The University of Sydney

Faculty of Law

Associate Professor Dr Luke Nottage
Co-director, Australian Network for Japanese Law (ANJeL)
Program Director (Comparative and Global Law), Sydney Centre for International Law

Room 640, Building F10,
Eastern Avenue, University of Sydney, NSW 2006
Telephone: +61 2 9351 0210
Facsimile: +61 2 9351 0200
luke.nottage@sydney.edu.au

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Senate Economics Committee – Inquiry into
Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Cc: Simon Writer
Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: economics.sen@aph.gov.au
CC: simon.writer@treasury.gov.au

Submission re Proposed Consumer Product Safety Incident Disclosure Duties

Please see the attached Submission and its Appendix.

I would also be pleased to provide further information to assist this Committee.

Yours sincerely

Luke Nottage

This Submission provides constructive comparative criticism of the draft provisions proposing new obligations on Australian suppliers to disclose information concerning serious consumer product related accidents. The provisions are in the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 ("the Bill"), introduced into the Federal Parliament on 17 March 2010 and referred to a Senate Committee for public inquiry.[1] Such obligations are welcome and long overdue, especially as they were not explicitly mentioned in the Treasury's Consultation Paper of 17 February 2009.[2] It has been five years since the Productivity Commission initiated its Inquiry into Consumer Product Safety, resulting in recommendations in 2006 that were repeated in 2008 as part of in its broader Inquiry into Consumer Policy, which has framed the debate and drafting of both Bills. And it has been almost a decade since the Australian Treasury first issued a discussion paper on that considered adding such provisions, which are now found among all our major trading partners.[3]

Unfortunately, the Bill's draft provisions still do not meet contemporary best practice among major economies world-wide. This reflects a broader "design defect" in Australia's consumer law reform process, which has focused overwhelmingly on re-harmonising consumer protection nation-wide to reflect best practice among its states and territories.[4] As well as broader parochialism, that focus (and the lengthy delays) suggests the decline of the consumer voice in Australian policy-making over the last decade, in contrast to most countries worldwide. The deficiencies in the Bill's provisions will leave problems not only for Australian consumers but also for consumers and suppliers of Australian products abroad, as overseas suppliers are increasingly subject to stricter accident disclosure standards yet unable to draw on as much information that Australian exporters will need to provide to their home country's regulatory authorities. Significant differences will also impede cross-border regulatory cooperation and harmonisation initiatives, increasingly important as Australia joins many countries in concluding Free Trade Agreements in growing numbers and scope of application.[5]

Fortunately, the Australian Government still has the opportunity to enact revised provisions that better align with those now found in its major trading partners. Below I suggest improvements by comparing mainly the decidedly more expansive disclosure obligations set out in "Bill C-6: Respecting the Safety of Consumer Products" almost agreed upon by the Canadian Parliament (the

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[1] See http://www.aph.gov.au/senate/committee/economics_ctte/tpa_consumer_law_10/index.htm. The first Amendment Bill, adding for example new nation-wide provisions controlling unfair contract terms, was introduced on 24 June 2009 and passed both Houses on 17 March 2010 after extensive debate: see http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation%2Fbillhome%2Fr4154%22 .

[2] L Nottage, 'Product Safety Regulation in Australia's New Consumer Law: Proper Disclosure Please' (2009) 19(10) *Australia Product Liability Reporter* 146-149.

[3] See www.pc.gov.au; L Nottage, 'Product Safety Regulation Reform in Australia and Japan: Harmonising Towards European Models?' (2008) 2 *Yearbook of Consumer Law* 429-446 (reproduced at www.ssrn.com); D Harland and L Nottage, "Conclusions" in *Product Liability in the Asia-Pacific,* J Kellam (Ed) (3rd ed, 2009) Federation Press, Sydney, pp 559-78 at p 577 (discussing the EU, USA, Japan, China and Hong Kong).

[4] L Nottage, 'Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism' (2009) 9 *QUTLJ* 111-136.

[5] L Nottage, 'Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era' (2009) 09/12 *Sydney Law School Research Paper* available at http://ssrn.com/abstract=1509810.

"Canadian Bill"),[6] but alluding also to other jurisdictions. The Appendix adds an annotated match-up of both countries' draft provisions, highlighting several key differences in bold italics.

1. Section 131(1) of the Bill's Schedule 1 (item 1, Part 3-3, Division 5) sets out the core obligation proposed for Australia. Suppliers in trade or commerce that supply "consumer goods of a particular kind" and that are "aware" that those have been "associated with the death or serious injury or illness of any person" must provide the Minister with specified written information within two days. This is generally similar to the requirement contained in cl 14 of the Canadian Bill but that typically goes further, as explained further below.[7]

2. Section 2 defines "serious injury or illness" as "an an acute physical injury or illness that requires medical or surgical treatment" through "a medical practitioner or a nurse" but not an actual or recurring or aggravated "ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development)". The Government's Explanatory Memorandum interprets the latter exclusion to refer to a "disease" and states that injury or illness "must be acute in nature arising through sudden onset rather than after gradual development over time" (para 10.165).[8] That interpretation is not obvious from the drafting of s2, and anyway appears decidedly more restrictive than the Canadian Bill, which refers broadly to any "serious adverse effects" on human health. Likewise, article 2(d) of the revised EU Directive defines a "serious risk", triggering the most extensive legislative obligations, as "any serious risk, *including those the effects of which are not immediate*, requiring rapid intervention by the public authorities".[9]

   Yet what are the policy grounds for this proposed difference? It seems odd that Australian consumers and regulators will be unable to benefit from a disclosure obligation on manufacturers of goods containing a material like asbestos, for example, if those manufacturers become aware that the asbestos is causing a disease like asbestosis that develops gradually. This is especially problematic given that Australia never got around to introducing a "toxic tort" provision (as in Japan) in extending the limitation period for (civil) product liability claims in such situations.[10]

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[6] See http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Session=22&query=5655&List=toc (and especially the text as passed by the House of Commons at http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=40&Ses=2&Mode=1&Pub=Bill&Doc=C-6_3). The Senate also passed the Bill, on 15 December 2009, but with amendments. Before the House of Commons could vote on those, it died on the *Order Paper* on 30 December 2009 when the 2nd Session of the 40th Parliament was prorogued, so it must be reintroduced into the House of Commons. However, Bill C-6's disclosure obligations compared in this Submission have not been the centre of differences between the two Houses: see http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=5655&Session=22&List=ls#fn2 and http://www.internationallawoffice.com/Newsletters/detail.aspx?g=376a18cc-99e6-40cc-aa54-a8adac604da4.

[7] Section 132 also imposes similar duties on suppliers of consumer goods-related services (as in Bill C-6, and the European Union's Product Safety Directive as revised in 2001: see D Fairgrieve and G Howells, 'General product safety - a revolution through reform?' (2006) 69 *Modern Law Review* 59-69.

[8] Also available via http://www.aph.gov.au/senate/committee/economics_ctte/tpa_consumer_law_10/index.htm.

[9] Available via http://ec.europa.eu/consumers/safety/prod_legis/index_en.htm (emphasis added).

[10] Cf TPA s75AO(2) in Part VA with Japan's Product Liability Act Article 5(2). After Part VA was enacted in 1992, the contested

3. Section 131(1) of the Bill refers to a serious accident "associated" with a consumer product, which suggests a similar causal linkage to the Canadian Bill's cl14(1) requirement of an "occurrence … that resulted" in serious adverse health effects. Section 131(3) goes on to state that the notification duty applies "whether or not the consumer goods were being used before or at the time of" the accident. This may prove a useful clarification, but it does make the Australian legislation more verbose.

   The Memorandum also adds that a good can be "associated" with an accident in circumstances "whereby the goods could have been used for its primary, normal or intended or intended purpose, for an unintended purpose, or being [sic] misused" (para 10.168). Another possible situation stated is where the good "was in the vicinity or close proximity of the occurrence of an accident, irrespective of whether the good was in fact being used (or misused) at the time of the accident". Other situations mentioned are where "the good was a cause or a possible cause (and not necessarily the sole cause)", or it actually or possibly contributed to, or was "somehow related to, in involved with" an accident. The first-mentioned clarification, in particular, seems more important than the proposed s131(3) to add to the legislation itself.

   An alternative, as in the Canadian Bill (as well as in the EU, and Japanese legislation in this respect) is not to go into such detail at all, leaving such issues of causality to the courts to later sort out if necessary – hopefully then drawing on similar legislation abroad.

4. A more serious problem is created by s131(2) of the Bill adding that no notification is required where it is (a) "clear" that the consumer goods were not associated with the accident or (b) "very unlikely" to have been so associated. Again, the EU Directive does not go into such detail. Article 2(5) of the Japan's Consumer Product Safety Act (adding a disclosure obligation through amendments in 2006) generally excludes "product accidents" but only if "clearly not caused by a defect in the consumer goods".[11]

   The Explanatory Memorandum indicates that "very unlikely" means "highly unlikely" (para 10.171), but it seems simpler to completely exclude mention of either in the Australian legislation, especially as the Memorandum goes on to conclude:

   > "10.172 Consumer behaviour, operator error, external influences and environmental factors, such as alcohol, weather conditions or other people's behaviour, are common contributing factors to product related injuries.

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issue of a longer limitation period for toxic torts was referred to the Senate for further discussion, but nothing ever came o that. See L Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (2004) RoutledgeCurzon, London, p 34

[11] A semi-official translation available via http://www.japaneselawtranslation.go.jp is misleading in translating "*akira*" as "apparently" rather than "clearly".

10.173 However, if it is possible that the consumer goods could somehow be associated with a death, serious injury or illness, and it is not clear that the goods were *not* associated with the accident – then the supplier should report the incident to the Commonwealth Minister."

5. Comparing s131 of the Bill and cl14(1) of the Canadian Bill reveals that the latter's notification requirement is triggered not just by an occurrence resulting in a death or serious adverse health outcome, but also (a) an occurrence or (b) a "defect or characteristic" or (c) "incorrect or insufficient information on a label or instructions" that may be "reasonably have be expected to result" in death etc. Arguably, (c) could be subsumed anyway into (b). But the key point is to have triggers for notifications that are not limited to actual accidents, so that regulators (and then consumers) can be put on notice that serious risks are present even before injuries have occurred.

   The US led the way by requiring notifications if suppliers obtain information that reasonably supports the conclusion that a product " contains a *defect which could create a substantial product hazard*" or "creates an unreasonable *risk* of serious injury or death".[12] Article 5(3) of the revised EU Directive also now requires notification where "producers and distributors know or ought to know, on the basis of the information in their possession and as professionals, that a product that they have placed on the market poses *risks* to the consumer that are incompatible with the general safety requirement" (or "GSP" under Article 3(1), requiring producers to "place only safe products on the market"). Article 9 of China's *Special Rules of the State Council on Strengthening the Supervision and Management of the Safety of Food and Other Products* (promulgated in July 2007) imposes notification (and other) obligations on manufacturers that discover any hidden safety *risks* in its products that are likely to cause damage to life or personal health.[13]

   Japan's Consumer Product Safety Act adopts an intermediate position. Article 35 requires notification for any manufacturer or importer "who comes to know that serious product accidents have originated with [sic: arisen from] the consumer products that he/she manufactured or imported". In general, article 2(5) defines "product accidents" as "(i) accidents where danger to the lives or bodies of general consumers has occurred; or (ii) accidents in which consumer products are lost or damaged that are *deemed likely to cause danger* to lives or bodies of general consumers". The second limb seems to encompass all risks of injury, but article 2(6) then limits "serious product accidents" to product accidents falling under the requirements provided for by Cabinet Order with respect to the content of danger or the manner of accident, as accidents where the actual or potential danger is

[12] Consumer Product Safety Act s15(b), reproduced at http://www.cpsc.gov/businfo/cpsa15b.html (emphasis added).
[13] Weining Zou and Xiaochun Wang, "China", in *Product Liability in the Asia-Pacific,* J Kellam (Ed) (3rd ed, 2009) Federation Press, Sydney, at p 107.

serious". Cabinet Orders currently specify "serious product accidents" to include, even without actual injury, incidents involving fires or carbon monoxide poisoning.[14]

Australia's new legislation should follow all these jurisdictions in requiring suppliers to disclose information about accidents that have not only already caused death or serious injury or illness, but also those that present significant risks thereof.[15] If the broader provisions adopted in the USA, EU and China are politically unpalatable, then at least Australia should adopt a compromise as in Japan that allows the Government later by Regulation to specify certain risks that would trigger additional notification requirements.

6. Section 14(1)(a) of the Canadian Bill requires notification for an "occurrence in Canada *or elsewhere*", ie even for (actual or reasonably foreseeable) serious accidents caused to overseas consumers by Canadian exports. Australia should also be a responsible member of the global trading community by stating clearly in its legislation that Australian exporters must also report to the Minister regarding product-related accidents occurring abroad. In the present draft Bill, this is only implicit via section 131(5)(b)(i), which specifies disclosure of information regarding "(i) when, and in what quantities, the consumer goods were … exported from Australia".[16] By expressly imposing disclosure duties on exporters regarding accidents abroad, Australian regulators will be in a better position to share information with counterparts abroad, especially if and when such cooperation becomes entrenched through Free Trade Agreements (or other more specific agreements among regulators, as now between the EU and China or the EU and the US).[17]

7. Another difference from the Canadian Bill is that s131(4) of the Bill lists (non-exhaustively) some means by which the supplier may become "aware" of relevant accidents: through information from consumers, re-suppliers, repairers or insurers of the goods, or an industry or consumer organisation. This is another helpful clarification, but it makes Australia's legislation even lengthier. Anyway, the Memorandum goes on to add that the Bill is intended to cover the receipt of "relevant information through *any* means, like being told, hearing or reading about the information" (para 10.175, emphasis added).

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[14] See also L Nottage, "Product Liability and Safety Regulation" in *Japanese Business Law,* G McAlinn (Ed) (2007) Kluwer, Th Hague, 221-262.

[15] See also my Submission regarding the February 2009 Consultation Paper (revised in Nottage, above n 2) urging the Government to enact a cumulative notification requirement –one regarding actual product related injuries and another regarding certain defects or risks of harm (even without actual injuries).

[16] The Explanatory Memorandum's "Comparison of key features of new law and current law" does note that, under both, suppliers must comply with notification requirements where the goods have been exported, but in situations where the Minister has required goods to be recalled (p 244). No mention is made of exported goods when referring to the new law's general notification obligation (p 245). Also noteworthy is s118 of the Bill, allowing suppliers to obtain Ministerial approval to export banned goods. One justification given in the Memorandum is that "overseas markets may be subject to different domestic regulatory requirements" (para 10.103). That may be true but the Australian government should be encouraging regulatory harmonisation.

[17] Nottage, above n 5.

A more serious policy issue concerns the proposal in the Bill to limit the disclosure obligation to situations where the supplier happens to become *actually* aware of relevant accidents. The Canadian and Japanese legislation have enacted a similar provision, but such a subjective test could encourage "wilfull blindness" or firms perversely making it difficult to acquaint themselves with accident information (especially in jurisdictions, like Australia, with low levels of product liability claims and reported judgments[18]). By contrast, as just mentioned above, article 2(5) of the revised EU Directive triggers a notification requirement where producers and distributors know *or ought to know* of the risks of harm.

8. The Bill (s131(2)(c)) and the Canadian Bill (cl4(1)) are also similar in excluding notification requirements for products covered by other legislation specified by Regulations (under the Bill) or a Schedule (under the Canadian Bill, which therefore seems comparatively inflexible and difficult to keep up-to-date). This is arguably more user-friendly to suppliers than the EU approach, where the revised Product Safety Directive is trumped by any notification duties in more specific Directives, yet it may be difficult to know what the latter are.

   However, this reinforces the need for the Australian Government to improve coordination in receiving, analysing and disseminating to consumers safety information regarding all types of consumer goods. Problems were highlighted by Productivity Commission reports dating back to 2006. Yet it took until March 2010 for the ACCC to unveil "a new national website for product safety information" aiming to provide "a single point of entry to product safety information nationally".[19] Furthermore, as of April 2010, this merely refers viewers interested in vehicle safety information, for example, to the top page of the transport regulator's website (from where relevant safety information is not easily accessible).[20]

9. The Bill contains no equivalent to cl14(1)(d)(i) of the Canadian Bill, which includes in its definition of a reportable incident "a recall or measure that is initiated for human health or safety reasons by (i) a foreign entity …". Section 128(2) of the Bill retains the existing TPA duty to notify the Australian authorities within two days of undertaking a "voluntary" recall, and s128(5) further requires notification thereof – as soon as practicable – to persons outside Australia to whom the goods have been supplied. Yet if an exporter (eg through its corporate presence abroad) is *required* by the export destination state to make a recall in that country, it would be difficult to argue that this is "voluntary", thus triggering notification

[18] For a list (and discussion) of only a few dozen judgments under TPA Part VA since 1992, arguably related to the complexity o substantive and some procedural law, see J Kellam and L Nottage, 'Happy 15th Birthday, TPA Part VA! Australia's Product Liabilit Morass' (2007) 15 *Competition and Consumer Law Journal* 26-73.

[19] See http://www.recalls.gov.au/content/index.phtml/itemId/974650.

[20] See http://www.productsafety.gov.au/content/index.phtml/itemId/971428.

duties under Australian law. The notification obligation on Australian manufacturers should be expanded to encompass such situations, as under the Canadian Bill, at least for regulators in countries that Australia trusts – such as those with which we have an FTA or some other agreement among the relevant regulators.

10. A further difference is that s131(5) requires the written notification to identify the problematic consumer goods and further information on certain matters as set out in subsection (b), such as when they were manufactured or exported, details of the accident and harmed caused and "any action that the supplier has taken, or is intended to take, in relation to the consumer goods". The Australian legislation could add a catch-all provision such as cl14(2) of the Canadian Bill, requiring suppliers to provide "all the information in their control regarding" the relevant incident within two days. It should also extend the disclosure requirement, as under cl14(2), to any person (if applicable) "from whom they received the consumer product" – so that others in the supply chain can take remedial measures and minimise further problems with the goods.

    Section 14(3), setting out further information to be contained in a written report, should also be followed in the Australian legislation by requiring such disclosures any products that Australian suppliers manufacture or import "that to their knowledge could be involved in a similar incident". Again, this would help minimise further problems with similar goods. Redrafting seems especially advisable given that s131(1) of the Bill imposes notification duties only regarding goods "of a *particular* kind" (emphasis added).

    However, to reduce the burden on suppliers at least this sort of information could be reportable "within ten days after the day on which they become aware of the incident or within the period that the Minister specifies by written notice", as under cl14(3) of the Canadian Bill. A blanket requirement of two days, as under s131(1) of the Bill, anyway seems quite inflexible.

11. A final deficiency with the Bill is that it provides no GSP, unlike the EU or for example Hong Kong, where clause 4 of the *Consumer Goods Safety Ordinance* requires suppliers to ensure that goods are safe.[21] Thus, as the Memorandum points out (para 10.179) for Australian suppliers there is "no additional requirement for suppliers to monitor the safety of consumer goods in question or to conduct any follow up investigation on the information reported". They also need not "report each and every time of becoming aware of the same incident, even if the information comes from a difference source each time" (10.185). Yet such information may be highly relevant for regulators – and consumers, as well as

[21] Allan CY Leung, "Hong Kong" in *Product Liability in the Asia-Pacific,* J Kellam (Ed) (3rd ed, 2009) Federation Press, Sydney, at p 162.

suppliers themselves – for example in assessing the likelihood of the accident in fact having resulted from an unsafe product rather than (exclusively) some other cause.

In general, in its 2006 and 2008 reports, the Productivity Commission did not consider that the benefits of adding a GSP to Australia's new law were likely to exceed the costs involved, preferring instead the enactment of more specific product safety obligations. Yet adding an ongoing duty to monitor and report products that suppliers have already informed regulators about seems a narrow extension where benefits involved should outweigh the extra costs.

More expansive disclosures to regulators in Australia seems particularly important given that the Bill does not impose any obligations on suppliers such as those found in cl13 of the Canadian Bill regarding record-keeping (traceability) – let alone obligations owed directly towards consumers. By contrast, Article 5(1) of the EU Directive requires producers to "provide consumers with the relevant information to enable them to assess the risks inherent in a product" (including for example "keeping a register of complaints and keeping distributors informed of such monitoring"), and Article 34 of the Japanese Act states that suppliers shall "collect information on product accidents caused by the consumer products manufactured, imported or retailed by the person and shall endeavor to provide such information properly to general consumers".

Conclusion

Overall, although it is heartening that a new disclosure duty on suppliers has remained on the agenda for Australia, even this brief comparative analysis confirms many problems with the present Bill's provisions. If enacted in its present form, Australia will end up belatedly with the most limited set of disclosure obligations among the world's major economies, which have already beefed up consumer product safety regulation particularly over the last decade. This is unacceptable given the centrality of product related accident and risk information flows for the other product safety measures in the TPA and elaborated in the Bill, such as product bans and mandatory safety standards, and generally for more efficient *and* legitimate "responsive regulation" in this field.[22] "Better late than never" and "anything is better than nothing" are also inadequate criteria for law reform. This may be the last chance to resolve at least some of the deficiencies outlined above, by aligning Australia's new legislation more closely with that of our trading partners, such as the Canadian Bill.

[22] I Ayres and J Braithwaite, *Responsive Regulation* (1992) Oxford University Press, New York; L Nottage, "Product Safety" in *Handbook of International Consumer Law and Policy,* G Howells, I Ramsay and T Wilhelmsson (Eds) (2010) Edward Elgar, Cheltenham, pp 256-94.