Improving mandatory standards under the Australian Consumer Law

Decision Regulatory Impact Statement and Exposure Draft

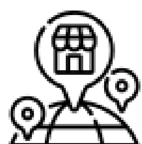
October 2024

About the National Retail Association

The National Retail Association is a not-for-profit organisation that represents the interests of retailers across Australia.

We exist to support, inform, protect and represent the interests of retailers and quick service restaurant businesses. We understand the issues and opportunities facing retailers every day.

Our members can expect to receive the latest industry information, the fastest news updates and the best range of industry insights to help their business grow and succeed



The retail industry plays a huge role in Australia's economy, employment and greater livelihood and we are dedicated to helping unite retailers and stakeholders for the success of the industry now, and for the future.

Introduction

The National Retail Association welcomes the opportunity to respond to Treasury and the Decision Regulation Impact Statement (DRIS) on amendments to mandatory standards regulation under the Australian Consumer Law (ACL).

We commend Treasury for recognising the undue imposts experienced by businesses under the current legislative framework. This includes greater investment in assessing and ensuring compliance, confusion over which standard applies to certain products, testing to more than one standard for the same product and even preventing some products from entering the Australian market. Industry strongly supports the intent behind the Amendment Bill as an essential revision of the ACL.

Feedback

Industry is frustrated by unnecessary barriers that impede their ability to significantly improve consumer safety and keep the Australian market out of step with international best-practice by disallowing products that meet revised standards with improved hazard reduction.

Most importantly, the amendments that more readily enable uptake of current Australian Standards and overseas standards as mandatory is a major improvement to the ACL. We recognise that the changes will allow more mandatory product standards to cover both 'safety' (performance/design) and information specifications. This will significantly reduce the impost of testing and compliance for businesses and allow industry to dedicate more resourcing towards improving safety of higher-risk products and address emerging issues.

Overall, we urge Treasury to proceed with these changes as soon as possible, but we take this opportunity to raise specific concerns with supporting elements of the proposed amendment. Principally, the potential for disproportionate penalties, is unaligned with the policy objectives of consumer safety and avoiding undue burden. National Retail supports policy that applies to all businesses, regardless of size, to ensure a level playing field.

Amendments to ACL sections 104, 108 and 134

Existing s. 133D of the Competition and Consumer Act (CCA) already provides the power to obtain documents when regulators have reason to believe a product will or may cause an injury. 'Reason to believe' is an important condition written into the CCA and the proposed clauses of ACL sections 104, 108 and 134 do not include such conditions. As such, National Retail questions the inclusion of these clauses.

Notwithstanding the above, the proposed wording of new subsections 104 (2) (e) & (f), 104 (3) (f) & (g) and 134 (2) (g) & (h) appears to be unduly broad. The intent appears to be for a mandatory standard that allows ACL regulators to require suppliers to produce evidence to substantiate compliance with a nominated standard (which would support new s.108 provisions). National Retail is very concerned that these s.104 & 134 additions allow record-keeping and information provision to be mandated beyond this primary purpose.

If the intent is just for the ACCC/state regulator to demand evidence to support the claim of compliance to the nominated alternative standard, then this needs to be stated. By not specifying this, the concern is that mandatory standards may overstep what is reasonable and justified.

Such regulated stipulations could require all suppliers to pay for more costly and frequent testing than is otherwise required. And a breach of such a specification would be subject to the full s.195 penalties of penalties of up to $2,500,000 or $50,000,000 plus director disqualification.

We are also concerned about reference to providing information 'to any person' in s.104 (2) (f) and s.134 (3) (g). It is unclear the purpose of such clauses what they mean in practice.

It is important to limit the proposed changes to s.104 and 134 to the intended purpose, or provide regulatory guidance setting out the essential purpose, with an indicative example in an explanatory statement.

Further, the proposed s.108 (3) appears unreasonable (and may in any event be unnecessary). Proposed s. 108 (3) is linked to the potential obligation for suppliers to keep records in s.104. Failure to provide evidence of compliance with a nominated standard should not itself attract a penalty. The proposed s.108 (4) should suffice, without requiring all suppliers to retain evidence.

Policy and guidelines

In addition to the legislative amendments, a guidance document on implementing the changes will be very important, to capture the practical details. Guidelines should include a clear statement of what happens next and an expected timeframe, and clarify:

- transition time for standards that are adopted 'as amended from time to time' is appropriate for each standard/amendment; and
- the process for nominating, reviewing and 'adopting' an alternative standard is clear, transparent and efficient.

Potential for immediate benefit – via safe harbour

The DRIS states that it will initially take time to fully implement the reforms with the 48 mandatory standards. In future, there may also be time lags on the adoption of some updated standards. A provision for safe harbour should be included in the bill to cover such periods.

Pending review of any particular mandatory standard, a 'safe harbour' provision would, as stated in the DRIS, allow businesses to comply with either outdated or the most updated versions of the same Australian or overseas standards. This is the most practical approach, allowing for responsiveness to improved safety, as well as changing market demands and product designs.

The DRIS reports no objection was made to the safe harbour concept. Adding safe harbour into the bill, at least for Australian Standards, would give immediate access for suppliers to sell goods that meet the latest version of published standards.

This would, without further delay, address all the current negative impacts on business and impediments to better consumer protection, which have been clearly articulated in the DRIS.

Recommendations

We recommend that:

1. the bill be given priority to achieve the primary purpose of enabling additional and updated standards for compliance with the ACL
2. the clauses described above that are supplementary to the Bill's main objectives be taken out for the time being, allowing for further work
3. provision for safe harbour be added into the bill; and
4. a suite of policy statements and guidelines be released to accompany passing of the amendments.

The National Retail Association would welcome the opportunity to answer any queries or provide further feedback if desired.