



HASBRO AUSTRALIA LIMITED

**SUBMISSION TO THE SENATE ECONOMICS COMMITTEE ON THE TRADE
PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL (No.2) 2010**

Product Safety Reform Proposals

16 April 2010

1. Introduction

- 1.1 Hasbro Australia Limited (*Hasbro*) welcomes this opportunity to participate in the consultation process in relation to the Senate Economics Committee's inquiry into the *Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Bill)*.
- 1.2 Hasbro, Inc. is a leading supplier of children's and family leisure time products and services. It has a portfolio of brands and entertainment properties that provide some of the highest quality and most recognisable play and recreational experiences in the world. Hasbro Australia Limited brings to market a range of toys, games and licensed products, from traditional to high-tech and digital, under such well known brand names as FurReal Friends, Littlest Pet Shop, My Little Pony, Playskool, Spider-Man, Star Wars, Transformers, Monopoly and Trivial Pursuit. While the majority of our products are supplied through retailers and other resellers, Hasbro is very much a consumer-focused company.
- 1.3 On 2 December 2009 Hasbro lodged a submission in response to the *Draft Regulation Impact Statements (Draft RIS)* for the Product Safety Reform Proposals to be considered for inclusion in the Australian Consumer Law.
- 1.4 Since Hasbro lodged its Draft RIS submission the final Regulation Impact Statement (*RIS*), Explanatory Memorandum and Bill have been released.
- 1.5 Many of Hasbro's concerns which were raised in the Draft RIS submission have not been addressed in the Bill and are raised again in this submission. Hasbro also has some additional concerns about aspects of the Bill which were not foreshadowed in the Draft RIS.
- 1.6 This submission does not discuss all of the matters addressed by the Bill but focuses on the product safety reform provisions in Parts 3-3 to 3-5 of the Bill, and specifically on *Part 3-3 Division 5 – Consumer goods, or product related services, associated with death or serious injury or illness*.
- 1.7 Hasbro fully supports efforts to help ensure the safety of toys and other consumer products and recognises the need for prompt remedial action if a product presents an unreasonable risk of injury.
- 1.8 However, Hasbro is concerned that the effect of Part 3-3 Division 5 would be unnecessarily onerous for both suppliers and government, that it goes further than is necessary to achieve the goal of obtaining earlier access to information about genuine product safety issues and that it could divert government and industry resources away from identifying such genuine issues. It also gives rise to unnecessary risks to the confidentiality of suppliers' information and damage to their reputation and brands.
- 1.9 Hasbro's specific concerns are set out in detail below.

Part 3-3, Division 5 - Consumer goods, or product related services, associated with death or serious injury or illness

1. Burden on suppliers and government

- 1.1 Hasbro is concerned that the proposed requirement that suppliers report to the Minister when they become aware that a product of a kind they have supplied has been associated with a serious injury, illness or death will be unnecessarily burdensome on both suppliers and government. Hasbro previously raised this concern in its Draft RIS submission.
- 1.2 Hasbro does not agree with the conclusion in the RIS that the compliance costs to suppliers of meeting the self-reporting requirement will be low. Hasbro also considers that the RIS understates the impact and cost to government of administering the self-reporting regime.

2. Multiple reports of the same incident

- 2.1 An example of the burden on government and industry is that not only the manufacturer of the good involved in the incident, but all other suppliers in the supply chain, would have to report the same incident. Hasbro suggested in its Draft RIS submission that, to avoid multiple reporting of the same incident or product risk by suppliers at different levels of the supply chain, consideration be given to relieving a supplier from the reporting obligation if it is aware that a report about an incident has already been made and it has no further information about the incident other than the information which has already been reported. Hasbro's suggestion has not been implemented in the Bill.
- 2.2 The RIS acknowledged the risk of duplication of information and additional compliance costs for suppliers, and administration costs for administrators, but stated that it is important that adequate information is communicated to the regulator even if it is reported more than once from a different source.
- 2.3 The Explanatory Memorandum makes it clear that all participants in the supply chain of a consumer good which has been associated with a death, serious injury or illness will be required to comply with the reporting requirement upon becoming aware of the incident. This includes retailers, dealers, distributors, repairers, importers, manufacturers and/or exporters of the consumer good in question.
- 2.4 Hasbro remains of the view that duplication can be minimised without compromising the information received by the regulator by relieving a supplier from its reporting obligation if the supplier is aware that a report about an incident has already been made and the supplier has no additional information about the incident.

3. Reporting by *all* suppliers of *all* goods "of a particular kind", including competitors

- 3.1 Now that the wording of the Bill has been released, however, another problem has become apparent. If the Bill is passed as currently drafted, the reporting requirement will not be a "self-reporting" requirement, it will also be a requirement to report other suppliers' products.

- 3.2 Section 131(1) of the Bill currently provides that:

(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 have been associated with the death or serious injury or illness of any person;*

the supplier must, within 2 days of becoming so aware, give the Commonwealth Minister a written notice that complies with sub-section (5). (underlining added)

- 3.3 As currently drafted, proposed section 131(1) would not only require the manufacturer (and other supply chain participants) of the good which was associated with the injury or death to report the incident, it would also require all other manufacturers and suppliers of other goods "of that kind" (ie competitor brands) to report the incident. This would have two undesirable consequences:
- (a) the volume of reports required to be made would increase enormously. *All* suppliers of *all* products of that particular kind would have to report; and
- (b) it would create opportunities for inappropriate competitive conduct, with Competitor A reporting Competitor B's product.

- 3.4 Hasbro assumes this result is unintended. This much is clear from a review of the earlier material released during the consultation process.¹ Presumably the intention is to require all suppliers of the good involved in the incident to report, but not to require suppliers of other brands of the same kind of good to report.
- 3.5 This drafting issue ought not to be left unremedied, because the words "goods of a particular kind" are used elsewhere in the Bill (and in the predecessor provisions of the *Trade Practices Act*) in circumstances where it is clearly intended to capture *all* goods no matter who supplies them (see for example sections 104 and 134 of the Bill, and sections 65C and 65D of the *Trade Practices Act*, in relation to the making of product safety standards and product information standards).
- 3.6 Hasbro suggests that this drafting issue should be remedied by adding words such as "*supplied by it*" or "*which is supplied*" after the words "*of that kind*" in proposed sub-section 131(1)(b).

4. Becoming "aware"

- 4.1 The Explanatory Memorandum makes it clear that a supplier "becomes aware" of information upon receiving it from any source.
- 4.2 It is anticipated that, in a large proportion of cases, notice of incidents would come to suppliers through consumer complaints or media reports. In these cases it will be difficult, within a short time frame, to verify the information provided to the supplier and to determine the circumstances surrounding the incident. The likely outcome of this is that suppliers will take a cautious approach and "*over-report*" incidents to the Minister, increasing the burden on government and industry resources and compromising the quality and utility of reported information. This concern, which was raised in Hasbro's Draft RIS submission, remains unaddressed.
- 4.3 Also, it is not clear whether an Australian supplier will be required to report in relation to an overseas incident which the Australian company becomes aware of relating to goods supplied by a foreign company. Hasbro submits that requiring Australian corporations to report incidents relating to supply in other countries would be unduly onerous and unnecessary.

5. Time frame for reporting

- 5.1 Hasbro submitted in its Draft RIS submission that the proposed time period of 2 days between a supplier becoming "*aware*" of an incident and being obliged to report is too short and does not allow adequate time to consider whether the incident was related to a product risk.
- 5.2 In response to similar concerns raised by the Australian Toy Association, the RIS stated that:
- "The time frame to report the required information to the regulator would commence once the supplier "becomes aware" that one of its product [sic] is "associated with" a serious injury or death. This would exclude the time for suppliers to verify whether they should report certain information to the regulator."*
- 5.3 This intended meaning is not, however, reflected in the wording of section 131(1) and the explanation is not repeated in the Explanatory Memorandum. Hasbro submits that the

¹ For instance, the RIS contains the following statements (which are set out below by way of example only and with emphasis added):

- (a) "To implement this recommendation a new mandatory reporting requirement would be imposed on suppliers... when they become aware that a product **they have supplied** has been associated with a serious injury or death of a person." (paragraph 24.82)
- (b) "Rather, the requirement would be to report once the supplier "becomes aware" that **their product** has been "associated" with a death or serious injury." (paragraph 24.92)
- (c) "The time frame to report the required information to the regulator would commence once the supplier "becomes aware" that **one of its product** [sic] is "associated" with a serious injury or death." (paragraph 24.97)

wording of the proposed legislation should be amended to make it clear that the 2 day time limit does not include the time it takes for suppliers to verify the incident.

5.4 If the legislation is not clarified in this way, the short time frame, in combination with the penalties for non-compliance, are likely to exacerbate the problem of over-reporting and lead to the reporting of unsubstantiated incidents. This risks contaminating the accuracy and utility of the pool of information available to government.

6. An "association" with serious injury or death is an inappropriate reporting trigger

6.1 Hasbro is concerned that the proposed connection between the product and the serious injury or death – that there merely be an "association" between them – is too broad. This concern was raised by Hasbro in its Draft RIS submission.

6.2 Hasbro submits the focus of any reporting regime should be *products*, not *incidents*; specifically the focus should be on defects in products which present risks of serious injury or death.

6.3 The proposed "association" test in Part 3-3, Division 5 would significantly increase the enforcement burden of government to review a large number of incident-based notifications, of which Hasbro considers a significant proportion will not relate to genuine health and safety concerns arising from issues with the product. As Hasbro indicated in its Draft RIS submission, each year thousands of bicyclists in Australia are treated in hospital emergency rooms for injuries sustained in cycling accidents.² Yet, to enhance the safety of bicycles, the focus should be on those accidents where there is evidence of a product defect (e.g. faulty brakes or sub-standard design or construction), rather than accidents caused by a myriad of other factors. Incident-based notifications would not meaningfully advance efforts to identify products that present an unreasonable risk and could divert both the supplier's and government's attention and resources away from those issues that merit serious consideration.

6.4 If, however, government is minded to introduce legislation that essentially requires the reporting of *incidents*, Hasbro considers the obligation to report should be triggered by information that a product *caused* the incident, rather than merely being *associated* with the incident.

6.5 An attempt to address concerns about the breadth of the "association" test appears to have been made by including sub-section 131(2) in the Bill. That section seeks to create exceptions to the reporting requirement imposed by sub-section (1) where:

- (a) *it is clear that the consumer goods supplied were not associated with the death or serious injury or illness; or*
- (b) *it is very unlikely that the consumer goods supplied were associated with the death or serious injury or illness; or*
- (c) *the supplier is required to notify the death or serious injury or illness in accordance with a law of the Commonwealth, a State or Territory that is a law specified in the regulations; or*
- (d) *the supplier is required to notify the death or serious injury or illness in accordance with any industry code of practice that:*
 - (i) *applies to the supplier; and*
 - (ii) *is specified in the regulations.*

6.6 Hasbro is concerned that sub-sections (2)(a) and (b), when read with sub-section (1), are confusing and contradictory. In relation to sub-section (2)(a), if it is clear that goods supplied

² See for example http://www.carrsq.qut.edu.au/publications/bicycle_safety_fs.pdf

were not associated with the death or injury, the reporting requirement under sub-section (1) would not be triggered in the first place.

- 6.7 In relation to sub-section (2)(b), the proposed exception where an association is "very unlikely" seems to contradict the explanation in the RIS that the time frame for reporting only commences once the supplier becomes aware that one of its products is associated with the serious injury or death, and the time frame for verifying this is excluded. The terminology "very unlikely" is also vague and likely to cause confusion.
- 6.8 The analysis of the proposed exceptions in sub-sections (2)(a) and (b) is further confused by the list of the "various circumstances whereby a good can be associated with a death, serious injury or illness" set out in paragraph 10.168 of the Explanatory Memorandum, which includes the good being "in the vicinity or close proximity of the occurrence of an accident, irrespective of whether the good was in fact being used (or misused) at the time of the accident". If goods in the vicinity of an accident are "associated" with it even if not used at the time, it is unclear what the (2)(a) and (b) exceptions are intended to cover.
- 6.9 Hasbro is concerned that sub-section (2) will not narrow the reporting requirement as intended, and will cause uncertainty on the part of suppliers, regulators and Courts who must interpret the legislation.
- 6.10 Hasbro considers that:
- (a) the issues highlighted by the problematic sub-sections (2)(a) and (b) underscore that a test based on *cause*, rather than *association*, would be preferable. Cause is a concept which is already well known and understood by the law; and
 - (b) even if an association test is adopted, sub-sections (2)(a) and (b) need to be reconsidered and provisions which do effectively reduce the breadth of the association test, as intended, should be included in the legislation.

7. No admission of liability

- 7.1 Hasbro commends the inclusion in the Bill of sections 131(6) and 133, which provide that the reporting of information does not amount to an admission of liability and will not affect the liability of insurers under insurance contracts with suppliers. Hasbro considers these provisions are critical in the context of an early reporting regime.

8. Confidentiality of reported information

- 8.1 The Bill does not address the issue of confidentiality.
- 8.2 Protecting the confidentiality of business information, and protecting suppliers from unfair use of potentially inaccurate information reported under section 131(1), is a critical consideration for suppliers.
- 8.3 Hasbro raised concerns about the absence of confidentiality provisions in its Draft RIS submission. Hasbro recognises that governments should be able to make use of information received in order to protect consumers from unsafe products, particularly where there is an immediate risk of harm. However much of the reported information would be confidential business information and, because reporting is to be required in such a short time frame, much would be unverified. Information released about unverified incidents may be misinterpreted by the public or the media, may give rise to false alarms and may cause serious reputational damage to businesses, even if it is later determined that the product was not at fault. These are not justifiable consequences of the reform.
- 8.4 The 2006 Productivity Commission Report acknowledged the need to guarantee that reported information would be kept confidential, at least until further investigation concluded the product did in fact pose an unacceptable safety risk.

- 8.5 These concerns have not been addressed in the Bill.
- 8.6 The Explanatory Memorandum touches on this issue only briefly, stating that information reported to the Minister under the reporting requirement will be shared among Australian regulators "*on a confidential basis*" and in accordance with "*privacy requirement*". Hasbro assumes that this is a reference to the Information Privacy Principles set out in the *Privacy Act 1988 (Cth)*. However the Information Privacy Principles are very broad and are not a sufficient answer to suppliers' concerns about the use and disclosure of reported information.
- 8.7 Hasbro is concerned that the Bill itself does not deal with confidentiality or with the question of use and disclosure of reported information, including whether the reported information may be included by Government in safety warning notices under section 129. A brief reference to the issue in the Explanatory Memorandum is insufficient.
- 8.8 Government has not given any indication to date of what access the public will have to notices given under section 131(1) or to reported information. For example, will there be a publicly accessible register of notices or reported incidents? Will any information be published on the ACCC's new "one stop shop" "Product Safety Australia" website? If so, what sort of information will it contain and what safeguards will be put in place to ensure the accuracy and currency of the information?
- 8.9 Hasbro submits that there should not be a publicly available register of incidents reported under section 131(1), and that reported information should not be publicly available. The appropriate balance of interests is for the public to be informed of product safety issues once government has investigated a reported incident and determined that action is warranted.
- 8.10 Government should deal squarely and transparently with this issue and should disclose now what arrangements are proposed. It should explain how notices and reported information would be stored, what the circumstances and extent of use and disclosure of information would be and what (if any) information the public would have access to.
- 8.11 Hasbro considers that the issue of confidentiality should be dealt with expressly in the legislation. Hasbro proposes that additional sub-sections be included in section 131:
- (a) requiring the Commonwealth Minister to keep notices given under sub-section 131(1) confidential and not to disclose any information reported in such notices to any person other than a State or Territory Minister or regulator; and
 - (b) requiring State or Territory Ministers or regulators who receive such information to keep that information confidential.

Hasbro appreciates this opportunity to contribute to the Senate Economics Committee's consideration of the Bill, and would be pleased to assist further if requested.