

EXPLANATORY STATEMENT

ISSUED BY THE AUTHORITY OF THE ASSISTANT TREASURER

Competition and Consumer Act 2010

Consumer Protection Notice No. 5 of 2012: Imposition of permanent ban on small high powered magnets

Overview

This Legislative Instrument imposes a permanent ban on small high powered magnets sold in multiples of two or more as toys, games, puzzles, construction or modelling kits or as jewellery sold to be worn in or around the mouth or nose.

If a person swallows more than one small high powered magnet, the magnets can be attracted across the walls of the intestine or other digestive tissue. Progressive tissue injury starts with local inflammation and ulceration, progressing to tissue death, perforation or fistula formation, and can lead to infection, sepsis and death. The serious nature of the hazard is not self-evident and, even after ingestion, will often not be recognised by either carers or medical staff. Since desk toys consisting of small high powered magnets were introduced into the Australian market in early 2011, there have been 16 known severe cases in Australia – including one death – caused when infants, children and teenagers have swallowed more than one small high powered magnet.

This ban is intended to have a narrow focus by only banning small high powered magnets which are marketed or supplied for use as toys or for one of the other specified uses. It does not ban small high powered magnets used for industrial, commercial or scientific applications. It does not impact upon small high powered magnets which are components in household electronic goods and it does not prevent sets of small high powered magnets being used in educational institutions for teaching purposes.

On the basis of advice from an expert on electromagnetism the notation for designating “magnetic flux index” provided in clause 5.31 of Australian / New Zealand Standard, *Safety of toys – Part 1: Safety aspects related to mechanical and physical properties* (AS/NZS ISO 8124.1:2010) has been expressed slightly differently in this Legislative Instrument to add clarity. The limit in the ban is expressed as $50 \text{ (kG)}^2 \text{ mm}^2$ (equivalent to $0.5 \text{ T}^2 \text{ m}^2$), instead of $50 \text{ kG}^2 \text{ mm}^2$.

This ban commences on the day after it is registered on the Federal Register of Legislative Instruments.

Background

Legislative Power

Subsection 114(1) of the Australian Consumer Law (ACL), contained in Schedule 2 of the *Competition and Consumer Act 2010* (CCA) provides that the Commonwealth Minister may, by written notice published on the internet, impose a permanent ban on consumer goods, if it appears to the Minister that a reasonably foreseeable use (including a misuse) will or may cause injury to any person.

Section 132 of the CCA specifies that the Commonwealth Minister must issue a proposed ban notice if the Commonwealth Minister proposes to impose a permanent ban on consumer goods of a particular kind. A proposed ban notice must invite any person who supplies or proposes to supply consumer goods of that kind to notify the Australian Competition and Consumer Commission (ACCC) that they wish for the ACCC to hold a conference in relation to the proposed imposition of the ban.

The Commonwealth Minister issued a proposed ban notice on 22 August 2012. Following notification of a request for a conference from suppliers, the ACCC held a conference with suppliers in relation to the proposed imposition of the ban on 20 September 2012. Further information on this consultation is outlined below.

As soon as practicable after the conclusion of a conference in relation to the proposed imposition of a permanent ban, the ACCC must recommend that the Commonwealth Minister impose the ban in the same terms as the draft notice, impose the ban with modifications or not impose the ban.

The ACCC recommended to the Commonwealth Minister that a permanent ban with modifications be imposed on 2 November 2012.

The CCA does not specify any further conditions that need to be satisfied before the power to make the Legislative Instrument may be exercised.

Subsection 118(1) of the ACL provides that a person must not, in trade or commerce, supply consumer goods of a particular kind if a permanent ban on consumer goods of that kind is in force.

Sunset Provisions

Under the CCA, a permanent ban is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA). This instrument is subject to sunseting under Part 6 of the LIA. Unless action is taken to defer or exempt it from sunseting, it is expected to sunset on 1 April 2023. This estimate assumes it is registered on or before 31 March 2013.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument is a permanent ban which prohibits the supply of a product which has caused death and injury to children.

Human Rights Implications

The Legislative Instrument engages the right to health and the rights of the child.

The International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The Convention on the Rights of the Child recognises the right of the child to the enjoyment of the highest attainable standard of health.

The Legislative Instrument promotes these rights by banning a product which has caused death and injury to children.

Conclusion

The Legislative Instrument does not limit human rights and is compatible with human rights because it advances the protection of human rights by removing from the market a product, the foreseeable use or misuse of which, may cause injury to people, particularly children.

Consultation

For the purposes of section 17 of the LIA, consultation has been undertaken concerning the permanent ban.

On 22 August 2012, the ACCC published a proposed ban notice that informed suppliers of magnets about the proposed ban and invited them to request a conference, as provided in Part XI of the CCA. Numerous suppliers did request a conference, which was accordingly held pursuant to section 132H of the CCA. The ACCC also accepted written submissions from suppliers before and after the conference. The ACCC's recommendation to the Assistant Treasurer has been provided to the suppliers which attended the conference, pursuant to section 132D of the CCA.

The proposed ban notice was publicised on the ACCC's website, which led to industry associations and other members of the public providing submissions on the proposed ban.

The ACCC also consulted a surgeon with expertise in paediatric emergency medicine as well as a physicist with expertise in electromagnetism.

State and territory fair trading agencies have been involved in the consultation process.

Following this consultation, changes were made to the ban to address concerns raised by stakeholders during the consultation process, and to provide greater clarity regarding what products are and are not captured by the ban.