



16 April 2010

The Secretary
Senate Economics Committee
Parliament House
CANBERRA ACT 2600

By email to: economics.sen@aph.gov.au

TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL (No 2) 2010

SUBMISSION BY THE AUSTRALIAN TOY ASSOCIATION LTD

Introduction

The ATA is pleased to make this submission to the Senate Economics Committee on this important legislation which the Association has supported in principle throughout its progress through the Productivity Commission, COAG, MCCA and SCOCA particularly in relation to the product safety provisions.

The Committee is urged to support the recommendations below in the interests of clarifying the provisions of the Bill for the benefit of business and consumers.

Specific Issues

Division 5 - Consumer goods or product related services associated with death or serious injury or illness

131 Suppliers to report consumer goods associated with the death or serious injury or illness of any person

The ATA fully supports the reporting of injuries caused by consumer goods and believes that this will form a valuable resource upon which to base the need for further regulation and / or standardisation. However the existing clauses in this section have the potential to generate misleading or inaccurate information leading to bad decisions and unnecessary cost to consumers and industry.

1. The test for association between a product and an injury is not defined and has not been tested in law. The ATA would prefer the more usual test of causation, i.e. a product may be associated with an injury but not the cause of it, e.g. a consumer has a heart attack while riding a bike. Suppliers should only be required to report goods where it has been established that the injury was caused by the good. There is sufficient case law surrounding causation to provide a clear understanding as to whether an injury was caused by the good
2. The law needs to be clearer regarding the timeframe for reporting. It is clearly not reasonable for a business to conduct a proper investigation into the cause of an injury and potential product issue and report within 2 days. The law should be adjusted to require that an investigation be completed within a timely manner and to require reporting within 2 days of completion if the product is found to be the cause of the injury.
3. The law makes no provision regarding the confidentiality of information supplied. The ATA is concerned that, in it's current form; the law may require reporting of product where there is no causal link to an injury. Publication of this information would lead to unnecessary consumer concern and damage to the reputation of the business and brand involved. If not modified in accordance with 1 & 2 above, the law should provide for complete confidentiality

of all reports until investigations have been completed and it has been established that the injury was caused by the good.

The 2006 Productivity Commission Report acknowledged the need to guarantee that reported information would be kept confidential, at least until further investigation concluded that the product did in fact pose an unacceptable safety risk. The Bill makes no provision for this and in fact the Bill does not deal at all with the disclosure or use of information provided to government through the mandatory reporting requirement.

Although the Explanatory Memorandum suggests that the information will be subject to "privacy requirements", this provides no comfort for suppliers. The Information Privacy Principles (set out in the Privacy Act 1988) are very broad and cannot be relied on to provide any protection for information provided by suppliers.

If it is proposed that reporting will be required even when a product is only "associated with" a death or serious injury or illness (but does not cause it), and will be required in a short time frame before the circumstances are fully investigated, this is all the more reason for the reported information to be kept confidential by government.

Disclosure and publication of this information (such as on a public access website, like that on which information about product recall notifications is published), would lead to unnecessary consumer concern and damage to the reputation of the business and brand involved.

It also has the potential for out-of-date or inaccurate information to be publicly available (unless, for example, the website was updated regularly so that the outcome of supplier and governmental investigations is included). Given the expected volume of reports due to the breadth of the reporting requirements, it is impractical to expect that published information could be kept up to date.

The issue of what use and disclosure can be made of reported information is of sufficient importance that it should be dealt with expressly in the legislation.

4. The exclusions given in Subsection (2) (a) and (b) seem unnecessary and so provide more confusion than clarity, i.e. Subsection (1) only applies if the goods are associated with an injury; it is unnecessary to state that it doesn't apply if the goods either weren't or were unlikely to be associated with the injury. The ATA is concerned at the perception of an implied requirement to report if the goods are likely to be associated with an injury

The ATA submits that Section 131 should be rewritten as follows:

131 Suppliers to report consumer goods associated with the death or serious injury or illness of any person

(1) If:

(a) a person (the **supplier**), in trade or commerce, supplies consumer goods of a particular kind; and

(b) the supplier becomes aware that consumer goods of that kind supplied by it may have caused the death or serious injury or illness of any person;

the supplier must complete an investigation of the incident within a period of 4 weeks and if it is found that the injury was caused by the good must, within 2 days of making this finding, give the Commonwealth Minister a written notice that complies with subsection (5).

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) Subsection (1) does not apply if:

(a) the supplier is required to notify the death or serious injury or illness in accordance with a law of the Commonwealth, a State or a Territory that is a law specified in the regulations;

or

(b) the supplier is required to notify the death or serious injury or illness in accordance with an industry code of practice that:

- (i) applies to the supplier; and
- (ii) is specified in the regulations.

(3) Subsection (1) applies whether or not the consumer goods were being used before or at the time the death or serious injury or illness occurred.

(4) Without limiting subsection (1), the ways in which the supplier may become aware as mentioned in subsection (1)(b) include receiving the relevant information from any of the following:

- (a) a consumer;
- (b) a person who re-supplies the consumer goods;
- (c) a repairer or insurer of the goods;
- (d) an industry organisation or consumer organisation.

(5) The notice must:

- (a) identify the consumer goods; and
- (b) include information about the following matters to the extent that it is known by the supplier at the time the notice is given:
 - (i) when, and in what quantities, the consumer goods were manufactured in Australia, supplied in Australia, imported into Australia or exported from Australia;
 - (ii) the circumstances in which the death or serious injury or illness occurred;
 - (iii) the nature of any serious injury or illness suffered by any person;
 - (iv) any action that the supplier has taken, or is intending to take, in relation to the consumer goods.

(6) The giving of the notice under subsection (1) is not to be taken for any purpose to be an admission by the supplier of any liability in relation to:

- (a) the consumer goods; or
- (b) the death or serious injury or illness of any person.

(7) The Commonwealth Minister must keep notices given under subsection (1) confidential and must not disclose any information contained in such notices to any person other than:

- (a) another responsible Minister; or
- (b) a regulator.

(8) A responsible Minister or regulator who receives information contained in a notice given under subsection (1) must keep that information confidential.

ATA would welcome the opportunity to appear at a public hearing of the Committee if requested to do so. For any further information please contact:

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