

# Chapter 6

## Product Safety

6.1 The 2006 *Review of the Australian Consumer Product Safety System* by the Productivity Commission<sup>1</sup> proposed a requirement for suppliers to report products associated with death or serious injury,<sup>2</sup> which was further supported by the Commission's consumer policy report in 2008.<sup>3</sup> The bill implements these recommendations and will mean that for the first time Australia will have a nationally consistent scheme for product safety reporting and product recalls.

### A national product safety system

6.2 Part 3-3 of the bill introduces a national consumer product safety regime for consumer goods and product related services, which replaces existing state and territory legislation on industry-specific products and compulsory recalls.

6.3 Division 1 outlines the way in which safety standards are to be determined and published by the relevant Commonwealth Minister. Division 2 provides for circumstances in which goods will be banned under the bill and the responsibilities of suppliers where a ban is affected by the Minister. Division 3 determines the circumstances in which the Commonwealth Minister may institute compulsory recalls of consumer goods and the notification requirements for suppliers where they initiate a voluntary recall of their product. Division 4 stipulates the contents of warning notices which may be published by the Minister.

6.4 Division 5, which proved the most contentious, introduces a new reporting regime which requires all suppliers – including manufacturers, importers, wholesalers and retailers of products – to provide written notice to the Minister where they become aware that a consumer good of a particular kind has been associated with the death, serious injury or illness of any person.<sup>4</sup> This 'incident-based' reporting regime is both pre-emptive: suppliers of products 'of a kind' associated with death, injury or serious illness are bound by the requirement; and responsive to incidents as they occur.

6.5 A guide to the Australian Consumer Law described the work being done by regulators to implement the changes the bill involves, and changes to coordination across the group of regulatory agencies:

---

1 Productivity Commission 2006, *Review of the Australian Consumer Product Safety System*, Research Report, Canberra. Recommendation 9.3, p. 211.

2 Freehills, *Submission 35*, p. 15

3 Productivity Commission 2008, *Review of the Australia's Consumer Policy Framework* (April 2008). Research Report, Canberra. Recommendation 8.2, p. 70.

4 Part 3-3, Division 5, section 13.

The ACCC, ASIC and the State and Territory fair trading offices are negotiating a Memorandum of Understanding (MOU). The MOU will set out the administrative and enforcement relationships and protocols between the agencies, including in relation to product safety.<sup>5</sup>

## Incident reporting

6.6 Sections 131 and 132 of the bill frame a new duty on suppliers to report incidents which may be associated with their products or product-related services. This is the first time Australia will operate a national 'incident reporting' regime. Section 131(1) of the bill states 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 subsection (5).

6.7 Associate Professor Luke Nottage cautioned that reporting duties must be supported by adequate information systems within government to ensure consumers benefit from the policy:

You have to have good information flows for the regulators to be able to do all those other things set out in the *Trade Practices Act* and now in the new bill, such as giving warnings to the public, imposing product bans for unsafe products and developing mandatory product and information standards. We also have to have good information flows for an effective product liability system, which is another mechanism that, through private action by injured individuals or sometimes businesses, encourages manufacturers and others to supply safe goods.<sup>6</sup>

6.8 On 15 April 2010, Consumer Affairs Minister Dr Craig Emerson launched a new clearing house government website, [www.productsafety.gov.au](http://www.productsafety.gov.au), for the publication of information garnered through product safety information collected voluntarily or under duties provisions in the bill.<sup>7</sup> The website will be administered by the ACCC and will be the main vehicle for information to be conveyed to the public. Associate Professor Nottage's comments draw attention to the need for state and territory authorities to work closely with the ACCC to ensure reporting is timely,

---

5 Treasury, *The Australian Consumer Law: A guide to provisions*, April 2010, p. 27.

6 Associate Professor Luke Nottage, *Proof Committee Hansard*, 28 April 2010, p. 2.

7 The Hon Dr Craig Emerson MP, 'New Push to Strengthen Consumer Safety', *Media Release*, 15 April 2010.  
<http://minister.innovation.gov.au/Emerson/Pages/NEWPUSHTOSTRENGTHENCONSUMERSAFETY.aspx> (accessed 21 April 2010)

---

accurate (including synthesising multiple reports of the same products or incidents) and based on verifiable information rather than competitive malice.

### ***International comparisons – incident versus hazard reporting***

6.9 Associate Professor Nottage recommended to the Committee that Australia use the opportunity of a national product safety system to introduce world's best practice. Professor Nottage said:

...the Bill's draft provisions still do not meet contemporary best practice among major economies world-wide. This reflects a broader "design defect" in Australia's consumer law reform process, which has focused overwhelmingly on re-harmonising consumer protection nation-wide to reflect best practice among its states and territories. As well as broader parochialism, that focus (and the lengthy delays) suggests the decline of the consumer voice in Australian policy-making over the last decade, in contrast to most countries worldwide. The deficiencies in the Bill's provisions will leave problems not only for Australian consumers but also for consumers and suppliers of Australian products abroad, as overseas suppliers are increasingly subject to stricter accident disclosure standards yet unable to draw on as much information that Australian exporters will need to provide to their home country's regulatory authorities.<sup>8</sup>

#### *Committee view*

6.10 The Committee's view is that this bill is the first step towards enabling Australia to meet world's best practice standards in a range of consumer protection measures, including product safety, over the longer term. While international comparisons are helpful benchmarks for future bills, the Committee believes that synthesising the current array of laws nationally provides substantial benefit upon which future product safety reform can be based.

#### ***Claims that the reporting requirements are too broad***

6.11 The Committee received a significant number of submissions critical of the drafting of section 131, particular with respect to term 'goods of that kind' and 'associated with'. Stakeholders claimed this created too broad a scope for consumer goods which would need to be reported to the regulator.

#### *"Associated with"*

6.12 Freehills expressed concern at the use of the phrase 'associated with', on the basis that it is not a phrase which has a given legal meaning, in the same way as

---

8 Associate Professor Luke Nottage, *Submission 26*, p. 2.

'caused by', or 'resulting from'. The various public consultation reports<sup>9</sup> have recommended a strengthened reporting system where suppliers are obliged to report occasions of products causing harm within the industry, without having to establish fault prior to doing so. While a number of policy research reports have used the term 'associated with' in making the recommendation to strengthen the reporting regime, none have discussed the effect of the term on legislative drafting. Freehills submitted that:

None of the reports has examined the meaning of the term. By way of contrast, the Productivity Commission's 2006 report noted (at 224) that a 'further way this reporting requirement may impose a cost on business is through the uncertainty associated with determining what constitutes a "serious injury"...The meaning of the phrase 'associated with' is imprecise. The term does not have a commonly understood meaning in the context of product safety.<sup>10</sup>

6.13 Industry groups were also concerned that the wording causes ambiguity, despite attracting pecuniary penalties for breach. The toy maker and importer, Hasbro Australian Ltd submitted:

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. 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...The proposed "association" test...would significantly increase the enforcement burden of government to review a large number of incident-based notifications...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.<sup>11</sup>

6.14 Freehills claim that a problem created by the drafting of the provision is that a duty to report now appears to exist:

...even if there is no suggestion or possibility that the goods caused or contributed to (in a legal sense) the death or serious injury or illness.<sup>12</sup>

6.15 There are exceptions to the duty imposed by section 131 (1) contained in subsection 2 of the provision. Subsection 131(2) states that subsection (1) does not apply if:

---

9 Productivity Commission 2006, *Review of the Australian Consumer Product Safety System*, Research Report, Canberra. Recommendation 9.3, p. 211; Productivity Commission 2008, *Review of the Australia's Consumer Policy Framework* (April 2008). Research Report, Canberra. Recommendation 8.2, p. 70; Ministerial Council on Consumer Affairs', Report, *Review of the Australian Consumer Product Safety System*, August 2004, Canberra, p. 8.

10 Freehills, *Submission 35*, p. 16.

11 Hasbro Australia Ltd, *Submission 6*, p. 5.

12 Freehills, *Submission 35*, p. 15.

(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 a 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 an industry code of practice that:

(i) applies to the supplier; and

(ii) is specified in the regulations.

6.16 Hasbro submitted, however, that the exceptions are unworkable, claiming:

...that sub-sections (2)(a) and (b), when read with sub-section (1), are confusing and contradictory.<sup>13</sup>

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.<sup>14</sup>

#### *Products already covered by comprehensive reporting regulations*

6.17 Peak bodies representing car manufacturers and the automotive industry were also critical of the duties created by sections 131 and 132 for reasons of duplication.<sup>15</sup> They proposed an industry-specific amendment to the wording of section 131(2)(c), which would preclude the car manufacturing industry from the obligations under section 131 where an accident and its cause have already been reported under state and territory regulations. They recommended to the Committee that the proposed scheme would see reports of all incidents involving motor vehicles flood the regulators, undermining the public interest benefit derived from incident reporting.

6.18 The Federal Chamber of Automatic Industries submitted:

...in relation to motor vehicles, a substantial Federal and State framework already exists which can readily provide the information sought by the Provisions – in a significantly more comprehensive manner than could be achieved by requiring suppliers of motor vehicles to report under proposed new sections 131 and 132. This framework includes comprehensive safety

---

13 Hasbro Australia Ltd, *Submission 6*, p. 5.

14 Hasbro Australia Ltd, *Submission 6*, p. 6.

15 Motor Trades Association of Australia, *Submission 24*, pp 3-4; Federal Chamber of Automotive Industries, *Submission 29*.

related legislation and controls, together with incident reporting mechanisms, which provide for a comprehensive and effective means by which to collect the required information, in a manner which meets (and likely exceeds) the requirements and objectives of the Provisions.<sup>16</sup>

*Goods supplied 'of a particular kind'*

6.19 Freehills claims the drafting of sections 131 and 132 is inconsistent as to whether the supplier must declare goods or services supplied by the supplier, or of a kind supplied:

In our view, the reporting requirement should apply if goods of the kind supplied, or goods to which services of the kind supplied relate, may have caused or contributed to a death or serious injury or illness.<sup>17</sup>

6.20 Hasbro regards this as raising an unintended consequence. According to Hasbro, the bill places on suppliers an obligation to report consumer goods 'of a particular kind', including those supplied by competitors, if they have an association with an incident causing death, serious illness or injury:

...the reporting requirement will not be a "self-reporting" requirement, it will also be a requirement to report other suppliers' products. 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...

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).<sup>18</sup>

6.21 Treasury disputes Hasbro's interpretation:

Senator BUSHBY—...So the interpretation, which some of the submitters have suggested, which actually could apply or require competitors of a similar good to report is not actually the case?

Mr Writer—That is not my reading of that provision.<sup>19</sup>

6.22 Hasbro also refer to the Productivity Commission's acknowledgement that confidentiality is important until an investigation into the risk posed by an unacceptable product be confirmed:

---

16 Federal Chamber of Automotive Industries, *Submission 29*, p. 2.

17 Freehills, *Submission 35*, p. 17.

18 Hasbro Australia Ltd, *Submission 6*, p. 3.

19 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010, pp 38-39.

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.<sup>20</sup>

*Two days reporting deadline when suppliers 'become aware'*

6.23 The Committee heard that suppliers often discover complaints or learn of incidents allegedly involving their product, or a similar product, via the media. They argue that in this instance it is difficult to ascertain sufficient details to sustain a report to the Minister as required under section 131 of the bill. They foresee that the likely outcome will be suppliers 'over-reporting' incidents or complaints to the Minister to avoid becoming the public of criminal sanctions. Hasbro cites a similar problem with complaints received from consumers.<sup>21</sup>

6.24 Hasbro submits that 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.<sup>22</sup>

6.25 Hasbro's reference to 'verification' seems to overstating its obligations. The *Explanatory Memorandum* says:

There is no additional requirement for a supplier to have to substantiate information it has become aware of prior to making a report.<sup>23</sup>

*Multiple reporting of incidents*

6.26 Hasbro submitted to the Committee that the provision may lead to over-reporting and an inundation of the regulatory agencies, due to the pecuniary penalties involve for failure to report:

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.<sup>24</sup>

---

20 Hasbro Australia Ltd, *Submission 6*, p. 6.

21 Hasbro Australia Ltd, *Submission 6*, p. 4.

22 Hasbro Australia Ltd, *Submission 6*, pp 4-5.

23 *Explanatory Memorandum*, 10.179.

24 Hasbro Australia Ltd, *Submission 6*, p. 3.

...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.<sup>25</sup>

### *Committee view*

6.27 The Committee notes the Productivity Commission report which stated that a tightly defined mandatory reporting requirement should limit business compliance costs and was likely to be a cost effective way of enhancing the ability of regulators to identify the most hazardous products early. The Committee has some sympathy with the automotive industries and other similarly highly regulated industries but notes that making exceptions causes complexity and its own ambiguity in the legislation. For example, modified new vehicles would not be adequately covered and nor would others not complying with Australian Standards. The Productivity Commission also acknowledged the uncertainty of the potential benefits and costs in this new measure, and recommended a three year review period.

6.28 The Committee finds that the new 'awareness' requirement is a deliberate policy decision to provide early warning of trends of incidents caused by unsafe goods. It is intended to alert customers to products which may be problematic at the first sign of a defect or unsafe outcome. The new provision does not require suppliers to pre-empt incidents, merely to notify the Minister where a report is made prior to establishing all of the technical details involved in the incident. The Minister, via the considerations set out in section 122 of the bill, is still responsible for making a decision, based on the information available from incidents reports, as to whether to issue a warning notice or a compulsory product safety recall. Voluntary recalls by the supplier simply require that supplier to provide written notice to the Minister no later than two days after the recall notice is published.<sup>26</sup>

6.29 The Committee is sympathetic to the need to balance protection of consumers and avoidance of overwhelming both suppliers and regulators with unproductive paperwork. Suggestions to reduce the reporting burden by, for example, replacing 'associated with' by 'caused by', however, could well raise more problems by putting an onus on the reporter to verify or investigate the incident before reporting.

### **Recommendation 8**

**6.30 The Committee recommends that the provisions of the legislation relating to product safety be reviewed within three years of implementation, particularly with regard to the costs of compliance versus the benefits obtained, the integrity of confidentiality of reports and any requirement to review definitions of product safety and risk in mandatory reporting.**

---

25 Hasbro Australia Ltd, *Submission 6*, p.3.

26 Sections 122 to 128.



## Requirements related to illness

6.31 Part 3-3, Division 5 of the bill invokes the reporting duties under section 131 where the product is "associated with the death or serious injury or *illness of any person*". The explanatory memorandum to the bill defines 'death or serious injury or illness of any person', to mean:

An acute physical injury or illness requiring medical or surgical treatment by or under the supervision of a qualified doctor or nurse...the injury or illness in question must be acute in nature arising through sudden onset rather than after gradual development over time. The injury or illness must also be serious rather than minor in nature. Lastly, the injury or illness must be a *disease*, which is defined to include an ailment, disorder or morbid condition which arises through sudden onset or gradual development.<sup>27</sup>

6.32 Freehills submitted it is unclear what 'illnesses' are intended to be caught by the definition as presently drafted.<sup>28</sup> In particular, it is unclear whether definition limits the reporting duties of suppliers in instances where a toxin causes an illness. Such afflictions are not always apparent through 'sudden onset', or may manifest as a 'disease', which is specifically excluded from the definition, although the term itself is not defined.<sup>29</sup>

### *Committee view*

6.33 There was concern by the Committee that a 2 day timeframe does not always enable suppliers to report toxicity reactions or illnesses which develop over the medium-long term, for example, asbestosis. The Treasury confirmed that diseases such as asbestosis would have coverage under the reporting regime, because of the past-tense wording of the provision "have been associated" and the 2 day rule is only activated once the supplier *becomes aware* of the association between the product and the 'serious illness'.<sup>30</sup>

---

27 *Explanatory memorandum*, p.267, [10.164] – [10.165]

28 Freehills, *Submission 35*, p. 17.

29 Freehills, *Submission 35*, p. 17.

30 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010. p.

