



Submission of the National Retail Technical Standards Committee to the Senate Economics Committee relating to the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2)

2010

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Lodged by email to: economics.sen@aph.gov.au

The NRTSC

The National Retail Technical Standards Committee is a retail industry committee formed to address matters relating to:

- Current or changing standards and regulations applicable to consumer goods or retail merchandise
- Product safety and regulatory reviews and the development of industry positions in response to government or regulatory proposals for change
- Formulation of product recall advice across relevant product categories
- Development of industry standards or codes of practice
- Compliance with codes, standards, and laws and regulations
- Harmonisation of state laws

This is the only committee of its kind operating in the retail sector and its view should be considered to be representative of the retail industry in areas where it is qualified to comment. Representation on the Committee includes many of Australia's most prominent retailers including:

- Myer
- Big W
- DSE Holdings
- Best and Less
- Target
- Coles
- Kmart
- Babyco
- Country Road
- Spotlight
- Retail Adventures
- The Reject Shop

Preamble

On 18 March 2010 the Senate referred the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 for inquiry and report to the Senate Economics Committee.

The Committee is now seeking written submissions from interested individuals and organisations.

NRTSC COMMENT:

Ability of States to Impose Temporary or Interim Bans

NRTSC recognises, and is grateful for, the development of a uniform national consumer law. It is a less than optimum outcome however that, under the national law, states will still be able to act unilaterally in some areas eg the imposition of temporary bans.

NRTSC is not unmindful of the political difficulties associated with the harmonisation process. We encourage the states to contemplate a co-operative approach to the imposition of temporary bans and to consider the formulation of a protocol which facilitates consultation across the jurisdictions before the imposition of temporary bans.

NRTSC also suggests that regulators be required to effectively communicate to retailers (among others) when temporary bans expire or cease to operate.

Foreseeable Use or Misuse

The Bill provides in section 109 of the Bill that a responsible Minister can make an interim ban on the supply of goods where it appears that the goods will or may cause injury or if it appears that a reasonably foreseeable use (including a misuse) of the goods will or may cause injury.

109 Interim bans on consumer goods or product related services that will or may cause injury to any person etc.

*(1) A responsible Minister may, by written notice published on the 7 internet, impose an **interim ban** on consumer goods of a particular kind if:*

(a) it appears to the responsible Minister that:

(i) consumer goods of that kind will or may cause injury to any person; or

(ii) a reasonably foreseeable use (including a misuse) of consumer goods of that kind will or may cause injury to any person;

NRTSC recommends that the Bill should be amended to further clarify what is intended by the foreseeable use or misuse provisions. If it is not, then there is a large number of products which will be captured, presumably unintentionally. For example products such as knives, ropes, ladders, candles, are products which are not TPA regulated and which could easily be captured by the language used in the Bill.

Transitional Arrangements

The Bill is deficient in that it does not appear to make provision for transitional arrangements.

NRTSC submits that the new legislation should require regulators to consider the appropriateness of transitional provisions when new standards are introduced or when changes are being made to existing standards. Transitional arrangements might allow retailers and others adequate time within which to comply with a change in the regulatory regime or to implement the required changes.

Transitional arrangements may also provide for an exemption for existing stock (for example in the case of labelling changes).

If bans are implemented without adequate notice substantial wastage may result which will contribute to higher costs of operation for retailers and result in higher prices being paid by consumers.

NRTSC is not proposing the use of transitional provisions in the event that it is established that a product may pose an immediate risk to consumers and significant public safety issues arise. However there are cases where enhanced safety consideration are applicable and in these instances transitional provisions should be considered to allow existing stock to be run down or modifications made to the product if relevant.

Section 131(1)

Section 131(1) of the Bill has been the source of considerable discussion with concern expressed about a number of elements of the proposed section.

Section 131(1) currently provides that:

(1) If:

*(a) a person (the **supplier**) in trade or commerce supplies consumer goods of a particular kind; and*

(b) the supplier becomes aware that consumer goods of that kind have been associated with the death or serious injury or illness of any person;

the supplier must, within 2 days of becoming so aware, give the Commonwealth Minister a written notice that complies with sub-section (5).

Multiple Notifications

Particularly if the obligation of retailers and others is not more effectively defined, multiple notifications from diverse sources may be counterproductive in that, rather than facilitating awareness and improving response times, the process may result in the transmission of many notifications which may cause confusion and place the staff of regulators in an invidious position in trying to assess the credibility of each report.

NRTSC acknowledges the positive aspects that may flow from the receipt by the regulator of information from multiple sources. However the Bill may not appropriately anticipate that the process may be counter-productive if too much information is received and significant parts of the information is either poorly expressed or does not adequately define either the product or the nature of the risk.

Additionally while compulsory reporting may constitute the simplest way for the regulator to capture information about potentially dangerous cases, it must nevertheless be recognised that this process will come at a significant cost to retailers particularly smaller retailers.

Becoming "Aware"

The Explanatory Memorandum explains that a retailer "becomes aware" of information upon receiving it from any source. The use of the catch all term "becoming aware" will create significant difficulty for many retailers because there is limited guidance about what "becoming aware" means. If a retailer becomes aware of a product causing harm via a newspaper or a television news report is the retailer obliged to respond to this information?

The NRTSC expects that in many instances retailers will "become aware" of information from reports from consumers which may be phoned in, orally explained to shop assistants or other staff, or expressed in writing. In cases the consumer's report may be anecdotal. Other reports may be vague or poorly expressed making it difficult to determine the type of product or the extent to which the product has caused an injury. It is the experience of some retailers that consumer feedback will not uncommonly be aggressively exaggerated for the purpose of lending weight to a claim for a refund. A requirement to notify the regulator of every claim without allowing time to assess the incident will significantly diminish the quality of the process.

Some retailers will experience significant difficulty in determining a response to some consumer feedback in the context of their obligations under the proposed legislation.

Small or medium retailers in particular are likely to favour an approach wherein each and every "awareness incident" is passed on to the regulator without internal evaluation and before any verification process could have run its course.

Time Frame for Reporting

On the presumption that the current time frame commences from the point of awareness, then, for many cases, sufficient time is not allowed for a reasonable verification process to be completed.

NRTSC submits that the legislation has a choice:

If it wants to cast the broadest net and allow a minimal time to report – then in some cases it is likely that the regulator will collect a substantial amount of material which may be unhelpful, not relevant, or can be regarded as unreliable, making it difficult to develop any coherent response. In these cases significant unnecessary compliance costs will be incurred by retailers.

Or

It can allow a longer time for reporting to enable retailers to undertake some form of verification process before notifying, thus improving the quality and accuracy of the notified material and making the decision making process of the regulator more productive.

In general, the current reporting requirements, when considered in conjunction with the penalties for non-compliance, are likely to contribute to a culture of over-reporting which will result in the legislation generating unnecessary additional costs for some retailers, particularly smaller retailers.

Particularly given the unreliability associated with consumer feedback, the NRTSC considers that a time frame in excess of two days would be necessary to allow retailers to complete a verification process with some retailers reporting that the integrity of the content of notifications will not be assured unless up to 2 weeks were allowed.

The "Association" Test

NRTSC is concerned that the proposed connection between the product and the injury, illness or death – that there be an "association" between them – may be too broad.

The use of the "association" test in conjunction with a requirement that retailers report within two days of awareness is expected to significantly increase the number of notifications and diminish the accuracy and relevance of the information supplied.

In these circumstances retailers are likely to proceed on the basis that the statutory regime does not expect it to conduct anything more than a superficial verification exercise. That is, the presumption is that the statutory regime is substantially directed to encouraging notifications and numerical outcomes and is less concerned with the qualitative character of any input.

This approach is most likely to be adopted by retailers who do not employ in house product safety experts, nor in-house lawyers, nor personnel who have the knowledge and investigative skills to make judgements about whether a particular product could be associated with an illness, injury or death.

The more prudent cause may be for the legislation to remove the "association" test and replace it with a test that involves a judgement about whether the product has caused the illness etc or may have caused the illness etc.

No admission of liability

NRTSC notes the operation of S131(6) and S133 and believes that it is important that the legislation makes clear that the reporting of information does not amount to any admission of liability on the part of the retailer arising from the retailers compliance with the legislation.

Confidentiality of Reported Information

NRTSC notes that the Explanatory Memorandum provides that information reported to the Minister under the reporting requirement will be shared among Australian regulators "*on a confidential basis*" and in accordance with "*privacy requirement*".

NRTSC submits that it is important that the legislation include provisions to ensure that reported information would be kept confidential, at least until further investigation concluded the product did in fact pose an unacceptable safety risk.

Conclusion

NRTSC appreciates this opportunity to contribute to the Senate Economics Committee's consideration of the Bill.

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