National Retail Association

SUBMISSION FROM
THE NATIONAL RETAIL ASSOCIATION

In response to Consultation Regulation Impact Statement:

Improving the effectiveness of the Consumer Product Safety System

Submitted 6 December 2019 to:

Consumer Policy Unit, Treasury
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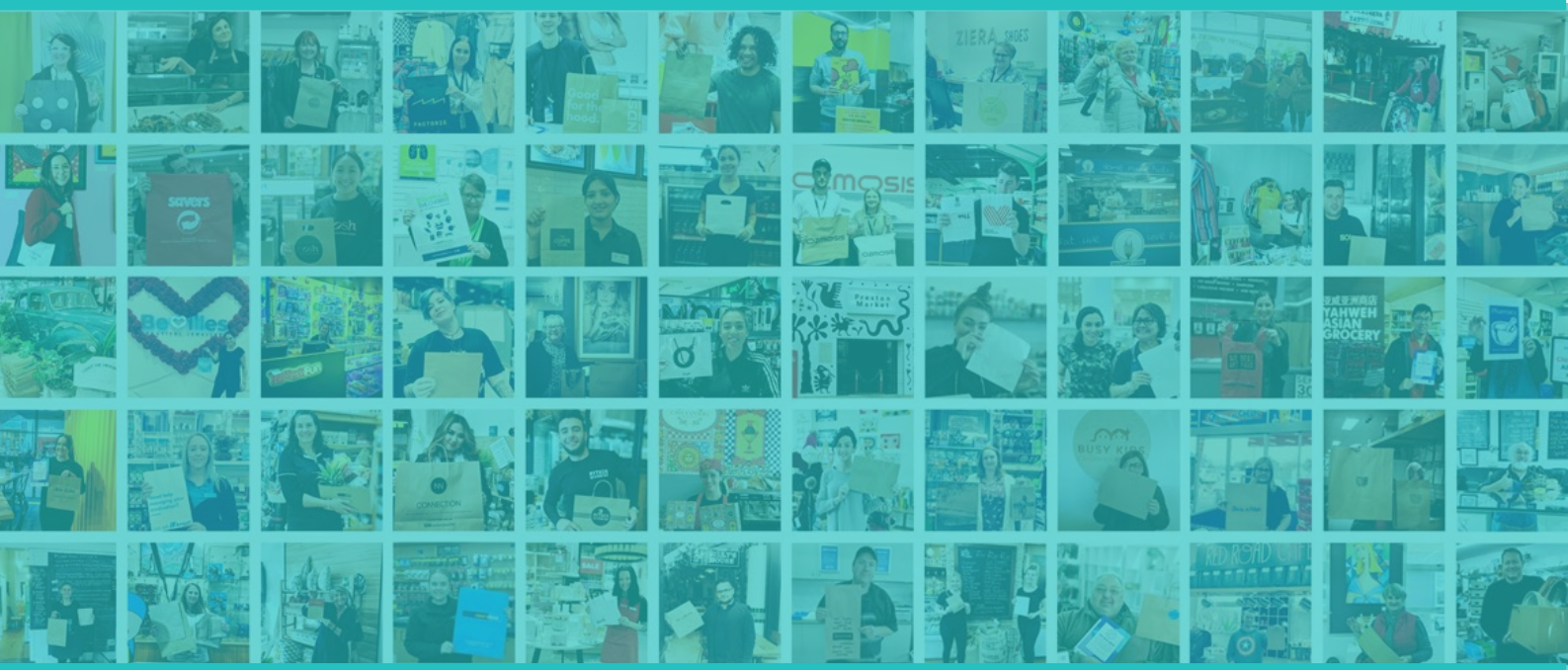

National Retail Association

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1. ABOUT THE NATIONAL RETAIL ASSOCIATION

Currently, the Australian retail sector accounts for 4.1 percent of GDP and 10.7 percent of employment, which makes retail the second largest employer in Australia and largest employer of young people.

The National Retail Association (NRA) is Australia's most representative retail industry organisation, servicing more than 28,000 retail and fast food outlets nationwide.

We know all types of retail.

Our members cover all types of retail including fashion, groceries, department stores, household goods, hardware, fast food, cafes and services. The NRA has represented the interests of retailers and the broader service sector for almost 100 years.

We represent all of retail.

The NRA not only leverages off the strength of its existing member network and existing communication channels, but is one of the few industry associations which engages with retailers *beyond* its membership base. Our inclusive approach allows us to engage across the entire industry, providing unparalleled access to our partners.

We offer an all-in-one solution for retail businesses.

At our core, we help retail and service sector businesses to navigate and comply with an ever-changing and growing regulatory environment. We provide professional services and critical information right across the retail industry, including national retail chains and thousands of small businesses, independent retailers, franchisees and other service sector employers.

We help retailers get on with business.

We understand that as a business operating in a competitive marketplace, it is vital that retailers receive accurate and timely information on issues that impact their business. But no business, whether large or small, can afford to employ in-house experts in every regulatory area in the industry. We provide retailers with easy and affordable access to industry-specific advice and solutions across all jurisdictions.

We know what we're doing.

NRA services are delivered by highly trained and qualified in-house staff with combined decades of experience and industry knowledge. Importantly, because the NRA is a not-for-profit industry association, we can deliver professional services at a much lower cost than other providers.

We work well with others.

The NRA are known and respected for our professional approach to collaboration, influence and negotiation. This mature approach enables us to gain greater access, build stronger relationships, and work collaboratively with a wide range of stakeholders, including all levels of government, law enforcement, regulatory bodies, shopping centres, community groups, supporting associations and many more.

National Retail Association Technical Standards Committee

Dedicated to promoting responsible retailing through a cohesive cooperation, the National Retail Association Technical Standards Committee (NRATSC) actively participates in regulatory, industry and standard reviews relating to the safety of retail merchandise.

The Committee consists of product safety and quality assurance specialists from most of the national retail organisations across Australia. The Committee meets twice annually, with meetings convened at different sites and states.

2. INTRODUCTION

The National Retail Association welcomes the opportunity to make submissions to Commonwealth Treasury on the consultation paper: *Improving the Effectiveness of the Consumer Product Safety System*.

The retail industry has changed significantly in the past decade through rapid rises in technology and internet platforms that have made it easier for customers and businesses to connect and transact in the global marketplace. Moreover, advances in product innovation, manufacturing systems and supply chain processes has forever changed the nature of retailing and presents many challenges. Customers now demand and have access to an endless supply of goods and services that can be purchased seamlessly from almost anywhere in the world.

We would like to emphasize that the NRA's membership always views product safety as critical to customer welfare. NRA members constantly embrace new and innovative ideas, monitor emerging challenges in product safety, and consider new ways of addressing emerging retail challenges in an agile manner, responsive, responsible and adaptable with a view to meeting evolving customer needs for product safety.

Our current product safety system has not kept pace with recent changes in our retail industry and requires reform to effectively manage product safety risks facing Australian consumers. While NRA's members remain dedicated to complying with product safety provisions in Australian Consumer Law, they continue to be challenged in the foreseeable future unless reform takes place.

Given the present and emerging challenges in our retail environment, it is our primary submission that change to our current product safety system is of paramount importance.

At this early stage of consultation, we provide *in principle* support for Option 2 and Option 5 of the Treasury Regulatory Impact Statement as avenues to build on in order to improve the current product safety system, without unnecessary regulatory burden on industry players. We submit that the exact solution is not presented in any of the Options provided and that a stakeholder taskforce is needed to find the best regulatory solution. We empasize that a new system will only be more effective if it allows that its requirements can be communicated more effectively.

We recommend:

1. That a stakeholder taskforce, combining industry, government and community specialists, be established to research, develop and test the best regulatory solution.
2. That option 2, more education and increased industry engagement, is essential to support businesses in their efforts to create safe products.
3. That option 5, a general safety duty requiring "reasonable steps", be considered for incorporation into the Australian Consumer Law if:
    - it focuses on improving pre-market tools and data needed to improve product safety rather than excessive paperwork at the risk of stretching resources away from real product safety efforts;
    - it applies and is enforced equally to all sizes and types of businesses to minimise loopholes;
    - it is interpreted and applied consistently across jurisdictions and levels of government;
    - "reasonable steps", "responsible party" and other terms are clearly defined and consistently applied; and
    - industry are engaged in the formation of the legislation to ensure it is practical and possible.

3. KEY EXISTING PROBLEMS

Q1. Do you agree with the key problems identified in the existing product safety system? Please provide any examples or evidence to explain your views.

We support the findings of CAANZ regarding the key problems with the existing product safety system and expand on these problems below.

Unsafe products enter the market and cause harm to consumers, businesses and the economy

The rise in direct to customer retail business models has seen a dramatic rise in unsafe products entering the Australian market. Global marketplaces such as Alibaba, E-bay and Amazon now offer platform sellers and factories from throughout the world the opportunity to set up an online store within hours and start selling directly to Australian customers. Advances in supply chain logistics will further enhance the flow of products into Australia from global marketplaces.

The level of non-compliant imports entering the Australian market through global online marketplaces is well known as exposed in the OECD analysis conducted by the ACCC in 2015[1]. During the OECD safety sweep, the majority of products sold online (54%) did not comply with safety standards. Furthermore, the OECD safety sweep identified that the level of noncompliance was twice as high at cross-border level (88% of inspected products) than at domestic level (44% of inspected products).

The detrimental impact this is having on law abiding Australian retailers striving to fairly compete with these marketplaces is significant.

We would submit that younger children are the most vulnerable to unsafe products sold online as they are particularly susceptible to online influence. Research has laid bare the staggering influence social media has on shoppers of the future, with 57 per cent of children under 16 years of age stating they want to buy products they have seen advertised on Instagram[2]. Online videos were found to be the most influential content (24 per cent) for shaping young shoppers' buying decisions, while social media posts (19 per cent) and TV adverts (19 per cent) followed closely behind. Therefore, we submit that our most vulnerable Australian consumers are increasingly buying online and the risk of unsafe products is high.

There is confusion and misunderstanding in the market

In our respectful submission the current system is not clear enough and too focused on compliance with mandatory standards. This has caused a level of confusion about whether to use voluntary standards (or specific clauses thereof) as a means for testing and determining whether a product is safe when there is no mandatory standard. There is a variety of products that potentially fall into the area, including, but not limited to:

Camping chairs	Engine cranes	Plastic stools	Gym benches
Loading ramps	Engine stands	Hand tools	Novelty Items
Air mattresses	Sporting goods	Tents and gazebos	Products powered by button batteries

[1] See National Retail Association Submission: Product Safety in Online Marketplaces (2019). https://www.nra.net.au/app/uploads/2019/12/190705-NRA-Submissions-Product-safety-in-online-retail-marketplace.pdf

[2] See further at: https://www.chargedretail.co.uk/2019/09/17/over-half-of-childrens-purchases-influences-by-youtube-and-instagram-influencers/

Feedback obtained from product safety professionals for the purposes of these submissions, highlight that the current product safety system has created a level of uncertainty and confusion around basic regulator enforcement outcomes. This is a particular issue for products that are not covered by mandatory standards but have a propensity to cause customer injury due to a range of factors.

The current system leads suppliers that manufacture products for retailers to believe that they only need to apply mandatory standards or follow bans. It does not clearly explain other means of establishing whether products are safe. It is difficult for product safety professionals within organisations to communicate effectively up the supply chain. Manufacturers have the greatest opportunity and responsibility to effect product safety. However, the diverse nature of the market, and supply chains, means that clear messages are needed to achieve the necessary reach.

In addition, some regulators have a practice of not engaging with key stakeholders which effectively can result in delays to action potential issues. Retailers also report that interpretations and applications of regulations can vary across jurisdictions or different regulators. This confusion creates doubt, duplicates efforts in national companies, and limits the ability to communicate clearly with supply chains. All regulators should operate using a more collaborative, nationally consistent approach.

The current system is slow to respond and relies on harm occurring

Members of the NRA TSC actively support data sharing and concepts on continuous product improvement, where meaningful available data suggest that as a preferable course of action.

However, an issue with the current product safety system is that some industry players (regulators, manufacturers and retailers/importers) are not taking decisive action in response to known customer complaints and injury data. There is a common misunderstanding that once a product passes testing to the relevant standard, then no immediate corrective or design improvement action is required in response to customer injury incidents, particularly in technical cases of customer (mis)use.

An example of this issue playing out, relates to portable butane stove cookers - often referred to as ‘lunch box cookers’ sold in the Australian market a few years ago. The lunch box cookers passed relevant mandatory gas standards, but also had known cases of customer near misses from butane explosions that were not quickly acted upon by all players in the industry.

Customer (mis)use of the lunch box cookers included misalignment of the butane cartridge into the cooker and failure to invert the single burner trivet (burner) from the packaging before use. Both scenarios caused a built up of butane gas and potential risk of fire explosion. Eventual recall of the double burner cooker took place, but arguably it took way too long to respond.

The lunch box cooker example again highlights a broader issue with the current process of mandatory reporting which should provide retail players with an early warning of potential emerging hazards. Unfortunately, the core weakness in the mandatory reporting system is that this data is not shared with key stakeholders such as suppliers and retailers. This could be a useful tool if certain non-identifying information could be extracted from the reports, trend analysis could be used to identify specific product categories of concern.

Clearly, product injury incidents do not always occur as a result of a faulty or dangerous product. The current system and its enforcement practices fail to recognise that customer behaviours are often a contributing factor to the injury or incident. Whilst every effort is made by reputable industry players during design, development, testing and approval procedures to ensure the product is fit for its intended purpose and for foreseeable conditions of (mis)use, not every possibility can be accounted for. Some uses or misuses are simply not foreseeable.

4. POLICY OBJECTIVES

Q2. Do you agree with the policy objectives outlined in this RIS? What are your reasons?

The NRA supports the policy objectives of CAANZ being:

- To promote consumer confidence in the market through eliminating risks that cannot be mitigated by market forces alone;
- Not hindering the efficient operation of consumer markets by imposing unnecessary costs on businesses; and
- Promoting consumers ability to purchase goods and services that meet their safety expectations.

Moreover, we support approaches that lead to a reduction in consumer injuries and encourage policy objectives that focus on the holistic approach and gaps that may be present both at industry and regulatory levels.

The current focus on enforcement agencies appears to be directed at the major Australian retailers where media reports highlighting failure gains a lot of attention. The same levels of focus appear to be absent from the smaller market participants who we believe represent 90% of the supply of unsafe goods.

Unfortunately, there is little recognition that major suppliers and retailers are putting effort and resources into achieving safe outcomes, the enforcement activities do not always reflect this position. Any future system needs to ensure an approach that levels the playing field.

5. SUPPORTED OPTIONS

It is our primary submission that change is required to the product safety system but that the ideal option is not presented in the RIS.

Therefore we strongly support formation of a **stakeholder taskforce** made up of industry, government and community specialists to research, develop and test the best solution.

A sensible starting point for the taskforce, in our opinion, is to focus on option 5, being a new safety duty aligned with our current Australian Consumer Law, supported by option 2, government education and collaborative industry programs, which is essential to any change.

We submit that a new system will only be more effective if it allows that its requirements can be communicated more effectively.

An important qualification in our support of option 5 would be a very clear definition of "reasonable steps" and "responsible party" to ensure that all players in the industry (small or large) understand their new obligations. It would be an undesired outcome of any proposed reform to implement new legislation that imposes further regulatory duties on larger retail players, without addressing smaller players who should be equally responsible for product safety.

OPTION 5 - A new safety duty aligned with the existing ACL

We give in principle support to elements proposed in option 5 and note that this option would:

> "Impose a new duty on traders to take 'reasonable steps' to ensure products placed on the market are not 'unsafe', consistent with existing ACL principles. It would operate in a similar way to existing work health and safety laws that require businesses to do what is reasonably practical. Under this option, traders conducting business in Australia, whether they are based domestically or overseas (online or physical stores) would be required to comply with this new duty."

It is recognised that under option 5 proposed by CAANZ:

> "A product would be considered 'unsafe' if it contains a 'safety defect', which is already defined in the defective goods regime under section 9 of the ACL. By aligning the definition of 'unsafe' with this existing standard for safety (i.e. the current definition), traders would not be required to comply with a new benchmark standard of safety, but would be obligated to consider upfront whether or not their products contain a 'safety defect'."

The key advantages of adopting elements of Option 5 are:

- an increased ability for product safety professionals within organisations to clearly communicate with the supply chain, product designers and senior management on the importance of product safety;
- a mechanism to close gaps created by products without standards, creating a baseline requirement; and
- a pre-market mechanism rather than the current post-injury system could enable businesses to take action earlier and more decisively.

We emphasize key stipulations below that form the basis of our support of Option 5, without which we would not support it.

Existing definition of "safety defect" is appropriate

In our submission, adopting the existing definition of "safety defect" under the ACL sets an appropriate level of safety for a new safety duty.

Adopting the current definition of "safety defect" in section 9 of the ACL for any safety duty introduced into the ACL as:

- the concept of "safety defect" is a term for which there exists current judicial guidance – this will provide benefits for traders, consumers and regulators in adopting and applying any new safety duty;
- the meaning attributed to "safety defect" acknowledges that the ACL does not require goods to be absolutely free from risk; and
- the definition has regard to the particular circumstances of the product under consideration – which is useful given the breadth of application of any new safety duty (i.e. across all consumer goods available in Australia).

Adopting the existing definition of "safety defect" in the ACL also has the benefit of avoiding regulatory misalignment between any new safety duty and the existing remedies available under the ACL in relation to manufacturers who supply goods that have a 'safety defect' (see Division 1 of Part 3-5 of the ACL).

Under the Australian Consumer Law (ACL), consumers can pursue an action against a manufacturer for product "safety defects" where they suffered an injury, loss and/or damage. For example, under sections 138 to 142 of the ACL, a consumer can bring the following actions against a manufacturer:

- Liability for defective goods causing loss to the injured individual (s 138);
- Liability for defective goods causing injury to a person other than the injured individual (s 139);
- Liability for the defective goods causing loss to other goods (s 140); and
- Liability for defective goods causing damage to land, buildings or fixtures (s 141).

If the existing definition of "safety defect" is applied for any new duty, we submit that the new duty also have regard to the defenses that apply in respect of actions under Division 1 of Part 3-5 of the ACL. That is, a manufacturer of a good that has a "safety defect" has a defense if, in summary:

- the "safety defect" did not exist when the goods were supplied;
- the goods only had the defect because they were complying with a mandatory standard;
- the state of scientific knowledge when the goods were supplied by the actual manufacturer was not such that the defect could be discovered;
- The defect is in a component to the defective goods and the defect is only attributable to the design of the component, the label on the component or the instructions or warnings given with the component.

"Reasonable steps" must be clearly defined

If a new safety duty is introduced, "reasonable steps" is an appropriate standard. Having said that, the concept of 'reasonable steps' need to be defined clearly without any ambiguity with particular reference to traders, retailers, industry and the type of consumer goods involved. The new system can only be more effective in protecting end consumers if the definition of "reasonable steps" is based on product risk (risk of an injury, and its consequence).

To deliver safe consumer goods in the marketplace, the majority of our members have already implemented many well-defined product development and approval processes that are guided via business policies and procedures and complemented by product risk assessment protocols and pre-shipment inspection, and suppliers audit programs.

On page 54 of the Consultation Regulatory Impact Statement, "reasonable steps" is described as a concept that should have regard to the circumstances of a particular industry and an entity's role within that industry. We strongly oppose "reasonable steps" being inconsistently applied based on the size or revenue of a business as this could lead to:

- increased burden on larger players that are already taking product safety seriously;

- reduced ability to enforce actions on smaller businesses, online outlets and importers which represent 90 per cent of unsafe products being purchased by Australian consumers; and
- confusion in industry being able to define what "reasonable steps" apply to them.

One of the major difficulties defining the "reasonable steps" in product safety is the consideration of foreseeable misuse or abuse scenarios.

We support option 5 only on the basis that "reasonable steps" are clearly defined and consistently applied. The current system already has inconsistencies and, unless these are addressed through clear definitions, these inconsistencies and confusion will continue.

Other definitions will also need to be well deliberated and clear to ensure consumer expectations, supplier efforts and regulator enforcement are aligned in their view, such as: "safe", "unsafe", and "significant consumer detriment".

We do not underestimate the challenges of ensuring clear and workable definitions. Our members have extensive experience and expertise in product safety processes, applications and potential models that could form the basis of the ACL amendments. We reiterate the need for a stakeholder taskforce to research, develop and test workable definitions.

Fair and consistent application

If the core objective of changing the system is to reduce the number of unsafe products being sold to Australian consumers, then careful consideration must be given to fair and consistent application across business types, sizes and sectors. Ultimately every business that sells goods should be responsible for ensuring those products are not unsafe.

As raised previously, the current focus on enforcement agencies appears to be directed at major Australian retailers where media reports highlighting failure gain a lot of attention. The same level of focus appears to be absent from the smaller market participants who we believe represent 90% of the supply of unsafe goods. This may be due to under-resourcing of the regulator and thus we support increased surveillance that goes beyond large players.

Unfortunately, there is little recognition that major suppliers and retailers are putting effort and resources into achieving safe outcomes, the enforcement activities do not always reflect this position. While we understand that smaller players cannot afford extensive in-house resources, there are many external operators that can assist. If education and engagement resources were increased (as per Option 2) it would be fair to propose that the duty could be applied consistently regardless of business size.

A new system must also improve a national approach to product safety across product types and sectors. A national, clear approach will ensure that product safety is at the centre of considerations, and not trying to 'tick boxes' of multiple regulators in an effort to be compliant on paper. For example, the Electrical Equipment Safety System (EESS) is not a fully national scheme which adds confusion and red tape, which distracts from safety.

One "responsible party"

Support for Option 5 is strictly conditional on the responsibility for product safety being applied to only one "responsible party" (i.e., the entity with direct ability and influence for the manufacture, packaging or import of the product), rather than multiple entities in the supply chain who in most instances could not reasonably or operationally be in a position to assess product lines offered for sale, nor have expertise across diverse product lines.

Having the onus placed on multiple businesses for the same product would result in unnecessary regulatory duplication, significantly increased costs and may lead to higher prices. Rather, the obligation for product safety should rest with the party with the necessary product expertise.

Under the Electrical Equipment Safety System (EESS), a "responsible supplier" is a person/company who manufactures in-scope electrical equipment in, or imports in-scope electrical equipment into, Australia (i.e. the entity that *first brings* the electrical equipment *onto the Australian marketplace*).[3]

> *EXAMPLE: Testing crayons for the absence of asbestos*
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> In July 2015 concerns about the presence of asbestos in crayon were raised.[4] The Department of Immigration and Border Protection (DIBP) manages the importation of crayons at the border and many retailers were asked to test crayons they sold after being contacted by DIBP.
>
> These crayons were produced by a handful of manufacturers who then supplied these to numerous intermediaries and retailers. However multiple retailers and intermediaries were asked to test the same products from the same suppliers, increasing cost and confusion. With few laboratories available in Australia equipped to test the absence of asbestos in crayons, a bottle neck was caused, with the laboratories testing the same products multiple times, resulting in long delays for businesses to receive test results.
>
> Had the "responsible party" been identified early and adequately, the process could have been simpler, less costly and completed in a much shorter timeframe.

Alignment with mandatory standards

The new system should adopt a better approach to mandatory standards, allowing product that has been tested to the latest version of a standard (that may not be the referenced version) to be considered compliant.

If the concept of mandatory standards is maintained, the review process needs to be transparent, regular and immediate. Revisions to bring regulations into line with contemporary practice (including the latest voluntary standards) suffer very long delays. This is despite revisions being able to provide better protection for consumers' safety, eliminate supplier confusion and inefficiencies, and avoid negative economic impacts.

> *EXAMPLE: Toys for children up to and including 36 months of age*
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> The mandatory standard is based on certain sections of the voluntary Australian/New Zealand Standard *AS/NZS ISO 8124.1:**2002** Safety of toys Part 1: Safety aspects related to mechanical and physical properties*. However, the most current edition of this standard is *AS/NZS ISO 8124.1:**2019** Safety of toys Safety aspects related to mechanical and physical properties.* See footnote for more information.[5]

Alignment with international standards

As the majority of goods sold in Australia are made overseas, many will have been tested to standards other than our domestic ones. The ACCC published criteria for accepting international standards[6]. The acceptance of this approach should ideally find mention and be embedded in the new product safety system.

Education and policy will need to be clear on recognition of overseas testing and international standards to demonstrate safety. Existing ACCC policy outlines acceptance criteria for use of international standards in ACL regulatory policy. Such criteria would likely be relevant to demonstrating the safety of goods under an improved product safety system.

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[3] See: https://www.erac.gov.au/wp-content/uploads/2019/04/Information-Notice-EESS-Commencement-Responsible-Supplier.pdf

[4] See: https://www.productsafety.gov.au/news/accc-statement-on-asbestos-in-crayons

[5] See: https://www.productsafety.gov.au/standards/toys-for-children-up-to-and-including-36-months-of-age

[6] See: https://www.productsafety.gov.au/publication/international-standards-for-the-safety-of-consumer-products-criteria-for-acceptance

Adequate and consistent enforcement

The system needs to be underpinned by adequate surveillance and enforcement, so the law becomes a living system, and does not get ignored over time for lack of 'teeth'.

We suggest that engagement with suppliers suspected of supplying unsafe goods should be the first step so that suppliers have the opportunity to demonstrate 'reasonable steps' or even voluntarily recall the product before penalties are imposed. Those that fail to comply and do make unsafe products available to consumers knowingly or by lack of adequate efforts, should be penalised. Different approaches may be needed for those identified as repeated 'offenders' compared to those taking conscientious, proactive actions.

Such enforcement would need to be administered consistently and fairly across agencies and types of suppliers. Such powers may not need to be used frequently but could serve as a useful aid to negotiations with non-compliant suppliers, and to take punitive action only where necessary. Greater accessibility to regulator engagement could be awarded to businesses, that have proven to be willing, pro-active and resourced to adequately support pre-market product safety efforts.

There needs to be checks and balances in place to ensure regulatory activities are carefully considered. It is proposed that there needs to be panel or similar independent body to ensure a consistent and fair application to ensure powers are not misused.

In addition, enforcement agents should consider the status of an alleged product safety fault: Is the fault 1) proven 2) presumed 3) perceived or 4) potential? A single incident or close-miss does not by definition mean there is a proven product safety fault. Though it would seem there is a presumption of fault threaded through the RIS.

Models or guidance should be provided on how businesses conduct "comprehensive product safety risk assessments" that align with the expectations of regulators, and allow companies to differentiate between isolated product failures (that pose no general safety risk for consumers generally) and those that have an increased frequency and/or consequences that do create a safety risk for customers. This highlights the clear need for education and engagement as outlined under Option 2.

Recalls

More clarity should be given around recalls, making sure there is clear consumer understanding when a recall is due to a product failure that has the potential of causing harm/death, or if it is due to missing labelling or similar - meaning that once the consumer is made aware of the safe use of the product, the product itself is safe for its intended use. Maybe a traffic light system, or akin to the fire danger warning scale?

Recalls could be improved by requiring information on the number of products being recalled. By that the extent of public exposure to hazard would be more effectively communicated.

National regulator to be adequately resourced

A national approach should eliminate duplication of activities between regulatory bodies.

The current system is hampered by resource constraints to the national regulator (ACCC) which can slow intervention, limit data and resources shared with industry and limit surveillance to 'easy' targets such as large players. A new system must be supported by adequate and sufficient resourcing in support of its roll-out and ongoing support of stakeholders. Arguably, investing greater resources in the national regulator may bring about better outcomes than additional laws.

We also submit that suppliers need more open channels to approach the regulator proactively and be given support and responses within a reasonable amount of time. The regulator needs to be equipped to swift respond to any emerging crisis. Whilst the new product safety system will ensure, that less risky products enter the Australian market, a crisis response mechanism needs to be in place (i.e. swiftly establish a taskforce).

Guidance will be required

Option 5 is a 'new', untested Australian model, and currently lacks coherence and clarity. Guidance will be required for traders as to what are 'reasonable steps', including guidance as to what steps particular traders will be expected to take having regard to the nature of their operations. Further work needs to be done to clearly define a new safety duty, for example, what about retailers which sell secondhand or refurbished goods?

Awareness of impacts

New laws always have the potential to increase costs for traders but we believe Option 5 – if carefully implemented - provides a strengthened system but will not unduly increase burdens on businesses.

Reputable traders will invest in addressing these changes and seek to manage regulatory changes. However, as the Consultation Regulatory Impact Statement notes, there will always be traders who choose not to have regard to any obligations in relation to safety of products or consumer guarantees. As has been submitted elsewhere, this issue is exacerbated by third party e-commerce platforms that facilitate the sale into Australia of products that do not meet Australian mandatory standards.

It is important that right balance is being found between proactive, risk-based measures that truly focus on product safety, and sufficient documentary evidence, without becoming an exercise in increased paperwork for little improvement in safety.

We recommend a minimum 2-year transition period from publication of the new system. Suppliers will need to communicate with the entire supply chain and potentially renegotiate contracts and redesign products.

Flexibility needed

As new and evolving products are constantly entering the marketplace, any safety duty must be flexible enough to be consistently applied into the future while supporting innovation. We are concerned that blunt regulatory instruments may stifle product development while allowing new, and potentially unsafe, products into the market if they are not captured in prescriptive legislation. This is a key reason for our concern regarding Option 6 which may result in a more inflexible regulatory instrument.

OPTION 2 - MORE EDUCATION AND INCREASED INDUSTRY ENGAGEMENT

We submit that a new system will only be more effective if it allows that its requirements can be communicated more effectively.

We submit that increased education and engagement of industry is a critical requirement of any change to the ACL and essential to improving product safety in Australia. We submit that this education and engagement should not be a one-off campaign but ongoing. A collaborative approach will best support positive outcomes for consumers and businesses.

We submit that, currently, the guidance and resources provided to suppliers to understand product safety are not enough. Better industry education is warranted to enable improvements if the law remains unchanged but will be critical if a broader duty, as in Options 5, is enacted.

Product safety resources available have substantially improved over recent years. For example, the ACCC's Product Safety Australia website, Australian and international standards on supplying safe products and product recalls, and ISO Guides provide guidance to suppliers, facilitating safety in all consumer goods.

However, these resources are often complex and micro, small and medium sized businesses may have difficulty understanding and implementing proactive product safety strategies. Given up to 90 per cent of the supply of unsafe goods are from smaller businesses, as we believe, then more practical assistance is needed.

While there are many useful published standards, there are many products for which no standard exists. Suppliers will need education on how to achieve safety where no benchmark is available. Without meaningful and practical guidance to accompany a new product safety system, many businesses will be put at a competitive disadvantage.

Providing clarification to businesses of their product safety obligations is expected to improve compliance with the current product safety framework and may lead to more voluntary action (such as voluntary recalls) from traders in instances where products are, or are at risk of, causing harm. It could also help to facilitate industry engagement on best practices approaches to product safety to lift overall standards across key areas of the market.

Proposed methods

- **Advisory panel**
  We submit that a stakeholder taskforce is required to develop and test the proposed changes to the ACL to find the best solution. In addition we propose that an ongoing advisory panel should be in place to support the regulatory bodies to develop meaningful programs to educate, support and engage businesses. Such a group could be comprised of experienced product safety practitioners from large retailers, business and industry associations, online retail platforms, online traders, test companies and less experienced industry representatives from small business.

- **Variety of resources**
  In terms of materials and resources, product safety practitioners need more than datasheets, FAQs or factsheets, and require them in a variety of formats or media. Education resources need to be ongoing programs, not one-off exercises. Members of a supply chain, and trade associations, could create guidance material for their sector. Perhaps a government sponsored program could encourage this type of initiative.

- **Recognised training**
  A key element lacking from the product safety system is the lack of comprehensive, recognised training. At present, no Vocational Education and Training units of competency exist to teach practical product safety.

  While a new product safety system may be intended as a means to drive better safety, the small businesses that are not currently product safety savvy will be alarmed and fearful, at least in its early days. This will be important to bear in mind when designing implementation.

- **Clear guidance on standards and testing**
  Levels of competence and accreditation vary amongst commercial test companies, and suppliers will need to understand what is reliable. As the majority of goods sold in Australia are made overseas, many will have been tested to standards other than our domestic ones. Businesses will need clear guidance on what is acceptable, in terms of both standards, and the testing that is done against them.

  We recommend that the ACCC document '*A guide to testing product safety*' be reviewed in time with the roll-out of any new system, to align with the proposed requirements[7].

- **Small business**
  One of the most challenging sectors to reach is small business as they lack time to attend workshops, lack resources to research product safety, lack money to buy standards and invest in different technologies, lack knowledge of product safety best practice, and ultimately lack control over their supply chain compared to larger businesses. This sector also relies on mainstream media less, represent a high proportion of regional and remote businesses, and many do not even have websites or emails for database communications. We recommend that the Treasury considers a large-scale, on-the-ground engagement program, like those deployed by the NRA in other policy areas, should changes to the ACL be enacted.

- **Consumer education**
  Changing consumer behaviour ranks lowest in terms of potential to improve overall safety. Better value can be gained by focusing on helping business to factor safety into their product design and management, than on consumer education. Nevertheless, strategic consumer education is an important component in the overall system, especially in terms of misuse of products.

[7] See: https://www.accc.gov.au/publications/a-guide-to-testing-product-safety

OPTIONS NOT SUPPORTED

Non-supported options	Disadvantages of these options
OPTION 1: No change to the system – maintains the status quo and provides a benchmark to compare the costs and benefits of other options	• It is post-market, limiting action till after a serious incident occurs. • Lacks clarity and flexibility
OPTION 3: New enforcement instrument – would provide an additional post-market tool to allow regulators to take action in response to product safety incidents by introducing a prohibition on continuing to supply unsafe products accompanied with the power to issue a 'Notice of Risk'	• Still post-market as per above.
OPTION 4: A new protection power – would give regulators the power to make direct orders to address conduct that has caused, or is likely to cause significant detriment (similar to ASIC's product intervention powers).	• Still post-market as per above. • Elements of Option 4 are better than Option 3.
OPTION 6: A new safety duty with a higher safety threshold – would require traders to ensure products placed on the market are safe by adhering to prescriptive requirements (modelled on the UK GSP)	• The way that this is described suggests increased burden on businesses with little net benefit. • A new prescriptive safety duty would be less flexible and may cause issues into the future as products evolve. • Would require extensive guidance on how to comply. • The burden on business would be complicated by modern supply chain networks which are no longer linear. • If administration becomes the greater focus, we are concerned that product safety resources and personnel within businesses would be spread too thin, and not be focused on actual improvements to safety. • One of the most effective aspects of current ACL mandatory standards is that the law applies equally to all levels of the supply chain. This provides strong incentive for retailers to hold their suppliers to account. This would not be achieved with Option 6.

6. CONCLUSION

We believe change to the Australian Consumer Law is warranted as we share and support Treasury's objective of ultimately ensuring that products sold to Australian consumers are safe.

We submit that a new system will only be more effective if it allows that its requirements can be communicated more effectively.

We submit that one ideal option is not presented in the RIS and therefore we strongly support formation of a **stakeholder taskforce** made up of industry, government and community specialists to research, develop and test the best solution.

In terms of the options presented in the RIS, we support Option 2 strongly, and elements of Option 5 in principle, but believe the best solution will require more research, collaboration and development over coming months.

To assist in starting this process, we submit the **essential** (or "non-negotiable") elements of a new system are:

- A focus on product-risk based approach, with enforcement targeting businesses that do not currently take any "reasonable steps" to ensure their products are safe;
- A federal approach to implementation which is not fragmented or uniquely interpreted by local or state regulators;
- A consistent approach in application to businesses of all sizes and sectors to avoid loopholes and tokenistic targeting;
- Clear definitions of essential terms and expectations, and use of known concepts in the existing ACL, to avoid confusion;
- Comprehensive education and engagement programs to assist industry in developing safer products;
- A clear understanding of the relationship between a new system and specific product regulatory schemes such as the EESS and TGA;
- Clear and articulated responsibility for product safety being applied to only one "responsible party";
- An ongoing advisory panel to increase collaboration, information-sharing and communication between industry and regulators.

Thank you for this opportunity to provide our submissions on behalf of the retail industry and our members.

The National Retail Association and member retailers of the National Retail Association Technical Standards Committee would welcome the opportunity to work with Treasury and other stakeholders to contribute our insight, practical experience and technical product safety expertise into further discussions and potential solutions.

Should you have any queries, I can be contacted on 0409 926 066 or d.stout@nra.net.au.

Yours faithfully,

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Association