



Project on Strengthening Technical Competency for Consumer Protection in ASEAN

Product Safety and Labelling

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The overall objective of the project is to enhance the capacities of AMS to adopt and implement consumer protection laws at the national level. The project aims to build/strengthen capacity of government agency personnel through the design, development and delivery of training programs focusing on technical requirements provisionally involving consumer concerns and demands in 6 core areas, namely: 1) Product safety and labelling; 2) Phone and internet services, and e-commerce; 3) Consumer credit and banking; 4) Environment; 5) Healthcare services; and 6) Professional services. For further information about the project, please contact the ASEAN Secretariat, Ms Yap Lai Peng (yap@asean.org) or Ms Sarah Firdaus (sarah.firdaus@asean.org), and Mr. Pierre Horna (pierre.horna@unctad.org), Manager of the Project on Strengthening Technical Competency for Consumer Protection in ASEAN.

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EXECUTIVE SUMMARY

1. An earlier road-mapping study for ASEAN had revealed the absence of a comprehensive product safety regulatory regime in the ASEAN Member States (AMS). In most countries, there is no designated agency exercising responsibility over all consumer products. Common features among the AMS include a focus on specific products or sectors considered high-risk, such as food, pharmaceuticals, cosmetics and pesticides, with ministries other than the consumer protection agency (CPA) having power and responsibilities over these products. In some countries, minimum safety standards exist only for some product groups. There are piecemeal product safety, strict product liability or labeling laws in most AMS, but rarely all three. Yet, as a result of a vibrant cross-border trade between AMS, countries with weaker product safety regimes risk becoming thriving markets for unregulated and sometimes underground trade in unsafe products. Such products do not conform to standards, contain hazardous content or are inadequately labeled in the languages of the countries of origin and not of the country of sale.
2. The main gaps or challenges in the overall regulatory regimes for product safety and labelling in the AMS are as follows:
 - Except in Singapore since 2011, specific minimum safety standards set by the CPA for a wide range of household consumer products and services do not exist, other than high-risk products (such as foods) which are typically subject to specific laws and other regulators (see Part II.2);
 - Except for Malaysia, general consumer laws enforced by the CPA do not provide for a general (back-up) product safety requirement requiring all consumer goods to be reasonably safe (Part 1 – Case Study and Part III.1);
 - Laws on labelling are not focused on product safety issues, but (as in Thailand) they can overlap with laws allowing the CPA to set minimum “information standards” (Parts II.2 and III.3);
 - There are few effective strict product liability laws providing redress to consumers who have suffered harm from goods with a safety “defect”, despite enactments in five AMS (Part II.2), even in the few AMS where collective redress mechanisms have been introduced (including US-style class action regimes in Indonesia and recently Thailand: Part V.3);
 - There is limited data collection and sharing regarding recalls of general consumer goods (except recently in Vietnam: Part V.5), let alone accidents more generally and other risks relating to consumer products (Part VI.3).
 - There is insufficient inter-agency cooperation and coordination on safety-related measures, nationally and across borders (Part VI.4).



PART I THE ROLE OF THE CPA

Key Learning Outcomes for Part I:

- *What are the main aims of a product safety regulatory regime?*
 - *What is the jurisdiction of the CPA over various types of consumer goods?*
 - *If limited or shared for some products, how does the CPA interact with other authorities and the general public?*
-

1. The marketplace is not hazard-free. Almost every consumer product can contain hidden dangers unknown and invisible to the consumer. Indeed, accident and injury reporting data from other countries reveal all manner of safety deficiencies with household consumer products such as exploding pressure cookers, electrical appliances that cause electric shocks, children's toys that contain toxic chemicals or small parts that present choking hazards, and so on. The dangers in some products such as pharmaceuticals may not manifest until after many years of use.
2. The main aims of a product safety regulatory regime are to:
 - protect consumers from unreasonable risk of damage to property or personal injury;
 - provide redress for consumers who suffer damage or injury;
 - incentivize producers to produce safe products that comply with minimum standards;
 - punish errant producers for placing unsafe products in the market;
3. Ultimately, a strong and effective product safety regime will result in increased trust in consumer goods markets as well as enhanced business efficacy and competitiveness, including more scope for domestic producers to access international markets that require products to conform to internationally recognized safety standards.
4. In most AMS, however, the CPA is not directly or primarily responsible for specific products such as food, cosmetics and pharmaceuticals which usually come within the purview of the Ministry of Health, or vehicle safety which is the responsibility of the Ministry of Transport, or agricultural products (including sometimes pesticides) which usually come under the jurisdiction of the Ministry of Agriculture. This is especially true with respect to (pre-market) regulatory powers to mandate minimum safety standards for goods, which are exercised only or primarily by other government ministries or agencies (see Part III below). In addition, the CPA may have (post-market) powers to ban or recall products later found to be unsafe, but even then it



may only be able to do so for the particular supplier and their products which have given rise to an actual or likely harm (Part IV).

5. Nevertheless, consumers are usually not aware of such distinctions and refer complaints on all types of consumer products to the CPA. This makes the CPA the *de facto* agency that consumers turn to for advice and representation. Therefore, even though the CPA does not have direct responsibility for all consumer products, it does become a referral agency for all consumer products. This is an important role as it gives the CPA an opportunity to collect data on unsafe products and to advise consumers on the course of action they need to take with respect to redress, as well as to refer them to the correct or more appropriate agency that can assist them with their problems.
6. Very exceptionally, if the Consumer Protection Act provides for a general safety requirement for all products (see the case study of Malaysia below), even those that are within the purview of other Ministries, consumers are then legally protected and can expect the CPA to take action that is required by law. More often but still rarely among AMS, the CPA may also have powers to set specific safety standards for certain types of high-risk consumer goods, such as baby products (the CPA in Singapore has broad powers since 2011: see Parts III.1 and III.2 below). Sometimes these powers are effectively only powers to set minimum information / warnings to be displayed on goods, through labeling laws, but not powers for the CPA to set minimum performance standards to ensure the safety of such goods in other respects (as in Thailand, discussed in Parts III.2 and III.3 below).
7. The scope of products that come within the jurisdiction of the CPA is usually found in a general Consumer Protection Act (see the appended **Glossary** for key terms/definitions). It is important that at a minimum all products used by consumers for household and domestic purposes are included within this definition. (The definition of products should also include services, and often does in AMS.) The definition employed for products will then have implications for the responsibility of the CPA for safety issues relating to these products.

Preliminary Training Exercise:

Look for the definition of products as well as for a general safety requirement for product safety in the Consumer Protection Act of your country (or equivalent). If there is NO provision for a general safety requirement (requiring that all consumer products placed on the market be reasonably safe: see s20 of Malaysia's Act below, as well as s19(4)), check if it contains a power for the CPA to set minimum safety standards for specific products (also



found in s19(1)-(2)), or at least to coordinate with other government departments in standard-setting, and whether in fact this occurs.¹

If such powers are unavailable or limited under the Consumer Protection Act, then it is most likely that the safety for specific consumer products will be covered under other specific laws such as the Food Act or Medicines Act, etc. In such a case, products not covered by specific laws will not be legally required to be safe for consumption and the CPA will have not have the legal authority to take (formal) action against producers of unsafe products.

Case study: Malaysia - Consumer Protection Act 1999

Section 3(1)

... "goods" means goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes -

- (a) goods attached to, or incorporated in, any real or personal property;
- (b) animals, including fish;
- (c) vessels and vehicles;
- (d) utilities; and
- (e) trees, plants and crops whether on, under or attached to land or not, but does not include choses in action, including negotiable instruments, shares, debentures and money;

Section 19. Safety Standards

- (1) The Minister may by regulations prescribe the safety standards in respect of -
 - (a) any goods or class of goods; and (b) any services or class of services, and may prescribe different safety standards for different goods or services, or classes of goods or services.
- (2) The safety standard in relation to goods may relate to any or all of the following matters:
 - (a) the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods; (b) the testing of the goods during or after manufacture or processing; (c) the form and content of markings, warnings or instructions to accompany the goods.
- (3) For the purposes of subsection (1), the Minister may, on the recommendation of the Controller and with consultation with the competent agency -
 - (a) adopt in whole or in part the safety standard used by the competent agency; or
 - (b) obtain advice from experts in the relevant field.

¹ Compare your analysis with the Appendix hereto, as well as the more detailed Appendix found in: Nottage, Luke R., ASEAN Product Liability and Consumer Product Safety Regulation: Comparing National Laws and Free Trade Agreements (February 7, 2015). Sydney Law School Research Paper No. 15/07. Available at SSRN: <http://ssrn.com/abstract=2562695>



- (4) Where no safety standard has been prescribed under subsection (1), the person supplying or offering to supply the goods or services shall adopt and observe a reasonable standard of safety to be expected by a reasonable consumer, due regard being had to the nature of the goods or services concerned.
- (5) In this section, "competent agency" means any person, body or authority that has determined or has the expertise to determine safety standards for any goods or services.
- (6) This Part shall not apply to healthcare goods and food.
- (7) For the purpose of this Part, "healthcare goods" means any goods used or intended to be used, provided or intended to be provided or prescribed or intended to be prescribed in the provision of healthcare services.

Section 20. Compliance with safety standards

No person shall supply, or offer to or advertise for supply, any goods or services which do not comply with the safety standards determined under section 19.

Section 21. General safety requirement for goods

In addition and without prejudice to section 20, no person shall supply, or offer to or advertise for supply, any goods which are not reasonably safe having regard to all the circumstances, including -

- (a) the manner in which, and the purposes for which, the goods are being or will be marketed;
- (b) the get-up of the goods;
- (c) the use of any mark in relation to the goods; and
- (d) instructions or warnings in respect of the keeping, use or consumption of the goods.

-
8. Overall, the situation across AMS regarding the CPA's powers under general consumer laws to engage in pre-market and post-market controls with respect to consumer goods are summarized in the **Appendix**. (It is beyond the scope of this module to compare and examine in detail the powers of other regulators, under sector-specific regimes for higher-risk products such as medicines or foodstuffs, but their interactions with the CPA and general consumer product safety law are mentioned.)
 9. What are the options available to the CPA if there is no general safety requirement, or (widely used) specific safety standard-setting powers, under its general consumer protection law? Alternatives include relying on other legal provisions such as obligations on suppliers to provide goods that are of merchantable quality or (also for most services) "fit for purpose" (Part II below). However, the limitation for such provisions is that these create private law rights provided to the consumer, and usually do give a power to the CPA to enforce them (except sometimes where further



provisions allow for it to bring a “representative” lawsuit on behalf of a consumer, or get involve in mediation of disputes where a consumer seeks compensation or other rights for the supplier violating such private law rights). Therefore, the CPA is largely reduced to an advisory role, to inform and educate consumers of their right to products that meet a reasonable standard of quality and safety.

10. The advisory role of the CPA also extends to educating business of their responsibility to supply or sell products that meet reasonable standards of quality and safety. This can be done on an industry or sector basis, where consultations can be held with the trade association to develop codes of conduct that also address quality and product safety issues.

Further general readings:

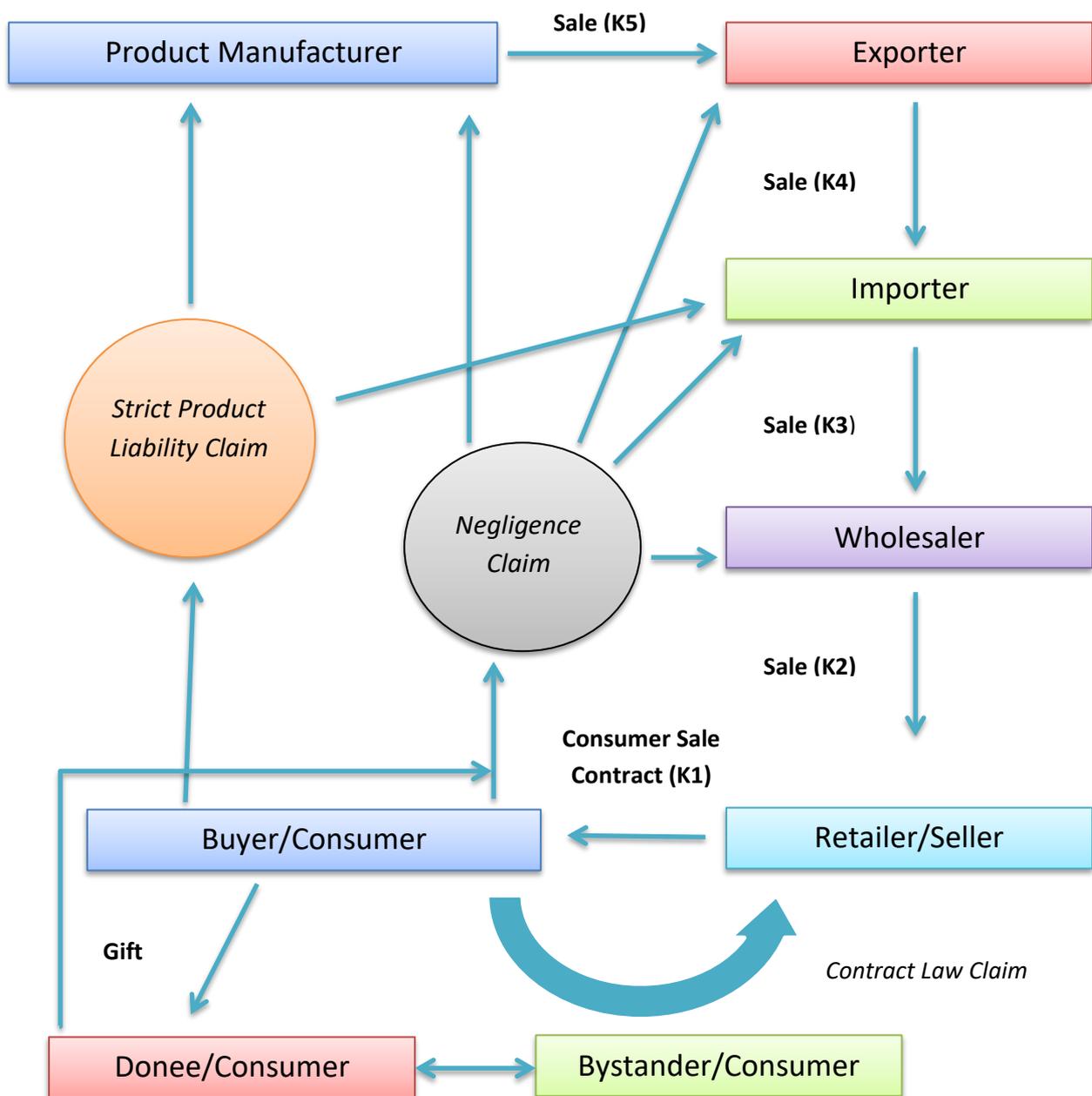
- Nottage, Luke R., ASEAN Product Liability and Consumer Product Safety Regulation: Comparing National Laws and Free Trade Agreements (February 7, 2015). Sydney Law School Research Paper No. 15/07. Available at SSRN: <http://ssrn.com/abstract=2562695>
- Nottage, Luke R., ASEAN Consumer Product Safety Law: National Laws and Free Trade Agreements – Case Study for ASEAN-Australia Development Cooperation Program Phase II: Supporting Research and Dialogue in Consumer Protection, forthcoming 2015 via <http://aadcp2.org/supporting-research-dialogue-on-consumer-protection/>
- Nottage, Luke R. and Thanitcul, Sakda (eds) *ASEAN Product Liability and Consumer Product Safety Law* (Bangkok: Winyuchon, forthcoming early 2016 in English and Thai translation) [3 introductory chapters and 10 country reports]

PART II PRIVATE LAW RIGHTS IMPACTING ON CONSUMER PRODUCT SAFETY

Key Learning Outcomes for Part II:

- *How can consumer contract law encourage direct sellers, and others further up the supply chain, to deal in safe products?*
 - *What are the main approaches taken by consumer contract law to restrict terms that may interfere with this function?*
 - *Can manufacturers, importers and other intermediaries in the supply chain also be encouraged to deal in safe products because of liability exposure for negligence, or strict liability for products which have a safety defect?*
 - *Especially under the latter product liability laws, what are the main categories of product safety defect, defences to liability, and scope of claimable damages?*
-

11. Private law usually provides consumers with rights to compensation and/or other relief if physically harmed or they suffer other losses, for example from unsafe goods. The possibility of consumers bringing such claims through the courts or other dispute resolution mechanisms should incentivise suppliers to put only safe products on the market, but this depends on how easy it is in theory and practice for consumers to pursue claims. Both contract law and tort law can be relevant, as illustrated in the following Diagram and outlined further below.





12. *Contract law* applies if the consumer has an agreement directly with a supplier – typically, the retailer (as in sales contract K1 in the Diagram above). If an unsafe product is supplied, the purchaser usually has a strict liability claim at least in relation to the diminished value of the product. The supplier can then typically seek reimbursement from its own supplier, so ultimately the manufacturer should bear responsibility for the losses suffered by the consumer. However, in some legal systems (eg following the continental European civil law tradition) the liability of intermediate suppliers may be limited if they are not negligent, at least with respect to consequential property losses associated with the unsafe goods. It may also be possible (even in countries following the Anglo-American common law tradition) for contracts between commercial suppliers to limit liability among themselves by express agreement, in which case the final supplier may be more reluctant to compensate the consumer. The final supplier may also seek to expressly exclude or limit its own liability to consumer.
13. To address this problem, many AMS now at least restrict this possibility in contracts concluded between suppliers and consumers (sales contract K1 in the Diagram above). Sometimes this is done by rendering void any purported exclusion or limitation clauses, leaving the background contract law obligations to supply goods that are of “acceptable” or “merchantable” quality, and “fit for purpose” disclosed by consumers before entering into the contract. Other AMS void “unfair terms” more generally, including for example terms that require consumers to perform certain things in order to benefit from the contract. Because safety defects may breach obligations to provide merchantable and/or suitable products, regulation of limitation clauses or broader unfair terms can provide damages or other relief to consumers as well as incentivizing their suppliers to source safer products from those further up the supply chain (e.g. under sales contracts K2, K3 etc: see further II.1 below).
14. However, contracts between commercial suppliers (e.g. sales contracts K2, K3, K4 or K5 in the Diagram above) may still contain valid clauses limiting the liability of earlier suppliers or the original manufacturer. Intermediaries (eg the wholesaler) may also go bankrupt and therefore cannot be effectively sued. Consumers may also find it simpler to join together and make multiple claims against the original manufacturer, if they suffer similar harm from similar goods. Then the difficulty is that the consumer(s) must generally prove fault or lack of due care in manufacturing, under the *law of tort* (delict) rather than the law of contract, and this is difficult in practice. It is even harder to prove *fault or negligence* when suing intermediate suppliers, even an importer from an actual manufacturer. Accordingly, many countries (including AMS) have recently enacted product liability statutes that allow consumers (including purchasers, but also donees receiving gifts or bystanders who may be harmed by unsafe products) to sue actual manufacturers, importers and certain other intermediary suppliers on a *strict liability* basis. This means that consumers only need to prove



that they suffered physical harm and/or specified other non-physical damages caused by goods that contain a safety “defect” (see Part II.2 below).

II.1 Limitation of Liability or Exclusion Clauses and Other Unfair Contract Terms

15. Contract terms are meant to be private and negotiated between the parties concerned. However, not all contract terms are freely negotiated between the parties and a good example is the standard form contract. There are many everyday consumer transactions that are governed by standard form contracts where the consumer is not in a position to bargain over the terms of the contract. Such contracts can contain terms that are harsh and unreasonable to the consumer. The law then steps in to mitigate the harshness of the terms by stating that such terms are not actionable and become void even if they appear in contracts. In this manner, the law seeks to equalize the power of the supplier over the consumer.
16. One such unfair contract term which has a direct impact on product safety is the term that limits or excludes the liability of the producer when the product causes damage, personal injury or death even if it is as a result of the negligence of the producer. Unfair contract term laws usually prohibit such terms outright, so they become illegal and unenforceable. But not all countries have in place such unfair contract terms provisions in their consumer protection law.
17. A second possibility, found especially in jurisdictions influenced by the English common law tradition (including some AMS, such as Malaysia and Singapore), is that laws provide consumers certain minimum statutory warranties or guarantees, and then prohibit any attempts for suppliers to contract out by getting consumers to agree to waive such rights. One such minimum standard is that goods be of “merchantable” or “acceptable” quality. The statute may then expressly include a requirement for goods shall be “safe” (as also under the Australian Consumer Law derived from New Zealand’s Consumer Guarantees Act, which is based on some Canadian statute law). Another minimum standard is that goods be “fit” or suitable for a pre-disclosed purpose. Courts have often interpreted this statutory requirement as including safety for consumers. They have also emphasised that the “purpose” for using the goods can be disclosed by the consumer to the supplier, before making the contract, impliedly as well as expressly. This means the consumer does not need always to inquire beforehand about the safety of goods, if that is an obvious concern when negotiating the purchase, in order to get the benefit of the “fitness for purpose” protection.
18. Of course, these and other requirements (such as that goods comply with descriptions given by the supplier) may involve more than just product safety issues. For example, a colour television is expected to show moving pictures in colour and produce sound effects of an acceptable quality but if it shows only black and white



images and the sound quality is poor, then the consumer can reject it as it does not meet the trade description and (probably) lacks fitness of pre-disclosed purpose. This has nothing to do with the safety aspects of the television.

19. If there a safety problem does arise, such as the television catching fire soon after purchase, the consumer can claim relief for violations of the statutory minimum obligations. Under section 50 of Malaysia's Consumer Protection Act 1999, the consumer can even claim damages directly against the manufacturer (not just the retailer it bought the unsafe goods from), for violating the guarantee of acceptable quality set out in section 32(2)(a) but not for violating the fitness for purpose guarantee (owed therefore only by the retailer or direct seller). In Singapore, under a "lemon law" amendment in 2012, the consumer can claim against the retailer for violating either statutory guarantee simply by showing that the goods failed within 6 months of purchase. However, such relief is limited to repair or replacement of the goods (section 12C), reduction in the value paid due to the defect, or rescission of the contract and then refund of the purchase price (section 12D). It does not allow claims for damages for any further harm suffered by the consumer, such as personal injury or losses to the consumer's other property.²

**Case study: Singapore – Consumer Protection (Fair Trading) Act (Chapter 52A)
Revised Edition 2009**

12B.

- (1) This Part applies if —
- (a) the transferee deals as consumer;
 - (b) the goods do not conform to the applicable contract at the time of delivery; and
 - (c) the contract was made on or after the date of commencement of section 6 of the Consumer Protection (Fair Trading) (Amendment) Act 2012.
- (2) If this section applies, the transferee has the right —
- (a) under and in accordance with section 12C, to require the transferor to repair or replace the goods; or
 - (b) under and in accordance with section 12D —
 - (i) to require the transferor to reduce the amount to be paid for the transfer by the transferee by an appropriate amount; or
 - (ii) to rescind the contract with regard to the goods in question.
- (3) For the purposes of subsection (1)(b), goods which do not conform to the applicable contract at any time within the period of 6 months starting from the date on which the goods were delivered to the transferee must be taken not to have so conformed at that date.
- (4) Subsection (3) does not apply if —
- (a) it is established that the goods did so conform at that date; or
 - (b) its application is incompatible with the nature of the goods or the nature of the lack of conformity.

² See generally Loke, Alex, The Lemon Law and the Integrated Enhancement of Consumer Rights in Singapore [2014] *Singapore Journal of Legal Studies* 285.



20. A third possibility for limiting limitation clauses inserted in contracts to restrict claims by consumers regarding unsafe products, which is found especially in countries following the European civil law tradition or otherwise influenced by developments within in the European Union, is that private law has a general prohibition of a standard-form consumer contract term that is “unfair”. This is typically defined broadly as a term that creates a substantial imbalance in the parties’ rights and obligations, which it would be contrary to good faith to enforce. The statute may then include a “black list” of terms that are deemed unfair, such as those attempting to exclude liability for personal injury caused by goods supplied, and a “grey list” of terms that may fail the unfairness test (depending on the circumstances surrounding the negotiations and/or the overall contract). The grey list may include terms that impact especially on consumer product safety, such as requirements for consumers to bring claims within tight time limits or including extensive evidence of product failures.
21. In countries where no statutory or background (case law) protection exists for consumers against unfair contract terms, then the only option available is for the CPA to educate and inform consumers to be aware of unfair contract terms when they purchase products and not to accept standard form contracts without reading the terms. If they find that there are terms that are unfair and unreasonable, they should bring this to the attention of the CPA. The CPA may then try to mediate with the producer to remove or alter such clauses. However, this may be difficult unless it has statutory powers to represent the consumer in litigation to have the courts strike down unfair terms (as eg in Thailand), or to require sectors or types of (essential) products and services to be supplied on the basis of standard form contracts that are pre-approved by the CPA or a sector-specific regulator (as eg in Vietnam).

II.2 Product Liability Laws

22. When a product has caused loss, personal injury or death, product liability law addresses issues of who is liable and what defences are available to the producer. The aim of product liability law is to compensate those who have suffered, and sometimes even to punish those who have caused the harm. It is also meant to be a deterrent to prevent producers from selling or supplying defective products as they will have to face legal claims which can ruin their brand reputation, as well as causing them enormous losses if they are faced with a large group of affected consumers all claiming together in a “class action” or other collective lawsuit (explained in Part V.3 below).
23. Before the modern product liability laws came about, the consumer was at a disadvantage because the only causes of action available were based on contract



law or the law of negligence (tort). The claim based on contract is deficient because it relies on the concept of privity of contract. This means that there must be a direct relationship between the buyer/consumer and the producer, which is quite unlikely in modern economies as producers (even in an internet era) mostly sell their products through intermediaries such as retailers or distributors. Also, a contractual relationship exists only between those who directly bought and paid for the product and the retailer who sells it; not with the producer who is further up the chain of distribution or users of the product who did not buy it themselves. The law of negligence on the other hand relies on proof of fault, meaning that the claimant has to show in what way the producer has been negligent and failing in its duty to produce a safe product. Without intimate technical knowledge of the production process for the product, and related evidence, it would be almost impossible for the claimant to show how and in what way the producer has been negligent.

24. To overcome these difficulties, modern product liability laws increasingly impose a strict liability regime, which means that the claimant does NOT have to prove that the producer is at fault. All that needs to be proved is that the product has a safety “defect” and that defect caused the loss or injury. However, the burden of proof is usually still on the consumer to show that there is a defect and the defect caused the loss or injury. This is the position under EU law, in turn derived from earlier US case law, which has influenced statutory enactments of strict product liability laws in several Asia-Pacific economies including the Philippines (1992), Malaysia (1999), Cambodia (2007, but in force from 2011), Thailand (2008, after law reform discussions from 2000), and Vietnam (2010).
25. Indeed, compared to the EU law model, strict product liability statutes in these AMS mostly expand the liability of manufacturers (typically including manufacturers) in various potentially significant ways.³ For example, in the statutes enacted in Thailand and the Philippines (as also in China and Taiwan), the consumer does not have the full burden of proving that the goods were unsafe because they had a defect. The supplier, which typically has much better access to relevant information, must instead prove goods were safe, to avoid liability. In Vietnam, at least one commentator argues that the 2010 Consumer Protection Law should be interpreted so that traders

³ See further http://blogs.usyd.edu.au/japaneselaw/2014/11/product_liability_asean.html and generally Kellam, Jocelyn (ed) *Product Liability in the Asia-Pacific* (Federation Press, 3rd ed 2009). A table summarizing key differences in strict liability statutes enacted by AMS compared to the EU law is also set out in: Nottage, Luke R., ASEAN Product Liability and Consumer Product Safety Regulation: Comparing National Laws and Free Trade Agreements (February 7, 2015). Sydney Law School Research Paper No. 15/07. Available at SSRN: <http://ssrn.com/abstract=2562695>.



have the burden of proving their products are not defective, once consumers prove product-related damages.⁴

26. An intermediate approach, less advantageous to consumers compared to strict liability statutes based on the EU model, is taken in Indonesia's Consumer Protection Law 1999. This provides for fault-based rather than strict liability, but subject to a reversed burden of proof. Thus, unlike the general Indonesian Civil Code provisions on negligence, the manufacturer has to prove that it was *not* at fault, if unsafe products harm consumers.⁵

II.2.1 Types of defects

27. A product can be unsafe not only because there is something physically wrong with it. Products can be unsafe as a result of the packaging or labelling or other deficiencies that make the use of the product hazardous. The types of defects that are claimable will depend on what was set out in the provision on general safety requirement.

28. Generally, product liability laws address the following three major categories of defects, although it is rare for statutes to separate them out expressly (unlike the 1997 US *Restatement 3rd of Product Liability*, or article 3(3) of Vietnam's Law on the Protections of Consumers 2010⁶):

- Manufacturing defect – these are defects that occur as a result of error during the manufacturing process or by the use of defective raw materials. The manufacturing error may have caused some products to come off the assembly line with substandard quality and not meeting the design specifications for that

⁴ Anh, Pham Thi Phuong, 'Vietnamese Law on Consumer Protection', (June 2013) *Vietnam Law & Legal Forum* 16 at p20.

⁵ See Article Art 19(1), subject to Article 28; and generally <http://www.iclg.co.uk/practice-areas/product-liability/product-liability-2015/indonesia> and <http://www.hnrlawyers.com/files/hhr-oct04.pdf>.

⁶ "Defective product" means a product that does not satisfy the safety for consumers, possibly causes damages to consumers' lives, health and assets, even in case when the product manufactured right under the existing standards or regulations that has not detected defect yet at the time of selling to consumers, included:

- a) The product manufactured serially which its defectiveness arisen from technical design;
- b) Single defective product having its defectiveness arisen from the process of manufacturing, processing, transporting and maintaining;
- c) The product which has the implicit risk of un-safety during the process of using without fully guiding, warning for consumers."



product. Products are usually checked when they come off the assembly line but it is not always easy to pick out the ones with the manufacturing defect.

- Design defect – these are defects where the whole product line or a specific component in a product is deficient and hazardous. Design defects could be due to any number of problems such as poor construction materials, inadequate testing, etc.
- Labelling or warning defect – this is a failure to include adequate warnings or instructions for use that then make the use of the product hazardous to the consumer. There are three types of warning defects – failure to warn, failure to provide an adequate warning and failure to instruct. The warning given must be adequate to protect any and all foreseeable users of the reasonably foreseeable dangers in the product. This duty also extends to bystanders, as with other types of defects covered by product liability laws. The adequacy of the warning or instructions is a factual determination that the courts will make depending on the circumstances of each case and may be based on decisions in previous court cases.

Labelling or warning defects under product liability laws may also contravene consumer protection laws dealing more generally with misleading advertising claims or imitation/counterfeit products. Conversely, since 2003 in Singapore and 2011 in Brunei, damages (and other relief) may be claimed by consumers for misleading statements on a strict liability basis, and such legislation might be used by consumers to claim against manufacturers (and indeed others in the supply chain) at least for safety defects with respect to warnings or instructions, even though these jurisdictions would still require proof of negligence to establish liability for design or one-off manufacturing defects.

29. Commentators sometimes also refer to the following types of defect:

- Packaging defect – the product may not be packaged safely, causing it to become defective or hazardous when it reaches the consumer. This may be a one-off manufacturing defect, a design defect (affecting for example the ingredients within the package), or a labeling defect (where the warnings are or become inadequate before the product is consumed).
- Development risks defect – the defect only comes to light after the product has been marketed. The risks associated with this type of defect are not known at the time of marketing but, if known, would have prevented the product from being marketed in accordance with current standards of safety at the time of marketing.



- State of the art defect – these defects are acceptable at the time of marketing but become less acceptable with time as new safer alternatives may already be available.
- Post-marketing defect – this is a failure on the part of the producer (or at least some intermediate suppliers) to take remedial action, recall the product or issue warnings after a danger has been detected. These involve hazards that become known to the producer after the products have been sold that the producer would not have reasonably known or expected to know before selling the product. Strict product liability laws usually do not impose liability for not conducting recalls, but producers may be held liable for lack of care under the general law of negligence, if they become aware of actual or probable serious harm suffered by consumers.

II.2.2 Defences to Liability

30. Product liability law allows the producer to plead certain defences in order to protect the producer from claims that are unreasonable or frivolous. The common defences allowed by law are:

- State of the art or development risks
This defence is based on the fact that producer has complied with the state of technical and scientific knowledge in existence at the time the product was manufactured and marketed. The liability of the producer is based on the standard at the time the product was manufactured and not at time of the injury.
- Product recalled
When the producer has conducted a voluntary recall (see generally Part IV.5 below), there is less risk of consumers suffering harm so liability is limited to some extent, but the producer is not totally absolved from all liability. To avoid liability under the general law of negligence, the producer will have to show all reasonable attempts and efforts have been made to inform consumers of the recall of the defective products and administer the recall effectively. If consumers nonetheless suffer harm, they generally may still seek compensation under strict liability laws.⁷
- Disclaimer of liability
If the disclaimer is disclosed before purchase and reasonable then the liability of the producer will be reduced accordingly, but only in the (unlikely) event that

⁷ Article 61.2(c) of Vietnam's Law on the Quality of Products and Goods exempts manufacturers and importers from liability where they have issued a proper public recall notice before harm arises, but this appears to be an exemption from sanctions by regulators rather than damages owed to consumers who are actually harmed.



there exists a contract directly between the producer or importer and the consumer. In addition, if the disclaimer is too broad and is against public policy or contained in a standard form contract where the consumer did not have an opportunity to negotiate the terms, laws on unfair contract terms (or sometimes the product liability statute itself, for example in Thailand) may result in the disclaimer being declared void by the court.

- **Statute of limitations**

The law requires an injured person to commence an action for personal injury within a specified period of time. One has to read the product liability law or other statutes to check whether the claim has to be filed within a specified number of years from date of purchase of the product or from the date of the injury, and/or from when the product was first marketed or put into circulation. In some cases, such periods may be extended because the nature of the injury is such that will not manifest until after a much longer period. A good example is pharmaceuticals where adverse effects may be building up in the body over many years and may not be noticeable until after a long time.
- **Compliance with other laws and regulations**

A strict liability statute or background general law will usually exempt producers from liability if they can show that the defect and harm arose due to compliance with mandatory standards set by the government, although such situations should be rare.
- **Consumer-assumed risk, contributory negligence, product misuse**

Under normal circumstances, the producer will not be able to claim the defences that the consumer assumed the risk and is contributorily negligent as strict liability is not based on who is at fault. However, there are certain situations where the court will take into account the plaintiff's conduct. They may include:

 - Negligent failure to discover the defective condition of the product;
 - Use of the product even after discovery of the defect;
 - Use of the product in a manner that could not have been reasonably foreseeable by the producer.

II.2.3 Scope of Damages and Other Incentives to Claim

31. It is also important to determine the scope of compensable damages, especially under strict product liability statutes. For example, in Cambodia (as in Japan, Taiwan and Korea), plaintiffs can claim for personal injury and *all forms* of consequential property loss. Thus, if a television set catches fire and burns down office premises and other equipment, the plaintiff (business operator) can claim



compensation against the television manufacturer for damage to those premises and equipment.

32. By contrast, Malaysia's Consumer Protection Act section 69(1)(c) follows the law in the EU: plaintiffs can only be awarded damages for personal injury and to property (other than the defective product itself) that is ordinarily and actually *intended for personal or household use* (such as a family home, if burned down due to a defective television). In parallel, however, section 51 also allows anyone to claim against the manufacturer for *all types of consequential damages* caused by a lack of "acceptable quality" (including safety: section 32) in a consumer good (defined in section 3 to mean a product ordinarily for personal use, and not for resupply or using up in a manufacturing process). To this extent in Malaysia (as also e.g. in Australia), and more broadly in Cambodia, other firms (not just individual consumers) can therefore sue for certain "business losses" caused by unsafe products.
33. At the other end of the spectrum, article 23(1) of Vietnam's Law on the Protection of Consumer Interests 2010 requires manufacturers to 'compensate damages caused by their defective product with regard to lives, health, and *assets of consumers*, even in case traders do not know or have no fault in causing defect' (emphasis added). Thus, similarly to the situation in the EU, plaintiffs cannot claim for "business losses" (such as office premises and equipment burned down due a television catching fire).
34. Thailand's Product Liability Act 2008 encourages more claims in a different way. It allows additional ('punitive') damages to be awarded to plaintiffs, similarly to laws in Taiwan and China, but capped at multiples of the amount of damages needed to compensate the plaintiffs for their actual losses. Thailand's statute also allows the government's Consumer Protection Committee, or NGOs it certifies, to bring representative suits on behalf of harmed consumers. (Vietnam and Indonesia, for example, also provide for certified NGOs to bring representative suits under general consumer protection laws, as mentioned further in Part V below.) Thailand has also enacted the Consumer Case Procedure Act 2008 that provides for how product liability and other consumer claim cases will be procedurally managed by the courts. This is quite unique as it goes beyond the normal parameters to assist aggrieved consumers to access the courts for redress (see Part V.1 below).
35. Singapore has enacted a "Lemon Law" for defective products - the Consumer Protection (Fair Trading) Act 2009. This law provides another option for dealing with defective products (Part II.1), which is not yet found in any of the other AMS. However, relief available excludes damages, and at present it only allows claims against direct sellers (not manufacturers or others with no contractual relationships with consumers).



Case Studies – Hospital Accidents

Often an injury can arise, for example where a patient is admitted to hospital for surgery or other treatment, due to a combination of circumstances which makes it hard for the plaintiff to pursue a claim even under a strict liability regime. The situation may involve multiple products, and/or possible negligence by the doctors or hospital (i.e. inadequate healthcare services, focused on in a separate Module), as illustrated by these two cases faced by Japanese courts:⁸

(i) A super-fine catheter being used in surgery to reduce a deformity in a patient's brain broke off, causing chemical matter to flow throughout the brain and leading to cerebral infarction. The plaintiff sued both the catheter's importer under Japan's Product Liability Law 1994 (based on the EU model, and similar to the strict liability provisions in Cambodia's Civil Code),⁹ as well as the hospital and surgeon for negligence.¹⁰

(ii) Two pieces of equipment - a tracheal tube and a fresh gas supply pipe - used during an infant tracheotomy, each produced by different medical companies, were incompatible, causing one of the pieces - the tube - to close up, resulting in the death of the infant during surgery. The infant's family sued both medical supplies companies and the hospital. It was discovered during trial that at least two other

⁸ Adapted from: Luke Nottage & Masanobu Kato, "Product Liability and Safety Regulation", *CCH Japan Business Law Guide* (looseleaf, Singapore, 2000-1 and 2007 updates); also reprinted in Luke Nottage (ed) *CCH Business Law in Japan, Vol. 1* (2008, Singapore/Tokyo, CCH).

⁹ Japan's Product Liability Act 1994 is available at: <http://www.consumer.go.jp/english/pla>. Cambodia's Civil Code Art 751 (Product Liability) states:

(1) Where an unreasonably dangerous defect exists in a manufactured movable and harm results to another due to such defect, the manufacturer of the movable is liable for damages. However, this shall not apply where the defect could not have been discovered based on the scientific standards existing at the time of manufacture. (2) The manufacturer of a movable that incorporates a defective part or material is also liable for damages as a manufacturer. (3) For the purposes of this Article, the importer of an imported movable shall be deemed the manufacturer. (4) For the purposes of this Article, a person who affixes his name on a movable as a manufacturer or distributor shall be deemed the manufacturer.

¹⁰ The Tokyo District Court decided (19 September 2003, reported in 1843 Hanji 118): the hospital and surgeon were not negligent, as it was unable to find proof that the surgeon had applied an unusual amount of pressure to the catheter or bent it too far, as submitted by the importer. However, the Court found the importer liable under the PL Law (for 117,000,000 yen), given that the catheter had been recalled in the US, where it was manufactured, and that the US FDA had provided statistics about past accidents involving the catheter. It held that provided the surgeon had not applied an unusual amount of pressure or used the catheter in an appropriate form, it had to be inferred that the catheter had been made in such a way as to incapable of resisting breakage.



infants had died under similar circumstances but with a different piece of equipment. Akoma, the maker of the fresh gas supply pipe, carried warnings of its incompatibility with the other product on its box, but not of its incompatibility with the tracheal tube. Taiko, the maker of the tube, had no such warnings. It was also found that a journal article published several years earlier had warned of the incompatibility of the equipment in question.¹¹

How would the CPA and ultimately a court in your AMS deal with such complaints from injured consumers?

Further general readings:

- Hawes, Cynthia et al, Sales and Guarantees, in: Howells, Geraint et al (eds) Handbook of Research on International Consumer Law (Cheltenham: Elgar, 2010)
- Howells, Howells, Comparative Product Liability (Aldershot, Dartmouth, 1998)
- Kellam, Jocelyn (ed.), Product Liability in the Asia-Pacific (Sydney: Federation Press, 3rd ed 2009)
- Nottage, Luke, Product Liability, in: Consumer Protection Digests and Case Studies: A Policy Guide (Jakarta: ASEAN Secretariat, November 2014). Available at <http://aadcp2.org/file/ConsumerProtectionDigestsPlcyGuideV1.pdf>
- Paterson, Jeannie, Case Study: Regulating Unfair Contract Terms in ASEAN Member States, in: Consumer Protection Digests and Case Studies: A Policy Guide (Jakarta: ASEAN Secretariat, November 2014). Available at <http://aadcp2.org/file/ConsumerProtectionDigestsPlcyGuideV1.pdf>

¹¹ The Tokyo District Court awarded 50,620,000 yen as follows (20 March 2003, reported in 1846 Hanji 62; 1133 Hanta 97; settled on appeal, along with a second suit involving the same hospital and same incompatible devices). Neither product was held to be defective of itself, but the products were held to be faulty for failing to warn of the incompatibility with the other, when it could be foreseen that the two products in question would be used together. Akoma's incompatibility warning about the third piece of equipment was held not to encompass Taiko's tracheal tube.

The medical staff were also found to be negligent under the Civil Code for not having previously tested the compatibility of the equipment. They could have foreseen the problem despite each device complying with industrial standards and having been approved by the Ministry of Health, and could have avoided the problem despite the instructions not specifying testing methods.

The Tokyo District Court rejected the development risks defence raised. Reports of similar accidents, including one outlined in a medical journal and a broader FDA warning in the US, ought to have been enough to establish the mechanism causing the accident, and most of the incidents had involved equipment produced by the manufacturer or its predecessor company. In addition, the Court rejected what was in effect a 'learned intermediary defence' (namely, the argument that the manufacturer of medical supplies should be excused due to potential advice or actions by expert medical staff dealing directly with patients).



PART III PRE-MARKET INTERVENTION BY PUBLIC AUTHORITIES

Key Learning Outcomes for Part III:

- *What are the two main types of pre-market interventions by a CPA aimed at ensuring that suppliers only provide safe consumer products?*
 - *What are the pros and cons of legislating a general safety requirement for all consumer products, or instead a power for the CPA only to set minimum safety standards for particular types of products?*
 - *What is the scope of labeling laws, and can they overlap with powers for the CPA to set minimum (information or safety) safety standards for certain products?*
 - *What is or should be the relationship between the CPA and other regulators at this pre-market stage?*
-

III.1 General Product Safety Requirement

36. A general product safety requirement in consumer protection laws provides for the responsibility of producers to supply a safe product, usually one that is 'reasonably' safe. It does not mean that the producer is expected to supply a product that is free from all risk – the expectation is that the product is either free of any risk or minimum risk. In order to determine whether the producer has met this legal requirement, the law will also state how this will be judged. In the case study above from Malaysia (Part 1), a unique example of an AMS that has clearly enacted a general safety requirement, the law provides that this will be determined by looking at the following aspects:

- a. The manner and purposes for which the product is being marketed;
- b. The get-up of the product;
- c. The use of any mark in relation to the product;
- d. The instructions or warnings in respect of the keeping, use or composition of the product.

37. In order to determine whether products being marketed are failing the general safety obligation, the CPA needs to examine the product's features to see if it is failing in any such stipulated aspects. These may be different in the laws of different countries. It is important therefore to be clear what requirements have been stated in the law. The producer can only be held accountable for failing to meet the general safety requirement if the product does not fulfill the stipulated aspects.

38. Products that fail to meet the general safety requirement then are subject to public law sanctions provided in the law. The range of public law sanctions include warnings,



finer, suspension of licences, recalls, bans, or even criminal sanctions in cases of large-scale public damage or injury. (See Part IV below on post-market interventions.)

39. By contrast, Article 6 of Cambodia's Law on the Management of Quality and Safety of Products and Services (2000) requires suppliers to obtain prior authorisation from relevant authorities before putting into circulation products that may harm consumers. Those authorities may not be the general consumer regulator. Anyway, if the product is pre-approved, it may not be possible or appropriate to hold the supplier liable for circulating an unsafe product, as under s21 of Malaysia's Act (which does not require prior approval, but only that all consumer goods be reasonably safe – otherwise public sanctions are applicable). In addition, the Cambodian government is presently revising this 2000 Law, planning to substitute provisions with a Food Law and new Consumer Protection Law, due to come into effect from next year.
40. In addition, Article 8(2) of Indonesia's Consumer Protection Law (1999) prohibits suppliers from 'trading damaged, defective or used and tainted goods without providing complete and correct information'. However, this appears to be a narrow provision aimed at suppliers who are aware that their goods contain defects. Those then must be disclosed or warned about, so that consumers can make an informed choice nonetheless to receive them.
41. If a product fails instead to meet a general product safety requirement, as provided expressly in Malaysia, it will also usually be easier for consumers to bring a product liability claim seeking compensation for any damages suffered. Product liability law provides for the kind of defects for which the producer will be liable and the legal defences available to the producer. In some countries, including AMS, product liability law provides for strict liability which means that the consumer does not have to prove that the producer is at fault. All the consumer needs to show is that the product has a safety defect that caused damage or injury (Part II.2 above).
42. Since 2011, Singapore has introduced a regime requiring all consumer goods to meet international (or otherwise national or regional) standards, but with exclusions especially for products regulated under other specific laws mainly by other regulators (discussed towards the end of Part III.2 below). This achieves something very close to a general safety provision, as in Malaysia (following the EU), except for the specific exclusions or where the applicable standards may turn out not to achieve a 'reasonable' level of safety for consumers.
43. A major advantage of the recent Singaporean regulation is that standard-setting is largely "outsourced" to other specified bodies (such as the ISO), reducing the cost and delays associated with the national regulator having to develop and maintain its own safety standards. There is also less risk of national standards being enacted that could be challenged by other countries (on behalf of their exporters) as disguised



protectionism rather than bona fide and proportionate public health measures, contrary to WTO or Free Trade Agreement commitments. In addition, the Singaporean approach of adopting mainly the standards developed instead by well-known overseas bodies (such as the ISO) has the benefit of providing quite specific guidance to both suppliers and national enforcement officers, as to what is required for particular types of products, compared to the broadly-worded general safety requirement applicable to all consumer goods in Malaysia.

44. However, there are also disadvantages with the Singaporean regime. Generally there is a cost involved in suppliers to even access ISO or other such standards. Those may also be set too high for local manufacturers to comply with and still make remain in business, especially if such standards are imposed on them across the board without phase-in periods. In addition, ISO and other standards often deal with matters that are not related to safety concerns as such. Even when they deal with product safety issues, at least some of those standards may have been developed with less sustained input from consumer representatives and experts than national standards developed by the consumer regulator, and may therefore be less focused on consumer protection. Admittedly, EU standards are developed with financial and other support provided to consumer groups, but under the Singaporean approach the suppliers are free to deal in products that comply instead with American or ISO standards.¹²

III.2 Specific Product Standards

45. Especially where no general product safety requirement provided under consumer protection laws, setting minimum standards for the consumer safety of specific goods is a very important function of CPAs and sectoral regulators. Such safety standards may relate to the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods; or to the form and content of markings, warnings or instructions to accompany the goods. They could also be in relation to the testing of goods during or after manufacture or processing (see section 19 of Malaysia's Consumer Protection Act 1999, set out in Part 1 above).
46. Where no safety standard has been prescribed, the person supplying the goods should adopt and observe a reasonable standard of safety to be expected by a reasonable consumer – as is provided in any general safety requirement, subject to public law sanctions (see sections 19(4) and 21 of Malaysia's Act), and/or as expected under product liability laws that can lead otherwise to private law compensation claims.

¹² See generally Howells, Geraint (1998), *Consumer Product Safety* (Aldershot: Ashgate).



47. Specific minimum safety standards set by regulators are of a preventative nature; they are designed as a means of setting standards for the future. They allow certain goods to be regulated more tightly and precisely, whether due to their nature or to the fact that it affects a certain class of consumers seen as more vulnerable e.g. children or the elderly. By contrast, a general safety requirement is a catch-all or back-up provision to complement prescribed standards, as such product-specific standards can sometimes take a while to be finalized and they can never be exhaustive due to the rapid rate at which goods are introduced into the market daily.
48. Sometimes the CPA has general jurisdiction to set minimum safety standards, as under section 19 of Malaysia's Consumer Protection Act (cited in Part I above), which however excludes jurisdiction regarding food and healthcare products. By contrast, most AMS (such as Vietnam under the s5 of the 2008 Law on Quality of Products and Goods) do not give the CPA power to set minimum safety standards; such standards are instead set by other sectoral regulators. Nonetheless, Vietnam's CPA can sometimes be formally involved in safety-standard setting activities under other legislation. In addition, the power for Thailand's CPA to undertake post-market interventions (such as imposing product bans or recalls if unsafe products cause harm) may lead relevant sectoral regulators (e.g. for foodstuffs) to informally invite input from the CPA in standard-setting activities.
49. In addition, the CPA may at least have some powers to set mandatory "information standards" (rather than standards specifying permitted ingredients or minimum performance outcomes for products) due to powers to specify labels (examined further in Part III.3 below). For example, under section 30 of Thailand's Consumer Protection Act 1979, the Office of Consumer Protection Board (OCPB) Committee on Labels can require goods to be 'label-controlled' if the labelling may cause physical or mental harm to consumers. Prescribed labels must then include only true and non-misleading statements (s 31), but the supplier need not make disclosures unless needed for consumer safety (s 32). If these labels are not affixed, the OCPB may order the supplier to cease circulation or rectify the goods (s 33).
50. In most countries, specific product standards are developed or set primarily by national standards bodies, which are related formally or informally to government institutions or organisations incorporated by public law. The standards are established after discussion with industry and consumer representatives, so if the CPA has the power and responsibility of supporting consumer NGOs it can indirectly get involved in standard-setting activities of other governmental agencies. Standards are set taking into consideration existing and foreseeable regional and international standards for that product. More often now, standards are being set at the international level and these standards are then adopted at the national level (see Part VI.4.3 below). This facilitates international trade in those goods that conform to international standards. Producers whose products conform to *mandatory* national



standards are generally protected from product liability lawsuits for damages under private law (outlined in Part II.2 above). Often, however, the standards are *voluntary* standards. In such cases, courts may take into account suppliers' compliance with such standards but will not necessarily exempt them from product liability (as the voluntary standard may be set too low). This situation provides an incentive for producers to ensure that their products comply even with national (or international) voluntary standards before they are marketed.

51. However, it is ineffective to generate and publish standards if there is no monitoring for compliance with standards. While most product standards are voluntary, there are certain sector-specific safety standards that are mandatory such as food, pharmaceuticals, motor vehicles, household electrical appliances, etc. At a minimum, monitoring for compliance with safety standards in these sectors should be done on a regular basis (see further Part IV.1 below).
52. In Malaysia and Singapore, certain consumer goods carry the certification mark of the national standards body, and consumers have become familiar with such marks as representative of the quality and safety of the goods. This reputational effect is another reason for suppliers to comply with such standards, and CPAs therefore should publicise such standards and certification mark schemes widely as part of their consumer awareness campaigns (Part VI.1 below).
53. In Malaysia, the CPA has set only a few minimum safety standards for specific categories of goods (as indicated in Case Study 2 below), but there is also a general safety provision requiring all consumer goods to be reasonably safe (Part III.1 above). By contrast, Singapore has set national minimum safety standards for 45 types of consumer goods under section 11 of the Consumer Protection (Trade Descriptions and Safety Requirements) Act, originally enacted in 1975, which allows the Minister to declare safety standards for specified classes of goods. This legislation lacks a general safety provision, as such. However, the Consumer Protection (Consumer Goods Safety Requirements) Regulations 2011¹³ generally now require all goods "ordinarily supplied for private use or consumption" to comply with (i) standards set by four specified international bodies (e.g. the ISO, plus any further standards set by the CPA, "SPRING Singapore"), or otherwise (ii) standards "formulated or adopted and published by any regional or national standards body". It is possible that there exist some general consumer goods that fall outside these two categories, but they will be very few, so these Regulations come very close to imposing a general safety provision (as in Malaysia and the EU) provided the specified standard-setting bodies generate safety standards which make goods

¹³ At <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=5d81b3b4-5d82-4c8b-beb7-81717eea014d;page=0;query=id%3A%22ec858afc-bdf6-41c6-9b81-c1a575675e97%22%20Status%3Ainforce;rec=0#legis>.



reasonably safe. Nonetheless, the 2011 Regulations also exclude various consumer goods covered by more specific regimes, as well as various types of goods mentioned below.

Case study 1: Singapore – Consumer Protection (Safety Requirements) Registration Scheme

This covers 45 types of household electrical, electronic, and gas products. These products must meet specified safety standards and carry the SAFETY mark before they can be sold or advertised in Singapore.

Consumer Protection (Consumer Goods Safety Requirements) Regulations 2011

Regulation 4 further requires that:

“(a) Category 1 goods shall conform to —

(i) safety standards for such goods formulated or adopted and published by —

(A) ISO and IEC, respectively;

(B) the European Committee for Standardisation; or

(C) ASTM International; and

(ii) the safety standards and requirements for such goods specified by the Safety Authority and published in its Consumer Protection (Consumer Goods Safety Requirements) Information Booklet;

(b) Category 2 goods shall conform to the safety standards for such goods that have been formulated or adopted and published by any regional or national standards body.”

Product Type	Regulator
Food product and products/Contacting food or beverages	Agri-food and Veterinary Authority of Singapore (AVA)
Cosmetics, medical devices, pharmaceuticals and Chinese proprietary medicines	Health Sciences Authority (HSA)
Motor vehicles	Land Transport Authority (LTA)
Motorcycle helmets and children car seats	Traffic Police (TP)
45 categories of household electrical, electronic and gas products (Controlled Goods)	SPRING Singapore
Hazardous substances (those not covered under HSA)	National Environment Agency(NEA)
Pesticides and vector repellents	National Environment Agency(NEA)



Products covered include toys, children's products, clothing, furniture, sports equipment DIY tools and household items. However, exclusions apply as follows:

- Used or second-hand goods
- Goods produced solely for export or imported solely for re-export
- Installation works
- Fixtures and fittings
- Products for commercial or industrial use
- The long-term health effects of consumer products.¹⁴

Case study 2: Malaysia – regulations under the Consumer Protection Act

Malaysia enacted subordinate legislation setting specific safety standards (based on ISO and/or national standards) for toys in 2009, and for primary batteries in 2013. It also set mandatory information/warning standards for motorcycle helmets and pneumatic tyres in 2012, and brake linings in 2013. See https://mystandard.kpdnkk.gov.my/mystandard_portal2014/index.php?r=column/cfive&id=57.

Discussion questions: (i) What are the pros and cons of the approach in Malaysia (fewer specific mandatory safety standards, but general safety provisions requiring all consumer goods to be reasonably safe) versus the approach more recently in Singapore (more mandatory safety standards for specific goods, plus adoption for most other consumer goods of ISO or specified EU or American standards supplemented where necessary with Singaporean amendments, otherwise national or regional standards)? (ii) In Malaysia or any other AMS that might consider adopting a general safety requirement requiring consumer products to be reasonably safe, could local enforcement agencies and courts consider that products not complying with mandatory safety standards set in neighbouring AMS (eg Singapore) violate such a requirement? (iii) What if there is difference in safety standards among AMS? Have you ever experienced such disparity when working?

III.3 Labelling Laws

54. In order to ensure that consumers use products as intended and safely, products should be accompanied by proper information. This is usually found on the label. For products that are complex, labelling is also accompanied by additional information inserted together with the packaging of the product such as instruction manuals. Some products need to be assembled, so instructions for assembly are included.

¹⁴ At <http://www.spring.gov.sg/Building-Trust/Raising-Confidence/Consumer-Product-Safety/CGSR-Regulations/Pages/cgsr-regulations.aspx>.



55. A general safety requirement, enforced by public regulation as in the EU or Malaysia (see Part III.1 above) or indirectly via product liability laws (Part II.2), requires that products must be accompanied by suitable instructions or warnings on proper and safe use of the product. General consumer laws may also allow the CPA to set “information standards”, as in Malaysia (see section 19 cited in the Case Study in Part I); or to require goods to contain labels to avoid or minimize safety issues, as in Thailand (Part II.2 above); or both, as in Singapore (sections 9 and 11(1)(b) of the Consumer Protection (Trade Descriptions and Safety Requirements) Act). However, the situation needs to be checked carefully in each country; such powers may instead be available only for sectoral regulators, for particular types of goods (such as foods: in Thailand, for example, the OCPB cannot prescribe warning/instruction labels). In addition, even where there exist labelling laws enforced by the CPA (or a sectoral regular), they usually are aimed at multiple goals – not just product safety – and this may create some challenges for the regulators. For example, a particular type of warning label may be considered more effective for safety purposes, but if it differs significantly from labeling already required for similar goods, it may make it harder for consumers to compare products efficiently.

III.3.1 The Purpose of Labelling

56. All products must be accompanied by adequate labelling. The labelling law will provide for what information must be included on labels. The purposes of labelling are generally to:

57. Provide consumers with important information about the product

- Inform consumers about proper and safe use of products
- Enable comparison between similar products
- Standardise information that should be available for similar categories of products
- Facilitate international trade

III.3.2 Types of Labelling

58. Similarly to minimum safety standards (outlined in Part III.2 above) there are usually two types of labels:

- Mandatory – the law will specify the content of labels for specific product groups such as food, medicines, children’s toys, electrical goods, cosmetics, pesticides, etc.



- Voluntary – these are schemes established by industry associations or specifications by international agencies for specific product groups to facilitate international trade in these products

III.3.3 Mandatory Labelling

59. The law may specify the information that is mandatory on the labels of certain categories of product groups and many of these have implications for product safety. Generally the following information must appear on labels:

- **Manufactures and importer details;** The name, address and contact details of manufacturers and/or importers are essential to enable consumers and regulators to identify them and communicate with them in case of problems arising with the product.
- **Dates;** Many different types of dates are found on labels:
 - Closed dates, often as part of the bar code are, meant to assist traders identify the date of manufacture and assist traders (along with information on batch numbers) in stock rotation and recall products when they need to.
 - Manufacturers sometimes just provide open dating of the date of manufacture. This is now required by law in many countries especially with respect to medicines.
 - Shelf life dating is intended to assist retailers and specifies the date up to which the product can be offered for sale at the retail store. The shelf life date is also referred to as the 'display until' date.
 - 'Best before', 'use by' and 'expiry date' are meant to assist the consumer. 'Best before' means the quality of the product (in terms of texture, appearance and nutritional value) cannot be guaranteed after the specified date. However, it does not mean that the product is unsafe for consumption after that date. Such labels are used for medium level perishable goods such as chocolates, cereals and snack foods.
 - 'Use by' date deals with quality and safety. It is often used for easily perishable products like milk and eggs.
 - 'Expiry date' refers to the last date a product may be used. It is an important safety notice. These dates are a guide only when consumers observe the normal rules as to preservation of foods and medicines. For instance, milk has to be refrigerated and will spoil even before the expiry date if not refrigerated.



- **Contents;** Food labels should provide nutritional data and the ingredients/composition. Such information assists consumers to determine the foods they need for their nutritional needs and identify those to which they may be allergic e.g. people with nut allergies. It also helps consumers make choices in line with their preferences (e.g. vegetarians) and religious or cultural requirements (*halal* food for Muslims, beef-free food for Hindus, etc.).
- **Quantity;** The label should specify the net quantity of contents by weight, measure, size/numerical count.
- **Instructions for use;** Such instructions can relate to the storage and preservation (medicines and food), preparation (food) and installation (do-it-yourself kits and electrical products) and the safe use of the product (electrical and electronic products and equipment). It can also relate to the safe disposal of the product and the container or wrapping in which the product was sold for personal safety as well as environmental considerations.
- **Warnings;** Warnings relate to safety and often focus on improper use. The producer is under a duty to warn where the product supplied is dangerous, the danger is or should be known by the producer, the danger is present when the product is used in the usual or normal way and the danger is not known or obvious to the user. A producer may fail to warn at all or fail to warn adequately. Failures will lead at least to liability for damages suffered, under contract or product liability laws (outlined in Part II above). Examples of warnings on labels are - "Do not purchase if the seal is broken", "Choking hazard. Keep away from children".
- **Marks and Symbols;** Marks are included to indicate that the product has met some standard relating to quality or standard (e.g. eco-labels indicate that the product is ecofriendly, *halal* labels that the food has been manufactured in compliance with Islamic laws). Certain symbols such as the skull and bone symbol are meant to indicate that the product contains toxic chemicals or the flame symbol which indicates that the product is flammable. Such marks and symbols are usually universally recognized by consumers and used by product manufacturers all over the world.
- **Price;** Price indications are now mandatory and usually form part of the labelling requirements in most consumer protection laws.
- **Language;** Labels should be in the local language for domestically manufactured products. For imported products, most countries would require that they should also have information in the local language of the country they are being sold in. This is important for product safety as consumers who are buying



imported products need to know how to use such products safely and will not be able to do so if such products are not labelled in the local language.

- **Label Size;** The size of the label in relation to the product may also be specified to enable better visibility of information on possible hazards e.g. the warnings on tobacco products, the safety symbols on pesticides.
- **Conformity to national/international standards;** Some product labels may have to conform to specific national/international standards, such as baby foods, pesticides or tobacco products. There will be standard information about the use or disposal of the products and safety warnings that are mandatory for all such products.
- **Eco-friendly information;** To encourage consumers to choose eco-friendly products and consume sustainably, many countries are now imposing environmentally friendly labelling requirements for certain products, for example information on energy saving features in refrigerators, water saving features in washing machines, use of recycled materials, safe disposal of packaging materials, and so on.

III.3.4 Voluntary Labelling Schemes

60. Voluntary labelling schemes provide information on significant product characteristics that are presented in standardised content and form for example, the use and wash instructions for clothes. The scheme is usually operated by the industry association concerned. In the case of certain products, such as electrical products, bodies such as the International Standards Organization (ISO) often would have prescribed the standards and symbols to be used. Such standardised labels facilitate international trade in these products as they would provide consumers all over the world with the same information in a standard format, making such products easily recognisable and comparable. However, since ISO or other labelling schemes are generally voluntary in nature, only producers participating in such schemes would comply with the labelling requirements. Exceptions arise where a national CPA adopts specific ISO labelling standards (eg in Malaysia) or all ISO standards except for specified types of consumer goods regulated under other laws (eg in Singapore since 2011) as the basis for minimum safety standards (see Part III.2 above).

61. Similarly, eco-labelling schemes began in many countries as voluntary labelling schemes to inform consumers about the eco-friendliness of the products; but in some countries now, some aspects of these eco-labels have become mandatory labelling for certain products.



III.3.5 Who is responsible for conformity with labelling?

62. Usually, at least the actual manufacturer or importer is responsible, as under s31 of Thailand's Consumer Protection Act 1979. However, under s52 a seller of label-controlled products is also liable if it sells them when it "knows or ought to have known that the nondisplay of label or the display of such label is against the law". In addition, other laws may directly impose labelling obligations on other commercial suppliers in the supply chain. For example, under art 12(1) of Vietnam's Consumer Protection Law 2010, all business individuals or organisations must "properly label their goods as provided for by law" (i.e. enacted by other regulators). Further, under art 13, where it provides information through a third party, the latter will be "jointly responsible for providing inaccurate or inadequate information, unless [this third party] can prove it having taken all the measures provided for by laws to examine the accuracy and adequacy of the information".
63. Labelling laws in such AMS seem to envisage imposing liability on an intermediate supplier, like a retailer, if it has tampered with the labels or has not followed the storage/display instructions for perishable products and caused the product and its initially correctly-applied label to change (e.g. instead of refrigerating the product, it has been left on the open shelf). These or general laws, e.g. on responsibility under criminal law if a third party intervenes, would also usually excuse liability of the original manufacturer or importer in such situations.

III.3.6 Common offences in respect of labelling

64. The following problems often arise, including across AMS:

- Mandatory labelling requirements are not met i.e. no labels, inadequate labelling or non-compliance with mandatory labelling requirements.
- The product does not conform to information provided on label (e.g. the label states 12 slices of fruit, but can contains only 10 slices).
- Information on label is deliberately falsified (e.g. the real expiry date is covered up with a false expiry date).
- False and misleading use of descriptive words that do not conform to labelling laws for use of those words (e.g. "100% fruit juice", "full cream milk", "natural", "organic", "cholesterol free", "low fat", "high in fibre", "energy efficient", "ozone friendly", "non toxic", etc).



III.3.7 When should action be taken for labelling violations?

65. Action against labelling violations can be both proactive and reactive. Proactive action to monitor compliance with labelling laws involves conducting periodic market surveillance (see Part IV.1 below) in all types of establishments such as neighbourhood stores, supermarkets, malls, markets, and wherever past history of consumer complaints show that violations are commonly occurring. Such action would involve not just inspection of the labels which can be done on the spot but also taking of samples for testing in the laboratory in case there is suspicion that the product labelling is false and misleading or may contain banned substances.
66. Reactive action is taken when consumers have filed complaints about a particular product (Part VI.2 below) or there have been incidents with certain products (Part VI.3 below), such as consumers falling ill or getting injured after using/consuming a particular product.
67. The CPA may also publish guidelines to educate businesses and consumers about the labelling laws (Part VI.1 below). In addition, sector-specific industries may be encouraged to develop Codes of Conduct and Labelling Standards for their own members to ensure that there is better quality labelling and compliance with agreed minimum standards. This is a form of co-regulation where government and business work together to promote consumer protection.

III.3.8 What action should be taken for labelling violations?

68. This is normally covered generally under the consumer protection law or specifically under the labelling laws, and any action taken will have to be as specified in the laws. In respect of violations against mandatory labelling requirements, the enforcement action would be against the manufacturer/producer/importer and usually requires confiscation of such products and warnings, fines or court action depending on the severity of the offence. For offences which involve tampering with the label by suppliers, distributors or retailers then the action would be against these parties and again would involve confiscation of the products and warnings, fines or court action. In some cases, it may be necessary to conduct testing of products to determine whether the product conforms to the label.

Further general readings:

- Howells, Geraint, Consumer Product Safety (Aldershot: Dartmouth, 1999)
- Nottage, Luke, Product Safety Regulation, in: Howells, Geraint et al (eds) Handbook of Research on International Consumer Law (Cheltenham: Elgar, 2010)



PART IV POST-MARKET INTERVENTION BY PUBLIC AUTHORITIES

Key Learning Outcomes for Part IV:

- *What are the five main types of post-market interventions undertaken by the CPA, after the consumer products are circulating in the market, to ensure that they are safe?*
 - *How can the CPA gather effective information about product risks?*
 - *Are there legislative or practical limits for the CPA being able to issue warnings to the public about certain types of products, to ban future supplies, or force their recall if already in the market and suppliers fail to withdraw such products?*
 - *What sanctions are available and should be enforced by the CPA if suppliers do not comply with its post-market intervention?*
 - *What is or should be the relationship between the CPA and other regulators at this stage?*
-

IV.1 Market surveillance

69. As discussed above (Part III.3) regarding violations of labeling requirements, the CPA and sectoral regulators should conduct both *pro-active* market surveillance, and *reactive* surveillance in response to consumer or media complaints and reports concerning allegedly unsafe products. As well as sampling and testing to ensure that products meet any applicable specified safety standards (Part II.2) and/or general safety requirement (as in Malaysia: Part II.1), regulators need to collect and analyse data on actual product-related injuries or “near misses” affecting consumers, in collaboration with national and international counterparts (see Part VI.3.2 below). As patterns of complaints or injuries emerge with respect to certain types of products, regulators should intensify market surveillance activities in such fields.

70. The CPA should play a key role, and therefore press for adequate human and budgetary resources. This is a particular challenge in developing AMS. An example is Myanmar, where there has been budget allocation to support implementation of the Consumer Protection Law 2014, but it has not yet been possible to find enough suitably trained staff, particularly for market surveillance and inspections.

71. Another and increasingly important mechanism for checking the marketplace for unsafe products or manufacturing procedures involves third-party certifiers.¹⁵ More and more suppliers are required by contracts with their own trading partners (especially large purchasers in more developed economies, with demanding

¹⁵ See eg Lytton, Timothy D. and McAllister, Lesley K., Oversight in Private Food Safety Auditing: Addressing Auditor Conflict of Interest (April 22, 2014). 2014 Wisconsin Law Review 289 (2014). Available at SSRN: <http://ssrn.com/abstract=2391289>.



consumers) to have their processes and sampled products checked by third-party individuals or organizations. If such suppliers fail to allow this or the third-party certifiers report problems, they will suffer consequences under their contractual arrangements with their trading partners. This creates an opportunity for CPAs and other safety regulators, by encouraging such practices (which have various formats). They may even seek to develop a regulatory framework to enhance the independence of the third-party certifiers or require them to disclose to regulators (at least on a confidential basis) any particularly high risks they may encounter.

72. Another possibility for CPA to indirectly improve market surveillance is to build up closer relationships with insurance companies. More and more now provide insurance for suppliers regarding compensation claims under product liability laws, and/or for costs associated with recalls of goods found or suspected to be unsafe. Although specific details will generally be bound by confidentiality obligations under such insurance contracts, insurance companies can often provide useful general information on product safety trends in particular markets.

IV.2 Investigations

73. Consumer protection laws, including in most AMS, allow the CPA to investigate the safety of products. However, there is disparity in terms of the scope of such powers. A key aspect in investigations is obtaining good *evidence* of violations, for example by entering business premises and seizing documentation or other information related to potentially unsafe products. Under Malaysia's Consumer Protection Act 1999, officials usually require a court-issued warrant (section 125), unless they have "reasonable cause to believe that by reason of delay in obtaining a search warrant under that section the investigation would be adversely affected or evidence of the contravention is likely to be tampered with, removed, damaged or destroyed" (s 126). By contrast, under s 5 of Thailand's Consumer Protection Act 1979, officials have powers:

- a. (2) to search, seize or attach goods, container or package of goods, label or other document which do not conform with this Act for the purpose of instituting legal proceeding in the case where there is a reason to suspect an offence under this Act has been committed; (3) to enter any premises or vehicle in order to inspect the manufacture of goods, sale of goods or services, as well as to examine books of account, related document and equipment of a businessman in the case where there is a reason to suspect that an offence under this Act has been committed.
- b. However these powers are partially limited under s 6 (emphasis added):
- c. In the performance of duties under section 5 (3), *which is not urgent*, the competent official shall, by a written notice, give the owner or occupier of the premises or vehicle a reasonable time in advance and acts must be done in the presence of the owner or occupier of premises or vehicle or, if he not present,



the presence of at least two other persons whom the competent official has asked to act as witnesses. The search under section 5 (2) shall be carried out by the competent official only during sunrise and sunset.

74. Another important avenue for obtaining evidence related to product safety is a legislative power for the regulator to order suppliers of suspected unsafe products to conduct tests, and then report results. For example, under s 36 of Thailand's Consumer Protection Act 1979, if "there is a reasonable cause to suspect that any goods may be harmful to the consumers, the [OCPB] may order the businessman to have such goods tested or verified. If the businessman does not proceed to test or verify the goods or delays in so doing without justification, the [OCPB] may arrange for the verification at the expenses of the businessman." If the results are unsatisfactory, and the safety issue cannot be addressed by labeling requirements or other legislative powers, the OCPB can then order modification or disposal of the unsafe products.

75. In practice, however, the OCPB has encountered problems in exercising this power in Thailand. Although the CPA can issue a private "stop selling" letter to a supplier found to be putting unsafe goods onto the market, it cannot proceed to a public "ban" without investigating further either by:

- requesting the supplier to conduct tests and report results to the CPA, which involves delays (especially if the supplier knows or realises that the goods are unsafe and wants then avoid publicity and to supply alternative goods into the market), and the risk that suppliers will test their goods based on insufficient criteria; or
- otherwise, conducting its own tests at the supplier's expense, which again involves delays (especially as Thailand's CPA only has a "mini-lab", and therefore must seek more extensive laboratory testing of potentially unsafe goods by seeking the cooperation of local universities or other organisations).

76. Other AMS appear to have more effective regimes, as their CPAs can publicise a ban even before concluding exhaustive tests, because e.g.:

- the general CPA has sufficient (budgetary and other) resources to conduct its own in-house tests before issuing a ban of goods found to be unsafe (e.g. in Singapore), thereby putting the onus on the supplier to generate its own plausible contrary test results; or
- the general CPA and/or other sectoral regulators may require prior authorisation for any supply of a new local or imported product into the market (e.g. in Cambodia). This will usually include safety test results submitted by the manufacturer or importer as well as involving possible further tests by the CPA –



thus creating an evidentiary base for the CPA later to publicise a ban if safety problems nonetheless emerge subsequently.

77. More generally, in conducting investigations and proceeding to forms of post-market intervention (such as public warnings and bans, discussed further below), the availability and reliability of government-accredited laboratories and testing facilities is therefore very important to secure consumer product safety outcomes. Such facilities also assist CPAs in pre-market intervention such as setting mandatory safety standards.

78. Budgetary and human resource constraints associated with such facilities reportedly remain a challenge especially for developing country AMS, in particular when the facilities also need to be certified to high international standards in order to be available for local firms seeking to export goods to markets in developed countries. However, there is some trend towards concluding inter-governmental MoUs or more informal arrangements to exchange laboratory test results and protocols.

Discussion Question

To what extent do general consumer laws (and/or other general laws) in AMS allow the CPA: (a) to require suppliers to conduct tests and report results about the safety of their products if the regulator suspects a safety issue; and (b) to readily access suppliers' premises to seize potentially unsafe products and related evidence? In addition to any limits to formal legislative powers, are there related practical issues, as in Thailand (such as limited access to testing facilities in-house or run by other organisations) or involving channels of cooperation with police and court officials or broader budgetary restraints? What other problems or disparities exist with respect to evidence-gathering or other aspects of investigations into consumer product safety problems in AMS?

IV.3 Public warnings

79. Sometimes consumer protection laws specifically allow the CPA to warn the public that products may be unsafe. This allows the regulator to contact other agencies or conduct more rigorous tests before taking further action such as bans or recalls. However, although section 10(3) of Thailand's Consumer Protection Act 1979 provides for such public warnings, it is presently interpreted to require first some investigations and testing, which give rise to practical problems as outlined in Part IV.2 above. More generally, regulators must be careful not to issue public warnings too quickly, as this may be prejudicial to the suppliers or even a whole market sector, especially if consumers may over-react to reports of possibly unsafe products. In at



least one AMS, a public warning (issued before full test results had been obtained) led to successful court action against the CPA. Nonetheless, in the specific area of foodstuffs, the regulator in the Philippines has developed a practice of actively issuing public warnings about potentially as well as actually unsafe products.

80. In addition, general consumer protection laws in most AMS do not contain a specific power to issue public warnings. Instead, as under Art 5(e) of Myanmar's Consumer Protection Law 2014, the CPA may have a more general power to disseminate information to protect or advance consumer interests. In addition, Art 19(a) allows the government's Consumer Dispute Settlement Body to issue a "warning" or "serious warning", but only if a specific dispute is brought before that Body to be resolved. It seems such warnings will be directed at the specific supplier, although it is possible that they could also be publicized because this Law does not require the Consumer Dispute Body to keep confidential its proceedings and decisions.

IV.4 Bans

81. The CPAs in almost all AMS have powers to prevent the future supply of unsafe products by all suppliers. However, Art 5(1) of Myanmar's Consumer Protection Law limits this to "*informing the relevant departments and organizations to prohibit in respect of goods which are hazardous and not fit for consumption*", presumably under separate legislation regulating specific types of goods (such as foods or pharmaceuticals, often also subject to standard-setting by other regulators: see Part II above). Nonetheless, with regard to a specific dispute and supplier, Art 19(d) does allow the government's Consumer Dispute Settlement Body directly to prohibit the sale and distribution of the disputed goods for a specified period.

82. In some countries, as under Article 10 of the Consumers Act 1992 in the Philippines, the CPA must first give public notice and allow hearings on whether or not a product found to be harmful needs a ban. If the harm is imminent, the CPA is given discretion to ban the product immediately, but then must still allow within 48 hours an opportunity for suppliers to present arguments and evidence regarding the product's safety and the necessity of a ban. Even without such express procedural provisions, it is important for a CPA and/or relevant sectoral regulators to consult adequately with the concerned industry as well as other stakeholders, especially as a ban impacting on imported products may lead to problems under WTO law or free trade agreements (as explained in Part VI.5 below). Although they should undertake their own risk assessments, national regulators can take into account measures and evidence about hazards from counterparts overseas. Partly on that basis, for example, Thailand banned asbestos products quite recently, although this measure generated litigation against the government.



Discussion Question

Does the CPA in your AMS have and often exercise powers to issue public warnings that goods may be unsafe, even before issuing bans, apart from helping to publicise voluntary recalls announced by suppliers? How often does the CPA issue bans, and what legal or practical issues may arise?

IV.5 Recalls

83. Voluntary recalls are now quite common across AMS, as shown by the large-scale recent recall by Kanebo of cosmetic products, or the website publicity provided by Singapore's CPA.¹⁶ In almost all AMS, the CPAs also have powers to force or direct the recall of unsafe products from the marketplace. However, there is some concern that these powers are not being used.¹⁷ In addition, Myanmar seems to lack a general mandatory recall power. With regard to a *specific* dispute and supplier, Art 19(e) of the Consumer Protection Law 2014 only allows the Consumer Dispute Settlement Body to cause the recall of disputed goods from the market for a nominated period. But the CPA cannot force *other* suppliers to recall unsafe goods of the *same or similar type*, which may also have injured consumers but have not yet generated disputes before the Settlement Body, or which may injure consumers in the future. Presumably such broader recall powers are only available to sectoral regulators under other laws.
84. Where the CPA does have general recall powers, the law usually provides for the CPA to order the suppliers to undertake the recall themselves (with sanctions for non-compliance), and/or for the CPA to itself undertake the recall in the market and then seek reimbursement of associated costs from the suppliers of the recalled products. In some AMS, as in Singapore at least for some consumer goods, the law or secondary regulations may specify the (minimum) requirements for conducting a recall (such as how often, where or in which languages to notify the public that the unsafe goods need to be returned or destroyed) and/or oblige the suppliers conducting the recall to inform the regulators about progress in achieving a recall.
85. However, except perhaps in some sectors with higher-risk consumer goods (such as healthcare products or automobiles), most legislation providing regulators with powers to force recalls does not specify in detail such minimum requirements.

¹⁶ See <http://www.spring.gov.sg/Building-Trust/Raising-Confidence/Safety-Tips-Alerts/Product-Safety-Alerts/>.

¹⁷ See eg <http://consumer.org.my/index.php/safety/household/514-an-effective-product-recall-mechanism-badly-needed>.



Instead, CPAs and/or sectoral regulators may publish “guidelines”, which set out their expectations and recommendations for conducting successful recalls.¹⁸ Although non-binding, these are very useful especially for suppliers with little experience, and should generally cover:

86. General background: defining “recalls” and their aims, including opportunities to enhance customer satisfaction (despite the initial problem) if recalls are conducted effectively;

- Planning for recalls and other corrective action: emphasizing the need for advance coordination within the supplier and with its trading partners and relevant regulators;
- Risk assessment procedures: determining and documenting the product’s risk level, across various injury scenarios, based on its likely probability and severity;
- Risk management procedures: developing a proportionate response and communication strategy, as well as monitoring progress of the recall;
- Learning from experience: creating a feedback loop so that the supplier can be better placed and resourced to deal with any future possible recalls.

87. As well as powers to order or conduct *mandatory* recalls, it is possible for consumer product safety laws to require suppliers to notify regulators if and when suppliers conduct *voluntary* recalls. These are often and increasingly done in order to minimize liability exposure towards any (further) harmed consumers (Part II above) as well as to limit harm to the supplier’s reputation with consumers and regulators. However, no legislation in AMS governing general consumer products imposes such a disclosure requirement, unlike say in Australia since 1986 and more recently New Zealand.

88. The closest provision is Art 22 of Vietnam’s Law on the Protection of Consumer Rights 2010. This requires suppliers manufacturing or importing goods which they find to be defective to promptly stop supply and make specified public notifications about recovering them, and then report results of the recall to relevant provincial authorities after the recall is completed. Such authorities could disclose those results publically, but this would be of limited value as the manufacturers and importers only need to report *after completion* of the recall. Future law reform in AMS should instead require all suppliers to inform the regulators *upon or soon after commencement* of the recall, and regulators should be required or at least permitted then to publicise such recalls, including via the internet (as in Australia). Suppliers should welcome this cooperation from regulators, as publicizing a recall widely is crucial to its success, which after all is in the suppliers’ own interests because it reduces private law liability exposure as well as reputational risk. Such a disclosure requirement would also help to provide national regulators with information to share with ASEAN and OECD

¹⁸ See http://blogs.usyd.edu.au/japaneselaw/2015/07/asean_recall_guidelines.html.



internet portals that publicize both mandatory and voluntary recalls (as listed in the Box below).

89. Another possible but perhaps more controversial law reform would be to require suppliers to notify the CPA about serious product related accidents or risks. This would capture information also about products which have not yet even been subjected to a voluntary recall. A compromise approach would be to make such accident reports fully or partly confidential to the national regulators (as discussed further in Part VI.3 below).

Useful Websites on Recalls

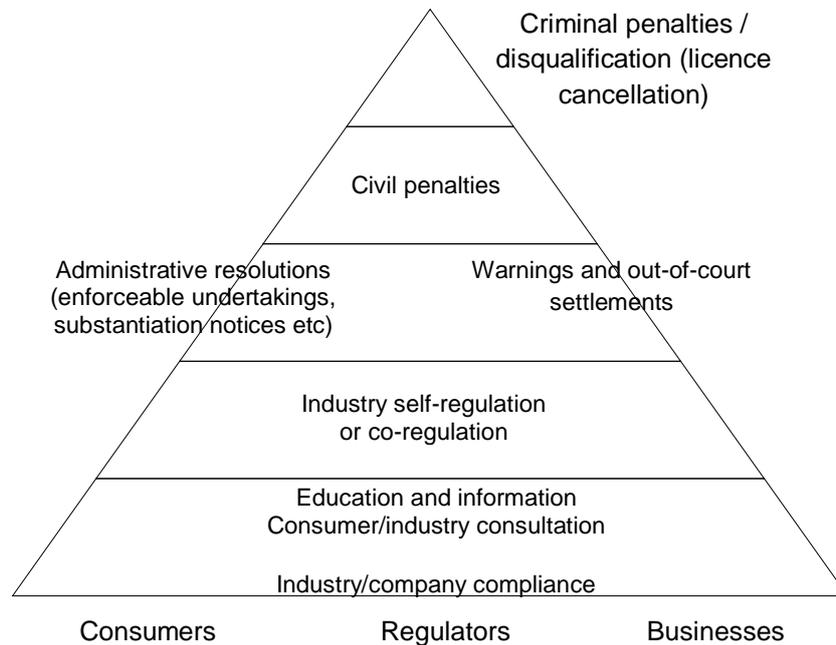
- ASEAN List of Official Recalled/Banned Products and Voluntary Recalled/Banned Products in ASEAN: <http://www.aseanconsumer.org/alerts/>
- ACCC guidelines for voluntary recalls: <http://www.recalls.gov.au>.
- US Consumer Product Safety Commission: <http://www.cpsc.gov/en/>
- European Union: <http://ec.europa.eu/consumers/safety/rapex/index.en.htm>
- Japan: <http://www.meti.go.jp/product-safety/recall/index.html>
- Singapore (for healthcare products): http://www.hsa.gov.sg/content/hsa/en/Health_Products_Regulation/Safety_Information_and_Product_Recalls/Guidelines_on_Product_Defect_Reporting_and_Recall_Procedures.html
- Organization for Economic Cooperation and Development (OECD): Global Portal on Product Recalls: <http://www.globalrecalls.oecd.org>

IV.6 Sanctions and Enforcement by Public Authorities

90. Consumer protection statutes or other laws, including in AMS, usually provide a variety of powers to sanction suppliers that violate requirements to supply products meeting certain specified or general product safety standards or to affix proper labels (Part III above), or which continue to trade in banned or recalled goods (Parts IV.4 and IV.5 above). However, the widely-accepted “responsive regulation” model urges regulators to try to maintain productive relations with suppliers by not unnecessarily escalating sanctions applied to violations.¹⁹ Instead, regulators are encouraged to apply lesser sanctions initially (such as warnings, or administrative sanctions such as court-enforced enforceable undertakings or mediated settlements), but then stronger sanctions if suppliers still fail to comply (such as large civil penalties or fines, then criminal fines or stronger sanctions, and cancellations of business licences):

¹⁹ Nottage, Luke R., Responsive Regulation and Comparative Consumer Product Safety (January 31, 2011). Sydney Law School Research Paper No. 11/06. Available at SSRN: <http://ssrn.com/abstract=1752627>.

“Regulatory enforcement pyramid”, reproduced from Productivity Commission, *Inquiry Report – Consumer Policy Framework* (2008) Chapter 10 (Enforcement) p228, via <http://www.pc.gov.au/inquiries/completed/consumer-policy/report>



91. However, for this approach to enforcement and sanctions to work well, including in AMS, regulators need to ensure that they:

- develop avenues for collaboration on safety issues (see Part VI below);
- have legislative powers to implement increasingly severe sanctions for continued violations (and/or cooperative relationships with criminal enforcement agencies);
- have adequate financial and human resources to credible monitor compliance and pursue sanctions for non-compliance.

This is particularly true in our present e-commerce era, where online retailers typically supply products to consumers across multiple countries. If products are found to be unsafe due to harm arising to consumers in one country, national regulators need to coordinate responses to avoid the supplier targeting consumers in other countries and to effectively pursue sanctions against the supplier’s personnel and assets which may be outside the jurisdiction of any one national regulator.



92. Even under this “responsive regulation” model, they also may need to sometimes directly pursue the most severe sanctions to establish credibility (and therefore collaboration) in the marketplace, or if the supplier is unlikely to continue operations and therefore “learn” from being subjected initially to lesser sanctions by the regulators. Particularly because of such constraints, AMS should also consider legislating specific provisions (as in Australia) facilitating private law claims by consumers for compensation, if they suffer harm from products that are found to violate bans or regulatory requirements to meet specified safety standards. For example, such products can be presumed to contain a safety “defect”, which consumers otherwise need to prove under product liability laws (Part II.2 above). Private lawsuits can thereby enhance the impact of regulatory requirements imposed by public authorities.

Case study and exercise: Konjac (konnyaku) jelly cup snacks

From the 1990s, Japanese manufacturers began producing flavoured jelly sweets using a root vegetable called konnyaku (konjac, sometimes translated as burdock root), locally grown or imported eg from China, instead of gelatine as a binding agent. The snacks were healthier and soft but a little chewy, so were popular as a health food for adults and as a treat for children. However, reports began to emerge of choking accidents, including a few fatalities especially among children and the elderly. Some tests indicated that choking hazards increased if the snacks were smaller (bite-sized), certain shapes, and served to certain vulnerable groups or after being frozen at home (as was quite popular during hot summer months). An industry association issued voluntary guidelines suggesting new shapes and sizes, recommending warnings on the snacks for consumers not to freeze them, and for special care to be taken when serving to children and the elderly. Despite some changes along those lines, products continued to generate a few serious accidents and at least one major manufacturer was sued in the Kobe District Court.

Consider how the CPA and/or other regulators in various AMS might respond to such reports if similar snacks and accidents arose in Southeast Asia involving either locally-produced or imported products, including regulators’ powers to:

- *set minimum standards for future manufacturing or imports (Part III);*
- *conduct investigations, recalls and bans, plus sanction for violations (see Part IV); and*
- *help resolve consumer disputes, including powers to initiate or facilitate representative lawsuits on behalf of injured consumers (see further Part V).*

For example, can the CPA set minimum safety standards for foods, or only a sectoral regulator applying laws specifically on foods? What about issuing a ban or recall of this type of product generally? What about only for certain sub-categories of products that are



especially high-risk (eg konjac jelly snacks that are small, as under the ACCC's ban in Australia in 2004) – in which case isn't such a power for the CPA similar to setting a minimum safety standard (i.e. the snacks can still be supplied but only if larger)?

In addition, even if its powers to set standards or ban foods are limited, can and should the CPA assist consumers harmed by konjac jelly snacks to seek compensation for product liability through local or even foreign (eg Japanese) courts or other dispute resolution mechanisms? If the legislation applied in AMS is or is similar to Japan's Product Liability Act 1994 (as in Cambodia's Civil Code),²⁰ in turn based on the 1985 EC Directive, does a product like that assessed in the Kobe District Court have "design" and/or "warning" defects? How would local courts in AMS assess product liability claims for other sticky/chewy foods that can harm especially vulnerable consumers such as children, even when served under parental or adult supervision?

Also consider what further aspects of consumer product safety law, such as obligations to notify regulators about serious product related accidents, might assist to anticipate or resolve quickly this sort of issue (Part VI).

- <https://www.productsafety.gov.au/content/index.phtml/itemId/971322/fromItemId/970799> (2004 permanent ban by CPA in Australia for konjac jelly cups of a "height or width smaller than or equal to 45mm", and "myths" versus "facts" about konjac, etc)
- <https://www.accc.gov.au/publications/banned-mini-jelly-cups-with-konjac-bulletin> (2002 temporary ban)
- <https://www.accc.gov.au/media-release/supplier-stops-trade-in-dangerous-mini-jelly-cups> ("enforceable undertaking" approved by court after regulator found imports of banned snacks)
- Nottage, Luke R., The Present and Future of Product Liability Dispute Resolution in Japan. William Mitchell Law Review, Vol. 27, No. 1, pp. 215-235, October 2000. Available at SSRN: <http://ssrn.com/abstract=837925> (initial responses in Japan)
- Kawawa, Noriko, Jelly Mini-Cups Containing Konjac: Is a Warning Enough to Protect Vulnerable Consumers? (March 4, 2013). Australian Journal of Asian Law, Vol. 13, No. 2, Article 2, 2013. Available at SSRN: <http://ssrn.com/abstract=2228461> (problems for Japanese regulators and courts in dealing with this type of safety issue)

Further general readings:

- Nottage, Luke R., ASEAN Product Liability and Consumer Product Safety Regulation: Comparing National Laws and Free Trade Agreements (February 7, 2015). Sydney Law School Research Paper No. 15/07. Available at SSRN: <http://ssrn.com/abstract=2562695>
- Australian Competition and Consumer Commission, The State of Product Safety — Jurisdiction Comparisons (2013). Available at <https://www.productsafety.gov.au/content/index.phtml/itemId/1003284>

²⁰ Reproduced above n 10.



PART V REDRESS MECHANISMS

Key Learning Outcomes for Part V:

- *What are two main types of redress mechanisms used especially by consumers suffering more limited harm from isolated product accidents?*
 - *What mechanisms are or should be available to consumers where there are widespread accidents involving the same or similar products?*
 - *What roles can be played by the CPA in both situations?*
 - *What further legal and practical issues arise if consumers are harmed by products are imported from overseas?*
-

V.1 Small Claims Courts or Tribunals

93. Particularly since the 1970s, many countries – including several AMS, such as Singapore and Malaysia – have set up specialist disputes courts or (administrative) tribunals to resolve claims by consumers. Important features to consider for them to function effectively, in general, include:

- **Types of claim and jurisdiction:** Which consumer disputes and amounts can be brought before the court or tribunal? (Often, these include at least contractual disputes involving general consumer protection law, motor vehicles, residential leases or home building disputes, with different maximum limits for each type plus some possibility of higher maximums if both parties agree.)
- **Filing:** Is the filing fee simply one low flat-rate amount? (Some countries allow an even lower amount for certain types of consumers, such as students or those with low income.) Should firms be able to file claims against consumers, for example for non-payment? (This is unusual, as comparative experience shows that it risks swamping the process and over-formalizing it.) Can filing be completed with court assistance and/or online? (Some countries allow for the former, but very few allow for the latter.)
- **Representation:** Should consumers be allowed to have lawyers represent them? (Mostly this is disallowed, as it again risks over-formalization.)
- **Cost recovery for successful claims:** Should this be permitted, including costs of the successful party's lawyers if representation is permitted? (Mostly, cost recovery is not permitted, even for the low initial filing fee paid by the consumer claimant.)



- **Settlement:** How can the parties be encouraged to settle their disputes, bearing in mind the typical imbalance (in finances and expertise) between consumers and commercial suppliers?(Often the court/tribunal is required or strongly encouraged to mediate disputes, which can help redress the balance but perhaps leaving the consumer feeling disappointed that their concerns have not been fully heard.)
 - **Procedure and evidence:** Should the usual court requirements be relaxed, given the typical imbalance between the parties? (Often the court or tribunal has to complete hearings within one day, and can reduce the evidentiary burden especially if there is a strict liability statute that requires the manufacturer to prove that a product safety defect did not exist (as for example in Thailand: see Part II.2 above). However, for example in motor vehicle disputes, the supplier may still obtain an advantage by producing expert witness evidence.)
 - **Decisions:** Do these have to be based solely on underlying substantive law, and how can decisions be enforced? (Often the small-claims court or tribunal is allowed to refer also to general considerations of fairness, beyond the strict letter of the law, but their orders may need extra procedures and enforcement via regular courts if the supplier does not comply with the original decision.) Should appeals be allowed and decisions publicized? (Most countries provide for appeals, although grounds can be more limited than in regular court proceedings, but few countries regularly make public even important decisions of the small-claims court or tribunal – Singapore being a prominent exception in AMS.)
94. Recently, the European Union has pressed strongly for its member states to promote pure mediation of small-scale consumer disputes, rather than adjudication binding on the parties. However, some commentators have argued strongly that this will lead to under-enforcement of substantive consumer rights. On efficiency and justice grounds, they urge instead the strengthening of small claims court or tribunal procedures, involving:²¹
- a low-entry initiation mode (online, very short complaint form, but with the capacity to upload key documents related to the claim);
 - a simple but rights-based dispute resolution procedure (requiring a prompt online response from the defendant business, highlighting areas of agreement as well as disagreement, perhaps with a facility to escalate the dispute to a more elaborate court process in the more unusual event of evidentiary issues being contested);

²¹ Eidenmueller, Horst and Engel, Martin, Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe (July 7, 2013). Available at SSRN: <http://ssrn.com/abstract=2290654>.



quick enforcement of the outcome, ultimately through the regular court process (including execution against the losing party's assets, and publication of the results to guide future behaviour of other suppliers and other dispute resolvers both in and out of court).

95. Such enhancements, and small claims courts or tribunal procedures more generally, can be useful also for consumer safety problems, especially isolated injuries suffered by individuals. However, there are often more complicated factual issues (including calculations of damages) and legal issues (such as the nature and extent of a "warning defect" for the particular consumer or class), compared to simple consumer contract disputes. Sometimes the small claims court or tribunal may not even have jurisdiction to hear claims under product liability law, or the maximum amount claimable may be too low (especially if the consumer needs to incur costs for legal representation and expert witness evidence, which may not be claimable even if successful). In such situations, consumers may be better off filing claims in regular courts.

96. Instead of setting up a separate small-claims court or tribunal, a few countries have instead enacted legislation that replicate many of the desired features with the regular court system. Thailand is unique about AMS in this respect. It seems product liability claims are quite often filed and pursued under the Consumer Case Procedure Act 2008 even under the Product Liability Act, although almost all cases are settled or discontinued so there were only two known judgments applying the latter Act as of July 2015.

Case study: Thailand - Consumer Case Procedure Act 2008 B.E.2551

Section 4 – a court appointed Case Officer will assist the court in product liability claims.

Section 13 – claim must be filed within 3 years of damage but not later than 10 years.

Section 18 – fee for filing product liability claims is waived.

Section 19 – the Consumer Protection Board or an association recognized by the Consumer Protection Board may file the product liability claim on behalf of the consumer.

Section 20 – filing of the case by the plaintiff can be made verbally or in writing.

Section 25– the court shall conduct mediation to allow the parties to reach agreement or compromise.

Section 29 – the business operator has the burden of proof for issues relating to production, assembly, design or contents of goods or provision of services or any acts that are considered to be within the knowledge of the business operator.

Section 42 - the court has the power to impose punitive damages of up to 5 times the actual damages suffered.

Section 43– the court may order the business operator at his own expense to recall dangerous goods to be repaired or replaced and if not possible to repair or replace, prohibit the business operator from producing or importing the goods or for the goods to be destroyed.



V.2 ADR

96. Alternative Dispute Resolution (ADR) mechanisms, meaning various types of procedures outside regular proceedings in civil courts, are popular nowadays to resolve consumer disputes, including in many AMS. However, stand-alone ADR schemes are not widely used to resolve consumer product safety claims, especially against manufacturers. This largely leaves only general mediation services provided by CPAs for consumer complaints generally.

V.2.1 Ombudsmen

97. Statutory or industry association based Ombudsman schemes are found nowadays especially in certain consumer services sectors, such as basic utilities, telecommunications and financial services. They typically bind the industry member to try to resolve complaints with customers, through direct negotiation and then mediation provided by the Ombudsman (often by telephone). If unsuccessful, the consumer can seek an adjudication decision from the Ombudsman which is binding only on the industry member; if dissatisfied, the consumer can claim elsewhere – including in court. In Australia, industry-based Ombudsman schemes handle very large volumes of cases, partly because they are free to consumers (funded by the industry members), with independence maintained because the regulators set minimum standards that industry members need to adhere to in order to be licenced.
98. However, there are no such schemes for consumer goods, rather than services, although one consumer group in Australia has recently suggested that it could be useful to develop an Ombudsman system for motor vehicles. The closest is in Japan, where various industry associations set up PL ADR Centres around the time the Product Liability Act was enacted in 1994, but these schemes only provide for facilitated negotiations between the consumer and supplier, and then mediation (not adjudication binding on the industry member).²²

V.2.2 Arbitration

99. Similarly, arbitration is rarely used to resolve consumer disputes, especially involving unsafe products, except in the United States especially for some consumer services (and where this remains controversial). Partly this is because arbitration requires an agreement to have a binding decision made by an arbitral tribunal chosen by the parties, instead of by the courts, whereas typically there is no underlying contractual

²² Nottage, Luke R. and Yoshitaka Wada, Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?. *Zeitschrift fuer Japanisches Recht (Journal of Japanese Law)*, Vol. 6, pp. 40-81, 1998. Available at SSRN: <http://ssrn.com/abstract=837965>



relationship (such as a sales contract) between the consumer and the manufacturer. Even with respect to the direct contractual (sales) relationship between the consumer and the retailer, if the latter also tries to insert and invoke an arbitration agreement, the consumer may claim that it is void as an “unfair term” under consumer contract law because the arbitration agreement limits rights to claim before courts. In some countries, the Arbitration Law may also expressly disallow arbitration clauses applying to consumers (as in Japan) or allow them only if extra writing requirements are fulfilled (as in New Zealand). In other countries, such as Australia, industry-based ombudsman schemes for many types of consumer (services) contracts are encouraged anyway by regulators, and these provide a more favourable ADR mechanism for consumers – including an adjudication decision which is binding only on the industry member (whereas an arbitration award will usually be binding also on the consumer).

V.2.3 Mediation

100. Mediation is partially similar to arbitration, in that it requires the parties to agree to take the matter outside the court system to try to have the dispute resolved with the assistance of a third-party neutral (or a statute may force the parties to try such mediation). However, it differs because even once this ADR process is underway, the parties are free whether or not to reach a further (settlement) agreement to resolve their dispute; by contrast, in arbitration, the arbitral tribunal will complete the process by issuing a decision or award binding on the parties (unless they withdraw or settle their dispute before that).
101. Privately-supplied mediation services are not widely used to resolve product liability disputes. The exception is again the United States, which has an exceptionally high level of such litigation. That is due to unique features such as the “American rule” for legal costs (the unsuccessful plaintiff does not need to pay the defendant’s lawyers’ fees), pure “contingency fees” (lawyers agree to take a percentage of damages awarded to plaintiff clients), pre-trial “discovery” (disclosure) of written documentary evidence and oral witness testimony, punitive damages, etc. Elsewhere in the world, the risk of (high-cost) product liability litigation remains low despite the enactment of strict liability legislation, including in many AMS.²³
102. Even in the United States, the scope for private mediation of product liability disputes is limited because the parties need to negotiate a mediation agreement, yet there is typically no direct contractual relationship between the consumer and the original manufacturer. However, even in such situations, in many countries (even those

²³ Nottage, Luke R. and Kellam, Jocelyn, Europeanisation of Product Liability in the Asia-Pacific Region: A Preliminary Empirical Benchmark (May 2007). Sydney Law School Research Paper No. 07/30. Available at SSRN: <http://ssrn.com/abstract=986530>.



following the common law tradition) there is now a power being used by courts to require or encourage parties to attempt (“court-annexed”) mediation, either facilitated by court officers or by court-accredited mediators.

103. Mandatory attempts to mediate disputes, before proceeding to adjudication, is also typically a feature of small claims courts (as in Singapore), or tribunals run by consumer law regulators (as in New South Wales). Myanmar’s new 2014 Law also provides for dispute settlement bodies that will attempt to mediate consumer claims, but otherwise can order compensation to be paid by particular suppliers.

Discussion Question

To what extent does the CPA in your AMS have the legal power (jurisdiction), and practical capacity, to help consumer complainants to mediate disputes with suppliers (including manufacturers, with any direct contractual link to consumers) arising from harm caused by their unsafe products? If it has both power and capacity, how successful are such mediation attempts and how are they carried out (eg mainly by telephone or by documents rather than meetings in person, with all parties present or instead separate discussions with each party involved)? If mediation is unsuccessful, what happens next – eg does or could the CPA consider bringing a representative action in court for the consumer complainant, or assist a certified NGO to bring such a representative action?

V.3 Collective redress (including Class Actions)²⁴

104. Many consumer disputes, even involving injuries from batches of unsafe products, involve only minor inconvenience or harm to each individual consumer. This makes it uneconomical for a claim to be filed, even in a well-functioning small claims court (as in Malaysia or Singapore) or with procedures within regular courts making it easier to bring consumer claims (as in Thailand: see Part V.1 above). Yet this results in under-enforcement of consumer product safety law, meaning that manufacturers and other suppliers are not fully internalizing the social and economic costs of putting their products onto the marketplace.
105. For such reasons, to improve access to justice, civil procedure laws in many countries have tried to facilitate the efficient aggregation of (smaller) claims by allowing for:

²⁴ For more details, see http://blogs.usyd.edu.au/japaneselaw/2014/12/enforcing_product_liability.html.



- “**consolidation**” of claims (but usually only by and within the same court, which is less efficient where defective goods cause harm across multiple jurisdictions) and
- “**joinder**” of claims (but usually only where relief is sought arising out of the same transaction or series of transactions, and with each joint plaintiff’s claim typically still being considered individually).

106. The main difficulty with these procedures is that consumers have to “opt-in” by becoming parties to the court proceedings, which requires knowledge that they are underway as well as generating costs. Further, in countries that follow the “English rule” whereby a losing party must pay the (reasonable) lawyers’ costs incurred by the winning party, such as Singapore or Malaysia, there is a further disincentive to becoming party to proceedings.

107. These problems have traditionally been reduced by providing for a “**representative action**”. In Malaysia, for example: “... the plaintiff is the self-elected representative of himself and others. He does not have to obtain the consent of the other persons whom he purports to represent, and they are not liable for costs, though they will be bound by the result of the case”.²⁵ However, there usually must be a claim where numerous persons have clearly the same interest, there is no requirement to notify (potential) class members or capacity for the court to assist in notifications, the court has discretion to order the proceedings to be discontinued, and enforcement of the judgment against any non-party requires leave of the court. The Singaporean Court of Appeal recently indicated that it will take a more flexible approach towards determining whether the plaintiffs have the “same interest”, and then allowing the claim to proceed (to promote access to justice), but that involved a claim concerning renegotiated club membership contracts rather than a product safety issue.²⁶

108. By contrast, in the field of tort law claims arising from defective products, concerns about the limits of traditional “representative action” procedures have prompted public debates and some reforms related to US-style “**class actions**”. In the federal courts in Australia since 1992, in conjunction with the introduction of strict product liability law, class actions were authorized where: (i) seven or more persons have claims against the same person, (ii) those claims arise out of the same or similar circumstances, and (iii) they give rise to a substantial common issue of law or fact.

²⁵ *EH Riyid v Eh Tek* [1976] 1 Malayan LJ 262.

²⁶ *Chong Chiah & Ors v Treasure Resort Pte Ltd* [2013] SGCA 52. Compare also eg the Philippines (limiting claims for damages), *Re Request of the Heirs of the Passengers of Dona Paz*, AM No 88-1-646-0 (3 March 1988), discussed in Corona, Renato (2006), ‘Class Action, Public Interest Litigation and the Enforcement of Shared Legal Rights and Common Interests in the Environment and Ancestral Lands in the Philippines’, Paper presented at the 9th General Assembly of the ASEAN Law Association, <http://www.aseanlawassociation.org/9GAdocs/Philippines.pdf>.



Once filed, the court directs how anyone within such a class can opt-out and therefore not be bound by awards of damages (which can be amounts specified or calculated in a particular manner, or an aggregate amount to be later distributed among all plaintiffs). There is no preliminary “class certification” step, as in the US. Costs can only be ordered against the losing representative plaintiffs, not the other class members, and since 2006 it is clear that third-party litigation funders can finance the litigation (including providing reimbursements for cost orders against the representative claimants) in exchange for a percentage of any damages awarded by the court.

109. Governmental reviews conclude that such class action procedures in Australia have significantly improved access to justice for consumers, despite initial concerns about frivolous lawsuits and over-enthusiastic plaintiffs’ lawyers. Major judgments and settlements have been reached in product liability class action claims (as in the recent Bonsoy settlement outlined in Part V.4 below). This contrasts with only one example of the regulator (the Australian Competition and Consumer Commission) using its power to get advance consent from an individual plaintiff to bring a claim under the strict PL law regime introduced also in 1992.
110. From 1999 in Indonesia, in addition to the possibility of a consumer protection non-government organisation filing a representative suit, the Consumer Protection Act has provided for a class action procedure, supplemented by Supreme Court Rules introduced in 2002. However, it includes a court certification step, and most suits are against government authorities and not related to defective products. A major impediment is the relatively high costs involved in notifying potential class members. As legal aid funding from the government is limited, one commentator advocates introducing a third-party litigation funding regime.²⁷
111. In Thailand, the Securities and Exchange Commission drafted in 2001 a “Bill on Class Actions for Securities Proceedings”, which was referred by the Council of State to the Civil Procedure Code Revision Committee to consider applying such a scheme more widely to enhance consumer access to justice.²⁸ A new draft Bill was developed with input also from US organisations. Differences from the Australian class action system included the possibility of a pure contingency fee (paid to lawyers, as opposed to third-party litigation funders) but capped at 30% of damages awarded. However, the Bill encountered business sector opposition and did not progress through the National Legislative Assembly until early 2015. (As of July 2015, Court Rules were still being finalised so the new class action regime was not yet in effect.) Meanwhile, the Consumer Act Procedure Act BE 2551 (2008) allowed for

²⁷ Sundari, Elisabeth (2013), 'The Cost Barrier of Consumers Class Action in Indonesia', *European Scientific Journal*, 9 (31), <http://eujournal.org/index.php/esj/article/view/2050>.

²⁸ Ratanachaichan, Chukiart (2006), 'A Primer on the Thai Draft Law on Class Actions', Paper presented at the 9th General Assembly of the ASEAN Law Association, <http://www.aseanlawassociation.org/9GAdocs/Thailand.pdf>.



government-certified consumer organisations to bring product liability and other consumer law claims. Thailand's CPA can also initiate claims under the Product Liability Act 2008, and a Japanese automobile manufacturer settled after one such claim was announced.²⁹

112. Similarly, in Vietnam, the Consumer Protection Act 2010 allows representative actions to be brought by certified social organisations registered for consumer protection. However, such organisations currently lack resources and expertise to file such actions.³⁰

V.4 Cross-border Access to Justice for Consumers

113. A particular and growing problem for consumers arises from product safety failures in imported products, including those increasingly imported directly by consumers from online retailers. Privately-supplied mediation of such disputes is difficult because the consumer usually had no contractual relationship with the foreign manufacturer before the harm and dispute arose, so they will not have concluded an arbitration or mediation agreement at that stage, and the consumer is unlikely to agree to such ADR afterwards. Even if a mediation agreement can be reached, and a settlement is achieved, if the foreign manufacturer does not comply then the consumer will have to bring a lawsuit for breach of (settlement) contract, which will be complicated and expensive.
114. As for lawsuits, if the importer can be identified and has sufficient assets, the consumer can bring claims locally against the importer, and product liability statutes generally impose strict liability on the importer as well as the actual (foreign) manufacturer. But if the importer will find it hard to cross-claim against the original manufacturer, because the applicable contract or tort law is unclear or it is hard for the importer to enforce any local court judgment against a foreign manufacturer, the importer will become less likely to settle claims brought by local consumers.
115. If the importer cannot even be identified or lacks sufficient assets to cover product liability claims (especially by multiple claimants), or if the consumers imported the goods directly from the foreign manufacturer (e.g. online), then problems of obtaining redress are even more acute. The consumer will need to get expert advice especially regarding:

²⁹ Thanitcul, Sakda (2013), 'Law and Legal Process of the Product Liability Act in Thailand', *Journal of International Cooperation Studies*, 20(2), pp36-40, at http://www.research.kobe-u.ac.jp/gsics-publication/jics/thanitcul_20-2&3.pdf.

³⁰ One lawsuit has been filed by a local consumer group in a provincial court after around 100 victims were injured by contaminated cakes, but such litigation remains unusual.



- whether and how its local court will take **jurisdiction** over a claim against a foreign party (this may require special leave from the court, and a lengthy process to correctly serve local court documents in the foreign manufacturer’s jurisdiction);
 - **what substantive law** will be applied by its local court (this may be a foreign product liability law, rather than the local law which is much easier for the consumer’s lawyers to prove, depending for example on whether the safety defect being claimed is a “warning defect” regarding instructions or a one-off “manufacturing defect”, and/or whether the consumer suffered serious injury as opposed to merely consequential loss to property other than the unsafe product);
 - if the foreign manufacturer lacks sufficient assets in the consumer’s own country, whether any local court’s judgment against the foreign manufacturer will be recognised and **enforced through the foreign courts** (this will depend on that country’s own “private international law” rules except in the rare situation where there exists a bilateral treaty treating local and foreign courts essentially equally, as between Australia and New Zealand albeit not for all small claims courts or tribunals, or a regional scheme as among the courts of EU member states).
116. A further complication may be that the foreign manufacturer and/or the consumer may wish to bring into the litigation claims against other parties, such as intermediate suppliers. The latter may bear some liability in contract and/or tort (at least in negligence), and have further assets or product liability insurance coverage to contribute to compensation payments claimed by consumers. However, this creates further issues relating to the jurisdiction of local courts in the country of the consumers, what substantive law will be applied, and how to enforce any resultant judgments if the intermediate supplier is based overseas (such as the exporter of the products, not usually covered by strict liability statutes if not the actual manufacturer of the products).
117. Usually, the extra complications and costs associated with cross-border product liability claims mean that they can only be commenced against a foreign manufacturer (or even perhaps an importer) if the consumer’s home country has an opt-out class action procedure, allowing plaintiffs and their lawyer to efficiently aggregate claims into one procedure. Further problems can arise if the class action tries to bring in consumers who have suffered loss not just in that country, but also consumers resident in other countries. Sometimes the class action regime will not allow even allow this (as proposed for example for Hong Kong in 2012).³¹ Even if allowed, tension may arise between the subset of consumers in the country where the class action is commenced and the other consumers, especially if the law firm leading the litigation are in the former country and want to achieve a settlement that

³¹ <http://www.hkreform.gov.hk/en/publications/rclassactions.htm>



may disproportionately benefit consumers in the former country. More complications can arise if a further class action is commenced in another country, making it harder for example for the suppliers to know when and how to settle the lawsuits. For such reasons, cross-border class actions are not often initiated (outside the US) or then tend to end in settlements (as do indeed most purely domestic class actions).

Case study and exercise – Bonsoy Class Action Settlement in 2015

An Australian health foods importer (A) concluded a contract with a Japanese exporter (B) for the supply of Bonsoy soy milk for consumers in Australia, which the exporter had produced by a Japanese manufacturer (C). From 2004, A imported and distributed soy milk that replaced salt with seaweed (konbu) extract in the soy milk, which similarly added flavour but had high levels of iodine, which was noted by tests they conducted in 2006. Despite complaints from Bonsoy consumers about thyroid-related health problems, arguably linked to excessive iodine, the soy milk was only subject to a voluntary recall in December 2009 and then a reformulation to remove the konbu extract. One cup of the original soy milk consumed in 2004 would have contained almost 4 times the Australian health authorities' *recommended* daily maximum limit of iodine for adults, and 7 times the recommended maximum from 2005 (when they raised the limit) until 2010, although below the (much higher) recommended maximum in Japan.

Representative consumers began a class action in the Victorian Supreme Court in 2010, against A under Australian product liability legislation and the general law of negligence, which was extended in early 2013 to B and C (including claims under Japanese law). The parties reached a A\$25m settlement in late 2014 potentially impacting around 500 consumers, soon before the main trial, which was approved by the Court in May 2015. (Indirectly, achieving this settlement may have involved negotiations by A, B and C respectively with their product liability insurers, if any.)

Consider what might have happened if this product was produced in and exported from one AMS (such as Vietnam) and consumed in other AMS (such as Singapore, Malaysia and Thailand), particularly in terms of consumer redress under product liability law, but also potential regulatory intervention in the exporting and importing countries.

- <http://www.mauriceblackburn.com.au/legal-services/general-law/class-actions/current-class-actions/bonsoy-class-action/>
- <http://www.smh.com.au/business/bonsoy-to-pay-soy-milk-victims-25m-in-record-class-action-20141124-11spe4.html>
- <http://www.corrs.com.au/publications/corrs-in-brief/court-approval-final-hurdle-to-the-bonsoy-class-action-settlement-cleared/>



- *Downie v Spiral Foods Pty Ltd & Ors* [2015] VSC 190 (7 May 2015), <http://www.austlii.edu.au/au/cases/vic/VSC/2015/190.html>³²

Further general readings:

- Asher, Allan, et al, ASEAN Complaint and Redress Mechanism Models (2013), Final Report on for ASEAN-Australia Development Cooperation Program Phase II: Models for Internal Complaint Systems and External Redress Schemes in ASEAN. Available at <http://aseanconsumer.org/misc/Output%20%20i.Complaint%20and%20Redress%20Models%20-%209Jan14.pdf>
- Hensler, Deborah, Using Class Actions to Enforce Consumer Protection Law, in: Howells, Geraint et al (eds) Handbook of Research on International Consumer Law (Cheltenham: Elgar, 2010)
- Karlsgodt, Paul (ed), World Class Actions (Oxford: OUP, 2012).
- Nottage, Luke, Enforcing Product Liability Law (2015). Policy Digest for ASEAN-Australia Development Cooperation Program Phase II: Supporting Research and Dialogue in Consumer Protection, forthcoming via <http://aadcp2.org/supporting-research-dialogue-on-consumer-protection/>
- Spiller, Peter et al, Individual Consumer Redress, in: Howells, Geraint et al (eds) Handbook of Research on International Consumer Law (Cheltenham: Elgar, 2010)

³² See especially paras 103-37 (describing some significant facts and issues), Japan's own Product Liability Act 1994 (at <http://www.consumer.go.jp/english/pla/>) which the Australian court might have had to apply if this class action had not settled, and articles 3(3) (above n 8) and 23-24 of Vietnam's Consumer Protection Law 2010 (via <http://www.aseanconsumer.org/downloads/>) as follows:

Article 23. Obligations of compensation for the damage caused by product's defect

1. Business individual, organization has the obligation to compensate damages caused by their defective product with regard to lives, health, and assets of consumers, even in case traders do not know or have no fault in causing defect, exemption for Article 24 of this Law.
2. Business individuals, organizations in one of the following cases must compensate damages caused by defects of product to consumers in accordance with clause 1 of this article:
 - a) Business individuals, organizations are the producers of defective product;
 - b) Business individuals, organizations imported defective product;
 - c) Business individuals, organizations affixing a trade name or using an indication on their products to make consumers aware that business individuals, organizations are producers or importers;
 - d). Business individuals, organizations directly distributing defective products to consumers shall be liable for such products if they fail to identify business individuals, organizations who are liable for the products in the cases referred to in point a, b, c clause 2 of this Article at the request of the consumers.
3. Compensation is done in accordance with provisions of civil procedural law.

Article 24. Exemptions from product liability

Business individuals, organizations shall be considered for an exemption from the obligation of compensation provided at Article 23 of this law if the product is proved that level of science and technology all over the world at the time the product was put into circulation did not make the business individuals, organizations capable to know the defect of the product.”



PART VI MANAGEMENT AND COMMUNICATION TOOLS

Key Learning Outcomes for Part VI:

- *What are the best ways for the CPA and other regulators to ensure that consumers are aware of their private law rights against suppliers if harmed by unsafe products, as well as the powers of the CPA to assist in their claims and to engage in pre- and post-market interventions?*
 - *How can consumer complaints be used both to resolve individual disputes and feed into developing and enforcing consumer product safety law and policy?*
 - *Apart from information about product risks received because consumers bring complaints, can the CPA obtain information from other sources including suppliers themselves?*
 - *How effectively can the CPA obtain and analyse product risk information from other parts of its own government, and regional or international bodies?*
-

VI.1 Consumer awareness and education

118. A key role and responsibility of CPA and other sectoral regulators is to help consumers become aware of their rights, including with respect to product safety.

VI.1.1 What Information Should Consumers Know?

- a. The right to safe products which is usually contained in the consumer protection law but not everything may be covered under this law. Other laws relating to specific product groups setting requirements for safe products, such as food, medicines, cosmetics, toys, should also be mentioned. The rights should be explained in a simple manner without the use of legal jargon so that consumers can easily understand what their rights are;
- b. What remedies are available if consumers encounter unsafe products;
- c. How to access these remedies;



- d. Where to go for further advice – consumer advice/complaints centres, sectoral regulators, other government agencies, consumer organisations, consumer courts or small claims courts, mediation, etc;
- e. Special Alerts through the mass media and the agency’s website can be used to caution or warn consumers against scams or unsafe products and services that have emerged suddenly and pose a threat to a large number of consumers.
- f. Information on successful case studies of handling consumer complaints on product safety should also be made available from time to time to gain the confidence of consumers in the effectiveness of the work of the CPA in safeguarding consumer rights.

VI.1.2 Who are the target groups of consumers?

119. Depending on the type of information to be disseminated, there could be specific target groups for certain types of information.
- a. General public - it is easiest to design and disseminate information materials for the general public as these will be generic materials not addressing any particular group. The mode of dissemination for the general public is generally where they can find the information readily, such as websites, social media, newspapers, radio, TV, posters, leaflets, hotlines, etc.
 - b. Women/homemakers are the main shoppers for the family especially for food and household products and services. Information materials should be designed and targeted to reach women in the workplace or their homes.
 - c. Students – there are many products and services targeting children and teens when they are at their most vulnerable age. Advising them of their right to safe products while they are young will benefit them and the nation in the long run. Information campaigns can be targeted to reach students in schools, colleges and universities.
 - d. Rural communities should be a special target group as they may face different problems from consumers in urban areas. Also, information is slow to reach distant rural areas. Information materials need to address their special needs.



VI.1.4 How should the Information be disseminated?

120. How the information is to be disseminated will depend of the type of information and the target audience for that information.

- a. Websites and social media (facebook, you tube videos, blogs, etc.) are best for information meant for the general public, as well as the young who are more IT savvy than the older generation.
- b. Media campaigns, via radio, TV, newspapers, exhibitions, public events such as Consumer Rights Day, are also meant for the general public and are ideal for all kinds of general consumer rights or information on specific issues.
- c. Printed leaflets or booklets, distributed in places the public frequent such as government offices, libraries, post offices, banks, department stores, consumer associations, can be used to disseminate both information on general consumer rights as well as about specific important issues.
- d. Partnership programmes with civil society organisations such as consumer associations, women's groups, user groups, school clubs and societies, are a good strategy to save and share resources and to plan together information programmes that will benefit the members of these organisations and also address the public as well.
- e. Toll free Consumer Hotlines are useful to provide quick and ready information and advice to consumers.
- f. Annual reports – relevant information from annual reports such as types of common problems consumers are facing, successful case studies of resolving consumer grievances, unethical business trade practices to avoid, product safety cases, product recalls/bans and so on, can be extracted and written up for the dissemination to the public.



Case Study: Trampoline Safety Campaign - Australian Competition and Consumer Commission

1. One at a time

Make sure there is only one child on the trampoline.

2. Supervise

Watch children at all times, and take extra care with younger children as they are more prone to serious injury.

3. Safety padding

Always use safety padding on the frame.

4. Check condition

Regularly check the:

- mat and net don't have holes
- springs are intact and securely attached at both ends
- frame is not bent
- leg braces are locked.

5. Hazard free surrounds

Make sure:

- the area around the trampoline is free from hazards like fences or garden furniture
- there is an overhead clearance to avoid objects like clotheslines, trees and wires.

Publications

- [Trampoline safety—it's flippin' important – Fact card](#)
- [Trampolines consumer research report by Kidsafe](#)

Videos

[Trampoline safety – It's flippin important](#)

Eight kids a day are injured by trampolines in Australia. Watch Australian Olympian trampolinist Blake Gaudry explain the simple steps you can take to avoid injuries such as fractures, open wounds, dislocations and head injuries.

Source: <http://www.productsafety.gov.au/content/index.phtml/tag/trampolinesafety>



VI.2 Consumer Complaint Handling

121. Complaints are a window to consumer problems in the marketplace, but depend on effective consumer education and awareness strategies (outlined in Part VI.1 above). Complaints are early indicators of what is going wrong and this is critical especially when products are hazardous and cause harm not just to individual consumers but have the potential to cause harm to a bigger group of consumers. Complaints handling services are now commonplace and are being offered by both the public and private sector to get into closer contact with the people they serve and to resolve grievances. If compiled and handled systematically, they are a valuable resource for CPAs to carry out their work of consumer protection efficiently and effectively. Information technology has expanded the scope of complaints handling services by enabling the services to reach a wider audience unconstrained by geographical location and providing a more efficient and systematic approach to responding to complaints, data compilation, storage and retrieval. However, new technology (such as internet-based complaints) also creates challenges for CPAs, such as anonymous sources which can be easily contacted to confirm or seek further details, leading possibly to over-inflated or spurious claims against suppliers by consumers or even competitors. Establishing effective working relationships with peak consumer NGOs can help address such challenges, by allowing the CPA to better determine reliability and details of complaints that it may receive.

VI.2.1 How to Handle Consumer Complaints

122. The following avenues and mechanisms can be effectively used:

- Receive complaints in person at the office or during special events/visits, telephone hotline, letters, emails, website.
- Take down relevant information about the problem such as contact information of complainant, date when the problem arose, nature of the problem, person/business complained against and their contact details, what recourse is preferred (refund, replacement, repair, compensation, apology, etc).
- Collect documents/samples (evidence) from the complainant if in person, and if not ask complainant to send copies of the relevant documents/samples.
- Follow up action – contact the other party, investigate with site visit where necessary, gather information (including e.g. liaising with consumer NGOs or overseas regulators who may be encountering similar complaints), decide on a



course of action, advise consumer/other party, try to mediate and suggest a resolution where possible (either directly or by reference to mediation provided by certified consumer NGOs), if the dispute cannot be resolved amicably refer complainant to the consumer tribunal or other available avenues for redress, record outcome of action taken, write up case study for website if it is a case that will be of educational value.

- If this is not merely an individual complaint but could lead to or is already affecting a larger class of consumers, urgent action may be required by the consumer protection agency before the problem escalates into a crisis. In such cases, the complaint should be immediately brought to the attention of a senior officer to make a decision on what action is needed. If necessary the CPA may have to call a press conference and use all other means (website, radio, etc.) to warn consumers especially if it involves possible economic loss, physical injury or death.

VI.2.2 IT-based Consumer Complaints Registration System

123. Using IT to receive, record, store and retrieve consumer complaints is an efficient and effective means of handling consumer complaints. Even a basic IT system is advantageous as it will save a lot of time and resources in handling common consumer complaints. Staff will have an easily available point of reference at their fingertips as much of the information they need can be easily stored in the system and retrieved just as easily. It will also be a good source of historical experience that is not lost when a staff member leaves the department. A good IT system for consumer complaints should at the very least have basic information on common consumer complaint areas for easy retrieval, categorised consumer complaints according to the areas covered under the CPA with a reference number to enable easy identification and retrieval, contain standard letters with blanks to fill in information for different types of complaints to save officers' time in drafting letters, inter-agency contact information to enable easy referral, and any other important information that is relevant.

VI.2.3 Components of a Consumer Complaints Website

124. Most consumer protection agencies now have a website to reach out to the public. The website can also be used as a convenient avenue for the public to access the CPA's consumer complaints department. The minimum information that the website should have includes:

- information about the consumer complaints department
- categories of consumer complaints handled, how to send complaints through the website



- what information consumers need to provide about the problem
- what action the department will take on receipt of the complaint
- time line for action to be taken
- contact information, such as a hotline to call personally for advice, an email address to send the complaint, and the street address in case the consumer wants to visit and speak to an officer.

125. The website could also provide information on common consumer rights and matters under the CPA, so consumers merely seeking information can retrieve the information from the website without having to call or email, as well as any advice or dispute resolution services provided by accredited or peak consumer NGOs.

VI.2.4 Converting Consumer Complaints to Consumer Policy

126. Measures include the following:

- Retrieve data from the registration system such as number of complaints according to categories of types of products and services, geographical location of complaints, how many were successfully resolved, what types of action were taken on complaints received, number of complaints received according to the various means such as telephone, letter, email, etc.
- Analyse data and write report such as trends in number of complaints compared to previous years, which categories had most number of complaints, number of complaints by class/location of consumers, which businesses were complained about the most and why, etc.
- Propose policy actions from data analysis such as need for new laws, close loopholes in existing laws, revise outdated laws, report on lack of law enforcement, propose action on hazardous products/services, propose action against unethical and consistently errant companies, identify issues for media campaign to educate consumers on rights and responsibilities, review complaints services to unserved consumers/target groups to improve services, publish information materials on common complaints areas to educate consumers to pre-empt similar problems from arising in the future.



Complaint submitted



Review and route



Company response



Consumer review



Review and investigate



Analyze and report

Source: CONSUMER RESPONSE ANNUAL REPORT (JANUARY 1 – DECEMBER 31, 2013)
CONSUMER FINANCIAL PROTECTION BUREAU, US.



Case study 1: Korea Consumer Counselling Network

The Consumer Counseling Center (www.ccn.go.kr) is a nationwide counseling system participated by 10 consumer organizations, 16 metropolitan city councils, local governments, and the Korea Consumer Agency. Consumers nationwide use the same telephone number – 1372, or the CCN website, to lodge complaints and seek advice from CCN.

- <http://www.aseanconsumer.org/misc/downloads/usftc-s15-KCA-Hyunmuk-Lim.pdf>

Case study 2: Annual Reports on Consumer Complaints

For good examples of informative annual reports on consumer complaints:

- Consumer Protection Financial Bureau US:
<http://www.consumerfinance.gov/reports/2013-consumer-response-annual-report/>
- European Consumer Centres Network:
http://ec.europa.eu/consumers/ecc/infographic/02_14_infograph-eccnet_2013.pdf

Case study 3: European Consumer Centres Network

For a good example of informing consumers about the complaints handling services:

- http://ec.europa.eu/consumers/ecc/docs/ecc-leaflet-2014_en.pdf
-

VI.3 Other Avenues for Sharing Accident Information

VI.3.1 Consumers and others providing and accessing accident information

127. In the US, since amendments to consumer product safety law in 2008 following high-profile problems with certain products such as imported toys, consumers can directly post reports of product related accidents on the government's Safer Products website: www.saferproducts.gov. This website is open to the public and is searchable. US government officials, healthcare professionals and others can also file reports. The facility is useful in collecting detailed accident data from hospitals, which may otherwise not record information useful to consumers and the CPA (such as the product manufacturer and model of the likely cause of the accident). The Safer Products also website allows suppliers to respond to accident reports. This safeguard is useful to minimize the risk of competitors filing spurious or over-inflated complaints, as well as in demonstrating to consumers that complaints are being taken seriously by suppliers.



VI.3.2 Suppliers providing accident reports to regulators

128. US consumer protection law requires a supplier to notify the Consumer Product Safety Commission if it holds information that reasonably indicates that its consumer product “fails to comply with an applicable consumer safety rule or voluntary consumer product standard, *contains a defect which could create a substantial risk of injury to the public, or creates an unreasonable risk of serious injury or death*” (Consumer Product Safety Improvement Act, 16 CFR s.1115.14(e): emphasis added). However, such reports remain confidential to the Commission and it has not actively sanctioned suppliers for non-compliance of the accident (risk) information reporting requirement. Partly this is offset by uniquely high volumes of product liability litigation in the US, including class actions, which alert regulators and others about product safety risks anyway. Nonetheless, perhaps now that the public and others can file accident reports via the public www.saferproducts.gov website, the Commission has recently indicated that it will take a tougher approach to enforcement.³³
129. In the EU, the revised General Product Safety Directive of 2001 has required member states (since 2004) to also implement reporting requirements on suppliers. Again, national regulators have generally not imposed sanctions for non-compliance – instead, encouraging suppliers to improve compliance programs and or taking further measures further down the “regulatory enforcement pyramid” (outlined Part V.6 above). However, in March 2015 the British government announced a review of the UK’s consumer product recall and safety regulation system, after a court ordered a large fine against a major domestic appliance manufacturer for failing to promptly report a serious product safety risk – one of the first such sanctions within the EU.³⁴
130. In the Asia-Pacific region, in 2006 Japan also introduced a mandatory reporting requirement for serious accidents (requiring hospitalization) and death, as well as risks prescribed by regulations (currently: involving fires, or carbon monoxide emissions eg from gas fan heaters). In 2010, Canada introduced an EU-like regime, whereas s 131 of the Australian Consumer Law added a narrower requirement – it applies for example only to actual serious accidents or deaths (not “near-misses” or other serious risks) and only rapid-onset injuries or illnesses (not longer-term health problems, unless death results). A further problem is that s 131A requires any reports received by the CPA to be kept confidential, unless the Minister decides that wider disclosure is in the public interest (which has never been done). Accidents

³³ For example, the Commission issued a \$4.3m civil penalty against a manufacturer for inadequate reporting (as well as large fines for retailers that distributed recalled products): <http://www.cpsc.gov/en/Newsroom/News-Releases/2015/Baja-and-One-World-Technologies-Agree-to-4300000-Civil-Penalty/>

³⁴ <http://www.hoganlovells.com/uk-government-announces-review-into-product-recall-system-03-16-2015/>



reports from suppliers can only be shared with other Australian regulators (not even counterparts in close economic partners like New Zealand), let alone with public, whereas no such restrictions apply to the Japanese regulators and they therefore disclose online the accident report information (including manufacturer's name and model details). In both countries, the CPA does not yet seem to have sought or obtained through the courts major civil penalties or other sanctions against suppliers that have violated the reporting requirements.³⁵

131. New Zealand considered enacting a similar requirement, but instead only added in 2013 a requirement on suppliers to notify regulators if and when conducting voluntary recalls (which is in their interest to do anyway, as discussed in Part V.5 above, and required in Australia since 1986).³⁶ No AMS has yet even such a requirement, let alone the broader accident reporting duty on suppliers found in their major trading Asia-Pacific and EU trading partners. This limits the potential for “responsive regulation” in developing and enforcing other aspects of the consumer product safety law systems in AMS (see Part IV.6 above).

VI.4 Inter-Agency Collaboration

VI.4.1 Central and Local Bodies within the CPA System

132. Coordination among central and local CPA authorities is a major challenge, especially in developing countries with new consumer protection law regimes (such as Myanmar since 2014) or limited financial resources (such as Laos), but also in countries permitting high levels of decentralization (such as Indonesia). Systems to help deal with consumer complaints (Part VI.2 above) and otherwise collect accident information (Part VI.3), and to share them efficiently (Part VI.5 below), become particularly important.

VI.4.2 Collaboration with Related Agencies, Courts and Hospitals

133. As outlined above (Part III.2), many CPAs lack legislative powers to develop and set mandatory safety standards for consumer goods generally, except perhaps “information standards” or warnings that could be required on products pursuant to labeling requirements (as in Thailand). Even when they do have such powers (as in Malaysia), there may be exclusions for certain higher-risk products (such as food

³⁵ See further Nottage, Luke R., Suppliers' Duties to Report Product-Related Accidents under the New 'Australian Consumer Law': A Comparative Critique (May 4, 2010). Commercial Law Quarterly, Vol. 25, No. 2, pp. 3-14, 2011; Sydney Law School Research Paper No. 10/41. Available at SSRN: <http://ssrn.com/abstract=1600502>

³⁶ See <http://www.consumeraffairs.govt.nz/pdf-library/product-safety-pdfs/Guidelines-for-Product-Recalls-December-2013.pdf> p6. (The following statement at <http://www.consumeraffairs.govt.nz/legislation-policy/acts-regulation/product-safety-standards/how-product-safety-laws-work-in-new-zealand> is out of date and incorrect: “New Zealand does not require notification of voluntary recalls, but MBIE's Trading Standards does offer assistance to companies undertaking a recall.”)



and healthcare products) under the jurisdiction of other regulators. This limits the capacity for the CPA to collaborate *formally* with other regulators.

134. However, there should be no legislative impediment to *informal* collaboration – including the sectoral regulators inviting CPA officials, or even representatives from consumer organizations that the general consumer law may allow or require the CPA to support, to attend standard-setting meetings and activities. (On the contrary, for example, the 2010 Consumer Protection Law in Laos indicates that generally the CPA should play a coordinating role.) Involving CPA officials or delegates is beneficial for other regulators because the former (should) have a keen understanding of consumer behaviour, even if they have less technical knowledge in specific fields subject to other regulators. Greater inter-agency collaboration in *pre-market* controls (such as safety standard setting) also has the benefit of enhancing understanding and capacity regarding safety features of the relevant types of products. This is important if and when the CPA becomes involved in *post-market* regulation such as banning or recalling products that are later found to be unsafe (Part IV above). The CPA may also be asked to bring representative actions under product liability laws, or support consumer organizations that have been certified to do so (Part II).
135. Even if the CPA or consumer organizations under its jurisdiction do not have the power to file representative lawsuits in courts, the CPA should collaborate with the judiciary at least by requesting information on consumer-related claims they encounter (especially if there are very few reported judgments, as e.g. in Vietnam). If the CPA administers small claims tribunals (Part V.1 above), or provides or supports mediation schemes (Part V.2), it should seek general guidance on design features as the judiciary specializes in dispute resolution techniques.
136. Another useful source of product safety related information is healthcare professionals, especially hospitals. Specific regulatory regimes, usually under the jurisdiction of a health ministry, typically require hospitals to record information about the likely cause of accidents that they treat. However, such information may not be detailed enough to be very useful to the CPA (e.g. it may not record at all, or accurately, the manufacturer or model of the product that likely caused the accident). The suspected defective product may not even have been taken with the patient to the hospital, or it may be disposed of there before details are recorded or it can be passed on the CPA for safety testing. The CPA, health authorities and hospitals or other healthcare providers therefore need to collaborate in developing reporting requirements and information exchange platforms that help future consumers most effectively, not just the treatment of patients.

Discussion Question

To what extent does the CPA in your AMS have or desire close coordination mechanisms with other parts of government (especially sectoral regulators) in publicity and information-sharing, standard-setting, and/or joint investigations, sanctions and dispute resolution?



VI.4.3 Collaboration with Regional and International Bodies

137. The limited scope of the CPA to set safety standards in many AMS, compared to the powers of sectoral regulators, also restricts their capacity to engage in the growing activities of regional and international bodies in consumer product safety setting activities and capacity building, for example regarding foodstuffs.³⁷
138. However, for similar reasons as set out just above regarding collaborating with sectoral regulators within each country, the CPA can and should be involved to some extent in such activities.
139. Free trade agreements nowadays also often provide for broader capacity-building and information-sharing initiatives among government authorities in the treaty party countries, with respect to food imports but also measures affecting other consumer products that may constitute “technical barriers to trade”. In fields such as cosmetics safety regulation, all AMS have already collaborated to implement an EU-like harmonized regime.³⁸
140. Already, consumer regulators in AMS should contribute actively to general consumer accident information sharing initiatives at regional and international levels.
141. The OECD now has an online Global Recalls Portal that lists (in searchable form) mandatory and voluntary recalls from Australia, Canada, the EU, Japan and the US, but it states that “additional OECD and non-OECD jurisdictions will be joining the initiative”.³⁹ The EU had already created a rapid exchange (RAPEX) mechanism so that national regulators could inform their counterparts (and the public) about product recalls and other risks notified under the General Product Safety Directive requirements introduced in 2011. The EU has concluded collaboration agreements with other countries (such as China) to share information, and might do so with individual AMS or ASEAN as a whole.
142. ASEAN is developing an information-sharing portal of its own at <http://www.aseanconsumer.org/alerts/>. However, this remains comparatively limited perhaps due to resource constraints (including budget and language capacity: only 5 AMS have been contributing), as well as a lack of obligations under national laws in AMS for suppliers to notify national regulators even about voluntary recalls (Part IV.3 above).⁴⁰

³⁷ http://blogs.usyd.edu.au/japaneselaw/2015/05/food_safety_regulation.html

³⁸ http://blogs.usyd.edu.au/japaneselaw/2015/06/cosmetics_regulation.html

³⁹

http://globalrecalls.oecd.org/Content.aspx?Context=AboutThePortal_Introduction&lang=En

⁴⁰ http://blogs.usyd.edu.au/japaneselaw/2014/10/consumer_product_safety_req.html



Case study: “RAPEX” accident information exchange

RAPEX notifications from either from supplier’s required accident or risk reports, or where national regulators identify a safety problem from local market surveillance or monitoring events overseas, except for foods, pharmaceuticals and medical devices (covered by other EU mechanisms).

If the risks are considered “serious”, they must be included in the weekly report circulated to all 31 participating countries (EU members, but also Norway, Iceland and Liechtenstein) and uploaded at http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/index_en.htm.

If risks fall into other risk categories (low, medium or high), they do not need to be included but national regulators now have the discretion to add them as well. RAPEX notifications have steadily increased (including a 9% increase to 2155 “serious risk” notifications in 2014, notably for toys, motor vehicles and clothing or fashion items). This does not necessarily mean that products are becoming more dangerous, but certainly that EU regulators are putting greater emphasis on enforcing product safety laws, as well as increased sensitivity of many companies to product safety issues (including more voluntary recalls).

- Rod Freeman et al, “A Snapshot of EU Product Safety Reporting 2012-2014” (March 2015) 58 (HoganLovells) International Product Liability Review 2-5.

VI.5 Information Technology and Data/Knowledge Management

143. Improving resourcing and functionality of the ASEAN “Product Alerts” databases, preferably in collaboration with other national and international databases on consumer product safety risks (Part VI.4 above), is important to improve the information and evidence base needed to make other aspects of safety regulation described above (Parts III and IV), as well as private liability regimes (Part II) enforced through various redress mechanisms (Part V), work effectively. Information concerning consumer complaints more generally (Part VI.2) should also be integrated. Computerised systems are available to collect and analyse such data, with Japan having pioneering experience (beginning with its PIONET system as early as the 1980s), and such systems also can help make public at least some of this information more efficiently (Part VI.1 above). Better information-sharing, nationally and internationally, is particularly important in addressing the challenges as well as opportunities presented by e-commerce, such as online retailers supplying unsafe goods to consumers across multiple countries.



Further general readings:

- Nottage, Luke, *Cosmetics Regulation Under National and ASEAN Law* (2015). Policy Digest for ASEAN-Australia Development Cooperation Program Phase II: Supporting Research and Dialogue in Consumer Protection, forthcoming via <http://aadcp2.org/supporting-research-dialogue-on-consumer-protection/>
- Nottage, Luke, *Food Safety Regulation under National and International law: Integrating Consumer Regulators in Proliferating Standardisation Projects* (2014), Policy Digest for ASEAN-Australia Development Cooperation Program Phase II: Supporting Research and Dialogue in Consumer Protection, forthcoming via <http://aadcp2.org/supporting-research-dialogue-on-consumer-protection/>
- Zakaria, Zalina, *Cosmetics Safety Regulations: A Comparative Study of Europe, the USA and Malaysia* (PhD thesis, University of Manchester, 2012) <https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:170807&datastreamId=FULL-TEXT.PDF>



GLOSSARY: key terms and concepts in product safety law

- Alert system: requirements or facilities to ensure product safety (especially product-related accident) information flows from suppliers and the marketplace to regulators and the public (see Parts IV.5 and VI.3).
- Bans: public notices public from sectoral regulators or the Consumer Protection Agency that consumer goods have been determined to be unsafe and therefore can no longer be supplied (see Part IV.4).
- Certification: accreditation or prior approval of consumer goods for supply, or of organisations (e.g. those allowed to bring representative claims on behalf of harmed consumers).
- Consumer expectations test: the usual overarching criterion for whether goods have a safety “defect” triggering liability under strict product liability statutes (Part II.2), namely whether the goods have the level of safety consumers are entitled to expect.
- Consumer protection agency: the main or lead government entity responsible for consumer product safety policy, laws and enforcement (usually nowadays under a framework or general Consumer Protection Act).
- Consumer services: usually not defined separately in general consumer product safety laws, or instead as supplies that are *not* consumer goods or products (see eg s3(1) of Malaysia’s Consumer Protection Act⁴¹)
- Defect: imperfection in consumer goods supplied, which under many strict product liability statutes trigger private law consequences if the defect relates to the safety of the consumer goods (see Part II.2), and possibly also public law requirements (e.g. a public recall process, as in Vietnam: Part IV.5).
- General safety requirement: a provision under consumer product safety legislation, enforced by the Consumer Protection Agency, imposing public law sanctions on suppliers if their consumer goods are unreasonably unsafe (see Part III.1).
 - goods primarily (or: ordinarily) for personal, domestic or household purposes, including movables incorporated into immovable property or “utilities” such as

⁴¹ ... “services” includes any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any contract but does not include rights, benefits or privileges in the form of the supply of goods or the performance of work under a contract of service



electricity (see s3(1) of Malaysia's Consumer Protection Act – Part 1 case study); or

- Labelling: information (including warnings) affixed to higher-risk products or their packaging, to allow consumers to make better comparisons and/or avoid harm, because of public law regulation, private law (especially product liability law) or reputational concerns for suppliers.
 - liability only for negligence by manufacturers not in a direct contractual relationship with consumers, except for strict liability for “defects” under many contemporary product liability statutes (Part II.2).
- Liability theories: bases for establishing consequences under (especially private) law – being generally:
- Mandatory (or: minimum) safety standards: safety standards set by regulators that must be complied with to supply consumer goods into the marketplace.
- Mandatory labelling: legislation enforced by public regulators requiring certain types of labelling
- Mandatory Recalls/ Withdrawals: orders against suppliers for corrective action, issued by sectoral regulators or the Consumer Protection Agency after determining that consumer goods are unsafe, requiring suppliers to take measures to recall or withdraw those goods from consumers and the supply chain in order to avoid (further) harm, directly or indirectly at the expense of the suppliers (see Part IV.5)
 - movables actually used for personal etc (i.e. non-business) purposes
- Objective test: a legal criterion distinguishing acceptable behaviour (e.g. under the “reasonable foreseeability” test for negligence of manufacturers, or under public laws related to consumer product safety) which does not depend on the individual or subjective circumstances and behaviour of the person in question
- Post-market surveillance or controls: measures from regulators focusing on assessing consumer goods after they enter the market, such as “public warnings”, “bans” or “mandatory recalls” concerning unsafe goods (see also Part IV.1)
- Pre-market surveillance or controls: measures from regulators focusing on assessing consumer goods before they are permitted into the market, such as a “general safety requirement” or other minimum safety standards



- Precautionary principle: a risk management approach (not found expressly in AMS consumer product safety laws, but e.g. in European environmental and consumer product safety regulation) stating that if an action or policy has a suspected risk of causing harm to the public or the environment, the burden of proof that it is *not* harmful falls on those adopting the action or policy, even in the absence of scientific evidence that it is not harmful
- Product safety laws: primary and secondary legislation or case law (judge-made law) aimed at securing consumer product safety.
- Product safety policy: the overall system (laws, principles and institutional arrangements) to secure product safety.
- Product safety: a level of risk or hazards acceptable under private law (including liability to compensate for safety defects), public law enforced by regulators, and good market practice.
- Public warnings: notices or alerts to the general public from sectoral regulators or the Consumer Protection Agency that certain consumer goods have caused harm, or are likely to do so, and may be subjected to testing or further regulatory consequences (see Part IV.3).
- Reasonable foreseeability test: the main criterion in the private law of negligence, to determine whether a product manufacturer (or, to a much lesser extent, intermediary suppliers) owe duties of care, as well as the scope for damages, with respect to harmed consumers.
- Risk-benefit balancing: an approach to assessing whether manufacturers should be liable for harm caused to consumers from faulty goods, involving weighing the risks and consequences of harm against the benefits consumer obtain from the goods, particularly under the general law of negligence, but possibly also under strict product liability legislation with respect to design or warning defects (Part II.2).
- Safety standards: benchmarks or requirements to achieve acceptable levels of product safety, set by industry or other voluntary associations, or by government regulators either generally (see Part III.1) or for specific types of consumer goods (Part III.2).
- Safety warnings: an aspect of “labelling” focusing on communicating possible risks and their effective management, to minimise product safety hazards



- Sectoral regulations or regulators: legislation or enforcement bodies (other than the general Consumer Protection Agency) for specific sectors or types of products (e.g. foods, healthcare products, cosmetics, electrical products)
 - strict liability for the sale of unsafe goods by sellers to direct purchasers under the law of contract (see Part II.1); but
- Subjective test: a legal criterion distinguishing acceptable behaviour that takes into consideration the individual or subjective circumstances and behaviour of the person in question (and therefore may be linked to principles of “self-regulation”)
- Unavoidably unsafe product: consumer goods that do not trigger consequences under public law (e.g. Parts IV.3-5) or strict liability legislation (Part II.2), because design defects and then warning defects have been minimised, but the consumer goods still retain some inherent risks which consumers can be expected to bear in order to retain functionality of the goods (e.g. a sharp knife).
- Voluntary labeling: schemes promoted by voluntary standard setting bodies, usually separate from mandatory labelling but sometimes with some encouragement also from regulators, aimed at consumers being provided with better information for comparisons among products and assessment of any product safety risks.
- Voluntary Recalls/ Withdrawals: corrective action about actually or potentially unsafe consumer goods, taken by suppliers without being subject to regulators’ powers to order mandatory recalls/withdrawals (see Parts IV.5 and VI.3).
- Voluntary safety standards: benchmarks for products set by (usually private or non-profit) organisations that suppliers are not bound to conform to under public law (eg under ISO – see Part III.3.4).



APPENDIX: Key general consumer product safety law provisions for AMS CPAs⁴²

Notes:

- If blank in the Table below, the relevant provision either does not exist at all (e.g. a General Safety Requirement, found only in Malaysia) or is only enforced by other government departments rather than the CPA (e.g. specific minimum safety standard setting powers, in Cambodia or Laos)
- This summary Table deals only with CPA powers and general consumer product safety law provisions. Specific sectors for higher-risk products (such as medicines, automobiles, foods or cosmetics) often have additional regulatory regimes, usually under the primary jurisdiction of non-CPA regulators, which may include some of these provisions just for those products (as indicated in the footnotes e.g. for the Singapore column).⁴³

	Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
General safety requirement					Yes			(Close: since 2011 Regulations)		
Specific safety standard-setting – by CPA		(Yes, but only info. standards, via label reqs.,			Yes (but not foods or healthcare)			Yes (but not foods ⁴⁴ etc.)	(Yes, but only information standards, via label requirements,	

⁴² Further details are provided in the rest of this paper, and the Appendix entitled “General Consumer Product Safety Regulation – ASEAN Member States Compared”, in: Nottage, Luke R., ASEAN Product Liability and Consumer Product Safety Regulation: Comparing National Laws and Free Trade Agreements (February 7, 2015). Sydney Law School Research Paper No. 15/07. Available at SSRN: <http://ssrn.com/abstract=2562695>.

⁴³ For an overview of food and cosmetics regulation in general, quite extensively harmonized internationally and regionally through the WTO, FTAs and the ASEAN Cosmetics Directive, see above n 39 and 40.

⁴⁴ Sector-specific regulation in Singapore is provided through the Food Act and associated Regulations, with the food safety standards encapsulated in the Codex Alimentarius set by WHO/FAO. Food safety also leverages on some ISO standards like the HACCP standard in ISO 22000. Similar to cosmetics in Singapore, the standards used are encapsulated in the relevant Poisons Act and other pieces of legislation.



		enforced by other depts)							but not e.g. foods)	
Public warnings						(Probably only for goods in dispute)		Yes (but not medicines, certain foods, etc. ⁴⁵)	Yes (but first need tests)	
Bans		Yes	Yes		Yes	(Only for goods in dispute)	Discretion to take urgent action (but otherwise other departments)	Yes (but not medicines, certain foods, etc. ⁴⁶)	Yes (but first need tests)	
Recalls		Yes	Yes		Yes	(Only for goods in dispute)	Discretion to take urgent action (but otherwise other departments)	Yes (but not medicines, certain foods, etc. ⁴⁷)	Yes	
Require accident reports to CPA										(Close: by requiring recalls and then public notices)

⁴⁵ Singapore’s specialist regulators, the Health Sciences Authority (HAS) and Agri-Food and Veterinary Authority (AVA), put out regular public alerts or warnings on unsafe cosmetics, medicines and food.

⁴⁶ The HSA and AVA put out regular bans.

⁴⁷ Recalls for medicines and foods are done by the affected companies in collaboration with the relevant local regulators, HSA and AVA. See http://www.hsa.gov.sg/content/hsa/en/Health_Products_Regulation/Safety_Information_and_Product_Recalls/Guidelines_on_Product_Defect_Reporting_and_Recall_Procedures.html, compared in above n 20.



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