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15 March 2009

**SCOCA Australian Consumer Law Consultation**  
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*Consultation Paper: An Australian Consumer Law*

This letter and the attachment constitute my Submission on the latest effort by the Australian Governments to bring our consumer law into the 21<sup>st</sup> century. The attached will also be published soon in the *Australian Product Liability Reporter*. I am also contributing to the Submission by the Consumer Law Roundtable.

I am pleased we may finally get uniform legislation banning the ever-proliferating **unfair terms in consumer contracts**. This is an issue on which I made a Submission to the NSW Legislative Council's review back in 2006,<sup>1</sup> and about which I wrote to Minister Chris Bowen on 14 January 2008.

However, as explained below, I am disturbed that the other issue on which I wrote to the Minister appears to have dropped off the agenda: **a duty on suppliers to notify regulators about serious consumer product-related accidents**. This duty is now found among our major trading partners (the US and Canada, the EU, and Japan), and is an essential aspect nowadays to an effective product safety regime. The Productivity Commission recommended a version as long ago as 2006, then again in 2008. Yet the issue is not mentioned in the Consultation Paper, nor in other MCCA

<sup>1</sup><http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/99D3B2CE26A40F9CCA2571D90018D245>

and COAG documents it refers to. This may be an inadvertent omission, but then we still need to discuss the precise contours of such a duty. If instead the Australian Governments have already somehow and somewhere decided not to add this duty, then this at least needs to be spelt out – and the more limited reforms on consumer product safety that are expressly set out in this Consultation Paper would then make a mockery of the last four years of official law reform discussions. They will leave Australian consumers without key improvements made over the last decade around the world, and the Australian Governments must put this issue (and some others, like a General Safety Provision) back on our agenda.

Both issues, unfair contract terms and a disclosure duty regarding consumer product related accidents, are essential to restore consumer trust in markets. This is particularly true as this country joins others in trying to spend its way out of the global economic crisis, itself triggered by lax regulatory standards and enforcement in various markets. It is even more urgent for Australia finally to “get its Act together”.

Please let me know when this Submission is made available on the Treasury’s website, and if there can be any opportunity for public or private meetings so I can elaborate these points, if necessary. I will be in Canberra anyway 2-4 April to participate in the AGD/Law Council’s annual conference on international trade law. I will chair a session on regional FTAs, where I expect to mention these developments in the context of cross-border business and consumer law harmonisation. Regrettably, unlike the work of the Productivity Commission, this Consultation Paper is focusing too much just on harmonisation within Australia.

Yours sincerely

**Luke Nottage**

## “Product Safety Regulation in the proposed *Australian Consumer Law*: Proper Disclosure Please”

Dr Luke Nottage\*

### *Where Does Australia Really Now Stand?*

Although it is difficult to work out the Australian Governments’ present position, there appears to be **a major gap in the proposed new consumer product safety regime**. There needs to be a clear commitment to updating the TPA and State/Territory regimes, which date back to the 1970s and 1980s, to reflect current best practice in other similar industrialised democracies. At the least, Australia should add **a duty on suppliers to inform** the ACCC if they become aware of a serious product related accident – as in the US, the EU, Japan and Canada. Australia should also now **reconsider adding a General Safety Provision (GSP)**, or at least add into the new legislation **a commitment to regular reviews** of product safety trends and evolving global standards.

In the 17 February 2009 consultation paper entitled *An Australian Consumer Law* and developed by the Standing Committee of Officials of Consumer Affairs (SCOCA),<sup>2</sup> Chapter 8 on “A national regulatory regime for product safety” (contained in Part II – “Agreed Reforms”) begins:

“In May 2008, MCCA agreed to a new model for the regulation of product safety in Australia. This model was endorsed by COAG at its July 2008 meeting. The new model will be underpinned by national application legislation.”

The Council of Australian Governments communiqué of 3 July 2008 mentions only that:<sup>3</sup>

“COAG today took a significant step in streamlining the processes associated with ensuring the safety of consumer products. COAG has agreed that the Commonwealth will assume responsibility for the making of permanent product bans and standards under the *Trade Practices Act 1974*. States will retain powers to issue interim product bans.”

The Ministerial Council on Consumer Affairs (MCCA) communiqué of 23 May 2008 adds to this:<sup>4</sup>

“• The Australian Competition and Consumer Commission and the State and Territory offices of fair trading will share responsibility for enforcement of the product safety law.

• Any jurisdiction may refer a proposal for a permanent ban or standard to the ACCC and there will be requirements for the ACCC to communicate its assessment to the Commonwealth Minister and to MCCA.”

The next section of the MCCA communiqué, entitled “Review of Australia’s Consumer Policy Framework”,

\* Associate Professor, Sydney Law School; Program Director (Comparative and Global Law), Sydney Centre for International Law. Thanks to participants in the 3<sup>rd</sup> Consumer Law Roundtable, Melbourne, 20 February 2009.

<sup>2</sup> Available via <http://www.treasury.gov.au/contentitem.asp?ContentID=1482>. See the summary by Jocelyn Kellam in the current issue of the *Australian Product Liability Reporter*, based on

[http://www.claytonutz.com/areas\\_of\\_law/controller.asp?aolstring=30&na=1943](http://www.claytonutz.com/areas_of_law/controller.asp?aolstring=30&na=1943).

<sup>3</sup> [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/docs/communique20080703.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/communique20080703.pdf) at p3. Regrettably, the COAG website does not yet have any Subject Heading for “consumer law” or “consumer product safety”: cf [www.coag.gov.au/coag\\_meeting\\_outcomes/issues\\_by\\_subject.cfm](http://www.coag.gov.au/coag_meeting_outcomes/issues_by_subject.cfm)

<sup>4</sup> [http://www.consumer.gov.au/html/download/MCCA\\_Meetings/Meeting\\_19\\_23\\_May\\_08.pdf](http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_19_23_May_08.pdf) at p2.

appears to commit the Ministers to developing a new nation-wide regime based generally on the March 2008 Final Report of the Productivity Commission (“PC”), while undertaking further assessment (through SCOCA) and stakeholder consultation regarding its specific features. However, this section does not clearly commit to implementing even all the Recommendations contained in the PC’s final Report regarding consumer product safety. Nor does the 17 February 2009 consultation paper pick up on all those original Recommendations.

In particular, the PC’s final Report had stated (emphasis added):<sup>5</sup>

Recommendation 8.2

*Consistent with the recommendations in the Productivity Commission’s Review of the Australian Consumer Product Safety System* [2006], Australian Governments should:

- develop a hazard identification system for consumer product incidents;
- introduce mandatory reporting requirements for voluntary product recalls; and
- *require suppliers to report products associated with serious injury or death or products which have been the subject of a successful product liability claim or multiple out-of-court settlements.*

...

Recommendation 8.3

Drawing on the mechanisms proposed in recommendation 8.2 and on the baseline study examining product related

accidents prepared for the Ministerial Council on Consumer Affairs, *Australian Governments should monitor trends in*

*product safety, including any impacts of the civil liability reforms, with a view to assessing whether the incentives to supply safe products continue to be adequate.*

### ***Supplier’s Duty to Notify if Serious Injury***

Even if the Australian Governments do plan still to add into the new generic Consumer Law a notification duty on suppliers, the last bullet point in the PC’s Recommendation 8.2 is quite ambiguous. At first blush, it seems to envisage two duties, triggered simply by (a) knowledge of products associated with serious injury or death, *and* (b) products involved in a successful product liability claim or multiple settlements. But this Recommendation is supposed to be consistent with the PC’s 2006 Review<sup>6</sup> recommendations (and at p 186 of its 2008 Report the PC noted that the latter “was not a supplementary review of Australia’s product safety arrangements”). The 2006 Review in fact recommended a notification duty triggered by (a) knowledge of products associated with serious injury or death, *or – only “if that should not be adopted”* – (b) products involved in a successful product liability claim or multiple settlements.<sup>7</sup>

At a minimum, Australian Governments should include a duty triggered by (a) knowledge of products associated with serious injury or death, as in Japan since late 2006.<sup>8</sup> We should also consider a duty triggered when the supplier *ought to have known* about a serious product related accident, not just when it had actual knowledge. By contrast, a duty triggered solely by (b) seems pointless. There have been only a few dozen product liability judgments under Part VA of the *Trade Practices Act* since 1992 (with many proving unsuccessful anyway).<sup>9</sup> “Tort reforms” since 2002 have further reduced personal injury filings, and hence the

<sup>5</sup> At <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>, Vol 2 at p188 (also in summary in Vol 1).

<sup>6</sup> At <http://www.pc.gov.au/projects/study/productsafety/docs/finalreport>.

<sup>7</sup> 2008 Report, p 186. See also Recommendation 9.3 of the PC’s 2006 Review, *op cit*, discussed at pp 217-26 of the latter. That text shows that the PC’s original Discussion Draft had favoured (a), but by the final Review it had been persuaded by Submissions and further analysis that net benefits were likely to come instead from (b). Note also that the PC considered “serious” injury to involve hospital admission.

<sup>8</sup> Nottage, L. “Product Liability and Safety Regulation” in Gerald McAlinn (ed) *Japanese Business Law* (Kluwer, The Hague) 221-262; Nottage, L. “Product Safety Regulation Reform in Australia and Japan: Harmonising Towards European Models?” [2008] *Yearbook of Consumer Law / Sydney Law School Research Paper No. 07/28* <http://ssrn.com/abstract=986528>.

<sup>9</sup> Nottage, L. and J. Kellam, “Happy 15th Birthday, Part VA TPA! Australia’s Product Liability Morass” 15 *Competition and Consumer Law Journal* (2007) 26-73 / *Sydney Law School Research Paper No. 07/35* <http://ssrn.com/abstract=988595>.

chance for multiple settlements.<sup>10</sup> Even a settlement, let alone a judgment, may take years to eventuate. A duty to notify should be triggered much earlier, so firms (in question and in the relevant industry), regulators and then consumers can work to prevent injury ever arising.

However, there is an argument for setting a *second* duty to notify regulators triggered by a successful product liability claim or settlement. This is because not all such cases necessarily involve personal injury. Consumers can claim under TPA Part VA for example solely for consequential loss to other products ordinarily for personal or household use. But because such liability is triggered only by an unsafe or defective product, it can also serve as an early warning signal about possible future personal injury from such a product.

There are some parallels in longstanding multiple duties to notify under s15(b) of the Consumer Product Safety Act in the US.<sup>11</sup> New legislation presently before the Canadian Parliament also provides for a dual notification requirement.<sup>12</sup> Under cl 14(2) of its Consumer Product Safety Bill, “A person who manufactures, imports or sells a consumer product for commercial purposes shall provide the Minister and, if applicable, the person from whom they received the consumer product with all the information in their control regarding any incident related to the product within two days after the day on which they become aware of the incident”. Cl 14(1) defines “incident” to include (emphasis added):

“(a) *an occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual’s death or in serious adverse effects on their health, including a serious injury;*  
(b) *a defect or characteristic that may reasonably be expected to result in an individual’s death or in serious adverse effects on their health, including a serious injury; ...*”.

Incidentally, the reporting duty on Australian suppliers should similarly extend to injuries arising outside Australia – or at least in any countries with which Australia concludes a Free Trade Agreement.<sup>13</sup>

The EU’s Product Safety Directive (revised in 2001<sup>14</sup>) offers an alternative formulation that also captures situations of both actual and likely injury. This deserves serious consideration in this country too, as it also influenced reform discussions for example in Canada. Article 5(3) of the Directive imposes a duty to notify triggered if the supplier knows *or ought to know* that there are *risks* of their products proving unsafe, as defined in Article 3(2).

### ***GSP and Regular Reviews***

Article 3(1) of that Directive goes on to require suppliers not to supply unsafe goods – a “general safety provision (GSP)”. The Canada Consumer Product Safety Bill also provides for a GSP. Under cl 7(a), “no manufacturer or importer shall manufacture, import, advertise or sell a consumer product that ... is a danger to human health or safety ...”. Under cl 8(a), “no person shall advertise or sell a consumer product *that they know ... is a danger to human health or safety*”.<sup>15</sup>

<sup>10</sup> Recommendation 9.3 of the 2006 Review, op cit, had added the requirement of a “verifiable initiating action to commence litigation” leading to settlement.

<sup>11</sup> As noted already in the PC’s 2006 Review (op cit), one is triggered if the product contains a defect which could create a substantial product hazard to consumers; another, if it creates an unreasonable risk of serious injury or death.

<sup>12</sup> Bill C-6 had its first reading in Parliament on 29 January 2009:

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3633883&Language=e&Mode=1&File=53#8>.

<sup>13</sup> The disclosure by Fonterra (formerly the NZ Dairy Board) to the NZ government last year, voluntarily but against the backdrop of the new China-NZ FTA, helped lead – albeit belatedly – to proper recalls and other measures to address melamine-contaminated milk products from its Sanlu subsidiary in China. See <http://www.eastasiaforum.org/author/lukenottage/>, updated/edited in Nottage, L “Economics, Politics, Public Policy and Law in Japan, Australasia and the Pacific: Corporate Governance, Financial Crisis, and Consumer Product Safety in 2008” [2009] *Ritsumeikan Law Review* / Sydney Law School Research Paper No. 08/134 <http://ssrn.com/abstract=1295064>.

<sup>14</sup> 2001/95/EC, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0095:EN:HTML>

<sup>15</sup> Op cit. Cl 2 defines such a danger as “any unreasonable hazard — existing or potential — that is posed by a consumer product during or as a result of its normal or foreseeable use and that may reasonably be expected to cause the death of an individual exposed to it or have an adverse effect on that individual’s health — including an injury — whether or not the death or adverse

In its 2006 Review,<sup>16</sup> the PC decided that there was insufficient evidence that the benefits of imposing this extra duty outweighed its costs. Three years later, it is time for Australian Governments to reconsider that view, considering many subsequent product safety failures (eg involving goods from China) and reform debates for example in Canada.

At the least, Australia's new legislation should include a provision requiring regular (at least five-yearly) governmental reviews of key features of product safety trends and legislation in our major trading partners, such as the need for a GSP. Formal ongoing reviews are a common practice in the EU, and increasingly in Japan.<sup>17</sup> Recall also that Recommendation 8.3 of the PC's final Report (cited above) called for monitoring of product safety trends, including impact of the tort reforms. Such reviews will be greatly facilitated by a duty to notify regulators about serious product-related accidents, as proposed by the PC and elaborated above.

Australian consumers live in a similarly open economy and deserve equal treatment to counterparts in our major trading partners. And better information flows are a basic premise for more legitimate and efficient "responsive regulation".<sup>18</sup> Fortunately, we still have time to get these aspects right, and finally get an updated product safety regime that goes *beyond* the TPA and state/Territory legislation dating back to the 1970s and 1980s, and which adopts *global best practice* in the 21<sup>st</sup> century. The 17 February 2009 consultation paper proposes this timetable:<sup>19</sup>

- by 30 June 2009: finalisation of the Inter-Governmental Agreement (covering the Australian Consumer Law and including product safety);
- by 30 June 2010: finalisation and agreement of the text of the legislation for the Australian Consumer Law, including the product safety reforms; and
- by 31 December 2010:
  - the Australian Parliament is to have passed legislation for the Australian Consumer Law (including product safety) and amend the TPA;
  - the Parliaments of the States and Territories are to have passed application Acts to apply the Australian Consumer Law (including product safety) in their own jurisdictions; and
  - commencement of the Australian Consumer Law in all Australian jurisdictions.

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effect occurs immediately after the exposure to the hazard, and includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health.”

<sup>16</sup> Op cit, chapter 5.

<sup>17</sup> See already eg a January 2009 report on implementation of the revised Directive, which was to be implemented in all EU member states by 2004: [http://ec.europa.eu/consumers/safety/prod\\_legis/docs/report\\_impl\\_gpsd\\_en.pdf](http://ec.europa.eu/consumers/safety/prod_legis/docs/report_impl_gpsd_en.pdf).

<sup>18</sup> Ayres, I. and J. Braithwaite, *Responsive Regulation* (Oxford, OUP, 1992). More generally on the comparative history, policy rationales and forms of product safety regulation (compared eg to product liability regimes and market incentives), see Nottage, L. "Product Safety" in Geraint Howells, Iain Ramsay & Thomas Wilhelmsson (eds) *Handbook of International Consumer Law and Policy* (Edward Elgar, Cheltenham) in press – and manuscript available on request.

<sup>19</sup> Op cit, pp 11-12.