the extent of the 'problem', and contributing factors, might also allow relative risk comparisons across products or product categories and also permit comparisons with other causes of death, injury, property and income loss, lost productivity etc. Greater knowledge of accident causation, and in particular the role played in accidents involving consumer products by the physical and social context, behaviour, manufacturing product fault, poor servicing and maintenance and product design, could also deliver benefits in guiding regulatory and budgetary interventions.

The benefits of data and research in providing a performance indicator for the regulatory system as a whole or, more particularly, for the success or otherwise of specific regulatory instruments are, however, qualified by certain factors. As was discussed in chapter 4, the effectiveness of incidence and cost data in acting as a direct performance indicator for the regulatory system dealing with consumer product safety is open to question. Observed safety outcomes (including injuries and deaths), in particular those accruing to specific products or product categories,

are the result of a range of possible determinants, of which product regulation is but one. Other important factors that are likely to influence observed safety outcomes include product liability laws, business reputation effects, consumer behaviour, technology and market forces.

The ability of data and research to identify specific product hazards has been discussed in detail earlier in this chapter. Certainly in this area a clear distinction needs to be made between prospective and retrospective identification of risks. The current option could combine elements of both types of identification. That is, it could involve some combination of data collection on injury and death with supporting research on design, emerging product risks etc. The payoffs from prospective identification of risks may be less certain.

For *consumers*, some benefits may accrue were increased research to result in the swifter identification of product hazards, with resulting reductions in the number of deaths and injuries.

Benefits may also be delivered to *business* via improved information on product hazards and product design. The ACCC stated in this regard:

> Given the potential for manufacturers and importers to have the greatest influence on safety of the three sectors, the ACCC believes this aspect should be further explored. (sub. DR56, p. 14)

Assessing the costs

The public good nature of significant parts of research, in particular data on incidence and cost, means that some government provision is likely in this area. An important role for business does exist in funding the research of design aspects of particular products that they intend to supply. However, large scale funding of wider research activities by producers is unlikely and, in economic terms, unjustified. Government, and ultimately taxpayers, are therefore likely to be the primary bearers of cost in this area.

There would be costs to *government* were an expanded research program, in particular one delivered via a CPSC-style 'super-agency', to be introduced in Australia. These costs are likely to include both large establishment costs and significant ongoing costs. Large costs would also be borne by government were an expanded program of research, undertaken across a range of research units and public health facilities, to be introduced.

Costs to government would also attach to a less extensive research program that was focused on providing improved data collection and reporting, however these are likely to be modest. Further, the use of relevant research from overseas, as a

secondary addition to an improved Australian research effort, may act to reduce resulting costs in some areas. Such information is readily available and, despite some minor limits on applicability to the Australian context, would represent a very low cost supplement to domestic research efforts.

Summing up

In the Commission's view, the current level of research on consumer product safety, in particular in the areas of data collection and research on aggregate and product-specific incidence and cost, is limited and poorly coordinated. In turn, this has a deleterious effect on policy debate and design in this area.

A valid case exists, in cost benefit terms, for some improvement in the collection and coordination of current data collection in the area of consumer product safety. The improved provision of incidence and cost data on product-related injuries, in particular, would deliver benefits to government in guiding regulatory activity, and to consumers in potentially reducing the number of deaths and injuries via improved hazard identification.

The Commission also sees merit, on cost benefit grounds, in a *limited* expansion of *targeted* research dealing directly with consumer product-related injury. In particular, a one-off baseline study of consumer product-related injuries and deaths, to consider the current level of incidence and costs associated with such events and also to analyse the possible roles played in injury and death by product fault and consumer behaviour, is worthy of more detailed consideration. The analysis should include consideration of the influence of broader causes (such as alcohol consumption and income distribution) on behaviour and product safety outcomes. In this context, the recent establishment of a dedicated research strategy by MCCA is noted, as is the commitment by jurisdictions to fund further research through the Council.

However, the costs of a more expanded program of supporting research, involving such elements as biomechanic and exposure studies, consumer surveys etc., may be considerable[5], would primarily be borne by government, and are likely to result in more limited net benefits. The high costs associated with introducing an extensively expanded research program via the establishment of a 'super-agency', along the lines of the CPSC within the US, are particularly noted. In the Commission's view,

[5] In this context, the DTI in the UK observed that (DTI 1999, p. 4): 'The investigation and monitoring of product safety cannot be based on large-scale follow-up surveys such as that used in this study, due to the time and cost involved. If more information is to be collected it must be at the time of injury/treatment, although the feasibility of this rests not only on time and cost, but on the ethics of interviewing at this time, especially in the case of serious injury.'

the merits of such research should continue to be assessed on a case-by-case basis through the competitive funding application processes already in place within the higher education and health systems.

RECOMMENDATION 9.6

A one-off baseline study should be commissioned by the Ministerial Council on Consumer Affairs (MCCA) to identify the current incidence and costs of product-related accidents and provide a thorough analysis of the significance of different causes of accidents. This would improve hazard identification and help guide government interventions to address consumer product injury and death. The recent establishment of a dedicated research strategy by MCCA and the commitment by jurisdictions to fund further research through the Council, may provide the means by which to guide and fund this study.

FINDING 9.2

Beyond the research strategy recently introduced by the Ministerial Council on Consumer Affairs and the base-line study proposed in Recommendation 9.6, any further research into consumer product safety should continue to be assessed on a case-by-case basis through competitive funding processes already in place.

10 Better informed consumers and businesses

Key Points

- Consumers have access to a range of information from government, businesses, and private organisations, including from advertising, information campaigns and product packaging and warnings, which may assist them in assessing the risks associated with consumer products.
- Nevertheless, there are circumstances where consumers may not have sufficient information or may not be able to apply available information to make reasonable decisions about product risks.
- Well-designed information provision can improve product safety outcomes and should be used in conjunction with other complementary measures for addressing product safety risks. However, as the effectiveness of alternative approaches depends on the purpose for which information is being used, costs and benefits need to be carefully assessed, on a case-by-case basis prior to the implementation of any information strategy.
- The additional benefits associated with establishing a dedicated organisation tasked with providing information to consumers would not justify the associated costs.
- Information about product safety laws and regulations is spread over a number of jurisdiction specific web-sites which can make it difficult for businesses to obtain a clear understanding of their legal obligations across all States and Territories.
- An internet-based one-stop shop dedicated to the provision of information about State, Territory and Australian Government product safety regulation would provide net benefits to the community.
- Extending this service to cover more technical aspects concerning how to produce a safe product is unlikely to be cost effective as businesses will usually be better placed than governments to access or develop such information.

10.1 The context

MCCA (2004) has suggested that governments can assist businesses to deliver safe products and help consumers choose and use products in a safe manner through the

provision of relevant information (p. 37). In particular, MCCA has proposed the development of a one-stop shop providing advice to business on the requirements for designing or importing safe products; and targeted advertising campaigns to encourage businesses and consumers to pursue product safety more actively.

However, it is important to ask whether these kinds of information initiatives are the most efficient approach to achieving consumer product safety objectives.

As noted in chapter 2, a key reason for markets failing to deliver an optimal level of safety in relation to consumer products is that consumers and business may not have sufficient information to make reasonable decisions.

There are a number of areas where business, government and consumers may have information that is not available to other groups:

- businesses are likely to have more information than consumers and government regarding more technical aspects of their products and the implications these have for the products' safety and regarding reports back to them about accidents and limits of safe use;
- government is likely to have more information than business and consumers regarding product safety regulation and may also have more information about certain hazards and risks (particularly emerging trends or patterns) due to research and information gathering; and
- consumers are likely to have more information than business or government about the circumstances in which a product will be used and precisely how it will be used.

As discussed in chapter 2, efficiency is generally promoted in relation to information provision when those who can provide information at the least cost are made responsible for doing so. On these grounds, businesses, government and consumers should each, respectively, be required to provide the types of information outlined above. That said, before requiring the provision of information, regulators would still need to be convinced that the benefits stemming from the information would be greater than the cost of providing it.

It is also important to recognise that information is only one element in a range of instruments that can be used to influence product safety outcomes. In some cases it may be the most appropriate way of addressing product safety-related problems, particularly when consumer behaviour is the predominant contributor to injury.

However, information strategies can also be used in conjunction with other complementary measures. For instance, governments seeks to improve safety outcomes in relation to nursery furniture by providing information to parents on the

hazards associated with cots (and other furniture) as well as by imposing mandatory safety requirements. Alternatively, many information campaigns are aimed at general risks and may cover a number of products or only cover some products indirectly. For instance, campaigns aimed at reducing the risk of falls in the elderly may provide some information about the safety of certain products (such as floor coverings or electrical cables) but these are unlikely to be the main focus of the campaign.

This chapter looks at the provision of information to suppliers and consumers. The following section focuses on consumers: identifying existing informational activities, identifying problems facing consumers and looking at options for reform. Section 10.3 mirrors this approach in relation to the provision of information to suppliers.

10.2 Informing consumers

Existing activities aimed at informing consumers

There are various avenues through which consumers have access to information about product safety and related risks.

Consumers can gain information about specific product risks from the packaging, literature and warnings provided with a product. Product packaging often displays information about the quality, function or design of the product, its intended use, and (particularly in the case of children's products) who should be able to use the product safely. Inside the packet, instructions or information leaflets can give additional information on the appropriate way to use the product and warnings on inappropriate use (which may also be indelibly marked or permanently affixed on the product itself). In some cases (such as bath supports for infants and elastic 'octopus' straps) mandatory information standards require some information to be disclosed. Further, current product liability laws expressly encourage the provision of such information.[1] Participants in this study suggested that consumers currently receive a significant amount of information via product packaging and warnings:

> From our industry's perspective, we do believe we provide enough information as it is on the product and/or packaging. Important information is provided in warnings in conformity with standards. (Australian Toy Association, sub. MCCA2, p. 6)

[1] Part VA of the TPA outlines factors that are considered when determining whether a good is defective (ie unsafe) for product liability purposes. One relevant factor is the adequacy of instructions or warnings relating to the use or misuse of a product, which in essence, requires suppliers to include appropriate information about the safety and safe use of a product.

> By and large, ACCI believes consumers are currently receiving sufficient product safety information. Retail product markets in Australia are highly developed and competitive and for the most part disclose large amounts of product information to provide consumers with clear choices on safety and other issues. (Australian Chamber of Commerce and Industry, sub. MCCA3, p. 5)

Consumers may also obtain information from a number of non-government organisations such as the Australian Consumers' Association (ACA) and Kidsafe. The ACA, via its publication *Choice*, provides safety-related information across a range of topics and regularly tests the safety of products against existing safety standards (see, for instance, *Choice's* review of cots — ACA 2005). Kidsafe is another consumer advocacy group, which provides a range of information on the dangers faced by children and how to minimise the risk of injury.[2]

The media (including the internet) and word of mouth are other important ways consumers obtain information about consumer product-related hazards.

In addition, governments directly provide product safety information to consumers about the most hazardous products. The Australian Competition and Consumer Commission (ACCC) maintains the 'consumers online' website (www.consumersonline.gov.au), which makes available information pamphlets on specific product-related hazards such as fire safety, bunk beds, children's nursery furniture and toys. The ACCC also supplies a number of 'product safety guides' for consumers as well as maintaining the Recalls Australia website (www.recalls.gov.au) which gives details on nationally recalled products. At the State and Territory level, offices of fair trading provide information to consumers including advice to consumers surrounding common problem areas (such as children's toys and nursery furniture).

Problems facing consumers

With regard to information, consumers face three main problems:

- insufficient information to identify product hazards;
- inability to assess and interpret information on product hazards; and
- an inability to remember and apply information about product risks.

[2] See www.kidsafe.com.au (accessed 22 December 2005).

Insufficient information to identify hazards

For many goods, consumers are likely to have sufficient information to make informed choices regarding their safety. In the case of some inexpensive and/or repeatedly purchased products, where the potential danger is small, consumers can purchase a product and try it for themselves. For other inherently risky goods, such as a knife or a lawn mower, consumers can make reasonable estimates of their safety, largely because the risk posed by the product is obvious or well known.

However, there are some products for which the risks posed are hidden or difficult to judge and consumers will have only limited information about their safety. For certain products it takes prior knowledge to identify the risks posed. For instance, unless they were told, many individuals would be unaware that a protrusion at the top of a cot (where a child's clothes could be entangled and pose a chocking hazard) could be dangerous.

Certain consumers are less likely to be able to identify product risks than others (for example, first time consumers such as teenagers or first-time parents) Similarly, consumers with limited cognitive capacities are more likely to have difficulty identifying hazardous products.

Another potential area of difficulty for consumers is knowledge of how to reduce risks. While consumers may be able to identify a risky product and potentially make informed choices when purchasing, it is also important they know how to manage the risks and use products in a safe manner. For instance, it is important for bicycle riders not only to know how to identify and purchase a safe helmet, but also how to fit and wear it in a correct manner.

Inability to assess and interpret information

Even where consumers have access to information about product risks there are a number of reasons why they may not be able to interpret or make use of that information. Often information is targeted at the 'average' consumer and may not be easily understood by all consumers.

For example, some consumers may speak English as a second language. The Department of Immigration and Multicultural and Indigenous Affairs note that 43 per cent of Australians were either born overseas or have parents born overseas and over 200 languages are spoken in Australia (sub. DR45, p. 2). This poses an obvious challenge in providing information about consumer product safety on a community-wide basis.

Research also suggests that consumers in general have a number of cognitive biases and limitations which affect the way in which they assess risks. For example, it appears that the *severity* of injury is much more important to consumers when assessing risks than the *likelihood* of injury (CPSC 2003). Some of the factors that may influence a person's assessment of risk are outlined in box 10.1.

Box 10.1 **Factors influencing an individual's assessment of risk**

Oglethorpe and Monroe (1994) have developed an analytical framework containing five factors which appear to influence individuals assessment of risk:[3]

- *Availability*: the vividness with which an outcome can be imagined (the more concrete and less abstract an outcome is to a consumer, the greater the perceived risk);
- *Uncontrollability*: hazards which the individual perceives to be outside their control;
- *Dreadedness*: some particular consequences (such as the possibility of burn injuries) illicit more emotional responses;
- *Irreversibility*: consequences that have permanent effects; and
- *Catastrophic potential*: risks that are likely to effect more people than just the individual in question.

These factors are likely to affect the way in which product safety information is perceived, whether or not it is considered and the extent to which it is acted on.

Source: Oglethorpe and Monroe (1994).

Consumers are more likely to pay attention to information if they perceive the risks to be high, that is if there is the potential for outcomes to be uncontrollable or catastrophic. On the other hand, if consumers don't perceive a hazard as potentially leading to these outcomes they may discount the risk and ignore (or not pay sufficient attention to) any information related to it.

The volume of information from various sources that consumers are subjected to on a daily basis may lessen the impact of some important safety messages. In the United States the Consumer Product Safety Commission (CPSC) notes consumers are presented with more than 3,000 persuasive messages daily (mostly in the form of advertising) and that 'safety-related messages … are only a small percentage of the torrent of persuasive messages received by users' (2003, p. 11). In this environment it is easy to see why consumers might be overloaded with information leading them to ignore safety-related messages.

[3] These factors directly influence the level of perceived risk. They also indirectly influence it by affecting individual's perception of the severity and likelihood of injury.

An important aspect of coping with this quantum of information are strategies that consumers use to filter information. The CPSC (2003) notes that consumers are more likely to filter out messages if they are familiar with the product, or with similar products or with the warning itself. Similarly, if consumers have repeatedly used the product, they are likely to filter out information. It was found that one way, of improving the likelihood a warning or other information will not be filtered out is to place the most important information in the first couple of lines.

Inability to remember and apply information

Even when consumers are presented with and are capable of fully understanding and applying information, they may not do so. Again, the CPSC, notes that:

> Other research studies have confirmed that consumers sometimes observe and read instructions, yet fail to act upon them. For example, in Friedmann's 1988 study of compliance with warning labels on liquid drain opener and wood cleaner products, she found that overall, 88 percent of subjects noticed the label, only 46 percent claimed to have read the label, and only 27 percent complied with it. (2003, p. 7)

In cases where individuals have read warnings (or other safety information), but seemingly not heeded those warnings, they may have assessed the potential costs and benefits and decided to 'take the risk'. In a study on the use of power files, van Duijne (2005) finds that many users are aware of the risks of being injured by this type of product (indeed most had suffered previous injuries) but do not alter their use to reduce the risk, as the potential injury risk was considered to be small. More generally, consumers may often consider that taking all the suggested precautions may be inconvenient and not justified by the associated risk of injury.

The CPSC (2003) also found that 'task overload' (undertaking multiple tasks), time pressures and stress adversely affected individuals' ability to remember and apply safety instructions.

Finally, the timeframe over which consumers have to remember the information is also likely to affect the extent to which they put it into practice. The greater the amount of time that has elapsed between being presented with information and having to act on it, the less likely they are to remember and apply the information.

Options for addressing these problems

Many problems facing consumers are associated with a lack of information, or information provided in an inappropriate manner. Governments can assist in addressing information deficiencies either through the direct provision of

information or indirectly by encouraging (or requiring) the provision of better information by businesses or other third parties.

Unlike other government interventions (such as standards and bans) which alter the design and/or availability of a product, the provision of information allows consumers full use of the product and benefits associated with this use. Consumers can, with sufficient information about the risks associated with a product, either choose to use it or not — given their own preferences and attitudes towards risk.

Once regulators have established there is a case for providing consumers with additional information to reduce the risk of consumer product-related injury, they would need to consider the following questions:

- *What is the nature and extent of the risk regulators are trying to address?*
- *Who is the target audience?*
- *What information needs to be provided?*
- *Who is best placed to provide the information?*
- *What is the most efficient method (or combination of methods) of providing the information?*

Different ways of delivering information

It is particularly important to recognise that the provision of information to consumers can take many forms including:

- warning labels on products (which may be worded, pictorial or symbolic)
- instructions provided with products
- directly approaching the owners of products (via post or phone)
- point of sale material placed in retail outlets
- school or workplace-based education programs
- education programs provided by non-government organisations
- information placed on the internet
- press releases
- narrowly targeted advertising in specific publications/mediums
- mass-media advertising encompassing various mediums (eg print media, internet, television).

Each of these can be implemented alone or in combination. Clearly, some methods will be more effective than others depending on the circumstances.

Are information strategies effective?

Even with meticulous design and thoughtful application, there is still a question as to whether information provision can be effective in improving consumer product safety outcomes. This effectiveness will depend crucially on the ability of the campaign to influence the behaviour of consumers. There are a number of reasons why campaigns may not be very effective in doing this:[4]

- *People may fail to take notice of campaigns.*
- *People may not understand campaigns.*
- *People may choose to ignore campaigns.*

Research supports the notion that information provision (in the form of warnings) may not be effective in influencing the behaviour of all consumers:

> … incident data and research demonstrate that in some cases injured parties have been provided with and were aware of safety instructions or warnings, yet they chose to disregard them for reasons that seemed appropriate at the time. … it is clear that while communication of safety information (e.g. recall notice) is a requisite to compliance, it may not be sufficient to motivate human behaviour. (CPSC 2003, pp. 6-7)

Reflecting these difficulties, some are pessimistic about the ability of information campaigns to address safety risks:

> The injury potential in many … products is not apparent to almost all consumers and no amount of information or education is likely to change this. (ACA, sub. 41, p. 3)
>
> ACA recognises the importance of the well-informed consumer and appreciates that consumers do not always read and understand product information as well as they might to ensure their optimal safety. The Productivity Commission [in the Discussion Draft] has not adequately recognised that changing behaviour is very challenging, especially if education is the principle tool. (Crothers 2005, p. 31)
>
> The product safety system cannot rely to any great extent on consumers knowing what to look for in products (beyond common sense), nor that they will necessarily use and seek out publicly available information about safety. (Commonwealth Consumer Affairs Advisory Council, sub. 43, p. 9)

There is limited empirical evidence regarding the success or otherwise of particular consumer product safety information campaigns. Nevertheless, evidence for campaigns aimed at other injury and disease prevention activities suggest they can be effective in altering consumer behaviour (see box 10.2).

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[4] See Latin (1994) for a detailed discussion of the reasons why information disclosure (in the form of hazard warnings) may be ineffective.

Box 10.2 **How effective are information campaigns?**

In the United States, the *Guide to Community Preventative Services* (produced by an independent Task Force) reviews the results of previous programs aimed at changing risk behaviours and improving health outcomes. It assimilates evidence from a range of primary sources on different approaches towards influencing behaviour and covers such issues as cancer, motor vehicle injury, vaccinations, tobacco use and domestic violence.

While it does not deal specifically with the general consumer products under reference, it does provide evidence concerning the ability of information campaigns to influence consumer behaviour in other areas of health care.

Unsurprisingly, it finds that information and education campaigns are more effective when used in conjunction with other measures (such as regulation or other incentives) than when used alone. For instance, the guide found that information and enforcement campaigns and incentive and education campaigns were more effective in promoting seatbelt wearing than education campaigns when used alone. Similar patterns were found in the case of tobacco use and vaccination promotion.

Nevertheless, education and information campaigns can still be effective when used alone. The Guide finds strong evidence of success for community-wide campaigns in increasing the level of physical activity undertaken by individuals. Specific education campaigns were found to be effective in preventing skin cancer (by reducing exposure to ultra-violet light).

The setting in which the campaign is undertaken and the audience at which it is targeted appears to have an impact on its success. In the case of skin cancer, stronger evidence of success was found for campaigns set in primary schools and 'recreation and tourism settings' than for mass-media campaigns or those set in child-care centres or occupational settings. Again, this suggests that careful targeting of campaigns enhances their effectiveness.

Another approach to supplying information is the provision of 'point-of-decision prompts' which where found to be effective in encouraging additional physical activity. A similar approach, providing information to consumers at the point at which they purchase consumer products, could be effective in addressing certain consumer product safety risks.

Source: Zaza, Briss and Harris (2005).

Importantly, there is the potential to improve the effectiveness of information campaigns at the design stage. In particular, in designing information campaigns, regulators should consider the relative merits of mass-media campaigns versus more narrowly-focused information provision (for example, school-based education programs, or work place and recreational programs). Further, in practice, the effectiveness of education and information campaigns can often be enhanced when

provided in conjunction with other complementary interventions rather than being used alone.

While the above discussion suggests that information provision will not always be effective in altering consumer behaviour, some success is likely with carefully designed information campaigns focusing on the behaviour of particular groups in the community. Certainly, it is the case that no campaign can alter the behaviour of all consumers, but the question for policy analysis is whether the campaign can influence enough consumers to justify the costs associated with its implementation. With thoughtful design many of the difficulties presented above can be mitigated (at least to some extent) and information approaches are likely to have an important role to play when used in conjunction with other complementary measures.

Proposals for reform

Additional information campaigns?

In their Discussion Paper, MCCA (2004) raised the possibility of undertaking additional advertising campaigns targeted at consumers. They noted that campaigns could be targeted at 'high risk' consumer groups such as families with young children.

The costs to government of undertaking additional advertising campaigns will depend on the nature of the campaign. However, these costs would include the initial cost of designing the advertising campaigns and the ongoing cost of delivering them (for example, the cost of buying advertising space in magazines and advertising slots on radio and television). Obviously, the medium chosen to deliver the advertising campaigns would have a significant influence on cost.

Various regulatory impact statements give some indication of the potential costs (see box 10.3). The costings in these RISs are based on fairly targeted campaigns and more extensive campaigns would entail greater costs. A less obvious cost of undertaking any particular campaign is that it may crowd out other product safety messages which are also vying for consumers' attention.

As the recipients of information, the benefits of information campaigns will accrue primarily to consumers. To the extent that information encourages safer behaviour and reduces the number of product-related accidents, businesses may also benefit from reduced liability and improved reputation. However, the size of these benefits are uncertain and would depend on how successful the advertising campaigns were in influencing the behaviour of the target group.

A decision on when to undertake advertising campaigns should be based on a case-by-case analysis of the costs and benefits. In general, benefits are more likely to outweigh costs when campaigns address significant information gaps and where advertising can effectively communicate the nature and extent of the risk to consumers. In undertaking advertising campaigns, authorities should be mindful of the appropriate role and limits of information provision and carefully consider other options for providing this information.

Box 10.3 **The cost of consumer awareness campaigns**

Regulatory Impact Statements on various product safety issues include estimates of the cost of consumer education campaigns:

Pedal Bicycles — July 1999:

> The most recent campaign on toy safety conducted by Consumer Affairs has cost $100,000 this financial year. This campaign was fairly low key and involved printing and distribution of an information booklet designed to educate consumers on how to select safe toys. A recent investigation of the cost of an education campaign on elastic luggage straps also gave an initial cost of $100,000 for one advertisement on television. The message would need to be repeated frequently to keep it in front of the public, and the estimated minimum cost would be $300,000. (Australian Treasury 1999)

Baby Walkers — November 2001:

> A suitable strategy … would comprise the publication and distribution of information leaflets and advertising in parenting magazines, at an estimated total cost of $10 500 per annum.
>
> The cost of production and targeted distribution of new information leaflets for baby walkers through appropriate parent and carer networks is estimated to be about $5500 pa.
>
> The cost of publishing half-page advertisements in four issues of *Kidsafe Magazine* per year is quoted at approximately $5000. (Australian Treasury 2001)

Basketball Rings and Backboards — June 2005:

> Government would be responsible for direct costs involved in funding any consumer education campaign it undertakes. … The costs of such a program could potentially be substantial but are not quantifiable, as their magnitude would depend on the nature and extent of the educational activities envisaged. The cost of a 'normal' campaign for a hazardous consumer product would approximate $50,000 … (ACCC 2005e)

Source: Australian Treasury (1999), Australian Treasury (2001) and ACCC (2005e).

Something more comprehensive?

While not proposed by MCCA, the ACCC highlighted the Canadian Smartrisk program (see box 10.3) and raised the possibility that a similar service could be established in Australia.

The Smartrisk program has two distinctive features:

- it aims to help consumers (particularly children) develop effective strategies for minimising the risk of injury when undertaking hazardous activities; and
- it undertakes research into injury prevention and makes this available to a wide range of stakeholders (including, government, the media and the general public).

In delivering information to consumers, Smartrisk attempts to educate consumers (particularly school aged children) about risks and how to take risks in a safe manner (ie take smart risks). In essence, the approach largely involves providing consumers with sufficient information and then allowing them to make informed (and hopefully safer) decisions for themselves. While Smartrisk makes available a large amount of information to consumers and educates many children (and adults), in practice, the Commission considers that Smartrisk does not appear to be particularly different from other information and education campaigns (see box 10.4) except perhaps in the scale of delivery.

As discussed above, regulators have a number of choices when designing and implementing a campaign and should undertake the campaign in the manner which best balances the benefits of intervention against the associated costs. In making this assessment, regulators should consider whether Smartrisk offers any useful insights or lessons for the design of particular information campaigns.

The question still remains as to whether an organisation should be set up to develop and deliver a more comprehensive set of consumer product safety information campaigns in Australia. Such a service could be tasked with undertaking a range of information provision and education activities. This role could be similar to that played by New Zealand's Accident Compensation Corporation, and in Australia by the National Health and Safety Commission. These organisations, while not focused on product safety, have developed and make available a wide range of information and safety material to the public.

Establishing a new organisation would be a costly exercise. Funding would need to be provided for the hiring of staff, as well as to pay for the development, publication and distribution of product safety information and education programs. Another possibility, which is closer to the Smartrisk model, would be for government to fund an existing non-government organisation to undertake the information provision activities.

FINDING 10.1

The additional benefits associated with establishing a dedicated organisation tasked with providing information to consumers would not justify the associated costs. Well-designed and cost-effective information provision can improve product safety outcomes and should be used in conjunction with regulators' overall strategies for addressing product safety risks.

Box 10.4 **Smartrisk**

Smartrisk is a Canadian private non-profit organisation founded in the early 1990s. Smartrisk aims to reduce the level of injury and death by informing children (and adults) of the dangers involved with risky activities and by giving them positive advice and strategies to minimise or avoid such risks. This approach was born out of a desire to avoid more traditional safety approaches which tended, in Smartrisk's opinion, to convey negative messages such as 'don't play with matches' and 'don't ride your bike without a helmet'.

The Smartrisk approach encourages consumers to take 'smart risks' or undertake risky activities in as safe a manner as possible. Smartrisk includes a number of programs:

- *Smartrisk Heroes* is a travelling road show aimed at informing teenagers of risks and preventing injury in areas such as sport and recreation, driving and the workplace.
- *Smartrisk No Regrets* is an adjunct to Smartrisk Heroes and provides a peer leadership program for high schools.
- *Snowsmart* is a program aimed at giving 10-18 year olds information about snow-related risks.
- *Smart Moves* is aimed at the elderly and reducing the risk of injury resulting from falls.
- *The Smartrisk learning series* is a distance-learning program for professionals working in the field of injury prevention.

In addition, Smartrisk undertakes research into injury and the cost of injury and provides information about injury and injury prevention to stakeholders, the media, government and the general public.

Smartrisk appears to have been successful in providing a wide range of information to a variety of audiences. That said, the approach it takes in practice does not appear to differ markedly from other information campaigns. In general, Smartrisk, like many other campaigns, appears to provide a mixture of information about risks (such as the most frequent type of injuries and their cause) and advice on how to avoid these risks (ie behavioural changes, or purchasing decisions that can mitigate the risk).

In the case of educating young people, Smartrisk note that their approach boils down to five key messages: 'buckle up'; 'look first'; 'wear the gear'; 'get trained'; and 'drive sober'. It would appear that the key difference between the 'traditional' approach ('don't drink and drive' or 'don't ride a bike without wearing a helmet') and the Smartrisk messages ('drive sober' and 'wear the gear') is that the latter uses more positive phrases.

Source: www.smartrisk.ca (accessed 22 December 2005).

Moreover, there would be merit in jurisdictions consolidating the information they currently provide separately on a single website. Consolidation of such information on a single website would make for easier access to a wider range of material and may potentially be more cost effective to develop and maintain. The potential for developing a single consolidated website housing consumer product safety information (including information for consumers) is discussed in section 10.3 (see 'one-stop shop').

10.3 Informing suppliers

Existing activities aimed at informing business

Businesses can obtain information about safety-related regulations from a range of *government agencies*. As the enforcement body responsible for ensuring compliance with the product safety provisions of the TPA, the ACCC also plays an important role in informing businesses of their responsibilities under the TPA. The ACCC also provides limited information to business through the consumers' online website (www.consumersonline.gov.au). At a State and Territory level, offices of fair trading provide jurisdiction-specific information on product safety. In general, these government organisations provide information on the product safety regulations, lists of banned products and information on product safety (and information) standards. For instance, the Victorian Government:

> … publishes all products banned and regulated by Victoria on the Consumer Affairs Victoria website. The Consumer Affairs Victoria website is an important tool for providing product safety information to Victorian consumers and business and provides an online channel to make an enquiry or a complaint. (sub. DR60, p. 17)

Business groups and associations can also provide valuable information to businesses. While many business organisations do not appear to provide significant information on product safety, organisations dealing with business in high risk industries can play an important role in informing members and promoting safety. For instance, the Australian Toy Association works with members to provide information and promote the safety of products and a key role of the Infant and Nursery Products Association of Australia is the 'education of members on industry matters including product safety and product standards'.[5]

Finally, *product standards* provide detailed information on technical matters associated with designing and manufacturing products (see chapter 12). There are a number of Australian standards as well as many international standards relating to products under reference.

Problems facing suppliers

The main area, where suppliers rely on government for information, concerns the laws and regulations with which they must comply. As outlined above, this information is currently made available through numerous Australian Government and some State and Territory web sites. Multiple web sites can make it difficult for

[5] See www.austoy.com.au and www.inpaa.asn.au/about.htm (accessed 22 December 2005).

businesses to obtain a clear understanding of all of their legal obligations across the nation in relation to consumer products. In its submission to MCCA, Coles Myer noted that regulators could:

> place regulations and bans on their websites (i.e. like Fair Trading, NSW), rather than charging for access to this information. … It has been our experience that many smaller businesses (i.e. many of our suppliers) find it extremely difficult to navigate the regulatory environment … (sub. MCCA9, p. 4)

All jurisdictions at least list bans and mandatory standards on their web sites. Nevertheless, in many cases only the name of the product is given and no additional information (such as pictures, detailed descriptions or reasons for the regulation) are provided. Further, it can be difficult to easily discern in which jurisdiction(s) a particular product is regulated. In the case of standards, regulators appear to only reference a standard or at best provide a limited summary of the requirements contained in the standard (meaning that businesses must pay to obtain the entire standard with which they must comply).

A further problem may arise when businesses are not aware that their products are associated with injuries. While consumers may be expected to notify business if their products fail, they may not do so if the product is not perceived to be the direct cause of the injury. It appears that if consumers believe an accident was (predominantly) their own fault, they are unlikely to notify business of the incident (this is especially the case for lower level injuries — see chapter 4). This may create a 'blind spot' on the part of business toward injuries associated with, but not caused by, their products. For example, one participant in a roundtable noted that, until discovered through a supplier-initiated search for appliance-related injuries in the National Injury Surveillance Unit Data Base (undertaken in 1993), suppliers of air conditioners were unaware that head injuries associated with individuals colliding with window/wall type air conditioners projecting from outside walls were among the most frequently recorded injuries associated with appliances. (Brown, R. A., Australian Electrical and Electronic Manufacturers Association, pers. comm. 6 October 2005). Similarly, the Blind Manufacturers Association of Australia indicated that, prior to being informed by government, they were unaware of strangulation incidents associated with blind cords (sub. 37, p. 2).

Options for reform

A one-stop shop

In discussing possible reforms relating to the provision of information to suppliers, MCCA (2004) proposed a 'one-stop shop' which would:

> … seek to provide businesses with information on the requirements associated with designing or importing safe products. (p. 37)

Clearly there are a number of options in terms of how such a service could be implemented. Important threshold design questions include:

- Should the service be web-based?
- How interactive should it be?
- What information should it cover?
- Who should be responsible for its administration?
- How frequently should information be updated?

An internet-based shop which provides information through web pages would appear to be the most cost-effective approach. Such a website could be accessed directly by suppliers (and consumers) or via links from other government websites (such as office of fair trading websites). A more interactive service that responded to firms' questions and correspondence could be envisaged, however, providing such a service would be more expensive to deliver and maintain.

A one-stop shop could provide technical information only, regarding product-related risks and how to design or import safer products; and/or information on legal requirements (ie. product safety laws and regulations).

In general, information about product hazards and solutions are likely to be specific to particular products. Generally, it is to be expected that business would have more and better quality information on specific product design issues than government. If a technically focused one-stop shop was to be established, governments would incur significant costs in developing technical knowledge and transmitting this to businesses. By and large businesses, given their more intimate product knowledge, should be better placed to develop this information for themselves. If regulators consider that businesses were not giving sufficient attention to safety in the design of products, other measures aimed at encouraging business to improve product design are likely to be more cost effective.

The Commission sees more value in developing a one-stop shop which provides information on consumer product safety laws and how they are administered and enforced. Such a website could also provide information to consumers on product safety issues. In order for the one-stop shop to be of most use to business and consumers, it would need to be comprehensive in its coverage. In particular, it could include:

- copies of relevant provisions of the Trade Practices Act and fair trading acts for each jurisdiction;

- information on products which are banned or subject to mandatory standards in each jurisdiction (including detailed descriptions of the products and standards where possible);
- information on how product safety laws are administered and enforced;
- information and details of all products recalled in Australia (this could subsume or be linked to the current Recalls Australia site which, as discussed in chapter 9, should include all voluntary and mandatory recalls);
- any relevant product safety information targeted at consumers;
- a portal for receiving consumer complaints (as described in chapter 9); and
- links to product specific regulators.

Another consideration raised by the Victorian Government is who would be responsible for administering the one-stop shop and how frequently would it be updated (sub. DR60, p. 17)? It would be more cost effective for an established organisation to administer the website and the Australian Competition and Consumer Commission would appear to be best placed to do this. As for the frequency of updating, clearly it should be updated whenever significant new information becomes available.

A one-stop shop dedicated to the provision of information regarding product safety regulation would provide several benefits. It should reduce compliance costs for businesses by removing the need for them to search for information about product safety laws. By making the laws and regulations more accessible, it should also promote compliance and have a positive impact on product safety outcomes. Further, being able to access all material on or through a single site would make the full range of information and 'updates' available to business each time they visit. This would remove the possibility of missing important information because they failed to visit one particular site. Such benefits would also extend to consumers if the one-stop shop included all information relevant to them.

A further benefit may accrue to government if the process of assembling the various laws and regulations into a single source highlights the differences in laws and how these differences affect business.

There would be some costs associated with setting up and maintaining a one-stop shop which would fall on the Australian, State and Territory Governments.[6] The Victorian Government argued that:

[6] Such costs could be passed on to business by charging fees for service, although a decision to pursue a cost recovery strategy should be based on the governments' cost recovery guidelines (see DOFA 2002).

> For a national site to be effective, resources would need to be committed to updating the site as soon as new information became available to ensure the currency of information. (sub. DR60, p. 17)

Currently, each government maintains various websites and many of these costs are already incurred. While the consolidated site is likely to be more expensive to run than each *individual* (existing) site, it is likely that it would still achieve some economies and reduce the *total* amount expended on these activities.

A further question regards the timeliness of the new service. It may take longer to update a national site than existing jurisdictional sites, as information would need to be forwarded to a central organisation before uploading, however these delays should be minimal.

The Victorian Government indicated that it:

> … would continue to use the Consumer Affairs Victoria website as a channel to provide product safety information, even with the establishment of a national internet based 'one stop shop'. A 'one stop shop' creates a risk of duplication of information between the two sites, as well as extra resources being required to update both sites. (sub. DR60, p. 17)

While there is the risk of some additional duplication between the central site and existing sites, there are already inefficiencies created by having multiple sites dedicated to providing information on product safety laws. Businesses must find, navigate and understand several separate sites and governments have to maintain and update several sites. While the greatest savings would be made by having a single national website, including all information on the national site would still bring benefits for consumers and businesses, even if the States continued with their own sites. After all, the majority of the benefits should stem from ease of access by business and consumers, rather than from administrative savings to government.

RECOMMENDATION 10.1

The Ministerial Council on Consumer Affairs should establish a national internet-based one-stop shop providing information about product safety regulations for all jurisdictions, administered by the Australian Competition and Consumer Commission. The one-stop shop should include:

- ***relevant trade practices and fair trading provisions;***
- ***information about product bans and standards;***
- ***information about administration and enforcement practices;***
- ***information about product recalls generally and a link to Recalls Australia;***
- ***relevant product safety information targeted at consumers;***

- ***links to product specific regulators; and***
- ***potentially a consumer complaints registration portal.***

Information on consumer behaviour

A second potential information deficiency on the part of suppliers concerns product safety incidents which are associated with their products but not caused by them. As outlined above, consumers appear to be happy to notify business if a product fails, but not if they believe that an incident was caused (predominantly) by their own actions.

If institutional arrangements are made to collect data about consumer product related injuries (and near misses), as discussed in chapter 9, this could provide a source of information about product use for business. In particular, governments could provide information to business, including through industry associations, when they become aware of a pattern of injury associated with a particular product.

The benefits stemming from such arrangements are likely to depend on the type and magnitude of injuries associated with the product, and the ability of suppliers to alter the design of their products. Nevertheless, the costs of forwarding information from such a system to businesses associated with the manufacture or importation of a product would appear to be minimal.

A campaign for business?

MCCA (2004) also put forward the idea of targeting advertising campaigns at business:

> … an advertising campaign with the theme of 'safety sells' could reinforce for business the link between safe products and corporate reputation and performance. (p. 37)

Clearly the aim of such a campaign would be to encourage businesses to produce safer products and thereby reduce the level of product-related injury or death.

However, the benefits of such a campaign could be limited. Businesses should already be well aware of the benefits of producing safe products and these messages are likely to be reinforced through a number of avenues:

- the incentives which already drive businesses to produce safe products (such as consumer preferences, liability law and insurance obligations — see chapter 4);
- knowledge of the costs of product recalls; and

- industry organisations which encourage the production of safe products (for instance, the first two items in the code of practice of the Australian Toy Association advocate the production of safe toys).

If such campaigns were to be developed, the costs and benefits would need to be assessed on a case-by-case basis.

11 Removing unsafe goods

Key Points

- Product recalls are a way of removing unsafe products from the market and attempting to recover or make safe those products which have already been sold.
- There are a number of incentives which encourage businesses to recall unsafe products voluntarily, including product liability laws, loss of reputation and the threat of regulators initiating a mandatory recall.
- While the Commission has received limited evidence about the success of product recalls, it seems that generally only a small proportion of products subject to recall are actually returned by consumers. This is particularly the case for products at the cheaper end of the market.
- Reviewing and improving the recall guidelines provided to business is one avenue for improving the effectiveness of recalls.
- A formal requirement for businesses to recall 'unsafe' products is unlikely to deliver net benefits, because:
  - it probably will not have a significant impact on the number of recalls or the proportion of products recovered from consumers; and
  - there would be some costs (albeit potentially not large) associated with defining what constitutes an unsafe product and the potential for businesses to be discouraged from investigating the safety of products.
- The benefits accruing from giving regulators the power to audit recalls are unlikely to justify the costs of establishing such an audit process, because:
  - an audit process is likely to be costly for governments to administer and enforce (although this might be reduced by the selective use of the audit power);
  - governments might be held accountable for failure to audit if accidents subsequently ensue;
  - the possibility of being audited may act as a disincentive for some businesses to undertake recalls; and
  - most governments currently have the power to order a mandatory recall of a product (and direct the nature of that recall) if unsatisfied with a supplier's response.

One means of minimising the harm caused by unsafe goods is the removal of goods from the market once they have been found to be unsafe. For the most part, unsafe

goods are removed by way of a recall, either undertaken voluntarily or mandated by government. As noted in chapter 3, since 1986 there have been around 1800 voluntary recalls and 6 mandatory recalls.

This chapter assesses the current product recall system (section 11.1) and options for improving it, including two identified in the MCCA Discussion Paper:

- a formal requirement for businesses to recall unsafe products (section 11.2); and
- granting government the formal power to audit product recalls (section 11.3).

11.1 The current recall system

A product recall is an action, usually taken by a business, to remove a potentially unsafe product from the market and retrieve or make safe any products which have already been sold to consumers. Usually this will require consumers (and merchants) to return the good to the supplier, though in some cases (especially for large products) the supplier may make arrangements for the good to be repaired and made safe while still in the consumer's possession. Where goods are returned, suppliers would usually repair or replace the product with an equivalent safe model, or refund the purchase price.

In general, the recall system in Australia affords a fair amount of flexibility to business. For the most part recalls are undertaken on a voluntary basis, so businesses usually determine when a recall is necessary and how it will be undertaken. In all jurisdictions, except Queensland and Tasmania, businesses must notify authorities once a recall has been initiated.[1] The TPA requirement to report captures all interstate traders and corporations and requires the reporting of recalls for all goods (not just those associated with 'consumer products'). Reports of recalls for other goods are handled by specialist regulatory agencies (such as Food Standards Australia New Zealand and the Therapeutic Goods Administration).

To aid business in undertaking recalls the government has prepared recall guidelines which give information on when to recall a product and how to go about the recall.

In the event that governments are worried about the safety of a product, they generally have powers to ban a product or order a mandatory recall. This gives regulators the ability to take action if it is considered a product should have been recalled or if there is a concern about the manner in which a recall has been undertaken.

[1] As discussed in chapter 9, it is recommended that all jurisdictions should include a requirement to report in their legislation.

Why undertake a recall?

With the current level of flexibility afforded to businesses concerning when and how a recall is undertaken, it is important to ask what would motivate a business to initiate a recall. Recalls can be an expensive exercise for business. In addition to the direct costs of advertising and replacing products, a recall removes a potentially profitable product from the market. A key question is whether the incentives to recall products are strong enough to entice business to act or whether additional measures may be necessary.

While it may be tempting to withhold information when a producer realises a product is unsafe, in order to maintain sales in the short term, other factors encourage producers to reveal this information and take action to remove the product from the market. A key motivation in undertaking a recall is the protection of a business's reputation. Placing an unsafe product on the market may damage a supplier's reputation. However, this damage is potentially compounded if suppliers are perceived not to have taken action proportionate to the risk their product poses for the health and safety of consumers, particularly after they have become aware there is a problem. Indeed, acting proactively after identifying a product poses an unacceptable safety risk may enhance a producer's reputation for taking safety seriously.

If businesses sell unsafe products, they also run the risk of being found liable under product liability laws for any damage caused by the product. Having knowledge of an unsafe good and failing to recall it can hurt the business in two ways. Firstly, the good is likely to continue to cause injury or economic harm and suppliers will be liable for the associated damages. Secondly, in the event that an action proceeds, it is likely that the supplier's prior knowledge that the product was unsafe will come to light.

The final reason why businesses may recall a product is to avoid the possibility of governments taking action if they find the good to be unsafe: banning a product, ordering a mandatory recall or issuing a product warning. Being seen to have had to be coerced to remove an unsafe product from the market is likely to be more damaging to a supplier's reputation than had it acted voluntarily.

These incentives appear to be effective in encouraging most businesses to voluntarily recall products. In reaching this conclusion, the Commission has observed that:

- a relatively large number of voluntary recalls (around 160 per year) are currently undertaken; and

- governments have very rarely resorted to the use of mandatory recall powers (see chapter 3).

Further, during the course of the study the Commission has been presented with little evidence of businesses failing to recall unsafe products. While there may be instances of this occurring that have not been brought to the Commission's attention, the discussion in chapter 4 suggests that, overall, Australia's consumer product safety system is delivering a reasonable level of safety. While the lack of such incidents being presented to the Commission does not prove that businesses recall all unsafe goods, it does suggest that problems in this area are not widespread.

How effective are recalls?

The effectiveness of the current recalls system in recovering unsafe goods from consumers appears variable. The NSW Office of Fair Trading (sub. DR61, p. 5) commented that in 'most consumer product recalls a return rate of less than 10% is viewed as very successful …'. This is broadly in keeping with anecdotal evidence presented to the Commission suggesting that recalls generally recover only a small percentage (as low as 5 per cent) of products from consumers. One participant indicated that even the very best return rates were around 50 to 60 per cent. The Australian Competition and Consumer Commission (ACCC) also noted that while recall efforts on the part of business were generally commensurate with the assessed risk posed by the product, the success of recalls can vary widely (sub. DR56, p. 11).

Such numbers appear to be a little lower than estimates produced by the Department of Trade and Industry in the UK (DTI 2000). In a study of 34 recalls, it found the average return rate to be 37 per cent (although eight recalls achieved rates of less than 10 per cent). It should be noted that fewer products were recalled in the UK (an average of 42 per year) and these may have represented higher risk goods. In the study, the return rate was significantly higher for products with a value greater than £10, with most products valued below this achieving a return rate of less than 12 per cent.

Of course, the success of a recall should not be judged solely by the number of goods returned to the manufacturer. On hearing that a product they own is potentially dangerous, consumers may respond in various ways. While some consumers would return the good to the supplier for a refund, replacement or alteration, others may judge that the level of risk posed by the product is small and choose to keep using the good. For inexpensive items, consumers may dispose of the good rather than return it to the supplier. Further, if products have been on the market for some time, many may already have been used and disposed of before the recall is initiated. In each case, an analysis of the return rate may not give an

accurate indication of the proportion of potentially unsafe products remaining in consumers' hands.

The West Australian Department of Consumer and Employment Protection indicated that they were unaware of any cases (in Western Australia) of injury resulting from products after a recall has been undertaken (pers. comm. 4 May 2005). This suggests that either consumers have stopped using the product as a result of the recall (and have not returned it) or have continued to use the product, but not been injured. The Australian Toy Association commented that:

> The low response rates may indicate that consumers do not agree with a particular assessment [of the risk posed by the good]. (sub. DR49, p. 9)

Overall, the general picture painted by the return rates associated with recalls indicates that potentially a large portion of products remain in consumers' hands even after they have been recalled. While to date these may not have caused significant harm, improved recall effectiveness would be desirable and could reduce the incidence of product-related injury.

How can recalls be improved?

At present, advice on how to undertake a recall is provided via guidelines prepared by the ACCC (see box 11.1). Consideration should be given to the potential to improve these guidelines with a view to enhancing the effectiveness of product recalls in Australia.

In response to the Discussion Draft, participants identified a range of possible strategies for improving the effectiveness of recalls (some of which could be reflected in revised guidelines). For example, through enhanced advertising and notification efforts. Clearly, if consumers don't know a product has been recalled they can't return it. The ACCC noted that:

> Mechanisms for improving the success of recalls include more effective advertisements (large advertisements, increased range of newspapers used), product photographs in recall ads, repeat rounds of advertising where appropriate, use of in-store notices, recall ads in speciality magazines, radio and television items when appropriate. (sub. DR56, p. 11)

Box 11.1 **A guide to product recalls**

The Australian government has issued a guide which aims to help suppliers in deciding whether to recall a product and how to go about the recall process.

The guide discusses the reasons why a company might undertake a recall, indicating that it is in the company's interest to ensure that an unsafe product is removed from the market. It reminds the company about product liability laws and the mandatory recall powers of the Minister.

It also outlines the aims of a voluntary recall, namely to: minimise risk of injury and death; retrieve or repair defective products; minimise costs and inconvenience to consumers and the company; and minimise the need for government involvement. It also advises on when a product should be recalled. In considering the need for a recall it recommends that a company should gather data on suspect products, identify how a problem occurred, undertake a risk analysis on the product and look at possible ways of addressing the defect.

In terms of how a recall should be conducted, the guidelines advise companies to determine what sort of recall action will be undertaken based on the risks posed by the product and identify which products or batches of products are dangerous. Arrangements should then be put in place to provide refunds, replace or repair defective products.

Within two days of taking recall action, companies are required to notify the Minister with:

- a description of the product and the risk it poses;
- contact details of the supplier;
- information about when and where the product was sold;
- information about what action the supplier proposes to take; and
- information about what action consumers should take.

Suppliers are also requested to notify overseas recipients of the product, domestic distributors and retailers and then to liaise with government agencies on recall action. The guide also provides direction as to the most appropriate type of publicity and advertising to use. The guide provides a standard template for newspaper and print media advertisements and recommends that publicity material should include:

- a clear description of the product including a drawing or photograph if available;
- a clear identification of and contact details for the supplier;
- a statement of the hazard and associated risk;
- when the product was available for sale; and
- what actions a consumer should take and who they should see about repairing or replacing the product, or obtaining a refund.

Finally, suppliers are advised to monitor the recall and keep a record of returned or repaired products. If it is considered that too few products have been returned from particular areas or distributors, suppliers may need to take additional actions or develop new strategies to improve the effectiveness of the recall.

Source: ACCC (2005d).

The ACA provided some examples of businesses acting innovatively to achieve higher return rates, including:

> … Toys R Us, which sends notices "IMPORTANT UPDATED SAFETY INFO OPEN IMMEDIATELY" in the event of a recall. Bath and Body Works reaches customers with incentives, visual graphics, prepaid mail envelopes and interactive voice response 1-800 numbers. Radio Shack recalled antennas, and made sure when customers used its website and searched antennas, the recall notice was the first thing to appear on the screen. (sub. DR51, p. 6)

The ACA also argued that government should become more involved during the recall process:

> ACA recommends that businesses be instructed to work with the government in the event of a recall and government should develop a protocol for working with business in developing effective outreach to customers and the public to ensure adequate information gets disseminated about an unsafe product. (sub. DR51, p. 2)

The main avenue for government involvement in voluntary recalls would appear to be via their recall guidelines, although direct involvement may be desirable in high risk cases to ensure that recalls are undertaken in an appropriate manner.

The Recalls Australia website is a key way of informing consumers of product recalls. The Australian Electrical and Electronic Manufacturers Association (AEEMA) and Consumer Electronic Suppliers Association (CESA) indicated that the quality of data on this website could be improved:

> A review of 226 currently listed 'consumer product' entries on the Recalls Australia website indicate a lack of quality control over the information provided. Much of the information does not comply with recall guidelines available from the same site. The most common problem is omission or understatement of hazards. (sub. DR44, p. 5).

To maximise the usefulness of the website, the information provided on it should be as comprehensive and detailed as possible. Improvements to the recall guidelines should assist in this area.

Another strategy for improving the effectiveness of recalls involves identifying mechanisms for directly notifying consumers that the product they have purchased has been recalled. Unsurprisingly, goods which can be traced to their owners (such as motor vehicles) appear to have a higher return rate. One potential avenue for addressing this is to use credit card or EFTPOS details to track down purchasers of a particular product. However, such a scheme could raise significant privacy issues that would need to be addressed. An alternative, suggested by the ACA, involves the use of registration cards:

> ACA also recommends the Commission review the regulations imposed in the US on makers of child restraints … Child restraint makers are required to include a postage

> paid postcard that asks consumers to provide basic contact information — name address, phone number, etc. The card indicates this is requested in case of recalls and the consumer is asked to mail the postcard into the child restraint manufacturer. This hasn't achieved universal compliance but the numbers are higher than the average recall achieves. The card attached to the child restraint also exhorts consumers to mail the card immediately and emphasizes its safety benefits. (sub. DR51, p. 5)

While such a requirement could be considered for particularly high risk products in Australia, the ACCC and other regulators could also encourage suppliers to voluntarily adopt such a measure on a case-by-case basis.

A further consideration in achieving higher return rates is the number of recalls undertaken and the seriousness of the risks these products pose for the health and safety of consumers. Undertaking an excessive number of recalls for products that have limited risks attached may make it difficult to gain consumers' attention when a genuinely dangerous product reaches the market. The Australian Toy Association considered that:

> … the effectiveness of recalls generally may have been diluted over time by the misuse and perhaps overuse of this tool. …
>
> It is important to regain the credibility of recall notifications for consumers so that when notified of a recall, consumers can make an informed choice. (sub. DR49, p. 9)

The costs incurred and effort involved in undertaking a recall should be commensurate with the risk posed by the product. It is important that recalls for particularly dangerous products are identified as such and additional efforts made to retrieve goods. A system where recalled products were rated for the risk they posed to consumers and recalls for high risk products were specially marked may provide added encouragement for consumers to take action in particularly dangerous circumstances.[2]

RECOMMENDATION 11.1

As the success of recalls in recovering unsafe products is variable (and especially poor for low value products) the Ministerial Council on Consumer Affairs should undertake a review of existing recall guidelines to ensure that recalls are undertaken in the most effective manner. Considerations for improving recalls could include:

- ***improved advertising efforts (including photographs in advertisements and other targeted material);***

[2] To some extent such a system already exists as suppliers in their recall notices describe the nature of the defect in the product, which may provide some indication to consumers of the severity of the risk posed by the product.

- ***buyer registration cards for high risk products; and***
- ***identification and highlighting of particularly high risk products which have been recalled.***

One final concern relates to the recall of 'orphan goods', that is goods for which no supplier can be found to undertake the recall. AEEMA and CESA indicated this had recently been a problem in the electrical products area:

> Electrical regulators identified two cases [where the importer or manufacturer of the goods could not be identified] … Most, if not all, regulators determined that the hazard was sufficient to justify a recall but, because no supplier of the defective goods could be identified … no recalls were undertaken. Some regulators publicised warnings in newspaper advertisements. Others published warnings only on their web sites. It is not known how many, if any, injuries have occurred or will occur because warnings were ineffectively publicised or because these products were not recalled. (sub. DR44, p. 8)

Clearly, products that pose a significant danger to the public should be recalled. If no supplier can be found to undertake the recall, governments should step in and undertake the recall.

RECOMMENDATION 11.2

Governments should have the power to undertake a recall directly where no supplier can be found to undertake such a recall.

11.2 Requirement for businesses to recall unsafe products

The first MCCA reform option aimed at improving the recall system (number 9 in the terms of reference) proposes a formal requirement on businesses to recall products that they have determined to be unsafe. Under such a requirement it is expected that businesses would undertake a greater number of recalls, in a more complete and timely manner, and thus reduce the number of hazardous goods on the market.

Benefits

The benefits resulting from a requirement on business to recall unsafe products would ultimately accrue to consumers if more unsafe products were removed from the market than would otherwise have been the case. Potentially this could reduce the incidence of product-related injury and death. Of course, this is also likely to

have flow on benefits, for example in reducing the burden of consumer product-related injuries on the Australian health system.

However, the extent to which additional unsafe products would be removed from the market is difficult to estimate and depends largely on whether such a requirement would significantly increase the number of recalls and/or the effectiveness of recalls. As discussed above, it appears that most businesses currently recall products on a voluntary basis and the scope for this proposal to improve on this may be limited. Further, even where businesses do not voluntarily recall an unsafe product, it is uncertain whether the proposed legal requirement would be an effective remedy. As discussed in chapter 9, any additional requirement would need to carry appropriate financial penalties and even then, may change the behaviour of very few businesses.

Benefits also accrue if recalls are undertaken in a more effective and efficient manner. Again this depends on the extent to which any new requirement would bring about a change in the behaviour of business and the manner in which they undertake recalls. Since most businesses already appear to follow government guidelines in undertaking recalls the benefits of this measure may be relatively small.

Costs

The costs of a mandatory requirement to recall unsafe goods will fall predominantly on business and government although some business costs may be passed on to consumers in the form of higher prices. The magnitude of these costs will depend on the level of compliance achieved and the extent to which businesses currently recall unsafe products on a voluntary basis.

Initially, businesses and government would incur costs associated with introducing and implementing the regulation and determining what constitutes an unsafe good for the purposes of the new regulation. Once in place, businesses would also incur costs associated with complying with the regulation, although to the extent that businesses currently recall unsafe products in an appropriate manner, these may not be significant. Costs associated with additional recalls are most likely to be borne by those businesses which are currently not recalling unsafe consumer products. There is also a risk that some businesses may unnecessarily recall a product to avoid the risk of prosecution, but this would appear to be limited.

In theory, government may also incur an increase in ongoing enforcement and administration costs. However, in practice, these costs may be quite small as regulators are likely to wait for unsafe goods to become apparent through other

means before taking action against a supplier. The increase in costs may be limited to those associated with negotiating with suppliers or prosecuting them for breaches of the requirement to recall.

However, a potentially significant cost associated with the introduction of a mandatory requirement to recall unsafe products, may be the perverse incentive effects it could have on business to investigate and assess product safety hazards and their associated risks. If suppliers know that they will have no choice but to recall a good if it is found to be 'unsafe', they may be disinclined to examine incidents and assess the safety of their products or at least delay such investigations. That said, it can be argued that other incentives, encouraging businesses to recall products, should outweigh this effect and ensure that recalls continue to be undertaken.

Summing up

Overall, the benefits and costs associated with a requirement to recall unsafe products are dependant on the extent to which such a requirement would change business conduct in relation to recalls. Businesses currently have strong incentives to undertake recalls when a good is found to be unsafe, and for the most part it appears that these incentives are working. Taken as a whole, the impact of this regulation on the level of damage caused by unsafe products is likely to be small and, even though the costs associated with the measure may not be large, there appears to be little to be gained from introducing the requirement.

FINDING 11.1

There do not appear to be net benefits in imposing a general requirement for businesses to recall unsafe products. Current incentives appear sufficient to motivate most businesses to recall unsafe products on a voluntary basis. It is unlikely that a legal requirement for suppliers to recall unsafe products would result in a significant number of additional recalls, while potentially adding to uncertainty and costs.

11.3 Recall audit power

The second MCCA reform option relating to the recall system (number 10 in the terms of reference), is for the government to have the power to audit voluntary recalls. Presumably, the audits would be used to assess the effectiveness of recalls: whether they had been conducted properly; and whether they had removed dangerous products from the market.

Participants expressed mixed views regarding the need for, or appropriateness of, the audit power. Some were supportive of such a measure, for instance, Coles Myer (sub. MCCA9, p. 4) argued that '... government should be able to audit a business recall process and success rate, irrespective of whether the recall was mandatory or voluntary', and the ACA (sub. MCCA5, p. 6) favoured 'stronger responsibilities for safety notification and recalls being placed on businesses'. On the other hand, the National Product Liability Association expressed a concern that a case for introducing such a requirement had not been made:

> … without firstly identifying specific defects in the current product recall process and providing details supporting the need for an audit and assessment power, the introduction of any such power may simply establish an additional layer of regulation where a need for such further regulation may not exist. (sub. MCCA19, p. 22)

How would the audit process work?

While an audit power would generally allow a government to investigate the effectiveness of a recall, a number of questions surround the manner in which the audit process would be conducted.

Which recalls should be audited?

A blanket approach of auditing all recalls would involve prohibitively high costs to government and business. This suggests that a more appropriate approach would be for regulators to undertake random or preferably 'risk-based' audits of product recalls. Risk-based audits would only be undertaken when enforcement agencies believed that a recall has been unsuccessful or the product poses an unacceptable risk to the health and safety of consumers. The ACCC noted that while the ability to audit recalls may be valuable:

> … the need to employ such a provision may be infrequent. Regulators' discretion should be used to determine the need for an audit of any particular recall exercise, based on factors such as the nature of the hazard, nature of distribution and the supplier's level of co-operation. (sub. MCCA4, p. 38)

At what stage of the recall process should regulators initiate an audit?

It is reasonable to suppose that regulators would normally wish to give suppliers adequate time to complete a recall before initiating an audit. However, in the case of products which pose serious safety risks for consumers, regulators may want to determine early-on whether a recall is likely to be effective. This gives regulators the scope to determine whether other measures may be necessary to achieve a

satisfactory outcome. In practice, regulators are likely to approach this question on a case-by-case basis.

What sanctions are necessary in the event an audit reveals an unsatisfactory outcome?

Clearly, policy makers would need to consider what sanctions are necessary in the event an audit reveals suppliers have not conducted a satisfactory product recall. In the Commission's view, the most appropriate sanction remains the scope for regulators to order a mandatory recall and direct how this is undertaken.

What are the costs?

The costs associated with granting enforcement agencies the power to audit voluntary recalls would, in the first instance, mostly fall on business and government, with the usual caveats that these costs are likely to be passed on to consumers and taxpayers.

Businesses would incur costs associated with undergoing particular audits as well as additional processes or practices adopted in light of the possibility of being audited. Such processes may include changes to the way businesses document and record a recall, although these costs may not be large as most businesses would already record the necessary details. Additional costs incurred in the event of being audited include gathering data and providing it to government, liaising with government officials, and in the event that a recall is found to be unsatisfactory, the costs associated with any sanction imposed upon the firm. For the most part these costs should be small as it is expected that governments would audit a small number of recalls and the costs associated with informing and liaising with government should not be substantial.

In all likelihood, government would bear the bulk of the costs associated with the proposed regulation. Initial and ongoing costs will be associated with informing businesses of their responsibilities under the regulation and dealing with enquiries from business relating to undertaking recalls. While this is potentially a costly exercise, government may already undertake many of these functions and guidelines indicating the appropriate manner of undertaking a recall already exist. Additional costs will be imposed on government when undertaking audits including: informing business that they are being audited; liaising with the business; obtaining appropriate records; and examining records to determine the success or otherwise of a recall.

An additional, less tangible, cost is associated with the risk that the regulator will be criticised for failing to audit a recall. In particular, the regulator might be held partly accountable when unsafe products cause injury, if a recall is later shown to be unsatisfactory. This may lead to a loss of confidence in the government's ability to ensure the safety of products.

Participants have given mixed indications of the actual costs an audit requirement would impose on the government. The ACCC (sub. MCCA4, p. 38) considered that 'the strategic use of such a provision should minimise the costs to government'. In contrast, Middletons Lawyers (sub. MCCA18, p. 4) suggested that 'the expense involved in monitoring a recall is likely to be beyond the resources available to the Australian Government'.

Another large and possibly unforeseen cost associated with the introduction of recall audits is the incentive effects they have on businesses. Currently, businesses undertake a large number of recalls on a voluntary basis. Introducing the possibility of being audited may make business less willing to undertake recalls on a voluntary basis and thus result in potentially unsafe products being left on the market. This disincentive may be exacerbated if formal sanctions are introduced in association with any audit power.

What are the benefits?

The benefits from auditing voluntary recalls should flow mostly to consumers. In essence, this reform option is about improving the quality of recalls and as a result reducing the harm done by unsafe products. The extent of the benefits would be measured by the reduction in the level of death and injury as a result of recalls becoming more effective (although some consumers may be denied access to products that had been providing some value to them). Of course, there would also be flow-on benefits, for example reducing the burden of consumer product-related injury on the Australian health system.

While the success of recalls in removing unsafe products is questionable (as discussed above), it is also questionable as to whether giving governments the power to audit recalls would improve the situation. To some extent, it depends on whether the lack of success is a result of the design of the recall process and whether an audit procedure would improve this process.

Presumably recalls would be assessed against the Government's guidelines for undertaking a recall and there are grounds to suspect that most firms already undertake recalls in a manner consistent with these.

First, firms have an incentive to ensure that a recall is undertaken in an appropriate manner. As Middletons Lawyers noted:

> ... the same incentive which has caused the business to conduct the recall in the first place is likely to result in the business conducting a complete and effective recall. The aim is to minimise potential costs in liability by consumers using the product, as well as preventing damage to the manufacturers' reputation. There is a sufficient element of self interest to induce the manufacturer to conduct an adequate recall. (sub. MCCA18, pp. 3-4)

Second, it appears that governments are already consulted during the process of undertaking many recalls. Such consultation should help ensure that recalls are undertaken in a manner consistent with government guidelines.

Third, if enforcement agencies suspected that recalls were currently being undertaken in an inappropriate manner they could order a compulsory recall and direct the nature of that recall. The fact that mandated recalls are rare suggests that either governments are satisfied that voluntary recalls are undertaken in an appropriate manner or that the risk posed by these goods is sufficiently low that it does not warrant further action.

However, it is important to recognise that the incentives for business to voluntarily recall products may not be sufficient in all cases. The key question here is whether an audit power would help address this. While the threat of an audit may, at the margin, encourage some businesses to undertake recalls in a more comprehensive manner, governments would have limited power to impose penalties in the case of inappropriate recalls. Indeed, the most likely sanction would be the ordering of a mandatory recall. Most governments already have the power to do this and the imposition of audits would not significantly augment the incentives already provided by the 'threat' of such action. That said, the process of being audited has some costs for business. Thus, to the extent that businesses would be able to avoid being audited by visibly 'doing the right thing', the audit power may provide some additional incentive to undertake recalls in an appropriate manner.

Further, the current power to order a mandatory recall can, if necessary, already be used to persuade firms to supply information about the success of a voluntary recall. If firms are unwilling to supply such information, governments can direct the nature of any ensuing mandatory recall and ensure that it is undertaken in an appropriate manner. In essence, the enforcement agencies already have a *de facto* ability to obtain information about the success of voluntary recalls.

Summing up

Overall, it is doubtful whether the ability to audit recalls would bring significant benefits:

- generally, firms already have the incentive to undertake recalls in an appropriate manner;
- auditing may not have a significant impact on the number of recalls undertaken or how recalls are conducted; and
- auditing may, perversely, reduce the number of voluntary recalls.

The costs of an audit process would be borne directly by government and business. Such costs have the potential to be significant although they may be reduced by only auditing recalls in selected circumstances.

Overall, the Commission considers that the benefits accruing from an ability to audit recalls are likely to be small and unlikely to justify the costs of establishing an audit process.

FINDING 11.2

The benefits accruing from governments being given additional powers to conduct audits of recalls are unlikely to justify the costs of an audit process, particularly as most governments can instigate mandatory recalls if they consider suppliers' actions to be inadequate. Such powers to instigate mandatory recalls should be available in all jurisdictions.

12 Design and standards

Key points

- It is at the design stage that manufacturers have the greatest opportunity to prevent injury caused by consumer products.
- Product safety should be carefully evaluated throughout the design process rather than being an afterthought. Although the costs of increasing safety in the original design are sometimes very marginal, it can be costly to address design problems once production has begun. In this regard, hazard identification, risk assessment and risk management are integral to design best practice.
- A key influence on design is consumer product standards which set out the specifications and procedures necessary to ensure that a product is fit for its purpose and consistently performs the way it was intended.
- Product standards also provide a way for governments to selectively address the most serious product-related hazards by mandating minimum safety requirements.
- In Australia, product standards are usually developed with the assistance of Standards Australia which is recognised by the Australian Government as the peak non-government standards organisation.
- Participants raised a number of concerns about the current standards-making process as it applies to consumer product safety, including that: standards tend to be product rather than hazard focused; standards take too long to develop; and stakeholder participation in the standards development process is in decline.
- In relation to standards making as it applies to consumer product safety, policy makers should give priority to: sharpening the focus of standards making on addressing product-related hazards; streamlining the standards development process with a view to ensuring mandatory standards can be developed and implemented in a more timely manner; and providing alternative ways to meet regulatory requirements designed to improve the safety of a product.

While providing consumers with information about product-related hazards can play an important role in accident prevention (see chapter 10), some would argue it is product design that offers the greatest opportunity to prevent injury caused by consumer products. This chapter briefly outlines the role of design in reducing the incidence of product-related injury and then goes on to consider how standards can be selectively used to address the most serious product-related hazards by

specifying minimum safety requirements. It concludes by assessing the need and scope to improve the standards-making process as applied to consumer product safety.

12.1 The role of design in reducing injury

Good design is central to preventing product-related injury and death. Indeed, it is at the design stage that manufacturers have the greatest opportunity to influence safety outcomes. In this regard, George Rechnitzer a design engineer and safety researcher, made the following general observation about the role of design in the context of occupational health and safety:

> Design is the key: it is at the design stage of any project, be it large or small, that we are presented with the greatest opportunity for injury prevention, or, alternatively, as we often see, through inadequate attention to design, in fact *ensuring* that serious injury will be an inevitable outcome. (Rechnitzer 2001, p. 1)

Similarly, the Australian Competition and Consumer Commission (ACCC) noted in its submission that:

> … the hierarchy of risk reduction indicates that the greatest influence in product safety is at the design stage, followed by applying protective devices and providing information. Actions by users of the product are the next level down.
>
> Manufacturers therefore have both the power and opportunity to improve the safety of the goods they supply to the consumer. And while a large proportion of consumer goods sold in Australia are imported, the importers will often have control or influence over design and other aspects. The fact that these players have the most potential to influence product safety means that they should be the real target of government's strategy (sub. DR56, p. 4)

Recognising this, it is important that manufacturers carefully consider product safety at each stage of the design process and if necessary re-evaluate it in light of consumer feedback once their product in available on the market. Not only does this potentially reduce the incidence of product-related injury but it also makes good business sense.

By considering product safety throughout the design process, businesses are likely to minimise the costs associated with having to re-design a product and re-tool the production process. Although the costs of increasing safety in the original design are sometimes very marginal, it can be costly to address design problems once production has begun (Australian Consumers' Council 1993, p. 40). Moreover, businesses are also likely to minimise the costs associated with being sued by consumers for the physical or economic harm caused to them by unsafe products; the financial penalties associated with failing to comply with mandatory safety

requirements; and possible damage to their brand image and reputation. As Keith Williams, President and CEO of Underwriters Laboratories Inc. in the United States recently observed:

> Addressing product hazards — real or perceived — during the product design cycle is one of the best ways for manufacturers to enhance the probability of compliance [with safety requirements], to speed time to market of new products, to minimise costs associated with product recalls or non-compliance issues and to protect a company's brand/image. (2005, p. 2)

While these may be obvious points, the Commission notes some participants considered that there is room for improvement in this area. In the past, the Australian Consumers' Association (ACA) has observed that:

> …some of the safety experts we consulted think that – almost in a cultural sense – some Australian manufacturers don't make the immediate, reflexive association between product design/manufacture and product safety. (1998, p. 15)

This view would appear consistent with concerns raised by the Commonwealth Consumer Affairs Advisory Council:

> … in many instances, it would appear that products could be made significantly safer with relatively little modification or expense. This is particularly true of products designed for children and babies. The fact that these relatively modest changes are not occurring in enough cases is a sign that the current regulatory system needs reform. (sub. MCCA10, p. 1)

And, the Monash University Accident Research Centre:

> There is currently no requirement and little incentive apart from product liability laws, for proactive assessment in the design phase or to incorporate best practice or new findings and technological developments. In the absence of organised consumer protest, product design for safety tends to stay at the minimum requirements. New products are created that repeat existing mistakes and new hazards emerge. (sub. MCCA16, p. 2)

It is beyond the scope of this study to determine the extent to which poor design may be contributing to product-related injury and death in Australia. However, the Commission notes the findings of research commissioned by the Department of Trade and Industry (DTI) in the UK which suggests poor product design appears to be having an ever decreasing influence on the incidence of home accidents (see box 4.2).

That said, the incentives operating through competitive product markets and the product liability arrangements may not always be sufficient to ensure businesses address design problems especially those which contribute to lower-level injuries (see chapter 4). Further, there is a risk new products may be released onto the market which repeat existing design problems.

The importance of hazard identification, risk assessment and risk management

At many points in this report the Commission has emphasised the importance of formally integrating hazard identification, risk assessment and risk management into the public policy-making process. Similarly, in terms of design best practice it appears generally accepted that manufacturers should integrate these elements into their design process.

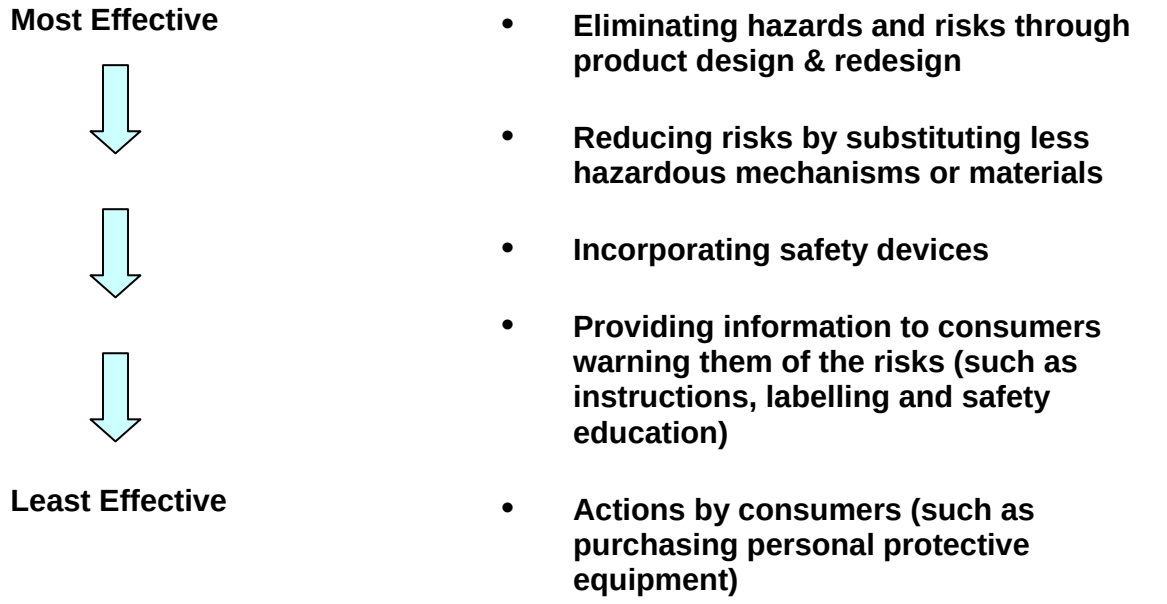
From the very earliest stages of the design process, designers and engineers should attempt to identify all possible types of users of their product and the hazards associated with its use. The basic question at this stage is simply 'How could someone be injured as a result of their interaction with this product?' It is important to recognise that the interaction between a product and its user can be affected by four key factors:

- the features of the product (including structure, moving parts, power sources, casings, packaging, controls, displays, information and instructions, fixings and ancillary equipment);
- the physical and psychological characteristics of the user (including personal characteristics, strength, motor skills, psychological characteristics, experience and exposure to the product, personality, sensory characteristics, disabilities, cultural differences and socio-economic background);
- what the user wants to do with the product; and
- environmental factors such as the visual, thermal and auditory environments of use and social condition (Norris & Wilson 1997, p. 8).

The risk of users being injured should then be assessed in order to determine whether any of the hazards that have been identified pose an unacceptable level of risk in terms of the health and safety of users. In assessing risk, manufacturers need to take into account the severity of potential injury and the probability of its occurrence. Risk can be described in qualitative, semi-quantitative or quantitative terms.

For those hazards which pose an unacceptable level of risk, it can be useful to apply the hazard control hierarchy in order to establish the most effective response (see figure 12.1). The hierarchy suggests that the most effective way of controlling hazards and reducing risk is through design and the least effective strategy is relying on consumers to take action.

Figure 12.1 **Hazard control hierarchy**



Source: Based on Main (2004).

The hazard control hierarchy has been described in the following terms:

> Just as not all risks are equal, not all methods of reducing risks are equal either. The hazard control hierarchy is a prioritised approach to hazard elimination and control. Part of practicing safety through design is identifying situations where hazards exist and developing the best response to the hazard according to this hierarchy. (Main 2004, p. 43)

In applying the hazard control hierarchy, designers would start at the top of the hierarchy to determine if there is a feasible and cost effective method of eliminating a hazard or reducing risk through product design. If there is not, the designer would move sequentially down the hierarchy with a view to determining the most appropriate strategy.

Each potential option for reducing the risk associated with consumer products would need to be assessed in terms of its:

- effectiveness;
- cost; and
- impact on the functionality and utility of the product.

Put simply, selecting the most appropriate option involves balancing the costs of implementing each option against the benefits derived from it.

The hazard control hierarchy is useful in discouraging designers from automatically relying on lower levels of control (such as information provision) when cost-effective design solutions may be feasible and potentially offer a larger net benefit.

Once designers have selected their preferred approach for reducing the risks associated with their product, it is important that the design of the product is re-evaluated with these measures in place in order to verify that the level of risk has been reduced to an acceptable level. This monitoring and evaluation process should also ensure that no new hazards have been created as a result of any design modifications. Regularly repeating hazard identification, risk assessment and risk management throughout the design process can encourage continuous improvement in product design and safety.

As noted in chapter 2, Standards Australia has developed a generic framework for identifying, analysing, evaluating, treating, monitoring and communicating risk (see Standards Australia, *Risk Management*, AS/NZS 4360:2004). This framework may be useful for manufacturers wishing to establish an effective approach to risk management as part of their product design process.

Of course, the value of undertaking a formal process of hazard identification, risk assessment and risk management depends to a large extent on the quality of the underlying data and analysis. Relevant sources of information and data include: product standards; accident statistics; and ergonomics data. Further, depending on the resource constraints they face designers can utilise a number of different techniques to evaluate the interaction of their products with users including: checking products against ergonomics data and guidelines; modelling; design appraisal; and user trials (Norris & Watson 1997).

The key message is that product safety needs to be carefully evaluated throughout the design process rather than being an afterthought, and that hazard identification, risk assessment and risk management should be an integral part of this process.

Some other general observations about design and consumer product safety

The Commission recognises that consumer product design is a highly specialised area and there is an extensive literature in this field (including in relation to product safety). Further, in practice, the safety of consumer products needs to be evaluated on a case-by-case basis. That said, the Commission would make the following general observations about product design and safety:

- Businesses need to develop a culture of safety within their organisation so that it permeates their design, manufacturing and post-market monitoring programs. In

particular, it needs to be recognised within the organisation that the total cost of designing, manufacturing and marketing a product includes the costs associated with preventable injuries and not just costs of preventive safety measures.

- Designers should extend their consideration of safety to include reasonably foreseeable use (and misuse), including use by unintended users such as children.
- Designers need to take into account the possible effects of a product's design on the risk perceptions of users. In a recent study of risk perception in product use, Freija van Duijne observed that:

  > … users were shown to rely on product characteristics in finding out about risks in usage. Users were observed to associate certain product characteristics with risk, e.g. sharp blades and flammable gasses, which triggered an affective response for some users. In addition, it was found that users were unaware of some emergent risks, because product characteristics triggered a functionality that was not intended by the design. … These examples, indicate that designers need to understand users' perception of product characteristics, if they want to raise users' awareness of risk and avoid misperception of product characteristics. (2005, pp. 238-239)

- Designers should consider whether there are any obvious safety hazards likely to emerge over the life of the product which could be cost effectively addressed at the design stage.

In practice, these principles should only be followed with a view to achieving the optimal level of safety – that is, the level which balances the benefits of improved safety against associated costs. Pursuing improved safety beyond this point imposes a net cost on the community as a whole (see chapter 2).

FINDING 12.1

It is at the design stage that manufacturers have the greatest opportunity to prevent injury caused by consumer products. In this regard, it is essential that product safety is carefully considered at each stage of the design process and re-evaluated in light of consumer feedback once the product is available on the market.

12.2 The role of standards in improving design

A key influence on design is consumer product standards which set out the specifications and procedures necessary to ensure that a product is fit for its purpose and consistently performs the way it was intended. In many cases, industry groups initiate the development of voluntary product standards to reassure consumers that the products they purchase are safe and reliable. As such, this can be seen as a

natural response to market forces and the other mechanisms which encourage businesses to design, manufacture and supply safe products.

Importantly, product standards also provide a way for governments to selectively address the most serious product-related hazards by mandating minimum safety requirements. In this context, it worth noting that COAG endorsed principles and guidelines for national standard setting and regulatory action by Ministerial Councils and standards-setting bodies require mandatory standards to be subject to a regulatory impact assessment. Among other things, this assessment would need to demonstrate that government intervention is required to address a product-related hazard and mandating minimum safety requirements is the most appropriate approach for dealing with this problem (see chapter 2).

The distinction between voluntary and mandatory product standards is set out in box 12.1. While the Commission's comments, below, on mandatory product standards could apply equally to safety standards and information standards, it is worth noting that participants' comments were mainly in relation to safety standards.

In Australia, product standards are usually developed with the assistance of Standards Australia which is recognised by the Australian Government as the peak non-government standards organisation.

The process Standards Australia follows in developing new product standards is outlined in box 12.2. This process has a number of important features: standards are developed by technical committees that seek to bring together a wide range of interests (including, designers, manufacturers, safety regulators, testers, technical experts and consumers); participation on these committees is voluntary and unpaid; and a consensus voting model means that standards are likely to reflect a compromise between the different interests represented on the committees. As outlined below, participants to this study had a number of concerns about how well this process works in practice.

Product rather than hazard focused

In common with the regulation of consumer product safety more generally, standards making appears to be largely focused on dealing with particular types of products rather than specific product-related hazards. For example, Standards Australia argued that:

Box 12.1 **Voluntary and mandatory product standards**

A standard is a published document which sets out specifications and procedures to ensure that a material, product, method or service is fit for its purpose and consistently performs the way it was intended. In Australia, product standards can be either voluntary or mandatory.

Generally, the impetus to develop a *voluntary* product standard comes from an industry body. These standards often seek to establish best practice in relation to a product's general design characteristics. In this regard, voluntary product standards provide an important way of reassuring consumers about the reliability and safety of consumer products, by defining what constitutes quality and establishing safety criteria. These standards are published by Standards Australia as an Australian Standard, which is available to anyone to purchase and use, from manufacturers to consumers.

Mandatory standards are usually introduced by government after concerns about a particular product have been raised – either because accidents have occurred in Australia or overseas, or because a standard has been introduced overseas that is relevant to the Australian situation. There are two types of mandatory standards: safety standards (which require goods to comply with particular performance, composition, contents, methods of manufacture or processing, design, construction, finish, labelling or packaging rules); and information standards (which prescribe the information that must be provided to consumers with certain goods). In declaring mandatory standards the government *specifies* minimum requirements that *must* be met before products can be legally sold.

If an existing standard is available, such as a published Australian Standard, it is usually used as a basis for developing the mandatory standard. In this case, the mandatory standard is declared by the Minister and registered on the Federal Register of Legislative Instruments. The mandatory standard will specify the products covered and may vary or delete certain requirements in the existing published standard. If no existing standard is available, the mandatory standard is created by regulation.

Source: ACCC (2003).

> The current Consumer Product Safety System relies largely on mandatory standards and is product focused. Product focus means that we regulate the product rather than the hazard that that product may present. (sub. 36, p. 1)

Similarly, the ACCC observed that:

> It is understood that in Europe, the hazards must be identified and outlined at the outset and then standards are written to address only those hazards. This may be contrasted with the system in Australia where a product is put forward for developing an Australian Standard (usually after one or more hazards are identified) but the whole product is then up for consideration, so that even relatively minor hazards are included. (sub. DR56, p. 2)

Box 12.2 **Standards Australia's approach to standard development**

Standards Australia applies the following process to the development of new standards.

Request for a Standard: Standards Australia does not initiate the development of new standards, rather it responds to a formal request from the community (often an industry body or government department).

Project approved: Approval for the new standards project is subject to research confirming that there is genuine community support for the standard; it would improve economic efficiency; generate a net benefit; and is in Australia's national interest.

Formation of a Technical Committee: Standards are prepared by technical committees. The essential characteristic is that membership is balanced, and that it represents the broadest possible spectrum of interests. Each committee has an unpaid external chairperson, and Standards Australia nominates one of its staff project managers to be committee secretary. Standards Australia is the neutral party in this process and does not play an active part in the decisions of committees. It provides the secretariat and back office support services. The committee members are responsible for the standard's technical content which must match the needs and values of the Australian community. Members of standards technical committees must be nominated by representative organisations, such as industry associations, and are not paid.

Preliminary draft: Before any drafting work is undertaken, the committee is obliged to ensure that the proposed standard will not act as a barrier to trade, competition or innovation. It is also a policy to adopt international standards to the maximum extent possible.

Committee draft: Most of the necessary drafting work is done off-line in sub-committees and expert working groups. The committee meets to discuss progress, coordinate work programs and seeks to maintain consensus in the technical content of the emerging draft.

Draft for public comment: The draft standard is published and made available to the public for comment.

Consideration of comment: All comments of the public are considered in detail by the committee and, if necessary, further drafting is undertaken.

Draft for postal ballot: The committee then votes on the final draft. For the standard to be published, the ballot must demonstrate substantial agreement with no major dissenting interests.

The published standard: Prior to publication, final process approval must be given by the relevant Standards Sector Board on behalf of the Council of Standards Australia.

Source: Standards Australia (2005b) and ACCC (2003).

Usually, if a voluntary product standard is available (such as a published Australian Standard), it will be used as the basis for developing the mandatory standard. To the

extent that voluntary standards focus on general design characteristics rather than specific product-related hazards there is a risk that this approach may flow through to the mandatory standard. As a result, the mandatory standard may specify minimum requirements for a wide range of a product's design features, not all of which may be relevant to the hazard the mandatory standard is trying to address. For example, the Infant & Nursery Products Association of Australia (INPAA) told the Commission that when regulators introduced a mandatory standard for cots, they mandated all the design features covered by the voluntary standard. The INPAA noted that it took a number of years for regulators to understand that some of the design features covered by the mandatory standard were not relevant to the safety of the product. Such an outcome potentially imposes an unnecessary compliance burden on business, which must meet minimum requirements relating to design features that have no bearing on safety.

However, in framing mandatory standards, regulators are not obliged simply to adopt an existing voluntary standard. In this regard, the ACCC noted that 'currently, prior to standards being mandated, they face close scrutiny and are often varied to maximise their enforceability and protection to consumers' (sub. MCCA4, p. 19). Nevertheless, in response to the Discussion Draft, the ACCC acknowledged that:

> There are always competing interests in developing standards as regulation and, as there is often an absence of useful data, some value judgements need to be made. It is often the case that information gained post-implementation allows a revaluation of the need for some aspects of the standards. When mature mandatory standards are reviewed, care is taken to ensure that mandatory obligations are addressing only essential safety issues. (sub. DR56, p. 2)

As discussed below, the Commission considers sharpening the focus of mandatory standards, and even voluntary standards in some cases, on addressing product-related hazards is central to improving and streamlining the standards development process as it applies to consumer product safety.

Standards take too long to develop

A common concern among participants was that standards currently take too long to develop. The Commission understands that the average length of time it takes to develop a standard for consumer products is around two years. This clearly has implications for the responsiveness of the current regulatory regime. There is also a concern that in the time it takes to develop and introduce a standard, the market for the product concerned may have evolved in such a way that the standard is no longer relevant.

In relation to the timeliness of the standards-making process, Queensland Health pointed to:

- Delays in finalising new Australian Standards, such as taking over 18 months to revise the Playground Safety standards; 2 years to revise the current pool fencing guidelines; and the current delay in approving suitable bike helmets for use with quad bikes, trail bikes and horses. (sub. MCCA30, p. 2)

Further, INPAA told the Commission that it has initiated a risk management and safety standard development project partly because of the length of time it takes to develop new Australian Standards (see box 12.3). Central to this initiative is the use of 'horizontal' standards (ie standards establishing requirements for addressing specific product-related hazards which can then be applied across different product types) as opposed to 'vertical' standards (ie standards giving a complete set of requirements for a specific type of product). Policy-makers should take note of this new initiative with a view to determining whether as a model for standards development it has any wider applicability – particularly in the context of improving the timeliness of the standards development process.

There are a number of factors that potentially slow down the standards-making process:

- Technical committees tend to meet infrequently. Further, participants usually work on standards development on a part-time basis (because participation on the technical committees is voluntary and unpaid). There appears to be limited scope to progress standards development out of session.
- As outlined above, standards tend to be focused on dealing with particular types of products rather than specific product-related hazards. Consequently, there is a risk that the work of the technical committees will be slowed down by their consideration of relatively minor safety hazards and a product's general design characteristics.
- Standards making is likely to require supporting research (such as product testing).
- Technical committees need to reach a consensus. Stakeholder groups represented on these committees can choose not to support a draft standard in order to try and force a compromise that is more favourable to their particular interests.

As discussed below, the Commission considers that reducing the length of time it takes to develop standards should be a priority going forward.

Box 12.3 **Australian Nursery Industry Safety Standards**

The Infant & Nursery Products Association of Australia (INPAA) has initiated a risk management and safety standard development project which aims to establish a base line level of safety for the Australian nursery products industry. In part, this is a self-regulatory response due to concerns about the time and effort it currently takes to develop new Australian standards. Once a hazard has been identified the industry considers that it cannot afford to wait two years for a standard to be developed.

Over the last 12 months, INPAA has developed the Australian Nursery Industry Safety Standards (ANISS)-Primary. ANISS-Primary is a horizontal standard which comprises a hazard check list; and a library of generic safety requirement modules (GRMs) and relevant product testing methodologies that are applicable to particular hazards (such as entrapment, choking hazards and heavy metals).

Member organisations would first identify all the major safety hazards that their product may pose for users. If there is an existing Australian Standard, the member would use that standard and test for compliance. In the absence of an existing Australian Standard, the member would refer to ANISS-Primary and identify relevant GRMs and testing methodologies. Compliance with the relevant standards would be independently certified by product testing companies.

In cases where there are significant products or a group of products with potential safety risks, such as infant bath aids and care and comfort products, INPAA will develop a specific industry safety standard using ANISS-Primary principles. These specific standards may include specific requirement modules (SRMs) where no suitable GRMs exist. In time, INPAA is committed to having specific product standards for every nursery product where there are potential safety risks. In the interim the ANISS-Primary establishes a default setting of improved safety for the benefit of users of nursery products. Through this framework, the nursery industry improves its ability to manage risks and consumers also become more aware of how to use products safely.

INPAA's aim is to ensure that all standards represent world best practice.

Where possible, products are grouped according to the types of hazards they pose (for example, care and comfort products). For these product groups there will be a list of all relevant GRMs, SRMs and testing methodologies.

Pressure on members to comply with the safety standards will come from INPAA's code of conduct, peer pressure from other members and from nursery product retailers. Further, compliance with the standards is expected to offer members a financial advantage in the form of lower product liability insurance premiums.

INPAA has developed this initiative in consultation with regulators and the ACA. It also expects that its standards development work will provide a useful resource for Standards Australia to draw on.

Source: Information provided by INPAA, pers. comm. 12 and 20 December 2005.

Stakeholder representation

The standards development process relies heavily on voluntary participation by a wide range of stakeholder groups. Given the specialised nature of consumer product safety, it is essential that there is adequate participation by technical experts to ensure standards are of good quality. Further, for the consensus voting model to work well it is important that relevant stakeholders are represented on the technical committees and all views are considered on their merits.

One of the challenges facing Standards Australia is the perception that stakeholder participation in standards development is in long-term decline (see the Cameron Ralph report 2005). Many participants to this study shared this view, pointing to less participation by businesses and academics in the development of standards. As a result, much of the burden for standards development appears to fall on the unpaid research undertaken by product testing companies. The ACCC noted its concern that any reduction in Australia's already limited testing and technical expertise would impact directly on the development of Australian standards (sub. MCCA4, p. 37). Similarly, Coles Myer observed that:

> … a lot of the expertise required to develop and maintain independent consumer technical standards is diminishing, i.e. has gone offshore. Retailer input, and the mechanism by which this happens also appears to be declining. While major retailers such as Coles Myer Ltd can represent themselves, this could be a significant issue for smaller players in the longer term. (sub. MCCA9, p. 6)

In response to the Discussion Draft, the ACA argued that there needs to be a stronger commitment to ensuring consumer representation in standards making. It noted for example, that the European Union provides financial support for consumer representation in standardisation, and recommended that:

> … the product safety standards setting process through Standards Australia increase resources for consumer involvement and recognise a formal right of consumers to be involved in matters of consumer concern, with government contributing to sufficient funding to Standards Australia to ensure consumer inputs are as effective as those of businesses. (sub. DR51, p. 14)

However, the Commission notes that Standards Australia recognises the Consumers' Federation of Australia (CFA) as the peak national body for end-use consumer organisations in Australia. Generally, Standards Australia seeks end-use consumer representatives for its technical committees through the CFA and its affiliated organisations. Moreover, Standards Australia provides some financial support to facilitate participation by CFA representatives on its committees:

> In recognition of the importance of promoting end-use consumer involvement in standarization, Standards Australia provides an annual grant to facilitate participation

> by CFA representatives on Standards Australia committees. This funding is currently administered through the Consumer Law Centre, Victoria. (Standards Australia 2005a, p. 1)

In the context of this study, the Commission is not in a position to determine the adequacy or otherwise of representation on consumer product safety-related technical committees. However, the Commission notes that Standards Australia is aware of the challenge it faces in terms of maintaining and reinvigorating stakeholder participation in the standards development process. At Standards Australia's Annual General Meeting in November 2005, CEO John Tucker acknowledged that the "traditional standards 'engine' of face-to-face committees runs counter to modern, evolving organisational structures of our stakeholders" (Tucker 2005, p. 2). The Commission understands that Standards Australia is looking at a number of initiatives to improve participation on technical committees including ICT solutions that allow for 'virtual committees', and improved consultation and access to documentation.

Beyond this, the Commission emphasises the importance of ensuring the views of representatives on the technical committees are given the same weight (including those of consumer representatives) and that ultimately, all views are considered on their merits.

Resourcing

A number of participants to this study were concerned that standards making for consumer products is not adequately resourced. It was felt this could limit Standards Australia's ability to develop new standards and maintain existing standards and slow down the standards development process.

In the first instance, Standards Australia bears all the costs for the development of a new standard, and subsequently, its on-going maintenance. In its submission, Standards Australia contended that:

> The sales of consumer product safety standards has always been extremely low and have never come close to recovering the development costs. Standards Australia has now disposed of many of its commercial activities, so the ability to raise additional money through other business ventures to subsidise consumer safety work is no longer available. (sub. MCCA25, pp. 1-2)

Clearly, a related issue is the ownership of the intellectual property embodied in a new standard and the scope for Standards Australia to use this intellectual property to generate a revenue stream. In this regard it is worth noting that as part of a major reorganisation, the commercial activities of Standards Australia were split into a

separate company, SAI Global, and that company was then floated on the Australian Stock Exchange in December 2003. Standards Australia retains ownership of the intellectual property of the standards and other products it develops, while publication and delivery of these products is managed by SAI Global under the terms of a 15 year Publishing Licence Agreement. In relation to the issue of intellectual property, Standards Australia noted that:

> In certain instances, the Australian Competition and Consumer Commission (ACCC) provides information from a mandatory Standard for free, leaving Standards Australia with no viable mechanism for recouping its costs. (sub. 36, p. 2)

Other participants were also concerned about whether Standards Australia is adequately resourced to develop new standards. For example, the INPAA argued that:

> Standards Australia is not sufficiently resourced to develop enough standards. INPAA regards this as a fundamental weakness and an impediment to an improved product safety system. (sub. MCCA14, p. 3)

It is beyond the scope of this study to determine whether standards making in the area of consumer product safety is adequately resourced. Among other things, any detailed consideration of this issue would need to take into account: the scope for Standards Australia to recoup the initial development cost of product standards and the ongoing cost of maintaining these standards; the public good nature of mandatory standards; and the costs and benefits of making mandatory standards in the area of consumer product safety available to users free of charge. Further, it is worth noting that in a recent report on the reform of building regulation, the Commission recommended that the Australian Government could usefully review the broader issue of access to standards referenced in legislation/regulation (PC 2004b, p. 298).

That said, the Commission notes that in discussions, Standards Australia considered that more resources would not necessarily speed-up standards development in every situation. For example, international harmonisation of a product standard requires alignment with international timeframes involving other national and international standards development organisations. However, additional resources would help reduce the back-log of existing standards which need to be reviewed.

Further, Standards Australia is currently looking to adopt a more sustainable business model including increased opportunities to partner other organisations in standards development, which opens up greater scope for co-funding arrangements. Standards Australia will be piloting ‘fast track’ development methodologies with partners in 2006.

The timeliness of periodic reviews

Once standards have been developed they require periodic review to ensure they continue to reflect market developments, the latest technologies, new knowledge and changing community needs. For this reason, Standards Australia has an automatic review process in place which requires major standards and those dealing with topics undergoing rapid change to be revised and republished within a maximum period of seven years; and most other standards to be revised within 10 years of their publication date.

In its recent submission to the Regulation Review Task Force, Standards Australia indicated that it has formed a special project team to review its current stock of standards to ensure they are relevant and contemporary (Standards Australia 2005c, p. 6). Under this initiative each existing Australian and joint Australian/New Zealand standard more than 10 years old will be reviewed and either withdrawn, re-confirmed, made obsolescent (not recommended for new equipment but retained to provide for the servicing of existing equipment or requirements) or revised. For standards more than 15 years old, the default position will be withdrawal of the standard. Further, Standards Australia intends to incorporate a 'use by date' in every new standard that would see it automatically expire if there is no call from industry or other affected parties to have it reviewed.

Some participants were concerned that mandatory standards can fall behind the most recent Australian standards. For example, INPAA argued that:

> Frequently Australian Standards and Regulations can lead to Regulations not being updated to reflect standards. A most obvious example in the nursery industry is in relation to cots. The existing Australian regulations relate to a 1998 cot standard but the most recent Australian standard is 2003. Industry must still comply with the regulation but the later standard has been accepted as more appropriate. This conflict between standards is frustrating and does not engender a safer outcome. (sub. MCCA14, p. 3)

The Commission notes that during the course of this study, the concern raised by INPAA has been largely addressed with a number of changes made to the mandatory safety standard for cots including referencing the latest Australian Standard. In the regulatory impact statement for these changes, the ACCC noted that:

> The present mandatory safety standard, in referencing the 1995 version of the Australian Standard for cots is an impediment to industry. While the Standard addresses the key safety issues, it lacks clarity in some areas and industry prefers to use the latest (2003) version of the Standard, which has been formulated to overcome the earlier difficulties. In order to facilitate industry's migration to the latest Australian/New Zealand Standard for the supply of new cots, it is proposed that the mandatory standard should reference AS/NZS 2172:2003, and amendments to that

> Standard which are currently being finalised by Standards Australia. The amendments are relatively minor, but provide further clarification of the standard and have been endorsed by industry. (2005g, pp. 9-10)

Nevertheless, this is an example of the problems that can arise when mandatory standards fall behind the latest Australian standards. In the Commission's view, when an Australian Standard, referenced in regulation is revised, governments should consider reviewing the regulation to determine whether it would be appropriate to reference the latest Australian Standard or whether any other revisions are needed.

Consistency with international standards

Over recent decades Australia has become increasingly integrated into the global economy and the regulation of consumer product safety needs to take into account the global nature of trade in consumer products. Inconsistencies between Australian and international standards can constitute a technical barrier to trade and have the potential to impose significant costs on business and consumers. For example, having to adjust production facilities to comply with diverse technical requirements in individual markets raises the unit cost of production, making goods more expensive than they need to be.

Further, differences between Australian and international standards can deny Australian consumers access to some imported products. Australia generally takes only a small proportion of the production lots of overseas factories and in these circumstances suppliers may be unwilling to alter production runs in order to satisfy Australian-specific product standards.

Consistent with Australia's international obligations, the terms of the Memorandum of Understanding between the Australian Government and Standards Australia require that national standards should not be used as a non-tariff barrier to free trade and no new Australian Standard will be developed where an acceptable international standard already exists.

However, in the context of this study, the Australian Toy Association was concerned about inconsistencies between Australian and international product standards, arguing that:

> Variations in standards between Australia and the rest of the world means that goods that pass standards in other countries cannot be imported, although the variations are slight and offer no greater protection to the consumer (sub. MCCA2, p. 3)

The Commission is not in a position to determine the extent to which there is a problem with regards to inconsistencies between Australian and international product standards in the area of consumer product safety. However, as a general principle, Australian standards should be consistent with international standards unless it can be demonstrated that adopting a different approach provides a net benefit to the community as a whole.

The Commission considers that one way to achieve greater consistency between Australian and international standards may be for the Australian Government to formerly 'prescribe' international standard-making organisations under the TPA. Currently, only Standards Australia is specifically referred to under the TPA. Further, where appropriate, governments should consider referencing more than one standard as an acceptable alternative to satisfying compliance with mandated minimum safety requirements.

12.3 The way forward

Voluntary and mandatory standards are key elements of Australia's consumer product safety system. In this regard, a wide range of participants to this study considered that standards making is an area where there is the potential for necessary and worthwhile reform. However, many of the issues raised in the context of this study are common to standards making more generally, such as: the consensus voting model; the voluntary and unpaid nature of participation on technical committees; the adequacy of technical expertise in standards making; the adequacy of resourcing of standards development; the timeliness of reviews; and broader community participation in the standards development process. In the Commission's view these issues are beyond the scope of this study and would best be considered as part of a more wide-ranging examination of the standards development process.

Moreover, the Commission is aware that Standards Australia recently commissioned consultants Cameron Ralph Pty Ltd to review its standards development and governance framework (see box 12.4). And, in response to this review a number of changes to the governance framework were outlined at Standards Australia's annual general meeting in November 2005, including the use of expert reference groups (or consultative forums). While Standards Australia has long relied on sectoral-based advisory boards for guidance on standards development, the need to augment these with cross-sectoral expert input and stakeholder consultation has now been recognised. A trade union consultative forum has recently been established, and others planned include consumer interests and certification and testing houses.

Box 12.4 Review of Standards Australia's standards development and approval governance framework

Recently, Standards Australia commissioned Cameron Ralph Pty Ltd to undertake a review of the effectiveness of the standards development governance framework. The consultants provided a final report to Standards Australia in July 2005, which was subsequently made available for public comment.

The Cameron Ralph report identified five key drivers for change:

- Stakeholder participation in standards development as a whole is not broken but is perceived to be in long-term decline and requires reinvigoration at all levels.
- The role of stakeholders in the governance system is driven largely by practicality – not principle. The consultants argued that a principle-driven framework is required for both participation by stakeholders and accountability to stakeholders.
- The lack of a robust framework for managing relations with non-participating stakeholders (i.e. 'other' industry bodies, 'other' government and the general public) requires a systematic, reinvigorated, professional approach to managing external relationships.
- Improving performance in relation to innovation and efficiency requires improved systems of support; improved information; greater management focus; and an effective external accountability to drive these aspects of operations.
- Over many years, upward pressure on the demand for standards (internationalisation, more standardisation, standards in regulation, community expectations of standards, etc) and the reducing contribution on the supply side (volunteers, support from government, etc) have resulted in a low cost structure that is unsustainable. The consultants argued this requires a governance structure and system that can oversee adjustment to long-held values and behaviours.

In all, the Cameron Ralph report made 28 recommendations covering five key areas: people (both those within and outside the system); information; decision-making processes; group dynamics of the governance bodies; and monitoring and evaluation.

The report concluded that going forward, the top priorities for improving the operation and performance of the standards development governance system are:

- a long-term process of renewal and refreshment of the participation of stakeholders;
- some flexibility and development of alternative processes for standards development and its governance;
- a simplification and minor reorganisation of the governance structures;
- a re-alignment of the accountabilities to stakeholders within the system; and
- a re-thinking of the support and funding required for the governance system.

Source: Cameron Ralph Pty Ltd (2005).

That said, in relation to standards making as it applies to consumer product safety, the Commission considers that policy makers should give priority to: sharpening the focus of standards making on addressing product-related hazards; and streamlining the standards development process with a view to ensuring that mandatory standards can be developed and implemented in a more timely manner.

In the Commission's view, all *mandatory* standards should be focussed on dealing with the most serious product-related hazards. In practice this means putting more emphasis on hazard identification, risk assessment and risk management. Any minor safety issues or general design characteristics should be covered by voluntary standards.

In relation to voluntary standards, it is important to recognise that industry groups may initiate the development of an Australian Standard for a range of commercial reasons not all of which may relate to addressing safety issues. Consequently, the Commission considers it would not be appropriate to prescribe that all voluntary standards must be hazard focused. However, in those cases where safety issues are the primary motivation for developing a voluntary standard it may be helpful to develop a 'hazard' focused Australian Standard addressing the most serious product-related hazards separately from a more general standard covering other design characteristics and performance issues.

Sharpening the focus of the standards development process on addressing the most serious product-related hazards would go some way towards ensuring standards are developed in a more timely manner. However, by itself this initiative is unlikely to be sufficient to significantly improve the timeliness of standards making and more needs to be done to streamline the standards development process.

In the Commission's view mandatory standards should be able to be developed and implemented within 12 months. This simply recognises the commercial reality that standards making needs to be more responsive to the rapidly changing marketplace for consumer products as well as responding to public policy pressures.

In saying this, the Commission acknowledges that this goal is likely to raise a number of technical issues about the current standards development process. However, the Commission sees value in MCCA committing to the goal of developing and implementing mandatory standards within 12 months and commissioning the ACCC and Standards Australia to work together to streamline the standards development process as it applies to consumer product safety.

RECOMMENDATION 12.1

All mandatory safety standards for consumer products should be developed on a 'hazard' focused basis. Regulators should ensure such standards only address essential safety issues and leave other design issues for voluntary standards. Further, wherever appropriate, regulators should adopt international standards.

RECOMMENDATION 12.2

The Ministerial Council on Consumer Affairs, through the Australian Competition and Consumer Commission, should work with Standards Australia with a view to significantly streamlining the standards-making process to improve timeliness, given the potential impacts of standards in a rapidly changing marketplace. The aim should be for mandatory safety standards to be developed and implemented within 12 months.

13 National approaches

Key points

- There is a compelling case for greater national consistency in consumer product safety regulation since variations impose substantial costs for little extra benefit. In essence, there is little justification for any differences in product safety regulation across Australia.
- The Commission's preferred approach, is the establishment of a single law and regulator. This would require the referral of existing State and Territory powers to the Australian Government.
  - Given the Australian Government's already substantial role in this area, the most efficient manner to achieve this is the adoption of the *Trade Practices Act* as the single law and the Australian Competition and Consumer Commission (ACCC) as the single regulator.
- Moving towards a single law and regulator would, however, be challenging. Accordingly, the Commission has presented modified alternatives, which would not deliver as many benefits, but would still be an improvement over current arrangements.
- A modified approach to a 'one law, one regulator' model would see the States and Territories refer their powers to impose permanent bans and mandatory standards to the Australian Government only retaining the ability to impose interim bans. States and Territories would need to maintain resources committed to consumer product safety but, under this approach, greater national consistency would be achieved in the long term.
- Failing the implementation of either of the above approaches, current arrangements should be changed to improve the uniformity and coordination of consumer product safety regulation:
  - Underlying legislation should be made uniform through the establishment of template arrangements (or at the very least a core set of provisions could be harmonised).
  - Jurisdictions should agree only to implement mandatory standards and permanent bans on a national basis. Existing mutual recognition processes could be used to resolve temporary inconsistencies and other improvements to existing arrangements (such as increasing the involvement of the ACCC, providing the Ministerial Council on Consumer Affairs (MCCA) with clear decision rules and setting time limits on MCCA decisions) would have merit.
  - Enforcement practices should be benchmarked with a view to achieving greater consistency.

Inconsistencies between the Australian, State and Territory product safety systems can impose large costs on businesses, result in the unnecessary duplication of government resources and cause confusion for consumers. In particular, inconsistencies make it difficult for businesses that supply goods across State and Territory borders, to fully understand and comply with up to nine different systems. That said, the different systems potentially create avenues for flexible regulatory responses to product safety issues.

This chapter considers these trade-offs (option 11 in the terms of reference). It concludes that greater consistency is warranted and considers two substantive approaches for achieving greater harmonisation:

- a one law, one regulator approach which would see the States refer powers to the Australian Government; and
- a uniform approach aimed at creating greater uniformity of regulations and consistency of enforcement across jurisdictions.

13.1 Why greater national consistency is warranted

There was broad support from participants for a more harmonised product safety system. Indeed, all submissions which commented on this issue agreed with the need for greater harmonisation. For example, the Small Business Development Corporation of WA stated that:

> Improved harmonisation would provide greater certainty for business, particularly those that trade across borders, and allow regulatory authorities to respond more quickly and cooperatively at the national level to potentially hazardous consumer products. (sub. DR46, p. 2)

In general, participants' views were based on the potential for a more harmonised product safety system to reduce business compliance costs. Substantial resources are devoted to checking and monitoring the different mandatory standards and bans that are imposed across Australia. Further, to the extent that these differences deter businesses from entering other markets, they may diminish competitive pressures as well as opportunities to exploit economies of scale. This latter point is especially relevant to integration between Australia and New Zealand. If inconsistencies between regulations can be reduced it will more closely align the Australian system with that of New Zealand, and make it easier for New Zealand businesses to enter Australian markets.

In addition, the costs of having to continually monitor the decisions of multiple agencies, or individually check the compliance of individual product lines, are

likely to make up a larger part of the average outlays of a small business than a larger business.

In competitive markets, such costs will manifest themselves in higher product prices for consumers. Differences in regulatory responses also send confused messages to consumers about the safety of certain goods.

The duplication and fragmentation inherent in parallel government regulations may also not lead to the development of the most appropriate regulations and may be a substantial drain on government resources. The Commission has also been made aware of instances where there has been insufficient communication between jurisdictions, resulting in parallel investigations into the same products.

Around $5 million annually is allocated to the administration and enforcement activities of the consumer product safety authorities. At times, the efforts of these authorities overlap, resulting in investigations of the same products simultaneously. That said, potential savings in consumer product safety costs should not be overstated, since there are complementarities between product safety regulation and the administration and enforcement of other consumer protection areas.

And, there was support for different jurisdictional approaches. The New South Wales Office of Fair Trading argued that:

> Dealing with issues in a federal system benefits from competition among jurisdictions to find solutions to problems, leading to better public policy and service delivery. (sub. DR61, p. 9)

To some extent, variation in regulation can highlight differences in the effectiveness of particular approaches, and help policymakers improve the regulation of consumer product safety in the long run. However, the limited data on product safety, and the resulting difficulty in examining the effect of regulations, makes this rationale less important in the product safety area (see chapter 2). And, in any case, it would make sense to devote effort to improving the initial analysis of the need for regulation and choosing the outcome most likely to provide the greatest net benefit.

State and Territory based regulators can, and do, respond more promptly to jurisdiction-specific product safety issues. However, in the product safety area, jurisdiction-specific issues are unlikely to be common. The market for consumer products appears relatively homogenous between jurisdictions: people face the same risks with respect to products and Australians appear to have similar preferences regarding their exposure to risk.

Nevertheless, there may be some instances where jurisdiction-specific concerns arise:

- A limited number of products are a more significant issue in certain jurisdictions. For example, concerns about the use of all-terrain vehicles are stronger in areas with large rural communities. Similarly, fuel storage devices (jerry cans) are more commonly used in the Northern Territory and are hence regulated there as well as in Victoria (MCCA 2005c, p. 10).
- Some products are only supplied in a single jurisdiction. For example, importers of relatively cheap products may at times individually source dangerous products from overseas and sell them in a single location (the Victorian seizure of 7500 illegal toy guns is an example, see *The Geelong Advertiser*, 17 May 2005, p. 4). In addition, local shows can also be a conduit through which jurisdiction-specific, unsafe products reach the market.

Further, State and Territory regulators are attuned to community concerns. For instance, the New South Wales Office of Fair Trading stated that:

> ... following the deaths of two children there was strong community demand that action be taken by the NSW Office of Fair Trading in respect of portable soccer goal posts independently of other jurisdictions. (sub. DR61, p. 6)

Nonetheless, these benefits must be set against the resulting inconsistencies that will continue to emerge if the current lack of uniformity remains. The above examples only indicate that certain products are more of a concern in some jurisdictions because of their greater *use* or that by chance an incident occurs in one State or Territory before others. The actual hazards posed by these products, however, do not appear to vary from state to state and generally unsafe consumer products in one state do not suddenly become safe or unsafe when crossing a state border. Consequently, if a ban or mandatory standard is justified in one jurisdiction, it is most likely justified in all. If the product is not used much in other States, then the ban or mandatory standard will have little practical effect in these situations.

The variations in risk (due to differences in usage) between States (or more accurately regions) is best dealt with through variation in enforcement by the consistent application of risk management procedures, such that resources are focused on the products and the locations where risks are highest. Overall, the Commission does not see a case for variation in product safety regulations between jurisdictions.

13.2 What areas should be harmonised?

The Commission has identified three areas of product safety regulation that could be harmonised:

- the underlying legislation that outlines the powers available to regulatory authorities;
- the application of these powers, in the form of standards and bans; and
- the enforcement of standards and bans.

Legislation

At first glance, the current differences in legislation do not appear to be large. The scope of all product safety legislation is already substantially aligned. All jurisdictions have the ability to ban products; all can mandate standards and all, except Queensland and Tasmania, have the ability to recall products. More importantly, the requirements for imposing a ban, standard or recall are broadly similar, but not the same (see chapter 8 for a more comprehensive list).

Despite these similarities, harmonising legislation would impose costs on some businesses, especially those which do not trade interstate. Harmonisation would invariably lead to changes in individual jurisdictions (both in regulation and the manner in which it is enforced), and businesses that have no experience of other State or Territory regimes would have to adapt to this new environment. Governments would also have to bear some up-front costs in changing existing legislation and in potentially having to adapt to the application of new legislative provisions. Although existing legislation is broadly similar, even small changes to legislation will take time for jurisdictions to agree on and implement.

But legislative consistency will deliver net benefits

Despite similar legislation, there are a few marked differences between jurisdictions. A few jurisdictions do not necessarily require a causal link between the product and the potential for injury before bans and recalls are adopted. There are also significant differences in the time for which interim bans are imposed. Further, the Australian Government, New South Wales, Western Australia, Tasmania, the Northern Territory and the ACT largely do not apply their regulations to services. These differences are more comprehensively listed in appendix B.

The removal of these inconsistencies would reduce compliance costs for businesses. For example, Coles Myer stated that:

> While it is accepted that there may still be some variations in enforcement practices across jurisdictions, this single set of rules alone, will provide both industry and consumers, with the greatest clarity and benefits. Achieving legislative consistency is far more important that the desire of jurisdictions to remain flexible. (sub. MCCA9, p. 5)

Middletons Lawyers also argued that there would be large benefits for businesses:

> We submit that even if the most stringent requirements currently existing were adopted nationwide the costs that would be saved by businesses in not needing to establish the requirements of supplying products in each State would be enormous. (sub. MCCA18, p. 5)

Consistent legislation will also, over time, increase the certainty with which businesses can predict regulatory outcomes. This will, in turn, lower the costs of business expansion into different jurisdictions and different product lines. Also, to the extent that consistent legislation reduces costs, consumers would be likely to benefit from cheaper, and perhaps a wider range of, goods.

It may also facilitate cooperation between jurisdictions on administration and enforcement issues. While it is possible to devise ways to achieve some consistency in mandatory standards and bans without changing legislation, consistency in the 'rules of the game' would provide a surer way to achieve consistency in the application and enforcement of product safety regulations. For example, agreement on identical time periods for temporary bans could facilitate the imposition of nationally consistent bans.

Overall, the Commission recognises that there may be some costs for governments and businesses in moving towards uniform legislation but believes that the benefits of greater certainty for businesses and consumers and the potential for it to facilitate greater cooperation between governments outweigh these.

Standards and bans

Despite similar legislation, the involvement of nine Australian jurisdictions lead to considerable differences in the range of products subject to regulatory intervention. For example, 65 per cent of products subject to bans are only banned in one jurisdiction and, although mandatory standards are more uniformly applied, sometimes differences exist between the requirements for the same product. Hence, the harmonisation of product safety legislation will not necessarily reduce these inconsistencies. Potentially, jurisdictions could still interpret legislative provisions differently.

Mandatory standards should be national

Mandatory standards generally take considerable time to develop. Often a standard does not exist before regulation is contemplated and even in cases where a voluntary standard is in place, it is often not justifiable to mandate all the elements of a voluntary standard.

Despite the long implementation periods, and the consequent window for coordination between jurisdictions, disagreements still occur on the need for, and design of, particular standards. However, rigorous analysis before the introduction of a mandatory standard should limit the scope of this disagreement. Such an effect is partly demonstrated by the fewer variations that exist between standards than exist between bans.

Nonetheless, the inconsistencies in standards that do occur have the potential to impose large compliance costs on businesses.

- Standards generally apply to classes of products (rather than individual product lines) and thus will potentially cover a greater share of the market. For instance, mandatory standards currently apply to bicycles, furniture and children's clothing. The costs associated with having to comply with any inconsistent standards will accordingly affect a large number of businesses.
- Compliance with standards can be difficult to judge and is complex where multiple mandatory standards relate to the same product. Some standards are very detailed and in a few instances (such as disposable cigarette lighters) compliance can only be checked through testing. The National Product Liability Association also stressed the difficulty of locating standards:

> Another problem often encountered is of identifying applicable standards. Australian Standards can be notoriously difficult to locate — even when it is known that a standard exists. It is even more difficult to locate gazettals if there is uncertainty about whether a standard for a particular product exists. (sub. MCCA19, p. 11)

Suppliers that are looking to export to Australia may also be deterred if Australian standards are not consistent with those that apply overseas. Likewise, Australian manufacturers may find difficulty exporting if:

- international standards are so inconsistent with Australian standards that even complying with the most stringent standard will not guarantee simultaneous compliance in both Australia and overseas; and
- in cases where Australian standards impose a higher level of safety then increased production costs may make Australian firms uncompetitive.

The high costs of inconsistencies between standards has convinced the Commission that mandatory standards should only apply nationally. The processes that precede the introduction of a standard should provide sufficient scope for national agreement.

The benefits of temporary differences do not outweigh their costs

Banning a product is the simplest and most direct mechanism for product safety authorities to reduce the risks posed by an unsafe product. It is also a 'quick-response' tool, temporary bans can be imposed: in emergencies under the TPA and in Victoria; and in six other jurisdictions while a product is being investigated. 111 products are currently banned across different jurisdictions.

However, the relative ease with which bans can be implemented also contributes to the large inconsistencies in their application. Appendix B illustrates that over 80 per cent of bans apply in only two (out of nine) jurisdictions and only seven per cent of bans apply in more than four jurisdictions.

Despite these large inconsistencies, the associated compliance costs resulting from the inconsistent application of bans may not be as large as those associated with inconsistencies in mandatory standards:

- Most bans are targeted at specific products and are unlikely to affect a large portion of the market.
- The binary nature of a ban generally means that reference to a simple list of products is sufficient to comply with regulations.

However, bans (even temporary ones) are not costless: they completely remove a good from the marketplace and can cause great damage to businesses (including damaging their reputation and future sales).

In the Discussion Draft, the Commission argued that because bans can be used as a 'quick-response' tool, individual jurisdictions should still be permitted to unilaterally impose bans on a temporary basis, lapsing unless they are made national and permanent through revised Ministerial Council on Consumer Affairs (MCCA) mechanisms. The Commission continues to recommend, and most participants have supported, that permanent bans should only apply nationally.

The Commission now considers that ideally there should be no variation in bans, even on a temporary basis across Australia. Although the case for inter-jurisdictional differences is strongest in relation to temporary bans, due to the high costs of inconsistency, and the lack of a clear rationale for differences between jurisdictions, all consumer product safety legislation should be applied on a national basis.

Enforcement

The Commission is in favour of the same product safety regulations applying throughout Australia. As mentioned earlier, however, there may still be some need for enforcement to vary to reflect differences in the risks posed by certain products in different States.

However, if the regulations are the same across the country, there does not appear to be any rationale for inconsistency in the principles that should guide enforcement. This is especially true since differences in enforcement practices can impose further compliance costs on businesses, especially those that operate across state boundaries.

Even if regulations continue to vary between the States, it is not necessary for jurisdictions to use significantly different enforcement procedures. National agreement on enforcement criteria would not seem to unreasonably restrict jurisdictions from meeting the objectives of preventing and reducing product safety injuries.

FINDING 13. 1

There is little justification for different consumer product legislation and enforcement responses across Australia. Such differences create inefficiencies in a resource constrained environment including unnecessary duplication of effort and inconsistent approaches to similar risks and hazards.

13.3 How should harmonisation be achieved?

There are basically two broad options to progress the harmonisation of product safety regulation:

- the States refer powers to the Australian Government and a national regulator is created; or
- improvements are made to existing arrangements that attempt to coordinate regulations between jurisdictions.

One law, one regulator model

The most efficient way to achieve nationally uniform product safety legislation, standards and bans and enforcement practices would be to centralise decision making in a single regulator administering a single law. Many participants supported this option (see box 13.1).

Box 13.1 **Participants' views on a single regulator**

Participants generally preferred the option of a single regulator taking over responsibility for product safety regulations.

> A single regime would reduce duplication and therefore be a better use of government's limited resources. A further benefit of a single decision-making body would be to remove the need to co-ordinate actions and therefore improve response times on strategies to counter hazardous goods. (sub. DR56, p. 12) *Australian Competition and Consumer Commission*
>
> ACA also supports the establishment of a new, national, product safety agency … Many of the submissions to the Commission highlight concerns over lack of coordination, fragmentary laws in different jurisdictions, mandatory and voluntary standards. This concern would be best addressed by the establishment of such a Commonwealth agency. (sub. DR51, p. 1) *Australian Consumers' Association*
>
> Rather than give attention to the possible introduction of a GSP, NPLA considers that an alternative would be to consider enhancing the powers of the appropriate government agency – whether it be the ACCC or some other body is a separate issue, which can move quickly in appropriate circumstances to ban a product or to order a compulsory product recall. (sub. MCCA19, p. 11-12) *National Product Liability Association*

The Australian Retailers Association (sub. MCCA7), the Infant and Nursery Products Association of Australia (sub. MCCA14), Monash University Research Accident Centre (sub. MCCA16, p. 5), Australian Electrical and Electronic Manufacturers' Association (AEEMA) and Consumer Electronics Suppliers Association (CESA) (sub. DR44), the Australian Toy Association (sub. DR49), ACCORD Australia (sub. DR52) and Kidsafe NSW (sub. DR57) also supported a single consumer product safety regulator. The Queensland Government, however, disagreed with these views and argued that a national regulator was not justified:

> Whereas a single regulator is the most appealing to industry and consumer bodies it may not be the most effective in terms of innovation, ensuring compliance, and educating consumers and business (sub. DR59, p. 6).

Submissions from the NSW Office of Fair Trading (sub. DR61) and the Victorian Government (sub. DR60) also maintained that there was still a need for State involvement in consumer product safety regulation.

Further, a single regulator will also streamline processes relating to other aspects of the consumer product safety system. For example, the Commission has recommended the establishment of a 'one-stop shop' — in part to help provide centralised information on various product safety regulation (see chapter 10). Such a shop will be easier to maintain, and easier to navigate, with only one regulator and one set of regulations. In addition, a single regulator will to some extent automatically centralise information and data relating to the safety of certain products. Thus, minimising the need to establish extensive information sharing arrangements (see chapter 9).

Moreover, national uniformity is unlikely to be achieved through existing frameworks. There are already arrangements that attempt to harmonise product safety orders, however, these have largely failed to achieve much consistency among jurisdictions in the standards and bans imposed. Fine tuning these arrangements may provide some additional gains, yet, they are unlikely to produce uniformity. Essentially, this is not the fault of the arrangements themselves, it reflects the political reality that achieving agreement between nine different jurisdictions is extremely difficult.

Given this, and the high importance of achieving national uniformity, the Commission believes that the establishment of a single consumer product safety law and regulator is the best way to achieve national consistency and enhance efficiencies in the consumer product safety regime. This option would require the States and Territories to refer powers to the Australian Government in respect of all consumer product safety matters.

Which regulator?

Centralising the consumer product safety regulatory environment would be a less difficult process than it would in some other regulatory areas. This is because the Australian Government already regulates the vast majority of consumer products through the TPA (via its corporation and interstate trade powers). For example, in the retail trade sector about 80 per cent of sales is attributable to corporations and in manufacturing the figure is over 95 per cent (ABS unpublished data).

Currently, the ACCC is largely responsible for the regulation of consumer products at the Australian Government level, although the Minister responsible for consumer affairs has the final say on what becomes a standard or ban. The ACCC enforces consumer product safety through the TPA, which is one of the oldest consumer product safety acts in Australia and has been used as a model for product safety acts in other jurisdictions.

Given these existing arrangements, the Commission believes that the ACCC should be the national regulator and the TPA (with amendments to reflect the Commission's recommendations in other parts of this report) should be the single law. As the Australian Toy Association stated:

> … the ACCC is the appropriate body for overall management of product safety regulation. It is already in existence and would appear to have a structure that could be reinforced to accept the role. (sub. DR49, p. 5)

This view was supported by other participants, including the Consumers Federation of Australia (sub. MCCA11), Monash University Research Accident Centre (sub.

MCCA16) and ACCORD Australia (sub. 35 and DR52). In contrast, the Australian Consumers' Association (ACA, sub. DR51, p. 23) supported the establishment of a separate agency with the specific remit of regulating consumer products. However, given the likely cost of such arrangements, and the availability of a lower cost option using institutions already in place, the Commission does not view the establishment of a specific consumer product safety agency as the most efficient option. Indeed, the ACA accepted that failing the creation of a new product safety regulator, responsibility for national product safety regulation:

> … could be constructed within the ACCC. If that was the case it would need to have clear separation from general ACCC activities and an identifiable budget and staff of its own. Some of its functions could be carried out by appropriate parts of the ACCC currently in existence as there would be obvious practical, experiential and financial benefits in that. (sub. DR51, p. 23)

There will also be transitional issues in implementing this proposal and sufficient time should be allowed to resolve important issues that will emerge. However, a strict time limit marking the end of this transitional process should be set, to ensure that decisions are made in a timely manner and inconsistencies are not maintained for longer than necessary.

A modified approach

Although the Commission believes that the one law, one regulator model has the greatest merit, it recognises that removing the States and Territories from all product safety regulation and enforcement functions would be challenging. The ACCC recognised the challenges in expressing its support for a national regulator:

> Based on its experiences with competition policy, the ACCC would be strongly supportive of a model that facilitated a harmonized approach based upon a national regulator. The ACCC recognises that there are significant sovereignty issues involved in any initiative directed to achieving harmonized outcomes, but is of the view that compromise solutions are both desirable and achievable, as already evidenced in the mutual recognition principles adopted by all MCCA jurisdictions. (sub. DR56, p. 13)

The Commission is aware that a central concern of State and Territories is the ability to act quickly and locally. Recognising this, the ACCC further proposed:

> … it would be possible to develop a system that would provide for substantially increased harmonization on the national scale without significantly derogating from the sovereignty of State/Territory jurisdictions. For example, jurisdictions could retain the right to temporarily ban the supply of unsafe goods or temporarily impose a labelling, design or performance standard (perhaps for a short period of 2-3 months), and then permit a national agency to examine that jurisdiction's concerns with a view to making a recommendation to the Ministerial Council on whether or not a permanent ban or standard on a national basis might be warranted. (sub. DR56, p. 13)

The Commission agrees that, an alternative approach may allow the States and Territories to temporarily ban suspected unsafe goods. As mentioned earlier, there is a greater rationale for the States and Territories to have a short-term role in the product safety area.

Under this modified approach, States and Territories could ban products for a limited period of time, of say up to 120 days. During this time, the State and Territory fair trading offices would have responsibility for the enforcement of these temporary bans. Nonetheless, the question of whether a national permanent ban or standard should be implemented, and all further enforcement powers, would be referred to the Australian Government, through the ACCC.

The Commission does not agree that States and Territories should be permitted to implement temporary mandatory standards. Standards generally take a longer time to develop, and there is little rationale for jurisdictions to use them as a quick-response tool. Further, implementing a temporary mandatory standard, which may then change following work by the ACCC, could be extremely costly for businesses which may have to change manufacturing procedures to meet different standards.

The Commission does not, however, see this model as superior to the one law, one regulator model presented above, since some of the benefits of a single system will be foregone under this compromise model, including:

- State and Territories would need to maintain some regulatory presence in the field (including complaint systems, enforcement responsibilities, etc) so the savings in administration costs would not be as great; and
- the introduction of temporary inconsistencies will add to business compliance costs since they will still need to monitor the regulatory decisions of nine different regulators.

RECOMMENDATION 13.1

Given the national nature of most product markets and the need to adopt the most efficient means of achieving an effective consumer product regime, a national regime with a single law and single regulator should be established; with the States and Territories referring their existing authority to the Australian Government.

RECOMMENDATION 13.2

Given its well established nature and broad application, the Trade Practices Act, as amended by the proposals recommended in this report, should be the single law for consumer product safety. Given its current role and breadth of coverage, the

Australian Competition and Consumer Commission should be the single regulator. This would involve lower transition costs than establishing a new body.

RECOMMENDATION 13.3

Failing the establishment of a single law and regulator as proposed, there would be merit in a modified approach with the States and Territories retaining the power to impose interim bans only. The authority to impose all other consumer product safety regulation (such as permanent bans, mandatory standards and recalls) would be referred to the Australian Government, and enforcement would occur through the Australian Competition and Consumer Commission.

Uniform approach

In presenting the above alternative ways forward, the Commission is mindful of the difficulties that may impede moves in this direction. If these difficulties prove too great an obstacle to achieving the preferred one law, one regulator arrangement, there are still changes that should be made, to the existing cooperative approaches that would help harmonise product safety regulations across the nation.

Of course, attempts to improve these arrangements are not new. As the Victorian Government observed:

> Improved harmonisation in product safety legislation, administration and enforcement has been attempted in the past, and the difficulties of achieving harmonisation, and the practicalities of a national ban or standard approval process should not be understated. (sub. DR60, p. 10-11)

As a result of these past attempts, there are arrangements in place to achieve harmonisation between jurisdictions. For example, MCCA already attempts to coordinate product safety regulation. MCCA's mission statement, among other things states that it aims to achieve:

- the coordination of policy development and implementation by all Jurisdictions to provide the best and most consistent protection for consumers;
- consistency of policy and enforcement decisions for the suppliers of goods and services within a national marketplace; and
- national legislative consistency of major elements of consumer protection policy (2005a).

In making decisions, MCCA is advised by the Standing Committee of Officials of Consumer Affairs (SCOCA), which includes the heads of Australian, State and Territory Government agencies responsible for consumer affairs or fair trading policy, as well as New Zealand Government representatives. SCOCA itself is

advised by the Consumer Products Advisory Committee (CPAC) which has a wider membership, including officials responsible for product safety (in both Australia and New Zealand) as a well as representatives from Standards Australia.

The Mutual Recognition Agreement (MRA) attempts to provide incentives to governments to use these processes. Under MRA, businesses can sell any good, which meets the regulatory requirements of the jurisdiction in which it is manufactured, or into which it is imported from overseas, in any Australian State or Territory (and to New Zealand under the Trans-Tasman Mutual Recognition Arrangement). These arrangements attempt to:

- ensure that businesses only need to conform with the regulations of their home jurisdiction, thus lowering the costs of complying with different sets of regulations; and
- encourage governments to coordinate on the imposition of standards and bans, since any unilateral regulations will be less effective due to the ability to bring in 'unregulated' goods under mutual recognition.

However, in practice, mutual recognition is not delivering all of these potential benefits and it generally does not restrict jurisdictions from adopting unilateral mandatory standards or bans. In its previous work in this area, the Commission (2003b) found that when a product is banned in one jurisdiction manufacturers will generally remove it from the market nationally due to concerns about liability exposure. As a result, inconsistent mandatory standards and bans are not only enforceable in their home jurisdiction, in practice, they also apply nationally.

Improved approach for developing national regulation

The lack of use of mutual recognition permits State and Territory, unilaterally-imposed standards and bans to be practically effective and thus lessens the incentives for inter-jurisdictional cooperation. Under the mutual recognition agreement, governments can implement a temporary exemption from their obligations for a period of 12 months. However, these exemptions are rarely sought by governments, because they can already effectively restrict products without having to resort to the temporary exemption process. Consequently, MCCA is rarely asked to adjudicate on whether a national standard or ban should apply.

Even if MCCA were relied on more often to resolve differences, some participants doubted whether the current arrangements would be up to the task. For example, the Infant and Nursery Products Association of Australia stated that:

> Attempts to bring regulators together through the Consumer Products Advisory Committee (CPAC), produce few outcomes for industry and consumers. As stated in

> the review paper, the main role of this group is to promote "a consistent, strategic response to consumer product issues." From the nursery industry perspective this objective is not being achieved. A priority for a revised product safety system should be to make this structure more effective. (sub. MCCA14, p. 2)

Similarly, the ACCC pointed out that:

> … the high costs of duplication and inconsistency should encourage new efforts to achieve harmonisation …. but [is] not supported by the fact that these costs have not to date been sufficient incentive for change. (sub. DR56, p. 13)

Reflecting these concerns, the Commission recommends some changes to existing arrangements:

- Permanent bans and mandatory standards should only be imposed on a national basis. This would permit some temporary variation between jurisdictions through the imposition of unilateral interim product bans.
- To achieve this the Commission proposes tying existing mutual recognition instruments more closely to product safety regulation. Under this model, if a jurisdiction decided to impose a ban then that would automatically initiate the temporary exemption process. Likewise, a national standard would only be implemented following the initiation of the referral process (where a jurisdiction refers the question of a mandatory standard for a certain product to MCCA).

Further, to provide more specific guidance on how such processes would work, the Commission has undertaken an examination of the strengths and weakness of other regulatory areas which also establish systems to encourage cooperation between jurisdictions. This analysis is contained in appendix E, which examines the food, building, occupational health and safety and transport regulatory environments.

From this analysis, the Commission considers that any future consumer product safety cooperative arrangements would be most effective if they incorporated the following principles:

- ensure a strong commitment to uniformity;
- independent experts should develop standards;
- Ministers (or the ultimate decision makers) should make the final decision to adopt a particular standard;
- establish clear decisions rules; and
- use advice and consult widely.

Currently, there is no independent body which is tasked with advising MCCA on the development of nationally agreed standards. The Commission considers that this

is a failing of current arrangements and, by placing too much pressure on MCCA and its supporting bodies to develop standards, it may inhibit the decision-making process.

The Victorian Government (sub. DR60, p. 11) agreed with this view and proposed the establishment of a National Assessment Committee to develop national mandatory standards. The establishment of a separate body, however, would involve some cost and it may not be the best use of existing expertise.

A less costly option would be to rely on either the ACCC or SCOCA to develop the national mandatory standards and advise on national permanent bans to be considered by MCCA. Reliance on SCOCA, however, would reduce the independence of the advice, since it is made up of government officials. In contrast, the ACCC is a statutory agency with a degree of independence from the government itself. The ACCC's experience in this area also points to it having the necessary expertise to develop mandatory standards and recommendations for permanent bans.

In order to achieve jurisdictional 'buy-in' mandatory standards and permanent bans developed by the ACCC should be submitted to MCCA for acceptance or rejection. In making its decision MCCA should be bound by clear rules. For example, analysis of other inter-jurisdictional systems indicates that restricting the Ministerial Council to either accepting or rejecting the proposals of the ACCC, rather than proposing its own amendments, facilitates decision making. Instead, on rejecting a particular regulation, there may be a provision for MCCA to direct the ACCC to review its original submission and resubmit the regulation.

Clear voting rules should also determine whether or not MCCA accepts or rejects certain regulations. Currently, MCCA decides general matters through a simple majority rule. However, mutual recognition questions (which apply across a range of portfolios) dictate that matters should be resolved by a two-thirds consensus of jurisdictions. Since the Commission is relying on these mutual recognition arrangements to provide greater consistency, it believes that matters should be decided by a two-thirds majority. This would require six (out of nine) jurisdictions to agree to a new regulation (such as mandatory standards or permanent bans) prior to their introduction.

Clear timelines for decision makers would also help. In the Discussion Draft the Commission recommended that a decision on whether a permanent ban should be adopted, should be made within 120 days of the initial temporary product ban being imposed. In response, the New South Wales Office of Fair Trading argued that:

> The experience of NSW with this process, in relation to other national regulatory proposals, is that completion within 120 days is most unlikely. In the case of unsafe

> products, an interim ban will be imposed in the interests of public safety. The detailed analysis required by a Regulatory Impact Statement may only commence once the immediate danger is averted by imposing an interim ban. (sub. DR61, p. 8)

While achieving agreement on a response within 120 days would not be an easy task, often the challenges are not necessarily time related. Moreover, without a time limit, decisions would take too long. In the Commission's view, a time limit exceeding 120 days will impose unnecessary uncertainty on businesses and prevent many of the gains from fewer inconsistencies being realised. As the Australian Chamber of Commerce and Industry (sub. DR54, p. 6) noted, 120 days currently exceeds every State and Territory time limit on interim bans (except for Tasmania which has no statutory time limit). In addition, in the food area, time limits are more compressed, with the Australian New Zealand Food Regulation Ministerial Council having only 60 days to respond to a draft standard and Food Standards Australia New Zealand having only three months to resubmit standards. The Commission also stresses that a decision only needs to be made within 120 days on *whether* a permanent ban should be imposed. The same time limit should apply as to whether a mandatory standard should be developed. The actual development of a standard could take place over the succeeding year, as is the case in the existing referral process.

The Victorian Government considered that:

> … 120 days is a reasonable length of time to achieve agreement. However, the ban process should retain a degree of flexibility to allow Ministers to extend temporary bans for an additional 120 days in special circumstances. This would be similar to the process for regulations, which allows extensions to regulations. (sub. DR60, p. 12)

The Commission agrees that in certain situations it may be necessary to extend the time permitted. An extension should only occur, however, through the MCCA two-thirds voting rule.

Even with these clear decision rules, there would still be the potential for nationally agreed decisions not to be implemented by all jurisdictions (as often occurs already in other regulatory areas). The MCCA (2005c) Options Paper suggested that a Memorandum of Understanding (MoU) could underpin these new arrangements. The Commission agrees that a strong level of commitment from governments to cooperative arrangements is essential. However, an intergovernmental agreement would provide an even stronger commitment to uniformity, than an MoU, and place greater responsibility on governments to implement uniform regulation.

In developing regulation, wide consultation is necessary to ensure that it has the strongest possible community acceptance. The Commission does not believe that *direct* representation of industry or consumer interests is needed on the decision-

making body. However, all stakeholders should be given ample scope for input into the regulations that are made. To a large extent, consultation is already carried out when consumer product safety regulations are proposed. As the ACCC stated:

> Industry and consumer bodies are widely consulted on any draft proposals for national standards and their views are respected and fairly assessed. Many national standards are based on published Australian Standards. Industry and consumers are generally well represented on the technical committees which write these standards. (sub. DR56, p. 12)

The Commission notes that the ACCC has significant experience in consulting with stakeholders on the implementation of a wide array of regulation. It considers the ACCC should continue to consult widely as an integral part of its role in any future product safety arrangements. (Consultation principles are outlined in more detail in appendix E.)

Legislation

There is a strong case for a uniform product safety act. A single law could still be achieved with nine jurisdictional regulators. For example, some participants supported the establishment of template arrangements to guarantee uniformity in product safety legislation. As AEEMA and CESA stated:

> Template legislation is favoured as the next best alternative to a single Australian law because, as outlined in the MCCA Product Safety Discussion Paper published in 2004, it offers the best chance of the laws being identical in all jurisdictions not only as first enacted but with subsequent amendments. Failure to synchronise amendments is a certain cause of differences in law occurring between jurisdictions. (sub. 44, p. 8)

Under template arrangements all jurisdictions would adopt identical pieces of legislation and amendments made in a designated parliament would be automatically adopted by all other jurisdictions. In theory, this guarantees that any future changes that are made to product safety legislation are adopted in all jurisdictions. Accordingly, they provide the greatest degree of consistency between jurisdictions over time.

That said, the previous experience with template arrangements has been mixed. In the transport area, template arrangements were implemented to maintain consistency over agreed reforms. However, these arrangements were not successful in maintaining consistency among jurisdictions (Moore and Wilson 2005). In addition, in the early 1990s jurisdictions agreed to implement template arrangements for the adoption of therapeutic goods regulation. However to date, only two jurisdictions, New South Wales and Tasmania, have implemented this agreement. However, problems with template arrangements may reflect more the

difficulties of achieving agreement between jurisdictions, than problems with the arrangements themselves.

Furthermore, other options for achieving legislative harmonisation also exhibit problems. As AEEMA and CESA point out:

> Experience shows that harmonization by processes such as model legislation or a core set of uniform provisions is not effective. Where a uniform provision does not accord with the opinion of regulators or parliamentary draftsmen in individual jurisdictions, they may use wording that accord with their opinion of what is needed rather than the desired uniform requirement. (sub. 44, p. 9)

In other areas, jurisdictions have implemented uniform legislation at the time of agreement but inconsistencies have re-emerged since there is no automatic adoption of subsequent changes. For example, in the therapeutic goods area, Victoria passed uniform legislation in 1994 (but not the template arrangements that would automatically adopt Australian Government variations). As a result, Victorian legislation is no longer completely uniform, unlike the legislation in New South Wales and Tasmania, where template arrangements were implemented. And, although model legislation has been more successful in the trade measurement area, notably there are fewer demands for changes to trade measurement legislation and hence less pressure on these arrangements.

Accordingly, the Commission believes that template arrangements are the best way forward in this area. It recognises that some jurisdictions may be concerned about sovereignty issues, however, under these arrangements all governments will have an input into future legislative changes and template legislation provides the best guarantee that legislation will remain consistent over time.

At the very least a core set of provisions should be harmonised

Although the Commission believes that all legislative provisions should be harmonised, in the Discussion Draft it identified a core set that may deliver most of the benefits from legislative harmonisation. This core set of provisions included:

- the scope of any coverage of services;
- pre-conditions for the imposition of bans and mandatory standards;
- mandatory recall powers;
- requirements to notify authorities of voluntary recalls;
- length of interim bans; and
- appeal processes.

In response, the ACCC argued that:

> In those States which have included safety of services in their fair trading legislation, the ACCC is not aware of any use of relevant powers. Lack of harmonisation in relation to services does not appear to be an issue. (sub. DR56, p. 11)

The Commission agrees that the lack of use of these provisions does imply that harmonisation of services is *currently* not a significant issue. However, in chapter 7, the Commission has recommended changes to the focus of services regulation that may see more use of these provisions. Consequently, services should still be included in any core set.

In contrast, the Commission, following further consultation, has reviewed its approach on appeal processes and believes that they should *not* be included in the core set. The Commission notes that appeal processes have not been harmonised in some other areas due to the inherent structural differences in the judicial systems of the States and Territories. Notably, when trade measurement legislation was harmonised, appeal processes were not included, instead remaining in distinct, separate acts. Some of the reasons for separating out appeal processes included:

- some jurisdictions had established commercial tribunals where it was more efficient to hear appeals; and
- in jurisdictions which did not have these arrangements, appeals were sent to a District Court, however, in Queensland District Courts were already overburdened so appeals were instead sent to the Magistrates Court (Milliner 1990a,b).

Since many of the issues involved in these core provisions are dealt with elsewhere in the report, table 13.1 outlines exactly what the Commission believes should be included in the harmonised provisions.

Should MCCA support the introduction of enhanced reporting requirements, as recommended in chapter 9, then these provisions should also be added to the core set.

Enforcement

Under cooperative arrangements, inconsistencies in enforcement will remain. Even in other areas where cooperative arrangements are much more developed, such as in food, there are continuing issues with inconsistencies in enforcement. Nonetheless, some policies can minimise these differences.

Table 13.1 **Proposed uniform core provisions**

Provision	*Recommendation*
Services	All product safety Acts should cover services related to the supply, installation and maintenance of consumer products.
Pre-conditions for bans and mandatory recalls	Products should only be banned if 'the goods are goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person.'
Pre-conditions for mandatory safety standards	The pre-condition of 'as are reasonably necessary to prevent or reduce the risk of injury' should be adopted.
Mandatory recall powers	All jurisdictions should have the power to order mandatory recalls when satisfactory action has not been taken by the supplier.
Notification of voluntary recalls	All voluntary recalls should be notified to regulators. If notification is given to the ACCC under the TPA this should be sufficient to satisfy all other notification requirements.
Length of interim bans	Interim bans should be 120 days in length (and only extended or made permanent through the MCCA process proposed).

The Commission believes that to move towards greater consistency in enforcement, regulators should:

- identify key inconsistencies and issues for businesses;
- benchmark enforcement decisions across jurisdictions; and
- institute joint information and education programs relating to unsafe products.

A number of these actions, such as benchmarking, have been used with success in the enforcement of trade measurement regulations. In addition, responding to complaints about inconsistency in food enforcement, regulators have outlined a new strategy which sets medium and long-term goals to guide greater consistency in particular areas of enforcement (see box 13.2). The Commission urges regulators to look to the practices of other regulatory areas to guide their implementation.

Some participants have also commented that there is some confusion over which jurisdictions have responsibility for transactions occurring over the internet. As the Victorian Government stated:

> Internet based transactions pose a problem for consumer agencies as they often by-pass the traditional outlets including shop fronts, and there is a greater potential for bypassing national laws and standards. (sub. DR60, p. 25)

Box 13.2 **Strategy for consistent implementation of food regulation**

In the late 1990s, Australian governments established a new food regulatory system, more focused on delivering nationally consistent food regulations. A key component of the new system was the establishment of the Food Standards Implementation Sub-Committee (ISC) which, among other things, is responsible for delivering consistency in enforcement practices. The ISC (2005) have recently published a strategy that attempts to provide a framework for collaborative work amongst Australian food safety regulators.

The strategy divides enforcement practices into discrete tasks and outlines how to achieve greater consistency in these areas. Some of the specific plans included:

- *surveillance and monitoring* — perform annual survey and establish mechanisms to share intelligence, surveillance and research information;
- *regulatory and compliance arrangements* — develop national risk profiling categories, resolve differences arising from allocation of business types to these risk categories and develop a set of definitions for key implementation and enforcement terms;
- *food safety incident response and management systems* — coordinate major incident responses and establish an integrated national food recall and food safety incident management system;
- *investigation, enforcement, corrective actions, sanctions and prosecutions* — develop mechanisms for the sharing of compliance information and enforcement activity, agree on enforcement priorities and approaches on strategic issues as they arise and develop a national enforcement policy, based on a graduated response; and
- *food industry and consumer education* — develop mechanisms for the sharing of industry educational and support material, establish an integrated approach to food handler training, undertake audit of currently available consumer information and identify gaps and implement national campaigns of food safety issues.

Since the strategy has only recently been introduced, it is too early to establish its effectiveness. Progress in reaching the goals, however, will be reviewed every three years.

Source: Food Standards Implementation Sub-Committee (2005).

The ACCC (sub. MCCA4, p. 12) also raised concerns that the application of point of sale specifications (which are included in some standards) is not clear in regard to sales that occur over the internet.

The Australian Government's powers over transactions which occur via telecommunication networks, imply that it would have the lead role in enforcing regulations on the internet. However, as expressed in chapter 3, State and Territory regulations will still apply if they are not inconsistent with those made under the

TPA. Accordingly, there would be merit in jurisdictions clarifying these issues, especially as the importance of e-commerce is likely to grow in the future.

RECOMMENDATION 13.4

Should the 'one law, one regulator' regime as recommended not be adopted, then a number of reforms should be made to the existing cooperative arrangements, to be contained within an intergovernmental agreement by all nine jurisdictions, including:

- ***Permanent bans and mandatory standards should only be implemented on a national basis by:***
  - ***automatically initiating the temporary exemption process, under the Mutual Recognition Agreement, when a jurisdiction imposes a temporary ban;***
  - ***requiring the Australian Competition and Consumer Commission (ACCC) to recommend to the Ministerial Council on Consumer Affairs (MCCA) on whether a permanent ban or mandatory standard should be imposed after the conclusion of the temporary exemption;***
  - ***a response to the ACCC's recommendation being made by MCCA using a two-thirds voting rule and on an 'accept or reject' basis; and***
  - ***imposing a time limit of 120 days on the temporary exemption, unless an extension is agreed to by MCCA.***
- ***Consumer product safety legislation should be made uniform, through the establishment of arrangements where legislation passed in one nominated jurisdiction would be adopted by all others, along with all subsequent changes. However, if this cannot be achieved, governments should agree on a core set of uniform provisions. At a minimum, this core set of provisions should include:***
  - ***the scope of any coverage of services***
  - ***pre-conditions for the imposition of bans and mandatory standards***
  - ***mandatory recall powers***
  - ***requirements to notify authorities of voluntary recalls***
  - ***length of interim bans.***

RECOMMENDATION 13.5

If an inter-jurisdictional approach remains, the Ministerial Council on Consumer Affairs should establish processes for the benchmarking of enforcement practices across jurisdictions as a way to lead to greater consistency in enforcement methods.

13.4 The ACCC's role

In all the approaches presented above, the Commission has recommended an expanded role for the ACCC. This would continue a trend in which the ACCC has been taking a more prominent role in this area, with it recently taking over advice on product safety issues from the Australian Treasury and also the administration of the recalls website (www.recalls.gov.au). Previously, the ACCC's main consumer product safety role was the enforcement of product safety orders and the organisation of conferences, which are created to respond to appeals on the imposition bans and recalls by stakeholders. The ACCC has continued responsibility for these conferences, which includes recommending to the Minister a course of action following the conclusion of a conference.

However, its expanded role in the consumer product safety system is likely to conflict with its responsibility to respond impartially on conferences. This would especially be the case if the Commission's recommendation that it be responsible for the creation of all national bans and mandatory standards is implemented.

Accordingly, there may be merit in establishing alternative appeal processes, at the Australian Government level. The Commission has no strong view on how these alternative arrangements should be designed but would see some merit in appeals being made to the Australian Administrative Tribunal to replace the existing conference arrangements.

RECOMMENDATION 13.6

Alternative appeal arrangements should be established, such that the Australian Competition and Consumer Commission is no longer responsible for the review of its own decisions.

13.5 Summing up

There is a need for greater national consistency in product safety regulation. Variations in product safety regulations currently impose substantial costs on taxpayers, businesses and consumers for little extra benefit.

To address these costs, the Commission has recommended significant changes to the regulation of consumer product safety:

- Its preferred option is the establishment of a national regulator administering a single product safety law.

  - If the States and Territories do not refer all their powers to the Australian Government there would still be merit in limiting their role to the imposition of temporary product bans only.
- If neither of these approaches are accepted then uniformity of core provisions, a new mechanism for imposing national standards and permanent bans and the harmonisation of enforcement practices are required.

However, almost regardless of the design of these arrangements, greater harmonisation will fail to be realised if there is not a strong commitment from all governments. Participants have expressed broad support for greater harmonisation and despite this support have indicated that political factors are impeding the harmonisation process. The ACCC has highlighted that the lack of progress can also be attributed to:

> … an unwillingness to accept decisions or outcomes made by other jurisdictions' minsters or agencies and a perceived need to conduct the work themselves. (sub. DR56, p. 12)

The Commission notes that unless jurisdictions commit to stronger cooperation then attempts to harmonise regulations will most likely fail. The high costs of duplication and inconsistency should encourage renewed efforts in this area.

APPENDICES

A Submissions and meetings

Submissions

Submissions to Ministerial Council on Consumer Affairs Review, 2004

Participant	*Submission no.*
ACT Office of Fair Trading	MCCA31
Australian Business Limited	MCCA1
Australian Chamber of Commerce and Industry	MCCA3
Australian Competition and Consumer Commission	MCCA4
Australian Consumers' Association	MCCA5
Australian Electrical and Electronic Manufacturers' Association	MCCA6
Australian Retailers Association	MCCA7
Australian Toy Association	MCCA2
Blind Manufacturers' Association of Australia	MCCA8
Coles Myer Limited	MCCA9
Commonwealth Consumer Affairs Advisory Council	MCCA10
Consumers' Federation of Australia	MCCA11
Department of Justice (Tasmania)	MCCA28
Disability Services Commission of Western Australia	MCCA12
Federal Chamber of Automotive Industries	MCCA13
Infant and Nursery Products Association of Australia	MCCA14
Insurance Council of Australia	MCCA15
Middletons Lawyers	MCCA18
Monash University Accident Research Centre	MCCA16
Motor Trades Association of Australia	MCCA17
National Product Liability Association	MCCA19
New Zealand Retailers Association	MCCA20
NSW Ombudsman	MCCA21
Pharmaceutical Society of Australia	MCCA23

(Continued next page)

Submissions (continued)

Participant	*Submission no.*
Queensland Health	MCCA30
Royal New Zealand Plunket Society	MCCA22
Small Business Development Corporation of Western Australia	MCCA24
Standards Australia	MCCA25
Strategic Injury Prevention Partnership	MCCA26
Tasmanian Chamber of Commerce and Industry	MCCA27
Therapeutic Goods Administration	MCCA29

Submissions to the Productivity Commission

Participant	*Date received 2005*	*Submission no.*
ACCORD Australasia Inc	27 May 10 October	35 DR52
Australian Automobile Association	20 June	38
Australian Chamber of Commerce and Industry	20 May 27 October	34 DR54
Australian Competition and Consumer Commission	28 October	DR56
Australian Consumers' Association	6 July 31 October	41 DR51
Australian Toy Association Limited	17 October	DR49
Blind Manufacturers' Association of Australia	31 May	37
Bryan, Ms Mandy	21 October	DR58
Commonwealth Consumer Affairs Advisory Council	17 July	43
Department of Immigration and Multicultural and Indigenous Affairs	11 October	DR45
Electrical Compliance Testing Association	20 May	33
Employers and Manufacturers' Association Northern Inc	30 June	40
Infant and Nursery Products Association of Australia Inc	28 October	DR55
Insurance Council of Australia	14 October	DR47
Joint Submission from Australian Electrical and Electronic Manufacturers Association and Consumer Electronics Suppliers Association	29 September 2 December	DR44 DR62
Kidsafe New South Wales Inc	2 November	DR57
National Coroners Information System, Victorian Institute of Forensic Medicine	18 October	DR50
National Product Liability Association	20 October	DR53

(Continued next page)

Submissions (continued)

Participant	*Date received 2005*	*Submission no.*
NSW Office of Fair Trading	15 November	DR61
Nottage, Dr Luke	11 July 17 October	42 DR48
NSW Minister for Primary Industries	30 June	39
Queensland Government	7 November	DR59
Safekids New Zealand	17 May	32
Small Business Development Corporation of Western Australia	14 October	DR46
Somers, Dr Ron – SA Department of Health	21 December	DR63
Standards Australia	30 May	36
Victorian Government	10 November	DR60

Consultations with organisations and individuals

Australian Capital Territory

ACT Department of Justice and Community Safety — Office of Fair Trading

Australian Chamber of Commerce and Industry

Australian Competition and Consumer Commission

Commonwealth Consumer Affairs Advisory Council

The Treasury (Australian Government)

New South Wales

Australian Consumers' Association

Australian Lawyers Alliance

Consumer Product Advisory Committee

Department of Commerce — NSW Office of Fair Trading

Insurance Council of Australia

NSW Health — Injury Prevention Unit

Standards Australia

University of NSW — NSW Injury Risk Management Research Centre

Queensland

Blind Manufacturers' Association of Australia

Department of Premier and Cabinet

Department of Tourism, Fair Trading and Wine Industry Development — Office of Fair Trading

Kidsafe Queensland

National Public Health Partnership — Strategic Injury Prevention Partnership

Queensland Health — Environmental Health Unit

Queensland Injury Surveillance Unit

Queensland Treasury

South Australia

Australian Electrical and Electronic Manufacturers' Association

Department of Health — Injury Surveillance and Control Unit, Epidemiology Branch

Office of Consumer & Business Affairs

Department of the Premier and Cabinet

Flinders University — Research Centre for Injury Studies — AIHW National Injury Surveillance Unit

Tasmania

Department of Health — Population and Rural Health Division

Department of Justice — Consumer Affairs and Fair Trading

Kidsafe Australia — Tasmanian Chapter

Victoria

Australian Toy Association

Department of Justice — Consumer Affairs Victoria

Infant and Nursery Products Association of Victoria

National Competition Council

National Product Liability Association

Victorian Institute of Forensic Medicine — National Coroners Information System

Western Australia

Coles Myer Limited

Department of Consumer and Employment Protection

Small Business Development Corporation

New Zealand

Accident Compensation Corporation

Commerce Commission

Consumers' Institute

Ministry of Consumer Affairs

Ministry of Economic Development

Ministry of Justice

Ministry of Justice — Disputes Tribunal

New Zealand Retailers Association

List of roundtable attendees

Accord Australasia Inc

ACT Department of Justice and Community Safety — Office of Fair Trading

Australian Competition and Consumer Commission

Australian Consumers' Association

Australian Electrical and Electronic Manufacturers' Association

Blind Manufacturers' Association of Australia

Coles Myer Limited

Consumer Electronics Suppliers Association

Consumers' Federation of Australia/Consumer Law Centre Victoria

Department of Health and Ageing — Population Health Division

Department of Health and Ageing — Therapeutic Goods Administration

Electrical Compliance Testing Association

Flinders University — Research Centre for Injury Studies — AIHW National Injury Surveillance Unit

Infant and Nursery Products Association of Australia

Kidsafe New South Wales Inc

Monash University Accident Research Centre

National Product Liability Association

NSW Department of Commerce — Office of Fair Trading

Queensland Injury Surveillance Unit

South Australian Government — Office of Consumer and Business Affairs

Standards Australia

Tasmanian Department of Justice — Consumer Affairs and Fair Trading

The Treasury (Australian Government)

University of NSW — NSW Injury Risk Management Research Centre

Victorian Department of Justice — Consumer Affairs Victoria

Victorian Institute of Forensic Medicine —National Centre for Injury Studies

Western Australian Department of Consumer and Employment Protection

B Inconsistencies between jurisdictions

Key points

- There are a range of inconsistencies among Australian, State and Territory product safety legislation.
- Differences in legislation include: varying coverage of services, some differences in the criteria necessary for action, differences in the length of interim bans and lack of recall powers (or notification requirements for voluntary recalls) in certain jurisdictions.
- There are large differences in adoption and use of bans and standards:
  - of the products that are banned, over 80 per cent are only banned in two (out of nine) jurisdictions and only ten per cent of banned products are banned in more than four jurisdictions; and
  - there is more uniformity in standards, but still 35 per cent of products covered by a mandatory standard are only covered in one jurisdiction.

Nine Australian Governments have responsibility for regulating product safety. Although the objectives of the jurisdictions are almost identical, their legislation varies on a number of specifics. Each jurisdiction also has its own agency responsible for enforcement, so even the interpretation of similar legislation can vary.

There are three main sources of inconsistency between jurisdictions:

- inconsistencies in the coverage and scope of legislation — for example on whether the provisions cover services as well as goods;
- inconsistencies in the adoption and use of standards, bans and recalls — for example some jurisdictions ban goods which others do not; and
- inconsistencies in the enforcement of provisions — for example some jurisdictions offer more avenues for appeal than other jurisdictions.

This appendix outlines the main differences between jurisdictions, drawing in particular on previous work completed by the Tasmanian Department of Justice and Industrial Relations (DJIR 2001). It is not, however, an exhaustive list and it inevitably generalises some terms. For an accurate description, the legislation should be consulted (where possible relevant sections are referenced).

B.1 Inconsistencies in legislation

Table B.1 lists the Acts of each jurisdiction as well as the relevant product safety sections.[1]

Table B.1 **Product safety provisions**

Jurisdiction	*Act*	*Product safety provisions*	*Product safety agency*	*Enforcement provisions*
Australian Government	*Trade Practices Act 1974*	Part V, Div 1A	Australian Competition and Consumer Commission	Part VC, Div 3
New South Wales	*Fair Trading Act 1987*	Part 3 and Part 4, Div 1	Office of Fair Trading	Part 6
Victoria	*Fair Trading Act 1999*	Part 3	Consumer Affairs Victoria	Part 11
Queensland	*Fair Trading Act 1989*	Part 4	Office of Fair Trading	Part 5
Western Australia	*Consumer Affairs (CA) Act 1971* *Fair Trading (FT) Act 1987*	CA Part IIIA; FT Parts V and VI	Department of Consumer and Employment Protection	FT Part VII
South Australia	*Trade Standards Act 1979*	Parts 3, 3A and 5	Office of Consumer and Business Affairs	Part 7
Tasmania	*Sale of Hazardous Goods Act 1977* *Goods (Trade Descriptions) Act 1971* *Flammable Clothing Act 1973*	ss. 6, 7, 8 and 9	Office of Consumer Affairs and Fair Trading	s. 10
Northern Territory	*Consumer Affairs and Fair Trading Act 1990*	Part 4	Office of Consumer and Business Affairs	Part 6
ACT	*Fair Trading (Consumer Affairs) Act 1973*	Parts 4 and 5	Office of Fair Trading	Part 3

Coverage of legislation

Some jurisdictions allow certain product safety provisions to relate to services as well as goods. For example, a ban or a mandatory standard can relate to services in

[1] References in this appendix, refer to the Acts in this table. In the case of Western Australia, where there are two relevant Acts, the abbreviations in the table are used. And, all references to Tasmanian legislation refer to the *Sale of Hazardous Goods Act 1977*.

Victoria, Queensland, South Australia and a warning notice can relate to services in New South Wales, Victoria and South Australia.[2] Nonetheless, these provisions appear to have had minimal use in relation to services. There is no express coverage of services by the Australian Government, Western Australia, Tasmania, the Northern Territory and the ACT.

Tasmanian legislation only applies to the *sale* of goods, whereas all other product safety legislation relates to the *supply* of goods or services. However, this supply generally needs to be in trade and commerce (or trade in business in South Australia) so the effect of these inconsistencies is probably minimal.[3]

The necessary conditions before action can be taken under product safety legislation are fairly similar (see table B.2). There are, however, some differences:

- A product can generally be banned if there is a reasonable belief that it 'will or may cause injury'. Deviations from this include:
  - 'Cause' is not mentioned in the pre-condition for a ban in South Australia, Tasmania, the Northern Territory and the ACT.
  - In South Australia and the Northern Territory, a ban can be implemented against 'dangerous' goods or goods that are a 'source of danger'. There is no express definition of these terms in South Australia or the Northern Territory; however, other jurisdictions (such as New South Wales, Victoria and Western Australia) that also have a dangerous goods criterion, define it to be one that is 'likely to cause death or injury'.
- In Tasmania, there is a higher threshold for the implementation of a ban where the 'dangerous' goods definition refers to goods that give rise to a *substantial* risk of injury or danger to health. Whether or not this apparently higher threshold prevents Tasmania from taking action, however, is debatable — they issue about the same number of bans as other jurisdictions (see table 3.1).
- In all States and Territories, but not under the TPA, there is an express ability to ban products that may cause damage to the 'health' of persons. Yet, the practical effect of this difference is unlikely to be large, given that a challenge on the Australian Government's ban of smokeless tobacco failed because the court interpreted the requirement of 'will or may cause injury' to include disease (see *United States Tobacco Co* v *Minister for Consumer Affairs & Ors* (1988) ATPR 40−870).

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[2] NSW s. 86A, Vic ss. 34(2), 35(1), 39, 40(1) and 58(1); Qld ss. 83(1), 85(1) and 85A(1); SA ss. 23(3)(b), 25(1)(b), 26A(1)(b) and 27(1).

[3] The ACT does not refer to the supply of goods needing to be in trade or commerce. However, the express definition of supply in ACT legislation (by way of sale, exchange, lease, hire or hire purchase) brings it close to a 'trade or commerce' definition.

Table B.2 **Selected pre-conditions for product safety orders**[a]

Pre-condition	*Jurisdiction*
Interim bans	
will or may cause injury	Australian Government (s. 65 C(5))
likely to cause death or injury	New South Wales (ss. 4 and 30(1)), Queensland (ss. 85(1) and 85A(1)) and Western Australia (CA ss. 23B and 23Q(1))
likely to cause death or serious injury	Victoria (ss. 3 and 35(2))
may be dangerous	South Australia (s. 26A(1))
substantial risk of injury	Tasmania (ss. 2 and 7(1))
under investigation	Northern Territory (ss. 28 and 30(1))
to prevent or reduce the risk of injury	ACT (s. 26(1))
Permanent bans	
where interim order expired and no safety standard prescribed	Australian Government (s. 65C(7))
after consideration of report or recommendation	New South Wales (s. 31(1)) and Western Australia (CA ss. 23L(1) and 23R(1)
likely to cause death or injury	Victoria (ss. 3 and 40(3)(b)(i)) and Queensland (s. 85(1))
to avert risk of injury and cannot not be dealt with by a safety standard	South Australia (s. 25(2))
substantial risk of injury	Tasmania (ss. 2 and 8(1)(a))
possible source of danger to health	Northern Territory (s. 30(3))
to prevent or reduce risk of injury	ACT (s. 27(1))
Emergency bans or recalls	
imminent risk of death, serious illness or serious injury	Australian Government (s. 65L(1))
Recalls	
will or may cause injury	Australian Government (s. 65F(1)(b)), New South Wales (ss. 34 and 35(1)), Victoria (s. 50(1)(a)(i)), South Australia (s. 27A) and ACT (s. 37(1)(b(i))
imminent risk of death, serious illness or serious injury	Western Australia (FT s. 55(1))
goods subject to investigation	Northern Territory (s. 33(2))
Safety standards	
to prevent or reduce the risk of injury	Australian Government (s. 65C(2)), New South Wales (s. 26(2)), Victoria (s. 34(1)), Queensland (s. 83(2)), Western Australia (FT s. 50(2)), South Australia (s. 23(1)), Northern Territory (s. 25(2)) and ACT (s. 25(2))
substantial risk of injury	Tasmania (ss. 2 and 8(1)(b))

a Some of the pre-conditions have been abbreviated for the purposes of this table. See relevant sections for complete wording.

Powers of intervention

All jurisdictions basically have the same powers

Most jurisdictions have the power to implement the commonly used product safety interventions. For instance, all jurisdictions have the power to ban or mandate a standard for products.

Nonetheless, some of the less frequently used interventions are not available to all jurisdictions. For example:

- Queensland and Tasmanian authorities cannot recall products;
- there is no provision for the issuing of warning notices in Queensland, Tasmania, the Northern Territory and the ACT; and
- wholesalers in Tasmania, who are in possession of a product that they believe is likely to be a source of danger, must notify authorities.[4]

Although each jurisdiction has similar powers, there are some variations in who decides to exercise such powers. Usually the relevant Minister responsible for consumer affairs makes such decisions. However, in Western Australia, the Commissioner (of its Consumer Product Safety Committee) has the responsibility — though the Minister can overrule decisions on permanent bans.[5] In the ACT, the Commissioner (of its Product Safety Advisory Committee) can also ban a good if a similar prohibition exists in another jurisdiction.[6] And, in New South Wales and Victoria, the Director General (of the New South Wales Office of Fair Trading) or Director (of Consumer Affairs Victoria) can, in addition to the Minister, issue warning notices and, in New South Wales, order recalls.[7]

There are some variations in how the powers can be applied

Interim bans last for different lengths of time depending on the jurisdiction:

- 28 days (Western Australia, Northern Territory and ACT);
- 42 days (Queensland);
- 3 months (New South Wales, Victoria and South Australia);
- 18 months (Australian Government); and

4 Tas s. 6.

5 WA CA s. 23R(7), (8) & (9).

6 ACT s. 29(2).

7 NSW ss. 35(1) and 86A(1); Vic 58(1).

- no period specified (Tasmania).[8]

In New South Wales, Victoria, Queensland, Western Australia, South Australia, Northern Territory and the ACT these periods can be extended for another period, usually only once.[9] In Queensland, 'permanent' bans expire after 18 months and then can only be extended through a regulation amendment, if thought necessary.[10]

There are also variations in some of the pre-conditions for the issuing of interim bans. For example, interim bans can be triggered:

- when a safety question, relating to the goods, is referred to the product safety committee (New South Wales, Western Australia, Tasmania, Northern Territory and ACT);
- where recommended by the product safety committee, Commissioner or Director (New South Wales, Victoria, Queensland, Western Australia, South Australia);
- where there is a similar prohibition in another jurisdiction (New South Wales, and Queensland).[11]

Permanent bans can be issued:

- when an interim order has expired and there is no prescribed safety standard for the good (Australian Government and Victoria);
- where there is a similar prohibition in another jurisdiction (New South Wales, Victoria, Western Australia and ACT).[12]

Furthermore, at the Australian Government level, and in Victoria, South Australia and the ACT, mandatory recalls can only be issued if the supplier has not taken satisfactory action to prevent the goods causing injury.[13] With the exception of Queensland and Tasmania, businesses must notify the appropriate authorities when they undertake voluntary recalls.[14] Notification requirements in New South Wales,

8 TPA s. 65C(6); NSW s. 30(3); Vic s. 36(2); Qld s. 85A(5); WA CA s. 23Q(1); SA s. 26A; NT s. 30(1); ACT s. 26(5)(a).

9 NSW s. 30(4); Vic s. 36(4); Qld s. 85A(6) &(7); WA s. 23Q(5); SA s. 23(2); NT s. 30(2); ACT s. 26(7).

10 Qld s. 85(5).

11 NSW s. 30(1); Vic s. 35(1); Qld s. 85A(3); WA CA s. 23Q(2) & (3); SA 26A(1); Tas s. 7(1); NT s. 30(1); ACT s. 61(3).

12 TPA s. 65C(7); NSW s. 31(1)(c); Vic s. 40(2); WA CA s. 23R(3) & (4); ACT s. 29(1) & (2).

13 TPA s. 65F(1)(c); Vic s. 50(1)(b); SA s. 27A(c); ACT s. 37(1)(c).

14 TPA s. 65F(7); NSW s. 36D(1); Vic s. 49(1); WA s. FT 54(9); SA s. 27C(1); NT s. 36(1); ACT s. 37(9) & (10).

Victoria, Western Australia and the ACT are waived when the Australian Government Minister has been notified under the TPA.[15]

The permitted elements of an information standard also vary between jurisdictions. For example, in some jurisdictions express provision is made to allow the place of manufacture, identity of manufacturer or date of manufacture to be a requirement of an information standard. Other jurisdictions also allow for care, storage and flammability information.

In Western Australia and South Australia, express parts of their Acts provide for the creation of quality and packaging standards.[16] Nonetheless, other jurisdictions are generally permitted to make standards, in relation to quality and packaging guidelines, by using information standards (see chapter 3).

Finally, in some jurisdictions certain types of goods are exempted from product safety provisions, for example:

- an organisation that undertakes the marketing of primary products, or is an Australian Government body, is exempt from Australian Government product safety orders;
- Australian Government information standards do not apply to goods that are intended for export;
- in Western Australia, goods that are intended for supply outside that jurisdiction are exempt from product safety orders;
- goods that are supplied for repair are exempt in Western Australia and ACT; and
- specified entities can also be exempted in Victoria, South Australia and the Northern Territory.[17]

B.2 Inconsistencies in the adoption of standards, bans and recalls

Product safety legislation is generally applied by the Minister responsible for consumer affairs in each jurisdiction. Product Safety Committees in the States and Territories advise on these decisions. Table B.3 lists some of the differences in the composition of the Product Safety Committees.

15 NSW s. 36D(2); Vic s. 49(2); WA s. FT 54(11); ACT s. 37(11).

16 WA FT Part VI, Divs 5 and 6; SA Parts 4 and 6.

17 TPA ss. 65D(3) and 172(2); Vic s. 165(2)(e); WA CA 23C(1) and FT s. 48(1), 51(4) and 60(4); SA s. 45(3)(b); NT s. 337(2); ACT s. 30(2)(b)(i).

Table B.3 **Product safety committees**

Jurisdiction	*Product safety committee*	*Number of members*	*Composition*
New South Wales (s. 24)	Product Safety Committee	determined by Minister	Chairperson, Executive Officer, others appointed by Minister
Queensland (s. 24)	Consumer Safety Committee	determined by Minister	Commissioner, others appointed by Minister
Western Australia (CA s. 23E)	Consumer Products Safety Committee	7	Officer of Department (Chairperson), others deemed by Minister
South Australia (s. 8)	Trade Standards Advisory Council	6	Nomination of Minister, employer representative, supplier representative, consumer representative, person with standard-making experience
Tasmania (s. 3(1))	Product Safety Committee	3	Director of Consumer Affairs and Fair Trading, Director of Public Health, nominee of Minister
Northern Territory (s. 14)	Consumer Affairs Council	6 to 10	At least 4 non-commercial representatives and no more than 2 commercial representatives (all appointed by Minister)
ACT (s. 17(2))	Product Safety Advisory Committee	determined by Minister	Chairperson, agency employee (executive officer), others appointed by Minister

Both the Minister and the Committees are advised by each jurisdiction's fair trading agency (or the ACCC in the case of the Australian Government). These agencies are also responsible for enforcement of product safety decisions (see below).

The adoption of standards, bans and recalls

As shown above, most jurisdictions have similar criteria for the imposition of bans, standards and recalls. There is generally a requirement that a reasonable expectation be formed that the goods are dangerous or 'will or may cause injury' before a ban can be imposed, or that a standard will 'prevent or reduce the risk of injury' before it can be mandated.

Nonetheless, the actual application of these measures varies widely between jurisdictions. Indeed, even where jurisdictions have similar criteria for the imposition of bans and standards, variations are prevalent. For example, New South Wales and Western Australia have identical pre-conditions for the imposition of a ban or mandatory standard; yet only 20 per cent of the bans, and around 50 per cent

of the standards, that apply in either New South Wales or Western Australia, apply across both jurisdictions.

Tables B.4 and B.5 list all the currently applied standards and bans in different jurisdictions: there are 111 products subject to a ban and 57 products subject to mandatory standards. None of these bans or standards apply in all jurisdictions.

The largest differences are in bans. Of the 111 products banned, only 12 can be thought of as applying nationwide, and then only because they are imposed by the Australian Government and thus cover all corporations and entities that trade interstate or within a territory. A few bans are applied in most jurisdictions: for example, expanding novelty toys, yo-yo water balls, lead wicks in candles and novelty flashing dummies are banned in 6 out of the 9 jurisdictions.

The majority of bans, however, apply in only one jurisdiction (see figure B.1). Further, over 80 per cent of the products banned are only banned in two jurisdictions and only 10 per cent of bans apply in four or more jurisdictions. Further, many of these bans apply to very specific products: such as particular types of toys or furniture.

Although the application of standards appears to vary less, there are still significant differences between jurisdictions in the range of products covered by mandatory standards. For example, 35 per cent of mandatory standards only apply in one jurisdiction; yet, unlike bans, nearly 50 per cent of standards apply in four or more jurisdictions. In addition, mandatory standards in relation to children's nightwear, cots, cigarette lighters and toys (for children under 3) apply to *all* entities since they are mandated under the TPA and in all States.

Standards, however, are a more complicated intervention than a ban; differences can also arise between mandatory standards that are applied to the *same* product. For example, the Commission is aware of differences that exist in mandatory standards relating to children's nightwear, projectile toys and spa outlets.

Table B.4 **Currently applied (safety and information) standards**

Product	*Australian Government*	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Automotive air-conditioning recharge kits					✓				
Baby rattlers							✓		
Baby walkers	✓	✓	✓	✓	✓		✓	✓	
Balloon blowing kits	✓	✓**a**	✓**a**		✓	✓	✓		✓
Bath supports for infants	✓	✓**a**	✓**a**	✓	✓				✓
Basketball rings and backboards	✓		✓						
Bean bags	✓	✓		✓	✓	✓	✓		✓
Brush cutters, clearing saw or grass trimmer				✓					
Bunk beds	✓		✓	✓	✓		✓	✓	✓
Care labelling for clothing	✓	✓			✓	✓			✓
Cellulosic fibre thermal insulation					✓				
Chemistry sets					✓				
Child carry seat for bicycles					✓		✓		
Child restraints for motor vehicles	✓	✓		✓	✓				✓
Children’s nightwear and limited daywear	✓	✓	✓**a**	✓	✓	✓	✓		✓
Children’s toy umbrellas					✓				
Corded internal window coverings (blind cords)		✓			✓		✓		✓
Cosmetic labelling	✓			✓		✓			
Cots for household use	✓	✓	✓**a**	✓	✓	✓	✓		✓
Disposable cigarette lighters	✓	✓	✓	✓	✓	✓	✓		✓

(Continued next page)

Table B.4 **(continued)**

Product	*Australian Government*	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Domestic service lifts					✓				
Elastic luggage (or 'occy') straps	✓	✓			✓	✓			
Erasers shaped like dummies					✓				
Electrical compliance consumption								✓	
Exercise cycles	✓			✓	✓		✓		
Flotation devices and swimming aids	✓	✓		✓	✓	✓			✓
Folding chairs (children's)		✓**a**	✓**a**			✓			
Folding laundry trolleys				✓					
Footwear				✓	✓	✓	✓		
Furniture				✓	✓	✓			
Helmets for motor cyclists	✓	✓		✓	✓				
Helmets for pedal cyclists	✓	✓		✓	✓	✓			✓
Hot water bottles			✓**a**						
Kerosene heaters					✓				
Laser pointers		✓							✓
Leather goods				✓					
Movable/portable soccer goals		✓	✓**a**						
Opals						✓			
Paper patterns for children's clothes	✓	✓	✓**a**		✓	✓	✓		✓
Pedal bicycles	✓	✓		✓	✓	✓			✓
Petrol price signs		✓							
Portable fire extinguishers (aerosol)	✓			✓					
Portable fire extinguishers (non-aerosol)	✓			✓	✓				
Portable ramps for motor vehicles	✓			✓	✓	✓			
Projectile toys		✓	✓**a**	✓	✓		✓	✓**a**	✓

(Continued next page)

Table B.4 **(continued)**

Product	*Australian Government*	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Puller winches							✓		
Ring caps for cap guns							✓		
Safety footwear							✓		
Spa outlets		✓			✓				
Sunglasses and fashion spectacles	✓	✓		✓	✓	✓			✓
Swimming pool outlets		✓							
Textiles (fibre content)		✓		✓	✓	✓	✓		
Tobacco labelling	✓								
Toys for children under 3 years	✓	✓	✓	✓	✓	✓	✓		✓
Trolley jacks	✓			✓	✓	✓			
Vehicle jacks	✓			✓	✓	✓			✓
Vehicle support stands	✓			✓	✓	✓			
Total	**28**	**23**[b]	**5**[b]	**29**	**38**	**23**	**19**	**3**[b]	**19**

a Imposed as a ban rather than a standard. **b** Does not include those 'standards' that are imposed through banning orders.

Data source: ACCC (2005a,b), Office of Fair Trading (2005), Consumer Affairs Victoria (2005), Office of Fair Trading (2005), Department of Consumer and Employment Protection (2005), Office of Consumer and Business Affairs (South Australia) (2005), Consumer Affairs and Fair Trading (2005a,b), Office of Consumer and Business Affairs (Northern Territory) (2005), *Consumer Affairs (Product Safety Standards) Regulations* (Northern Territory), *Consumer Affairs (Product Information Standards) Regulations* and *Fair Trading (Consumer Product Standards) Regulation 2002* (ACT).

Table B.5 **Currently applied bans**

Product	*Australian Government*	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
.303 inch ball MK7 ammunition							✓		
Aqualarm						✓			
Asbestos products									✓
Autotrend sun filter	✓				✓				
Baby bomba								✓	
Baby bath supports		✓							
Baby rattles: certain models							✓		✓
Bed restraints									✓
Balloon blowing novelties					✓				
BB Air Sport Gun and similar toy guns			✓						
Blowguns			✓				✓		
Car seat covers							✓		
Child restraints									✓
Children's roller skates ("Sizzler Kids Boot Skates")							✓		
Children's toy umbrellas: spring loaded					✓				
Chopsticks coated with lead paint			✓						
Citronella candles								✓	
Confectionary: "whistle bottle"					✓		✓		
Cookware: habitat microwave			✓						
Cot and bed restraints		✓	✓						
Cots: portable folding (certain models)		✓							✓
Crib and playpen snap-lock beads			✓						
Cross-bow: "Barnett pistol cross-bow"							✓	✓	
Dart gun sets		✓	✓				✓	✓	
"Datchery dart slinger"									✓

(Continued next page)

Table B.5 **(continued)**

Product	*Australian Government*	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Dinnerware: imported Chinese with excessive lead levels							✓	✓	
Diveman breathing apparatus	✓	✓	✓		✓		✓		
Disposable lighter: child restraint mechanism disabler		✓	✓						
Dummy (safe'n'sound cough pacifier)							✓		
Emergency car light and sound watch			✓						
Expanding bath toys								✓	
Expanding novelty toys		✓	✓		✓	✓		✓	✓
Flammable candles or candleholders		✓	✓		✓				
Foil confetti						✓			
Folding chairs (hinged or pivoted)		✓	✓						
Gas masks which contain asbestos	✓		✓				✓		
Glucomannan in tablet form	✓				✓				
Geri bags (used for carrying petrol)			✓						✓
Glass imitation confectionary									✓
Glider plane			✓						
"Hand boiler" or "Love Meter"			✓						
Harnesses and lines for yachting		✓							
Headlight covers (tinted) for vehicles	✓								
"Help multi-task cleaner"									✓
Hydro pneumatic toy rockets								✓	
Ice pipes (used for smoking amphetamines)			✓			✓			
Infant footwear (containing buckles)							✓		

(Continued next page)

Table B.5 **(continued)**

Product	*Australian Government*	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Inflatable toys, novelties, furniture or items made of soft plastic		✓					✓		
Lead wicks in candles	✓	✓	✓		✓	✓	✓		
Liquid filled novelties		✓			✓				
Liquid squirt toys		✓							
Knives contained in certain toys		✓							
Laser pointer guns		✓							
Mini-cup jelly containing konjac	✓	✓	✓					✓	
Monkey bikes			✓	✓					
Motorcycle handlebar windscreens					✓		✓		
Moulded skimmer boxes			✓		✓	✓		✓	✓
Mouth toys containing loose objects							✓		
Nivins perfumed glue									✓
Novelty cigarettes			✓		✓		✓		
Novelty drinking straw			✓						
Novelty flashing dummies		✓	✓	✓	✓	✓		✓	
Novelty toy cigarette lighter (including “Mad Dog lighter”)			✓		✓	✓	✓		✓
Novelty wine bottles			✓						
Pillows, cushions, mattresses containing expanded polystyrene beads							✓		
Polyester padded oven mitts								✓	
Pop domes and similar products		✓							
Pop gun			✓						✓
Portable home exercise equipment		✓			✓				

(Continued next page)

Table B.5 **(continued)**

Product	*Australian Government*	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Portable spring exercisers								✓	✓
Power tools (Panzer and International brands)						✓			
“Pull along mini loco”			✓						
Push along toys			✓						
Projectile toys: small parts	✓				✓				
“Quickie” line release system	✓		✓				✓		
Rotary paint strippers							✓		
Safety pins for nappies or “Happy Baby Nappy Clips”			✓		✓		✓	✓	✓
Santa bags		✓							
Seat belt accessories	✓				✓				
Self loading centre fire rifles									✓
Siphon bulbs		✓							
Sjoffels water shoes		✓	✓						
Skin treatment preparations (containing fibrous silicious)							✓		
Slingshots, shanghais and catapults							✓	✓	✓
Smokeless tobacco products	✓								
Snakebite kits recommending incorrect snakebite treatment					✓				
Sparkle bracelets								✓	
Spark cars			✓						
Spinning disk toy						✓			
Stuffed venomous snakes			✓				✓		
St. Valentine ball point pen						✓			

(Continued next page)

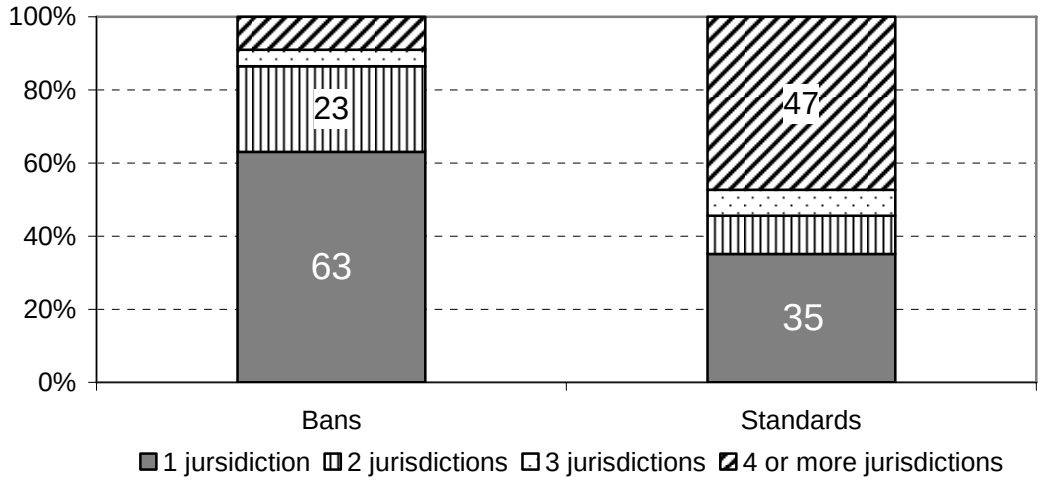
Table B.5 **(continued)**

Product	*Australian Government*	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*NT*	*ACT*
Super cap gun						✓			
Swimming pool main drain covers		✓							
Tattoo removal kits							✓		
Tea set			✓						
“The Hooker” (glass product)							✓		
Tommee-Tippee cuddle-sak						✓			
Toy: 4x4 renegade jeep			✓						
Toy aeroplane with launching device									✓
Toy hammer			✓						
Toy mobile phones								✓	
Toy vacuum cleaner			✓						
Toys containing abrus precatorius seeds			✓		✓				
Toys containing small pellets		✓							
Toys containing strychnos nux vomica			✓						
Trafalgar medicine glass								✓	
Underwater toys and games		✓							
Vehicle seat covers fitted with straps		✓							
Victim toys	✓				✓				
‘Western Ranger’ cap rifle						✓			
Yo-yo water balls		✓	✓	✓[b]	✓	✓	✓		
Total	**12**	**31[a]**	**51[a]**	**3**	**23**	**14**	**28**	**19[a]**	**19**

a Includes banning orders that have been presented as standards in the previous table. **b** Enforced through regulation rather than a banning order.

Data source: ACCC (2005a,b), Office of Fair Trading (2005), Consumer Affairs Victoria (2005), Office of Fair Trading (2005), Department of Consumer and Employment Protection (2005), Office of Consumer and Business Affairs (South Australia) (2005), Consumer Affairs and Fair Trading (2005a,b), Office of Consumer and Business Affairs (Northern Territory) (2005), *Consumer Affairs (Product Safety Standards) Regulations* (Northern Territory), *Consumer Affairs (Product Information Standards) Regulations* and *Fair Trading (Consumer Product Standards) Regulation 2002* (ACT).

Figure B.1 **Bans and standards applying in different jurisdictions**



Data source: ACCC (2005a,b), Office of Fair Trading (2005), Consumer Affairs Victoria (2005), Office of Fair Trading (2005), Department of Consumer and Employment Protection (2005), Office of Consumer and Business Affairs (South Australia) (2005), Consumer Affairs and Fair Trading (2005a,b), Office of Consumer and Business Affairs (Northern Territory) (2005), *Consumer Affairs (Product Safety Standards) Regulations* (Northern Territory), *Consumer Affairs (Product Information Standards) Regulations* and *Fair Trading (Consumer Product Standards) Regulation 2002* (ACT).

B.3 Inconsistencies in enforcement

The fair trading agencies in each State and Territory (and the ACCC at the Australian Government level) all have similar powers to enforce the above product safety provisions. Variously these include powers to search and inspect premises and documents, question individuals and remove suspected goods. At times, product safety agencies use these powers to carry out pre-emptive surveys or audits (usually during "Show week" or Christmas shopping periods).

There are some restrictions, however, on the information and evidence that can be demanded in certain jurisdictions. For example, in Queensland agencies cannot demand information on the names and addresses of persons or their ownership of particular businesses.[18] In South Australia self-incriminating information does not have to be provided.[19]

Further, some agencies are required to seek warrants to search premises. The ACCC and agencies in Victoria, Queensland, Western Australia, Northern Territory and the ACT must usually seek a warrant prior to inspections. These warrants are valid for

[18] Qld s. 90(6A).

[19] SA ss. 15(5) and 16(3).

one month in Victoria, Queensland, the Northern Territory and the ACT, and for seven days under the TPA.[20]

Agencies can also carry out searches without a warrant:

- in an emergency (under the TPA or in Victoria);
- with the consent of the occupier (in Victoria, Northern Territory and ACT); or
- on the authority of the Minister (in Tasmania).[21]

Other jurisdictions also have recourse to injunctions or undertakings. Injunctions allow agencies to file for a court order preventing someone from supplying goods if he/she is suspected of supplying, or planning to supply, goods that contravene a product safety provision. Injunctions can be sought by the ACCC and in New South Wales, Victoria, Queensland, Western Australia and the Northern Territory.[22] Undertakings are agreements between an agency and a supplier that is suspected of supplying unsafe or dangerous goods. They are enforced by courts and can be agreed to by the ACCC, the Director General in New South Wales and by the Director in Victoria.[23]

All jurisdictions can prosecute entities that have been found to breach product safety provisions, but in some jurisdictions there are time limits for commencing prosecutions. For example, prosecutions must be initiated within three years of the alleged offence in New South Wales, Victoria, Queensland and Western Australia.[24] While in South Australia they must be initiated within two years, but the Minister can approve the initiation of prosecutions for up to 5 years after the suspected offence.[25]

There are large differences in the maximum penalties that can be applied for non-compliance. Table B.6 shows that these vary from $5000 (in Tasmania) to $1.1 million (under the TPA). In most jurisdictions, penalties applying to corporations are much higher than those applying to individuals.

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20 TPA s. 65Q(3) & (7); Vic ss. 122(1) & (3)(d); Qld s. 89(1A), (3) & (4); WA CA s. 19(2)(a); NT s. 20(2) & (4); ACT s. 12(1)(d).

21 TPA s. 65(3); Vic ss. 119(1) and s. 121(1); Tas s. 11(1); NT s. 20(2)(a); ACT s. 12(1)(a).

22 TPA ss. 80 and 80A; NSW ss. 65, 66 and 67; Vic ss. 149, 150, 151 and 152; Qld s. 98; WA FT ss. 74, 75 and 76; NT ss. 89 and 90.

23 TPA ss. 87B(2) and 87C(2); NSW s. 73A; Vic s. 146(1).

24 NSW s63(6); Vic s. 142; Qld s. 94(6)(b); WA FT s. 69(5).

25 SA s. 43(1).

Table B.6 **Maximum penalties**

Jurisdiction	*Enforcement agency*	*Corporations*		*Individuals*	
		Breach of a ban, standard or recall	Breach of voluntary recall requirement	Breach of a ban, standard or recall	Breach of voluntary recall requirement
		$'000	$'000	$'000	$'000
Australian Government	ACCC	1100	16.5	220	3.3
New South Wales	Office of Fair Trading	110	11	22	2.2
Victoria	Consumer Affairs Victoria	62.9	62.9	25.1	25.1
Queensland	Office of Fair Trading	40.5	na	40.5	na
Western Australia	Department of Consumer and Employment Protection	100	10	20	5
South Australia	Office of Consumer and Business Affairs	10[a]	10[a]	10[a]	10[a]
Tasmania	Office of Consumer Affairs and Fair Trading	5	na	5	na
Northern Territory	Office of Consumer and Business Affairs	100	20	20	5
ACT	Office of Fair Trading	100	10	20	2

a The Commissioner also has the option of imposing an expiation fee of $315 for lesser offences. na: not applicable

Source: *Trade Practices Act 1974* (ss 6, 65R(2), 75AZS, 75AZT & 75AZU), *Crimes Act 1914* (ss 4AA & 4B(3)), *Fair Trading Act* (New South Wales) *1987* (ss 36D & 62), *Crimes (Sentencing Procedures) Act* (New South Wales) *1999* (s 17), *Fair Trading Act* (Victoria) *1999* (ss 49(1), 33(1), 38, 44, 46 & 53), Office of the Chief Parliamentary Counsel (2005), *Fair Trading Act* (Queensland) 1989 (ss 82(1), 84(1) & 86), *Penalties and Sentences Act* (Queensland) *1992* (s 5(1)), *Fair Trading Act* (Western Australia) *1981* (ss 54(10) & 69(2)), *Trade Standards Act* (South Australia) *1979* (ss 22(1) & (2), 24 (1) & (2), 26A(3), 27A(11) & 27C(2)), *Sale of Hazardous Goods Act* (Tasmania) *1977* (s 10), *Penalty Units and Other Penalties Act* (Tasmania) *1987* (s 4), *Consumer Affairs and Fair Trading Act* (Northern Territory) *1980* (ss 36(3) & 88(2)), *Fair Trading (Consumer Affairs) Act* (ACT) *1973* (ss 30(1), 37(8) & (10)) and *Legislation Act* (ACT) *2001* (s 133).

Entities that face prosecution only have a limited number of defences available. At the Australian Government level, and in New South Wales, Victoria, Queensland, Western Australian and the Northern Territory, a supplier can argue that the contravention was a 'reasonable mistake'. To prove a reasonable mistake suppliers

have to show that they conducted sufficient due diligence prior to the contravention.[26]

Other defences include:

- the contravention of a safety standard resulted from goods being acquired for re-supply and the good faith of the original supplier being relied upon (under the TPA and in Western Australia); and
- the contravention was due to the act or default of another person (under the TPA, and in New South Wales, Victoria, Queensland, Western Australia, South Australia and the Northern Territory).[27] In all jurisdictions, a court can excuse a defendant if the person acted honestly and reasonably and ought to be excused.

The onus of proof is also reversed for some product safety matters. For example, under the TPA and in New South Wales, Queensland and the Northern Territory, there is a presumption that the good involved is a consumer good.[28] And, in all jurisdictions, where consumers seek compensation for damages due to the contravention of a product safety provision, there is a presumption that the supplying of the good caused the loss or damage once that contravention has been established.

Avenues for appeal vary markedly between jurisdictions. For example, in Victoria there is a right of appeal to the Victorian Civil and Administrative Tribunal against bans and recalls.[29] There are also avenues for appeals against bans in Western Australia, Tasmania and the ACT.[30] Under the TPA, and in New South Wales, South Australia and the ACT, conferences provide an alternative avenue for appeal (see chapter 3).[31]

B.4 Summary

Table B.7 summarises the major inconsistencies between the product safety systems of the Australian Government and those of the States and Territories. The inconsistencies listed in this table come at a potentially high cost to both businesses

[26] TPA s. 85(1)(a); NSW s. 71(1)(a); Vic s. 155(1)(a); Qld s. 97(1)(a); WA FT s. 83(1)(a); NT 94(1)(a).

[27] TPA s. 85(1)(c) & (4)(a); NSW 71(1)(c); Vic s. 155(1)(c); Qld s. 97(3); SA s. 37(1)(b); WA FT 83(1)(b) & (c) & (5); NT s. 94(1)(c).

[28] TPA s. 4C(3); NSW s. 81; Qld s. 6(5); NT s. 333.

[29] Vic s. 57(1).

[30] WA CA s. 23R(7); Tas s. 9; ACT s. 36(1).

[31] TPA ss. 65J, 65K, 65M, 65N and 65P; NSW s. 36; SA s. 27B; ACT s. 38.

and governments. Chapter 4 further explores these costs and Chapter 13 looks at options to further harmonise the nine different product safety systems.

Table B.7 **Summary of product safety inconsistencies**

Inconsistency	*Description*
Legislation	
Coverage of services	Relate to: • bans (Victoria, Queensland and South Australia) • standards (Victoria, Queensland and South Australia) • warning notices (New South Wales, Victoria and South Australia)
Pre-conditions for interim bans	'Cause' is not included in the pre-condition in South Australia ('may be dangerous'), Tasmania ('substantial risk of injury') and the ACT ('to prevent or reduce the risk of injury').
Pre-conditions for permanent ban	'On expiration of interim order' (TPA), 'after consideration of report or recommendation' (New South Wales and Western Australia), 'likely to cause death or injury' (Victoria and Queensland), 'prevent or reduce the risk of injury' (South Australia and ACT) and 'source of danger' (Tasmania and Northern Territory).
Express reference to health	States and Territories mention the 'health' of a person in their pre-conditions for bans.
Pre-conditions for safety standard	'Where satisfied that product is source of danger' (Tasmania) and 'prevent or reduce the risk of injury' (all other jurisdictions).
Powers of intervention	Queensland and Tasmania cannot compulsorily recall products.
Notification of voluntary recall	Entities covered by Queensland and Tasmanian legislation do not have to notify authorities of a voluntary recall.
Who makes the decisions	Decisions are made by Minister in all jurisdictions, except Western Australia, where decisions are made by the Commissioner.
Length of interim ban	28 days (Western Australia, Northern Territory and ACT); 42 days (Queensland); 3 months (New South Wales, Victoria and South Australia); 18 months (TPA); no specified period (Tasmania)
Exemptions	Relate to: • marketing of primary products (TPA) • exports, for information standards (TPA) • supply outside jurisdiction (Western Australia) • goods supplied for repair (Western Australia and ACT)
Administration and application	
Bans	Only 12 of 111 bans apply nationwide, and then only because made under TPA. No ban applies in all jurisdictions.
Standards	35 per cent only apply in one jurisdiction. Also some differences in standards that relate to same product.

(Continued next page)

Table B.7 **(continued)**

Inconsistency	*Description*
Enforcement	
Searches without warrant	• an emergency (under the TPA or in Victoria); • with the consent of the occupier (Victoria, Northern Territory and ACT); or • on the authority of the Minister (Tasmania).
Injunctions and undertakings	• injunctions (TPA, New South Wales, Victoria, Queensland, Western Australia and Northern Territory) • undertakings (TPA, New South Wales and Victoria)
Time limits on prosecution	3 years (New South Wales, Victoria, Queensland and Western Australia); up to 5 years (South Australia)
Defences	• reasonable mistake (under the TPA, and in New South Wales, Victoria, Queensland, Western Australia and Northern Territory) • goods were acquired for re-supply and good faith of original supplier was relied upon (under the TPA and in Western Australia) • due to act or default of another person (all except Tasmania and ACT)
Reversal of onus of proof	• presumption that good was bought by consumer (TPA, New South Wales, Queensland and Northern Territory)
Appeals	• appeal against bans and recalls (Victoria) • appeal against bans (Western Australia, Tasmania and ACT) • conferences (TPA, New South Wales, South Australia and ACT)

C Product-related injury: incidence and cost issues

Key points

- Despite recent improvements in data collection, the available information on product-related injuries and deaths in Australia remains piecemeal, uncoordinated and beset by methodological problems. As such, determining with any degree of precision the share of total injuries and deaths currently caused directly by unsafe consumer products, and trends in this share across time, is difficult.
- International evidence, and past Australian estimates, point to the possibility that genuine product faults account for only a very small proportion of total deaths, hospitalised injuries and non-hospitalised injuries. Other more significant factors associated with most injuries and deaths that occur in the household appear to be failure to maintain or service a good and risky behaviour (both with and without products).
- As with incidence, estimating the direct and indirect costs of injury caused by consumer products is problematic given an absence of quality data. To estimate with precision the direct and indirect costs associated with consumer product-related injury, specific and detailed information on the incidence, severity and duration of injury episodes, together with age and gender patterns, is required. Estimation problems are further compounded by the absence of an agreed methodology for estimating costs, particularly indirect costs.
- Exploratory estimates for some direct and indirect cost components for fatalities and serious injuries are presented below. These figures, in combination with the fact that other product-related injuries that were excluded from this estimate are also likely to incur significant, if less easily quantified, costs, suggest that the total cost of consumer product-related injury is likely to be in the order of hundreds of millions of dollars annually.

This appendix considers Australian and international evidence regarding the incidence of deaths and injuries associated with consumer products and related costs. Section C.1 analyses the extent to which adverse outcomes directly related to the use of consumer products (such as injuries and deaths) are observed in Australia and internationally, and looks at the nature of such outcomes. Section C.2 then considers the main direct and indirect costs likely to result from adverse outcomes related to consumer products.

C.1 Incidence: injuries and deaths caused by consumer products

The Commission examined a broad range of data sources and related research in considering the current safety of consumer products in Australia. The sources of Australian data and related indicators include:

- mortality data provided at the national level by the Australian Bureau of Statistics (ABS) and the National Coroners Information System (NCIS);
- morbidity (non-death injury) data using information on injury hospitalisations and non-hospitalised injury cases, such as that provided at the state level by the Monash University Accident Research Centre (MUARC) (Victoria) and the Queensland Injury Surveillance Unit (QISU), and at a national level by the Australian Institute of Health and Welfare (AIHW);
- research undertaken by the National Injury Surveillance Unit (NISU); and
- other data sources and analysis focussing on particular products or consumer groups, such as MUARC and QISU reports on product hazards.

A range of international data and research was also considered, including material collected by the Department of Trade and Industry (DTI) in the UK, by the European Consumer Safety Association (ECOSA) and by the Consumer Product Safety Commission (CPSC) in the US.

The question of causation

For the purposes of the present study, it is important to ascertain the extent to which collected data:

- is detailed enough to discern, with some degree of confidence, whether a consumer product was involved in an injury or death; and
- can be used to determine causation.

When considering these issues several key threshold questions apply[1]. One key question is how consumer products, and consumer product involvement, are defined? Another related question is to what extent any such definitions are useable within administrative data sets as they are presently coded?

[1] These issues are also important when assessing options for reform of data collection and product safety regulation.

Need for a definition of consumer products

During consultations, injury prevention researchers placed considerable emphasis on the absence of a workable and comprehensive definition of 'consumer products' and 'consumer product involvement' in Australia. According to these researchers, the need for an operational definition is significant because it provides guidance on 'what questions to ask' when interrogating the data on death and injury held within administrative data sets. This view is supported by earlier statements on the importance of an accepted definition in this area, such as by Harrison and Steenkamp (2002, p. 14):

> 'Product-related' does not have a widely accepted definition … Operational definition of product-related injury would require decisions concerning the types of object or substance to be regarded as 'consumer products' for this purpose, and on the meaning of '-related' (e.g. any mention of a product, or only where the product had some specific type of role in the occurrence of injury). The nature of the definition would affect the feasibility of reliable measurement by means of routine data collection.

Researchers also suggested that a more developed definition of consumer products would assist in making coding systems, such ICD-10-AM (see box C.1), more compliant with this definition in the future. A more developed operational definition would also assist researchers within the detailed and lengthy processes often involved when proposing further inclusions to such coding systems.

Certainly, the data considered by the Commission contained varying amounts of detail regarding consumer products and their role in adverse outcomes. However, in general, a developed definition of consumer products, which would facilitate the rapid accessing of incidence information, appears entirely lacking from currently collected administrative data sets in Australia. A further challenge for this review is posed by the focus on consumer products covered by the general regulatory system (such as CDs, ladders and chainsaws) but not by specialised regulatory regimes (such as cars and medicines). The present study therefore relies on an operational definition of consumer products based largely on those lying outside of current specialised Australian regulatory boundaries. This category of goods is further described in chapter 1.

Taxonomies of product involvement

Various taxonomies have also been used to categorise injury events in which products have in some way been involved. One such taxonomy, developed by ACA (1989, p. 11), divides consumer product-related injury events into four possible categories:

Box C.1 **ICD-10, ICD-10-AM and external cause categories**

A number of key mortality and morbidity data sources within Australia are currently collected using either the International Classification of Diseases (Tenth Revision) (ICD-10) system or the modified Australian version of this system, ICD-10-AM. For example, ABS Deaths data is coded using the ICD-10 system, which codes fatalities into a number of key categories, including falls, poisonings, motor vehicle accidents etc. Several sources of injury data use the ICD-10-AM system, including the Victorian Injury Surveillance and Applied Research system (VISAR) data set.

While these coding systems are widely accepted as reporting frameworks across the health sector, their use creates significant limitations on the detail provided by the data. As Watson and Ozanne-Smith (1997, p. 86) state:

> Consumer product-related injury is … generally hidden within the global injury problem because of the lack of detail provided by current hospital-based collections … Few products can be identified using the ICD 9 or 10 coding systems.

In moving to newer editions of ICD-10-AM, improvements have been made that allow the identification of *some* specific consumer products within the injury process. For example, from the introduction of the third edition of ICD-10-AM in 2002, external cause codes (or 'E codes') for falls involving small folding scooters (W02) and types of playground equipment (W09) have been introduced (Harrison 2001).

However, despite such improvements, data that is classified using these coding systems generally provides an insufficient level of information on product-related death and injury. (Recent developments of an alternative coding system, the International Classification of External Causes of Injury (ICECI), that may provide greater detail in relation to product involvement, are discussed in chapter 9.)

- Type 1 Injury related to physical failure of the product
  - Due to a fault in manufacturing
  - Due to a lack of maintenance
- Type 2 Injury related to inadequate design of the product
  - Design inappropriate for the normal use of the product
  - Design inappropriate for some specific age or ability groups intended to use the product
  - Inadequate protection against foreseeable mishandling or misuse
  - Inadequate protection for non-users (eg bystanders)
- Type 3 Injury related to inadequate instructions
  - Due to inadequate instructions for use or maintenance
  - Due to lack of safety warnings
- Type 4 Injury not influenced by any shortcoming in the product

– Due to misuse beyond the influence of the supplier

– Due to unforeseen human or environmental factors

As discussed further below, the extent to which currently collected administrative data can provide details on the approximate shares of these categories varies. For example, the NCIS stated in relation to coronial data:

> Currently we do not have the ability to distinguish which product related deaths were due to "misuse" or "the normal operation of the product" as opposed to "faulty" products. (sub. DR50, p. 1)

These taxonomies also point to the need for *considerable* caution when assessing injury events and associated data – in particular aggregate incidence figures. The causal mechanisms behind such events are often difficult to categorise with precision and allow for a substantial degree of interpretation.

Australian data on incidence: injury-related deaths and injuries

Injuries are often characterised as occurring at varying levels within an 'injury pyramid' (see figure C.1).

Current injury data collected in Australia tends to be gathered *on a national basis* at the upper end of this pyramid, resulting in particularly extensive reporting on injury-related death. In part, this reflects a concentration of reporting efforts on the more severe end of the injury spectrum. This is also due to the pronounced difficulties in gathering information and implementing uniform reporting strategies at the lower ends. [2]

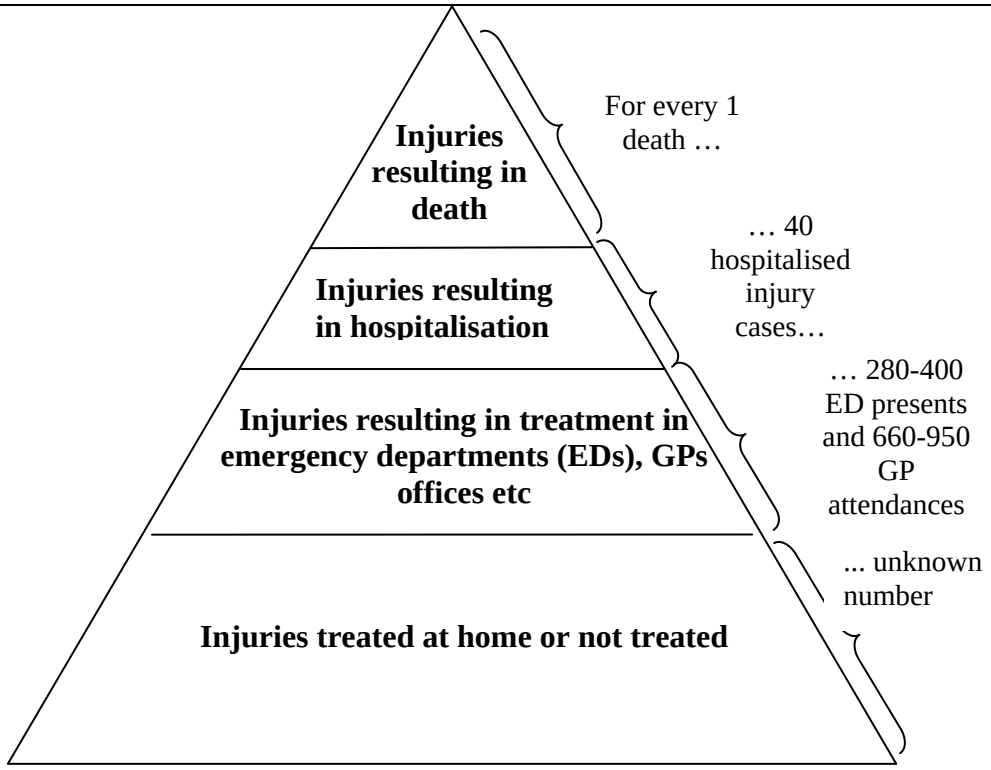
Broad estimates exist about the likely relative sizes of each category within the injury pyramid. For example, Harrison and Steenkamp (2002, p. 56) state:

> The several hundred thousand injury cases admitted to hospital in Australia each year are much more numerous than injury deaths, but they comprise only a small proportion of all incident injury cases. Limited available data suggest that something like ten times as many injury cases attend an emergency department as are admitted, and two or three cases attend a general practitioner for each one that is seen at an emergency

[2] The ACA stated in this context: 'There is very little data available on the overall pain and suffering experienced by consumers. Many minor avoidable injuries caused by consumer products do not result in hospital presentations. Only a small proportion of hospital presentations across Australia resulting from consumer product injuries are reliably logged and used to provide statistics. It's reasonable to assume most minor injuries that may be beyond home treatment end up in regular GP surgeries or 'medical centres' which generally provide faster attention than hospital emergency services these days and bulk bill.' (sub. 41, pp. 4-5)

department. Beyond this there are still numerous injuries that do not result in medical consultation.

Figure C.1 **The injury pyramid and possible Australian proportions for all injury**



Source: Indicative proportions for all injury based on Harrison and Steenkamp (2002).

However, these estimates remain speculative, and deal with undifferentiated injury (that is, they do not distinguish consumer product-related injury). Clearly, the proportional size of the various areas shown may also vary among consumer product categories – some products may be associated with a very large number of 'low level' injuries and almost no severe injuries, or vice versa. The pyramid depiction is also limited in the case of consumer products because it omits 'near misses'.

ABS deaths data

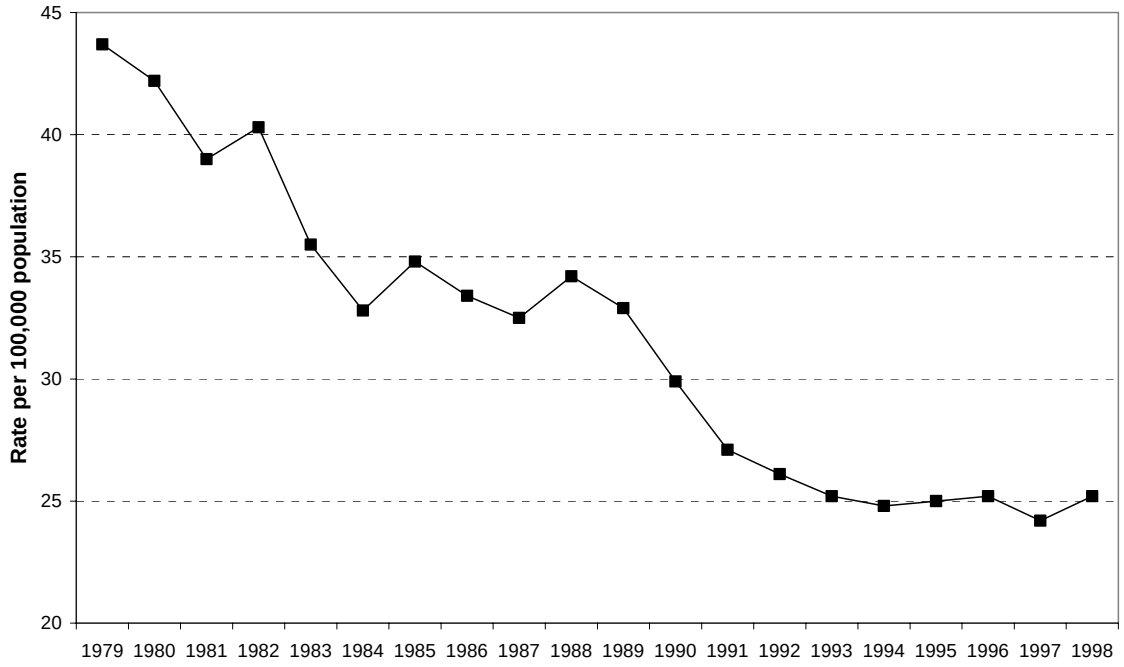
In the area of injury-related deaths, the main source of national data is ABS deaths data (Cat. no 3303.0). This provides detailed information on all deaths registered in Australia and is currently collected using an ICD-10 reporting framework (see box C.1).

Detailed analysis of recent ABS deaths data, performed by the NISU (Kreisfeld, Newson and Harrison 2004), shows that:

- a total of 133 707 deaths from all causes were registered in Australia in 2002 (figure C.3);
- of this total, 6 per cent (7820 deaths) were caused directly by injury. Injury ranked fourth as a common cause of death behind diseases of the circulatory system (37 per cent), neoplasms (29 per cent) and diseases of the respiratory system (9 per cent);
- of the 7820 deaths due to injury that were reported in 2002, 5130 (or 66 per cent) were unintentional, 2320 (or 30 per cent) were suicides and 303 (4 per cent) homicides; and
- injury was a particularly significant cause of death in lower age groups. For example, 50 per cent of all deaths involving persons aged 1 to 44 years were due to either injury or poisoning.

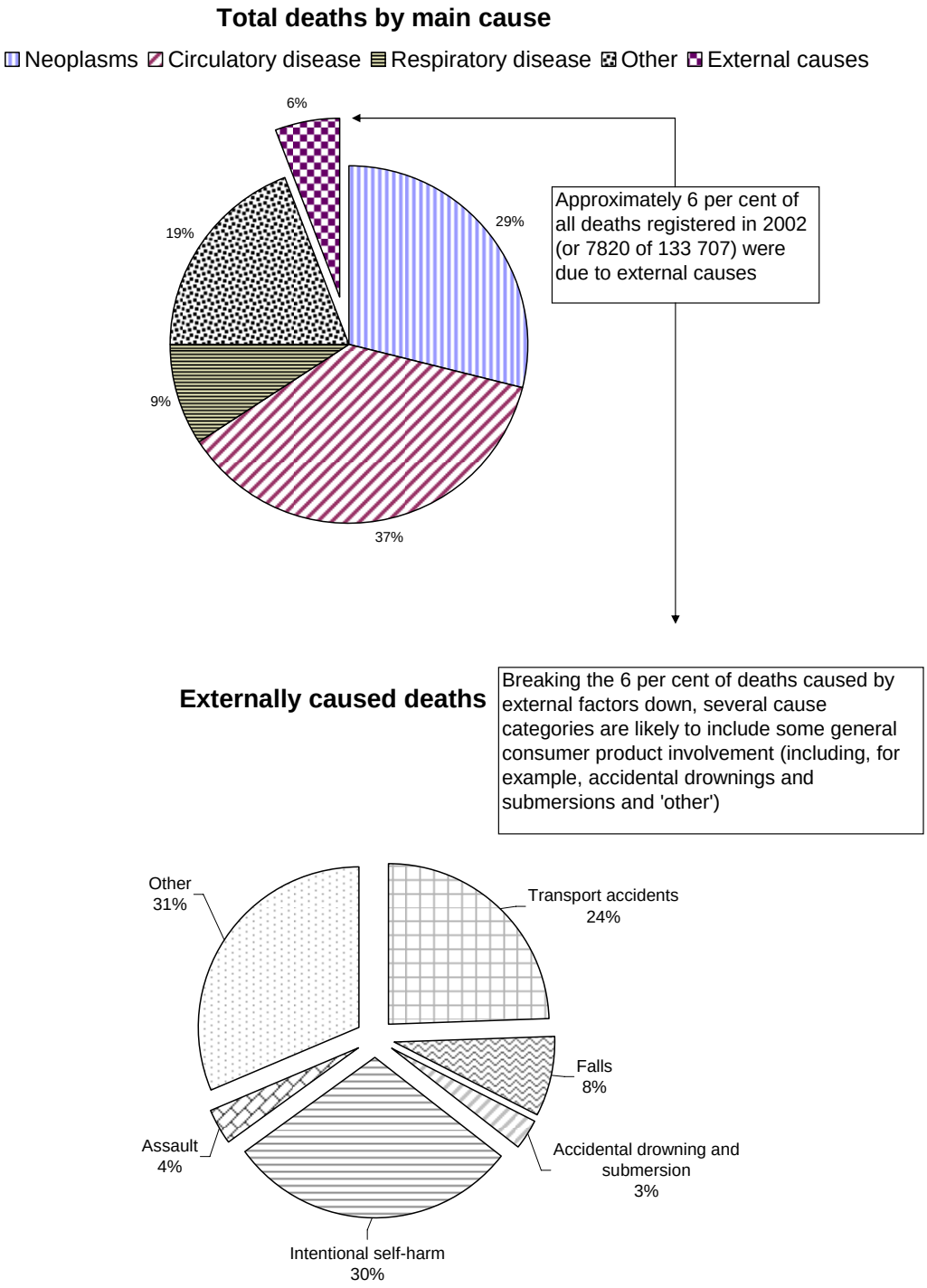
Comparisons of recent data with previous years also shows that a declining rate of injury-related death has been apparent in Australia (figure C.2). Injury mortality has

Figure C.2 **Accidental injury deaths, Australia 1979-1998**



Data source: NISU (1998).

Figure C.3 **Underlying causes of death, ABS deaths data 2002**



Data source: ABS (2002, cat. no. 3303.0).

been falling in successive years since 1999, with the rate recorded in 2002 being the lowest on record. This is also part of a longer-term trend towards reductions in the rate of injury-related deaths. Between 1979 and 2002, for example, the overall age-standardised death rate due to injury has decreased by 39 per cent (Kreisfeld,

Newson and Harrison 2004, p. 6). A *significant* contributor to this reduction has been a decrease in injury-related transport deaths for both males and females.

Product-related injury deaths

As stated above, in undertaking this study the Commission considered the extent to which currently collected aggregate data, including ABS deaths data, could be broken down into causative categories, particularly:

- due to a genuine fault in the product (for example, through clear failure of parts or components);
- due to consumer behaviour (for example, through dangerous use of a power tool); and
- the product was incidental to the injury (for example, a product was present at the scene of injury but was clearly not causally implicated).

In the case of ABS deaths data, clearly some proportion of registered deaths that were due to unintentional injury will be product-related in the broad sense (that is, a product will have been present at the time of injury). Some lesser proportion will also have been due to misuse and to genuine product fault.

However, a *precise* estimate of these proportions using current ABS data is not possible. While this data is therefore useful in providing a general picture of trends in injury-related deaths across time, its ability to provide detail in specific areas of injury, and in particular in the area of consumer products, is limited. The ABS data, as it is currently configured, simply does not possess the required detail to establish the total share of injury-related deaths in which consumer products (generally defined) were causally implicated. For this, more detailed reporting, based on an agreed definition of what constitutes a consumer product and a 'product-related' event, would be needed.

An indicative figure can, however, be obtained by netting out from the unintentional injury death figures a number of mechanism/cause categories that either do not contain consumer products within them, or that are very likely to contain products (such as therapeutic goods) or other objects (such as motor vehicles and firearms) that are outside of the current study's terms of reference. For this purpose the Commission adjusted 2002 ABS deaths data in two ways:

- by using broader 'underlying cause of death' figures, and netting out from total externally caused death the following ICD code categories: transport accidents (V01-V99), intentional self-harm (X60-X84) and assault (X85-Y09); and
- by undertaking the same operation using a more detailed, mechanism/cause reporting of the same data, and removing firearm, motor vehicle occupant,

motorcyclist, complications of medical/surgical care, and some falls and poisonings (see table C.1).

Both methods result in a total net range of unintentional deaths of approximately 3000 to 3300 for the year 2002 (or approximately 58 to 64 per cent of the total unintentional deaths registered). Some smaller part of this total is likely to include fatalities involving a consumer product.

National Coronial data

One possible alternative data source considered by the Commission in the area of product-related deaths is coronial data, which generally contains very detailed information on cause of death. As Harrison and Steenkamp (2002, p. 8) state:

> In Australia nearly all sudden and/or unexpected deaths, such as cases where a person dies violently, or from an unusual, suspicious or unknown cause, as well as deaths in custody, are required to be reported to a coroner. Most injury deaths are reported to a coroner … Coroners' records are the single richest repository of information about unnatural deaths, including most injury deaths.

The primary source of coronial information in Australia currently is the National Coroners Information System (NCIS). Established in 2000, the NCIS contains information on deaths reported to an Australian coroner since July 2000.[3] As at January 2005, the NCIS contained recorded information on over 85 000 deaths.

In comparing the research uses of ABS deaths data and NCIS coronial information, Driscoll, Henley and Harrison (2003, p. 92) state:

> The NCIS is potentially very useful for prevention purposes because of the considerable detail available in the coded and brief text variables and in the free text documents … In contrast, the ABS data are much more rigid, and the combination of concepts in the same variable limits the usefulness of the information unless the question of interest is specifically addressed by the combination of concepts included. This reflects the primary purpose of the system, which is to code Underlying Cause of Death according to ICD-10, and to do this in a reliable manner for all deaths registered in Australia.

[3] Data relating specifically to deaths reported in Queensland became incorporated from January 2001.

Table C.1 **ABS injury deaths classification (ICD-10), by manner/intent and mechanism cause, Australia 2002**

	Manner/intent					
Mechanism/cause	Unintentional	Suicide	Homicide	Undetermined	Other	Total
Cut/pierce	**8**	**55**	**98**			**161**
Drowning	**232**	**40**	**3**	**9**		**284**
Fall	**629**	**106**	**2**	**5**		**742**
Fire, hot objects	**115**	**29**	**7**	**2**		**153**
Fire/flame	**103**	**29**	**7**	**2**		**141**
Hot object/substance	**12**					**12**
Firearm	**31**	**217**	**45**		**6**	**299**
Machinery	**16**					**16**
All transportation	**1 907**	**12**	**3**	**2**		**1 924**
Motor vehicle traffic:	**1 666**					**1 666**
Occupant	1 104					1 104
Motorcyclist	214					214
Pedal cyclist	33					33
Pedestrian	244					244
Unspecified	71					71
Pedal cyclist, other	**6**					**6**
Pedestrian, other	**63**					**63**
Other land transport	**91**					**91**
Other transport	**81**					**81**
Natural/environmental	**35**					**35**
Poisoning	**568**	**726**	**9**	**38**		**1 341**
Struck by or against	**52**		**71**			**123**
Suffocation[a]	**222**	**1 045**	**19**	**5**		**1 291**
Other specified, classifiable	**94**	**73**	**10**	**4**		**181**
Other specified	**54**	**16**	**6**			**80**
Unspecified	**1 031**	**1**	**20**	**1**		**1 053**
Complications of medical/surgical care:	**136**					**136**
Adverse effects of drugs	36					36
Misadventure during care	100					100
All injury	**5 130**	**2 320**	**293**	**66**	**10**	**7819**

a Includes hanging.

Note: shaded cells represent mechanism/cause categories netted out of total.

Source: ABS deaths data (cat. no. 3303.0) as shown in Kreisfeld, Newson and Harrison (2004, p. 4).

> Therefore, for many injury issues of interest, the NCIS is now of much more use than the ABS and is likely to become more so, although generally the ABS currently provides more timely information on the number of deaths. However, there are some areas in which the ABS will remain more useful than the NCIS for injury surveillance. Chief among these is fall-related death in the elderly. In many circumstances, these deaths can be certified by a medical practitioner rather than having to be reported to a Coroner.

As it is presently constructed, the NCIS is capable of providing only very broad information about the role of products within injury-related deaths.[4] The object codes used within the system cover many broad categories of products, including infants' and children's products, furnishings, sporting equipment, personal use items and other miscellaneous objects. In undertaking the present study, the Commission requested that the NCIS conduct a number of high-level searches relating to consumer products. The findings from these searches suggest that, despite a range of broad product categories within the system, difficulties remain in using the NCIS as an identifier of *aggregate* problems with consumer product safety. Key findings from requested searches were that:

- a *very* small number of fatalities presently recorded on the NCIS were directly attributed to faulty products. Of a total of around 85 000 findings since July 2000, only 18 refer specifically to faulty products. Further, of these 18 findings, only six involve products directly under reference; and
- a very large proportion (68 per cent) of externally caused deaths reported to a coroner in 2004 are coded in the NCIS as being product-related in some way.

In relation to the second point, the use of NCIS data when considering *aggregate* problems with consumer products is clearly limited at present. This is largely because the coding for product involvement within the current system is extremely broad. Thus, as the NCIS states (Manager, NCIS, pers. comm., 26 May 2005):

> … the definition of 'product related' on the NCIS is "*whether the injury/death was contributed to by a consumer related product"*. As such, this includes a wider scope than only those deaths which involved a faulty product.

As it is presently configured, the NCIS appears of far greater use in relation to individual products or product categories (see box C.2). In the course of this study, several parties indicated to the Commission that the NCIS provides a valuable resource in this regard, and that it is commonly used by regulatory authorities from States and Territories when researching regulation impact statements in the area of consumer products.

[4] NCIS has indicated that it is currently reviewing the way it codes and collects fatalities that are 'product related'.

Box C.2 **Using coronial information to identify product hazards**

A recent example illustrates the potential uses of the NCIS as a means to identify potentially hazardous individual products or product classes.

In 2003, researchers from the Research Centre for Injury Surveillance (Flinders University, SA) were asked by the Australian Department of Health and Ageing to supply information about the incidence of deaths of infants and young children related to strangulation by blind cords. A number of potential data sources were considered. ABS deaths data, based on the ICD-10 coding system, was found to lack the specificity required to identify whether a problem existed that could be directly due to blind cord design features or installation methods. Several ICD-10 categories, such as W76 'Other accidental hanging and strangulation' and W75 'Accidental suffocation and strangulation in bed' appeared to be potentially useful, but lacked the required detail concerning objects involved in strangulations.

Researchers therefore used the NCIS, in conjunction with a search of international scientific literature and consideration of work on this topic by CPSC and Health Canada. The research process is described by Driscoll, Henley and Harrison (2003, p 94):

> The data specificity and detail necessary to provide useful information for this request is provided by the classifications in the NCIS. In addition to the coded data, documents attached to many records in the NCIS can be examined for additional information.
>
> Two project members independently conducted searches of the NCIS, and each found the same three cases of interest … The two cases for which detailed information is available have similarities: both children were about one and a half years old, and both died in their cot after having become entangled in the cord of a window furnishing during a period in which they had been left alone for a day-time sleep.

An additional case was also found among Coronial inquest Findings in South Australia (predating establishment of the NCIS) published on the Coroner's website. This case, which dated from 1999, was similar to the two cases described above. Following the results of this research the issue was brought to the attention of Australian coroners in July 2003.

Source: Driscoll, Henley and Harrison (2003, pp. 94-95) and subs. 37 and DR50.

Conclusion on death data

Consideration of ABS deaths data and coronial data held on the NCIS suggests that, as they are currently collected, such sources provide an incomplete picture of the aggregate level of fatalities associated with consumer products. Nevertheless, these sources suggest that consumer products are likely to be a smaller relative contributor to injury-related fatalities than other causes such as motor vehicle accidents. Further, coroners' data suggests that, in fatalities coded as involving a product, cases involving genuine product fault may be very small in number.

Non-death injury data

Moving down a level from injury-related deaths to non-fatal injuries a range of evidence was identified and considered by the Commission.

Several institutions in Australia undertake the routine collection of hospital-based injury data. This includes emergency department (ED) injury case data (Harrison and Steenkamp 2002, p. 14) such as:

- the Victorian Injury Surveillance and Advanced Research System (VISAR), which operates in the emergency departments of 26 Victorian hospitals (and consists of the Victorian Admitted Episodes Dataset (VAED) and the Victorian Emergency Minimum Dataset (VEMD));
- data collected by the QISU from 14 emergency departments located in Queensland hospitals; and
- limited collection in emergency departments in other states, such as South Australia (two hospitals) and Tasmania (three hospitals).

Hospital separations are also monitored as part of the AIHW National Hospital Morbidity Database (NHMD) on inpatient hospital care.

However, with the exception of use of Victorian data by Watson and Ozanne-Smith (1995), the Commission could find no reporting of the information contained within these data collections that assisted it in establishing the current incidence, *in the aggregate*, of consumer product-related injury.[5]

Conclusion

At present the ways in which both death (mortality) and injury (morbidity) data are collected in Australia make it difficult to easily identify the aggregate incidence of injury and death caused by consumer product fault or consumer behaviour.

[5] Harrison and Steenkamp state (2002, p. 14, emphasis added): 'People with injuries frequently attend GPs and other service providers, as well as EDs, and fractions attending various types of service providers may differ between places and over time. Hence, monitoring of ED attendances resulting from product-related injury may not provide a reliable basis for assessing trends in case occurrence in a population. *There is currently no data source in Australia capable of monitoring national trends in ED attendances resulting from product-related injury.'*

International and past Australian estimates of incidence

Given this paucity of current data, the Commission also considered past Australian research estimates of incidence, and related international research, to further develop a broad picture of the possible size of problems with consumer product-related death and injury.

Past Australian estimates

A number of attempts have been made to quantify the size of the injury problem caused directly by unsafe consumer products in Australia. These include estimates made by the Australian Consumers' Association (1989), the Industry Commission (IC 1990), Somers (1994) and Watson and Ozanne-Smith (1995).

Using data on accidents recorded by the now disbanded *National Injury Surveillance and Prevention Project* (NISPP), the Australian Consumers' Association, estimated that, while as many as 80 per cent of the 1 150 000 accidents recorded between March 1987 and February 1988 involved a product in some way, 1 per cent (or 11 300) were clearly due to physical product failure (table C.2). However, this estimate did not include design-related accidents, and on that basis is therefore likely to be conservative.

Table C.2 **NISPP data on product caused accidents**

Type of accident	*Number*
Total accidents	1 150 000
Product-related accidents	940 000
Accidents identified as due to physical *product failure*	11 300

Source: ACA (1989), reported in IC (1990, p. 38).

A separate review of non-fatal injury cases and coronial data reported in IC (1990) estimated that products contributed in some way to as many as 134 500 accidents annually (equivalent to approximately 11 per cent of total accidents). Netting out workplace and motor vehicle accidents (47 500), the review estimated that around 3500 (or 4.0 per cent) of such accidents would be of such severity as to be legally compensable for accident-related loss, while only 500 (or 0.6 per cent) would be of such severity as to warrant legal action.

In a further study of NISPP data, Somers (1994, reported in DTI 2002) reviewed 16 000 injury cases and found that 10 per cent of such cases were product-involved injury episodes attributable to 'unsafe products'.

Finally, Watson and Ozanne-Smith (1995, p. 15) used data from Victoria on unintentional injury deaths (1991-92, total sample size 794), hospitalised injuries (1991-92, total sample size 496) and non-hospitalised injuries (1991-94, total sample size 1786) to consider the extent and direct health costs of product-related injury. Amongst their key findings were that [in 1991-92] consumer products contributed *directly*, via product failure or malfunction, to:

- 4.0 per cent of all unintentional injury deaths;
- 6.0 per cent of non-intentional injury hospitalisations; and
- 6.3 per cent of injury-related emergency department presentations (table C.3).

Table C.3 **Role of consumer products in death and injury: Watson and Ozanne-Smith (1995)**

Per cent

Outcome	*Fatality*	*Serious Injury*	*Minor Injury*
Product failure/malfunction	4.0	6.0	6.3
Design solution available[a]	7.1	9.7	8.6
Product involved but unclear	82.0	43.5	30.8
Product involved due to proximity	1.4	20.8	25.6
None or incidental	5.5	20.0	28.7
Total	100	100	100

a The authors describe this category as follows (1995, p. 47): 'A design solution or safety equipment is currently available which may have prevented, or reduced the severity, of the injury ... In some cases (e.g. trampoline injuries) safety equipment (such as padding for the metal frame) are not provided as standard equipment by the manufacturer. In others, safety equipment such as seat belts are provided but not worn.'

Source: Watson and Ozanne-Smith (1995, pp. 17-19).

Importantly, part of Watson and Ozanne-Smith's (1995) 'product failure and malfunction' category is likely to include behavioural factors. They stated (1995, p. 48):

> This category involves cases where a malfunction or failure of a consumer product contributed to the injury. It is difficult to know from the one-line narrative whether such malfunctions are the result of a fault on the part of the product, or misuse or lack of maintenance on the part of the user. Misuse of a product by the consumer may result from inadequate instructions on the part of the manufacturer.

The study's focus was also broader than the consumer products that are under reference by the present study. For example, the authors included within their sample all those non-intentional injuries and poisonings defined by ICD-9-CM coding and excluded only medical misadventure and complications from medical treatment. This leaves a range of injury categories, including motor vehicle traffic,

poisonings and falls that, in the Commission's view, are unlikely to include significant and direct involvement by the general group of consumer products covered by this study.

International estimates

Several attempts have also been made internationally to quantify the extent of total observed deaths and injuries that may be due to unsafe consumer products. (The extent to which the results from these studies are transferable to the Australian context is considered in further detail below).

UK study by the DTI (2002)

Work commissioned by the Department of Trade and Industry (DTI) in the United Kingdom (DTI 2002) used extensive data collected within two data sets (the HASS home accident and LASS leisure accident surveillance sets) to estimate the relative roles of faulty products and consumer behaviour within loss events **occurring at home** (box C.3)[6]. This study used large sample sizes (4 426 fatalities, 5 106 serious injuries and 2 466 minor injuries) reported for four years: 1990, 1993, 1996 and 1999. In general, the samples were based on all home-based death and injury, not just those associated in some way with a product, although the samples taken from the Office of National Statistics database of consumer's returns were selected on the basis of those codes more likely to include consumer products.

The study analysed the contributions of four broad factors to accidents: the user; the product; the task; and the environment. It utilised definitions for product fault, behaviour and hazard as follows (DTI 2002, pp. 10-11):

> Definitions of an accident vary according to the domain of interest … broad definitions of accident causation were developed as follows:

- Product fault – something wrong with the article that caused or may have been involved in the cause of the incident.
- (User) Behaviour – some action by one of the people involved in the incident that has, or might have, caused or contributed to the incident.
- Hazardous product – an article that is, by nature or use, more likely to be involved in an incident eg a blade or a ladder.

6 In May 2003, the DTI announced that it would cease collecting HASS and LASS data citing 'increased pressure on resources' (DTI 2003).

Box C.3 **Main types of product fault and behaviour observed by the UK DTI**

Of the fatalities and injury cases considered by DTI (2002), the largest role for product fault was observed in relation to fatalities. The most commonly involved faults in relation to fatalities included:

- carbon monoxide being emitted from an appliance, flue, ventilation or other;
- faults leading to fire/smoke from products such as electric blankets, electrical wiring, TV, heating or other appliance;
- electrocutions involving a wiring fault or damaged/exposed wires; and
- other faults such a furniture collapsing, car jack injuries and ladder/scaffold collapse.

Behavioural factors were seen to play a far more significant role in all accidents. Major types of risky behaviour contributing to death or injury included:

- undertaking an activity under the influence of alcohol;
- leaving unsuitable items in the reach of a child;
- smoking-related incidents;
- working up a ladder or stepladder; and
- careless actions by another person.

Detailed lists of the product fault and behaviour categories identified by DTI (2002) are shown in tables C.7 and C.8.

A more detailed definition of product fault was also presented (DTI 2002, p. 11):

> Any aspect of the product which means that the product was not as safe to use as expected, for any user, over any period of its life, including the following product features: design; construction; materials; manufacturing; quality controls; packaging; instructions; and labelling.
>
> This would include the following range of uses and therefore lifespan of the product: assembly; use; maintenance; disassembly; and disposal.

Amongst the main findings of the study were that:

- across all loss categories (that is, deaths, serious injuries and non-serious injuries) genuine product fault contributed directly to a very small number of incidents (table C.4);
- while product fault alone accounted for between 0.4 and 1.6 per cent of home accidents, most of these faults were judged on further consideration to be due to a lack of servicing and maintenance during the life of the product (DTI 2002, p. 5);

- some trends are observable between 1990 and 1999 (table C.5). For example, the contributory role of product faults in fatalities fell continuously from 2.0 per cent in 1990 to 0.9 per cent in 1999; and
- considerable variation was also apparent in the above proportions across age categories (table C.6). For example, behaviour was observed to be a more significant contributory factor in accidents (relative to product fault) in younger age categories.

Table C.4 **Key findings of the DTI (UK) study into home accidents (weighted proportions by outcome)**

Per cent

Cause	*Fatality*	*Serious Injury*	*Minor Injury*
Product fault alone	1.6	0.4	0.6
Product fault and behaviour	1.2	1.0	0.7
Behaviour alone	23.5	34.1	44.1
Physical environment	73.7	64.5	54.6
Total	100	100	100

Source: DTI (2002).

The types of product fault provided by the study indicate that many of the products involved are addressed by the specialised regulatory regimes rather than the general consumer product safety system.

As part of the study, a follow-up survey of a selected sample of cases (1 700 of the over 11 000 accidents considered by the study) was also conducted (DTI 2002, p. 46). This suggested that estimates based on the aggregate data used were likely to be reliable in a majority of cases.7

EU Study 2003

A more recent study within the EU in 2003 analysed injury data collected across a 16 year period within the European Home and Leisure Accident Surveillance System (EHLASS) and its successor, the EU Injury Surveillance System (ISS) data set. The former data set was established in 1986 and, by 1994, had collected commonly coded data, with narrative, from 54 Accident and Emergency departments dealing with over 350 000 home and leisure injuries. According to the study (EU 2003, p. 3) 'EHLASS/ISS are the only available instrument to provide an empirical background in injuries related to (consumer) products on the EU level'.

7 Within these follow-up cases a higher involvement of behaviour (97 per cent compared to 85 per cent) and product faults (product fault alone was 2 per cent compared to 1.5 per cent while product fault plus behaviour increased from 2.7 per cent to 3 per cent) was observed.

Table C.5 **UK DTI trend data by outcome for years 1990, 1993, 1996 and 1999**

Per cent

Outcome	*1990*	*1993*	*1996*	*1999*
Fatality				
Product fault alone	2.0	1.9	1.3	0.9
Product fault and behaviour	1.1	1.3	1.3	1.4
Behaviour alone	30.9	21.9	21.4	17.6
Accident involving neither	66.0	74.9	76.0	80.1
Total	*100*	*100*	*100*	*100*
Serious injury				
Product fault alone	0.6	0.3	0.4	0.3
Product fault and behaviour	0.6	0.8	1.2	1.0
Behaviour alone	37.9	36.4	32.1	33.4
Accident involving neither	60.9	62.5	66.3	65.3
Total	*100*	*100*	*100*	*100*
Non-serious injury				
Product fault alone	0.4	1.4	0.9	0
Product fault and behaviour	0.7	0.4	0.5	1.2
Behaviour alone	54.8	36.7	42.2	41.2
Accident involving neither	44.1	61.5	56.4	57.6
Total	*100*	*100*	*100*	*100*

Source: DTI (2002, p. 18).

Table C.6 **UK DTI trend data by age group**

Per cent

Outcome	*0 to 7*	*8 to 15*	*16 to 65*	*Over 65*
Fatality				
Product fault alone	1.9	5.1	1.7	1.2
Product fault and behaviour	2.9	2.8	1.6	0.9
Behaviour alone	81.5	41.5	25.3	17.5
Accident involving neither	13.7	50.6	71.4	80.4
Total	*100*	*100*	*100*	*100*
Serious injury				
Product fault alone	0.4	0.1	0.6	0.2
Product fault and behaviour	0.7	0.8	1.7	0.6
Behaviour alone	68.4	46.7	36.2	10.5
Accident involving neither	30.5	52.4	61.5	88.7
Total	*100*	*100*	*100*	*100*
Non-serious injury				
Product fault alone	0.6	0.7	0.8	0.4
Product fault and behaviour	0.1	1.8	0.8	0.4
Behaviour alone	56.9	50.1	41.4	17.0
Accident involving neither	42.4	47.4	57.0	82.2
Total	*100*	*100*	*100*	*100*

Source: DTI (2002, p. 21).

Table C.7 **Summary of main types of product fault observed by UK DTI (2002) — unweighted data**

Type of incident	*Fatality*	*Serious*	*Non-serious*	*Total*
Carbon Monoxide (CO)				
Appliance	64	3		67
Flue	28			28
Ventilation	7			7
Other/no detail	21	3		24
CO Total	**120**	**6**	**0**	**126**
Fire/Explosion				
Electric blanket	40			40
Gas escape fire/explode	9	6		15
Electrical wiring/supply	11	1		12
TV fire	7	1		8
Heating appliances	6	3		9
Other appliances	6	2	1	9
Other/no detail	7	16	1	24
Fire Total	**86**	**29**	**2**	**117**
Electrocution				
Wiring fault	15	1		16
Damaged/exposed wires	11	1		12
Other/no detail	8	6		14
Electrocution Total	**34**	**8**	**0**	**42**
House/fittings				
Items not maintained	1	6	7	14
Items broken	4	1	3	8
Gas leak – no fire	5	1		6
Other	6	11		17
House/fittings Total	**16**	**19**	**10**	**45**
Mechanical/Other				
Furniture collapsed	3	8	6	17
Car jack	8			8
Sharp edge on item		3	5	8
Ladder/scaffold collapse	3	5		8
Other	7	9	10	26
Mechanical/Other Total	**21**	**25**	**21**	**67**
Total	**277**	**87**	**33**	**397**

Source: DTI (2002, p. 27).

Table C.8 **Main types of contributory behaviour identified by UK DTI (2002)**

Type of incident	*Fatality*	*Serious*	*Non-serious*	*Total*
Under the influence of alcohol	368	130	16	514
Hazardous action by victim	59	218	148	425
Unsuitable item e.g. medicine left in reach of child	18	258	51	327
Smoking related	245	4	4	253
Falls from ladder/scaffolding	147	82	20	249
Careless action by other person	8	131	88	227
Fall off something/out of window/child unattended on stairs	38	140	46	224
Careless action by victim	73	40	51	164
Careless use of hand/power/garden tool	6	69	58	133
Choking eating food	42	52	19	113
Cooking – chip pan fire/careless use/clothing caught alight	72	30	7	109
Careless use of kitchen/other knife		38	52	90
Drug related	79	4		83
May have been deliberate	73	10		83
Problem in bath	60	12	2	74
Too close to/careless use of heater/fire	60	8	2	70
Spilled hot drink		44	13	57
Broke window/glass	2	29	19	50
Unattended child drowned	47			47
Caused by untidiness e.g. tripped over/trod-on something left on floor	4	25	15	44
Trapped hand/finger		13	27	40
Incompetence	25	11		36
Not serviced/not swept/blocked vent	34			34
Playing with fire	22	8	1	31
Aggression	4	10	9	23
Opening can/bottle	1	6	16	23
Careless use of a candle	20	2		22
Other e.g. related to specific article	164	378	358	900
Behaviour likely to have been involved – no detail in text	607	160	84	851
Total	**2 278**	**1 912**	**1 106**	**5 296**

Source: DTI (2002, p. 28).

Table C.9 **Main types of incident where no fault, behaviour or hazard was indicated — unweighted data, UK DTI (2002)**

Type of incident	*Fatality*	*Serious*	*Non-serious*	*Total*
Fall/slip on stairs/steps	1 152	373	165	1 690
Fall – no detail	211	1 111	220	1 542
No detail	136	113	79	328
Tripped and fell	40	145	71	256
Illness/collapsed/dizzy	90	130	16	236
Fall from/getting out of bed	55	129	38	222
Injured arm/leg – no detail	8	88	126	222
Slipped and fell	41	76	15	132
Caused by animal e.g. bite		64	64	128
Fracture – no detail	2	103		105
Head/face injury no detail	20	40	38	98
Cut – no detail	9	23	41	73
Fall from/ getting off seat	6	45	17	68
Running, tripped and fell		25	25	50
Others	135	402	175	712
Total	1 924	2 905	1 097	5 926

Source: DTI (2002, pp. 30-31).

A key part of the study was to generate a taxonomy of Product Involvement Factors: PIF1: No product involved; PIF2: Product non-manufactured; PIF3: Product related due to proximity; PIF4: Product potentially defective; PIF5: Product potentially maladapted; PIF6: Product with high intrinsic risk; and PIF7: Product identified but description inadequate to enable a judgement.

This taxonomy was applied to cases from four national EHLASS data sets (Austria, France, Netherlands, Sweden). Results suggest that:

- in 85 per cent of the cases considered a ‘Manufactured product was involved’ (PIF factors 3-7);
- in 19 per cent of cases the ‘Product role was clearly defined’ (PIF factors 3-6);
- in 5 per cent of cases ‘Product causality was likely’ (PIF factors 4-6); and
- in 2 per cent of cases the ‘Product was potentially defective’ (PIF factor 4).

A sample of cases was also subject to further consideration by a product safety expert panel. This panel determined that the majority of accidents (56 per cent) were attributable predominantly to behavioural causes, while 12 per cent were preventable via a currently available technical safety solution and 4 per cent were preventable with the development of new design solutions.

Exploratory estimates of incidence

On the basis of available international evidence, past Australian estimates and information provided during consultations with interested parties, the Commission has attempted to estimate the *possible* incidence of consumer product death and injury in Australia. The method used involved applying estimates for product involvement categories to recent Australian data, including ABS deaths data and AIHW data on hospital separations due to injury.

The Commission's estimates are provided in table C.10. They are based on applying the indicative proportions from the aforementioned DTI study (2002) to recent Australian deaths and injury data. Given the primary focus of the DTI study on

Table C.10 **Exploratory estimates of accidental injury deaths and hospitalisations, based on recent Australian data and DTI (UK) study**

Cause	*Fatalities ABS Deaths Data 2002*	*Serious Injury AIHW Hospital separations due to injury 1999-00 Lower (home only) upper (all places[c]) estimates*
Product clearly involved in the incident		
Product fault alone[a]	45 - 65	364 - 1027
Product fault and behaviour	35 - 50	910 - 2567
Product possibly present but not causally linked to the incident		
Behaviour alone[b]	705 - 775	31 049 - 87 555
Physical environment	2215 - 2410	58 730 - 165 610
Total	3000 - 3300[d]	91 053 (home only) to 256 759 (all places)

[a] The DTI study suggests that most of the fatalities and injuries due to 'product fault alone' were attributable to poor servicing and maintenance rather than a manufacturing fault (2002, p. 4). So, for example, this would suggest an upper bound estimate in 2002 of 32 fatalities directly caused by a manufacturing fault with the remaining fatalities caused by a failure to adequately service or maintain consumer products.[b] Includes incidents involving an interaction with a product, but also incorporates accidents in which no product is present. Detailed lists of 'behaviour' and 'neither product fault nor behaviour' cases observed by the DTI study are shown in appendix C, tables C.8 and C.9. [c] The upper estimates for serious injury presented involve the application of home-based proportions to a broader data set (including many injury events occurring outside the home) and so may be significantly overstated. [d] These fatality totals have been obtained by netting out of the Australian Bureau of Statistics unintentional injury death data a number of mechanism/cause categories which in the Commission's view either do not contain consumer products within them, or are likely to contain products (such as therapeutic goods) or other objects (such as motor vehicles and firearms) that are outside the terms of reference of this study. The process used to estimate these fatality totals was outlined above.

Source: Productivity Commission estimates.

determining the relative roles likely to be played by product fault, servicing and maintenance and behaviour, it was thought that this study would provide a useful basis on which to provide exploratory totals. The UK study was also underpinned by a large sample size, collected across a number of years, and was supplemented by further follow-up surveys of consumers.

The imprecision inherent in using data and estimated accident proportions that are partly derived from overseas experience, where different market structures, regulatory requirements, consumer demography and general levels of safety may be present, are acknowledged. However, some level of broader commonality may be supposed between these countries given that they are both western developed countries with similar levels of educational attainment and attitudes to risk, and given that similar products are likely to be consumed across both markets, in part due to globalisation of product markets.

Use of Watson and Ozanne-Smith (1995) as a basis for estimation was also considered. However, while this remains the sole Australian study in the area, and is quoted often, it is arguably of less use for the present study given:

- its inclusion of a more expanded range of product categories than currently under reference (including motor vehicles and food);
- its use of data that is now relatively dated;
- use of data covering a single year (1991-92); and
- its use of a more limited sample size.

Estimates for serious injury include both injuries 'at home' and 'all injury' given that the AIHW data used for this exercise presented figures for both categories, and given that injury related to consumer products is likely to occur across a range of locations.

Given the paucity of data, no exploratory estimates are provided for injury categories other than injuries resulting in hospital separations. However, recent estimates (Harrison and Steenkamp 2002) suggest that, for each injury resulting in hospitalised admission, there are likely to be 7-10 injuries presenting at an emergency department and a further 18-27 attendances at a GP surgery. (These totals do not capture untreated injuries, injuries treated at home etc.) Totals for lower level injuries are therefore likely to be much larger.

Sources of overstatement and understatement in the Commission's estimates of incidence

The above figures are *exploratory* estimates and, in the absence of adequate aggregate data on consumer product-related death and injury, the Commission

recognises the *considerable* imprecision inherent in such an exercise.[8] Nevertheless, these estimates provide very broad indicative totals with which to stimulate ongoing discussion, as well as reinforcing the considerable importance that attaches to distinctions between consumer behaviour (both with and without products), product failure, and maintenance and servicing failure in this area.

Several possible sources of overstatement and understatement exist within the above figures.

Overstatement

First, the use of proportions derived from the DTI study of home-based injury to injury aggregates that include non-home settings is likely to significantly inflate the resulting totals presented for product-related injuries.

Second, the use of proportions obtained from the DTI (2002) study may also be a source of overstatement in relation to the consumer products being considered by the current study given that they include accidents connected to electrical and other products that are not currently under reference as part of the Commission's study. In responding to the Discussion Draft report, this point was emphasised by the Australian Electrical and Electronic Manufacturers Association and Consumer Electronics Suppliers' Association:

> The national and international injury data … includes injuries related to electrical products among those related to consumer products covered only by the general consumer product safety system. Review of the types of faults listed in UK DTI data … indicates that deaths and injuries related to electrical products would constitute the majority of deaths and injuries in that data set and would be about three times as great as the number related to general consumer products. (sub. no. DR44, p. 2)

Understatement

Estimates based on the DTI (2002) study place less explicit emphasis on *design-related* solutions within the injury process than is the case in many other studies. Inclusion of a separate category of events that may have been prevented through better product design is not possible when using the DTI (2002) study as the basis for estimation, but would be a useful addition to such estimates. As the DTI itself acknowledges (2002, p. 6):

> There is an important 'grey area' of accident causation, and that is the definition of product 'fault' compared to a 'hazardous' product. Some products such as access products and medicine packaging have intrinsic hazards. It is tempting to assign

[8] Options for improving the level and quality of data in this area are discussed more fully in chapter 9.

causation of all accidents with these types of products as behavioural, as there may not have been anything particularly 'wrong' with the product at the time or it may not have 'failed'. However if there is potential for improvements in the basic safety of these products (e.g. increased stability of stepladders or more child-resistant packaging) then accidents with these products could be considered as product 'faults'.

The role played by product design in preventing accidents is discussed in greater detail in chapter 12.

A second source of more general understatement derives from the use of 1999-2000 AIHW injury data. While this data is the most recent aggregate data available, it is possible that injury separations have increased since this time, given population growth, and that the estimates provided for serious injury therefore understate the possible size of such injuries. However, this effect may be counteracted by reductions in injury rates across time due to increased levels of safety.

On balance

In the Commission's view, on balance the exploratory totals presented for fatalities and serious injuries may, on further consideration, be found to overstate the level of consumer product-related injuries. This is particularly the case given that they include the application of proportions derived from a setting where product-related injury is more prevalent (the home) to some settings where such injury is likely to be less significant (for example, sports and athletics areas and schools).

Conclusion

The discussion on incidence above serves to illustrate a number of key points. First, for those death and injury events where consumer products are in some way involved, international research and past Australian estimates suggest that product manufacture faults are likely to be implicated in a very small number of such cases, and that far more significant factors, in the aggregate, are the physical and social context, behaviour by consumers and poor maintenance and servicing. Second, the imprecision inherent in using data and estimated accident proportions that are derived from overseas experience indicates that reliable causation figures can only be provided for Australia if better data were collected to provide more accurate information in the area of consumer product safety. This issue is discussed in further detail in chapter 9.

C.2 Cost of product-related injury

Three distinct cost elements are generally associated with fatal and non-fatal injury.[9] These are:

- *Direct costs*: constituting the medical care and other expenses associated with injury or illness which may include, for example, the cost of emergency services (police and ambulance), the acute and long term medical treatment costs which arise as a result of injury (or illness), or property damage;
- *Indirect costs*: broadly defined as the costs of production losses associated with injury, which may include the lost output of employed persons, lost non-market production, and future or potential losses of production; and
- *'Human costs'*: being the more subjective or intangible costs arising from the loss of both the quantity of life (life expectancy) and quality of life (in terms of pain, grief and suffering or incapacity) associated with an injury or illness. (DTI 1997, p. 5)

The considerable lack of data described leads to pronounced difficulties when it comes to estimating such costs as they apply to injuries and deaths caused by consumer products. As Watson and Ozanne-Smith (1997, p. 23) state:

> … any costing exercise is dependent entirely on the availability and quality of both incidence and cost data. Consequently … most costing exercises in this area can provide only a partial estimate of the total economic cost, due to limitations of the available data.

To estimate *with precision* the direct and indirect costs associated with consumer product-related injury, specific and detailed information is required on:

- *the incidence, severity (disability weight) and duration of injury episodes*. This information is important in providing a detailed understanding of such cost components as direct health costs, ongoing rehabilitation, and the duration of absence from work. It is also important to an understanding of year of injury effects – for the costs associated with injury-related deaths, for example, one needs to know not just the incidence of occurring in the year in question but also deaths occurring in subsequent years from injuries sustained in that year; and
- *the age and gender patterns of consumer product-related injury.*[10] Such data is fundamental to any attempt to estimate lifetime costs, given that the age and gender of injured parties is a key influence on loss of earnings.

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9 Some approaches to calculating costs, such as the willingness-to-pay approach (WTP) (described in box C.5 below), provide a single estimate that incorporates elements of both indirect and human costs. As Goodchild et al (2002, p. 28) state: 'The WTP approach tends to bundle both indirect and intangible costs into a single measure.'

10 For example, Rice et al (1989, pp. 50 -51) found that of the injury fatalities occurring in 1985 and later years, 72 per cent were males and 28 per cent females, while 81 per cent of the resulting

A further important point is that current data collection is heavily concentrated on higher level injuries (usually fatalities and serious injuries requiring hospital treatment) and does not assess the incidence of more minor injuries. While such events may result in lower costs per injury, they are likely to be more numerous in the case of consumer product-related injury and therefore be a considerable contributor to overall costs.[11]

In the absence of good quality data in these areas, it is not possible to provide *precise* estimates of cost. This section considers three main issues:

- key methodological and data issues likely to face researchers currently when attempting to estimate the cost of consumer product-related injury;
- past estimates of cost, both from Australia and overseas, of injury generally and of consumer product-related injury in particular; and
- the approximate likely orders of magnitude of *some* main direct and indirect costs resulting from consumer product-related fatalities and serious injuries.

Methodological and data issues

Why estimate cost?

A large number of studies are now available within Australia and internationally that estimate the costs of injury and/or disease. Internationally, perhaps the most well-known work on injury costs is Rice, MacKenzie and Associates (1989).

While cost of injury studies are increasingly common, considerable controversy attaches both to the desirability of undertaking cost estimates and to the uses of cost figures, in particular in relation to program and policy evaluation.

Proponents of cost of injury estimates claim that they perform a number of valuable functions. These include (Rice 2000):

- adding to our understanding of absolute and relative burden by defining the actual magnitude of disease or injury in dollar terms;
- providing the basis for assessing the case for intervention;

lifetime costs from such fatalities were incurred by males. The same study (1989, p. 52) also found that the 25-44 age group incurs the largest share (33 per cent) of lifetime cost of fatalities.

11 The Queensland Government (sub. DR 59, p. 1) stated in this context: 'many product related injuries are considered minor and do not, thankfully, result in long term hospital stays. It does not mean that the costs are insignificant. It means that they are not as obvious and refined as costs associated with workplace or road-related injuries.'

- assisting in the allocation of research dollars on specific diseases;
- providing a basis for policy and planning relative to prevention and control initiatives; and
- providing an economic framework for program evaluation.

However, several of these points have been questioned. In relation to the ability of cost estimates to increase an understanding of the burden of injury, for example, one view is that incidence figures already perform an adequate role in quantifying burden, and that the additional estimation of cost aggregates therefore adds little more to an understanding of the size of the problem. A second, and perhaps more fundamental point, is that cost figures say very little, of themselves, about the *net* benefits accruing to various programs or policies that are aimed at alleviating disease or injury. As Currie et al (2000, p. 176) state, a consideration of net benefits:

> … requires marginal analysis, that is, comparing the expected changes in benefits and resource use for a given intervention, compared with other interventions … Again, in this context, the total cost of injury does not matter, it is the costs and benefits 'at the margin' that is the key issue in determining the efficient use of available resources.

A third related point, stated, for example, by Mathers and Penm (1999, p. 4), is that estimates of the current level of expenditure on a disease or injury do not convert easily into precise figures of the likely expenditure savings that would occur in the absence of such problems.

Caution is therefore needed in interpreting cost of injury figures. While cost estimates may improve the general understanding of the relative size of the burden imposed on the health system and on society generally, from an efficiency perspective such analysis provides an incomplete picture of the relative effectiveness of treatment, research or policy options, both within and across categories of injury. Cost of injury estimates should therefore be seen as only one part of a broader range of information required when undertaking economic evaluations.

Available methods for cost estimation

In addition to data constraints and a lack of agreement on the uses of cost of injury estimates, there is disagreement about the need to estimate both direct and indirect costs and an absence of an agreed methodology for estimating such costs (see boxes C.4 and C.5). The relative advantages and disadvantages of the human capital and willingness-to-pay (WTP) approaches for calculating indirect costs remains an area of particularly pronounced ongoing debate (see table C.11).

Box C.4 **Incidence and prevalence-based approaches**

Most cost of illness studies (of which injury cost studies are a subset) use one of two generic methodologies: the prevalence and incidence based approaches.

In the *prevalence* approach, data is used to establish how many people currently have a condition — the condition's prevalence — and this information is used as a basis for establishing total costs for the year in question. Prevalence figures capture old cases still being treated and new cases. In the specific case of injury, the *prevalence-based* approach therefore estimates the total cost of new and old injury for a single given year, irrespective of onset. Costs are defined as 'the value of net resources which in a given year are unavailable to the community for consumption and investment purposes as a result of the effects of past and present (injury) plus the intangible costs imposed' (Potter-Forbes and Aisbett 2003, p. 3).

In the *incidence* approach, data is used to establish the annual number of people contracting a condition in a given year, and then estimating the costs of these injuries over time. Incidence-based approaches therefore estimate the *lifetime* cost of cases first diagnosed (or injuries sustained) in a base year. This approach generally requires detailed information on the nature and intensity of injury of a given type or types and requires estimates to be made about the likely length of treatment and disability. It essentially models a 'do-nothing' or current care case: what will the costs be over all subsequent years of doing nothing in addition to what is already being done to prevent further injuries of the type in question.

Neither approach is without problems. The incidence-based method, while possibly more useful in relation to many injury areas, is particularly demanding in terms of data requirements. As Potter-Forbes and Aisbett (2003, p. 4) state:

> Although an incidence based approach is to be preferred in a cost-of-injury study, there are substantial problems associated with obtaining sufficient information on the incidence and long-terms consequences of injury as well as the associated costs. There is an absence of definitive longitudinal data – evidence – as to the sequelae of the various consequences of injury. The cost data needed to carry out a 'bottom-up costing' is never readily available either.

The prevalence-based approach is often seen as inadequate when estimating costs in the specific area of injury because the costs of care, mortality and morbidity may be incurred over an extended period of time and this approach may not capture the full extent of such costs.

Source: Watson and Ozanne-Smith (1997, p. 3) and Potter-Forbes and Aisbett (2003, pp. 3-4).

Data constraints place significant limits on many cost of injury studies, in particular those which seek to estimate indirect mortality and morbidity cost components (see, for example, Mathers, Vos and Stevenson 1999, pp. 137-139). As discussed above and within Chapter 9, these problems are particularly pronounced in the area of consumer product-related injury.

Box C.5 **Willingness-to-pay and human capital approaches**

In estimating the indirect costs of death and injury, two main approaches are generally used: human capital and willingness-to-pay.

The human capital method provides an *ex-post* valuation of the potential loss of output associated with death or injury. Mortality costs of injury-related death are calculated as the product of the number of injury-caused deaths and the present value of the future production foregone. The morbidity costs of non-fatal injury are calculated as the value of lost production while an injured individual is unable to perform their normal activities.

The willingness-to-pay method provides an *ex-ante* valuation; that is, it attempts to measure an individual's willingness to pay for reductions in the risk of death or the prevention of impaired health status. This approach uses an individual perspective and incorporates all aspects of well-being, including not only loss of income but also human costs such as reduced quality of life and pain and suffering. This approach therefore provides an estimate of the value of a statistical life (VOSL) rather than just an estimate of the value of lost output due to known mortality or morbidity.

These methods usually yield very different valuations, with the willingness to pay approach generally resulting in far greater estimates of cost. Considerable differences of opinion remain about which method is preferable. For example, in reflecting on the strengths and weaknesses of each approach, Watson and Ozanne-Smith (1997, pp. 6-7) state:

> The human capital approach does not accurately reflect the way people value their own or others' lives. Most people value safety more out of an aversion to injury or death than out of a wish to preserve future levels of income … However, the overriding objection to the willingness-to-pay method is that it requires substantial development prior to implementation, thereby limiting efforts to apply it.

As a result of such problems many studies now report estimates based on both methods.

Source: Watson and Ozanne-Smith (1997) and Potter-Forbes and Aisbett (2003).

Table C.11 **Advantages and disadvantages of cost estimation approaches**

Advantages	*Disadvantages*
Human Capital	
Data reliable and readily available	• Values some lives higher than others due to labour market imperfections, such as wage discrimination. If simplistically applied, the very young and old are undervalued.
Consistent and transparent results	• Overestimates costs in an economy with less than full employment. • Does not reflect a key reason for investment in safety: aversion to death/injury rather than income protection.
Simple to use	• Ignores the loss of 'joy of life', while values for pain, suffering and grief are often arbitrary. • Actuarial uncertainties regarding life expectancy and earnings. • Selection of the appropriate discount rate is controversial.
Willingness to pay	
Comprehensive	• People have difficulty understanding and valuing small risks (generally less than 1 in 10 000).
Incorporates subjective welfare costs	• Individual perceptions of risk may differ. • Willingness to pay does not necessarily imply ability to pay.
Reflects individual preferences	• Differences exist between people's expenditure patterns/actions and their real preferences. • Aggregating individuals' willingness to pay may not produce the social willingness to pay, as individuals may ignore external social costs. • Difficulty in applying concept of a statistical life rather than a particular life. • Methodological difficulties (e.g. inaccurate responses) and strategic behaviour in surveys. • Equity is not taken into account, as results are income-related. • Discrepancy in results using willingness to pay and willingness to accept approaches. • Value will change with incomes and variations in safety.

Source: BTE (2000, p. 22).

A focus on direct cost has been suggested by some researchers. Harrison (1999, p. 11), for example, states in this regard:

> What should be the scope of cost models? Broad scope has the appeal of inclusiveness. However, investigators typically find that data are most available and of better quality for direct health costs and related components. Consequently, models restricted to such components tend to require fewer and less bold assumptions than more inclusive

models. Even where models have a wider scope, consideration should be given to reporting estimates in a manner that enables a well-defined set of direct costs to be distinguished.

The AIHW has also focused on direct costs in several past studies, given the data and methodological issues surrounding the estimation of indirect costs. In supporting this focus, Mathers et al (1998, p. 4) state:

> The inclusion of indirect costs in cost of illness studies remains an area of debate and controversy. Since the … major objectives in measuring indirect costs leads to different methodologies (and very different magnitudes of estimates), and these methodologies are either contentious and/or at an early stage of development, the Institute has decided to focus on the analysis of direct health system costs in the Disease Costs and Impact Study and to include in reports, where appropriate, more direct measures of disease impact in health status terms, rather than the impact in dollars.

Other commentators, such as Miller and Levy (1997) have suggested that a focus on direct, measurable costs alone provides an incomplete picture, as it does not account for a societal perspective.

Proponents of the WTP approach, including Abelson (2003), also argue that a focus on direct costs (and indirect costs estimated using the human capital approach) ignores the costs associated with pain and suffering. BTCE (1996, p. 26) state in this context that WTP's:

> … focus is on the interests, preferences and attitudes to risk of those who are likely to be affected by a project or program. Because the approach reflects the community's desire or preference to avoid death or injury it automatically incorporates the associated humanitarian factors such as avoidance of pain, suffering and grief.

The Queensland Government, for one, emphasised the importance of such a broad focus in relation to consumer product-related injury, stating:

> Product-related injury has a broader significance in the community than purely economic considerations. There are major social issues around the safe supply of consumer products which cannot be quantified in strictly dollar terms such as pain, suffering and long-term lifestyle changes resulting from injuries. (sub. DR59, p. 1)

Certainly, the relative significance of indirect costs – the fact that they generally account for by far the largest share of total costs[12] – also suggests that some attempt

[12] In terms of generally accepted proportions between direct and indirect costs, Potter-Forbes and Aisbett (2003, p. 14) state : 'The total lifetime cost of injury for Victoria in 1993-94 was estimated at $2.6 billion of which direct costs of $759 million accounted for 29.4 per cent of total lifetime cost and the indirect cost of mortality and morbidity, as calculated using the human capital approach, was a further $1.8 billion representing 71.6 per cent of the total lifetime cost. This result closely follows the estimates in the seminal 1989 study of Rice et al. as reported in the

to quantify them, however imprecise, may be justified. In this context, Miller et al (2000, p. 76), when discussing the CPSC's Injury Cost model (ICM), state:

> The intangible losses are quite important. When valued in dollars, they comprise 65-80 per cent of total injury costs. Because these losses are both large and difficult to measure, the revised ICM places special emphasis on measuring them and assessing their reliability.

Given the relatively large share of the costs of consumer product-related injury likely to be contributed by intangible costs, including the costs of pain and suffering, and given the widespread use of WTP methods in many other cost of injury studies, the Commission has chosen to present some exploratory costings using this approach. These estimates are presented below.

Past Australian studies

Several attempts have been made to estimate the specific costs associated with injury as a whole in Australia. These include Watson and Ozanne-Smith (1997), Mathers and Penm (AIHW) (1999) and Potter-Forbes and Aisbett (2003).

One attempt has been made (Watson and Ozanne-Smith 1995) at estimating the direct costs of injuries and deaths that result specifically from consumer product-related losses.

Costs of consumer product-related injury

Watson and Ozanne-Smith (1995)

A 1995 study by Watson and Ozanne-Smith (discussed above) used incidence figures derived from Victorian data to extrapolate the direct costs to government of consumer product-related injury in Australia as a whole. Key findings in relation to cost were that:

- the total *direct* cost in 1991-92 of hospital and medical treatment for non-intentional consumer product-caused injury was 'significant', at $253 million per annum;

MUARC publication, in which it was estimated that 29 per cent of the cost of injury was in direct costs and 71 per cent in indirect mortality and morbidity costs.'

- total government outlays on the treatment of such injury was expected to range between $194 and $238 million per annum;[13] and
- hospital and medical costs represented only a small proportion of the real total cost of such injury.

The study also observed that, while only direct costs were considered, in reality injury (including product-related injury) also involves a range of indirect costs that need to be taken into account when calculating total lifetime costs. In supporting this view, the study (p. iv) cited estimates by the Bureau of Transport and Communication Economics (1992) which suggested that, while medical, hospital and rehabilitation costs contributed 2.4 per cent to the total cost of road accidents, other contributors to total cost were lost earnings of victims (14 per cent), family and community losses (10 per cent), vehicle damage (30 per cent), pain and suffering (24 per cent), insurance administration (9 per cent), legal and court costs (2.9 per cent), traffic delays (4.5 per cent), accident investigation costs (0.9 per cent), losses to third parties (0.3 per cent) and ambulance and rescue (0.1 per cent).

Main cost components of consumer product-related injury

This section provides exploratory estimates of *some* of the main direct and indirect cost components likely to accrue to serious (hospital admitted) consumer product-related injury and death in Australia.

Costs for which some estimates are provided include:

- direct health treatment costs;
- other direct costs, including administrative costs and at-home care costs; and
- costs of morbidity and mortality (including effects on productivity and employment and personal costs).

As with the incidence figures on which they draw, where figures for cost are provided below they are exploratory in nature.

[13] A range for costs to government was presented given the inclusion of private hospitals admissions (except in the case of Victoria and NSW) within the hospitals admission data used and given 'the complex relationship between government services and injury compensation systems that operate in different states (motor vehicle traffic accident insurance schemes and work-related injury insurance schemes)'. (Watson and Ozanne-Smith 1995, p. iv)

Direct costs

Direct costs are generally defined as the changes in resources directly attributable to the injury event, and may be medical or non-medical.[14] Among the main direct costs of fatalities and serious injuries from consumer products are: coronial costs, ambulance costs, emergency department and hospital inpatient costs and GP and specialist costs. Some attempt has been made, *on the basis of very limited data*, to provide exploratory estimates for these cost elements below.

A range of other direct costs may also result from death and serious injury which, due to limited data, are not estimated below, but nevertheless could contribute to the cost burden in this area. They include:

- health costs connected to nursing home care, pharmaceutical use, care provided by allied health professionals, rehabilitation programs and equipment;
- costs connected to at-home care, including nursing service expenses, attendant care costs, use of aids and home modifications, and informal care (such as provided by family and friends); and
- administration costs connected to legal actions and property damage.

These costs usually account for around 30 per cent of the total costs of injury, though considerable variation in this proportion may occur. Of the direct costs mentioned above, by far the most significant share is usually accounted for by the combined costs of hospitalisation, medical treatment, pharmaceuticals, allied health and nursing home care.

Direct costs incurred during the initial episode of hospitalisation are generally a significant contributor to total direct costs. As Potter-Forbes and Aisbett (2003, p. 5) state:

> … it is generally accepted that approximately 85 per cent of the direct cost of an injury occurs on the initial hospitalisation or at least arises within the first year of the injury.

[14] As Potter-Forbes and Aisbett (p. xvii) state: '(Direct costs) include the value of all goods, services and other resources arising from the utilisation of health services such as hospitalisation, pharmaceuticals, ambulance transport, and medical and allied health treatments received outside of the hospital setting. Non-medical costs include the cost of supporting the injured person's activities of daily living, for example through modification of living spaces, and the broader derivative costs associated with the occurrence of the event rather than the injury, such as property damage. The value of the personal health effects of injury are not considered as direct costs in this schema but are valued separately.'

Coronial costs

Many of the specific costs that apply to injury fatalities are subsumed in other health data, such as Emergency Department and hospitalisation costs. One cost element that is able to be separately estimated are coronial costs. For example, Watson and Ozanne-Smith (1995, p. 10) used a crude measure of coronial costs based on Victorian data and applied this to Australia-wide cases as follows:

> The cost of a fatality applied in this study is the estimated cost to State governments through their Coronial systems and is based on costs in Victoria. Because of the huge variation in the costs associated with individual deaths a crude estimate of the average of the average coronial costs of an injury fatality of $2 500, based on the number of deaths investigated annually and the total budget of Coronial Services Victoria (including the Institute of Forensic Pathology) was applied.

An alternative proxy for coronial costs is the net expenditure per reported death and fire for coroners' courts. Nationally, the average expenditure by coroners' courts per reported death and fire was $1283 in 2002-03 (SCRGSP 2004, p. 6.61) Across jurisdictions, it was highest in WA ($4846) and lowest in the ACT ($615). Applying this average[15] to the fatality estimates presented in table C.10, for example, and assuming that all product-related fatalities proceed to a coronial hearing, would yield a range of annual coronial costs due to consumer product-related injury of $102 000 to $147 500 in 2002-03.

Ambulance costs

Detailed indicators dealing with ambulance costs are limited – for example, there are currently no indicators for average ambulance expenditure per urgent and non-urgent response (SCRGSP 2005, p. 8.48). The present study therefore draws on an estimate by IPART NSW (2005, p. 8) of average ambulance costs in Australia, derived from SCRGSP data on treated and transported patients and total ambulance costs in each State and Territory (table C.12).

[15] While this figure has been included in the current costing, its use is qualified by a lack of uniform measurement across jurisdictions. Some jurisdictions have included autopsy and chemical analysis costs within their expenditure data, but others have excluded these costs because they are incurred outside their immediate control. Data for NSW, Queensland and the ACT include fires reported to the coroner; all other jurisdictions exclude these data.

Table C.12 **Average ambulance costs per patient, $2003–04**

	2001–02	*2002–03*	*2003–04*
NSW	491.4	477.6	512.0
Victoria	599.4	590.7	602.6
Queensland	551.4	499.5	533.4
WA	445.5	445.4	454.4
SA	435.3	461.7	509.3
Tasmania	475.5	491.4	666.1
ACT	488.8	570.9	523.4
NT	439.8	434.2	450.0
Australia	**521.6**	**506.9**	**536.2**

Source: IPART (NSW) (2005, p. 8).

Some of the problems with generalising about average ambulance costs are discussed by IPART (NSW) (2005, pp. 8-9):

> … there are very significant differences in average costs per patient … depending on whether the patient is classified as an emergency or non-emergency case, a city or rural case, or a fixed-wing aircraft or a helicopter case. For example:

- for city cases, the costs per emergency patient are around double those per non-emergency patient transported by ambulance, and triple those per non-emergency patient transported by a designated 'patient transport vehicle';
- the costs per rural patient are 50 per cent or more higher than the costs per city patient (except for rescue cases, where the costs per patient are about the same for city and rural patients); and
- for aeromedical cases, the average costs per patient transported by helicopter are around four times higher than those per patient transported by fixed-wing aircraft.

Further complications arise from the fact that some instances of consumer product-related injury may involve multiple response vehicles, or may involve treatment on the scene with no progression to hospital admission. The actual costs of any event, and the resulting aggregate ambulance costs in this area, are therefore highly contingent on the nature of such episode patterns. Applying an average value of ambulance transportation in 2001-02 of $500, and assuming that a low level of 50 per cent and a high level of 100 per cent of the product-related death and serious injury cases estimated in section C.1 involve one ambulance transportation episode, would result in total annual ambulance costs of between $338 500 and $1 854 000.

Emergency department costs

Considerable difficulties attach to establishing the ED utilisation of admitted hospitalised cases. For the purposes of the current study, and in line with Watson and Ozanne-Smith (1995, p. 11), we have assumed that all hospitalised injury cases

are assigned one ED attendance. (This assumption is likely to be valid given that the focus is on costing serious injury and fatality – serious injury cases are more likely to follow a sequence of ED presentation followed by admission rather than other possibilities such as admission following a consultation with a GP.)

Actual average costs for ED episodes in public hospitals, by triage class are shown in SCRGSP (2004). For the purposes of the current exercise, an average cost for ED episodes of $409 was applied, representing the average figure across admitted triage categories 1-5. Applying this level to a range of ED presentations associated with fatalities and serious injuries proceeding to admission of between 1354 – 3709 would yield a cost range for ED treatment of $554 000 to $1 520 000.

Hospital inpatient costs

Information on the average cost and duration of hospital admitted patient episodes (for both public and private hospitals) is readily available for many forms of injury and illness. However, the Commission was unable to access extensive data relating specifically to recent utilisation patterns for consumer product-related injury.[16]

Key issues that face those attempting to estimate the inpatient costs of consumer product-related injury include:

- number of bed days (average length of stay, or ALOS) accounted for by individuals injured by products;
- utilisation splits between private and public hospitals; and
- number of hospital episodes, given that injury can result in multiple admissions to hospital and other health service contact (Mathers and Penm 1999, p. 4).

Regarding a reasonable proxy for possible ALOS, Helps, Cripps and Harrison (2002, p. 17) estimate an ALOS in 1999-00 for injury and poisoning as a whole of four days, with discharge occurring on the day of admission for 29 per cent of cases. Removing same day cases yields an ALOS of 5.5 bed days per separation. These figures are very similar to more recent estimates for all injuries and poisonings (ALOS for private hospitals appear, on average, slightly higher) (AIHW 2004b, p. 434).

Average costs per hospital separation were estimated by the AIHW (2005, p. 324) at $2952 for public hospitals and $2396 for private hospitals. These totals are broadly similar to those estimated for injury. In the specific category of ‘injury, poison and toxic effects of drugs’, for example, average costs per hospital separation for

[16] Utilisation data specific to consumer product-related injury has been presented in several past MUARC reports, including Watson and Ozanne-Smith (1995).

2001–02 are equivalent to $2650 for public hospitals and $2940 for private hospitals (AIHW 2004, pp. 438-439). Average costs per bed day (including same-day separations) for this category in 2001-02 are equal to $943 for public hospitals and $827 for private hospitals.

Assuming a ratio of public/private hospital usage for consumer product-related injury of 6:1, and applying a weighted average to the aforementioned average costs per public and private bed days yields an average cost per bed day across both sectors of $925 for this injury category.

Applying the above estimates to hospitalised injury cases yields a range of costs of between $5.2 and $14.4 million (table C.13).

Table C.13 **Experimental estimates of inpatient hospitalisation costs for hospital admitted serious injury and fatalities, 2001–02**

Outcome	*Fatalities*[b]	*Serious Injury Hospital separations Lower (home only) and upper (all places) estimates*	*Same day separations*	*Multiple day separations*	*Estimated Total Bed Days*[c]	*Total Hospitalisation Costs ($m)*
Product fault alone[a]	45 - 65	364 – 1027	118 - 316	291 - 776	1718 - 4584	1.59 – 4.24
Product fault and behaviour	35 - 50	910 – 2567	274 - 759	671 - 1858	3964 - 10978	3.6 – 10.15
Total	80 - 115	1274 - 3594	392 - 1075	962 - 2634	5682 - 15562	5.2 – 14.4

a Includes poor servicing and maintenance.

b All fatalities assumed to involve hospitalisation episode. Multiple episodes of admission not included.

c Application of average utilisation and cost levels to serious injury problematic due to possible longer duration of such episodes.

Source: Productivity Commission estimates.

GP and Specialist Consultations

Several past cost studies in Australia provide information on the likely relationship between GP and specialist consultations and ED presents. In relation to the specific area of consumer product-related injury, Watson and Ozanne-Smith (1995, p. 21) use ELVIS data to estimate a ratio of GP to ED attendances of 2.37:1 and a rate of

single follow-up either to a GP or referral to a specialist in 37.75 per cent of cases.[17]

Applying these values to the injury cases estimated in section C.1 would result in 3209 – 8790 accompanying GP consults and 1211 – 3318 follow-up visits or referrals to either a GP or specialist.

Clearly, the total costs of GP and specialist consultations varies greatly depending on such factors as length of consultation, nature of examination, and extent of previous related encounters. As a very rough approximation for initial GP consultation costs, the Medicare Benefits Schedule (2000) amount of $49.80 - $73.35 for category 1 attendances involving consultations of a mid-range to high level complexity and duration was used. This would result in total costs of initial GP consults of $160 000 to $650 000 and values for further consultations with either a GP or specialist of $60 000 to $243 500. This method would therefore yield total costs ranging from $320 000 to $895 000.

Mortality and morbidity costs

Given the lack of data in this area, the Commission has not attempted to estimate, in detail, the possible magnitude of mortality and morbidity costs. However, such costs are, on the basis of previous estimates in other areas of injury and disease, likely to be considerable, even given the relatively small level of incidence of consumer product-related injury when compared to other causes.

The following sections use a willingness-to-pay method and exploratory age and gender profiles to demonstrate the possibility that the indirect costs of consumer product-related death and serious injury may be significant – in the order of hundreds of millions of dollars.

Value of a statistical life

At present, there is no consensus on the appropriate level of VOSL in Australia or internationally. Estimates continue to vary widely given the type of injury or disease under consideration and the methods used for establishing willingness to pay (see table C.14).

[17] While the ratio for GP attendances is higher than subsequent estimates using ELVIS data (Day, Valuri and Ozanne-Smith 1997, McClure and Ozanne-Smith 1996), the higher estimate may more accurately apply to the injury cases currently being considered.

The process of selecting a feasible VOSL is also complicated in the present case by the absence of past estimates specific to consumer product-related injury. However, values have been estimated in many other areas of injury, such as drowning and transport accidents,[18] that may be similar to, or may indeed include, consumer product-related injury.

Given this lack of consensus, one possibility is to present a range of hypothetical values as a basis for estimating indirect costs. As Potter-Forbes and Aisbett (2003, p. 10) state:

> The variability of the VOSL rather complicates selection of the value that ought to be used in a particular study, but it has been argued that internal consistency within the study may be of more importance than comparability across studies. The problem may be resolved by presenting the values within a range or presenting the statistical confidence with which a particular value may be used.

Table C.14 **Surveys of VOSL Results**

Report	*Year*	*Original studies*	*Estimated VOSL (US$)*
Kneiser and Leith	1991	Wage risk study, Australia	About $2.2 million in 2000 prices
Viscusi	1993	24 wage-risk studies,	Most estimates in $3m-$7m range
		4 Contingent Valuation (CV) studies[a]	Range $1.2m-$9.7m
Jones-Lee	1994	13 wage-risk studies, 7 other revealed preference studies, 8 CV studies	$1.9m-$2.2m are the median and mean for most reliable results
Jones-Lee et al.	1995	CV study in the UK	$2.7m
Schwab-Christe	1995	CV study in Switzerland	$7.5m
Desaigues and Rabl	1995	CV study in France	$3.4m
Van Den Burgh et al.	1997	10 US and 1 UK wage-risk studies	$3.9m 'most reliable estimate'
Johannesson et al.	1997	CV study in Sweden	$3.8m in 1995 prices
Desvouges et al.	1998	28 wage-risk studies and 1 CV study, US	VOSL of $3.6m with confidence interval of $0.4m-$6.8m
Day	1999	16 wage-risk studies, 10 US, 2 Canada, 4 UK	$5.6m is best estimate
Guria et al.	1999	CV study in New Zealand	$2.1m
Krupnick et al.	2000	CV study in Canada	$0.5m-$2.0m
Mrozek and Taylor	2001	40 wage-risk studies	Approximately $2.0m

a Excludes two early study outliers with very small samples and extreme results.

Source: Abelson (2003, p. S6).

18 For drowning see, for example, Hendrie (2004) and for transport accidents see BTE (2000) and BTCE (1996).

Estimated mortality costs

For the purposes of the current exercise, and absent of other reasonable proxies for willingness-to-pay in this area, the Commission has chosen an exploratory hypothetical range for VOSL of between $1.5 and $2.5 million for a healthy individual in middle age (approximately 40 years). Allowing 40 years of life lost and a utility or consumer discount rate of 5 per cent, this would imply values for a life year of between $87 500 and $146 000.

This range for VOSL is in line with several recent reports on injury that have included VOSL estimates (see box C.6). Applying it to the estimated level of mortality presented in section C.1 would yield average values for life lost (unadjusted for age) of between $120 and $287.5 million.

Given an absence of detailed data on age profiles, no attempt has been made to combine age-related incidence figures with estimates of age-specific VOSLs, however, were such data to be available it would provide a far more accurate costing of mortality in this area.

Estimating morbidity costs

No attempt has been made to estimate the indirect costs associated with morbidity caused directly by consumer product-related injuries. For this to occur, detailed data on the duration and severity of related morbidity is required. However, it is possible that these costs could be considerable in relation to consumer product-related injury. In reviewing a range of acute and chronic health conditions (and using a VOLY of $108 000), Abelson (2003, p. S12) states:

> Typically, acute conditions such as asthma, earache or eye irritation, are valued at about $40 - $50 per day. The cost of chronic conditions ranges from $20 000 - $30 000 per annum for mild bronchitis and broken arms up to $100 000 plus per annum for various forms of paralysis and brain damage. These proposed values are consistent with economic theory, international research and international practice.

Box C.6 **Recent views on the VOSL in Australia**

Abelson (2003, p. S8):

> There is no general VOSL in use in Australia. Here, road agencies have been the main users of VOSL estimates … To estimate the national cost of road crashes, the Commonwealth Bureau of Transport Economics (2000) adopted $1 359 000 for loss of life. This included $540 000 for loss of workplace labour, $500 000 for loss of home and community labour, and $319 000 for loss of quality of life. This is an ex-post cost of illness value rather than a WTP value …
>
> In lieu of Australian research on VOSL, we draw on overseas studies and values. These studies indicate that most likely VOSL values are in the range of A$3.3 – 6.6 million … Taking a conservative view of estimated VOSLs, and given the broad similarity between European and Australian incomes, it appears that, for policy purposes in Australia, a VOSL of about A$2.5 million for a healthy prime-age individual would be an appropriate (conservative) value.

Applied Economics (2003, p. 20):

> Abelson's (2003) survey of international values for life shows that the European Union has adopted a value of about A$2.5 million per fatality and that this is at the lower end of the research findings, which range up to $10 million and even beyond. Abelson proposes that A$2.5 million is an appropriate standard for Australian public policy requirements …
>
> On the other hand, the value of a DALY would be lower if a more conservative value of life of say $1.5 million were adopted, which is more in line with recent Australian practice. A value of life of $1.5 million combined with 40 years of life and a 5 per cent discount rate would produce a value for a healthy life year of $87 500.

Hendrie (2004, pp. 11-12):

> With estimates of the VOSL used in Australia falling in the $1.0 to 2.5 million range, a mid-range VOSL of $1.5 million was selected for this study. This converts to a value of a life year of approximately $90 000, based on a life expectancy of 40 years and a discount rate of 5 per cent …
>
> A benchmark against which the $90 000 value of a life year used in this study can be compared is the incremental cost-effectiveness of drugs that the Pharmaceutical Benefits Advisory Committee (PBAC) recommends for listing on the Pharmaceutical Benefits Schedule. Conceptually the incremental cost per life year gained of drugs recommended for public reimbursement can be interpreted as the amount society is willing to pay of taxpayer funds for an additional life year, in the context of public decision making or choices about resource allocation…
>
> The upper threshold of the additional cost per life year of $83 000 beyond which the PBAC was unwilling to pay for additional life years gained is broadly in line with the value of a life year of $90 000 adopted in this study.

Table C.15 **Experimental estimates for selected cost elements of consumer product-related injury: fatalities and serious injuries only ($m)**

	low	*high*
Direct costs		
Ambulance transport	0.3385	1.854
Pharmaceuticals	n.e.	n.e.
Allied health	n.e.	n.e.
Nursing home	n.e.	n.e.
Hospital costs		
Hospital admissions	5.2	14.4
ED	.554	1.52
Medical		
GPs and Specialists	.32	.89
Rehabilitation		
Programs	n.e.	n.e.
Equipment	n.e.	n.e.
At-home		
Nursing service	n.e.	n.e.
Attendant care	n.e.	n.e.
Aids, home modifications	n.e.	n.e.
Informal care (such as by family and friends)	n.e.	n.e.
Administration costs		
Coroners	.102	.148
Legal	n.e.	n.e.
Property damage	n.e.	n.e.
Total of estimated direct costs	**6.5**	**18.8**
Mortality and morbidity costs		
Mortality[a]	120	287.5
Morbidity	n.e.	n.e.

[a] Unadjusted for age.

n.e.: not estimated.

Source: Productivity Commission estimates.

Sources of overstatement and understatement

The very limited nature of the present cost estimates should be emphasised. The difficulties apparent in the estimations presented above, in particular the problems associated with a lack of detailed data, point to a possible need for greater research on incidence and cost in this area. This topic is discussed further in chapter 9.

In relation to sources of understatement, injuries that are not severe enough to require medical attention, or one or more days of restricted activity, are excluded from the current costing given a lack of data, as are injuries resulting in ED presentations but not proceeding to hospital admission. Figures also assume single

episodes of presentation and admission for serious injury and fatality cases, so do not cost the multiple presentations and admissions that might be expected of at least some part of this cohort[19]. The large number of uncosted categories, some of which may be significant in relation to serious injury and death caused by consumer products, is also a potentially considerable source of underestimation.

In relation to sources of overestimate, and as stated in section C.1, the incidence figures used as the basis upon which cost elements are calculated contain significant sources of overstatement and, as a result, costs may also be significantly overstated.

19 This assumption of single episodes is also problematic from a methodological viewpoint given that an incidence-based approach, which explicitly accounts for costs from injury incurred across multiple years, is preferable when costing injury for policy purposes.

D International approaches

This appendix provides a brief overview (see table D.1) of the approach taken toward ensuring general consumer product safety in the United Kingdom, the United States, Canada and New Zealand. In general, the political structures and attitudes towards risk are similar in these countries to those that exist in Australia. Further, some of these countries have already implemented reforms similar to those proposed for the Australian system and their experience with these may provide some insights for the current review.

Two aspects of overseas product safety regulation of particular interest to this study are discussed in more detail:

- The European Union General Product Safety Directive which forms the basis for the consumer product safety system in much of Europe (including the United Kingdom). It is of particular interest as it embodies: a General Safety Provision (GSP); requirements on business to report unsafe products; and a rapid exchange system for information sharing between countries.
- The US system which places reporting requirements on business and has an extensive hospital-based early warning system.

D.1 The European General Product Safety Directive (GPSD)

The European GPSD embodies rules regarding product safety which are applied throughout the EU in national regulations and laws. The rules are aimed at ensuring consumer products placed on the market are safe, and by doing so protect consumers' health and safety and the proper functioning of the market (EU 2005f). In many cases the Directive has led to the enactment of legislation in countries that previously had few laws or regulations relating to general consumer product safety (CDC 2000).

Table D.1 **Elements of product safety regimes in other countries**

	US	*UK*	*Canada*	*New Zealand*
Legal basis	*Consumer Product Safety Act 1972* (CPSA)	*Consumer Protection Act 1987* (CPA) *General Product Safety Regulations 2005*	*Hazardous Products Act 1969* (HPA)	*Fair Trading Act 1986* (FTA) *Consumer Guarantees Act 1993* (CGA)
Administrative authority	The Consumer Product Safety Commission (CPSC) is an independent agency established under the CPSA. The CPSC is responsible for both day-to-day policy decisions and enforcement.	Policy decisions are undertaken by the Department of Trade and Industry (DTI). Enforcement of product safety regulations is undertaken by local government Trading Standard Authorities.	The Minister for Health, assisted by Health Canada (a government department) is responsible for policy decisions and enforcement of product safety laws and regulations.	The Ministry of Consumer Affairs is responsible for policy formulation under the FTA. The Commerce Commission, an independent agency similar to the ACCC, is responsible for the enforcement of policy decisions.
Product liability	Product liability law allows consumers to take action against firms and seek compensation and redress for harm caused by unsafe goods. While varying by State, product liability is generally a strict liability offence.	The CPA contains a strict liability regime which allows consumers the right to seek compensation for personal injury or loss caused by unsafe products, independent of the suppliers' intentions.	Consumers have rights of action under civil law to seek compensation if they incur injury of economic loss as a result of negligence on the part of suppliers.	New Zealand has a comprehensive accident compensation scheme that compensates consumers for loss caused by unsafe products. As a result, consumers do not have the right to sue, other than for exemplary damages.
Powers to act against unsafe products	The CPSC has the power to mandate consumer product safety and information standards, issue warnings and ban products. It relies where possible on voluntary standards and can effectively order a recall for products that present a substantial hazard.	The DTI has the power to set mandatory standards. Enforcement agencies can require a business to withdraw or recall a dangerous product or to issue a warning or mark the product.	The HPA allows Health Canada to impose mandatory standards and to ban products. It does not have the ability to order compulsory product recalls.	The FTA allows the Minister of Consumer Affairs to recommend the introduction of safety and information standards or order a compulsory recall.

(Continued next page)

Table D.1 **(continued)**

	US	*UK*	*Canada*	*New Zealand*
General safety provision (GSP)	The US does not have a GSP.	The UK GSP (first adopted in 1987) obliges manufacturers and suppliers to place only safe products on the market. In addition, suppliers are now required to inform consumers of the risks associated with a product.	At present Canada does not have a GSP, but is considering making it illegal to make or sell a product that causes undue adverse health effects (over the lifespan of the product).	The New Zealand system does not have a GSP, however the CGA establishes a guarantee that goods purchased should be of acceptable quality, including that they be 'safe'. This statutory requirement can only be enforced through private action.
Early warning and information sharing measures	US businesses are required to report any product that contains a defect which could create a substantial hazard or which creates an unreasonable risk of injury or death. Further, the National Electronic Injury Surveillance System provides information on emerging product safety risks by monitoring hospital emergency rooms.	The UK participates in the EU's early warning and information exchange system known as RAPEX. In addition, businesses are required to notify government when they have reason to believe that a product is dangerous.	Health Canada request that all businesses report voluntary recalls. Regional product safety offices accept complaints from consumers.	Information is received mostly through complaints from consumers and businesses. The Ministry also seeks information from overseas agencies and businesses are advised to report product recalls.
Coverage of services	Not covered.	Services associated with the supply, installation and maintenance of products are explicitly included in product safety laws.	Not covered.	The FTA includes powers for the minister to issue safety and information standards in respect to the provision of services.
Coverage of second-hand goods	The CPSA does not distinguish between new and second-hand goods.	Second-hand goods are explicitly covered unless they are sold as antiques or to be reconditioned, and the purchaser is informed that the product is not obliged to meet explicit safety requirements.	The HPA does not distinguish between new and second-hand goods and Health Canada guidance makes clear that the Act applies to second-hand products	The CGA and FTA do not distinguish between new and second-hand goods. Guidance material from the Ministry of Consumer Affairs makes clear the CGA covers second-hand goods.

Business do not have to comply directly with the GPSD, rather the GPSD requires member states to enact the laws and/or regulations necessary to give effect to its requirements. All (pre-expansion) EU countries have adopted the GPSD, albeit in different ways to accommodate local considerations and differences in legal and constitutional environments. This section focuses on the requirements of the GPSD in general rather than the particular laws of any EU country.

The first GPSD was passed in June 1992 and was to be applied by member states at the latest by June 1994. Following a review, a second amended Directive was issued in December 2001, to be enacted by January 2004 (see box D. 1). The second Directive extended the scope of the product safety laws and strengthened several aspects of the initial Directive.

The GPSD imposes a number of requirements on business and member governments. Principally it introduces a GSP but it also establishes requirements for business to report to government and a system for sharing information about product risks between EU members.

The new GPSD applies to:

> … any product — including in the context of providing a service — which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new used or reconditioned. (EU 2002, p. 5)

This definition covers the safety of services related only to the supply of a product, although some EU countries have introduced regulation dealing with the provisions of services more generally.

The European Union also has some sector specific directives which vary the regulations applied to particular goods. Such goods include: food products, pharmaceuticals, children's toys, personal protective equipment, cosmetics and electrical equipment. In addition, member states may also introduce or amend measures applying to particular goods or sectors.

Box D.1 **Review of the GPSD**

Before revising the GPSD and introducing an amended version in 2001, the EU commissioned a study (CDC 2000) of the original GPSD and its effectiveness. This report found that although the Directive had been adopted by most EU members there were some issues of concern surrounding its implementation and enforcement.

- There was some ambiguity in the wording of the Directive. Initial confusion centred on whether all products, or just those not subject to sector-specific regulation, were covered (most countries have excluded the latter products). There were also questions on whether products that are intended for professionals, but are also used by consumers, were covered (the revised directive clarifies that they are). Further, many businesses complained about the vague nature of the safety provision (not helped by the lack of case law).
- Even in instances where the provisions were well understood, they had had little practical effect. The study found that businesses were much more likely to be influenced by the threat of product liability than by the possibility of breaching the GPSD. Some businesses were also ignorant of their monitoring and reporting obligations. The study concluded that, 'The sad fact is that the Directive has had very limited impact in practice' (CDC 2000, p. 2).
- The impotence of the provisions may partially be attributed to their lack of enforcement. For example, there was an absence of penalties for failing to monitor and report and few guidelines existed on what should be reported. Furthermore, there was a lack of resources in most countries and penalties were only imposed in a handful of cases.

In contrast, most countries found the RAPEX system to be effective and several countries used it as their sole source of information (CDC 2000, p. 12).

Many of the findings of the report have since been addresses in the revised directive. For example, the scope and coverage of the Directive has been clarified, regulators have been given more powers to monitor and enforce requirements and there has been an increase in collaboration among countries on risk assessment and the testing of products.

Source: CDC (2000) and EU (2005b).

The General Safety Provision

The GPSD establishes a GSP which obliges producers to place only safe products on the market. A safe product is defined as:

> any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection

for the safety and health of persons, taking into account the following points in particular:

- the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
- the effect on other products, where it is reasonably foreseeable that it will be used with other products;
- the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;
- the categories of consumers at risk when using the product, in particular children and the elderly. (EU 2002, p. 5)

The definition goes on to note that:

> The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be "dangerous". (EU 2002, p. 5)

In practice, a product is considered safe if it: conforms to the specific laws of the member state; or meets a European standard which has been referenced by the *Official Journal of the European Communities*. Otherwise, conformity with the GSP is assessed on a case-by-case basis taking into account:

- any voluntary European or national standards which apply to the product;
- any European Commission recommendations that set guidelines on product safety;
- any product safety codes of practice;
- the state of art and technology; and
- reasonable consumer expectations concerning safety.

The producer of the product is taken to be: the manufacturer where they are established in the EU; the manufacturer's representative where the manufacturer is not established in the EU; or the importer of the product.

Reporting requirements

In addition to the GSP, producers are also required to report to government any unsafe goods that they have supplied. The GPSD requires producers and distributors to notify authorities if they know or should have known that a product they have placed on the market contravenes the GSP (EU 2002, p. 7). Suppliers are encouraged to undertake a risk assessment procedure to determine whether a good is unsafe (see box D.2).

Box D.2 **Risk evaluation in the European Union**

Before placing a product on the market, European businesses are expected to undertake a risk assessment to determine whether the product is considered 'safe' and meets the requirements of the GPSD. In addition, after identifying a potential hazard, authorities undertake a risk assessment to guide them on what action to take.

Severity of injury

Risks are categorised as either slight, serious or very serious (the table below shows the risks relating to a mechanical device). The assessment of severity should also consider the number of people likely to be injured in any one incident.

Table: Severity of mechanical injury

Slight	*Serious*	*Very Serious*
<2% incapacity, usually reversible and not requiring hospital treatment	2 – 15% incapacity, usually irreversible requiring hospital treatment	>15% incapacity, usually irreversible
Minor cuts	Serious cuts	Serious injury to internal organs
Minor fractures	Loss of finger or toe	Loss of limbs
	Damage to sight	Loss of sight
	Damage to hearing	Loss of hearing

Probability of occurrence

The probability of occurrence depends on:

- the probability of the product being or becoming defective; and
- the probability of a 'normal' user, exposed to the hazardous product, being injured.

The following table shows how these two probabilities are combined to give an 'overall probability of health/safety damage'.

Table: Overall probability of health/safety damage

	Probability of product being defective		
	1%	10%	100%
Hazard is always present and health/safety damage is likely to occur in foreseeable use.	Medium	High	Very high
Hazard may occur under an improbable or two possible conditions	Low	Medium	High
Hazard only occurs if several improbable conditions are met	Very low	Low	Medium

Putting it all together: what is a serious risk (and is a good unsafe)?

First, the severity of the health/safety damage is combined with the probability of damage to give an indication of the 'overall gravity of outcome'. This gravity of outcome is then modified according to the competency of the user, the obviousness of the danger and the existence of safeguards and warnings to give the final assessment of the risk (which determines whether notification is required).

(Continued next page)

Box D.2 **(continued)**

Table: Overall gravity of outcome

		Severity of health/safety damage		
		Slight	Serious	Very serious
Probability of damage	Very high	High	Very high	Very high
	High	Moderate	High	Very high
	Medium	Low	Moderate	High
	Low	Very low	Low	Moderate
	Very low	Very low	Very low	Low

The effect is that even a product risk that has a 'low' gravity of outcome is assessed as serious if it is being used by vulnerable people (such as the blind, disabled, very old or young). On the other hand, a product risk with high gravity of outcome may not be considered serious if it is used by 'normal' adults, the risk is obvious and it has adequate warnings and/or safeguards.

Table: Overall assessment of the need for intervention

Overall gravity of outcome	*Vulnerable People*		*Normal adults*			
			Are their adequate warnings/safeguards?			
	Very vulnerable	Vulnerable	No	Yes	No	Yes
			Is the hazard obvious?			
			No	No	Yes	Yes
Very high	SERIOUS RISK: RAPID ACTION REQUIRED					
High						
Moderate						
Low			Moderate Risk: some action required			
Very low				Low Risk: action unlikely		

Source: EU (2005c).

Suppliers are not required to notify authorities if the danger relates only to isolated products or circumstances and the manufacturer believes that the risk has been controlled. For example if the risk is related to a limited number of well identified products (or batches) only, and the supplier knows that the risk has been controlled, they are not required to report. If suppliers are unsure of whether they need to notify government they can submit preliminary information and authorities will help suppliers undertake their responsibilities.

The obligation to notify falls upon manufacturers, distributors and retailers. Whoever of these is the first to obtain evidence that a product is unsafe, they are required to pass this information on to others in the supply chain. Distributors or retailers are not required to report if they know that the national authorities have already been informed (although they are encouraged to provide any new information to the manufacturer).

Suppliers are required to notify within 10 (calendar) days of receiving reportable information or, in the case of a 'serious risk', within 3 days and in an 'emergency

situation' by the fastest means. Notifications must include: details of the producer; the product involved and the hazard (including accidents and health/safety effects). Suppliers are also required to report corrective actions that have been taken or are planned to reduce or eliminate the risk to consumers (e.g. recall, modification, informing consumers, etc). Suppliers must also report all companies who hold the affected products and estimate the approximate number of products in the hands of businesses as well as consumers. However, this last requirement only applies in cases of serious risk or when the supplier opts to submit the notification only to their 'home' authorities, and it can be submitted after the initial notification to government (EU 2005c, p. 13).

RAPEX – information sharing

Further to requiring businesses to report, the GPSD also requires national authorities to inform other countries about suspected unsafe products. These arrangements provide the basis for the RAPEX system which requires member countries to inform the European Commission of product safety risks. The Commission then checks the notification and passes it on to other member countries. The revised GPSD has reinforced the requirements on members to share information on unsafe goods.

This strengthening, and the expansion of the EU, has seen an increase in the number of notifications from 139 (in 2003) to 388 (in 2004). The majority of products notified through RAPEX are electrical appliances or toys, with the major hazards involving these products including injury, electric shock, choking/suffocation and fire risks/burns. Most notified products are imported from China, although this may reflect the volume of 'risky' products that are made in China (EC 2004).

Member countries are required to notify the Commission of any potentially unsafe products for which they:

- impose pre-marketing conditions;
- require to be marked with warnings concerning any risks;
- alert consumers about a related risk; or
- organise the ban, recall or modification of (EU 2005c, p. 6).

Member states are also encouraged to provide the Commission with information regarding: the existence of a serious risk prior to action being taken; any action taken against a batch of products (and when the batch has been withdrawn); and if a customs authority blocks a consumer product due to a serious risk (EU 2005c, p. 7).

In general, member states are not required to notify the Commission of product risks that do not and can not go beyond the territory of the member state. Nevertheless, where such cases may be of interest to other members (for instance, where the incident represents a new type of risk or a new category of product) members are encouraged to report the incident and the action taken.

Upon being informed of a potential product risk, member nations are required to investigate whether the product was sold in their country and decide on what action should be taken. In the case of notifications requiring emergency action (very serious risks) member countries are then obliged to provide a 'reaction' to inform the Commission of their research and conclusions.

D.2 The US Consumer Product Safety Commission

The Consumer Product Safety Commission (CPSC) is an independent federal agency of the United States, which is tasked with protecting the public from unreasonable risks of injury associated with consumer products. It was established in 1972 by the *Consumer Product Safety Act 1972*[1] and, in 2005, received US$62 million in funding with a total staff of 471 (see table D.2).

The CPSC divides its budget by the hazards that are targeted, rather than by administration, educative activities and enforcement. The majority of the budget is aimed at reducing product hazards to children and families. By 2013, the CPSC aims to reduce death rates from most of these hazards by 20 per cent.

The Consumer Product Safety Act (CPSA) requires the Commission to collect and investigate data on injury, disease and death associated with consumer products and undertake appropriate research into risks posed by consumer products. The Act does not cover food, motor vehicles, aircraft, boats, pesticides, pharmaceuticals, cosmetics, tobacco products and any products which are not customarily produced for use by consumers.

National Electronic Injury Surveillance System (NEISS)

The CPSC operates an extensive data collection framework for the purposes of obtaining information on consumer product related injury.

[1] A consolidated version of the Consumer Product Safety Act is available at: www.cpsc.gov/businfo/cpsa.pdf (accessed 6 January 2006).

Table D.2 **CPSC resource levels**

	2005 (planned)	
Reducing product hazards to children and families	FTE[a]	US$'000
Reducing fire and electrocution hazards	173	22 489
Fire deaths	*147*	*19 212*
Electrocution hazards	*26*	*3 277*
Reducing children's hazards	115	14 683
Drownings	*17*	*2 147*
Other children's hazards	*98*	*12 536*
Reducing poisonings and other chemical hazards	53	6 977
Carbon monoxide poisoning	*13*	*1 642*
Child poisonings and other chemical hazards	*40*	*5 335*
Reducing household and recreational hazards	12	5 408
Subtotal	***383***	***49 557***
Identifying product hazards		
Data collection	77	11 168
Emerging hazards/data utility	11	1 424
Subtotal	***888***	***12 592***
Total for CPSC	**471**	**62 149**

a full time equivalent staff.

Source: CPSC (2005a).

The National Electronic Injury Surveillance System (NEISS)collects data from 100 hospital emergency rooms and children's hospitals. The hospitals are chosen as a representative sample of the more than 5 000 hospitals with emergency departments in the US. Hospitals in the sample are grouped into five strata, four according to size — small (47 hospitals), medium (13), large (9) and very large (23) — and a fifth representing children's hospitals (8) (CPSC 2001). From time to time, the selection of hospitals is revised to ensure that the sample continues to be representative of all US hospitals.

Within each hospital, all patients visiting the emergency room are asked how their injury occurred. These details are entered into the patients' medical records by various emergency room staff. At the end of each day, a NEISS co-ordinator (who may be a member of staff or a person under contract to the CPSC) surveys all presentations to the emergency rooms to determine which are considered 'in-scope' cases (product-related injuries). For all in-scope cases, the co-ordinator enters the relevant data from the hospital records into individual NEISS case files, which are automatically uploaded to the central NEISS database. Of particular interest to the CPSC are two entries in the data base: the coding which identifies which consumer

product was involved; and the narrative which describes what the patient was doing at the time of the accident.

In addition to regular recording of hospital presentations, the NEISS system is also used to provide more information about particular product safety risks. For instance, the system is used to undertake a special study of fireworks injuries around the 4th of July. Usually, additional data regarding these injuries are extracted from the hospital records and are uploaded to the NEISS database. And, more detailed information about a small number (less than one per cent) of product-related incidents are obtained through additional 'follow-back' investigations where the patient is interviewed (by phone or face to face) about the specific circumstances regarding his or her injury.

The NEISS has recently been expanded to collect data on all injuries, in addition to consumer product-related injuries (which the NEISS was initially designed to identify). Since 2000, the system has been collecting data on:

- injuries where no product was mentioned (e.g. fell to ground);
- injuries related to products outside the mandate of the CPSC (e.g. motor vehicles); and
- intentional injuries such as assaults and suicide attempts. (CPSC 2005c)

Once data has been centrally collated at the CPSC, it is used for a variety of studies and made available, via the Information Clearing House, to other researchers and the public. The CPSC uses the data to give early warning of emerging product hazards and to allow it to take timely action to reduce risks. The data collected by the NEISS also allows the CPSC to assess the success of actions taken to reduce risks (such as the implementation of voluntary or mandatory standards) and to better target future risk reduction activities.

Requirements to report

The CPSC also collects information about potentially hazardous products from business. Requirements to report apply to manufacturers, importers, distributors and retailers. When reporting suppliers are required to detail a description of the product, the risk of possible injury and an explanation of the nature and extent of injuries already associated with the good. Businesses are required to report unsafe goods to the CPSC in three circumstances.

Firstly, businesses must notify the CPSC immediately if it believes a consumer product:

- fails to meet a consumer product safety standard or banning order;

- contains a defect which could create a substantial product hazard to consumers (see box D.3);
- creates an unreasonable risk of serious injury or death; or
- fails to comply with a voluntary standard upon which the Commission has relied under the CPSA. (CPSC 1999a)

Businesses must report within 24 hours, but the CPSC encourages businesses to report products as early as possible, even while internal investigations into the safety of certain products are continuing.

Secondly, businesses must notify the CPSC of settled or adjudicated law suits. Suppliers must report if:

- a particular model of a product is subject to at least three civil actions; and if
  - each suit alleges the involvement of the product in death or grievous bodily injury;
  - during a two year period each of the suits resulted in a final settlement involving the manufacturer or a court judgement in favour of the plaintiff; and
  - the manufacturer is involved in the defence of or has notice of each action and is involved in discharging any obligation owed to the plaintiff.

The supplier is required to report within 30 days of the judgement or settlement in the final case.

Finally, businesses must report certain choking incidents to the CPSC. In particular, manufacturers of marbles, small balls, latex balloons and toys which contain such items (or other small parts) are required to report if a child choked on such an item and as a result either: died; suffered serious injury; stopped breathing for a length of time; or was treated by a medical professional. Such reports must be made within 24 hours of obtaining the information.

Preventative and intervention activities

Once a potentially unsafe product has been detected, the CPSC can take two main actions to address it. For immediate threats, the CPSC has powers to take court action against the manufacturer or importer. For less imminent dangers, the CPSC can promulgate a product safety rule.

Box D.3 **CPSC risk assessment**

In deciding whether a product presents a substantial hazard and needs to be notified to the CPSC, businesses are encouraged to undertake a risk assessment on the product. A similar assessment is undertaken by the CPSC after the notification to determine whether further action is required. These assessments are similar to those that are **mandated** in the EU (see box D.2).

The CPSA lists a number of factors that determine whether a product presents a substantial hazard. These are summarised by the CPSC as being:

- *Pattern of defect*. The defect may stem from the design, composition, content, construction, finish, or packaging of a product, or from warnings and/or instructions accompanying the product. The conditions under which the defect manifests itself must also be considered.
- *Number of defective products distributed in commerce*. A single defective product could be the basis for a substantial product hazard determination if an injury is likely or could be serious.
- *Severity of risk*. A risk is considered severe if the injury that might occur is serious.
- *Likelihood of injury*. The likelihood is determined by considering the number of injuries that have occurred, or that could occur, the intended or reasonably foreseeable use or misuse of the product, and the population group (such as children, the elderly, or the disabled) exposed to the product (pp. 10-11).

Source: CPSC (1999a).

The CPSC can initiate court action against a product that poses 'imminent and unreasonable risk of death, serious illness, or severe personal injury'. In essence, this allows the CPSC to seek a ruling ordering the manufacturer to take whatever action is deemed appropriate to ameliorate the risk posed by the product. The CPSC is then required, as soon as possible, to initiate proceedings to develop a product safety rule.

A product safety rule can either declare a product a 'banned hazardous product' or promulgate a product safety standard. A product safety standard can require that a product meet certain performance requirements or be marked with or accompanied by warnings or instructions.

The process for enacting a product safety rule is complex (see box D.4) and the CPSC is required to make use of a voluntary standard:

> … whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely there will be substantial compliance with such voluntary standards. (*Consumer Product Safety Act 1972,* s. 7(b)(1))

Box D.4 **Creating consumer product safety rules**

Before creating a consumer product safety rule the CPSC must publish an advance notice that they intend to promulgate a rule, identifying:

- the product and the nature of the risk associated with it;
- the regulatory alternatives under consideration; and
- information on any existing standards and why the CPSC believes that they will not adequately address the risk.

Interested parties are then invited to comment on the regulatory alternatives being considered; present an existing standard that they believe will adequately address the risk or notify that they intend to develop such a voluntary standard.

The CPSC is then required to examine the presented voluntary standards and if they determine that one will address the risks, the CPSC must cease the creation of a rule and rely on the voluntary standard. If no satisfactory voluntary standard is proposed, the CPSC can continue developing the product safety rule.

After 60 days have elapsed (since the publishing of the advance notice), the CPSC can publish details of the proposed product safety rule, which must contain a preliminary description of the potential costs and benefits; why a voluntary standard was not relied upon and a description of any reasonable alternatives to the proposed rule with a summary of their potential costs and benefits.

Following the publication of the proposed rule, the CPSC must give interested parties the opportunity to present written or oral submissions. The final rule must take into account these submissions as well as the approximate number of consumer products or types that would be subject to the rule, the public need for the product and the probable effect that the rule will have on the utility, cost or availability of such products.

The CPSC can not promulgate a final product safety rule unless:

- the rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with a product;
- the promulgation of the rule is in the public interest and the benefits from the rule bear ‘reasonable relationship’ to its costs;
- in the case of a rule to ban a product, that no feasible safety standard would adequately protect the public from the risk of injury; and
- the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury.

The final rule should contain a description of the potential costs and benefits of the rule as well as alternatives to the rule, and a summary of any significant issues raised by responses to the preliminary regulatory analysis. Each rule shall specify when the standard or ban is to come into force (though this should not be more than 180 days from the publication of the final rule).

Source: Consumer Product Safety Act 1972.

Further, the CPSC is required to invite interested parties to develop a voluntary standard and examine whether such a standard would meet the above test.

Recalls

In addition to its ability to promulgate product safety rules or initiate court action, the CPSC can direct the recall of a product. As noted above, businesses in the US are required to notify the CPSC if a consumer product that they supplied poses a substantial risk to consumers. In cooperation with the CPSC businesses are required to further assess the risk posed by the product and determine whether it is substantial and whether a recall is required (see box D.3).

Upon deciding that a product notified to it presents a substantial hazard, the CPSC can require the manufacturer to:

- give public notice of the defect (including to distributors, retailers or customers);
- repair the defect in all products sold;
- replace such products with a like or equivalent product; or
- refund the purchase price of the product.

In essence this allows the CPSC to order a mandatory recall of the product and direct the nature of that recall. However, this process can be time consuming and requires the CPSC to consult with interested persons.

Rather than wait for a determination that a product presents a substantial risk firms can choose to ‘fast track’ the recall of the product. If a company, within 20 days of notifying of an unsafe product, implements a voluntary recall that is satisfactory to the CPSC, then the CPSC will take no further action.

E Alternative regulatory models

Governments regulate to achieve better safety outcomes in a range of areas. This appendix draws out some broad lessons from the experience of regulating food, building, Occupational Health and Safety (OHS) and transport. Although these other regulatory regimes are not the direct focus of this study, their design may provide some insights into ways to improve the consumer product safety system. In particular, two aspects of these regimes warrant investigation:

- where a general safety provision has been adopted (the focus of chapter 5); and
- the variety of measures used to coordinate and harmonise policy and administration across jurisdictions (the focus of chapter 13).

Importantly, there is no single 'best practice' model that can be identified and applied to consumer products. The preferred model will depend on a range of factors including legal sovereignty, existing arrangements, the appropriate extent of involvement by different levels of government, the nature of the hazards involved and the degree of risks posed by the products in question.

E.1 General safety provisions

Broad overarching general safety obligations are a feature of several sector-specific safety regimes in Australia. Examples include food, building, electrical products and OHS.

These regulatory regimes typically involve a tiered structure with health and safety requirements outlined in the broadest terms at the top level, with the specifications for meeting these general requirements (involving increasing degrees of guidance and/or prescription) at lower levels. The key to the effectiveness of such arrangements may rest as much on the structure and design of these lower level specifications or guidance, as to the wording of the overarching safety obligation.

The sectoral regimes that have incorporated general safety requirements can all be categorised as typically involving potentially more significant safety hazards than the general range of products not covered by specific schemes. This has a critical bearing on the case for a general safety provision.

Food

Under State and Territory Food Acts, it is an offence to sell food that is 'unsafe' or 'unsuitable' (the meaning of which is defined in each Act). The Acts also require compliance with the Australian and New Zealand Food Standards Code (ANZFSC), which includes a similar definition of safe and suitable food.[1] In relation to safety:

> (1) For the purposes of the Food Safety Standards, food is not safe if it would be likely to cause physical harm to a person who might later consume it, assuming it was:
>
> (a) after that time and before being consumed by the person, properly subjected to all processes (if any) that are relevant to its reasonable intended use; and
>
> (b) consumed by the person according to its reasonable intended use.
>
> (2) However, food is not unsafe merely because its inherent nutritional or chemical properties cause, or its inherent nature causes, adverse reactions only in persons with allergies or sensitivities that are not common to the majority of persons. (ANZFA 2001, p. 16)

The above standard is mandatory and enforceable. In support of the overarching objective of 'safe food', the ANZFSC contains specific requirements relating to such areas as: food handling (storage, processing, transportation, display, etc); health and hygiene; and skills and knowledge. These contain a mix of principle-based, performance-based and prescriptive standards. These standards are further supported by detailed guidance material.

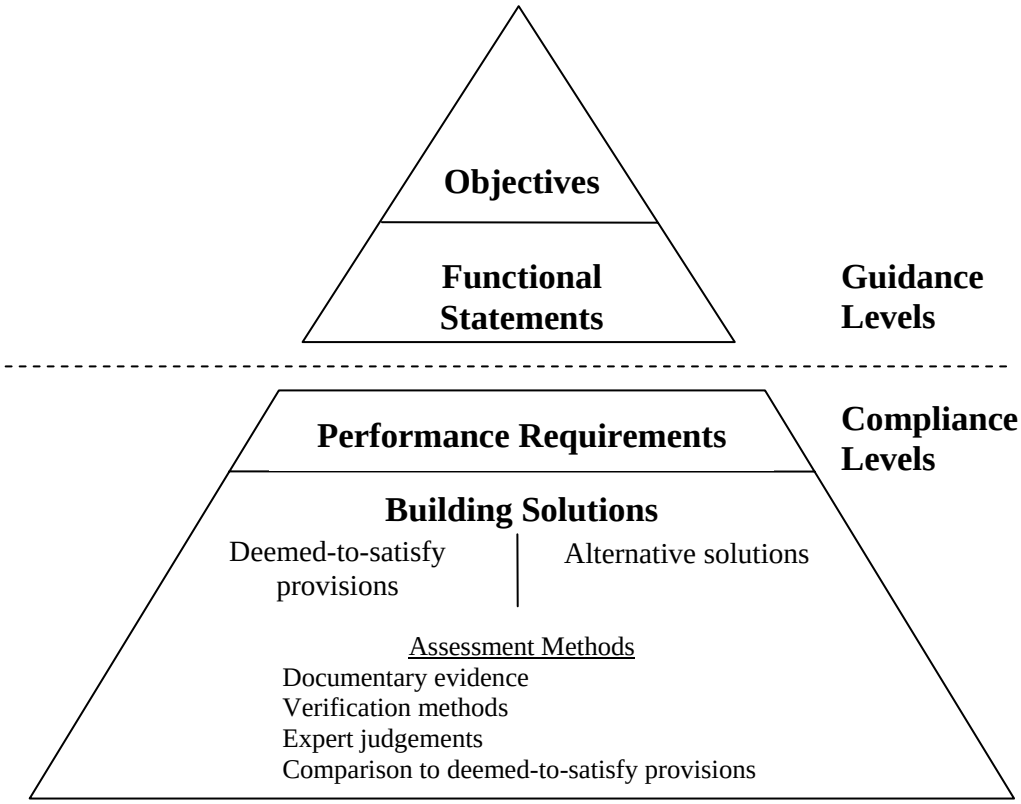
Building regulation

The Building Code of Australia (BCA) is a national code containing technical standards for building. It has been adopted into the building regulations of all States and Territories. There are four broad levels of guidance and obligations contained in the Code (figure E.1).

At the broadest level, *objectives* outline what the Australian Building Codes Board has judged to be the 'community expectation' in relation to a particular area of building performance. For example, in relation to the structure of a building, the Code has the objective of safeguarding people and other property from injury and loss of amenity from a structural failure or malfunction.

[1] There are four national food safety standards in chapter 3 of the ANZFSC, but they apply only in Australia.

Figure E.1 **BCA structure**



Source: ABCB (2004a, vol. 1, p. A0.4).

At the next level, the *functional statement* describes 'how it is proposed that the building will be designed and constructed to meet those community expectations' (ABCB 2004b, p. A0.8).

The third level of detail are the *performance requirements*, that set out the level of performance *required* for a building to meet the BCA. The purpose of these requirements is to meet the functional statements and objectives of the Code and outline the minimum standard that a building must meet. For example, the performance requirement for structural stability states *inter alia* that the building must, by resisting the actions to which it may reasonably be subjected, 'remain stable and not collapse' (ABCB 2004a, vol. 1, p. BP1.1).

At the fourth level, the BCA offers a dual approach to complying with the performance requirements. Buildings can either be designed using 'deemed-to-satisfy' solutions or an alternative solution — provided the solution can be demonstrated to meet the performance criteria. The deemed-to-satisfy solutions offer a 'recipe book' approach that give detailed information (often referencing standards) on one method of construction that will meet the requirements. In its recent research report on *Reform of Building Regulation*, the Productivity

Commission (2004b) found that the use of alternative solutions was very limited in the case of residential building (in the order of 2–5 per cent), but quite common for commercial buildings (between 70 and 80 per cent).

Electrical products

Electrical regulatory functions in relation to technical and safety matters are also the responsibility of State and Territory Governments. Liaison between Australian and the New Zealand Governments is coordinated by the Electrical Regulatory Authorities Council (ERAC).

The relevant electrical safety Acts and/or regulations of each of the jurisdictions aim to prevent the sale of unsafe electrical products. The particular safety obligations imposed on suppliers are worded differently in each jurisdiction. As one example, in Western Australia, the *Electricity Act 1945* requires that all electrical appliances/equipment sold are in a safe condition. 'Safe' means that no significant risk of injury or death to any person, or damage to any property is likely to result from the proper use of the electrical appliances/equipment.

In addition, certain 'prescribed' or 'declared' electrical products require pre-sale approval. The relevant regulatory bodies in each jurisdiction administer the *Uniform Approvals Scheme.* Under this scheme, many household electrical appliances, parts and accessories are prohibited from sale unless they have been approved by the relevant authority. Approval is issued where the person who intends to sell the appliance satisfactorily demonstrates that they have accepted the responsibility of ensuring that it is safe for use. The most common way of doing this is by the person proving that the appliance complies with the appropriate Australian electrical safety standard. Electrical products approved in one jurisdiction, after testing by an accredited testing facility, are recognised in all other jurisdictions.

Occupational Health and Safety

State, Territory and Commonwealth OHS Acts codify the general duties of care under the common law. While the wording of the general provisions differs from jurisdiction to jurisdiction, essentially they place a duty of care on employers, employees, suppliers and service providers to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risks to health. In addition, workers have obligations not to put others at risk and to obey the reasonable instructions of their employer in relation to OHS.

These obligations effectively allow persons flexibility in how they are to meet their duties. However, all OHS Acts also provide for the making of regulations, which set

out in detail the carrying out of some aspects of the more general duties outlined in the Acts. Further, employers must establish OHS committees to represent workers' interests, if requested by employees. Many of the regulations are supported by codes of practice (or advisory standards in Queensland). Regulations are enforceable whereas codes contain guidance material.

E.2 Cooperation between governments

From education to the measurement of weights and lengths, in Australia's federal system, many regulatory areas must grapple with the difficulties of coordinating regulations across nine jurisdictions (the States and Territories plus the Australian Government). Most regulatory areas have specific arrangements in place to progress the harmonisation of regulation between jurisdictions.

The Commission's detailed views on the appropriate extent of harmonisation of consumer product safety regulation is contained in chapter 13. But further to the question of what should be harmonised, there is a question of how to design arrangements, when multiple governments are involved in a particular area, to best achieve the desired level of harmonisation. Four models of intergovernmental cooperation (food, building products, OHS and transport regulation) are reviewed here to provide lessons for the harmonisation of the consumer product safety system. Some details of these models are outlined in table E.1.

Suffice to say, as demonstrated by table E.1, there is considerable variation between approaches to achieving consistency. To some extent, these variations reflect differences in jurisdictional environments; in the nature of the problems being addressed; and regulatory objectives. Accordingly, it is not possible to pinpoint which design elements work best (let alone which would be best applied in the product safety area). That said, some broad lessons do fall out of an analysis of the differences. These lessons draw on the common features of the different models, and also on the Commission's (2004a,b) earlier work on the Australian Building Codes Board (ABCB) and the National Occupational Health and Safety Commission (NOHSC, the predecessor to the ASCC), as well as research by Wilson and Moore (2005) on the effectiveness of the National Transport Commission (NTC) (see box E.1).

Table E.1 **Key characteristics of alternative cooperative models**

	Building	*Food*	*Transport*	*OHS*
Standard making body	Australian Building Codes Board (ABCB)	Food Standards Australia New Zealand (FSANZ)	National Transport Commission (NTC)	Australian Safety and Compensation Council (ASCC)
Representation	One representative from each of the Australian, State and Territory Governments as well as a local government representative. Four representatives from the building and construction industry.	12 person Board, comprising the Chief Executive Officer, representatives from government, the National Health and Medical Research Council and others drawn from specialist areas relating to food and consumer rights.	Five part-time Commissioners appointed on the basis of relevant expertise and skills, (rather than as representatives of particular stakeholder groups).	One representative from each of the Australian, State and Territory Governments. Three employer and three employee representatives and an independent chair.
Independence	The Board is established under an Inter-Governmental Agreement (IGA) as a (non-statutory) decision-making body. A secretariat unit is located within the Australian Government Department of Industry, Tourism and Resources.	FSANZ is an Australian Government independent statutory authority. The Australian Government Department of Health and Ageing is responsible for providing the Secretariat to the Ministerial Council.	The Commission is an independent statutory body. The NTC Office is a Statutory Agency, staffed by Australian Public Service and non-public service staff.	The ASCC is located within the Australian Government Department of Employment and Workplace Relations.
Ministerial involvement	Board has the authority to make final decisions on the content and coverage of the Code, but has no control over adoption. No Ministerial Council involvement in approving decisions.	Ministerial Council sets policy and may reject or seek a review of any standard. Following two reviews the Ministerial Council may amend the regulation.	Ministerial Council sets policy and approves decisions. All outputs of NTC are put forward as recommendations to the Ministerial Council, which can only approve or reject them.	Ministerial Council directs policy. The ASCC has the power to declare national standards and codes of practice but it also generally seeks the endorsement of the Ministerial Council.

(Continued next page)

Table E.1 (continued)

	Building	*Food*	*Transport*	*OHS*
Voting rules/decision making	A majority voting rule is used by the Board and its Committees.	A vote on a resolution is carried via a simple majority of all jurisdictions.	Most matters put to the Council are carried via a simple majority. Either a unanimous or a two-thirds majority is required for certain matters.	If matters cannot be decided by consensus, then a two-thirds majority rule is relied upon. (At least 12 members must be in attendance.)
Commitment to uniformity	An IGA commits States and Territories to develop a nationally consistent regulatory framework and building regulation that is 'as uniform as possible'. Jurisdictions have the freedom to deviate from the Code.	An IGA commits the States and Territories to adopt, without variation, food standards that have been approved by the Australia New Zealand Food Regulation Ministerial Council (ANZFRMC).	All governments are required by the IGA to use their best endeavours to implement reforms, once approved by Ministers of the Australian Transport Council.	The national standards that ASCC develop are of an advisory and guidance nature only. ASCC processes are aimed at achieving greater consistency, rather than national uniformity.
Advisory committees/ consultation	The Building Codes Committee (BCC) is the peak technical advisory body to the Board. Membership comprises officials from Australian, State and Territory Governments, a local government representative, three industry representatives and the ABCB executive director. The ABCB undertakes broad and open consultation.	The Ministerial Council is advised by committees representing government officials and technical experts. A specific committee is tasked with developing consistent enforcement practices. There is also broad community consultation.	The NTC establishes a number of committees and other consultative forums that provide advice on current issues and reforms. Some of these committees comprise officials only, while others provide scope for input from industry and other community groups.	ASCC is advised by various committees and subcommittees covering specific areas. Committees include government, employer and employee representatives and may also include representatives of professional organisations and community groups, or other experts.

Sources: Based on various annual reports, and other documents and information accessible from the web sites of the relevant organisations — www.abcb.gov.au, www.ntc.gov.au, www.ascc.gov.au and www.foodstandards.gov.au.

Box E.1 **Assessment of alternative harmonisation arrangements**

Building

In 2004 the Commission was asked to investigate the contribution of the ABCB's building reforms to the productivity of the building and construction industry. As part of this study, it looked at whether the existing processes were effectively progressing the national adoption of building reforms. The Commission found that generally the arrangements were delivering reasonable outcomes and was supportive of arrangements which:

- provided for government representation on the ABCB, since the Board did not report to a Ministerial Council and without such representation the views of government would not be sufficiently reflected in the decision-making process; and
- did not directly involve a Ministerial Council because portfolio responsibility for building regulation differed between jurisdictions and the costs of establishing a separate council were not warranted.

The Commission also recommended that some improvements could be made:

- officials involved in decision-making processes should be at an appropriately senior level and there should be continuity in representation;
- although industry representation on the ABCB was justified, as a general principle members should be appointed on the basis of their knowledge and expertise, rather than as representatives of nominating organisations; and
- amendments to the Building Code of Australia should be automatically adopted by State and Territory Governments.

Occupational Health and Safety

In 2003, the Commission evaluated national frameworks to generate cooperation between governments relating to occupational health and safety arrangements. The Commission found that national standards were not always fully adopted by most jurisdictions. Accordingly, it recommended that:

- the wide range of stakeholders represented on NOHSC led to problems of workability and instead members should only be appointed on the basis of expertise and skill;
- stakeholder involvement should be accommodated through formal advisory committees;
- there should be clear lines of responsibility, including prescribed procedures and timetables for developing and implementing standards; and
- jurisdictions should, through an intergovernmental agreement, commit to adopt nationally approved standards.

(Continued next page)

Box E.1 **(continued)**

Transport

In 2005, Tony Wilson and Barry Moore (both from the NTC), evaluated the effectiveness of the NTC (and its predecessor the National Road Transport Council) in coordinating transport regulation. They found that although there are variations in the State mechanisms for adopting national reforms, the intent of nationally agreed transport reforms have largely been fully adopted. They attributed this success to:

- central agencies being intimately involved in the development of reforms, bringing a 'whole-of-government' perspective;
- recommendations being developed by an independent NTC and restricting Ministers to only accepting or rejecting these proposals, not amending them;
- undertaking wide stakeholder consultations and the consistent use of Regulatory Impact Statement processes;
- the focus of the NTC charter on areas where national consistency can have a significant impact (the NTC has no role in infrastructure planning or funding);
- decisive majority voting rules; and
- the involvement of high level advisory bodies from industry and government.

Despite the general advantages of the transport arrangements, Wilson and Moore found that there were some deficiencies:

- the initial adoption of template arrangements failed to deliver consistency — only two reforms were completely adopted using the template mechanism;
- introducing an ability for individual jurisdictions to diverge from national decisions has also failed to facilitate national consistency; and
- variations in resources between governments has led to significant delays in the adoption of reforms.

Source: PC (2004a,b) and Wilson and Moore (2005).

Standards should be developed by independent experts

In the food and transport regulatory areas, independent bodies (FSANZ and the NTC) develop the standards or reforms and submit these to Ministerial Councils. In both of these models there is no direct involvement by government officials in the adoption of standards: the NTC is made up of five members who are specifically chosen for their skills and expertise and FSANZ has a larger membership of twelve with experience in government, health research, food and consumer rights (although the Department of Health and Ageing provides a secretariat for FSANZ). Importantly, both of these organisations are independent, statutory bodies, which

gives them some degree of independence from government. Previous studies have found that the independent nature of these bodies helps to develop policies that are rigorous and reflect the concerns of the wider community, see Wilson and Moore (2005) and Alan Bansemer Banscott Consulting (2003).

Government officials themselves can also provide expertise, and this is one reason why FSANZ includes members with experience in government. And, in some other areas government officials are explicitly included within the decision-making process. For instance, the ABCB and the ASCC include representation from State and Territory Governments as well as industry or employee representatives. In its earlier work, the Commission (2004b) did not recommend significant changes to the membership of the ABCB since it saw governmental involvement in decision making as integral (see below) and there was no existing Ministerial Council in the building area for an independent body to report to.

Nonetheless, there is a danger that government officials can politicise matters or that stakeholder groups could 'capture' processes that should be based on a scientific assessment of the risks involved and the costs of avoiding these risks. For this reason, the Commission, in its previous studies, has found that it is preferable for independent experts to develop standards. For example, in its report on building regulation the Commission (2004b, p.328) stated that 'as a general principle, members should be appointed as independent advisors on the basis of their knowledge and expertise'. And, in the OHS area, the Commission (2004a) found that the direct involvement of stakeholder groups on NOHSC created problems of workability:

> Certainly the development of OHS legislation and regulation cannot be undertaken without the commitment and involvement of employers and employees, as well as those with particular expertise in the field. However, there is a significant difference between a consultation process, and a situation where those being regulated have direct control over the drafting of that regulation. Where stakeholder interests diverge significantly and where agreement or consensus becomes a major consideration, the chance that necessary change will be introduced in a timely fashion is put at risk. It also introduces the likelihood that compromise will result in something well short of best-practice. (p. 91)

But Ministers should have final say

The advancement of national consistency requires individual governments to implement changes that harmonise policies across levels of government. As a result, it is crucial that the support of individual governments is forthcoming and that they are 'on board' in the policy-making process. For this reason, in all of the other regulatory areas, senior government representatives, have the final say on which regulations are adopted.

Usually this occurs through the submission of recommendations to a Ministerial Council. For example, FSANZ, the NTC and the ASCC all submit their proposals to relevant Ministerial Councils. Indeed, the ASCC are not required to submit their proposals to the Ministerial Council, but they do so to try and acquire the political will necessary to generate national consistency. In the building area, State and Territory Governments are represented, by high-ranking officials, on the standard-making board itself. In its previous work on building, the Commission (2004b) found that this involvement was crucial to providing jurisdictions with 'ownership' of outputs and guaranteeing a commitment to their adoption by administering authorities and practitioners.

Clear decision rules are necessary

The involvement of nine jurisdictions in decision making will necessarily make it difficult to reach timely decisions. In this environment, reaching consensus is probably impractical and consequently many decision-making bodies (such as in building, food and transport) rely on majority voting rules to determine whether to accept or reject a standard.

In addition, in the food and transport areas, Ministerial Councils are restricted to accepting or rejecting recommendations and are prevented from proposing amendments. (That said, a majority of Ministers in the food area can seek amendments, providing they have already asked FSANZ to review the standard twice and that they give FSANZ the opportunity to draft the amendment, though this ability has never been used.) In their evaluation of the transport arrangements, Wilson and Moore (2005) found that the formal voting process had assisted in the success of the transport model and that much of the strength of this model is due to the strict decision (to accept or reject) that it requires of Ministers. Notwithstanding these arrangements, individual jurisdictions sometimes do not fully implement nationally agreed decisions.

Some regimes also impose time limits on the decision-making process, which attempt to minimise delays. For example, the Australian and New Zealand Food Regulation Ministerial Council is permitted 60 days to respond to a draft standard developed by FSANZ. In its earlier work on building regulation (2004b, p. 281), the Commission found that such timelines may have merit but noted that:

> Were such target timeframes to be adopted, there would need to be appropriate *flexibility* to accommodate unforseen developments and any timetable *must not come at the expense of good process*.

There should be a strong commitment to uniformity

Despite arrangements to harmonise existing in most of these areas since at least the 1990s, many stakeholders, especially industry groups, remain frustrated at the substantial variation that remains between the regulations of different governments. To a large extent, this variation occurs because governments are usually given too much scope to alter nationally agreed regulations.

Previous studies have shown that governments often use this flexibility to either not implement or to amend national decisions. The Commission (2004a) found that the advisory nature of NOHSC developed standards contributed to only one of the seven priority areas of OHS being fully adopted in all jurisdictions. Similarly, the Commission (2004b) found that building arrangements that required jurisdictions to adopt national decisions 'so far as possible' and 'as far as practicable' gave jurisdictions excessive scope to create independent amendments. In addition, Wilson and Moore (2005) found that the 'best endeavours' approach of transport regulation, and the lack of any discipline on diverging jurisdictions (other than persuasive power and industry pressure) was a limitation of these arrangements.

All of these studies, recommended the implementation of automatic or binding rules, which oblige jurisdictions to implement nationally agreed decisions. And, in building and OHS, the Commission (2004a,b) recommended that jurisdictions sign an intergovernmental agreement holding them to this commitment.

Notably, in the food area, the commitment to uniformity is greater (governments must adopt decisions 'without variation') and this has guaranteed uniformity in the food standards adopted throughout Australia (although there are some issues relating to their consistent enforcement, see chapter 13).

Advice and consultation is important

All the other regulatory areas consult with stakeholder groups through the development of regulations and their adoption. Not only are stakeholders an important source of information on existing problems and potential solutions, their participation can be crucial in making new policies a success. For this reason effective consultation arrangements are an important element of COAG's *Principles and Guidelines for National Standard Setting*.

However, there is a wide variation in the design of consultative arrangements. For example, in the building and OHS areas consultation is achieved through the direct membership of industry, employer or employee interests on the standard-setting bodies. Whereas, in other areas, formal input is received through advisory

committees, such as in the building and food regulatory areas. In all the regimes examined here, consultative processes are also bolstered by further input from meetings and submissions.

Notwithstanding the specific arrangements, the crucial factor is that there are sufficient avenues for the submission of stakeholder comment at all stages of regulation development. In previous work on improving the quality of regulations, the OECD (2002) found that consultation processes should:

- remain flexible to operate within different circumstances but operate within a framework of minimum standards;
- maximise participation (especially by less organised interests) by using plain language in outputs and developing innovative delivery strategies, including through the use of information technology;
- commence at an early stage; and
- be supported at high political levels and reinforced with staff training, incentives and resources.

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