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Treasury ACL amendments exposure draft *Treasury Laws Amendment Bill 2024 – Product Safety Regulation*

Product Safety Solutions is a Melbourne-based product safety consultancy and advocacy business. We work with a range of individual businesses and stakeholders ranging from consumer safety NGOs, trade associations, standards agencies, test companies and others.

I would like to thank the Treasury Consumer Policy unity for doing the work associated with the proposed amendments, including the Decision RIS and for providing an exposure draft and opportunity to comment.

The Decision RIS has correctly articulated the undue imposts the system, and especially to business, that are experienced under the current legislative framework. These imposts include greater investment in assessing and ensuring compliance, confusion over which standard applies to any particular product, testing to more than one standard for the same product and even preventing some products from entering the Australian market.

Also noted are the impediments to increased safety by disallowing products that meet revised standards with improved hazard reduction. The primary purpose of this proposed amendment bill is an essential revision of the Australian Consumer Law.

Primary changes must proceed as soon as possible

Most importantly, the amendments that more readily enable uptake of current Australian Standards and overseas standards as mandatory are a major major (*repeat intended*) improvement and these must proceed as soon as possible. I note too that the changes will allow more mandatory product standards to cover both ‘safety’ (performance/design) and information specifications. Doing so will significantly simplify the task of testing and compliance.

I do, however, have concerns with two accompanying parts of the proposed amendments in particular. Both of these concerns involve potential for disproportionate requirements and penalties to be contained within the legislation, at odds with the objectives of consumer safety and avoiding undue burden.

Amendments to ACL sections 104 and 134

Existing s. 133D of the Competition and Consumer Act 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, I question 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). I am 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. This would add substantially to (rather than reduce) the burden on suppliers and potentially diminish the benefits of these ACL reforms.

Furthermore, 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.

I am 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 and what they mean in practice. If retained, 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.

Amendments to ACL s. 108

Regulators need to have the opportunity to take meaningful enforcement action to shore up any mandatory consumer safety standard. The proposed amendments to s.108 appears to only create a minor offence of s.108 (s.196) for not complying with the standard that is nominated.

I believe not complying with the nominated optional standard needs to be included as a far more serious s.194 offence of not complying with the mandatory standard itself. This is because when multiple standards are optional in a mandatory standard (as will increasingly be the case), proving non-compliance for enforcement purposes is not generally viable. Even if the ACCC or state ACL agencies don't intend taking a matter to court, they need to be able to prove that a mandatory standard has been breached for any enforcement action to be undertaken.

Hypothetical

If a mandatory standard for high chairs were to allow compliance with any of a named Australian, ASTM or British Standard and:

- the ACCC had evidence of a major failure to the AS with serious hazards by a cot sold by a local importer
- the importer claims the cot meets the ASTM (108 (2))
- provides a (possibly fake) test report to back that up
- the ACCC arranges its own tests to verify ASTM cot standard compliance and the product fails the ASTM
- the importer would then be in breach of the new s.108 (4) and liable to a civil penalty of up to $10,000 or $50,000
  or
  the ACCC is unable to arrange an ASTM test, but is confident the product fails all three alternative standards, given the nature of the proven AS failure
- in either case no s.106/195 breach of a mandatory standard has been proven (even if the ACCC also tests to the British Standard)
- so, the importer could cop a modest fine (only if the ACCC can test to the ASTM), but avoid conviction for a breach of the mandatory standard, which has penalties of up to $2,500,000 or $50,000,000 plus director disqualification.

In these circumstances, and in absence of a GSP, a breach of the ACL's misleading and deceptive conduct or false or misleading representations provisions could possibly come into play (as in *ACCC v Woolworths 2016 FCA 18*)? But this is less than ideal and I believe the ACCC has argued against reliance on this avenue to address unsafe goods.

Rationale

Regulatory agencies can be limited in their ability to prove non-compliance when multiple standards are referenced in a mandatory standard. The number of samples available for testing may be limited, and overseas standards may specify test equipment not available in Australia, overseas testers may not have access to relevant samples, etc. In the above hypothetical, independent testing to the ASTM may not have even been feasible.

One of the reasons (the main reason?) s.108 was initially introduced was to hold suppliers accountable for at least one of the alternative standards made mandatory. The current s.108 does not do so. And while an improvement, the proposed amendment does not appear to achieve an appropriate level of accountability and therefore ineffective deterrence and inadequate consumer protection.

Consideration needs to be given to strengthening s.108 (4) to link non-compliance with a nominated standard to non-compliance with the actual mandatory standard, enabling action against s.195.

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. While there is much good policy and rationales in the DRIS, it doesn't have the status of a policy document for the changes themselves. Guidelines should include a clear statement of what happens next and an expected timeframe, and address:

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

What would also be valuable in the context of several points made in the DRIS about how product safety regulations can unduly add to compliance burden, would be a stated policy on how regulators can and should use their enforcement discretion. As the agency with primary carriage of the consumer law, I believe this is something Treasury should do, in concert with the state agencies.

Potential for immediate benefit – via safe harbour

The DRIS points out that it will initially take time to fully implement the reforms with the 48 mandatory standards. And in future, there may be time lags on the adoption of some individual 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 imposts on business and impediments to better consumer protection, which have been clearly articulated in the DRIS.

Recommendation

I propose that:

- the bill be given priority to achieve the primary purpose of enabling additional and updated standards for compliance with the ACL
- the clauses described above that are supplementary to the Bill's main objectives be withdrawn or taken out to allow further work
- provision for safe harbour be added into the bill; and
- a suite of policy statements and guidelines be released to accompany passing of the amendments

There are complex issues covered in the proposed amendments. Thank you again for progressing these reforms. Please let me know if you have any questions about my response.

Gail Greatorex
Owner and Principal
Product Safety Solutions
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