

EXPOSURE DRAFT EXPLANATORY MATERIALS

TREASURY LAWS AMENDMENT BILL 2024: PRODUCT SAFETY
REGULATION

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Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law as set out in Schedule 2 to the <i>Competition and Consumer Act 2010</i>
CCA	<i>Competition and Consumer Act 2010</i>
Bill	Treasury Laws Amendment Bill 2024: Product Safety Regulation
Information standard	An information standard (legislative instrument) as defined under the ACL
Safety standard	A safety standard (legislative instrument) as defined under the ACL
Standard	A standard that is not an information standard or safety standard, such as a standard made by Standards Australia Limited

Chapter 1: Safety Standards and Information Standards

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Outline of chapter

- 1.1 Schedule 1 to the Bill amends the CCA and ACL to improve the flexibility and enforceability of safety standards and information standards by:
- allowing safety standards and information standards to incorporate matters in instruments and other writings as they exist from time to time, including international standards;
 - replacing the Minister’s ability to ‘declare’ safety standards and information standards with an expanded ability to ‘make’ safety standards and information standards;
 - updating requirements relating to the nomination of alternative methods of compliance with safety standards; and
 - allowing the regulator to request certain information and documents in relation to compliance with safety standards and information standards.
- 1.2 All references in this Chapter are to the ACL unless otherwise stated.

Context of amendments

- 1.3 The *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* established the national regulatory regime for safety standards and information standards in the ACL, allowing the Minister to make or declare safety standards for consumer goods and product related services, and information standards for goods and services.
- 1.4 Safety standards are an important aspect of the national consumer product safety law in preventing or reducing the risk of injury to a person in relation to consumer goods and product related services, and ensuring consumers are able to purchase consumer goods and product related services that meet their safety expectations. Safety standards complement the ability to identify and remove unsafe consumer goods and product related services from the market through recalls and bans and public warnings under the ACL.
- 1.5 Information standards generally require suppliers to provide certain information or present information in a certain manner, when supplying particular goods and services. Information standards are generally used where the Government considers the characteristics of a good or service are such that the mandated provision of information will facilitate effective trade in that good or service.
- 1.6 Standards (that is, standards that are not safety standards or information standards under the ACL) may be prepared in Australia by industry or non-governmental bodies, such as Standards Australia Limited. International associations or bodies, such as the International Organization for Standardization and the International Electrotechnical Committee may also develop standards, and these standards may be approved by Australian standard setting bodies. However, prior to the amendments in Schedule 1 to the Bill, the Minister could not declare standards that were not prepared or approved by Standards Australia Limited to be safety standards or information standards unless the relevant association was prescribed in regulations. In addition, safety standards and information standards could not incorporate standards as they existed from time to time, and could become out-of-date quickly.
- 1.7 On 4 June 2021, the former Government announced its intent to develop amendments to support businesses to innovate, grow and minimise compliance costs, while maintaining protections for Australian consumers and the integrity of standards made under the ACL. This included amendments to make it easier to recognise overseas product safety standards in Australia, provided they offer at least an equivalent level of consumer protection.
- 1.8 Consultation on the proposed reforms occurred from 1 December 2021 to 21 January 2022. Treasury received 59 submissions from a broad range of stakeholders, including industry representatives, government, consumer groups, test laboratories, standards setting bodies, safety experts, and suppliers.
- 1.9 There was strong support across the board for improving the regulatory framework to allow easier recognition of overseas standards in safety standards

and information standards. There was also strong support for improvements to the regulatory framework to more easily allow safety standards and information standards to reference voluntary standards as they exist from time to time.

- 1.10 Schedule 1 to the Bill makes it easier to recognise overseas standards in Australia, whilst also improving the flexibility and enforceability of safety standards and information standards.

Summary of new law

- 1.11 Schedule 1 to the Bill improves the flexibility and enforceability of Australian safety standards and information standards by:

- allowing safety standards and information standards to incorporate matters in instruments and other writings as they exist from time to time, including international standards;
- replacing the Minister's ability to declare safety standards and information standards with an expanded ability to make safety standards and information standards;
- updating requirements relating to the nomination of alternative methods of compliance under safety standards; and
- allowing the regulator to request certain information and documents in relation to compliance with safety standards and information standards.

Detailed explanation of new law

Scope of safety standards and information standards

- 1.12 Prior to the amendments, the Minister could make or declare safety standards that set out requirements for consumer goods and product related services, and information standards that set out requirements for goods and services.
- 1.13 The Minister was able to declare a standard (or part of a standard, with any additions or variations) that has been prepared or approved by Standards Australia Limited or an association prescribed by the regulations, to be a safety standard or information standard. This process was lengthy, and delayed the timely incorporation of standards, including standards made by international standards bodies such as the International Organization for Standardization.
- 1.14 The amendments replace the Minister's ability to declare a safety standard pursuant to section 105 or information standard pursuant to section 135, with a broader ability to make a safety standard pursuant to section 104 or information standard under section 134.

1.15 The Minister is empowered to make safety standards and information standards that make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing (an ***incorporated instrument***) as in force or existing at a particular time or from time to time. This provides a contrary intention to subsection 14(2) of the *Legislation Act 2003*, which states that unless a contrary intention appears, a legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

1.16 This is intended to ensure that standards and other instruments or writings that are incorporated into information standards and safety standards stay up to date, and businesses are not prevented from using the latest and safest Australian or overseas standards that are available.

[Schedule 1, items 3, 11 and 16, subsection 131E(4) of the CCA and subsections 104(5) and 134(4)]

1.17 The amendments repeal the Minister's ability to declare a safety standard under section 105 and declare an information standard under section 135. The ability to declare a standard is largely redundant due to the new ability for the Minister to make information standards or safety standards that incorporate matters in an instrument or writing (including a standard prepared or approved by Standards Australia Limited or any other association, such as an international standards body) as they exist from time to time or at a particular time.

[Schedule 1, items 12 and 17, sections 105 and 135]

1.18 A number of additional amendments are made to update the Minister's power to make a safety standard under section 104 and information standard under section 134 and ensure that the Minister's ability to make safety standards and information standards entirely replaces the Minister's power to declare safety standards under section 105 and information standards under section 135 respectively.

1.19 First, the requirement to publish an information standard or safety standard on the internet is removed. This is redundant as safety standards and information standards are legislative instruments (see section 131E of the CCA) and subject to requirements under the *Legislation Act 2003*, such as the requirement to be published on the Federal Register of Legislation.

1.20 Second, the amendments clarify the kind of matters that may be prescribed under a safety standard in relation to consumer goods listed under subsection 104(2) and product related services under subsection 104(3) include record keeping requirements and the provision of information to any person (including the regulator), whilst ensuring such matters do not limit the Minister's broad ability to make a safety standard for consumer goods or product related services pursuant to subsection 104(1). The ACCC is the regulator for the purposes of the application of Schedule 1 to the Bill as a law of the Commonwealth. For the purposes of the application of Schedule 1 to the

Bill as a law of a State or a Territory, regulator has the meaning given by the application law of the State or Territory.

- 1.21 This complements amendments before Parliament in the Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023, which will repeal the matter under paragraph 104(2)(c) dealing with ‘the form and content of markings, warnings, or instructions to accompany consumer goods of that kind’ and substitute it with:
- the form and content of markings to accompany consumer goods of that kind, and
 - the form and content of warnings, instructions or other information about consumer goods of that kind.
- 1.22 Third, the amendments clarify that the kind of matters that may be prescribed in an information standard for goods of a particular kind or services of a particular kind under subsection 134(2) include record keeping requirements and the provision of information to any person (including the regulator).
- 1.23 Fourth, the amendments ensure that safety standards and information standards may deal with matters incidental or related to the matters that may be prescribed in a safety standard listed under subsections 104(2) or (3) or an information standard listed under subsection 134(2) (noting that the listed matters are non-exhaustive). If the safety standard or information standard does incorporate an instrument or writing prepared or approved by an Australian or international standards body, the safety standard or information standard may also make provision in relation to any matter dealt with in that instrument or writing.

[Schedule 1, items 6, 7, 8, 9, 10, 11, 14, 15 and 16, subsections 104(1), 104(2), 104(3), 104(4), 104(6), 134(1), 134(2), 134(3) and 134(5)]

Nominating alternative methods of compliance under safety standards

- 1.24 Prior to the amendments, if a safety standard specified alternative methods of compliance and the regulator gave the relevant supplier a written request to nominate which set of requirements they intended to comply with, the supplier was required to give the regulator written notice (within the period specified in the regulator’s request) specifying the requirements the supplier intends to comply with, pursuant to section 108 of the ACL.
- 1.25 The amendments expand on this requirement in a number of ways.
- 1.26 First, the application of section 108 is expanded to include product related services, in addition to consumer goods. This corrects a technical error, given the explanatory memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 indicated that section 108 was intended to apply to product related services.

- 1.27 Second, the amendments clarify when section 108 is to apply. Section 108 will apply in relation to a person that:
- has manufactured consumer goods or product related services in the past;
 - is currently manufacturing consumer goods or product related services; or
 - intends to manufacture consumer goods or product related services in the future.

The inclusion of manufacturing is appropriate as safety standards may prescribe, for example, matters dealing with methods of manufacture or testing of products after manufacture, and the ACL includes penalties for the manufacture of consumer goods that do not comply with a safety standard that is in force. The existing application of section 108 to a person that intends to supply consumer goods or product related services is also expanded to include a person that has supplied consumer goods or product related services, or is supplying consumer goods or product related services. With these updates, the regulator is able to request a person nominate the relevant set of alternative requirements in relation to past, current or future manufacture or supply.

- 1.28 Third, a civil penalty provision applies for breach of the requirement to nominate an alternative standard under new subsection 108(2). The maximum pecuniary penalty that a court may order for breach of this civil penalty provision is \$50,000 for a body corporate and \$10,000 for a person that is not a body corporate.
- 1.29 The civil penalty provision offers an alternative to the existing criminal offence for failure to nominate an alternative standard under section 196. However, the maximum pecuniary penalties for the civil penalty provision are set at a level that is higher than the maximum fines available for the criminal offence to ensure that the penalty will act as a deterrent, particularly for corporations, and recognises that being found liable to pay a civil penalty does not attract imprisonment or a criminal conviction.
- 1.30 Fourth, a civil penalty provision applies if a supplier nominates a set of requirements, by written notice (as described above) or other means (this may include a requirement in a safety standard to nominate the chosen alternative requirement on the consumer good itself, for example), and the person has not complied, is not complying or will not be able to comply with that set of requirements. The maximum pecuniary penalty that a court may order for breach of this civil penalty provision is \$50,000 for a body corporate and \$10,000 for a person that is not a body corporate.
- 1.31 The new penalties are in dollar amounts rather than penalty units, consistent with the current approach in the ACL. This is intended to achieve a uniform maximum across jurisdictions implementing the ACL as nationally uniform legislation, which may have differences in the value of a penalty unit.

[Schedule 1, items 13, 20 and 21, subsections 108(1), 108(2), 108(4) and 224(3) and subparagraph 224(1)(a)(viii)]

Requirements to provide information or documents

- 1.32 The amendments introduce a power for the regulator to request, in writing, information or documents to determine whether a person has complied, is complying, or will comply with a safety standard that is in force for consumer goods or product related services of a particular kind or an information standard that is in force for goods or services of a particular kind.
- 1.33 This only applies to a person that has supplied or manufactured, is supplying or manufacturing, or intends to supply or manufacture the particular consumer goods or product related services in the case of safety standards, or goods or services in the case of information standards.
- 1.34 The person must, within the period specified in the request, give to the regulator the requested information or documents.
- 1.35 A civil penalty provision applies if a person does not give the regulator the requested information and documents within the time period specified in the request. The maximum pecuniary penalty that a court may order for breach of this civil penalty provision is \$50,000 for a body corporate and \$10,000 for a person that is not a body corporate.

[Schedule 1, items 13, 18, 20, 21 and 22, section 137B, subsections 108(3) and 224(3) and subparagraphs 224(1)(a)(viii) and (viii)]

Consequential amendments

- 1.36 A number of consequential amendments are made to:
- remove references to subsections 105(1) and 135(1), which provide the power for the Minister to ‘declare’ safety standards and information standards respectively, and
 - ensure the existing offence provisions relating to section 108 are not expanded.

[Schedule 1, items 1, 2, 4, 5 and 19, paragraphs 131E(1)(b) and (i) of the CCA and subsections 2(1) (definition of information standard and safety standard) and 196(1)]

Commencement, application, and transitional provisions

- 1.37 Schedule 1 to the Bill commences the day after Royal Assent.
- 1.38 The amendments to section 108 (dealing with requirements to nominate and comply with a safety standard) only apply in relation to:

- requests given by the regulator on or after commencement of Schedule 1 to the Bill; and
- the supply or manufacture of goods or services on or after commencement of Schedule 1 to the Bill; and
- a person's compliance with the standard on or after commencement of Schedule 1 to the Bill;

regardless of whether the safety standard in relation to which the request is given is made before, on or after commencement Schedule 1 to the Bill.

[Schedule 1, item 23, section 308]

- 1.39 The amendments ensure a declared safety standard continues in force despite the repeal of the enabling provisions.
- 1.40 Specifically, a safety standard that was declared under section 105 and was in force immediately before the commencement of Schedule 1 to the Bill, continues in force (and may be dealt with) on and after the commencement of Schedule 1 to the Bill as if it were made for the purposes of section 104 (that is, the enabling provision for the Minister to make a safety standard) as amended by Schedule 1 to the Bill. No saving provisions are prescribed for declared information standards under section 135, as none are in force.

[Schedule 1, item 23, section 307]

- 1.41 Schedule 1 to the Bill is defined as the *amending Schedule*, to facilitate the application and savings provisions.

[Schedule 1, item 23, section 306]