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Safety first: fostering a cultural shift in the product safety system

Submission to Treasury –

Consultation Regulatory Impact Statement:

Improving the Effectiveness of the Consumer Product Safety System

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INTRODUCTION

When you buy a product in Australia, it should be safe. Our product safety system will continue to fail us until this concept is enshrined in the law.

CHOICE and Consumer Action Law Centre welcome the Treasury's consultation on improving the effectiveness of the consumer product safety system. We have been advocating for a general safety provision (GSP) to be incorporated into the Australian Consumer Law (ACL) for more than a decade.¹ We are pleased to see a GSP contained in two out of the six options in the consultation regulatory impact statement. A proactive requirement for products to be safe, together with appropriate penalties for breaches, better aligns with international best practice and consumer expectations.

There remains a persistent view among the community that products must be safe in order to be sold. In a recent survey, CHOICE found that 93 per cent of Australians believe that products sold in Australia are legally required to be safe.² This view is entirely reasonable and the law should reflect it.

A robust product safety system is one that is underpinned by the following:

- **Pre-market controls** that place the onus on manufacturers and suppliers to ensure the products they put on the market are safe;
- A **proactive 'safety first' culture** that is found at all levels of the supply chain;
- **Responsive regulators** that have strong enforcement and compliance tools to swiftly intervene where a product may pose a risk to the Australian community; and
- **Clear laws and commensurate penalties** for breaches that align with community expectations.

We believe that the general safety duty outlined in option 6 is the best way to improve the effectiveness of Australia's product safety system. As a pre-market control, the general safety duty will require a more proactive approach from manufacturers and retailers, and encourage reform in corporate attitudes towards product safety. With product recall rates skyrocketing in recent years,³ now is the time to reform our product safety system with the introduction of this general safety duty.

¹ More than 26,403 people support CHOICE's campaign calling for the introduction of a GSP.

² Results are from the TEG Omnibus, November 2019. Sample of n = 1,000 representative of the Australian population. Quota controls are applied to achieve a nationally representative sample.

³ Product Safety Australia 2019, *List of recalls by year*, accessed on 19 November 2019, <https://www.productsafety.gov.au/recalls/browse-all-recalls>

An effective product safety system is not possible without effective enforcement. We are supportive of option 3 and 4 if pursued alongside option 6. Providing regulators with stronger enforcement powers and mechanisms to investigate and compel traders to swiftly remove unsafe products from the market. Adding these powers and mechanisms to the regulator toolkit will allow for more efficient and responsive enforcement.

We urge the Treasury to seriously consider the harms and risks of allowing the product safety system to remain as it is: slow, reactive and outdated.

Australia needs a product safety duty. Without it, unsafe products will continue to flow into our homes and pose an unacceptable and ongoing risk to the Australian community.

RECOMMENDATIONS

We recommend:

1. That option 6, a new general safety duty, be incorporated into the Australian Consumer Law.
 - a. That in the absence of option 6, option 5 (general safety duty requiring 'reasonable steps') which employs a definition of 'safe' be incorporated into the ACL.
 - b. Breach of the general safety duty should carry hefty penalties capable of acting as a strong deterrent.
2. That option 4, a new protection power, be given to regulators.
3. That option 3, a new enforcement instrument, be given to regulators.
4. That option 2, more education and increased industry engagement, is implemented to support the introduction of the general safety duty and not as a standalone option.

1. The current system is not working

The current level of consumer harm is unacceptable

It is an unacceptable risk that consumers, simply by using products available in the Australian market, may be exposed to harm in their daily lives. Unsafe products can have long-lasting and irreversible impacts on people's lives – physically, emotionally and financially. The ACCC's estimation that unsafe consumer products cause around 780 deaths and 52,000 injuries each year⁴ is not only shocking but points to a failure within the current product safety system. When the system does not prioritise safety at every stage of the supply chain, consumer harm is inevitable.

Consumers are disproportionately burdened with the onus of assessing that a product is unsafe in the current system. The responsibility to ensure a product is safe should lie where it is best placed – within the supply chain – not with the end user.

In a recent CHOICE survey, respondents described their experiences with unsafe products. The variety of products here illustrates how an applied general safety duty would be useful in ensuring such products do not get into people's homes in the first place.

⁴ ACCC 2019, *Unsafe goods should be illegal to sell*, accessed on 22 November 2019, <https://www.accc.gov.au/media-release/unsafe-goods-should-be-illegal-to-sell>

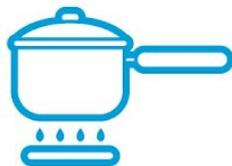
Experiences of unsafe products

“A rotary cheese grater that ground metal into the cheese. I consumed fine metal shreds.”



“A plastic bath toy from a \$2 shop which broke easily and small pieces came loose. No [harm]. I removed it in time!”

“An Aldi electric kettle. The brand was called Sterling. The lid snapped off after a short amount of time. I think it cost roughly \$40. Total rubbish. The cheap bracket attached to the kettle body seemed flimsy and I could have burnt myself.”



“A set of stainless steel saucepans which were on sale for half price. The handle heated up to the same temperature as the pot and I was burnt by it.”

“The blender jug was made of glass. I put milk, flavouring and some small pieces of ice in the jug. When I turned on the appliance, the ice broke through the glass sending shards of glass flying at high speed right at eye level. I was very lucky to avoid serious injury.”



“My 11-month-old son swallowed a button battery that came loose from a novelty night light. He had to undergo X-ray, anaesthetic, endoscopy and ultimately, copious amounts of bowel prep administered by IV over a 12-hour period. My son was lucky, but I still suffer from anxiety over what might have been had we not realised what had happened.”

CHOICE

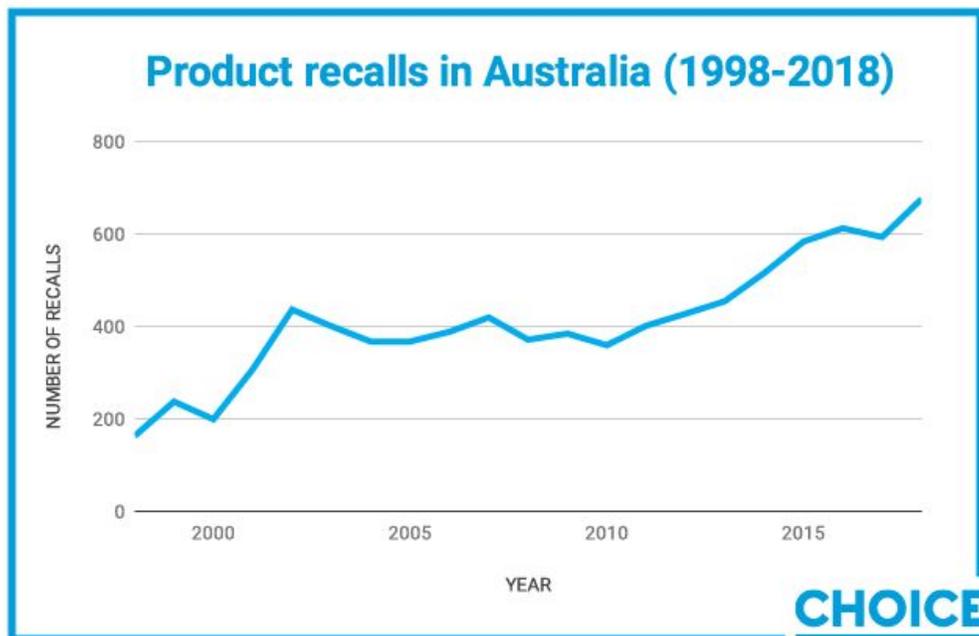
A reactive system is not fit for the future

The current product safety system is not equipped to deal with emerging changes to consumer markets. The rise of online shopping, proliferation of low-cost products from overseas and the increasing diversity and complexity of products present enforcement and compliance problems.

In particular, the system is over-reliant on recalls, which are both onerous and ineffective in removing unsafe products from people's homes.⁵ Recalls are conducted and investigations initiated sometimes only after harm has already been caused.

The number of recalls in Australia continues to grow annually (refer to Chart 1).⁶ In October 2019 alone, there were 59 product recalls.⁷ Without a general safety duty providing a pre-market control, the number of recalls will continue to grow.

Chart 1: Product recalls in Australia from 1998 to 2018



⁵ Australian Treasury 2019, *Consultation Regulation Impact Statement: Improving the effectiveness of the Consumer Product Safety System*, p 19

⁶ Product Safety Australia 2019, *Recalls – Date published*, accessed on 22 November 2019, <https://www.productsafety.gov.au/recalls>

⁷ Product Safety Australia 2019, *Recalls – October 2019*, accessed on 15 November 2019, <https://www.productsafety.gov.au/recalls>

Alarming new data from the ACCC shows that there are 6.6 million individual products currently under voluntary recall. This means that one in four Australian households are currently exposed to potential hazards.⁸ Image 1 illustrates the types of household products that have been recalled in recent years. It draws attention to the potential prevalence of these common yet unsafe products in the average Australian household.

Image 1: A sample of household products recalled in the last 6 years⁹



⁸ ACCC 2019, *Over a million recalled products still in circulation in Australia*, accessed on 19 November 2019, <https://www.accc.gov.au/media-release/over-a-million-recalled-products-still-in-circulation-in-australia>

⁹ Product Safety Australia 2019, *List of recalls by year*, accessed on 19 November 2019, <https://www.productsafety.gov.au/recalls/browse-all-recalls>

A modern, effective law would place an onus on manufacturers and retailers to ensure the safety of their products before they reach the market. Retailers should treat the safety of their products as a priority, rather than an element of financial risk to be weighed up against the chances of an individual consumer taking legal action for compensation following an injury.

If an unsafe product does come onto the market, regulators need better tools to swiftly remove them. The new protection power (option 4) and new enforcement instrument (option 3) would increase the responsiveness of regulators and allow them to prevent products from entering or staying on the market.

The law is unclear

The product safety framework within the ACL is unclear and should be strengthened to improve clarity for consumers and traders. CHOICE receives 5 to 10 calls per month from businesses of all sizes, requesting assistance in understanding the product safety framework. The general safety duty presented in option 6 would provide this clarity by specifying what is required of traders.

2. Option 6: general safety duty

We support a new safety duty where the onus is placed on traders (including online marketplaces) to ensure products supplied are 'safe'. This duty would provide much needed clarity for traders and aligns with the reasonable consumer expectation that products sold in Australia are safe. This model operates successfully in the UK context and is consistent with international best practice.

A general safety duty should not impose further costs on businesses that already treat product safety as a priority. If businesses are taking care to only introduce safe products to the marketplace, they will not need to change their practices to comply with this duty. Manufacturers and retailers are best placed to observe and act on safety risks, and the introduction of this duty would ensure that responsibility for the safety of products is placed with the parties best positioned to act.

However, this duty on manufacturers and retailers should not explicitly exclude other levels of the supply chain, in particular online marketplaces. The continued rise of online shopping means that online marketplaces are increasingly important transaction points for consumers. As the primary interface for consumers, online marketplaces should use their technical and commercial ability to hold suppliers to account for consumer safety.¹⁰ To future-proof the product safety system, online

¹⁰ Which? 2019, *Online marketplaces and product safety*, accessed on 21 November 2019, <https://www.which.co.uk/policy/consumers/5234/onlinemarketplaces>

marketplaces should be required to ensure that consumer products offered for sale by sellers on their sites are safe.

We recommend the UK *General Product Safety Regulations 2005* [part 2, regulation 5] as a useful starting point for inclusion in the ACL, as below. At minimum, manufacturers (producers) should have a duty to ensure that the products they supply are safe. However, more consideration should be given to how the provisions can place accountability on all levels of the supply chain to comply with the duty. An effective product safety system needs a 'safety first' culture permeating through all levels of the supply chain – not just at the starting point.

General safety duty

- (1) No producer shall place a product on the market unless the product is a safe product.*
- (2) No producer shall offer or agree to place a product on the market or expose or possess a product for placing on the market unless the product is a safe product.*
- (3) No producer shall offer or agree to supply a product or expose or possess a product for supply unless the product is a safe product.*
- (4) No producer shall supply a product unless the product is a safe product.*

CASE STUDY: online trading and the general safety duty

The emergence of online trading has introduced new regulatory challenges for the product safety system. The complexity and diversity of products along with the globalised nature of the online marketplace present unique problems for all levels of the supply chain.

The general safety duty would create a cultural shift that prioritises product safety at all levels of the supply chain. CHOICE is aware of online marketplaces taking proactive steps to ensure that suppliers' products are compliant with relevant standards. This is achieved through prompts, warnings and nudges in the marketplace's portal where the product is initially uploaded for approval. In this process, once the supplier uploads their product, a prompt states that 'this product requires certification for sale in Australia' and the supplier would then be prompted to upload a certificate of compliance (see below). This model would work well under the general safety duty, where all levels of the supply chain would be under the obligation to make sure the products they supply are safe before they are made available to the public.

- Step 1: Supplier approaches online marketplace
- Step 2: Supplier uploads product to marketplace platform for sale in Australia
- Step 3: Product upload prompts warning about safety regulation
- Step 4: Supplier uploads certificate of compliance
- Step 5: Marketplace makes product available for sale in Australia once compliance is confirmed.

Definition of 'safe'

A clear and concise definition of 'safe' is crucial for a modern product safety system. The current law is fragmented in its approach to safety, where multiple provisions in the ACL cause confusion. The term 'safe' is conceptually easier to grasp than 'not unsafe' or 'safety defect'. Simplifying the definition in the law would be an improvement on the status quo.

We regard the UK's *General Product Safety Regulations 2005* definition of 'safe' as a useful starting point for any such definition in the ACL:

“safe product” means a product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product’s use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons. In determining the foregoing, the following shall be taken into account in particular—

- 1) *the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, instructions for installation and maintenance,*
- 2) *the effect of the product on other products, where it is reasonably foreseeable that it will be used with other products,*
- 3) *the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product, and*
- 4) *the categories of consumers at risk when using the product, in particular children and the elderly.*¹¹

Demonstrating conformity with the duty

This general safety duty would provide businesses with more clarity on what is required to determine compliance. A manufacturer may, depending on how the law is framed, be able to demonstrate compliance with a trusted international safety standard, in the absence of a specific Australian Standard, as a way of managing risk. For businesses that supply goods into other markets, the safety duty could help increase the business' reputation overseas.

Using the UK's *General Product Safety Regulations 2005* as a basis, we propose these terms for demonstrating conformity:

The conformity of a product to the general safety duty shall be assessed taking into account:

¹¹ *General Product Safety Regulations 2005*, Part 1, Regulation 2, accessed on 20 November 2019, <http://www.legislation.gov.uk/ukSI/2005/1803/regulation/2/made>

- (a) any mandatory standards drawn up in Australia and other current consumer safety regulations,
- (b) any voluntary national standards of Australia,
- (c) any standards mandated by overseas government consumer safety agencies, including the European Commission and the US Consumer Product Safety Commission,
- (d) any active voluntary standards, published via national standards bodies,
- (e) product safety codes of good practice in the sector concerned,
- (f) the state of the art and technology, and
- (g) reasonable consumer expectations concerning safety.

Conformity of a product with the criteria designed to ensure the general safety duty is complied with, shall not bar an enforcement authority from exercising its powers under these Regulations in relation to that product where there is evidence that, despite such conformity, it is dangerous.

Arguments for option 5 state that the ‘reasonable steps’ general safety duty is pragmatic and easier to comply with due to its flexibility. However, we believe that option 6’s general safety duty provides for sufficient flexibility through the provisions allowing for traders to demonstrate conformity against (f) the state of the art and technology and (g) reasonable consumer expectations concerning safety. These provisions give traders enough scope to determine the safety of products in the absence of codes or standards, which is similar to option 5’s ‘reasonable steps’ test.

CASE STUDY: bassinets

A bassinet is an important and popular item for new parents who follow safe-sleeping guidelines that babies should sleep in the same room as them for up to 12 months. Despite their prevalence in Australian homes, there is no Australian safety standard (mandatory or voluntary) for bassinets. This makes it easier for potentially unsafe bassinets to make it onto the market for new parents to buy.

From 2014 to 2019, CHOICE has tested 41 bassinets. CHOICE found that 3 out of 5 bassinets had at least one major safety failure in our tests (25 out of 41).¹² This is an alarming rate of failure for a widely used infant sleeping product. Twelve of the models that failed CHOICE’s safety tests appear not to have been manufacturer-tested against any criteria that would be reasonably expected of an infant sleeping product (based on the fact that for these products, the manufacturer provided no statement of compliance with any standards).

¹² CHOICE bassinet testing data, 2019

However, of the remaining 16 models that did not have a major safety failure, 13 claimed compliance with a standard. With the general safety duty described in option 6, all manufacturers would be required to assess conformity against a standard in the first instance, in order to ensure that the product is safe. Similarly, applying option 3 or 4, regulators would have the power to move swiftly to remove unsafe bassinets from the market, reducing the need for lengthy bureaucratic processes.

3. Discussion: options 1 to 5

Our recommendations are underpinned by their alignment with the principles of:

- **Pre-market controls** that place the onus on manufacturers and suppliers to ensure the products they put on the market are safe;
- A **proactive ‘safety first’ culture** that is found at all levels of the supply chain;
- **Responsive regulators** that have strong enforcement and compliance tools to swiftly intervene where a product may pose a risk to the Australian community; and
- **Clear laws and commensurate penalties** for breaches that align with community expectations.

Option 1: status quo

We do not support the status quo.

Option 2: more education and industry engagement

We support more education and increased industry engagement in the context that the general safety duty is adopted. As a standalone option, option 2 cannot change the underlying problems of the current system.

Option 3: new enforcement instrument

We support option 3 as it provides regulators with an additional post-market tool, thereby increasing their responsiveness. The ‘Notice of Risk’ could be strengthened by allowing the regulator to publicly notify the trader so that consumers who already own the product can take appropriate action and potential consumers can receive forewarning about the potential risks of the unsafe product. This is crucial in reducing consumer detriment caused by the unsafe product if the product is still available on the market.

Option 4: new protection power

We support option 4 as it provides regulators with an additional post-market tool, thereby increasing their responsiveness. Providing regulators with the power to intervene in the market

before (and after) a product safety incident occurs will result in reduced incidences of harm occurring.

CASE STUDY: baby sleep pods

Unsafe baby sleep pods that have been linked to infant deaths in the US currently appear to be available for sale in Australia. These products are designed to allow co-sleeping or easier night feeding. They can have soft padding or surfaces that pose a breathability and suffocation risk to infants. These products are not subject to any mandatory safety standards.

Consumer Reports (CR), CHOICE's sister organisation in the United States, has recently linked baby sleep pods to infant deaths. Some of the products linked to infant deaths, now appear to be available online for sale in Australia, including:¹³

- SwaddleMe by Your Side sleeper, available through Amazon, which Consumer Reports linked to two infant deaths.¹⁴
- DockATot sleeper, available through their Australian online store, which Consumer Reports linked to two infant deaths.¹⁵

Other models are available through popular online baby stores.¹⁶ CHOICE has yet to conduct any in-store investigations to see if these products are more widely available.

In an effective product safety system, the general safety duty would require traders supplying this product to take appropriate actions to ensure that the product is safe. This would include rigorous testing, incorporating learnings in the US context to amend the product, and provide clear instructions and warnings with the product to minimise risk of harm.

If a non-compliant trader who is reasonably aware that the product has a safety hazard continues to supply it nonetheless, regulators could use the new enforcement instrument (option 3) to prohibit the supply of unsafe baby sleep pods. To demonstrate a contravention in court, regulators could use evidence from the US context to establish that the product was unsafe and the trader was aware the product was unsafe (knowledge of infant deaths in the US).

The new protection power (option 4) would allow regulators to make direct orders to the trader to remediate the safety issues or stop supplying the product in the Australian market. Market intelligence and learnings in the US context could provide sufficient evidence for regulators that significant detriment to consumers is likely should baby sleep pods stay on the market. In this

¹³ Consumer Reports 2019, *More Infant Sleep Products Linked to Deaths, a Consumer Reports Investigation Finds*, 21 October, accessed on 22 November 2019,

<https://www.consumerreports.org/child-safety/more-infant-sleep-products-linked-to-deaths/>

¹⁴ Amazon Australia 2019, *SwaddleMe by Your Side Sleeper product listing*, accessed on 22 November 2019, <https://www.amazon.com.au/SwaddleMe-by-Your-Side-Sleeper/dp/B00YBADM1O>

¹⁵ DockATot 2019, accessed on 22 November 2019, <https://dockatot.com.au/>

¹⁶ Baby Kingdom 2019, *The First Years Cozy Baby Sleeper*, accessed on 22 November 2019, <https://www.babykingdom.com.au/the-first-years-cozy-baby-sleeper.html>

case, regulators could use the new protection power to address market-wide supply of the product.

This power would be instrumental in ensuring that dangerous products are not dumped on the Australian market.

Option 5: 'reasonable steps' general safety duty

We support pre-market controls that promote a proactive 'safety first' culture in the Australian product safety system. In the absence of the adoption of option 6, we support option 5. However, more guidance of what is expected under 'reasonable steps' is necessary. Equally, the definition of 'safe' suggested in option 6 should be adopted in option 5 to provide clarity for both traders and consumers.