SUBMISSION

by

EMPLOYERS AND MANUFACTURERS' ASSOCIATION (N) INC.

to the

Australian Productivity Commission

on

Review of Consumer Product Safety

30 June 2005
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Review of Consumer Product Safety
Submission by Employers and Manufacturers Association (N)

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1. BACKGROUND

This submission is made by the Employers and Manufacturers Association (N) Inc. (EMA)
The EMA is made up of approximately 7500 member companies covering the New Zealand region north of Taupo. This membership includes approximately 1500 manufacturers ranging from large to SME.

Within our membership there are a significant number of companies involved in the manufacture supply, distribution and use of products on a Trans-Tasman basis

The EMA includes in its advocacy role a keen interest in trade (export and domestic issues) and that of compliance costs for our members both within the New Zealand market and under international agreements such as CER and the rules that apply within such agreements
The EMA has focused its submission on core recommendations and our support for them in ensuring our members interests and concerns are represented.

2. CONTACT

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3. SUBMISSION ON IMPACTS

3.1 Impact Groups

The EMA's members consist of many of the business groups identified within the issues paper although particularly affected are manufacturers, industry associations, advertisers, certification/accreditation bodies and services providers.

Our members supply goods that may be sold direct to the consumer or be used by the consumers through facilities provided within Australia by schools, local government, private entertainment facilities and service providers.

Therefore any legislative change that alters or impacts on the obligations, risk, or liability of our members is of deep concern.

It is important to ensure that risk is managed appropriately and in a targeted manner.
Our members in New Zealand work within a range of consumer protection laws which include but are not restricted to, the Consumer Guarantees Act, the mandatory standards under the Fair Trading Act, mandatory standards for electrical goods and for Gas Appliances under the Energy Safety Service and within the Medicines Act for products that may affect health. Such a mix of regulatory protections provide a highly comprehensive coverage, adequate prosecution in those areas where risk is particularly high to consumers for harm and adequate redress where the risk is low but the consumer requires appropriate redress.

While similar rules apply in many areas of Australian law there are a large number of additional mandatory standards in Australia that are not based on real risk but on perception and we would argue that these do not protect the consumer from defective goods or give any rights or specific to redress problems whether or not they cause harm to the consumer.
The lack of a similar Consumer Guarantees Act in Australia is perhaps the only area where use of the Trade Practices Act must be used by consumers. It is important to note that neither the introduction of a Consumer Guarantees Act or modification to the Trade Practices Act will necessarily improve consumer safety. This is better done through joint industry actions which may include education where appropriate.

Business has an obligation to ensure that products sold are safe and consumers are 'reasonably' made aware of any risks associated with products that may have risk potential however this is a fundamental tenet of good business practice and not restricted to legal obligations established under regulation.

3.2 Categories of Impact

There is no doubt that any reform will produce impacts however it is questionable whether in fact these impacts will deliver the positive outcomes desired from the reform in reducing consumer harmed by product.
We have seen in the US market the examples of excessive consumer protection measure where the warnings applied to products can exceed the normal packaging and ultimately lead to consumer apathy towards the warnings.

Under the current Australian system there is just as much incentive to ensure all goods supplied to consumers are safe as might occur under the proposed GSP. For New

Zealand manufacturers it is likely that our market would disappear if that safety is not paramount. Placing a general safety provision may mean that importers would move to Australian produced products to ensure that product liability can be moved back to the supplier should issues occur. We see the introduction of the GSP without cross Tasman alignment or agreements as likely to become a technical barrier to trade.
Such introduction may therefore be in breach of the Mutual Recognition Treaty (TTMRA) under CER. We believe that this must be addressed prior to any such introduction.

The TTMRA does not denigrate any aspects of public safety since the highest risk categories such as Gas and medicines remain excluded and Australia maintains alternative regimes for these. Food safety has been addressed through the Food Safety Authority and while medicines are subject to a new treaty this has yet to be formalised under the proposed Joint Agency.
In many instances joint standards apply for electrical goods, building products and many consumer goods. This means that goods already comply to appropriate standards in the areas where risk or quality has been previously identified and addressed.

It should be noted that standards are not always produced for the primary purpose of consumer safety and that quality or the standardisation of goods does often hold a greater importance in some goods. The term standard is about uniform rules and many of these standards are now becoming increasingly international in nature under such organisations as the IEC. Safety is applied to such standards as a matter of course, based on best practice.

There must be rules for the withdrawal of unsafe goods from the market and business has consistently demonstrated its willingness to do so as soon as a safety issue is identified. While this may be provided under legislation where a compulsory recall can be issued such as that provided under the New Zealand Fair Trading Act. The fact that this very rarely occurs in New Zealand demonstrates that business does act responsibly and there is no reason to assume any less would apply for Australian business.
It should be noted that in New Zealand other law can be used to recall or ban some product types. These include the Medicines Act, Land Transport Act, HSNO Act, Electricity Act/regulations and Gas Act/regulations. Similar provisions occur in Australia and providing an overarching GSP will duplicate those provisions thus increasing the compliance costs to business.

Consumer warranties do not provide any additional consumer safety protection however they do provide consumer recourse. New Zealand has the Consumer Guarantees Act which also requires the goods to be safe and provides for enforcement under the Fair Trading Act. This produces the dual role of consumer redress as well as the mandatory requirement to business marketing goods whether they are imported or domestically manufactured. The recourse provisions are critical in making this legislation work effectively.
By providing consumers the tools to enforce their rights through simple low cost legal actions, there is no requirement for Government to undertake enforcement actions other than in instances where business might try and avoid their obligations by contracting out which is expressly forbidden in relation to consumers.

Australia is a significant market to New Zealand manufacturers and in many cases part of a trans-Tasman business structure, so it is important to ensure that rules are consistent and that those rules fit within the CER/TTMRA obligations.

3.3. The Case for Intervention

There is an assumption that the consumer can not assess what is good for them and that additional consumer information will provide safer outcomes.
Neither is necessarily true. Most consumers are well informed and choose products according to that information. To regulate for a small minority appears to be applying the lowest common denominator rule which inevitably costs consumers considerably more for products that must be relabelled or marked up specifically for the Australian market.

As mentioned earlier in this submission, the US where voluntary codes are often used frequently sees products labelled with a range of warnings to either meet the obligations of the Code or to avoid the potential of litigation should a consumer be harmed from the product. This does not produce a safer result as consumers become immune to the warnings and still continue to ignore clear instructions. Business still faces litigation due to claims that not enough warning was given in spite of clear warnings that would have been visible to all reasonable persons.

It is better to work on what a reasonable person would read or understand since you can not legislate for those that do not take reasonable actions. Hence our preference for measurement is the taking of Reasonable actions to prevent consumer Harm" where any legislation is required.
Maintaining or enhancing the protection requirements for products that may be of the greatest risk to consumers through mandatory standards such as those applied under specific legislation such as electrical goods or the like. These should be restricted to essential or high risk only.

If this is the basis then the situation where consumer harm might occur should be kept to the lowest level while maintaining common sense rules for products that are of generally low risk.

The current systems have far too many standards that are mandatory for "public protection" however only small elements of these standards are related to actual safety issues.
While it is logical to have a mandatory bicycle standard prior to sale due to potential safety issues of this product from immediate use, having mandatory requirements for normal consumer products are unnecessary when the risk is minor.

In many instances we believe that industry codes across a range of products in a broad category should be negotiated between industry and regulators. These are likely to get 'buy in' by the industry and can be aligned to international requirements to thus ensure international obligations are met.

It should be noted that the greatest enforcement of compliance comes from competitors in the market who proactively monitor their market segment and therefore compliance to an industry code is more likely to achieve the desired results than any level of enforcement monitoring or reliance on consumer or media groups. That is not to say that those groups do not have an effect as they contribute to the overall mix.

The MCCA Discussion paper talks of "acceptable" levels of product safety risk. This is quite difficult to define as the risk for one product may be greater than another however the ability to reduce that risk may be the opposite. In many cases product risk is primarily associated with the consumer use or misuse and clearly in these areas it is almost

impossible to achieve risk reduction without changes in social attitude. Motor vehicles could fall largely into this category since the level of safety problems caused by the drivers far outweighs the level of safety problems caused by the product..

In this example however mandatory requirements are set to ensure that safety is maintained by the manufacturer of the vehicle.

4. Assessment of the Current system

Our member companies who supply products in Australia are conscious of safety and perhaps even more conscious of the possibility of legal repercussions should their products produce a safety risk where a consumer is harmed. Since this last element is not one that is present in New Zealand due to the Accident Compensation System, it is often given more weight that perhaps might be by domestic Australian manufacturers.

The EMA can not comment on statistical issues relating how many problems exist or the nature of those problems in consumer products.

We are however keen to see consistency between the respective jurisdictions with that of New Zealand law in the same area in keeping with CER and the TTMRA.

5. System reform

The reform of any Australian legislation following the GSP option must be undertaken to ensure it reflects CER and the TTMRA.

5.1 General legal obligation

The model of the New Zealand Consumer Guarantees Act may provide some guidance in appropriate response for most consumer goods when combined with targeted mandatory standards or industry codes under such legislation as the Fair Trading Act or the Trade Practices Act to ensure enforcement where necessary.

5.2 Revised definition of unsafe goods

The definition of unsafe goods needs to be very carefully thought through. We see the open ended wording proposed under point 5.2 as giving the potential for abuse or misuse.
We prefer the term “where the goods are likely to cause injury” as more appropriate.
We believe there would need to be provisions to allow manufacturers to voluntarily recall or modify products to make them safe and to negotiate the timing and process of that recall with the Australian Government where the risks are not to life and where there is a willingness to ensure an orderly recall is undertaken.

Our experience with ban’s or compulsory recalls is that while the message generally does get out to the targeted audience, there is no opportunity to have retailers or logistics in place to handle the recall process. This ends up with disgruntled consumers who can not get their refund or repairs undertaken in a timely manner.

A voluntary recall has the advantage that this planning can be put in place jointly with Government so that not only the message goes out but systems are in place to deal with the logistical exercise that is involved. It also has the advantage to government in that much of the cost of the recall advertising is met by the business involved.

5.3 Revisions of coverage

Services being covered under this law may be difficult to achieve due to the variety and nature of the services being provided. There are already standards for most mainstream work such as electrical, gas and building which are safety oriented. A number of these standards are also Joint Standards with New Zealand and so it is appropriate to consider how to implement anything in this area jointly with New Zealand.
Those services that pose particular consumer risk are in the same areas where the standards exist and so it should be unnecessary to legislate for other areas of service on the basis of consumer risk. Developing new standards equally should not be necessary.

We point out that the New Zealand Consumer Guarantees Act covers services as well as products and gives consumer rights of redress when services are not performed to an appropriate level of quality or standard regardless of whether a recognised standard exists. This may be a better model to look to while maintaining the existing services standards for essential safety categories.

Second hand goods are almost impossible to address and while licensing of dealers is appropriate for non safety issues such as crime reduction, 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.

5.4 Improved provision of safety information to businesses and consumers

Consumer information is essential however as mentioned earlier in this submission the US model can show how too much consumer information becomes a barrier to consumers absorbing the real safety messages.
It is important that the provision of information to consumers and businesses be differentiated since business normally has mechanisms to ensure safety is maintained and also has Occupational Health and Safety laws to comply with which necessitates a higher level of expertise when compared to the end consumer.
For example a hairdresser, through training, will understand the risks and necessary information about products supplied for use in the business from both their training and from understanding of the associated material safety data sheets (MSDS) To require warnings the same as those that might be required for consumers is therefore unnecessary on the products themselves.

Business may choose to include safety messages in their promotions however there would be a reluctance to expose the business to risk of legal action should the product have an unforeseen failure.

5.5 New Requirements for businesses to monitor and report on the safety of their products

This suggestion is almost unenforceable and would be impossible for businesses to fully comply. The cost of capturing this data would need to fall on government as no business would willingly bear the cost of such a system.
It is likely that businesses would not be able to report in time to give any benefit, and it raises the possibility of victimisation of businesses, so reporting is a great concern.

5.6 & 5.7 The Establishment of product hazard early warning information systems

It is an additional cost to business to have to provide advice services and there is some question whether the level of knowledge would exist in bureaucratic circles about specific product information. The suggestion of a centralised database for early warning is expensive and has no established outcomes to measure whether such a concept could be effective.

5.8 Increased Government and Industry funding of Product Safety Research
There is an assumption that all such products will be made in Australia when this is not true. Such assistance may be in breach of CER and considered a trade subsidy if not available to overseas suppliers developing products for Australia.

5.9 Requirement for business to recall unsafe products
This is already the case in New Zealand and we do not argue against this provision providing the work is done in a co-operative manner, in line with our suggestions in 5.2.

5.10 Government power to audit product recalls
This would appear to be a natural part of the voluntary process and co-regulation.

5.11 Measures to harmonise product safety legislation, administration and enforcement
We support consistency across the jurisdictions for products safety legislation where it is introduced and advocate strongly the need to ensure that CER and the TTMRA are also part of this consideration.

5.12 Measures to enhance the making of product safety regulation decisions by the Australian Government
Harmonisation remains our preferred option however providing the reasoning for bans or mandatory products standards is based on the genuine risk involved to consumers then these and other measure may be acceptable.
The General Safety provision (GSP) should only be introduced once all Harmonisation issues are able to be resolved and consistency with New Zealand under CER and the TTMRA is established and formalised.

Conclusion

This association appreciates that this submission is outside of the advertised period for submissions, but asks that it be taken into account as we only became aware of the discussion document issues paper in the last two weeks.
The EMA requests that it be registered as an ”interested party” to this review and wishes to participate in any further consultation process that may evolve relevant to it.