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SUBMISSION BY THE AUSTRALIAN TOY ASSOCIATION LTD

The ATA welcomes the opportunity to make this submission in relation to the Government's information and consultation paper, "An Australian Consumer Law, Fair markets - Confident consumers" released on 17 February 2009.

The Australian Toy Association supports consumer protection and harmonisation of laws across the states. We share the goals inherent in the information and consultation paper. It is, however, concerned about some aspects of the proposed laws, whether the proposals represent the best solution and the regulatory burden which may be imposed.

Further, the information and consultation paper released by the Government is lengthy and contains far-reaching proposals. It seems that the time period allowed for comment is quite short and a draft bill has not been released for review. In these circumstances, the detail of what is proposed is not always transparent.

The ATA considers that in all of the circumstances, it would be appropriate if draft legislation could be released and the timetable amended to allow for an additional round of consultation with all stakeholders. Further, the inevitable outcome of this round of submissions is that changes will be made to the proposals. Stakeholders will need to see these subsequent changes.

Australian Toy Association (ATA)

The ATA is an independent, not-for-profit industry body representing and servicing Australian industries specialising in products for children and family leisure as well as learning and entertainment to enhance their future health and prosperity. Members include manufacturers, distributors, importers, retailers, agents and licensors. The ATA's membership consisting of more than 260 companies represents the vast majority of total industry sales in Australia, amounting to about \$1.5 billion annually.

The Australian Toy Association Limited was incorporated in 1983, having previously been the Toy and Games Manufacturers of Australia. Currently the ATA's members are involved in a wide variety of children's products, ranging across toys, hobbies, nursery products, clothing, confectionary, games (board, electronic and video), CDs, books, collectibles, car safety products, furniture, sports, life style and licensed products. This diversity of ATA membership reflects the changing needs of a quickly evolving society.

The ATA's major goal is delivering information and services which extend the performance of its industry sectors as they service the changing needs of consumers at an individual level, a national level and as a global industry.

Achieving a uniform national system for consumer protection and product safety has been a major goal for the ATA over a number of years. The ATA has participated actively in the various Productivity Commission inquiries which have preceded this consultation. The ATA is represented on the Toy Safety Committee of Standards Australia as well as on global ISO committees.

Timetable

The ATA strongly believes that the reform process would benefit if a new step could be introduced in the timetable, that is, the review of draft legislation with a period of eight weeks for comment.

We think that introducing this step would allow proper consultation with and between all stakeholders to allow the best outcome for Australian consumers. Without the benefit of scrutiny from all stakeholders, any reforms may contain unintended consequences and loopholes which could be the subject of protracted litigation with associated transaction costs.

The Hon Chris Bowen in his Keynote Address to the national Consumer Congress (12 March 2009) stated "The core of these reforms is the introduction of an Australian Consumer Law: a nationally consistent law based on the existing provisions of the *Trade Practices Act*. This consistency will of course, provide very substantial compliance cost savings to business". It is therefore important for this "core" to be properly examined and to ensure that the "substantial compliance cost savings to business" do indeed eventuate.

The information and consultation paper by its nature is an overview document. Some of the language used in it is imprecise. For example, Table 8.1: Details of the product safety reforms says: "The Minister can also order the compulsory recall of a product if the goods will or may cause injury and where it **appears** the supplier has not taken satisfactory action to prevent the goods causing injury to any person." Similar wording currently exists in section 65F of the Trade Practices Act. The word "appears" is uncertain. ATA would suggest that a better wording would be "is demonstrated".

Also unspecified is what standard of proof must be met - eg on the balance of probabilities or beyond reasonable doubt. Further, no detail is given as to the composition or membership of the *independent review body which will be conducting conferences in respect of bans and recalls*. Will it be a quasi-judicial body or a committee including representative from industry?

The last major reform to Australian consumer protection legislation was the introduction of Part VA of the Trade Practices Act. Detailed consideration was given to those proposals in a process which lasted from 1988 to 1992. In the result, provisions were enacted which have not required extensive consideration by the Courts.

One of the problems to which ATA has consistently drawn attention is unincorporated traders not covered by the Trade Practices Act for constitutional reasons. Hence, ATA was pleased to see the attention given to "individuals and non-incorporated entities" on pages 9 and 10 of the information and consultation paper.

Unless unincorporated traders are covered by the Australian Consumer Law, the new system will not be complete. Under the current timetable, the State and Territory governments must implement their part of the Application Law Model before 31 December 2010. Previous experience suggests that the State and Territory governments will have to accord appropriate priority to implementing the Australian Consumer Law if the current time line is to be achieved.

ATA submits that this is a necessary reason why an additional step in the timetable should be introduced in order to avoid any unintended consequences.

Name change

The ATA does not support this proposal. This is because many companies have agreements which require contractual parties to comply with provisions in the Trade Practices Act. If the name is changed, the benefit of these wordings will be lost.

It will also impose a significant burden upon companies if they have to review all of their current

agreements. This would not meet the Government's stated aim of reducing the regulatory burden on business. Any law reform should not be retrospective but only apply to agreements entered into in the future.

The need for product safety reform

The ATA is pleased that it is proposed that all Australian consumer regulators – the ACCC, ASIC and each of the state and territory bodies – will have common enforcement powers. It is to be hoped that they will indeed take “effective, consistent action at the local, state or national levels”¹, as the ATA supports one uniform national regulatory approach.

The ATA agrees that there is a need for a streamlined system relating to product safety in Australia. ATA supports and applauds the move towards national harmonisation for the following two reasons:

1. Consumers: The products manufactured, distributed, and sold by ATA members are done so almost universally on a national basis. For product safety regulation to lag so far behind industry practice is clearly not in the interest of consumers. Further, consumers should be entitled to uniform protection regardless of what state they live in.
2. Business: The costs to business should be reduced by the need to comply with separate legislation in nine jurisdictions, being replaced by the need to comply with one, ie. the Australian Consumer Law.

Chapter Eight of the information and consultation paper is devoted to “a National Regulatory Regime for Product Safety”. This chapter is indicative of the need for further consultation with affected industries that has been the feature of this process. In particular:

- Chapter Eight includes no Questions section unlike the other Chapters in which reforms are proposed or suggested. This suggests that the reforms have already been decided. If this is the case, this outcome would be of grave concern to the ATA. Introduction of an additional step allowing industry to comment on draft legislation would ensure the transparency of the process;
- Figure 8.2 details the proposed consumer product safety enforcement framework. This does not include any provision for ongoing consultation or industry input; and
- The failure to address this vital aspect is conceded on page 55, “Unlike some jurisdictions, the Commonwealth has no product safety advisory committees”.

To address these inadequacies, ATA recommends the following:

Consultation: The ATA recommends the immediate establishment of a temporary Reference Group to assist SCOCA during the implementation process up to the end of 2010. This should then be replaced by a permanent Product Safety Consultative Committee including a transparent process to ensure that consultation is properly undertaken. The composition of such a Committee should include fair and balanced industry representation—including industry representatives with applicable technical, commercial and legal expertise.

Plain English Documentation: Consumer product safety legislation is virtually incomprehensible to consumers and many businesses. The regulation consists of adoption of technical standards which are impossible for lay people to comprehend. To ensure that the Australian Consumer Law is accessible, the regulations should be drafted in plain English. This will considerably facilitate ATA's role in educating its members as well as benefiting consumers.

¹ Keynote Address to the National Consumer Congress - Chris Bowen “Fair markets for confident consumers: Delivering an Australian Consumer Law”

Proper Disclosure of proposed reforms: The PC's Final Report proposed that 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.

As details of this proposal are not contained in the information and consultation paper, the ATA assumes that these proposals have been abandoned. However if this were not the case, clearly industry needs to be given a proper opportunity to comment upon such a proposal given the significant administrative compliance burden which would result.

The ATA is concerned that there should not be a process of "creeping reform" and that a process will be established to afford all stakeholders proper meaningful and timely consultation on this broad-sweeping reform.

Substantiation Notices

The ATA has noted with concern that it is proposed that the regulators are to be given the power to issue substantiation notices.

Implementation of this proposal may mean that regulators will encourage companies to hold substantiation for claims on file so that companies can comply in a timely manner, advocating that this is best practice. Implementation of such a proposal would result in significantly increased compliance costs for companies.

The regulators already have extensive powers to obtain documents and information. There has been no evidence that additional, duplicative powers are necessary, or that they would be used effectively. Indeed, in those States which already have the power to issue substantiation notices, the evidence is that this power is not being used in practice by the relevant fair trading departments.

Infringement Notices

The ATA is also concerned that the power to issue infringement notices (akin to "on the spot" fines) may be used as a revenue-raising provision. Furthermore, at this stage, no restrictions have been introduced to indicate how these notices might be limited.

For example, in the case of a game alleged to contain small parts, would an infringement notice be issued in relation to each game on shelf and in relation to each breach alleged, would the manufacturer or also retailers be targeted, and could infringement notices be issued on successive days?

Requirements and restrictions must be set forth in the legislation describing how infringement notices are to be issued and limiting the number of infringement notices which can be issued for a single breach.

Proposed extension to false and misleading representation provisions

There is also a proposal to standardise consumer law nationally by making any offences which exists in one state (but not others) a national provision. However, there must be a process for ensuring that state offences are reviewed to ensure there is a legitimate need (and there is no duplication of pre-existing national standards) for making them "national".

For example, section 12 of the Victorian FTA currently prohibits the making of a false or misleading representation:

- about the production, manufacture, preparation or supply of any goods;
- which is unnecessary for the reasonable care and maintenance of any goods; or
- that is false, misleading or deceptive in any material particular.

Section 12 of the Victorian FTA also covers false or misleading representations made in a broader range of situations by applying to representations in connection with advertisements about the supply or

possible supply of goods and services.

The ATA welcomes harmonisation. However, it is not clear to us why harmonisation should be on the basis that the "exceptional" provisions in the law of some states should be made national. The need for such changes has not been demonstrated. For example, it is not apparent to us why the provisions referred to above do not fall under the umbrella provisions prohibiting misleading and deceptive conduct already in section 52 of the Trade Practices Act and state law.

In the absence of a clear need for additional provisions, the ATA proposes, in the alternate, that harmonisation should proceed on the basis that the law of a majority of Australian states should become national.

Further, in circumstances where the supply of goods is international, the ATA hopes that product safety legislation impacting upon toys such as a mandatory product safety standards should have the effect of international harmonisation. Further, it is not yet apparent that as part of the reforms a mechanism will be put in place to ensure that when international standards change, the corresponding Australian standards will be updated.

Consumer Protection

The ATA supports consumer protection. However, we are concerned that a significant opportunity to streamline provisions for consumers has been lost.

Currently, consumers have multiple over-lapping rights. They are entitled to compensation in contract, tort, and under Part V 1A, Part V Division 2 and 2A and Part VA of the Trade Practices Act. Further, consumers are entitled to different levels of compensation for breach of the Trade Practices Act (two times average weekly wage) and rights under state law (three times average weekly wage). Part VA in the Trade Practices Act is not replicated in state law (so unincorporated businesses are not caught by the provisions).

The current review process represents an important opportunity for the Government to simplify the law in this area. It is disappointing to see, therefore, that it is not proposed to simplify and clarify the law in this area. Indeed, in the entire information and consultation paper, Part VA is mentioned only once.

This example demonstrates the need for a further round of consultation and consideration of draft legislation by stakeholders.

False Billing

The issue of "asserting a right to payment for unsolicited goods or services or for making an entry in directory" is included on page 76. ATA members are subject to attempts by overseas companies to solicit illegal payments for non-existent directory listings as a result of participation in the Annual Toy Fair. The ATA tries to combat this practice by drawing members' attention to the scams.

The following item was included in the ATA Member Bulletin for 4 December 2008:

THEY'RE BACK!!

BEWARE!BEWARE!BEWARE! EXHIBITORS FAIR GUIDE SCAM.

Austrian company Construct Data Verlag AG are at it again! The Fair Guide deceives exhibitors around the world to believing that they have booked a free service into the Fair Guide without charge. In actual fact, companies who sign and return the form are then contracted into a three year non-retractable agreement which could cost the exhibitor a significant amount of money with no foreseeable benefits. Construct Data Verlag has been condemned with fraud throughout Europe.

Be aware that Construct Data Verlag has used our name and information without our knowledge and approval. Please let us know if you receive an offer from an unknown company in connections with planned participation at our Fair which in some way implies directly or indirectly any form of relationship with the Australian Toy, Hobby and Nursery Fair, so that we may provide confirmation of the collaboration or otherwise.

While ATA appreciates the efforts of the Consultation Paper to provide improved protection against false billing, the problem ATA members face comes from overseas scammers beyond the reach of the Australian law. ATA stands ready to co-operate with Australian authorities in approaches to international enforcement agencies.

Further, the ATA is concerned that if its members are exposed to overseas scams, consumers must be more vulnerable. The ATA would welcome proposals from the Government as to how all Australians may be better protected in relation to international fraud.

Next steps

The ATA agrees that there is indeed an opportunity for reform of Australia's consumer law to ensure one uniform national approach across Australia. We endorse the aims of consumer protection and harmonisation. Nothing in the submission above should be seen to detract from that sentiment.

ATA members already subscribe to a code of practice of which adherence to safety standards and practices are central:

We agree to adhere strictly to national and international safety standards and to take prompt, effective and appropriate action should a safety problem arise. (ATA Code of Practice)

The ATA is however concerned that not all of the current proposals represent the best solution. We consider that the proposals would benefit if our submissions above could be given serious consideration. The best result will not be achieved if reforms are implemented in haste.

We ask that an additional round of consultation be included in the timetable prior to draft legislation being released.

There is no doubt that the proposals outlined in the consultation paper represent major reform of Australian consumer laws, with significant and wide-reaching consequences if they are passed into law. Any one of the areas covered by the proposals would in itself represent substantive reform.

This review process encompasses not one but many substantive areas of the current regime. It is critical, in these circumstances, that the reform process provides sufficient time and opportunity for proper and meaningful consultation among all stakeholders. Not only does this enable the exchange of best practice solutions, but it also allows unintended consequences and loopholes to be identified and addressed up front, rather than requiring costly litigation or further legislative amendments after the new laws have been introduced.

As a meaningful debate ensues, the ATA reserves its right to make supplementary submissions.

Thank you.

Beverly Jenkin
Chief Executive Officer
Australian Toy Association