

AUSTRALIAN CONSUMER LAW REVIEW 2016

Submission by Gail Greatorex, Product Safety Solutions, Melbourne, Australia

Thank you for the opportunity to make a submission on the Australian Consumer Law. My comments are all on the product safety provisions. They cover the need for

1. a general safety provision for products sold in Australia, and
2. provisions dealing with unsafe product designs sold in Australia for 3D printing

1. General safety provision

The ACL contains no express prohibition from selling unsafe products, including from knowingly doing so. I believe it is important to examine the need for a general safety provision to remedy this situation.

A general safety provision (GSP), as set out in the Productivity Commission's review of the consumer product safety system 2006,¹ involves the creation of an explicit legal obligation to market only 'safe' products.

Mandatory standards and bans exist for a modest number of product categories, but these essentially entail a reactive approach to consumer safety. A more proactive approach to product safety policy/legislation by way of a GSP can be valuable. A range of factors inform such consideration, including:

Changes in the consumer market

The ACCC as product safety regulator has expressed concern, for example, about the trend towards direct sourcing of less expensive products from overseas by retailers of Fast-Moving Consumer Goods (FMCG). These are goods that sell quickly and for a relatively low cost and include goods such as some electronic goods that have become cheaper and until recently were not in this category. The ACCC has reported an increase in consumer injuries and a sharp increase in the number of recalls of FMCG products.

¹ Review of the Australian Consumer Product Safety System, Productivity Commission Research Report, February 2006

A number of other trends are impacting the nature of consumer markets and the safety of products

- increasingly globalised manufacturing and markets
- increasingly price driven competition
- international regulators networks with greater information sharing
- heightened focus on chemical safety in products
- ever-expanding product ranges
- growing online retail and auction sales
- trends toward product customisation
- more educated consumers with higher product expectations
- evolving product technology - more products incorporating electronics/technology

Such trends make it all the more difficult for governments to monitor and influence the safety of products on an operational basis. They also create challenges for individual businesses trying to ensure safety as a 'voluntary' measure. A legislative requirement that applies across the product supply chain is likely to have a stronger impact, providing incentive at all levels and better leverage for governments and businesses alike.

New case law

In the Woolworths case run recently by the ACCC (*ACCC v Woolworths Ltd 2016 FCA 18*) the Court declared that the retailer/importer breached the ACL's misleading and deceptive conduct provisions by selling unsafe products after it had become aware of safety concerns.

This case has created precedent which serves a similar purpose to a GSP, but while it has established application to product safety in certain respects, it does not provide the clear unambiguous requirement for unsafe goods that a GSP would do.

Influencing change

A key element in product safety policy is the message that's conveyed to the business community. Without a GSP, suppliers of most products are far less aware of safety and have far less incentive to give safety priority over business costs and other practical factors.

Compared with 2006 when the Productivity Commission considered a GSP, the product safety resources available to suppliers are now substantially improved. Resources now include the ACCC's Product Safety Australia website, as well as ISO standards on supplying safe products and product recall; a series of ISO Guides; and Standards Australia's Product Safety Framework: Handbook 295. Such material provides access and guidance to all suppliers, facilitating safety in all consumer goods.

Having a GSP in the ACL could engender a much higher awareness of product safety across all suppliers and provide clear motivation to only design, source and supply safe products.

Safety provisions for 3D printing

Background

The commercial market for 3D printers is relatively new and would not have been on the radar when the product safety provisions were last reviewed.

The advent of desktop and other smaller scale 3D printers has seen a growing global market. The market, which consists of 3D printers, 3D printing materials, 3D printing services and 3D printing software, reached US\$4.98 billion in 2015. That market is expected to balloon to US\$30.19 billion by 2022²

The technology is disruptive. It allows product development and manufacturing on a very small scale and in doing so enables a market without the expertise or checks and balances that operate in established consumer product manufacturing.

3D-printed product safety

3D printing allows individuals to manufacture their own products, by using software to replicate an existing product or design a new one. Consumers are purchasing 3D printers for home use, and local commercial print services are also available across Australia. Schools are using 3D printers to train junior designers, manufacturers and entrepreneurs.

Many factors influence the safety of products made using 3D printing. In the hands of an untrained consumer who make products ('prosumer') products may be unfit for purpose (eg. using the wrong raw material for food contact products, incorrect printing infill settings). Prosumers may also unwittingly design and supply new products that create new hazards³.

3D print designs

An associated (online) market for 3D printing *designs* has also developed. Consumers and businesses can download a product design specification that allows them to then make the product on their own 3D printer or have it printed at a commercial 3D printing facility. However, consumers (or businesses) obtaining 3D printing designs online may not be able to assess the safety of the intended end-product.

The supply of product designs (by sale or free download) does not appear to be covered under existing ACL product safety provisions. While manufacturers and other suppliers are obliged/required under the ACL to provide safe and/or compliant *products*, at

² *Research and Markets Predicts Global 3D Printing Market to Reach \$30 Billion by 2022*, Scott J Grunewald, 3Dprint.com, Apr 24, 2016 <https://3dprint.com/131105/3d-printing-market-30-billion/>

³ *3D Printing and Consumer Product Safety*, Gail Greatorex, Product Safety Solutions 2015, <http://productsafetysolutions.com.au/downloads/3d-printing-white-paper/>

present there are no provisions that address the possibility that a 3D print designer can supply (intentionally or otherwise) designs for consumer products that are unsafe.

The ACL's misleading and deceptive provisions to unsafe products, as discussed above, may not apply to supply of product designs.

Design is widely accepted as being the primary determinant of a product's safety. Provisions in the ACL (including potentially a general safety provision) dealing with supplying product designs would enable remedial action where necessary. It would also help motivate and educate designers on factoring safety into their designs.

Safety provisions

Product bans – these currently cover around 20 product types and serve to protect consumers from known hazards by regulating *products* sold. If a 3D print design was available for a product that was non-compliant with a ban, the ACL does not currently appear to allow government intervention.

Mandatory standards – these currently cover around 40 product types and also serve to protect consumers from known hazards by imposing standards on *products* sold.

Mandatory standards are defined as meaning a standard for the goods '*or anything related to the goods*' (s.2). This may allow mandatory standards to include designs for the products it covers, but this is so far untested.

Alternatively, it may be simpler to insert a general provision that says any design sold/supplied for products that are subject to a mandatory standard must be such that they provide for compliant end-products.

(The current suite of mandatory standards do not include reference to product designs and this should be factored into any standards reviews, or preferably inserted proactively).

Recalls – The definition of consumer goods for recall purposes does not appear to include product designs. The recall provisions in the ACL that require businesses to notify the ACCC when conducting a recall, and allow the government to order compulsory recall should be revised to include the recall of unsafe product designs.

Liability provisions

The provisions relating to liability for defective goods do not appear to cover designs for defective goods. The provisions should be reviewed to address the case where an unsafe design has led to injury. This situation has been discussed in the 2016 book *Socio-legal Aspects of the 3D Printing Revolution*, by Dr Angela Daly of Queensland University of Technology.

Beyond the sale of 3D print designs, Dr Daly's book explains the issues involved with applying product liability provisions in the 3D printer making world. These include: liability of prosumers, 3D printer manufacturers, 3D print designers and design

repository websites; issues around supply in trade or commerce and supply of designs free of charge; negligence issues; liability insurance and compensation affordability. The book outlines product liability application to 3D printing in the USA, Europe, New Zealand and Australia.

Recommendations

The ACL review should consider adding product designs to the product safety provisions for mandatory standards and bans; mandatory reporting; and recalls.

Existing mandatory standards should be reviewed for the need to include product designs.

Product liability provisions should be reviewed to accommodate the new ways products come to market via 3D printing.