

## AUSTRALIAN TOY ASSOCIATION

### Submission to Consumer Affairs Australia and New Zealand

#### Australian Consumer Law Review

#### Introduction

The Australian Toy Association (ATA) is an industry association representing and servicing suppliers of products for children and family leisure, learning and entertainment. We have approximately 280 members that together represent 90% of the industry and \$2.4b in annual retail sales.

Product Safety and compliance is one of our core activities.

- We actively promote the development of standardised requirements for safe toys and the international alignment of those requirements.

To this end, we provide resources to support Australia's participation in the development of ISO Standards for the safety of toys and our subsequent adoption of those as National Standards.

We provide resources to chair the standards committees for safety of toys, trampolines and dummies. We also participate in several other standards committees both locally and internationally.

- We commit our members to adhere to safety standards applicable to their product and provide them with training and support to achieve this.

#### Preamble

The ATA has six basic issues with our consumer law as it stands today. These are all in the area of product safety and quality and are explained in some detail below including what we believe to be the impacts to the economy, suppliers of products and consumers.

Later in the document we have provided responses to relevant questions from the Issues Paper and attempted to put our concerns into that context.

While this approach may seem repetitive, we want to ensure that our concerns are understood as a whole while at the same time fitting within the framework of this review.

#### **1. Regulations that reference National Standards are not updated to reflect the latest versions of those standards**

##### Impacts

- a. More expensive compliance
  - Products are more expensive
- b. Regulations do not reflect latest knowledge
  - Products may be less safe or unnecessarily restricted
  - Consumers may be injured
  - Reduced utility for Australian consumers
- c. Corrections and clarifications to National Standards are not taken up

- Incorrect requirements are continued for extended periods of time
  - Incorrect requirements become entrenched and more difficult to change
- d. Australia is out of sync with the rest of the world
- Products are more expensive due to smaller runs just for Australia
  - Artificial barriers to trade

#### Discussion

The ATA fully supports the concept of adopting the requirements of National Standards or trusted International Standards to meet the need for specific protections when required. These requirements are developed by well-established and proven consensus processes including experts from relevant stakeholders both nationally and internationally and are expected to provide the best opportunity to have requirements that are well written, proven to address the hazard and aligned internationally.

National Standards or International Standards are revised as needed to reflect the current state of knowledge. Reasons for this may include:

- The identification of a new hazard, perhaps due to the introduction of a new technology.
- To clarify requirements that have been shown to be difficult to understand and may be misunderstood or misinterpreted.
- To adjust requirements that are not having the intended impact or that are having unintended consequences.
- To correct errors that may have been made during the development of the standard.

An example for toys is the requirements for magnets that were added to AS/NZS ISO 8124.1 – Safety of toys in 2009. The requirements were added to address a newly identified hazard that came from the development of strong rare earth magnets and their inclusion in children’s toys. In 2013 the requirements were adjusted when it was found that similar requirements in the US did not completely eliminate the issue there.

Our regulation for magnets in toys was introduced in 2010 based on the 2009 version of the requirements (CPN no 5 of 2010). There has been no adjustment to reflect the more onerous requirements in the updated 2013 version of the requirements.

In this case, there is a risk that less scrupulous suppliers could legally dump product in Australia that is known to be unsafe and rejected in other markets. At the same time responsible suppliers will actually ensure compliance with the current standard, but face extra costs to conduct incremental testing to the old requirements just to ensure that there is no technical breach of the law.

In some cases, Standards are made less onerous, e.g. when it is found that mistakes were made or incorrect data relied on for the original requirements. Failure to update the regulation results in product that is known to be safe being unable to be sold in Australia or recalls being done on products that do not present a risk to the consumer. If extended too long, the incorrect requirement becomes entrenched and even more difficult to fix.

In our discussions with the ACCC on this topic, we have come to understand that there are restrictions imposed by the Office of Best Practise in Regulation that may prevent them from acting to update the regulations in these situations. We understand that these restrictions are intended to support a more efficient regulatory process. However, the saving in regulatory cost is being lost through added costs and inefficiencies in complying with an outdated regulation, not to mention the risk to consumers from product that would not meet the requirements of the current Standard.

A listing of regulations that impact ATA members currently referring to outdated Standards is attached as Appendix A. In many cases, the referenced Standard has been replaced more than once in the intervening years and in the worst case, there are two different regulations referring to two different outdated versions of the Standard

### Recommendations

1. Implement a simple, cost effective process that ensures that regulations referencing National Standards are updated to reflect new versions of the National Standard even if the particular requirement is not affected.

In the US, the CPSIA requires that children's toys meet the requirements of their Standard, ASTM F963. It is understood that after an update to that Standard, the CPSC has 90 days in which to consider the changes and decide whether or not they are acceptable. After that, the revised standard becomes the regulated requirement.

European law also provides for reference to current versions of their Standards by their process of recognising that compliance with certain versions of certain Standards provide presumption of conformity with their specific Safety Directives, e.g. compliance with EN71 Standards generally provides presumption of conformity with the Toy Safety Directive.

So it is clear that regulators internationally see the benefits of maintaining alignment with the requirements in their National Standards and have implemented processes that ensure that this happens. The US case is particularly noteworthy in that the only thing that has to happen for an updated Standard to become law is for the CPSC to do nothing. This allows the regulator to still maintain control, but the default and least cost option is for the most desirable and usual result which is that the updated requirements become reflected in law.

There are two possible approaches that could be taken. Both seem to have pros and cons that would need to be evaluated further to know what would work best for Australia:

- The first would allow referencing of the requirements in the National standard without version information.  
This would work best when there are no variations to the requirements.  
Updated requirements from the National Standard would become mandatory when published subject to reasonable transitional arrangements.  
The consensus standards development process would fulfil the consultation requirements for the update.
- The second would be a streamlined process for updating of regulations with fixed timelines from the publication of updated National standards.  
Again the consensus Standards development process could fulfil the consultation requirements and an update would just need to consider any existing variations that may need to be retained

2. Revisit the role of the Office of Best Practise in Regulation so that it would look for ways to enable and facilitate worthwhile updates to regulations rather than the current situation where they somehow seem to have added to the barriers and red tape that make the regulatory process more difficult and costly.

## **2. Requirements from National Standards referenced in regulations are sometimes misunderstood**

### Impacts

- a. The same text is understood differently in the regulation to the National Standard
  - The requirement becomes unpredictable
  - Laboratory reports to the requirements in the Standard do not give certainty of compliance
  - Uncertainty and questions leading to waste of resource and increased cost
- b. Enforcement action results in the withdrawal of safe product
  - Waste of resources
  - Cost to business
  - Loss of utility to consumers
- c. Australia is out of sync with the rest of the world
  - Products are more expensive due to smaller runs just for Australia
  - Artificial barriers to trade
  - Reduced utility for Australian consumers

### Discussion

As previously stated, the ATA fully supports the adoption of requirements from National or International standards to be specific regulated requirements when needed. In doing this, we are recognising and relying on the robustness of the standardisation process. However, there are many situations where, in practise, the text in a standard can be understood in more than one way or a term is not 100% clear. The ATA contends that the committee of experts that drafted the standard in the first place are the best group to advice on the actual meaning of the text.

It is also critical to the operational objective of 'proportionate, risk-based enforcement' that the regulation be enforced based on the actual meaning as intended by the committee rather than some other determination. An incorrect determination would either allow unsafe products to stay on the market or cause safe products to be taken off.

Although the ACCC are generally represented on these committees, changes in responsibilities, departures, promotions, etc., ensure that the person filling the role is not constant (they have in fact been changing at an increasing rate since the implementation of the ACL) and the ACCC cannot be expected, on its own, to have the expertise make these determinations.

Despite this, the ACCC seems to be less willing or less able under the ACL, to consult and rely on the determination of the standardisation committees than it was under the previous legislation. The Standards Australia committee responsible for the set of standards on the safety of toys set up an interpretation process in 2009, with the support of the ACCC at the time, for the purpose of making determinations in these cases of uncertainty. The process mirrored that in Europe and ISO and seemed to be well received for a time. More recently, however, the ACCC has preferred to enforce based on its own interpretation of 'the letter of the law' and there have been a number of recalls and withdrawals of products that comply with the National Standard, but fail the 'interpreted' requirement.

### Recommendations

1. Implement an interpretation / determination process that respects the source of the requirements and the expertise that developed them.

For regulations that reference National Standards, it would be entirely consistent with the principle of referencing those standards and the operational objective of the ACL to promote 'proportionate, risk-based enforcement' if the expert group that developed them could be relied on to resolve any uncertainty in the meaning of the requirements.

The English language is often able to be understood in more than one way and it is therefore expected that some sort of interpretation will be needed at times. It makes much more sense in these situations to rely on the knowledge of the experts on the intent of the requirement rather than to adopt a letter of the law approach and enforce the withdrawal of product that has no issue.

This process is used successfully in Europe where the CEN group responsible for their Toy Safety Standard considers many interpretations annually on the application of their Standard and provides publicly available written responses. Compliance with the Standard gives presumption of conformity with the EU Toy Safety Directive so these interpretations are critical to compliance with the law although not legally binding.

We understand that there is a similar process in the US where interpretations made to ASTM F963 are recognised and accepted by the CPSC.

### **3. The overall system is still too complex**

#### Impacts

- a. Differing interpretations between Regulators
  - Uncertainty for suppliers and extra cost
- b. Gaps brought about by uncertainty on which Regulator is responsible for which aspect of the law
  - Unsafe products are allowed into the market
  - Safe compliant product is unable to compete with the lower cost non-compliant alternatives

#### Discussion

Although it was a huge improvement to consolidate the responsibility for making regulation to the ACCC, the enforcement is still split between the ACCC and the different State Regulators. Each is able to make an interpretation of a regulation and this leads to more opportunities to get it wrong. Once an interpretation has been made, it has proven to be impossible to get it adjusted.

In addition to this, different aspects of product safety are covered by different regulators, e.g. the ACCC looks after ingredient labelling for cosmetics, but NICNAS is responsible for the safety of the chemicals; the ACCC seem to be responsible for some aspects of electrical products, but the States are responsible for others. To make it more complex, those aspects that are covered by the States such as electrical safety are not treated consistently, e.g. in Victoria the Electrical Safety Act covers extra low voltage goods while in New South Wales, it does not. This means that it could be considered mandatory for a toy to comply with the Standard for the electrical safety of toys in Victoria while it wouldn't be in New South Wales.

This complexity makes it difficult for suppliers to understand the requirements. Individual regulators are unable to provide a complete answer and answers from different regulators may conflict with each other. All of this leads to a great deal of confusion and contributes to the possibility of unsafe or non-compliant product. It also adds to the cost of compliance for responsible suppliers.

### Recommendations

1. Review State based regulation for consistency between States and implement processes to maintain alignment of the regulations and their enforcement  
It is understood that this would be a complex task and our second recommendation may be a more realistic alternative
2. Review the roles of the different Regulators with the objective that there be one National Regulator for both policy and enforcement of all product safety related regulation.  
It is understood that this would be a huge change to the current situation, but it would be easier to maintain and much more economical for the future.  
Consideration would also need to be given to a structure that supports the development and retention of appropriate expertise, e.g. a division of the National Regulator could manage requirements related to electricity in consumer products, another division could manage requirements related to chemicals in consumer products and another could manage requirements related to mechanical and physical properties.  
A consistent regulatory process could be implemented across all divisions and would apply nationally
3. Establish an office as a single point of contact to advise on all mandatory requirements for any type of consumer product.  
This office should have the expertise to provide advice on all aspects of product safety regulation regardless of jurisdiction. It is extremely confusing and frustrating for suppliers to be given different advice by different authorities.

## **4. The prescribed text for warranties against defects prevents global alignment of product**

### Impacts

- a. Special production runs for Australia
  - Products are more expensive due to smaller runs just for Australia
  - Artificial barriers to trade
- b. Removal of additional benefits
  - Reduced utility for Australian consumers

### Discussion

The ACL requires that warranties against defects include specific text that reminds consumers of their rights under the ACL and is intended to ensure that suppliers cannot contract out of those rights. It is important to note that this does not provide any specific rights to consumers in itself; it is just providing information on those rights.

The unintended consequence of this requirement is that suppliers that previously may have used increased warranty benefits as a point of competition now find the additional effort to comply to be too burdensome and so no longer offer those benefits.

The additional burden comes from the fact that the text is specific to Australia and so any product intended to carry a warranty would need to be specifically produced or reworked to come here. This inhibits the international movement of goods and incurs considerable extra cost on low value items.

For the toy industry in particular, it is now very uncommon to have any additional warranty offered to consumers.

#### Recommendations

1. Use alternative ways to let consumers know of their rights under the ACL.  
This could be by means of a national media campaign, brochures or hand-outs, information the ACCC web site, etc.
2. Either remove the requirement for prescribed text or change it such that the message is a more generic version and could apply to multiple markets

### **5. The deadline for mandatory reporting of injuries is too short**

#### Impacts

- a. Reports are made without proper investigation
  - More reports are made than are actually required
  - Effort is wasted investigating incidents that do not need to be investigated
  - Increased effort to circle back on incorrect reports

#### Discussion

The mandatory reporting requirement under the ACL requires that certain injury incidents associated with consumer products are reported within 48 hours of businesses becoming aware of them. Within this period, the supplier should get a proper understanding of what happened, the relationship of the consumer product to the incident and the treatment provided to know whether the incident is actually reportable or not.

In most cases, it is not possible to gather the required information within the period allowed. For example, it may take more than 48 hours just to make contact with the consumer, particularly in the case that the supplier has learnt of an incident by social media. In order to comply with the reporting requirement, suppliers take the conservative approach of reporting everything and then completing the investigation afterwards. This leads to a lot of incomplete, inaccurate and possibly unnecessary reports and also creates extra effort in managing the process.

#### Recommendations

1. Increase the reporting period to four business days.

An increase in the allowed time to report would not impose significant additional risk to consumers, but would allow reports to be more accurate and give a better chance that they are complete when reported.

2. Evaluate whether some version of the data could be made available to interested parties to assist with risk management processes

The provision of the data would need to be managed in a way to ensure that it is accurate and respected the confidentiality of the parties making report, but a robust set of data on injuries associated with consumer products would be helpful in various risk management activities such as Standards development and product selection.

## **6. The meaning of 'acceptable quality' under the ACL is not clear**

#### Impacts

- a. Consumers are uncertain of the meaning
  - Unrealistic expectations of product replacement under the guarantee
  - Frustration and disappointment if expectations are not met
  - Replacements are not requested when they should be
- b. Suppliers are uncertain of the meaning
  - Goods are replaced unnecessarily leading to increased costs
  - Goods are not replaced when they should be

#### Discussion



Section 54 of the ACL provides for a guarantee that goods supplied to consumers are of acceptable quality. The guarantee is not subject to a time limit but is generally assumed to mean that the goods will last for a certain amount of time, depending on factors such as the nature of the goods and their cost.

However, there is significant uncertainty about the meaning of 'acceptable quality' in the context of any particular product and whether a manufacturer or retailer is liable under the guarantee in any particular case.

In addition, there is uncertainty about whether a failure in any particular instance is a 'minor failure', or a 'major failure' and hence opening up to consumers the option of rejecting the goods.

This uncertainty can cause suppliers to take an incorrect approach when responding to claims under the guarantee and either replace goods that should not be replaced or refuse to replace goods that should be replaced. In one situation the supplier's costs are significantly increased and in the other, the consumer suffers a loss and experiences frustration or additional effort to enforce his rights.

#### Recommendations

1. Consider ways that uncertainty surrounding concepts such as acceptable quality and major/minor failures can be reduced.

Additional guidance on the meaning of the terms, e.g. through the provision of examples or actual cases would simplify the application of the guarantee in practise. It would lead to more certainty for consumers and an overall reduction in cost for suppliers

## Response to Issues Paper Questions

### **1.3 Australia's consumer policy framework objectives**

1. Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?

#### ATA Response

The six operational objectives are well written and remain relevant.

However, it is apparent that the implementation of the ACL has not fully supported all of these objectives and this is the focus of the ATA comment.

It is particularly concerning that we have not achieved proportionate, risk-based enforcement in the area of product safety, but instead are often faced with a letter of the law approach that has little to do with safety or consumer welfare.

2. Are there any overseas consumer policy frameworks that provide a useful guide?

#### ATA Response

The US and European frameworks are most often compared to Australia's. Each market's consumer policy framework has been developed over a long period of time and have become quite different, even while having the same or similar objectives. It is therefore important when making

comparisons that one not assume that a seemingly desirable feature of one framework would work the same way if transposed into our framework.

Nevertheless, one feature of both the US and European framework in the area of product safety is the recognition and reliance by the Regulator on National Standards. The CPSC and the European Commission have processes in place to keep their laws in synchronisation with updates to these standards. Australian regulation stands out as being less effective and perhaps less mature in this regard, referencing standards that have been superseded many years ago and jealously guarding full control of regulated requirements.

3. Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?

#### ATA Response

It is not new or innovative, but regulators and policy makers should view themselves as partners with business in achieving the objectives of the ACL. We want our products to be safe and fit for purpose, we want to comply with the law and we want to compete fairly. We have also developed considerable expertise in the products that we supply.

To this end, the regulatory process should be genuinely consultative and this means more than just giving the opportunity to provide submissions; it means reviewing them in detail, seeking clarification on points not understood and having a dialogue on points of disagreement.

Since the introduction of the ACL, the process seems to have become less consultative. We still have the opportunity to make submissions, but there is much less discussion on the feedback provided.

## **2.1 Structure and clarity of the Australian Consumer Law**

Structure and clarity of the ACL (2.1.1)

Meaning of 'consumer' (2.1.2)

4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?

#### ATA Response

The ACL is not simple to understand. It is an approximately 368-page document written as Schedule 2 to the Competition and Consumer Act, which is around 1,600 pages in total.

Neither ATA members (nor consumers) would expect to go through and understand the document on their own and would instead use a specialist advisor (lawyer) to explain specific provisions and provide training as and when required.

5. Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?

#### ATA Response

The relationship between the ACL, the Competition and Consumer Act, the Trade Practises Act and the various State and Territory Acts are not easy to know. There are also many other Acts impacting consumer products such as the various State and Territory Electrical Equipment Acts. So while it is an improvement over the previous situation, it is not easy.

It would be beneficial to further reduce the regulatory burden and actually have one regulation and one regulator for all consumer goods. This would avoid the confusion of different treatment in different states and provide a better chance of a coordinated view on requirements.

6. Are there overseas consumer protection laws that provide a useful model?

ATA Response

We understand that there is a variety of consumer protection laws in different markets. Some rely on a single law and a single 'Consumer Authority' while others have multiple laws and authorities as in our case. While we do not know enough to recommend considering a particular market as an example, it seems clear that a single simplified Act managed by a single authority would be the easiest to explain and understand.

7. Is the ACL's treatment of 'consumer' appropriate? Is \$40,000 still an appropriate threshold for consumer purchases?

ATA Response

For products sold by ATA members, \$40,000 is more than enough.

## **2.2 General protections of the Australian Consumer Law**

Misleading or deceptive conduct (2.2.1)

Unconscionable conduct (2.2.2)

Unfair contract terms (2.2.3)

8. Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

ATA Response

The ATA does not have knowledge of any issues in this area.

9. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2? Are there any gaps that need to be addressed?

ATA Response

The ATA does not have any suggestions in this area

## **2.3 The Australian Consumer Law's specific protections**

False or misleading representations (2.3.1)

Other unfair practices (unsolicited supplies, pyramid schemes, pricing, referral selling, and harassment and coercion) (2.3.2)

Consumer guarantees (including 'lemon' laws) (2.3.3, 2.3.4)

Unsolicited selling agreements (2.3.5)

Other consumer rights (lay-by agreements, proof of transaction, itemised bill, and warranty against defects) (2.3.6)

Product safety (2.3.7)

10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

ATA Response

Please refer to our discussions concerning regulations on pages 1 through 4 that reference National Standards not being updated to reflect the latest versions of those Standards and interpretations of the meaning of these Standards. These two issues are impacting the effectiveness of the specific protections and causing frustration, confusion and additional cost to the Australian economy.

11. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?

ATA Response

Please refer to our recommendations concerning regulations that reference National Standards not being updated to reflect the latest versions of those standards and interpretations of the meaning of these Standards.

The ATA is advocating for increased reliance on National Standards as the source of requirements for specific protections. The suggested changes would ensure that specific protections that reference National or International Standards requirements are updated soon after the Standards are updated. They would also require that enforcement of the regulation be in alignment with the meaning of the requirement in the Standard and that the entity responsible for the Standard be consulted in the case of any uncertainty concerning that meaning.

The overseas models referenced in these recommendations are processes adopted by the US CPSC and the European Commission.

An alternative approach is suggested in Case study 8 and it seems that this concept would resolve the issue of updating the regulation although it would take more time to understand and evaluate the concept fully.

12. Does the ACL need a 'lemon' laws provision and, if so, what should it cover?

ATA Response

The ATA is not aware of a need for provisions for 'lemon' products.

13. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of businesses in today's marketplace?

ATA Response

While it seems that the regulator has sufficient tools to respond to product safety issues as they arise, it is also apparent that there are difficulties in implementing these due to barriers to the creation of new regulations and jurisdictional complexities.

An example where the ACCC could have been expected to impose a specific protection is the issue of button batteries where children have been seriously injured, in the main by 3V lithium cells around 20 mm in diameter that are ingested and become lodged in the oesophagus. The issue presents a significant number and severity of injury, including death, and there are National Standards, e.g. the Standard for the Electrical safety of toys with suitable requirements that could have been quickly referenced in regulation in order to limit the further occurrence of such issues. However, we understand that the ACCC has been deterred from acting due to the requirements for new regulations imposed by the Office of Best Practise in Regulation.

In another situation, the ACCC recently responded to issues with hoverboards by imposing an interim ban based on compliance with certain electrical requirements. It is understood that the implementation of the protection, and in fact the lack of compliance in the first place, was impacted by the added complexity of separate electrical requirements by the States and Territories and the fact that these are not consistent. The different rules by State is further complicated by the uncertainty as to which regulator should cover electrical requirements. Note for example that extra low voltage equipment is covered by the Victoria Electrical Safety Act, but not by the NSW version.

The ATA believes that action could be taken faster if there was a nationally consistent regulation and clarity on the responsible regulator. This would have an additional benefit of making the product safety framework easier to understand and the number of non-compliant products would reduce naturally as a result

14. Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be more effective, and how? Should protocols or other arrangements be established between ACL and specialist regulators?

ATA Response

Electrical requirements are particularly complex because the specialist regulators are State based and the relevant Acts are not consistent.

The ATA would support a simplification of the regulatory process wherever possible. At the very least, there should be a single law and a single national authority for electrical product. Ideally, there would be a single national regulator for all consumer product, with specialist departments within that regulator.

## **2.4 Other Issues**

Addressing 'unfair' commercial practices (2.4.1)

Interaction between the ACL and ASIC Act (2.4.2)

15. Should the ACL prohibit certain commercial practices or business models that are considered unfair?

ATA Response

The ACL seems to already prohibit certain unfair commercial practises, e.g. pyramid schemes. In many cases, these unfair practises negatively impact both consumers and other businesses. For example, a business supplying counterfeit branded goods may be misleading consumers on the

value of the goods while at the same time impacting sales and the brand equity of the legitimate supplier of that product.

The ATA would support the prohibition of such unfair practises.

16. Is introducing a general prohibition against unfair commercial practices warranted, and what types of practices or business models should be captured? What are the potential advantages, and disadvantages, of introducing such a prohibition?

ATA Response

The ATA supports the prohibition of businesses practises that take advantage of vulnerable parties, but is concerned that a 'general' provision would be easily misunderstood and lead to uncertainty without necessarily stopping the practises at which it is aimed. It is therefore better to prohibit specific practises and provide the flexibility to add new practises as the regulator becomes aware of them.

17. Does the current approach to defining a 'financial service' in the ASIC Act create unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act? How could this be addressed?

ATA Response

The ATA does not have knowledge of any issues in this area.

### **3.1 Proportionate, risk-based enforcement**

18. Does the ACL promote a proportionate, risk-based approach to enforcement?

ATA Response

Please refer to our comments and recommendations on updating of regulations that refer to national standards and interpretation of the requirements specified in national standards. These are made in order to support a more proportionate, risk-based approach to enforcement.

ATA members have had experience of enforcement action based on incorrect understandings of the requirements in National Standards and products with no known hazard were withdrawn from the market as a result.

We would understand enforcement that is risk-based and proportionate to be related to real hazards and risks to consumers. The correct understanding of referenced requirements from National Standards is a critical component of that as well as a recognition of the intent of requirements, even if not worded perfectly.

We do see differences in approach by the different regulators and have noted that individuals with the most experience are more likely to have the knowledge and flexibility to be risk-based, while less experienced individuals will rely on a prescriptive, letter of the law approach and tend to precautionary rather than fact-based.

We therefore advocate for a movement towards a single, national regulator while at the same recognising and retaining the experience of the current co-regulators. We also believe that there is a need to formalise the process for ensuring that enforcement is based on real, identified risks rather than misunderstandings and a precautionary approach

### **3.2 Effectiveness of remedy and offence provisions**

- Distinction between civil and criminal penalties (3.2.1)
- Types of ACL penalties and remedies (3.2.2)
- Deterrent effect of financial penalties (3.2.3)
- Setting and updating maximum financial penalties (3.2.4)
- Role of non-punitive orders (3.2.5)
- Jurisdictional differences in the enforcement 'toolkit' (3.2.6)

19. Are the remedy and offence provisions effective?

ATA Response

The ATA is not aware of issues with the remedy and offence provisions and find that its members make every effort to comply with the law.

20. Are the current maximum financial penalties available under the ACL adequate to deter future breaches?

ATA Response

The ATA believes that the existing financial penalties are sufficient to deter future breaches. It is important that penalties are proportionate to the offence and the relative gain or loss of the affected parties rather than the size of the organisation committing the offence.

21. Is the current method for determining financial penalties appropriate?

ATA Response

The ATA believes that the most important considerations are the nature and extent of the conduct, the gain or loss to affected parties and the previous behaviour of the entity.

Large businesses will be equally deterred by penalties in proportion to the offence as small businesses.

22. Are the non-punitive orders available under the ACL sufficient for the court to apply an appropriate order to address the harm caused by a breach?

ATA Response

The ATA believes that non-punitive orders are a useful approach and in many cases will have a better outcome than punitive ones.

23. What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions?

ATA Response

Please refer to our discussion on the complexity of the Consumer Policy Framework on pages 5 and 6.

The ATA prefers a National Regulation and single Regulator model to achieve consistency and remove uncertainty.

As a side benefit, the preferred model should be significantly less expensive to operate and so provide overall community benefits

24. Do you have views on any of the issues raised in section 3.2?

ATA Response

The ATA view has been expressed in response to the questions above and in our preamble to the document

### **3.3 Access to remedies and scope for private action**

Effective dispute resolution (3.3.1)

Scope for private action (3.3.2)

Reach of the ACL — international private action and recognition of foreign judgments (3.3.3)

25. Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?

ATA Response

The ATA is not aware of consumers or businesses enforcing their rights under the ACL, but the sheer size and complexity of the document in relation to the CCA, Trade Practises Act and various State laws would seem to be a barrier to private action.

26. What low-cost actions could consumers and businesses more readily use to enforce their rights?

ATA Response

The ATA believes that it would be a benefit to both consumers and suppliers to have an easily accessible low cost method to seek determinations under the ACL. Suppliers could use such a process to get a determination on compliance with specific product requirements in the case that there is a disagreement with the regulator on the understanding of the requirement.

Examples would be a small claims court, tribunal or ombudsman.

27. Are there any overseas initiatives that could be adopted in Australia?

ATA Response

There may be both local and international models that could be referenced, but the ATA doesn't have sufficient information to recommend one over another.

28. What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL?



ATA Response

The ATA is not aware of private actions being taken under the ACL and while we support retaining the possibility of them, we are concerned that promoting them may lead to a large number of hopeful or frivolous claims where persistent people can get compensated for being a nuisance. Larger businesses may be tempted to settle such claims as a least cost option, but over time the total cost would be significant.

29. How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders?

ATA Response

An important objective of the CCA is to facilitate fair competition for the ultimate benefit of the consumer.

ATA members have noted that online retailers based offshore may not be aware of Australian Laws and may not ensure compliance of their product with specific protections. They may spend less on compliance and so be able to compete unfairly. Private imports of these products may be subject to less scrutiny than imports made by businesses.

The ATA would advocate for the same laws and enforcement processes to be applied to both online and bricks and mortar sales. Products subject to specific protections should be subjected to higher levels of scrutiny and online stores that fail to comply or respond to requests to comply should be blocked from Australian consumers.

#### **4.1 Selling away from business premises**

30. Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?

ATA Response

This question is not relevant to the ATA.

31. Does the distinction between 'solicited' and 'unsolicited' sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving 'pressure selling'?

ATA Response

This question is not relevant to the ATA.

32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, 'pop-up' stores?

ATA Response

This question is not relevant to the ATA.

33. How could these issues be addressed?

ATA Response

The ATA does not have a view on this.

## **4.2 Online shopping**

Price transparency (4.2.1)

Transparent safety information for products sold online (4.2.2)

Comparator (comparison shopping) website (4.2.3)

Online reviews and testimonials (4.2.4)

34. Is it sufficient for a business to disclose the total minimum price before making a payment, or should optional fees and charges also be disclosed upfront?

### ATA Response

The ATA believes that consumers should be provided with all relevant information as soon as possible, e.g. if there are freight charges relevant for the sale, then this should be stated even if the exact amount is not known. We believe that a consumer will make better and more competitive decisions earlier in the transaction process. If freight is only disclosed at the end, then the investment in the activity to date may cause the consumer to continue with a purchase that no longer makes sense.

35. Are there any changes that could be made to the ACL to improve pricing transparency?

### ATA Response

The ATA is not aware of specific changes that would be required to achieve the objectives of pricing transparency.

36. Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?

### ATA Response

The ATA believes that the online description of a product is a substitute for its retail packaging. It should be made clear in the ACL that requirements for retail packaging apply to online point of sale material.

The EU Toy Safety Directive has specific text around this, requiring that ‘warnings which determine the decision to purchase the toy, such as those specifying the minimum and maximum ages for users and the other applicable warnings ... shall appear on the consumer packaging or be otherwise clearly visible to the consumer before the purchase, including in cases where the purchase is made on-line’.

The US CPSIA also has a similar requirement in section 105; ‘Any advertisement by a retailer, manufacturer, importer, distributor, or private labeller (including advertisements on Internet websites or in catalogues or other printed materials) that provides a direct means for the purchase or order of a product for which a cautionary statement is required ... shall include the appropriate cautionary statement displayed on or immediately adjacent to that advertisement ...’.

37. Do the existing ACL provisions (including provisions on false or misleading representations) adequately address issues regarding the transparency of comparator websites and online reviews? How could this be improved?

ATA Response

The ATA does not have a view on this.

### **4.3 Emerging business models and the Australian Consumer Law**

38. Does the ACL provide consumers with adequate protections when engaging in the 'sharing' economy, without inhibiting innovation and entrepreneurial opportunities?

ATA Response

This question is not relevant to the ATA.

39. Does the ACL provide adequate clarity and certainty for consumers when engaging in the 'sharing' economy? What areas need to be addressed, and what types of personal transactions should be excluded?

ATA Response

This question is not relevant to the ATA.

### **4.4 Promoting competition through empowering consumers**

Consumer access to data (4.4.1)

Disclosure requirements (4.4.2)

40. Do consumers want greater access to their consumption and transactional data held by businesses?

ATA Response

This question is not relevant to the ATA.

41. What is the role of the ACL and the regulators in supporting consumers' access to data? Is there anything in the ACL that would constrain efforts to facilitate access?

ATA Response

This question is not relevant to the ATA.

42. Does the provision of data, or the emergence of an 'infomediary' market create, or increase, any risks of consumer harm not adequately addressed by the ACL? If so, how could the ACL mitigate these risks as the market evolves?

ATA Response

This question is not relevant to the ATA.

43. Are the disclosure requirements effective? Do they need to be refined, or is there evidence to indicate that further disclosure would improve consumer empowerment?

ATA Response

This question is not relevant to the ATA.

## Appendix A

Table of regulations affecting ATA members that reference outdated standards

Regulation	Product	Referenced Standard	Known Issues	Current Standard
<b><u>Consumer Protection Notice No 3 of 2009</u></b> Consumer product safety standard for swimming aids and flotation aids for water familiarisation and swimming tuition	Swimming aids	AS1900-2002	Stitching Buckles	AS/NZS 1900:2014
<b><u>Consumer Protection Notice No. 4 of 2006</u></b> Consumer Product Safety Standard for Babies' Dummies	Dummies	AS 2432-1991	Dummies that pass the standard are known to subsequently deteriorate and generate hazards	AS 2432:2015
<b><u>Consumer Protection Notice No. 33 of 2011</u></b> Revocation of interim ban and imposition of permanent ban on certain babies' dummies to which there are crystals, beads or other similar ornaments attached	Dummies	AS 2432 - 2009		AS 2432:2015
<b><u>Consumer Protection Notice No 1, 2009</u></b> Consumer product safety standard for lead and certain elements in children's toys	Toys that may be licked sucked or swallowed	AS/NZS ISO 8124.3:2003	None, but current requirements are more inclusive due to change in defn of what may be licked sucked or swallowed	AS/NZS ISO 8124.3:2012
<b><u>Consumer Protection Notice No. 14 of 2003</u></b> Consumer Product Safety Standard: Toys for children up to and including 36 months of age as amended by Consumer Protection No. 1 of 2005.	Toys for Children Aged less than 36 Mths	AS/NZS ISO 8124.1:2002	Soft filled toys	AS/NZS ISO 8124.1:2013
<b><u>Consumer Protection Notice No 2 of 2009</u></b> Consumer product safety standard for flotation toys and aquatic toys	Aquatic toys	AS/NZS ISO 8124.1:2002	None	AS/NZS ISO 8124.1:2013
<b><u>Consumer Protection Notice No 5 of 2010</u></b> Consumer product safety standard for Children's Toys Containing Magnets	Magnets in toys	AS/NZS ISO 8124.1:2002	None, but current requirements are more onerous. Standard was updated as incidents continued internationally after the original requirements were added.	AS/NZS ISO 8124.1:2013
<b><u>Consumer Protection Notice No. 16 of 2010</u></b> Consumer product safety standard for children's projectile toys	Toys with Projectiles	AS/NZS ISO 8124.1:2002	Wind up rubber band powered aeroplanes	AS/NZS ISO 8124.1:2013

Regulation	Product	Referenced Standard	Known Issues	Current Standard
			Hand operated rotors	
<p><b><u>Trade Practices (Consumer Product Safety Standards) (Children's Nightwear and Paper Patterns for Children's Nightwear) Regulations 2007</u></b>            Safety and labelling requirements for children's nightwear and paper patterns for making children's nightwear.</p>	Children's nightwear and paper patterns for making children's nightwear	AS/NZS 1249:2003	None	AS/NZS 1249:2014