Law Council
OF AUSTRALIA

Business Law Section

25 October 2024

Director
Consumer Policy Unit
Market Conduct Division
Treasury
Parkes ACT 2600

By email: consumerlaw@treasury.gov.au

Dear Treasury,

Consultation Exposure Draft of the *Treasury Laws Amendment Bill 2024* (October 2024)

1. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to respond to the Treasury's Consultation on the Exposure Draft of the *Treasury Laws Amendment Bill 2024: Product Safety Regulation* (**Exposure Draft**) and related Exposure Draft Explanatory Materials (**Exposure Draft Explanatory Materials**), published on 11 October 2024.

2. The Committee supports the underlying policy objective of improving the flexibility and enforceability of safety standards and information standards. The Committee broadly supports the proposed amendments to the Australian Consumer Law (**ACL**) (Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**)) in the Exposure Draft, but wishes to take the opportunity to raise some additional matters concerning the way the Exposure Draft seeks to implement this policy objective.

1. The Committee suggests these additional matters should be considered by the Treasury to ensure that the amendments proposed in the Exposure Draft have their intended effect.

New regulator information gathering powers—sections 108(3) and 137B(c)

Proposed amendments

3. The proposed amendments introduce powers for the ACCC to make a written request for information or documents to determine whether a person who has, is or intends to, supply or manufacture goods or services of a particular kind has

complied, is complying, or will comply with an applicable safety standard or information standard.[1]

2. These are compulsory information gathering powers and the proposed drafting provides that a failure by a notice recipient to provide the requested information and documents within the timeframe specified in the notice may attract civil pecuniary penalties of up to $50,000 (for a body corporate) or $10,000 (for an individual).

The Committee suggests clarifying the scope of the proposed new information gathering powers, including their interaction with the ACCC's existing compulsory information gathering powers.

3. The Committee acknowledges the important role that the proposed compulsory information gathering powers would have in enabling the ACCC to determine historical, current, and intended compliance by suppliers and manufacturers with mandatory standards. However, the Committee considers that further clarification is required as to the intended scope and application of the proposed new information gathering powers. This is especially the case when the powers are new and there are proposed penalties for non-compliance.

4. First, the Committee considers that the compulsory information gathering powers in sub-section 108(3) would benefit from some clarifications to the drafting. In particular, it is not a pre-requisite to the proposed power in sub-section 108(3) that the supplier or manufacturer has first nominated which set of requirements it will comply with in accordance with sub-section 108(2). Accordingly, sub-section 108(3) should be amended to expressly clarify that its scope is confined to where the regulator seeks to substantiate a sub-section 108(2) claim of compliance with a nominated standard. Additionally, the drafting should be clarified so that it is clear the powers can only be exercised in relation to current, previous or intending suppliers or manufacturers—i.e. the persons specified in sub-section 108(1)(b)—and that a notice recipient is only required to provide information or documents in relation to their own compliance. As currently drafted, sub-section 108(3) could require '*the person'* (i.e. a supplier) to provide information or documents to determine whether another person (i.e. a manufacturer) has, is or intends to comply with a safety standard. Accordingly, the Committee suggests the following drafting changes to clarify these matters:

> *(3) If the regulator gives to ~~the~~ a person mentioned in subsection (1)(b)[2] a written request for information or documents to determine whether ~~a~~ the person has complied, is complying, or will comply with the standard nominated by the person in accordance with subsection (2), the person must, within the period specified in the request, give to the regulator the requested information or documents.*

5. Secondly, the Explanatory Draft is silent as to how the proposed compulsory information gathering powers are intended to interact (if at all) with the regulator's already extensive compulsory information gathering powers—

[1] See e.g. Explanatory Draft item 13, ss 108(3) (safety standards) and item 18, ss 137B(c) (information standards).

[2] For completeness, the Committee has also proposed to expressly clarify to whom section 108(3) is directed: e.g. that it is the 'person' defined in section 108.

including in respect of section 133D disclosure notices, which require the provision of information or documents about goods or product related services that may cause injury. Failure to comply may constitute a civil contravention and attract a maximum pecuniary penalty of $66,000 (corporations) or $13,200 (individuals).[3]

4. The Committee acknowledges that it may be the case that the proposed new compulsory information gathering powers are intended to enable the ACCC to determine compliance with safety standards and information standards in circumstances where the ACCC may not be able to exercise its section 133D powers. However, the Committee considers that business and lawyers would benefit from the ACCC publishing guidance on how it intends to exercise its different information gathering powers. The Committee acknowledges that the ACCC must satisfy a higher threshold in order to exercise its compulsory information gathering powers under section 133D and it is unlikely the ACCC could seek to use those powers for the purposes of section 108.

6. Thirdly, in circumstances where penalties are proposed for non-compliance with a written request, the Committee considers greater clarity needs to be included in these compulsory information gathering powers for prospective notice recipients: e.g. as to the scope of information the ACCC may request, the timeframes for responding to such requests (including any option of extensions), and defences to alleged non-compliance. As an example, the Committee refers to the regulator's compulsory powers to issue substantiation notices and the timeframes and parameters for the exercise of those powers set out in sections 219 and 220 of the ACL:

    i. sub-section 219(3) specifies that any kind of information or document sought under a substantiation notice must be of a kind that the regulator is satisfied *'is relevant to'* substantiating or supporting the claim or representation, or substantiating the quantities in which, or the period for which, the person is or will be able to make such a supply;

    ii. sub-section 219(2) specifies that the timeframe for responding to substantiation notices is within 21 days of receipt; and

    iii. section 220 provides for the extension of time periods for complying with substantiation notices, which may be granted by the regulator where '*appropriate'*.[4]

7. Fourthly, the proposed drafting appears to go beyond the intended policy rationale for these powers by providing the ACCC with compulsory information gathering powers in respect of not only mandatory safety standards, but also information standards. The Committee recalls the policy intent for introducing these powers being grounded in the ACCC's desire to substantiate a supplier's compliance with their *nominated* standard under section 108. The concept of

[3] ACL, s 133F(1).
[4] See e.g., ACCC, '*ACCC powers to issue infringement, substantiation and public warning notices'* (July 2015) at p.2, available at: https://www.accc.gov.au/system/files/707_Business%20Snapshot_ACCC%20powers%20to%20issue%20notices_FA_2015.pdf.

nominating a standard, where there are multiple potential requirements or methods of compliance, only applies to safety standards, e.g.:

> *'Currently … section 108 does not provide a mechanism for the regulator to require a supplier to provide information such as test reports to substantiate a claim of compliance with the nominated standard."*[5]

8. Accordingly, the Committee considers that the proposed compulsory information gathering powers conferred in relation to information standards in section 137B(c) are unwarranted.

Uncertain transitional and notification arrangements in respect of *existing* stock or product-related services

Proposed amendments

9. The proposed amendments would allow mandatory safety and information standards to incorporate matters in instruments and other writings including international standards as they exist *'from time to time'* (in addition to '*at a particular time'*, as is the case currently).[6] This would ensure that businesses will not face penalties by adopting the latest and safest standards which otherwise meet voluntary Australian standards and/or the equivalent overseas standards (which are incorporated into a mandatory standard).

10. However, the proposed amendments are silent about how (if at all) businesses may treat existing stock or product-related services that adhere to *earlier* versions of incorporated voluntary Australian standards and/or equivalent overseas standards.

5. For completeness, a degree of detail on intended transitional arrangements is contained in the DRIS (though the Committee notes it has no legal effect), for example:

    i. for existing mandatory standards, time-to-time updates could be introduced after each standard has been assessed by the ACCC and implemented via legislative amendment by the Minister;

    ii. the regulatory impact would be considered on a case-by-case basis depending on the nature of the products being regulated, as currently occurs when the ACCC reviews existing mandatory standards; and

    iii. in doing so, the ACCC would also provide '*appropriate transition periods'* for businesses to move to the latest standards.[7]

11. In sum, this means that the proposed amendments are not intended to '*have any immediate effect'* on existing individual mandatory standards, because instead either new mandatory standards will need to be created that include the

[5] Decision Regulatory Impact Statement (**DRIS**) (October 2024) at p.25, available at https://treasury.gov.au/sites/default/files/2024-10/p2024-582678.pdf.
[6] Exposure Draft at ss 11 (re proposed s 104(5); and 16 (re proposed s 134(4)).
[7] DRIS (October 2024) at p.42, available at https://treasury.gov.au/sites/default/files/2024-10/p2024-582678.pdf .

language referring to the relevant international or Australian standard as it '*exists from time to time'* or the existing standard is updated to incorporate time-to-time referencing. As the DRIS notes at page 44:

> *'… [their] effect will only be realised when a new mandatory standard is created or where an existing mandatory standard is reviewed and updated to incorporate relevant overseas standards and time-to-time referencing. As noted earlier, this may take several years to complete in relation to all affected mandatory standards.'*

12. The Committee suggests that proposed sections 104 and 134 should be amended to clarify that businesses may rely on earlier versions of incorporated voluntary standards for an appropriate transition period.

6. The Committee welcomes the foreshadowed ACCC review, principally intended to safeguard against future updates to incorporated voluntary standards that may be inappropriate in an Australian context.

13. However, the Committee also considers that further certainty should be included in the draft legislation to ensure that the ACCC must provide appropriate transitional periods for compliance with changes to safety standards and information standards, where appropriate. For example, stakeholder submissions cited in the DRIS suggested an 18-month period,[8] and similar arrangements with ACMA under the Telecommunications Act prescribe '*up to two years*'.[9] The Committee recommends that, given the varied subject matter of the mandatory standards, a minimal transition period is included, with the ACCC having the discretion to set a longer transition period, where appropriate.

Scope of matters that may be addressed in mandatory safety standards and information standards

Proposed amendments

14. The proposed amendments insert additional matters that may be prescribed under a mandatory safety standard under sub-sections 104(2)–(3) or information standard under subsection 134(2). These include setting record keeping requirements and the provision of information to any person (including the regulator).[10]

The committee considers that the scope of these additional matters requires further clarification

15. The Committee notes that the current proposed drafting is broad and unconfined in terms of the types of record keeping requirements and provision of information requirements, and the potential scope of these additional matters

[8] See e.g., Decathlon submission at p5: "*There also needs to be a sufficient transition period to enable businesses to have adequate time to make any changes required to comply with the latest version compared to the existing mandatory standard at that time. A transition period should be at least 18 months as shorter transition periods have not always allowed enough time to make required changes or sell through existing stock."*

[9] DRIS (October 2024) at p.35, available at https://treasury.gov.au/sites/default/files/2024-10/p2024-582678.pdf.

[10] Exposure Draft at items 8, 10 (safety standards) as to proposed ss 104(2)(e) and (f); item 15 (information standards) as to proposed ss 134(2)(g) and (h).

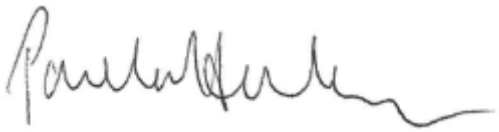
ought to be appropriately confined. For example, there may be potential for a mandatory safety standard or information standard to include record keeping requirements and/or obligations to provide information that duplicate or are inconsistent with existing requirements under the broader Australian product safety regime.

Suggested correction of inadvertent errors

16. The Committee notes that there appears to be a minor typographical error in item 8 of the Exposure Draft, which proposes to add two new sub-paragraphs (2)(e) and (f) to section 104. The Committee considers that these paragraphs should be referred to as sub-paragraphs (2)(d) and (e).

7. The Committee would be pleased to discuss this submission. Please contact the Chair of the Committee, Peta Stevenson, [redacted] in the first instance if you require further information or clarification.

Yours sincerely



Professor Pamela Hanrahan
Chair
Business Law Section